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NEW LAW REPORTS

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

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JUDGES OF THE SUPREME COURT

July 1969 to April 1970

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The Hon. G. P. A. Silva (Acting)

Puisne Justices

The Hon. G. P. A. Silva
The Hon. A. L. S. Sirimane
The Hon. A. C. A. Alles
The Hon. V. Siva Supramaniam (retired on April 14, 1970)
The Hon. G. T. Samerawickrame
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TABLE OF CASES

	PAGE
Abdeen *v.* Wickremasinghe	445
Abdul Latiff *v.* Seyed Mohamed	20
Abeysinghe *v.* Baudhasara	385
Abusally *v.* Price Controller, Kandy	69
Agnes Nona *v.* Palipana	431
Alagasunderam Chettiar *v.* Indian Bank Ltd.	1
Algin *v.* Kamalawathie	429
Andrayas, Odiris *v.*	110
Appuhamy, Dingiri Amma *v.*	347
Arumugam *v.* Officer-in-Charge, Mirihana Police Station	301
Arumugasamy Iyer *v.* Muttucumaroo Iyer	136
Asirwatham *v.* Premawardena	182
Assistant Superintendent of Police, Panditaratne *v.*	273
Atchuvely Multi-purpose Co-operative Society Ltd. *v.* Balasingham ..	180
Athambawa *v.* Bee Bee	112
Attorney-General, Kodeeswaran *v.*	337
Attorney-General, Mandirampillai *v.*	169
Attorney-General, Ratnagopal *v.*	145
Attorney-General, Veerappen *v.*	361
Balasingham, Atchuvely Multi-purpose Co-operative Society Ltd. *v.* ..	180
Baudhasara, Abeysinghe *v.*	385
Bandiya, Dodanwela *v.*	10
Bank of Ceylon, De Costa *v.*	457
Batuvantudave, *In re*	198
Bee Bee, Athambawa *v.*	112
Cassim, Kodikara *v.*	91
Ceylon Transport Board *v.* Gunasinghe	76
Ceylon University Clerical and Technical Association, Peradeniya *v.* University of Ceylon, Peradeniya	84
Ceylon Workers' Congress, Uplands Tea Estates Co. Ltd. *v.* ..	68
Chandradasa *v.* The Queen..	160
Charles Silva *v.* Manchanayake	440
Coconut Research Board *v.* Subramaniam	422
Commissioner of Inland Revenue *v.* Ranaweera	294
Commissioner of Inland Revenue, Vairayan Nadar *v.*	164
Costa, de *v.* Bank of Ceylon	457
Dabare, Sivasupramaniam *v.*	22
David *v.* The Ship " Periolos "	279
De Costa *v.* Bank of Ceylon	457
De Jonk *v.* De Jonk	140
De Silva, Devendram *v.*	186
De Silva, Wilbert *v.* Town Council of Dodanduwa	196
Devendram *v.* De Silva	186
Dharmadasa *v.* The Queen	298
Dharmadasa, Joachim *v.*	399
Dharmasena *v.* Navaratne	419
Dharmasiri, Fernando *v.*	320
Dingiri Amma *v.* Appuhamy	347
Dingiri Amma, Sujatha Kumarihamy *v.*	409
Dodanwela *v.* Bandiya	10
Ediriweera, Sebastian *v.*	64
Eluvaitheevu North Co-operative Credit Society *v.* Nallalingam ..	92
Engalthinahamy, Nona *v.*	152
Fernando *v.* Dharmasiri	320
Fernando *v.* Fernando 174,	549
Fernando *v.* Mel Mendis Ltd.	433
Fernando, Lewis Perera *v.*	16
Food and Price Control Inspector, Mahabood *v.*	116
Food and Price Control Inspector, Veeriah *v.*	403
Garlis Singho *v.* Geeger Singho	200
Geeger Singho, Garlis Singho *v.*	200
Girihagama, Sherifdeen *v.*	454

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	PAGE
Gnaneswara, Punchirala *v.*	367
Gooneratne *v.* Wimalawathie	134
Government Agent, Nadarajah *v.*	455
Gunaratne, Ramasamy *v.*	187
Gunasinghe, Ceylon Transport Board *v.*	76
Hameed *v.* Inspector of Police, Crimes	95
Hamza Naina *v.* Inspector of Police, Gampaha	166
Hassan *v.* Inspector of Police, Panadura	449
Herath, Suntheralingam *v.*	54
Ibrahim, Quyn *v.*	130
In re Batuvantudave	198
In re Rajapakse	352
Indian Bank Ltd., Alagasunderam Chettiar *v.*	1
Inspector of Police, Hameed *v.*	95
Inspector of Police, Hamza Naina *v.*	166
Inspector of Police, Hassan *v.*	449
Inspector of Police, Jayaratne *v.*	272
Inspector of Police, Joseph *v.*	357
Inspector of Police, Podimenike *v.*	306
Inspector of Police, Samson *v.*	330
Inspector of Police, Sumathipala *v.*	378
Inspector of Police, William *v.*	406
Jayaratne *v.* Inspector of Police, Maharagama	272
Jayasekera, Padmanaba *v.*	132
Jayasena *v.* The Queen	313
Jayatillake, Ranasinghe *v.*	126
Jayawardene *v.* Silva	25
Jayawardene, Robosingho Mudalali *v.*	193
Joachim *v.* Dharmadasa	399
Joseph *v.* Inspector of Police	357
Joseph *v.* Thiruchlvam	426
Joseph *v.* Wootler	213
Jupiter Cigarette and Tobacco Co. Ltd., Soysa *v.*	12
Kadirgaman, Subramaniam *v.*	289
Kamalawathie, Algin *v.*	429
Khaleel, Nallarakkupillai *v.*	114
Koch, Thameena *v.*	192
Kodeeswaran *v.* Attorney-General	337
Kodikara *v.* Cassim	91
Latiff *v.* Seyed Mohamed	20
Leelawathie, Punchinona *v.*	304
Mahabood *v.* Food and Price Control Inspector	116
Manchanayake, Charles Silva *v.*	440
Mandirampillai *v.* Attorney-General	169
Marikkar *v.* The Queen	57
Mc Intyre, Rengasamy *v.*	286
Mel Mendis Ltd., Fernando *v.*	433
Mellaaratchy *v.* Naidoo	97
Minister of Lands, Ratwatte *v.*	60
Mohamed *v.* Wahab	333
Munasinghe, Town Council of Madampe	156
Municipal Commissioner of Jaffna, Shanmugam *v.*	328
Mustapha *v.* Sub-Inspector of Police, Batticaloa	310
Muttucumaroo Iyer, Arumugasamy Iyer *v.*	136
Nadarajah *v.* Government Agent, Jaffna	455
Nadarajah *v.* Registrar-General	185
Naidoo, Mellaaratchy *v.*	96
Nallalingam, Eluvaitheevu North Co-operative Credit Society *v.*	92
Nallarakkupillai *v.* Khaleel	114
Nandias Silva *v.* Unambuwa	382
Navaratne, Dharmasena *v.*	419
New India Maritime Agencies Private Ltd. *v.* The Ship "Barun"	202
Nona *v.* Engalthinahamy	152

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	PAGE
Odiris *v.* Andrayas	110
Officer-in-Charge of Mirihana Police Station, Arumugam *v.* ..	301
Padmanaba *v.* Jayasekera	132
Palipana, Agnes Nona *v.*	431
Panditaratne *v.* A. S. P., Kegalle	273
Peiris, A. W. A. K. *v.* K. D. D. Perera	232
Peiris, K. D. D. Perera *v.*	217
People's Bank, Ratnasingham *v.*	73
Perera, A. W. A. K. Peiris *v.*	232
Perera, K. D. D. *v.* A. W. A. K. Peiris	217
Perera, Lewis *v.* Jane Fernando	16
Piyadasa *v.* The Queen	434
Podimenike *v.* Inspector of Police, Kiriella	306
Premawardena, Asirwatham *v.*	182
Price Controller, Abusally *v.*	69
Punchinona *v.* Leelawathie	304
Punchirala *v.* Gnaneswara	367
Queen, The *v.*—(*See* R. *v.*—)	
Quyn *v.* Ibrahim	130
R. *v.* Chandradasa	160
R. *v.* Dharmadasa	298
R. *v.* Jayasena	313
R. *v.* Marikkar	57
R. *v.* Piyadasa	434
R. *v.* Sethuwa	573
R. *v.* Sirisena	389
R. *v.* Somapala	121
R. *v.* Wyman	6
Rajapakse, *In re*	352
Ramachandran, Ranaweera *v.*	562
Ramasamy *v.* Gunaratne	187
Ranasinghe *v.* Jayatillake	126
Ranaweera *v.* Ramachandran	562
Ranaweera *v.* Wickramasinghe	553
Ranaweera, Commissioner of Inland Revenue *v.*	294
Ratnagopal *v.* Attorney-General	145
Ratnasingham *v.* People's Bank	73
Ratwatte *v.* Minister of Lands	60
Re—(See *In re*—)	
Regina *v.*—(*See* R. *v.*—)	
Registrar-General, Nadarajah *v.*	185
Rengasamy *v.* Mc Intyre	286
Robosingho Mudalali *v.* Jayawardene	193
Rohana *v.* Senaratne	370
Rubasinghe *v.* Welgama	369
Sadeen, Thaha *v.*	142
Samson *v.* Inspector of Police, Maradana	330
Sebastian *v.* Ediriweera	64
Senaratne, Rohana *v.*	370
Sethuva *v.* The Queen	573
Seyed Mohamed, Abdul Latiff *v.*	21
Shafi, Thahir *v.*	19
Shanmugam *v.* Municipal Commissioner, Jaffna	328
Sherifdeen *v.* Girihagama	454
Ship " Barun ", New India Maritime Agencies Private Ltd. *v.* ..	202
Ship " Periolos ", David *v.*..	279
Silva, Jayawardene *v.*	24
Sirisena *v.* The Queen	389
Sivasupramaniam *v.* Dabare	22
Somapala *v.* The Queen	121
Soysa *v.* Jupiter Cigarette and Tobacco Co. Ltd.	12
Sub-Inspector of Police, Mustapha *v.*	310
Subramaniam *v.* Kadirgaman	289
Subramaniam, Coconut Research Board *v.*	422
Sujatha Kumarihamy *v.* Dingiri Amma	409
Sumathipala *v.* Inspector of Police, Crimes	378
Suntheralingam *v.* Herath	54

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PAGE

Thaha *v.* Sadeen 142
Thahir *v.* Shafi 19
Thameena *v.* Koch 192
Thiruchelvam, Joseph *v.* 426
Town Council of Dodanduwa, Wilbert de Silva *v.* 196
Town Council of Madampe *v.* Munasinghe 156

Unambuwa, Nandias Silva *v.* 382
University of Ceylon, Ceylon University Clerical and Technical Association *v.* 84
Uplands Tea Estates Ltd. *v.* Ceylon Workers' Congress 68

Vairayan Nadar *v.* Commissioner of Inland Revenue 164
Veerappen *v.* Attorney-General 361
Veeriah *v.* Food and Price Control Inspector 403

Wahab, Mohamed *v.* 333
Welgama, Subasinghe *v.* 369
Wickramasinghe, Ranaweera *v.* 553
Wickremasinghe, Abdeen *v.* 445
Wilbert de Silva *v.* Town Council of Dodanduwa 196
William *v.* Inspector of Police, Mirigama 406
Wimalawathie, Gooneratne *v.* 134
Wootler, Joseph *v.* 213
Wyman *v.* The Queen 6

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ERRATUM

Page 304—Line 16, delete the words "I agree" and substitute the following judgment :—

DE KRETSER, J.—

The facts are set out in the judgment of my brother Alles which I have had the advantage of perusing.

Section 121 (2) of the Criminal Procedure Code enacts that the officer in charge of a Police Station shall forthwith send a report to a Magistrate's Court "if from fnformation received or *otherwise*" he has reason to suspect the commission of a cognisable offence. It follows then that a report to a Magistrate need not necessarily be based on an information in writing or reduced to writing, signed by the informant and entered in the Information book in terms of section 121 (1) of the Cr. P. C.

As pointed out in *Emperor v. Nazir Ahamed* A.I.R. 32 (1945) P.C. 18 " ..... there is no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognisable offence has been committed should not of their own motion undertake an investigation into the truth of the matters alleged."

The Criminal Procedure Code Amendment Act (Cap. 20 of Vol. 1 of the 1967 supplement) brought into existence section 122 A of the Cr.P.C. which provided that (1) "where in pursuance of any information given under sub-section 1 of section 121 proceedings are instituted in a Magistrate's Court under section 148 the accused or his proctor shall be entitled to obtain from the proper authority a certified copy of such information ....."

It must be noted that this section does not provide for the accused or his proctor being furnished with any of the material which would come under the heading "*otherwise*" in section 121 (2) which also would entitle the police officer in charge of a station to send his report to the Magistrate under section 148 Cr.P.C. The error of the petitioner who has made the application for the issue of a writ of Mandamus in this case requiring the police officer in charge of Mirihana Police Station to furnish him with a certified copy of the "notes and observations" of S. I. Silva made in connection with a raid that culminated in a prosecution under the Price Control Act in M.C. Colombo South case 87875 B being filed, lies in my opinion in the assumption that section 122A allows an accused person or his proctor to have a certified copy of the *material* in pursuance of which the police decided to institute proceedings in the Magistrate's Court *even if that is not an information recorded in terms of section 122 (1) on the footing that it is its equivalent.* That section 122A does not do.

Counsel for the petitioner relied on the case of *Panditaratne v. The Assistant Superintendent of Police, Kegalle* 72 N. L. R. 273 in support of his submissions. In that judgment the impact of the word *otherwise* in section 121 (2) had not been considered by my brother Alles, J.

I am unable to agree that when a police officer, who has set out to investigate a non-cognisable offence as happened in *Panditaratne v. A.S.P., Kegalle*, is a witness to cognisable offences committed in his presence in the course of that investigation and arrest, on his return to station makes his notes and observations of what happened in his presence, those notes and observations constitute an information within the meaning of section 121 (1) of the Code. The report to Court in such a case in my view is based on the fact that the police are in possession through their own knowledge of matter which would entitle them to suspect the commission of an offence. There is no information in the present case a certified copy of which the accused is entitled to have in terms of section 122 (A) of the Code, and the application of the petitioner must be dismissed. I agree with Alles, J., that the application should be dismissed with costs fixed at Rs. 52.50.

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DIGEST

Actions— PAGE

Action for money had and received 457

See NEGOTIABLE INSTRUMENTS (2).

Administrative Districts Act—

See EVIDENCE (2).

Admiralty Court—

1. *Admiralty Court—Ship—Action* in rem *to enforce a claim for a sum of money— Jurisdiction—Requirement that the money claimed should be referable to supply of necessaries—Balance due on a general mercantile account—Unenforceability of claim by action* in rem*—Right of mortgagees of ship to intervene in the action—Admiralty Court Rules, Rule 78.*

The Colonial Court of Admiralty of Ceylon has no jurisdiction to entertain an action *in rem* against a ship in respect of a claim for a sum of money unless the amount claimed by the plaintiff is referable to the supply of necessaries to the defendant ship.

An action *in rem* for the supply of necessaries is not available to an agent against his principal when the sum claimed is based in fact on the balance due on a general mercantile account between the parties. The fact that the principal has consented to the ship being detained at any port until the agent's dues are paid cannot affect the question whether the claim is one which is enforceable by an action *in rem*.

A mortgagee of the ship against which an action *in rem* is instituted is entitled to intervene in the action and raise objections to the plaintiff's claim against the ship, even when the owner of the ship has not appeared to contest the plaintiff's claim.

NEW INDIA MARITIME AGENCIES PRIVATE LTD. *v.* THE SHIP "BARUN" 202

2. *Admiralty Court—Damaged ship which is not under the immediate control of a Master or crew—Forcible seizure of it by receiver of wrecks—Legality —Meaning of term "wreck"—Wrecks and Salvage Ordinance (Cap. 267 of Legislative Enactments, 1938 edn.), ss. 3 to 10, 12 to 15, 22 (b), 23, 24— Whether action* in rem *lies against the ship for value of necessaries supplied.*

The receiver of wrecks, purporting to act under sections 5 and 14 of the Wrecks and Salvage Ordinance, took forcible possession of a damaged ship which was grounded on a reef and compelled the agents of the owners of the ship to deliver to him the keys of the cabins and other rooms in the ship. It was contended on his behalf that his action was justified on the ground that the ship was a "wreck".

Held, that the ship was not property that was cast ashore and was not "wreck" within the meaning of the Wrecks and Salvage Ordinance. The receiver, therefore, has no right to take possession of the ship. Even if the term "wreck" could be given a wider meaning so as to include a totally damaged ship, there was no provision in the Ordinance to take forcible possession of the ship after it had been grounded and had become non-navigable.

Held further, that an action *in rem* for the value of necessaries supplied lies, and a warrant of arrest can issue, against a ship which is totally disabled and which is not under the immediate control of a Master or crew.

DAVID *v.* THE SHIP "PERIOLOS" 279

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PAGE

Adoption of Children Ordinance—

Adoption of Children Ordinance (Cap. 61)—Section 6 (3)—Deed of fideicommissum—Designation of lawful children or lawful heirs of donee as fideicommissaries—Adoption of child by donee subsequently—Death of donee without issue—Whether adopted child acquires any rights under the fideicommissum.

A condition in a deed of gift of 3rd February 1930 burdened the donated property with a fideicommissum in favour of the lawful children of the donee M or, failing such children, in favour of the lawful heirs of M. M died unmarried and without issue. But shortly before his death, M adopted a child under the Adoption of Children Ordinance.

The question to be decided in the present action was whether the adopted child became entitled to the property or any interest in it.

Held, that the proviso to section 6 (3) of the Adoption of Children Ordinance prevented the adopted child from acquiring any right, title or interest in the property whether as M's lawful child or as M's lawful heir.

ABEYSINGHE *v.* BAUDHASARA 385

Advocates—

See LEGAL PRACTITIONERS.

Appeal and Revision—

1. *Civil Procedure Code—Section 761—Application thereunder for stay of execution of decree—Duty of Court to consider it though petition of appeal has not been filed.*

The fact that petition of appeal has not yet been filed is not a ground for the refusal of an application made under Section 761 of the Civil Procedure Code for stay of execution of an appealable decree.

KODIKARA *v.* CASSIM 91

2. *Income tax—Issue of certificate to District Court to recover tax by seizure and sale of property—Issue of writ of execution to Fiscal—Application by assessee for stay of execution pending appeal to Commissioner of Inland Revenue—Power of District Court to allow stay of execution—Scope—Right of Commissioner to appeal to Supreme Court from order allowing stay of execution—Civil Procedure Code, s. 761—Income Tax Ordinance, ss. 81 (2), 84 (3)* 294

See INCOME TAX (2).

3. *Privy Council—Appeal against acquittal—Conviction thereafter—Desirability of accused being heard in mitigation of sentence* 361

See CRIMINAL PROCEDURE (6).

4. *Revision when right of appeal lies—Requirement of exceptional circumstances—Matrimonial action—Order for maintenance of children* pendente lite—*Whether application in revision lies for enhanced maintenance—Civil Procedure Code, ss. 619, 624—Courts Ordinance, s. 73.*

Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision.

Where, in a matrimonial action, the wife, without exercising her right of appeal, moved the Supreme Court, by way of revision, to enhance the sum awarded by the District Court as maintenance *pendente lite* for the five children of the marriage—

Held, that the facts of the case did not warrant the exercise of the extraordinary powers of revision.

FERNANDO *v.* FERNANDO 549

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Autrefois acquit— PAGE

See CRIMINAL PROCEDURE (6).

Banks and Banking—

Banker's liability in English law—Applicability in Ceylon—Civil Law Ordinance, s. 3 457

See NEGOTIABLE INSTRUMENTS (2).

Bills of Exchange Ordinance—

See NEGOTIABLE INSTRUMENTS.

Brothels Ordinance—

Brothels Ordinance—Section 2 (a)—Offence of keeping or managing a brothel—Sentence of imprisonment—Duty of Court to exercise its discretion on proper material.

Before an accused is sentenced to a term of imprisonment under the Brothels Ordinance, the trial Court is expected to exercise its discretion on proper material, in the circumstances of each case.

AGNES NONA *v.* PALIPANA 431

Buddhist Temporalities Ordinance—

Buddhist Temporalities Ordinance (Cap. 318)—Section 23—"For his exclusive personal use"—Improvements effected on pudgalika *property—Claim for compensation—Maintainability.*

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

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

Held, that the words " acquired for his exclusive personal use " relate to the kind of title obtained by the *bhikkhu* in the property, namely, a title for his own benefit and not for the benefit of any other person. They have no reference to the purpose for which the property is acquired, or to the manner in which the property is to be enjoyed, by the *bhikkhu* acquiring it.

Dhammadara Thero v. Sederahamy (41 N. L. R. 236) followed.

Hanwelle Piyaratana Thera v. Jinananda Thera (68 N. L. R. 178) not followed.

Held further, that a person is entitled to claim compensation for improvements effected by him on *pudgalika* property in good faith and with the consent of the owner.

PUNCHIRALA *v.* GNANESWARA 367

Butchers Ordinance—

1. *Municipal Council of Colombo—By-Law prohibiting sale of meat of animals not slaughtered at the Municipal Slaughter House—Validity—By-Law 30 of Chapter XIII of the By-Laws and Regulations—Butchers Ordinance, ss. 3 (a), 4 (1), 14.*

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By-law 30 of Chapter XIII of the By-laws and Regulations of the Municipal Council of Colombo is not void as being inconsistent with the provisions of the Butchers Ordinance when it restricts the sale of meat to sale only of meat of animals slaughtered in the Municipal Slaughter House.

Lafier v. Ediriweera (70 N. L. R. 334) not followed.

SEBASTIAN *v.* EDIRIWEERA 64

2. *Ordinary meaning of "beef"—Whether it includes buffalo meat—Butchers Ordinance, s. 2* 449

See CONTROL OF PRICES ACT (10).

Carriers—

Carriage of Goods by Sea Ordinance (Cap. 85)—Schedule, Article I (e), Article II, Article III Rule 6, Article IV Rules 1 and 2—Meaning of expression "loss or damage"—Time limitation in Article III Rule 6—Circumstances when it is applicable—Inapplicability in case of misdelivery of goods to wrong person.

The provision in Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Ordinance that "the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered" does not apply to a case where the carriage contemplated in the bill of lading has been duly completed by the discharge of the shipment consigned to Ceylon. Nor is the time limitation in Rule 6 applicable to a case where the carrier or its agent has caused a complete misdelivery of the goods to some person other than the person entitled to delivery.

ALAGASUNDERAM CHETTIAR *v.* THE INDIAN BANK LTD. .. 1

Certiorari—

See WRIT OF CERTIORARI.

Ceylon (Constitution) Order in Council—

See CONSTITUTIONAL LAW.

Charges and Indictments—

Criminal breach of trust—Charge—Error in stating date of offence—Effect—Burden of proof—Penal Code, s. 389—Criminal Procedure Code, ss. 6, 168, 171 370

See CRIMINAL BREACH OF TRUST.

Cheques—

See NEGOTIABLE INSTRUMENTS.

Citizenship—

Privy Council—Citizenship Act, s. 6—Charge of forgery—Penal Code, ss. 452, 453, 454 361

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Civil Procedure—

PAGE

1. *Civil Procedure Code—Section 761—Application thereunder for stay of execution of decree—Duty of Court to consider it though petition of appeal has not been filed.*

The fact that a petition of appeal has not yet been filed is not a ground for the refusal of an application made under Section 761 of the Civil Procedure Code for stay of execution of an appealable decree.

KODIKARA *v.* CASSIM 91

2. *Execution of decrees—Matrimonial action—Salary of an employee—Exemption from seizure for alimony—Civil Procedure Code, s. 218 (m)* .. 140

See MATRIMONIAL ACTIONS (1).

3. *Effect on an action when a party dies or ceases to exist in law—Civil Procedure Code, s. 404* 156

See LOCAL AUTHORITIES (2).

4. *Jurisdiction—Sale of immovable property of minor—Property situate outside jurisdiction of Court of minor's residence—Appropriate Court to which the curator should apply for sanction to sell—Courts Ordinance, s. 69—Civil Procedure Code, ss. 6, 9 (a) (b), 584.*

An application for permission to sell land belonging to a minor should be made to the District Court within whose jurisdiction the minor resides, although the land in question may be situate within the territorial limits of the jurisdiction of another District Court. In such a case it is not necessary to obtain the consent of the Court where the property is situate.

FERNANDO *v.* FERNANDO 174

5. *Mortgage—Hypothecary sale—Conditions of sale—Whether they can be varied after sale has taken place—Mortgage Act (Cap. 89), ss. 50 (3), 50 (4) (d), 61—Civil Procedure Code, ss. 260 to 262* 426

See MORTGAGES (2).

6. *Revision when right of appeal lies—Requirement of exceptional circumstances—Matrimonial action—Order for maintenance of children* pendente lite*—Whether application in revision lies for enhanced maintenance—Civil Procedure Code, ss. 691, 624—Courts Ordinance, s. 73* .. 549

See APPEAL AND REVISION (4).

7. *See also* APPEAL AND REVISION ; CIVIL PROCEDURE CODE.

Civil Procedure Code—

Section 6	174
Section 9 (*a*) (*b*)	174
Sections 84, 85	347
Section 207	347
Section 217	180
Section 218 (*m*)	140
Section 218 (*n*)	180
Sections 260, 261, 262	426
Section 403	347
Section 404	156
Section 406	347

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PAGE

.. 347
Section 547 174
Section 584 549
Section 619 549
Section 624 .. .. 91, 294
Section 761 .. ..

See also APPEAL AND REVISION ; CIVIL PROCEDURE.

Coconut Products Ordinance—

Customs Ordinance—Export of desiccated coconut—Export licence issued by Manager of Ceylon Coconut Board—Specification of Halifax as port of destination—Shipments landed at port of New York—Forfeiture under s. 130 of Customs Ordinance for exporting restricted goods—Whether Certiorari *lies in respect of such forfeiture—Scope of* audi alteram partem *principle—Whether the forfeiture was valid—Customs Ordinance (Cap. 255), ss. 7, 8, 9, 12, 33, 43, 44, 47, 50, 58, 65, 75, 125, 129 to 133, 142, 144, 145, 154, Schedule B—Coconut Products Ordinance (Cap. 160), as amended by Act No. 20 of 1962, ss. 18, 20, 20A, 20B, 30, 31, and Regulations 7, 11, 14, 17 of Amending Regulations of 1963* 25

See CUSTOMS ORDINANCE (1).

Coconut Research Ordinance—

Industrial Disputes Act—Section 49—Coconut Research Board—Incapacity of the Board to claim Crown privilege in an industrial dispute—Corporations depending on and controlled by the Government—Whether they can claim to be servants or agents of the Crown—Interpretation Ordinance, s. 3—Coconut Research Ordinance (Cap. 440), s. 4 (7) .. 422

See INDUSTRIAL DISPUTES ACT (5).

Commissions of Inquiry Act—

Privy Council—Commission of inquiry—Scope of inquiry—Requirement that it should be limited by the Governor-General and not be left to be decided by the Commissioner—Power of Commission to summon a person residing in Ceylon—Meaning of expression "residing in Ceylon" —A witness's refusal to be sworn or to answer a question—Contempt of Court—Irrelevancy of allegation of bias or interest on the part of the Commissioner—Commissions of Inquiry Act (Cap. 393), ss. 2 (1), 7, 10, 11, 12—Courts Ordinance, s. 47.

The appellant was convicted of contempt of Court for refusing to be sworn when he was summoned to give evidence at a meeting of a Commission appointed under the Commissions of Inquiry Act. The terms of the warrant of appointment issued to the Commissioner were that he should inquire into and report on abuses in connection with certain tenders made to or contracts entered into by contractors between 1st June 1957 and 31st July 1965. The scope of the inquiry was left entirely to the Commissioner's discretion. Under the terms of the warrant the Commissioner was entrusted with deciding what tenders and what contracts required to be inquired into.

Held, that, inasmuch as the scope of the inquiry was not limited by the Governor-General and was to be decided by the Commissioner, the appointment of the Commissioner in terms of the warrant was *ultra vires* and invalid having regard to the powers of the Governor-General under section 2 of the Commissions of Inquiry Act. It followed that the conviction of the appellant for contempt of Court should be set aside.

Obiter : (i) No intention of permanently residing in Ceylon is necessary in order that a person may be liable to be summoned under section 7 of the Commissions of Inquiry Act to give evidence at a meeting of a Commission.

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PAGE

(ii) A person who refuses to be sworn under the power given to the Commissioner by section (7) (*b*) of the Commissions of Inquiry Act is guilty under section (12) (1) (*b*) of the offence of contempt of Court, whether or not he has reasonable cause to refuse to take part in the proceedings on the ground of the Commissioner's bias or interest. If such refusal be considered as a refusal to answer a question, this refusal too may well not be justified by an allegation of bias or interest on the part of the Commissioner.

RATNAGOPAL *v.* ATTORNEY-GENERAL 145

Common Intention—

1. *Common intention—Applicability of rule in a prosecution of two or more persons for unlawful possession of house-breaking instruments—Penal Code, ss. 32, 449.*

Where, in a prosecution of more than one person for unlawful possession of house-breaking instruments in contravention of section 449 of the Penal Code, the evidence shows that the instruments were found in the possession of only one of the accused persons, section 32 of the Penal Code relating to common intention cannot be applied to convict the other accused of the offence charged.

HAMEED *v.* INSPECTOR OF POLICE 95

2. *Criminal Procedure Code—Section 122 (3)—Scope—Charge of murder—Joint offenders—Liability to be convicted of lesser offence of culpable homicide on the ground of knowledge—Common intention—Penal Code, ss. 32, 33, 35, 36* 389

See COURT OF CRIMINAL APPEAL DECISIONS (7).

Company Law—

Company law—Debt incurred by irregularly appointed Directors—Ratification of it by the Company—Effect.

Where an *intra vires* debt transaction on behalf of a Company is entered into by its Directors concerning whose appointment as Directors there is some irregularity, the transaction may be ratified by the Company.

SOYSA *v.* JUPITER CIGARETTE AND TOBACCO CO. LTD. .. 12

Compensation for Improvements—

Usufructuary—His right to claim compensation for improvements effected by him 136

See THESAVALAMAI (2).

Condictio indebiti—

See NEGOTIABLE INSTRUMENTS (2).

Constitutional Law—

1. *Prevention of Social Disabilities Act, No. 21 of 1957—Sections 2 and 3—Temple entry—Discrimination on ground of caste—Culpability—Ceylon (Constitution) Order in Council (Cap. 379), s. 29 (2) (d)—Tesawalamai Regulation (Cap. 63), s. 4—Penal Code, s. 183—Maxim* generalia specialibus non derogant 54

See PREVENTION OF SOCIAL DISABILITIES ACT.

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PAGE

2. *Parliamentary election—Appeal to Supreme Court from decision of an Election Judge—Report of Supreme Court that a corrupt or illegal practice was committed by a person—Validity to disqualify that person for membership of House of Representatives—Parliament's power to amend Parliamentary Elections Order in Council—Constitutional validity of a Statute—When a Court will make a pronouncement thereon—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 82A, 82C (2) (b), 82D (2)—Ceylon (Constitution) Order in Council (Cap. 379), ss. 13 (3) (h), 29 (4)* 217

See PARLIAMENTARY ELECTIONS (1).

3. *Privy Council—Constitutional law—Public servant—Contract of service with the Crown—Action for recovery of arrears of salary due —Maintainability—Roman-Dutch law—Effect of Proclamation of 23rd September 1799—Applicability of English law* 337

See PUBLIC SERVANTS (2).

4. *Corporations depending on and controlled by the Government—Whether they can claim to be servants or agents of the Crown* 422

See INDUSTRIAL DISPUTES ACT (5).

5. *Privy Council—Income tax—Penalty for making an incorrect return— Power of Commissioner of Inland Revenue to impose such penalty— Whether the Commissioner exercises judicial power and requires appointment by Judicial Service Commission—Nature of his duties— Difference between administrative functions and judicial functions— Effect of alternative proceedings before Magistrate*—Certiorari— *Constitution Order in Council, Articles 3, 53, 55, 58, 60—Income Tax Ordinance, ss. 2, 3, 23, 58, et seq., 73, 80 (1), 90, 92* 553

See INCOME TAX (3).

6. *Privy Council—Income tax—Board of Review—Validity of its appointment by Minister and not by the Judicial Service Commission or the Public Service Commission—Functions of the Board—Power of the Board to hear appeals—Whether it involves the exercise of judicial power— "Public officer"—"Servant of the Crown"—"The Crown"—"Her Majesty"—Constitution Order in Council, ss. 3, 55, 60—Income Tax Ordinance, ss. 11 (1) (a), 11 (7), 15, 36 (1), 37, 43 (3), 56 (9), 73, 77, 80*—Certiorari 562

See INCOME TAX (4).

Contempt of Court—

1. *Commission of Inquiry—Scope of inquiry—Requirement that it should be limited by the Governor-General and not be left to be decided by the Commissioner—Power of Commission to summon a person residing in Ceylon—Meaning of expression "residing in Ceylon"—A witness's refusal to be sworn or to answer a question—Contempt of Court— Irrelevancy of allegation of bias or interest on the part of the Commissioner —Commissions of Inquiry Act (Cap. 393), ss. 2 (1), 7, 10, 11, 12—Courts Ordinance, s. 47.* 145

See COMMISSIONS OF INQUIRY ACT.

2. *Contempt of Court—Tampering with a juror in the course of a pending case—Punishability—Courts Ordinance (Cap. 6), s. 47.*

Where, while a trial before the Supreme Court is proceeding, a person attempts to interfere with one of the jurors with the intention of influencing the decision of the juror in the case, he is liable to be punished for the offence of contempt of Court under section 47 of the Courts Ordinance.

IN RE RAJAPAKSE 352

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PAGE

Contracts—

1. *Privy Council—Constitutional law—Public servant—Contract of service with the Crown—Action for recovery of arrears of salary due—Maintainability—Roman-Dutch law—Effect of Proclamation of 23rd September 1799—Applicability of English law* 337

See PUBLIC SERVANTS (2).

2. *Contract—Presumption of undue influence—Applicability as between employer and employee.*

The presumption of undue influence does not apply in the case of a strictly contractual relationship of employer and employee, which is not of a fiduciary character. Accordingly, where an employee, having freely admitted his liability to pay a sum of money to his employer, enters into a contract voluntarily to pay that amount, no presumption of undue influence attaches to such contract, even though the motive for the contract on the part of the employee may be to avoid a criminal prosecution

FERNANDO *v.* MEL MENDIS LTD. 433

3. *Action for money had and received—Maintainability—Quasi-contractual liability—Condictio indebiti—Unjust enrichment* 457

See NEGOTIABLE INSTRUMENTS (2).

Control of Prices Act—

1. *Control of Prices Act—Price order relating to sale of mutton with bone—Validity.*

A Price Order of 7th August 1962 fixed the controlled price of mutton with bones at Rs. 2·25 per pound and further directed that " when mutton is sold with bones the weight of bones sold therewith shall not exceed 25 per cent. of the total weight sold ".

Held, that the Price Order was invalid to the extent that it is not possible to say of mutton with bone, when it is sold as an indivisible whole, what percentage of it is bone. In such a sale, it is unreasonable to insist that the percentage of bone must not exceed 25 per cent.

ABUSALLY *v.* PRICE CONTROLLER, KANDY 69

2. *Food Price Order No. 390—Charge of sale of beef at excessive price by more than one person jointly—Quantum of evidence—Penal Code, s. 35—Question whether the beef sold was not imported—Burden of proof—Evidence Ordinance, s. 105—Control of Prices Act, s. 8 (1) and (6).*

In a prosecution of the 1st and 2nd accused for jointly selling beef with bones at a price above the controlled maximum retail price, the evidence established that the sale was effected by means of several acts, some done by the 1st accused, other by the 2nd accused.

Held, that upon an application of the principle of liability contained in section 35 of the Penal Code, each of the two accused was guilty of the offence charged.

Held further, that evidence led by the prosecution that the beef which was sold was fresh meat was sufficient to establish *prima facie* that the beef did not fall into the category of " imported beef whether frozen, salt or chilled " which is exempted in the relevant Price Order.

Quaere, whether, if the beef had in fact been imported, that fact was a fact peculiarly within the knowledge of the accused so as to make section 105 of the Evidence Ordinance applicable.

MAHABOOD *v.* FOOD AND PRICE CONTROL INSPECTOR .. 116

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PAGE

3. *Control of Prices Act—Sections 3 (2), 4—Contravention of Food Price Order—Place of offence—Whether Court can take judicial notice that it fell within Colombo District—Evidence Ordinance, s. 57—Administrative Districts Act (Cap. 392), s. 2 (2).*

In a prosecution for contravention of a Food Price Order which is applicable to the Colombo District excluding the Municipal limits of Colombo, the Court is not entitled to presume that the place where the alleged offence was committed fell within the Colombo District in the absence of any evidence regarding the limits of the Colombo District.

HAMZA NAINA *v.* INSPECTOR OF POLICE, GAMPAHA .. 166

4. *Control of Prices Act—Offenders in profiteering cases—Sentence—Applicability of Criminal Procedure Code, s. 325.*

Section 325 of the Criminal Procedure Code can properly be applied in appropriate circumstances in cases of profiteering in contravention of the Control of Prices Act. The Regulation made on 27th November 1967 under section 5 of the Public Security Ordinance is no longer operative.

DEVENDRAM *v.* DE SILVA 186

5. *Control of Prices Act—Price Order relating to maximum retail price of red onions—Sale in contravention thereof—Quantum of evidence as to question whether article sold was red onions—Sale to a decoy in the course of a raid—Whether it is a sale for " consumption or use "—Fixing of maximum price for Ratnapura District at a few cents above the price fixed for Colombo—Validity.*

In a prosecution for the sale of a pound of red onions to a decoy at a price in excess of the maximum retail price fixed by the relevant Price Order—

Held, (i) that the failure of the accused to cross-examine the prosecution witnesses who referred to the article purchased and produced in Court as " red onions " was sufficient to justify the inference that the article sold was red onions, even though a letter written to the Magistrate regarding the quality of the onions by a person who called himself a Systematic Botanist was inadmissible in evidence.

(ii) that where a person who is a retailer of red onions sells a quantity less than one hundredweight, the sale is from the point of view of the seller intended for " consumption or use " and it is irrelevant to enquire what, if any, purpose the buyer had in view. In such a case the proper question to ask is not what purpose the buyer had in view, but for what purposes the seller sold the onions. Accordingly, a sale to a decoy in the course of a " raid " is a sale for purposes of consumption or use.

(iii) that the fixing of maximum price for Ratnapura at a figure increased by a few cents over the Colombo price was not an unauthorised delegation or a surrender of his statutory powers by the Assistant Controller of Prices of the Ratnapura District.

PODIMENIKE *v.* INSPECTOR OF POLICE, KIRIELLA .. 306

6. *Control of Prices Act—Price Order relating to sale of Nespray milk food—Charge of contravening it—Quantum of evidence—Statements on label—Relevancy.*

Selling a marketed tin of milk food labelled " Nespray 1 pound " at a price in excess of the price permitted by the relevant Price Order is a contravention of that Price Order. In such a case it is not necessary for the prosecution to prove that the tin contained a pound of the milk food, for the price is fixed per tin and not per pound, and the question whether what is stated on the label is factually correct does not arise.

MUSTAPHA *v.* S. I. POLICE, BATTICALOA 310

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7. *Control of Prices Act—Contravention of Food Price Order—Area where offence was committed—Requirement of evidence that the Price Order applies to the area.*

In a prosecution for contravention of a Food Price Order, there must be very clear evidence that the offence was committed in an area to which the Price Order applies.

RUBASINGHE *v.* WELGAMA 369

8. *Control of Prices Act—Sections 4 (1) and 8 (9)—Extent of employer's liability for his employee's offence—Price Order made for an outstation district—Regulation prices according to prices for the time being fixed for the Colombo municipal area—Meaning of words " for the time being " —Validity of the Price Order.*

(i) Where an employer and his employee are charged together for selling an article at a price in excess of the controlled price, the employer is not liable under section 8 (8) of the Control of Prices Act for the offence of his employee unless he is charged on that footing and is given an opportunity of proving the matters stated in that statutory provision.

(ii) A Price Order applicable to the Badulla municipal area provided for the fixing of the maximum retail price of red onions according to the maximum retail price for the time being fixed for the Colombo municipal area.

Held, that the Badulla Price Order contemplated not only the Price Order for the Colombo municipal area in existence at the time it was made but also Price Orders for the Colombo municipal area that might be made thereafter.

Held further, that the Badulla Price Order was not invalid on the ground of uncertainty or of being *ultra vires* of the provisions of section 4 (1) of the Control of Prices Act.

VEERIAH *v.* FOOD AND PRICE CONTROL INSPECTOR, BADULLA .. 403

9. *Control of Prices Act—Food Price Order C. 418—Dried chillies—Sale to a decoy—Applicability of maximum retail price to a consumer.*

A sale of a small quantity (half a pound for instance) of dried chillies to a decoy is a sale to which the maximum retail price to a consumer laid down by Food Price Order C 418 applies, even though the decoy does not require the chillies for consumption but wants them only for the purpose of the raid.

ABDEEN *v.* WICKREMASINGHE 445

10. *Control of Prices Act—Sections 3 (2) and 4 (1) —Contravention of Price Order of 7th November 1964 relating to sale of beef—Place of offence—Proof as to whether it fell within Kalutara District—Judicial notice—Power of Court to consult appropriate books of reference—Evidence Ordinance, s. 57—Administrative Districts Act (Cap. 392), Schedule 1—Ordinary meaning of " beef "—Whether it includes buffalo meat—Butchers Ordinance (Cap. 272), s. 2.*

The accused-appellant was convicted of selling beef at a rate above the maximum controlled price. It was contended on his behalf (1) that there was no proof that the offence was committed within the administrative district of Kalutara to which the relevant Gazette notification applied, and (2) that the prosecution, by failing to eliminate the possibility that what was sold was the flesh of a buffalo, had failed to prove that the item sold was " beef " within the contemplation of the Price Order of 7th November 1964.

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Held, (i) that, for the purpose of ascertaining whether the village of Keselwatte, which was the place where the offence was committed, fell within Panadura, section 57 of the Evidence Ordinance empowered the Court to consult, as an appropriate book of reference, the compilation of the Department of Census and Statistics known as An Alphabetical and Numerical List of Villages in the Western Province. Panadura in its turn was within the administrative district of Kalutara, as would appear from the second entry in the first Schedule to the Administrative Districts Act.

(ii) that the ordinary meaning of beef does not exclude the flesh of a Ceylon buffalo.

HASSAN *v.* INSPECTOR OF POLICE, PANADURA 449

11. *Control of Prices Act—Charge of profiteering in sale of beef—Proof—Requirement of evidence of the accuracy of the scales in which the beef was weighed—Failure to seal the parcel of the beef—Effect.*

In a prosecution for selling beef at a price in excess of the maximum controlled retail price—

Held, that, in view of the possibility that the scales used to weigh the beef could have been inaccurate and also of the possibility that, on account of failure to seal properly, there could have been tampering with the beef sold, there was doubt as to the guilt of the accused.

" Having regard to the fact that prison sentences are quite usual in cases of profiteering, it is important that when the alleged offence consists of selling under-weight there should be satisfactory evidence of the correctness of the scales in which articles are weighed before prosecutions are launched in respect of the sale of them."

SHERIFDEEN *v.* GIRIHAGAMA 454

Conversion—

See NEGOTIABLE INSTRUMENTS (2).

Co-operative Societies—

1. *Registered co-operative society—Dispute touching its business—Reference to arbitrator—Arbitrator's award and other proceedings—Exemption from stamp duties—Co-operative Societies Ordinance (Cap. 124), ss. 33, 53 (1)—Co-operative Societies Rules of 1950, Rule 38—Stamp Ordinance (Cap. 247), ss. 2, 4, 8 (1), 8 (2), 39 (1), 41, 53, Exemption F (2) at p. 755.*

Where, after a dispute between a registered co-operative society and some of its members is referred to an arbitrator, the award of the arbitrator is made a Rule of Court in accordance with Rule 38 (13) of the Co-operative Societies Rules of 1950, the award and the other proceedings are " instruments " within the meaning of section 33 of the Co-operative Societies Ordinance and, therefore, are not liable to stamp duty.

ELUVAITHEEVU NORTH CO-OPERATIVE CREDIT SOCIETY *v.* NALLALINGAM 92

2. *Co-operative Societies Ordinance, as amended by Act No. 27 of 1964—Section 53A (4)—Enforcement of an award thereunder—Seizure and sale of defaulter's dwelling house—Validity—Difference, in execution proceedings, between a decree of Court and an award made under the Co-operative Societies Ordinance—Civil Procedure Code, as amended by Act No. 49 of 1958, ss. 217, 218 (n).*

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PAGE

When a sum of money due under an award made under the Co-operative Societies Ordinance is sought to be recovered in terms of the provisions of section 53A (4) of the Co-operative Societies Ordinance, the dwelling house of the defaulter is liable to be seized and sold in pursuance of the writ issued to the Fiscal by the District Court. In such a case, the defaulter is not entitled to the benefit of the proviso to the amended section 218 of the Civil Procedure Code because what is sought to be enforced is not a decree or order of a Court but an award made under the Co-operative Societies Ordinance. Moreover, according to section 53A (4) of the Co-operative Societies Ordinance, the only sections of the Civil Procedure Code which are applicable to execution proceedings relating to an award are sections 226 to 297.

ATCHUVELY MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD. *v.* BALASINGHAM 180

Co-owners—

Vendor and purchaser—Cond-itional transfer of property by co-owners—Subsequent re-transfer—Proportions to which the co-owners will be entitled then 200

See VENDOR AND PURCHASER.

Corporations—

Industrial Disputes Act—Section 49—Coconut Research Board—Incapacity of the Board to claim Crown privilege in an industrial dispute—Corporations depending on and controlled by the Government—Whether they can claim to be servants or agents of the Crown—Interpretation Ordinance, s. 3—Coconut Research Ordinance (Cap. 440), s. 4 (7) .. 422

See INDUSTRIAL DISPUTES ACT (5).

Court of Admiralty—

See ADMIRALTY COURT.

Court of Criminal Appeal Decisions—

1. *Evidence—Witness—Doubt as to his competency to understand nature of oath—Right of Counsel to question the witness—Unsworn evidence—Requirement of corroboration—Burden of proof—Misdirection.*

Where there is doubt as to the question whether a witness was, by reason of his age or mental immaturity, able to understand the nature of the oath which was administered to him, Counsel should not be prevented by the Court from questioning the witness so as to clear the doubt. If the doubt is confirmed, the Jury should be directed that it is unsafe to act on unsworn evidence unless it is satisfactorily corroborated.

Where the defence calls no evidence and only suggests, by cross-examination of the prosecution witnesses, that it was not the accused, but some other person who committed the criminal act charged, the burden lies throughout on the prosecution to establish the guilt of the accused. In such a case, it would be a misdirection if the Court suggests to the Jury that some onus lies on the defence to disprove, by a balance of probabilities, facts averred by the prosecution.

WALALAWITA WYMAN 6

2. *Charge of murder—Place of intoxication—Proof—Whether intoxication can result from the smoking of ganga—Misdirection.*

Intoxication affecting the question of intention to commit an offence may be caused by the smoking of ganja.

M. A. MARIKAR 57

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PAGE

3. *Charge of murder—Meaning of what is commonly called "murderous intention"—Misdirection—Penal Code, ss. 293, 294.*

In directing the Jury on the question of murderous intention, the trial Judge stated—

"Did he cause those injuries with an intention to kill? That is one of the intentions which falls within the three types of murderous intentions. The second one, that is, an intention of causing bodily injury with knowledge that the bodily injury intended was likely to cause death. There again, gentlemen, it is murderous intention. The third is, neither you have the intention to cause death nor the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, but you have an intention to cause bodily injury, without any such knowledge, but the bodily injury is of such gravity that it is sufficient in the ordinary course of nature to cause death."

Held, that there was misdirection in that there was a lack of appreciation of important points of difference between s. 293 and s. 294 of the Penal Code. While the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such an act is not murder, unless either (*a*) the offender intends to cause bodily injury and has the special knowledge that the intended injury is likely to cause the death *of the person injured*, or (*b*) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death.

R. G. SOMAPALA 121

4. *Charge of attempted murder—Defence of alibi—Failure of accused to give evidence—Judge's adverse comments thereon—Effect—Evidence Ordinance, s. 114 (f).*

In a prosecution for attempted murder by shooting with a gun, the accused-appellant did not give evidence but he called as his witness his sister who gave evidence of an alibi. The trial Judge, in his summing-up, made adverse comments on the failure of the accused to enter the witness-box and give explanation himself. He stated that the accused "sat dumb in the dock but has chosen to call a sister of his to give evidence" and that he "has not had the manly courage to come to the witness-box and say that he was elsewhere".

Held, that the natural effect of the Judge's adverse comments was to create antipathy towards the accused in the minds of the Jury and cause them to reject the defence of alibi out of hand or, at the least, without due and proper consideration. It is the duty of a trial Judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the Jury.

CHANDRADASA 160

5. *Evidence—Corroborative evidence—Misdirection.*

In a case where corroborative evidence is required, the Court must not leave to the jury as corroborative evidence some evidence which is not capable of amounting in law to corroboration.

DHARMADASA 298

6. *Privy Council—Charge of murder—Admission of intention to kill—Reliance by accused upon private defence entirely—Burden of proof then—Evidence Ordinance, ss. 3, 105, 106—Meaning to be given to the words "burden of proving" in s. 105—Penal Code, ss. 73, 89 et seq., 93, 293, 294.*

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Where an accused who is charged with murder admits at the trial that the deceased died of wounds deliberately inflicted by him with intention to kill and his defence entirely is that he was acting in self-defence, section 105, read with section 3, of the Evidence Ordinance imposes upon the accused the burden of proof on the issue of private defence. In such a case it cannot be contended on behalf of the accused that he has not got to provide any sort of proof that he was acting in private defence. It is not sufficient for the accused to raise a doubt as to whether he is entitled to the benefit of the right of private defence, the use of which is permitted not only as a general exception by section 93 of the Penal Code but also as a special exception in section 294 of that Code.

In the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by section 105 of the Evidence Ordinance can be anything less than proof in accordance with section 3 of that Ordinance. Even if there is any ambiguity in the language of sections 3 and 105 of the Evidence Ordinance, the decision in *Woolmington v. D. P. P.* (1935 A. C. 462) is not of assistance in resolving it.

R. v. Chandrasekera (44 N. L. R. 97) approved.

(The position however is different when the accused denies intention to kill and says that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution.)

JAYASENA 313

7. *Criminal Procedure Code—Section 122 (3)—Scope—Charge of murder—Joint offenders—Liability to be convicted of lesser offence of culpable homicide on the ground of knowledge—Common intention—Penal Code, ss. 32, 33, 35, 36.*

(i) By section 122 (3) of the Criminal Procedure Code, " No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it . . . . . "

Held, that in the opening sentence of Section 122 (3) no distinction is intended between the oral statement or oral evidence of such statement and its written record. The statement therefore in whatever form cannot be used to *corroborate* the evidence of the witness. Such corroborative evidence may, however, be elicited by the Court in the course of contradicting a false answer given by the police officer when, while giving oral evidence, he refers to the written record for the purpose only of refreshing his memory, without the necessity of proving the written record.

Per Curiam : " In view of the frequent occasions when the interpretation of Section 122 (3) has come up for consideration in our Courts we are constrained to draw the attention of the legislature once again to the necessity of redrafting Section 122 (3)".

(ii) In a prosecution for murder, joint offenders can be convicted, by virtue of the provisions of section 32 of the Penal Code, of the lesser offence of culpable homicide on the ground of knowledge. In such a case, it is open to the Judge to direct the jury to consider the verdicts of murder, culpable homicide and grievous hurt on the basis of joint responsibility.

SIRISENA 389

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PAGE

8. *Evidence Ordinance—Section 27—How much of information received from accused may be proved—" Fact discovered "—Statement made by accused from the dock—Summing-up—Non-direction.*

(i) When the Police Inspector who recorded a statement of the accused-appellant in the course of his inquiry under Chapter XII of the Criminal Procedure Code was being examined as a prosecution witness, Crown Counsel sought to prove in evidence, through the witness, two sentences (barring the words " close to the spot ") out of that statement (P22), in terms of section 27 of the Evidence Ordinance. The two sentences were—

" I hid the sword under some leaves close to the spot. I can point out the place to the police."

The trial Judge then directed that the word " sword " should be substituted for the word " place " and that all that should be elicited from the witness were the words " I can point out the sword to the police ".

Held, that, inasmuch as both sentences appearing in document P22 were admissible under section 27 of the Evidence Ordinance, it was not possible to say that the admission of the document, with the substituted word, could have caused any prejudice to the accused.

(ii) In regard to an exculpatory statement made by the accused from the dock, the trial Judge directed the Jury thus—

" If you take the view—this is important—that his statement is true or at least it is probably true, then the case for the Crown must fail because it must cause a reasonable doubt in your mind."

Held, that the charge to the Jury in respect of the dock statement of the accused was unduly unfavourable to the accused and constituted a non-direction on a necessary matter. It was capable of leaving in the minds of the jury the impression that even if the appellant's statement raised a reasonable doubt as to the probable truth of the Crown's case, that was not sufficient to enable him to claim a verdict of acquittal.

PIYADASA 434

9. *Trial before Supreme Court—Examination of a Crown witness—Judge must not perform functions of prosecutor—Opinion of Judge as to credibility of a witness—Duty of Judge not to express it during the examination of the witness.*

At a trial before the Supreme Court, the Judge must not take on the examination of a prosecution witness in such a manner that the whole of his evidence incriminating the accused is elicited in answer to questions put by the Judge. In such a case, the Jury can scarcely resist the impression that the Judge is presenting the evidence of the witness as being evidence in which the Judge himself has confidence.

However much a trial Judge may be entitled, in his summing-up, to express an opinion as to the credibility of the evidence of a witness, there is no sanction in law for the course of intimating to the Jury, during the examination of a witness, that the Judge considers his evidence to be trustworthy.

SETHUWA 573

Courts Ordinance—

Section 20 60
Section 47 .. .. .. 145, 352
Section 69 174
Section 73 549

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PAGE

Criminal breach of trust—

Criminal breach of trust—Charge—Error in stating date of offence—Effect—Burden of proof—Penal Code, s. 389—Criminal Procedure Code, ss. 6, 168, 171.

Where a person is charged with having committed criminal breach of trust in respect of a certain sum of money on a particular day, it is sufficient for him to show that there is no evidence that he misappropriated any money on that day. Disbelief of evidence given by him at the trial that, on a subsequent date, he gave the money to the person to whom it was due is not a valid reason for convicting him.

ROHANA *v.* SENARATNE 370

Criminal Law—

1. *Common intention—Applicability of rule in a prosecution of two or more persons for unlawful possession of house-breaking instruments—Penal Code, ss. 32, 449.* 95

See COMMON INTENTION (1).

2. *Charge of murder—Meaning of what is commonly called "murderous intention"—Misdirection—Penal Code, ss. 293, 294* 121

See COURT OF CRIMINAL APPEAL DECISIONS (3).

3. *Criminal trespass—Charge against estate labourer for remaining on estate with intent to annoy superintendent—Physical occupation by him of line room after notice to quit—Whether it is a valid defence* .. 286

See CRIMINAL TRESPASS (1).

4. *Privy Council—Charge of murder—Admission of intention to kill—Reliance by accused upon private defence entirely—Burden of proof then—Evidence Ordinance, ss. 3, 105, 106—Meaning to be given to the words "burden of proving" in s. 105—Penal Code, ss. 73, 89, et seq., 93, 293, 294.* 313

See COURT OF CRIMINAL APPEAL DECISIONS (6).

5. *Penal Code—Section 451—Loitering about by reputed thief—Ingredients of offence—Quantum of evidence.*

In a prosecution under section 451 of the Penal Code, it is open to the complainant to lead evidence of previous convictions to establish the fact that the accused is a reputed thief. (*Perera v. The Police*, 32 C. L. W.108, not followed.) Further, the fact of the accused being a reputed thief at the time of loitering may be established independently of the arresting officer's knowledge of the accused's reputation. (*Mansoor v. Jayatillake*, 48 N. L. R. 308, not followed.)

SAMSON *v.* INSPECTOR OF POLICE, MARADANA 330

6. *Privy Council—Criminal law—Charge of forgery—Penal Code, ss. 452, 453, 454—Citizenship Act, s. 6—Defence of* autrefois acquit*—Burden of proof—Whether accused should be given an opportunity of calling evidence if the defence that prosecution does not support the charge is not accepted—Sentence—Privy Council will not generally interfere with it—Appeal against acquittal—Conviction thereafter—Desirability of accused being heard in mitigation of sentence* 361

See CRIMINAL PROCEDURE (6).

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PAGE

7. *Criminal breach of trust—Charge—Error in stating date of offence—Effect—Burden of proof—Penal Code, s. 389—Criminal Procedure Code, ss. 6, 168, 171* 370

See CRIMINAL BREACH OF TRUST.

8. *Jurisdiction—Robbery on a highway between sunset and sunrise—Not triable by Magistrate's Court—Penal Code, s. 380—Criminal Procedure Code, Schedule I—Legislative Enactments of Ceylon, 1938 Revised Edition—Ordinance No. 19 of 1937, ss. 3, 6 (1), 10—Powers of the Commissioner thereunder—Incapacity of the Commissioner to alter the law* 378

See ROBBERY.

9. *Criminal Procedure Code—Section 122 (3)—Scope—Charge of murder—Joint offenders—Liability to be convicted of lesser offence of culpable homicide on the ground of knowledge—Common intention—Penal Code, ss. 32, 33, 35, 36* 389

See COURT OF CRIMINAL APPEAL DECISIONS (7).

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

Criminal Procedure—

1. *Criminal procedure—Magistrate's Court—Joinder of charges—Trial of indictable offence together with offences triable summarily—Omission to assume jurisdiction under s. 152 (3) of Criminal Procedure Code—Illegality—Criminal Procedure Code, ss. 152 (3), 180 (1), 425.*

Where a number of offences alleged to have been committed in the course of one and the same transaction are tried together summarily by a Magistrate, but one of those offences is an indictable offence, the joinder of the indictable offence with the offences triable summarily vitiates the entire proceedings *ad initio*. In such a case, the failure of the Magistrate to assume summary jurisdiction under section 152 (3) of the Criminal Procedure Code is an illegality which is not curable by section 425 of the Criminal Procedure Code.

RAMASAMY *v.* GUNARATNE 187

2. *Criminal Procedure Code—Section 152 (3)—Trial before Magistrate's Court—Joinder of a charge relating to an offence summarily triable with a charge relating to an indictable offence—Failure of Magistrate to assume jurisdiction under s. 152 (3)—Effect—Penal Code, ss. 219, 323.*

Two offences were alleged to have been committed by the accused-appellant in the course of the same transaction. One of them was triable summarily and the other was triable only by a District Judge. The Magistrate, who was also District Judge, convicted the appellant of both offences without assuming jurisdiction under section 152 (3) of the Criminal Procedure Code.

Held, in appeal, that it was permissible to separate the illegal trial of the indictable offence and sustain the conviction on the remaining summarily triable count. In such a case it cannot be contended that the entire trial is vitiated by reason of the failure of the Magistrate to assume jurisdiction under section 152 (3) of the Criminal Procedure Code.

Ramaswamy v. Gunaratne (72 N. L. R. 187) not followed.

JOSEPH *v.* WOOTLER 213

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PAGE

3. *Criminal Procedure Code—Section 152 (3)—Assumption of jurisdiction thereunder—Sentence—Quantum* 272

See SENTENCE (1).

4. *Criminal Procedure Code, as amended by Act No. 42 of 1961—Sections 121 (1), 122 (1), 122A, 148 (1) (b)—Cognizable offence committed against a police officer—Arrest of offender under Police Ordinance, s. 65—Information given or recorded, and statements made during investigation, in respect of the offence—Right of accused to obtain certified copies—First information—Different forms of it.*

When proceedings under section 148 (1) (*b*) of the Criminal Procedure Code have been instituted in a Magistrate's Court in respect of a cognizable offence committed against a police officer, the fact that the offence was committed against a police officer does not exempt the "proper authority", when application is made to him under section 122A of the Criminal Procedure Code, from his duty to furnish to the accused or his proctor certified copies of information given or recorded and statements made in terms of sections 121 (1) and 122 (1) respectively of the Criminal Procedure Code.

The information under section 121 (1) of the Criminal Procedure Code may be obtained in several ways. It may be made orally and reduced to writing, or it may be made in writing in the first instance or it may be communicated over the telephone. Although a police officer who is present at the time of the commission of a cognizable offence against him is entitled to arrest the offender under section 65 of the Police Ordinance, he would be giving information under section 121 (1) of the Criminal Procedure Code when he takes the offender to the Police Station and informs the authorities of the offence.

PANDITARATNE *v.* A. S. P., KEGALLE 273

5. *Criminal Procedure Code, as amended by Act No. 42 of 1961—Section 122A (1)—Right of an accused person to obtain certified copies of "first information"—Meaning of expression "first information"—Sections 121 (1), 121 (2), 148.*

Section 122 A (1) of the Criminal Procedure Code does not enable a person accused of a cognizable offence to obtain certified copies of the "notes and observations" made by a police officer concerning the offence, if the notes and observations do not relate to any part of the first information in regard to the offence.

A report under section 148 (1) (*b*) of the Criminal Procedure Code need not always be preceded by information recorded under section 121 (1). Section 121 (2) of the Criminal Procedure Code contemplates the institution of proceedings without a first information being recorded under section 121 (1).

Panditaratne v. The Assistant Superintendent of Police, Kegalle (72 N. L. R. 273) considered.

ARUMUGAM *v.* O. I. C., POLICE STATION, MIRIHANA .. 301

6. *Privy Council—Criminal law—Charge of forgery—Penal Code, ss. 452, 453, 454—Citizenship Act, s. 6—Defence of* autrefois acquit—*Burden of proof—Whether accused should be given an opportunity of calling evidence if the defence that prosecution does not support the charge is not accepted—Sentence—Privy Council will not generally interfere with it—Appeal against acquittal—Conviction thereafter—Desirability of accused being heard in mitigation of sentence.*

The defence of *autrefois acquit* cannot succeed if in the relevant earlier case the accused was discharged because counsel for the prosecution stated that the prosecution was not adducing any evidence against the accused and there is no indication that the accused was called upon to plead to the charge. In such a case it cannot be said that the appellant was ever put in peril on the first occasion.

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Where, at the trial of a criminal case, Counsel for the accused states that he is not calling any evidence but makes a submission in law to the effect that the evidence for the prosecution does not support the charge, there is no obligation on either the trial Court or the Supreme Court (on appeal from an acquittal) to give a further opportunity to the accused of calling evidence if the submission made on behalf of the accused is not accepted and the accused is convicted.

The Judicial Committee of the Privy Council does not as a rule interfere with sentences.

In appeals against acquittals it is highly desirable that accused persons should have the opportunity, after conviction by an appellate court, of pleading in mitigation of sentence.

VEERAPPEN *v.* ATTORNEY-GENERAL 361

7. *Criminal breach of trust—Charge—Error in stating date of offence—Effect—Burden of proof—Penal Code, s. 389—Criminal Procedure Code, ss. 6, 168, 171* 370

See CRIMINAL BREACH OF TRUST.

8. *Criminal Procedure Code—Section 122 (3)—Scope—Charge of murder—Joint offenders—Liability to be convicted of lesser offence of culpable homicide on the ground of knowledge—Common intention—Penal Code, ss. 32, 33, 35, 36* 389

See COURT OF CRIMINAL APPEAL DECISIONS (7).

9. *Criminal procedure—Magistrate's Court—Trial of indictable offence with offences triable summarily—Failure of Court to assume jurisdiction under s. 152 (3) of Criminal Procedure Code—Effect—Criminal Procedure Code, ss. 152 (3), 180 (1), 425.*

Where a number of offences are alleged to have been committed in the course of the same transaction, the joinder, at one summary trial, of an indictable offence with offences triable summarily vitiates the entire proceedings if the Magistrate omits to assume jurisdiction in terms of section 152 (3) of the Criminal Procedure Code. In such a case, the mere fact that the accused has been acquitted in respect of the indictable offence is of no consequence.

Ramasamy v. Gunaratne (72 N. L. R. 187) followed.

Joseph v. Wootler (72 N. L. R. 312) not followed.

WILLIAM *v.* INSPECTOR OF POLICE, MIRIGAMA 406

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

Criminal Procedure Code—

Section 6	..	..	..	370
Section 121 (1)	..	..	..	273, 301
Section 121 (2)	..	..	..	301
Section 122 (1)	..	..	..	273
Section 122 (3)	..	..	..	389
Section 122 A	..	..	..	273, 301
Section 152 (3)	..	..	..	187, 213, 272, 406
Section 168	..	..	..	370
Section 171	..	..	..	370
Section 180 (1)	..	..	..	187, 406
Sections 330, 331	..	..	..	361
Section 425	..	..	..	187, 406

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

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PAGE

Criminal Trespass—

1. *Criminal trespass—Charge against estate labourer for remaining on estate with intent to annoy superintendent—Physical occupation by him of line room after notice to quit—Whether it is a valid defence.*

The accused-appellant, who was employed as labourer on an estate, was convicted of the offence of criminal trespass for remaining on the estate with intent to annoy the complainant, who was the superintendent in occupation of the estate. There was another charge laid against him of committing house trespass by remaining in his line room with intent to annoy the complainant, but he was acquitted on the ground that, although his occupation of the line room after receipt of notice to quit was unlawful, it was not the complainant but the accused himself who had actual physical occupation of the line room.

Held, that the fact that the accused was not guilty of house trespass in respect of the line room of which he was in physical occupation did not preclude his being guilty of criminal trespass in respect of his entry on and use of adjacent property in the occupation of the complainant.

RENGASAMY *v.* MC INTYRE 286

Crown—

See CONSTITUTIONAL LAW (3), (4), (6).

Customs Ordinance—

1. *Customs Ordinance—Export of desiccated coconut—Export licence issued by Manager of Ceylon Coconut Board—Specification of Halifax as port of destination—Shipments landed at port of New York—Forfeiture under s. 130 of Customs Ordinance for exporting restricted goods—Whether* Certiorari *lies in respect of such forfeiture—Scope of* audi alteram partem *principle—Whether the forfeiture was valid—Customs Ordinance (Cap. 255), ss. 7, 8, 9, 12, 33, 43, 44, 47, 50, 58, 65, 75, 125, 129 to 133, 142, 144, 145, 154, Schedule B—Coconut Products Ordinance (Cap. 160), as amended by Act No. 20 of 1962, ss. 18, 20, 20A, 20B, 30, 31 and Regulations 7, 11, 14, 17 of Amending Regulations of 1963.*

In March 1968 a Company, of which the petitioner was a Director, made applications to the Principal Collector of Customs under section 58 of the Customs Ordinance for permission to ship certain quantities of desiccated coconut to Halifax in Canada. Although the applications and the ship's manifesto specified Halifax as the port of destination, the three shipments of desiccated coconut were in fact landed at the port of New York in the United States of America. The Collector took the view that the exportation of these consignments to New York, instead of to Halifax, was contrary to a restriction imposed by the Regulations made under the Coconut Products Ordinance. He therefore called upon the Directors and the Office Manager of the Company to show cause why an order of forfeiture under section 130 of the Customs Ordinance, read with the Coconut Products Ordinance, should not be made. After an inquiry was held the Collector elected, in terms of section 130 of the Customs Ordinance, to impose a forfeiture of three times the value of the goods in question, amounting to a total of Rs. 5,010,504. The position of the Collector was that the exportation of the consignments of desiccated coconut was in contravention of section 12 of the Customs Ordinance, read with the last paragraph of Schedule B to that Ordinance, and punishable under section 130.

The petitioner sought, in the present application, to have the order of the Collector quashed by way of *Certiorari*. Separate applications for similar writs were made by the two other Directors and the Office Manager of the Company.

Held, (i) that section 130 of the Customs Ordinance, so far as was relevant to the present application, should be stated as follows:—
"Every person who shall be concerned in exporting any goods the

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PAGE

exportation of which is restricted contrary to such restriction shall forfeit either treble the value of the goods, or be liable to a penalty of Rs. 1,000, at the election of the Collector of Customs." The forfeiture under this Section is incurred at the moment a prohibited or restricted exportation takes place. The function, and even the duty, of the Collector is only to make an election as between the two specified amounts of the incurred forfeiture.

(ii) that a Writ of *Certiorari* does not lie to quash an election made by the Collector under section 130 of the Customs Ordinance. *Certiorari* does not lie against a person unless he has legal authority to determine a question affecting the rights of subjects and, at the same time, has the duty to act judicially when he determines such question. The existence of a duty to act judicially is not made manifest in section 130 and in connected provisions of the Customs Ordinance. At the highest the Collector's election may, in a provisional manner and to a limited extent, affect the " right " of a subject ; but the circumstances in which the election is made are not such as to require the Collector to hear the other side ; and no sanction in the proper sense can either be imposed by the Collector upon a person liable to a forfeiture or can else attach under the Customs Ordinance to render the election effective. Unless a competent Court determines, in a subsequent action instituted by the Attorney-General under section 145 of the Customs Ordinance, that a forfeiture was indeed incurred under section 130, the Collector's election is ineffective. The principle *audi alteram partem*, as discussed in *Durayappah v. Fernando* (69 N.L.R. 265), does not apply in the case of the election authorised or required by section 130 of the Customs Ordinance.

Tennekoon v. Principal Collector of Customs (61 N.L.R. 232), overruled.

Omer v. Caspersz (65 N.L.R. 494), partly overruled.

Quaere, whether, if the petitioner had been " concerned in the exportation " of shipments of desiccated coconut to New York, instead of to Halifax, in contravention of the terms of the export licence issued to the Company by the Manager of the Ceylon Coconut Board, such exportation was an exportation of restricted goods contemplated in section 130 and Schedule B of the Customs Ordinance, read with the Coconut Boards Ordinance as amended by Act No. 20 of 1962 and the Amending Regulations of 1963 made under section 20B of the amended Coconut Products Ordinance.

JAYAWARDENE *v.* V. P. SILVA 25

2. *Privy Council—Customs Ordinance (Cap. 235)—Section 125—Forfeiture of goods thereunder—Meaning of word " concealment "—Sections 30, 47, 75, 107, 125, 129, 132, 150, 152, 154.*

The plaintiffs-appellants imported from Tuticorin in May 1961 fifty bags of what were described on the Bill of Lading as being Fenugreek seeds (Mathe seeds). Fenugreek seeds are permitted to be imported free of duty. When the goods reached their destination in Jaffna, the Customs officers detected that only 30 of the bags contained Fenugreek seeds and that the remaining 20 bags contained poppy seeds the importation of which is prohibited. The Assistant Collector of Customs thereupon ordered the forfeiture of not only the 20 bags of poppy seed but also of the 30 bags of Fenugreek seed. The appellants contested in the present action the validity of the order of forfeiture in respect only of the 30 bags of Fenugreek seed. They claimed that the forfeiture of those 30 bags by the Assistant Collector of Customs was not lawful.

The finding of the trial Judge was that the appellants had " planned to conceal poppy seeds in the consignment and that the 30 bags were used to conceal 20 bags of poppy seeds ". The evidence established that all 50 bags had the same mark " Mani " on each of them and that there was a scheme, by inducing the Customs to believe that all 50 bags contained permissible imports, to smuggle in the prohibited poppy seed which was in the 20 bags.

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PAGE

Held, that the forfeiture of the 30 bags of Fenugreek seeds was lawful under the provisions of Section 125 of the Customs Ordinance. The word " concealment " in that Section covered the situation that existed in the present case.

MANDIRAMPILLAI *v.* ATTORNEY-GENERAL 169

3. *Charge of possessing unclaimed goods in the Customs premises—Burden of proof as to place of offence—Customs Ordinance (Cap. 235), ss. 101 (1) (b) [Regulation 26 (a) (3) thereunder], 101 (2) [Notification thereunder], 148.*

In a prosecution for handling goods found concealed or unclaimed in the Customs premises at Colombo in breach of regulation 26 (*a*) (3) made under section 101 (1) (*b*) of the Customs Ordinance, the averment by the complainant that the offence was committed at the Dry Dock Gate, Port of Colombo, is sufficient *prima facie* evidence under section 148 of the Customs Ordinance, read with Notification made under section 101 (2), that the offence was committed within the Customs premises.

JOSEPH *v.* INSPECTOR OF POLICE 357

Debt Conciliation Ordinance—

1. *Debt Conciliation Ordinance (Cap. 81), as amended by Act No. 5 of 1959—Application to effect a settlement thereunder—Bar of subsequent civil action—Inapplicability to an unsecured debt—" Debtor "—" Debt "—Sections 14 (1), 17 (c), 24 (2) (c), 26 (1), 64.*

Though the term " debt ", according to section 64 of the Debt Conciliation Ordinance, " includes all liabilities owing to a creditor in cash or kind, secured or unsecured . . . ", section 14 (1) does not permit a debtor to make an application to the Board for the settlement of an unsecured debt owed to a secured creditor.

Where a debtor makes an application to the Board for the settlement of a secured debt, the disclosure under section 17 (*c*) of an unsecured debt due to the same creditor on a promissory note does not have the effect of making the unsecured debt " a matter pending before the board " within the meaning of section 56 so as to debar the creditor from instituting action subsequently in a civil court to recover the amount of the unsecured debt.

ATHAMBAWA *v.* BEE BEE 112

2. *Debt Conciliation Ordinance (Cap. 81)—Sections 40 (1) and 43 (1)—Debt secured by mortgage of immovable property—Settlement before Board—Default of payment thereafter—Right of mortgagee to institute hypothecary action then—Procedure.*

Where the creditor and debtor in respect of a debt secured by a mortgage of immovable property enter into a settlement before the Debt Conciliation Board whereby it is agreed *inter alia* that in case of any default the mortgagee is entitled to all his legal rights including mortgagee's remedies to sue and recover in a court of law in a consolidated sum any amount due on the settlement, it is open to the mortgagee, if the mortgagor defaults in payment subsequently, to institute a hypothecary action under the provisions of Part II of the Mortgage Act. In such a case the Court has jurisdiction to entertain the hypothecary action without following the procedure laid down in section 43 of the Debt Conciliation Ordinance. The law grants a discretion to a creditor, in the case of a secured debt, to choose whether he should proceed under Section 43 or not.

NONA *v.* ENGALTHINAHAMY 152

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PAGE

Delicts—

Delict—Damage caused by dangerous tree—Liability of the owner of the tree.

A tree which stood on the defendant's land fell across the roof of the plaintiff's house and caused damage to it. Although the tree did not overhang the plaintiff's land or the house, the defendant was aware of the dangerous condition of the tree.

Held, that the defendant was guilty of neligence and liable to pay damages.

GOONERATNE *v.* WIMALAWATHIE 134

Dividend Warrants—

See NEGOTIABLE INSTRUMENTS.

Divorce Actions—

See MATRIMONIAL ACTIONS.

Drunkenness—

See COURT OF CRIMINAL APPEAL DECISIONS (2).

Election Petitions—

See PARLIAMENTARY ELECTIONS.

Estoppel—

See RES JUDICATA.

Evidence—

1. *Evidence—Witness—Doubt as to his competency to understand nature of oath—Right of Counsel to question the witness—Unsworn evidence—Requirement of corroboration—Burden of proof—Misdirection* .. 6

See COURT OF CRIMINAL APPEAL DECISIONS (1).

2. *Control of Prices Act—Sections 3 (2), 4—Contravention of Food Price Order—Place of offence—Whether Court can take judicial notice that it fell within Colombo District—Evidence Ordinance, s. 57—Administrative Districts Act (Cap. 392), s. 2 (2)* 166

See CONTROL OF PRICES ACT (3).

3. *Evidence—Corroborative evidence—Misdirection* 298

See COURT OF CRIMINAL APPEAL DECISIONS (5).

4. *Control of Prices Act—Sale of price-controlled article—Statements on label of the article—Relevancy* 310

See CONTROL OF PRICES ACT (6).

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PAGE

5. *Privy Council—Charge of murder—Admission of intention to kill—Reliance by accused upon private defence entirely—Burden of proof then—Evidence Ordinance, ss. 3, 105, 106—Meaning to be given to the words "burden of proving" in s. 105—Penal Code, ss. 73, 89 et seq., 93, 293, 294* 313

See COURT OF CRIMINAL APPEAL DECISIONS (6).

6. *Divorce action—Evidence—Wife's confession, outside Court, of adultery—Inadmissibility against co-respondent—Standard of proof for proving adultery.* 419

See MATRIMONIAL ACTIONS (2).

7. *Evidence Ordinance—Section 27—How much of information received from accused may be proved—"Fact discovered"—Statement made by accused from the dock—Summing-up—Non-direction* 434

See COURT OF CRIMINAL APPEAL DECISIONS (8).

8. *Control of Prices Act—Sections 3 (2) and 4 (1)—Contravention of Price Order of 7th November 1964 relating to sale of beef—Place of offence—Proof as to whether it fell within Kalutara District—Judicial notice—Power of Court to consult appropriate books of reference—Evidence Ordinance, s. 57—Administrative Districts Act (Cap. 392), Schedule 1—Ordinary meaning of "beef"—Whether it includes buffalo meat—Butchers Ordinance (Cap. 272), s. 2* 449

See CONTROL OF PRICES ACT (10).

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

Evidence Ordinance—

Section 3 313
Section 27 434
Section 57 .. .. 166, 182, 449
Section 105 .. .. 116, 313
Section 106 313
Section 114 (*f*) 160

See also COURT OF CRIMINAL APPEAL DECISIONS ; EVIDENCE.

Execution of Decrees—

Execution of decrees—Matrimonial action—Salary of an employee—Exemption from seizure for alimony—Civil Procedure Code, s. 218 (m).. 140

See MATRIMONIAL ACTIONS 1

Fisher Ord nance—

Fisheries Ordinance (Cap. 212)—Sections 14 and 15—Offence of possessing fish dynamited in Ceylon waters—Ingredients of the offence.

In a prosecution under section 15 of the Fisheries Ordinance for possessing fish killed by using dynamite in contravention of section 14, it is incumbent on the complainant to prove, *inter alia*, that the fish was dynamited in Ceylon waters.

NALLARAKKUPILLAI *v.* KHALEEL 114

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Food and Drugs Act—

PAGE

Food and Drugs Act (Cap. 216)—Section 4—Sale of food not of the nature, substance or quality demanded—Quantum of evidence.

A seller does not contravene the provisions of section 4 (1) of the Food and Drugs Act if the purchaser has notice at the time of sale that the article sold to him is not of the nature, substance and quality of the article which he demands.

SIVASUPRAMANIAM *v.* DABARE 22

Habeas corpus—

See WRIT OF HABEAS CORPUS.

Housebreaking—

See CRIMINAL LAW (1).

Housing and Town Improvement Ordinance—

Mandamus—*Whether it lies when a specific statutory remedy is available—Erection of a building in an Urban Council area—Certificate of conformity—Refusal of Chairman of Council to issue it despite order of tribunal of appeal—Remedy then of person who erected the building—Housing and Town Improvement Ordinance (Cap. 268), ss. 15, 16, 88, 95.*

Mandamus does not lie where there is a specific statutory remedy available providing for a mode of enforcement.

The Chairman of an Urban Council refused to issue a proper certificate of conformity to the petitioner in respect of a building although he had been ordered to issue one by the District Court upon an appeal preferred to it by the petitioner in terms of section 16 of the Housing and Town Improvement Ordinance. Thereupon the petitioner made the present application for a writ of *mandamus* on the Chairman directing him to issue the certificate of conformity.

Held, that *mandamus* was not available to the petitioner inasmuch as section 95 of the Housing and Town Improvement Ordinance provided a special statutory remedy whereby it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the enforcement of a decree.

FERNANDO *v.* DHARMASIRI 320

Improvements—

See COMPENSATION FOR IMPROVEMENTS.

Income Tax—

1. *Income tax—Proceedings for recovery of it—Order for payment by instalments— Permissibility.*

In proceedings for the recovery of income tax due, payment by instalments may be ordered if the assessee has made no attempt to evade the payment of the tax and the circumstances are such that he should be granted relief.

VAIRAYAN NADAR *v.* COMMISSIONER OF INLAND REVENUE .. 164

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PAGE

2. *Income tax—Issue of certificate to District Court to recover tax by seizure and sale of property—Issue of writ of execution to Fiscal—Application by assessee for stay of execution pending appeal to Commissioner of Inland Revenue—Power of District Court to allow stay of execution—Scope—Right of Commissioner to appeal to Supreme Court from order allowing stay of execution—Civil Procedure Code, s. 761—Income Tax Ordinance, ss. 81 (2), 84 (3).*

Where, in consequence of the Commissioner of Inland Revenue issuing a certificate to a District Court in terms of section 84 (3) of the Income Tax Ordinance for the recovery of income tax due from an assessee, the District Court directs a writ of execution to issue to the Fiscal for the seizure and sale of the properties of the assessee, the District Court acts in its judicial capacity and not ministerially if and when an application is made by the assessee to stay the writ which has been issued by the Court in performance of the ministerial duty which the law casts on the Court. Accordingly, an order of the Court allowing stay of execution is appealable at the instance of the Commissioner.

Where stay of execution of the writ is sought by the assessee on the ground that an appeal to the Commissioner of Inland Revenue is pending against the assessment of the tax alleged to be in default, neither section 81 (2) nor any other provision of the Income Tax Ordinance precludes the District Court from staying execution on condition that the assessee should deposit a sum of money so as to enable the Commissioner to obtain payment of the tax in default in the event that the determination of the assessee's appeal wholly or partly confirms the existing assessment.

COMMISSIONER OF INLAND REVENUE *v.* RANAWEERA .. 294

3. *Privy Council—Income tax—Penalty for making an incorrect return—Power of Commissioner of Inland Revenue to impose such penalty—Whether the Commissioner exercises judicial power and requires appointment by Judicial Service Commission—Nature of his duties—Difference between administrative functions and judicial functions—Effect of alternative proceedings before Magistrate*—Certiorari—*Ceylon (Constitution) Order in Council (Cap. 379), Articles 3, 53, 55, 58, 60—Income Tax Ordinance (Cap. 242), ss. 2, 3, 23, 58 et seq., 73, 80 (1), 90, 92.*

Section 80 (1) of the Income Tax Ordinance reads as follows :—

" 80. (1) Where in an assessment made in respect of any person the amount of income assessed exceeds that specified as his income in his return and the assessment is final and conclusive under section 79, the Commissioner may, unless that person proves to the satisfaction of the Commissioner that there is no fraud or wilful neglect involved in the disclosure of income made by that person in his return, in writing order that person to pay as a penalty for making an incorrect return a sum not exceeding two thousand rupees and a sum equal to twice the tax on the amount of the excess. "

The only question for decision in the present appeal was whether the Commissioner of Inland Revenue had power to impose penalties under section 80 of the Income Tax Ordinance. It was argued on behalf of the appellant (a taxpayer) that such imposition was an exercise of a power which is judicial and not administrative, and that judicial power could, under the Constitution of Ceylon, be exercised only by a judicial officer appointed by the Judicial Service Commission. In support of the submission that the Commissioner exercised judicial power, reliance was placed on the words " unless that person proves to the satisfaction of the Commissioner " in section 80 and upon the alternative course which the Commissioner could elect by causing proceedings to be instituted before a Magistrate under sections 90 and 92 of the Income Tax Ordinance.

Held, that where the resolution of disputes by some Executive Officer can be properly regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function. This is particularly so in the field of income tax though it is certainly not confined thereto. The Commissioner,

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PAGE

when he acts under section 80 of the Income Tax Ordinance, is still performing his administrative duties albeit that he must act judicially in exercising the powers conferred upon him by the section. The conclusion that this is not the same thing as the exercise of judicial power is unaffected by the circumstance that penalties may be imposed as an alternative by a Magistrate acting under sections 90–92 of the Income Tax Ordinance.

RANAWEERA *v.* WICKRAMASINGHE 553

4. *Privy Council—Income tax—Board of Review—Validity of its appointment by Minister and not by the Judicial Service Commission or the Public Service Commission—Functions of the Board—Power of the Board to hear appeals—Whether it involves the exercise of judicial power—" Public officer "—" Servant of the Crown "—" The Crown "—" Her Majesty "—Ceylon (Constitution) Order in Council (Cap. 379), ss. 3, 55, 60—Income Tax Ordinance (Cap. 242), ss. 11 (1) (a), 11 (7), 15, 36 (1), 37, 43 (3), 56 (9), 73–77, 80*—Certiorari.

In this appeal by a taxpayer against an order of the Board of Review which was appointed by the Minister of Finance under section 74 (1) of the Income Tax Ordinance, the first contention for the appellant was that the work of the Board of Review involved the exercise of judicial power and that, therefore, the members of the Board should have been appointed, according to section 55 of the Constitution, by the Judicial Service Commission and not by the Minister. Alternatively, it was contended that the members of the Board were " public officers " within the meaning of the Constitution and that their appointment to the Board was invalid because it was made by the Minister and not by the Public Service Commission as required by section 60 of the Constitution.

Held, (i) that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance, and that as such its work is administrative though judicial qualities are called for in its performance. It was irrelevant therefore that members of the Board were not appointed by the Judicial Service Commission.

(ii) that members of the Board of Review cannot properly be described as " servants of the Crown " within the meaning of the definition of " public officer " in section 3 of the Constitution. They are more like independent arbitrators which the legislature has thought it right to appoint as an administrative check in favour of the taxpayer and as an additional assurance that his liability to tax will be correctly asscertained.

Per LORD DIPLOCK in dissenting judgment—" The members of the Board of Review if not ' judicial officers ' are ' public officers ' and were not validly appointed as such."

RANAWEERA *v.* RAMACHANDRAN 562

Indictments—

See CHARGES AND INDICTMENTS.

Industrial Disputes Act—

1. *Labour Tribunal—Application by dismissed workman for reinstatement in service—Jurisdiction of labour tribunal to award compensation for past services—Industrial Disputes Act, ss. 31B, 31C (1), 33 (1), 33 (5).*

Where, in an application under section 31B of the Industrial Disputes Act, a workman seeks relief in respect of the termination of his services by the employer and prays for reinstatement in service, it is open to the parties, by subsequent agreement between them, to confer jurisdiction on the labour tribunal to award compensation to be paid to the workman on the basis of his past services, in lieu of reinstatement.

UPLANDS TEA ESTATES LTD. *v.* CEYLON WORKERS' CONGRESS .. 68

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PAGE

2. *Labour Tribunal—Finding of fact made by it—Right of a party to appeal therefrom to Supreme Court—Question of law—Duty of Court to act judicially and in accordance with the evidence placed before it—Incapacity of the Tribunal to make inquiries without notice to the parties—Misconduct of workman—Domestic inquiry—Admission of guilt—Evidentiary value of it at the inquiry before Labour Tribunal—Industrial Disputes Act, ss. 24 (1) (2), 31C (1), 31C (2)—Industrial Disputes Regulations 20, 21, 25.*

Where a Labour Tribunal makes a finding of fact for which there is no evidence—a finding which is both inconsistent with the evidence and contradictory of it—the restriction of the right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the order based on such a finding if the Labour Tribunal is under a duty to act judicially.

The question whether a particular functionary is under a duty to act judicially is different and distinct from the question whether he holds judicial office. Although the President of a Labour Tribunal does not hold judicial office, the decision in *United Engineering Workers' Union v. Devanayagam* (69 N.L.R. 289) does not free Labour Tribunals from the duty to act judicially. "Inasmuch as the Tribunal is required to give both parties a full opportunity of stating their cases, a notice of the full statement of the opposite party, and a notice of time and place of hearing and inasmuch as the Tribunal is impressed with the duty to hear evidence and its orders are made subject to a right of appeal to this Court on matters of law, it would appear to be largely academic to go further afield in quest of other indicia of the duty to act judicially."

Section 31C (1) of the Industrial Disputes Act does not enable a Labour Tribunal to make inquiries outside the inquiry which it is conducting with notice to and in the presence of the parties.

Where, at a domestic inquiry held at the instance of the employer, a workman is found guilty of misconduct on his own admission, the evidence of the admission of guilt must be given due consideration by a Labour Tribunal which subsequently conducts an inquiry into an application made by the dismissed workman for reinstatement.

CEYLON TRANSPORT BOARD *v.* GUNASINGHE 76

3. *Labour Tribunal—Inquiry about a criminal act involving moral turpitude—Standard of proof required—Industrial Disputes Act (Cap. 131), ss. 31C, 36 (4).*

Where, in an industrial dispute between an employer and an employee, a Labour Tribunal is called upon to decide whether the employee was guilty of a criminal act involving moral turpitude—such as making fraudulent entries with a view to misappropriation of funds—the standard of proof should be as in a criminal case. Accordingly, if there is a reasonable doubt, the benefit of such doubt should be given to the person accused. This requirement is not in conflict either with section 31C (1) of the Industrial Disputes Act, which empowers a labour tribunal to make a "just and equitable" order, or with section 36 (4), according to which the Tribunal is not bound by any of the provisions of the Evidence Ordinance.

THE CEYLON UNIVERSITY CLERICAL AND TECHNICAL ASSOCIATION, PERADENIYA *v.* THE UNIVERSITY OF CEYLON, PERADENIYA .. 84

4. *Labour Tribunal—Order made by it—Incapacity of Supreme Court to deal with it by way of revision.*

The revisionary powers of the Supreme Court do not extend to revision of orders made by Labour Tribunals.

THAMEENA *v.* KOCH 192

5. *Industrial Disputes Act—Section 49—Coconut Research Board—Incapacity of the Board to claim Crown privilege in an industrial dispute—Corporations depending on and controlled by the Government—Whether they can claim to be servants or agents of the Crown—Interpretation Ordinance, s. 3—Coconut Research Ordinance (Cap. 440), s. 4 (7).*

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PAGE

The Coconut Research Board, which is a body corporate established and incorporated under the provisions of the Coconut Research Ordinance, does not perform functions and duties which have traditionally been performed by the Crown or the Government. Therefore the Board is not entitled to invoke the provisions of section 49 of the Industrial Disputes Act, in order to claim as against its employees the privileges available to the Crown in respect of Crown employees.

A Corporation, such as the Coconut Research Board, depending on and controlled by the Government, may nevertheless be the employer of persons in its services within the meaning of the definition of " employer " in the Industrial Disputes Act. In such a case, such Governmental control does not bring the Corporation within the scope of the exemption provided by section 49 of the Industrial Disputes Act.

COCONUT RESEARCH BOARD *v.* SUBRAMANIAM 422

Infants—

See MINORS.

Injunctions—

Compulsory acquisition of land—Interim injunction to restrain it—Requisite conditions—Suspicion of malice—Duty of Court then to scrutinise the acquisition—Land Acquisition Act, ss. 4 (1), 5, 38 (proviso) —Courts Ordinance, s. 20 60

See LAND ACQUISITION ACT (1).

Interpretation of Statutes—

1. *Legislative Enactments of Ceylon, 1938 Revised Edition—Ordinance No. 19 of 1937, ss. 3, 6 (1), 10—Powers of the Commissioner thereunder—Incapacity of the Commissioner to alter the law* 378

See ROBBERY.

2. *Corporations depending on and controlled by the Government—Whether they can claim to be servants or agents of the Crown—Interpretation Ordinance, s. 3* 422

See INDUSTRIAL DISPUTES ACT (5).

Intoxication—

See COURT OF CRIMINAL APPEAL DECISIONS (2).

Jaffna Matrimonial Rights and Inheritance Ordinance—

See THESAVALAMAI.

Jurisdiction—

Jurisdiction—Sale of immovable property of minor—Property situate outside jurisdiction of Court of minor's residence—Appropriate Court to which the curator should apply for sanction to sell—Courts Ordinance, s. 69—Civil Procedure Code, ss. 6, 9 (a) (b), 584 174

See CIVIL PROCEDURE (4).

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PAGE

Jurors—

Contempt of Court—Tampering with a juror in the course of a pending case—Punishability 352

See CONTEMPT OF COURT (2).

Kandyan Law—

Kandyan law prior to 1938—Inheritance of paternal property by intestate heirs—Subsequent physical division of some of the undivided lands by the co-heirs by notarial deed—Whether a land owned dividedly thereafter by a co-heir should be regarded as entirely paraveni—Concept of "paraveni" prior to 1938—"Acquired property"—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 10, 27.

Held by H. N. G. FERNANDO, C.J. and WEERAMANTRY, J. (WIJAYATILAKE, J. dissenting), that, under the Kandyan law prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, when co-heirs who inherited several lands from their father who died intestate divided some of the lands physically between themselves by subsequent mutual agreement by the execution of a notarial deed in such a manner that they became sole owners of specific and separate portions, any one of such separate lands became "paraveni" property entirely in the hands of its owner and no portion of it partook of the character of " acquired " property.

One Appuhamy, who was subject to the Kandyan law, died intestate leaving as his heirs two children K and D and several lands. By deed P1 of 13th October 1893, K and D divided part of their inheritance in such a manner that K became sole owner of sixteen lands and D the sole owner of twenty. It was further agreed that the other lands which they inherited were to be possessed in common.

The question for adjudication in the present appeal was whether Paragahapitiyahena, which was one of the lands of which K became sole owner under the deed P1 of 13 October 1893, was entirely " paraveni " in the hands of K or whether it partook of this character only in part. It was held by the trial Judge that inasmuch as K and D each became entitled on Appuhamy's death to an undivided half share in each of his lands, and inasmuch as K's title to the other half share of Paragahapitiyahena rested solely on the document P1, such latter half share derived by acquisition from a collateral and not by inheritance from a parent and thus constituted " acquired " property in his hands.

Held, by the majority of the Court, that Paragahapitiyahena was entirely paraveni in K's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source, despite the fact of the execution of P1. In such a case, prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, what paraveni in effect means is that which each heir gets in his capacity as heir, and, in considering what property was paraveni and what acquired, the old Kandyan law would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

SUJATHA KUMARIHAMY *v.* DINGIRI AMMA 409

Labour Tribunals—

See INDUSTRIAL DISPUTES ACT.

Land Acquisition Act—

Compulsory acquisition of land—Interim injunction to restrain it—Requisite conditions—Suspicion of malice—Duty of Court then to scrutinise the acquisition—Land Acquisition Act, ss. 4 (1), 5, 38 (proviso) —Courts Ordinance, s. 29.

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The requisite conditions for the issue, by the Supreme Court, of a temporary injunction under section 20 of the Courts Ordinance are—

(1) irremediable mischief would ensue from the act sought to be restrained ;

(2) an action would lie for an injunction in some court of original jurisdiction ; and

(3) the plaintiff is prevented by some substantial cause from applying to that court.

By a notice under section 4 (1) of the Land Acquisition Act the Minister (the 1st respondent) sought to acquire certain lands of the 1st petitioner for the purpose of carrying out the widening of a road. Upon the facts and circumstances disclosed in the Supreme Court, the question arose whether, in giving directions for these acquisitions, the 1st respondent, wittingly or unwittingly, gave effect to a design or plan by a political opponent of the petitioners which was calculated to protect the interests of himself and his relatives and cause loss and detriment to the petitioners.

Held, that the petitioners were entitled to the issue of a temporary injunction restraining the respondents in respect of the acquisition of the lands. In order that an interim injunction may issue, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events ; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of.

RATWATTE *v.* MINISTER OF LANDS 60

Landlord and Tenant—

1. *Rent Restriction Act—Subletting of premises in the guise of a " partnership agreement "—Immateriality of the label to the transaction.*

Where a tenant of rent-controlled premises enters into a " partnership agreement " with a person in relation to the premises but such agreement is only a blind to cover the subletting of the premises, the tenant and the sub-tenant are liable to be ejected by the landlord if the landlord has not given his written consent to the agreement.

ABDUL LATIFF *v.* SEYED MOHAMED 20

2. *Rent controlled premises—Authorised rent—Determination by Rent Control Board—Claim based on it for refund of rent overpaid during a past period—Validity—Rent Restriction Act, as amended by Act No. 10 of 1961, ss. 4, 5, 16, 16A, 20 (5), 20 (13).*

Section 16A of the Rent Restriction Act, as amended by Act No. 10 of 1961 provides not for a fixation of the authorised rent but for a determination of the amount of the authorised rent. The purpose of section 16A is not that the Rent Control Board alters the authorised rent from one amount to another but that it determines what is the authorised rent in terms of the relevant provisions of the Act.

A refund of rent overpaid during a past period may be claimed by a tenant on the basis of the authorised rent as determined by the Rent Control Board in terms of section 16A. The Board's determination is evidence of the amount of the authorised rent for a past period.

When the Rent Control Board has made determination of authorised rent under section 16A, the parties must be given authentic notice of the contents of the order affecting them.

RANASINGHE *v.* JAYATILLAKE 126

3. *Rent Restriction Act—Landlord carrying on business in partnership in his premises—Whether his partners can remain in occupation of the premises after termination of partnership.*

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PAGE

Where a landlord of rent-controlled premises who carries on a business in partnership in the premises permits a partner to occupy or use the premises during the continuance of the partnership, the latter is not entitled to remain on the premises after the termination of the partnership, after he has been given due notice to quit.

QUYN *v.* IBRAHIM 130

4. *Lease of a grass field—Subsequent erection of houses on the land by the lessee—Renewal of lease thereafter in December 1962—Whether the lessee is entitled to protection under the Rent Restriction Act—Meaning of word "premises"—Rent Restriction (Amendment) Act, No. 10 of 1961, s. 13.*

The defendant obtained from the plaintiff in 1952 the lease of a grass field, 1 rood and 38·81 perches in extent and situated within the U.C. limits of Moratuwa. By 1961 the defendant had constructed four houses on the land, which then ceased to be a grass field. The houses were tenanted by about 15 persons. When the lease was renewed on 23rd December 1962 for a period of 3 years, it made no special reference to the buildings and referred only to "the premises fully described in the Schedule". The Schedule set out the entire allotment of land of 1 rood 38·81 perches.

Held, that, according to the definition of the term "premises" in section 13 of the Rent Restriction (Amendment) Act, No. 10 of 1961, the defendant was entitled to protection under the Rent Restriction Act in respect of the leased premises, after the period of the lease of 23rd December 1962 had expired. The Rent Restriction Act applied to each one of the buildings constructed on the land.

PADMANABA *v.* JAYASEKERA 132

5. *Rent-controlled premises—Sub-letting—Subsequent sale of the premises by landlord—Right of purchaser to have the tenant and sub-tenant ejected—Rent Restriction Act (Cap. 274), ss. 9 (2), 27.*

Where a tenant of rent-controlled premises sub-lets the premises in contravention of section 9 (2) of the Rent Restriction Act and the premises are subsequently sold by the landlord to a third party, the purchaser, to whom the tenant has attorned, is entitled to maintain an action for the ejectment of the tenant and the sub-tenant.

Ratnasingham v. Catheraswamy (58 N. L. R. 476) followed.

Wallace v. Silva (70 N. L. R. 308) not followed.

THAHA *v.* SADEEN 142

6. *Rent Restriction Act—Section 12A(1) (a)—Action in ejectment thereunder—Tender of the rent due, before institution of action—Non liability of tenant to be ejected then.*

Where, in a case governed by section 12A (1) (*a*) of the Rent Restriction Act a landlord seeks ejectment of his tenant on the ground that rent has been in arrears for a period of three months or more after it has become due, the tenant is not liable to be ejected if, before the date of institution of action, he tenders to the landlord the rent due.

MOHAMED *v.* WAHAB 333

7. *National Housing—Right of tenant to sue sub-tenant—Procedure—National Housing Act, Part V—Inapplicability of Rent Restriction Act.*

Plaintiff was a tenant of certain premises of the National Housing Department under an agreement which provided that he should not let or sub-let any part of the premises. The defendant occupied a distinct portion of the house as a sub-tenant on a monthly rental of Rs. 90. Plaintiff stated in his evidence that he obtained the necessary permission from the Commissioner of National Housing.

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PAGE

Held, that the plaintiff was entitled to sue the defendant for ejectment from the annexe on the basis of a monthly tenancy. In such a case neither the Rent Restriction Act nor the special procedure prescribed in Part V of the National Housing Act is applicable.

NANDIAS SILVA *v.* UNAMBUWA 382

8. *Rent Restriction Act (Cap 274), as amended by Act No. 12 of 1966—Sections 9, 12A, 13, 23—Sub-letting of rented premises—Word " premises " in s. 12 A (b) includes " part of the premises "—Rent Restriction (Amendment) Act, No. 10 of 1961, s. 11— Servitude*—Jus superficiarium.

If a tenant of premises to which section 12A of the Rent Restriction Act applies sublets a part of the premises without the written authority of the landlord, he is liable to be ejected from the premises.

A tenant of premises governed by section 12A of the Rent Restriction Act erected, with the consent of the landlord, certain temporary buildings on the land which formed part of the premises and let those buildings to a third party S without the landlord's written authority. During the period of the tenancy, the local authority assessed separately for rating purposes the temporary buildings and the land on which they stood. The rates in respect of the newly assessed buildings were paid by the tenant and not by the landlord.

Held, (i) that it could not be contended that what was let by the tenant to S was a *jus superficiarium*.

(ii) that, despite the variation of language between section 9 (1) and section 12 A (*b*) of the Rent Restriction Act, the latter section prohibited the subletting not only of the entirety of the premises let but also of part of the premises. Therefore, when the tenant let the temporary buildings, he necessarily let also the land on which the buildings stood, and that land was unquestionably part of the premises of which he was tenant. He was thus liable to be ejected on the ground of subletting.

CHARLES SILVA *v.* MANCHANAYAKE 440

Legal Practitioners—

Advocate—Name struck off roll of Advocates—Readmission on proof of re-establishment of character—Whether recall to English Bar is condition precedent if he was called to that Bar.

The applicant had been called to the English Bar and was subsequently enrolled as an Advocate in Ceylon on August 4, 1932. His name was struck off the Roll of Advocates on October 8, 1937, because he was convicted of certain offences in the District Court of Colombo on June 19, 1936. About 13 years after he was disbarred, his application for re-admission as an Advocate was dismissed on April 5, 1950. The present application for re-admission was presented by him more than 17 years after the rejection of the first. There was sufficient proof that he expiated his offences and re-established his character.

Held, that the applicant's name should be restored to the Roll of Advocates. It was not a pre-condition to his re-admission that he should have been recalled to the English Bar.

IN RE BATUVANTUDAWE 198

Legislative Enactments of Ceylon—

1938 Revised Edition—Ordinance No. 19 of 1937, ss. 3, 6 (1), 10—Powers of Commissioner thereunder—Incapacity of the Commissioner to alter the law 378

See ROBBERY.

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PAGE

Limitation of Actions—

See PRESCRIPTION.

Local Authorities—

1. *Municipal Council of Colombo—By-Law prohibiting sale of meat of animals not slaughtered at the Municipal Slaughter House—Validity—By-Law 30 of Chapter XIII of the By-Laws and Regulations—Butchers Ordinance, ss. 3 (a), 4 (1), 14* 64

See BUTCHERS ORDINANCE (1).

2. *Town Council—Appointment of Special Commissioner after dissolution—Action instituted by him—Effect thereon when new Town Council is constituted—Suit against the same defendant by the new Council on the same claim—Plea of res judicata raised by the defendant—Invalidity—"Privy in estate"—Effect on an action when a party dies or ceases to exist in law—Civil Procedure Code, s. 404—Town Councils Ordinance (Cap .256), s. 183 (5) (6).*

Where, after the dissolution of a Town Council, a Special Commissioner is appointed in terms of section 183 (5) of the Town Councils Ordinance, an action instituted by him lapses automatically as soon as a new Town Council is constituted later and its Chairman is elected. Accordingly, the subsequent dismissal of that action after the Special Commissioner has lost his capacity to continue the proceedings and ceased to have any existence in law is a nullity and is not capable of founding the plea of *res judicata* in a fresh action brought by the new Town Council against the same defendant in respect of the same claim for recovery of a sum of money due to the Council from the defendant. Moreover, in such a case, the new Council, whose interests accrued prior to the dismissal of the earlier action cannot be regarded as a privy in estate of the Special Commissioner.

TOWN COUNCIL OF MADAMPE *v.* MUNASINGHE 158

3. *Municipal Councils Ordinance—Sections 261 and 263—Non-payment of rates or taxes—Purchase of immovable property by Municipal Council or Town Council—Certificate issued by Council—Whether its validity can be questioned by way of* Certiorari*—Validity of the certificate if the purchase was irregular.*

The Mayor of a Municipal Council or the Chairman of a Town Council does not perform a quasi-judicial function when he signs a certificate under section 263 of the Municipal Councils Ordinance in respect of property purchased in terms of section 261 for non-payment of rates or taxes. Accordingly, *Certiorari* does not lie to quash the certificate.

Quaere, whether the conclusive effect of a certificate issued under section 263 of the Municipal Councils Ordinance attaches in a case where a property is shown to have been purchased by a person who was not duly authorised by the Council in terms of the provisions of section 261.

WILBERT DE SILVA *v.* TOWN COUNCIL, DODANDUWA .. 196

4. *Municipal Council—Municipal accounts—Surcharge—Non-payment of amount surcharged—Whether it is an "offence"—Recovery of surcharge—Procedure—Effect thereon of dissolution of Council—Municipal Councils Ordinance (Cap. 252), ss. 34, 172, 226 (3), 226 (1), 226 (6), 277, 286 (3), 308, 327.*

Where an order of surcharge in respect of a sum of money is made against a person under section 226 (1) of the Municipal Councils Ordinance, the non-payment of the amount surcharged does not constitute an offence contemplated in section 308 of the Ordinance.

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Where the Municipal Commissioner initiates proceedings in the Magistrate's Court under section 226 (6) of the Municipal Councils Ordinance for the recovery of the surcharge as a fine of court, the proceedings may be continued by the Municipal Commissioner even if the Municipal Council happens to be dissolved subsequently by reason of an Order made by the Minister in terms of section 277 of the Ordinance. It cannot be contended that, with the dissolution of the Municipal Council, the Municipal Commissioner himself ceases to function as such.

SHANMUGAM *v.* MUNICIPAL COMMISSIONER, JAFFNA .. 328

Local Government—

See LOCAL AUTHORITIES.

Mandamus—

See WRIT OF MANDAMUS.

Matrimonial Actions—

1. *Execution of decrees—Matrimonial action—Salary of an employee—Exemption from seizure for alimony—Civil Procedure Code, s. 218 (m).*

Section 218 (*m*) of the Civil Procedure Code, as amended by Act No. 24 of 1961, debars the seizure of the salary of an employee (other than a public officer or servant) in execution of an order for alimony entered against him in a matrimonial action.

DE JONK *v.* DE JONK 140

2. *Divorce action—Evidence—Wife's confession, outside Court, of adultery—Inadmissibility against co-respondent—Standard of proof for proving adultery.*

In a divorce action instituted by a husband, statements made outside Court by the defendant (the wife) admitting adultery cannot be used against the co-respondent in proof against him of an act of adultery.

Proof beyond reasonable doubt is necessary for proof of adultery.

DHARMASENA *v.* NAVARATNE 419

3. Habeas Corpus—*Divorce action—Decree in favour of plaintiff husband—No order of court in regard to custody of children—Right of husband to claim custody from the wife pending appeal in the divorce action.*

There is no rule of law that the plaintiff in a divorce action must necessarily ask for the custody of his children.

Petitioner obtained a decree for divorce and, during the pendency of the appeal in the divorce action, filed the present application for *habeas corpus* against his wife for the custody of his children. In the divorce action he had not sought an order for the custody of the children and the Court made no order on the application of the wife for their custody, because the decree for divorce was entered in the absence of the wife who failed to appear on the trial date.

Held, that the divorce action was not a bar to the application for *habeas corpus*.

ALGIN *v.* KAMALAWATHIE 429

Maxims—

See WORDS, PHRASES AND MAXIMS.

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PAGE

Minors—

Jurisdiction—Sale of immovable property of minor—Property situate outside jurisdiction of Court of minor's residence—Appropriate Court to which the curator should apply for sanction to sell—Courts Ordinance, s. 69—Civil Procedure Code, ss. 6, 9 (a) (b), 584 174

See CIVIL PROCEDURE (4).

Mortgages—

1. *Mortgage—Concurrent mortgagees—Right to sue mortgagor in one action—Joinder of parties and causes of action—Mortgage Act (Cap. 89), s. 65 (1) (a).*

Where a single property is hypothecated in a single mortgage bond, two or more lenders who have provided, in different proportions, the money borrowed by the mortgagor are permitted by section 65 (1) (*a*) of Mortgage Act to sue on the bond in one action. In such a case, it cannot be contended that there is a misjoinder of parties and causes of action.

SOYSA *v.* JUPITER CIGARETTE AND TOBACCO CO. LTD. .. 12

2. *Mortgage—Hypothecary sale—Conditions of sale—Whether they can be varied after sale has taken place—Mortgage Act (Cap. 89), ss. 50 (3), 50 (4) (d), 61—Civil Procedure Code, ss. 260 to 262.*

Where a hypothecary sale of mortgaged property has already taken place, subject to the conditions of sale prescribed by the Court, the provisions of section 50 (4) (*d*) of the Mortgage Act debar the Court from varying the conditions of sale at the instance of the purchaser, except with the consent of all the parties who would be affected by such variation.

JOSEPH *v.* THIRUCHELVAM 426

Motor Vehicles—

1. *Motor vehicle—Charge of negligent driving—Evidence that accused did not have full control of steering wheel—Effect—Motor Traffic Act, s. 240.*

A person who is at the steering wheel of a motor vehicle is not liable to be convicted of the offence of negligently driving that vehicle unless he has full control of the vehicle at the wheel, whether the vehicle moves by mechanical propulsion or by gravitation. He cannot be convicted if he is deprived of the control of the vehicle by an external agency.

The accused-respondent was charged with having negligently driven a motor vehicle on a public highway. The evidence showed that at the time of the accident the accused was at the driving wheel and that the vehicle was being pushed backwards up a hill by four or five people for the purpose of getting the engine started, when it struck a pedestrian who was legitimately using the road on his correct side and injured him.

Held, that, at the moment of the impact, there was hardly anything which the accused was doing of his own volition, apart from sitting at the driving seat and holding the steering wheel. In the circumstances, the accused was entitled to be acquitted.

Held further, that when the character or attribute of mechanical propulsion is absent in a vehicle even for the time being, such vehicle cannot be regarded as a " motor vehicle " within the meaning of that term in section 240 of the Motor Traffic Act.

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JOACHIM *v.* DHARMADASA 399

PAGE

2. *Motor vehicles—Prosecution of registered owner for possessing a vehicle without a licence—Presumption of possession by registered owner—Rebuttability—Motor Traffic Act, s. 25 (2).*

A person is not liable to be convicted of the charge of possessing a motor vehicle without a licence in contravention of section 25 (2) of the Motor Traffic Act, if he proves that, although he is for the time being the registered owner, he neither used the vehicle nor was in possession of it at the time relevant to the charge.

NADARAJAH *v.* G. A. JAFFNA 455

Muhammadan Law—

See MUSLIM LAW.

Municipal Councils—

See LOCAL AUTHORITIES.

Murder—

See COURT OF CRIMINAL APPEAL DECISIONS.

Muslim Law—

Muslim Marriage and Divorce Act (Cap. 115)—Section 64 (1)—Enforcement order—Duty of Quazi to issue notice to the respondent.

Before an enforcement order under Section 64 (1) of the Muslim Marriage and Divorce Act is issued a Quazi should issue notice to the respondent and inquire into any objections which he may raise.

THAHIR *v.* SHAFI 19

National Housing Act—

Right of tenant to sue sub-tenant—Procedure—Inapplicability of Rent Restriction Act. 382

See LANDLORD AND TENANT (7).

Negotiable Instruments—

1. *Promissory note—Designation of payee—Reasonable certainty—Bills of Exchange Ordinance (Cap. 82), s. 7 (2).*

A promissory note which is made payable to a person *or his heirs* on demand is valid. In regard to such a promissory note it cannot be contended that the payee is not specified with certainty.

Peter v. Suriapperuma (20 N. L. R. 318) not followed.

PUNCHINONA *v.* LEELAWATHIE 304

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PAGE

2. *Cheques and dividend warrants—Collecting banker—Proceeds of a cheque credited to account of a person other than the true owner—Negligence—Liability of the banker to the true owner—Burden of proof—English law doctrine of conversion—Inapplicability of it in Ceylon—Applicability to a cheque transaction—Roman-Dutch law—History and scope of its applicability in Ceylon—Proclamation of 23rd September, 1799—Adoption of Roman-Dutch Law Ordinance (Cap. 12)—An inaccuracy in s. 2 thereof—Ordinance No. 5 of 1852, s. 2—Scope and effect of it—Bills of Exchange Ordinance (Cap. 82), ss. 22, 27, 82, 98 (2)—Lost cheque—Secondary evidence—Evidence Ordinance, ss. 65 (5), 65 (3)—Bankers's liability in English law—Applicability in Ceylon—Civil Law Ordinance (Cap. 79), s. 3—Action for money had and received—Maintainability—Prescription Ordinance (Cap. 68), s. 7—Quasi-contractual liability*—Condictio indebiti—*Unjust enrichment.*

Where a crossed " not negotiable " cheque in the form of a dividend warrant is indorsed by the payee with the words " Credit my account only ", a banker who collects payment of it and credits the proceeds to the account of a person other than the true owner is liable to pay the sum to the true owner if he acted negligently in crediting the collected sum to a wrong Account. In such a case section 82 of the Bills of Exchange Ordinance cannot protect the collecting banker, and his liability has to be determined by the application of the English law of conversion in respect of cheque transactions. The Bills of Exchange Ordinance (read with section 2 of Ordinance No. 5 of 1852) has the effect that the liability of a negligent collecting banker in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

Alternatively, the collecting banker is liable to the true owner on the basis that he received the money for the use and benefit of the true owner and, accordingly, an action for money had and received would lie.

Where a collecting banker is sued by the true owner of a cheque for the recovery of the proceeds of the cheque credited by the banker to the account of a person other than the true owner, the onus, according to section 82 of the Bills of Exchange Ordinance, is on the banker to show that he was not negligent and that at the time when he received the cheque for collection there was something on the face of the cheque which justified the action taken by him ; in other words, the banker should show that the cheque was altered in such a manner as to mislead his officers.

Per FERNANDO, C.J., ALLES, J., and WEERAMANTRY, J.—The English law doctrine of conversion is not part of the common law of Ceylon.

Per SIRIMANE, WEERAMANTRY and WIJAYATILAKE, JJ.—The conversion of a cheque by a collecting banker is also a matter of banks and banking, and thus affords another basis for the application of English law.

Per SIRIMANE, J.—The general law of conversion has been considered to be part of our law from very early times. But it is not necessary to decide it in the present case.

Per WEERAMANTRY, J.—The plaintiff is also entitled to succeed on the basis of the law relating to unjust enrichment.

Daniel Silva v. Johanis Appuhamy (67 N. L. R. 457) discussed.

DE COSTA *v.* BANK OF CEYLON 457

Notaries Ordinance—

Notaries Ordinance (Cap. 107)—Section 31, Rule 3—Whether it prohibits the signature of an incomplete duplicate.

While Rule 3 of Section 31 of the Notaries Ordinance provides that a duplicate of a deed may not be signed before the original instrument is executed, it does not clearly prohibit the Notary from taking the signature of an incomplete duplicate.

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NADARAJAH *v.* REGISTRAR-GENERAL 185

PAGE

Paddy Lands Act—

1. *Paddy Lands Act, No. 1 of 1958—Section 63—Meaning of term "cultivator"—Burden of proof.*

Where, in an action for declaration of title and ejectment in respect of a land, the defendant pleads that the land is a paddy land and that he, being the cultivator of it as tenant under the plaintiff, cannot be ejected by reason of the provisions of the Paddy Lands Act, the burden is on the defendant to prove that he did not employ hired labour for the work specified in paragraph (*b*) of the definition of "cultivator" in section 63 of the Paddy Lands Act, and that he did not employ hired labour for at least two of the operations mentioned in paragraph (*a*) of the definition.

DODANWELA *v.* BANDIYA 10

2. *Paddy Lands Act, No. 1 of 1958—Sections 3 and 63—Tenant-cultivator—His right to assert his interest in a partition action—Partition Act (Cap. 69), s. 48.*

The interest of a "tenant-cultivator" under the Paddy Lands Act is an "encumbrance" within the meaning of Section 48 of the Partition Act and, therefore, may properly be specified and conserved in a partition decree entered in terms of that Section.

ODIRIS *v.* ANDRAYAS 110

Parliamentary Elections—

1. *Parliamentary election—Appeal to Supreme Court from decision of an Election Judge—Report of Supreme Court that a corrupt or illegal practice was committed by a person—Validity to disqualify that person for membership of House of Representatives—Parliament's power to amend Parliamentary Elections Order in Council—Constitutional validity of a Statute—When a Court will make a pronouncement thereon—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 82A, 82C (2) (b), 82D (2)—Ceylon (Constitution) Order in Council (Cap. 379), ss. 13 (3) (h), 29 (4).*

Where, upon an appeal to the Supreme Court from the decision of an Election Judge, the Supreme Court sends a report to the Governor-General in terms of section 82C (2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council that a corrupt or illegal practice has been committed by a person the report is effective to disqualify that person under section 13 (3) (*h*) of the Ceylon (Constitution) Order in Council for membership of the House of Representatives.

The Parliamentary Elections Order in Council may be amended, by virtue of the section 29 (4) of the Constitution Order in Council, by an Act passed by a simple majority of the House of Representatives.

Section 82D (2) of the Parliamentary Elections Order in Council, in so far as it attaches to a person who is reported by the Supreme Court the incapacity referred to in section 13 (3) (*h*) of the Constitution Order in Council, is not *ultra vires* and void on the ground that when it was enacted it was tantamount to an amendment of section 13 (3) (*h*) of the Constitution requiring a two thirds majority in Parliament in compliance with the proviso to section 29 (4) of the Constitution. The pronouncement to the contrary in *Thambiayah v. Kulasingham* (50 N. L. R. 25) was made *obiter* and *per incuriam*.

A Court will not pronounce upon the constitutional validity of a Statute unless a decision as to validity is essential for the purposes of the case actually before the Court.

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DAVID PERERA *v.* PEIRIS 217

PAGE

2. *Parliamentary election—Disqualification of one of the candidates—Fact of disqualification well known to the entire electorate—Dispute or uncertainty in the minds of the voters as to the disqualifying legal effect of the fact grounding the disqualification—Votes given to the disqualified candidate—Whether they can be regarded as cast away—Applicability of English law on the subject—Claim of seat for the candidate who was placed second at the poll—Whether all the other candidates should be made respondents to the election petition—Whether there should be a scrutiny of votes—Purpose of scrutiny of votes—Right of unseated candidate to file recriminatory objections against the candidate for whom the seat is claimed—Abandonment or waiver thereof—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 48, 58 (1) (d), 80, 81, 82C (2) (b), 82D (2) (a), 82D (2) (b) (ii), 85, 86 (2)—Election Petition Rules 7, 8, 10, 15.*

The respondent had contested a seat in a Parliamentary election earlier and in consequence of a report sent by the Supreme Court to the Governor-General under section 82C (2) (b) of the Parliamentary Elections Order in Council he became disqualified for a period of seven years for being elected a Member of Parliament. Nevertheless he contested the same seat again at the by-election held on 23rd September, 1967.

At the by-election the decision of the Supreme Court resulting in the disqualification of the respondent was made known to the whole electorate and was a matter of public notoriety in the constituency, but it was claimed on the respondent's behalf before the electorate that the decision was constitutionally invalid in law in view of a previous seemingly conflicting decision of the Supreme Court in a different election petition appeal, viz. *Thambiayah v. Kulasingham* (50 N. L. R. 25).

There were, apart from the respondent, two other candidates at the by-election. The respondent secured the largest number of votes and was declared duly elected. In an election petition filed against him, his election was declared void. The appeal filed by him against the decision of the Election Judge was dismissed. In the election petition the petitioners had also asked for a determination that the candidate who secured the second highest number of votes was duly elected and ought to be returned. When their claim was dismissed by the Election Judge, they lodged the present appeal.

Held, by H. N. G. Fernando, C.J. and Weeramantry, J. (Sirimane, J. dissenting), that, in a Parliamentary election, a vote cast by a voter with knowledge of the facts constituting a candidate's disqualification for election is a vote thrown away and should be treated as not cast. Therefore, inasmuch as the disqualification of the respondent was definite and certain and was known to the whole electorate prior to the date of the election, all the votes which were cast in favour of the respondent were wasted votes and the seat must be awarded, as claimed, to the candidate who was placed second at the poll. In such a case ignorance of the law does not excuse, and the existence of any uncertainty in the minds of voters in regard to the disqualifying legal effect of the known facts grounding the disqualification is not a ground for not awarding the seat to the candidate next at the poll. The English law on this subject is applicable in Ceylon by virtue of section 86 (2), read with sections 80, 81 and 85 (1) (*f*), of the Parliamentary Elections Order in Council.

Held further, (i) by H. N. G. Fernando, C.J., and Weeramantry, J., that the power of an Election Judge to determine that a candidate, other than the Member returned, was duly elected, may be exercised without resort to a scrutiny of votes in a case where there was either public notice to *all* the electors of the disqualification of the Member returned or where the disqualification or the facts causing it were notorious to *all* the electors. Accordingly, in the present case, where the fact of the disqualification of the Member who was returned was known not to some only of the voters but to all the voters, it was not necessary that the scrutiny of votes contemplated in sections 80 (*d*) and 85 (1) (*f*) of the Parliamentary Elections Order in Council should be actually held and that the invalid ballot papers should be physically rejected before the seat is awarded to the second candidate.

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PAGE

Peiris v. Samaraweera (71 N. L. R. 250) overruled in so far as it conflicts with the judgment in the present case.

(ii) by the whole Court, that it was not necessary that the third candidate should have been named as a respondent to the present election petition. Our law does not require that an election petition which claims a seat for some candidate who was not declared to be returned at the election must name as a respondent not only the Member whose return is challenged but also every other candidate who unsuccessfully contested the election.

(iii) by the whole Court, that, in view of the time limit of six days prescribed in Election Petition Rule 8, the respondent could not be given an opportunity to file belated recriminatory objections against the candidate for whom the seat was claimed.

PEIRIS *v.* DAVID PERERA 232

Partition Actions—

1. *Partition action—Non-appearance of plaintiff on trial date—Dismissal of action—Whether it debars institution of a second action*—Res judicata—*Partition Act* (*Cap. 69*), *ss. 10, 12, 25, 29, 63, 66, 71, 76, 79—Civil Procedure Code, ss. 84, 85, 207, 403, 406, 547—Inapplicability of sections 84 and 85 in a partition action.*

Where a partition action is dismissed in terms of section 84 of the Civil Procedure Code on the ground of the non-appearance of the plaintiff on the trial date and without any adjudication on the plaintiff's rights, the order of dismissal would not operate as *res judicata* in a subsequent action brought by the plaintiff for partition of the same land.

Obiter : The provisions of Chapter 12 of the Civil Procedure Code relating to the consequences and cure of defaults in appearing have no application at all to a partition action instituted under the Partition Act.

DINGIRI AMMA *v.* APPUHAMY 347

2. *See also* PADDY LANDS ACT (2).

Penal Code—

Section 32	..	..	..	..95, 389
Section 33	..	..	..	.. 389
Section 35	..	..	..	116, 389
Section 36	..	..	..	.. 389
Section 73	..	..	..	.. 313
Sections 89 *et seq.*	..	..	..	.. 313
Section 93	..	..	..	.. 313
Sections 293, 294	..	..	..	121, 313
Section 380	..	..	..	.. 378
Section 389	..	..	..	.. 370
Sections 427, 433	..	..	..	.. 286
Section 449	..	..	..	.. 95
Section 451	..	..	..	.. 330
Sections 452, 453, 454	..	..	..	.. 361

See also COURT OF CRIMINAL APPEAL DECISIONS ; CRIMINAL LAW.

Plea of autrefois acquit—

See CRIMINAL PROCEDURE (6).

Prescription—

Privy Council—Rei vindicatio *action—Plaintiffs' claim based on prescriptive title—Quantum of evidence.*

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PAGE

The plaintiffs (1st and 2nd respondents) instituted action for declaration of title to a land. Their claim was based upon prescription. The issue was essentially one of fact, namely, whether the plaintiffs proved possession, adequate in continuity, publicity and extent, over 10 years or more, to establish a prescriptive title to the land. Judgment was given in plaintiffs' favour by the trial Court and, on appeal, by the Supreme Court.

Held, that, in the absence of any error in law, the findings of both courts in Ceylon should not be disturbed.

ROBOSINGHO MUDALALI *v.* JAYAWARDENE 193

Prevention of Social Disabilities Act—

Prevention of Social Disabilities Act, No. 21 of 1957—Sections 2 and 3—Temple entry—Discrimination on ground of caste—Culpability—Ceylon (Constitution) Order in Council (Cap. 379), s. 29 (2) (d)—Tesawalamai Regulation (Cap. 63), s. 4—Penal Code, s. 183—Maxim generalia specialibus non derogant.

A person who prevents or obstructs, at the instance of the High Priest and hereditary trustee of a Hindu temple which constitutes a public religious trust, a Hindu worshipper of a different caste from entering into or beyond the inner court-yard of the temple in breach of the constitution of the religious trust and of the custom or ancient usage observed in that temple, contravenes the Prevention of Social Disabilities Act. In such a case it cannot be contended that the Prevention of Social Disabilities Act is *ultra vires* of the provisions of section 29 (2) (*d*) of the Constitution of Ceylon or of section 4 of the *Tesawalamai* Regulation (Cap. 63).

Dictum in *Sevvanthinathan v. Nagalingam* (69 N.L.R. 419) disapproved.

SUNTHERALINGAM *v.* HERATH 54

Price Control—

See CONTROL OF PRICES ACT.

Privy Council—

1. *Sentence—Privy Council will not generally interfere with it,* .. 361

See CRIMINAL PROCEDURE (6).

2. *See also* PRIVY COUNCIL DECISIONS.

Privy Council Decisions

1. *Privy Council—Questions of fact—Concurrent findings thereon in the Courts below—Finality of such findings—New contentions not put forward in the Courts below—Whether Privy Council will entertain them.*

The Judicial Committee of the Privy Council treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established, unless there are special circumstances such as would justify setting aside those findings. Furthermore, they do not admit new contentions not put forward in the Courts below if such contentions require further evidence and further findings and cannot succeed on the materials already available to them.

MELLAARATCHY *v.* NAIDOO 97

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PAGE

2. *Commission of Inquiry—Scope of inquiry—Requirements that it should be limited by the Governor-General and not be left to be decided by the Commissioner—Power of Commission to summon a person residing in Ceylon —Meaning of expression "residing in Ceylon"—A witness's refusal to be sworn or to answer a question—Contempt of Court—Irrelevancy of allegation of bias on the part of the Commissioner—Commissions of Inquiry Act, ss. 2 (1), 7, 10, 11, 12.*

RATNAGOPAL *v.* THE ATTORNEY-GENERAL 145

See COMMISSIONS OF INQUIRY ACT.

3. *Customs Ordinance—Section 125—Forfeiture of goods thereunder—Meaning of word "concealment".*

MANDIRAMPILLAI *v.* ATTORNEY-GENERAL 169

See CUSTOMS ORDINANCE (2).

4. Rei vindicatio *action—Plaintiff's claim based on prescriptive title—Quantum of evidence.*

ROBOSINGHO MUDALALI *v.* JAYAWARDENA 193

See PRESCRIPTION (1).

5. *Thesavalamai*—Tediatetam—*Devolution on death intestate of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (prior to amendment by Ordinance No. 58 of 1947)—Sections 6, 7, 19, 20, 21 and 22—Sections 19 and 20 as amended by Ordinance No. 58 of 1947—Whether Amending Ordinance has retrospective effect—Interpretation Ordinance, s. (3)—Wills Ordinance, s. 7.*

SUBRAMANIAM *v.* KADIRGAMAN 289

See THESAVALAMAI (3).

6. *Charge of murder—Admission of intention to kill—Reliance by accused upon private defence entirely—Burden of proof then—Evidence Ordinance, ss. 3, 105, 106—Meaning to be given to the words "burden of proving" in s. 105—Penal Code, ss. 73, 89 et seq., 93, 293, 294.*

JAYASENA *v.* THE QUEEN 313

See COURT OF CRIMINAL APPEAL DECISIONS (6).

7. *Constitutional law—Public servant—Contract of service with the Crown—Action for recovery of arrears of salary due—Maintainability—Roman-Dutch law—Effect of Proclamation of 23rd September 1799—Applicability of English law.*

KODEESWARAN *v.* ATTORNEY-GENERAL 337

See PUBLIC SERVANTS (2).

8. *Criminal law—Charge of forgery—Penal Code, ss. 452, 453, 454—Citizenship Act, s. 6— Defence of* autrefois acquit*—Burden of proof—Whether accused should be given an opportunity of calling evidence if the defence that prosecution does not support the charge is not accepted—Sentence—Privy Council will not generally interfere with it—Appeal against acquittal—Conviction thereafter—Desirability of accused being heard in mitigation of sentence.*

VEERAPPEN v. ATTORNEY-GENERAL 361

See CRIMINAL PROCEDURE (6).

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PAGE

9. *Income tax—Penalty for making an incorrect return—Power of Commissioner of Inland Revenue to impose such penalty—Whether the Commissioner exercises judicial power and requires appointment by Judicial Service Commission—Nature of his duties—Difference between administrative functions and judicial functions—Effect of alternative proceedings before Magistrate*—Certiorari—*Constitution Order in Council, Articles 3, 53, 55, 58, 60—Income Tax Ordinance, ss. 2, 3, 23, 58 et seq., 73, 80 (1), 90, 92.*

RANAWEERA *v.* WICKRAMASINGHE 553

See INCOME TAX (3).

10. *Income tax—Board of Review—Validity of its appointment by Minister and not by the Judicial Service Commission or the Public Service Commission—Functions of the Board—Power of the Board to hear appeals —Whether it involves the exercise of judicial power—"Public officer"—"Servant of the Crown"—"The Crown"—"Her Majesty"—Constitution Order in Council, ss. 3, 55, 60—Income Tax Ordinance, ss. 11 (1) (a), 11 (7), 15, 36 (1), 37, 43 (3), 56 (9), 73–77, 80*—Certiorari.

RANAWEERA *v.* RAMACHANDRAN 562

See INCOME TAX (4).

Promissory Notes—

See NEGOTIABLE INSTRUMENTS (1)

Public Servants—

1. *Public servant—Salary less than Rs. 520—Temporary secondment to Port Cargo Corporation on salary of more than Rs. 520—Debt incurred by him during period of seconded service—Exemption from liability—Port Cargo Corporation Act, No. 13 of 1958, s. 50—Motor Transport Act, No. 48 of 1957, s. 9—Public Servants (Liabilities) Ordinance, s. 2 (1) (2).*

Where a public servant whose salary in regard to his fixed employment does not exceed Rs. 520 per month enters into a contract of guarantee at a time when he has been seconded to the Port Cargo Corporation on a temporary appointment giving a monthly salary of more than Rs. 520, section 2 of the Public Servants (Liabilities) Ordinance protects him from liability under the guarantee.

RATNASINGHAM *v.* PEOPLE'S BANK 73

2. *Privy Council—Constitutional law—Public servant—Contract of service with the Crown—Action for recovery of arrears of salary due—Maintainability—Roman-Dutch law—Effect of Proclamation of 23rd September 1799—Applicability of English law.*

A civil servant in Ceylon is entitled to sue the Crown for arrears of salary which have accrued due, by the terms of his appointment, in respect of services which he has rendered during the currency of his employment. In such a case the fact that his appointment as a Crown servant is terminable at will, unless it is expressly otherwise provided by legislation, is not relevant.

"Although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the 'common law' of Ceylon, it is not the finishing point. Like the common law of England the common law of Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a *cursus curiae* (*Samed v. Segutamby*, 25 N. L. R. 481) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view if long established judicial authority for a proposition of law not inconsistent with the Britsh constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves there is no need to go back to see whether

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PAGE

any precedent can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law."

KODEESWARAN *v.* ATTORNEY-GENERAL 337

3. *Privy Council—"Public officer"—"Servant of the Crown"—"The Crown"—"Her Majesty"—Constitution Order in Council, ss. 3, 55, 60* 562

See INCOME TAX (4).

Punishment—

See SENTENCE.

Purchase and Sale—

See VENDOR AND PURCHASER.

Rent Restriction Act—

See LANDLORD AND TENANT.

Res judicata—

1. *Town Council—Appointment of Special Commissioner after dissolution—Action instituted by him—Effect thereon when new Town Council is constituted—Suit against the same defendant by the new Council on the same claim—Plea of* res judicata *raised by the defendant—Invalidity—"Privy in estate"—Effect on an action when a party dies or ceases to exist in law—Civil Procedure Code, s. 404—Town Councils Ordinance (Cap. 256), s. 183 (5) (6)* 156

See LOCAL AUTHORITIES (2).

2. *Partition action—Non-appearance of plaintiff on trial date—Dismissal of action—Whether it debars institution of a second action—*Res judicata*—Partition Act (Cap. 69), ss. 10, 12, 25, 29, 63, 66, 71, 76, 79—Civil Procedure Code, ss. 84, 85, 207, 403, 406, 547—Inapplicability of sections 84 and 85 in a partition action* 347

See PARTITION ACTIONS.

Revision—

See APPEAL AND REVISION.

Robbery—

Jurisdiction—Robbery on a highway between sunset and sunrise—Not triable by Magistrate's Court—Penal Code, s. 380—Criminal Procedure Code, Schedule I—Legislative Enactments of Ceylon, 1938 Revised Edition—Ordinance No. 19 of 1937, ss. 3, 6 (1), 10—Powers of the Commissioner thereunder—Incapacity of the Commissioner to alter the law.

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PAGE

The offence of robbery (Section 380 of the Penal Code), when it is committed on a highway between sunset and sunrise, is not triable summarily by a Magistrate's Court even if the value of the property in respect of which the offence is committed does not exceed two hundred rupees. The only Court other than the Supreme Court by which the offence is triable is the District Court.

The alteration effected in the 1938 edition of the Legislative Enactments of Ceylon so as to give jurisdiction to a Magistrate to try a case of robbery committed on a public highway between sunset and sunrise was not based on pre-existing law or on the general powers given to the Commissioner by Ordinance No. 19 of 1937.

Observations on the powers of the Commissioner.

SUMATHIPALA *v.* INSPECTOR OF POLICE, CRIMES 378

Roman Dutch Law—

1. *Privy Council—Roman-Dutch Law—Effect of Proclamation of 23rd September, 1799.* 337

See PUBLIC SERVANTS (2).

2. *Roman-Dutch Law—History and scope of its applicability in Ceylon—Proclamation of 23rd September 1799—Adoption of Roman-Dutch Law Ordinance—An inaccuracy in s. 2 thereof* 457

See NEGOTIABLE INSTRUMENTS (2).

Sale of immovable property—

See VENDOR AND PURCHASER.

Sentence—

1. *Criminal Procedure Code—Section 152 (3)—Assumption of jurisdiction thereunder—Senate—Quantum.*

Where a Magistrate who is also a District Judge assumes jurisdiction under section 152 (3) of the Criminal Procedure Code for the purpose of trying a charge which is triable by a District Court as well as by a Magistrate's Court, he has no power to impose a sentence exceeding that which a Magistrate's Court can impose.

JAYARATNE *v.* INSPECTOR OF POLICE, MAHARAGAMA .. 272

2. *Sentence—Privy Council will not generally interfere with it—Appeal against acquittal—Conviction thereafter—Desirability of accused being heard in mitigation of sentence* 361

See CRIMINAL PROCEDURE (6).

Servitudes—

1. *Servitude—*Usus*—Claim of right to wash clothes in a neighbouring paddy field—Maintainability—An essential ingredient of* Usus.

The defendants, who were dhobies by occupation, claimed the right to wash clothes in a portion of the paddy field belonging to the 1st plaintiff. They based their claim on some kind of long standing practice or custom and maintained that it fell within the ambit of the personal servitude known to the Roman-Dutch law as *Usus*. The plaintiff's unchallenged evidence was that if clothes were allowed to be washed in the field he would not be able to use the field because it would be polluted.

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PAGE

Held, that, although there was a finding of fact in defendants' favour, that for a considerable period they had washed clothes at the water hole on the 1st plaintiff's field, the defendants' claim must fail in view of the evidence of the plaintiff in regard to the damage to his field. The claim to the servitude of *Usus* is the right of using the property of others for daily needs *without detriment to the substance of the property*.

LEWIS PERERA *v.* JANE FERNANDO 16

2. *Servitude*—Jus superficiarium 440

See LANDLORD AND TENANT (8).

Ship—

1. *Admiralty Court—Ship—Action* in rem *to enforece a claim for a sum of money* 202

See ADMIRALTY COURT (1).

2. *Damaged ship which is not under the immediate control of Master or crew—Forcible seizure of it by receiver of wrecks—Legality—Wrecks and Salvage Ordinance—Whether action* in rem *lies against the ship for value of necessaries supplied* 279

See ADMIRALTY COURT (2).

Shop And Office Employees—

Shop and Office Employees (Regulation of Employment and Remuneration) Act (Cap. 129), as amended by Acts Nos. 60 of 1957, 28 of 1962, 26 of 1966—Sections 43 (1), 43 (2), 51 (3), 60 (1), 65—Closing Order—Charge of-contravention thereof by owner of a shop—Liability of owner for acts of his employees—Mode of proving a Closing Order—Evidence Ordinance, s. 57.

In a prosecution of the registered owner of shop for having kept open his shop for the serving of customers in contravention of a Closing Order made under the Shop and Office Employees (Regulation of Employment and Remuneration) Act—

Held, (i) that production of the Closing Order together with copies of the certified extracts of the *Government Gazette* bearing the legend that they were printed by the Government Printer constituted sufficient evidence to satisfy the requirements of section 65 of the Act.

(ii) that evidence of service of a customer by employees of the owner, even in the absence of the owner, was sufficient to convict the owner, unless the owner discharged his liability in terms of section 60 (1) of the Act.

ASIRWATHAM *v.* PREMAWARDENA 182

Social Disabilities—

See PREVENTION OF SOCIAL DISABILITIES ACT.

Stamp Ordinance—

Registered co-operative society—Dispute touching its business—Reference to arbitrator—Arbitrator's award and other proceedings—Exemption from stamp duties—Co-operative Societies Ordinance (Cap. 124), ss. 33, 63 (1) —Co-operative Societies Rules of 1950, Rule 38—Stamp Ordinance (Cap. 247), ss. 2, 4, 8 (1), 8 (2), 39 (1), 41, 53, Exemption F (2) at p. 755 .. 92

See CO-OPERATIVE SOCIETIES.

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PAGE

Temple ent y—

See PREVENTION OF DISABILITIES ACT.

Thesavalamai—

1. *Prevention of Social Disabilities Act, No. 21 of 1957—Sections 2 and 3—Temple entry—Discrimination on ground of caste—Culpability—Ceylon (Constitution) Order in Council (Cap. 379), s. 29 (2) (d)—Tesawalamai Regulation (Cap. 63), s. 4—Penal Code, s. 183—Maxim* generalia specialibus non derogant 54

See PREVENTION OF SOCIAL DISABILITIES ACT.

2. *Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58)—Section 37—Interest of surviving spouse in estate devolving on minor child—Surviving parent's rights to claim compensation for improvements effected by him—Similarity to those of a usufructuary.*

Section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance reads as follows :—

" 37 When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority. "

Held, that a surviving parent who continues to possess the estate of a deceased parent which has devolved on a minor child and enjoys the income thereof in terms of S. 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance is not entitled, after the period of minority of the child has elapsed, to claim compensation for improvements effected by him on a land which forms part of such estate. In such a case, the surviving parent is in the very same position as a usufructuary as regards his rights of possession of the minor's property and enjoyment of the income thereof.

ARUMUGASAMY IYER *v.* MUTTUCUMAROO IYER 136

3. *Privy Council—Thesavalamai—Tediatetam—Devolution on death intestate of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (prior to amendment by Ordinance No. 58 of 1947)—Sections 6, 7, 19, 20, 21 and 22—Sections 19 and 20 as amended by Ordinance No. 58 of 1947—Whether Amending Ordinance has retrospective effect—Interpretation Ordinance, s. 6 (3)—Wills Ordinance, s. 7.*

Where a half share of *tediatetam* property acquired by a husband had already automatically vested in his wife (as the non-acquiring spouse) by virtue of the provisions of Sections 19 and 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911, the subsequent repeal of Sections 19 and 20 by the Amending Ordinance No. 58 of 1947 did not operate retrospectively so as to divest the wife of that share. And if the wife dies intestate after the date when the Amending Ordinance No. 58 of 1947 came into operation, the devolution of her share upon her death is regulated solely by Sections 21 and 22 of the old Ordinance and not by the new Section 20 of the amended Ordinance.

Kumaraswamy v. Subramaniam (56 N.L.R. 44) approved.

SUBRAMANIAM *v.* KADIRGAMAN 289

Torts—

See DELICTS.

Town Councils—

See LOCAL AUTHORITIES.

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PAGE

Trees—

Damage caused by dangerous tree—Liability of the owner of the tree, .. 134

See DELICTS.

Unjust enrichment—

See NEGOTIABLE INSTRUMENTS (2).

Urban Councils—

See LOCAL AUTHORITIES.

Usus—

See SERVITUDES.

Vendor and Purchaser—

Vendor and purchaser—Conditional transfer of property by co-owners—Subsequent re-transfer—Proportions to which the co-owners will be entitled then.

Where property owned by co-owners is conveyed by them on a conditional transfer and is subsequently re-transferred to them without specifying any particular proportions, the deed of re-transfer will be construed to mean that the property was returned to them in the same proportions in which they held it at the time when they executed the conditional transfer.

GARLIS SINGHO *v.* GEEGER SINGHO 200

Words, Phrases and Maxims—

1. *Audi alteram partem* 25
2. *Generalia specialibus non derogant* 54
3. " *Residing in Ceylon* " 145

Wrecks and Salvage Ordinance—

See ADMIRALTY COURT (2).

Writ of Certiorari—

1. *Customs Ordinance—Export of desiccated coconut—Export licence issued by Manager of Ceylon Coconut Board—Specification of Halifax as port of destination—Shipments landed at port of New York—Forfeiture under s. 130 of Customs Ordinance for exporting restricted goods—Whether* Certiorari *lies in respect of such forfeiture—Scope of* audi alteram partem *principle* 25

See CUSTOMS ORDINANCE (1).

2. *Municipal Councils Ordinance—Sections 261 and 263—Non-payment of rates or taxes—Purchase of immovable property by Municipal Council or Town Council— Certificate issued by Council—Whether its validity can be questioned by way of* Certiorari*—Validity of the certificate if the purchase was irregular* 196

See LOCAL AUTHORITIES (3).

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PAGE

3. *Privy Council—Income tax—Penalty for making an incorrect return—Power of Commissioner of Inland Revenue to impose such penalty—Whether the Commissioner exercises judicial power and requires appointment by Judicial Service Commission—Nature of his duties—Difference between administrative functions and judicial functions—Effect of alternative proceedings before Magistrate*—Certiorari—*Ceylon (Constitution) Order in Council (Cap. 379), Articles 3, 53, 55, 58, 60—Income Tax Ordinance (Cap. 242), ss. 2, 3, 23, 58 et seq., 73, 80 (1), 90, 92* .. 553

See INCOME TAX (3).

4. *Privy Council—Income tax—Board of Review—Validity of its appointment by Minister and not by the Judicial Service Commission or the Public Service Commission—Functions of the Board—Power of the Board to hear appeals—Whether it involves the exercise of judicial power—"Public officer"—"Servant of the Crown"—"The Crown"—"Her Majesty"—Ceylon (Constitution) Order in Council (Cap. 379), ss. 3, 55, 60—Income Tax Ordinance (Cap. 242) ss. 11 (1) (a), 11 (7), 15, 36 (1), 37, 43 (3), 56 (9), 73–77, 80*—Certiorari 562

See INCOME TAX (4).

Writ of Habeas Corpus—

Habeas Corpus—*Divorce action—Decree in favour of plaintiff husband—No order of court in regard to custody of children—Right of husband to claim custody from the wife pending appeal in the divorce action* .. 429

See MATRIMONIAL ACTIONS (3).

Writ of Mandamus—

Mandamus—*Whether it lies when a specific statutory remedy is available—Erection of a building in an Urban Council area—Certificate of conformity—Refusal of Chairman of Council to issue it despite order of tribunal of appeal—Remedy then of person who erected the building—Housing and Town Improvement Ordinance (Cap. 258), ss. 15, 16, 88, 95* .. 320

See HOUSING AND TOWN IMPROVEMENT ORDINANCE.

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THE
NEW LAW REPORTS OF CEYLON

VOLUME LXXII

1969 *Present :* **H. N. G. Fernando, C.J., and Wijayatilake, J.**

ALAGASUNDERAM CHETTIAR and another, Appellants,
and THE INDIAN BANK LTD., Respondent

S. C. 81-82/65 (Inty.)—D. C. Colombo, 52875/M

Carriage of Goods by Sea Ordinance (Cap. 85)— Schedule, Article I (e), Article II, Article III Rule 6, Article IV Rules 1 and 2—Meaning of expression " loss or damage "—Time limitation in Article III Rule 6—Circumstances when it is applicable—Inapplicability in case of misdelivery of goods to wrong person.

The provision in Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Ordinance that " the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered " does not apply to a case where the carriage contemplated in the bill of lading has been duly completed by the discharge of the shipment consigned to Ceylon. Nor is the time limitation in Rule 6 applicable to a case where the carrier or its agent has caused a complete misdelivery of the goods to some person other than the person entitled to delivery.

APPEAL from a judgment of the District Court, Colombo.

C. Thiagalingam, Q.C., with *D. S. Wijewardena*, for the 2nd defendant-appellant in S. C. 81/65 and for the 2nd defendant-respondent in S.C. 82/65.

C. Ranganathan, Q.C., with *J. A. L. Cooray* and *Gamini Dissanayake*, for the 1st defendant-respondent in S.C. 81/65 and for the 1st defendant-appellant in S.C. 82/65.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte, K. N. Choksy* and *E. B. Paul Perera*, for the plaintiff-respondent in both appeals.

Cur. adv. vult.

1*——J 4415 — 2,255 (6/69)
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January 15, 1969. H. N. G. FERNANDO, C.J.—

The plaintiff in this action was the holder of certain Bills of Lading relating to a shipment of goods which was despatched from Tuticorin to Colombo on a ship of which the 2nd defendant is alleged to have been the owner, proprietor or operator. The 1st defendant is alleged to have been carrying on the business of shipping agents and also to have been the Agent in Colombo of the 2nd defendant.

According to the allegations in the plaint, the goods in question were brought in the said ship to Colombo and were duly landed ashore in Colombo. The plaint further alleged that it was the duty and business of the 2nd defendant and/or the 1st defendant acting as Agent for and on behalf of the ship and/or the 2nd defendant to give delivery of the goods in terms of the Bills of Lading to the plaintiff, but that neither the 1st defendant nor the 2nd defendant gave such delivery. It was further alleged that the 1st defendant by its servants or agents wrongfully or unlawfully gave delivery of the goods to persons other than the plaintiff and that the 2nd defendant is liable in law for the negligence or fraud or the breach of duty aforesaid.

Upon the basis mentioned above, the plaintiff prayed for a sum of Rs. 48,000 odd as the loss or damage suffered by him, in consequence of the failure on the part of the 1st and/or the 2nd defendant to deliver the goods to the plaintiff.

Several issues were framed at the trial, some of which raised the question whether the liability of any of the defendants ceased when the goods had been duly discharged from the ship at the Port of Colombo. In addition, Counsel appearing for the defendants framed issues No. 17, 18, 19 and 24 which were as follows :—

" *Issue No. 17*

Has this action been brought within one year of the date on which the goods should have been delivered ? "

" *Issue No. 18*

If the answer to Issue No. 17 is in the negative, is the present suit time-barred ? "

" *Issue No. 19*

(*a*) Can the 1st defendant and the 2nd defendant be sued together in one and the same action? "

(*b*) If not, can the plaintiff maintain this action? "

" *Issue No. 24*

In any event is the 2nd defendant discharged from any liability to the plaintiff in respect of loss or damage sustained by him as more than one year has elapsed from the date on which the goods should have been delivered? "

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Counsel for the defendants moved that these issues be decided as preliminary issues. In addition the learned trial Judge also regarded issues Nos. 13 and 20 as preliminary issues :—

" 13. Did the liability of the defendants, if any, to the plaintiff cease as soon as the said goods were lifted from and left the ship's side at the Port of Colombo? "

20. If any or all of the issues (12) to (18) are answered in the affirmative, are the defendants under any legal liability to the plaintiff in respect of the said goods? "

Although the order of the learned trial Judge against which the 1st and 2nd defendants have appealed to this Court does not give separate answers to the issues which have been reproduced above, the learned trial Judge concludes his order by a statement that all the preliminary issues are answered against the defendants, and he has further directed that the trial will proceed on the other issues.

The issues numbered 17, 18 and 24 were designed to invoke the provisions of Article III Rule 6 of The Hague Rules which were given statutory effect by Ordinance No. 18 of 1926 (Cap. 85 of the 1956 Edition of our Enactments), and which are set out in the Schedule to that Ordinance. The same Rule 6, upon which the defendants here rely, was considered in the judgment of this Court in *Sri Lanka Shipping Co., Ltd. v. The Indian Bank Ltd.* (S.C. 441/64 F, S.C.M. of 1st March 1968) [1], and the judgment sets out my reasons for holding that the time limitation in Rule 6 does not apply in a case where only a mis-delivery of goods, and not actual physical loss of goods is involved.

Counsel for the 2nd defendant has argued that the recent case was wrongly decided by this Court, and in support of that argument he relied on the decision of the House of Lords in the case of *Admastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd.*[2] One of the matters which arose for decision in that case was the construction of statutory provision in United States law corresponding to the provision contained in Article IV Rule 1 and Article IV Rule 2 of the Schedule to our Ordinance, Cap. 85 ; the particular question of construction was " do the words ' loss or damage ' in s. 4 (1) or s. 4 (2) of the Act relate only to physical loss of, or damage to, goods ? ".

In deciding this question Viscount Simonds approved and adopted the reasoning and conclusion of Lord Devlin in the lower Court which was as follows :—

" The last question asks whether the words ' loss or damage ' in s. 4 (1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual

[1] *(1968) 71 N. L. R. 361.*
[2] *(1957) 1 A. E. R. 673 ; and (1958) 1 A. E. R. 725.*

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liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words 'loss or damage' should be limited to physical loss or damage. The only limitation which is, I think, to be put on them is that which is to be derived from s. 2 which is headed : 'Risks'. The 'loss or damage' must, in my opinion, arise in relation to the 'loading, handling, stowage, carriage, custody, care and discharge of such goods', but is subject to no other limitation. In *G. H. Renton & Co. Ltd. v. Palmyra Trading Corpn. of Panama* (5) ((1956) 3 All E.R. 957), the House of Lords held that the words 'loss or damage to or in connection with goods' in Art. III, r.8, were not limited to actual loss of or physical damage to the goods; and I should give the same meaning to 'in relation to' as to 'in connection with'." (*Anglo-Saxon Ltd. v. Admastos Ltd.* (1957) 1 A.E.R. 673 at p. 680).

With much respect I would adopt the opinion of Devlin, J. that the "loss or damage" which is referred to in our Article IV must mean a loss or damage in relation to what is specified in our Article II, that is, "the loading, handling, stowage, carriage, custody, care and discharge of goods", and I agree that the expression "loss or damage" in Rule 6 of Art. III must have the same meaning. Since this aspect of the matter was not taken into account in my judgment in the recent *Sri Lanka Shipping Co.* case, Rule 6 of Art. III has now to be examined as read with Art. II.

Article II of the Schedule to our Ordinance (Cap. 85) corresponds to s.2 of the American Act to which Lord Devlin referred. This Article declares in general terms that the responsibilities and liabilities, and the rights and immunities, set forth in the subsequent Articles will be those to which a carrier will be subject, and entitled, respectively, in relation to the *loading*, *handling*, *stowage*, *carriage*, *custody*, *care* and *discharge* of goods. The list here specified indicates in my opinion an intention to regulate the duties and rights of a carrier from the stage (of loading) when the carriage is about to commence, until the stage (of discharge) when the carriage ends. The same intention is quite clearly indicated in the definition of "carriage of goods" in Article I of the Schedule :—

> (*e*) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

In the present case, however, as also in the *Sri Lanka Shipping Co.* case recently decided in this Court, the carriage contemplated in the bill of lading had been duly completed by the discharge of the shipment consigned to Ceylon. The loss or damage alleged by the plaintiff in this case is therefore not one in relation to any of the matters which are regulated by the provisions in the schedule to Cap. 85. On this ground, which was not relied on in the judgment in the recent case, I hold that the limitation in Article III Rule 6 does not apply to the present action.

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Although this finding is conclusive of the question whether the plaintiff's action is time-barred, further examination of Rule 6 Article III has revealed additional reasons for the opinion expressed in the recent case that its provisions are inapplicable to a case of alleged loss by misdelivery ashore.

Thus the first paragraph of Rule 6 requires " notice of loss or damage and the general nature of such loss or damage " to be given to the carrier or its agent before or at the time of the removal of the goods into the custody of the person entitled to delivery ; and the second paragraph states that the notice need not be given " if the state of the goods as at the time of their receipt has been the subject of joint survey or inspection ". The fourth paragraph of Rule 6, again, affords to both the carrier and the consignee an opportunity for inspection and tallying,with a view obviously to ascertaining the nature and extent of loss or damage to goods. Hence, the 1st, 2nd and 4th paragraphs of Rule 6 when considered together are wholly applicable in a case in which a consignee is removing or about to remove the goods, and at that stage becomes aware of actual or apprehended loss or damage, in which event he must immediately or within three days give notice to the carrier in order that the latter himself may by survey or inspection investigate the correctness of the consignee's complaint ; and if a proper notice of alleged loss or damage is not given, the fact of removal becomes *prima facie* evidence of due delivery. I can see nothing in these three paragraphs which is reasonably applicable in a case where no goods are available for removal by a consignee, for the reason that the carrier or its agent has, as is alleged in the instant case, caused a complete misdelivery to some person other than the person entitled to delivery.

It will be seen that the limitation clause which requires suit to be brought within one year after delivery or after due date for delivery is to be found in the 3rd paragraph of Rule 6, and that this 3rd paragraph is (if I may be permitted the expression) " sandwiched " between paragraphs, the terms of which are applicable only to actual physical loss or actual physical damage. I thus see very good reason for the opinion that the 3rd paragraph was intended to apply only in case where goods delivered are alleged to be damaged or where there is an alleged short delivery.

I would add also that at the least it is doubtful whether the adoption by the Legislature of a Rule in such uncertain terms can be regarded as having amended the provisions of the Prescription Ordinance in its application to a claim of the nature made by the plaintiff in the instant case.

For these reasons I must adhere in the construction placed by this Court upon Rule 6 in the case of *Sri Lanka Shipping Co. Ltd. v. The Indian Bank Ltd.* Counsel for the defence has adverted to the risk that, if no appeal to the Judicial Committee is taken from the present judgment

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at this stage, the defence may be precluded from ultimately appealing against the present judgment on the point which I have been discussing. I must add therefore that although the present judgment will be binding upon both the District Court and this Court in any further proceedings in the present action, the defence will be entitled to rely upon the limitation clause in Rule 6 in any appeal which may ultimately be preferred from the final determination of this Court of the present action.

In the result I affirm the finding of the trial Judge in this case that the issues numbered 17, 18 and 24 must be answered in favour of the plaintiff.

In regard to issue No. 19, relating to alleged misjoinder, and to issues Nos. 13 and 20, we are of opinion having regard to certain arguments raised before us that a proper answer to those issues may depend on evidence concerning the custom and practice in the Port of Colombo and the functions relating to delivery of goods to consignees which are performed by carriers and their agents. We set aside *pro forma* the findings of the learned trial Judge on those issues, and direct that they be answered only at the end of the trial.

The costs of this appeal will abide the ultimate decision of the case.

Case sent back for trial on certain issues only.

[COURT OF CRIMINAL APPEAL]

1969 *Present:* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Weeramantry, J.**

WALALLAWITA K. WYMAN, Appellant, *and*
THE QUEEN, Respondent

C. C. A. APPEAL No. 73 OF 1968, WITH APPLICATION No. 107

S. C. 89/68—M. C. Matugama, 7514

Evidence—Witness—Doubt as to his competency to understand nature of oath—Right of Counsel to question the witness—Unsworn evidence—Requirement of corroboration—Burden of proof—Misdirection.

Where there is doubt as to the question whether a witness was, by reason of his age or mental immaturity, able to understand the nature of the oath which was administered to him, Counsel should not be prevented by the Court from questioning the witness so as to clear the doubt. If the doubt is confirmed, the Jury should be directed that it is unsafe to act on unsworn evidence unless it is satisfactorily corroborated.

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Where the defence calls no evidence and only suggests, by cross-examination of the prosecution witnesses, that it was not the accused, but some other person who committed the criminal act charged, the burden lies throughout on the prosecution to establish the guilt of the accused. In such a case, it would be a misdirection if the Court suggests to the Jury that some onus lies on the defence to disprove, by a balance of probabilities, facts averred by the prosecution.

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

E. R. S. R. Coomaraswamy, with *L. Athulathmudali*, *C. Chakradaran*, *N. T. S. Kularatne*, *Kosala Wijayatilleke*, *M. S. Aziz*, *S. C. B. Walgampaya* and *C. Ganesh* (assigned), for the accused-appellant.

N. Tittawella, Crown Counsel, for the Crown.

Cur. adv. vult.

November 28, 1968. H. N. G. FERNANDO, C.J.—

The appellant was indicted with the murder of one Gunadasa, and was on that charge convicted of the offence of culpable homicide not amounting to murder.

The only alleged eye-witness called by the prosecution was one Karunadasa, who was affirmed at the trial and stated his age to be 15 years. The learned Crown Counsel commenced his examination of this witness in a manner which quite obviously indicated Counsel's own doubts as to the question whether the witness was, by reason of age or mental immaturity, a competent witness.

When this examination had proceeded for a few minutes, Counsel for the defence submitted to the learned trial Judge that the witness appeared to be much younger than he claimed to be. This submission was based on grounds (*a*) that the witness was " very small in size ", and (*b*) that the witness could not repeat some words of the oath administered to him. In regard to these words, Counsel's submission was that the witness did not understand their meaning.

The learned Commissioner then ruled " I hold that he is competent to give evidence ". Despite this ruling, Crown Counsel put further questions designed to test the understanding of the witness, and asked the direct question "Do you know the difference between truth and falsehood?". There was no answer to this question, and the Commissioner remarked : " Is all this necessary, I am quite satisfied that the witness is competent

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to give evidence." Crown Counsel then, with admirable persistence, showed the witness a book and asked the witness, "If I call this an elephant, is it right or wrong?", to which the witness replied, "That is correct". At this point, Counsel appearing for the defence again protested that the witness was incompetent, but he was again over-ruled by the Court. The evidence of the witness was thereafter led, and it is perfectly clear that the conviction of the appellant depended on that evidence.

We feel bound to say that the learned Commissioner was unduly impatient in his consideration of this matter, which a sufficiently experienced Crown Counsel thought worthy of investigation. If the prosecution itself was doubtful whether the witness understood the nature of the oath which had already been administered, further questioning, if permitted, might have confirmed that doubt. If so, the Jury would have had to be directed that it was unsafe to act on unsworn evidence unless it was satisfactorily corroborated. We are content however to let this matter rest there, since the conviction was vitiated on more certain grounds.

The defence called no evidence, except to prove some minor contradictions, and made no attempt, in cross-examination of prosecution witnesses, to prove facts which might have established an alibi or founded an exculpatory or mitigatory plea of self-defence, nor did the existence of any such facts arise upon the prosecution evidence. Thus the defence only challenged the prosecution to prove that it was this accused, and no other person, who had stabbed the deceased, and the burden lay throughout on the prosecution to establish the guilt of the accused.

We now quote certain passages from the summing-up :

"The defence takes up the position that the Crown has not satisfactorily proved that it was this accused who committed this offence. The defence has suggested that it could be anybody else. Now, where the defence is concerned, you need not be satisfied beyond reasonable doubt. If you are satisfied that the defence position is established on a balance of probabilities, as they say, then you will accept the defence position. Unlike the prosecution which has to prove its case beyond reasonable doubt, no such high degree of proof is required as far as the defence is concerned. All that the defence need show is that their position is more probable."

"In this case the defence has also taken up the position that this incident did not take place at the spot described by Karunadasa. They say, for one thing, from where Karunadasa was, that is according to them, as he got out of the boutique, he could not have seen an incident where this incident is supposed to have taken place."

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"Whereas the prosecution has to prove its case, every aspect of its case, beyond reasonable doubt, the defence has only to show by a balance of probabilities that the position taken up by the accused is probably true. The defence has stated that Baby Nona and her husband were angry with this accused, and therefore the accused was falsely implicated."

"The defence is that this accused has been falsely implicated in this case."

The passage quoted at (1) above can fairly mean that there was an onus on the defence to prove, on the standard of the balance of probabilities, *that someone other than the accused committed the offence*; the second passage can mean, in the light of several references to that standard, that the defence position, *that the offence may have been committed at some other place*, must be rejected unless some alternative place of commission is proved by that standard of proof; the third and fourth passages can mean that the *possibility of the accused having been falsely implicated* must be rejected unless proved by the same standard. We must say with respect that the same error is disclosed in each of these passages, namely, the error of suggesting that some onus lay on the defence to disprove facts averred by the prosecution. It will suffice to note the precise consequences of this error in the case of the first of the quoted passages.

In every criminal case, the burden lies throughout on the prosecution to prove convincingly that the person charged is the person who actually committed the criminal act charged. This the prosecution can do, only if it succeeds in excluding beyond reasonable doubt the possibility that some other person committed that act, and no burden lies on the defence to establish the existence of that possibility. But the direction now under consideration quite clearly informed the Jury that they need not consider the existence of that possibility, unless the defence proved that it was probable that "anybody else" committed the act of stabbing. These passages thus contained serious mis-directions as to the burden of proof.

We have now to quote another passage in the summing-up, which was criticised at the appeal:—

"You will next ask yourselves, is there corroboration of this evidence? Has the evidence of Karunadasa and Baby Nona been corroborated? They have stated that they followed a trail of blood and went up to the body. The sub-Inspector of Police has told you that there was a very long trail of blood. I will deal with this aspect of the trail of blood a little earlier (*sic*). For the moment, Karunadasa

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and Baby Nona say that a trail of blood led down to the body of the deceased and there is evidence that there has been a trail of blood up to the body of the deceased."

The proved existence of a trail of blood did confirm the truth of the testimony of the two witnesses that they found the body of the deceased man lying at the place where the trail ended. But the defence did not dispute this part of the testimony. What was actively in dispute was the truth and the accuracy of Karunadasa's evidence that he saw the accused stabbing the deceased, and the trail of blood afforded no corroboration of this evidence. The matter which was here referred to was not true corroboration, because it was not "evidence tending to show that the accused committed the offence charged". We hold that the learned Commissioner should either have refrained from referring to the trail of blood as being corroboration, or should else have directed the Jury that the existence of the trail of blood did not corroborate the vital and disputed part of Karunadasa's testimony. There was thus misdirection on a matter of mixed law and fact.

For the reasons now stated we set aside the verdict and sentence and ordered a verdict of acquittal to be entered. Having regard to the fact that the prosecution depended almost entirely on the evidence of a single witness, whose understanding was seriously doubted by Crown Counsel, we did not consider this a fit case for the exercise of our discretion to order a fresh trial.

Accused acquitted.

1968 *Present :* **H. N. G. Fernando, C.J., and Wijayatilake, J.**

DODANWELA, Appellant, *and* BANDIYA, Respondent

S.C. 309/65 (F)—D. C. Kurunegala, 597/L

Paddy Lands Act, No. 1 of 1958—Section 63—Meaning of term "cultivator"—Burden of proof.

Where, in an action for declaration of title and ejectment in respect of a land, the defendant pleads that the land is a paddy land and that he, being the cultivator of it as tenant under the plaintiff, cannot be ejected by reason of the provisions of the Paddy Lands Act, the burden is on the defendant to prove that he did not employ hired labour for the work specified in paragraph (*b*) of the definition of "cultivator" in section 63 of the Paddy Lands Act and that he did not employ hired labour for at least two of the operations mentioned in paragraph (*a*) of the definition.

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APPEAL from a judgment of the District Court, Kurunegala.

C. R. Gunaratne, for the plaintiff-appellant.

D. R. P. Goonetilleke, with *Chulpathmendra Dahanayake*, for the defendant-respondent.

September 27, 1968. H. N. G. FERNANDO, C.J.—

The plaintiff sued the defendant for declaration of title and ejectment in respect of two lands specified in the schedule to the plaint. The defendant pleaded that the lands were paddy lands and that he was the cultivator of the lands as tenant under the plaintiff and that he could not be ejected by reason of the provisions of the Paddy Lands Act. The learned Judge was satisfied that the defendant did not himself cultivate land No. 2 and in respect of that land entered judgment for the plaintiff.

In the case of land No. 1 however the learned Judge has held in favour of the defendant. It would appear that the learned Trial Judge based his decision upon a consideration of the question whether the defendant had worked or cultivated the field or in other words had been generally responsible for the cultivation. In regard to land No. 1, the Judge was satisfied that the defendant had passed that test.

The definition of ' cultivator ' in Section 63 of the Paddy Lands Act refers however to a somewhat different matter, namely, the question whether the tenant by himself or by any member of his family, and without the employment of hired labour, carries out the major part of the actual work of cultivation. A burden lay on the defendant in this case to satisfy the Trial Judge that he did not employ hired labour for the work specified in paragraph (*b*) of the definition and that he did not employ hired labour for at least two of the operations of work mentioned in paragraph (*a*) of the definition. Far from giving evidence to such an effect, the defendant merely stated as follows :—

> " I cultivated these fields myself. I got the villagers to help me at times, otherwise I employed labourers to cultivate them. "

It seems to us that at the least the defendant made no attempt to prove the facts which the definition in the Act requires him to prove.

The appeal is allowed without costs. The decree is amended in order to provide that the defendant be ejected from land No. 1 Mahamuttetuwa and also from land No. 2. The decree is further amended by substituting Rs. 300/- per annum for Rs. 60/- as the amount of the damages.

WIJAYATILAKE, J.—I agree.

Appeal allowed.

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1968 *Present :* **H. N. G. Fernando, C.J. and Sirimane, J.**

H. C. HENRY SOYSA and others, Appellants, *and* THE JUPITER CIGARETTE AND TOBACCO CO. LTD., Respondent

S. C. 156/66—D. C. Colombo, 9039/MB.

Company law—Debt incurred by irregularly appointed Directors—Ratification of it by the Company—Effect.

Mortgage—Concurrent mortgagees—Right to sue mortgagor in one action—Joinder of parties and causes of action—Mortgage Act (Cap. 89), s. 65 (1) (a).

Where an *intra vires* debt transaction on behalf of a Company is entered into by its Directors concerning whose appointment as Directors there is some irregularity, the transaction may be ratified by the Company.

Where a single property is hypothecated in a single mortgage bond, two or more lenders who have provided, in different proportions, the money borrowed by the mortgagor are permitted by section 65 (1) (*a*) of the Mortgage Act to sue on the bond in one action. In such a case, it cannot be contended that there is a misjoinder of parties and causes of action.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *Ben Eliyatamby*, for the plaintiffs-appellants.

C. Ranganathan, Q.C., with *B. J. Fernando*, for the defendant-respondent.

Cur. adv. vult.

December 20, 1968. SIRIMANE, J.—

This was a hypothecary action filed by the three plaintiffs against the defendant-Company claiming a sum of Rs. 125,000 on mortgage bond No. 432 of 13th August 1960 (P1).

The defendant-Company filed answer pleading, *inter alia*, that the borrowing was not for the purposes of the Company, that there was no resolution or decision in terms of the Articles of the Company to borrow, that the borrowing was *ultra vires*, and that the bond was, therefore, not binding on the Company.

According to the recitals in the bond P1, a meeting of members had been held on 12th August 1960 and a resolution passed authorising the borrowing.

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The learned District Judge dismissed the action on the ground that there was no meeting held on that day at which such a resolution was passed.

The bond bears the seal of the Company, and has been signed by two persons : E. A. P. Edirisinghe, and E. A. S. Appuhamy (by his thumb impression) as Directors of the Company.

The evidence shows that at some time before 16th August 1960, E. A. P. Edirisinghe was in reality the Company itself. He owned 3239 shares out of 3241. His father, E. A. S. Appuhamy, and his mother owned one share each.

The money was lent to the defendant-Company by the plaintiffs on three cheques, in all of which the defendant-Company is the payee. At the time of the borrowing, the Company was in debt to the extent of about Rs. 122,000 according to D1, which is a statement of affairs of the Company as at 31st May 1960. This sum includes loans advanced to the Company by Directors among whom were the three plaintiffs and E. A. P. Edirisinghe.

P9 shows that this bond had been sent to the Registrar of Companies for registration as an instrument creating a charge over the Company's property, as required by Section 78 of the Companies Ordinance, Chapter 145. The annual returns of the Company for the years 1961, 1962 and 1963 sent to the Registrar of Companies (P7, P6 and P8) show this sum of Rs. 125,000 borrowed on this bond as a debt due *from the Company*.

At the time the bond was signed, E. A. P. Edirisinghe was admittedly a Director of the Company and his father E. A. S. Appuhamy, before he signed as a Director, had, according to the evidence, the terms of the bond explained to him by his own lawyer.

E. A. P. Edirisinghe giving evidence on behalf of the defendant-Company stated that his father was a Director on 13th August 1960, i.e., the day on which the bond was signed. This fact was never in dispute. So that on the face of the bond and the defendant's own evidence relating to its execution, P1 was a perfectly valid bond and would be binding on the Company.

Was the borrowing *ultra vires ?*

In the Articles of Association of the Company, under the heading " Powers and duties of Directors ", Regulation 69 reads as follows :—

" The Directors may from time to time at their discretion raise or borrow any sum or sums of money for the purposes of the Company in such manner and upon such terms and conditions in all respects as they think fit. Provided that the Directors shall not, without the

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sanction of a General Meeting of the Company, so borrow any sum of money which will make the amount borrowed by the Company and then outstanding exceed the amount of the subscribed capital for the time being of the Company. Nevertheless no lender or other person dealing with the Company shall be concerned to see whether this limit is observed."

The sum borrowed is admittedly much less than the subscribed capital of the Company at that time. So that there was no necessity for a meeting or a resolution authorising the borrowing as long as it was done by two Directors for the purposes of the Company. In these circumstances, I do not think that it was necessary to decide whether, in fact, a meeting had been held to authorise the loan and the exact time and place of the meeting. It could not be seriously contended that the money borrowed was not utilized for the purposes of the Company. On the contrary, D1, P6, P7 and P8, referred to earlier, indicate that it was so used.

The three plaintiffs had themselves been Directors of this Company, and sold their shares to Edirisinghe. It was submitted that the money borrowed on the bond was for the purpose of purchasing these shares. The evidence, however, shows that Edirisinghe had plenty of money of his own to buy these shares for himself, and the cheques D9 and D10, D62 to D64, D71 and D72 put this matter beyond doubt. These were Edirisinghe's personal cheques on which he purchased the shares.

According to the copies of the minutes P5, P10 and P11, signed by all the Directors including Edirisinghe, three meetings had been held on 12th August 1960, and according to P5, a resolution was passed authorising this loan. The learned District Judge, on the evidence of Proctor Abeywardene (who was alleged to have been present at that meeting, but who denied that fact), held that there was no meeting at which the loan was authorized, and that the defendant was, therefore, not liable. He said in his judgment,

> " On a consideration of the circumstances which I referred to, I hold that no meeting of shareholders was held on 12.8.60 at which a resolution is said to have been passed with regard to the alleged loan P1. I hold that the evidence, real as well as circumstantial, is sufficient to contradict the recital in P1 although it is a notarial document and also the minutes P5. *In view of this the defendant-Company had no power to borrow.*"

As pointed out earlier, under Regulation 69, no resolution was necessary to empower the Directors to raise the loan, and once it was admitted that two persons, who were, in fact, Directors of the Company at the time of its execution, signed this bond, I think that the Company cannot avoid liability to repay the loan.

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It is not suggested that this was anything but an honest and bona fide transaction. No shareholders were in any way prejudiced and all persons concerned were aware of, and consented to, the transaction.

In these circumstances, I think that the learned District Judge attached too much importance to the exact date of the meeting at which Directors were appointed.

Even assuming that there had been some irregularity in the appointment, the evidence (for example, P9, P6, P7 and P8) clearly shows that the Company ratified the borrowing of the loan on P1.

In *Parker and Coper Limited v. Reading and James* [1] it was held that if all the individual corroborators, in fact, assent to a transaction which is *intra vires* the Company, although *ultra vires* the Directors, it is valid although they had not met together in one room or place, but all of them discussed and agreed to do one with another separately. In the course of his judgment, Astbury, J. said, "If Company Law enables the entirety of the corroborators to ratify an irregular *intra vires* transaction, why should this not protect an honest bona fide *intra vires* transaction entered into for the benefit of the Company ?".

An issue as to whether there was a misjoinder of parties and causes of action had been left unanswered by the learned District Judge and some argument was addressed to us on this point. There is a single bond on which a single property is hypothecated. The fact that there were three lenders who provided the money borrowed in different propertions, does not, in my view, preclude all three of them suing on the bond in one action. I think section 65 (1) (*a*) of the Mortgage Act, Chapter 89, contemplates an action of this kind. That section reads as follows :—

> "65 (1). Where a mortgage bond is executed in favour of two or more persons (each of whom is hereinafter referred to as a "mortgagee") in consideration of sums due or to be due to each of such persons by the mortgagor,
>
> (*a*) any such mortgagee to whom any monies secured by the mortgage are due and payable, may institute a hypothecary action for the enforcement of the mortgage, and in such action join as a defendant, every such mortgagee, who is not a plaintiff in the action."

The judgment of the learned District Judge is set aside and judgment entered for the plaintiff as prayed for in the plaint. The plaintiffs are entitled to costs of this appeal.

H. N. G. Fernando, C.J.—I agree.

Appeal allowed.

[1] *136 Law Times 170.*

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1967 *Present :* **T. S. Fernando, A.C.J., and Alles, J.**

K. L. LEWIS PERERA and 3 others, Appellants, *and* H. JANE FERNANDO and 3 others, Respondents

S. C. 142/1966 (F)—D. C. Negombo, 888/L

Servitude—Usus—*Claim of right to wash clothes in a neighbouring paddy field—Maintainability—An essential ingredient of* Usus.

The defendants, who were dhobies by occupation, claimed the right to wash clothes in a portion of the paddy field belonging to the 1st plaintiff. They based their claim on some kind of long standing practice or custom and maintained that it fell within the ambit of the personal servitude known to the Roman-Dutch law as *Usus*. The plaintiff's unchallenged evidence was that if clothes were allowed to be washed in the field he would not be able to use the field because it would be polluted.

Held, that, although there was a finding of fact in defendants' favour, that for a considerable period they had washed clothes at the water hole on the 1st plaintiff's field, the defendants' claim must fail in view of the evidence of the plaintiff in regard to the damage to his field. The claim to the servitude of *Usus* is the right of using the property of others for daily needs *without detriment to the substance of the property.*

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *S. D. P. Valentine* and *I. S. de Silva*, for the plaintiffs-appellants.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the defendants-respondents.

Cur. adv. vult.

November 29, 1967. ALLES, J.—

In this action, the defendants, who are dhobies by occupation, successfully obtained a declaration from the District Court that they were entitled to the right to wash clothes in a portion of the paddy field belonging to the first plaintiff and depicted as Lot A in the plan attached to the plaint. In spite of the plaintiff's persistent assertions that the water hole in his paddy field was not used by the dhobies in the neighbourhood for the purpose of washing clothes, there is a finding of fact against the plaintiff and the trial Judge has held that the water hole in question had been so used by the defendants and their forefathers for several years beyond the prescriptive period. On 25th October 1964, the plaintiff closed the water hole, planted paddy in the area so covered and sought a declaration from Court in this case that his paddy land was free of any right in the defendants to wash their clothes.

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The question that has been argued in this appeal is whether the trial Judge came to a correct conclusion when he held that a servitude of the nature claimed by the defendants was one that was recognised in law. Counsel for the defendants-respondents sought to bring this claim within the ambit of the personal servitude known as Usus. According to Walter Pereira, (Laws of Ceylon, p. 507), Usus " consists, in reference to land, in the occupation of the same without hindrance from the owner or his workmen, and in the right to take fruits, vegetables, flowers, hay, and wood for daily consumption " and also includes such rights as the right of grazing on common land, and also the right of fishing in another's water. On a parity of reasoning, Counsel sought to claim the prescriptive right to wash clothes on another's land.

The learned trial Judge in the course of his judgment sought to equate the right to wash clothes on another's land to such servitudes recognised by Voet as " the right of pressing grapes or threshing corn or pulse on another's land ". In doing so the Judge has fallen into error because the kind of servitudes enumerated by Voet are rural praedial servitudes, which normally attach to land and have no analogy to the personal servitude claimed in this case. It is on the basis of a rural praedial servitude that Dalton, J. in *Tikiri Appu v. Dingirala* [1] recognised the right of a person to thresh his paddy on the threshing floor of another's land. In *Fernando v. Fernando* [2], which was a possessory action instituted by members of the dhoby community residing at Polwatte claiming a right to possess the land for the purpose of drying clothes, there was an alternative claim to a servitude of drying clothes on the land of another, but Hutchinson, C.J. held that no such servitude was known to the Roman Dutch Law. The case of *Fernando v. Fernando* was considered by Shaw, J. in *Kawrala v. Kirihamy and another* [3]. In the latter case, the plaintiff successfully claimed the right of threshing paddy on the threshing floor of a neighbouring owner as appurtenant to the plaintiff's field, and Shaw, J. held that such an easement was one that was recognised under the Roman Dutch law. Dealing with the claim of the dhobies in *Fernando v. Fernando*, Shaw, J. stated :

> " This is not a claim for a servitude such as we are dealing with in the present case. It was a claim of right such as is gained in some cases in England by custom for the inhabitants, or a particular class of inhabitants, of a district to make use of another person's property. All that *Fernando v. Fernando* decides is that such an extension of the law of servitudes as has been adopted in England has not been adopted under the Roman Dutch Law."

In the present case too the right that is claimed by the defendants to wash their clothes at the water hole on the plaintiff's paddy field is based on some kind of long standing practice or custom which the defendants seek to place on a legal basis by maintaining that it falls

[1] *(1934) 36 N. L. R. 267 at 268.* [2] *(1911) 14 N. L. R. 166.*
[3] *(1917) 4 C. W. R. 187.*

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within the ambit of the personal servitude known to the Roman Dutch Law as Usus. The only recorded instance of an attempt to establish such a servitude in Ceylon was the unsuccessful effort of the dhobies of Polwatte in 1911, and here too they sought to claim the servitude as an alternative to their right to a possessory action. Percival Gane in his translation of Voet in commenting on this servitude states that there are only five decided cases in South Africa in which this subject has figured. " That it has not been more fully used may, so far as the servitude of use is concerned, be explained by the rarity of that servitude in and since Voet's day." (vide Translator's Note to Book VII, Tit. 8). Voet explains the reason for the rarity of this servitude in the following terms :—

> " Meantime at the present day the establishment of use is indeed rarer between private persons than is that of usufruct. That is because of the difficulties which commonly arise as to the extent to which the usuary ought to use, and because of the apprehension that fruits will be pillaged under cover of exercising use."
>
> (Book VII, Tit. 8, Sec. 5)

Even Maasdorp (Vol. II, 7th Edn., p. 225) states that the personal servitudes of Usus and Habitatio are seldom met with in the present day. One can understand the reluctance of jurists to too readily recognise these servitudes since they are apt to seriously interfere with the right of the private individual and today they have invariably been superseded by agreement between the parties usually in legal form.

The Courts should therefore be slow to extend the application of this servitude to modern conditions particularly as it is likely to adversely affect the rights of private citizens and the servitude should only be recognised when there is clear evidence that the essential conditions necessary to establish the servitude have been proved.

In the present case, although there is a finding of fact in the defendants' favour, that for a considerable period they had washed clothes at the water hole on the plaintiff's field, the defendants' claim must fail in view of the evidence of the plaintiff in regard to the damage to his field. The claim to the servitude of Usus is the right of using the property of others for daily needs *without detriment to the substance of the property.* (Voet Book VII, Tit. 8, Sec. 1.) The plaintiff's unchallenged evidence in this case is that " if clothes are allowed to be washed in the field he will not be able to work the fields because the fields will be polluted ". This is a legitimate fear and one that is not unlikely, having regard to the nature of the work contemplated. Therefore one of the essential elements necessary to claim this servitude has not been established by the defendants.

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The defendants were not entitled to a declaration that they had the right to wash their clothes on the plaintiffs' field and the plaintiffs were entitled to the declaration which they prayed for in their plaint.

We set aside the judgment and decree of the District Court dismissing the plaintiffs' action and allow the plaintiffs' appeal with costs in both Courts.

T. S. FERNANDO, A.C.J.—I agree.

Appeal allowed.

1968 *Present :* **Sirimane, J., and Pandita-Gunawardene, J.**

A. L. M. THAHIR, Petitioner, *and* A. M. SHAFI and another, Respondents

S. C. 403/68—Application for a Mandate in the nature of a Writ of Certiorari and/or Mandamus on A. M. Shafi (Quazi), Quazi Court, Ratnapura, and another

Muslim Marriage and Divorce Act (Cap. 115)—Section 64 (1)—Enforcement order—Duty of Quazi to issue notice to the respondent.

Before an enforcement order under Section 64 (1) of the Muslim Marriage and Divorce Act is issued a Quazi should issue notice to the respondent and inquire into any objections which he may raise.

APPLICATION for a writ of *certiorari* and/or *mandamus*.

M. S. M. Nazeem, for the petitioner.

December 7, 1968. SIRIMANE, J.—

The first respondent (a Quazi) has issued an enforcement order to the Magistrate of Avissawella on 3.8.68, to recover a sum of Rs. 1,050 from the petitioner, as arrears of maintenance due to his daughter at Rs. 12·50 per month from 3.6.61 to 7.6.68. No inquiry had been held by the first respondent, and no notice given to the petitioner, before the order was made.

There is some prima facie evidence, which indicates that the sum of Rs. 1,050 is incorrect. In July 1968, the second respondent had moved for enhancement of maintenance for her daughter and the amount was enhanced from Rs. 12·50 to Rs. 25. There was no complaint by her that there were any arrears of maintenance from 1961 onwards. Before an enforcement order under Section 64 (1) of the Muslim Marriage and Divorce Act issues a Quazi should notice the respondent and inquire into any objections he may raise.

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The order of 3.8.68 is quashed and the first respondent is directed to hold an inquiry after notice to the petitioner, before an enforcement order is issued.

PANDITA-GUNAWARDENE, J.—I agree.

Sent back for further proceedings.

1967 *Present:* **Siva Supramaniam, J.**

S. D. ABDUL LATIFF, Appellant, *and* M. N. SEYED MOHAMED *and* another, Respondents

S. C. 105/1965—C. R. Kurunegala, 2302/L

Rent Restriction Act—Subletting of premises in the guise of a "partnership agreement"— Immateriality of the label to the transaction.

Where a tenant of rent-controlled premises enters into a "partnership agreement" with a person in relation to the premises but such agreement is only a blind to cover the subletting of the premises, the tenant and the sub-tenant are liable to be ejected by the landlord if the landlord has not given his written consent to the agreement.

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

C. Ranganathan, Q.C., with *Ananda Paranavitane*, for the plaintiff-appellant.

W. D. Gunasekera, for the defendants-respondents.

Cur. adv. vult.

March 20, 1967. SIVA SUPRAMANIAM, J.—

The only question for determination on this appeal is whether on the facts as found by the learned Commissioner of Requests the appellant has established that the 1st respondent sublet the premises in suit to the 2nd respondent. The principal facts are as follows :—The appellant became the owner of the premises in suit (which are subject to the provisions of the Rent Restriction Act) in July 1962 and the 1st respondent who had been the tenant under the previous owner attorned tenancy to the appellant in August 1962. The 1st respondent had previously carried on the business of selling fancy goods in the said premises. Since July 1959 the business had in fact been carried on by the 2nd respondent in terms of a notarially attested agreement D1 entered into between the two respondents on 20th July 1959 which was effective for a period of four years. On 23rd April 1963 the respondents entered into a fresh agreement D2, valid for a period of seven years. The new agreement D2

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was a renewal of the old agreement D1 with a variation of some of the terms and conditions. Each of the documents D1 and D2 was designated ' Partnership Agreement '.

The appellant contends that D1 and D2 were not in fact partnership agreements but were blinds to cover the subletting of the premises by the 1st respondent to the 2nd respondent. The case of the respondents, on the other hand, is that the business was carried on in partnership and that the 2nd respondent, as the Managing partner, was in occupation of the premises and in control of the business. It is not disputed, however, that the attornment of tenancy to the appellant by the 1st respondent was in his personal capacity and not as an agent of the partnership.

It will be sufficient for the purpose of this appeal to examine the document D2, as that was the agreement entered into between the respondents during the period the 1st respondent was a tenant of the appellant. Among the terms and conditions of D2 were the following :—

(*a*) that all the capital necessary for the business should be contributed by the 2nd respondent ;

(*b*) that the 2nd respondent should have the full management and control of the business " without any interference whatsoever " from the 1st respondent ;

(*c*) that all electricity bills due on the said premises and all licence fees, etc., due in respect of the said business shall be paid by the 2nd respondent " *on his own account* " ;

(*d*) that the 1st respondent shall not be entitled to any share of the profits or be liable for any share of the losses arising from the said business ;

(*e*) that the 2nd respondent shall pay the 1st respondent as his share of the profits a fixed sum of Rs. 100 per month out of which the 1st respondent shall pay the rent and rates and taxes due in respect of the said premises ;

(*f*) that, *in any case*, the 1st respondent " shall not be entitled to any payment over and above the monthly sum of Rupees One hundred above mentioned either as profit or in any other manner " ;

(*g*) that the 1st respondent shall not have the right to request the 2nd respondent to wind up the business ;

(*h*) that the 2nd respondent shall have " the full liberty to admit such other partner or partners to carry on the said business ", and that the 1st respondent shall have no right to prevent the 2nd respondent from taking in such partner or partners ;

(*i*) that certain furniture and fittings in the said premises belong to the 1st respondent ; and

(*j*) in the event of default of payment of the monthly sum of Rs. 100 for more than three months, the 2nd respondent will deliver peaceful possession of the *premises* along with the furniture and fittings to the 1st respondent.

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The aforesaid " terms and conditions " of the agreement D2 make it abundantly clear that the business carried on in the premises was the sole concern of the 2nd respondent and all that the 1st respondent was entitled to was the right to receive a fixed monthly payment of Rs. 100 during the period of seven years covered by the agreement. The sum of Rs. 100 was in reality the rent payable by the 2nd respondent to the 1st respondent for the premises and the furniture. There can be little doubt that the use of the word " partnership " in the agreement was in fact a blind to cover a lease of the premises. If the document had been described as a " lease of the furnished premises " instead of as a " partnership " the respective rights and obligations of the two respondents would not have been any different. As was stated by Nagalingam S.P.J. in *Charles Appuhamy v. Abeyesekera* [1], " the mere affixing of a label to a transaction by the parties or by their legal advisers does not control or govern the true nature of the rights and liabilities created which have to be determined by an examination of the terms and conditions of the instrument itself. "

It was also established in evidence that on the bills issued in connection with the business carried on in the premises in question, the name of the 2nd respondent was mentioned as the " proprietor ".

On the evidence before him, the learned Commissioner of Requests should have answered in favour of the appellant the issue relating to the subletting of the premises by the 1st respondent to 2nd respondent without the written consent of the appellant and the consequential issue relating to ejectment.

I allow the appeal, set aside the judgment and decree and direct that a fresh decree be entered in favour of the plaintiff-appellant as prayed for in the plaint. The 1st defendant-respondent will be entitled to credit in respect of all sums of money paid by him as rent to the plaintiff-appellant after the date of the institution of this action.

The appellant will be entitled to his costs in both Courts.

Appeal allowed.

1969 *Present :* **de Kretser, J.**

T. SIVASUPRAMANIAM, Appellant, *and* C. P. DABARE (Inspector of Food and Drugs), Respondent

S. C. 966/68—M. M. C. Maligakanda, 30994

Food and Drugs Act (Cap. 216)—Section 4—Sale of food not of the nature, substance or quality demanded—Quantum of evidence.

A seller does not contravene the provisions of section 4 (1) of the Food and Drugs Act if the purchaser has notice at the time of sale that the article sold to him is not of the nature, substance and quality of the article which he demands.

[1] *(1954) 56 N. L. R. 243 at p. 244.*

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APPEAL from a judgment of the Municipal Magistrate's Court, Maligakanda.

K. C. Kamalanathan, for the accused-appellant.

J. W. Subasinghe, for the complainant-respondent.

Cur. adv. vult.

March 5, 1969. DE KRETSER, J.—

In this case the Municipal Magistrate (Mr. Walgampaya) convicted the accused of selling—according to his judgment—" Butter which was not of the quality of Butter demanded by the customer to the customer's prejudice in breach of section 4 (1) and (2) of the Food and Drugs Act (Cap. 216 L. E. C.) ". He fined him Rs. 75. The accused has appealed.

The charge as it was first framed on 14.6.67 was that he sold "..... to the prejudice of the purchaser an article of food to wit, Butter which was not of the nature of the article to wit Butter demanded by the purchaser....." This was amended on 21.2.68 and then read " An article of food to wit 'Allora Pure Creamery Buttrin ' which was not of the nature of the article of food to wit Butter demanded by the purchaser..".

It will be observed that this amended charge does not set out that it was as Butter that " Allora Pure Creamery Buttrin " was sold to the customer. It was on this very point that there was a clash of evidence at the trial, for while it is common ground that Dabare did go to this shop and ask for a half pound of Butter and that accused sold to him half a pound of " Allora Pure Creamery Buttrin " there is dispute as to what happened between these two incidents. It is accused's version that he happened to sell the Buttrin in the following circumstances :—

" On this day I sold 'Allora Buttrin' to the prosecution witness Dabare. He came to the shop and spoke to me. He came and asked me for Butter. I did not have Butter in my shop at the time.

Q. So what did you tell him ?
A. I told him there was no Butter.
Q. Thereafter what happened ?
A. Then he looked in the refrigerator.
Q. What was in the refrigerator ?
A. There was Allora Buttrin in it.
Q. After that what did the Inspector do ?
A. He asked me for Allora Buttrin and I then gave him a packet of Allora Buttrin.

The Inspector under XXM denies that he was told when he asked for Butter that no Butter was available and claims " I was given this substance as Butter ". The Magistrate says of this evidence of the

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accused " That evidence is clearly unacceptable and I reject it." It is unfortunate that the Magistrate has apparently lost sight that the matter might not be as clear to others, and that the giving of reasons for a finding is for the purpose of assistance to a Court that has to review his order. Apart from this there is no analysis of the evidence, and no consideration of the case from the aspect as to whether there was prejudice caused to the purchaser by this sale. Examining the evidence on the basis of probability I am by no means satisfied that the version given by the accused is not the correct one.

In the instant case the Inspector in consequence of knowledge received from other cases, hearsay and complaints was aware that " Allora Buttrin " was not Butter so that when he bought it—quite irrespective of what accused sold it as—he was aware it was not Butter. But the test is whether the sale would have been to the prejudice of a purchaser who did not have that special knowledge, and with that end in view to consider what the position of an ordinary person purchasing would be. The long line of cases to be found in the commentary on this section of the Food and Drugs Act by Bell establishes that a purchaser cannot be prejudiced when he has notice at the time of sale that the article sold is not of the nature, substance and quality of the article he demands.

That notice can be had from information given by the seller, by the nature of the article itself, or by what passed at the time of purchase. In this instance the package had clearly marked on the label that any purchaser had necessarily to see that " Allora is better than Butter for vim, vigour and vitality ", and also gave the information that it was manufactured from Pure Cow Cream, emulsified gingelly and coconut cream.

In regard to this label the Inspector was asked :

Q. So does it not make quite clear that this substance is certainly not Butter ?

A. Yes. It also claims to be better than Butter.

In my view any ordinary purchaser would know that it could not be Butter if it was set out as being " Better than Butter ". I do not think that there is any ordinary person who does not know that gingelly oil and emulsified coconut are not components of Butter. It appears to me therefore that the nature of the article was sufficiently brought to the notice of the purchaser and if he thereafter chose to buy it he cannot claim to have been prejudiced. The conviction and sentence are set aside and the appeal is allowed.

Appeal allowed.

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1969 *Present :* **H. N. G. Fernando, C.J., Samerawickrame, J., and Weeramantry, J.**

D. L. JAYAWARDENE, Petitioner, *and* V. P. SILVA (Assistant Collector of Customs), and 2 others, Respondents

S. C. 532/68—In the matter of an Application for a Mandate in the nature of a Writ of Certiorari

***Customs** Ordinance—Export of desiccated coconut—Export licence issued by Manager of Ceylon Coconut Board—Specification of Halifax as port of destination—Shipments landed at port of New York—Forfeiture under s. 130 of Customs Ordinance for exporting restricted goods—Whether* Certiorari *lies in respect of such forfeiture—Scope of* audi alteram partem *principle—Whether the forfeiture was valid—Customs Ordinance (Cap. 255), ss. 7, 8, 9, 12, 33, 43, 44, 47, 50, 58, 65, 75, 125, 129 to 133, 142, 144, 145, 154, Schedule B—Coconut Products Ordinance (Cap. 160), as amended by Act No. 20 of 1962, ss. 18, 20, 20A, 20B, 30, 31 and Regulations 7, 11, 14, 17 of Amending Regulations of 1963.*

In March 1968 a Company, of which the petitioner was a Director, made applications to the Principal Collector of Customs under section 58 of the Customs Ordinance for permission to ship certain quantities of desiccated coconut to Halifax in Canada. Although the applications and the ship's manifesto specified Halifax as the port of destination, the three shipments of desiccated coconut were in fact landed at the port of New York in the United States of America. The Collector took the view that the exportation of these consignments to New York, instead of to Halifax, was contrary to a restriction imposed by the Regulations made under the Coconut Products Ordinance. He therefore called upon the Directors and the Office Manager of the Company to show cause why an order of forfeiture under section 130 of the Customs Ordinance, read with the Coconut Products Ordinance, should not be made. After an inquiry was held the Collector elected, in terms of section 130 of the Customs Ordinance, to impose a forfeiture of three times the value of the goods in question, amounting to a total of Rs. 5,010,504. The position of the Collector was that the exportation of the consignments of desiccated coconut was in contravention of section 12 of the Customs Ordinance, read with the last paragraph of Schedule B to that Ordinance, and punishable under section 130.

The petitioner sought, in the present application, to have the order of the Collector quashed by way of *Certiorari.* Separate applications for similar writs were made by the two other Directors and the Office Manager of the Company.

Held, (i) that section 130 of the Customs Ordinance, so far as was relevant to the present application, should be stated as follows :—" Every person who shall be concerned in exporting any goods the exportation of which is restricted contrary to such restriction shall forfeit either treble the value of the goods, or be liable to a penalty of Rs. 1,000, at the election of the Collector of Customs." The forfeiture under this Section is incurred at the moment a prohibited or restricted exportation takes place. The function, and even the duty, of the Collector is only to make an election as between the two specified amounts of the incurred forfeiture.

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(ii) that a Writ of *Certiorari* does not lie to quash an election made by the Collector under section 130 of the Customs Ordinance. *Certiorari* does not lie against a person unless he has legal authority to determine a question affecting the rights of subjects and, at the same time, has the duty to act judicially when he determines such question. The existence of a duty to act judicially is not made manifest in section 130 and in connected provisions of the Customs Ordinance. At the highest the Collector's election may, in a provisional manner and to a limited extent, affect the "right" of a subject; but the circumstances in which the election is made are not such as to require the Collector to hear the other side; and no sanction in the proper sense can either be imposed by the Collector upon a person liable to a forfeiture or can else attach under the Customs Ordinance to render the election effective. Unless a competent Court determines, in a subsequent action instituted by the Attorney-General under section 145 of the Customs Ordinance, that a forfeiture was indeed incurred under section 130, the Collector's election is ineffective. The principle *audi alteram partem*, as discussed in *Durayappah v. Fernando* (69 N. L. R. 265), does not apply in the case of the election authorised or required by section 130 of the Customs Ordinance.

Tennekoon v. Principal Collector of Customs (61 N. L. R. 232), overruled.

Omer v. Caspersz (65 N. L. R. 494), partly overruled.

Quaere, whether, if the petitioner had been "concerned in the exportation" of shipments of desiccated coconut to New York, instead of to Halifax, in contravention of the terms of the export licence issued to the Company by the Manager of the Ceylon Coconut Board, such exportation was an exportation of restricted goods contemplated in section 130 and Schedule B of the Customs Ordinance, read with the Coconut Boards Ordinance as amended by Act No. 20 of 1962 and the Amending Regulations of 1963 made under section 20B of the amended Coconut Products Ordinance.

APPLICATION for a writ of *certiorari*.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena, Q.C.*, *N. E. Weerasooria* (Junior) and *R. D. C. de Silva*, for the petitioner.

H. L. de Silva, with *Ananda de Silva*, *Shiva Pasupathy* and *G. P. S. Silva*, Crown Counsel, for the respondents.

Cur. adv. vult.

March 30, 1969. THE JUDGMENT OF THE COURT—

The petitioner in this case is a Director of a Company carrying on business *inter alia* as exporters of desiccated coconut from Ceylon. Early in March 1968 the Company made applications to the Principal Collector of Customs stating its intention to ship certain quantities of desiccated coconut to Halifax (Canada). These applications were made under s. 58 of the Customs Ordinance for permission to export the goods prior to the presentation of the Bill of Entry for the goods. Customs duty and dues having been duly recovered or secured, the desiccated coconut

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was exported in April and March, 1968. Although, however, the applications and the ship's manifests specified Halifax as the port of destination, the three shipments of desiccated coconut were in fact landed at the port of New York.

On 17th September 1968, the 1st respondent to the present application, an Assistant Collector of Customs, issued a notice to the present petitioner in the following terms :—

" *Shipments of D. C. Nuts*

An Inquiry will be conducted by me in my office commencing at 9.30 a.m. on 23rd and 24th September, 1968 in regard to the following shipments of Desiccated Coconuts effected by your establishment in contravention of Sections 58, 57 and 130 of the Customs Ordinance (Chap. 235), read with the Coconut Products Ordinance (Chap. 160)—

(i) ' Jeppessen Maersk ' sailed on 22.4.68. 742,900 lbs. D. C. Nuts valued at Rs. 713,553.

(ii) ' Johannes Maersk ' sailed 5.4.68. 504,400 lbs. D. C. Nuts valued at Rs. 483,780·48.

(iii) ' Leda Maersk ' sailed 14.3.68. 499,900 lbs. D. C. Nuts valued at Rs. 472,835·75

as persons being concerned in the exportation of the above shipments of Desiccated Coconuts contrary to restriction, in that the above Desiccated Coconuts were shipped to the Port of New York, instead of the Port of Halifax as stated in your application in respect of each consignment. You are requested to be present at this inquiry and show cause, as to why I should not proceed to make order of forfeiture of three times the value of the said Desiccated Coconuts in each case, on each of you, in terms of Section 130 of the Customs Ordinance, Chap. 235. "

Similar notices were also issued to two other Directors of the same Company and to the Office Manager of the Company.

On 25th September 1968, the 1st respondent informed the petitioner that the " application " referred to in the above notice was " the intend-to-ship application " made by the Company under s. 58 of the Customs Ordinance in respect of the shipments specified in the notice.

The inquiry referred to in the notice was ultimately held on 25th and 26th September, at which sworn evidence was recorded of the petitioner and other Directors or employees of the Company, and at which also some documents were produced by the Customs. The 1st respondent

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kept a written record of the evidence. The inquiry was followed by a letter of 30th September 1968 addressed to the petitioner in the following terms :—

" *Shipments of D.C. Nuts*

I have carefully considered the evidence that was led before me at this inquiry, and I hold that Mr. D. L. Jayawardene is guilty of the charges made against him and conveyed to him by my notice No. EXP. 470 of 17.9.68.

I elect in terms of Section 130 of the Customs Ordinance (Cap. 235) to impose a forfeiture of three times the value of the goods in question—

viz : (*a*) ' Jeppessan Maersk ' Rs. 2,140,659·00

(*b*) ' Johannes Maersk ' Rs. 1,451,340·00

(*c*) ' Leda Maersk ' Rs. 1,418,505·00

amounting to a total of Rs. 5,010,504·00 (Rupees Five Million ten thousand five hundred and four). "

Letters were addressed in identical terms to the two other Directors and the Office Manager, subject only to the difference that in the case of Office Manager the amount of the forfeiture was mitigated to Rs. 1,670,168.

We reserve for explanation at a later stage, the references in the notice of 17th September to ss. 57 and 58 of the Customs Ordinance, because they do not appear to be of relevance to the questions we have firstly to decide.

Some explanation is here necessary of the reference in the Collector's notice of 17th September 1968 to the Coconut Products Ordinance, Cap. 160. It is sufficient to state for the present that the position of the Collector has been that the export of desiccated coconut from Ceylon is subject to a licensing scheme established by Regulations made under that Ordinance, that the scheme requires an export licence to authorise the export of desiccated coconut, that the licence actually issued to the Company is one which authorised export only to Halifax (Canada), that the exportation of these consignments to New York was therefore contrary to a restriction imposed by those Regulations, and that the petitioner was a person concerned in such exportation.

If the position of the Controller as just explained be correct, then the exportation of these consignments of desiccated coconut was in contravention of s. 12 of the Customs Ordinance, read with the last paragraph of Schedule B to that Ordinance. The penalty for such a contravention is set out in s. 130 of that Ordinance, which we now proceed to examine.

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The relevant provision of section 130 which has to be considered for present purposes may be stated as follows :—

> " Every person who shall be concerned in exporting any goods the exportation of which is restricted contrary to such restriction shall forfeit either treble the value of the goods, or be liable to a penalty of Rs. 1,000, at the election of the Collector of Customs. "

It is necessary at this stage to point out that sections 33, 129, 132 and 133 of the Customs Ordinance also provide for a similar election by the Collector as between the same two alternative penalties. But in these Sections, the language employed is slightly different from that used in s. 130, and the forfeiture is expressed as :—" shall forfeit treble the value thereof, or the penalty of Rs. 1,000, at the election of the Collector of Customs. " It is clear that this is the language appropriate to express the apparent intention, that is to say, that the offender will forfeit a sum equal to treble the value of the goods *or* the sum of Rs. 1,000, the choice between the two sums being made at the election of the Collector.

It will be seen that this intention was not accurately stated in the language of the section 130. That language is in fact ungrammatical. The use of the words " shall forfeit either " obviously indicates an intention to impose one of two alternative forfeitures ; but that intention is not properly carried out in the phrases which follow. Reference to the English Customs Statutes establishes that the imposition of a forfeiture of one of two alternative sums was adopted into our Law from the English Law, and that in corresponding sections of the English Statutes the language was the same as that employed in our sections 33, 129, 132 and 133. It is therefore clearly necessary to correct the grammar of s. 130 and to assume its intention to be that a person concerned in any of the acts referred to in the section " shall forfeit treble the value of the goods, or the penalty of Rs. 1,000, at the election of the Collector of Customs ". The propriety of this assumption was not questioned by Counsel at the hearing.

In the case of *Palasamy Nadar v. Lanktree* [1] this Court considered the effect of a provision in s. 46 (now s. 44) of the Customs Ordinance that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions *shall be forfeited*, and construed this provision to mean that on the happening of some event " the owner of the goods is automatically and by operation of law divested of his property in the goods as soon as the event occurs ". The Court further held that " no adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture ". The decision in this case followed the construction placed in *De Keyzer v. British Railway Traffic Co.* [2], on the language of s. 202 of the English Customs Consolidation Act of 1876, which states that all conveyances used for the conveyance

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[1] *(1949) 51 N. L. R. 520 at p. 523.* [2] *(1936) 1 K. B. 224.*

of any goods liable to forfeiture under the Customs Acts *shall be forfeited.* The judgments in the English case state that "where certain events have happened the property in question is labelled 'forfeited' under s. 202", and that "as soon as it is ascertained that a conveyance has been used for the conveyance of goods liable to forfeiture, *ipso facto* that conveyance is forfeited".

We can see no sensible distinction between the language in s. 130, and the language of the two sections which were construed in the two decisions to which we have just referred, and much of the argument before us proceeded on the basis that the forfeiture under s. 130 is incurred at the moment a prohibited or restricted exportation takes place. It thus appears that the function, and even the duty, of the Collector under s. 130, is only to make an election as between the two specified amounts of the incurred forfeiture.

Consideration of the matters to which we have thus far referred shows, despite some indications to the contrary in the Collector's notice of 17th September and his letter of 30th September, that the action which the Collector intended to take was to elect "treble the value of the goods exported", and not a sum of one thousand rupees, as being the sum forfeited under s. 130 in the instant case. It is this action, purporting to have been taken under s. 130, which the petitioner seeks to have quashed by means of a Mandate in the nature of a Writ of Certiorari issuing from this Court. Applications for similar Mandates were made to this Court by the two other Directors and the Office Manager of the Company, and the arguments we have heard covered all the four applications.

The first question which arises for our decision is whether a Writ of Certiorari will lie to quash action taken by the Collector of Customs under s. 130 of the Ordinance.

Undoubtedly the Collector cannot claim that the occasion for the exercise of his function or duty of election under s. 130 has arisen, unless, at the least, he has reason for forming an opinion that goods have been exported contrary to one of the statutory prohibitions or restrictions contemplated in the section; but the argument for the petitioner has been that the election cannot lawfully be made unless the Collector has first determined that the facts by reason of which the statutory forfeiture is incurred do actually exist. On this ground it was argued that such a determination is one which affects the rights of the person concerned in the exportation, in that the consequence of the election can be that the person will have to pay the larger of two alternative sums. Having regard to the magnitude of the difference between the two alternative sums which may have to be paid in the instant case, it was further argued that a determination which precedes an election, which can have so serious a consequence, must be reached in a quasi-judicial manner.

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It was also submitted by one Counsel in the course of his argument that the application of s. 130 may well involve two stages of quasi-judicial decision, namely, the stage at which the Collector satisfied himself in regard to the existence of what were described as the jurisdictional facts, and secondly, the stage at which he brings his mind to bear on the question of electing between the alternative statutory forfeitures.

Another similar argument was that, because there are two stages in this process of election and because the election made at the second stage can seriously affect the rights of subjects, the quasi-judicial character attaches to both stages of the consideration which the Collector must give to the matter.

We have had the benefit of full and helpful arguments from both sides upon the question whether a Writ will lie in this case, and Counsel have very properly referred us to numerous decisions, of British, Ceylon and other Courts. But we find after considerations that it will suffice to refer only to some of those decisions which in our opinion help to resolve the problem which we have to decide.

We ask no excuse for citing the celebrated dictum of Atkin L.J. in the case of *R. v. Electricity Commissioner* [1] :—

> " Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs."

This dictum was amplified in the judgment of Lord Hewart, C.J. in *Rex v. Legislative Committee of the Church Assembly* [2] as follows :—

> " The question therefore which we have to ask ourselves in this case is whether it is true to say in this matter, either of the Church Assembly as a whole, or of the Legislative Committee of the Church Assembly, that it is a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially. It is to be observed that in the last sentence of Atkin L.J. the word is not " or ", but " and ". In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects ; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially. The duty to act judicially is an ingredient which, if the test is to be satisfied, must be present. As these writs in the earlier days were issued only to bodies which without any harshness of construction could be called, and naturally would be called Courts, so also today these Writs do not issue except to bodies which act or are under the duty to act in a judicial capacity ."

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[1] *(1924) 1 K. B. 171 at 205.* [2] *(1928) 1 K. B. 411 at 415.*

Acting upon the dicta which we have just cited, what we have to consider is whether, in making an election under s. 130 of the Customs Ordinance, the Collector firstly has to determine a question affecting the rights of subjects, and secondly has to act judicially in making the election.

In the case of the *Electricity Commissioners*, what was claimed to be *ultra vires* was a Scheme purporting to be adopted under Statute by the Commissioners. The Attorney-General relied on provisions in the Statute which required the Scheme to be submitted to a Minister for confirmation and to both Houses of Parliament for approval, and under which the Scheme might be altered or even rejected. In view of these provisions, it was argued that the Scheme as adopted *by the Commissioners* did not affect the rights of subjects, and that the Writ therefore would not lie. Once this objection to the issue of a Writ of Prohibition was overruled, the fact that the provisions of the Scheme did affect the rights of subjects could no longer be disputed. There then remained the question whether the Commissioners had a duty to act judicially. In regard to this question, the judgment of Bankes, L.J. [1] points out that the Act imposed upon the Commissioners very wide and responsible duties and powers in reference to the approval or formulation of schemes and that " at every stage they are required to hold local inquiries for the purpose of giving interested parties the opportunity of being heard ". There is a further statement in the judgment that the Court should hold " that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially and not ministerially ". It appears therefore that in the circumstances of the case it was manifest to the Court that the Commissioners did indeed have a duty to act judicially. For the present we must say that the existence of such a duty is not made manifest in s. 130 and in connected provisions of our Customs Ordinance.

Mr. Gratiaen relied on a dictum of their Lordships of the Privy Council in a recent appeal from Ceylon, *Durayappah v. Fernando* [2], where the matter for consideration was whether a Minister, in making an order for the dissolution of a Municipal Council, had a duty to observe the principle *audi alteram partem*. The dictum in this judgment, which we find of great assistance, reads thus :—

> " In Their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are :—
>
> First what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice.

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[1] *(1924) 1 K. B. 198.* [2] *(1966) 69 N. L. R. 265.*

Secondly in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene.

Thirdly when a right to intervene is proved what sanctions in fact is the latter entitled to impose upon the other.

It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined."

It is convenient at this stage to consider the third of the matters which Their Lordships in *Durayappah's case* regarded as of importance in deciding whether the principle *audi alteram partem* does or does not apply, namely what sanctions the authority is entitled under the Statute to impose upon the complainant of injustice. We pass therefore to discuss the consequences which will or can flow from the Collector's election under s. 130. No doubt (as is apparent from the letter of 30th September 1968 addressed to the petitioner) the Collector will, when he makes an election under s. 130, proceed to make a demand of payment of the forfeiture; but no liability to pay the amount demanded arises merely by reason of the demand. The Collector has no right under the Ordinance, by any executive act to seize or take any sum of money from a person to whom such a demand is addressed. Unless of course a person voluntarily complies with such a demand, there is only one means by which he can be compelled to pay the amount of the demand, and this is by a decree of a competent Court entered in an action instituted by the Attorney-General and referred to in s. 145 of the Ordinance, which provides as follows :—

"All penalties and forfeiture which shall be incurred under this Ordinance shall and may be sued for and recovered in the name of the Attorney-General in the respective courts of Ceylon, in like manner as other revenue cases."

It was common ground at the argument that in such an action the Attorney-General cannot succeed in obtaining a decree unless he is able to establish the relevant cause of action, namely, that a person has been concerned in an exportation falling within the scope of s. 130. Once the existence of the cause of action is established in the action, the further element that he forfeits a sum of money is automatically established by the operation of s. 130 itself. It is thus clear that the fact that the Collector makes an election of one of the two alternative sums which section 130 declares to be forfeit, does not and must not in any way affect the duty of a competent Court to decide whether or not the statutory forfeiture was actually incurred in a particular case. Indeed the judgment in the case of *Palasamy Nadar v. Lanktree* [1] makes it clear that the Collector *makes no adjudication* when he elects to seize goods which s. 46 declares to be forfeited. We are satisfied that similarly there is no adjudication on the facts by the Collector when he makes his election

[1] (1949) 51 N. L. R. 529.

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under s. 130, and that the only determination having the legal effect of an adjudication is that which a Court will make in an action brought by the Attorney-General. There is thus no sanction attached to the Collector's election in the nature of any compulsion to make payment. What is effective in the Collector's election is that, if a Court does hold that the liability to make payment has arisen in law, the amount of the payment (as between the two alternative sums specified in s. 130) has been pre-determined by the Collector's election. We cannot think that this fixation of one of two alternative sums is a *sanction* imposed upon the petitioner in the sense in which that term is used in the judgment in *Durayappah's case*. With respect to this point, Their Lordships observed as follows :—

> " The third matter can be dealt with quite shortly. The sanction which the Minister can impose and indeed, if he is satisfied of the necessary premise, must impose upon the erring Council is as complete as could be imagined ; it involves the dissolution of the Council and therefore the confiscation of all its properties. "

In regard to the first matter enumerated by Their Lordships in *Durayappah's case*, the precise question for us is " what is the nature of the property held by the petitioner ? " He certainly has a right to keep his money, which right can clearly be affected, but only because the Statute, and not the Collector, imposes a forfeiture of money against a person who has in fact contravened s. 130. By reason of that forfeiture, he incurs under the Statute a liability to pay money, which of course places in jeopardy his right to keep his money. In making this observation we are appreciative of the principle that the rights affected need not necessarily be " rights " from a jurisprudential point of view. The election of the Collector under s. 130, however, *does not create a new jeopardy* to the petitioner's right ; the election serves only to fix the extent of the statutory jeopardy to one of two alternative amounts arbitrarily imposed by s. 130. The election will have validity only if a Court holds, in an action instituted under s. 145, that there has been a contravention of s. 130 ; and if a Court does so hold, we much doubt whether a person so found to have contravened the section can properly be regarded as having any " right " to suffer the lesser of the two alternative forfeitures.

It is significant that in s. 130, as well as in a few other sections of the Ordinance, the Legislature compels the Collector to make a choice between what manifestly appear to be two arbitrary alternatives. The sections give no guidance to the Collector as to the considerations which might affect his choice between these two alternatives, and they do not leave it open for him at the stage of election to demand no forfeiture at all or to demand a sum lower than either of the two arbitrary sums specified in these sections. In the absence of any standard prescribed in the Statute by reference to which the Collector might decide to recover a sum which he might consider appropriate in a particular case, it is

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unreasonable to infer that the Legislature had any intention that the Collector should in making this election act otherwise than in his absolute discretion. In *Pritchard's case* [1] Parker J., as he then was, observed that it cannot be too clearly understood that the remedy by way of Certiorari only lies to bring up to this Court and quash *something which is a determination or a decision*. (The italics are ours.) This description of the character of the matter which may be quashed can scarcely be said to apply to an *election* between two arbitrary alternatives, one or other of which must necessarily be chosen under s. 130.

It was submitted for the petitioner that the duty of election imposed on the Collector must necessarily carry with it the duty to have due regard to the extent of the participation of the offender in any of the acts referred to in s. 130, to the question whether his participation was with guilty knowledge of the breach of any relevant law, and also to the question whether his blameworthiness was such as to render more appropriate the one penalty or the other. One practical example of a case which in this submission might deserve special consideration of a quasi-judicial nature would be that of a clerk employed in the petitioner's Company who had merely been concerned upon instructions from his employers in filling up application forms in a misleading manner. It was submitted, of course on the assumption that a clerk who had acted in that manner comes within the scope of s. 130, that the penalty of Rs. 1,000 would be more appropriate and that the Collector, despite the lack of any indication to this effect in the Section, would nevertheless be under a duty to take all the circumstances into consideration and impose the lesser penalty. In our opinion the answer to this submission is twofold ; firstly, that the Legislature has nowhere indicated the principle on which the Collector is to be guided in making his election ; secondly, that the Legislature has not expressly contemplated the process of a quasi-judicial determination of this matter by the Collector. Moreover the possibility that the lesser penalty may appear to a Court to be the more appropriate in a particular case is not in our opinion a consideration upon which to base an inference that the Legislature intended the Collector to act quasi-judicially. While it is true that one can contemplate cases in which the milder choice may appear more appropriate, one can also contemplate cases in which either choice which the Collector may make would be harsh in the particular circumstances. If for instance a messenger of the petitioner's Company who delivered to the Customs authorities documents effective to promote the exportation of these shipments of desiccated coconut is assumed to fall within the scope of s. 130, even the lesser penalty of Rs. 1,000 appears to us to be somewhat fantastic. In any event if the election actually made by a Collector under s. 130, whether of the graver or less grave forfeiture specified in s. 130, is excessive, the matter does not end there. The Ordinance provides in s. 163 for mitigation by the Collector of any forfeiture incurred under the Ordinance and for appeals to the Minister. We have no doubt that it was the intention of the Legislature that the provisions of s. 163 will be

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[1] *(1953) 1 W. L. R. 1158.*

utilized with due regard to particular circumstances and to any mitigating factors, and to soften the strictness of the arbitrary forfeitures imposed by various Sections of the Ordinance. Sections 131 and 142, for instance, impose automatic forfeitures which might be harsh and unreasonable in the circumstances of a particular case. In enacting s. 163, the Legislature took account of the fact that the penalties which it itself arbitrarily imposed, or which it compelled a Collector to select, may be arbitrary and should as a matter of policy be mitigated in appropriate circumstances.

Some stress was laid during the argument on cases in which it has been held that the need for confirmation or the possibility of alteration or abandonment of some determination does not have the effect that there is no duty to act judicially in reaching the stage of determination. Two such cases were those of *Carmichael* [1] and *Boycott* [2] in which the ground for the issue of a Writ was that the certifying officer in those cases made adjudications which virtually decided facts upon which another authority could make an order affecting the rights of a subject. This view of those cases was expressed in the case of *R. v. Manchester Legal Aid Committee* [3].

> "The certifying surgeon in the former case and the Board of Education certifying medical officer in the latter case were concerned solely with the facts of the particular case, facts presented to them *ex parte*, and it was not for them to take into consideration any questions of policy or expediency."

It suffices to point out that there is no indication in s. 130 of the Customs Ordinance that the Collector need consider any matters *other than matters of policy or expediency.*

With reference to the second matter specified in the dictum in *Durayappah's case*, Their Lordships directed attention to the statutory grounds upon which the Minister was empowered to dissolve a Municipal Council. With reference to two of these specified grounds, it appeared manifest to them that a Council must be entitled as a matter of the most elementary justice to be heard before the Minister decided to dissolve a Council on such grounds. That being so, and looking at the Section as a whole, it was not possible to single out for different treatment the third ground of dissolution, which was incompetence on the part of a Council. Their Lordships thought that if the sole ground for dissolution had been only the vague ground of incompetence, there might be some force in the argument that the principle *audi alteram partem* is not applicable. In the instant case, the Legislature has not specified even a vague ground upon which the election of the Collector is to be based. Thus the circumstances or occasions on which the Collector intervenes do not appear to be such as require that a party be heard before an election unfavourable to him is made.

[1] *(1928) 1 K. B. 29.* [2] *(1939) 2 A. E. R. 626.*
[3] *(1952) 1 A. E. R. 480 at 490.*

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Our consideration, in the context of s. 130, of the matters mentioned in the dictum in *Durayappah's case* thus leads us to these conclusions : at the highest the Collector's election may, in a provisional manner and to a limited extent, affect a "right" of the petitioner ; but the circumstances in which the election is made are not such as to require the Collector to hear the other side ; and no sanction in the proper sense can either be imposed by the Collector upon a person liable to a forfeiture or can else attach under the Ordinance to render the election effective. We hold therefore that the principle *audi alteram partem* does not apply in the case of the making of the election authorised or required by s. 130.

Mr. Gratiaen cited a decision of the Supreme Court of India in *East India Commercial Co. Ltd. v. Collector of Customs* [1], in which it was held that certain proceedings taken under the Indian Sea Customs Act are quasi-judicial, and that a Writ of Prohibition will lie in respect of them. It is not necessary to discuss the circumstances of this particular case because there is a decisive distinction between the structure of the Indian Act and that of our own. Section 167 of the Indian Act, which was construed in the case mentioned, uses the language that goods "*shall be liable* to confiscation", and that a person "*shall be liable* to a penalty". Section 188 provides that "where goods are under any other provision so liable to confiscation, or a person so liable to a penalty, an appropriate Customs officer may *adjudge* the confiscation or penalty", and Section 188 provides for an appeal from such an adjudication. Further there is provision for remission of such penalties or confiscations and for the review by the Central Government of any decision or order passed under the Act. What is most important is s. 193 which provides that an adjudged penalty may be levied by the sale of goods of the offender, and that where it cannot be realised by such a levy, a Magistrate will, upon notification to him of the penalty, proceed to enforce payment thereof in like manner as if it were a fine imposed by the Magistrate.

It will be seen therefore that when a penalty is adjudged by a Customs Officer under s. 182 of the Indian Act, and it is not set aside or varied in a subsequent proceeding, a Customs Officer has power to recover the penalty and a Magistrate acting as a Court of execution has a duty to levy that penalty. This is a procedure significantly different from that contemplated in our Ordinance : unless a competent Court determines that a forfeiture was indeed incurred under our s. 130, the Collector's election is ineffective. The adjudication of an Indian Customs Officer has effect in its own virtue and constitutes a determination as against an alleged offender that he is in fact an offender ; whereas in our Ordinance such an adjudication is committed solely to a Court, which will manifestly act judicially and independently of any opinion of the Collector upon which his election of a penalty may have been based.

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[1] *(1962) A. I. R. S. C. 1893.*

Relying upon the provisions in ss. 7, 8 and 9 of the Customs Ordinance as to the power of Customs Officers to administer oaths, to hold inquiries, to examine witnesses on oath, and to call for and inspect documents, and as to the punishment of persons giving false evidence at such inquiries, it was argued for the petitioner that an inference properly arises from these provisions that an election under s. 130 must be made in a quasi-judicial manner. Having regard however to the wide scope of various provisions of the Customs Ordinance, there appear to be many purposes in connection with which inquiries by Customs Officers may be necessary, such for instance as the purpose of determining the appropriate scale of duties applicable to goods, imported or exported ; and it was not argued that in regard to inquiries held for such purposes a duty arises for Customs Officers to act judicially. There are many Statutes which require that returns, statements and declarations furnished to a statutory authority must be made or verified under oath, but this circumstance by itself does not justify an inference that in the consideration of such returns, statements or declarations for the purpose of reaching some decision thereon, the statutory authority has a duty to act judicially.

In connection with the argument just considered, Counsel referred to the fact that in the instant case the Collector, by giving the notice of 17th September 1968, appears himself to have conceded that it was his duty to act judicially. The procedure which the Collector purported to follow was apparently the consequence of two decisions of this Court to which we will now refer.

In *Tennekoon v. Principal Collector of Customs* [1], the version of the facts presented by the Customs was that the petitioner in the case had been concerned in unshipping of two bars of gold unlawfully imported, or had knowingly concealed them. On this ground the petitioner was called upon to pay a penalty of Rs. 10,000 under s. 127 of the Customs Ordinance, which is now s. 129. This section provides just as does s. 130 for the automatic forfeiture of either treble the value of the goods, or the penalty of Rs. 1,000, at the election of the Collector. Weerasooriya J. referred to the Collector's order as being one " calling upon the petitioner to pay a penalty of Rs. 10,000 ". Relying principally upon dicta in the case of *R. v. Manchester Legal Aid Committee*, the learned Judge held that the Collector was under a duty to act judicially. Having regard to a concession by the Crown that no opportunity was given to the petitioner to meet the case against him, a Writ of Certiorari was issued to 'quash' the Collector's order. This judgment was followed in the case of *Omer v. Caspersz* [2], without any fresh consideration of the question whether Certiorari would lie. There was in this latter judgment criticism of the Customs Officers who had dealt with the matter under review to the effect that, because of the earlier decision in *Tennekoon's case*, they should have known that it was their duty to conduct a proper inquiry before imposing a forfeiture. It appears that this criticism has led to the form of procedure (notice and inquiry) which the Collector adopted

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[1] *(1959) 61 N. L. R. 232.* [2] *(1963) 65 N. L. R. 494.*

in the instant case. Despite our opinion that the Collector has no duty to act judicially in electing between the two alternative forfeitures, we would encourage rather than discountenance the procedure of a notice and inquiry.

In considering the character of the forfeiture which is incurred under s. 130 and the nature of the function performed by the Collector under this section, it is useful to compare the character of other forfeitures for which the Ordinance provides. Section 44 which was considered in the case of *Palasamy Nadar v. Lanktree* [1] provides that goods exported contrary to the restrictions in Schedule B " shall be forfeited and shall be destroyed or disposed of as the Principal Collector of Customs may direct." Section 43 has identical provision for the case of goods imported contrary to certain prohibitions or restrictions. Sections 47, 50, 65 and 75, for example, also provide for the forfeiture of goods in certain events. As was held in the case just mentioned, the forfeiture is " automatic " in all these cases, and the character of the forfeiture was thus explained in that case (*idem* at p. 523) :—

> " A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 (now s. 125) of the Ordinance provides the machinery for this purpose. It empowers any officer of the Customs to seize any goods which are " declared to be forfeited " by the Ordinance. When that is done, the goods " shall be deemed and taken to be condemned " and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner " shall, within one month from the date of seizure..... give notice in writing to the Collector..... that he intends to enter a claim to the..... goods..... and shall further give security to prosecute such claim before the Court having jurisdiction to entertain the same." (Section 146, now s. 154.) If notice is given and security tendered within the prescribed time, the Collector is required to deliver up the goods to the claimant who is given a further thirty days within which to prosecute his claim in the appropriate Court. Unless notice and security are so given, and the action filed within the prescribed period, the owner no longer retains a right to claim property in the goods and is also precluded from challenging the validity of the seizure and alleged forfeiture in judicial proceedings. In that event he may only hope for but he may not demand as of right from the appropriate authority a merciful mitigation of the full rigours of the forfeiture. (Sections 155, 156 and 157—now Sections 163, 164 and 165.) "

We agree entirely with this explanation. It follows that when goods are declared by the Ordinance to be forfeited, and are seized as provided in s. 125, the property in the goods will be lost to their owner unless the validity of the seizure is challenged by an action instituted in a competent Court within a strictly limited period.

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[1] *(1949) 51 N. L. R. 520.*

Counsel did not attempt to argue before us that seizures under s. 125 need be preceded by any quasi-judicial proceedings ; and the explanation which we have just cited confirms our own opinion that no such proceeding need be held, for instance, when Customs Officers seize goods because of an opinion that they are forfeit under s. 43 or s. 44 or any other of the Sections we have mentioned. In other words, such a seizure is purely an executive act, which will render effective in practice the statutory forfeiture of goods, unless of course an action is brought by their owner as provided in s. 154.

It readily appears that the restrictions contemplated in ss. 44 and 130 are identical or substantially similar. The breach of such an export restriction entails (if the goods are within reach) a physicial forfeiture of the goods under s. 44, and entails also a monetary forfeiture under s. 130 against persons concerned in the exportation. There is a corresponding relationship between ss. 43 and 129 in the case of imports. The physical seizure of goods under s. 125, which conclusively deprives their owner of his property unless he is vigilant to prosecute his claim to them by action in the Court, creates a real and present peril. Far slighter is the peril, if any, created by the mere election and demand of the monetary forfeiture incurred under s. 130, which may or may not be sued for by the Attorney-General and will be recoverable only if a Court determines that it was indeed incurred. If then a quasi-judicial proceeding need not precede so grave an action as a seizure of goods, far less is there the need of such a proceeding before an election is made under s. 130.

In the case of *Omer v. Caspersz*, customs officers had taken three different actions, because of an opinion that certain goods had been imported contrary to restrictions :—

(1) The goods were seized in March 1962 and the importer was later informed that the goods were forfeited. This action was referable to s. 43 read with Section 125.

(2) In October 1962 the Principal Collector informed the importer that an additional forfeiture of Rs. 149,850 (treble the value of the goods) had been " imposed " on him under s. 129, and he was called upon to pay this sum.

(3) In November 1962 the Principal Collector informed the importer that under s. 144 steps were to be taken to stop all his imports or exports until the additional forfeiture was paid.

The application made by the importer to this Court was for a Writ of Mandamus to compel the Collector to pass entries for subsequent imports by the importer, and this Writ was issued by the Court.

The Crown at the present hearing has not questioned the correctness of the issue of the Writ of Mandamus in that case, although Crown Counsel has argued that the Writ should have been issued on a ground

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different from that set out in the judgment. He conceded that s. 144 applies only if and after a forfeiture is adjudged due by a Court in an action under S. 145.

In addition however, the learned Judge in that case either did, or thought that he could, issue a Writ of Certiorari to quash the order of November 1962 in so far as it related to the additional forfeiture referred to at (2) above ; and the ground for the issue of the Writ or the opinion that it could issue, was that the Collector had a duty to act quasi-judicially before " imposing a forfeiture ".

The circumstances of that case reveal the inconsistency which can arise from the opinion which the learned Judge in that case obviously held.

The seizure and forfeiture of the goods alleged to have been unlawfully imported in March 1962 was referable to s. 43, under which unlawfully imported goods are automatically forfeited. In fact the importer had actually resorted to the remedy against a seizure afforded by s. 154, for he had instituted an action in the District Court to challenge the validity of the seizure. The Crown had in the same action made a claim in reconvention for the forfeiture of Rs. 149,850.

As we have already pointed out above, the physical forfeiture and the monetary forfeiture both automatically applied on the assumption that the importation in March 1962 had been unlawful. In the action filed by the importer, the District Judge would have had to decide whether in fact the importation was unlawful ; and if he so decided, then the consequences would be that both the physical forfeiture and the monetary forfeiture were legally effective ; but the quashing by this Court of the monetary forfeiture had the effect of nullifying the physical forfeiture, and of thus preventing the District Court from upholding the counter claim by the Crown which in law should have been perfectly valid.

It seems to us that the circumstances of the case of *Omer v. Caspersz* illustrate the error of admitting a distinction between s. 43 and s. 129, based on an opinion that a quasi-judicial proceeding is required in the latter case although such a proceeding is not required in the former.

The present Bench is not bound by the two decisions, each of a single Judge, to which we have just referred. The decision in *Tennekoon's case* appears to have been reached without consideration of the Legislative Scheme in the Customs Ordinance providing for the incidence and recovery of forfeitures, and without the advantage of applying, to the circumstances and effect of the Collector's election, tests of the nature which were subsequently laid down by the Privy Council in *Durayappah's case*. In view of the conclusion which we now reach, the decision in *Tennekoon's case* must be overruled ; so also the decision in *Omer v. Caspersz*, in so far as it is inconsistent with the present judgment.

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For the reasons now stated we uphold the objection to the issue of the Writ which was taken by the youthful Counsel who led for the Crown, and we express our appreciation of the assistance which we have derived from his able and lucid arguments. We hold that the Writ of Certiorari does not lie to quash an election made by the Collector under s. 130 of the Ordinance, and we must accordingly dismiss this application.

At the conclusion of the arguments pertaining to the question which we have just decided, Mr. Gratiaen, referring to certain observations made by the Privy Council in the case of *Kariapper v. Wijesinghe* [1], invited us to express our views on the merits of the petitioner's application, even if we were to decide that the Writ would not lie in this case. Counsel appearing for the petitioners in the other applications endorsed this invitation. Learned Crown Counsel did the same; but we must note that at a later stage of the hearing he did express the fear that the position of the Crown might be prejudiced if, while dismissing this application on the ground upon which we have now decided to do so, we were to express *obiter* any opinion on the merits of the petitioner's case. His fear was that if the proceedings in the present applications are not at this stage taken before the Privy Council by way of an appeal against our judgment, a District Judge may in any further action taken by the Attorney-General under s. 145 of the Ordinance, quite naturally be influenced by any opinion we express adverse to the Crown's case. Even a Bench of this Court hearing an appeal in such an action may, Crown Counsel thought, at the least be embarrassed by opinions expressed by the present Bench. We shall bear in mind the considerations which Crown Counsel has urged, especially as opinions which we may now express may also place at a disadvantage the petitioners in these four applications. At the same time we must record Mr. Gratiaen's statement from the Bar that the legal advisers of the petitioners in these applications would be anxious to recommend that an appeal be taken from a decision of this Bench holding that Certiorari does not lie in this case. We invited Counsel who led for the petitioner in Application No. 535 of 1968 to make such statements from the Bar as he might wish in relation to this matter, and we understood that his silence meant acquiescence in the statement made by Mr. Gratiaen.

On the assumption that the Writ will lie in an appropriate case to quash the election of the Collector of Customs under s. 130 of the Ordinance, Mr. Gratiaen argued that even if the petitioner had been " concerned in the exportation " of shipments of desiccated coconut to New York, instead of to Halifax, such exportation was not within the restrictions contemplated in s. 130 read with Schedule B to the Customs Ordinance, and that accordingly there did not exist the jurisdictional facts upon which the Collector could lawfully elect the forfeiture of treble the value of the consignments. This argument calls for consideration of the history of the control of the export of desiccated coconut, which would in Mr. Gratiaen's submission establish that there have been only ineffective attempts to regulate and control such exports.

[1] *(1967) 70 N. L. R. 49.*

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It is perfectly correct that until 4th June, 1962 Parliament had not directly imposed any control of such exportation. In April 1961 a set of regulations, which we will refer to as the " 1961 Regulations ", were published in the *Gazette* after approval by the Senate and the House of Representatives. These regulations purported to be made under the powers conferred by s. 30 of the Coconut Products Ordinance (Cap. 160). The scheme of control embodied in these regulations can be briefly summarised thus :

(*a*) persons engaged in the manufacture or export of desiccated coconut were required to register themselves with the Manager of the Ceylon Coconut Board as " manufacturers " or " shippers ", as the case may be ;

(*b*) the right to registration was made dependent upon the availability to an applicant of a factory at which the process of manufacture is in accordance with certain specified requirements, where registration as a manufacturer is sought, or the availability of a place of business suitable for the storage and shipment of desiccated coconut, in the case of a person seeking registration as a shipper ;

(*c*) a registered shipper would be entitled free of charge to an export permit, but such a shipper was prohibited from exporting any desiccated coconut not manufactured by a registered manufacturer ;

(*d*) certain standards of quality as to the manufacture of desiccated coconut were prescribed and comprehensive requirements were enforced as to the factories and processing by which desiccated coconut may be manufactured.

Counsel for the Crown did not argue that the 1961 Regulations were *intra vires* the powers conferred by s. 30 of the Coconut Products Ordinance. Although desiccated coconut is a " coconut product " as defined in s. 31, it is fairly clear that s. 30 did not enable the Minister to make Regulations for the control of the *export* of desiccated coconut. In the case of copra and coconut oil, which also are " coconut products ", ss. 18 and 20 respectively did enable the Executive to introduce a scheme of control for exportation whether by licence or by permit ; but there was no corresponding provision for the case of desiccated coconut. This apparent deficiency in the Ordinance was provided for in the Amending Act, No. 20 of 1962, which inserted in the principal Ordinance the following new section :—

" 20 A. On and after such date as may be fixed in that behalf by the Minister by notification published in the *Gazette*, no person shall export any desiccated coconut from Ceylon except under the authority of a desiccated coconut general export licence or desiccated coconut special export licence issued by the Board. "

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At the same time a new section 20B was also so inserted which authorised Regulations to be made for—

" (*a*) the regulation, inspection, supervision, and control of the manufacture, packing, transport, storing *and export* of desiccated coconut ;

(*b*) prescribing standards of quality to which all desiccated coconut manufactured shall confirm ;

(*c*) ensuring that desiccated coconut exported from Ceylon is free from impurities or foreign matter, and is of good quality ;

(*e*) the issue, renewal, suspension and cancellation of desiccated coconut general export licences and desiccated coconut special export licences, and the terms and conditions subject to which such general or special licences shall be issued, and the manner of disposal of desiccated coconut in respect of which such licences are refused. "

In addition, power was taken for regulations to be made in regard to numerous matters affecting the manufacture of desiccated coconut, and the registration of manufactures and shippers. Sub-section (2) of the new section 20B further provided as follows :—

" (2) Section 20B, inserted in the principal enactment by sub-section (1) of this section, shall be deemed to have come into force on the date of commencement of the principal enactment and accordingly, the Desiccated Coconut (Manufacture and Export) Regulations, 1961, published in Gazette No. 12,400 of May 5, 1961, shall be deemed to have been duly made under the said section 20B, and to have been valid and effectual for all the purposes for which they were made. "

As matters have turned out, it appears that Parliament's intention to control the export of desiccated coconut by means of a licensing system, has to this day not been directly implemented. The simple mode of implementation contemplated in the new section 20A was that the Minister should fix a date as envisaged in that section, having previously obtained the approval of Parliament for regulations made under the new s. 20B, embodying details of the procedure for the issue, renewal, suspension and cancellation of licences to exporters of desiccated coconut. Instead of taking the obvious course of rendering the new section 20A effective by fixing a date, the Minister in April 1963 was content only to obtain the approval of Parliament for a set of Regulations which amended the 1961 Regulations. The principal amendment for present purposes was the introduction of a new Regulation 7, which includes the following provisions :—

" 7. (1) No desiccated coconut shall be exported from the Island except on a general export licence issued in that behalf by the Manager on a payment of a fee at the rate of 15 cents per hundredweight or part thereof.

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(2) Every application for a Desiccated Coconut General Export Licence shall be substantially in such Form as may be approved for the purpose by the Board, and shall be accompanied by a declaration that the statements contained therein are true and accurate.

(3) If the Manager is satisfied that the particulars given in the application are correct and if the bacteriological reports relating to the production of the mill on or about the date or dates of manufacture have consistently been satisfactory up to the date of application in that they do not indicate contamination with pathogenic organisms or other organisms to a harmful extent, the Manager shall issue a Desiccated Coconut General Export Licence to the applicant."

It is unhelpful to speculate about the reason why the Minister did not in 1963 think fit to fix a date as envisaged in new section 20A ; but his failure so to do has given rise to doubts and difficulties which might well have been avoided. The petitioner relies on that failure for the submission that there is not in force any lawful provision which restricts the exportation of desiccated coconut. The submission in brief has been that the only lawful provision which can require an export licence as a condition precedent to the export of desiccated coconut is section 20A but that this requirement in s. 20A is not effective in the absence of the notification referred to therein. The new regulation 7 purports to impose such a requirement, but it is submitted that the regulation is *ultra vires*.

The answer of Crown Counsel has been that the power given by paragraph (*a*) of s. 20B, to make regulations for the regulation, supervision and control ..... of *the export* of desiccated coconut, when read with s.17(1) (*d*) of the Interpretation Ordinance, includes the power to provide for an export licensing system. What is involved in the answer of Crown Counsel is that paragraph (*a*) of s. 20B conferred on the Minister, independently of s. 20A and as an alternative to enforcing its provisions, power to make regulations for an export licensing system.

We agree of course that had paragraph (*a*) of s. 20B been the only provision of the Ordinance relevant to this question, the general provision in s. 17 of the Interpretation Ordinance would have the effect of conferring the independent and general power contended for by Crown Counsel. But s. 17 of the Interpretation Ordinance applies in the case of an enactment *unless the contrary intention appears ;* and we must therefore consider whether a contrary intention does appear. The Legislature undoubtedly intended that from a date to be fixed by the Minister, the requirement of export licences which Parliament had in prospect would become operative. The powers to make regulations which will make that requirement workable and effective and which will be ancillary to that requirement were expressly conferred by Parliament in paragraph (*b*), (*c*) and (*e*) of s. 20B ; and the descriptions "general export licence" and "special export licence" which are used in s. 20A recur in paragraph (*e*) of s. 20B.

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Moreover, the Legislature specified the Board as the authority competent to grant the licences, and we are unable to agree that the apparent general power which paragraph (*a*) of s. 20B confers would enable the Minister to commit the function of granting licences to some other authority chosen by the Minister. We note also that, if Crown Counsel's argument be correct, s. 20A and paragraph (*e*) of s. 20B become mere surplusage if the Minister elects to exercise his alleged alternative powers. Our conclusion is therefore that Parliament did not intend to confer such alternative powers. (An explanation for the subject of " export " being mentioned in paragraph (*a*) of s. 20B can be found in sub-section (2) of s. 20B. That sub-section validated the 1961 Regulations, which *inter alia* did control export ; and since " cover " was being given to those Regulations under the powers in s. 20B (2), it was perhaps thought expedient that those powers should (in paragraph (*a*)) include the regulation .... of export.)

The conclusion we have stated above is not however decisive in favour of the petitioner. We have to take note of the fact that the Regulations which the Minister did make in 1963, and which introduced the new Regulation 7, had the approval of both Houses of Parliament. In so far therefore as the Amending Regulations purport to require a General Export Licence as a condition for the exportation of desiccated coconut, we cannot shut our eyes to the fact of Parliament's approval of this Regulations and we are compelled to the conclusion that Parliament did thus approve what was in substance a proposal of the Minister to bring into effect the intention of Parliament evidenced in s. 20A that desiccated coconut may only be exported under the authority of a licence. We hold in other words that Parliament's approval of the Regulations relieved the Minister of the duty to fix a date under s. 20A, and that the coming into force of the Regulations as so approved was tantamount to the requisite fixation of the date by the Minister.

The doubt to which we have so far dealt is not however the only doubt which has arisen because of the Minister's failure to act in the manner precisely contemplated by Parliament. We have thus far held that the approval and publication of the Amending Regulations of 1963 was tantamount to the fixation of the date from which s. 20A was effective. But s. 20A contemplated Export Licences to be issued by the Ceylon Coconut Board, whereas Regulation 7 of the Amending Regulations provides for licences to be issued by the Manager of the Board. Here again, we are quite unable to understand why the Minister and the Draftsman of the Regulations apparently failed to read s. 20A and to frame the Regulations so as to accord with that section. Nevertheless we think that the defect in Regulation 7, that it committed to the Manager, and not to the Board, the function of issuing export licences is not so fundamental as to render the Regulation *ultra vires*. The Manager is a subordinate officer appointed by the Coconut Board, and no doubt acts under the Board's supervision. Moreover, under paragraph (8)

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of Regulation 7 the refusal by the Manager to grant an export licence is subject to an appeal to the Board, which may then allow the licence. The Regulation thus complies in substance with the intention of s. 20A that licences be issued by the Board.

We pass now to material relevant for the consideration of Mr. Gratiaen's second submission upon the question whether the exportation in this case was contrary to a valid legal restriction contemplated in schedule B to the Customs Ordinance. Regulation 7 (2) of the 1961 Regulations as amended in 1963 provides that an application for an export licence shall be in a form approved by the Board, and it has been assumed on all sides that the form upon which the petitioner made this application for a licence was one so approved by the Board. This form required the petitioner's Company to specify the port of discharge and the final destination of the consignments in respect of which the Company sought export licences and the company specified respectively " Halifax " and " Canada ". Similarly, the form of the licences issued to the Company specified " Halifax " as the port of discharge.

From certain averments in an affidavit of the 1st respondent and from the contents of copies of certain notices which have been produced, it would appear that the Coconut Board had decided and notified to shippers that shipments of desiccated coconut *to the United States* would be authorised by licence only if officers of the Board had first exercised certain special precautions in the matter of the supervision of the manufacture and the inspection and testing of desiccated coconut intended for export to the United States. In order that these special precautions may be taken, it was important that the Manager should have notice in advance of a shipper's ntention to export desiccated coconut to the United States. Two Circulars to Shippers, dated 29th November, 1963, and 21st July, 1966, accordingly requested shippers to notify the Board immediately upon their entering into contracts with American buyers, and to furnish particulars of the mill from which desiccated coconut would be purchased for shipment under such contracts. In the instant case, the Company did not furnish any such notification or particulars to the Board although the petitioner does not deny that his Company had received the two notices to which we have referred. The position for the Crown, has been that the petitioner was aware that the exportation of these three consignments to New York would not have been authorised by export licence if the Company's applications of March 1968 had specified the United States, and not Canada, as the final destination of the sh pments.

One point in Mr. Gratiaen's second submission is that the licences issued to the Company, while specifying Halifax as the port of destination, did not in terms state, either that they authorised exportation only to that port or that the shipments must not be exported to any port in the United States. We should add that there is nothing in the Regulations which might indicate to a shipper that the specification of a destination,

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whether in a shipper's application or in the Manager's licence, is restrictive in the sense that exportation to any other destination would constitute a breach of a fundamental condition of the licence. We were referred in this connection to paragraph (*o*) of s. 30 (2) of the Ordinance which gave power to maintain statistics relating to the coconut industry; the specification of the destination of shipments, it was contended, may have been required merely for statistical purposes, and not for the purpose of controlling the destination of exports. It was further urged that the specification of a destination in an export licence is no more restrictive than is the specification of the name of the vessel in which a shipment is to be made; learned Crown Counsel did not argue that the specification of the vessel was intended to be restrictive.

We understand that the Board's decision to exercise special precautions and control in relation to the export of desiccated coconut to the United States was one of much importance for the maintenance of the reputation in that country of Ceylon's product and for the promotion of our exports to that country. It is surprising therefore that neither the Regulations nor the Forms employed were altered in order to give clear effect to that decision, and to avoid the possibility of objections that export to the United States was not in contravention of the Board's licences. Nevertheless, but with some hesitation, we think that in all the circumstances these objections must be overruled. The Company was aware of the contents of the Board's circulars and of the intention to prevent exports to the United States of desiccated coconut, in respect of which the special precautions therein mentioned had not been taken. The Company was thus aware that, had the United States been specified in its applications as the final destination, the licences either would not have been granted or else would have been granted only after a special investigation as to the source and quality of the proposed shipments. In these circumstances, when the Company specified Canada as the final destination, it represented to the Board that the shipments were not destined for the United States; and the Company was further aware that the Board's licence was not intended to authorise exportation to a destination in the United States. The Company cannot rely on the lack of clarity in the four licences in order to disclaim knowledge of the fact that the licences did not authorise exportation to the United States. We hold therefore that the exportation to that country was in contravention of the terms of the licence. We should add that we were not invited to consider whether or not the petitioner himself had knowledge of the matters of which we hold the Company to have been aware.

For the reasons we have stated, we must now assume that the licences issued in this case did purport to restrict or prohibit exportation of the three consignments to the United States. This means in effect that we have to read the entry in the licences of the destination as being " Halifax, and not any destination in the United States ". The further question which now arises is whether the Manager had power in law to make such an entry, or in any other manner to prevent the exportation of these

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shipments to the United States. The question, framed somewhat differently, is : if the Company had in its three applications specified the United States as the final destination, did the Manager have power to refuse the licences solely on the ground that there had not been compliance with the requirements set out in the Board's circulars ?

Upon this question, it was submitted for the Crown that Parliament's intention in enacting provisions for a scheme of licensing must be construed in the light of present-day economic conditions and of the need to regulate trading with any country in particular products by reference to the special requirements of the country of importation. For example, it was suggested, the authorisation of exports from Ceylon to particular countries only may be desirable in order to redress an adverse balance of our trade with those countries, or because the exports might fetch higher prices in those countries than in others ; again, as is the case with rubber produced in Ceylon much of which is the subject of a " barter " agreement, it may be desirable to " channel " Ceylon exports to those countries which supply some of our essential requirements. As to the particular restriction in the present case, we have no doubt that the Coconut Board decided to take special precautions before authorising exports of desiccated coconut to the United States, for the very good reason that the Health authorities of that country insist on high standards of quality and purity.

Crown Counsel argued that the provisions of S. 20A and of S. 20B (in particular paragraphs (*a*) and (*e*)) are wide enough to authorise the Board or its Manager to impose what was described as a system of " destination control ". He submitted that the word " export " carries with it the connotation of " sending out to another country " ; this submission is undoubtedly correct, being borne out by the fact that some sections of the Customs Ordinance distinguish between " exporting " and " taking out " of goods. Relying on the considerations mentioned in the preceding paragraph of this judgment, Crown Counsel further submitted that s. 20A of the Ordinance, and/or paragraph (*a*) of s. 20B, contemplate that it is not only exportation from Ceylon generally, but also exportation to any particular country, which may be regulated by a licensing scheme.

It was urged that the purpose of the Board, in deciding that special precautions must be taken in the case of desiccated coconut intended for shipment to the United States, was not to impose a higher standard of quality or purity in such a case, but only to make investigations and inspections which should eliminate as completely as possible the risk that such shipments do not attain the prescribed standards. In this view if the special precautions thus taken reveal deficiencies in standard or quality, then the Board would refuse a licence for exportation, not only

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to the United States, but to any country whatsoever. But this view of the matter is not readily reconcilable with a relevant paragraph in the Board's Circular of 21st July 1966 :—

> " The Board's inspectors will then pay special attention to the manufacture of the material destined for America, and will carry out bag by bag sampling. If the material is likely to satisfy American requirements, licences for shipment to America will be issued. Licences will not be granted in respect of material that does not reach the required standard."

The only explicit provisions in the regulations which refer to the issue of export licences are found in regulation 7. Paragraph (3) of that regulation refers to certain " bacteriological reports relating to the production of the mill ". Having regard to the form provided by the Board for the making of applications for export licences, this reference is to the mill at which is manufactured the desiccated coconut which an applicant intends to export. If the reports relating to the production at that mill have consistently been satisfactory, paragraph (3) requires that the Manager " shall issue " the export licence. This paragraph by implication empowers the Manager to refuse a licence if the relevant bacteriological reports are not satisfactory. Thereafter paragraph (9) also empowers the Manager to refuse a licence if the packages intended for export do not bear labels issued by him. It is not the position of the Crown that the company's applications could have been refused on either of these grounds, or that the Manager was deceived into issuing the licences to the Company despite the existence of one or other of these grounds for refusal.

Regulation 11 prescribes standards of quality for the manufacture of desiccated coconut, and regulations 14, 17 and 19 contain elaborate provisions regarding the packing of desiccated coconut for export, the conditions with which a shipper's store and packing room must conform, and the inspection of such store and packing rooms by the Board's officers. Despite the absence of any link between Regulation 7 and these other regulations, it may have been open to the Crown to argue that these other regulations qualify the apparently peremptory provision in regulation 7 (3), which entitles an applicant to an export licence if the condition specified in that regulation is satisfied. But such an argument was not presented by the Crown in this case, because there is no averment that there was any breach of any of these regulations.

Our consideration of the relevant regulations shows that there is no provision in the regulations, which requires a shipper to give notice to the Board at the stage when he enters into a contract with any foreign buyer or with a buyer in any particular foreign country, or which empowers the Manager to refuse a licence for export to any particular country on the ground that special precautions could not be taken to supervise the manufacture of the product intended to be exported.

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It thus appears that the Manager's alleged power to control the destination of a shipment of desiccated coconut exists, if at all, only by implication; namely that any statutory requirement of a licence to export goods implies that the authority issuing the licence has power to impose a restriction as to the countries to which they may be exported. In considering whether such a power may be implied, we have to bear in mind the following observations of Lord Halsbury L.C. in *Rossi v. Edinburgh Corporation* [1]:—

> "What is sought to be done, whether by by-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the Legislature. It is a restraint of a common right which all His Majesty's subjects have—the right to open their shops and to sell what they please subject to legislative restriction—and, if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated."

We have unfortunately not been able to reach unanimity upon the question whether or not the Manager does have the implied or inherent power which learned Crown Counsel claimed that he has. That being so, we do not consider it appropriate, in the circumstances of this case, to express by way of an *obiter* the opinion of the majority of us on this question. We shall only set out therefore the substance of the opposing arguments.

The position of the Crown was that it is implicit in any system of licensing of exports that goods are not to be sent out of the country to any other country except upon the authority of a licence authorising the sending of the goods to that other country. The fact that export licences are and may be issued which are silent as to destination, in this view really creates no difficulty. A licence may expressly or impliedly grant wide authority to export to any part of the world, and where a licence is silent as to destination, it implied y gives authority to do so. In the ordinary case, a licence would give authority for the export to a particular country or place. In such a case, the authority to export to that particular country or place is the pith and substance of the licence and is not a condition or restriction attached to it.

If the Coconut Board had reason to think that it was in the interests of the industry that more stringent steps than were ordinarily taken should be taken to ensure that desiccated coconut to be exported to American ports was free of contamination and conformed to the standards laid down by the regulations, there was no reason why it should not issue export licences after such export only after such steps were taken. The

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[1] *1905 A. C. 21 at page 26.*

regulations provide for sampling, for inspection of the factory and the shipper's place of work where the packing is done. It was submitted that one of the purposes which was served by the special precautions taken by the Board was to ensure that shipments to American ports do not fail to attain to the prescribed standards of quality and purity, and that this was a legitimate purpose.

Crown Counsel further urged that, even if the Board had no power to require for exports to American ports standards higher than those generally prescribed, the petitioner's Company nevertheless took an improper course in failing to disclose its intention to export these shipments to the United States. If the company had been refused a licence on the ground that the shipments did not conform to such a higher standard, it could have insisted on its rights and, if necessary, sought its legal remedy against a wrongful refusal to issue the licence. It was, however, not open to the company to resort to the device of applying for an export licence to send desiccated coconut to Halifax and thereafter to send that desiccated coconut to New York, for an export licence to send goods to Halifax gives no authority to send them to any other place.

The arguments for the petitioner on this question directed attention to the context of the Ordinance, particularly paragraphs (*b*) and (*c*) of s. 20B, and of the regulations themselves.

In the case of the export of desiccated coconut, both the Ordinance and the Regulations enter into comprehensive details indicative of the nature and extent of the contemplated scheme of export licensing : standards and methods of manufacture, quality and purity, sampling, storage, packing and labelling of the product to be exported—all these matters are the subject of express regulation. It was contended that if a particular intended shipment of the product satisfies all these detailed express requirements, it would be unreasonable to suppose that the Legislature or the Minister had in contemplation a further unspecified restriction on export, namely that the Manager may refuse to authorise export to a particular country if he is of opinion that the shipment " does not satisfy the requirements " of that country. Had such an additional restraint been in contemplation, one would expect even a passing or indirect reference to it in the regulations. Instead, and on the contrary, regulation 7 (3) provides that the Manager *shall issue* the licence if the condition stated in that regulation is satisfied.

Mr. Gratiaen further submitted that if the regulations could properly have introduced " destination control ", the power to do so is referable to paragraph (*e*) of s. 20B, which enables regulations to be made for " the issue " of export licences and for " the terms and conditions subject to which " licences shall be issued. A specification " Halifax, and not the United States ", or a restriction " any destination other than the United States ", would be, in his submission, a condition of a licence, and

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the insertion of such a condition would be lawful only if it is clearly authorised by the regulations. In the absence of such an empowering regulation, the proper conclusion, he argued, is that the Manager had no authority to impose such a condition.

Learned Crown Counsel also relied on something in the nature of an " estoppel ". He contended that since the Company accepted and had the benefit of an export licence, the validity of a restriction or condition contained or implied therein cannot now be challenged. We adopt with respect the answer given by Sankey J. (as he then was) to a similar contention which was made in the case of *Ellis v. Dubowski* [1].

We need refer only to one further point raised on behalf of the petitioner. It was contended that the only " offence " referred to in the notice of 17th September 1968 was that of making a false statement in the " intend to ship " applications, and that the notice did not inform the petitioner of the much more serious charge that there had been exportation contrary to a restriction referred to in s. 130 of the Customs Ordinance. We are satisfied, however, that there is no substance in this contention. The notice refers to *a contravention of s. 130 of the Customs Ordinance*, read with the Coconut Products Ordinance ; it uses the language of s. 130 " persons concerned in the exportation " ; it states that the Desiccated Coconut were shipped to the port of New York, instead of the port of Halifax ; and it refers to a forfeiture of three times the value *in terms of s. 130*. Moreover the arguments of Counsel who appeared for the petitioner at the inquiry held by the Collector show clearly Counsel's knowledge that the charge was one of exportation to an unauthorised destination. No grounds were made out, in our opinion, for an objection that the petitioner did not have notice of the " charge " against him, or that in any other respect the Collector failed to observe the principles of natural justice.

These applications to this Court were probably made in reliance upon the two earlier cases which we have held to have been wrongly decided. While the application is dismissed, we make no order as to costs.

(Sgd.) H. N. G. FERNANDO,
Chief Justice.

(Sgd.) SAMERAWICKRAME,
Puisne Justice.

(Sgd.) WEERAMANTRY,
Puisne Justice.

Application dismissed.

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[1] *(1921) 3 K. B. 621 at p. 627.*

1969 *Present :* **H. N. G. Fernando, C.J.**

C. SUNTHERALINGAM, Appellant, *and* R. HERATH (Inspector of Police), Respondent

S. C. 1192/68—M. C. Mallakam, 4700

Prevention of Social Disabilities Act, No. 21 of 1957—Sections 2 and 3—Temple entry —Discrimination on ground of caste—Culpability—Ceylon (Constitution) Order in Council (Cap. 379), s. 29 (2) (d)—Tesawalamai Regulation (Cap. 63), s. 4—Penal Code, s. 183—Maxim generalia specialibus non derogant.

A person who prevents or obstructs, at the instance of the High Priest and hereditary trustee of a Hindu temple which constitutes a public religious trust, a Hindu worshipper of a different caste from entering into or beyond the inner court-yard of the temple in breach of the constitution of the religious trust and of the custom or ancient usage observed in that temple, contravenes the Prevention of Social Disabilities Act. In such a case, it cannot be contended that the Prevention of Social Disabilities Act is *ultra vires* of the provisions of section 29 (2) (*d*) of the Constitution of Ceylon or of section 4 of the *Tesawalamai* Regulation (Cap. 63).

Dictum in *Sevvanthinathan v. Nagalingam* (69 N. L. R. 419) disapproved.

APPEAL from a jugdment of the Magistrate's Court, Mallakam.

C. Suntheralingam, with *S. N. Rajadurai*, *R. R. Nalliah*, *P. Nagendran* and *V. Shanmuganathan*, for the accused-appellant.

L. D. Guruswamy, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 13, 1969. H. N. G. FERNANDO, C.J.—

This is an appeal against the conviction of the appellant on a charge that in contravention of the Prevention of Social Disabilities Act, No. 21 of 1957, he did prevent or obstruct one Sinniah, being a follower of the Hindu religion, from or in entering or being present in or worshipping at a place of worship to which followers of that religion have access.

The appellant did not at the trial deny that he prevented or obstructed Sinniah from entering the inner court yard of a Hindu Temple, or that Sinniah is a follower of the Hindu religion. The grounds of his appeal are based on matters of law.

The appellant firstly referred to a decree of Court declaring this Temple and its appurtenances to be a public religious trust, and declaring the High Priest of the Temple to be its hereditary trustee, responsible *inter alia* for the proper conduct and performance of *poojahs* in the Temple.

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The High Priest had by the document D6 authorised the appellant to act on his behalf in taking steps to secure that the customs and ancient usages of this Temple are observed, and the appellant's position was that his act of prevention or obstruction (in relation to Sinniah) was necessary to prevent defilement of the Temple by the entry of a person of low caste; if there had been such defilement, he argued, *poojahs* could not be thereafter performed in the Temple. On this basis, the appellant urged that the Act of 1957, in purporting to penalise the prevention of the entry of persons of low caste into this Temple, has the consequence that its operation can prevent the High Priest from performing *poojahs* in this Temple, and that it is thus a law which alters the constitution of a religious body; not having been passed with the consent of the governing body, this law offended the provisions of s. 29 (2) (*d*) of the Constitution of Ceylon, and was therefore void.

I agree with the learned Magistrate in rejecting this argument. Even if all the " facts " on which the appellant's argument is based be correct, the question whether some person may or may not enter, or be prevented from entering, premises controlled by a religious body, is not one which relates to the " constitution " of that body. Section 29 (2) (*d*) of the Constitution of Ceylon would in my opinion apply only to a law which purports to alter the mode by which a religious body is elected, appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship *inter se* of members of the body.

The appellant relied also on s. 4 of the *Tesawalamai* (Cap. 63) which provides as follows :—

> " All questions that relate to those rights and privileges which subsist in the said province between the higher castes, particularly the Vellales, on the one hand, and the lower castes, particularly the Covias, Nalluas and Palluas, on the other, shall be decided according to the said customs and the ancient usages of the province. "

The appellant's contention was that it was a custom or ancient usage of the Northern Province that persons belonging to certain alleged " low " castes were not permitted entry into or beyond the inner courtyards of certain Temples, including the Temple to which this case relates, and that this custom or usage is a special law relating to Temple entry. This special law, he urged, was not superseded by any provision of the Act of 1957 because of the operation of the maxim " generalia specialibus non derogant ". The simple answer to this argument is that the Act contains several provisions directly intended to afford to persons of all castes the freedom to enter places of several specified descriptions; these provisions thus constitute a special law which prohibits the obstruction of the entry of persons into such places on the ground of their caste. Even therefore if s. 4 of the *Tesawalamai* can be regarded as a special law regulating Temple entry, the later special law contained in the Act must prevail over the former.

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The appellant also relied heavily on an observation in the judgment in *Sevvanthinathan v. Nagalingam* [1] to the following effect :—

> " I am inclined to agree also with the argument of Mr. Ranganathan that sections 2 and 3 of the Prevention of Social Disabilities Act, No. 21 of 1957 do not have the effect of conferring on the followers of any religion a right of entering, being present in or worshipping at any place of worship which they did not have before the Act came into force ; in other words, the Act penalised only the prevention or obstruction of the exercise of a right which was an existing right at the time the Act became law. "

This observation was made *obiter* in the case under reference, but it is directly in point in the instant case. The Magistrate has found as a fact that people of the caste to which Sinniah belongs used to worship at this Temple only from the outer courtyard, and were not permitted to enter the inner yard. On that finding, the obstruction offered by the appellant did not interfere with rights which people of that caste used to enjoy before the enactment of the Act of 1957.

With the utmost respect, I am unable to agree with the very narrow construction which was given to the Act in the cited case. Let me consider the first of the " rights " in respect of whch the Act prohibits discrimination on the ground of caste, namely the admission of a student to a school. If admission is refused on the ground of the student's caste, there is nothing whatsoever in the Act which even by implication can permit the school management to plead, as a defence to a charge under the Act, that students of that caste were excluded from that school before the Act was passed. Nor is there anything in the Act from which it may be implied that in such a case the prosecution must establish that students of the complainant's caste had prior to the Act enjoyed a right of admission to the school.

Having regard to the terms of the Act, a person commits an offence if " *he prevents or obstructs another person in entering* " any of several specified places. The terms are substantially the same as those which occur in a provision like s. 183 of the Penal Code :—" Whoever voluntarily obstructs any public servant.....in the discharge of his public functions ". If, as is manifest, s. 183 covers any obstruction to the discharge of functions committed to a public servant both before and after the enactment of the Code, the Act of 1957 equally covers obstruction to any entry to whch the Act refers, whether or not a right to such entry had existed before the Act was passed.

The judgment in the 69 N. L. R. case appears to regard the Act of 1957 as having been intended merely to prevent the imposition of " new " social disabilities. If that be the intention, then the Act has achieved nothing in practice, for in my understanding the social evil arising from distinctions of caste in this country at the present time is

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[1] *(1960) 69 N. L. R. 419.*

only that undemocratic and anti-social forms of discrimination still persist in some areas and communities despite popular opposition to such discrimination. I much prefer the construction, plainly appearing from the Act, that Parliament did intend to prevent forms of discrimination which prevailed in the past.

The reasons stated by the learned Magistrate in this case deal adequately with the other matters urged by the appellant in support of his case. The appeal is dismissed.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1969 *Present :* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Alles, J.**

M. A. MARIKKAR, Appellant, *and* THE QUEEN, Respondent

C. C. A. No. 86 OF 1968, WITH APPLICATION No. 126

S. C. 170 of 1968—M. C. Puttalam, 3943

Charge of murder—Plea of intoxication—Proof—Whether intoxication can result from the smoking of ganja—Misdirection.

Intoxication affecting the question of intention to commit an offence may be caused by the smoking of ganja.

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

E. R. S. R. Coomaraswamy, with *T. Jokanathan*, *M. S. Azeez*, *C. B. Walgampaya* and *E. St. N. D. Tillekeratne* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 26, 1969. SIRIMANE, J.—

The appellant was convicted of the murder of his 2 little sisters, aged 10 and 11 years, by a divided verdict (5 to 2) of the Jury.

The appellant had shot the 2 girls in the early hours of the morning while they were asleep, and the prosecution could suggest no motive for this act.

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The evidence shows that the appellant looked after his sisters, and was very fond of them.

According to the evidence of the appellant he had taken a bottle of beer and some arrack on the previous night, and had smoked 'ganja' thereafter. One part of his evidence indicates that this smoking had been done some time after midnight.

There is no doubt that ganja is a powerful intoxicant, and may even by itself cause a state of intoxication in which a person may not know the nature of his act, or that what he was doing is wrong or contrary to law.

The evidence of Dr. Sittampalam, Psychiatrist, on this point is as follows :—

" *To Court :*

Q. What do you understand by intoxication ?

A. The state that is produced in the mind by drugs.

Examination contd. :

Q. Poisoning by alcohol ?

A. That is one form of intoxication.

Q. Alcoholism is a form of narcotic poisoning ?

A. Yes.

Q. Ganja is also a narcotic ?

A. Yes.

Q. Can acute confusional insanity arise from the effect of ganja smoking ?

A. Yes, sometimes. "

So that the question of intoxication arose on the evidence in this case. Unfortunately the Doctor had been questioned at length as to whether on the evidence available, the appellant was of *unsound mind*, at the time he committed the act, and the Doctor expressed the opinion that he probably was not. But, his opinion was not clearly sought on the question of intoxication. According to the evidence, the appellant had, immediately after he fired the shot, said, " I have shot ", and again, " Have I shot ?". The Doctor's evidence when these facts were placed before him is of significance and is as follows :—

" Q. The 3rd factor is that having shot the children he first said " I have shot " and later said " Have I shot ?".

A. It indicates a certain doubt and that there wasn't full awareness. There seems to have been some doubt whether he had done it or not and that is in keeping with a confusional state ".

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The learned Judge, in his charge to the Jury dealt with the medical evidence in so far as it related to insanity and unsoundness of mind. But, when he came to the question of *intoxication*, he always told the Jury that there must be evidence that the accused was *drunk*; for example, the learned Judge said :—

" If you hold that at the time he fired the gun, he was so drunk —not merely drunk, but so drunk—as to have been incapable of forming a murderous intention, imputing to a drunken man the knowledge of a sober man, you can only reduce the offence that far and no more. "

And again —

" You will remember that I told you, gentlemen, that intoxication may reduce the offence of murder to one of culpable homicide not amounting to murder , , , , , , , You must have evidence that at the time he fired he was so drunk that he was incapable of forming a murderous intention. "

A little later he said :—

" . . . . . if you take the view that at 6 o'clock that morning he was so *drunk* as to be incapable of forming a murderous intention, then the offence of murder will be reduced from murder to one of culpable homicide not amounting to murder. "

" . . . . . the D.R.O. says that he was not smelling of alcohol . . . . . The question is, was he drunk and not only was he drunk, was he so drunk as to be incapable of having a murderous intention when he used that gun. I will put it in a different way : was he so drunk that he was incapable of intending death ".

Just before he concluded his charge, the learned Judge said :—

" First you have to ask yourselves—was he drunk that morning—if he was drunk, was he so drunk as to be incapable of forming a murderous intention. "

The Jury were therefore repeatedly told that the accused must be drunk in order to reduce the offence to culpable homicide not amounting to murder. They were not directed to consider whether a state of intoxication might have resulted from the smoking of ganja.

A lay jury may very well have thought that the law recognised only " drunkenness " resulting from the intake of an excess of alcoholic liquor as an extenuating factor. Had they been correctly directed on this point, it is impossible to say, on the facts of this case, that they would have found the appellant guilty on the capital charge.

We therefore altered the conviction to one of culpable homicide not amounting to murder, and sentenced the appellant to ten (10) years' rigorous imprisonment on each count, the sentences to run concurrently.

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Conviction altered.

1969 *Present :* **Samerawickrame, J.**

Mrs. MALLIKA RATWATTE *et al.*, Petitioners, *and*
THE MINISTER OF LANDS (The Hon. C. P. de Silva) *et al.*,
Respondents

S. C. 141/69—Application for an Injunction in terms of Section 20 of the Courts Ordinance

Compulsory acquisition of land—Interim injunction to restrain it—Requisite conditions —Suspicion of malice—Duty of Court then to scrutinise the acquisition—Land Acquisition Act, ss. 4 (1), 5, 38 (proviso)—Courts Ordinance, s. 20.

The requisite conditions for the issue, by the Supreme Court, of a temporary injunction under section 20 of the Courts Ordinance are—

(1) irremediable mischief would ensue from the act sought to be restrained ;

(2) an action would lie for an injunction in some court of original jurisdiction ; and

(3) the plaintiff is prevented by some substantial cause from applying to that court.

By a notice under section 4 (1) of the Land Acquisition Act, the Minister (the 1st respondent) sought to acquire certain lands of the 1st petitioner for the purpose of carrying out the widening of a road. Upon the facts and circumstances disclosed in the Supreme Court, the question arose whether, in giving directions for these acquisitions, the 1st respondent, wittingly or unwittingly, gave effect to a design or plan by a political opponent of the petitioners which was calculated to protect the interests of himself and his relatives and cause loss and detriment to the petitioners.

Held, that the petitioners were entitled to the issue of a temporary injunction restraining the respondents in respect of the acquisition of the lands. In order that an interim injunction may issue, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events ; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of.

APPLICATION for an injunction in terms of Section 20 of the Courts Ordinance.

Nihal Jayawickrema, for the petitioners.

H. L. de Silva, Crown Counsel, for the 1st, 2nd and 3rd respondents.

Cur. adv. vult.

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April 11, 1969. SAMERAWICKRAME, J.—

On the application of the petitioners, I made order on the 20th of March, 1969, ordering the issue of a temporary injunction restraining the respondents in respect of the acquisition of certain lands and in my order, I reserved the right to the respondents to apply, on good grounds shown, to have the order vacated. The respondents have now applied to have the order set aside and, in view of the imminence of the Court Vacation and the possibility that this matter may not come up for hearing during the term if they controverted the facts and thereby made it necessary for the respondents to file counter affidavit, they have been content with contending that upon the facts and circumstances disclosed in the papers filed by the petitioners, they were not entitled to the issue of an injunction.

In the case of *Mohamado v. Ibrahim*,[1] Bonser, C.J. set out the circumstances in which a temporary injunction under Section 20 of the Courts Ordinance would issue and his statement of them has been cited and adopted by Alles, J. in *Vellasamy v. N. Q. Dias*[2]. The requisite conditions are as follows :—

(1) Irremediable mischief would ensue from the act sought to be restrained ;

(2) an action would lie for an injunction in some court of original jurisdiction ; and

(3) the plaintiff is prevented by some substantial cause from applying to that court.

A notice under s. 4 (1) of the Land Acquisition Act has been issued in respect of these acquisitions and unless the respondents are restrained, the petitioners are in grave danger of being deprived of their lands, and, if their case is true, being deprived wrongfully. An order under s. 5, and an order for immediate possession under the proviso to s. 38 could be made in a matter of few days. In recent times, it has been the rule rather than the exception to make orders for immediate possession of land in acquisitions. I am, therefore, satisfied that condition (1) is fulfilled in this case. The petitioners are also prevented from applying to the District Court for relief by reason of the requirement that notice of action should be given before an action is filed against a person holding the office of Minister or a public officer. The petitioners state that they have issued notice but are precluded from applying for relief immediately to the District Court by reason of the requirement that action should be filed only after the expiry of a month after delivery of notice. I am also, therefore, satisfied that condition (3) has been fulfilled.

There remains to be considered the question whether an action in the District Court would lie to the petitioners in which they would be entitled to apply for an interim injunction. The 1st petitioner is the Member of Parliament for Balangoda and her husband had been the Member of

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[1] *(1895) 2 N. L. R. 36.*

[2] *(1965) 68 C. L. W. 37.*

Parliament before her. The other petitioners are their political supporters. Both at the election at which she was elected and at the election at which her husband was returned, the opposing candidate was one Aboosally, a gentleman who now holds the office of Chairman of the Urban Council of the area. According to the petitioners, their political opponent Aboosally informed them that he had decided that, instead of widening the existing main road which passes through the bazaar, an old circuitous road, which had hitherto been hardly used by motorists, would be widened by 34 feet. The main road which is at most places about 40 feet wide is at the centre of the bazaar only about 20 feet wide and the land and buildings immediately adjacent to that spot are occupied by the said Aboosally and several of his relatives. The land and premises on either side of the old circuitous road belong to the families of the petitioners. On 21st February, 1969, the 3rd respondent, in the company of the said Aboosally and other officials, inspected the said old circuitous road. At the inspection the 1st petitioner's husband requested the 3rd respondent not to pursue the proposed project as it was nothing but an attempt to take political revenge. According to the petitioners, the 3rd respondent rejected the request of the petitioner's husband apparently for the reason that it did not lie in the mouth of the petitioners to raise such an objection because the previous government, which the petitioners had supported, had arbitrarily acquired lands, including a land belonging to a relative of his, upon false pretexts. It is alleged that Aboosally who was present also stated that the previous government had acquired a land belonging to him for the purpose of a housing scheme about ten years ago but had failed to pay him any compensation.

On or about the 14th of March, 1969, a notice under s. 4 of the Land Acquisition Act was issued in respect of these acquisitions and the petitioners made the present application on the 17th of March, 1969. They state in their petition that the said notice is a nullity and is void and has no force or effect in law as the 1st respondent as the Minister of Lands has acted in excess or in abuse of his powers and has been induced by the said Aboosally, for political and other reasons, to direct the issue of the said notice.

Aboosally was the government party candidate at the election for a member of parliament for the Balangoda constituency at the last two parliamentary elections. He is also presently the Chairman of the Urban Council of the area. It is, therefore, likely that the 1st respondent who is the Minister of Lands would have received and given weight to the views that he expressed in respect of the road widening. In addition to antecedent probability there are the further circumstances relied on by the petitioners that Aboosally's information to them that he had decided that instead of the main road the old circuitous road should be widened was followed by directions by the 1st respondent for the acquisition of their lands for the purpose of carrying out the proposed widening of the old circuitous road.

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Section 4 of the Land Acquisition Act makes provision for objections to an intended acquisition and for consideration of those objections by the Permanent Secretary who is to make his recommendation to the Minister, and it provides that after the Minister has considered the Permanent Secretary's recommendation on objections, he should decide whether the land should or should not be acquired. In this case the Permanent Secretary who is to receive objections is the 3rd respondent who had, at the inspection, already expressed the view that there was not available to the petitioners the objection that the acquisitions were an act of political revenge. It would follow, therefore, that the petitioners are deprived of the opportunity of any real consideration of their objections, and of a proper and impartial recommendation upon them to the Minister.

Upon the matters placed before this Court by the petitioners, the question arises whether in giving directions for these acquisitions, the 1st respondent, wittingly or unwittingly, gave effect to a design or plan by a political opponent of the petitioners which was calculated to protect the interests of himself and his relatives and cause loss and detriment to the petitioners; and if the 1st respondent did so, but acted unwittingly, whether the petitioners are entitled to relief. In order that an interim injunction may issue it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events : it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated, and that matters ought to be preserved *in statu quo* until that question can be finally disposed of.—vide *Halsbury's Laws of England, Simonds Edition, Volume 21, page 365.* I am, therefore, of the opinion that condition (2) also is fulfilled in this case.

I cannot resist the observation that it is remarkable how often over the years it has turned out by some extraordinary coincidence that the public interest appeared to require the acquisition of lands belonging to persons politically opposed to the party in power at the time. It is, therefore, necessary that Courts, while discouraging frivolous and groundless objections to acquisitions, should be vigilant, if it is open to them to do so, to scrutinise acquisition proceeding where it is alleged that they are done *mala fide* and from an ulterior motive.

In fairness to the persons against whom the petitioners have made allegations, I should state that the Court is not called upon, at this stage, to consider the truth of the petitioners' case and it has not done so. In fact, this Court has not heard what the other persons have to say on the subject. As indicated earlier, my order was made *ex parte* and, even upon the application made by the respondents, occasion has not arisen for going into the questions of fact. I desire to point out that the issue of a temporary injunction by this Court to enable a party to file an action in the District Court and to apply for an injunction in that action, does not absolve that Court from the duty of considering the matter and of forming its own view, particularly where it comes to consider the matter

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after the defendants have put before it such material as it may be permitted to place before it by law in support of their opposition to the grant of the injunction.

I accordingly hold that the objections of the respondents fail and they are dismissed. I make no order as to costs.

Application for temporary injunction allowed.

1969 *Present :* **Samerawickrame, J.**

S. SEBASTIAN and 2 others, Appellants, *and* A. D. A. EDIRIWEERA (Veterinary Stock Inspector), Respondent

S. C. 1343–1345/66—M. M. C. Colombo, 26685

Municipal Council of Colombo—By-Law prohibiting sale of meat of animals not slaughtered at the Municipal Slaughter House—Validity—By-Law 30 of Chapter XIII of the By-Laws and Regulations—Butchers Ordinance, ss. 3 (a), 4 (1), 14.

By-law 30 of Chapter XIII of the By-laws and Regulations of the Municipal Council of Colombo is not void as being inconsistent with the provisions of the Butchers Ordinance when it restricts the sale of meat to sale only of meat of animals slaughtered in the Municipal Slaughter House.

Lafier v. Ediriweera (70 N. L. R. 334) not followed.

APPEAL from a judgment of the Municipal Magistrate's Court, Colombo.

G. F. Sethukavalar, with *S. G. Wijesekera* and *A. Puthumanayagam*, for the accused-appellants.

H. Wanigatunga, with *S. Basnayake*, for the complainant-respondent.

Cur. adv. vult.

April 26, 1969. SAMERAWICKRAME, J.—

The first, second and third accused-appellants were jointly charged on the following count :—

" That they did, at stall No. 26, Edinburgh Market, on the 3rd day of August, 1965, expose for sale 243 lbs. of meat and one heart of a carcase of an animal not slaughtered at the Municipal Slaughter House, Colombo, and thereby committed an offence in breach of s. 30 of Chapter XIII of the Municipal Councils By Laws and Regulations read with s. 267 (2) of the Municipal Councils Ordinance No. 29 of 1947 and punishable under Rule (2) of Chapter 25 of the aforesaid by laws published in *Government Gazette* No. 8212 of 8th April, 1936. "

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After trial, the learned Magistrate found them guilty and sentenced the 1st and 2nd accused-appellants to pay a fine of Rs. 75 each, and the 3rd accused-appellant to pay Rs. 75 as Crown costs. They have appealed against the convictions and sentences.

The only submission made by learned Counsel for the appellants was that the By-law, which is the basis of the charge, was void as being inconsistent with the provisions of the Butchers Ordinance. The By-Law reads :—

> " 30. Except as otherwise provided in these by-laws, no carcase of any animal (or any portion thereof) not slaughtered at a Municipal Slaughter-house shall be brought into a public or private market, or to any place specially licensed as provided in by-law 9 of this Chapter, or sold or exposed for sale in any public or private market or in any such specially licensed place. The provision of this by-law shall not apply to meat, game, or fish imported into the Island. Meat, game or fish so imported shall be sold in any place specially licensed therefor. "

Section 4 (1) of the Butchers Ordinance states :—

> " No person shall carry on the trade of a butcher except under the authority of an annual licence or a temporary licence in that behalf issued by the proper authority. "

The term " butcher " is defined as follows :—

> " 'butcher' shall include every person that slaughters animals or exposes for sale the meat of animals slaughtered in Ceylon. "

The proper authority to issue a licence in respect of an area within the administrative limits of a Municipal Council is the Mayor of the Council or any person authorized in writing on his behalf—*vide* Section 3 (*a*) of the Butchers Ordinance.

From the definition of the word " butcher " it would appear that the trade of a butcher may involve two different functions ; the slaughter of animals and the exposing for sale of the meat of animals slaughtered in Ceylon.

In regard to the slaughter of animals, Section 14 of the Butchers Ordinance contains the following provision :—

> " No licensed butcher shall slaughter any animal at any place other than—
>
> (*a*) the place appointed by the proper authority ; or
>
> (*b*) any public slaughterhouse as hereinafter provided ;
>
> nor between the hours of 6 p.m. and 6 a.m. "

Public slaughterhouses are dealt with in Chapter III of the Butchers Ordinance and have to be certified by the proper authority which has also the power to make regulations in regard to their establishment,

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regulation, management and general discipline. The proper authority in regard to slaughterhouses within its administrative limits is the Municipal Council of Colombo. The Council has made By-Laws providing for slaughterhouses which are contained in Chapter XII of the By-Laws and Regulations of the Municipal Council of Colombo. A Municipal slaughterhouse referred to in By-Law 30 is obviously a slaughterhouse provided for in the said By-Laws contained in Chapter XII. It was not suggested, nor is there any evidence, that there is within the Municipal limits of Colombo any other public slaughterhouse or any other place appointed by the proper authority for the slaughter of animals, within the meaning of s. 14 of the Butchers Ordinance. So far, therefore, as a butcher who is licensed under the Butchers Ordinance in respect of any area within the administrative limits of the Municipal Council of Colombo is concerned, the By-Law does not have the effect of restricting the places at which he may slaughter animals.

In this case, no licence under the Butchers Ordinance appears to have been marked, but there is a statement that Mr. Sethukavalar produced the Butchers licence on behalf of the 3rd accused. The Butchers licence issued to the 3rd accused would not entitle him to slaughter animals outside the administrative limits of the Municipal Council of Colombo as the proper authority that issued the licence to him could only authorize him to carry on that trade of butcher in an area within the administrative limits of the Municipal Council of Colombo.

The Butchers Ordinance makes provision for the slaughter of animals by a licensed butcher within the area of a Municipal Council, or of an Urban Council, or of a Town Council, or of Village Committee or any other area falling within the administrative region of an Assistant Commissioner of Local Government. It also provides for the slaughter of animals by a person other than a licensed butcher on permits issued in terms of the provisions in Chapter II. There is, however, no provision in the Butchers Ordinance which states that only the meat of animals slaughtered under or in terms of the provisions of the Butchers Ordinance may be exposed for sale or sold by a licensed butcher. If a person, other than a licensed butcher, slaughters an animal without a permit, he would no doubt be committing an offence under the Ordinance ; but if the carcase of that animal is exposed for sale by a licensed butcher that act would not be a contravention of any provision of the Butchers Ordinance, but the licensed butcher may risk the revocation of his licence.

There is contained in the Ordinance the requirement of a licence before any person exposes meat of animals slaughtered in Ceylon for sale. It appears to me that the Ordinance treats the licence as a *sine qua non* for the sale of meat of animals slaughtered in Ceylon but has no provision in regard to the nature or quality or any other attribute that the meat that is to be exposed for sale should have. It is quite obvious that there must be a wide area in regard to which regulative provisions of some kind are required. To take one instance, an animal which is healthy at the

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time it is slaughtered may become verminous later and, so far as the Butchers Ordinance is concerned, there is no provision that prohibits the exposure for sale of such verminous flesh by a licensed butcher.

I am, therefore, of the view that a By-Law dealing with the meat of animals that may be sold or exposed for sale in any public or private market or other specially licensed place within the administrative limits of the Municipal Council of Colombo cannot be said to be inconsistent with the provisions of the Butchers Ordinance for the reason that the Butchers Ordinance has no provision dealing with the matter which is the subject of the By-Law.

It was held in the case of *White v. Morley*[1] that a By-Law is not bad because it deals with something that is not dealt with by the general law. Section 23 of the Metropolitan Streets Act, 1867 made it an offence to obstruct a street by three or more persons assembling for the purpose of betting and the By-Law made by the Glamorgan county council pursuant to the provisions of s. 23 of the Municipal Corporations Act, 1882, prohibited any person from frequenting any street or other public place for the purpose of book-making or betting or wagering. The Court held that the section was a provision relating to traffiic in streets and dealing with obstruction, while the By-Law aimed at frequenting a street for the purpose of betting, which was a different thing and a different mischief.

In the case of *Lafier v. Ediriweera*[2] it was held that this by-law was *ultra vires* as being inconsistent with the Butchers Ordinance and that decision has been followed in S. C. 110/'66 M. M. C. Colombo case No. 26938/MPL. These decisions proceed on the view that the provisions of the Butchers Ordinance impliedly authorize the sale of the meat of animals slaughtered in a public slaughterhouse or other place appointed by the proper authority and the By-Law in question restricts the sale of meat only to that of animals slaughtered in the Municipal slaughterhouse and that the By-Law is therefore inconsistent with the provisions of the Ordinance. With respect I am unable to agree with that view. It appears to me that in the absence of any provision in the Ordinance as to the meat of animals that may or may not be exposed for sale by a licensed butcher it is not possible to say that the sale of any category of meat of animals has been impliedly authorized by the provisions of the Ordinance. Accordingly it follows that the By-Law does not prohibit what the provisions of the Ordinance impliedly authorized and that is not inconsistent with such provisions.

I am, therefore, of the view that By-Law 30 of Chapter XIII of the By-Laws and Regulations of the Municipal Council of Colombo is not void as being inconsistent with the provisions of the Butchers Ordinance. The order of the learned Magistrate is therefore affirmed and the appeals are dismissed.

Appeal dismissed.

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[1] *(1899) 2 Q. B. 34.*

[2] *(1966) 70 N. L. R. 334.*

1968 *Present :* **Alles, J.**

UPLANDS TEA ESTATES LTD., Appellant, *and* CEYLON WORKERS' CONGRESS, Respondent

S. C. 70/67, 71/67, 72/67—Labour Tribunal Cases Nos. K/3416, K/3417, K/3425

Labour Tribunal—Application by dismissed workman for reinstatement in service—Jurisdiction of labour tribunal to award compensation for past services—Industrial Disputes Act, ss. 31B, 31C (1), 33 (1), 33 (5).

Where, in an application under section 31B of the Industrial Disputes Act, a workman seeks relief in respect of the termination of his services by the employer and prays for reinstatment in service, it is open to the parties, by subsequent agreement between them, to confer jurisdiction on the labour tribunal to award compensation to be paid to the workman on the basis of his past services, in lieu of reinstatement.

APPEAL from an order of a Labour Tribunal.

H. V. Perera, Q.C., with *L. Kadirgamar*, for the respondents-appellants.

N. Satyendra, for the plaintiff-respondent.

Cur. adv. vult.

January 27, 1968. ALLES, J.—

Counsel for the respondents-appellants has submitted that the President acted without jurisdiction in ordering compensation to the worker in this case. The Union on behalf of the petitioner-worker made an application under Section 31B of the Industrial Disputes Act for relief in respect of the termination of his services by the employer and prayed for reinstatement. On the date of inquiry counsel for the employee did not insist on reinstatement. The record thereafter reads :

" The only question that is left is the quantum of compensation, if any, that is to be paid for the past services of these employees. "

" Both parties agree to leave the quantum of compensation to be given to the workers, if any, in the hands of the President."

The President thereafter, in view of the submissions of counsel, made order directing compensation to be paid to the workers on the basis of their past services.

Mr. Perera's main contention is that it is only under Section 33 (5) of the Act that the President could make an order of compensation. Such an order could only be made at the instance of the worker and in

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lieu of making a decision for reinstatement. He submits that the present application for reinstatement was not accompanied with any such request and, therefore, the President acted without jurisdiction in ordering compensation. Counsel for the Union, however, submits that this is not a case to which Section 33 (5) applies. The order that was made by the President was one made with the consent of the parties and was an order that could properly be made under Section 31 C (1) of the Act. I am inclined to agree. Section 33 is permissive in nature and is only intended to enlarge the scope of the President's powers and enables the Tribunal to include in the order such decisions as may be necessary to give full effect to the order of the Tribunal. The wording contained in the introductory portion of Section 33 (1) makes this position clear. It is correct, as counsel submits, that the nature of the payment made to the worker in this case is more akin to the payment of a gratuity than to compensation ; but it is abundantly clear from the agreement between the parties that they intended that some payment for the past services of the worker should be made the basis of a just and equitable order.

I dismiss the appeal.

Appeal dismissed.

1969 *Present :* **de Kretser, J.**

A. ABUSALLY, Appellant, *and* THE PRICE CONTROLLER, KANDY, Respondent

S. C. 964/68—M. C. Kandy, 53132

Control of Prices Act—Price order relating to sale of mutton with bone—Validity.

A Price Order of 7th August 1962 fixed the controlled price of mutton with bones at Rs. 2·25 per pound and further directed that " when mutton is sold with bones the weight of bones sold therewith shall not exceed 25 per cent. of the total weight sold ".

Held, that the Price Order was invalid to the extent that it is not possible to say of mutton with bone, when it is sold as an indivisible whole, what percentage of it is bone. In such a sale, it is unreasonable to insist that the percentage of bone must not exceed 25 per cent.

APPEAL from a judgment of the Magistrate's Court, Kandy.

N. Satyendra, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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April 26, 1969. DE KRETSER, J.—

The Magistrate of Kandy (Mr. D. F. Dharmasekera) found the accused—a butcher by name Abusally—guilty of the two charges laid against him :

(1) of selling a pound of mutton with bones at Rs. 2·50 when the controlled price was Rs. 2·25 ;

(2) of selling a pound of mutton with bones—the weight of the bones exceeding 25% of the total weight of one pound.

The Magistrate imposed a sentence of four weeks' R. I. and a fine of Rs. 250 in default two weeks' R. I. on each count. The jail sentences to be concurrent. The accused has appealed.

The relevant Price Order No. KD. 107 is found in G. G. 13255 of 7th August 1962 and states (para. 2) that mutton for the purpose of the order means the flesh of sheep or goat but shall exclude all forms of offal and controls the price of mutton as follows :—

(1) Mutton without bones Rs. 2·50 per pound.

(2) Mutton with bones Rs. 2·25 per pound.

Para. 3 of the Order directs that " when mutton is sold with bones the weight of bones sold therewith shall not exceed 25% of the total weight sold ".

It is this direction that Counsel for the appellant submits is bad in Law in that it requires a seller of mutton with bone to do what is impossible, for he submits that where mutton is not separated from bone it is impossible for a seller to ascertain the bone content in it with the precision required to say what percentage of the total weight it is., e.g., when a butcher sells a mutton chop it is impossible for him to ascertain with precision what per cent. of it is bone short of scraping the flesh off it and weighing flesh and bones separately and making it to cease to be what the customer wants to buy, namely a mutton chop.

To sell three-quarter pound mutton and one-quarter pound of bone is to sell a pound of mutton and bone, but that is something quite different to selling a pound of mutton with bone which at the time of sale is an indivisible whole. There are cuts of mutton which are sought to be bought in butchers' stalls in which adherence of mutton to bone is essential for the purpose it is bought for, and the sale separately of mutton and bone cannot be adequately used as a substitute. The Price Order recognises this for while the Price Order controls *the price of mutton* and not the price of bone, it recognises that mutton has to be of two descriptions : (1) Mutton with bones ; (2) Mutton without bones.

Were that not so it could content itself with only controlling the price of mutton and stating that as in the case of mutton with offal (vide para. 5 of the Price Order) mutton when sold with bone must be weighed separately from the bone.

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The Law does not force anyone to do what is impossible, and when a Price Order directs a person to do what is impossible a Court can say with certainty that Parliament never intended to give the Controller of Prices authority to make such an order and that it is unreasonable and *ultra vires*. In the instant case I am completely satisfied that it is not possible to say of mutton with bone what percentage of it is bone and the proof of that is that even in this case a veterinary surgeon had to be called who says that he separated the flesh from the bone and had it weighed and it is on these weighings that this prosecution was launched. It is so unreasonable to insist that where there is a sale of mutton with bone that the percentage of bone must not exceed 25% that I hold that the Price Order to that effect is *ultra vires*. The conviction of the accused on the charge of selling a pound of mutton with bones the weight of the bones exceeding more than 25% of the total is set aside.

There remains the conviction on count 1. It is accused's own evidence that what he was asked for and what he supplied was a pound of mutton with bones. That he supplied a pound of mutton with bones the weight apparently being made up by the addition of bones is also established on complainant's evidence read with the evidence of the veterinary surgeon. The conflict of evidence is in regard to the price charged. For while accused admits he had handed over Rs. 2·50 as change from the Rs. 5 tendered in payment, he says that he intended to hand over 25 cents more but had no change and had sent 50 cents to be changed for that purpose. The decoy admits that he was asked whether he had 25 cents change and he strangely says that he cannot remember whether the accused asked people around whether they had 25 cents with them, and also that he cannot remember whether the accused gave 50 cents to be changed. But he does claim that he asked the accused " whether the amount was correct and when the accused said yes he lifted the parcel which was the agreed signal for the other Inspectors to come up." He has denied under XXM that he never asked that question.

The Magistrate bases his conviction on the evidence of the decoy who he says gave his evidence in a truthful manner. But he has apparently not given his mind to the fact that a person speaking to a true incident can give evidence in a truthful manner and yet smuggle in one lie without causing a change of impression. In this instance the one matter is whether it is true that he asked whether the amount was correct. It appears to me to have been an unusual question to ask in the given circumstances for surely what he would have asked is " What about the balance 25 cents "—the accused admittedly having asked him for change. The prosecution could have corroborated his evidence on this vital point by calling the Inspector who was sent for the specific purpose of watching the transaction and was doing so according to the decoy from 4 to 5 feet away. But the prosecution does not call him. While it is

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possible that the Magistrate is correct when he says that the witness Perera called for the defence was not a witness of truth, the falsity of evidence given for the defence does not necessarily show that the evidence for the prosecution is true.

It appears to me that as the Magistrate has not given his mind to these aspects of the evidence I am entitled to give the accused the benefits of the doubts that assail me that what the accused says is true, namely, " Before I could give the 25 cents I was arrested." I set aside the conviction on this count as well. The appeal of the accused is allowed.

Appeal allowed.

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1969 *Present :* **H. N. G. Fernando, C.J., and Weeramantry, J.**

G. E. RATNASINGHAM, Appellant, *and* PEOPLE'S BANK, Respondent

S. C. 302/67 (F)—D. C. Colombo, 60492/M

Public servant—Salary less than Rs. 520—Temporary secondment to Port Cargo Corporation on salary of more than Rs. 520—Debt incurred by him during period of seconded service—Exemption from liability—Port Cargo Corporation Act, No. 13 of 1958, s. 50—Motor Transport Act, No. 48 of 1957, s. 9—Public Servants (Liabilities) Ordinance, s. 2 (1) (2).

Where a public servant whose salary in regard to his fixed employment does not exceed Rs. 520 per month enters into a contract of guarantee at a time when he has been seconded to the Port Cargo Corporation on a temporary appointment giving a monthly salary of more than Rs. 520, section 2 of the Public Servants (Liabilities) Ordinance protects him from liability under the guarantee.

APPEAL from a judgment of the District Court, Colombo.

K. Nadarajah, for the 3rd defendant-appellant.

N. Satyendra, for the plaintiff-respondent.

Cur. adv. vult.

June 20, 1969. H. N. G. FERNANDO, C.J.—

The plaintiff Bank sued three defendants on two causes of action. As against the 1st defendant the plaintiff claimed that the Bank had lent an advance to him of a sum of Rs. 15,000 with interest, and giving credit for certain payments, sued for the balance due on the loan.

As against the 2nd and 3rd defendants, the claim of the plaintiff was based on a guarantee by which these defendants undertook to pay to the plaintiff moneys due on the loan transaction from the 1st defendant. On this cause of action the learned District Judge entered judgment against the 3rd defendant for the amount claimed.

The defence taken up by the 3rd defendant was based on s. 2 of the Public Servants (Liabilities) Ordinance. Sub-section (1) of this section provides that no action shall be maintained against a public servant upon any promise to be answerable for the debt or default of another

1*——J 4758—2,255 (7/69)

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person. Sub-section (2) provides that this immunity does not apply to a public servant " who at the date when the liability sought to be enforced is contracted is in receipt of a salary in regard to his fixed appointment of more than five hundred and twenty rupees a month ".

The guarantee in this case was signed by the 3rd defendant on 16th June 1962. The 3rd defendant was a member of the General Clerical Service and his substantive salary as a member of that service at all material times was less than Rs. 520 per month. On 15th May 1958 however, he had been seconded for service with the Port Cargo Corporation, and at the time when he signed the guarantee he was still under secondment to the Corporation and was at that time in receipt as salary from the Corporation of Rs. 640 per month. The learned trial Judge has held that the salary of the 3rd defendant in regard to his fixed appointment on 16th June, 1962 was Rs. 640, and that accordingly the Public Servants (Liabilities) Ordinance does not protect him from his liability under the guarantee.

Section 50 of the Port Cargo Corporation Act No. 13 of 1958 enables the Directors of the Corporation to recruit as employees of the Corporation an officer in the Public Service either for temporary appointment to the staff of the Corporation or for permanent appointment to the staff. The section further provides that in such cases the provisions of section 9 of the Motor Transport Act will apply to an officer so appointed to the staff of the Corporation. The 3rd defendant clearly was thus seconded to the Port Cargo Corporation on a temporary appointment. In fact this secondment ceased even prior to the institution of the present action and the 3rd defendant reverted to office in the General Clerical Service in November 1962.

In reaching his conclusions against the 3rd defendant the learned trial Judge has relied upon a provision of s. 9 of the Motor Transport Act (in its application to this case) under which in a case of a temporary officer the Port Cargo Corporation must pay to the Consolidated Fund 25% of the salary payable to the officer in his substantive post in the public service. Having referred to this provision, the trial Judge states " that the Board pays to the Treasury the extra remuneration which the 3rd defendant became entitled to by virtue of his secondment ". This statement is based on a misunderstanding of the provision in s. 9. This monthly sum equivalent to 25 per cent of the officer's substantive salary does not in any way represent the extra remuneration which the officer gets in the seconded office. The requirement for such a payment by the Corporation to the Treasury is connected with the fact that the period of the seconded service with the Corporation will count for the pension to which the officer will be entitled as a member of the General Clerical Service under the Pension Minute. Such a provision does not provide a test by which to determine for the purpose of the Public Servants

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(Liabilities) Ordinance what was the 3rd defendant's salary in regard to his fixed appointment at the relevant time. Undoubtedly the 3rd defendant on 16th June 1962 was in receipt of a salary of Rs. 640 per month as a seconded employee to the Corporation, and the question for determination is whether his appointment at that date under the Corporation was his fixed appointment.

The question is a difficult one because there could not have been in contemplation in 1889 a situation in which Public Officers are seconded for service under Corporations established for the purpose of carrying out functions which before their establishment were carried out by Departments of Government. But there is in my opinion sufficient material for holding that the protection enjoyed under the Ordinance by certain categories of public servants is retained by them on such secondment. By reason of s. 9 (3) of the Motor Transport Act, an officer in the Public Service who is permanently appointed to the staff of the Corporation, *shall be deemed to have left the public service*. This is some indication of an intention that a seconded officer *temporarily* appointed to the Corporation does not thereby leave the Public Service. Again, s. 9 (2) provides that an officer having a temporary appointment in the staff of the Corporation "shall be deemed to have been absent from duty in the Public Service on leave granted without salary", and the effect of this provision is that the officer's service with the Corporation counts for pension as service under the Government. Thus the law for pension purposes regards service with the Corporation as being service as a Public Servant. Having regard to these provisions there is much justification for the view that a public servant who is temporarily employed by the Corporation is so employed for the very reason that he is a permanent officer of the Public Service, and that it is his capacity as a member of the Public Service which qualifies him for the temporary appointment in the Corporation.

Let me take now a case which is fairly analogous to the present one. Suppose that an officer in the Clerical Service whose substantive salary is less than Rs. 520 per month acts for some period in a staff appointment, and receives during that period a salary exceeding Rs. 520. If what is relevant for the purpose of the Public Servants (Liabilities) Ordinance is the salary in his seconded office, then the officer will not be immune from liability upon a contract entered into during his secondment. Nevertheless, if he later reverts to a post in the Clerical Service and to his former scale of salary, the immunity will again attach to him in respect of any new contract. I much doubt whether the Legislature intended that a particular Public Officer should at some stages of his service be liable upon such contracts, but that there may be intervals between these stages during which he will not be so liable.

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I hold accordingly that in the case of the 3rd defendant his fixed appointment within the meaning of the Public Servants (Liabilities) Ordinance was his permanent and substantive appointment, which was that of an officer in the General Clerical Service. His salary in respect of that appointment was obviously below Rs. 520 per month and he therefore enjoyed the immunity conferred by the Ordinance.

The judgment and decree are set aside and the plaintiff's action is dismissed. In view of the novelty of the question which arises in this case the 3rd defendant will be entitled only to the costs of this appeal.

WEERAMANTRY, J.—I agree.

Judgment and decree set aside.

1968 *Present :* **Weeramantry, J.**

CEYLON TRANSPORT BOARD, Appellant, *and*
W. A. D. GUNASINGHE, Respondent

S. C. 133/67—Labour Tribunal Case 7/28002

Labour Tribunal—Finding of fact made by it—Right of a party to appeal therefrom to Supreme Court—Question of law—Duty of Court to act judicially and in accordance with the evidence placed before it—Incapacity of the Tribunal to make inquiries without notice to the parties—Misconduct of workman—Domestic inquiry—Admission of guilt—Evidentiary value of it at the inquiry before Labour Tribunal—Industrial Disputes Act, ss. 24 (1) (2), 31C (1), 31C (2) —Industrial Disputes Regulations 20, 21, 25.

Where a Labour Tribunal makes a finding of fact for which there is no evidence—a finding which is both inconsistent with the evidence and contradictory of it—the restriction of the right of the Supreme Court to review questions of law does not prevent it from examining and interfering with the order based on such a finding if the Labour Tribunal is under a duty to act judicially.

The question whether a particular functionary is under a duty to act judicially is different and distinct from the question whether he holds judicial office. Although the President of a Labour Tribunal does not hold judicial office, the decision in *United Engineering Workers' Union v. Devanayagam* (69 N. L. R. 289) does not free Labour Tribunals from the duty to act judicially. " Inasmuch as the Tribunal is required to give both parties a full opportunity of stating their cases, a notice of the full statement of the opposite party, and a notice of time and place of hearing and inasmuch as the Tribunal is impressed with the duty to hear evidence and its orders are made subject to a right of appeal to this Court on matters of law, it would appear to be largely academic to go further afield in quest of other indicia of the duty to act judicially. "

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Section 31C (1) of the Industrial Disputes Act does not enable a Labour Tribunal to make inquiries outside the inquiry which it is conducting with notice to and in the presence of the parties.

Where, at a domestic inquiry held at the instance of the employer, a workman is found guilty of misconduct on his own admission, the evidence of the admission of guilt must be given due consideration by a Labour Tribunal which subsequently conducts an inquiry into an application made by the dismissed workman for reinstatement.

APPEAL from an order of a Labour Tribunal.

N. Satyendra, for the employer-appellant.

Nimal Senanayake, with *Miss P. Abeyeratne* and *Sam Silva*, for the applicant-respondent.

Cur. adv. vult.

October 29, 1968. WEERAMANTRY, J.—

The President of the Labour Tribunal has ordered the reinstatement of the respondent upon the basis of certain findings of fact which the appellant contends are so wholly untenable that no reasonable Tribunal could arrive at such a finding. On this basis the appellant invites the interference of this Court, submitting that the material before the President pointed only in the direction of the respondent's dismissal having been fully justified.

The respondent, a bus conductor employed under the appellant, was on the 17th of November 1969 working on a bus plying between Colombo and Kurunegala. It would appear that when the bus was on its way from Colombo to Kurunegala, officers of the Flying Squad boarded the bus at Tulhiriya.

They found a passenger who had boarded the bus at Pasyala to whom a ticket imprinted " Stage 1 " had been issued. Such a ticket could not properly have been issued to a passenger who had boarded the bus at this stage of the journey. Moreover the value of the ticket was Re. 1·65 although according to the passenger he had paid only a sum of -/95 cts. to the conductor. This ticket was marked R2 at the hearing before the President.

The officers of the Flying Squad also found another passenger who claimed to have boarded the bus at Nittambuwa who said he had paid Re. 1/05 to the conductor as his fare but had received a ticket with the fare indicated thereon as -/05 cts. This ticket was marked R6.

The Flying Squad also detected that the collections of the respondent were in excess of the sums he should have received to the extent of Rs. 8/82. The regulations of the appellant required collections to be kept distinct from the private money of conductors, but the respondent claimed that the excess represented his private money.

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On 4th January 1966, a Charge Sheet, R8, was served on the respondent requiring him to show cause why he should not be dismissed. Four charges were set out therein, the first of which charged the respondent with obtaining a sum of Re. 1/05 from a passenger who travelled from Nittambuwa to Kurunegala and issuing him with a -/05 cts. ticket with fraudulent intention. The second charge was in respect of having obtained a sum of -/95 cts. from a passenger bound from Nittambuwa to Kurunegala and having issued him with a ticket for Re. 1/65 which had in fact been issued at the outset of the journey. The third charge was on the basis that the respondent had deliberately defrauded the appellant Board of a sum of Re. 1/- which should have accrued to it and the fourth was on the basis of failure by the respondent in the correct performance of his duty.

Thereafter a domestic inquiry was held by an Inquiring Officer of the appellant Board and at this inquiry, the proceedings of which have been marked R9, the respondent was asked whether he was guilty or not guilty. In answer the respondent stated that he pleaded guilty and that he desired in mitigation to explain the circumstances in which he came to issue the tickets.

The Inquiring Officer, who himself had had former judicial experience as the President of a Village Tribunal, warned the respondent that his plea of guilt might render him liable to dismissal, but the respondent still maintained his plea of guilt. He proceeded to state that, accepting the warning and realising the gravity of the plea of guilt, he was nevertheless reiterating his plea of guilt in the hope that any punishment meted out to him would be of such a nature as to give him a chance of making good in the future.

His explanation in mitigation was that at Pettah about five passengers boarded the bus and asked for five Re. 1/65 tickets and that whilst reeling out these five tickets an additional ticket of the same value was also reeled out. As he could not issue any other ticket without tearing this off, he removed this from the machine and kept it in his possession until at Pasyala a passenger who boarded the bus asked for a ticket to Kurunegala to the value of -/95 cts. He therefore issued the extra ticket which he had in his hand to this passenger and received -/95 cts. from him, honestly thinking that he was not committing any offence.

In regard to the other ticket his position was that he could not remember whether he had collected Re. 1/05 from the passenger who had boarded the bus at Nittambuwa.

In his statement the respondent went on to say that he had admitted his faults to the officers of the Flying Squad.

The excess sum of Rs. 8/82 that was found with his collections he still maintained was his private money and not moneys collected from any passengers.

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As I have observed earlier, the entirety of this statement as well as of the other proceedings before the Inquiring Officer was put in evidence before the President who therefore had before him material showing that both before the officers of the Flying Squad and before the Inquiring Officer the respondent had admitted his guilt.

At the hearing before the President the appellant called an officer of the Flying Squad who spoke to the matters to which I have already referred, and also the Inquiring Officer, who produced the record of the proceedings. The Inquiring Officer stated that having found the respondent guilty of the charges, he had recommended suspension for a period of six months.

The respondent did not himself give any evidence nor was any witness called on his behalf.

The President in the course of his order has observed that there was no evidence before him to show at what point the passenger who had paid -/95 cts. had boarded the bus. He observed that the Flying Squad officer had stated that he had got this information from the passenger but that the passenger himself had not been called to give evidence. In these circumstances, the President took the view that the charge relating to the issue of that ticket had not been proved.

In regard to the other charge, that of collecting Re. 1/05 on a ticket for -/05 cts., the Flying Squad officer had been unable to read the number of the ticket or show that it had been issued from the ticket machine which had been used by the conductor. On this basis, the President held that there was no evidence to show that this ticket had been issued by this conductor.

In regard to the excess cash found to be with the conductor the President took the view although there was evidence that conductors were expected to keep their private money separate from their collections, this evidence by itself did not show that the conductor had defrauded the appellant of any amount.

In this view of the matter, and observing also that there had been no admission of the charges before him, the President held that the appellant had failed in the burden of justifying the dismissal, and he ordered reinstatement of the respondent.

I do not think the approach of the President to the material placed before him was correct.

At an inquiry such as that which the President was conducting, the admission of the respondent was a circumstance on which the appellant was entitled to rely in the absence of any evidence by the respondent to the contrary. It was not open to the President to disregard that admission, for an admission by a party, no less than evidence offered

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against him by his adversary, is evidence before the Tribunal, which the Tribunal is under a duty to consider. It was wrong, therefore, for the President to take the view that there was no evidence before him in support of the charges, nor was it correct for him to rest his order on the technicality that there had been no admission of the charges *before him*. Such an attitude which may perhaps have been appropriate in a criminal trial, was, as Tennekoon J. has observed in *Ceylon Transport Board v. Ceylon Transport Workers' Union* [1], wholly inappropriate to an inquiry before a Labour Tribunal. Indeed the applicability of such an approach even to a criminal trial is strictly limited to confessions obtained in certain defined circumstances outside which admissions are evidence which a criminal court is under a duty to consider. In the present case all such circumstances as would be required to justify exclusion of such evidence even at a criminal trial were completely absent. In fact, the admission was made before an officer with judicial experience who had given due warning to the respondent of the consequences of the admission which he proposed to make—a circumstance the President should not have failed to consider before deciding to ignore the admission.

The conclusion of the President is thus clearly unsustainable, for the material placed before him could lead to no other conclusion than that the respondent was guilty of the charges against him. There was a total absence before the President of any evidentiary material on which a contrary finding could be based.

The question then arises whether, inasmuch as the decision of the President which is now assailed turns on his findings on questions of fact, the procedure of an appeal to this Court is available to the appellant.

Where a statute makes an appeal available only in respect of questions of law, the Appellate Court is not without jurisdiction to interfere where the conclusion reached on the evidence is so clearly erroneous that no person properly instructed in the law and acting judicially could have reached that particular determination.[2] It is true that Courts will be more ready to find errors of law in erroneous inferences from facts than in erroneous findings of primary fact, but it has been repeatedly held that a Tribunal which has made a finding of primary fact that is wholly unsupported by evidence has erred in point of law.[3]

The statement of this principle has perhaps achieved its clearest expression at the hands of Lord Normand who in *Inland Revenue v. Fraser* [4] observed : " In cases where it is competent for a tribunal to make findings of fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears . . . *that the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it.* "

[1] *(1968) 71 N. L. R. 158 : 75 C. L. W. 33.*

[2] *Edwards, Inspector of Taxes v. Bairstow and another (1955) 3 All E. R. 48.*

[3] *de Smith, Judicial Review of Administrative Action, pp. 86–7.*

[4] *(1942), 24 Tax Cases, 498.*

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In the present case the Tribunal would, for the reasons I have stated, appear to have made a finding for which there is no evidence—a finding which is both inconsistent with the evidence and contradictory of it. The restriction of this Court's right to review questions of law would not appear therefore to prevent it from examining and interfering with the order based on such a finding if the Tribunal was under a duty to act judicially.

The question whether Labour Tribunals are under a duty to act judicially is then the only matter remaining.

It appears to me that the decision in the case of *United Engineering Workers' Union v. Devanayagam* [1] must not be thought to mean that Labour Tribunals do not and are not required to act judicially. It must be emphasised that the question whether a particular functionary is under a duty to act judicially is different and distinct from the question whether he holds judicial office. Some dicta in the majority judgment in *United Engineering Workers' Union v. Devanayagam* [2] would appear to be indicative of the view that the President of a Labour Tribunal even when hearing an application under section 31B (1) is not acting judicially, but what the Privy Council in fact decided therein was that Presidents of Labour Tribunals do not hold judicial office. In my view this latter is the true *ratio decidendi* of this case and any attempt to read more into this decision than this underlying principle may well have repercussions which their Lordships did not intend.

Though we are thus bound to the view that such functionaries are not judicial officers, we are, with the greatest respect, not bound to consider such officers as being freed of the duty to act judicially—for it is manifest that the duty to act judicially is not exclusively confined to those who hold judicial office. This is a view which this Court has expressed on more than one occasion.[3] "Judicial power and power in the exercise of which there is a duty to act judicially are two different things."[4]

In deciding whether Labour Tribunals are required to act judicially we are fortunate in having for our guidance a particular set of requirements in accordance with which such Tribunals function. An examination of that large body of decided cases dealing with the tests for determining whether a body is under a duty to act judicially hence becomes largely academic and it does not become necessary to examine in detail the nice distinctions drawn therein.

Section 31 C (1) states that it shall be the duty of the Tribunal to make all such inquiries into the application and to hear all such evidence as the Tribunal may consider necessary and *thereafter* to make such order as may appear to the Tribunal to be just and equitable.

[1] *(1967) 69 N. L. R. 289.*

[2] *(1967) 69 N. L. R. 289.*

[3] *Tennekoon v. The Principal Collector of Customs, (1959) 61 N. L. R. 232, Omer v. Caspersz, (1963) 65 N. L. R. 494.*

[4] *Rola Company (Aust.) Pty. Ltd. v. The Commonwealth (1944), 69 Commonwealth L. R. at 203.*

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The Tribunal has in this case considered it necessary to hear certain evidence and has in fact heard it. Its duty does not end when the evidence so considered necessary is in fact heard. The duty of hearing evidence must necessarily carry with it the duty of considering such evidence for the duty to hear is meaningless without the duty to consider. The present case reveals quite clearly a total omission by the Tribunal to consider evidence which has been placed before it and it cannot be said that the Tribunal has been acting in accordance with the duties laid down for it by statute.

The rules made for regulating the procedure to be observed before these Tribunals are also strongly indicative of the judicial nature of their functions. For example parties are required to submit to the Tribunal statements setting out in full their respective cases in regard to the matters in dispute, one copy of each statement being required to be sent to the other party (Rule 20). So also Rule 21 enables the Tribunal by written notice to call upon the parties to transmit statements setting out in full their respective cases in regard to the matters in dispute. Rule 25 requires every person considered likely to be affected by a dispute to be informed by written notice of the date, time and place of hearing.

The provision of a right to appeal to this Court is also an important factor which appears to mark off such Tribunals from those which are purely administrative. Were they not under a duty to act judicially, appeals to this Court would be meaningless and unworkable except in cases of clear violation of statute, and few such can be visualised when a Tribunal is empowered to make an order which is ' just and equitable '. This important factor alone is sufficient to distinguish the two cases of *Robinson v. Minister of Town & Country Planning* [1] and *Liversidge v. Anderson* [2] which were relied on by the appellant. The Minister in making the decision in both these cases was not making his decision subject to a right of appeal to any Court. Assuming he was acting bona fide the Minister was in those cases the sole judge of the matters which he decided.

Inasmuch, then, as the Tribunal is required to give both parties a full opportunity of stating their cases, a notice of the full statement of the opposite party, and a notice of time and place of hearing and inasmuch as the Tribunal is impressed with the duty to hear evidence and its orders are made subject to a right of appeal to this Court on matters of law, it would appear to be largely academic to go further afield in quest of other indicia of the duty to act judicially.

It is said on behalf of the respondent that the terms of section 31 C (1) impose on the Tribunal the duty of making all such inquiries into the application and hearing all such evidence as the Tribunal may consider necessary, and that the Tribunal is therefore not limited to the evidence

[1] *(1947) 1 All E. R. 851.* [2] *(1941) 3 All E. R. 338.*

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which may be led before it. I do not agree that this provision enables the Tribunal to make inquiries outside the inquiry which it is conducting with notice to and in the presence of parties.

Section 31 C (2) lays down the procedure for an "inquiry" before a Tribunal and in so laying down this procedure makes no distinction between "inquiries into the application" and "hearing all such evidence". The procedure so laid down would thus appear to govern both aspects referred to in section 31 C (1), namely "inquiries" and "evidence", and both these aspects alike would appear to be subject to such requirements as that the inquiry should be conducted with notice to and in the presence of parties. There would thus appear to be no place in the scheme of our legislation for inquiries conducted without notice to and in the absence of the parties. Similar provisions in regard to Industrial Courts appear in section 24 (1) and (2) where again although the Court may make inquiries and hear evidence, no distinction is drawn, so far as concerns procedure, between inquiries and evidence. No analogy may therefore be drawn upon the basis of section 31 C (1) between the case of Labour Tribunals and cases such as *Robinson v. Minister of Town & Country Planning*[1] and *Liversidge v. Anderson*[2] where the Minister was empowered to make his own inquiries and was not even under a duty to reveal the nature and sources of the information on which he acted.

Having regard to all these matters it becomes clear that the decision in *United Engineering Workers' Union v. Devanayagam*[3] does not free Labour Tribunals from the duty to act judicially. This case should not therefore be viewed, as it sometimes tends to be viewed, as granting to Labour Tribunals a free charter to act in disregard of the evidence placed before them. They are, in arriving at their findings of fact, as closely bound to the evidence adduced before them and as completely dependent thereon as any Court of law. Findings of fact which do not harmonise with the evidence underlying them lack all claims to validity, whatever be the Tribunal which makes them.

Proper findings of fact are a necessary basis for the exercise by Labour Tribunals of that wide jurisdiction given to them by statute of making such orders as they consider to be just and equitable. Where there is no such proper finding of fact the order that ensues would not be one which is just and equitable upon the evidence placed before the Tribunal, for justice and equity cannot be administered in a particular case apart from its own particular facts. I am strengthened in the conclusion I have formed by a perusal of the judgment already referred to, of my brother Tennekoon,[4] who has observed that it is only after the ascertainment of the facts upon a judicial approach to the evidence that a Labour Tribunal can pass on to the next stage of making an order that is fair and equitable having regard to the facts so found.

[1] *(1947) 1 All E. R. 851.* [2] *(1941) 3 All E. R. 338.*
[3] *(1967) 69 N. L. R. 289.*
[4] *Ceylon Transport Board v. Ceylon Transport Workers' Union (1968) 71 N. L. R. 158; 75 C. L. W. 33.*

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A point has been made on behalf of the appellant that the proceedings before the domestic Tribunal have not been properly marked in evidence and that the inquiring officer did not identify these documents or the signature of the applicant thereon. This submission seems to me to be without merit for it assumes a strictness in the proof of documents which is wholly foreign to the functions and objects of Labour Tribunals. In the spirit in which the inquiries of these Tribunals should be conducted there is little scope for reliance on such legal technicalities.

I take the view therefore that there is in this case a right of appeal from the order of the Labour Tribunal to this Court, and in the exercise of this Court's powers in appeal I set aside the order of the President and direct that the application be inquired into afresh by another Tribunal. The appellant will be entitled to the costs of this appeal.

Order set aside.

1968 *Present :* **Wijayatilake, J.**

THE CEYLON UNIVERSITY CLERICAL AND TECHNICAL ASSOCIATION, PERADENIYA, Appellant, *and* THE UNIVERSITY OF CEYLON, PERADENIYA, Respondent

S. C. 43/67—Labour Tribunal No. K 991

Labour Tribunal—Inquiry about a criminal act involving moral turpitude—Standard of proof required—Industrial Disputes Act (Cap. 131), ss. 31C, 36 (4).

Where, in an industrial dispute between an employer and an employee, a Labour Tribunal is called upon to decide whether the employee was guilty of a criminal act involving moral turpitude—such as making fraudulent entries with a view to misappropriation of funds—the standard of proof should be as in a criminal case. Accordingly, if there is a reasonable doubt, the benefit of such doubt should be given to the person accused. This requirement is not in conflict either with section 31C (1) of the Industrial Disputes Act, which empowers a labour tribunal to make a "just and equitable" order, or with section 36 (4), according to which the Tribunal is not bound by any of the provisions of the Evidence Ordinance.

APPEAL from an order of a Labour Tribunal.

K. Thevarajah, for the applicant-appellant.

M. M. Kumarakulasingham, for the employer-respondent.

K. M. M. B. Kulatunga, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

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December 20, 1968. WIJAYATILAKE, J.—

This is an appeal from the order of the learned President of the Labour Tribunal dismissing the Application made by the Applicant union on behalf of Mrs. Padma Perera, a nurse employed at the Dental School of the University of Ceylon, Peradeniya from 16th January 1956. The services of Mrs. Perera were terminated by the University on the ground that she had made certain false entries (seven) and misappropriated certain funds amounting to Rs. 80 odd belonging to the University during a period of 15 days in February 1962 when she acted for the cashier-clerk of the Dental school. A domestic Inquiry had been held by the University and the University Council had decided to dismiss her from service with effect from 14th November 1962.

After a lengthy Inquiry the learned President has come to the conclusion that this nurse has been responsible for several incorrect entries in the cash register all of which are of the kind one intending to misappropriate would make and it is difficult to resist the inference that they were made with a dishonest intention. He proceeds to hold that in a case like this the University does not have to prove beyond all reasonable doubt that there has been misappropriation; and that while the inferences from certain facts are clear, *it may be that they are not sufficient for conviction in a criminal case, but that he has to be satisfied on a balance of evidence* that the University was justified in acting on the basis that there had been dishonest conduct. He accordingly holds that the University had sufficient reason for her dismissal.

The evidence was concluded on 20th September 1965, and the Order was delivered on 14th November 1966; the delay being due to the question which had arisen with regard to the regularity of the appointment of the President by the Public Service Commission.

Learned Counsel for the appellant has submitted that the Order of the President is bad in law, as it is not just and equitable as contemplated under Section 31 C of the Industrial Disputes Act as on the evidence led the University has failed to establish the charge of misappropriation of funds or even an attempt to misappropriate the funds of the University beyond reasonable doubt. He further submits that the President has misdirected himself on the Law in the matter of the burden of proof in a case such as the instant one where the charge whether of misappropriation or the making of false entries, with a view to misappropriation clearly involves moral turpitude on the part of the person so accused, by proceeding to adjudicate on the balance of evidence. He submits that in our Criminal Law it is well recognised that a charge laid against an accused has to be proved beyond reasonable doubt. Vide *A. G. v. Rawther*[1]. It is a Rule of practice which we have adopted from the English and now it has ripened into a Rule of Law. This Rule has been extended to our Civil Courts when the issue pertains to an allegation

[1] *(1924) 25 N. L. R. 385.*

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of moral turpitude ; for instance an allegation of adultery in a matrimonial action or allegation of Fraud in a civil dispute. This Rule has also been adopted in the Election Court. Vide *Jayasinghe v. Jayasinghe* [1] ; *Selliah v. Sinnammah* [2] ; *Coomaraswamy v. Vinayamoorthy* [3] ; *Muttiah Chettiar v. Mohamed Hadjiar* [4] ; *Aluvihare v. Nanayakkara* [5] ; *Subasinghe v. Jayalath* [6] ; *Premasinghe v. Bandara* [7] ; *Narayana Chetty v. Official Assignee* [8].

Mr. Thevarajah has cited the case of *M. K. B. v. Advocates Committee* [9] where this Rule was adopted even in a domestic Inquiry in India where the charge was against an Advocate for professional misconduct. He submitted that the learned President would not have dismissed the Application of this nurse if he adopted this Rule. He states that this nurse was during this period attending to the work of three persons with her children down with measles, and as a result in keeping the accounts she has made certain mistakes. As for the cash collected by her she had not appropriated any part of it. No shortage has been proved either. It would appear that during this period she had kept the money in the drawer of the table in the office and when she went on leave Mrs. Cramer had taken over from her and she had given the key of the drawer to Mrs. Cramer, but this lady has not been called as a witness by the University. He further submits that the Matron herself has admitted making a correction in the figures pertaining to the transactions during this period when this nurse was acting for the cashier-clerk. He questions why at least at that stage the cash was not checked precisely.

Learned Crown Counsel who appeared as *amicus curiae* at my request was of considerable assistance to me by referring to a series of cases but he has not been able to cite a single case which has dealt with the question before me precisely in regard to the standard of proof required before a Labour Tribunal in Ceylon in a dispute where the charge against the employee pertains to an act of moral turpitude—such as cheating, fraud, forgery and misappropriation. So far as I could gather his submission is that the onus on an Employer is not so heavy as in a Criminal case and the standard of proof is flexible and it varies according to the particular case. It is his submission that even in a case where the charge alleges a criminal act involving moral turpitude the employer need not prove it beyond reasonable doubt but at the same time the President should not hold against the employee on a slight preponderance of probabilities. He submits that the President has to make a just and equitable order and the procedure he adopts in making such order need not be legalistic and techincal. He is not bound by the provisions of the Evidence Ordinance. At the same time although a President of a Labour Tribunal is not a 'judicial officer' as such he has to act judicially and not

[1] (*1954*) *55 N. L. R. 410.*
[2] (*1947*) *48 N. L. R. 261.*
[3] (*1945*) *46 N. L. R. 246.*
[4] (*1923*) *25 N. L. R. 185.*
[5] (*1948*) *50 N. L. R. 529.*
[6] (*1966*) *69 N. L. R. 121.*
[7] (*1966*) *69 N. L. R. 155.*
[8] (*1941*) *A. I. R.* (*P. C*). *93.*
[9] (*1956*) *1 W. L. R. 1442* (*P. C.*).

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arbitrarily. He has to exercise his discretion with circumspection and act with caution as a prudent man would in the more important affairs of his daily life. The order contemplated under the Industrial Disputes Act has to be just and equitable and a President has necessarily to restrain himself lest the freedom he enjoys leads him astray. This submission of learned Crown Counsel that in a case such as this the President should adopt a flexible standard of proof sounds simple but in actual practice it does not appear to be so. It is better said than done ! In fact when I put him the question whether an employee charged with an offence such as this could be found guilty on suspicion not amounting to proof his reply was that in the instant case although there was a reasonable doubt the President was justified in finding this nurse guilty as the evidence was sufficiently cogent to show that she had made a series of false entries with a view to misappropriation of funds belonging to the University. When I pursued the question whether he could set out a general principle in regard to cases involving moral turpitude his submission was that the standard of proof being flexible unlike in a Criminal case a general rule as such cannot be laid down and every case has to be adjudged on its merits. He even sought to rely on the Public Service Commission Rule 54 to show that even when a Public servant is acquitted in any Criminal proceeding he cannot by reason of such acquittal claim to be re-instated or re-employed. In my opinion the answer to the question now before me should not be influenced by this Rule. Perhaps the P. S. C. Rule 54 which on the face of it appears to be a serious affront on the Courts still remains in this set of Rules in the interests of State security and I presume the Government would resort to it only in very exceptional circumstances. Now that Crown Counsel has relied on the P. S. C. Rules it would be pertinent to note that in Appendix C there are a set of notes on Disciplinary procedure and note 18 is substantially a faithful reproduction of Section 3 of the Evidence Ordinance in regard to the proof of a fact. Note 19 provides that the report of the Inquiring officer should always be based on facts and not on mere conjectures. But inferences may be drawn if they *obviously* arise from the facts. It is also important to note that Rule 53 provides that if in the course of or at the conclusion of a disciplinary inquiry a criminal offence is disclosed the Tribunal or person shall, after recording the findings in the disciplinary proceedings and awarding such punishment as the Tribunal or person is authorised to impose forward the proceedings to the Attorney-General for such action as he may deem fit. So that it will be seen that a Public officer has the benefit of any charge against him savouring of a criminal offence being checked by no less a person than the Attorney-General and I presume in a case where the Attorney-General finds that a prima facie case has been made out he would take action to see that the officer concerned is charged in the Criminal Courts. In a Criminal Court the Crown will have to prove the case beyond reasonable doubt and if there is any such doubt the benefit of it will have to be given to the accused and acquit him. Thus it would appear that a Public servant enjoys this privilege. Could it be said that an employee at the University of Ceylon should not be

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entitled to this same privilege ? Counsel for the appellant does not go so far as to say that in every case where there is an element of criminality (for instance, minor assault, abuse and intimidation) the charge should be proved beyond reasonable doubt. He submits that at least in a case such as the present where the charge involves moral turpitude this salutary practice of giving the benefit of a reasonable doubt to the accused should be adopted by the Labour Tribunal.

Mr. Kumarakulasingham, learned Counsel for the respondent has made a strenuous effort to support the finding of the President and he submits that proceedings before the Labour Tribunal should not be equated with proceedings in Courts of Law. The relationship of Master and servant is governed by the terms of the contract of employment and the object of our Industrial Disputes Act is to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto. Therefore this dispute should be viewed in the proper perspective. He submits that it is not incumbent on an employer to adopt the standard of proof that is required in a Court of Law ; and that it would be open to him to arrive at a conclusion even on the balance of evidence. He submits that the learned President was quite justified in not adopting the strict standard of proof required in a Criminal Court. The fact that the charge against this Nurse is in the nature of a Criminal offence involving moral turpitude should not make any difference in regard to the standard of proof except that the person sitting in judgment should act as a prudent man. He further submits that an order could be just and equitable although there is a reasonable doubt if there is a strong suspicion, as in the instant case where the wrong entries point the finger of guilt at this nurse. In other words as for the President of a Labour Tribunal, even if he has a reasonable doubt in his mind as to the commission of the offence it would be just and equitable for him to make an order confirming the dismissal by the employer by acting on strong suspicion. He relies on the Indian case of *Jubilee Mills v. Baburao Chintaman and another* 4.2.1954. Appln. (Misc. Bom.) No. 349 of 1953–1954 1 LLJ 807 referred to in Khare & Bhide Industrial Law Digest 1952–54 page 43, where it was held that in an inquiry held by a management on the evidence it was found by the management that the charge of theft against the workmen could not be conclusively proved, but a strong suspicion arose in the mind of the Manager that the employees must have tampered with and must have been responsible for the shortage of Company's property and therefore the Manager ordered that they be discharged, the Labour Appellate Tribunal went into the evidence and came to the conclusion (following the principles laid down in Buckingham and Carnatics Mill's Case 1952 L. A. C. 490) that a *prima facie* case had been made out and accorded permission to discharge them, observing, " employees in this department (Stores Dept.) must naturally continue to enjoy the confidence of the

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management and it would not be in the interest of the industry if persons not enjoying the confidence of the management are thrust upon it to work in such a Department ".

In this context learned Crown Counsel has very fairly drawn my attention to the fact that in India all that a domestic inquiry has to ascertain is whether a prima facie case has been made out and the Labour Appellate Tribunal has to ascertain whether in fact the charge had been well founded and grant permission to discharge the employees concerned. On the other hand under our Industrial Law the Labour Tribunal under section 31C of the Act has to make all such inquiries into the application and hear all such evidence as the Tribunal may consider necessary, and thereafter make such order as may appear to the Tribunal to be just and equitable.

Mr. Kumarakulasingham has also relied strongly on Section 36 (iv) of the Act which provides that the Labour Tribunal shall not be bound by any of the provision of the Evidence Ordinance. Vide *C. T. B. v. Ceylon Transport Workers' Union*[1]. He submits that so long as the employer has not acted *mala fide* or indulged in unfair labour practice a decision made by him to dismiss an employee on strong suspicion, even in the absence of conclusive proof, could be upheld by the Labour Tribunal and such an order would be just and equitable.

I give below a list of cases cited by Crown Counsel.

On a careful consideration of these submissions I am inclined to agree with learned Counsel for the appellant that in a case such as the instant one where there is an allegation of misappropriation connected with an allegation of falsification of accounts with intent to defraud the standard of proof should be as in a Criminal case and if there is a reasonable doubt the benefit of such doubt should be given to the person accused. As Taylor in his treatise on Evidence observes " in civil disputes when no violation of the Law is in question, and no legal presumption operates in favour of either party the preponderance of probability, due regard being had to the burden of proof, may constitute sufficient grounds for a verdict. To affix on any person the stigma of crime requires, however, a high degree of assurance ; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt ". This passage is quoted with acceptance by Bertram C.J. in the case of the *Attorney-General v. Rawther*[2]. In fact this standard of proof has been adopted even in the Civil Courts as shown by Mr. Thevarajah where there is an element of criminality involving moral turpitude. In the present case if this Nurse was charged of Criminal misappropriation under Section 386 of the Penal Code or falsification of accounts under Section 467 of the Penal Code she would have been entitled to the benefit of a reasonable doubt. The Ceylon University has not thought it fit to refer this matter to the

[1] *(1968) 71 N. L. R. 158 ; 75 C. L. W. 33.* [2] *(1924) 25 N. L. R. 385.*

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Police or file private plaint. It may well be that the authorities concerned had good reasons for not doing so. In the circumstances, would it be just and equitable to deprive this nurse of a right which she would have had in our Criminal Courts by the fact that this dispute has been referred to a Labour Tribunal ? Under Section 467 she would have been entitled to a non-summary Trial. In my view it would be neither just nor equitable to indirectly rob her of this right. It used to be said in England years ago that the dispensation of Equity was measured by the length of the Chancellor's foot. Vide *Gee v. Pritchard* (1818) 2 Swan. 414. I do not think that in the highest seat of learning in our country the humblest employee should be deprived of this privilege, in a case involving criminal moral turpitude. If for instance a dental surgeon or a law lecturer of the University had to face a charge of this nature would it be right to find him guilty on suspicion, however strong it may be ? Should the Industrial and Labour Law of this country adopt a different standard of proof in the case of a minor employee ? A dismissal of this nature would amount to a condemnation for life and to do so when there is a reasonable doubt would be, in my opinion, neither just nor equitable. It would result in a serious erosion of the Criminal Law of this country and an encroachment on our Courts of Justice. Far from promoting Industrial peace it can lead to difficult situations.

On a scrutiny of the facts it would appear that the alleged seven false entries pertained to a misappropriation of a sum of Rs. 80 odd during a period of 15 days. However, as the President has observed, the shortage in the cash actually handed over has not been established. Mrs. Cramer who took over from Mrs. Perera has not been called. She was a vital witness. Why was she not called to prove the shortage ? The matron's evidence too in this regard is of an indefinite character. It is also noteworthy that during this period the relations of the matron with this nurse had been hostile in regard to a loan transaction with a Chettiar in which the matron alleges this nurse's husband had let her down. It is quite apparent from the evidence that the system of keeping accounts at the Dental School had been most unsatisfactory and everyone appears to have acted on trust ! It is surprising that the University had permitted such a system to be adopted particularly when the store-keeper cum cashier had got into trouble in connection with a similar matter sometime in 1958 or 1959. Although Mr. Kumarakulasingham submits that the charge had been sufficiently proved I find it difficult to agree with him that the onus in this case has been discharged. There is a reasonable doubt and the President who entertained this doubt has not thought it fit to give the benefit of this doubt to the employee but in my opinion she is entitled to it and this being a misdirection in law I would quash the finding of the learned President that she has been guilty of making fraudulent entries with a view to misappropriation. I might mention that although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom enshrined in it and treat it as a safe guide.

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I have given my anxious consideration to the order I should make in this case in the interests of both parties and Industrial peace and I have come to the conclusion that this nurse should be reinstated by the University or in the alternative the University should be given the option of terminating her services on payment of all her back wages and other attendant benefits up to the date of termination and also compensation in a sum to be computed by the Labour Tribunal on the basis of her period of service at this University and the nature of her employment.

The appellant shall be entitled to the costs of the Inquiry before the Labour Tribunal which I fix at Rs. 300 and the costs of appeal which I fix at Rs. 250.

Cases cited by Crown Counsel :—1963 A. I. R. 630 (634) ; 1960 Vol. 1 Lab. Law Journal 558 ; 1957 (44) A. I. R. (S.C.) 232 (239) ; 1957 (44) A. I. R. 882 (885) ; (1967) 69 N. L. R. 289 ; (1962) 65 N. L. R. 566 ; (1963) 2 A. E. R. 114 ; S.C. 133/1967 L/T 28002 of 29.10.68 ; (1967) 71 N. L. R. 78 ; (1960) 63 N. L. R. 36 ; 1960 (47) A. I. R. (S.C.) 191 ; 1963 A. I. R. (S.C.) 1719 ; S. C. Appln. 485/64 of 3.9.68 ; Simonds Vol. 15, page 272 ; 1929 Probate 131 ; 1917 (1) K.B. 352 ; (1942) 44 N. L. R. 97 ; (1937) 39 N. L. R. 494.

Order set aside.

1969 *Present :* **H. N. G. Fernando, C.J., and Pandita-Gunawardene, J.**

S. K. KODIKARA, Petitioner, *and* M. I. M. CASSIM, Respondent

S. C. 582/68—Application for Revision in D. C. Galle, 6909/L

Civil Procedure Code—Section 761—Application thereunder for stay of execution of decree—Duty of Court to consider it though petition of appeal has not been filed.

The fact that a petition of appeal has not yet been filed is not a ground for the refusal of an application made under Section 761 of the Civil Procedure Code for stay of execution of an appealable decree.

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

D. R. P. Goonetilleke, for the defendant-petitioner.

Percy Karunaratne, for the plaintiff-respondent.

May 3, 1969. H. N. G. FERNANDO, C.J.—

In this case decree was entered on 7th October 1968 against the defendant for ejectment from certain premises, and the plaintiff's proctor almost immediately after judgment was delivered made an application

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for the execution of the decree and for the issue of a writ of possession. On the same day the proctor for the defendant moved for stay of execution, but the learned District Judge refused to entertain this application on the ground that a petition of appeal had not yet been filed.

Section 761 of the Code expressly empowers a court to order stay of execution if an application for stay be made before the expiry of time allowed for an appeal. Thus the refusal of the Judge to entertain the defendant's application denied to the defendant the right which he had that the Court should consider and determine his application.

In the result the defendant was ejected from the premises without his having had the opportunity that the Court should first consider the matters which he might have urged in his application for stay of execution.

We make order that the District Judge should now consider the defendant's application for stay of execution of the decree and make an appropriate order thereon. If the District Judge so decides, the writ of possession should be recalled and steps taken requiring the plaintiff to restore possession to the defendant. The defendant will be entitled to a sum of Rs. 200 as the costs of this application.

PANDITA-GUNAWARDENE, J.—I agree.

Application allowed.

1969 *Present :* **Wijayatilake, J.**

ELUVAITHEEVU NORTH CO-OPERATIVE CREDIT SOCIETY, Appellant, *and* M. NALLALINGAM (Chief Clerk, Court of Requests, Kayts), Respondent

S. C. 94/67—C. R. Kayts, 8708

Registered co-operative society—Dispute touching its business—Reference to arbitrator—Arbitrator's award and other proceedings—Exemption from stamp duties—Co-operative Societies Ordinance (Cap. 124), ss. 33, 53 (1)—Co-operative Societies Rules of 1950, Rule 38—Stamp Ordinance (Cap. 247), ss. 2, 4, 8 (1), 8 (2), 39 (1), 41, 53, Exemption F (2) at p. 755.[1]

Where, after a dispute between a registered co-operative society and some of its members is referred to an arbitrator, the award of the arbitrator is made a Rule of Court in accordance with Rule 38 (13) of the Co-operative Societies Rules of 1950, the award and the other proceedings are " instruments " within the meaning of section 33 of the Co-operative Societies Ordinance and, therefore, are not liable to stamp duty.

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APPEAL from an order of the Court of Requests, Kayts.

S. Sharvananda, with *P. Thuraiappah*, for the appellant.

K. M. M. B. Kulatunga, Crown Counsel, for the respondent.

Cur. adv. vult.

February 7, 1969. WIJAYATILAKE, J.—

The Appellant Society has been registered under the Co-operative Societies Ordinance, Chapter 124 as amended by Act No. 21 of 1949. The business of the said Society includes granting of loans to its members. Two members of this Society namely T. Krishnapillai and K. Sivalingam had stood surety to V. Vadivelu, another member, who had obtained a loan of Rs. 200 at 10 per cent. interest from this Society. They had failed to repay this loan and the Committee of the Society had in accordance with Section 53 (1) of the Co-operative Societies Ordinance and the Rules framed thereunder referred the dispute to the Assistant Commissioner of Co-operative Development for decision; who had in turn referred the matter to A. Tharmarajah for arbitration in pursuance of the powers conferred on him under Section 2 (2) of the said Ordinance read with Order of the Minister appearing in *Government Gazette* No. 10,115 of 30th June, 1953. The Arbitrator having inquired into the dispute in accordance with Rule 38 (1) of the Co-operative Societies Rules had made his Award as required by Rule 38 (9) and ordered the three members referred to above to pay the Society the sum of Rs. 246·50 and interest. There was no appeal from this Award. The said Society by its representative C. Thambo—Executor of Awards filed a petition before the Commissioner of Requests, Kayts, praying for an Order Nisi to the effect that the said Award be enforced in the same manner as a Decree of Court in accordance with Rule 38 (13) of the Co-operative Societies Rules of 1950 and the Civil Procedure Code. The Award was accordingly made a Rule of Court and Order Nisi was issued against the three respondents. Order Nisi was served only on T. Krishnapillai, the 2nd respondent and he had stated in Court that he had no cause to show why writ should not issue against him. At this stage the learned Commissioner had observed that the Award and the other proceedings had not been stamped and he had directed the Chief Clerk, to report on the amount of deficiency of Stamp Duty. The Chief Clerk had filed his report shewing the deficiencies as follows :

Letter of Appointment ..	Re. 1·00
Award	Re. 1·00
Petition	Re. 1·00
Application for execution of Writ ..	Re. 1·00
Notice	Re. 1·00
	Rs. 5·00

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The Society has raised objections and the learned Commissioner after Inquiry had ruled that all these documents are liable to Stamp Duty as reported by the Chief Clerk. The present Appeal is from this order.

Mr. Sharvananda, learned Counsel for the appellant submits that the appellant being a registered Society Section 33 of the Co-operative Societies Ordinance exempts it from stamp duty. Section 33 provides as follows :

" Every registered society shall be exempt from—

(*a*) the Stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society, or by an officer, or member, and relating to the business of such society, or any class of such instruments are respectively chargeable ; or

(*b*) any fee payable under the law of registration for the time being in force."

He submits that the word ' instrument ' in this Ordinance includes the word ' document '. He has referred to the word ' documents ' in Section 2 of the Stamp Ordinance Chapter 247 to show that this word is synonymous with the word ' instruments ' and it does not have a connotation distinct from it. He submits that it is clear that it is mere surplusage. Sections 4 and 8 (1) and (2) too have been referred to in support of this submission.

Mr. Kulatunga, learned Crown Counsel, submits that the documents referred to are not ' instruments ' within the meaning of this section and that they are not executed *by or on behalf* of the Appellant society. He has dealt with the procedure relating to an Award of Court being made a decree of Court and he submits that the documents occurring in this context are clearly not ' instruments ' executed by or on behalf of the Society. He relies on the Divisional Bench cases of *Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath* [1] and *Kandy Co-operative Urban Bank v. Senanayake* [2] and Sections 91, 224 and 225 of the Civil Procedure Code and Rule 38 of the Co-operative Societies Rules 1950 Chapter 124, and exemption F (2) appearing at page 755 of the Stamp Ordinance. He submits that any exemption should be expressly stated and he has drawn my attention to the Land Acquisition Ordinance (Chapter 460) and also the Requisitioning of Land Ordinance (Chapter 462) and Resumption of Crown Land Ordinance (Chapter 455). He has also referred me to Sections 39 (1), 41 and 43 of the Stamp Ordinance and to the Cases of *Fernando v. Pieris* [3] and *Don Cornelis Appuhamy v. Kiribanda* [4].

[1] *(1957) 59 N. L. R. 145.*
[2] *(1937) 39 N. L. R. 382.*
[3] *(1937) 39 N. L. R. 526.*
[4] *(1938) 12 C. L. W. 166.*

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Mr. Sharvananda has further submitted that a registered Co-operative Society is virtually a body founded and fostered by the Government and therefore it would be contrary to the objects of both the Co-operative Societies Ordinance and the Stamp Ordinance to make these documents liable to duty.

In my opinion a statute such as the Stamp Ordinance should be strictly construed. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the Statute clearly imposes the obligation. *Vide* Maxwell on Interpretation of Statutes—11th ed. p. 278. The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the Enactment and the Object the legislature has in view. Vide—Maxwell page 51. In my view the word 'instruments' in Section 33 of the Co-operative Societies Ordinance is wide enough to cover the word " documents '. An instrument is a formal document especially of a legal character. In the instant case the documents in question have come into being in pursuance of a dispute which had arisen between the society and some of its members and the procedure adopted is recognised by our Law. In the circumstances it would be highly artificial and hyper-technical to hold that these documents are not instruments as contemplated in Section 33 and that they have not been executed on behalf of the appellant society.

I would accordingly set aside the order of the learned Commissioner and hold that none of these documents are liable to Stamp Duty. The petitioner had made the Chief Clerk of the Court of Requests, Kayts, respondent to this Appeal. In the circumstances I make no order as to costs.

Order set aside.

1967 *Present :* **Samerawickrame, J.**

S. M. S. HAMEED and 2 others, Appellants, *and*
INSPECTOR OF POLICE, CRIMES, Respondent

S. C. 778–780/67—M. C. Panadura, 245

Common intention—Applicability of rule in a prosecution of two or more persons for unlawful possession of house-breaking instruments—Penal Code, ss. 32, 449.

Where, in a prosecution of more than one person for unlawful possession of house-breaking instruments in contravention of section 449 of the Penal Code, the evidence shows that the instruments were found in the possession of only one of the accused persons, section 32 of the Penal Code relating to common intention cannot be applied to convict the other accused of the offence charged

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APPEALS from a judgment of the Magistrate's Court, Panadura.

Accused-appellants absent and unrepresented.

Ranjit Gunatilleke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 2, 1967. SAMERAWICKRAME, J.—

The 2nd, 3rd and 4th accused-appellants and one Mohamed Mohideen, who was the 1st accused, were charged with having committed an offence punishable under Section 449 of the Penal Code read with Section 32 of the said Code, in that they were found having in their possession without lawful excuse, instruments for house-breaking. All four accused had been convicted and the 2nd, 3rd and 4th accused-appellants have filed petitions of appeal.

The instruments were found in the possession of the 2nd accused and they consisted of articles that are commonly used for lawful purposes, though they may be capable of being employed for the purpose of house-breaking. In such circumstances, it is incumbent on the prosecution to prove the intention of the accused to use the instruments for house-breaking.

There are circumstances upon which the learned Magistrate was entitled to hold that such intent had been proved and I do not think that, sitting in appeal, I can interfere with that finding. The articles were found in the possession of the 2nd accused-appellant. In fact he was holding them in his hand. The 2nd accused-appellant was, therefore, guilty of the offence charged and I affirm his conviction and dismiss the appeal.

The Magistrate has convicted the other accused in reliance on Section 32 of the Penal Code. That Section deals with the position where a criminal act is done by several persons in furtherance of the common intention of all. There can perhaps be no doubt that the other accused shared an intention to commit house-breaking, but it cannot be said that they did any criminal act. Section 32 is applicable where several accused have jointly done a criminal act. I am, therefore, of the view that Section 32 cannot be applied in this case to make the other accused guilty of the offence charged.

I allow the appeals of the 3rd and 4th accused-appellants and set aside their convictions and the sentences passed on them. Acting in revision, I also set aside the conviction and sentence passed on the 1st accused. The sum of Rs. 50/- or any part of it that has been paid by the 1st accused will be refunded.

Convictions of 1st, 3rd and 4th accused set aside.

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[PRIVY COUNCIL]

1969 *Present:* **Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce, Lord Pearson and Lord Diplock**

D. P. MELLAARATCHY, Appellant, *and* J. A. NAIDOO, Respondent

PRIVY COUNCIL APPEAL No. 9 OF 1968

S. C. 56 (F)/65—D. C. Nuwara Eliya, 5409/M

Privy Council—Questions of fact—Concurrent findings thereon in the Courts below—Finality of such findings—New contentions not put forward in the Courts below—Whether Privy Council will entertain them.

The Judicial Committee of the Privy Council treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established, unless there are special circumstances such as would justify setting aside those findings. Furthermore, they do not admit new contentions not put forward in the Courts below if such contentions require further evidence and further findings and cannot succeed on the materials already available to them.

APPEAL from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena, Q.C.*, and *Brian Sinclair*, for the defendant-appellant.

M. P. Solomon, for the plaintiff-respondent.

Cur. adv. vult.

April 15, 1969. [*Delivered by* LORD PEARSON]—

The plaintiff in the action, who is the respondent in this appeal, is the executor of the will of the late Mr. Marley who died in Ceylon on 26th February 1963. Mr. Marley was a retired tea-planter and a man of substantial means. He was about 86 or 87 years of age when he died, being considerably older than Mrs. Marley, his wife, who played a prominent part in the events leading up to the action though she is not a party to it. The defendant in the action, who is the appellant in this appeal, is also a man of substantial means, owning a number of properties and having experience of managing rubber and coconut estates.

On 6th August 1960 a contract in writing was made between a Company called Borakande Estate Company Limited (who will be called "the Vendor Company") and Mrs. Marley and the appellant

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J*----J 5640–2,255 (8/69)

for them to purchase as joint purchasers from the Vendor Company a rubber and coconut estate of about 400 acres called the Borakande Estate at the price of Rs. 425,000. Completion of the contract took place on 29th November 1960. The appellant had hardly any available ready money at that time. The sum of Rs. 425,000 required for the purchase of the estate was provided as follows :—

(*a*) A sum of Rs. 125,000 was borrowed by the purchasers from the Vendor Company and it was agreed that it should be secured by a mortgage of the estate.

(*b*) A sum of Rs. 125,000 was lent to the purchasers by the Mercantile Bank on Mr. Marley giving a guarantee for this sum and interest thereon and agreeing that a fixed deposit of Rs. 150,000 which he had at the Bank should be appropriated for the purposes of the guarantee.

(*c*) A sum of Rs. 50,000 was lent by Mr. Marley to the appellant and used by the appellant in paying the deposit of Rs. 42,500 and making a further payment of Rs. 7,500 in respect of the purchase price.

(*d*) A sum of Rs. 25,000 was borrowed by the appellant from a Bank on a guarantee given by Mrs. Marley.

(*e*) Further sums amounting to Rs. 100,000 were provided by Mr. and Mrs. Marley.

In addition Mr. Marley paid legal expenses amounting to Rs. 17,004 and the purchasers—Mrs. Marley and the appellant—were liable to reimburse him. The appellant's share of this liability was one-half, *i.e.*, Rs. 8,502. Mrs. Marley and the appellant became owners of the estate in equal shares.

Arrangements were made for the appellant to have the management of the estate and out of the nett proceeds to pay Rs. 6,000 per month to the Mercantile Bank towards repayment of the loan of Rs. 125,000 and accruing interest. It is important in relation to one of the issues in this appeal to ascertain the nature of these arrangements. There is contemporary documentary evidence that the arrangement for the payment of the Rs. 6,000 per month was imposed by the Mercantile Bank as a condition of granting the loan of Rs. 125,000. On 8th September 1960 the appellant, in a letter to which Mrs. Marley added her written consent and signature, wrote to the Bank saying :

"After the interview the undersigned had with your goodself the proposals were discussed with Mr. and Mrs. Marley and now we have decided to send the details.

. . . .

We really need a Rs. 125,000 to complete the pruchase and if you are prepared to accommodate us Mrs. Marley and I are prepared to give you a mortgage of the property as we would be owning the

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property in equal shares. We are also prepared to send all our produce to Mr. Armitage of Messrs. John Keel, Thompson White Limited and from the proceeds of sales for us to draw the minimum as working expenses and the balance to be sent into your Bank or as an alternative for them to send all proceeds of sales to the Bank and for us to draw from the Bank an amount fixed upon monthly for the working expenses. As we are anxious to complete the purchase without delay we would very much appreciate an early reply.

Thanking you,

Yours faithfully,

(Sgd.) D. P. Mellaaratchy.

I consent.

(Sgd.) Eileen Marley "

On 30th September 1960 the Bank wrote to the appellant, sending a copy to Mrs. Marley. They said :

" . . . we are pleased to advise that your application for a loan of Rs. 125,000 has been sanctioned by our Head Office. The terms of the Limit are as follows :—

' *A limit of Rs. 125,000* for advances on a separate loan account repayable on demand, secured by a first legal mortgage of freehold land beneficially owned in equal shares by Mrs. E. Marley and Mr. D. P. Mellaaratchy, comprising of Maha Borakande Estate being a rubber estate of 2,399 acres, with various estate buildings, situated near Ambalangoda in Galle District, to be shortly occupied by the borrowers and valued by Mr. A. A. Jayasinha, Court Valuer & Auctioneer, at Rs. 480,000.

. . . .

Repayment of Advances

By monthly instalments of Rs. 6,000 to be paid direct to the Bank by Messrs. John, Keell Thompson, White Ltd. from whom a letter will be obtained undertaking to pay to the Bank the proceeds of all produce sold by them on account of the estate. Interest at 3% over Central Bank rate, minimum 7%. '

We shall be grateful if you will now write to Messrs. John, Keell, Thompson, White Limited instructing them to pay the proceeds of all produce sold by them on your behalf to this Bank for credit of your account. Such payments will be credited to a general account to be opened in the name of the Estate and the sum of Rs. 6,000 will be transferred monthly from the general account to the loan account.

. . . . "

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For a very short time the joint venture seemed to be proceeding smoothly and successfully. On 8th December 1960 Mr. Marley wrote a friendly letter to the appellant and on 12th January 1961 the appellant wrote a friendly letter to Mr. Marley. Also on 12th January 1961 Messrs. John Keell, Thompson, White Limited paid into the Bank a sum of Rs. 8,811/85 of which Rs. 2,811/85 was credited to the joint current account of the appellant and Mrs. Marley for the Borakande Estate and Rs. 6,000 was credited to the joint loan account.

But after that there was no further payment into the joint loan account and the only further payment into the joint current account in the year 1961 was of a sum of Rs. 1,181/40 on 17th February. There was antagonism developing between Mrs. Marley and the appellant. Early in February 1961 Mr. Martensz, Mr. Marley's legal adviser, and then a partner in the firm of F. J. and G. de Saram, was trying to bring about either a sale of the estate by the appellant and Mrs. Marley or a sale by Mrs. Marley of her half share to the appellant. Mr. Martensz also requested that Messrs. Mackwoods be appointed to manage the estate, but the appellant would not agree. Also in February and March 1961 Mr. Martensz and Mr. Marley were asking the appellant to give a mortgage of his half share of the property as security for the loan of Rs. 50,000 and the half of the Rs. 17,004 paid by Mr. Marley in respect of legal expenses and the half of Mr. Marley's liability under the guarantee, but no mortgage was given. On 8th August 1961 Messrs. F. J. and G. de Saram wrote to the appellant asking for a working account of Borakande Estate showing Mrs. Marley's half share of the profit or loss for the period 1st April 1960 to 31st March 1961. On 12th October 1961 another lawyer, Mr. Clarence L. de Silva, wrote on behalf of Mrs. Marley to the appellant requesting him to hand over the management of the estate and also asking for an account. On 12th November 1961 the appellant replied, refusing to hand over the management of the estate on the ground that Mr. Marley had made it an express condition before the purchase that the appellant should devote his entire time and energy to the management of the estate, and also refusing to send an account on the ground that as Mr. Jaleel was Mrs. Marley's agent and attorney in respect of her half share in the estate the appellant was not accountable to anybody else. On 22nd November 1961 Mr. Clarence L. de Silva wrote a letter protesting against the appellant's attitude and proposing that the appellant should either sell his interest in the estate to Mrs. Marley or purchase her interest. In the meantime Messrs. F. J. and G. de Saram wrote to the appellant on behalf of Mr. Marley demanding repayment of the Rs. 50,000 and the Rs. 8,502 (half the sum of Rs. 17,004) and requiring him to pay to the Bank the arrears of the monthly instalments of Rs. 6,000. Mr. Martensz (partner in F. J. and G. de Saram) was still trying to bring about a sale by Mrs. Marley of her interest in the estate to the appellant.

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The antagonism came to a climax in February 1962. On 6th February Mr. Clarence L. de Silva as proctor for Mrs. Marley filed a plaint on her behalf against the appellant in the District Court of Balapitiya. The plaint alleged mismanagement of the estate by the appellant in several ways, especially by failing to send the produce to the brokers John Keell, Thompson, White Limited so that they could pay the proceeds to the Mercantile Bank for the credit of the joint estate account, and by failing to render to Mrs. Marley any account of the income and expenditure. She claimed an account, certain sums of money and the appointment of a receiver. On 20th February 1962 strange things happened. Mrs. Marley granted or purported to grant to Mr. Jayatilleke and Mr. Gunasekara a lease of the estate for five years at a rent of Rs. 500 per month or one quarter of the nett income whichever should be the less. On the same day there was an invasion of the estate by Mr. and Mrs. Marley and Mr. Jayatilleke accompanied by a number of men some of whom were armed, and they took possession of the estate and forced the superintendent to leave the estate. The comment of the District Court on this behaviour was " It is rather shocking that people from whom one could have expected a better standard of conduct should have descended to that low level reminding one of Chicago gangsterism ". Complaints to the police were made by the superintendent on 20th February and by the appellant two days later.

Then there were negotiations, and on 2nd March 1962 an agreement in writing was made, which is important in its bearing on the issues in this appeal. The parties to it were the appellant as vendor and Mrs. Marley as purchaser. The appellant agreed to sell and Mrs. Marley agreed to purchase the appellant's half share in the estate (subject to authority being obtained from the Tea and Rubber Estate (Control of Fragmentation (Board) at the price of Rs. 100,000—and completion was to take place within two weeks of such authority being obtained. There were additional terms including the following :—

" 7. That all outstanding debts and liabilities accruing in respect of moneys advanced by Herbert Goddard Marley for the purchase of the said premises shall be borne by the purchaser, who shall also be solely liable for the payment of the sum of Rs. 125,000 which may become due upon an Agreement to Mortgage executed by the vendor and the purchaser and the said mortgage in respect of the said sum of Rs. 125,000 shall be executed in favour of the Borakanda Estate Company Limited by the vendor and the purchaser before the execution of the transfer herein mentioned.

. . . . . .

10. The purchaser shall withdraw all proceedings and suits filed against the vendor in the District Court of Balapitiya in respect of the said premises.

. . . .

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12. If the purchaser shall fail to complete the purchase as provided in Clause 4 hereof, then in that event this Agreement shall forthwith be deemed to be cancelled and of no effect and thereupon the purchaser shall become liable to pay forthwith to the vendor a sum of Rs. 100,000/- as liquidated damages and not by way of penalty, subject however to the conditions that the Tea and Rubber Estates (Control of Fragmentation) Board has granted its authority for a sale of the said premises in terms of paragraph 3 hereof."

The appellant had legal advice with regard to this agreement of 2nd March 1962. He said in his evidence that when Mr. Marley had asked him to meet Mr. Marley's proctor, Mr. Welikala, "I could not make up my mind because the matter was in the hands of my lawyers Mr. Adv. Thurairatnam and Mr. David Perera....On Mr. Thurairatnam's advice, I was agreeable to be rid of the bother on receipt of Rs. 125,000/- Mr. Marley agreed and asked me to go and see Mr. Welikala and he wanted me to discuss the details with him. I went and saw Mr. Welikala a day or two after. Then I met him and he gave me a draft and with Proctor De Silva I went and saw Mr. Adv. Neville Samarakoon and after some corrections were made, I brought and gave it to Mr. Welikala."

When they had entered into this agreement both the appellant and Mrs. Marley went to the police and made statements informing them of the settlement that had been effected.

The Board granted its authority for the sale to be made.

But Mrs. Marley did not proceed with the purchase. In breach of clause 10 of the agreement of 2nd March 1962 she did not withdraw the action which she had commended against the appellant in the District Court of Balapitiya. Indeed she signed judgment against the appellant in that action but the appellant had the judgment set aside. From about April 1962 onwards Messrs. Julius and Creasy were acting for Mrs. Marley. On 15th June 1962 Messrs. Julius and Creasy wrote on her behalf a letter to the appellant referring to the lease of 20th February 1962 in favour of Mr. Jayatilleke and Mr. Gunasekera and to the agreement of 2nd March 1962, and saying that they proposed taking steps to secure to their client her interest in the property free from any encumbrances effected by these documents, and calling upon the appellant to have the agreement of 2nd March 1962 cancelled and discharged.

On 12th July 1962 Mrs. Marley through her proctors Messrs. Julius and Creasy commenced an action against Mr. Jayatilleke and three other defendants, alleging that Mrs. Marley's execution of the lease of 20th

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February 1962 had been obtained by fraudulent misrepresentation as to the nature and contents of the lease or by undue influence, and claiming that the lease should be declared void *ab initio* or rescinded or set aside and that possession of Mrs. Marley's one half share of the estate should be restored to her and also claiming damages. Mrs. Marley did not bring an action to have the agreement of 2nd March 1962 declared void or rescinded or set aside.

Mr. Marley died on 26th February 1963, and his will was proved by the plaintiff (respondent) who is a senior partner in the firm of Julius and Creasy. The will contained a proviso: "I do hereby....direct my executors out of my estate to pay to the said Mercantile Bank Limited the sum which at the time of such payment shall be found to be owing to the said Bank for principal and interest upon the joint loan account in the name of my said wife and the said Peter Mellaaratchy and on such payment I direct my executors at the expense of my estate to obtain from the Bank an assignment cession or other appropriate document in consequence of such payment having been made under or in respect of my hereinbefore recited guarantee." Mr. Marley by his will released his wife from certain debts which she owed to him in connection with the purchase of the estate in 1960 and also from any liability which would arise out of the repayment of the Bank loan. On the other hand he directed his executors to demand payment of all monies owing to him by the appellant, and to take all such steps as might be necessary for the recovery of such monies. The will had been made on 9th October 1961, and there was a codicil made on 17th May 1962.

The directions in the will were carried out. On 12th June 1963 the fixed deposit of Rs. 150,000, which Mr. Marley had in 1960 appropriated to his guarantee of the loan of Rs. 125,000 made by the Bank to the appellant and Mrs. Marley on joint account and interest thereon, was applied to this purpose by the Bank at the request of the respondent who was the executor. The amount owing including interest was Rs. 136,343·69, and the deposit receipt was used to pay off this debt and the balance of Rs. 16,183·71 was paid to the respondent. Then on 21st November 1963 the respondent brought the action against the appellant, claiming repayment or reimbursement of:

(*a*) Rs. 68,171·84 being one half of the sum of Rs. 136,343·69.

(*b*) Rs. 8,502 being one half of the sum of Rs. 17,004 which Mr. Marley had paid in respect of the legal expenses of the purchasers of the estate in 1960.

(*c*) Rs. 52,812·50, being the sum of Rs. 50,000 lent by Mr. Marley to the appellant in 1960 and interest thereon.

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There was an Answer from the appellant as defendant, and it was dated 29th May 1964. As there were afterwards "issues framed" covering most of the material allegations in the Answer, it will be necessary to set out only the main contents of paragraph 13 :

> "13. Thereupon Eileen Florence Marley with the concurrence, approval and knowledge of and together with H. J. G. Marley acting by their Proctor, Mr. Welikala, and others entered into negotiations with the Defendant as a result whereof the Defendant was discharged from all obligations to pay any moneys to H. J. G. Marley or Eileen Florence Marley and the Agreement No. 227 dated 2nd March 1962 . . . was entered into between Eileen Florence Marley and the Defendant . . . . The Defendant thereafter and in consequence thereof abandoned all steps taken by him and referred to above and gave up all claims against Eileen Florence Marley and H. J. G. Marley and was thus and otherwise absolved and released by H. J. G. Marley and Eileen Florence Marley from all or any liability to pay any sum of money to H. J. G. Marley or to Eileen Florence Marley. In the circumstances aforesaid, H. J. G. Marley was estopped and barred from making any claim and the Plaintiff has no cause of action against the Defendant."

The appellant's primary contention at the trial in the District Court, and the version of the agreement of 1960 given by him in his evidence, were that he did not in 1960 acquire any half interest in the estate and he did not have any liability to repay the loans out of his own pocket, but the agreement was that he should manage the estate and out of the profits pay off the monies which had been borrowed for effecting the purchase of the estate, and when all these monies had been paid off then and only then he would acquire his half interest in the estate. This contention of the appellant and his version of the 1960 agreement were rejected by the District Court because they were extensively contradicted by the documents as well as by the evidence of the respondent's witnesses which was accepted by the District Court. The decision of the District Court on this aspect of the case was not challenged in this appeal (nor, so far as appears, in the Supreme Court). Therefore it is unnecessary to set out the issues and findings relating to these matters.

The plea of estoppel raised in paragraph 13 of the Answer was relied upon in argument in the Courts below, but there seems to be in the facts of this case no matters from which any estoppel, in any ordinary sense of the word, could possibly be derived or inferred. At any rate no argument based on estoppel was put forward in this appeal.

Learned counsel for the appellant put forward two contentions in this appeal.

(A) It was contended that before the written agreement of 2nd March 1962 was entered into there was an oral agreement made between the appellant and Mr. Marley by which Mr. Marley would release the

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appellant from his liability to Mr. Marley if the appellant would enter into the written agreement with Mrs. Marley. In regard to this contention it will be convenient to set out the relevant issues framed and the District Court's answers to them :

" (18) Did the deceased H. J. G. Marley thereupon agree with the defendant whereunder :

	Answer
(*a*) the defendant was discharged of all obligations to pay any monies to H. J. G. Marley, deceased, or Eileen Florence Marley, his widow ?	No
(*b*) Agreement No. 227 of 2.3.62 attested by R. M. S. Karunaratne, Notary Public, was entered into between the defendant and Eileen Florence Marley ?	Yes
(*c*) the defendant abandoned all steps taken against Eileen Florence Marley and H. J. G. Marley, deceased ?	Yes
(19) (*a*) Has the defendant been released and absolved from liability to pay any sum of money to H. J. G. Marley, deceased, or to Eileen Florence Marley ?	No
(*b*) Is the Estate of H. J. G. Marley, deceased, estopped and barred from making any claim against the defendant ?	No "

The District Court's negative answer to issue No. 18 (*a*) was expressly approved by the Supreme Court. Therefore the appellant is faced with concurrent findings of fact against him. There is a well-established rule that, unless there are special circumstances, their Lordships' Board treat questions of fact on which there have been concurrent findings in the Courts below as conclusively established. *Vatcher v. Paull* [*1915*] A.C. 372, 383 J. C. per Lord Parker of Waddington. *St. Francis Hydro Electric Company Limited v. The King* [1937] 2 All E. R. 541 J. C. per Lord Maugham. *Yachuk v. Oliver Blais Company Limited* [1949] A.C. 386, 397 J.C. per Lord du Parcq.

Counsel for the appellant, however, has argued that there are special circumstances in this case, in that the judges of both the Courts below misdirected themselves as to the effect of the evidence relating to issue 18 (*a*) in that the distinction between the notarial agreement D. 5 (*i.e.*, the written agreement of 2nd March 1962) and the alleged oral agreement between Mr. Marley and the appellant which preceded D. 5 was not sufficiently appreciated.

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There is in the judgment of the District Court some foundation for this argument, in that the judgment after reviewing the evidence at length and dealing very carefully and lucidly with the main question at issue (the question as to the nature of the orginal transaction) dealt rather cryptically with the question whether Mr. Marley had before the conclusion of the written agreement of 2nd March 1962 agreed to release the appellant from his liabilities to Mr. Marley. The learned District Judge must have had in mind what the question was. The note of the address of defendant's (the appellant's) counsel in reply ended with the words " Mr. Adv. Thiagalingm in reply says that Mr. Marley agreed to release the defendant from all obligation and that the defendant was absolved from all liability. " In the judgment the description of the defendant's evidence includes this passage : " He agreed with Mr. Marley that he was to be discharged of all obligations in respect of the Borakanda Estate. If that was not agreed he would not have signed the agreement ". Also issue No. 18 (*a*), which has been set out above, was quite clearly phrased and received the definite answer " No ". The passage in the judgment giving reasons for the decision is as follows :—

> " The defendant has taken up the position that the Plaintiff is estopped from making any claims against him as by D. 5 the defendant was discharged from all obligations to pay any monies to Mr. Marley or Eileen Florence Marley and further the defendant abandoned all steps taken by him and gave up all claims against Eileen Florence Marley and H. J. G. Marley. Now it would appear that D. 5 is an agreement between Mrs. Marley and the defendant only. There is no doubt credible evidence that Mr. Marley was also present at the time of execution of D. 5. Mr. Karunaratne states that Mr. Marley was present at the time. The defendant states that he would not have signed the agreement if Mr. Marley was not a party to it and he was not absolved from all claims by Mr. Marley. It is difficult to understand why it was not thought fit to make Mr. Marley also a signatory to D. 5. By D. 5 Mrs. Marley has undertaken to pay all monies advanced by Mr. Marley. One cannot, however, say that Mr. Marley did not acquiesce in the transaction, but why was he not made a party to it ? However, the agreement is a conditional one as can be seen by paragraph 12 and also paragraphs 3 and 4. There is proof that Mrs. Marley did not abide by the agreement, because, despite paragraph 10 of D. 5 she proceeded with the case filed against the defendant in the Balapitiya Courts. . . . In the circumstances I am of opinion that the plea of estoppel must fail. "

In this passage, although the explanation of the ground of decision is lacking in clarity the reasoning is sound. The fact that Mr. Marley was not made a party to D. 5 (the written agreement of 2nd March 1962) is a vital point. It is to be remembered that the appellant had ample legal advice with regard to this agreement, as appears from a passage in his evidence quoted above. Mrs. Marley if she took over the appellant's half share in the ownership of the estate would naturally take over all or

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most of the appellant's obligations arising out of their purchase of the estate. But her promise to perform his obligations would not extinguish the obligations nor relieve him of his liabilities to Mr. Marley as creditor. If the intention had been to release the appellant from his liability to Mr. Marley, Mr. Marley should have been joined as a party to the written agreement, so that there would have been a novation with Mr. Marley agreeing to accept Mrs. Marley as his debtor in lieu of the appellant—in other words agreeing to release the appellant from the obligation in consideration of Mrs. Marley assuming it. As the appellant was acting under legal advice, the fact that Mr. Marley was not joined as a party, so that the written agreement could not operate as a novation, is strong evidence against the alleged existence of an oral agreement to relieve the appellant of his obligation to Mr. Marley. Moreover Clause 12 of the written agreement, to which the District Court referred, also tends to show that the alleged oral agreement was not made. The scheme of Clause 12 is that if Mrs. Marley does not complete her purchase of the appellant's half share the agreement will be cancelled and of no effect and Mrs. Marley will be liable to pay to the appellant Rs. 100,000/- as liquidated damages. That is reasonable if the appellant keeps his half share of the ownership of the estate and also remains under his obligations arising out of the purchase of the estate in 1960 : he is deprived of the purchase price of Rs. 100,000—but he will receive the same sum as liquidated damages. On the other hand, if the appellant were relieved of his obligations to Mr. Marley the Scheme of Clause 12 would go wrong and the appellant would get too much : he would keep his half share of the ownership of the Estate, and be relieved of his obligations to Mr. Marley and in addition receive Rs. 100,000/- as liquidated damages ; that would be an excessively favourable position for the appellant and is not likely to have been intended.

The judgment of the Supreme Court on this issue, affirming the decision of the District Court, shows beyond all doubt a full understanding of the appellant's allegation of an oral agreement and gives clear and cogent reasons for rejecting it.

There are in this case no special circumstances such as would justify setting aside the concurrent findings of fact by the Courts below that the alleged oral agreement was not made. Accordingly the first contention put forward on behalf of the appellant in this appeal fails.

(*B*) The second contention put forward on behalf of the appellant in this appeal has been to the effect that from the findings of the District Court on certain of the issues it follows as a matter of law that the appellant has been released from his obligations to Mr. Marley or at any rate from those arising out of Mr. Marley's guarantee in respect of the sum of Rs. 125,000 lent by the Mercantile Bank to the appellant and Mrs. Marley.

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This is a new contention, not put forward in the Courts below. In *Connecticut Fire Insurance Company v. Kavanagh* [1892] A. C. 473, 480 J.C. Lord Watson said :

> " When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

The findings relied upon were in the answers given to issues (11), 15 (*a*) and (16 (*a*)), and the answer to issue 17 is also relevant :

Issues	*Answers*
" (11) Prior to the Deed of Transfer No. 1419 of 29th November 1960 of Borakanda Estate to the defendant and Mrs. Marley was it agreed between H. J. G. Marley, the deceased, and the defendant :	
(*a*) that the defendant was to be in sole management of Borakanda Estate after the transfer ;	Yes
(*b*) that the defendant was to manage the same and pay out the nett income therefrom :	
(i) the sum of Rs. 125,000/- and interest thereon due to Borakanda Estate Co. Ltd., on a mortgage to be entered into in favour of the said Company ;	Yes
(ii) the sum of Rs. 275,000/- to the said Marley, deceased, and Eileen Florence Marley by crediting the same to a separate account with the Mercantile Bank Ltd. ; and	Yes
(iii) the defendant was to maintain an account under the name ' Borakanda Estate ' for the purpose of running the Estate.	Yes

. . . . . .

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Issues	*Answers*
(15) (*a*) Did H. J. G. Marley, deceased, and his widow Eileen Florence Marley on 20.2.62 along with some thugs take wrongful and forcible possession of Borakanda Estate from the defendant ?	Yes
.....	
(16) Was the defendant wrongfully deprived of the possession and management of :	
(*a*) Borakanda Estate	Yes
.....	
(17) Did the defendant thereupon take necessary steps to regain possession of Borakanda Estate.....	Yes "

These findings are not enough to establish any contention on the lines put forward, however it might be formulated. Further evidence and further findings would be required. Was it a condition of the loans made by Mr.Marley, or of any agreement that there might have been relating to Mr. Marley's guarantee of the Bank loan of Rs. 125,000, that repayment or reimbursement would be made only out of the proceeds of the estate and not otherwise ? The arrangement for payment of Rs. 6,000 in reduction of the Bank loan of Rs. 125,000 was made at the instance and for the benefit of the Bank. Was there any agreement between Mr. and Mrs. Marley and the appellant that this arrangement was to operate for the benefit of the debtors ? When and how was any such agreement made ? Secondly, did the dispossession brought about by the high-handed invasion of the Estate on 20th February 1962 prevent the appellant from effecting repayment or reimbursement out of the proceeds of the Estate ? No payment in reduction of the Bank loan had been made since 12th January 1961 and only one payment (a payment of about Rs. 1,118) had been made into the joint current account since that date. If the appellant had remained in possession, would he in any case have made any repayment or reimbursement out of the proceeds of the Estate ? If not, the dispossession did not prevent him from doing so. Also, was the dispossession permanent ? The answer to issue No. 17 shows that the appellant took steps to regain possession of the Estate. If he had not decided to settle the dispute by entering into the written agreement of 2nd March 1962, perhaps he would have been able to regain possession. Thirdly, what was the position to be as between the appellant and the Bank ? The Bank was the primary creditor for Rs. 125,000. The wrongful dispossession effected by Mr. and Mrs. Marley would not deprive the Bank of any of its rights against the appellant. These are some of the questions which would have to be decided—and decided in favour of the appellant—before this second contention put forward on behalf of the appellant could succeed. There may well be other questions on which decisions would be required.

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Consequently this is not a suitable case for admitting new contentions not put forward in the Courts below. It could not succeed on the materials now available.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

Appeal dismissed.

1969 *Present :* **H. N. G. Fernando, C.J., and Pandita-Gunawardene, J.**

H. L. ODIRIS, Appellant, *and* H. L. ANDRAYAS, Respondent

S. C. 164/67 (Inty.)—D. C. Matara, 4857/P

Paddy Lands Act, No. 1 of 1958—Sections 3 and 63—Tenant-cultivator—His right to assert his interest in a partition action—Partition Act (Cap. 69), s. 48.

The interest of a " tenant-cultivator " under the Paddy Lands Act is an " encumbrance " within the meaning of Section 48 of the Partition Act and, therefore, may properly be specified and conserved in a partition decree entered in terms of that Section.

APPEAL from an order of the District Court, Matara.

H. Rodrigo, with *Asoka Abeysinghe*, for the defendant-appellant.

W. D. Gunasekera, for the plaintiff-respondent.

Cur. adv. vult.

June 23, 1969. H. N. G. FERNANDO, C.J.—

Section 3 of the Paddy Lands Act of 1958 declares that a person who is the cultivator of any paddy land let to him under any oral or written agreement is the " tenant cultivator " of that paddy land. The definition in s. 63 of the Act of the word " cultivator " is such that every tenant of

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a paddy land is not necessarily a " tenant cultivator ". In the present case, however, there is no doubt that the defendant, who owned a paddy field in equal half shares with his brother the plaintiff, was the " tenant cultivator " of the brother's half share.

In this action, which the plaintiff instituted for the partition of the paddy field, the defendant asserted that he was the " tenant cultivator " of the plaintiff's half share ; and the question which arises is whether the defendant's right or interest as tenant of the plaintiff's share can be specified in the partition decree as being an encumbrance affecting the share and the lot to be allotted to the plaintiff in the interlocutory and final decrees respectively.

The answer to this question seems perfectly simple. If the defendant was the lessee of his brother's half share under a notarial lease the term of which has not expired, then clearly that lease is an encumbrance for which the defendant could secure protection by having the lease specified in the decree. By reason of the Paddy Lands Act, the defendant, even if he was the tenant under an oral agreement, was a perpetual tenant enjoying rights of tenancy limited only by the Act itself : his rights are thus even more fundamental than those of a lessee under a notarial lease, and he should be entitled to the same protection as s. 48 of the Partition Act allows to such a lessee. The phrase " or any interest whatsoever howsoever arising ", in the definition of " encumbrance " in s. 48 amply confirms the conclusion that the interest of a " tenant cultivator " may properly be specified in a partition decree.

I have hesitated to act upon this conclusion only because of a fear that this conclusion may have the consequence that the failure of a " tenant cultivator " to assert his right in a partition action might extinguish that right. If such a consequence is possible, an unscrupulous landlord might resort to a partition action in the hope of defeating the objects of the Paddy Lands Act.

There are, however, observations in the judgment in *Hendrick Appuhamy v. John Appuhamy* [1] tending tot he opinion that the fear which I entertain may be unreal. In any event, even if the true position be that a tenant cultivator's right may be extinguished by his failure to assert his right in a partition action, that is an evil which can be averted by some appropriate amendment of the law.

For the reasons stated the appeal is allowed with costs. The judgment of the District Judge is varied, in the paragraph allotting shares, by inserting, after the words " plaintiff to—1/2 : ", the words " subject to the rights of the defendant as tenant-cultivator of the plaintiff's 1/2 share ". This additional matter will no doubt be specified when the Interlocutory and Final Decree are prepared.

PANDITA-GUNAWARDENE, J.—I agree.

Appeal allowed.

[1] (1966) 69 N. L. R. 29.

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1969 *Present :* **Sirimane, J., and Samerawickrame, J.**

M. ATHAMBAWA, Appellant, *and* I. P. BEE BEE, Respondent

S. C. 274/66 (F)—D. C. Batticaloa, 4868/M

Debt Conciliation Ordinance (Cap. 81), as amended by Act No. 5 of 1959—Application to effect a settlement thereunder—Bar of subsequent civil action—Inapplicability to an unsecured debt—" Debtor "—" Debt "—Sections 14 (1), 17 (c), 24 (2) (c), 26 (1), 64.

Though the term " debt ", according to section 64 of the Debt Conciliation Ordinance, " includes all liabilities owing to a creditor in cash or kind, secured or unsecured . . .", section 14 (1) does not permit a debtor to make an application to the Board for the settlement of an unsecured debt owed to a secured creditor.

Where a debtor makes an application to the Board for the settlement of a secured debt, the disclosure under section 17 (c) of an unsecured debt due to the same creditor on a promissory note does not have the effect of making the unsecured debt " a matter pending before the Board " within the meaning of section 56 so as to debar the creditor from instituting action subsequently in a civil court to recover the amount of the unsecured debt.

APPEAL from a judgment of the District Court, Batticaloa.

C. Ranganathan, Q.C., with *A. R. Manzoor*, for the plaintiff-appellant.

S. Sharvananda, for the defendant-respondent.

Cur. adv. vult.

May 17, 1969. SIRIMANE, J.—

The plaintiff filed this action against the defendant by way of summary procedure, for the recovery of a sum of Rs. 1,500 and interest due to him on a promissory note.

The learned District Judge made order staying proceedings as he was of the view that this matter was pending before the Debt Conciliation Board, and in accordance with the provisions of section 56 of the Debt Conciliation Ordinance (Cap. 81) he had no jurisdiction to entertain the action.

Section 14 (1) of that Ordinance enables a debtor to " make an application to the Board to effect a settlement of the *debts* owed by him to all his *secured creditors* or any one or more of them. "

For the purposes of this case, it is sufficient to note that the term " debtor " in the Ordinance as amended by Ordinance No. 5 of 1959 means a person

" who has created a mortgage or charge over any immovable property or any part thereof . . . . . "

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Though the term "debt", according to section 64, "includes all liabilities owing to a creditor in cash or kind, secured or unsecured .....", I am of the view that in the context of section 14 (1) the words "*debts* owed by him to his *secured creditors* ....." refer only to secured debts.

I am unable to accept the argument that a debtor could, under section 14 (1) make an application to the Board for the settlement of an unsecured debt owed to a secured creditor.

In this case the defendant also owed another debt to the plaintiff on a mortgage bond. The defendant could undoubtedly make an application to the Board in respect of that debt, as in fact he has done. When such an application is made, section 17 (*e*) requires that the debtor should also furnish "particulars of all debts due by the applicant to unsecured creditors .....". This information is obviously needed to assist the Board in making a just and equitable order in respect of the secured debt. The disclosure (as in this case) under section 17 (*e*) of an unsecured debt due to the same creditor does not have the effect of making that unsecured debt, "a matter pending before the Board". The learned District Judge, in my opinion, was wrong in taking the view that he had no jurisdiction to entertain an action in respect of the unsecured debt.

Unsecured debts can be reviewed by the Board only in certain instances, e.g., under section 24 (2) (*c*), where an application has been made by a creditor, and the debtor desires that the Board should attempt to effect a settlement between him and *all* his creditors whether secured or unsecured. The debtor in such a case must make a written request. Or again, under section 26 (1), if, after the examination of an applicant, the Board itself is of opinion that it is desirable to attempt to effect a settlement between a debtor and *all* his creditors, whether secured or unsecured, a certain procedure has to be followed. But the unsecured debt in the present case was not considered under those provisions.

The appeal is allowed, and the order of the District Judge staying proceedings is set aside.

The case is sent back to the District Court for further hearing in compliance with the provisions of chapter 53 of the Civil Procedure Code.

The appellant is entitled to costs of this appeal.

SAMERAWICKRAME, J.—I agree.

Appeal allowed.

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1968 *Present :* **Alles, J.**

NALLARAKKUPILLAI, Appellant, *and* M. I. KHALEEL (Fisheries Sub-Inspector), Respondent

S. C. 1123/1967—M. C. Puttalam, 3265

Fisheries Ordinance (Cap. 212)—Sections 14 and 15—Offence of possessing fish dynamited in Ceylon waters—Ingredients of the offence.

In a prosecution under section 15 of the Fisheries Ordinance for possessing fish killed by using dynamite in contravention of section 14, it is incumbent on the complainant to prove, *inter alia*, that the fish was dynamited in Ceylon waters.

APPEAL from a judgment of the Magistrate's Court, Puttalam.

Colvin R. de Silva, with *M. L. de Silva* and *Mrs. Sarath Muttetuwegama*, for the accused-appellant.

Lalith Rodrigo, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 3, 1968. ALLES, J.—

The accused-appellant in this case was charged and convicted with having in his possession 150 pounds of ' seraya ' fish, knowing or having reasonable cause to believe that the said fish was killed in contravention of section 14 of the Fisheries Ordinance, by using an explosive substance, to wit, dynamite, and thereby committed an offence punishable under section 26 of the said Ordinance.

Section 14 of the Fisheries Ordinance reads as follows :

" No person shall in Ceylon waters use any poisonous, explosive or stupefying substance for the purpose of poisoning, killing or stupefying any fish."

' Ceylon waters ' includes—

(*a*) the territorial waters of Ceylon ; and

(*b*) all public bays, rivers, lakes, lagoons, estuaries, streams, tanks, pools, ponds and channels and all other public inland waters."

In order therefore to establish the charge under section 15 in this case the prosecution must establish beyond reasonable doubt—

(*a*) that the accused was in possession of dynamited fish ;

(*b*) that he knew or had reason to believe that the fish was dynamited ; and

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(c) that the fish had been dynamited in *Ceylon waters* as defined in the Ordinance.

In this case, I am satisfied that the accused, who has been described as a Fish Mudalali, had in his wadiya at Kalpitiya a large quantity of fish which he knew or had reason to believe to have been killed with the use of dynamite. Indeed, his entire conduct, at the time the Fisheries Inspector visited the wadiya, is indicative of his guilty knowledge—he denied the presence of the fish in his wadiya and when the fish was discovered, he denied it was dynamited fish and commenced to plead with the Inspector. A sample of fish was removed from his wadiya, examined by the Doctor and found to have been killed with dynamite.

Counsel for the appellant however submits that an essential ingredient of the charge has not been established by the prosecution inasmuch as there is no evidence that the fish was dynamited in ' Ceylon waters '. The accused admitted that the fish was bought by his agents at Unchamulla, 12 miles from Kalpitiya along the sea-coast and transported by boat to his wadiya. It was not disputed that Unchamulla is within Ceylon waters but Counsel for the appellant submits that there is no admissible evidence that this fish was dynamited at Unchamulla and the evidence of the Fisheries Inspector that " dynamiting of fish is frequent in Unchamulla and Dutch Bay " is only hearsay. It is not clear whether the Inspector was personally aware of this fact or whether he obtained this information from some other source, particularly as this evidence was elicited only in re-examination. In spite, therefore, of the admission of the accused that the fish came from Unchamulla and that the fish was found to be dynamited, the evidence is not sufficient to establish that the dynamiting took place at Unchamulla. One cannot exclude the possibility of the fish being dynamited outside territorial waters, brought to Unchamulla, purchased by the accused's agents and then transported from Unchamulla to Kalpitiya.

It is not an offence to have in one's possession dynamited fish knowing or having reason to believe that it has been killed by the use of explosives. The offence under section 15 can only be committed if the prosecution proves further that the fish was dynamited in Ceylon waters. The prosecuting authorities have not given their mind to this essential ingredient of the offence and failed to lead evidence on this essential matter. If there was a modicum of admissible evidence on this point, I would not have hesitated to affirm the conviction.

I am therefore constrained to hold that in this case, the prosecution has not proved beyond reasonable doubt that the fish had been dynamited in ' Ceylon waters ' and consequently the charge under section 15 of the Ordinance has not been established. I allow the appeal, set aside the conviction and acquit the appellant.

Appeal allowed.

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1967 *Present :* **Tennekoon, J.**

K. S. P. MAHABOOD and another, Appellants,
and FOOD AND PRICE CONTROL INSPECTOR, Respondent

S. C. 368-369/67—M. C. Colombo, 35275/A

Food Price Order No. 390—Charge of sale of beef at excessive price by more than one person jointly—Quantum of evidence—Penal Code, s. 35—Question whether the beef sold was not imported—Burden of proof—Evidence Ordinance, s. 105—Control of Prices Act, s. 8 (1) and (6).

In a prosecution of the 1st and 2nd accused for jointly selling beef with bones at a price above the controlled maximum retail price, the evidence established that the sale was effected by means of several acts, some done by the 1st accused, others by the 2nd accused.

Held, that upon an application of the principle of liability contained in section 35 of the Penal Code, each of the two accused was guilty of the offence charged.

Held further, that evidence led by the prosecution that the beef which was sold was fresh meat was sufficient to establish *prima facie* that the beef did not fall into the category of " imported beef whether frozen, salt or chilled " which is exempted in the relevant Price Order.

Quaere, whether, if the beef had in fact been imported, that fact was a fact peculiarly within the knowledge of the accused so as to make section 105 of the Evidence Ordinance applicable.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Y. L. M. Mansoor, with *Gamunu Seneviratne*, for the accused-appellants.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 6, 1967. TENNEKOON, J.—

The two appellants were charged with jointly selling beef with bones at a price above the controlled maximum retail price fixed by Food Price Order No. 390 and thereby committing an offence under section 8 (1) of the Control of Prices Act and punishable under section 8 (6) thereof. They were both convicted and each sentenced to four weeks' rigorous imprisonment and to a fine of Rs. 500, in default a further 4 weeks' simple imprisonment.

The prosecution case rested mainly on the evidence of three price control inspectors, de Silva, Maney and Weerasekera. The Magistrate said of them that their evidence was consistent, uncontradicted and clear.

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De Silva's evidence was to the effect that he was the organiser of the raid : that he gave Maney a five-rupee note and instructed him to go to the beef stall at Edinburgh Market and buy some beef ; he himself stood a short distance away near the entrance to the Market while Maney and Weerasekera went up to the accused's stall. He goes on to say—

"Maney asked for 2 pounds of beef from the 1st accused and the 1st accused cut and weighed and gave a parcel of beef to Maney. Maney tendered the Rs. 5 note to the 2nd accused as directed by the 1st accused. Then I saw him taking a balance from the 2nd accused and Maney gave me a signal."

Cross-examined he said—

"The 1st accused cut the beef. He cut the beef and put it into the spring balance and to that he added some bones. After that he wrapped it in a piece of brown paper and handed it to Maney. Thereafter Maney was directed by the 1st accused to go to the 2nd accused and pay the money. He went to the 2nd accused and paid the money. I did not hear the 1st accused saying anything to the 2nd accused. I did not see the 1st and 2nd accused having a conversation prior to this. The 2nd accused is only a cashier. The 2nd accused handed over something to Maney. I did not know what it was."

A close-up of what actually transpired at the stall is obtained from the evidence of Maney and Weerasekera.

Maney testified—

"I went to Stall No. 24 and asked for 2 pounds of beef with bones from the 1st accused. He cut two pounds of beef with bones and having weighed it, he handed it over to me. I asked him for the price and he quoted Rs. 2·50. When I gave him the Rs. 5 note, he directed me to pay it to the 2nd accused. When I went to the 2nd accused and tendered the Rs. 5 note, he quoted Rs. 2·50. He recovered Rs. 2·50 from the Rs. 5 and handed over to me a balance of Rs. 2·50 made up of a two-rupee note and a 50 cent coin."

Cross-examined as to what exactly took place between him and the 2nd accused Maney said :

"I asked for the price of beef from the 2nd accused. He quoted Rs. 2·50. The 1st accused also shouted out the amount."

Witness Weerasekera also testified in relation to this part of the incident as follows :—

"Maney asked for the price. The 1st accused said Rs. 2·50. Then Maney offered the Rs. 5 note to the 1st accused. He wanted it to be given to the 2nd accused. While offering the Rs. 5 to the 2nd accused, Maney said two pounds of beef with bones."

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A veterinary surgeon Mr. Amarasinghe to whom the beef was taken immediately after the "raid" testified that "the meat was the flesh of neat cattle and was fresh. There were no offals present."

Counsel for the accused raised two points at the hearing of the appeal. The first was that the 2nd accused was wrongly convicted because while the sale was effected only by the 1st accused, the 2nd accused merely collected the money as cashier. I am not disposed to agree that no case has been made out against the 2nd accused. The charge against the two accused was that they jointly committed the offence. The evidence establishes that the sale of beef with bones in excess of the controlled price was committed by means of several acts, some done by the 1st accused, others by the 2nd accused. The first accused quotes the price and delivers the beef into the hands of Maney; the sale is not complete at that stage. The 2nd accused then himself quotes the sum of Rs. 2·50 as the price for 2 pounds of beef without bones and receives that sum from the buyer. It is obvious that he was not a mere cashier in the sense that he was collecting a sum stated on a bill or a sum that he was asked by the 1st accused to collect without reference to the sale of a particular quantity of beef. The evidence establishes that the 2nd accused was aware of the fact that two pounds of beef with bones was the subject of the transaction when he quoted and recovered Rs. 2·50 as the price thereof.

There is in my mind no doubt arising on the evidence that the 1st and 2nd accused knowingly co-operated to effectuate a sale of two pounds of beef with bones at Rs. 2·50, each one of them doing what he did at the different stages of the transaction in order to effect a sale of that quantity of beef at that price. Section 35 of the Penal Code provides that—

> "When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence."

I am of the opinion that upon an application of the principle of liability contained in this provision of law, the 1st and 2nd accused are each guilty of the offence charged.

The second ground urged by counsel for the appellants is that the prosecution has failed to establish that the subject of the sale was 'beef'. He relies of the definition given to the word 'beef' in the Price Order. It reads as follows :—

> "For the purpose of this Order the expression 'beef' does not include imported beef whether frozen, salt or chilled and any form of offal."

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There was evidence in the case to show that the meat was the flesh of neat cattle and that it was not offal, but there was no direct evidence to show that the beef in question was not imported. Counsel for the appellant submitted that the burden of proving all ingredients of the offence was on the prosecution and there being no evidence that the beef was not imported the accused were entitled to be acquitted. He relied on the case of *The Attorney-General v. A. M. A. Rahim*[1] where in a similar case my brother Abeyesundere, J. held that the burden of proving the fact that the beef in respect of which the charge was framed was not imported beef was on the prosecution.

The facts of that case are clearly distinguishable. Counsel for the appellant overlooks the fact that in the instant case there was the evidence of Mr. Amarasinghe to the effect that the beef when brought to him immediately after the raid was *fresh* meat. The learned Magistrate himself took the view that this was sufficient to establish *prima facie* that the beef did not fall into the category of 'imported beef whether frozen, salt or chilled'. I am inclined to agree. To my mind the words 'whether frozen, salt or chilled' exhaust the kinds of imported beef that are not subject to the Price Order. The arrangement of the words does not lend support to the view that even fresh beef imported fresh (if that is ever done) is also subject to the Price Order. The Price Order appears to me to have proceeded on an assumption of fact, which is notorious, that beef imported for sale in Ceylon is always beef that has undergone one or other of the processes of preservation—freezing, salting or chilling. Counsel for the appellant submitted that there may be the extraordinary and rare case of fresh beef being imported by air from South India for sale here, and that the existence of such a possibility was sufficient to raise a doubt as to whether the beef in question in this case is beef within the meaning of the Price Order. The answer to this is that the Price Order would apply even to that kind of beef which though imported is not frozen, salt or chilled. Even if I were wrong in taking this view, the possibility of the accused who are beef stall holders at the Edinburgh Market, having imported fresh beef by air from India is so fanciful in the prevailing context that such a possibility can be ignored. In my opinion the evidence that the beef was fresh was *prima facie* evidence of the fact of non-importation sufficient to 'shift' the burden to the accused. Here I may quote from Stephen's *Digest of the Law of Evidence* 12th Edn. Art. 104 a passage that was cited with approval in *R. v. Kakelo*[2] and in *R. v. Cohen*[3]:—

> "in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

[1] *(1966) 69 N. L. R. 519.* [2] *(1923) 2 K. B. 793 at 795*

[3] *(1917) 1 K. B. 807*

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Mr. Amarasinghe was not cross-examined at all. Neither of the accused gave evidence nor produced any other evidence. It seems to me that if the beef were in fact imported beef that would be a fact peculiarly within the knowledge of the accused and no evidence to that effect having been adduced by the accused, the court is entitled to presume that the evidence if produced would establish not importation but the contrary. The proof of non-importation is thus established beyond reasonable doubt.

Learned Crown Counsel submitted that no evidence of non-importation need have been adduced by the prosecution at all because in his submission the effect of the definition of ' beef ' in the Price Order as " not including imported beef whether frozen, salt or chilled and offal " is to create an exception to the offence that arises under section 8 (1) of the Control of Prices Act read with Price Order 390 and that accordingly the burden of proving importation (if that was the defence of the accused) was on them, under section 105 of the Evidence Ordinance. He relied for this submission on the case of *Mudliyar, Pitigal Korale North v. Kiri Banda*[1]. He also submitted that the case of *The Attorney-General v. A. M. A. Rahim*[2] was wrongly decided. Apart from noting a certain attractiveness in the argument and the fact that *The Mudliyar's* case was not cited to my brother Abeyesundere, J. when he heard the case of *Rahim*, it seems to me unnecessary to consider in this case the correctness or otherwise of learned Crown Counsel's submission in view of the fact that the conclusion reached by me in the paragraphs immediately preceding this one render that exercise superfluous.

The appeals of both accused are dismissed. Their convictions and sentences are affirmed.

Appeals dismissed.

[1] *(1909) 12 N. L. R. 304.*

[2] *(1966) 69 N. L. R. 519.*

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[COURT OF CRIMINAL APPEAL]

1969 *Present:* **H. N. G. Fernando, C.J. (President), Samerawickrame, J., and Weeramantry, J.**

R. G. SOMAPALA, Appellant, *and* THE QUEEN, Respondent

C. C. A. 103 OF 1968, WITH APPLICATION 152

S. C. 15/68—M. C. Gampaha, 18785/B

Charge of murder—Meaning of what is commonly called "murderous intention"—Misdirection—Penal Code, ss. 293, 294.

In directing the Jury on the question of murderous intention, the trial Judge stated :—

"Did he cause those injuries with an intention to kill ? That is one of the intentions which falls within the three types of murderous intentions. The second one, that is, an intention of causing bodily injury with knowledge that the bodily injury intended was likely to cause death. There again, gentlemen, it is murderous intention. The third is, neither you have the intention to cause death nor the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, but you have an intention to cause bodily injury, without any such knowledge, but the bodily injury is of such gravity that it is sufficient in the ordinary course of nature to cause death."

Held, that there was misdirection in that there was a lack of appreciation of important points of difference between s. 293 and s. 294 of the Penal Code. While the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such an act is not murder, unless either (*a*) the offender intends to cause bodily injury and has the special knowledge that the intended injury is likely to cause the death *of the person injured*, or (*b*) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death.

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

Colvin R. de Silva, with *F. C. Perera*, *I. S. de Silva* and *E. B. Vannitamby* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

March 12, 1969, H. N. G. FERNANDO, C.J.—

In this appeal against the conviction of the appellant of a charge of murder his Counsel has contended that there was misdirection in law in the explanation to the Jury by the trial Judge of the meaning of what is

1*—J 6019 (8/69)

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commonly called 'the murderous intention'. The explanation is contained in two passages in the summing-up which we now cite :—

"Gentlemen, a person is guilty of murder when he does an act which causes death and the act is done with one of three types of intention. Firstly, the intention of causing death ; secondly, the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, and thirdly, the intention of causing bodily injury without any knowledge but of such gravity that it is sufficient in the ordinary course of nature to cause death."

"Did he cause those injuries with an intention to kill ? That is one of the intentions which falls within the three types of murderous intentions. The second one, that is, an intention of causing bodily injury with knowledge that the bodily injury intended was likely to cause death. There again, gentlemen, it is murderous intention. The third is, neither you have the intention to cause death nor the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, but you have an intention to cause bodily injury, without any such knowledge, but the bodily injury is of such gravity that it is sufficient in the ordinary course of nature to cause death."

In order to consider the question whether these explanations are incorrect, it is necessary to set out and compare the provisions of ss. 293 and 294 of the Penal Code :—

" s. 293 (set out in paragraph form)—

(1) Whoever causes death by doing an act with the intention of causing death ;

(2) Whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death ; and

(3) Whoever causes death by doing an act with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

" s. 294. Except in the cases hereinafter excepted, culpable homicide is murder—

Firstly—If the act by which the death is caused is done with the intention of causing death ; or

Secondly—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or

Thirdly—If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or

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> Fourthly—If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

It is manifest that s. 293 comprises a wider group of cases than does s. 294, and that the latter section classifies as murder only some, and not all, of the cases in the wider group.

No difficulty arises with regard to the offence of culpable homicide which is defined in the first clause of s. 293, i.e. causing death by doing an act with the intention of causing death ; this clause is co-terminous with the 1st limb of s. 294, and thus the offence of culpable homicide defined in this first clause of s. 293 is also an offence of murder.

Under the second clause of s. 293, the act of causing death is culpable homicide if done "with the intention of causing such bodily injury as is likely to cause death." At first impression, the intention specified in that second clause may not appear to differ very much from the (murderous) intention defined in the 2nd limb of s. 294, i.e. "that intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused." This in fact appears to be the impression in the mind of the learned Commissioner. His explanation of the second type of murderous intention is "an intention of causing bodily injury with knowledge that the bodily injury is likely to cause death" ; the omission from this explanation of the concluding words of the 2nd limb—*of the person to whom the harm is caused*—indicates in our opinion a lack of appreciation of an important difference between s. 293 and s. 294. That difference will become clear when our comparison of the two sections is completed.

The 3rd limb of s. 294 postulates one element which is also present in the second clause of s. 293, namely, the element of the intention to cause bodily injury ; but whereas the offence of culpable homicide is committed, as stated in the second clause of s. 293, when there is intention to cause bodily injury *likely to cause death*, the offence is one of murder under the 3rd limb of s. 294 only when the intended injury *is sufficient in the ordinary course of nature to cause death*. In our opinion, it is this 3rd limb of s. 294 which principally corresponds to the second clause of s. 293 ; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd limb. An injury which is only *likely to cause death* is one in respect of which there is no certainty that death will ensue, whereas the injury referred to in the 3rd limb of s. 294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish

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between the cases of culpable homicide defined in the second clause of s. 293, and to provide in the 3rd limb of s. 294 that only the graver cases (as just explained) will be cases of murder. If this was not the object of the Legislature, then there would be no substantial difference between culpable homicide as defined in the second clause of s. 293 and murder as defined in the 3rd limb of s. 294. It will be seen also that if the object of the 2nd limb of s. 294 was to adopt more or less completely the second clause of s. 293, then the 3rd limb of s. 294 would be very nearly superfluous.

To continue with the comparison of the two sections, it is noteworthy that the *element of knowledge* is specified only in the third clause of s. 293, and again only in the 2nd and 4th limbs of s. 294. This fact at least prima facie justifies a supposition that the 2nd and 4th limbs of s. 294, under which *knowledge* is an element of the offence of murder, are intended to correspond, not with the second clause of s. 293, but instead with the third clause of the latter section. This third clause declares to be culpable homicide "an act done with the knowledge that the offender is likely by such act to cause death", and it is obvious that knowledge here comprises both a *general* knowledge, i.e. held objectively, or a *special* knowledge held subjectively with respect to the person injured. On the other hand, the language of the 2nd limb of s. 294 prima facie denotes only the subjective knowledge as to the likelihood of the death *of the person to whom the harm is caused*. There is thus evidence in the 2nd limb of s. 294 of a design to classify as murder some but not all of the offences of culpable homicide defined in the third clause of s. 293. There is evidence also of a similar design in the 4th limb of s. 294 ; knowledge, that an act is *so imminently dangerous that it must in all probability* cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death or injury likely to cause death ; so that many cases which fall within the third clause of s. 293 will not be murder within the meaning of the 4th limb of s. 294.

It thus appears that while the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such an act is not murder, unless either—

(*a*) the offender intends to cause bodily injury and has the special knowledge that the intended injury is likely to cause the death *of the person injured*, or

(*b*) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death.

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Support for this analysis is found in the judgment of Melvill J. in *Reg. v. Govinda*[1] in which the 2nd and 4th limbs of our s. 294 are referred to as (2) and (4) respectively, and the third clause of our s. 293 is referred to as (c) :—

> "The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of constitution or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death."

> "(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide ; if it is the most probable result, it is murder."

For these reasons, we are of opinion that the explanation of the learned Commissioner as to the second type of murderous intention is incorrect in that it does not emphasize that the 2nd limb of s. 294 requires, not an objective knowledge or the presumed knowledge of a reasonable man, but instead the knowledge subjectively of the likelihood of the death of the person to whom the harm is caused. In this way the summing-up left it open to the Jury to convict the accused of murder although the accused may not actually have had the particular knowledge specified in the 2nd limb of s. 294.

This apparent misunderstanding of the proper relationships between s. 294 and the wide definitions of culpable homicide in s. 293 seems also to have influenced the learned Commissioner's explanation of the 3rd limb of s. 294. In explaining the 3rd limb, the learned Commissioner states as follows :—

> "The third is, neither you have the intention to cause death nor the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, but you have an intention to cause bodily injury, *without any such knowledge*, but the bodily injury is of such gravity that it is sufficient in the ordinary course of nature to cause death."

This explanation is perhaps literally correct, but the statement, that there need not be present the knowledge that the injury intended was likely to cause death, can it seems be confusing. The requirement in the 3rd limb that the intended injury is sufficient in the ordinary course of nature to cause death presupposes at least an offender's presumed knowledge that the intended injury is sufficient.....death.

[1] *(1876) 1 Bom. 342.*

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In the more common cases of homicide, a verdict of murder can be returned if the Jury find that the offender had the intention to cause death. If they do not so find, the case will ordinarily fall within the third clause of s. 293 because of the offender's knowledge of the likelihood of causing death ; and then the important question is whether the offence is elevated into the 3rd limb of s. 294 by reason of the gravity of the intended injury. The learned Commissioner's explanation of this 3rd limb might tend to obscure the importance of this question.

For present purposes we think it sufficient to point out, as was pointed out in the citation to which we have referred, that reference to the 2nd limb of s. 294 need not ordinarily be made in the common type of case which is tried in our Courts. As a general rule it will be safer to refer to the 2nd limb, only when there is evidence of the offender's actual knowledge that the particular injury was likely to cause the death of the particular person because of some peculiarity of constitution or immature age or other special circumstances. Similarly there need be no reference to the 4th limb of s. 294 save in cases in which the facts resemble those set out in the illustration (*d*) to the first part of s. 294.

We are unable to say in the instant case that, if the Jury had been correctly directed as to the meaning in our law of " murderous intention ", they would without doubt have convicted this appellant on the charge of murder. Had the element of the knowledge of the likelihood of causing death been referred to only as an element of the offence of culpable homicide, the Jury may reasonably have convicted only of that offence.

We accordingly set aside the verdict and sentence, and we substitute therefor a verdict of culpable homicide not amounting to murder and impose on the appellant a sentence of seven years rigorous imprisonment.

Conviction altered.

1969 *Present :* **H. N. G. Fernando, C.J., and Weeramantry, J.**

R. A. W. RANASINGHE, Appellant, *and* K. D. L. JAYATILLAKE, Respondent

S. C. 513/66 (F)—D. C. Kalutara, 1083/M.R.

Rent-controlled premises—Authorised rent—Determination by Rent Control Board—Claim based on it for refund of rent overpaid during a past period—Validity—Rent Restriction Act, as amended by Act No. 10 of 1961, ss. 4, 5, 16, 16A, 20 (5), 20 (13).

Section 16A of the Rent Restriction Act, as amended by Act No. 10 of 1961, provides not for a fixation of the authorised rent but for a determination of the amount of the authorised rent. The purpose of section 16A is not that the Rent Control Board alters the authorised rent from one amount to another but that it determines what is the authorised rent in terms of the relevant provisions of the Act.

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A refund of rent overpaid during a past period may be claimed by a tenant on the basis of the authorised rent as determined by the Rent Control Board in terms of section 16A. The Board's determination is evidence of the amount of the authorised rent for a past period.

When the Rent Control Board has made determination of authorised rent under section 16A, the parties must be given authentic notice of the contents of the order affecting them.

APPEAL from a judgment of the District Court, Kalutara.

Nimal Senanayake, with *Neil Dias*, for the plaintiff-appellant.

J. W. Subasinghe, for the defendant-respondent.

Cur. adv. vult.

June 20, 1969. H. N. G. FERNANDO, C.J.—

The plaintiff instituted this action for the recovery of a sum of money alleged by him to have been overpaid to his landlord the defendant as rent for the period 1st January 1962 to 30th September 1964. The premises are situated within the limits of the Town Council of Matugama and the plaintiff proved that he has during this period paid a sum of Rs. 100 per month as rent together with Rs. 158·73 cents as assessment rates on the premises.

In October 1964 the plaintiff made an application to the Rent Control Board of Matugama requesting the Board to fix the rent of the premises "in terms of section 4 of the Rent Restriction Act". Notice of this application was given to the landlord and an inquiry was held on 5th November 1964, at which however the landlord was not present. The Board apparently realised that the plaintiff's application was intended to be one for the order under s. 16A of the Rent Restriction Act as amended by Act No. 10 of 1961, which provides as follows :—

"16A. The board may, upon an application made in that behalf by the landlord or the tenant of the premises, by order determine the amount of the authorised rent of the premises."

It will be seen (as I had occasion to remark in the case of *William v. Somasundaram*[1]) that s. 16A provides not for a fixation of the authorised rent but for a determination of the amount of the authorised rent. Section 16 of the principal Act originally provided that the landlord must supply the tenant on request with a statement of the standard rent, and the amount of any claimed permitted increase. It is clear that the Legislature considered this provision to be insufficient in the tenant's interest because of possible inaccuracy in a statement so supplied by the landlord. The deficiency was supplied by the new section 16A, under which a tenant can have the amount of the authorised rent more certainly calculated and

[1] *(1968) 71 N. L. R. 459.*

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determined by the Rent Control Board. The tenant will thus be in a position to assure himself that he does make correct payments of rent to his landlord.

The Rent Control Board in this case determined that the rent of the premises in question is Rs. 58/82 per month. The learned District Judge had two reasons for not accepting the Board's determination and I shall now consider these.

The defendant marked in evidence as D1 the Board's office copy of the notice which was sent to the defendant by the Board after the inquiry held on 5th November 1964. In this copy, which is signed by the Secretary of the Board, the defendant was quite clearly informed of the Board's order that the monthly rent payable to the landlord of the premises is Rs. 58/82. From the terms of D1 the learned District Judge has inferred that the notice which the Board sent to the defendant was identical with D1, and has further held on this footing that a notice in the form of D1 is not due compliance with the Board's duty to send to the defendant a copy of its order.

Sub-section (13) of s. 20 requires that every order made by the Board shall be reduced to writing and signed by the Chairman, and further that a copy of the order shall be transmitted to each party. A very strict construction of this sub-section might justify the opinion that the copy of an order sent to a party must be a duplicate, and must itself bear the signature of the Chairman, and I must concede that this case has revealed the need for Rent Control Boards to be advised as to the form and manner in which the requirements of the Act must be observed. Nevertheless I am satisfied that a notice in the form D1 adequately satisfies the object of sub-section (13), which is only that the parties must have authentic notice of the contents of an order affecting them. I hold therefore that the defendant did receive in the communication D1 what was substantially a copy of the Board's order.

As stated above, the order of the Board was made on 5th November 1964, but the claim of the plaintiff in this action was that he had overpaid rent each month from 1962 until September 1964, in an amount representing the difference between Rs. 100 and the sum of Rs. 58/82 determined by the Board. The learned Judge has however declined to accept the Board's determination of Rs. 58/82 as being the authorised rent during a period which was prior to the date of the order. The Judge here purported to apply a judgment in the case of *Ranasinghe v. Fernando*[1]. This case related to premises to which paragraph (*c*) of section 5 (2) of the Act applies. According to the judgment in that case it was not one in which the authorised rent of the premises had been fixed by reference to the assessment in November 1941, and thus it was one to which paragraph (*c*) of sub-section (2) of section 5 applied. Under that paragraph, the standard rent is declared to be the agreed rent or else an amount fixed by the Board on application to it. In that case therefore, until

[1] *(1951) 53 N. L. R. 163.*

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there was a fixation by the Board, paragraph (*c*) made the agreed amount the standard rent, and the amount fixed by the Board became the standard rent only after the Board actually fixed it. In other words, the Board under that paragraph alters what was previously the amount of the standard rent. On these grounds Gratiaen J. held that the rent fixed by the Board did not apply to the premises prior to the date of the fixation.

The case is clearly distinguishable from one to which s. 16A of the Act applies. The purpose of s. 16A is not that the Board alters the authorised rent from one amount to another, but that it determines what is the authorised rent in terms of the relevant provisions of the Act. In the present case, the premises were during the relevant period assessed for rates by the Town Council, and accordingly the annual value of the premises as so assessed was the criterion by reference to which (in terms of s. 5 (1) (*a*) etc.) the authorised rent is to be ascertained. There is no allegation that the Board in determining Rs. 58/82 to be the authorised rent, erred in any manner in reaching its determination, and in any event the plaintiff was entitled to rely on the presumption of regularity. It must be assumed therefore that the Board's determination was reached upon due consideration of s. 5 (1) (*a*) of the Act and other provisions relevant to the ascertainment of the authorised rent.

It thus appears that the objection that the Board's determination of November 1964 is not evidence of the amount of the authorised rent for a past period, is at best purely technical. The provisions of the Act relating to the standard rent of assessed premises and to permitted increase of the standard rent are such that there is little possibility that the authorised rent of any premises at any time can be higher than the amount which was the authorised rent at any earlier period *. On the contrary, the only apparent possibility is one quite unfavourable to a landlord, namely that the authorised rent of premises say in 1962 or 1963 may be *lower* than the amount which a Rent Control Board may determine under s. 16A in 1964.

The amendment of the principal Act by Act No. 10 of 1961 contains no provision which expressly indicates the purpose of a determination under s. 16A by a Rent Control Board. But I note that such a determination is made in an order of the Board (section 20 (3)), that parties must be given an opportunity to be heard, that notice of the Board's order must be given to the parties, and that the order is subject to appeal to a Board of Review. In these circumstances it is fair to assume that the Legislature intended that determination under s. 16A should at least be prima facie evidence of the authorised rent of premises. If the correctness of the amount determined by the Board is not contested, and if no evidence is offered to show that the true authorised rent is different from the amount as determined by the Board, a Court must

* Fernando, C.J., has pointed out that this sentence of his judgment erroneously states the opposite of what he intended; the next sentence indicates the actual intention.—Ed.

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accept and act upon the determination. The establishment of two statutory tribunals, the decisions of the second of which are declared to be final and conclusive, must surely eliminate the need for a Court to make a fresh determination of the authorised rent of premises in a case where no evidence is offered to challenge the correctness of the Board's determination.

I hold for these reasons that the plaintiff established that the authorised rent for the relevant period was Rs. 58/82 per month and accordingly that overpayments were made as claimed in the plaint.

The appeal is allowed and judgment will be entered for the plaintiff in a sum of Rs. 1517/67 and for costs in both Courts.

WEERAMANTRY, J.—I agree.

Appeal allowed.

1968 *Present :* **Sirimane, J.**

S. J. QUYN, Appellant, *and* M. M. IBRAHIM, Respondent

S. C. 144/67—C. R. Colombo, 91153/R. E.

Rent Restriction Act—Landlord carrying on business in partnership in his premises—Whether his partners can remain in occupation of the premises after termination of partnership.

Where a landlord of rent-controlled premises who carries on a business in partnership in the premises permits a partner to occupy or use the premises during the continuance of the partnership, the latter is not entitled to remain on the premises after the termination of the partnership, after he has been given due notice to quit.

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

B. J. Fernando, with *Gamini Dissanayake,* for the plaintiff-appellant.

T. Nadarajah, for the defendant-respondent.

Cur. adv. vult.

September 25, 1968. SIRIMANE, J.—

The plaintiff is the tenant of premises No. 480, Skinners Road South, Colombo, and carried on business there alone. In 1959, he entered into a deed of partnership (P1) with the defendant and certain others, and agreed, *inter alia*, not to prevent the defendant and the others from

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occupying or using the premises during the continuance of the partnership. The defendant, therefore, entered into occupation of the premises as the licensee of the plaintiff.

After the lapse of two years, the partnership was renewed by (P2) which is in similar terms.

The plaintiff thereafter, in February, 1965, by (P3) terminated the partnership and requested the defendant to quit the premises.

The defendant in his original answer pleaded that he was a tenant under the plaintiff and sought the protection of the Rent Restriction Act.

In his amended answer he abandoned that position, and averred that *the partnership was terminated* on 24th of May, 1963, by an Agreement, but that according to that Agreement (which was produced marked D1) the plaintiff was estopped from instituting this action. So that both parties were agreed that the partnership has been terminated, but they were only at variance in regard to the date of termination. The learned Commissioner was, therefore, wrong in holding that the partnership was still in existence.

The defendant's claim to remain in occupation was based solely on D1 of 1963. By this document the plaintiff agreed not to claim any sum whatsoever from the business and also agreed to the defendant carrying on the business by himself. The plaintiff stated in evidence that he signed D1, without any consideration, only to enable the defendant to raise a loan on the footing that he was the sole owner of the business. The defendant, on the other hand, stated that he paid a sum of Rs. 6,000 to the plaintiff on D1.

The learned Commissioner found the evidence of both the plaintiff and the defendant relating to D1 very unsatisfactory, and stated that he could not act on the evidence of either.

One has, therefore, to look at the document D1 itself. I can see nothing in this document by which the plaintiff surrendered his right to possession of the premises to the defendant.

The learned Commissioner thought that the decision in *Mohamed v. Sahul Hameed* [1] applied to this case and dismissed the plaintiff's action on that ground. The decision there was that one partner as landlord could not sue the other partners as tenants for rent and ejectment in respect of premises where the business of the partnership is carried on.

In this case the partnership had been terminated.

In my view, the defendant was in occupation of the premises only as the licensee of the plaintiff so long as the partnership subsisted. On its termination (and that was the case for both parties) he was no longer entitled to remain there after the plaintiff had given him due notice to quit.

[1] *(1949) 51 N. L. R. 86; 40 C. L. W. 61.*

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The order dismissing the plaintiff's action is set aside, and I direct that judgment be entered in favour of plaintiff for ejectment of the defendant.

The plaintiff had claimed Rs. 150 per month as damages from 28.6.66. There is no evidence to support this claim. The evidence discloses that the monthly rent of the premises was Rs. 35. The plaintiff will be entitled to damages at that rate from 28.6.66. The plaintiff is also entitled to the costs of this action.

Appeal allowed.

1969 *Present :* **Sirimane, J.**

K. PADMANABA, Appellant, *and* M. K. JAYASEKERA, Respondent

S. C. 38/68—C. R. Colombo, 94354

Lease of a grass field—Subsequent erection of houses on the land by the lessee—Renewal of lease thereafter in December 1962—Whether the lessee is entitled to protection under the Rent Restriction Act—Meaning of word " premises "—Rent Restriction (Amendment) Act No. 10 of 1961, s. 13.

The defendant obtained from the plaintiff in 1952 the lease of a grass field, 1 rood and 38·81 perches in extent and situated within the U. C. limits of Moratuwa. By 1961 the defendant had constructed four houses on the land, which then ceased to be a grass field. The houses were tenanted by about 15 persons. When the lease was renewed on 23rd December 1962 for a period of 3 years, it made no special reference to the buildings and referred only to " the premises fully described in the Schedule ". The Schedule set out the entire allotment of land of 1 rood 38·81 perches.

Held, that, according to the definition of the term " premises " in section 13 of the Rent Restriction (Amendment) Act No. 10 of 1961, the defendant was entitled to protection under the Rent Restriction Act in respect of the leased premises, after the period of the lease of 23rd December 1962 had expired. The Rent Restriction Act applied to each one of the buildings constructed on the land.

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

W. D. Gunasekera, with *Raja Bandaranayake*, for the defendant-appellant.

B. J. Fernando, with *Gamini Dissanayake*, for the plaintiff-respondent.

Cur. adv. vult.

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March 14, 1969. SIRIMANE, J.—

On lease P2 of 1952, the plaintiff had leased to the defendant an allotment of land, 1 rood 38·81 perches in extent situated within the U. C. limits of Moratuwa. The learned Commissioner has taken the view that it was a piece of bare land or a grass field with a hut *at that time*, and one may assume that this view is correct.

Thereafter the defendant had constructed certain buildings on the land. These buildings consisted of four houses, each containing a verandah, a room and a kitchen. They were constructed about 10 feet apart, and are tenanted by about 15 persons. It was conceded at the argument that the defendant's evidence correctly sets out the factual position in regard to the buildings, as the plaintiff apparently knew very little about this land. According to the defendant he had come on this land under the plaintiff's husband even long before P2. By 1961 these buildings were on the land, and it was not used as a grass field thereafter. The evidence of the Assessment Clerk of the Moratuwa Urban Council shows that the five buildings were separately assessed. They had been so assessed for the first time in 1958.

On 23rd December 1962, the plaintiff once again on P1 leased to the defendant for a period of 3 years " the premises fully described in the Schedule together with all and singular the rights, privileges, servitudes and appurtenances whatsoever to the said premises.....". The Schedule sets out the entire allotment of land of 1 rood 38·81 perches.

This action was brought by the plaintiff to eject the defendant from the leased premises, as the period of the lease had expired. She averred in the plaint that the subject matter of this action was not governed by the Rent Restriction Act.

The main question for decision was whether these were premises to which the Rent Restriction Act applied.

Section 13 of the Rent Restriction (Amendment) Act No. 10 of 1961 enacts that " Premises mean any building or a part of a building together with the land appertaining thereto ". There can be little doubt, in my view, that the Act applies to each one of the buildings constructed on the land.

Before the definition of " premises " in the amending Act, Gunasekara J., in a case where the facts were somewhat similar—*Paul v. Geverappa Reddiar* [1]—said (at page 404) that the question was whether the property leased consisted of a building with appurtenant land or a land with appurtenant building.

Sinnetamby J. in *Nallathamby v. Leitan* [2] expressed the view at page 61 that the only rational test was to ascertain whether it was a house that was let with a garden as an adjunct or whether it was a garden that was let with a house as an adjunct.

[1] *(1958) 59 N. L. R. 402.*

[2] *(1956) 58 N. L. R. 56.*

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Even by these tests it would appear that at the time of the lease P1, the premises consisted of buildings in the occupation of tenants with the land appertaining thereto.

In this view of the matter it is unnecessary to express an opinion on the further point raised by Mr. Gunasekera for the appellant, viz., that after the definition in the amending act, the provisions of the Rent Restriction Act applied to every building or a part thereof situated in an area where the Act is in operation, and that the tests in the cases referred to above are no longer applicable. He contended that *Fernando v. Vadivelu* [1] was wrongly decided.

The learned Commissioner held in favour of the plaintiff on the ground that the lease P1 made no special reference to buildings and that the defendant could not claim that the buildings were also included in that lease.

It is elementary that when an allotment of land which is leased is described by metes and bounds, everything standing within those boundaries (unless expressly excluded) are also leased to the lessee.

In my view the defendant is entitled to protection under the Rent Restriction Act.

The appeal is allowed, and the plaintiff's action is dismissed with costs both here and below.

Appeal allowed.

1969 *Present :* **Alles, J., and Pandita-Gunawardene, J.**

A. D. J. GOONERATNE, Appellant, *and* J. A. WIMALAWATHIE, Respondent

S.C. 494/65 (F)—D. C. Panadura, 8409/LD

Delict—Damage caused by dangerous tree—Liability of the owner of the tree.

A tree which stood on the defendant's land fell across the roof of the plaintiff's house and caused damage to it. Although the tree did not overhang the plaintiff's land or the house, the defendant was aware of the dangerous condition of the tree.

Held, that the defendant was guilty of neligence and liable to pay damages.

APPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *L. W. Athulathmudali* and *G. S. Samaraweera*, for the defendant-appellant.

G. P. J. Kurukulasuriya, for the plaintiff-respondent.

Cur. adv. vult.

[1] *(1964) 69 N. L. R. 335.*

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June 1, 1969. ALLES, J.—

The plaintiff instituted this action against his neighbouring landowner to recover damages sustained in consequence of an arecanut tree which admittedly stood on the defendant's land falling across the concrete roof of the plaintiff's house resulting in some cracks being caused to the roof.

The house was built in 1957 but was not in occupation and the colour washing and plastering had not been completed when the tree fell on the roof on 6th August, 1962. On 26th November, 1959, the plaintiff by P2 wrote to the Government Agent that there were three very old arecanut trees and two coconut trees which seriously endangered the safety of her house and seeking the intervention of the authorities to have them cut. It was however not possible to arrive at an amicable arrangement with the defendant to have these trees cut. In spite of some confusion in regard to the identity of the tree which fell on the plaintiff's house, the learned District Judge has accepted the evidence of the plaintiff that the tree that crashed on the house was one of the arecanut trees referred to in P2. The defendant was therefore aware of the dangerous condition of the tree from 1959. The evidence of the plaintiff was that the tree was standing 14 feet away from the house and slanting towards the house. It was however not overhanging the plaintiff's land or the house.

Although the tree did not overhang the plaintiff's house, I think the principles laid down in *Jinasena v. Engeltina* [1] are applicable to the case of a tree which causes damage to the property of a neighbouring landowner, provided the owner of the tree is aware of the dangerous condition of the tree. Thus in *Darlis Appu v. David Singho* [2] the defendant who took no steps to prevent a coconut tree, which to his knowledge, was a potential source of danger, from falling on his neighbour's house was held to be guilty of negligence. In similar circumstances in *Podihamy v. Jayaratne* [3] Soertsz A.C.J. held that in respect of a dangerous tree (it was not clear on the evidence that the tree was overhanging the plaintiff's land or house) "apart for the principle involved in the maxim *sic utere tuo ut alienum non laedas* there devolved on the defendant a duty to take care at least from the time his attention was drawn to the dangerous nature of the tree".

We are therefore satisfied in the circumstances of this case that the defendant was liable for the damage caused to the concrete roof of the plaintiff's house.

There only remains the question of the quantum of damages to which the plaintiff would be entitled. The plaintiff originally claimed Rs. 3,000 as damages, then asked for Rs. 1,577·77 in her letter of demand and

[1] *(1919) 21 N. L. R. 445.* [2] *(1948) 50 N. L. R. 241.*

[3] *(1946) 47 N. L. R. 484.*

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finally was awarded Rs. 1,000 which was the sum she claimed in her plaint. Her expert Philipiah, a Chartered Civil Engineer, described the cracks on the roof as lines with no appreciable width. The width he said was only a pinpoint. Of the three cracks only one had gone through the entire width. The learned District Judge has remarked that "Philipiah has not given evidence which we expect from an expert though there is no reason to doubt his bona fides". The defendant's expert Ahangama was a licensed Surveyor and estimated the damage at only Rs. 50 because in his view it was unnecessary to remove the entire roof. The only reason which the Judge gives for not accepting Ahangama's estimate is because he was not an expert on buildings. We think however having regard to the damage caused a reasonable estimate would be Rs. 250. We therefore enter judgment and decree in favour of the plaintiff in a sum of Rs. 250. It was plaintiff's exaggerated claim that necessitated this action being instituted in the District Court and in the circumstances we direct that each party should bear their own costs. We do not propose to interfere with that part of the Judge's order in which he had directed that the defendant should cut down an arecanut tree and two coconut trees which overhang the plaintiff's house as the defendant has agreed to have these trees cut.

PANDITA-GUNAWARDANE, J.—I agree.

Decree varied.

1967 *Present :* **T. S. Fernando, A.C.J., and Siva Supramaniam, J.**

K. ARUMUGASAMY IYER, Appellant, *and* K. MUTTUCUMAROO IYER, Respondent

S. C. 141/1965—D. C. Point Pedro, 6717/L

Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58)—Section 37—Interest of surviving spouse in estate devolving on minor child—Surviving parent's rights to claim compensation for improvements effected by him—Similarity to those of a usufructuary.

Section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance reads as follows :—

"37 When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority."

Held, that a surviving parent who continues to possess the estate of a deceased parent which has devolved on a minor child and enjoys the income thereof in terms of S. 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance is not entitled, after the period of minority of the child has elapsed, to claim compensation for improvements effected by him on a land which forms part of such estate. In such a case, the surviving parent is in the very same position as a usufructuary as regards his rights of possession of the minor's property and enjoyment of the income thereof.

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APPEAL from a judgment of the District Court, Point Pedro.

C. Ranganathan, Q.C., with *V. Arulambalam*, for the defendant-appellant.

S. Sharvananda, for the plaintiff-respondent.

Cur. adv. vult.

October 30, 1967. SIVA SUPRAMANIAM, J.—

The question that arises for decision in this appeal is whether a surviving parent who continues to possess the estate of the deceased parent which has devolved on a minor child and enjoys the income thereof in terms of S. 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58) (hereinafter referred to as the Ordinance) is entitled to claim compensation for improvements effected by him on a land which forms part of such estate.

This was an action for a declaration of title to a share of a piece of land called Kaluvanuvayadi described in the schedule to the plaint and depicted on survey plan No. 243 dated 25.3.1962 and to the entirety of the buildings standing on lot 4A thereof. The following facts were common ground:—The parties are governed by the provisions of the Ordinance. The defendant's wife had been entitled to 1/144 share of the land in question and on her death that share devolved on Balasubramanya Iyer, her only child of the marriage, who was then about 3 years of age. Balasubramanya Iyer was also entitled to another 1/144 share by right of inheritance from his grandfather. He continued to reside with the defendant and was looked after and maintained by him. The defendant was in possession of lot 4A of the said land in lieu of the 1/72 share which belonged to his son. Under S. 37 of the Ordinance the defendant was entitled to possess and enjoy the income only from the share which his son inherited from his mother. On the said lot 4A, between the years 1933 and 1955, the defendant put up buildings to the value of about Rs. 25,000. The defendant's son died in 1956 but the defendant continued to be in possession of the said lot 4A and the buildings standing thereon even at the date of the present action.

The parties were not agreed as to whether the defendant's son had attained majority at the time of death but it was conceded that, if he had not, he would have attained majority in 1957. His interests in the land in question devolved on his maternal grandmother who, by deed No. 7350 dated 10.2.1960, donated the same to the plaintiff. The plaintiff instituted this action as the defendant refused to deliver possession of the said lot 4A and the buildings standing thereon to him. The plaintiff also claimed certain other undivided shares in the land through other sources. The trial Judge entered judgment in favour of the plaintiff and the defendant has appealed.

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At the trial, the defendant set up alternative defences. He alleged that lot 4A on which the buildings stood was not part of the land called Kaluvanavayadi but formed a part of another land called Kalivilappu of which he was the sole owner. He claimed to be entitled to the said land on certain deeds. The trial Judge rejected this claim and characterised the deeds as fabrications. Learned Counsel for the appellant did not seek to canvass that finding.

Alternatively, the defendant claimed a sum of Rs. 25,000 as compensation for improvements and the *jus retentionis*. This claim too was rejected by the trial Judge. It is this finding that has been canvassed in appeal.

The parties were at variance in regard to the source of the funds with which the buildings in question were constructed. According to the defendant, he utilised his own monies for that purpose. The plaintiff stated, on the other hand, that the defendant's son was entitled to a substantial income from a temple and the defendant collected that income and utilised it for the construction of the buildings. The defendant denied that he collected his son's share of the income from the temple but his evidence was not accepted by the trial Judge. Apart, however, from the fact that there is no evidence to prove that the defendant utilised the monies he collected as his son's share of the income from the temple to construct the buildings in question, it should be borne in mind that the defendant was entitled to appropriate to himself the share of the income from the temple to which his son was entitled by way of inheritance from his mother.

It was submitted by learned Counsel for the appellant that the defendant had a vested interest in the land under the law, that he put up the buildings in question bona fide for his own benefit and not for the benefit of his son, and that the son's heirs or representatives in title were not entitled to take advantage of the improvements effected by him without making compensation. I shall examine the submission of Counsel on an assumption of the facts most favourable to the defendant, namely, that he effected the improvements out of his own funds and for his own benefit.

It was argued that the defendant was a bona fide occupier of the land when he put up the buildings and that he was, under the Roman-Dutch law, entitled to claim compensation for the useful expenses incurred by him. Learned Counsel relied on the judgment of the Privy Council in *Hassanally v. Cassim*[1] in the course of which their Lordships stated: " . . . . the right of an improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity." The question that arose for decision in that case was whether a person who had lawfully occupied a

[1] *(1960) 61 N. L. R. 529.*

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land under a lease and, in that capacity, had made improvements was entitled to compensation when his term of lease was prematurely terminated by operation of law. In upholding the claim of an improver for compensation in those circumstances, their Lordships cited with approval several decisions of the South African Courts which laid down that not only a "possessor" in the strictly juristic sense of the term but also "a bona fide occupier" whose occupation was prematurely terminated was entitled to claim compensation for improvements effected by him in the expectation that he would have the benefit of the improvements until the expiration of the period during which the occupation was to last. The basis of the claim is the deprivation of the use and enjoyment of the improvements by the improver by reason of a premature termination by the owner of the period of anticipated occupation. Where, therefore, a bona fide occupier effected improvements and enjoyed the benefit of such improvements for the full period of occupation contemplated by himself and the owner, he would have no claim whatsoever for compensation.

The position was set out clearly by Gardiner J. in the case of *Urtel v. Jacobs*[1] as follows :—"Where improvements have been made by a person in the faith that he will enjoy these improvements either as owner or as occupier with the right of occupying for a certain fixed period and he has been disappointed in this expectation or his occupation for a certain fixed period has been prematurely terminated, that is, prior to what he had expected, he is entitled to compensation if the real owner has benefited by the improvements .... A lessee who occupies for a fixed period and makes improvements during that period, if his term is allowed to run to an end, or he becomes in default, gets no compensation for improvements."

In the instant case, had his son not died in 1956, the maximum period during which the defendant would have been entitled to remain in occupation of the land was the period of minority of his son, namely, till some date in 1957. But he has, in fact, continued in possession till long after that period. Consequently, even if he came within the category of "a bona fide occupier", referred to above, he has no basis for a claim for compensation in as much as he has had the use and enjoyment of the improvements for the entire anticipated period.

The character of the occupation of the defendant, however, was that of a usufructuary and it is now well settled that under the Roman-Dutch Law a usufructuary is not entitled to claim compensation for improvements. The question whether a usufructuary is entitled to claim for expenses voluntarily incurred by him in the improvement of the property, subject to his usufruct, was examined by Kotze J. in a learned judgment in the case of *Brunsdon's Estate v. Brunsdon's Estate and others*[2] and he held that "both principle and authority lead to the conclusion that a usufructuary is not, in the absence of special circumstances, entitled to claim for improvements made by him to the property over which he enjoys the right of usufruct." This decision has been followed in subsequent cases

[1] *(1920) C. P. D. 487 at p. 492.* [2] *(1920) C. P. D. 159 at pp. 171 et seq.*

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in South Africa (vide *Urtel v. Jacobs* (supra); *Wait v. Estate Wait*[1]) and has been adopted by text writers of such high authority as Wille[2] and Lee[3].

Learned Counsel for the appellant argued that the rights of a surviving parent under the Ordinance are larger than that of a usufructuary and the Roman-Dutch Law in regard to claims of usufructuaries is not applicable to the facts of this case. S. 37 of the Ordinance provides as follows :— " When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority ". The rights of the surviving parent, therefore, are (1) to possess the property and (2) to enjoy the income thereof. The rights of a usufructuary under the Roman-Dutch Law are set out by Lee (supra page 181) as follows :—(1) To use the property and take its fruits as owner; (2) To possess the property and to recover possession from the dominus or from a third party; (3) To alienate the right of use and enjoyment but only for the term of the usufruct and (4) To give the property in pledge or mortgage and to suffer it to be taken in execution but only to the extent of his usufructuary interest. It will be seen, therefore, that the rights of a surviving parent as set out in S. 37 of the Ordinance are narrower in scope than those of a usufructuary, while as regards his rights of possession of the property and enjoyment of the income thereof a surviving parent is in the very same position as a usufructuary. In the instant case, no special circumstances were established by the defendant which would entitle him to claim compensation.

In view of the above conclusion it becomes unnecessary to examine the submission of respondent's counsel, that the presumption of advancement will apply in favour of the defendant's son in regard to the expenditure incurred by the defendant in constructing the buildings in question.

The learned District Judge was right in rejecting the defendant's claim for compensation for improvements. The appeal is dismissed with costs.

T. S. Fernando, A.C.J.—I agree.

Appeal dismissed.

1969 *Present :* **H. N. G. Fernando, C.J., and Pandita-Gunawardene, J.**

B. A. R. DE JONK, Petitioner, *and* M. D. DE JONK, Respondent

S. C. 708/68—Application for Revision in D. C. Colombo, 7409/D

Execution of decrees—Matrimonial action—Salary of an employee—Exemption from seizure for alimony—Civil Procedure Code, s. 218 (m).

Section 218 (*m*) of the Civil Procedure Code, as amended by Act No. 24 of 1961, debars the seizure of the salary of an employee (other than a public officer or servant) in execution of an order for alimony entered against him in a matrimonial action.

[1] *(1930) C. P. D. 1.* [2] *Wille : Principles of S. African Law (2nd Edition), p. 214.*
[3] *Lee : An introduction to Roman-Dutch Law (4th Edition) p. 182.*

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

Siva Rajaratnam, with *C. Chakradaran*, for the defendant-petitioner.

L. A. T. Williams, for the plaintiff-respondent.

May 22, 1969. H. N. G. FERNANDO, C.J.—

In this case writ had issued against the present petitioner for the seizure of his salary in execution of an order for alimony *pendente lite* and of a decree for permanent alimony. The petitioner applied to the District Court for a release of the seizure on the ground that under Section 218 paragraph (*m*) of the Civil Procedure Code, as amended by Act No. 24 of 1961, the salary and allowances of an employee are exempt from seizure. The learned District Judge refused the petitioner's application on the ground that the provisions of Sections 217 and 218 of the Code do not apply to a decree in a matrimonial action.

Prima facie the provisions of Section 218 do apply in the case of any decree to pay money, and counsel for the respondent in the present application, despite an able argument, could not refer to any authority in support of the Judge's order. We ourselves see no ground upon which to uphold the order.

Counsel has further argued that this application should now not be allowed because the order complained of was itself appealable and no appeal was taken from it.

The delay in the filing of this application has been quite brief and there may well be explicable reasons why the petitioner and his legal advisors were uncertain as to the correctness of the order briefly pronounced by the learned District Judge.

Acting in revision we hold that the order made by the District Judge on 25th September 1968 was illegal and we allow the application of the petitioner dated 18th September 1968 for a direction to the Fiscal to release the seizure. There will be no order for costs in respect either of the application in the District Court or of the present application.

PANDITA-GUNAWARDENE, J.—I agree.

Order set aside

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1968 *Present :* **Pandita-Gunawardene, J.**

M. I. M. THAHA, Appellant, *and* M. M. SADEEN, Respondent

S. C. 40/67—C. R. Colombo, 86538/R. E.

Rent controlled premises—Sub-letting—Subsequent sale of the premises by landlord—Right of purchaser to have the tenant and sub-tenant ejected—Rent Restriction Act (Cap. 274), ss. 9 (2), 27.

Where a tenant of rent-controlled premises sub-lets the premises in contravention of section 9 (2) of the Rent Restriction Act and the premises are subsequently sold by the landlord to a third party, the purchaser, to whom the tenant has attorned, is entitled to maintain an action for the ejectment of the tenant and the sub-tenant.

Ratnasingham v. Catheraswamy (58 N. L. R. 476) followed.

Wallace v. Silva (70 N. L. R. 308) not followed.

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

C. Ranganathan, Q.C., with *A. Sivagurunathan*, for the 2nd defendant-appellant.

C. Thiagalingam, Q.C., with *M. S. M. Nazeem*, for the plaintiff-respondent.

Cur. adv. vult.

September 26, 1968. PANDITA-GUNAWARDENE, J.—

The plaintiff, who is the respondent to this appeal, became owner of the premises in suit by purchase in 1961. The first defendent who was the tenant, attorned to the plaintiff and thereby continued in his tenancy.

In November, 1963 the plaintiff commenced action against the first defendant, stating *inter alia* (*a*) that the first defendent—he was the only defendant to the original plaint—was in arrears of rent within the meaning of the Rent Restriction Act and (*b*) that he had sub-let the premises without prior consent. The prayer was for an order of ejectment against the defendant and those holding under him. Thereafter the alleged sub-tenant, who is the second defendant in this case, was added as a party. And in December, 1964 amended plaint was filed against both defendants, seeking their eviction on the ground of arrears of rent and on the ground of sub-tenancy in favour of the second defendant. The first defendant filed no answer and did not resist the plaintiff's claim. The second defendant, who is the appellant in this case, filed answer in which he asserted that he, the second defendant, was in occupation, not

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as sub-tenant but that in truth and in fact he was the lawful tenant; that he was the tenant of the plaintiff's predecessor in title and thereafter by attornment and/or by operation of law, became the rightful tenant of the plaintiff as from 1961.

Apparently in the year 1959, the first defendant tenant had entered into an agreement with the second defendant whereby he let to the second defendant the business called " Old Metal Stores " carried on in the premises in suit at a monthly rental of Rs. 30. The second defendant defaulted in the payment of the rental and in 1962, the first defendant filed action against him for ejectment from the premises. In his answer to that plaint, the second defendant admitted that he was a sub-tenant of the first defendant (the plaintiff in that case) which position he has significantly abandoned in this case : and further went on to aver that as from October, 1960 the sub-tenancy turned into a tenancy (Vide P 28). The case did not proceed to trial as the first defendant agreed to his action being dismissed in view of the fact that the business name had not been properly registered.

The learned Commissioner of Requests has considered the documentary and oral evidence in this case and has in my view, correctly found against the second defendant. I see no reason to interfere with his finding.

Mr. Ranganathan for the second defendant however contended that the plaintiff cannot maintain this action for ejectment on the ground of sub-letting as the act of sub-letting was done when he was not the landlord. He strongly relied on the judgment in the case of *Bertha Wallace v. D. V. Hector Silva* [1] where Sirimane, J. held " where a tenant sub-lets 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 sub-letting which had been done when he was not the landlord ". I would, with respect, disagree with the view expressed by Sirimane, J. I would prefer to follow the judgment in the case of *Ratnasingham and another v. Cathereswamy* [2] where Basnayake, C.J. (K. D. de Silva, J. agreeing) in similar circumstances, decided in favour of the plaintiff landlord.

Section 9 (1 and 2) of the Rent Restriction Act, Cap. 274, Volume 10, L. E. C., provide :

> (1) Notwithstanding anything in any other law, but subject to any provision to the contrary in any written contract or agreement, the tenant of any premises to which this Act applies shall not, without the prior consent in writing of the landlord, sub-let the premises or any party thereof to any other person.

[1] *(1968) 70 N. L. R. 308.* [2] *(1956) 58 N. L. R. 476.*

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(2) Where any premises or any part thereof is sub-let in contravention of the provisions of sub-section (1), the landlord shall, notwithstanding the provisions of section 13, be entitled in an action instituted in a court of competent jurisdiction to a decree for the ejectment from the premises of his tenant and of the person or each of the persons to whom the premises or any part thereof has been so sub-let.

The word ' landlord ' is defined in Section 27 of the Act as meaning the person who in relation to any premises is, at the time-being, entitled to receive the rent of such premises.

It would seem to me that it is necessary to consider Section 9 of the Act realistically and not in a technical and narrow sense. It is correct to say that the act of sub-letting it is that gives rise to the cause of action. But to hold that if a sub-letting is done on a particular day, therefore the cause of action can only arise to the landlord who on that particular day was the landlord of the premises, is, I think, not in accord with a common sense approach to the situation. Sub-letting without consent, as can well be imagined, is unlike letting. It is done by the tenant in stealth, for his profit. The landlord may, in the generality of cases, never know whether his premises are sub-let. Proof of sub-letting is in the circumstances, invariably difficult to obtain, and if in addition, it is required that the landlord should establish the date of sub-letting, it will be casting on the landlord a well nigh impossible burden. My interpretation of this Section is that at whatever time it is discovered that the premises have been sub-let, then on that discovery the cause of action arises. What the Section implies is that at the time of commencing action, the sub-letting should subsist ; there should be in existence, a sub-tenant in the premises.

The general purport of the Rent Restriction Act is to afford protection to the honest tenant. But to construe the Act in a manner that may assist a dishonest tenant would be to deny to the landlord the modicum of rights available to him under the Act.

I would affirm the judgment of the learned Commissioner of Requests and dismiss the appeal with costs.

Appeal dismissed.

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[PRIVY COUNCIL]

1969 *Present :* **Lord Hodson, Lord Guest, Lord Pearce, Lord Pearson, Lord Diplock**

R. RATNAGOPAL, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

PRIVY COUNCIL APPEAL No. 30 OF 1968

APN/GEN/2 of 1968—In the matter of a Rule under Section 47 of the Courts Ordinance

Commission of Inquiry—Scope of inquiry—Requirement that it should be limited by the Governor-General and not be left to be decided by the Commissioner—Power of Commission to summon a person residing in Ceylon—Meaning of expression " residing in Ceylon "—A witness's refusal to be sworn or to answer a question—Contempt of Court—Irrelevancy of allegation of bias or interest on the part of the Commissioner—Commissions of Inquiry Act (Cap. 393), ss. 2 (1), 7, 10, 11, 12—Courts Ordinance, s. 47.

The appellant was convicted of contempt of Court for refusing to be sworn when he was summoned to give evidence at a meeting of a Commission appointed under the Commissions of Inquiry Act. The terms of the warrant of appointment issued to the Commissioner were that he should inquire into and report on abuses in connection with certain tenders made to or contracts entered into by contractors between 1st June 1957 and 31st July 1965. The scope of the inquiry was left entirely to the Commissioner's discretion. Under the terms of the warrant the Commissioner was entrusted with deciding what tenders and what contracts required to be inquired into.

Held, that, inasmuch as the scope of the inquiry was not limited by the Governor-General and was to be decided by the Commissioner, the appointment of the Commissioner in terms of the warrant was *ultra vires* and invalid having regard to the powers of the Governor-General under section 2 of the Commissions of Inquiry Act. It followed that the conviction of the appellant for contempt of Court should be set aside.

Obiter : (i) No intention of permanently residing in Ceylon is necessary in order that a person may be liable to be summoned under section 7 of the Commissions of Inquiry Act to give evidence at a meeting of a Commission.

(ii) A person who refuses to be sworn under the power given to the Commissioner by section 7 (*b*) of the Commissions of Inquiry Act is guilty under section 12 (1) (*b*) of the offence of contempt of Court, whether or not he has reasonable cause to refuse to take part in the proceedings on the ground of the Commissioner's bias or interest. If such refusal be considered as a refusal to answer a question, this refusal too may well not be justified by an allegation of bias or interest on the part of the Commissioner.

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1*——J 7153—2,255 (9/69)

APPEAL, by special leave, from a judgment of the Supreme Court reported in (*1968*) *70 N. L. R. 409.*

Sir Dingle Foot, Q.C., with *E. Cotron*, for the appellant. [In the application for special leave to appeal :—*Sir Dingle Foot, Q.C.*, with *Hamavi Haniffa* and *R. R. Nalliah*, for the appellant.]

E. F. N. Gratiaen, Q.C., with *M. P. Solomon* and *H. L. de Silva*, for the respondent.

Cur. adv. vult.

June 30, 1969. [*Delivered by* LORD GUEST]—

This is an appeal by special leave against a conviction for contempt of Court by a judgment of the Supreme Court of Ceylon, whereby the appellant was fined 1,000 rupees or in default was sentenced to one month's imprisonment.

The matter arises out of a warrant published in the Ceylon Government Gazette of 22nd October 1965 whereby Mr. E. G. Wikramanayake, Q.C., was appointed Commissioner under section 2 of the Commissions of Inquiry Act (Cap. 393) to inquire into and report on abuses in connection with certain tenders made to or contracts entered into by contractors between 1st June 1957 and 31st July 1965.

Section 2 (1) of the Commissions of Inquiry Act is in the following terms :

"(1) 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 warrant was addressed by the Governor-General to the Commissioner and appointed him 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

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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 followed an enumeration in very general terms of "relevant tenders" and "relevant contracts".

Paragraph 2 (so far as relevant) continues as follows :

"(2) making such recommendations as you the said Commissioner deem necessary as a result of the inquiry to prevent the recurrence of such abuses in the future, and, in particular, with regard to the law, practice and procedure relating to the custody, receipt, scrutiny or disposal of tenders for the performance of contracts with Government departments, the giving or performance of such contracts, and the supervision of the performance of such contracts :"

Following upon this there are two paragraphs in the following terms :

"And I do hereby direct you, the said Commissioner, to recommend to me the action that should be taken against the persons, if any, whom you have found to be guilty of any such abuses :

And I do hereby authorise and appoint you, the said Commissioner, to hold all such inquiries and make all such investigations into the aforesaid and other like matters as may appear to you to be necessary, and require you to transmit to me, with as little delay as possible, a report thereon under your hands :"

By section 7 of the Commissions of Inquiry Act the Commissioner has power *inter alia* to require the evidence of any witness to be given on oath or affirmation and—

"to summon any person residing in Ceylon to attend any meeting of the commission to give evidence."

By section 10 it is provided—

"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

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Section 47 of the Courts Ordinance as though it were an offence of contempt committed against or in disrespect of the authority of that court."

Section 11 contains provision regarding service of summonses.

Section 12 provides—

"(1) If any person upon whom a summons is served under this Act—

(*a*) fails without cause, which in the opinion of the commission is reasonable, to appear before the commission at the time and place mentioned in the summons ; or

(*b*) refuses to be sworn or, 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 ;

. . . . .

such person shall be guilty of the offence of contempt against or in disrespect of the authority of the commission."

Subsection 2 of section 12 is in the following terms :

"(2) Where a commission determines that a person has committed any offence of contempt (referred to in subsection (1)) against or in disrespect of its authority, the commission may cause its secretary to transmit to the Supreme Court a certificate setting out such determination ; every such certificate shall be signed by the chairman of the commission, or where the commission consists of only one person by that person.

(3) In any proceedings for the punishment of an offence of contempt which the Supreme Court may think fit to take cognizance of as provided in section 10, any documents purporting to be a certificate signed and transmitted to the court under subsection (2) shall—

(*a*) be received in evidence, and be deemed to be such a certificate without further proof unless the contrary is proved ; and

(*b*) be conclusive evidence that the determination set out in the certificate was made by the commission and of the facts stated in the determination."

By section 47 of the Courts Ordinance it is provided that the Supreme Court has power to take cognisance of and try in a summary manner any offence of contempt committed against or in disrespect of the authority of itself or any other Court.

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The Commissioner commenced the inquiry proceedings on 2nd September 1967. After a number of witnesses had given evidence on oath, the appellant after being duly summoned to attend as a witness appeared at the proceedings on 8th January 1968. Before the proceedings commenced the appellant placed before the Commissioner an affidavit in which he alleged that he had no confidence in the Commissioner because the Commissioner was associated either as a shareholder or a director in a number of companies with which the company (in which the appellant's wife was the chief shareholder and of which he (the appellant) was Overseas Representative) would be in business competition. The appellant also stated that he was not residing in Ceylon having surrendered his passport and become registered as a British citizen. After making certain observations regarding the allegations contained in the appellant's affidavit the Commissioner directed the appellant to be sworn or take an affirmation. The appellant then said that he would not proceed further with the proceedings. He was again called upon by the Commissioner to take the oath or affirmation and to testify. The appellant again declined.

On 16th January 1968 the Commissioner issued a certificate in terms of section 12 (2) of the Commissions of Inquiry Act in which the Commissioner after narrating the facts as above stated :

> "When directed to be sworn or affirmed, he refused to proceed any further and refused either to be sworn or to give evidence. In doing so, he has been guilty in my view of contempt of this Commission."

The matter then proceeded by means of a Rule under Section 47 of the Courts Ordinance directing the appellant to show cause.

The judgment of the Supreme Court was given on 9th April 1968 and the relevant order was issued on 15th April 1968 in which it was adjudged that the appellant was guilty of the offence of contempt committed against and in respect of the Commissioner.

Three points were taken by the appellant before their Lordships. A point regarding service of the summons was excluded when special leave to appeal was granted. It was argued, firstly, that the appointment of the Commissioner was *ultra vires* of the Act ; secondly, that the appellant was not residing in Ceylon at the relevant time and that the Commissioner accordingly had no jurisdiction to summon him to attend as a witness, and thirdly, that the appellant had reasonable cause to refuse to give evidence on the ground that the Commissioner in view of his conflict of interest might be biased against the appellant.

The main question which arises accordingly is whether the appointment of the Commissioner in terms of the warrant was *ultra vires* and invalid having regard to the powers of the Governor-General under section 2 of the Commissions of Inquiry Act. Under that section he is empowered

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if it appears to him to be necessary that an inquiry should be held and information obtained as to any matter in respect of which an inquiry would in his opinion be in the interests of the public safety or welfare to appoint a Commission of Inquiry to inquire into and report upon the matter. When the appointment of the Commissioner is examined it will be found that the scope of the inquiry is left entirely to the Commissioner's discretion. In effect he is empowered to inquire into whether during the period in question any abuses occurred in relation to such tenders and such contracts as the Commissioner should in his absolute discretion deem to be by reason of their implications financial or otherwise on the Government of sufficient importance in the public welfare to warrant an inquiry and report. Under the terms of the warrant the Commissioner is being entrusted with deciding what tenders and what contracts require to be inquired into. Under section 2 of the Act the matter to be inquired into must be one in respect of which an inquiry will " in the opinion of the Governor-General " be in the interests of the public welfare. Under the warrant the Commissioner is given the power of selecting the matters which he will inquire into and report upon whereas the selection is by the Act imposed on the Governor-General. The scope of the inquiry instead of being limited by the Governor-General, as in terms of the Act it should be, is to be decided by the Commissioner. Thus the power of selection is by the Gazette delegated to the Commissioner. On behalf of the respondent it was submitted that in the nature of such an inquiry into a great number of different transactions there must in the necessity of things be a roving inquiry by the Commissioner at the initial stage in order to decide which matters require investigation and report and that it would be impracticable to remit all the contracts and all the tenders to the Commissioner at the outset. It was suggested that when the Commissioner had made this preliminary investigation it might be open to the Governor-General to appoint the same or another Commissioner to inquire into specified matters. This argument is reflected in the point taken by the Chief Justice in his judgment where he suggested that if the terms of reference had been drafted in such a form that the inquiry was to be into all tenders and contracts and if the Commissioner reported that he had inquired into certain selected matters the report would not be rendered invalid because the Commissioner had decided not to report in the certain other matters. But the answer to this point is that the Commission did not take this form and that the validity of the appointment of the Commissioner cannot be tested by the result of the inquiry. It may be that another form of reference might by different means have achieved the same end. But their Lordships' attention must be confined to the terms of the actual warrant of appointment.

The importance of construing section 2 of the Commissions of Inquiry Act quite strictly is illustrated when section 12 (1) (*b*) is considered. In that section the safeguard provided to a witness against being required to answer irrelevant questions is to be tested by whether the question touches the matter directed to be inquired into by the Commissioner. If the

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ambit of the inquiry is not limited to any particular matter but is at large, then there would be no limit to the questions which a witness might be obliged to answer.

Their Lordships have reached the conclusion that for these reasons the appointment of the Commissioner was *ultra vires* of the Act and cannot stand. It follows that the conviction for contempt by the Supreme Court must be set aside.

Such a decision renders unnecessary an examination of the remaining points taken by the appellant, but as they were forcefully argued their Lordships propose quite shortly to state their views.

The appellant argued that as he was not " residing in Ceylon " on the relevant date he was not amenable to the jurisdiction of the Commissioner under section 7 of the Act. The Supreme Court have carefully examined the facts in relation to the appellant's visits to Ceylon and their Lordships agree with the view of the Supreme Court that no intention of permanently residing in Ceylon is necessary in order that the appellant may fall within the terms of the section. They do not propose to elaborate further on the necessary requirements of residence. There was clearly material in the facts as narrated by the Supreme Court upon which they could hold that the appellant was residing in Ceylon at the relevant time. If the point had been alive, their Lordships do not consider that any reasons had been shown why they should interfere with the Supreme Court's judgment.

The last matter related to the allegation of bias or interest made against the Commissioner. This arose in relation to the appellant's refusal to be sworn under the power given to the Commissioner by section 7 (*b*) of the Act. The appellant submitted that he had reasonable cause to refuse to take part in the proceedings on the ground of the Commissioner's interest and possible bias and he was therefore not guilty of contempt of Court. As can be seen from the certificate by the Commissioner which by section 12 (3) (*b*) of the Act is conclusive evidence of the facts therein stated, his refusal was to being sworn. The offence in relation to such a refusal is under section 12 (1) (*b*) absolute. No question of reasonable cause arises in regard to this refusal. If however the refusal be considered as a refusal to answer a question, this refusal to answer a question may well not be justified by an allegation of bias or interest on the part of the Commissioner. It is the Commissioner's duty to require a witness to answer a question touching the matter directed to be inquired into by the Commissioner. Whether his refusal is without reasonable cause relates to the form of the question. It is unlikely that the section would impose on the Commissioner the duty of deciding whether he is a suitable person to require the witness to answer a question. He is appointed as Commissioner by the Governor-General and his authority to require a witness to answer a question derives from section 12. But quite apart from these technical considerations their Lordships agree with the views

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expressed by the Supreme Court that the allegations of bias and interest are vague and unsubstantial and quite insufficient to justify the appellant's refusal to take part in the proceedings. If therefore this latter point had been open their Lordships would have agreed with the judgment of the Supreme Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and that the Decree of the Supreme Court by which the appellant was adjudged guilty of contempt and was punished accordingly should be set aside. There will be no order as to the costs of the appeal.

Appeal allowed.

1969 *Present :* **Alles, J., and Pandita-Gunawardene, J.**

S. P. NONA and another, Appellants, *and* H. ENGALTHINAHAMY, Respondent

S. C. 104/67 (Inty.)—D. C. Kurunegala, 1644/MB

Debt Conciliation Ordinance (Cap. 81)—Sections 40 (1) and 43 (1)—Debt secured by mortgage of immovable property—Settlement before Board—Default of payment thereafter—Right of mortgagee to institute hypothecary action then—Procedure.

Where the creditor and debtor in respect of a debt secured by a mortgage of immovable property enter into a settlement before the Debt Conciliation Board whereby it is agreed *inter alia* that in case of any default the mortgagee is entitled to all his legal rights including mortgagee's remedies to sue and recover in a court of law in a consolidated sum any amount due on the settlement, it is open to the mortgagee, if the mortgagor defaults in payment subsequently, to institute a hypothecary action under the provisions of Part II of the Mortgage Act. In such a case the Court has jurisdiction to entertain the hypothecary action without following the procedure laid down in section 43 of the Debt Conciliation Ordinance. The law grants a discretion to a creditor, in the case of a secured debt, to choose whether he should proceed under Section 43 or not.

APPEAL from an order of the District Court, Kurunegala.

Lakshman Kadirgamar, with *P. N. Wikramanayake*, for the defendants-appellants.

Felix R. Dias Bandaranaike, for the plaintiff-respondent.

Cur. adv. vult.

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July 25, 1969. ALLES, J.—

On 21st January 1959, the defendants executed Mortgage Bond No. 210 whereby they bound themselves to pay the plaintiff a sum of Rs. 1,250 with interest at 12% per annum. As security for the said debt they mortgaged and hypothecated with the plaintiff as a primary mortgage the premises described in the schedule to the bond. Having defaulted in the payment of the principal and interest the parties effected a settlement before the Debt Conciliation Board under the provisions of the Debt Conciliation Ordinance, No. 39 of 1941. The terms of the settlement were entered on 11th May 1961 and have been produced as the document marked 'X' 1. According to the terms of the settlement it was agreed that on 21st January 1965, the amount due to the plaintiff was Rs. 1,250 as capital and Rs. 350 as interest. It was agreed that the instalments of principal and interest were to be paid annually by the defendants from 1965 to 1968. Clauses 7 and 8 of the settlement read as follows :—

(7) that if the payments are made the creditor will discharge the mortgage bond and deliver it to the debtor with the title deeds ;

(8) that in case of any default the creditor is entitled to all his legal rights including mortgagee's remedies to sue and recover in a court of law in a consolidated sum any amount due on this settlement.

An instalment of the interest amounting to Rs. 350 being due before the last day of August 1965 and the defendants having defaulted in this payment, the plaintiff instituted this action on the mortgage bond on 5th October 1965. The defendants in their answer filed on 4th June 1966 stated that the proceedings adopted by the plaintiff were in contravention of Section 43 (1) of the Debt Conciliation Ordinance. Nevertheless on 24th September 1966 the case was settled and judgment was entered for the plaintiff in a sum of Rs. 1,350 with costs fixed at Rs. 150 and legal interest. Order to sell was not to issue for six months in the first instance and the Court entered a hypothecary decree. On 27th March 1967 the defendants filed petition and affidavit and moved that the proceedings be declared void *ab initio* and prayed for a dismissal of the action. The learned District Judge after inquiry made order dismissing the application with costs and stated that the judgment creditor would be entitled to proceed with his writ after a proper application to the Court. In the Court below the only question that was in issue was whether the Court had jurisdiction and the learned trial Judge held that inasmuch as the conduct of the defendants revealed a lack of *bona fides* it was not open to them to raise this issue. The present appeal is from the interlocutory order made by the learned District Judge and the execution of the decree has been stayed pending the disposal of this appeal.

The main contention of counsel for the defendants-appellants was that the Court acted without jurisdiction in entertaining the hypothecary action without following the procedure laid down in Section 43 of the Debt

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Conciliation Ordinance. For the purposes of considering the submissions of counsel it is necessary to reproduce Sections 40 (1) and 43 of the Ordinance which read as follows :—

S. 40 (1). A settlement under Section 30 or Section 31 shall, when the original and duplicate thereof have been counter-signed by the Chairman and subject to any order the Board may make in respect of that settlement under Section 54, be *final between the parties* and the contract in respect of any debt dealt with in the settlement shall become merged in the settlement :

Provided, however, that where any debt secured by any charge, lien or mortgage over any property, movable or immovable, is dealt with in any settlement, the rights of the creditor under such charge, lien or mortgage shall, unless otherwise expressly provided in the settlement, be deemed to subsist under the settlement to the extent of the amount payable thereunder in respect of such debt, until such amount has been paid or the property over which the charge, lien or mortgage was created has been sold for the satisfaction of such debt.

S. 43 (1). Where the debtor fails to comply with the terms of any settlement under this Ordinance, any creditor *may* except in a case where a deed or instrument has been executed in accordance with the provisions of Section 34 for the purpose of giving effect to those terms of that settlement, apply to a court of competent jurisdiction, at any time after the expiry of three months from the date on which such settlement was countersigned by the Chairman of the Board, that a certified copy of such settlement be filed in Court and that a decree be entered in his favour in terms of such settlement. The application shall be by petition in the way of summary procedure and the parties to the settlement, other than the petitioner, shall be named respondents, and the petitioner shall aver in the petition that the debtor has failed to comply with the terms of the settlement.

(2) If the court is satisfied, after such inquiry as it may seem necessary, that the petitioner is *prima facie* entitled to the decree in his favour, the court shall enter a decree *nisi* in the petitioner's favour in terms of the settlement. The court shall also appoint a date, notice of which shall be served in the prescribed manner on the debtor, on or before which the debtor may show cause as hereinafter provided against the decree *nisi* being made absolute.

The interpretation of these two Sections have been considered in two recent judgments of this court—*Samarasinghe v. Balasuriya* [1] and *Sawdoon Umma v. Fernando* [2].

In both cases, as in the present case, the debts were secured by a mortgage of immovable property. In the former case Sansoni, C.J. held that the plaintiff had mistaken his remedy in suing on the mortgage

[1] (*1966*) *69 N. L. R. 205.* [2] (*1968*) *71 N. L. R. 217.*

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bonds when, after the settlement, the right of action which the plaintiff would have had was not on the contracts contained in the mortgage bond which had become merged in the settlement. The learned Chief Justice held that the debt due from the defendant to the plaintiff became a *new* debt, due not on the bonds but on the settlement, and that his remedy to recover his debt was under Section 43. In the latter case, after the settlement, the creditor made an application to the District Court praying for a decree to be entered in terms of the settlement and also praying that a hypothecary decree be entered for the sale of the property mortgaged to the creditor. The Chief Justice held that Section 43 of the Debt Conciliation Ordinance did not enable the District Court to enter a hypothecary decree and went on to hold further that a settlement under the Debt Conciliation Ordinance cannot confer jurisdiction on a Court, even by express provision to enter hypothecary decree, which could only be maintained in conformity with the special procedure laid down in Part II of the Mortgage Act. The learned Chief Justice in the course of his judgment in *Sawdoon Umma v. Fernando* had occasion to consider the rights of a mortgagee in a case where a settlement has been effected under the Debt Conciliation Ordinance and in particular dealt with the proviso to Section 40 (1) and made the following observations, with which I am in respectful agreement :—

> " The language of the Section, in particular of its proviso shows that the creditor's former right *under the mortgage*, i.e., the right of hypothec as distinct from the right to receive payment of the debt, continues to subsist under the settlement, even though the settlement may not expressly so provide. The creditor thus retains his right over the property mortgaged to him as security for the payment of the debt due under the settlement. "

In the present case under the proviso to section 40 (1) not only was the statutory right of the mortgagee preserved, but there is an express provision in the terms of settlement which entitled the creditor to institute a hypothecary action. Learned Counsel for the appellant, while conceding the right of the creditor to obtain a hypothecary decree over the property originally mortgaged to him, maintained that such a right was only available after he had exhausted his remedy under Section 43 of the Debt Conciliation Ordinance and that therefore the trial Judge had no jurisdiction to entertain the hypothecary action. I am unable to agree. The creditor is only *entitled* under Section 43 to obtain a decree *nisi* and the use of the permissive word 'may' in Section 43 (1) grants him a discretion as to whether he chooses to exercise his rights under the Section or not. It may well be that in the case of an impecunious debtor the creditor does not consider it worth his while proceeding under Section 43 of the Ordinance and thereby obtaining an empty decree, but prefers to seek satisfaction of his debt under the more profitable hypothecary action. In this connection, with respect, I am inclined to think that in (*b*) of the opinion expressed by the learned Chief Justice in *Sawdoon v. Fernando* 71 N. L. R. at page 222 the learned Chief Justice intended that

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the words 'should apply' should mean 'is entitled to apply'. Indeed the learned Judge earlier in the same judgment stated that under Section 43 the creditor is only *entitled* to obtain a decree *nisi*.

In my view the law grants a discretion to a creditor in the case of a secured debt to choose, whether he should proceed under Section 43 or not. Needless to say in the case of an unsecured debt the only remedy available to the creditor is that prescribed under Section 43 (1) of the Ordinance.

The creditor in this case was entitled to file a hypothecary action to recover the amount of his debt and his action is a properly constituted one under the provisions of Part II of the Mortgage act. The appeal is therefore dismissed with costs.

PANDITA-GUNAWARDENE, J.—I agree.

Appeal dismissed.

1968 *Present*: **T. S. Fernando, J., and Alles, J.**

TOWN COUNCIL OF MADAMPE, Appellant, *and*
J. C. W. MUNASINGHE, Respondent

S. C. 462/66 (F)—D. C. Chilaw, 17092/M

Town Council—Appointment of Special Commissioner after dissolution—Action instituted by him—Effect thereon when new Town Council is constituted—Suit against the same defendant by the new Council on the same claim—Plea of res judicata *raised by the defendant—Invalidity—"Privy in estate"—Effect on an action when a party dies or ceases to exist in law—Civil Procedure Code, s. 404—Town Councils Ordinance (Cap. 256), s. 183 (5) (6).*

Where, after the dissolution of a Town Council, a Special Commissioner is appointed in terms of section 183 (5) of the Town Councils Ordinance, an action instituted by him lapses automatically as soon as a new Town Council is constituted later and its Chairman is elected. Accordingly, the subsequent dismissal of that action after the Special Commissioner has lost his capacity to continue the proceedings and ceased to have any existence in law is a nullity and is not capable of founding the plea of *res judicata* in a fresh action brought by the new Town Council against the same defendant in respect of the same claim for recovery of a sum of money due to the Council from the defendant. Moreover, in such a case, the new Council, whose interests accrued prior to the dismissal of the earlier action cannot be regarded as a privy in estate of the Special Commissioner.

APPEAL from a judgment of the District Court, Chilaw.

S. Sharvananda, for the plaintiff-appellant.

A. C. Nadarajah, for the defendant-respondent.

Cur. adv. vult.

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March 30, 1968. T. S. FERNANDO, J.—

The Town Council of Madampe constituted by Order (P2) made by the Minister of Local Government and the term of office of which commenced on July 1, 1962, instituted this action on August 13, 1963, against the defendant for the recovery of a sum of Rs. 9,082·03 alleged to be due from him on account of electric current supplied to a theatre of which he was the owner and proprietor. On the date of trial, after issues had been framed, counsel for both parties agreed that one of the issues (issue 5) be decided as a preliminary issue. As framed and accepted by the court, it read as follows :—" Does the decree in case No. 16699 operate as *res judicata* against the plaintiff in this case ? ". After argument by Counsel, the learned District Judge reserved his order for September 11, 1966, on which day he held against the plaintiff and entered judgment dismissing the plaintiff's action with costs. The appeal before us canvasses the correctness of this judgment.

In view of the nature of the plea, it becomes necessary to examine the decree in the said case No. 16699 and the circumstances in which it came to be entered. Document D1, the plaint in that case, shows that the action was filed by one E. V. S. de Alwis, the Special Commissioner, to administer the affairs of the town of Madampe appointed by Order (P1) of the Minister in terms of section 183 (5) of the Town Councils Ordinance (Cap. 256) against the present defendant-respondent for the recovery of a sum of Rs. 9,082·03. There is no dispute between the parties that it is the very same sum of money that the plaintiff-appellant seeks to recover in the action from which the present appeal has resulted. As the Order (P1) by which Mr. de Alwis was appointed with effect from May 4, 1959 also dissolved, as from the said date, the then existing Town Council of Madampe, it is clear that by section 183 (6) of the Ordinance all the property and the rights under contracts and all the powers vested in the Town Council were deemed vested in Mr. de Alwis. He therefore, undoubtedly, had the right to institute action No. 16699. In terms of P1 the Special Commissioner was " to administer the affairs of the town until a new Town Council is constituted for that town under the Ordinance and (until) that Council elects its Chairman. " Although the term of office of the new Town Council commenced on July 1, 1962, a Chairman was elected only on July 23, 1962, so that on this latter day the office of Special Commissioner ceased to exist.

To return to case No. 16699. In D2, which is the answer filed by the defendant therein on November 7, 1962, at a time when the office of Special Commissioner had ceased to exist, the defendant pleaded, *inter alia*, that " the plaintiff is not the Special Commissioner now and is not entitled in law to maintain the action ". On the day fixed for trial, i.e. on March 4, 1963, the record reads as follows :—" Counsel for plaintiff states he is unable to proceed with this case as the plaintiff is absent ". Thereupon the learned trial judge made order that the plaintiff's action be dismissed. Had the judge examined the pleadings he would have become aware that the defendant's own position was that the plaintiff

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was not the Special Commissioner any longer. There was no person called the Special Commissioner on the date of trial. In view of that circumstance the proctor (and therefore counsel also) for the plaintiff on the record had no authority to act for the latter in the same way that a proctor ceases to have authority to act for a party who has died. In *Sabapathypillai v. Vaithialingam* [1], where the question was whether a trustee whose term of office has expired during the pendency of an action brought by him is entitled to continue the action, this Court held that he was not so entitled. In doing so, it followed an earlier decision of the Court in *Appusingho v. Balasuriya* [2]. A similar view was taken in the case of *Thangavadivel v. Inthiravathy* [3] which was one instituted under section 10 of the Jaffna Matrimonial Rights and Inheritance Ordinance by a wife against her husband for the return of certain jewellery. A decree absolute dissolving the marriage between the husband and wife having been entered during the pendency of the case, this Court held that the wife by reason of the divorce lost her status to continue the proceedings. The true position being that the Special Commissioner lost his capacity to continue the proceedings he initiated in case No. 16699, it does not seem to be possible to maintain that the Court had any jurisdiction to dismiss that action on any date after he had lost that capacity any more than it would have had jurisdiction to dismiss after the death of a person a case brought by that person. I would here refer to the observations of the Privy Council in the Indian case of *Debi Bakhsh Singh v. Habib Shah* [4], a case of a dismissal of a suit on the occasion of the non-appearance of a plaintiff who, unknown to the court, was dead at the time of such dismissal. Said Lord Shaw : " It requires no words of their Lordships to show the inapplicability of rules or orders dealing with the case of the non-appearance of a suitor to the situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default, does not seem very reasonable ". The office of Special Commissioner having ceased to exist as from July 23, 1962, even before the defendant's answer was filed, it was not competent to the person who held that office prior to the aforesaid state to have entered an appearance on the date of trial. The dismissal of the action in case No. 16699 was, in my opinion, a nullity and, therefore, was not capable of founding the plea of *res judicata* that has been upheld in the order appealed against.

An alternative argument relied on by counsel for the plaintiff was that the plea of *res judicata* being one available against the same party, his heirs, privies or successors, the decree before it can be pleaded as *res judicata* against him should be one entered before he became such heir, privy or successor. He relied on certain cases decided by this Court,

[1] (*1938*) *40 N. L. R. 107.*
[2] (*1913*) *16 N. L. R. 385.*
[3] (*1950*) *53 N. L. R. 369.*
[4] (*1913*) *I. L. R. 35 All. at 336.*

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notably *Molagoda Kumarihamy v. Kempitiya* [1] and *William Singho v. Silva* [2]. In the last mentioned case, it was held that a person whose interests accrued to him prior to an order of court is not a privy in estate of his predecessor for the purposes of *res judicata*. Nagalingam J. (at p. 512) observed :—" This contention brings one to a consideration of the question, who is a privy in estate ? Had the 2nd defendant acquired his interest subsequent to the order of amendment, then clearly the 2nd defendant would have been a privy in estate to the 1st defendant and would be bound by the decree. But in this case the 2nd defendant had acquired his interest .....anterior to even the application made by the plaintiff to have the decree amended. His rights therefore accrued to him not subsequent to the order of amendment but prior to it and he cannot therefore be deemed to be privy in estate to the 1st defendant, and no judgment or order made against the 1st defendant in respect of the interests he had parted with can affect the rights of the transferee of those interests, namely the 2nd defendant. Hukm Chand, in his treatise on the Law of Res Judicata, quotes a citation which is worth reproducing :

> "It is well understood though not usually stated in express terms in works upon the subject that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. "

Learned counsel for the defendant sought to counter the alternative argument put forward as above indicated by trying to show that this case falls within Chapter XXV of the Civil Procedure Code which deals with the continuation of actions after alteration of a party's status. Arguing that section 404 of the Code applies, he relied on the decision of this Court in *Chittambaram Chettiar v. Fernando* [3], where Jayetileke J. interpreting that section, after stating—at page 51—that " section 404 provides that the person acquiring the interest may continue the action with the leave of the court. It does not provide that, if he does not obtain the leave of Court to continue action, the action should stand dismissed ", cited the following passage from a judgment of the High Court of Calcutta relating to an interpretation of rule 10, Order 22 of the Indian Civil Procedure Code, which is the corresponding provision to our section 404 :—

> " This entitled the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest *pendente lite* to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon him to do so. If he does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in ..... he will be bound by the result of the litigation, even though he is not represented at the hearing. "

[1] *(1943) 45 N. L. R. 34.*

[2] *(1949) 50 N. L. R. 510.*

[3] *(1947) 49 N. L. R. 49.*

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I think it is sufficient to say that these decisions have no application in a situation where the party on the record has become incapable of continuing the section because he has ceased to have any existence in law. *Rai Charan v. Biswanath*[1], the Calcutta case from which the above citation has been taken, was a case where there was a party competent on the record to take action and not a party who was dead or had ceased to exist in law. Another case brought to our attention, *Viswanathaswami Devasthanam v. Koodalinga Nadar*[2], is of no assistance as it has not purported to decide a point similar to that with which we are here concerned. I am of opinion that the alternative argument of counsel for the plaintiff is also entitled to prevail.

For the reasons set out above, the judgment of September 11, 1966 dismissing the plaintiff's action with costs has to be set aside. I accordingly do so, and the case will now be remitted to the District Court for the trial to be continued on the remaining issues one of which has raised the question whether the action filed by the plaintiff is prescribed. The plaintiff is entitled to the costs of August 21, 1966, and of this appeal.

ALLES, J.—I agree.

Judgment set aside.

[COURT OF CRIMINAL APPEAL]

1969 *Present :* **H. N. G. Fernando, C.J. (President), Samerawickrame, J., and Weeramantry, J.**

J. M. CHANDRADASA, Appellant, and THE QUEEN, Respondent

C. C. A. 2 OF 1969, WITH APPLICATION 3

S. C. 50/68—M. C. Tissamaharama, 57742

Charge of attempted murder—Defence of alibi—Failure of accused to give evidence—Judge's adverse comments thereon—Effect—Evidence Ordinance, s. 114 (f).

In a prosecution for attempted murder by shooting with a gun, the accused-appellant did not give evidence but he called as his witness his sister who gave evidence of an alibi. The trial Judge, in his summing-up, made adverse comments on the failure of the accused to enter the witness-box and give explanation himself. He stated that the accused " sat dumb in the dock but has chosen to call a sister of his to give evidence " and that he " has not had the manly courage to come to the witness-box and say that he was elsewhere ".

Held, that the natural effect of the Judge's adverse comments was to create antipathy towards the accused in the minds of the Jury and cause them to reject the defence of alibi out of hand or, at the least, without due and proper consideration. It is the duty of a trial Judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the Jury.

[1] *A. I. R. (1915) Cal. 103.* [2] *A. I. R. (1928) Mad. 246.*

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

N. Balakrishnan (assigned), for the accused-appellant.

T. A. de S. Wijesundere, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

March 28, 1969. SAMERAWICKRAME, J.—

The appellant appeals from a conviction of the offence of the attempted murder of one Charles by shooting him with a gun.

The prosecution relied on the evidence of Charles alone for proof of the facts. Charles stated that on the day in question he slept, as usual, on a bed in the verandah of his house. At about 3·45 a.m. he was awakened by the barking of his dog. He says, he looked around and saw the accused firing at him. Charles sustained no injuries but there were pellet marks on the bed and on a sheet used by him. He also gave evidence of the fact that there had been some unpleasantness between the appellant and himself over an association between the appellant and a son of Charles. This evidence was led by the prosecution to prove motive on the part of the appellant for the shooting but it also shows that there was animosity on the part of Charles towards the appellant.

The appellant did not give evidence but he called as his witness his sister Jane Nona who gave evidence of an alibi.

In a Charge, which was otherwise quite unexceptionable, the learned presiding judge made the following comments on the failure of the appellant to give evidence. He said :—

> " Now in this case the accused has not chosen to give evidence. He is perfectly entitled to remain in the dock and say not a word. But in this case you will find that the accused has sat dumb in the dock but has chosen to call a sister of his to give evidence. "

He further said :—

> " You will have to ask, as I said, the question, the prisoner himself has had not the manly courage to come to the witness-box and say that he was elsewhere ; he got his sister to substantiate, what is called an alibi defence. "

Towards the end of his Charge, he finally said :—

> " That is even on the assumption that this evidence of the woman is true when she says that the accused was with her these ten days. Did not the accused have an opportunity to go out in the night and do the shooting and go back ? That is where, gentlemen, you will ask yourselves the question. How is it that the accused did not enter the witness-box and give an explanation himself ? Because if

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there is a matter for the accused to explain, if the evidence is of such a nature as to give cause for the accused to submit an explanation, to explain away certain factors which would operate against him, in such circumstances if the accused does not choose to make an explanation, you are rightly entitled to infer that he withholds evidence ; because if that evidence was led by him that evidence would be adverse to his case. "

There was not, in this case, a failure to call any evidence at all ; the accused's sister gave evidence of an alibi. But, even if we assume that, as the appellant was a person who could have given the best evidence in regard to the fact that he was at his sister's house at the time of the shooting, his failure to testify was a matter for consideration, the point could have been made without stating that he ' sat dumb in the dock but has chosen to call a sister of his to give evidence ' or that he ' has not had the manly courage to come to the witness-box and say that he was elsewhere.' The natural effect of such animadversions is to create antipathy towards the accused in the minds of the jury and cause them to reject the defence of alibi out of hand or, at the least, without due and proper consideration. An impartial and adequate consideration of his case by the judge of fact is the right of every accused. It is for that reason that this Court has laid it down that it is the duty of a trial judge to place a defence, however weak and insubstantial it may appear to be, fairly and adequately before the jury. We are unable to say that the learned trial judge has fulfilled this duty.

The inference which the learned trial judge suggested might be drawn from the failure of the accused to explain was that the evidence was withheld because it would be adverse to his case. The evidence the learned judge referred to was the evidence of the accused himself. It is not an appropriate inference to suggest in regard to the accused's own evidence, but this may be a matter of form. What the learned judge had in mind may be expressed thus, namely, that it might be inferred that the accused did not give evidence because he could not truthfully have given evidence that he was at his sister's house at the time of the shooting. The drawing of such an inference is however precluded by the circumstances of the case. The accused has, through his sister, led evidence of an alibi and it would be inapt to infer that he kept out of the witness-box because the assertion of an alibi was inconsistent with the truth. It may be that the effect, if any, that could be given to his failure to testify, would be that a court should be less ready to consider that the evidence of alibi raised a reasonable doubt in regard to the prosecution case because the accused, who was the person who was in the best position to give evidence in regard to it, has failed to testify.

An inference that the evidence which a party is able to place before court, but chooses to withhold must be unfavourable to that party is one referred to at Section 114 (*f*) of the Evidence Ordinance. It is a presumption of fact. One should have thought that such a presumption would

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not arise in a criminal case because of the fundamental rule that an accused is free to elect whether he will, or will not call evidence. It has been held that the presumption in s. 114 (*f*) is not one which may be drawn against an accused person because he is free to elect whether he will, or will not, call evidence, and an inference cannot be drawn against him by reason of his electing to take the one course rather than the other—vide *Hurry Churn Chuckerbutty and Another v. the Empress.*[1] It has been suggested that it is not a principle of evidence but a rule of logic that such an inference might be drawn. This rule was first set out in the dictum of Lord Ellenborough in *Rex v. Cochrane* :—

> " No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistent with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests. "

This dictum has been applied in cases of circumstantial evidence as well as where the evidence is direct. In many cases, however, while it has been held that in the circumstances the failure of an accused to offer evidence was a matter to be taken into account, the inference to be drawn or the effect to be given to that fact has been set out in terms other than that contained in the dictum of Ellenborough J. In a recent case, in *Seetin and others v. the Queen*[2], in which this Court by a majority decision held that the failure of an accused was in the circumstances a matter that the judge had correctly directed the jury to consider, T. S. Fernando J., who delivered the order of the Court considered the effect to be given to that fact and referred to a passage from Cross on Evidence which sets out the possible effect that may be given. Cross states :—

> " While a party's failure to testify is not to be treated as equivalent to an admission of the case against him, it may add considerable weight to the latter. "

Later, he states :—

> " As a general rule a party's failure to explain damning facts cannot convert insufficient into prima facie evidence, but it may cause prima facie evidence to become presumptive. "

The inference that evidence which an accused might have called but has withheld was unfavourable to him is so incompatible with the fundamental rule that an accused is free to elect whether he will, or will not, call evidence that it may be necessary to consider, in an appropriate case, whether it is an inference that should in any case be drawn. The proper effect to be given to the failure of an accused to offer evidence

[1] *10 Calcutta 140.*

[2] *(1965) 68 N. L. R. 316.*

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when a prima facie case has been made out by the prosecution and the accused is in a position to offer an innocent explanation appears to have been better set out in the dictum of Abbott J. in *Rex v. Burdett* [1] :—

> " No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends. "

In the present case, as indicated earlier, the circumstances of the case precluded the inference that the evidence which the accused withheld would have been adverse to his case.

It has been said that though it is a matter for the judge's discretion whether he should comment on the fact that an accused has not given evidence, yet the very fact that the prosecution is not permitted to comment on that fact shows how careful a judge should be in making such a comment—vide *Waugh v. Rex.*[2] Where a direction in a Charge on this point may have had the effect of misleading the jury this Court has interfered—vide *King v. Duraisamy*[3], *Chelliah v. the Queen*[4] and *Jayasena v. The Queen.*[5] In the present case, the terms in which the direction of the learned judge on this point were made and the faulty formulation of the inference that might be drawn from the failure of the accused to testify may well have prevented the jury from giving due consideration to the evidence of alibi led by the defence and from giving its proper effect to it. We are, therefore, of the view that this conviction cannot be allowed to stand. It appears to us, however, that there was, in this case, evidence upon which, a jury properly directed, might reasonably have convicted. We accordingly set aside the conviction and sentence passed on the appellant and direct a new trial upon the same indictment.

Case sent back for a new trial.

1968 *Present :* **Wijayatilake, J.**

S. VAIRAYAN NADAR, Appellant, *and* THE COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 241/68, with Application 355/68—M. C. Galle, 50799

Income tax—Proceedings for recovery of it—Order for payment by instalments—Permissibility.

In proceedings for the recovery of income tax due, payment by instalments may be ordered if the assessee has made no attempt to evade the payment of the tax and the circumstances are such that he should be granted relief.

[1] *(1820) 4 B. & Ald. 95 at 120.*
[2] *(1950) A. C. 203.*
[3] *(1942) 43 N. L. R. 241.*
[4] *(1952) 54 N. L. R. 465.*
[5] *(1953) 55 N. L. R. 514.*

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APPEAL, with application in revision, from an order of the Magistrate's Court, Galle.

S. Ambalavanar, with *C. Tittawella* and *W. H. Perera*, for the respondent-appellant in the appeal and for the petitioner in the application.

Lalith Rodrigo, Crown Counsel, for the Attorney-General.

October 4, 1968. WIJAYATILAKE, J.—

This is an appeal with an application in revision in respect of an order made by the learned Magistrate imposing a term of six months' simple imprisonment for failing to pay the balance income tax due in full. Learned Crown Counsel takes a preliminary objection to the hearing of the appeal and the application in revision. Learned counsel for the appellant concedes that there is no right of appeal but he submits that he is entitled to pursue his application in revision. Crown Counsel submits that even this application in revision cannot be maintained owing to the inordinate delay in presenting it. He relies on the case of *Tirimanne v. Commissioner of Income Tax*[1]. In my view this can be distinguished. There is a substantial explanation for the delay in the instant case. I would therefore overrule the objection.

Mr. Ambalavanar has referred me to the proceedings before the learned Magistrate and he submits that the Magistrate was in error when he refused to accept instalments of Rs. 6,000 which the respondent wanted to pay on 21.12.67 in respect of this case and the two other cases called on this date. He refers me to the case of *de Jong v. Commissioner of Income Tax*[2] which sets out the stage at which a penalty may be imposed. It would appear that the learned Magistrate appears to have been inclined to send the respondent to jail rather than collect the arrears of taxes of which a substantial part was in fact available and which the respondent offered to pay. The fact that the respondent had brought a sum of Rs. 6,000 to Court would show his good faith and in those circumstances in my opinion the learned Magistrate should not have abruptly imposed the penalty of 6 months' imprisonment which was to say the least most injudicious.

Mr. Ambalavanar states that in regard to the assessment the matter was at that stage under appeal and is still pending before the Commissioner of Inland Revenue and there has been no delay in pursuing this matter on the part of the petitioner. He also states that a sum of nearly Rs. 35,000 is available in deposit to the credit of this case and the other two cases on today's list subject to his appeal to the Commissioner.

[1] (*1957*) *59 N. L. R. 304.* [2] (*1955*) *57 N. L. R. 279.*

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He submits that this factor merits consideration to show that there has been no attempt to evade the payment of taxes due. In all these circumstances I think this is a case in which the petitioner should be granted relief.

I would accordingly vacate the order of the Magistrate refusing to grant payment of the taxes due in instalments and the order committing the petitioner to imprisonment. I would make order permitting the petitioner to pay the taxes due in monthly instalments of Rs. 2,500 on or before the 10th of each month commencing 10th November, 1968.

Order varied.

1968 *Present :* **Wijayatilake, J.**

P. A. HAMZA NAINA, Appellant, *and* INSPECTOR OF POLICE, GAMPAHA, Respondent

S.C. 668/68—M. C. Gampaha, 18233/A

Control of Prices Act—Sections 3 (2), 4—Contravention of Food Price Order—Place of offence—Whether Court can take judicial notice that it fell within Colombo District—Evidence Ordinance, s. 57—Administrative Districts Act (Cap. 392), s. 2 (2).

In a prosecution for contravention of a Food Price Order which is applicable to the Colombo District excluding the Municipal limits of Colombo, the Court is not entitled to presume that the place where the alleged offence was committed fell within the Colombo District in the absence of any evidence regarding the limits of the Colombo District.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

E. H. C. Jayetileke, for the accused-appellant.

Priyantha Perera, Crown Counsel, for the Attorney-General.

October 30, 1968. WIJAYATILAKE, J.—

In this case the accused is charged with selling beef above the maximum price in contravention of the Food Price Order No. FC/B SF 7 (6) of 15.10.64 made by the Assistant Food Controller of Prices (Food) Colombo District under Section 4 read with Section 3 (2) of the Control of Prices Acts No. 29 of 1950 and 31 of 1952 and published in *Ceylon Government Gazette* (*Extraordinary*) No. 14,199 of 15th October, 1964.

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The learned Magistrate has found the accused guilty and sentenced him to a term of 4 weeks' rigorous imprisonment and to pay a fine of Rs. 500/- in default 6 weeks' rigorous imprisonment. Mr. Jayatileke, learned counsel for the appellant, has referred me to the *Government Gazette* mentioned in the charge and he submits that according to the schedule this Price Order applies to the Colombo District excluding the Municipal limits of Colombo and therefore the prosecution had to establish that this offence was committed within the Colombo District and outside the Municipal limits of Colombo the beef stall in question being at No. 3 Yakkala on the Gampaha-Kirindiwela Road. He submits that the prosecution has failed to prove that the place where the beef was alleged to have been sold is *within* the Colombo district. When the sub-inspector of police gave evidence he was cross-examined particularly in regard to this point and in answer to the question as to the limits of the Colombo District he stated that the Colombo Municipality area extends up to the Peliyagoda bridge, and Colombo Municipality ends at the Peliyagoda bridge. Then when he was questioned again as to the limits of the Colombo District he confessed that he could not say what they were and he confirmed that he could not give the areas which are incorporated in the Colombo District. The learned Magistrate in his reasons has considered this objection taken by the defence that the prosecution has failed to prove that the place of offence was within the Colombo District and he has commented that in regard to this submission he has to observe that " there cannot be any doubt that No. 3 Yakkala where the accused's beef stall is situated is not a place within the limits of the Colombo Municipality ". In regard to this particular observation there is the evidence of the Inspector of Police. The Magistrate, however, observes that the detection had been made by the Gampaha police in an area within the jurisdiction of that police station and he thinks that he is entitled to presume " that administratively Gampaha comes within the jurisdiction of the Government Agent, Colombo District ". It may be mentioned that the prosecution has failed to produce in evidence a map of the Colombo District showing the Administrative divisions or the evidence of anyone who could authoritatively speak to the limits of the Colombo District. The Administrative Districts Act, Chapter 392, sets out the limits of the Administrative Districts. Section 2 (2) sets out that the limits of each Administrative District specified in column 1 of the first schedule to this Act shall, subject to any alterations made therein, under Section 3, be those specified in the corresponding entry in column II of that schedule. It is not at all clear how the learned Magistrate presumed that this particular place No. 3 Yakkala came within the jurisdiction of the Colombo District without a precise scrutiny of the divisions as set out in these two columns. My attention has been drawn by Crown Counsel to Section 57 of the Evidence Ordinance and he submits that Courts can take judicial notice of facts other than those mentioned in that Section. He relies on the principle set out in the case of *Bogstra v. Custodian of Enemy Property* [1]. He has also drawn my attention to the cases

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[1] *(1943) 44 N. L. R. 272 ; 26 C. L. W. 5.*

of *Galahitiyawa v. Inspector Joseph* [1] and *Menon v. Lantine* [2] and he submits that the Magistrate is entitled to make use of his personal observations and arrive at certain conclusions. Therefore in the instant case he was entitled to presume that this particular place fell within the Colombo District as he was the Magistrate functioning at Gampaha. However, it may be noted that the Judicial Districts of Ceylon with which a Magistrate may be familiar do not correspond to the Administrative Districts of Ceylon. In this case the Police Inspector who should have been more familiar with the area, has himself confessed that he was not aware of the limits of the Colombo District.

Mr. Jayatileke has referred me to a recent judgment of de Kretser, J. in *Mendis v. Jayawardene* S.C. 543/68 M.C. Avissawella 80838 S.C. minutes of 23.10.68 which has dealt with a similar question. With great respect I am in agreement with the judgment of my brother de Kretser, J. and the principle set out by him would be applicable to the facts before me the only evidence being that the beef stall is at No. 3 Yakkala on the Gampaha-Kirindiwela Road and I would uphold the objection raised by counsel for the accused that the Magistrate was not justified in presuming that this stall is within the Colombo District, on the facts proved in this case. Perhaps, if the evidence was that the stall in question is situated within close proximity to the Municipal limits of Colombo or within well defined and well known physical boundaries the presumption might have been justified but in the instant case it would be quite unsafe to base a conviction on a rather tenuous presumption of the Magistrate.

I would accordingly quash the conviction and acquit the accused.

Conviction quashed.

[1] (*1966*) *69 N. L. R. 152.* [2] (*1941*) *43 N. L. R. 34.*

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[PRIVY COUNCIL]

1969 *Present:* **Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn, Lord Wilberforce and Lord Diplock**

V. MANDIRAMPILLAI and another, Appellants, *and* THE ATTORNEY-GENERAL, Respondent

PRIVY COUNCIL APPEAL No. 1 OF 1969

S. C. 165/1965 (F)—D. C. Jaffna, 1870/M

Customs Ordinance (Cap. 235)—Section 125—Forfeiture of goods thereunder — Meaning of word " concealment "— Sections 30, 47, 75, 107, 125, 129, 132, 150, 152, 154.

The plaintiffs-appellants imported from Tuticorin in May 1961 fifty bags of what were described on the Bill of Lading as being Fenugreek seeds (Mathe seeds). Fenugreek seeds are permitted to be imported free of duty. When the goods reached their destination in Jaffna, the Customs officers detected that only 30 of the bags contained Fenugreek seeds and that the remaining 20 bags contained poppy seeds the importation of which is prohibited. The Assistant Collector of Customs thereupon ordered the forfeiture of not only the 20 bags of poppy seed but also of the 30 bags of Fenugreek seed. The appellants contested in the present action the validity of the order of forfeiture in respect only of the 30 bags of Fenugreek seed. They claimed that the forfeiture of those 30 bags by the Assistant Collector of Customs was not lawful.

The finding of the trial Judge was that the appellants had " planned to conceal poppy seeds in the consignment and that the 30 bags were used to conceal 20 bags of poppy seeds ". The evidence established that all 50 bags had the same mark " Mani " on each of them and that there was a scheme, by inducing the Customs to believe that all 50 bags contained permissible imports, to smuggle in the prohibited poppy seed which was in the 20 bags.

Held, that the forfeiture of the 30 bags of Fenugreek seeds was lawful under the provisions of Section 125 of the Customs Ordinance. The word " concealment " in that Section covered the situation that existed in the present case.

APPEAL from an order of the Supreme Court.

T. O. Kellock, Q.C., with *Eugene Cotron* and *M. I. Hamavi Haniffa*, for the plaintiffs-appellants.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo*, for the defendant-respondent.

Cur. adv. vult.

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July 28, 1969. [*Delivered by* LORD MORRIS OF BORTH-Y-GEST]—

The appellants who are father and son carried on business at all relevant times in partnership at Jaffna under the business or firm name of Sana Mana Rawanna & Co. The business was that of wholesale and retail general merchants and importers and exporters. In May 1961 the father, on behalf of the firm, ordered 50 bags of Fenugreek seed from a firm in Tuticorin. The son was the sole proprietor of that firm. They were exporters and importers. The goods were to be shipped direct to Jaffna. The firm in Tuticorin shipped packages, 50 in number, described on the Bill of Lading as being " Bags Fenugreek ", and having the marks " Mani " for carriage to Jaffna. The son as the sole proprietor of the firm in Tuticorin made an export application there in respect of a consignment of goods described as Fenugreek seed and consisting of 50 bags with the marks " Mani ".

When the vessel on which the 50 bags had been shipped (the *Nooraniah*) reached its destination at Jaffna, an agent of the appellants, as importers of the goods, signed a Bill of Entry in respect of the goods. They were described as 50 bags Fenugreek seeds (Mathe seeds) : the goods were entered as having a value of Rs. 5,644 cts. 65. The agent, at the request of the sub-collector of Customs, went to the Customs warehouse into which the 50 bags had been carried and looked at them and took a sample of Fenugreek seeds which he produced for inspection. Fenugreek seeds are free of duty on importation. What then happened was that the Assistant Collector of Customs sent his officers to take samples from the bags. They found that some of the bags did not contain Fenugreek seeds. Thirty of the bags did but 20 of them contained poppy seeds. The importation of poppy seeds is prohibited. It was further found that though all 50 bags had the mark MANI there was a distinction between the 30 bags and the 20 bags in that on the 30 but not on the 20 there was the additional mark " 218X ".

As a result of what was discovered the Assistant Collector of Customs made certain orders. He ordered the confiscation of the 20 bags of poppy seed. He had full power to make that order. It has not been contended otherwise. Furthermore, under section 127 of the Customs Ordinance (Chapter 185) now s. 129 he imposed a penalty of Rs. 45,000, which penalty however, he mitigated to Rs. 15,000. No question arises in the present proceedings in regard to the imposition of that penalty. But furthermore he made an order stated to be under s. 123 of the Customs Ordinance now s. 125 of Chapter 235 for the confiscation of the 30 bags of Mathe seed. The appellants contest the validity of that order. They claimed that they were entitled to have delivery of those 30 bags and claimed that there was illegal and wrongful detention of them by the Assistant Collector of Customs. Having given notice to the Collector of Customs that they intended to commence proceedings for the restoration to them of the goods or to recover their value, which was stated to be Rs. 3,600, the appellants gave security to the satisfaction of the Collector in the sum of Rs. 5,000 (see s. 154 of the Customs Ordinance Chapter 235)

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and received the 30 bags. After due notice given, the appellants by their Plaint dated 1st August 1961, commenced their proceedings. Claiming thay they had been entitled to take delivery of the 30 bags, their claim was in substance for a refund of the security of Rs. 5,000 which they deposited with the Collector of Customs. The issue in the action was therefore whether the detention and confiscation of the 30 bags was lawful.

The action was tried in the District Court of Jaffna. The first appellant, the father, gave evidence ; the second appellant, the son, did not give evidence. The learned judge dismissed the action with costs. In his judgment (in March 1965) his conclusions were definite. He considered that the facts clearly showed that the two appellants had planned to introduce into the consignment of what should have been 50 bags of Fenugreek seeds, 20 bags which, instead of containing such seeds, in fact contained poppy seeds. He held that that was what the second appellant (the son) had done. He rejected an explanation which had been suggested by the first appellant (the father) in a statement to the Assistant Collector to the effect that a mistake had been made by the exporter in India. " The evidence in this case points to only one conclusion namely that the plaintiffs had planned to conceal poppy seeds in the consignment that was sent to the second plaintiff as sole proprietor of Velautham Pillai and Company. "

The learned judge further held as follows : " The burden was on the Crown to prove beyond reasonable doubt that the plaintiffs and their agents had put together the 50 bags sent by Velautham Pillai and Company on the *Nooraniah* to the plaintiff in such a way that 30 bags of Fenugreek seeds were used to conceal 20 bags of poppy seeds. I hold that sufficient evidence has been led to satisfy the Court beyond reasonable doubt that this is exactly what happened." There had been submissions made to the learned judge in regard to the onus of proof and as to whether s. 152 of the Customs Ordinance Chapter 235 was or was not applicable. In this appeal counsel for the respondent was prepared to make a submission that the onus of proof as to whether the forfeiture by the Crown of the 30 bags of Fenugreek (or Mathe) seeds was lawful was not upon the Crown but that it was for the plaintiffs in the action to prove that the forfeiture was unlawful and that they had not done so. Their Lordships did not find it necessary to hear submissions in regard to these matters and express no opinion in regard to them.

Following his conclusions as summarised above the learned judge answered the first of the issues on which the case went to trial by saying that the refusal by the Customs to deliver the 30 bags and the detention of the 30 bags were lawful. The contention which the appellants submit in this appeal has relevance to that answer. In answering another of the issues the learned judge stated that under s. 47 of the Customs Ordinance (Chapter 235) there was entitlement to forfeit the 30 bags for the reason that the goods which the plaintiffs had claimed (*i.e.*, the 50 bags lying in

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the warehouse) did not agree with the particulars in the Bill of Entry : those particulars referred to 50 bags Fenugreek seed whereas actually only 30 contained such seeds while 20 contained poppy seeds.

The concluding words of s. 47 are as follows: "but if such goods shall not agree with the particulars in the Bill of Entry the same shall be forfeited and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained." The learned judge held that though in his order the Assistant Collector had not expressly referred to s. 47 it was open to the Crown to justify the forfeiture because in any event s. 47 had been contravened. The answer which the defendant had filed in the action had made no mention of s. 47 and by an Order made in March 1963 the District Court rejected an Amended Answer in which it was sought to introduce s. 47. The trial proceeded on the original answer and no issue had been based on s. 47. The appellants submitted that the learned judge was wrong in holding that the 30 bags could be forfeited under s. 47 inasmuch as they were not in fact forfeited under that section and they submitted that matters had proceeded on the basis that the forfeiture of those bags was under section 125 and not under section 47 and furthermore they submitted that section 47 was not contravened. The respondent was prepared to make a submission to the effect that the District Court had been in error in rejecting the Amended Answer and in rejecting certain issues which had been framed by defendant's counsel. Their Lordships did not find it necessary to hear the respondent's submission and accordingly express no opinion on any of these matters. Nor does any occasion arise to consider any of the contentions referable to s. 47 if on the findings of fact of the learned judge the confiscation of the 30 bags was lawful under the provisions of s. 125.

From the judgment of the learned judge the plaintiff appealed to the Supreme Court of Ceylon. On 27th November 1967 the appeal was dismissed with costs. No oral or written judgments were delivered.

The central contention of the appellants was that the forfeiture and continued detention of the 30 bags was not lawful. In his order the Assistant Collector of Customs stated that the forfeiture was made under s. 123. That is now s. 125 of the Customs Ordinance Chapter 235. It is in the following terms :

> "125. All goods and all ships and boats which by this Ordinance are declared to be forfeited shall and may be seized by any officer of the customs ; and such forfeiture of any ship or boat shall include the guns, tackle, apparel, and furniture of the same and such forfeiture of any goods shall include all other goods which shall be packed with them as well, as the packages in which they are contained ; and all carriages or other means of conveyance, together with all horses and all other animals, and all other things made use of in any way in the concealment or removal of any goods liable to forfeiture under this Ordinance, shall be forfeited."

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The finding of the learned judge having been that the appellants had "planned to conceal poppy seeds in the consignment and that the 30 bags were used to conceal 20 bags of poppy seeds", it was submitted on behalf of the appellants that the learned judge had misconceived the meaning in the section of the word "concealment" and that the facts of the case did not warrant a finding that there had been "concealment". It was submitted that the word concealment, in its context, involved that there should be something in the nature of a secret disposition having the result that goods were hidden or were in some way removed from observation or were placed somewhere so as to avoid detection. Reference was made in support of this submission to the wording in certain sections of the Customs Ordinance Chapter 235 (such as sections 30, 75, 107, 129, 132, and 150). Accordingly it was argued that on the facts of this case there was no concealment of the 20 bags; that they were fully exposed to view; that they were in no way hidden or placed in any such way that they would not be seen or observed; that accordingly even if the appellants had planned in the way that the learned judge thought that they had planned even so the 30 bags were not used in the concealment of the goods which were liable to forfeiture.

While the word concealment in its context may fully embrace the conceptions above noted their Lordships cannot accept that it does not cover the situation that existed in the present case. On the findings of the learned judge the appellants planned to import prohibited goods which were liable to forfeiture. The prohibited goods consisted of the poppy seed which would be contained in some of the bags of a group of bags which were described as all containing duty free permitted imports. In the normal course of events there would be every chance that the plan would succeed. Provided that a sample was taken from a bag described as containing Fenugreek seeds and in fact containing them there would be every likelihood that the Customs would readily accept that all the bags contained what they were said to contain. On the facts as found the Customs were induced to believe that the unseen contents of the 50 bags were all the same and were all permissible imports. The whole scheme as found by the learned judge involved that there should be an intentional suppression of the true facts.

The means employed in the scheme to smuggle in the poppy seed which was in the 20 bags involved that there should be 50 bags all having the one mark and all purporting to contain the same kind of goods and therefore goods of the same value and involved that the 30 bags should truly contain what they were said to contain. The use in that way of the 30 bags was an essential part of the plan. It was made to appear that the contents of the 20 bags were the same as those of the 30 so that all 50 would seem to be the same with the result that the prohibited goods could pass through with the others and under the cloak or protection of apparent legality. The addition of a special mark (218X) to the 30 bags would enable samples to be taken from these bags and so

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avoid detection of the illegal contents of the remaining 20 bags. If then the question is posed whether the 30 bags and their contents were " made use of in any way in the concealment " of poppy seeds liable to forfeiture their Lordships consider that the answer must be in the affirmative. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the respondent.

Appeal dismissed.

1968 *Present :* **Samerawickrame, J., and Weeramantry, J.**

L. C. N. FERNANDO, Appellant, *and* L. A. G. FERNANDO and another, Respondents

S. C. 151/68 (F)—D. C. Negombo, 2392/C

Jurisdiction—Sale of immovable property of minor—Property situate outside jurisdiction of Court of minor's residence—Appropriate Court to which the curator should apply for sanction to sell—Courts Ordinance, s. 69—Civil Procedure Code, ss. 6, 9 (a) (b), 584.

An application for permission to sell land belonging to a minor should bh made to the District Court within whose jurisdiction the minor resides, althougn the land in question may be situate within the territorial limits of the jurisdictioe of another District Court. In such a case it is not necessary to obtain the consent of the Court where the property is situate.

APPEAL from a judgment of the District Court, Negombo.

S. J. P. Fernando, with *N. T. S. Kularatne*, for the petitioner-appellant.

Ananda de Silva, Crown Counsel, as *amicus curiae*, for the respondents.

Cur. adv. vult.

August 11, 1968. WEERAMANTRY, J.—

The petitioner-appellant filed an application in the District Court of Negombo praying that he be appointed curator of the property of the first respondent, a minor resident within the jurisdiction of that court. The guardian *ad litem* of the minor for the purpose of this application was the scond respondent.

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In the same application the petitioner-appellant sought permission to sell an item of immovable property belonging to the minor situated in the Puttalam district. The learned District Judge dismissed that part of the application which related to the sale of the land, holding that he had no jurisdiction to order such a sale inasmuch as the land was situate outside the territorial limits of his jurisdiction.

This appeal therefore raises the interesting question whether an application for permission to sell land belonging to a minor should be made to the District Court within whose jurisdiction the minor resides or to the court within whose jurisdiction the land is situate.

Section 69 of the Courts Ordinance provides that every District Court shall have the care and custody of the persons and estates of all idiots and persons of unsound mind and others of insane and non-sane mind resident within its district, with full power to appoint guardians and curators of all such persons and their estates. The section goes on to provide that in the like manner and with the same powers, the care of the persons of minors and wards and the charge of their property within its district shall be subject to the jurisdiction of the District Court.

Although the words " within its district " appear immediately after the word " property " in this provision it has been held on more than one occasion by this court that the former expression qualifies the words " minors " and " wards " rather than the word " property ". This interpretation would seem to follow from the fact that the words "also and in like manner " suggest that the jurisdiction of District Courts as regards minors and wards should be of the same nature as the jurisdiction in respect of idiots and insane persons conferred on them by the earlier part of the section. This view also received approval in *Keppitipola Kumarihamy v. Rambukpotha.*[2] It seems settled then that the jurisdiction of a District Court to appoint guardians and curators of minors and their estates depends on the residence of the minor within the territorial limits of the jurisdiction of such court.

It is true that a somewhat different view has more recently been expressed by this court in *Cassaly v. Buhari*[3]. Gratiaen J. there observed in regard to section 69 (1) of the Courts Ordinance that it gives statutory recognition to the powers and responsibilities of a court as the traditional upper guardian of minors under the Roman-Dutch law and that this provision entrusted every District Court with the care and management of a minor's estate situate within its jurisdiction.

Gratiaen J. was in that case considering the question of a sale of a minor's property by his curator without the proper sanction of the court and was not giving his attention specifically to the question whether the

[1] *In the matter of May Fernando a minor (1896) 2 N. L. R. 249 ; Muthiah v Baur* (1906) 9 N. L. R. 190, F.B.

[2] *(1928) 30 N. L. R. 273.* [3] *(1956) 58 N. L. R. 78.*

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court of residence had jurisdiction in preference to the court where property was situate. The dictum to which I have referred must not therefore be taken to be one to the effect that the court where property is situate has jurisdiction in preference to the court of residence, but rather as one emphasising that the powers of District Courts over minors though conferred by statute hark back to the traditional notion of upper guardianship so well known to and recognised by the Roman-Dutch law.

It would not appear, therefore, that this Court has at any stage departed specifically from the view expressed in its earlier decisions to which I have already referred, and these decisions having as they do the support of a full Bench of this Court must be taken to state authoritatively the law on this subject.

In the Roman-Dutch law likewise there would appear to have been a principle that for an order of court to be made relating to the property of a ward, the ward should have his domicile within the district of the Judge or Magistrate making such order, a rule which obtained even though the things of which the alienation was in question were situate in places not subject to the power of such Magistrate [1].

As Voet observes [2] this principle is similar to that by virtue of which the praetor permitted the property of a ward to be sold not only in Italy but even in the provinces, provided the guardianship was being conducted at Rome and the guardian had undertaken at Rome the administration of the property in the provinces [3].

There is indeed a statement in the Digest [4] to the effect that if a patrimony over which a tutor is appointed is situate in very different parts, a tutor might apply to have other tutors appointed to act in those parts. This passage does not however derogate from the general principle that the tutor appointed has control over all property wherever situate, for, as is observed in the Institutes [5] and in the Digest,[6] a tutor who is appointed is considered appointed for the whole patrimony.

Applying this principle then, the appointment of a curator over the property of a minor would ordinarily give that curator control over all the property of the minor even though some items of property be situate outside the territorial limits of the court making the appointment.

The South African Courts have in reliance on this Roman Dutch principle held that it would be proper to apply in the first instance to the Court of the minor's domicile even though in certain cases it might be necessary to obtain a further order from the Court where the property

[1] *Voet 27.9.5*
[2] *Voet 27.9.5*
[3] *D. 27.9.5.12*
[4] *27.1.21.2*
[5] *1.25.17*
[5] *27.1.21.2*

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was situate [1]. They have also observed that there can be no doubt that as a general rule the most convenient place for investigating whether the alienation is in the interests of the minor or not is the Court of the minor's domicile [2].

In Ceylon we do not have a multiplicity of divisions and jurisdictions such as may make it necessary in certain cases in South Africa to obtain the consent of the Court where the property is situate[3]. I do not think therefore that under our procedure it becomes necessary as a matter of law to obtain the dual consent which may sometimes be rendered necessary in South Africa.

It may also be observed that it is not possible to derive guidance on this matter from either English or Indian procedure. In the former case, guardians are appointed by the Chancery Division of the High Court in the exercise of its traditional function of superintendence of the care and custody of infants, and any analogy with the territorial jurisdiction of District Courts becomes inappropriate ; and in the latter case the matter is dependent on the special provisions of the Guardians and Wards Act, No. 8 of 1890, section 9 (2) of which expressly provides that an application may be made either in the court where the minor resides or in the court where the property is situate. Likewise, little guidance can be obtained from decisions on the New York Code of Civil Procedure, from which many of our provisions of Civil Procedure are taken, for the reason that in that jurisdiction as well, application for appointment of a guardian of the property may be made to the Supreme Court [4].

We must next consider the effect on the present application, of section 584 of the Civil Procedure Code, which provides that if the property is situate in more than one district, an application for appointment of a person to take charge of the property and person of a minor should be made to the District Court of the district in which the minor at the time of application resides.

It is not clear what precisely was the necessity for the enactment of such a section having regard to section 69 of the Courts Ordinance which had already provided that the Court of the minor's residence should be vested with such jurisdiction. A section expressly giving such jurisdiction to the Court of residence when property is situate in more than one jurisdiction seems to be superfluous in the light of section 69 (1) of the Courts Ordinance, but I do not think that the mere existence of this provision is sufficient of itself to justify a departure from the view that the intention of section 69 (1) of the Courts Ordinance was to vest jurisdiction in the Court of residence. Compelling reasons deriving both from

[1] *Ex parte Uys* 1929 T. P. D. 443 at 444; *ex parte Ford* 1940 W. L, D. 155 at 157. See also *ex parte Estate Hiddingh* 1935 O. P. D. 92 at 95.

[2] *Ex parte Uys*, 1920 T. P. D. 443.

[3] *Ex parte Ford*, 1940 W. L. D. 155. See also *exparte Snyman*, 1930 C. P. D. 107 and *ex parte Jhaveri*, 1933 N. P. D. 104.

[4] Section 2349 of the New York Code of Civil Procedure, 1876.

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the context of that section itself and from the underlying principles of common law must necessarily outweigh such inference to the contrary as may be suggested by section 584.

There are other practical reasons which point also to the necessity for the principle that the Court of residence should have jurisdiction.

It will readily be appreciated that the Court, discharging as it does the role of upper guardian, is expected to perform the same functions as those which an individual would have to perform had he been placed in a position of supervisory authority over a guardian or curator. This function cannot be split as between different Courts for one Court alone must take this responsibility and discharge this function.

In particular, where property is situate in more jurisdictions than one, it would be undesirable to have this supervisory function exercised piecemeal by the different Courts in which such property happens to be situate. One Court would not then be able to have that overall view of the minor's affairs and of the conduct and activities of the guardian or curator, which would be necessary to a proper assessment of the necessity for sale or other disposition of property. Sales or other dispositions, or, for that matter, the very conduct of a guardian or curator, may well, when viewed in their totality, put the Court upon inquiry in cases where an individual application to deal with property may not arouse suspicion. It is desirable therefore that when a Court discharges the supervisory responsibility lying upon it, it should not be denied the benefit of seeing the minor's affairs in this wider way.

An alternative basis is also available in law on which to rest the jurisdiction of the Court of the minor's residence.

An application for the appointment of a curator and the sale of property has been held by this Court to be an action as defined in section 6 of the Civil Procedure Code.[1] To such an application the minor is required by law to be made a party and he must in such application be represented by a guardian *ad litem*.[2] Since the application constitutes an action, the minor respondent would be in the position of a defendant and in terms of section 9 (*a*) of the Civil Procedure Code, the Court of the minor's residence would be a Court having jurisdiction to hear and determine such application.

It is also pertinent to observe, though it is not necessary to rest this decision upon that principle, that the mere fact that an application concerns land does not necessarily make it an action in respect of land within the meaning of section 9 (*b*) of the Civil Procedure Code, for this

[1] *Mudiyanse v. Pemawathie* (*1962*) *64 N. L. R. 542 at 543.*

[2] *Cassaly v. Buhary* (*1956*) *58 N.L.R. 78 at 81.*

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Court has held that an action for specific performance of an agreement to sell land is not an action in respect of land within the meaning of that provision.[1] On the basis of this decision an application for permission to sell land may well fall outside the ambit of actions in respect of land, in which case the Court where the property is situate may not in any event be a Court vested with jurisdiction to entertain such application.

Having regard to all these considerations it would appear that statute law, common law and considerations of practical advantage all combine in indicating the Court of the minor's residence as the appropriate Court to which application should be made for sale of property.

The order of the learned District Judge refusing permission on the ground that the Court of residence had no jurisdiction is therefore wrong in our view and we remit this case to the learned District Judge in order that he may consider the application for sale made to him.

We have in this case called for the record in an earlier Curatorship case concerning these minors to which reference has been made in the course of these proceedings. This case, No. 2327 Curatorship of the District Court of Negombo, has been instituted on 9th October 1962 and the maternal aunt of the minors has been appointed therein as curatrix over the property of the minors. Order nisi was entered on 9th October 1962 and was made absolute on 7th March 1963. Thereafter, on 4th September 1963 the present petitioner appears to have been substituted as curator, the earlier order appointing the curatrix having been cancelled. Certificate of curatorship was accordingly issued on 8th January 1964. Various steps have been taken on the basis of this order and there does not appear to be any entry in the record of that case showing that that order has at any time been vacated.

As long as that order stands, it would appear that there is no need for a fresh appointment of the petitioner as curator over the same minors. We accordingly formally set aside the order appointing a curator, leaving it to the learned District Judge to consider whether the present application for sale should have been made upon the basis of the earlier appointment and within the framework of the earlier case or whether the circumstances call for a fresh application and a fresh appointment, after cancellation of the earlier appointment.

After determining upon the manner in which the curator should be appointed and making the appointment accordingly, the learned District Judge will proceed to consider the application for permission to sell on the footing that his Court has jurisdiction to decide this matter.

SAMERAWICKRAME, J.—I agree.

Order set aside.

[1] *Pelis v. Silva (1958) 60 N. L. R. 289.*

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1969 *Present :* **Samerawickrame, J., and Pandita-Gunawardene, J.**

ATCHUVELY MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD., Appellant, *and* S. BALASINGHAM, Respondent

S. C. 106/67 (Inty.)—D. C. Jaffna, 268/A

Co-operative Societies Ordinance, as amended by Act No. 27 of 1964—Section 53A (4)—Enforcement of an award thereunder—Seizure and sale of defaulter's dwelling house—Validity—Difference, in execution proceedings, between a decree of Court and an award made under the Co-operative Societies Ordinance—Civil Procedure Code, as amended by Act No. 49 of 1958, ss.217, 218 (n).

When a sum of money due under an award made under the Co-operative Societies Ordinance is sought to be recovered in terms of the provisions of section 53A (4) of the Co-operative Societies Ordinance, the dwelling house of the defaulter is liable to be seized and sold in pursuance of the writ issued to the Fiscal by the District Court. In such a case, the defaulter is not entitled to the benefit of the proviso to the amended section 218 of the Civil Procedure Code because what is sought to be enforced is not a decree or order of a Court but an award made under the Co-operative Societies Ordinance. Moreover, according to section 53A (4) of the Co-operative Societies Ordinance, the only sections of the Civil Procedure Code which are applicable to execution proceedings relating to an award are sections 226 to 297.

APPEAL from an order of the District Court, Jaffna.

A. C. Gooneratne, Q.C., with *S. Sharvananda*, for the petitioner-appellant.

No appearance for the respondent-respondent.

Cur. adv. vult.

July 11, 1969. PANDITA-GUNAWARDENE, J.—

The provision in the Co-operative Societies Ordinance which stipulates for enforcement of awards is Section 53A (Co-operative Societies (Amendment) Act 27 of 1964).

Section 53A (4) empowers the Registrar upon an award being made in the matter of a dispute that a sum of money due by one party to another has not been paid, to issue a certificate to the District Court " and the Court shall thereupon direct a writ of execution to issue to the Fiscal authorizing and requiring him to seize and sell all or any of the property movable and immovable of the defaulter, or such part thereof as he may deem necessary for the recovery of such sum, and the provisions of sections 226 to 297 of the Civil Procedure Code shall, *mutatis mutandis*, apply to such seizure and sale ".

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In this case upon application made to him under section 53A (4) the learned Additional District Judge directed writ of execution to issue to the Fiscal for seizure and sale of properties belonging to the respondent for default of payment on the award. Pursuant to the Court's direction the Fiscal seized the dwelling house of the respondent.

The respondent's contention is that in view of section 218 Civil Procedure Code as amended by section 2 (2) of Act No. 49 of 1958, his dwelling house is not liable to seizure and sale. The learned Additional District Judge has accepted this contention and ordered that the property seized be released from seizure. The appellant, the Atchuvely Multi-Purpose Co-operative Society Ltd., appeals from this Order.

Chap. 22 Civil Procedure Code deals with executions. Section 217 enacts, " A decree or order of court may command the person against whom it operates—

(A) to pay money ;

(B) }
(C) } not relevant
(D) }

Under section 218 where the decree to pay money remains unsatisfied the judgment-creditor is entitled to seize and sell, among others, the immovable property of the judgment-debtor. There is however the proviso to this section which gives a list of items of property which shall not be liable for seizure or sale. By section 2 (2) of Act 49 of 1958, the dwelling house of the judgment-debtor has been added to the list of excepted property.

It has been argued for the appellant that section 218 and its amendment only applies to seizure and sale in enforcement of a decree or order of Court ; that what is sought to be enforced here is not a decree or order of a Court but an award under the Co-operative Societies Ordinance.

It would appear to me that there is substance in this argument. In terms of section 53A (4) of the Co-operative Societies Ordinance the Court does not enter a decree or make any order upon the award submitted to it. The Court has no option but to direct that writ of execution do issue, not upon a decree or order entered by Court but on the award filed before it. In that view of the matter the proviso to section 218 cannot be said to apply. It is pertinent to note in this regard that section 53 A (4) (Co-operative Societies Ordinance) expressly provides that sections 226 to 297 Civil Procedure Code shall apply. These would, therefore, be the only sections of the Civil Procedure Code in the Chapter dealing with " executions " which would become operative. They are sections which

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deal with, "the duties of the Fiscal on receiving writ: modes of seizure"; "claim to property seized:" and "sale of movable and immovable property:".

Had the Legislature intended that the judgment-debtor be entitled to the benefit of the proviso to section 218 Civil Procedure Code in the enforcement of an award under section 53 A (4) (Co-operative Societies Ordinance) it would, I expect, have so provided. In the absence of such a provision I find myself unable to agree with the order of the learned Additional District Judge releasing the respondent's property from seizure. The order directing the Fiscal to release the property from seizure is set aside.

The appeal is allowed with costs.

SAMERAWICKRAME, J.—I agree.

Appeal allowed.

1968 *Present:* **Alles, J.**

G. ASIRWATHAM, Appellant, *and* A. PREMAWARDENA (Labour Officer), Respondent

S. C. 354/68 — M. C. Avissawella, 83248

Shop and Office Employees (Regulation of Employment and Remuneration) Act (Cap. 129), as amended by Acts Nos. 60 of 1957, 28 of 1962, 26 of 1966— Sections 43 (1), 43 (2), 51 (3), 60 (1), 65—Closing Order—Charge of contravention thereof by owner of a shop— Liability of owner for acts of his employees— Mode of proving a Closing Order—Evidence Ordinance, s. 57.

In a prosecution of the registered owner of a shop for having kept open his shop for the serving of customers in contravention of a Closing Order made under the Shop and Office Employees (Regulation of Employment and Remuneration) Act—

Held, (i) that production of the Closing Order together with copies of the certified extracts of the *Government Gazette* bearing the legend that they were printed by the Government Printer constituted sufficient evidence to satisfy the requirments of section 65 of the Act.

(ii) that evidence of service of a customer by employees of the owner, even in the absence of the owner, was sufficient to convict the owner, unless the owner discharged his liability in terms of section 60 (1) of the Act.

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APPEAL from a judgment of the Magistrate's Court, Avissawella.

S. C. Crossette-Thambiah, with *Ralph de Silva*, for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Priyantha Perera*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 25, 1968. ALLES, J.—

The accused, who was the owner of a shop called Asir Stores, Avissawella, was charged and convicted under sections 43 (1) and 43 (2) of the Shop and Office Employees (Regulation of Employment and Remuneration) Act (Cap. 129), (hereafter referred to as the Act), as amended by Acts Nos. 60 of 1957, 28 of 1962 and 26 of 1966, thereby committing offences punishable under section 51 (3) of the amended Act, No 26 of 1966.

There is no dispute with regard to the facts which may be briefly stated :

The accused, as the registered owner of the said shop, employed a cashier called Jayarajah and a salesman called Cyril. On 26.2.67, which happened to be a Sunday and a day on which no business could be transacted according to Closing Order P3, while Labour Officer Premawardena and his assistant Alutge were on patrol duty about 7.35 p.m. along the main road at Avissawella, they saw a customer enter Asir Stores through an open plank of the planked door. They entered the shop and saw Cyril selling a bottle of Quink and a bottle of gingelly oil. The parcel of goods was handed to the customer who then asked for a pound of sugar. Jayarajah, the cashier, was in charge of the boutique. Premawardena then revealed his identity. The accused was not present, having gone to Colombo and returned at 9 p.m. The learned trial Judge on an examination of the evidence has held that the shop had been opened and that the customer was served by the employees. On these facts, the accused was charged under section 43 (1) and 43 (2) of the Act.

Section 43 (1) and (2) of the Act reads as follows :

> 43. (1) No shop shall be or remain open for the serving of customers in contravention of any provision of any closing order made under this Act.
>
> (2) It shall be the duty of the employer to prevent any customer from entering the shop on any day or at any time when such shop is required by any closing order to be closed for the serving of customers.

Learned Counsel for the appellant raised two questions of law and submitted that the accused could not have been found guilty for a contravention of these two sections. It was his submission, firstly, that

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the Closing Order P3 and the copies of the certified extracts of the *Ceylon Government Gazette* produced P1, P2 and P4 did not constitute evidence on which a court can act because in his submission there was no evidence that the extracts containing the closing order were purported to have been printed by the Government Printer as required under section 65 of the Act. The extracts that have been produced bear the legend that they were printed by the Government Printer and having regard to section 57 of the Evidence Act, judicial notice of the *Gazettes* and its contents can be taken. The Divisional Bench case of *Sivasampu v. Juan Appu* [1] has laid down the principle that there would be sufficient compliance with the requirements of the law if in the complaint or report to Court there is a reference to the *Gazette* in which the invoked rule appears. Counsel's first submission therefore fails.

The second submission of learned Counsel for the appellant related to the liability of the employer under section 43 of the Act. The evidence established that the shop remained open for the serving of customers in contravention of the Closing Order P3. In the absence of evidence that the employer had taken steps under section 60 (1) of the Act to prove to the satisfaction of the Court that he had used due diligence to enforce the provisions of the Act and to ensure that his employees did not commit any offences without his knowledge, consent or connivance, the employer must be deemed to have contravened the provisions of section 43 (2). The Act which is meant for the protection of shop employees, provides that the primary obligation for the contravention of its provisions rests on the employer. Learned Crown Counsel has drawn my attention to the unreported judgment of Tambiah, J. in S. C. Case No. 1209-1211/67, M. C. Colombo South No. 81593/B where my brother has held that the conviction of an owner of a shop for a contravention of sections 43 (1) and (2) cannot be sustained in the absence of the owner from the shop at the time when the offences were committed. With respect, I am unable to agree. In the judgment cited, my brother has not considered the provisions of section 60 (1) of the Act in arriving at his conclusions. The primary liability therefore being on the employer, he has not sought to discharge this liability in any way and is therefore guilty of an offence under section 51 (3) of the Amendment Act No. 26 of 1966.

It was also open to the prosecution under section 59 of the Act to proceed against the cashier and the salesman in this case if they are so minded.

I therefore hold that the submissions of Counsel on the law are not entitled to succeed and the appeal is dismissed.

Appeal dismissed.

[1] *(1937) 38 N. L. R. 369.*

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1969 *Present :* **H. N. G. Fernando, C.J.**

V. S. NADARAJAH, Appellant, *and* THE REGISTRAR-GENERAL, Respondent

S. C. 1275/68—M. C. Jaffna, 35862

Notaries Ordinance (Cap. 107)—Section 31, Rule 3—Whether it prohibits the signature of an incomplete duplicate.

While Rule 3 of Section 31 of the Notaries Ordinance provides that a duplicate of a deed may not be signed before the original instrument is executed, it does not clearly prohibit the Notary from taking the signature of an incomplete duplicate.

APPEAL from a judgment of the Magistrate's Court, Jaffna.

P. Somatilekam, for the accused-appellant.

Kumar Amarasekere, Crown Counsel, for the Attorney-General.

May 14, 1969. H. N. G. FERNANDO, C.J. —

The accused-appellant was convicted on three counts of alleged breaches of the Notaries Ordinance but he was acquitted on two other charges for similar breaches. Count one was based on an allegation that the Notary permitted a party to a deed "to sign the duplicate of the deed before the whole of the duplicate had been written" in breach of Rule 3 of Section 31. In regard to duplicates, Rule 3 prohibits a Notary from permitting a duplicate to be signed "until the whole of the deed or instrument shall have been written". While the Rule provides that a duplicate may not be signed before the original instrument is executed, it does not clearly prohibit the signature of an incomplete duplicate.

Counts 3 and 4 are charges based on the Notary having permitted the duplicate to be signed by the witnesses before the whole of the duplicate was completed. I have already pointed out that Rule 3 does not clearly declare such an act to be an offence. The convictions are quashed and the accused is acquitted.

Appeal allowed.

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1969 *Present :* Alles, J.

N. DEVENDRAM, Appellant, *and* M. A. A. DE SILVA (Food and Price Control Inspector), Respondent

S. C. 899/68—M. C. Negombo, 19177

Control of Prices Act—Offenders in profiteering cases—Sentence—Applicability of Criminal Procedure Code, s. 325.

Section 325 of the Criminal Procedure Code can properly be applied in appropriate circumstances in cases of profiteering in contravention of the Control of Prices Act. The Regulation made on 27th November 1967 under section 5 of the Public Security Ordinance is no longer operative.

APPEAL from a judgment of the Magistrate's Court, Negombo.

Felix R. Dias Bandaranaike, for the accused-appellant.

Tivanka Wickramasinghe, Crown Counsel, for the Attorney-General.

July 15, 1969. ALLES, J.—

Counsel for the appellant has not canvassed the facts in this case but only submitted that this is an appropriate case to which the provisions of Section 325 of the Criminal Procedure Code should be made applicable.

The short point that arises for consideration in this appeal is whether my decision in *Attorney-General v. Gunewardene*[1] in regard to the exclusion of Section 325 of the Criminal Procedure Code in profiteering cases should be followed. *In Attorney-General v. Gunewardene*, the Attorney-General appealed from an order of the Magistrate and submitted that when a person contravenes any provision of the Control of Prices Act as amended by Act 16 of 1966, the imposition of a term of imprisonment was obligatory, even in the case of a first offender. My order in that case was delivered on 21st May 1967 and in my view correctly set out the law as it stood on that date.

On 27th November 1967 a regulation was made under Section 5 of the Public Security Ordinance to the effect that Section 325 shall not apply to the case of persons charged with an offence under the Control of Prices Act as amended by Act 16 of 1966. Whatever may have been the intention of the Legislature in promulgating this regulation, it is submitted by counsel for the appellant that an argument can be urged that in introducing this regulation, the Legislature indicated that it was not certain prior to 27th November 1967 whether Section 325 had or had not any application to cases of profiteering instituted and concluded prior that date, in spite of my decision in *Attorney-General v. Gunewardene*

[1](*1967*) *70 N. L. R. 68.*

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It was this doubt in regard to the intention of the Legislature that appears to have prompted Samerawickrame, J. in *Don Edirisinghe v. Alwis*,[1] the Chief Justice in *Podi Appuhamy v. The Food and Price Control Inspector, Kandy*[2] and Weeramantry J. in *Gunapala v. Wilson Silva*[3] to take the view that Section 325 could properly be applied in appropriate circumstances to cases of profiteering. Nor does it appear that Crown Counsel, who appeared for the Attorney-General in the above cases contended otherwise.

Judges of this Court have in recent times dealt with offenders in profiteering cases under Section 325. (*Vide* Wijayatilake, J. in S. C. 295/68, M. C. Colombo 48046, S. C. Minutes of 22.11.68 and de Kretser J. in S. C. 1070/68, M. C. Batticaloa 24128, S. C. Minutes of 28.5.69.) The emergency has now been lifted and the regulation of 27th November 1967 is no longer in operation.

For the above reasons, my decision in *Attorney-General v. Gunewardene* should not be followed.

This case appears to me to be one to which the provisions of Section 325 should be made applicable, in view of the youth of the offender. Crown Counsel, after investigation, has informed me that the appellant was a little over 14 years of age at the time of the commission of the offence. I therefore set aside the sentence of three (3) months' rigorous imprisonment inposed on the appellant and warn and discharge him.

Acting under Section 325 (3) of the Criminal Procedure Code, I direct him to pay Rs. 500 as costs of the proceedings. Subject to this variation in the sentence, the appeal is dismissed.

Sentence varied.

1968 *Present :* **Pandita-Gunawardene, J.**

RAMASAMY *et al.*, Appellants, *and* GUNARATNE, Respondent

S.C. 521-526/68—M. C. Gampola, 8978

Criminal procedure—Magistrate's Court—Joinder of charges—Trial of indictable offence together with offences triable summarily—Omission to assume jurisdiction under s. 152 (3) of Criminal Procedure Code—Illegality—Criminal Procedure Code, ss 152 (3), 180 (1), 425.

Where a number of offences alleged to have been committed in the course of one and the same transaction are tried together summarily by a Magistrate, but one of those offences is an indictable offence, the joinder of the indictable offence with the offences triable summarily vitiates the entire proceedings *ab initio*. In such a case, the failure of the Magistrate to assume summary jurisdiction under section 152 (3) of the Criminal Procedure Code is an illegality which is not curable by section 425 of the Criminal Procedure Code.

[1](1967) 71 N. L. R. 88. [2](1968) 71 N. L. R. 93.

[3](1968) 71 N. L. R. 233 at 237.

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APPEAL from a judgment of the Magistrate's Court, Gampola.

N. Satyendra, for the accused-appellants.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 16, 1968. PANDITA-GUNAWARDENE, J.—

The appellants were charged and convicted in the Magistrate's Court of Gampola on the following counts :—

(1) that they on 10.11.67 at Black Forest Estate, Pussellawa were members of an unlawful assembly, the common object of which was to voluntarily cause hurt to Murhu Vellayan of South Delta Group and thereby committed an offence punishable under Section 140 of the Penal Code, Cap. 19 R.L.E.C.

(2) at the time and place aforesaid and in the course of the same transaction as set out in Count 1 above, the accused were all armed with deadly weapons, to wit, knives and clubs while being members of the said unlawful assembly and thereby committed an offence punishable under Section 141 of the Penal Code, Cap. 19 R.L.E.C.

(3) that all the accused being members of the said unlawful assembly while being armed with deadly weapons, did use violence in the prosecution of the said common object of the said unlawful assembly as set out in Count 1 and thereby committed an offence punishable under Section 145 of the Penal Code, Cap. 19 R.L.E.C.

(4) at the same transaction as set out in Counts 1 to 3 above, the above-named 1 to 3 accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group with a sharp cutting instrument, to wit, a pruning knife and thereby committed an offence punishable under Section 315 of the Penal Code, read with Section 32 of Cap. 19 R.L.E.C.

(5) at the time and place aforesaid and in the course of the same transaction as set out in Counts 1 and 3 above, the 4th and 5th accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group, Pussellawa, with clubs and thereby committed an offence punishable under Section 314 read with Section 32 of Cap. 19 R.L.E.C.

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(6) at the time and place aforesaid and in the course of the same transaction as set out in Counts 1 to 3 above, the 6th accused did voluntarily cause hurt to Murhu Vellayan of South Division, Delta Group, Pussellawa by kicking at the abdomen and thereby committing an offence punishable under Section 314 of the Penel Code, Cap. 19 R.L.E.C.

The third count sets out an offence under Section 145 of the Penal Code. It is an offence triable by the District Court and not one in respect of which the Magistrate's Court had jurisdiction to try. Learned Counsel for the Appellants contends that the entire proceedings are tainted with illegality and therefore the convictions and sentences must be quashed.

The facts upon which the charges were brought are as follows :—On 10th November 1967, Vellayan, the Supervisor in Black Forest Estate, accompanied by one Nagalingam, was walking along a road in the Estate ; they were met by the appellants who obstructed them ; the appellants attacked Vellayan ; the first appellant is said to have cut Vellayan with a knife whilst the others struck him with clubs ; one of the appellants kicked him ; as a result of this assualt, Vellayan sustained injuries. They were however not of a serious or grievous nature as would appear from the Medico-Legal report, P1. The two knife injuries were skin deep, one on the back of the left wrist and the other on the inner aspect of the left knee. The other injuries were minor contusions and abrasions and they were on the right and left arms.

The charges against the appellants are based on facts relating to one incident. The joinder of the charges has been by virtue of Section 180(1) of the Criminal Procedure Code which provides " If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment ". It has been urged that as Count 3 discloses an offence not summarily triable by the Magistrate, the trial was bad in law and the proceedings are *ab initio* vitiated. It is manifest that Count 3—the offence of rioting—is an offence which the Magistrate had no jurisdiction to try and the trial upon that charge is illegal and is a nullity.

The question to which I have to address myself is whether it is permissible for me to quash the conviction and sentence on Count 3 and proceed to consider the remaining Counts which are properly triable by the Magistrate. Learned Counsel for the Appellants argues that that is a course not open to me. It is submitted that the facts in this case relate to one transaction ; that charges inclusive of Count 3 are based on one incident of assault upon Vellayan ; that the joinder of the charges has been for the reason that the offences were committed in the course of one and the same transaction ; and that it has been one trial on all the

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charges. It has been said, and with much force, that the Magistrate could not commence trial in this case in view of Count 3, a count which he was not competent to try.

The learned Magistrate has apparently proceeded to try the appellants in the erroneous belief that all the offences were triable by him as Magistrate. In the proceedings of 11th January 1968, after the evidence of Vellayan had been led, the learned Magistrate has said " In view of this witness's evidence, it is not necessary to act under Section 152 (3) of the Criminal Procedure Code. I proceed to charge the accused and try them on the powers vested in me as Magistrate without assumption of jurisdiction ". Had the learned Magistrate taken the trouble to refer to the first schedule to the Criminal Procedure Code, he would have seen that Count 3—an offence under Section 145 of the Penal Code—is clearly one which is not triable by him as Magistrate. What the learned Magistrate should have done was to have adopted the procedure laid down in Section 152 (3) of the Criminal Procedure Code. Section 152 (3) states " Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of opinion that such offence may properly be tried summarily, he may try the same summarily following the procedure laid down in Chapter XVIII and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose ".

In the case of *Madar Lebbe. v Kiri Banda at al.*[1] it has been held—I am quoting from the headnote—" There is no objection to a Police Magistrate applying Section 152(3) of the Criminal Procedure Code to a case where an accused charged with several offences, some of which are triable by the Police Court and others are not, provided he inflicts no higher punishment than he has ordinary jurisdiction to impose ". The facts of that case as reported are as follows :—the charges against the accused were for offences under Sections 140, 144, 146 and 439 of the Penal Code. The Magistrate proceeded to try the accused summarily in his capacity as District Judge, invoking the provisions of Section 152 (3) of the Criminal Procedure Code. Section 140 discloses an offence which the Magistrate had jurisdiction to try as Magistrate and the sentence imposed on that count was one of six months' rigorous imprisonment, which was within the powers of the Magistrate to impose. The sentence passed for the offence under Section 144 was two years' rigorous imprisonment, plus a fine of Rs. 2,500/- which clearly exceeded the punitive jurisdiction of a District Court, (*vide* Section 14 of the C.P.C.) where the maximum fine is Rs. 1,000/-. The sentence on that count was therefore varied by reducing the fine to Rs. 1,000/-. De Sampayo, J (agreeing with Wood Renton, C.J. and Ennis, J) in the course of his judgment (*ibid.* at page 379) said " If the offence is one which is triable by the Police Court, the Police Magistrate has jurisdiction without any reference to Section 152(3) of the Criminal Procedure Code, and if he arrogates to himself higher punitive

[1] *(1915) 18 N. L. R. 376 (Full Bench).*

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powers by purporting to act under that provision, the infliction of any punishment beyond the Police Court limit does not by itself vitiate a conviction, but is in my opinion an irregularity which may be cured as regards the sentence by the interference of the Supreme Court in appeal or in revision. Mr. Bawa, for the appellants, does not seriously contest this point, but he strenuously argues that where an accused is charged in the same proceedings with several offences, some of which are triable summarily by the Police Court and other are not, Section 152(3) is not applicable at all, and that if for the purpose of trying the latter offences summarily the Police Magistrate gives himself jurisdiction under that Section, a conviction for all or any of the offences is wholly bad ". . . . . " I do not think that this reasoning is sound ". . . . . " In my opinion there is no objection to a Police Magistrate applying Section 152(3) to a case where several offences of two descriptions of gravity are concerned, provided of course he inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose ".

The position in this case is that although among the offences was one which the Magistrate was not empowered to try summarily as Magistrate, the Magistrate in the mistaken belief that they were all offences which he could have tried as Magistrate, proceeded to trial. It is, in my opinion, not a case of an irregularity which is curable by Section 425 of the Criminal Procedure Code. Section 425 enacts that " Subject to the provisions herein before contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—

(*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial in any inquiry or other proceedings under this Code, or

(*b*) . . . . . .

(*c*) . . . . . .

unless such error, omission, irregularity, or want has occasioned a failure of justice."

The Magistrate's Court was certainly not a Court of competent jurisdiction in respect of Count 3, an offence under Section 145 of the Penal Code. The failure on the part of the Magistrate to act under the terms of Section 152(3) of the Criminal Procedure Code is therefore an illegality which is incurable.

Neither the researches of Counsel nor my own into this aspect of the matter has resulted in the discovery of any authority for the proposition that in circumstances such as are present here, it is permissible to separate the illegal trial of the offence under Count 3 from the trial of the remaining counts ; to quash the proceedings in respect of Count 3 ; and consider the remaining summarily triable counts. It would appear that the basic principle which militates against such a course is that the

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trial by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences which have been joined together under Section 180(1) as forming part of the same transaction. It would seem to me that the case of *Madar Lebbe v. Kiri Banda* [1] lays down the procedure to be adopted by Magistrates in cases where some of the offences are triable summarily by a Magistrate and others are not. In such cases, the Magistrate is required to adopt the procedure laid down in Section 152 (3) of the Criminal Procedure Code, "provided of course he inflicts no higher punishment in respect of the lower offences than he had ordinary jurisdiction to impose ".

The trial in this case has not been in accordance with the law and is therefore illegal. The convictions and sentences are hereby quashed.

Convictions quashed.

1969 *Present :* **Tennekoon, J.**

Mrs. M. U. THAMEENA, Appellant, *and* J. H. KOCH, Respondent

S. C. 112/67—L. T. 1/18051

Labour Tribunal—Order made by it—Incapacity of Supreme Court to deal with it by way of revision.

The revisionary powers of the Supreme Court do not extend to revision of orders made by Labour Tribunals.

APPEAL from an order of a Labour Tribunal.

R. L. Jayasuriya, for the appellant.

T. Parathalingam, with *C. Sandrasagara*, for the respondent.

May 6, 1969. TENNEKOON, J.—

Mr. Parathalingam objects to this appeal being heard on the ground that it is out of time. Mr. Jayasuriya appearing for the appellant concedes that the appeal is out of time by four days. He however moves that the matter be dealt with in revision. This I am not prepared to do as I do not think the revisionary powers of this Court extend to orders made by Labour Tribunals.

The appeal is rejected with costs.

Appeal rejected.

[1] *(1915) 18 N. L. R. 376 (Full Bench).*

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[Privy Council]

1965 *Present :* **Viscount Dilhorne, Lord Morton of Henryton, Lord Guest, Lord Upjohn, Lord Wilberforce**

D. ROBOSINGHO MUDALALI, Appellant, *and* L. D. P. JAYAWARDENE and others, Respondents

Privy Council Appeal No. 50 of 1962

S. C. 194/1958 (F)—D. C. Kurunegala, 10868/L

Rei vindicatio *action—Plaintiffs' claim based on prescriptive title—Quantum of evidence.*

The plaintiffs (1st and 2nd respondents) instituted action for declaration of title to a land. Their claim was based upon prescription. The issue was essentially one of fact, namely, whether the plaintiffs proved possession, adequate in continuity, publicity and extent, over 10 years or more, to establish a prescriptive title to the land. Judgment was given in plaintiffs' favour by the trial Court and, on appeal, by the Supreme Court.

Held, that, in the absence of any error in law, the findings of both courts in Ceylon should not be disturbed.

Appeal from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *Dick Taverne*, for the 2nd defendant-appellant.

Sir Derek Walker-Smith, Q.C., with *R. K. Handoo*, for the 4th respondent.

Cur. adv. vult.

February 4, 1965. [*Delivered by* Lord Wilberforce]—

These proceedings relate to the title to certain land, about 50 acres in extent, in the District of Kurunegala in Ceylon. The action was started on 23rd April 1954 by the first and second respondents as plaintiffs against the appellant and the third and fourth respondents as defendants for a declaration of the plaintiffs' title to the land, ejectment of the appellant and the third respondent from the land and for damages. The plaintiffs' claim was based first upon certain deeds of conveyance and secondly upon prescription. The fourth respondent was made a defendant to the action by reason of the fact that he had, in a conveyance dated 5th May 1953 to the plaintiffs warranted his (the fourth respondent's) title to the land, and in order to enable him to appear and defend the title,

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1*—J 7659 (10/69)

At the trial before the District Court of Kurunegala, the plaintiffs were successful and on 16th May 1958 the Court granted the relief prayed for. The second defendant appealed against the decree of the District Court to the Supreme Court of Ceylon which on 26th January 1961 dismissed the appeal. The present appeal is brought by leave of the Supreme Court, by the second defendant as appellant : the only respondent who has appeared is the third defendant in the action, the 4th respondent on the record, Dr. M. G. Perera.

Their Lordships will examine first the claim based on prescription. In the plaint, the land to which claim was made was identified by a description set out in the schedule, which description corresponded to that which was contained in the schedule to a deed of transfer dated 11th September 1941 between one Singappulige Rana Fernando as vendor of the one part and Dr. M. G. Perera (the 4th respondent) as vendee of the other part. It is sufficient to state that it consisted of two contiguous allotments called Elabodahenyaya and Medakumburahenyaya marked L114A and O114 situated at Chandarayagama in the District of Kurunegala containing in extent 50 acres and 27 perches. The claim was that the said Singappulige Rana Fernando was the lawful owner of the land by long and prescriptive possession ; that she sold and transferred it to Dr. M. G. Perera by the said deed of 11th September 1941 and that Dr. M. G. Perera entered into possession ; that Dr. M. G. Perera by deed dated 5th May 1953 sold and transferred the land to the plaintiffs, and that the plaintiffs and their predecessors in title had been in undisturbed and uninterrupted possession by a title adverse to and independent to all others and had acquired a prescriptive title. It was then alleged that the first and second defendants had wrongly entered upon the land on 22nd November 1953.

The defence (on this issue) of the second defendant (the appellant) consisted of a denial of the plaintiffs' allegations : in addition there was a positive allegation that the second defendant and his predecessors in title had been in possession of the land for a period of over ten years. The third defendant (the fourth respondent) admitted the relevant averments in the plaint. The issues framed and accepted included explicitly an issue as to the prescriptive rights of the parties.

At the trial before the District Court a number of witnesses were called to testify as to possession of the land. For the Plaintiffs there were called (*a*) the first Plaintiff L. D. P. Jayawardene and (*b*) C. B. Wickremasinghe the Assistant Superintendent of Dr. M. G. Perera, the fourth respondent. For the second defendant (the appellant) there were called (*a*) Claude Stanley Fernando, whose evidence was not material on the prescriptive issue ; (*b*) K. M. D. B. Kulatunga, who claimed to have cultivated the land for a period, (*c*) A. M. Rambanda headman of the village of Chandrayagama.

The defendants did not themselves give evidence, nor did the second plaintiff. The learned judge did not accept the evidence of Kulatunga

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as true, and held that Rambanda was a witness partial to the defence. He rejected Rambanda's evidence on the only point which was material on the issue as to prescription, namely as to the age of certain trees on the land. Their Lordships must accept the trial judge's findings as to the credibility of these witnesses and must therefore deal with this issue on the evidence of the plaintiffs' witnesses.

The evidence of the plaintiff Jayawardene did little more than to establish that he and his co-plaintiff had possession of the land from 5th May 1953 to 22nd November 1953—a period of 6½ months and that when they took possession there were a few trees on the land. He said that when he took possession there was no house there. In order to establish the period of ten years which is required for a prescriptive title it was necessary to rely on possession by Dr. M. G. Perera. Dr. Perera did not himself give evidence and it was only Mr. Wickremasinghe, his Assistant Superintendent, who was called as to the period from 1941 to 1953. In his evidence in chief he referred to the purchase by Dr. Perera in 1941 and the sale in 1953 and said " I was in possession for the entirety of that period ". In the rest of his evidence and in his cross-examination he gave evidence as to " opening up the land ", planting with coconuts and other crops, the erection of a small house on the land where the witness stayed from time to time, efforts to improve the land by expenditure and labour, visits to the land and the absence of any disturbance of possession. As to the planting, he agreed that the land was jungle when purchased and that the area planted was " within ten to fifteen acres " on which 60 to 70 trees per acre were put : planting was given up during the war years and the plantation became neglected. The learned judge said that " he saw no reason not to accept the evidence of Wickremasinghe " and held that Dr. Perera was in possession since 1941 and obtained a prescriptive title.

On his appeal to the Supreme Court, the second defendant (the appellant) challenged these findings of the learned judge. As appears from the petition of appeal, the grounds were that the evidence of prescriptive possession was inadequate and insufficient—Dr. Perera and his Watcher not having been called ; that the evidence of Mr. Wickremasinghe ought not to have been accepted on account of inconsistency between his evidence and that of the plaintiffs and the evidence of Kulatunga and the Village Headman ; that the evidence of the latter ought to have been accepted. The Supreme Court however dismissed the appeal without giving any reasons for their judgment.

Their Lordships have carefully considered whether there are any grounds which would entitle them to interfere with the decision on this issue of the District Judge affirmed by the Supreme Court. The issue is essentially one of fact, namely whether the plaintiffs proved possession, adequate in continuity, publicity and extent, over 10 years or more, to establish a prescriptive title to the land in question. Certainly the evidence, in effect that of Wickremasinghe supplemented to a minor

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extent by that of the Plaintiff Jayawardene, was slender even when account is taken of the character and location of the land. But their Lordships consider that Mr. Wickremasinghe when he referred to " the land " was clearly referring to that which was bought in 1941 and sold in 1953, i.e. the 50 acres 27 perches, and this being established, they cannot accept that there was no evidence on which a finding of 10 years uninterrupted possession of that land—regard being had to its nature, i.e., mainly jungle land—could properly be made. Moreover there does not appear to their Lordships to be any ground for holding that the learned trial judge in any way misdirected himself, or applied the wrong standard or test in order to decide whether the necessary possession was proved. Admittedly the passage in his judgment on this issue is somewhat brief but that may be because of the absence of any full argument on a point of law, and does not show that the correct legal considerations were not present to his mind. Equally their Lordships are unwilling to assume that the Supreme Court, on the appeal, did not apply the right test in reviewing the learned judge's findings and deciding whether it was justified on the evidence. In the absence of any error in law, which in the opinion of their Lordships, the appellant has failed to demonstrate, the case becomes one in which an issue of fact has been concurrently determined against the appellant by both courts in Ceylon. Their Lordships would not be justified in disturbing those findings.

Their Lordships are of the opinion that the fourth respondent succeeds on the issue of a prescriptive title and therefore do not consider it necessary to deal with the other issue in the appeal namely whether the plaintiffs could succeed on any other basis. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

1969 *Present* : **H. N. G. Fernando, C.J., and Weeramantry, J.**

G. H. WILBERT DE SILVA, Petitioner, *and* THE TOWN COUNCIL, DODANDUWA and another, Respondents

S. C. 468/68—Application for a Mandate in the nature of a Writ of Certiorari

Municipal Councils Ordinance—Sections 261 and 263—Non-payment of rates or taxes—Purchase of immovable property by Municipal Council or Town Council—Certificate issued by Council—Whether its validity can be questioned by way of Certiorari—*Validity of the certificate if the purchase was irregular.*

The Mayor of a Municipal Council or the Chairman of a Town Council does not perform a quasi-judicial function when he signs a certificate under section 263 of the Municipal Councils Ordinance in respect of property purchased in terms of section 261 for non-payment of rates or taxes. Accordingly, *Certiorari* does not lie to quash the certificate.

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Quaere, whether the conclusive effect of a certificate issued under section 263 of the Municipal Councils Ordinance attaches in a case where a property is shown to have been purchased by a person who was not duly authorised by the Council in terms of the provisions of section 261.

APPLICATION for a writ of *certiorari* on the Town Council, Dodanduwa, and its Chairman.

Nimal Senanayake, for the petitioner.

Harischandra Mendis, with *Gemunu Seneviratne*, for the respondents.

June 2, 1969. H. N. G. FERNANDO, C.J.—

This is an application for a writ of Certiorari to quash a certificate purporting to have been issued under section 263 of the Municipal Councils Ordinance in its application to property alleged to have been sold for non-payment of rates due to a Town Council. Having regard to the provisions of sections 261 and 263, it does not appear to us that the Mayor of a Municipal Council or the Chairman of a Town Council in signing a certificate referred to in section 263 performs a quasi-judicial function and we doubt for that reason whether certiorari will lie to quash the certificate.

The complaint of the petitioner in the present case is that the alleged purchase by the Town Council was not a purchase *under the provisions of section 261 of the Ordinance*, for the reason *inter alia* that the property was not bid for and purchased by a person authorised for that purpose by the Council. There appears to be substance in the argument that a resolution of the Town Council is necessary to authorise a person to bid for and purchase property as provided in section 261. If this argument be sound, then the certificate signed under section 263 would be ineffective to vest the property in the Council for the reason that there was not the requisite authority for its purchase. We think that there is good reason for the opinion that the conclusive effect of a certificate issued under section 263 only attaches in a case where a property is shown to have been purchased *duly* under the provisions of section 261.

We are met however by a decision of this Court in the case of *Nafia Umma v. Abdul Aziz* [1] where the directly opposite conclusion has been upheld.

In regard to the very property which is the subject of the present application, the Town Council has instituted an action for ejectment of the petitioner from this land and the ground for that action is that title to that land was vested in the Council in terms of section 263. We are informed by Counsel for the petitioner that an application was made in that action to lead evidence to establish that there was non-compliance with the

[1] (1925) 27 *N. L. R.* 150.

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provisions of section 261 of the Municipal Councils Ordinance, and that order on the application to lead such evidence has been reserved by the District Judge. It seems to us that when the order of the District Judge is made there will be a suitable opportunity for a review of the decisions in the case reported in 27 N. L. R. if either of the parties to the pending action appeals against the order of the District Judge. In the event of any such appeal being filed, it will be open to Counsel for either party to bring this matter to the notice of the Registrar, in order that the Chief Justice may consider whether the former decision should be reviewed by a Bench of greater strength. The application is refused ; we make no order as to the costs.

WEERAMANTRY, J.—I agree.

Application refused.

1967 *Present :* **T. S. Fernando, A.C.J., Tambiah, J., and Alles, J.**

In re U. BATUVANTUDAVE

S. C. No. B 52 of 1967—In the matter of an application by Upali Batuvantudave for readmission and re-enrolment as an Advocate of the Supreme Court

Advocate—Name struck off roll of Advocates—Readmission on proof of re-establishment of character—Whether recall to English Bar is condition precedent if he was called to that Bar.

The applicant had been called to the English Bar and was subsequently enrolled as an Advocate in Ceylon on August 4, 1932. His name was struck off the Roll of Advocates on October 8, 1937, because he was convicted of certain offences in the District Court of Colombo on June 19, 1936. About 13 years after he was disbarred, his application for readmission as an Advocate was dismissed on April 5, 1950. The present application for readmission was presented by him more than 17 years after the rejection of the first. There was sufficient proof that he expiated his offences and re-established his character.

Held, that the applicant's name should be restored to the Roll of Advocates. It was not a pre-condition to his readmission that he should have been recalled to the English Bar.

THIS was an application by the petitioner for readmission and re-enrolment as an Advocate of the Supreme Court.

E. B. Wikramanayake, Q.C., with *M. Rafeek*, for the applicant.

A. C. M. Ameer, Q.C., Attorney-General, with *M. Kanagasunderam*, Crown Counsel, as *amicus curiae* on notice from the Court.

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A. H. C. de Silva, Q.C., with *E. R. S. R. Coomaraswamy* and *Desmond Fernando*, for the General Council of Advocates, as *amicus curiae* at the instance of the Court.

Cur. adv. vult.

December 11, 1967. T. S. FERNANDO, A.C.J.—

The applicant who had been called to the English Bar was admitted and enrolled as an Advocate of this Court on August 4, 1932. Rule 51 (as it then stood) of the Rules set out in the Second Schedule to the Courts Ordinance permitted persons called to the English Bar to be so admitted and enrolled. He was convicted on June 19, 1936 in the District Court of Colombo on charges which alleged that he had committed " very serious offences involving gross fraud in each ". His name was struck off the Roll of Advocates on October 8, 1937. Some thirteen years after his disenrolment he applied to the Court for re-admission as an Advocate, and this Court, having given the matter very careful consideration, dismissed his application on April 5, 1950—see *In re Batuvantudave* [1]. This second application for readmission has been presented more than 17 years after the rejection of the first, and nearly a third of a century after the disenrolment.

In an affidavit attached to his petition the applicant sets out the manner in which he has since his conviction by the court and subsequent disenrolment from the profession led an honest and industrious life devoting his time to religious and cultural pursuits. We must take note also of the fact that during this period he had been elected to the country's then legislature, the State Council, and served as a member thereof for some seven years. To this affidavit he has attached a number of certificates from men who have held high and distinguished office in this Country, certificates which go to prove that the applicant has expiated his offences and re-established his character. In these circumstances he is entitled to a favourable reception by us of his present application.

Where an advocate had been convicted of cheating and had subsequently been disenrolled, this Court,—(see *In re Seneviratne* [2])—while it refused readmission where an application therefor had been made even before five years had elapsed since disenrolment, however accepted the proposition that it had power to readmit when an applicant has expiated his offence and redeemed his character. While the present applicant's earlier attempt to gain readmission, although made some thirteen years after disenrolment, failed, we have to remember that thirty years have now passed since the day the applicant lost his right to practise his profession in our Courts. He is said to be 57 years of age today, and the offences which entailed the loss of his professional rights were committed in 1935 when he was but 25 years old.

It is not clear whether he intends actively to pursue a professional career, but in regard to our inquiry relative thereto, we have been referred by the learned Attorney-General to the observations of this

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[1] *(1950) 51 N. L. R. 513.* [2] *(1928) 30 N. L. R. 299.*

Court in *In re an Advocate*[1]. The Court, while there affirming the view taken on an earlier occasion that " we should be very careful in admitting to the profession a man who has been guilty of a crime of dishonesty ", went on to endorse the following opinion :—" But that is not to say that character once lost cannot be redeemed ". In that case the Court also observed that it saw no reason why the intention of the applicant before it to continue his career as a teacher should stand in the way of his readmission to the profession of advocates.

A point touching procedure did at one stage of the hearing cause us some concern. As the applicant came to be admitted here by virtue of his call to the English Bar from which too we assume he has been disbarred, the question did arise in our minds whether a pre-condition to his readmission is not a recall to the English Bar. The learned Attorney-General and the learned Queen's Counsel who appeared on behalf of the General Council of Advocates both submitted that such a recall is not imperative, a submission endorsed by the applicant's counsel as well.

I might add that for the first time in the case of applications of this nature the Court invited the presence at the hearing of counsel on behalf of the General Council of Advocates, as we deemed it prudent to hear any submission the Council wished to make either for or against the application. Counsel who so appeared made no submission and offered no argument tending towards a rejection of this application. Nor indeed did the learned Attorney-General. In these circumstances we make order in this case directing a restoration of the name of the applicant to the Roll of Advocates of this Court.

TAMBIAH, J.—I agree.

ALLES, J.—I agree.

Application allowed.

1969 *Present :* **Sirimane, J., and Samerawickrame, J.**

T. D. GARLIS SINGHO, Appellant, *and* T. D. GEEGER SINGHO and others, Respondents

S. C. 142/67 (Inty.)— D. C. Kalutara, 1046/P

Vendor and purchaser—Conditional transfer of property by co-owners—Subsequent re-transfer—Proportions to which the co-owners will be entitled then.

Where property owned by co-owners is conveyed by them on a conditional transfer and is subsequently re-transferred to them without specifying any particular proportions, the deed of re-transfer will be construed to mean that the property was returned to them in the same proportions in which they held it at the time when they executed the conditional transfer.

[1] *(1951) 52 N. L. R. at 562.*

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APPEAL from an order of the District Court, Kalutara.

Frederick W. Obeyesekere, for the defendant-appellant.

Upali de Z. Gunawardene, with *Asoka de Z. Gunawardene*, for the respondents.

May 5, 1969. SIRIMANE, J.—

It is common ground that one Gettohamy inherited a half share of the rights of her husband Hendrick Appu, and that the balance half share passed to Hendrick Appu's seven children. The widow and the seven children on deed P2 of 1955, which is a conditional transfer, transferred their rights to one Meelis Singho. The property was redeemed, and the widow and the seven children bought back the property from Meelis Singho on deed P3 of 1957.

That deed P3 does not set out the proportions in which the property was re-transferred.

When the property which is conveyed on a conditional transfer is purchased back by the vendors, the deed in their favour must be construed to mean that the property was returned to them in the same proportions in which they held it at the time they executed the conditional transfer ; unless there is something in the deed of re-transfer which shows that the property was being returned in proportions different to those they were entitled to at the time of their conditional transfer.

Thereafter on deed P4 the widow and the children gave another conditional transfer to Thomas Perera and Richard Perera. On deed P5 of 1959, they once again redeemed the property. The property was sold back to the original vendors without specifying any particular proportions, and we think that the deed P5 should be construed to mean that the property was returned back to Gettohamy and her children in the same proportions to which they were entitled when they transferred it, on P4.

Thereafter, Gettohamy on deed P6 of 1959 transferred her *half share* to the first defendant who is one of her children. This is a clear indication, that there had been no change in the extent of the rights of herself and her children.

In deed P4 there was a condition that if any one or more of the vendors should redeem the property, the vendees on that deed (P4) were entitled to re-transfer the property only to those who actually made the payments. But, in this case, the retransfer was made to *all* the vendors and there is no indication that any one of them got more rights than they were originally entitled to.

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We are of the view that on deed P5 Gettohamy got back the rights she was entitled to, viz., a half share of her husband's property, and the children were entitled to the balance half share in equal shares. The Interlocutory Decree should be amended on this basis. The first defendant-appellant is entitled to the costs of this appeal.

SAMERAWICKRAME, J.—I agree.

Decree amended.

[COLONIAL COURT OF ADMIRALTY OF CEYLON]

1969 *Present:* **Siva Supramaniam, J.**

NEW INDIA MARITIME AGENCIES PRIVATE LTD. (of Madras)
v. THE SHIP " BARUN " (now in the Port of Colombo) *et al.*

Action in rem *No. 7 af 1968*

Admiralty Court—Ship—Action in rem *to enforce a claim for a sum of money—Jurisdiction—Requirement that the money claimed should be referable to supply of necessaries—Balance due on a general mercantile account—Unenforceability of claim by action* in rem—*Right of mortgagees of ship to intervene in the action—Admiralty Court Rules, Rule 78.*

The Colonial Court of Admiralty of Ceylon has no jurisdiction to entertain an action *in rem* against a ship in respect of a claim for a sum of money unless the amount claimed by the plaintiff is referable to the supply of necessaries to the defendant ship.

An action *in rem* for the supply of necessaries is not available to an agent against his principal when the sum claimed is based in fact on the balance due on a general mercantile account between the parties. The fact that the principal has consented to the ship being detained at any port until the agent's dues are paid cannot affect the question whether the claim is one which is enforceable by an action *in rem*.

A mortgagee of the ship against which an action *in rem* is instituted is entitled to intervene in the action and raise objections to the plaintiff's claim against the ship, even when the owner of the ship has not appeared to contest the plaintiff's claim.

THIS was an action *in rem* instituted by theplaintiffs against a ship " s.s. Barun " in order to enforce a claim for a sum of money due on a decree obtained by them in the High Court of Madras against the Hindusthan Shipping Co. Ltd. of Bengal and its Managing Director. The ship belonged to the Calcutta Steam Navigation Co. Ltd. The Hindusthan Shipping Co. Ltd. was the charterer by demise of the ship. Neither the owner nor the charterer entered an appearance to contest the

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plaintiffs' claim in the action *in rem*. But two mortgagees, viz. (1) The Damodar Bulk Carriers Ltd. of Bombay and (2) The Shipping Development Fund Committee of India, intervened as added-defendants and moved for the release of the ship and the recall of the warrant of arrest.

H. W. Jayewardene, Q.C., with *S. Mahadeva, Annesley Perera, M. Devasagayam* and *Gamini Dissanayake*, for the plaintiffs.

C. Ranganathan, Q.C., with *K. N. Choksy, R. Gooneratne* and *S. C. Chandrahasan*, for the 1st intervenient added party.

S. J. Kadirgamar, Q.C., with *J. W. Subasinghe* and *E. B. Vannitamby*, for the 2nd intervenient added party.

Cur. adv. vult.

February 28, 1969. SIVA SUPRAMANIAM, J.—

This is an action *in rem* instituted by the plaintiffs against the "s. s. Barun", which is now in the Port of Colombo, claiming a sum of Rs. 400,000 on the ground that the said sum represents (*a*) the value of necessaries supplied by the plaintiffs and/or (*b*) monies advanced by the plaintiffs and utilised to procure necessaries for the defendant. On 2nd December 1968 a writ of summons and warrant of arrest issued and on the same day the ship was arrested. The owners of the ship are the Calcutta Steam Navigation Co. Ltd. and during the period relevant to the transactions set out in the petition the Hindusthan Shipping Co. Ltd. of Bengal (hereinafter referred to as the Hindusthan Co.) was the charterer by demise of the said ship. The documents relied on by the parties do not disclose whether the charter is still in force or not. Neither the owner nor the charterer has entered an appearance to contest the plaintiff's claim. But two mortgagees of the ship, viz., The Shipping Development Fund Committee of India which is a first mortgagee of the ship for a sum of Rs. 1,600,000 and the Damodar Bulk Carriers Ltd. of Bombay which is a second mortgagee for a sum of Rs. 500,000, have intervened and have moved for the release of the ship and the recall of the warrant of arrest.

It is contended on behalf of the mortgagees that this Court has no jurisdiction to entertain this action by the plaintiffs and that the petition should be rejected. The contention is based on grounds both of fact and law. It is therefore necessary to examine in the first instance the relevant facts as disclosed in the petition of the plaintiffs and in the documents pleaded as part and parcel thereof.

The plaintiffs are a private limited liability company who carry on the business of Liner and Chartering agents and ship brokers. From September 1964 to November 1967 the plaintiffs were the steamer agents

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of the Hindusthan Company " for all necessary purposes of paying ports and customs dues and for all requirements of the vessel (s. s. Barun) and its master. " According to the petition, during the aforesaid period, the plaintiffs expended a sum in excess of Rs. 405,000 in respect of (*a*) necessaries required by the defendant and/or (*b*) monies advanced and utilised to procure necessaries for the defendant.

In April 1968 the plaintiffs instituted an action *in personam* in the High Court of Madras against the Hindustan Co. and its Managing Director claiming from them jointly and severally a sum of Rs. 420,421·96. On 22.6.1968 they consented to judgment in a sum of Rs. 400,000. The plaint and decree in the said case have been pleaded as part and parcel of the petition in the instant case. That decree remains unsatisfied. In the present petition the plaintiffs have prayed for judgment in a sum of Rs. 400,000 and interest thereon at six per cent. per annum from the date of the aforesaid decree. To the plaint in the said case was annexed a statement of account which disclosed an outstanding liability to the plaintiffs in a sum of Rs. 420,421·96 on the part of the Hindusthan Co. and its Managing Director. The said sum was made up of Rs. 396,947·99 as principal and Rs. 23,473·97 as interest. A copy of the said account, though not filed by the plaintiffs along with the other documents attached to the petition in the instant case, has been marked in evidence by learned counsel for the second mortgagee (2D1A).

It is common ground that this Court has jurisdiction to entertain the plaintiffs' claim only if the amount claimed or part thereof is due on account of either necessaries supplied to the defendant ship or monies advanced to procure necessaries for her.

It is urged by learned Counsel for the plaintiffs that the nature of the plaintiffs' claim will be established by evidence that will be led at the trial and that the question of jurisdiction based on the nature of the plaintiffs' claim cannot be determined *in limine* without the plaintiffs being given an opportunity of placing their evidence. Learned Counsel for the second mortgagee submits, on the other hand, that his objection is based on the facts contained in the documents annexed to the petition and, consequently, the need to lead further evidence does not arise.

The plaint in the Madras case (P15) which has been pleaded as part and parcel of the present petition sets out in detail the transactions the plaintiffs had with the Hindustan Co. in connection with the defendant ship. The documents filed therewith establish beyond any doubt that the claim which the plaintiffs seek to enforce in these proceedings is the identical one in respect of which decree was entered in the Madras case. But so long as that decree remains unsatisfied, it is no bar to the maintenance of these proceedings, provided, however, it is established

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that the amount claimed is referable to the supply of necessaries to the defendant ship. (Vide the judgment of the President in *The Cella* [1] and *The Bengal* [2].

According to para. 4 of P15, the balance due to the plaintiffs as at 31st December 1966 on account of the disbursements made for the supply of necessaries and "for all requirements of the vessel" was Rs. 71,045·74. The vouchers P2 to P14, filed with the petition in the instant case, which related to the disbursements during the aforesaid period (although erroneously described as statements of accounts for the period September 1964 to 4th November 1967) showed the total disbursements to be Rs. 397,779·03, and the receipts to be Rs. 70,000. The statement of account 2D1A, however, discloses further receipts during that period exceeding a sum of Rs. 250,000 to which no reference has been made either in the documents P2 to P14 or in the petition.

The agreement entered into between the plaintiffs and the Hindusthan Co. in regard to the liquidation of the aforesaid debt of Rs. 71,045·74 and in regard to further advances of money was set out in the following terms in para. 5 of P15 :—

"By May 1967 the 1st defendant company ran into financial difficulties which affected their business. Thereupon, the second defendant, the Managing Director of the 1st defendant company acting, as represented by him, under the authority and on behalf of the said company, approached the plaintiff company to lend financial assistance for the purposes of that company and entered into an arrangement with the plaintiffs in and by which it was agreed between them that—

(i) *Plaintiffs should advance to the 1st defendant company up to the limit of Rs. Two Lakhs for the purposes of the said company* including the existing liability of Rs. 71,045·74 referred to above, for a period of two years and the 1st defendant company was to give the plaintiffs a Demand Promissory Note for the said sum of Rs. Two Lakhs and the said liability was to be progressively reduced.

(ii) The plaintiffs were to be irrevocably appointed and constituted as the General Agents of the 1st defendant company throughout the world to manage the employment and operations of the said vessel s. s. Barun, fixing cargoes, collecting freights and making all kinds of disbursements.

(iii) The plaintiffs were to receive as their remuneration for their services the following commissions :—

(*a*) Five per cent. on actual freight earnings plus one per cent brokerage, on all export cargoes.

[1] *(1888) 13 Probate 82 at p. 85.* [2] *Jurist Reports (1859) Vol. 5 p. 1085.*

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(*b*) Import Commission of one per cent. on freight earnings as per manifest : and

(*c*) A fixed sum of Rs. 2,500 for bulk cargoes consisting of full shipload of any particular commodity.

(iv) The plaintiffs were to deduct and pay themselves Rs. 20,000 towards the above loan from each freight collection from every port and the plaintiffs, after deducting the said Rs. 20,000 and all disbursements made by them, shall remit the balance of the freight collection on each trip to the defendants.

(v) The defendants were not to collect directly any freight for the vessel " Barun " under any circumstances and the same shall be payable directly to the plaintiffs.

(vi) In case of any dispute, the same was to be referred to an Arbitrator mutually appointed or else the Madras Courts were to have exclusive jurisdiction to decide the dispute. "

In terms of the aforesaid agreement, the Hindusthan Co. and its Managing Director granted to the plaintiffs a promissory note on 2nd May 1967 for Rs. Two Lakhs payable on demand with interest at 12% per annum. A composite agreement was also executed between the parties embodying all the terms and conditions referred to above.

Out of the loan of Rs. Two Lakhs agreed upon, the plaintiffs deducted a sum of Rs. 70,000 on account of the debt of Rs. 71,045·74 that was outstanding in respect of the supply of necessaries to the defendant ship up to 31st December 1966 and paid the Hindusthan company the balance sum of Rs. 130,000 in two instalments as follows :—Rs. 100,000 on 2nd May 1967 and Rs. 30,000 on 22nd May 1957. It would appear, therefore, that in respect of the disbursements set out in the documents P2 to P14 filed with the petition only a sum of Rs. 1,045·74 remained unpaid to the plaintiffs on 22nd May 1967. In the course of the hearing, however, learned Counsel for the plaintiffs marked in evidence vouchers P17 to P26 setting out the disbursements alleged to have been made on account of the defendant ship during the period 2.6.1967 to 4.11.1967. The total amount of disbursements on the documents P17 to P26 is Rs. 965,718·20. There are many items in these accounts which will not fall within the category of necessaries but I need not go into that question at this stage. I shall assume that the full sum of Rs. 965,718·20 represents disbursements in respect of necessaries.

According to para. 10 of P15, " subsequent to the aforesaid contract of agency, the Managing Director of the defendant company *made further requests for money on behalf of the company for its purposes, namely, repaying the company's old liabilities* ". The plaintiffs, accordingly, " made further advances aggregating to Rs. 319,800 between 25.5.1967

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and 23.10.1967, the total advances made by the plaintiffs thus coming to Rs. 520,845·74." This sum of Rs. 520,845·74 included the sum of Rs. 1,045·74 which was the balance due on the supply of necessaries up to 31.12.1966. If, however, the sum of Rs. 1,045·74 was added to the disbursements alleged to have been made on account of the defendant ship between 2.6.1967 and 4.11.1967, the resulting position was as follows : the amount payable as disbursements made on account of the ship up to 4.11.1967 was Rs. 966,763·94 and the cash advances to the Hindusthan Co. Rs. 519,800.

During the aforesaid period, the plaintiffs received as freight collections a total sum of Rs. 1,089,615·95. The Statement of Operation 2D1B and the statement of account 2D1A show clearly that the freight was collected at four ports. If the subsequent advances and disbursements were made on the same terms as those on which the initial loan of Rs. 200,000 was granted, the plaintiffs were entitled to deduct only a sum of Rs. 20,000 from each freight collection towards the loans and were under a duty to apply the balance towards the disbursements made on account of the ship. Any balance left over had to be paid to the Hindusthan company. On that basis, the plaintiffs were entitled to appropriate only a sum of Rs. 80,000 out of the freight collections towards the cash advances of Rs. 519,800, and they had in their hands a sum of Rs. 10,09,615·95 to meet the other disbursements which amounted to only Rs. 966,763.94. They still had a balance sum of Rs. 42,852·01 which was payable to the Hindusthan Co. If credit was given in this sum against the cash advances, the balance payable by the Hindusthan Co. was Rs. 396,947·99. The sum of Rs. 420,421·96 claimed in the Madras case was arrived at by adding to the said sum 12% interest on the sum of Rs. 200,000 for which the promissory note had been given.

It was submitted by learned counsel for the plaintiffs that the terms of the agreement set out in para. 5 of P15 applied only to the initial loan of Rs. 200,000 and not to the subsequent cash advances amounting to Rs. 319,800 and that the plaintiffs were therefore entitled to pay themselves that sum out of the freight collections before meeting the expenses incurred in respect of the ship. On the basis of that submission he argued that the outstanding balance or a substantial part of it represents disbursements made in respect of necessaries for the ship and that an action *in rem* therefore lies against the ship.

I am of opinion that the aforesaid submission is not tenable as it is clear from the averments contained in P15 and from an examination of the vouchers P17 to P22 that the plaintiffs made the subsequent advances too on the basis of the agency agreement set out in para. 5 of P15. In vouchers P17 to P22 the plaintiffs claimed agency commission in terms of the said agreement in respect of each of the six voyages set out in the Statement of Operation 2D1B. Apart from that, the plaintiffs

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expressly averred in para. 16 of P15 that they " have kept alive the contract of agency and hereby signify their acquiescence in its continuance. " It is not open, therefore, to the plaintiffs to contend at this stage that the subsequent advances were made by them on a different basis.

On the material contained in the documents filed by the plaintiffs and pleaded as part and parcel of their petition I find that the plaintiffs had sufficient funds out of the freight collections to pay themselves all expenses incurred by them in respect of the defendant ship, whether necessaries or not, and that the sum of money claimed in the Madras case as well as in the instant case represents the balance payable to the plaintiffs in respect of the monies advanced to the Hindusthan Co., for its own purposes and not for the purpose of procuring necessaries for the ship. An action *in rem* does not lie to enforce such a claim. As was stated by Dr. Lushington in *The Aaltje Willemina*[1] : " It is well known that the Court has no jurisdiction as to claims for money advanced, unless it is perfectly clear that the money was to be applied for the purchase of necessaries to be supplied for the use of the ship or crew."

It was further submitted that the plaintiff's claim is one by an agent against his principal for the balance due on a general mercantile account and an action *in rem* does not lie in such a case. A claim for necessaries by an agent has been the subject of several decisions by the Presidents of the High Court of Admiralty in England as well as by the Privy Council in appeal.

In the case of *The Megileff*[2] Hill J. reviewed all the earlier cases on this subject and stated : " There is nothing in the mere relation of principal and agent as between owner and agent which prevents the agent who has found money for the supply of necessaries to a ship from suing the owner, his principal, by a writ *in rem* and arrest of the ship to which the necessaries have been supplied." But he held that where a plaintiff is not in a position to say that he has a present right of action for the items of necessaries as a separate and distinct cause of action, and his claim is for the balance due on a mercantile account, an action *in rem* is not available to him.

In the instant case, the statement of account 2D1A filed by the plaintiffs is in two parts. The first is headed " True copy of accounts from 22nd September 1964 to 31st December 1966—In account with Messrs Hindusthan Shipping Co. Ltd. " and the second part " True copy of account from 2nd May 1967 up to 15th April 1968 ". In the account, a balance is struck as at 31st December 1966 and that balance is carried over to the second part. The second part contains on the debit side several items of loans made to the Hindusthan Co., as well as disbursements made on account of the ship in respect of the six voyages set out in the

[1] *Admiralty and Ecclesiastical Cases, Vol. 1 (1865–1867) p. 107.*

[2] *1921 Probate 36.*

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Statement of Operations 2D1B. The vouchers attached give the details of the amounts debited as disbursements. On the credit side are set down the freight collections. A balance is struck as at 15.4.1968 according to which a sum of Rs. 396,947·99 is payable to the plaintiffs by the Hindusthan Co. To this sum is added 12% interest on a loan of Rs. 200,000 and the total debit is Rs. 420,421·96. The plaintiffs have restricted their claim to Rs. 400,000 which was the amount for which the Hindusthan Co., consented to judgment in the Madras case. The loans referred to in the account were not advances made to the Hindusthan Co., to pay for or to procure necessaries for the ship. The form of the account makes it clear that it is a general mercantile account and what the plaintiffs have claimed in this action is the balance due on that general account.

The facts in the instant case bear strong points of similarity to the facts in the cases of *the "Twentje"* [1] and *"El Salto"* [2].

In *the "Twentje"*, the plaintiffs were the agents in England of the owners of the ship which traded between London and Holland. They received the freights payable in London and out of the proceeds paid the expenses incurred by the ship in England and from time to time made out accounts in which they placed the sums so paid and received respectively to the debit and credit of each successive voyage and sent these accounts to the defendants who were the Managers of the ship. An action was instituted by the plaintiffs for £195 8*s*. 7*d*. as the balance due to them for coals supplied to the ship for six voyages. They arrived at this balance by taking the whole of their agency accounts with the owners for a period of three years down to the time when they ceased to be agents and by excluding all the items in respect of the coals. There was a balance for the voyages in question in favour of the owners, of £27 6*s*. 11*d*. This balance they deducted from the sum of £125 15*s*. 6*d*. the whole amount payable for the coal, and proceeded for the remainder against the ship. Dr. Lushington held that the plaintiffs were entitled to have recourse to the ship to obtain satisfaction of their demand. In appeal, the Privy Council reversed the finding and held that the arrest of the ship for a general balance of the accounts was unjustifiable. The Rt. Hon. Lord Chelmsford, in pronouncing the opinion of the Board said: "The case of the Respondents depends entirely upon their right to deal with the accounts in this manner. They say, in effect, that on taking an account, according to their own view, of all their dealings and transactions with the owners of the ship they find a balance in their favour of £195 8*s*. 7*d*. and that in order to obtain a charge on the ship, they are entitled to select from the accounts the items which consist of charges for coals and to attribute the balance specifically to those items. They thus propose to treat the sums received in respect of the six voyages, not as received on account of the disbursements

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[1] *13 Moo. P. C. 185.* [2] *25 Times L. R. 99.*

made for each successive voyage, which would be the fair inference from the accounts then rendered, but as payments made in liquidation of a balance due on a previous account current. But there is no principle which can enable the Respondents thus to make the suppli ofsecoals a distinct and separate account ".

In the case of the " *El Salto* ", the plaintiffs entered into an agreement with the owners of the ship whereby the plaintiffs were to open a credit for the ship's disbursements and were for a commission to do all the business of insurance, sale or purchase of steamers and chartering or coaling of steamers belonging to the owners. The agreement was terminable by three months' notice. Subsequently the amount of the credit was increased and the advances of the plaintiffs included other matters than ship's disbursements. When the account was finally closed after termination of the agreement, it included items amounting to £1000 for coal supplied to the ship. The plaintiffs sued *in rem* for that sum. But they had no immediate right upon the supply of coals to be paid for them. In dismissing the action, Sir Gerell Barnes said : " I feel myself bound by authority in this case, as soon as I come to the conclusion, as I do, that the claim I have to consider is really based upon a general mercantile account between the parties and I am satisfied that that is the true view to take of the case, given the provisions of the agreement between the parties ".

The case of *the Underwriter* [1] in which the claim was allowed may also be noticed. In that case, the plaintiffs were agents of the owners, having had large transactions with them in respect of other vessels. They made advances for payment of repairs to the *Underwriter* and for other necessaries. They collected freights which were sufficient to pay for the ordinary disbursements but not for the repairs. Sir Robert Phillimore, in holding that they were entitled to sue *in rem* for the unsatisfied balance of their account said : " This suit is instituted, not to recover any particular or selected item of a general account, but the whole of the sum expended upon this particular occasion in payment of the necessaries required by the exigencies of the ship, and without which she could not have prosecuted her voyage. "

In *Foong Tai v. Buchheister* [2] their Lordships of the Privy Council in affirming a decision in favour of the plaintiffs said : " No accounts, therefore, have been rendered in this case which in fact resemble ordinary mercantile accounts. But on an examination of the authorities to which their Lordships have been referred and especially of the cases of *the Twentje* and *the Underwriter*, it will be found that what they really decide is this—that, as necessaries supplied to a ship are *prima facie* presumed to have been supplied on the credit of the ship, and not solely on the personal credit of her owners (*The Perla* (1857) Swa. 230), the form in which accounts are rendered by an agent,

[1] *1 Asp. M. L. C. 127.* [2] *1908 A. C. 458.*

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who has supplied or paid for necessaries, to his principal is evidence to rebut that *prima facie* presumption and show that the agent looked for payment to the principal alone. There is nothing in the Act of 1861 to prevent an agent from suing for necessaries under S. 5, nor is there any rule or principle of law that an agent loses his right so to sue if in the account he furnishes to his principal for those necessaries he gives credit for sums received."

Unlike the accounts dealt with in *Foong Tai's case*, *the Underwriter* and *the Megileff*, the account rendered by the plaintiffs in the instant case brings the claim within the class of cases dealt with in *the Twentje* and *El Salto* and an action *in rem* is not available to enforce it. The fact that under the terms of settlement entered into in the Madras case, the Hindusthan Co. consented to the ship being detained at any port until the plaintiffs' dues were paid cannot affect the question whether the claim is one which is enforceable by an action *in rem*.

A large sum of money is undoubtedly payable by the Hindusthan Co. to the plaintiffs but the question I have to determine is whether the plaintiffs are entitled the enforce the claim by an action *in rem*. On this question, having regard to the authorities cited, I have no alternative but to rule against the plaintiffs.

In support of the motion that the petition be rejected, learned Counsel for the intervenients made also the following submissions: (*a*) that an action *in rem* does not lie where the claim is against the charterers and not against the owners (*b*) that the attorney of the plaintiffs has no authority to institute or maintain the present action under the Power of Attorney filed in this case and (*c*) that the plaintiffs are seeking to enforce in this Court the decree *in personam* entered in their favour in the Madras Court and this Court has no jurisdiction to enforce that decree. Several interesting questions of law were argued at length in connection with the above submissions, but in view of the conclusion I have already reached, it is unnecessary to express any opinion upon them.

Learned Counsel for the plaintiffs raised the question of the right of the mortgagees to intervene and raise objections to the plaintiffs' claim when neither the owners of the ship nor the Hindusthan Co. have appeared to contest the claim. It was submitted that only mortgagees in possession were entitled to intervene. Halsbury (3rd Ed. vol. 1 p. 80) while dealing with the topic "Who may appear" states: "Further, any person not named in the writ may intervene in an Admiralty action *in rem* and appear on filing an affidavit showing that he is interested in the *res* under arrest or in the fund in the Registry. Such persons are mortgagees etc". In the case of *the Orienta*[1] the defendants, the owners of the ship, did not appear but the first and second mortgagees who had made

[1] *1895 Probate 49.*

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advances and held registered mortgages on the ship were allowed to intervene and defend the action. They were not mortgagees in possession of the ship. I am of opinion that the mortgagees were entitled to intervene in the action.

Learned Counsel for the plaintiffs also submitted that, unless the action is frivolous or vexatious, the plaintiffs should not be shut out *in limine*. He relied on the following observations of Wilmer J., in *The St Elefterio* [1] :—" Suppose, for instance, following the argument of counsel for the defendants, that this Court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible (these things have been known to happen) that a higher Court might take a different view : but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in these circumstances the plaintiffs would have lost their right for ever to entertain proceedings *in rem* in this country ". The preliminary objection in that case depended on the proper construction to be given to S. 3 (4) of the Administration of Justice Act, 1956—a matter which admitted of argument. In the instant case, on the other hand, the objection is based on facts on which the plaintiffs themselves rely in their petition. The question of further evidence, therefore, does not arise.

The averments contained in the petition and affidavit of the plaintiffs' attorney that the claim of Rs. 400,000 represented the value of necessaries and/or moneys advanced to procure necessaries and that the claim is supported by the vouchers P2—P14 are clearly not in accord with the facts. Had the statement of account 2D1A been filed along with the petition (as the plaintiffs should have done) and the true position in regard to the claim been made clear in the petition, the writ of summons and warrant of arrest would not have been issued by this Court in this case.

Under rule 78 of the Admiralty Court Rules (Subsidiary Legislation Vol. 1, p. 139) I rescind the order directing the issue of a writ of summons and a warrant of arrest. Let the writ and the warrant be recalled. The plaintiffs will pay the mortgagee-intervenients their costs of these proceedings.

Action in rem *dismissed. Writ of summons and warrant of arrest of ship rescinded.*

[1] *(1957) 2 A. E. R. 374.*

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1969

Present : **de Kretser J.**

W. JOSEPH, Appellant, *and* F. A. WOOTLER (S. I. Police), Respondent

S. C. 140/69—M. C. Dambulla, 15,776

Criminal Procedure Code—Section 152 (3)—Trial before Magistrate's Court—Joinder of a charge relating to an offence summarily triable with a charge relating to an indictable offence—Failure of Magistrate to assume jurisdiction under s. 152 (3) —Effect—Penal Code, ss. 219, 323.

Two offences were alleged to have been committed by the accused-appellant in the course of the same transaction. One of them was triable summarily and the other was triable only by a District Judge. The Magistrate, who was also District Judge, convicted the appellant of both offences without assuming jurisdiction under section 152 (3) of the Criminal Procedure Code.

Held, in appeal, that it was permissible to separate the illegal trial of the indictable offence and sustain the conviction on the remaining summarily triable count. In such a case it cannot be contended that the entire trial is vitiated by reason of the failure of the Magistrate to assume jurisdiction under section 152 (3) of the Criminal Procedure Code.

Ramaswamy v. Gunaratne (72 N. L. R. 187) not followed.

APPEAL from a judgment of the Magistrate's Court, Dambulla.

V. Karalasingham, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 11, 1969. DE KRETSER, J.—

The Magistrate of Dambulla (Mr. Siva Selliah) convicted the appellant on 15.1.68 on charges framed against him : (1) That he had voluntarily caused hurt to P.C. Wimal a Public Servant in the discharge of his duty, an offence punishable under section 323 of the Penal Code. (2) That he had offered resistance to his lawful apprehension by S.I. Wootler and P.C. Wimal an offence punishable under section 220A of the Penal Code.

Counsel for the appellant submitted and Counsel for the Crown agreed that the charge under section 220A was triable only by a District Judge and as the Magistrate had not assumed jurisdiction as D.J. in terms of section 152 (3) of the Criminal Procedure Code the conviction was bad in law. He further submitted and Crown Counsel agreed with him that the failure of the Magistrate to assume jurisdiction on the charge under 220A vitiated the conviction under section 323 as well which was otherwise

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triable by a Magistrate summarily. He relied for this proposition on the case of *Ramasamy v. Gunaratne*[1] decided by Pandita Gunawardene J. said Pandita Gunawardene J., "The question to which I have to address myself is whether it is permissible for me to quash the conviction and sentence on count 3 and proceed to consider the remaining counts which are properly triable by the Magistrate. . . . . Neither the researches of Counsel nor my own into this aspect of the matter has resulted in the discovery of any authority for the proposition that in circumstances such as are present here it is permissible to separate the illegal trial of the offence under count 3 and consider the remaining summarily triable counts. It would appear that the basic principle which militates against such a is that the trial course by the Magistrate must be treated as one trial and not as separate trials in respect of separate offences which have been joined together under section 180 (1) as forming part of the same transaction."

It would appear a pity that the joint research of all concerned failed to discover the case of the *King v. Jayasinghe*[2] in which Ennis J., held that a Police Magistrate may in the *same case*, exercise jurisdiction for the trial of one offence as Magistrate and for the trial of another offence under section 152 of the Cr. P. C. Apart from the authority of the *King v. Jayasinghe*[2], with great respect I find myself unable to agree with the reasoning in *Ramasamy v. Gunaratne*[1]. For while it is true that there is one trial in the sense of one proceeding it appears to have lost sight of the fact that the accused was being tried for several offences which the law allows to be tried in the same proceeding in terms of the chapter on the Joinder of Charges in the Criminal Procedure Code.

At one stage there was doubt whether where an accused was charged in the same proceedings with several offences some of which were triable summarily by the Magistrate's Court and others were not it was possible to make use of section 152 (3) at all, and that if the Magistrate gave himself jurisdiction under that section a conviction for all or any of the offences was wholly bad. These doubts were removed by the decision of the Full Bench in *Mardar Lebbe v. Kiri Banda*[3] which held there is no objection to a Magistrate applying section 152 (3) to a case where an accused is charged with several offences, some of which are triable by the Magistrate's Court and others are not *provided he inflicts no higher punishment in respect of the lower offences than he has ordinary jurisdiction to impose.* The words I have underlined in my view clearly point to the recognition of the fact that the Magistrate's jurisdiction in regard to offences which he could try as Magistrate always remains and was in no way affected by the assumption of higher punitive powers assumed under section 152 (3) in regard to an offence not otherwise triable by him which he found convenient by this device to try in the same proceeding. Equally the failure to assume higher punitive

[1] (*1968*) *72 N. L. R. 187*; *75 C. L. W. 85.* [2] (*1915*) *18 N. L. R. 374.*
[3] (*1915*) *18 N. L. R. 376.*

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powers in regard to offences not summarily triable by him could not in any way affect the trial of offences he had the right to try and had tried summarily in the same proceeding. It is useful to note what De Sampayo J., said in a case now to be found at page 379 of 18 N. L. R. "Misleading language is often employed to describe the nature of the proceedings authorised by section 152 (3). The Police Magistrate, for instance, is said 'to act as District Judge', but this is wholly incorrect. The Police Magistrate acts and can only act as Police Magistrate, the only difference being that, being also a District Judge, he has power to impose a sentence which ordinarily a District Judge may impose..... The wrong application of section 152 (3) involves a mere irregularity." It would appear to me that not making use of section 152 (3) would also be no more than an irregularity which would need setting right by the Supreme Court in revision in regard to the offence in reference to which the Magistrate should have assumed those powers if he dealt with it. For these reasons I have not the slightest doubt in affirming the conviction under section 323 in the instant case which the Magistrate was competent to try and in regard to which I see no blemish in the Magistrate's finding of fact. But I am of the view that the submission of Counsel for the appellant with which Crown Counsel agreed, that a charge under 220A can only be tried as District Judge, is not correct. The confusion appears to have arisen as a result of what should have been a charge under section 219 of the Penal Code being wrongly laid under section 220A.

In order to see whether a Magistrate has the right to try a charge under section 220A one must consult the first schedule to the Cr. P. C. and in doing so one finds that the offence under section 220A is triable in the District Court as well as in the Magistrate's Court and the maximum sentence is six months' R. I. or a fine. If a Magistrate has jurisdiction to try a charge summarily he could not under section 152 (3) assume jurisdiction to punish it more severely, *vide* the *King v. Jayasinghe* 18 N. L. R. at page 374. So that if the charge was correctly laid under section 220A I am of the view that the Magistrate was right when he decided that he had correctly tried the charge summarily. But it appears a pity that the very crudity with which the charge is set out in the Charge Sheet did not make him look into the question whether there was in fact a charge made out under section 220A which was enacted to cover the cases not provided for under sections 219, 219A, and 220 of the Penal Code, e.g, a case where the lawful apprehension was not for an offence but for any other purpose. A perusal of the facts appears to me to indicate that the charge against the accused was wrongly laid under this section. The evidence of S.I. Wootler that he explained the charge (presumably the charges of House-breaking and Robbery) to the accused who in spite of his doing so offered resistance to his apprehension appears to point to an offence, if any, under 219 and of course if the offence was under 219 it would be column 8 of the First Schedule of the Cr. P. C. as Soertsz J., pointed out in *Uparis v. The Police* [1] which would determine

[1] (1946) 47 N. L. R. 378.

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the jurisdiction of the Court. A reference to column 8 shows that the Magistrate could not try this offience if the person resisting lawful apprehension had been charged with an offence not cognisable by the Magistrate's Court. In the instant case on the scanty evidence led on this aspect of the matter the offence appears to be House-breaking by night and Robbery of guns over Rs. 500 in value, so that the offence would appear to be under section 219 and triable by the District Court. The conviction under 220A is set aside by me for the reason that the charge should not have been laid under that section. I do not direct that the case should go back to the Magistrate either to take non-summary proceedings or to act under section 152 (3) for in my view the punishment imposed by the Magistrate for the offence under section 323 plus the punishment imposed under the Prevention of Crimes Ordinance appears to be adequate in a case in which the offences have happened in the same transaction and largely turn on the same facts.

The appeal of the accused is allowed from the conviction under section 220A. The appeal is dismissed in regard to the conviction and sentence under 323 and section 6 of the Prevention of Crimes Ordinance.

Appeal partly allowed.

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1969 *Present :* **H. N. G. Fernando, C.J., Sirimane, J., and Weeramantry, J.**

K. D. DAVID PERERA, Appellant, *and* A. W. A. K. PEIRIS and another, Respondents

Election Petition Appeal No. 3 of 1968—Bandaragama (Electoral District No. 27)

Parliamentary election—Appeal to Supreme Court from decision of an Election Judge—Report of Supreme Court that a corrupt or illegal practice was committed by a person—Validity to disqualify that person for membership of House of Representatives—Parliament's power to amend Parliamentary Elections Order in Council—Constitutional validity of a Statute—When a Court will make a pronouncement thereon—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 82A, 82C (2) (b), 82D (2)— Ceylon (Constitution) Order in Council (Cap. 379), ss. 13 (3) (h), 29 (4).

Where, upon an appeal to the Supreme Court from the decision of an Election Judge, the Supreme Court sends a report to the Governor-General in terms of section 82C(2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council that a corrupt or illegal practice has been committed by a person, the report is effective to disqualify that person under section 13 (3) (*h*) of the Ceylon (Constitution) Order in Council for membership of the House of Representatives.

The Parliamentary Elections Order in Council may be amended, by virtue of the section 29 (4) of the Constitution Order in Council, by an Act passed by a simple majority of the House of Representatives.

Section 82D(2) of the Parliamentary Elections Order in Council, in so far as it attaches to a person who is reported by the Supreme Court the incapacity referred to in section 13 (3) (*h*) of the Constitution Order in Council, is not *ultra vires* and void on the ground that, when it was enacted, it was tantamount to an amendment of section 13 (3)(*h*) of the Constitution requiring a two-thirds majority in Parliament in compliance with the proviso to section 29 (4) of the Constitution. The pronouncement to the contrary in *Thambiayah v. Kulasingham* (50 N. L. R. 25) was made *obiter* and *per incuriam*.

A Court will not pronounce upon the constitutional validity of a Statute unless a decision as to validity is essential for the purposes of the case actually before the Court.

APPEAL from the judgment of an Election Judge reported in (*1968*) *71 N. L. R. 481.*

Colvin R. de Silva, with *Hanan Ismail*, *Mrs. Manouri Muttetuwegama*, *P. W. D. de Silva* and *Shibly Aziz*, for the respondent-appellant.

H. W. Jayewardene, *Q.C.*, with *A. C. Gooneratne*, *Q.C.*, *Izadeen Mohamed*, *H. D. Tambiah*, *Mark Fernando* and *R. C. Gooneratne*, for the petitioners-respondents.

H. L. de Silva, Crown Counsel, with *N. Sinnetamby*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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1*—J 8953—2,152 (11/69)

February 22, 1969. H. N. G. FERNANDO, C.J.—

At a bye-election held on 23rd September 1967, the candidate who is the appellant in this appeal was declared elected as Member of Parliament for the Bandaragama Seat in the House of Representatives. But at the trial of an election petition his election was determined by the Election Judge to be void on the ground that he was at the time of his election disqualified for election as a Member. This appeal is against that determination.

The appellant successfully contested the same seat at the General Election of March 1965, and, upon an election petition then filed against him, an Election Judge determined that he had been duly elected at that Election. On appeal to the Supreme Court, however, it was determined that this election of the appellant was void on the ground that a corrupt practice had been committed by an agent of the appellant. Having so determined, the Judges who heard the appeal made a Report to the Governor-General stating that a corrupt practice had been committed at the election by an agent of the appellant, and a copy of this report was published in the *Gazette* of 2nd July 1967. The judgment of the Election Judge which is under appeal in the present case holds that the appellant was disqualified at the time of the bye-election by reason of the combined operation of the said Report, of s. 82D (2) of the Ceylon Parliamentary Elections Order in Council, and of s. 13 (3) (*h*) of the Constitution.

Section 13 (3) (*h*) of the Constitution provides that a person shall be disqualified for being elected a Member of Parliament or for sitting or voting in Parliament if " by reason of his conviction for a corrupt or illegal practice or by reason of the report of *an Election Judge* in accordance with the law for the time being in force relating to the election of Senators and Members of Parliament he is incapable of being elected as a Senator or Member ". The essential fact on which Counsel appearing for the appellant has relied is that the Report published in the *Gazette* of 2nd July 1967 is not the report of an " Election Judge ", but is instead a Report of the Supreme Court. Relying upon this fact, Counsel has argued, *firstly* that the Report of the Supreme Court was not such a report as is referred to in s. 13 (3) (*h*) of the Constitution and that it therefore did not have the effect of attaching to the appellant a disqualification under that section ; and *secondly* that in so far as the provisions of s. 82 D (2) of the Parliamentary Elections Order in Council (hereinafter referred to as the " Election Law "), purported to attach to a person reported in a Report of the Supreme Court the incapacity referred to in s. 13 (3) (*h*), those provisions are *ultra vires* and therefore void.

Much the same argument was considered by this Court in the very first appeal preferred under the Elections Law from the determination of an Election Judge (*Thambiayah v. Kulasingham* [1]). I must acknowledge that a perusal of the judgment in that case had, prior to the present

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[1] (1948) 50 N. L. R. 25.

hearing, led me to form a tentative opinion that this argument was a sound one. However, after consideration of the question at issue and of the able arguments of the Counsel in this appeal, I have reached the conclusion that the learned Election Judge in the instant case has rightly decided that question. I do not propose to set out here the various relevant provisions of the Constitution and of the Election Law because they are fully set out in the judgment under appeal.

It is important to note that when the Constitution was enacted in May 1946, the reference in s. 13 (3) (*h*) to " the law relating to the election of Senators and Members of Parliament " was not a reference to any existing law, because there was yet no law relating to that subject. But s. 13 of the Constitution did contemplate that there will be such a law, and that such a law will or may provide for the making of a report by an Election Judge as to the commission of a corrupt or illegal practice at an election, and will or may provide that by reason of such a report a person will be incapable of being elected a Senator or Member of Parliament. The language of paragraph (*h*) of sub-section (3) of s. 13, when compared to the language of other paragraphs of that sub-section, establishes that this particular disqualification was not imposed or defined in paragraph (*h*) itself. There was instead (*a*) the contemplation or expectation that an Elections Law will be enacted and will or may impose and define an incapacity for election to Parliament arising from the report of an Election Judge, *plus* (*b*) a prospective adoption of any incapacity which would be so imposed and defined.

When therefore the Parliamentary Elections Law as in fact enacted in September, 1946, did contain provision for the report of an Election Judge and for the incapacity thereby arising, *the subject of that provision* was not one which the Constitution itself regarded as a subject which may lawfully be dealt with only in an enactment amending the Constitution. On the contrary, s. 13 (3) (*h*) expressly contemplates that the authority competent to enact " the law for the time being relating to the election of Senators and Members of Parliament " has power to deal with this subject, and that authority today is the Parliament of Ceylon.

Doubts concerning the question under considerations have arisen chiefly because the Election Law in its original form was an Order of His Majesty in Council and that it provided only for the trial of an election petition, and for the determination and report of an Election Judge after such trial. The provision for appeals from an Election Judge and for determinations and reports of three Judges of the Supreme Court was made by an amending Act of Parliament No. 19 of 1948. That Act did not bear a Certificate of the Speaker under s. 29 of the Constitution that it was passed by a two-thirds majority in the House of Representatives. The principal argument in this appeal has been that the amended sections of the Election Law, when they authorise a report *by the Supreme Court* as to the commission of a corrupt or illegal practice and attach to a person thus reported the incapacity for election to Parliament, are tantamount to an amendment of s. 13 (3) (*h*) of the Constitution. Thus the

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question is whether s. 13 (3) (*h*) of the Constitution intended to adopt as a disqualification only an incapacity for membership of Parliament declared by the contemplated Election Law to arise from the report of a trial Judge, but not an incapacity declared by the same Law to arise from the report of Judges exercising a jurisdiction in appeal from the determination of a trial Judge.

The 1948 decision in *Thambiayah v. Kulasingham* directly upheld the validity of the provision in the Election Law (as amended by Act No. 19 of 1948) which empowered the Supreme Court in appeal to reverse a determination of a trial Judge holding that the election of a person as a Member of Parliament was void on the ground of disqualification.

There have thereafter been numerous cases in which appellants have invoked the jurisdiction of this Court, in appeal from determinations of Election Judges, to reverse such a determination and to hold in appeal that an election is void, or as the case may be, that a person elected at a pool was duly elected. That jurisdiction in appeal has not been challenged in any of these cases, including the present case. It is thus settled law that the Constitution, when it contemplated the enactment of an Election Law, recognised the validity of provision in any prospective Election Law which would empower Judges sitting in appeal to reverse and replace determinations of trial Judges in election cases. That recognition fully involves acceptance of a common-sense principle underlying the establishment of all appellate jurisdictions, namely that the review of judicial decisions by judicial tribunals is conducive to the correction of error, or (if I may state the point colloquially) that three heads are probably better than one.

It is I think evident that the same principle is in common-sense applicable in relation to the lesser or incidental jurisdiction of an Election Judge to make a report that some person has committed a corrupt or illegal practice at a Parliamentary Election. Indeed the judgment in *Thambiayah's case* holds, by way of an *obiter dictum*, that s. 13 (3) (*h*) of Constitution does not render invalid that provision of Act No. 19 of 1948 which empowers Judges in appeal to render ineffective, and thus virtually to quash, such a report of a trial Judge in an election petition. In relation therefore to the power in appeal to reverse and replace the determination of a trial Judge, and to the power to quash the report of a trial Judge, the judgment is in accord with the principle of common-sense to which I am referring. But it seems to me, with the utmost respect, that the judgment failed to take that same principle into consideration when it pronounced that s. 13 (3) (*h*) of the Constitution did not contemplate the inclusion in the Elections Law of provision, empowering Judges in appeal to report the commission of a corrupt or illegal practice, and declaring the incapacity for election to Parliament of a person so reported.

As already stated, the Elections Law which was contemplated in s. 13 (3) (*h*) of the Constitution actually took the form of an Order in Council and that Order contained no provision for any appeal from the

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determination of a trial Judge or for the making of a disqualifying report upon an appeal. Had the Order actually contained such provision, I gravely doubt whether any question of the validity of such a provision would ever have been raised. Indeed the first objection taken in *Thambiayah's case* was that the Election Order in Council is a part of the Constitution, and that therefore Act No. 19 of 1948, which conferred the challenged right of appeal from the determination of an Election Judge, was invalid on the ground that an amendment by Parliament of that Order in Council must be passed in compliance with s. 29 (4) of the Constitution. This objection was summarily rejected on the ground that s. 29 (4) made it clear beyond doubt that the Election Order in Council could be amended by an Act passed by a simple majority of the House of Representatives. Since s. 29 (4), which specifically deals with *the power of Parliament to make laws*, so clearly recognises Parliament's power to amend the Elections Order by an ordinary Act, s. 13 (3) (*h*) must be construed consistently with the existence of Parliament's power, unless such a construction is excluded either expressly or by implication. Act No. 19 of 1948, in providing for determinations and reports in election appeal, easily satisfies the " pith and substance " test approved by the Privy Council in *Attorney-General for Ontario v. Reciprocal Insurers* [1] and in *Kodakan Pillai v. Mudanayake* [2]. If the original Election Order in Council properly included provisions for the qualifications of electors, for election offences, for the trial of election petitions, for determinations as to the validity or otherwise of the election of candidates, and for incapacities arising by reason of reports of Election Judges, the pith and substance of the Order was not changed when Act No. 19 of 1948 added provision for appeals, and for determinations and disqualifying reports in appeal.

Let me now examine two statements of the Court in *Thambiayah's case*, upon which Counsel for the appellant has relied :—

> " . . . I think that the provisions of the Ceylon (Parliamentary Elections) Amendment Act, No. 19 of 1948, are in conflict with section 13 (3) (*h*) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947, in so far as those provisions make the report of the Supreme Court operate as a ground of disqualification. What is the result of that conflict ? Is the Ceylon (Parliamentary Elections) Amendment Act, No. 19 of 1948, invalid as it has not been passed in accordance with the proviso to section 29 (4) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947 ? Or it is invalid only in so far as the offending provisions are concerned ? " . . .

> " . . . There is another way of looking at these "offending provisions". It was possible, in accordance with my views on the first preliminary objection of the respondent, for the Legislature to have amended section 78 of the Ceylon (Parliamentary Elections) Order in Council, 1946, by inserting a new definition of "Election Judge" so as to include the body of Judges hearing an appeal under the new section 82A, and such an amendment need not have been passed in

[1] (*1924*) *A. C. 328.* [2] (*1953*) *54 N. L. R. 433.*

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accordance with the proviso to section 29 (4) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. If that was done, the second preliminary objection could not have succeeded ". . .

The second statement means that when Act No. 19 of 1948 inserted in the Elections Order provision for a disqualifying report in appeal, that report could have been equated to the report of an Election Judge mentioned in s. 13 (3) (*h*) of the Constitution by means of some definition clause contained in the same Act. There is here a concession that Parliament had power by an ordinary Act to make provision for a disqualifying report in appeal, which is virtually a concession that the pith and substance of such a provision does not conflict with the Constitution. This concession exposes the incorrectness of the first statement which is cited above.

Such a definition clause as is contemplated in the second statement would merely express in clear terms Parliament's intention to equate the report in appeal to the report of an Election Judge. But paragraph (*b*) of s. 82 D (2), which was contained in Act No. 19 of 1948, sufficiently manifests that very intention, when it provides that each such report will involve identical incapacities.

I adopt the opinion of the trial Judge in the instant case that the first statement cited above from *Thambiayah's case* was *obiter*. I observe in this connection that the attention of the Court in that case was apparently not drawn to the principle that a Court will not pronounce upon the constitutional validity of a Statute unless a decision as to validity is essential for the purposes of the case actually before the Court. I would refer in this connection to statements in decisions of the American Supreme Court, which are cited in the judgment of this Court in *The Attorney General v. Kodeswaran* [1].

Thambiayah's case did not render necessary a pronouncement as to the validity of a report made by Judges in appeal under the Elections Law. Had the Court been aware of the principle just discussed, its judgment should have been that the provision for appeals in Act No. 19 of 1948 was valid and severable, even on the assumption that the provision for a report may have been invalid.

For these reasons, I hold that the pronouncement in *Thambiayah's case* upon which Counsel for the appellant has so strongly relied was made both *obiter* and *per incuriam*. That being so, it is not necessary to examine Counsel's further proposition that, when the Supreme Court has once declared a provision of an Act of Parliament to be *ultra vires* of Parliament's legislative power, the Court must not again review the correctness of its previous declaration. But I feel compelled to offer some general observations concerning this proposition. It is contrary to the attitude of the United States Supreme Court, which has on several occasions departed from precedent in order to uphold the validity of

[1] *(1967) 70 N. L. R. at p. 138.*

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Statutes. It implies that this Court must stubbornly adhere to previous error, even if the rule of *stare decisis* does not prevent review of a former decision. If accepted, the proposition will tend to place the Judiciary in a position of obstructive opposition to the Legislature, which is not the position which the Judiciary in my understanding occupies under our Constitution. Lastly, Counsel could cite neither case law nor the opinion of any text-writer in support of it.

For these reasons I am in agreement with the conclusion of the learned Election Judge that the report of the Supreme Court published in the *Gazette* of 2nd July 1967 was valid and effective, and that by reason thereof the appellant was at the time of the bye-election held on 23rd September 1967 disqualified for election as a Member of Parliament. The determination of the learned Judge that the election of the appellant was void is accordingly affirmed, and this appeal is dismissed with costs.

SIRIMANE, J.—

The respondent-appellant in Election Appeal No. 3 of 1967 (David Perera), whom I shall refer to as the "respondent" throughout this judgment, was first elected as the Member of Parliament for Bandaragama at the election held in March, 1965. A petition challenging his election was dismissed by the Election Judge, but in appeal the Supreme Court unseated him, on the ground that he had committed a corrupt practice in that one of his agents had made a false statement concerning the character of an opposing candidate. In accordance with the procedure as set out in section 82C (2) (*b*) of the Ceylon (Parliamentary Elections) Order in Council, Chapter 381 (as amended) the Supreme Court sent a report to the Governor-General.

At the bye-election which followed, the respondent contested the seat again and won, when the present petition was filed alleging that he was disqualified from contesting the seat in view of the report.

The question that arises in the first appeal is whether the learned Election Judge was right in holding that the report was effective to disqualify the respondent under section 13 (3) (*h*) of the Ceylon (Constitution) Order in Council, Chapter 379, which I shall refer to as the "Constitution".

Section 13 (3) (*h*) reads as follows :

> "A person shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives—if by reason of his conviction for a corrupt or illegal practice or by reason of the report of an Election Judge in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament he is incapable of being registered as an elector or of being elected or appointed as a Senator or Member as the case may be ;"

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It will be seen that the report of the Election Judge must be "*in accordance with the law for the time being in force relating to the election of Senators or Members of Parliament.*"

At the time Section 13 (3)(*h*) was enacted, there was no appeal from an order of an Election Judge who was also a Judge of the Supreme Court. Thereafter our legislature provided for an appeal from the order of an Election Judge to a Bench of three Judges of the Supreme Court (Section 82A of Chapter 381).

I find it difficult to accept the argument that the use of the words "election judge" in Section 13 (3)(*h*) of the Constitution had the effect of preventing Parliament from passing laws which, for example, provided for an appeal, and a report by the Judges who hear the appeal—unless the Constitution was also amended. In my view the words "election judge" in the section must be construed to mean the Judge or Judges on whom the legislature reposes the responsibility of deciding an election matter, and sending a report in accordance with the law for the time being in force. The disqualification is not to be found in Section 13 (3)(*h*) but as in Section 13 (3)(*e*) (bankruptcy) and Section 13 (3)(*g*) (unsoundness of mind) has to be looked for elsewhere in the law.

In arriving at this conclusion, I have given my anxious consideration to the decision of this Court in *Thambiayah v. Kulasingham* [1]. That was the first appeal after the amendment (Act No. 19 of 1948) permitting an appeal from the decision of an Election Judge. It was the person who was unseated by the Election Judge who appealed in that case. Apart from the question whether the appellant in that case was disqualified on account of an alleged contract with the Crown, the Court had to decide whether the legislation relating to an appeal from the order of an Election Judge was *intra vires* the legislature. The question whether the Judges in appeal could send a valid report under the amended law, did not directly arise on the facts of that case. It was held, however, that the provisions of the amending Act No. 19 of 1948 in so far as they relate to a report were *ultra vires*. Wijeyewardene, A.C.J. said, in the course of his judgment, at page 35 :

> "A difficulty arises, however, when we proceed to consider the case that may arise under the new sections 82(*c*) and 82(*d*) where the decision of the Supreme Court in appeal sets aside the report of the Election Judge that a person is not guilty of corrupt or illegal practice and the Supreme Court sends its own report finding such a person guilty. As I am of opinion that the term Election Judge means the Judge who tries an election petition, I think that the provisions of the Ceylon (Parliamentary Elections) Amendment Act No. 19 of 1948 are in conflict with section 13 (3)(*h*) and Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947 in so far as those provisions make the report of the Supreme Court operate as a ground of disqualification."

[1] *(1948) 50 N. L. R. 25.*

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He went on to say (page 37) :

> " In the case before us I have found that the provisions of the Parliamentary Elections (Amendment Act) No. 19 of 1948 relating to a report by the Supreme Court so far as it embodies the finding that a corrupt or an illegal practice has been committed was not duly passed by the Ceylon Parliament. Those provisions were, therefore, ultra vires "

But in an earlier passage, the learned Judge said,

> " It was possible..... for the legislature to have amended section 78 of the Ceylon (Parliamentary Elections) Order in Council, 1946, by inserting a new definition to " Election Judge " so as to include the body of Judges hearing an appeal under the new section 82 (*a*) and such amendment need not have been passed in accordance with the proviso to section 29 (4) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947. "

One gathers from this passage that the learned Judge did not consider an amendment to section 13 (3) (*h*) of the Constitution which requires a two-third majority in Parliament, to be necessary ; but merely that the language in the Parliamentary (Elections) Amendment Act was not sufficiently precise. After hearing the arguments of learned Counsel on this question, I am persuaded to take the view that the finding in *Thambiayah's Case* that a report by the appeal Judges is *ultra vires*, was unnecessary for deciding the questions which arose in that case.

The learned trial Judge has very carefully gone into this question, and I respectfully agree with his conclusion that the dicta relating to this question were *obiter*, and the respondent's appeal must, therefore be dismissed.

In the second appeal* the petitioners pray that the candidate who came second be declared elected. That candidate obtained 18,372 votes as against 23,840 cast in favour of the respondent. This application is made on the allegation in the petition that all the votes cast for the respondent " were thrown away and null and void ". Section 85 of Chapter 381 provides for votes to be struck off at a scrutiny, and section 85 (1) (*f*) relied on by the petitioners reads as follows :

> 85 (1) " On a scrutiny at the trial of an election petition the following votes only shall be struck off, namely :
>
> (*f*) votes given for a disqualified candidate by a voter knowing that the candidate was disqualified or the fact causing the disqualification or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious. "

* The judgments of FERNANDO, C.J., and WEERAMANTRY, J., in the " second appeal " (Election Petition Appeal No. 2 of 1968) appear at pp. 234 *et seq.* (*infra*)—Ed.

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The fact that a report had been sent by the Appeal Court was published by the petitioners. So that the voters must be presumed to have been aware of that fact. But, admittedly, the respondent gave as much publicity to the judgment in *Thambiayah v. Kulasingham* referred to above. So that the voters were aware of that fact as well. The appeal Judges who sent the report were not required and did not express any view as to whether their report was an effective one. There was then section 13 (3) (*h*) of the Constitution, and the only decision of the Supreme Court on the point was *Thambiayah's case*.

The vote, now is looked upon as a very cherished right. Since the granting of Independence our voters have begun to realize its importance, and its value. They attend many meetings which are held in support of the different candidates, read and consider the statements in the manifestoes and pamphlets which are issued at election time, before they decide to cast their votes for the candidate of their choice. Unlike in the case of an opinion on a question of law expressed by a candidate or his supporters, or even by lawyers, however distinguished, a voter, as a rule, pays the highest respect to a judgment of the Supreme Court. To him, such a judgment lays down the law as authoritatively as an enactment by the legislature itself. The decision in *Thambiayah's case* was prominently placed before the voters.

It was against this background that the majority of the voters of this electorate voted for the respondent.

It is my very firm view that before a voter can be said to have cast away his vote, the Court must be convinced, that in voting for a particular candidate, he was being wilfully perverse. Halsbury (Simond's Edition) Volume 14 at page 305, says :

> " Votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away and for so deciding a scrutiny is not necessary. The disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of *wilful perverseness* on the part of the electors voting for the disqualified person. "

The facts must clearly show that the voter who had knowledge of an undoubted disqualification, acted obstinately or in wilful defiance of a warning that a reasonable person should have heeded. The knowledge may be imputed when the disqualification is published, or is notorious ; but there should be no doubt about the disqualification itself. The possibility that the law as interpreted by the Supreme Court may be dissented from, should not deter an elector from casting his vote for the candidate of his choice.

Whether a voter can be said to have cast away his vote or not, must depend on the facts of each case, and the facts here are very different from those in any other decided case.

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In the old case of *Queen v. The Mayor, Tewkesubury*,[1] at an election of Town Councillors, there were four vacancies and five candidates. B., one of the four who had a majority of votes was the Mayor and acted as Returning Officer and was, therefore, incapable of being elected. It was held that mere knowledge on the part of the electors who voted for B that he was the Mayor and Returning Officer did not amount to knowledge that he was disqualified in point of law as a candidate. Blackburn, J. said :

> " Voting for a dead man or for the man in the moon are expressions showing that in order to make the vote a nullity, there must be wilful persistence against actual knowledge. But it does not seem to me consistent with either justice or common sense, or common law, to say that because these voters were aware of a certain circumstance, they were necessarily aware of the disqualification arising from that circumstance, and that, therefore, their votes are to be considered as mere nullities. "

I am aware that this decision has not been followed by distinguished Judges in later cases ; for example, in *Drinkwater v. Deankin*. But with the utmost respect I think that the words of Blackburn, J., quoted above are applicable to the facts of this case.

In *Drinkwater v. Deakin*,[2] one of the candidates, Colonel Deakin, on the day of nomination, permitted his tenants to kill rabbits on his estate for the purpose of influencing their votes. He won the election and was unseated on a petition against him. But the seat was not given to the next candidate (Drinkwater) as the incapacity had not been ascertained at the time of the election. This case is direct authority for the proposition that bribing by a candidate at an election, though it renders his election void if he be found guilty on petition, does not incapacitate the candidate at that election in the sense that the votes given for him by voters with knowledge of it were thrown away. No disqualification arises in that sense of the term until after the candidate has been found guilty of bribery.

Lord Coleridge, C.J. referring to the votes cast for Colonel Deakin said :

> " Invalid upon proof of his bribery, for the purpose of seating him they are ; thrown away for the purpose of seating his opponent in my opinion, they are not. "

In the course of the argument in that case, Coleridge, C.J. also said :

> " In the *Clitheroe case* the committee made a special report on this subject, pointing out the unsatisfactory state of the law and the conflicting nature of the authorities. They elected to follow the cases which point to the conclusion that to give effect to the notice, *the*

[1] *(1867) 3 Q. B. D. 629.* [2] *(1961) 3 A. E. R. 375.*

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disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person. I believe that view has ever since been followed . . . "

He also said :

" Under the same principle may be classed cases where the disqualification was infancy such as was *Claridge v. Evelyn*, a want of estate as in the Belfast case, the Tavistock case and some others. The cases of a woman, of an alien under the old law, of a convicted felon stand upon the same footing. In all these cases something is wanting in the candidate himself which cannot be supplied, the existence or non-existence of which is not dependent on argument or decision, but which the law insists shall exist in every one who puts himself forward as a candidate. "

In *Beresford Hope v. Lady Sandhurst*[1] the voters cast their votes for a woman, and a woman was not qualified to seek election according to the law as it stood then. She was unseated and the seat given to the next candidate. Stephen J. said :

" In the first place it was admitted that all those who voted for Lady Sandhurst knew that she was a woman. In the second place it was shown to our satisfaction that the question whether as a woman, she was incapacitated from election was a subject of common public discussion at the time and place of her election. It was not proved specifically that notice was given to the individual voters. We think, however, that it must be taken that the fact which, if we are right, constituted the disqualification was known to all, and that the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification. The question whether in such a case the voters voted at their peril or whether there should be a new election is not altogether clear. "

He then went on to examine the case of *Gosling v. Veley*,[2] and quoted with approval, the following dicta in that case :

" But if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given ; no one can doubt that, if an elector would nominate and vote only for a woman to fill the office of Mayor or Burgess in Parliament, his vote would be thrown away : there the fact would be notorious and every man would be presumed to know the law upon that fact. "

In *Re Bristol South-East Parliamentary Elections*[3] votes cast for a peer were held to have been thrown away.

[1] *(1889) 23 Q. B. D. 84.* [2] *(1847) 7 Q. B. 406.*
[3] *(1961) 3 A. E. R. 354.*

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It seems to me that in the last two cases referred to above, there was no real doubt regarding the disqualification itself, but the voters merely joined their candidate in demonstrating their disapproval of an existing state of affairs.

The question as to when votes should be looked upon as cast away must, as I said, depend on the facts of each case. Different views have sometimes been expressed on somewhat similar facts,—but I think that the law has been fairly summarized by Parker in Election Agent and Returning Officer, 6th Edition, at page 156 :

"If the alleged disqualification be disputed or denied, that circumstance has in one case (Leominster, Rog. 1202) apparently been treated as immaterial, but in another (2nd Cheltenham, 1 P.R. & D. 238) as of great importance. So, where the disqualification is not clear, but doubtful, and depends on argument and decision as to the effect of complicated facts and legal inferences, the decisions of the old election committees are conflicting. Some committees held that if the disqualification did in fact exist at the election, the decision establishing the disqualification related back to the time of election, and nullified the votes given thereat after notice of the disqualification, on the ground that every man is bound to know the law ; and, therefore, when apprised by notice of the fact creating the disqualification of the candidate for whom he voted, his vote was given at his own risk, and if he were wrong in his construction of the law, he could not plead ignorance or mistake and upon these grounds they seated the candidate next on the poll. Other committees observed the distinction, and where the alleged disqualification was disputed, and was not clear but doubtful, they, while unseating the disqualified candidate, yet declined to give the seat to the qualified candidate. The law in such cases has not yet been declared by the election judges, but it must be remembered that the words in the 2nd Clitheroe case, "that the disqualification must be founded on some positive and definite fact existing and established at the time of polling", have been approved and followed in *Drinkwater v. Deakin* ; and that the L.C.J., in that case seems to doubt whether votes are thrown away where the disqualification depends on an uncertain or obscure legal question or that in such a case a voter gives his vote at his own risk and on his own responsibility. It has also been said that to hold the contrary, is to place each individual elector in a position of hardship and difficulty, if upon the mere assertion of an opposing party that a disqualification exists, the truth or falsehood of which the voter may have no means of ascertaining, he is to exercise his franchise at the risk of his vote being thrown away, if on subsequent investigation the existence of that disqualification should be established. It is submitted,

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therefore, that a disqualification depending upon a novel question, or one of doubt or difficulty, or upon legal argument and decision upon complicated facts and inferences does not cause votes to be so thrown away as to seat the opponent on a minority of votes."

To my mind a voter who casts his vote for a particular candidate, on the faith of a judgment of the Supreme Court, is in a different position from one who does so on his own interpretation of the law, or the interpretation placed upon it by his lawyers.

At the time the voters went to the poll, *Thambiayah's case* referred to above laid down the law on this point.

After much legal argument and discussion, we have taken a different view. But, in my opinion, that is not a ground for holding that the majority of the voters of Bandaragama threw away their votes and that this electorate should, therefore, be represented in Parliament, not in accordance with the will of the majority but against it. Such an unwholesome result should follow, only if it is clear that the voters have acted perversely or in a spirit of defiance, where there is no real doubt about the disqualification itself.

I would, therefore, affirm the decision of the learned trial Judge on this point as well. I agree with his conclusion that the candidate who came second is not entitled to this seat.

Before I leave this judgment there is one other matter to which I would like to refer. Learned Counsel for the respondent submitted that when the seat was claimed for the candidate who came second the other candidate who came third should also have been made a respondent to these proceedings, and that the failure to do so should result in the petitioner's claim to seat the second candidate being dismissed.

Under rule 8 in the third schedule to Chapter 381 only a respondent in a petition may lead evidence to prove that the election of such a person was undue, and in such a case he should file his list of objections six days before the trial. The best way of affording a candidate an opportunity to do this is to make him a respondent to the petition. He may perhaps make an application to be joined as a respondent, but the rules are silent on this point, and in the absence of an express provision, such an application may not be favourably considered. But that procedure may have been attempted if the third candidate in this case had really something to say, and I do not think that in the circumstances of this case the petitioner's claim to seat the second candidate should be denied on this ground alone. But I would like to state that when a seat is claimed for a candidate by an order of a Court against the will of the majority of voters as reflected in the ballot, the

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conscience of the Court must be satisfied that such a candidate is himself innocent of any election offence. It is, therefore, very desirable that all the candidates should be made parties to the petition.

The respondent could have filed his list of objections, and Counsel for him urged that he be now given an opportunity of doing so, as there had been some misunderstanding at the trial.

The learned Judge and Counsel for the parties appear to have had in mind the right of the respondent to show that the second candidate was himself disqualified, but they appear to have thought that this need be done only if the Court was of the view that the second candidate was entitled to claim the seat. The proceedings show that there had been an agreement, that the two questions, whether the respondent should be unseated, and if so, whether the second candidate is entitled to claim the seat, should be decided first, on affidavits filed by parties without evidence of witnesses being led. It was only if the second candidate was held to be entitled to the seat that the question whether or not he was disqualified, was to be investigated. *After the trial had commenced*, the learned Judge had remarked to Counsel for the petitioners,

> " That is why I indicated to you earlier if, for instance, I am inclined to agree with the submissions for the petitioners with regard to the second matter, then the necessity for evidence of corrupt practice can be led by the respondent. "

And, again, thereafter,

> " I understood in view of your second submission that you are entitled to the seat, although you were the unsuccessful candidate, the other side is entitled to maintain that you are disqualified by reason of corrupt practice ".

But, the failure to file a list of objections in accordance with rule 8 is an omission by the respondent, and I suppose he must suffer the consequences of his default even if there had been some misunderstanding.

But, as I am of the view that the second candidate should not be declared entitled to the seat, it is unnecessary to discuss this matter any further.

I would affirm the decision of the learned trial Judge on both points, and as each party has succeeded in part, I would make no order as to costs.

WEERAMANTRY, J.—I agree with My Lord the Chief Justice.

Appeal dismissed.

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1969 *Present :* **H. N. G. Fernando, C.J., Sirimane, J., and Weeramantry, J.**

A. W. A. K. PEIRIS and another, Appellants, *and*
K. D. DAVID PERERA, Respondent

Election Petition Appeal No. 2 of 1968—Bandaragama (Electoral District No. 27)

Parliamentary election—Disqualification of one of the candidates—Fact of disqualification well known to the entire electorate—Dispute or uncertainty in the minds of the voters as to the disqualifying legal effect of the fact grounding the disqualification—Votes given to the disqualified candidate—Whether they can be regarded as cast away—Applicability of English law on the subject—Claim of seat for the candidate who was placed second at the poll—Whether all the other candidates should be made respondents to the election petition—Whether there should be a scrutiny of votes—Purpose of scrutiny of votes—Right of unseated candidate to file recriminatory objections against the candidate for whom the seat is claimed—Abandonment or waiver thereof—Ceylon (Parliamentary Elections) Order in Council (Cap. 381), ss. 48, 58 (1) (d), 80, 81, 82C (2) (b), 82D (2) (a), 82D (2) (b) (ii), 85, 86 (2)—Election Petition Rules 7, 8, 10, 15.

The respondent had contested a seat in a Parliamentary election earlier and, in consequence of a report sent by the Supreme Court to the Governor-General under section 82 C (2) (*b*) of the Parliamentary Elections Order in Council, he became disqualified for a period of seven years for being elected a Member of Parliament. Nevertheless he contested the same seat again at the bye-election held on 23rd September 1967.

At the bye-election, the decision of the Supreme Court resulting in the disqualification of the respondent was made known to the whole electorate and was a matter of public notoriety in the constituency, but it was claimed on the respondent's behalf before the electorate that the decision was constitutionally invalid in law in view of a previous seemingly conflicting decision of the Supreme Court in a different election petition appeal, viz. *Thambiayah v. Kulasingham* (50 N. L. R. 25).

There were, apart from the respondent, two other candidates at the bye-election. The respondent secured the largest number of votes and was declared duly elected. In an election petition filed against him, his election was declared void. The appeal filed by him against the decision of the Election Judge was dismissed—*vide* page 217 *et seq.* (*supra*). In the election petition the petitioners had also asked for a determination that the candidate who secured the second highest number of votes was duly elected and ought to be returned. When their claim was dismissed by the Election Judge, they lodged the present appeal.

Held, by H. N. G. Fernando, C.J. and Weeramantry, J. (Sirimane, J. dissenting), that, in a Parliamentary election, a vote cast by a voter with knowledge of the facts constituting a candidate's disqualification for election is a vote thrown away and should be treated as not cast. Therefore, inasmuch as the disqualification of the respondent was definite and certain and was known to the whole electorate prior to the date of the election, all the votes which were cast in favour of the respondent were wasted votes and the seat must be awarded, as claimed, to the candidate who was placed second at the poll. In such a case ignorance of the law does not excuse, and the existence

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of any uncertainty in the minds of voters in regard to the disqualifying legal effect of the known facts grounding the disqualification is not a ground for not awarding the seat to the candidate next at the poll. The English law on this subject is applicable in Ceylon by virtue of section 86 (2), read with sections 80, 81 and 85 (1)(*f*), of the Parliamentary Elections Order in Council.

Held further, (i) by H. N. G. FERNANDO, C.J., and WEERAMANTRY, J., that the power of an Election Judge to determine that a candidate, other than the Member returned, was duly elected, may be exercised without resort to a scrutiny of votes in a case where there was either public notice to *all* the electors of the disqualification of the Member returned or where the disqualification or the facts causing it were notorious to *all* the electors. Accordingly, in the present case, where the fact of the disqualification of the Member who was returned was known not to some only of the voters but to all the voters, it was not necessary that the scrutiny of votes contemplated in sections 80 (*d*) and 85 (1) (*f*) of the Parliamentary Elections Order in Council should be actually held and that the invalid ballot papers should be physically rejected before the seat is awarded to the second candidate.

Peiris v. Samaraweera (71 N. L. R. 250) overruled in so far as it conflicts with the judgment in the present case.

(ii) by the whole Court, that it was not necessary that the third candidate should have been named as a respondent to the present election petition. Our law does not require that an election petition which claims a seat for some candidate who was not declared to be returned at the election must name as a respondent not only the Member whose return is challenged but also every other candidate who unsuccessfully contested the election.

(iii) by the whole Court, that, in view of the time limit of six days prescribed in Election Petition Rule 8, the respondent could not be given an opportunity to file belated recriminatory objections against the candidate for whom the seat was claimed.

APPEAL from a judgment of an Election Judge reported in (*1968*) *71 N. L. R. 481.* The facts are set out in the judgment of Weeramantry, J.

H. W. Jayewardene, Q.C., with *A. C. Gooneratne, Q.C.*, *Izadeen Mohamed*, *H. D. Tambiah*, *Mark Fernando* and *R. C. Gooneratne*, for the petitioners-appellants.

Colvin R. De Silva, with *Hanan Ismail*, *Mrs. Manouri Muttetuwegama*, *P. D. W. de Silva* and *Shibly Aziz*, for the respondent-respondent.

H. L. de Silva, Crown Counsel, with *N. Sinnetamby*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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February 22, 1969. H. N. G. FERNANDO, C.J.—

The judgment prepared by my brother Weeramantry in this appeal contains a full and (if I may so say with respect) admirable discussion of the principal question which arose for our decision. I can add nothing to the reasons which he has stated for the conclusion that the law in England, as decided in the cases of *Drinkwater*, *Lady Sandhurst*, and *Stansgate*, is that a vote cast by a voter with knowledge of the facts constituting a candidate's disqualification for election is a vote thrown away. If then the law in Ceylon is the same, all the votes which were cast in favour of the respondent were wasted votes, and the seat must be awarded, as claimed, to the candidate who was placed second at the poll. I need only to state some grounds for my agreement with my brother that our law on this subject is the same as that which according to his conclusions is the English law as stated in certain texts and judgments to which he refers.

Section 80 of the Parliamentary Elections Order entitles a petitioner to claim in an election petition " a declaration that any candidate was duly elected and ought to have been returned ". This is the particular relief claimed by the petitioners in the present case. Section 81 provides that the Election Judge " shall determine whether the Member whose return or election is complained of, *or any other or what person, was duly returned or elected* ". The words which have just been italicized confer the jurisdiction on the Judge to grant the relief of a declaration that a candidate, other than the Member returned at the poll, was duly elected. The use of the word " shall " in s. 85 requires the Judge to grant such declaration, but in of course a proper case. The Elections Order however contains no provision as to the circumstances in which the jurisdiction may or should be exercised. In the absence of express provision for this matter, I am in full agreement with my brother's opinion that s. 86 (2) compels resort to the English Law.

That consideration apart, I find much evidence in s. 85 of our Elections Order of an intention to adopt for Ceylon the principle that where there has been notoriety of positive and definite facts establishing a disqualification, a fair inference will arise of the wilful perversity of all those who voted for the disqualified candidate.

I refer in this connection to the statement in Parker (6th Edition p. 156) that the former Election Committees had held two opposing opinions : the one, that the existence of any dispute or uncertainty as to the question whether a disqualification arises in law upon known facts will be a ground for not awarding a seat to an unsuccessful candidate ; the other, that despite any such dispute or uncertainty, voters who vote for a candidate with knowledge of the facts causing his disqualification will be presumed to have known the law and thus to have " thrown away " their votes. I will for convenience refer to the former as " the Tewkesbury opinion " and to the latter as " the opinion of Brett L.J. ".

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My brother Weeramantry's citations show quite clearly that the text of *Parker* and of the *third edition of Halsbury* state the law in terms of the Tewkesbury opinion, while *Rogers, Frazer, Schofield* and the *1st and 2nd editions of Halsbury* state the law to be as expressed in the opinion of *Brett L. J.* It thus suffices for me to consider only the statement in Frazer (2nd Edition p. 226), that a vote will be considered as lost or thrown away when it is given for a disqualified candidate —

(1) after sufficient notice of a disqualification ;

(2) knowing that the candidate is disqualified ;

(3) knowing the facts by reason of which he is disqualified ; or

(4) when the fact of the disqualification or the facts by which it is caused are notorious.

A comparison of Frazer's text with s. 82 (*f*) of the Ceylon (State Counci) Elections Order of 1931 shows that the Ceylon section was in terms identical with Frazer's text, with alterations only in the order in which the 4 different grounds for striking off votes were arranged. Paragraph (*f*) of s. 85 of our present Parliamentary Elections Order is a straight copy of the former s. 82 (*f*). In these circumstances, it is reasonable to assume that, when it became necessary to enact in statutory form for Ceylon the law on this subject, resort was had to the text in Frazer, the intention being to adopt for Ceylon the law as stated in that text. Such resort was justified by the fact that the law had been similarly stated in *Rogers, Schofield* and the edition of *Halsbury* extant in 1931. In a parallel situation, it has long been accepted that the Indian Evidence Act, as also our own, was in many respects an enactment of the English Law as set out in the text of Stephen's Digest of the Law of Evidence. It thus appears that so far as we are concerned it does not matter that the opinion of *Brett L.J.* may even be wrong. That opinion, or rather *Frazer's* precise statement of it, whether right or wrong, was adopted in our Statute Law in 1931 and again in s. 85 of the present Elections Order.

I will now set out paragraph (*f*) of s. 85 :—

> " Votes given for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification, or when the disqualification or the facts causing it were notorious."

The first ground here mentioned for striking off the vote of a voter is his *knowing that the candidate was disqualified.* Here proof is required of two matters, for a voter cannot know that a candidate is disqualified, unless he knows (*a*) some fact concerning the candidate and (*b*) that the law renders that fact a cause of disqualification. But the second ground is his " *knowing the facts causing the disqualification* " ; in this case, proof is necessary of knowledge *only* of some fact concerning the candidate, but not of knowledge of any relevant law. In any other view, the

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statement in the section of the second ground is not merely tautologous, but is incorrect and positively misleading in that it wrongly omits mention of the need for proof of the voter's knowledge of the law.

The same distinction is drawn in the statement in the two last lines of paragraph (*f*). A vote for a disqualified candidate will be struck off *when the disqualification was notorious* OR *when the facts causing the disqualification were notorious*. In the second case here contemplated, notoriety of the *facts* causing disqualification is by itself a ground for striking off votes, without the need for notoriety as to the *law* imposing the disqualification. Notoriety of the *law* would be required only if a petitioner relies on the first of the grounds for striking off which are stated in the last two lines of paragraph (*f*).

It thus becomes clear that our law relating to the striking off of votes at a scrutiny leaves no room for reliance on the *Tewkesbury* opinion that the maxim *ignorantia juris neminem excusat* has no application in election cases.

I shall be deciding later in this judgment that s. 85 does not directly apply in the present case, because a scrutiny is not here required. But the point of importance is that when a scrutiny is held, paragraph (*f*) of s. 85 requires that a vote given for a disqualified candidate *shall be struck off* if there is established any one of the grounds upon which, according to *Frazer's* text, the vote must be regarded as having been " thrown away ". Since there has been in s. 85 a clear adoption of the opinion of Brett L.J. for a case where a scrutiny is actually necessary, it is unreasonable to imply any intention in our Elections Order to exclude the application of that opinion in a case where (as I shall show later) invalid votes can be identified and rejected without resort to a scrutiny.

Once it is established that votes have been cast for a disqualified candidate with knowledge of the facts causing the disqualification, the question whether the votes are to be regarded as thrown away arises immediately for decision by the Election Judge; and it would be illogical that the proper decision should depend on whether the further step of a scrutiny is or is not necessary to make a decision effective. Thus the express provision in s. 85 (*f*) carries the necessary implication that the question whether votes cast for a disqualified candidate were thrown away must in all cases be answered in accordance with the opinion of Brett L.J. The admissions in the respondent's affidavit establish beyond doubt the notoriety of the facts which caused his disqualification, and upon those facts I must hold in accordance with that opinion that the claim of the seat for the second candidate has been established.

Learned Counsel for the respondent has argued that the election petition filed in this case is defective in respect of the claim for a declaration that the candidate, who received the second largest number of votes, was duly elected ; the defect alleged is that the third candidate was not named as a respondent to the petition. Counsel referred in this

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connection to Rule 8 of the Election Petition Rules which are set out in the Third Schedule to the Elections Order in Council (L. E. 1956, vol. xi, p. 822), which runs as follows :

> " The respondent in a petition complaining of an undue return and claiming the seat for some person may lead evidence to prove that the election of such person was undue, and in such case such respondent shall, six days before the day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioner, a list of the objections to the election upon which he intends to rely, and the Registrar shall allow inspection of office copies of such lists to all parties concerned ; and no evidence shall be given by a respondent of any objection to the election not specified in the list, except by leave of the Judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

This Rule clearly contemplates that, in a case like the present one, the respondent to a petition has an opportunity of showing that, even if his own election is void on some ground, the Judge must not declare to be duly elected some other person for whom the seat is claimed in the petition, because the election of that person is (in the words of Rule 8) " undue ".

Despite an argument of long duration, Counsel for the respondent did not (nor did we on the Bench) consider what is meant by the expression " election was undue " which occurs in Rule 8 and in s. 80 of the Order in Council. But I can assume for present purposes that Rule 8 permits the respondent in a case like the present one to prove that the person for whom the seat is claimed was himself disqualified for election to Parliament, or that he himself or an agent of his had been guilty of a corrupt or illegal practice at the election, or to prove against such a person any other matter which can render an election void. And I agree that if any such matter is proved by the respondent, the election Judge will not declare such person to be elected. Counsel's point is that, where there have been three or more candidates at an election, all the candidates should have the opportunity to prove any such matter as against a person for whom the seat is claimed in an election petition, and that this opportunity has in law to be afforded by the joinder of all such candidates as respondents to the petition.

Counsel urged some relevant considerations in support of this argument. Where there have been three or more candidates at an election, each of the unsuccessful candidates may be interested to oppose the claim of the seat for a candidate other than the one who received a majority of votes at the poll, and may be able to establish valid grounds of objection to the claim being allowed. But such objections can be made under Rule 8 only by " the respondent ". Therefore, it was argued, Rule 8 must be construed to mean that, in the case of a petition to which the Rule applies, every candidate must be joined as a respondent.

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While conceding that provision in the Elections Order or the Rules for such joinder would have been perfectly reasonable and appropriate, I am constrained to the conclusion that the law as it stands does not require such joinder. Neither the Elections Order nor the Rules contain express provision as to the persons who should or may be made respondents to an election petition. But examination of those Rules which refer to " the respondent " throws some light on the matter of joinder.

Rule 10 provides that *any person returned as a Member* may, after he is returned, leave at the office of the Registrar a writing, appointing a Proctor to act as his agent *in case a petition is filed against him*, or stating his intention to act for himself in such a petition, and giving the address (of the agent or of himself) at which notices relating to such a petition may be left. The Rule continues to provide that if no such writing be left or address given, all notices and proceedings may be given or served by leaving the same at the Registrar's office.

Rule 15 provides for the service of an election petition by the petitioner on *the respondent*, the manner of service being—

(*a*) by delivery of the notice to the agent appointed under Rule 10 ; or

(*b*) by posting the notice in a registered letter to the address given under Rule 10 ; or

(*c*) if no agent has been appointed nor address given under Rule 10, by publication in the Gazette of a notice stating that the petition has been presented and that a copy of it is available at the office of the Registrar.

It will be seen, when these two Rules are read together, that they require notice to be given only *to the Member against whom a petition is filed*. The object of Rule 10 is to enable a petitioner to ascertain the person to whom (i.e., the agent) and the address at which notice of his petition (and subsequent notices) may be served. But it is only the identity of the agent *of the Member returned*, and the address of such agent, that is thus ascertainable ; and if no writing and address are left at the Registrar's office, the alternative of leaving the notice at the Registrar's office will operate as service *on the Member*. The clear implication is that " the respondent " referred to in Rule 15 is the Member against whom a petition is filed. Ordinarily therefore, there would only be that one Member as respondent to a petition, although there may be an exceptional case in relation to an election for a multiple-member constituency. In that case each person who is returned as a member may file the writing under Rule 10, and if a petition challenges the election of two or three such Members, then the rule of construction that the singular includes the plural will require that notice must be served on both or all such Members, as respondents. But even in such a case, the writing left by a Member is intended to be operative in relation to a petition *against him* ; he need not be a respondent to a petition which only challenges the return of some other person who was

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returned at the same election. Indeed the researches of the respondent's Counsel in the present case have brought support for my statement in the preceding sentence. In the case of *Line v. Warren*[1] it was held that in a petition challenging the election of 3 Members, where 4 had been returned, it was not necessary to join the Member whose election was not being challenged.

Rules 10 and 15 deal with a matter of vital importance, equivalent to the matter of the service of summons on the defendant in a civil action, and default of due service of notice of a petition will result in dismissal of the petition. The Rules themselves strongly evidence the intention that it is the Member whose return is challenged, and no other person, who must necessarily be the respondent named in an election petition. That being so, the decision of a Court, requiring that the third candidate should have been made a respondent to the present petition, would amount not to the application or construction of the law, but to the making of law. Since neither the Order in Council nor the Rules, as actually enacted, impose such a requirement either expressly or by implication, it would be unjust for this Court to reject the present petitioner's claim for the seat on the ground that such a requirement, however reasonable, must be read into the law.

The relevant Rules in India expressly provided at one time that all persons who had been candidates must be joined as respondents to an election petition, and the Rules were later amended to require that such candidates must be so joined only in a petition which claims the seat. The existence in India of express statutory provision imposing such a requirement confirms my opinion that it is for the Legislature, and not for the Courts, to determine whether or not all unsuccessful candidates must be named respondents in such a petition.

Counsel for the respondent in this case was unable to cite any decision of an English Court in support of his objection on this ground of non-joinder. The English Petition Rules are substantially the same as the Rules applicable in Ceylon. That being so, resort to s. 86 (2) of our Elections Order is of no avail to the respondent in connection with the argument now under consideration.

I hold for these reasons that our law does not require that an election petition, which claims a seat for some candidate who was not declared to be returned at the election, must name as respondent every other candidate who unsuccessfully contested the election.

[1] *14 Q. B. D. 73.*

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The arguments presented in this case have shown the need for Parliament to consider whether or not it is expedient to amend the existing law as construed in this judgment. Upon such consideration Parliament may decide—

(1) that the law as now construed needs no amendment ; or

(2) that every election petition which claims a seat for one unsuccessful candidate must name as respondent every other unsuccessful candidate ; or

(3) that in the case of any such petition any unsuccessful candidate has a right to be joined as a respondent if he seeks to intervene.

I express the opinion, for what it may be worth, that the third of these alternative decisions would be the most satisfactory. I state also the opinion that, despite the absence of express provision in the Election Order, it would be open to an Election Judge to permit the intervention of an unsuccessful candidate in a petition which claims a seat for another unsuccessful candidate.

The prayer in the petition filed in this case asked for a determination—

(*c*) that the petitioners are entitled to a scrutiny in order to strike off all votes in favour of the respondent ; and

(*d*) that the said Mr. George Kotalawala (i.e. the candidate who secured the second highest number of votes) was duly elected and ought to be returned.

It was argued on behalf of the respondent that a scrutiny is a condition precedent to a declaration by an Election Judge that any person, other than the Member actually returned at the poll, was duly elected. The argument is based on a construction of s. 80 of the Elections Order which declares (*inter alia*) that the following reliefs may be claimed in an election petition :—

" (*c*) a declaration that any candidate was duly elected and ought to have been returned ;

(*d*) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny."

Paragraph (*d*), it was argued, applies in every case where a seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, and peremptorily requires that a scrutiny must be held before a seat can be awarded on this ground. Counsel in this connection relied also on Rule 7 of the Election Petition Rules :

" When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the Registrar, and also at the address, if any, given by the petitioners and respondent, as the case may be, a

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list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Registrar shall allow inspection and office copies of such lists to all parties concerned ; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

It was urged that this Rule applies in every case where a seat is claimed on the ground under consideration ; that therefore the petitioners in the present case should have furnished a list of the votes to which they intended to object ; that such objections could only be determined and disposed of at a scrutiny ; and that since the petitioners failed to furnish the list of objections required by this Rule the seat cannot be awarded to the candidate for whom they claimed it.

I note firstly that although paragraph (*d*) of s. 80 refers to a scrutiny as a relief which may be claimed in a petition, the substantial relief which can be awarded, even after a scrutiny, is specified in paragraph (*c*), namely " a declaration that any person was duly elected and ought to have been returned ". Similarly the reliefs which may be ultimately granted by the determination of the Election Judge under s. 81 are those specified in paragraphs (*a*), (*b*) and (*c*) of s. 80, and the ultimate determination will say nothing about a scrutiny. Section 85 contains a list specifying which votes shall be struck off at a scrutiny. Let me first set out paragraphs (*a*) to (*e*) of s. 85 :—

(*a*) the vote of any person whose name was not on the register of electors assigned to the polling station at which the vote was recorded or who has not been authorized to vote at such station under Section 39 ;

(*b*) the vote of any person whose vote was procured by bribery, treating, or undue influence ;

(*c*) the vote of any person who committed or procured the commission of personation at the election ;

(*d*) where the election was a general election, the vote of any person proved to have voted at such general election in more than one electoral district ;

(*e*) the vote of any person, who, by reason of a conviction of a corrupt or illegal practice or by reason of the report of an Election Judge, or by reason of his conviction of an offence under section 52 or section 53 of this Order, or by reason of the operation of section 4A (or section 5 B) of this Order, was incapable of voting at the election.

In each of these cases, a party has first to prove that a particular person voted at the election, and secondly to prove some ground affecting that person which renders his vote invalid, i.e., that his name was not on

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the register, that his vote was procured by bribery, that he committed personation at the election, that he was disqualified to vote, that he voted twice at the same General Election. What has to be emphasised in the present context is that the invalidity of the vote of a particular voter must be established *before* an Election Judge orders a scrutiny. Thereafter, the scrutiny is held only in order to trace the ballot paper, and then to strike off that paper. At this stage those present at the conduct of the scrutiny can become aware of how the particular voter had voted. But this breach of the secrecy of the ballot is allowed, as I have just stated, only because the invalidity of the vote has been antecedently established.

I pass now to paragraph (*f*) of s. 85 which provides for the striking off at a scrutiny of votes given for a disqualified candidate by a voter—

(i) knowing that the candidate was disqualified ; or

(ii) knowing the facts causing the disqualification ; or

(iii) after sufficient public notice of the disqualification ; or

(iv) when the disqualification or the facts causing it were notorious.

In cases (i) and (ii), it is quite clear that there has first to be proof of a particular voter's knowledge, followed by a decision by the Election Judge that his vote was invalid. A scrutiny must thereafter be held in order to trace his ballot paper and then to strike it off.

An examination of paragraphs (*a*) to (*e*) of s. 85, and of the first part of paragraph (*f*), thus reveals the precise purpose of holding a scrutiny which is simply to trace and strike off the votes cast by persons whose votes have previously been held to be invalid. It is reasonable to think therefore that in a case falling within the second part of paragraph (*f*) as well, a scrutiny will be ordered only if it has been antecedently established that the votes cast *by some voters* in favour of a disqualified candidate were invalid on one of the grounds which I have set out at (iii) and (iv) above, and that the object of the scrutiny is to trace the ballot papers *of those voters* in order to strike off their votes.

The argument now under consideration is that, even in a case where *all the votes cast in favour of a disqualified candidate* are held invalid because of the notoriety to all the electors of the fact of disqualification, the seat cannot be awarded to the second candidate unless a scrutiny is actually held and unless the invalid ballot papers are physically rejected.

Let me for the moment assume that a scrutiny had been held in the present case, and let me consider what would have been done at the scrutiny. As already pointed out, the order for a scrutiny would be preceded by a decision that certain votes were invalid, and the votes affected would be *all the votes cast in favour of the disqualified candidate.* Hence the scrutiny would have involved inspection of all the 42,423

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ballot papers which are known to have been cast at the election, and the separation of all those found on such inspection to have been cast in favour of the respondent. These separated ballot papers would then have been struck off, and a declaration made that the candidate having the majority of the remaining votes was duly elected. In brief then the scrutiny would have consisted of a count of the total number of votes which were cast in favour of the respondent, in order to strike all of them off, and thereafter of a count of the number of votes cast in favour of the other two candidates. But such a count had already been made after the poll as required by s. 48. The scrutiny would therefore have served merely to establish figures the correctness of which had already been established. I cannot assign to the Legislature an intention to require that so needless a proceeding should have taken place. On the contrary, I much prefer to assign to the Legislature an intention that a scrutiny must if possible be avoided, in order that any risk of a breach of the secrecy of the ballot be also avoided.

Let me also consider the applicability of Rule 7 in the present context. If compliance with that Rule be necessary, the petitioners in this case should have furnished a " list of the votes intended to be objected to, and of the heads of objection to each such vote ". No difficulty would have arisen with respect to the " heads of objection ", for the ground taken against all the challenged votes would be the notoriety of the fact of disqualification. But how could the petitioners have drawn up a list of the " votes intended to be objected to "? Their objection would be to all the votes cast in favour of the respondent, but they could not have, and indeed should not have, knowledge as to how any voters had in fact voted. Thus they would not be able to furnish a list of votes in compliance with Rule 7. The maxim *lex non cogit ad impossibilia* therefore supports the construction that Rule 7 does not apply in a case where the objection is to all the votes cast in favour of the Member returned on the ground that the facts causing his disqualification were notorious.

I have already stated that an order for a scrutiny will only be made if the invalidity of some vote or votes is first established. The list which Rule 7 requires is intended to give notice to a respondent of the votes which the petitioner intends to challenge as invalid. It will be seen therefore that the Rule always applies in cases in which a petitioner's ultimate purpose is to have votes struck off on a scrutiny. Thus the construction I have reached, that Rule 7 does not apply in the present context, shows at least indirectly that no scrutiny is necessary in this context.

I must not be understood to mean that a scrutiny need never be held in a case where the matters stated in paragraphs (iii) or (iv) of my explanation of s. 85 (*f*) are established. My brother Weeramantry refers to the case of *Gosling v. Veley* [1] where notice of a disqualification was given only after some voters had voted. There was also envisaged during the

[1] 7 Q. B. 406.

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argument the possibility that notice of a disqualification is given, or a disqualification is notorious, only to voters in some part of an electorate. In such cases, there would be a decision by an Election Judge declaring that some only, but not all, of the votes cast in favour of a disqualified candidate are invalid, and defining with some measure of precision the means of ascertaining which particular ballot papers are to be struck off as invalid. In such cases, a scrutiny will be necessary in order to ascertain definitely what are the invalid ballot papers, and thereafter to strike them out and to re-assess the result of the poll. Thus the construction, that a scrutiny is not necessary in the instant case, does not imply that the provisions of paragraph (*f*) of s. 85 are partly nugatory.

Counsel's contention on this matter was quite independent of the fact that there were three candidates in this case. His contention is that a scrutiny is necessary even when there are only two candidates and there has been public notice or notoriety of the disqualification of the one who was returned at the poll. That contention is negatived in the *Lady Sandhurst case*[1] and the *Standgate case*[2], both of which are sufficiently discussed in the judgment of my brother Weeramantry, and in each of which the seat was awarded without a scrutiny to the one and only unsuccessful candidate.

I hold for these reasons that the power of an Election Judge to determine that a candidate, other than the Member returned, was duly elected, may be exercised without resort to a scrutiny in a case where there was either public notice to all the electors of the disqualification of the Member returned or where the disqualification or the facts causing it were notorious to all the electors.

My conclusion, that a scrutiny is not necessary in a case like the present one has been reached mainly by the consideration of our Elections Order. I need only to state in addition that it is supported by statements to the same effect by text-writers in England (14, Halsbury, p. 305 ; Parker, 1959, p. 157).

The learned Election Judge who tried the second Welimada Petition (*E. S. Peiris & another v. W. P. Sameraweera*[3]) has held in a judgment delivered on 6th October 1967 that under our law a scrutiny must be held before a seat can be awarded to an unsuccessful candidate. That conclusion was reached after full consideration of s. 85 and was based largely on the opinion that this section alone authorises the striking off of votes. I agree with that opinion. But the judgment does not examine the question why a scrutiny is held ; nor naturally does it take into account the answer to that question, which as I have tried to show is to trace and reject ballot papers which an Election Judge has previously held to be invalid. Had the purpose of making a scrutiny been considered, it may have become apparent that in that case also there may have been no need to identify and reject ballot papers, because the Court already knew

[1] *23 Q. B. D. 79.* [2] *(1961) 3 A. E. R. 354.*

[3] *(1967) 71 N. L. R. 250.*

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that all the votes cast for the disqualified candidate had been thrown away. The decision in that case must be regarded as overruled in so far as it conflicts with the present judgment.

Counsel for the respondent urged that in the event of this appeal being decided against him, the respondent should now have an opportunity to file recriminatory objections against the candidate for whom the seat has been claimed in this petition. Rule 8 of the Election Petition Rules provides that such objections should be filed six days before the day appointed for the trial of the petition, but the respondent failed to file any such objections even on the day of trial. I do not find in the record of the proceedings any justification for the explanation now given that there was any understanding between Counsel or on the part of the trial Judge that the filing of these objections may be delayed until the Judge had decided the question whether the petitioners were in law entitled to claim the seat for the unsuccessful candidate. The Judge on 21st February 1968 stated that the necessity *to lead evidence* against the unsuccessful candidate would arise only if this question is answered in favour of the petitioner. Had any suggestion been made in Court of the possibility of filing recriminatory objections after the time fixed in Rule 8, I am very nearly certain that the learned Judge would have rejected it because he had no power to approve such a suggestion. Nor is it reasonable to impute to the petitioners' Counsel any agreement to allow to the respondent unlimited time to file the objections. The petitioners' Counsel had nothing to gain by an agreement so detrimental to the interests of his clients. I see no reason for granting the opportunity now sought.

For the reasons which have been stated by my brother Weeramantry and in this judgment, the finding of the learned Election Judge that the seat cannot be claimed in this case for an unsuccessful candidate has to be set aside, and the appeal of the petitioners has to be allowed.

The judgment of this Court delivered this day in Election Appeal No. 3 of 1968 affirms the determination of the learned Election Judge that the election of the respondent to the present appeal was void.

It is now further determined that Mr. George Kotelawala, the candidate who received the second largest number of votes cast at the Election was duly elected the member for Electoral District No. 27—Bandaragama, at the Election held on 23rd September 1967.

The order of the learned Election Judge that each party to the Election petition will bear his own costs is set aside. The petitioners should, according to our conclusions, have succeeded on both the claims made in their petitions, and they will accordingly be entitled to the costs of trial before the Election Judge. But each party will bear his own costs of the present appeal.

SIRIMANE, J.—

[His Lordship's dissenting judgment in this appeal, beginning with the words " In the second appeal ", appears at pp. 225 *et seq.* (*supra*).]

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WEERAMANTRY, J.—

A bye-election was held on 23rd September 1967 in respect of the Bandaragama seat in the House of Representatives. At this bye-election there were three candidates—the respondent to this appeal, one George Kotelawala and one Eustace Bandara. The respondent secured the largest number of votes and was declared the duly elected Member for Bandaragama.

The respondent had earlier contested the same seat and had been unseated upon an election petition presented against him alleging *inter alia* that he or his agent or other persons acting on his behalf or with his knowledge and consent had published false statements of fact in relation to the personal character or conduct of a candidate at that election and as such was guilty of a corrupt practice under section 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council. The Election Judge who heard that petition dismissed it, but an appeal lodged against that decision to the Supreme Court was successful and the three Judges hearing the appeal held the election of the respondent to be void on the ground of corrupt practice committed by the respondent's agent, one Jayatileke. The same three Judges after giving Jayatileke an opportunity to show cause why he should not be reported to his Excellency, issued a report to the Governor-General under section 82 C (2) (*b*). This report was published in Government Gazette No. 14,755/2 of 2nd July 1967 in terms of Section 82 D (2) (*a*).

The consequence of the report and its publication in the Gazette was that the respondent became, in terms of section 82D (2) (*b*) (ii), subject to the incapacities prescribed for those convicted of corrupt practice and the respondent consequently became incapable for a period of seven years of being registered as an elector or of voting at an election or of being elected or appointed a Member of Parliament.

It was after his disqualification that the respondent contested the Bandaragama seat at the bye-election held on 23rd September 1967. His right to be declared elected was challenged by the petitioners-appellants on the ground that by reason of the report as aforesaid to His Excellency, the respondent had become incapable of being elected a member of Parliament and that by reason of his offering himself as a candidate, the electors were prevented from electing a candidate qualified to be elected.

In the same petition the petitioners claimed that George Kotelawala, the candidate placed second at the election, had the largest number of lawful votes and as such was duly elected and ought to have been returned.

The respondent's position was that the provision in the Parliamentary Elections (Amendment) Act No. 19 of 1948 relating to a report by the Supreme Cour t upon anappeal, so far as it related to a finding that a

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corrupt or illegal practice had been committed, was not duly passed by Parliament. This position was taken up in reliance on certain observations of Wijeyewardene, A.C.J. in *Thambiayah v. Kulasingham.*[1]

The learned Election Judge in a most comprehensive judgment has rejected this contention on the ground that the observations of Wijeyewardene, A.C.J. were made obiter and the provision referred to was valid. The election of the respondent to this seat was therefore declared void. The learned Election Judge refused however to accede to the petitioners' claim that the seat should be awarded to the candidate placed second at the poll.

There has been an appeal to this Court by the respondent against the determination by the Election Judge that the election was void. That appeal, Election Appeal No. 3 of 1968, has been decided against the respondent. In that appeal I have signified my agreement with the learned trial judge's findings and with the view of my Lord the Chief Justice and my brother Sirimane that the appeal should be dismissed.

The appeal we are now considering, Appeal No. 2 of 1968, is an appeal by the petitioners against the second conclusion of the learned Election Judge, namely, that the seat ought not to be awarded to the unsuccessful candidate.

Before I proceed to consider the main question to be decided by us on this appeal and to set out my reasons for agreeing with my Lord the Chief Justice that this appeal should be allowed, I wish also to signify my agreement with the views of my Lord in regard to certain preliminary matters raised by the respondent—the contentions that the claim of a seat for the unsuccessful candidate must in every case be associated with a request for a scrutiny and that a claim on behalf of the unsuccessful candidate cannot be maintained without a joinder of the third candidate as a respondent to the petition of the petitioner, so as to enable such other candidate to object to such a claim. Associated with this latter contention was the submission that the proceedings before the learned Election Judge took a course in which the respondent was released from the requirement of filing a recriminatory petition six days prior to the day appointed for trial. It was submitted therefore that any award of the seat to the second candidate should, despite the respondent's failure to file a recriminatory petition, be made only after the respondent is given an opportunity to file objections to such election and lead evidence in support of such objections.

I do not need to deal in detail with these submissions except to observe that on the question of scrutiny, it seems clear upon a reading of section 80, that the provisions of section 80 (*d*) do not afford a relief in themselves, but only a means towards obtaining relief, for a scrutiny by itself, without

[1] (1948) 50 N. L. R. 25.

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more, gives no redress at all. The eventual relief sought in such a case must therefore be found in one of the other sub-heads of section 80, and the sub-head under which such relief most readily finds a place is section 80 (*c*). It follows therefore that a claim to have the seat for an unsuccessful candidate is not necessarily bound up with the requirement of a scrutiny, and that a scrutiny is not a pre-requisite to every claim for a seat. Section 85 (1) itemises the votes that may be struck off upon a scrutiny but it does not follow from this provision that it is only upon a scrutiny that votes may be regarded as thrown away. With much respect I therefore find myself unable to subscribe to the view expressed in *Peiris v. Samaraweera* [1] that scrutiny is in all cases a necessary pre-requisite to a claim that the seat be awarded to the unsuccessful candidate. It has been stated in that judgment, as a necessary corollary to the view therein expressed regarding scrutiny, that our law does not recognise the concept of votes given to a disqualified candidate being considered cast away. I would respectfully dissent from this view as well, for the reason that it follows upon the incorrect premise to which I have already referred.

On the question of joinder of the third candidate, there is no rule of our law that other candidates should be joined, although in certain other jurisdictions, as for example in India, there would appear to be such a requirement when the seat is claimed for an unsuccessful candidate. In the absence of any express provision to such effect under our law it would not, for the reason stated by My Lord, be correct to dismiss a claim for the seat on account of such non-joinder, having regard in particular to the possibility always open to such other candidate to apply that he be made a party to the proceedings.

It suffices to observe on the question of an abandonment or waiver of the imperative requirement that a recriminatory petition should be filed six days before the day appointed for trial, that at the preliminary proceedings held some weeks anterior to the trial there was no necessity for the respondent to seek exemption from this requirement, for at that stage ample time was still available to him for compliance. At the commencement of the trial on the other hand, the non-compliance with this imperative provision of statute law having already occurred and the attendant consequences having already ensued in law, it was not within the competence of the Court to grant relief against these consequences nor was there any expression by counsel for the appellant of any willingness on his part to abandon the advantage accruing to him from the respondent's failure to comply with the statute.

Having said so much in regard to these preliminary matters, I now pass on to the main question with which we are concerned in this appeal, namely the question of the claim that the seat be awarded to the unsuccessful candidate.

[1] *(1967) 71 N. L. R. 250.*

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Our law, following the English Law on this matter, provides that the seat may be awarded to the candidate next at the poll in cases where the votes cast for the successful candidate are regarded as having been thrown away. It is clear that where a vote is cast by a voter with knowledge of a disqualification which is definite and certain at the time, that vote must be regarded as thrown away so that it will be treated as not cast, and that upon the elimination of such votes the seat will be awarded to the candidate next at the poll.

In order that a disqualification be regarded as definite and certain, it must in the first place be based on facts which are definite and certain. If the facts grounding the disqualification are not definite then the vote cannot be regarded as thrown away. For instance, if there is an allegation of facts at the time of the election which become definite and certain only at a later point of time inasmuch as those facts have not been adjudicated upon at the date of the election, they remain, so far as the voter is concerned, mere unproved allegations. In such cases, although the candidate may be declared disqualified and the election avoided, the seat cannot be awarded to the next candidate, for there is not that definiteness about the facts grounding the disqualification, which would be essential if the votes are to be treated as thrown away. As Coleridge, C.J. observed of such votes in *Drinkwater v. Deakin*[1], a case of alleged acts of bribery, " Invalid, upon proof of his bribery, for the purpose of seating him, they are ; thrown away, for the purpose of seating his opponent, they are not. "

The principle underlying such a rule is self-evident and needs no elaboration, for a vote cannot be treated as thrown away merely because there was an allegation of fact about the candidate for whom they were cast which at the time of voting may have been true or untrue and which the voter could not be expected, and would not in most cases be able, to verify.

If however the facts grounding the disqualification are definite and certain at the time of the election, two alternative positions require consideration. There is in the first place the case where the law applicable to those facts is itself definite and certain in the mind of the voter, and there is, secondly, the possibility that although the facts are definite and certain the voter is not certain that disqualification results in law from those definite and certain facts.

In the first of these alternative cases the disqualification would clearly be a definite and certain disqualification and a vote cast with knowledge of that definite and certain disqualification would be a vote thrown away. It is the second alternative which needs closer examination in the context of this case for, as will presently appear, the instant case is one where the facts grounding the disqualification were definite and certain but it is alleged that there was some uncertainty in the minds of voters in regard to

[1] *(1874) 9 L. R. C. P. 626 at 637.*

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their legal effect. In such cases the question arises whether a vote cast with knowledge of these facts, but with uncertainty as to their legal result, is thrown away if disqualification is the true legal effect of these facts. Must the voter, as in other areas of the law, be presumed to know the true state of the law, or, in the sphere of election law, is there to be an exception to this rule ?

It is common ground in this case that at the time of the election the facts grounding the disqualification were definite and certain and that the voters had notice or knowledge of these facts. Two views had however been expressed to the voters regarding the disqualifying effect in law of these facts.

The definite and certain facts which the voter knew or had notice of were the facts of the report to the Governor-General and the publication thereof in the Gazette. It was regarding the legal effect of these facts that two views were presented to the voter.

I should at this stage refer to the averments of fact on the basis of which the legal question which I have outlined will have to be considered.

The petition of the appellants states that the incapacity of the respondent was brought to the notice of persons entitled to vote in the following ways :

(1) About 50,000 notices in Sinhala issued by the supporters of the defeated candidate were distributed all over the electorate. This notice, which has been reproduced in the petition, informed them of the report of the three Judges to His Excellency the Governor-General and indeed reproduced this report. This notice also informed the electors of the fact of publication of this report in the Government Gazette and reproduced the relevant extract from the Gazette.

(2) In the course of speeches made by the defeated candidate and other speakers at several election meetings held in the electorate in support of the candidature of the defeated candidate, the disqualification was brought to the notice of the electors.

(3) By reason of the wide publicity given to this disqualification the matter was widely discussed at election meetings of the respondent by several speakers.

(4) The respondent's ineligibility and incapacity for election were brought to the notice of the Returning Officer in the course of an objection on the date of nomination.

The petition goes on to aver that the respondent's incapacity and disqualification were matters of notoriety in the constituency at the time of the election and were well known to all persons entitled to vote and that the persons who voted for the respondent knew well at the time of

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voting, of this incapacity and disqualification. The votes given to the respondent are hence claimed to have been thrown away and to be null and void. No evidence was led at the trial but in support of the averments in this petition the petitioners filed the affidavit marked P1. The respondent likewise set out his position on matters of fact in an affidavit marked R1.

The affidavit of the petitioners states that in view of the disqualification of the respondent, objection was taken to his nomination before the Returning Officer and that the Returning Officer disallowed the objection. According to the affidavit sufficient notice to the effect that the respondent was a person disqualified from being elected by reason of the circumstances referred to was given to the voters of the constituency by distribution of leaflets and by speeches made at political meetings held in support of the candidature of George Kotelawala and the said alleged disqualification and the facts constituting the same were a matter of public notoriety in the constituency. The respondent in an affidavit of the same date admitted all the averments in the affidavit of the petitioners and we thus have on this important question of fact the concurrence of both sides in the position that the facts grounding the disqualification had been brought to the notice of voters and were also a matter of public notoriety in the constituency. It will thus be seen that the report of the Judges to His Excellency and the due publication thereof were facts which at the date of the election were not mere allegations but were existing and established and which, as distinguished from the legal consequences following therefrom, admitted of no uncertainty.

Having made these admissions the respondent goes on in paragraph 2 of his affidavit to explain that he, his lawyers, supporters and agents gave sufficient notice to the voters of the electorate by the distribution of leaflets and also by speeches made at political meetings, of certain matters in reply to the allegation that he was disqualified. He states that he explained to the satisfaction of his supporters in the electorate that the Supreme Court had held in the case of *Thambiayah v. Kulasingham* [1] that the provision in the Parliamentary Elections (Amendment) Act No. 19 of 1948 relating to a report of the Supreme Court, so far as it embodies a finding that a corrupt or an illegal practice has been committed, was not duly passed by the Ceylon Parliament. These provisions were stated, in view of this decision, to be *ultra vires*.

It is significant also to note that the petitioners in their affidavit admit the averments in paragraph 2 of the respondent's affidavit; and we are thus left in the position that while the respondent admits that the petitioners gave due notice to the electorate of the facts constituting the disqualification, and indeed that these facts were matters of public notoriety, the petitioners admit wide notice to the electorate by and on behalf of the respondent that the circumstances relied on by the petitioners did not in law constitute a valid disqualification.

[1] *(1948) 50 N. L. R. 25.*

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I proceed therefore on the basis that there was knowledge on the part of the electors of the certain and established facts of the Election Judge's report and the publication thereof in the Government Gazette but that there was also material before them on which they were invited to doubt that legal incapacity flowed from those facts.

As much has been said concerning the uncertainty in the mind of the voter arising from the view taken by Wijeyewardene, A.C.J., it becomes pertinent, though of course this circumstance does not conclude the matter before us, to examine the relative weight of the opposing matters presented to the voter.

The submission for the respondent is that the opinion expressed by Wijeyewardene, A.C.J. is the judgment of three Judges of this Court and though the report to His Excellency is also a report of three Judges of this Court, the voter was entitled to act on the basis of the judgment, which, to the average voter at least, was sufficient to create a doubt in his mind.

It has been shown in the connected appeal, in the judgment of my Lord the Chief Justice with which my brother Sirimane and I agree—and indeed that was the view strongly expressed by the learned Election Judge himself—that Wijeyewardene, A.C.J.'s view in regard to the invalidity of the report was not essential to the judgment in that case but was a view expressed purely *obiter*, and also that that view was incorrect in law.

Moreover, what must be weighed against the decision of Wijeyewardene, A.C.J. is not the fact that three Judges have acted in terms of the impugned section in sending their report, but rather that there is in existence an express provision of statute law empowering the Judges to send such a report and annexing to such report a statutory disqualification. The dictum of Wijeyewardene, A.C.J. is not *in pari materia* with an express provision of statute law ; and where the voter is given due notice of an express provision of statute law which he disregards on the basis of an obiter dictum, he must be taken to disregard such provision of statute law at his risk. Although the view presented to the voter on behalf of the respondent was thus not on a level of parity with that presented against him, I shall nevertheless examine the principles of law applicable as though there was such parity and as though legal questions of doubt and intricacy arose in consequence.

This then is the background against which we must consider the legal question which I have already outlined. Upon such a state of facts we must determine whether in the operation of the principle that every citizen is presumed to know the law, an exception should be made in the sphere of election law, in cases involving the application of law which is uncertain or difficult to facts which are known. Associated with this problem is the question whether there must be wilful perverseness on the part of voters voting for a disqualified candidate in order that their votes should be regarded as having been thrown away.

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No section of the Parliamentary Elections Order-in-Council affords us any guidance on this matter unless indeed one invokes the analogy of section 85, the provision dealing with votes that may be struck off upon a scrutiny. These rules, as will appear later on in this judgment, seem to set out correctly the provisions of English law on the question when votes will be regarded as having been thrown away. There is also the provision in section 86 that on any matter of procedure or practice not provided for by the Order or by the rules or by Act of Parliament, the procedure or practice followed in England on the same matter shall, so far as it is not inconsistent with the Order or rules or Act of Parliament and is suitable for application to the Island, be followed and shall have effect. Furthermore, throughout the history of our election law, our Courts have always acted on the assumption that guidance is to be found in the English law on matters of difficulty, as for example Akbar, J. did in *Cooray v. de Zoysa* [1], another case in our reports discussing the concept of votes being thrown away. It would not be inappropriate to add also that the argument in this case has proceeded on the assumption on both sides that a proper source for deriving guidance on this matter is the English law—a system which, in matters of Parliamentary elections, embodies the wisdom of several centuries of experience.

In this judgment it thus becomes necessary to examine the English law as set out in the principal text books on the subject, the earlier English decisions referred to in these texts and the law as finally stated and settled in two decisions which are of compelling authority. I shall also refer briefly to the law as understood and applied in Ireland, where too the same questions have arisen which we are now considering, and to the only other Ceylon case where these principles have been discussed. I shall finally examine section 85 (1) (*f*) of the Ceylon (Parliamentary Elections) Order-in-Council. This section, though limited only to claims for a scrutiny, would appear to state the law in a manner confirming the views I shall express.

The English cases reach back to the days when the disqualification of a candidate was exclusively within the purview of Parliament, which adjudicated upon such matters through Parliamentary committees appointed specially for the purpose. This function was later vested in the Courts and we thus have for our guidance the decisions of Parliamentary committees and in later times the judgments of Courts of law. As Coleridge, C.J. observed in *Drinkwater v. Deakin* [2] the law as to the disqualification of candidates and notice of such disqualification to voters is to be collected from the decisions of Courts of law and of Parliamentary election committees which latter, if not binding upon Courts, are yet to be treated with respect as an exposition of the law of Parliament which is part of the Common Law itself.

These decisions have been collected in the various text books on the subject and these texts afford a convenient point of commencement for a study of the decisions relating to the award of a seat to the unsuccessful

[1] *(1936) 41 N. L. R. 121 at 140.* [2] *(1874) 9 L. R. C. P. at 633.*

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candidate upon the unseating of the successful candidate. Difficulty arises, however, owing to the somewhat different presentation in the various texts, of certain points of law with which we are particularly concerned in this case. The difficulty centres principally around the questions whether knowledge of the facts from which disqualification arises is sufficient without actual knowledge that disqualification results in law from these facts, and whether wilful perverseness on the part of voters is required as a condition precedent to their votes being treated as votes thrown away. On this matter we have on the one hand the law as stated by Rogers, Schofield, Fraser and the earlier editions of Halsbury and on the other the law as stated in the third edition of Halsbury and in Parker, and it is on these latter authorities that the respondent relies.

It will be apparent from the ensuing discussion that this latter view, held by only a minority of the text writers, is not only unsupported by authority but contrary to the law as now settled by decisions of binding authority in England.

Rogers on Elections states the law in these terms :—

" votes may be lost or thrown away, 1st by voting for a candidate who is disqualified either—

(*a*) after notice of his disqualification ; or

(*b*) with knowledge of the disqualification or of the facts creating it. 2nd....." [1].

The principle underlying this rule is that votes given for a disqualified candidate in the circumstances stated are to be considered in the same way as if such votes had not been given at all.

According to Fraser a vote will be regarded as lost or thrown away when it is given for a disqualified candidate—

(1) after a sufficient notice of the disqualification,

(2) knowing that the candidate is disqualified,

(3) knowing the facts by reason of which the candidate is disqualified, or

(4) when the fact of the disqualification or the facts by which it is caused are notorious [2].

Schofield observes that the rule of law in elections generally is that where a voter receives due notice that a particular candidate is disqualified before he votes, and yet persists in voting for that candidate, he must be taken as having voluntarily abstained from exercising his franchise, and, therefore, however strongly he may in fact dissent, and in however strong terms be may dissent, he must be taken to assent to the election of the opposing candidate [3].

[1] *20th ed. vol. II p. 80.* [2] *2nd ed. p. 226.*

[3] *Parliamentary Elections, 2nd ed. p. 321.*

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So also the first and second editions of Halsbury formulate the law in the terms that in the absence of a notice of disqualification a new election ought to be held *unless* either the person whose votes are sought to be treated as thrown away can be shown in fact to have been aware of the disqualification or the disqualification is of a sort whereof notice is to be presumed [1]. In a footnote to this portion of the text these two editions of Halsbury go on to explain the practice of the Parliamentary committees in terms of the decision in the *2nd Clitheroe* case [2], as being that it will in all cases be inferred that when the voter is aware of the facts he is aware of the legal deduction from those facts however intricate and doubtful such deduction may be.

The third edition of Halsbury states however that the disqualification must be founded on some positive and definite facts existing and established at the time of the poll so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person [3]. The reference to wilful perverseness, it may be observed, finds no place in the first or second editions of this work. The third edition (though not the first or the second) goes on also to state the proposition that if the disqualification is not notorious and depends on legal argument or upon complicated facts and legal inferences it would appear that even though the candidate may be unseated by reason of his disqualification, the votes given for him will not be thrown away so as to award the seat to the candidate with the next highest number of votes [4]. Inconsistently however with these observations, the same edition proceeds to observe that in order that votes given for a candidate may be considered thrown away, voters must before voting either have had or be deemed to have had notice *of the facts* creating the candidate's disqualification and that it is not necessary to show that the elector was aware of the *legal result* that such a fact entailed disqualification. The same edition omits altogether the quotation from the *2nd Clitheroe* case contained in the earlier editions.

The law as so stated in the earlier part of the section cited from the third edition of Halsbury finds support also in Parker where it is stated that in order that votes given for a candidate should be regarded as having been thrown away, the disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person [5]. The same author also submits that a disqualification depending on a novel question or one of doubt or difficulty or upon legal argument and decision upon complicated facts and inferences, does not cause votes to be thrown away so as to seat the next candidate [6].

[1] *2nd ed. Vol. XII pp. 285–6 ; 1st ed. Vol. XII. p. 306.*
[2] *Clitheroe — Borough 2nd case, (1853) 2 Pow. R & D 276 at 285.*
[3] *3rd. ed. Vol. XIV p. 305 s. 549.*
[4] *Ibid.*
[5] *Election Agent and Returning Officer, 5th ed. p. 152.*
[6] *Ibid.*

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These latter authorities are relied on by the respondent in support of his contentions (1) that wilful perverseness on the part of the electors is essential to such votes being regarded as thrown away, and (2) that votes are not thrown away where there is uncertainty or difficulty in the application of the law to facts which are known.

For reasons which I shall set out later in this judgment, it seems clear that the law is now settled in the sense opposite to what would appear from a perusal of Parker and the latest edition of Halsbury, for the cases of *Beresford-Hope v. Lady Sandhurst* [1] and *Bristol South-East* [2] have categorically stated the law in the opposite sense and by these decisions, if English law is to be any guide, we should feel bound.

The views of the two authorities cited being thus in conflict not only with the law as stated by Rogers, Schofield, Fraser and the earlier editions of Halsbury, but also with the sense in which the law is now settled in England, it becomes necessary to examine in greater detail the cases referred to in Parker and the third edition of Halsbury with a view to ascertaining whether in fact the authorities cited bear out the proposition they enunciate. It will appear from this examination that the cases cited do not support these propositions but indeed lend support to the views of the other text writers (including the earlier editions of Halsbury) and in fact indicate that even the weight of early authority preponderated in favour of the opposite view.

Instances where votes cast for a disqualified candidate have been considered thrown away and the seat awarded to the candidate next on the poll date back as far as I have been able to trace from the reports available to me, to the very commencement of the 18th century, the principle having been acted upon in the *Queen v. Boscaween* [3] in the thirteenth year of Queen Anne. Many cases occur in the early reports arising out of the failure of candidates to have previously taken the sacrament as required by a statute of Charles II [4]. In one of these cases—*R v. Hawkins* [5]—Lord Eldon observed that votes cast knowingly for a disqualified candidate were as though they had been cast " for a dead man " ; and in *Reg v. Coaks* [6] Lord Campbell, C.J. observed that " it is the law, both Common Law and the Parliamentary Law, and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existing person, as it has been said, as if he gave his vote for the man in the moon."

The question whether a distinction should be drawn between cases where the disqualification was clear and those where it was doubtful and depended on argument and decision as to the effect of complicated facts and legal inferences, was thrown up quite early before the election committees and on this matter we find early decisions on both sides of the

[1] *(1889) 23 Q. B. D. 79, C.A.*
[2] *(1964) 2 Q. B. D. 257.*
[3] *Easter. 13, Anne.*
[4] *See R. v. Hawkins 2 Dow. 124, 148; 103 E.R. 755.*
[5] *Ibid.*
[6] *(1854) 23 L. J. Q. B. 133.*

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line. Both lines of decision are conveniently collected in Parker's work [1], and it is significant that even at that early stage in the decisions on one side of the line, the principle *ignorantia juris non excusat*, so firmly established in other departments of the law, was applied.

The learned editor of the third edition of Halsbury cites four cases in support of his statement regarding wilful perverseness—*Clitheroe* (*Borough*) *No. 2*, *The Launceston case* (*Drinkwater v. Deakin*), *Gosling v. Veley* and *Claridge v. Evelyn*. The only authority cited by Parker on this question is the *2nd Clitheroe* case, with a note that it was approved in *Drinkwater v. Deakin*.

In support of the principle relating to uncertain or difficult law the third edition of Halsbury cites *Cox v. Ambrose*, *Etherington v. Wilson*, *Abingdon*, *Penryn*, *2nd Clitheroe* and *2nd Cheltenham*. The same footnote in which these cases appear contains as cases to the contrary—*Wakefield*, *Belfast*, *Cork*, *Tavistock*, *2nd Horsham* and *Leominster*. The cases cited by Parker in support of the view that such votes are cast away are *Wakefield*, *Belfast*, *Cork County*, *Tavistock*, *2nd Horsham* and *Leominster* while the cases cited in support of the opposing view are *Abingdon*, *Penryn*, *2nd Clitheroe* and *2nd Cheltenham*. In favouring the latter view Parker cites also the case of *Cox v. Ambrose*. The same author relies also on the fact that in the case of *Drinkwater v. Deakin* the Lord Chief Justice seems to have doubted whether votes are thrown away when the disqualification depends on an uncertain or obscure legal question.

An examination of these cases is perhaps best begun by examining the *2nd Clitheroe* case [2] which is cited both in the third edition of Halsbury and in Parker and was much stressed by both counsel at the argument before us.

In this case the successful candidate had been the unsuccessful candidate at an election the previous year. There had been a petition against the successful candidate at the first election and the committee hearing that petition had resolved "that extensive and systematic treating together with other corrupt and illegal practices, prevailed at that election." In view of this finding upon the first petition it was alleged in the second petition that the successful candidate at the second election had been guilty of corrupt practices at the first election, and that he was thereby rendered incapacitated and ineligible from sitting or being chosen to sit. This second petition was, it is important to note, confined to a charge of corrupt practice against the candidate and there was an allegation that agents, friends or others on behalf of that candidate had been guilty of corrupt practices at the first election.

It was the case for the petitioner that notice of this incapacity had been duly given to the candidate and to the electors at the second election and that votes given for the candidate were thrown away. It was urged

[1] *Election Agent and Returning Officer, 6th ed. p. 156.*

[2] *(1853) 2 P. R. & D. 276.*

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further at the hearing that the resolution of the first committee was admissible as evidence of notoriety as regards treating by the candidate at the earlier election and also that it amounted to an adjudication of his disqualification.

The committee hearing this second petition held against these latter contentions and ruled that the resolution of the first committee was inadmissible, a decision easy enough to understand in view of the generality of the earlier findings and in view of the restriction of the second petition to charges of corrupt practice against the candidate. In that case therefore the alleged acts of bribery and corrupt treating by the candidate at the first election were at the date of the second election facts which yet remained unproved and were but mere allegations. The voter at the second election could not therefore have been fixed with knowledge of the truth or falsehood of these allegations.

It was hence argued in support of the votes cast for the successful candidate that it would be unfair to the voter if his vote might be lost by a disqualification " arising from facts, of the truth of which he could form no opinion and which might upon inquiry by a competent tribunal turn out to be unfounded." The Committee, while accepting this contention, observed that " by the common law the principle seems to be firmly established, that where a candidate is in point of fact disqualified at the time of an election, all votes given for him with knowledge of the fact upon which such disqualification is founded, must be considered as thrown away. This knowledge may be established either by distinct notice or by notoriety, and it will in all cases be inferred, that *where the voter is aware of the facts, he is aware of the legal deduction from those facts, however intricate and doubtful such deductions may be.*" However they drew attention to the hardship which may arise in certain cases where the fact of such disqualification is only subsequently established and as far as the voter is concerned there is only a mere assertion by the opposing party that a disqualification exists, *the truth or falsehood* of which he may have no means of ascertaining. The voter would then run the risk of having his vote thrown away if on subsequent investigation that disqualification should be established.

The Committee therefore held that the disqualification " must be founded on some positive and definite fact, existing and established at the time of the polling, so as to lead to a fair inference of wilful perverseness on the part of the electors."

The reference by the Committee to wilful perverseness is not in the form that it is a requisite that must be proved, for the requisite stated consists of positive and definite *facts* existing and established at the time of polling. Upon proof of such facts, in disregard of which the voter nevertheless votes for the candidate concerned, there would be a fair *inference* of wilful perverseness, but the latter is an inference or presumption following from the requisite of positive and definite facts

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and is not itself a requisite of proof. Indeed, as will presently be pointed out, proof of actual perverseness would involve a burden which in a case involving thousands of votes, would be impossible to discharge.

The view of the committee having been thus expressed in a case where the *facts* were not existing and established at the time of polling, it cannot be viewed as authority for the proposition that where the *law* is uncertain or difficult, the vote is saved. Indeed the committee set out as firmly established and settled law the proposition that where the voter is aware of the facts, he is aware of the legal deduction therefrom "however intricate and doubtful"; and nowhere does this case envisage any special departure in the sphere of election law from the ordinary fixed and settled maxim that ignorance of the law does not excuse. Moreover, wilful perverseness as an inference or presumption resulting from an ignorant or incorrect view of the *law* applicable to known *facts* was not referred to or contemplated.

I next refer to the case of *Drinkwater v. Deakin* [1], the second decision cited by Halsbury, and relied on also by Parker as supporting the *Clitheroe* case on the question of perverseness. One of the candidates contesting a Parliamentary election was in that case found guilty of corrupt practice in that on the day of nomination he gave leave to his tenants to kill rabbits on his estate for the purpose of influencing their votes at the election. On the morning of polling day, before the polling, the agent of the rival candidate gave notice to the electors that he believed the candidate had been guilty of this corrupt practice and that the candidate being thus disqualified, all votes given for him would be thrown away. The petitioner also claimed the seat on the ground that the votes given to the successful candidate had been thrown away with knowledge of the disqualification. It was held that although bribery by a candidate at an election renders his election void if he is found guilty of it on petition, no disqualification arose until after the candidate had been found guilty of bribery on petition and consequently that the petitioner was not entitled to the seat. Lord Coleridge, C.J. and Brett, J. (with the latter of whom Denman J. agreed) were at one on the question that though bribery at an election is an offence which renders that election void, it does not render the candidate incapable of being a candidate at that election. However the judgments of Lord Coleridge, C.J. and Brett, J. exhibit a difference of opinion in regard to the question whether votes are to be considered as having been thrown away when the disqualification is one which results from the application of uncertain legal principles to known facts. Lord Coleridge, C.J. seems not to have departed from a view which he expressed in the course of the argument in that case that voting for a man obviously and notoriously disqualified is a very different thing from voting for a man who proves to be disqualified after much doubt and argument upon the effect of complicated facts or legal inferences. Brett, J. however said, in a passage cited with approval by Akbar, J. in *Cooray v. de Zoysa* [2],

[1] *In re Launceston (1874) 20 L. T. 823* [2] *(1936) 41 N. L. R. 121 at 140.*

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" I accept that which seems to me to have been always admitted to be the law before the case of *Reg. v. Mayor of Tewkesbury*, viz. the proposition which I have expressed, as generally applicable to all cases where notice of the law as affecting any subject-matter is material, that is to say, where by the law, if certain facts exist incapacity exists, and where by the law, if the law were known to the elector, his vote would be thrown away if he persisted in voting for the disqualified candidate, *he cannot, if the facts exist to his knowledge, or if he have notice of the facts equivalent to knowledge, which by law produce incapacity for election in the candidate, render his vote valid by asserting that he did not know that the facts by law produced such incapacity, or that his vote would be thrown away if he voted for such candidate.*"

The view of Brett, J. must be considered to be the view of the Court in this case, for his view had the approval of Denman, J., thus making it the view of the majority of the Court. The case is thus strong authority that a voter knowing the facts must be taken to know the law applicable to those facts and hence sharply negatives any requirement that perverseness should be proved.

Cosling v. Veley [1], the third case cited in the third edition of Halsbury, held that " where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet does nothing but tenders his vote for him, he must be taken voluntarily to abstain from exercising his franchise ; and therefore however strongly he may dissent and in however strong terms he may express his dissent, he must be taken to assent to the election of the opposing and qualified candidate, for he will not take the only course by which it would be resisted, that is to help in the election of some other person."

This case went on to hold that if the disqualification depended upon a fact which may be unknown to the elector, he is entitled to notice and that if the disqualification be of the sort where notice is to be presumed none need be given, and contains no suggestion of a requirement of wilful perverseness. This case was approved of not only by Lord Coleridge, C.J. and Brett, J., despite their apparent difference of views in *Drinkwater v. Deakin*, but also more authoritatively in *Beresford-Hope v. Lady Sandhurst* to which I shall presently refer.

The fourth and last of this group of cases cited by Halsbury, *Claridge v. Evelyn* [2], was one holding that an infant cannot be appointed to the office of Clerk of a Court of Requests and holding votes given to him to have been thrown away. There is no suggestion in that case either of any requirement of wilful perverseness. As the first and second editions of Halsbury observe [3] this case falls within the principle of *Gosling v. Veley* which is cited in that work as authority for the proposition that votes would be considered thrown away if the disqualification is of a sort whereof notice is to be presumed.

[1] *(1847) 7 Q. B. 406.* [2] *(1821) 5B. & Ald. 81; 106 E. R. 1123.*
[3] *1st ed. Vol. XII p. 306 note (i) ; 2nd ed. Vol. XII p. 286 note (o).*

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It is thus evident that the cases cited are no authority for the proposition that perverseness is a *sine qua non* for votes to be considered thrown away ; and as between the different views set out in the third edition of Halsbury, as opposed to the first and second, the views set out in the first and second editions are certainly more in consonance with authority. Furthermore, as already pointed out, there are in the third edition itself statements apparently contradictory of the view therein expressed.

I move on now to the authorities cited in the two texts under examination, on the second proposition, that regarding the application of uncertain law to known facts. Of these I have already dealt with the *Clitheroe* case and *Drinkwater v. Deakin* and it remains to consider *Abingdon*, *Penryn* and *2nd Cheltenham*. These cases are respectively of the years 1775, 1819 and 1848. Ranged against these are the cases, cited by both Parker and the editor of the third edition of Halsbury, of *Wakefield* [1], *Belfast* [2], *Cork* [3], *Tavistock* [4], *2nd Horsham* [5] and *Leominster* [6]. It is scarcely necessary to refer in detail to each one of these cases ; suffice it to observe that the latter group of authorities is not only more numerous but also taken by and large more recent, all six authorities in the latter group being subsequent to 1825, as against one only in the former group. A special reference should also be made to the *Leominster* case where as in the present case conflicting views on the law were placed before the voters, in that a counter-notice was circulated containing the opinion of two barristers that the candidate was not disqualified. It was nevertheless held that votes given to him were thrown away and the candidate next on the poll was declared duly elected.

As an assessment of these competing lines of authority I cannot do better than refer to Brett J.'s statement in *Drinkwater v. Deakin* that the view admitted to be law in England, and with which *R. v. Mayor of Tewkesbury* was out of harmony, was that an assertion by the voter of ignorance of the legal effect of known facts is of no avail.

I now pass on to the case of *Cox v. Ambrose* relied on in both Parker and the third edition of Halsbury, which is the next decision calling for examination. In that case the respondent was a member of a firm interested in certain continuing contracts with a corporation of a borough, which contracts were unexpired at the time of a municipal election in that borough. Before offering himself as a candidate at the election he dissolved partnership and assigned all the interest in these contracts to the other partner, remaining liable however on bonds securing the due performance of the contracts. The respondent's candidature was objected to on the ground that his connection with these contracts was a matter of notoriety in the ward for which he was a candidate. It was held that the respondent was not qualified to be elected within the meaning of section 12 of the Municipal Corporations Act 1882 and that votes given to him were votes thrown away. There is a considerable

[1] (*1842*) *B. & Aust. 317.*
[2] (*1838*) *Falc. & F. 601.*
[3] (*1835*) *K. & O. 406.*
[4] (*1853*) *2 P.R. & D. 5.*
[5] (*1848*) *1 P. R. & D. 258.*
[6] (*1827*) *Rog. 1202.*

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difference between the reporting of the judgment in this case in the Law Journal and the Times Law Reports. In the Law Journal Reports [1] Mathew, J. is reported as having accepted as a complete statement of the law governing the matter before him, the view expressed by Brett, J. in *Drinkwater v. Deakin* that all that is necessary for considering votes as thrown away is that the facts should be known to the voters, on the basis of which the law determines that the candidate was incapacitated. The report in the Times Law Reports [2] however omits all reference to *Drinkwater v. Deakin*, and quotes Mathew J., as saying " I can suppose a case of reasonable difficulty when a disqualification of a candidate, though known, might not make a man's vote void . . . The test may be whether there is a reasonable difficulty as to the facts or as to the law" These statements are completely absent from the Law Journal Report of the judgment, which accepts Brett, J.'s views and goes on to state that in the particular case which Mathew, J. was considering there was no reasonable doubt about the law. As between the two versions of the judgment, the version contained in the Law Journal would perhaps be more authoritative, but even if one were to take both versions, one sees a strong adoption of the principle that a knowledge of the facts rather than of the legal result of these facts, is what is requisite ; and that having considered it " not necessary to go beyond the expressions made use of " by Brett, J. in *Drinkwater v. Deakin*, Mathew, J. goes on to express a passing opinion, not necessary to the decision he was making, that there may be cases of difficulty where a known disqualification may not render a vote void. The result then is that this decision would appear to reinforce the general principle stated by Brett, J. in *Drinkwater v. Deakin*, while the suggestion that a possible exception may arise where there is reasonable difficulty on the law is at best a view expressed obiter.

It is necessary now to deal with the case of the *Queen v. Mayor of Tewkesbury* [3] to which reference has already been made. One of the candidates at an election of Town Councillors was the Mayor, who was incapable of being elected by reason of his being Mayor and having acted as Returning Officer. Blackburn, J. and Lush, J. took the view that it was not enough to show that the voter knew the fact that the candidate was Mayor and Returning Officer but that there must be knowledge that he was disqualified in point of law as a candidate. Consequently, votes given for this candidate were held not to have been thrown away so as to make the election fall on the next candidate. There were undoubtedly in this case strong expressions of opinion by the Judges that those who voted for the disqualified candidate would not be treated as voting for a person not *in esse* unless there was an actual knowledge of his disqualification in law. Blackburn, J. stated that the earlier cases showed that in order to make the vote a nullity there must be wilful persistence against actual knowledge. He went on to observe that it had been plain to him to be inconsistent with either justice or common

[1] *(1891) 60 L. J. Q. B. 114 at 117.* [2] *7 T. L. R. 59 at 60.*
[3] *(1868) 3 L. R. Q. B. 629.*

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sense or common law to say that because these voters were aware of a certain circumstance, they were necessarily aware of the disqualification arising from that circumstance.

It is no doubt quite clear that the *Queen v. Mayor of Tewkesbury* is authority in favour of the contention of the respondent but it seems equally clear that the subsequent cases in England, as for instance *Drinkwater v. Deakin*, repeatedly mention the *Tewkesbury case* as being out of line with the law on the point as it had been understood hitherto ; and later cases as well represent a clear departure from the law as therein stated.

In *Etherington v. Wilson* [1], the disqualification in question was plain. Under a scheme sanctioned by the Court for a charity entitling a parish to select children for Christ's Hospital, it was provided that no child was eligible unless born in the parish or unless he or his parents had been parishioners of the parish. It was held that the word " parishioner " could not be applied to a person taking a small house in the parish temporarily for the mere purpose of obtaining a qualification. Malins, V.C. had no hesitation in concluding that the whole transaction was colourable and unfair and that the parent of the child was not a parishioner. On the question whether a re-election should be ordered, it was held that where an unqualified candidate was elected after notice to the electors of such disqualification, the votes were thrown away and the opposing candidate though having only a minority of votes was duly elected. Malins, V.C. referred to the *Tipperary* case as well as *Reg. v. Mayor of Tewkesbury* and distinguished the latter case by observing that the disqualification there was not as plain as in the case before him and that there the candidate was disqualified on a point of law which the electors might not have been supposed capable of appreciating. *Etherington v. Wilson* was thus not a case of a disqualification involving complicated or uncertain law, and was in fact a case where votes were considered thrown away and the candidate with a minority of votes awarded the seat, in consequence of a disqualification which was plain.

Hobbs v. Morey [2] is the last remaining case, cited on behalf of the respondent, which must be examined. In that case both at the time of his nomination and of his election the candidate was disqualified by reason of his interest in a contract with the Council. However the disqualification was not apparent on the face of the nomination paper and no notice was alleged to the electorate of this disqualification. It was therefore held that the votes given for him could not be regarded as thrown away and that the petitioner could not claim the seat. It will be seen that this case turns simply on the absence of notice to the electors in a case where the disqualification was not manifest.

It thus becomes apparent again upon a close examination of this body of case law that it affords little support for the contention that where the facts grounding the disqualification are definite and established, the

[1] *(1875) L. R. 20 Eq. 606.* [2] *(1904) 1 K. B. 74.*

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votes cast for a disqualified candidate are saved by the sole circumstance that the law applicable to such facts is difficult or uncertain. On this question, as on that of perverseness, the views stated by the majority of the text writers would appear to be preferable—a conclusion in which I am strengthened by the fact that their view is confirmed by the authoritative decisions in *Lady Sandhurst's* case and in the case of *Lord Stansgate*, to which I shall presently refer.

Before I leave this topic it may also be pertinent to observe, with the greatest respect, that another proposition contained in the third edition of Halsbury though not in the earlier editions, in regard to the disqualification of a Peer to take his seat in the House of Commons, was proved in *Lord Stansgate's* case to be incorrect. Here too there has been a departure in the third edition from the text of the earlier edition and the departure has been authoritatively pronounced to be incorrect. This observation is not in any way meant however to detract from the very great authority which undoubtedly attaches to Halsbury's exposition of the law of England in all editions, but with much respect I prefer, for the reasons I have stated, to be guided on the matter with which we are concerned by the first and second rather than by the third edition. Moreover, the difference in the statement of the law on this topic in the third edition was not effected in consequence of any development of the law between the second and third editions but rather in consequence of a re-arrangement of the work by the learned editor of the third edition. On this topic there were no decisions of significance between these two editions, and the case of *Lord Stansgate* was in fact decided after the third edition. There is therefore no reason for considering that the law on this topic as stated in the second edition had in any way been altered by the date of the third edition.

Having said so much in regard to the text writers and the earlier cases, I pass now to the two later decisions by virtue of which the principles governing cases such as the present have now become in the English law the subject of settled authority. These cases are *Beresford-Hope v. Lady Sandhurst* [1] and *In re the Parliamentary Election for Bristol South-East*.[2]

The decision of six Judges of the Court of Appeal in the first of these cases is now treated as the leading authority on the question of the circumstances in which votes given to a disqualified candidate will be considered as having been thrown away, and was unhesitatingly accepted as binding in the second, which is in fact the most recent English decision, subsequent even to the third edition of Halsbury.

Learned Counsel appearing for the respondent has sought to distinguish these two cases on the basis that in the case of *Lady Sandhurst* as well as in the case of *Bristol South-East*, the disqualifications were apparent and were based on matters of fact. In the former case the disqualification arose from the fact that the candidate was a woman and in the latter case

[1] (*1889*) *23 Q. B. D. 79, C. A.* [2] (*1964*) *2 Q. B. D. 257.*

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from the fact that the candidate was a peer. It was submitted therefore that votes cast for candidates who were so obviously disqualified could appropriately be considered to be votes thrown away and that these two decisions are inapplicable to the present case inasmuch as the present case involves not merely a question of fact but an application of legal principles to a question of fact. The question of fact in the present case is the report of the three Judges to His Excellency but it is said that this fact cannot, so to speak, be disentangled from the legal question of the validity of the report of the three Judges, and differs in this respect from such obvious disqualifications as those stemming from sex or nobility. This argument is connected with the view that there is a requirement of wilful perverseness in the elector and it is said that when the law is doubtful or difficult no perverseness exists. It is said further that the concept of wilful perverseness is inextricably interwoven with the attitude of a Court in deciding whether to seat a defeated candidate.

It will however be seen presently that the two cases of *Lady Sandhurst* and *Bristol South-East* were not cases where the law applicable to the facts was plain and free from doubt. In both these cases the disqualifications though arising from status resulted not merely from a known question of fact namely that the one candidate was a woman and the other a peer, but from the application to that known state of facts of difficult considerations of law, the decision upon which was well beyond the capacity of the average lay voter.

I shall deal first with the case of *Lady Sandhurst.*

Lady Sandhurst offered herself as a candidate at an election of members of a County Council under the Local Government Act of 1888. She was duly elected but was unseated on a petition on the ground that being a woman she was disqualified. The law relating to the question whether women were disqualified from being councillors was discussed at length by Stephen, J., the Election Judge. This discussion involved *inter alia* the construction of several Acts among which were the Local Government Act of 1888, The Municipal Corporations Act of 1882, The Municipal Corporations Act of 1835, Act 32 and 33 Victoria ch. 55, 5 and 6 Wm 4, ch. 76. Lady Sandhurst's disqualification was therefore not such as would have been manifest and apparent to all the electors although it was from a manifest fact that it arose. Indeed the application of the law to this known fact was a matter of considerable difficulty, and one gathers from the observations of Stephen J. that far from the legal disqualification being apparent and obvious, the question whether she was indeed incapacitated was one of much discussion at the time. As Stephen, J. observed, "the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification."

Lord Coleridge observed that if the fact exists which creates an incapacity, and it is known and must be known to the person voting for the incapacitated candidate, he had no hesitation in deciding that votes

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so given were thrown away. Lord Esher M.R. thought that the case was absolutely determined by the expression of both Judges in *Drinkwater v. Deakin*. Lindley L. J. observed that once the facts were told to the elector of the incapacity of being elected or where he must be taken to know them and really does know them, *the question as to whether he really knows the law on the subject or not is another thing*. Lopes L. J. thought that the case was well within the decision in *Drinkwater v. Deakin*. Cotton L.J. and Fry L.J. stated that they had nothing to add on this point.

More than one judgment examines the statutory provisions referred to and the questions of interpretation involved. We thus see that a bench comprising judges of the highest authority considered that the question whether votes were thrown away was concluded by the circumstance that the voters were aware of the facts from which the disqualification resulted, quite apart from the question of their knowledge of the law applicable to those facts.

Coming now to the case of *Bristol South-East*, this matter arose upon the attempt of a member of Parliament who succeeded to the peerage upon his father's death to contest an election to the House of Commons. The election was rendered necessary because the House had taken the view that the member had ceased to be a member and was disqualified from membership by reason of his automatic succession to the peerage.

In this case as well, considerable legal argument was involved. The position of the candidate, Lord Stansgate, was that there was no automatic disqualification in this case, his contention being that the disqualification arose only upon receipt of a writ of summons to attend the House of Lords. He had refrained from applying for such a writ and contended that he was entitled to renounce his peerage. These contentions of the candidate called for a careful and detailed examination of his disability in the light of numerous historical and legal considerations, including also the difficult question of the right of a peer to renounce his peerage. The judgment as reported in the Law Reports shows that a consideration of these legal and historical questions required around fifteen pages of discussion in the judgment and that since much could have been said in support of either view, the answer was certainly not so obvious as to render it manifest to all electors.

It is also significant that as in the present case, support for the candidate's contention that he was qualified was based on high authority, for Lord Stansgate's claim was based *inter alia* upon a statement in the third edition of Halsbury's Laws of England. In this edition, though not, as the judgment points out, in the earlier edition, it is stated that a peer of Parliament is legally incapable of voting at a Parliamentary election even though his name may have been placed upon the register without objection, and that the writ of summons to the House of Lords must be issued before the disqualification attached.

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It will be seen then that the question raised by Lord Stansgate was not without legal difficulty although the fact of his being entitled to the peerage was plain and known to all. In that case therefore, as in the case of Lady Sandhurst, we meet the situation which we meet in the present case, of the application of uncertain legal principles to a known or notified state of facts, and despite the circumstance that the candidate's legal contention was, to say the least, arguable, the Court treated the votes given to the candidate whose qualification was in doubt, as votes thrown away.

This then being the state of the English law according to its latest exposition and application in that country, I do not see room for any departure therefrom in our law, based as it is on the same principles. Indeed it is significant to note that in *Bristol South-East* the Court having, after the elaborate discussion already referred to, found against Lord Stansgate in regard to his right to sit, and having satisfied itself that notice of the alleged disqualification had been given to the electors, proceeded without further question to declare that the votes cast for Lord Stansgate were thrown away and that the other candidate was duly elected. The Court expressly stated that it was bound by the decision in *Beresford-Hope v. Lady Sandhurst* and that it *had no option* but to make the declarations referred to.

On the basis of the law as examined by me this Court too has no option but to make the declaration which is sought.

Some light is thrown on the matter under discussion by certain Irish decisions to which I shall now refer. In the *Tipperary case* [1] a person convicted of treason and felony contested a seat. This candidate had been sentenced to 14 years' transportation and was alleged to have become thereafter a naturalised American subject and to be an alien. There were strong observations in that case by Mr. Justice Lawson to the effect that " . . . we have decided in the case of *Trench v. Nolan* [2] acting on all the authorities, that votes given to a candidate who is disqualified after notice of that disqualification had been given, are thrown away, and I must say if a case were wanted to show the soundness and propriety of that decision it would be the present case ; because if such were not the law, persons who were disposed to set the law at defiance might select candidate after candidate from a list of disqualified persons, disqualified either by alienage or conviction for felony, and the properly qualified candidate although in a minority, could not be seated, but there should be a new election. Therefore according to the decision in *Trench v. Nolan* the electors having had notice of the disqualification, the necessary result must follow in this which followed in that case, namely that the properly qualified candidate should be declared to be duly elected. . . . Both on the authority of *Trench v. Nolan* and of *Drinkwater v. Deakin*, when once we arrive at the

[1] *3 O'Malley and Hardcastle, p. 19.* [2] *Irish Reports 6 Common Law, 464.*

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conclusion that there were these two disqualifications and notice to the electors, it necessarily follows that the other candidate must be declared duly elected." [1]

In the *Fermanagh and South Tyrone case* [2] the petition was brought on the ground that the candidate was incapable of being elected a member of Parliament under the terms of the Forfeiture Act of 1870 and the seat was claimed by the unsuccessful candidate on the ground that votes cast with knowledge of the disqualification were votes thrown away and that the unsuccessful candidate was entitled to the seat. Lords Justices Black and Sheil of the High Court of Northern Ireland held that it was sufficient to prove only that the elector had notice of the fact of disqualification and that *it was not necessary to show that the elector was aware of the legal result which such disqualification entailed.* In that case the Court held that the disqualification was in any event a matter of notoriety, the successful candidate being still under a ten year sentence for treason-felony (see also the Irish case referred to in 1955 L. Jo 482). It is of interest to refer to a comment in the Law Journal on the *Fermanagh case* [3] where it is observed that the supporters of the disqualified candidate had determined to nominate the same candidate again and that he would possibly be elected once more, so that the same issue may therefore arise all over again *ad infinitum* with farcical results. This observation focuses attention on the damage which would result to the processes of Parliamentary election were any other view of the law to be entertained. With special reference to the facts of the present case there is nothing in theory to prevent the occurrence of the same situation, for the dictum of Wijeyewardene, A.C.J. could repeatedly be invoked as the view of three Judges which casts a doubt on the legal validity of the report of three other Judges despite any decision of three Judges to the contrary.

The Irish cases serve to underline the considerations of public policy underlying this rule and also to show the adoption by that system as well of the principle that knowledge of the facts giving rise to the disqualification without the necessity for knowledge of the legal consequences flowing from those facts, is all that is required for votes to be treated as thrown away, and for the seat to be awarded to the unsuccessful candidate.

I pass now to an examination of section 85 (1) (*f*) which sets out the circumstances in which votes are to be struck off upon a scrutiny. For the reason stated by My Lord the Chief Justice, with which I respectfully agree, the relief of claiming the seat for an unsuccessful candidate is not necessarily sought through the means of a scrutiny and a scrutiny may well be totally unnecessary in cases such as the present, where the votes sought to be struck out are not individual votes but a whole class of votes. It is clear however that in drafting section 85 (1) (*f*) the draftsman was attempting to follow the English law in regard to votes which would

[1] *O'Malley and Hardcastle, p. 44.* [2] *(1955) L. J. 594.*

[3] *(1955) L. J. 482.*

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be struck off. It is necessary therefore to examine section 85 (1) (*f*) if only for the reason that it is based upon the English law as understood by the draftsman and seems to reproduce accurately the English law on the question of the votes which will be considered as having been thrown away, where the seat is sought for the second candidate.

Section 85 (1) (*f*) may be analysed as dealing with five distinct cases of votes given for a disqualified candidate by a voter, namely—

(*a*) knowing that the candidate was disqualified ; or
(*b*) knowing the facts causing the disqualification ; or
(*c*) after sufficient public notice of the disqualification ; or
(*d*) when the disqualification was notorious ; or
(*e*) when the facts causing the disqualification were notorious.

Certain circumstances become apparent upon this analysis, which are of assistance in this matter.

It will be seen in the first place that the sub-section draws a distinction between the disqualification and the facts causing the disqualification, for at two points within the sub-section the distinction is drawn between the disqualification and the facts causing it. Applying to this phraseology the facts of the present case, the fact causing the disqualification was the report of the three Judges and the publication thereof in the Government Gazette. The disqualification was the result of the application of the law contained in section 82D to these facts. All that is required, for the throwing away of votes to ensue, is knowledge of the facts grounding the disqualification without the necessity for a knowledge of the application of the law to those facts. Hence, if one were considering a case under section 85 (1) (*f*) the fact that difficult or uncertain principles of law had to be applied to the facts would be no ground for refusing to strike off a vote.

A second comment upon this section is that, apart from cases where there is actual knowledge, knowledge would appear to be presumed from sufficient public notice or from notoriety. It follows therefore that even where there is no notoriety of the facts, as where they are not manifest and apparent to all, the absence of such notoriety is made good by sufficient public notice and when the latter is given the case is elevated to a level of parity with circumstances of notoriety such as those arising from status.

Yet another circumstance which emerges from the section is that it is totally lacking in any requirement of wilful perverseness on the part of the voters as a pre-requisite to votes being considered thrown away—a conclusion which once more accords with the conclusions I have reached in regard to the English law on this matter.

Finally, this judgment would be incomplete without a reference to the only other case decided in Ceylon which has considered the English decisions relating to the award of a seat to an unsuccessful candidate.

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This was the case of *Cooray v. de Zoysa* [1] where Akbar, J. analysed section 82 (1) (*f*) of the Ceylon (State Council Elections) Order-in-Council which corresponds to section 85 (1) (*f*) of the Parliamentary Elections Order-in-Council. In this case objection was taken to the election of a candidate on the ground that he enjoyed a contract made with the Principal of the Ceylon University College for or on account of public service within the meaning of section 9 (*d*) of the Ceylon (State Council) Order-in-Council of 1931. The petitioner also claimed the seat under section 77 (*d*) of the Ceylon (State Council Elections) Order-in-Council. It was held by Akbar, J. that the petitioner was bound to prove common knowledge on the part of the voters of the fact of the contract with the Government and not merely knowledge of the fact that the respondent was a lecturer at the University College, and that the required knowledge was not proved. He however referred to *Drinkwater v. Deakin* and *Beresford-Hope v. Lady Sandhurst* as the leading English cases on the subject and cited *in extenso* the dissent of Brett, J. in *Drinkwater v. Deakin* from the view expressed in *Queen v. Mayor of Tewkesbury*. Akbar, J. concentrated however on the question whether the disqualification was based on a known incapacity, for in the case before him the petitioner had failed to prove common knowledge on the part of the voters of the fact that the respondent had a contract with the Government. It was this fact alone from which disqualification resulted, and a mere knowledge of the fact that the respondent was a lecturer of the University College was insufficient.

It was not necessary therefore for Akbar, J. to give his mind to the specific questions we are now considering namely whether perverseness was required on the part of the voters, or whether knowledge was required of the legal consequences as distinct from the facts giving rise to these legal consequences. He did however draw attention to the law as stated in Rogers according to which knowledge either of the disqualification or of the facts creating the disqualification is stated to result in the voter throwing away his vote ; and he referred also to the fact that Article 82 (1) (*f*) of the State Council Elections Order-in-Council dealt with five different types of cases, as outlined by me in regard to section 85 (1) (*f*) of the Parliamentary Elections Order-in-Council.

In the result then, in the only other matter in which our Courts reviewed the principles governing the grant of a seat to an unsuccessful candidate, the general principles applicable have been stated in the sense in which I have set them out in this judgment, but no further guidance can be derived from it as there was no special consideration of the particular matters which concern us here.

It is evident from the foregoing discussion that under the law as it now stands this Court has no alternative but to allow this appeal and award the seat to the unsuccessful candidate. The weight of opinion on the part of eminent text writers, the preponderance of earlier English authority, the conclusiveness of the most recent decisions, the identical law as

[1] *(1936) 41 N. L. R. 121.*

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applied in Ireland and an analysis of section 85 (1) (*f*) are all lines of approach converging towards this one result. Moreover this conclusion is fully in accord with the respect which must be shown to Parliament and to the processes by which it is constituted.

The duty devolves in a special way upon the Courts of ensuring, through an insistence thereon in the matters that come before them, that election procedure be kept inviolate and its sanctity preserved ; and it is their duty whenever possible, zealously to safeguard the sovereignty of Parliament and all that is incidental thereto. Essential to this result is the proper conduct of elections, and essential to the proper conduct of elections is the requirement that only candidates qualified in law to be Members of Parliament should offer themselves to the electorate. Those who already labour under a disqualification which by law prevents them from taking their seat in Parliament go to the polls at their peril and those who vote for them with knowledge of the facts grounding such a disqualification record their votes in vain. This is a principle now ingrained in the law relating to elections and ingrained for the very good reason that the dignity and decorum which must attend the Parliamentary process are at all costs to be preserved. A candidate labouring under a disqualification resulting from known facts may else, as was observed in the *Tipperary case*, offer himself repeatedly for election to an electorate which accepts him again and again, only to be declared disqualified on each occasion by the Courts. The Parliamentary process cannot thus be permitted to be brought into disrepute or exposed to ridicule, nor can the Courts countenance the possibility, inherent in such a situation, of a constituency being thus kept indefinitely without proper representation in Parliament at the will of persons inclined for reasons of their own to resort to such conduct. Such possibilities should not be permitted to mar the procedures essential to the proper constitution of Parliament ; nor does a candidate so offering himself or a voter so exercising his franchise display that respect properly due and owing to the sovereign legislature.

Moreover, once a doubt cast upon the legal effect of known facts is permitted to constitute a field of exemption to the principle that votes are thrown away, where does one draw the line between the degrees of doubt which will and will not produce this result ? Will the standard by which this is determined be purely objective or should it not be subjective, depending on the state of mind of the individual voter ? What may raise a reasonable doubt in the mind of an unintelligent or uneducated voter may raise none at all in the mind of one of intelligence or education ; or, conversely, what seems unreasonable to an unintelligent or uneducated voter may well carry conviction to a mind more alert or cultivated. So also a doubt which seems unreasonable to a Court of law may well trouble the mind of an average voter, while that which leaves the latter's mind unruffled may well produce serious agitation in the

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mind of a Court. A Court conducting an investigation into this matter may thus be obliged to pursue an interminable series of individual inquiries.

All these difficulties are stirred up by an abandonment of the principle which holds sway in so many other spheres of the law, that ignorance of the law does not excuse. There is no ground of precedent or principle which renders this maxim less applicable in this sphere of the law, than in any other. We enter upon troubled waters indeed if we admit of varying standards of certainty and varying degrees of doubt in the application of so simple a principle and one which has through the experience of ages earned so high a place among the maxims of the law.

It will thus be seen that the law leaves no course open to us but to conclude that votes cast for the disqualified candidate, cast as they were with knowledge of the existing, certain and established facts on which that disqualification was based, must be regarded as thrown away ; and that the seat must be awarded to the qualified candidate who has polled the largest number of lawful votes.

I agree therefore with my Lord the Chief Justice that this appeal should be allowed, and with the order as to costs which he has proposed.

Appeal allowed.

1969 *Present :* **Sirimane, J.**

K. JAYARATNE, Appellant, *and* INSPECTOR OF POLICE, MAHARAGAMA, Respondent

S. C. 1074/68—M. C. Colombo South, 92647/B

Criminal Procedure Code—Section 152 (3)—Assumption of jurisdiction thereunder—Sentence—Quantum.

Where a Magistrate who is also a District Judge assumes jurisdiction under section 152 (3) of the Criminal Procedure Code for the purpose of trying a charge which is triable by a District Court as well as by a Magistrate's Court, he has no power to impose a sentence exceeding that which a Magistrate's Court can impose.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

Colvin R. de Silva with *I. S. de Silva* and *S. S. Wijeyeratne*, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

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May 27, 1969. SIRIMANE, J.—

The appellant has been convicted on five counts. On the first count he has been convicted of putting a woman in fear in order to commit extortion under Section 374 of the Penal Code. On the 2nd count he has been convicted of attempting to commit extortion under Section 373/490. On the 3rd and 4th counts he has been convicted of causing simple hurt under Section 314 and on the 5th count of committing mischief under Section 410.

I see no reason to interfere with the convictions which are amply supported by the evidence.

In regard to the sentence however, it was pointed out that the learned Magistrate has imposed a sentence of 2 years' rigorous imprisonment on the 1st count. This is a charge which is triable by a District Court as well as by a Magistrate's Court. The learned Magistrate assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code apparently for the purpose of trying the charge under Section 373/490. Section 152 (3) empowers a Magistrate who is also a District Judge to impose a sentence which a District Court may impose where the offence appears to be one triable by a District Court and *not summarily* by a Magistrate. In regard to the conviction under Section 374, therefore, the Magistrate had power only to impose a sentence of 6 months' rigorous imprisonment.

I reduce the sentence passed on the 1st count to 6 months' rigorous imprisonment. The other sentences will stand. In the result the appellant will serve 1 year's rigorous imprisonment. Subject to this variation, the appeal is dismissed.

Sentence reduced.

1967 *Present :* **Alles, J.**

K. S. PANDITARATNE, Petitioner, *and* THE ASSISTANT SUPERINTENDENT OF POLICE, KEGALLE, and another, Respondents

S. C. 343/67—Application for the issue of a Mandate in the nature of a Writ of Mandamus

Criminal Procedure Code, as amended by Act No. 42 of 1961—Sections 121 (1), 122 (1), 122 A, 148 (1) (b)—Cognizable offence committed against a police officer—Arrest of offender under Police Ordinance, s. 65—Information given or recorded, and statements made during investigation, in respect of the offence—Right of accused to obtain certified copies—First information—Different forms of it.

When proceedings under section 148 (1) (*b*) of the Criminal Procedure Code have been instituted in a Magistrate's Court in respect of a cognizable offence committed against a police officer, the fact that the offence was committed

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against a police officer does not exempt the " proper authority ", when application is made to him under section 122A of the Criminal Procedure Code, from his duty to furnish to the accused or his proctor certified copies of information given or recorded and statements made in terms of sections 121 (1) and 122 (1) respectively of the Criminal Procedure Code.

The information under section 121 (1) of the Criminal Procedure Code may be obtained in several ways. It may be made orally and reduced to writing, or it may be made in writing in the first instance, or it may be communicated over the telephone. Although a police officer who is present at the time of the commission of a cognizable offence against him is entitled to arrest the offender under section 65 of the Police Ordinance, he would be giving information under section 121 (1) of the Criminal Procedure Code when he takes the offender to the Police Station and informs the authorities of the offence.

APPLICATION for a writ of *mandamus* against the Assistant Superintendent of Police, Kegalle, and the Officer-in-Charge of the Police Station, Kegalle.

Nimal Senanayake, with *Dharmasiri Senanayake* and *Gemunu Seneviratne*, for the petitioner.

V. S. A. Pullenayegum, Crown Counsel, with *Ranjit Abeysuriya*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 7, 1967. ALLES, J.—

This is an application for a mandate in the nature of a writ of mandamus by the petitioner against whom proceedings have been instituted under section 148 (1) (*b*) of the Criminal Procedure Code in the Magistrate's Court of Kegalle. The 1st respondent to the application is the Assistant Superintendent of Police, Kegalle, and the 2nd respondent the Officer in charge of the Kegalle Police Station. In his application, the petitioner prays for the intervention of this Court and seeks an order directing the respondents to furnish him or his proctor with certified copies of information given and statements made in terms of section 121 (1) and 122 (1) respectively of the Criminal Procedure Code in respect of cases Nos. 68125, 68267 and 68269 filed by the Inspector of Crimes, Kegalle, against the petitioner. In M. C. Kegalle 68125, the Police report under section 148 (1) (*b*) of the Code alleges that the petitioner intentionally insulted M. P. W. Munasinghe, Inspector of Police, Kegalle, an offence punishable under section 484 of the Penal Code ; that he used criminal force on the said Munasinghe (section 344 of the Code) ; and that he offered resistance to the apprehension of himself by Munasinghe (section 220A). In M. C. Kegalle 68267, the report alleges that the petitioner caused annoyance to N. B. Cyril Gunadasa, while being in a state of intoxication (section 488 of the Code), insulted the said Gunadasa,

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(section 484) and committed criminal intimidation on Gunadasa (section 488). In M. C. Kegalle 68269, the report alleges the commission of offences under section 314 of the Penal Code by the petitioner in respect of hurt caused to P. S. Pietersz and P. C. Karunadasa of the Kegalle Police. Except for the offence of Insult under section 484, the other offences are cognizable offences.

In order to appreciate the question of law that has been argued in this application it is necessary to briefly recount the circumstances that led to the institution of criminal proceedings against the petitioner.

According to the affidavit of the 2nd respondent between 8 and 8.30 p.m. on 15.6.67, several abusive telephone calls were received at the Kegalle Police Station from the petitioner. It is not known how the Police officers were aware that the calls originated from the petitioner, but according to the 2nd respondent the calls were traced to the Kegalle Rest House. A Police party, among whom were Inspector Munasinghe and P. S. Pietersz, was sent to the Rest House to make investigations. When the Police party arrived at the Rest House, the petitioner, who was the worse for liquor, abused the Police officers in obscene language and used criminal force on them. He also caused annoyance to Gunadasa who was apparently a visitor to the Rest House and insulted him. The petitioner was thereupon arrested and taken to the Kegalle Police Station and subsequently criminal proceedings were instituted against him.

In his affidavit, the 2nd respondent maintains that no information under section 121 (1) of the Criminal Procedure Code was given to any Police officer nor recorded by any Police officer in respect of the offences which the petitioner is alleged to have committed and that no proceedings have been instituted in the Magistrate's Court in pursuance of any such information. Consequently it has been submitted by Crown Counsel that this is not a case to which the provisions of section 122A of the Criminal Procedure Code applied. This section, which was introduced as an amendment to the Code by Act No. 42 of 1961, enabled the accused or his proctor to obtain from the proper authority a certified copy of any information given under section 121 (1) of the Code consequent on which proceedings are instituted against any person and also any statement under section 122 (1) by the person against whom or in respect of whom the accused is alleged to have committed an offence.

Section 121 (1) contemplates the first information given orally or in writing to an officer in charge of a Police Station and is usually the basis for the commencement of proceedings under Chapter XII of the Code.

I am not prepared to accept the bare statement of the 2nd respondent that "no information under section 121 (1) of the Criminal Procedure Code was given to any police officer nor recorded by any police officer at the Kegalle Police Station in respect of the offences with which the petitioner had been charged and that no proceedings have been instituted

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in the Magistrate's Court in pursuance of any such information". The 2nd respondent in his affidavit has admitted that the petitioner did make an application for certified extracts of the information under section 121 (1) and the statements recorded under section 121 (2) and that the certified copies applied for cannot be issued to the petitioner as he was not entitled to obtain them. One can only assume from the averments in the affidavits of the petitioner and the 2nd respondent that the position taken up by the 2nd respondent is that certain statements were recorded by the Police in the course of the investigation but that the petitioner was not entitled in law to obtain them in spite of the provisions of section 122A of the Criminal Procedure Code. Indeed, having regard to the nature of the charges preferred against the petitioner in the 148 (1) (*b*) reports one can reasonably assume that statements must have been made by the persons against whom or in respect of whom the petitioner is alleged to have committed the cognizable offences contained in the reports. It is idle to suggest that Inspector Munasinghe did not make a record of the manner in which the petitioner used criminal force on him and intentionally offered resistance or illegal obstruction to his lawful apprehension or that P. S. Pietersz and P. C. Karunadasa did not give an account of the commission of the cognizable offence of causing hurt of which they were the victims or that Gunadasa's statement of the manner in which the petitioner conducted himself to his annoyance while being in a state of intoxication was not a matter of record. Their statements may indeed be the first information of the commission of cognizable offences under section 121 (1). If they were not, then one must assume that they were statements recorded under section 122 (1) of the Code and under section 122A the petitioner would be legally entitled to obtain these statements, quite independent of whether information was given under section 121 (1) or not.

Unfortunately, this Court has been left completely in the dark as to what transpired at the Police Station after the petitioner was brought to the Station and one is left in the realm of speculative inquiry as to the steps taken by the Police before they filed the reports under section 148 (1) (*b*) of the Code. These reports are made entirely on the responsibility of the police officers and after due inquiry and investigation. The information under section 121 (1) may be obtained in several ways. It may be made orally and reduced to writing or it may be made in writing in the first instance, or the information may be communicated over the telephone. A Police officer who is present at the time of the commission of a cognizable offence has no doubt the right to arrest the offender under section 65 of the Police Ordinance, but when he takes the offender to the Station and informs the authorities of the offender's lapse, he would be giving information under section 121 (1) of the Code. Section 121 (1) does not make an exception in the case of Police officers. I cannot envisage any situation in which a report made under section 148 (1) (*b*) of the Code is not preceded by some information given in terms of section 121 (1) and after statements are recorded under section 122 (1) of the Criminal Procedure Code.

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I am not prepared to act on the averment of the 2nd respondent in his affidavit that the petitioner is not entitled to the certified extracts called for by his letter of 4th August 1967 (marked 'C'). Whether he is entitled to them or not is a question of law which must be left for the determination of this Court.

The extracts called for by the petitioner have not been furnished to this Court in order that I may be satisfied that the assertion in the 2nd respondent's affidavit that the petitioner is not entitled to the extracts called for in his letter is a claim that can be justified. The amendment to the Criminal Procedure Code by section 122A has expressly provided that the accused is entitled in law to obtain the information given under section 121 (1) of the Code and the statements made under section 122 (1) by the persons against whom or in respect of whom the accused is alleged to have committed an offence. Justice requires that the Courts should be vigilant that the legal rights of an accused person are not circumvented by any mistaken view of the law by over zealous officials. I therefore direct the respondents to forward to the Registrar of this Court on or before 15th December the Information Book of the Kegalle Police Station containing all investigations made by the Police in regard to the reports made by them under section 148 (1) (*b*) of the Criminal Procedure Code in Cases Nos. 68125, 68267 and 68269 of the Magistrate's Court of Kegalle together with certified copies of all statements recorded by them in the course of their investigations.

After a perusal of the relevant documents, I will make a final order whether the application of the petitioner is one that is entitled to succeed or not.

December 20, 1967.—

When I delivered my order on 7th December 1967, I stated that I would make my final order on this application after a perusal of the relevant documents.

I have now perused the notes of the police investigation in relation to this application. According to these notes the Police party consisting of S. I. Munasinghe, P. S. Pietersz and P. C. Karunadasa went to the Kegalle Rest House at 9.40 p.m. to enquire into the non-cognizable offence of Insult alleged against the petitioner. On arrival at the Rest House the petitioner again commenced to abuse the Police officers and offered resistance to his arrest. He was then forcibly taken into the police land rover and while the vehicle was being driven to the police station he kicked Police officers Pietersz and Karunadasa causing hurt to them. S. I. Munasinghe, when he returned to the Station at 10.05 p.m., made his observations as to how the petitioner resisted arrest and kicked the police officers. These observations form the subject matter of the 148 (1) (*b*) report in Case No. 68125 and make mention of the cognizable offences under ss. 344 and 220A of the Penal Code. These observations

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would constitute the information relating to the commission of the cognizable offences referred to in the report and recorded under s. 121 (1) of the Criminal Procedure Code. The petitioner would be entitled to this information.

At 10.55 p.m. after having the petitioner examined by the Doctor and brought back to the Station, S. I. Munasinghe sent P. S. Pietersz to the Rest House to conduct enquiries. On Pietersz's arrival at 11.10 p.m. he recorded the statement of Cyril Gunadasa. In his statement Gunadasa described the manner in which the petitioner caused annoyance to him while being in a state of intoxication (s. 488 of the Penal Code) and how he was criminally intimidated (s. 486). These offences form the subject of the 148 (1) (*b*) report in M. C. Kegalle 68267. The offence under s. 488 is a cognizable offence alleged to have been committed before the Police party arrived at the Rest House and would constitute the first information made under s. 121(1). The petitioner would be entitled to a certified copy of Gunadasa's statement.

P. S. Pietersz and P. C. Karunadasa, the victims of the kicking, have made statements as to the manner in which the petitioner is alleged to have caused hurt to them and which form the subject matter of the 148 (1) (*b*) report to Court in M. C. Kegalle 68269. The petitioner would be entitled to the statements of these two police officers in relation to the offences under s. 314 alleged against the petitioner.

I am therefore of the view that the petitioner is entitled to succeed in his application for the issue to him or his proctor certified copies of the following documents in the under-mentioned cases :—

(*a*) The recorded observations of S. I. Munasinghe made at 10.05 p.m. on 15.6.67 commencing with the words, "At the Rest House with the Police party" and ending with the words, "Inside the Land Rover he violently struggled and started kicking the Police Sergeant and the party who were in the Land Rover".

(M. C. Kegalle 68125)

(*b*) The statement of Naragala Vidanalage Cyril Gunadasa made to P. S. Pietersz at 11.10 p.m. at the Rest House commencing with the words, "He dialled on three or four occasions" and ending with the words, "His conduct in the Rest House was such that it caused annoyance to me as well as others and visitors to the Rest House".

(M. C. Kegalle 68267)

(*c*) The statement of P. C. 2042 Karunadasa recorded by P. S. Pietersz on 16.6.67 commencing with the words, "On 15.6.67 I accompanied I. P. Munasinghe and P. S. Pietersz to the Rest House" and ending with the words, "I received several kicks all over my body".

(M. C. Kegalle 68269)

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(*d*) The statement of P. S. Pietersz recorded by S. I. Munasinghe commencing with the words, "At about 9.55 p.m. I accompanied I. P. Munasinghe and P. C. 2042 and arrived at the Rest House at 10 p.m." and ending with the words, "I received several kicks on my body".

(M. C. Kegalle 68269)

The application of the petitioner is allowed with costs which I fix at Rs. 105.

Application allowed.

[COLONIAL COURT OF ADMIRALTY OF CEYLON]

1969 *Present :* **Siva Supramaniam, J.**

P. J. DAVID (carrying on business under the name and style of the Mobile Marine Engineering Co.) *v.* THE SHIP " PERIOLOS "

ACTION *in rem* No. 1 OF 1968

Motion by the Receiver of Wrecks, Colombo

Admiralty Court—Damaged ship which is not under the immediate control of a Master or crew—Forcible seizure of it by receiver of wrecks—Legality—Meaning of term " wreck "—Wrecks and Salvage Ordinance (Cap. 267 of Legislative Enactments, 1938 edn.), ss. 3 to 10, 12 to 15, 22 (b), 23, 24—Whether action in rem *lies against the ship for value of necessaries supplied.*

The receiver of wrecks, purporting to act under sections 5 and 14 of the Wrecks and Salvage Ordinance, took forcible possession of a damaged ship which was grounded on a reef and compelled the agents of the owners of the ship to deliver to him the keys of the cabins and other rooms in the ship. It was contended on his behalf that his action was justified on the ground that the ship was a " wreck ".

Held, that the ship was not property that was cast ashore and was not " wreck " within the meaning of the Wrecks and Salvage Ordinance. The receiver, therefore, had no right to take possession of the ship. Even if the term " wreck " could be given a wider meaning so as to include a totally damaged ship, there was no provision in the Ordinance to take forcible possession of the ship after it had been grounded and had become non-navigable.

Held further, that an action *in rem* for the value of necessaries supplied lies, and a warrant of arrest can issue, against a ship which is totally disabled and which is not under the immediate control of a Master or crew.

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ORDER made in the course of an action *in rem* instituted by the plaintiff against the motor vessel "Periolos".

R. D. C. de Silva, for the plaintiff.

J. W. Subasinghe, with *T. Wickramasinghe*, for the owners of m. v. "Periolos".

Mervyn Fernando, Crown Counsel, for the Receiver of Wrecks.

Cur. adv. vult.

February 21, 1969. SIVA SUPRAMANIAM, J.—

This is an action *in rem* instituted by the plaintiff on 25th March 1968 against the motor vessel "Periolos" which is at present grounded on a reef within the territorial waters of Ceylon. The plaintiff claims a sum of Rs. 35,486·40 as value of necessaries supplied and cost of repairs effected and services rendered. On the application of the plaintiff a writ of summons and warrant of arrest issued and the vessel was arrested on 12th June 1968.

On 25th June 1968 the receiver of wrecks, Colombo (hereinafter referred to as the receiver) filed an affidavit and moved that the warrant be withdrawn and the vessel be released from arrest. The owners of the ship—Palizada Compania Naviera S. A.—have entered an appearance and they, as well as the plaintiff, have objected to the motion of the receiver. The present enquiry is into that motion.

The relevant facts, as they appear from the documents produced by the parties, may be summarised as follows :—

(*a*) The vessel is of Greek origin and is owned by Messrs Palizada Compania Naviera S. A. (hereinafter referred to as the owners). She arrived at the port of Colombo on 31st August 1967 from Madras for repairs and was lying in the harbour after repairs were effected. On 16th October 1967 the Master Attendant ordered her to be moved to anchorage outside the harbour to make room for another vessel. On the night of 20th October there was a heavy storm during which the vessel broke her moorings. The master was unable to steer her into the high seas and she was grounded on a reef. On 31st October the crew were repatriated and on the 17th December the master left Ceylon.

(*b*) During the relevant period Pegasus Ocean Services Ltd. of London were agents of the owners of the ship. McLaren & Co. of Colombo (hereinafter referred to as McLarens) were the agents in Colombo

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of Pegasus Ocean Services Ltd. and attended to the requirements of the ship and paid the customs and other dues when she entered the port on 31st August for repairs. After the ship was grounded on 20th October, McLarens were in general charge of her and attended to the repatriation of the crew. They also employed watchmen to keep watch on the ship until 17th February 1968.

(*c*) On 25th January 1968, by letter X1, the Principal Collector of Customs who was also the Superintendent of Wrecks directed McLarens to hand over to the receiver the articles that had been removed by them from the ship and also requested them, *inter alia*, "to produce evidence of the title to the ship claimed by the owners".

(*d*) On 17th February 1968 the services of the watchmen were discontinued by McLarens on instructions received from Pegasus Ocean Services Ltd. in view of the heavy expenditure incurred on account of their wages. On the same day, by letter O 20, McLarens informed the receiver of the instructions received by them to discontinue the watchmen. The receiver, while acknowledging that letter, informed McLarens by letter O 22 that he was taking steps to appoint watchmen "to guard the wreck". On 23rd February 1968 naval personnel were appointed to watch the ship on behalf of the receiver.

(*e*) A notice under date 23rd February 1968 (X 9) was published in the *Government Gazette* of 8th March 1968 by the receiver stating that under Section 14 of the Wrecks and Salvage Ordinance (Cap. 267) (hereinafter referred to as the Ordinance) he had taken possession of the "wrecked vessel". Before the Gazette notice appeared, by letter O 25 of 25th February 1968 McLarens informed the receiver that they, as agents of the owners, had not abandoned the ship.

(*f*) In November 1967 the Captain of the Navy wrote letter O 8 to McLarens intimating the desire of the Royal Ceylon Navy to salvage the vessel on a "no cure-no pay" basis and requesting permission for two Naval personnel to visit the vessel for purposes of inspection. McLarens accepted the offer and sent the necessary permits. On 12th January 1968 by letter O 15 the Captain of the Navy informed McLarens that the salvage team was of opinion that the vessel could be safely salvaged. On 24th January 1968 by letter O 17 Pegasus Ocean Services Ltd. authorised McLarens to have the vessel salvaged by the Royal Ceylon Navy on a "no cure-no pay" basis. By letter O 18 of 31st January 1968 McLarens instructed the Captain of the Navy to undertake the salvage operation. By letter O 23 of 23rd February 1968 the Captain of the Navy informed McLarens that

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he understood that the vessel was being abandoned and his offer to salvage the ship may be treated as cancelled. On the next day by letter O 24 McLarens informed the Captain of the Navy that they were surprised to hear from him that the vessel was abandoned and affirmed that they " as agents for the owners of the Periolos have not abandoned the vessel ".

(*g*) Although McLarens were negotiating with intending purchasers to sell the vessel on behalf of the owners, the naval personnel who were watching her on behalf of the receiver refused to permit anyone to inspect her. A complaint in regard to this matter made by McLarens to the receiver was ignored by the latter who called upon McLarens to deliver to him whatever keys that were in their custody to the cabins and rooms of the ship and to furnish the information called for by letter X1 of 25th January 1968.

(*h*) By letter X 13 dated 11th March 1968 the receiver informed McLarens that he was unable to accept them as agents of the owners in the absence of proof of ownership and of agency and that he had taken possession of the " wrecked vessel " under Section 14 of the Ordinance and his demand for the keys was under Section 5 of the Ordinance.

(*i*) On 25th March 1968 McLarens forwarded the keys to the receiver along with letter X 16 stating that they were handing the keys " as agents to the owners of the S.S. Periolos without prejudice to the owner's rights of ownership and possession ". Since 23rd February 1968 the vessel has remained in the possession of the receiver.

Although several grounds were set out in the affidavit, learned Crown Counsel pressed his motion on the following grounds :—

(1) That the vessel Periolos is a wreck and is in the lawful possession and control of the receiver in terms of the provisions of the Ordinance.

(2) That section 529 of the Merchant Shipping Act of 1894 of England is applicable to Ceylon and in view of the provisions of that section this Court has no jurisdiction to issue a warrant of arrest against the said " wreck ".

(3) That no action *in rem* lies and, in any event, no warrant of arrest can issue against a vessel which is not navigable and which is not under the immediate control of a Master and crew.

I shall now proceed to examine the said submissions but, before doing so, I should record that on the facts set out above I find that when the receiver took possession of the vessel on 23rd February 1968, McLarens were in constructive possession of her on behalf of the owners and that at no stage did they abandon such possession.

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The first question for consideration is whether the receiver was empowered under the Ordinance to take possession of the damaged ship and to compel the agents of the owners to deliver to him the keys of the cabins and other rooms in the ship. Sections 3 to 10 of the Ordinance set out the powers and duties of the receiver when he receives information that "any ship or boat is stranded or is in distress at any place on the shore of the sea or of any tidal water within the limits of Ceylon". Section 3 casts on him the duty to "forthwith proceed to such place and take the command of all the persons present, and assign such duties to each person and issue such directions as he may think fit, with a view to the preservation of such ship or boat, and the lives of the persons belonging thereto, and the cargo and apparel thereof". But it is not lawful for him "to interfere between the Master of such ship or boat and his crew in matters relating to the management thereof unless he is requested so to do by such master". Section 5 provides that "all cargo and other articles belonging to such ship or boat as aforesaid that may be washed on shore, or otherwise be lost or taken from such ship or boat, shall be delivered to the receiver" and empowers the receiver, *inter alia*, "to take such cargo or article by force from the person refusing to deliver the same" to him. This section, however, has no application to a case where an owner or his agent who is in possession of such ship removes anything therefrom. In the group of sections 3 to 10 there is none which empowers the receiver to take possession of the ship in the circumstances in which it was taken over by him in the instant case.

Learned Crown Counsel did not rely on any of the aforesaid sections to justify the action of the receiver in taking over the possession of the ship. His submission was that the ship was a "wreck" within the meaning of the Ordinance and that the receiver was entitled to take possession of any "wreck" within the territorial waters of Ceylon. Sections 12 to 15, 22 (*b*) 23 and 24 of the Ordinance deal with the powers and duties of the receiver in regard to "wrecks". Section 12 sets out the rules to be observed by "any person finding or taking possession of wreck within Ceylon". If the person is the owner of the wreck he is required to give notice to the receiver that he has found or taken possession of the same; if he is not the owner, he is required to deliver the same to the receiver. Where "wreck" is secreted or is in the possession of some person who is not the owner or is otherwise improperly dealt with, Section 13 empowers the receiver to obtain a warrant from a Justice of the Peace and to search for, seize, and detain such wreck. Section 14 requires the receiver, within 48 hours after taking possession of any wreck, to cause to be posted up in the nearest custom house a description of the same and to give further publicity as directed by the Principal Collector of Customs. Under Section 24, if no owner establishes his claim to the wreck before the expiration of a year from the date at which the same came into the possession of the receiver, the receiver is authorised to sell the wreck. Sections 22 (*b*) and 23 empower the receiver to detail and sell, if necessary, a wreck to pay salvors where salvage is due and is not paid by the party liable.

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In order to determine whether any of the aforesaid sections apply to the instant case, it is necessary to examine, in the first instance, whether the vessel in question was a "wreck" within the meaning of the Ordinance. According to the interpretation section contained in the said Ordinance "wreck" includes jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water". The definition is intended to give a wider interpretation to the word "wreck" than its ordinary connotation. The ship in the instant case did not, of course, fall within the category of jetsam, flotsam, or lagan. Nor did it fall within the category of a derelict. To constitute a derelict there should be an abandonment of the ship at sea by the master and crew without hope of recovery. "There must be no *spes recuperandi* and no *animus revertendi* and this depends on the state of mind of the master and crew at the time when they quitted the vessel". (Vide the speech of the Lord Chancellor in *Bradley and others v. Newsum Sons & Co. Ltd.*[1])

It was decided in *Sir Henry Constable's case* (English Reports 77 King's Bench 218) that "nothing shall be said 'wreccum maris' but such goods only which are cast or left on the land by the sea . . . . and none of these goods which are called jetsam, flotsam, or lagan are called wreck as long as they remain in or upon the sea; but if any of them by the sea be put upon the land, then they shall be said wreck". Coke in his Institutes (vol. 2 page 167) says "wrecke of the sea in legal understanding is applied to such goods as after shipwreck at sea are by the sea cast upon the land. . . . ."

Learned Crown Counsel submitted that the aforesaid definition of wreck may have been appropriate in the Elizabethan era but cannot be applied in modern times. I find myself unable to agree. The Ordinance was passed in 1861 and the provisions contained therein are taken over mainly from the English Merchant Shipping Act of 1854. In the English Statute the word is used in its common law meaning. The definition of "wreck" in *Constable's case* was adopted with approval by Brett L. J. in the course of his judgment in the case of *Cargo ex Schiller* [2]. The Statute 17 & 18 Vict. c. 104 which Brett L. J. was construing in that case gave to the term "wreck" the identical meaning given in the Ordinance. Halsbury (3rd edition Vol. 35 page 721) says "wreck may be defined as property cast ashore within the ebb and flow of the tide after shipwreck". The ship in the instant case was not property that was cast ashore and was not "wreck" within the meaning of the Ordinance. The receiver had accordingly, no legal right to take possession of her.

Even if the term "wreck" is given a wider meaning than the one given to it under the common law and is interpreted to include a totally disabled ship, as contended for by learned Crown Counsel, there in no provision in the Ordinance which empowered the receiver to take possession of the vessel in question after it had been grounded. Section 12 of the Ordinance

[1] *119 Law Times 239 at page 241.*
[2] *(1876-1877) Probate Division Vol. 2 p. 145.*

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which refers to a person "finding or taking possession of wreck within Ceylon" can have no application to a case where the owner of a ship which had become a "wreck" continues to be in possession of it through his agent. The provisions of section 14 of the Ordinance requiring the receiver to give publicity to a description of the wreck that had been taken possession of by him are obviously intended to enable the owner to establish his claim under Section 24. This procedure would be meaningless where the wreck has been taken possession of by the receiver from the owner or his agent. Section 13 of the Ordinance which gives the receiver the power to seize concealed wreck expressly excludes the case of a wreck which is in the possession of a person who is the owner thereof.

If it was the intention of the Legislature that the receiver should take possession of as "wreck" a ship that is grounded and is non-navigable even though such ship is in the possession or custody of the owner or his agent, express provision would have been made in the Statute to that effect and the procedure to be adopted in regard to the disposal of such wreck would have been prescribed. There is express provision in the Ordinance empowering the receiver to detain a wrecked ship and to sell her if necessary, in cases where salvage is payable to anyone in respect of saving her and the owner or other person responsible has failed to make such payment. In the instant case there was no question of a claim by anyone for salvage. The receiver himself had incurred no expenses in respect of the ship until after he took possession of it.

The receiver appears to have been misled by the intimation given to him by McLarens on behalf of the owners that they were withdrawing the watchmen but he was not justified in ignoring the further intimation given by them that their withdrawal of the watchmen should not be interpreted to mean that they were abandoning the ship. I find that the receiver had no lawful authority to take possession of the vessel in question and to demand from McLarens the surrender of the keys. Sections 5 and 14 of the Ordinance on which the receiver relied have no application to the facts in this case.

In view of the aforesaid finding it is unnecessary to consider the question whether Section 529 of the Merchant Shipping Act of 1894 of England applies to Ceylon and, if so, whether that section is a bar to this Court exercising jurisdiction and issuing process against a ship which is a "wreck".

There remains to be considered the last submission of learned Crown Counsel that no action *in rem* lies and, in any event, no warrant of arrest can issue against a vessel which is totally disabled and which is not under the immediate control of a Master or crew. No authority was, however, cited in support of that proposition. The nature and scope of an

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action *in rem* in maritime law make it clear, on the other hand, that that proposition is untenable. McGuffie, Fugeman and Gray in their treatise on Admiralty Practice (British Shipping Laws vol. 1) state at para. 69 :

" *Res* against which an action *in rem* may be brought include :

(*a*) In all cases : a ship, that is to say any description of vessel used in navigation, and all her equipment *and wreck of the ship or equipment including flotsam, jetsam, lagan and derelict.*"

As regards the issue of a warrant of arrest, the same authors state (*Ibid* para. 231.) :

" The basic principle of an action *in rem* is that a *res* may be arrested."

Halsbury states : " When a plaintiff has duly procured the issue of a writ of summons, he may even before the service of a writ apply for a warrant for the arrest of the property against which the action has been brought." (Laws of England, 3rd Edition vol. 1, page 74.)

In the instant case, the plaintiff, who sues *inter alia* for the value of necessaries supplied, is entitled to maintain the action *in rem* and to have the *res* arrested until his claim is settled.

The motion of the receiver is accordingly refused with costs. The action will proceed as between the plaintiff and the defendant.

Motion of the receiver of wrecks refused.

1969 *Present :* **Samerawickrame, J.**

M. RENGASAMY, Appellant, *and* A. R. Mc INTYRE, Respondent

S. C. 1158/66—M. C. Badulla, 16761

Criminal trespass—Charge against estate labourer for remaining on estate with intent to annoy superintendent—Physical occupation by him of line room after notice to quit—Whether it is a valid defence.

The accused-appellant, who was employed as labourer on an estate, was convicted of the offence of criminal trespass for remaining on the estate with intent to annoy the complainant, who was the superintendent in occupation of the estate. There was another charge laid against him of committing house trespass by remaining in his line room with intent to annoy the complainant, but he was acquitted on the ground that, although his occupation of the line room after receipt of notice to quit was unlawful, it was not the complainant but the accused himself who had actual physical occupation of the line room.

Held, that the fact that the accused was not guilty of house trespass in respect of the line room of which he was in physical occupation did not preclude his being guilty of criminal trespass in respect of his entry on and use of adjacent property in the occupation of the complainant.

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APPEAL from a judgment of the Magistrate's Court, Badulla.

Colvin R. de Silva, with *Bala Nadarajah*, for the accused-appellant.

R. A. Kannangara, with *M. Underwood*, for the complainant-respondent.

Cur. adv. vult.

July 29, 1969. SAMERAWICKRAME, J.—

The appellant has been convicted of the commission of the offence of criminal trespass by remaining on Braughing Estate which was in the occupation of the complainant A. R. Mc Intyre who is the superintendent of the estate with intent to annoy the complainant.

The appellant had been a labourer on Braughing Estate and on 13th April, 1960, there had been an incident on the estate in consequence of which the appellant and certain others were charged in the Magistrate's Court with being members of an unlawful assembly the objects of which were to wrongfully restrain A. R. Mc Intyre and to commit mischief by damaging a land rover belonging to him as well as to cause hurt to Mc Intyre. They were convicted and sentenced to terms of imprisonment. On appeal the convictions were set aside on the ground that the Magistrate had not examined the person who brought the accused into Court and had thereby failed to comply with the provisions of Section 151 (2) of the Criminal Procedure Code.

The appellant had made an application to the Labour Tribunal asking for reinstatement in his employment as a labourer on Braughing Estate. Order was made by the tribunal in February 1965. In his order, the President of the Labour Tribunal held that the appellant had threatened the employer in his presence and had assaulted him. On appeal the order of the Labour Tribunal was set aside on the ground that the person who functioned as the President had not been appointed by the Judicial Commission and, therefore, had no jurisdiction to make the order appealed from.

Immediately after the incident which took place on 13th April, 1960, in the course of which, according to Mc Intyre, the appellant had intimidated and threatened to kill him, notice (P1) was given to the appellant terminating his employment and requiring him to vacate his line room. No action however has been taken to compel the appellant to leave upon that notice. On 10th March, 1965, shortly after the appellant's application to the Labour Tribunal had been dismissed, a fresh notice (P2) was given to the appellant requiring him to leave the estate. The superintendent of the estate has stated that he had refrained from taking action on the earlier notice out of deference to the Magistrate's Court and the Labour Tribunal in which proceedings were pending.

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The present proceedings against the appellant were initiated in the Magistrate's Court of Badulla on 2nd February, 1966. On 16th June, 1966, the appellant's trade union by document (D5) applied to the Labour Tribunal to have the application made to it on behalf of the appellant set down for hearing before the duly appointed President.

It transpired in the course of the trial that the appellant is living on the estate and is working outside. When a civil action was filed for his ejectment, the appellant has put the plaintiff to prove his title to the estate.

Learned Counsel for the appellant submitted that as the Labour Tribunal has power to reinstate the appellant, the appellant's continued stay on the estate is referable to that fact and that, in the circumstances of this case, it cannot be inferred that his dominant intention is to annoy the complainant. He cited a number of decisions on the question of the intention requisite to be proved in a charge of criminal trespass. I do not think it is necessary to examine those authorities in view of the circumstances of this particular case. The learned Magistrate's finding is that the appellant is defying the complainant and his intention is clearly to annoy the complainant. The facts and circumstances which have transpired in evidence support the finding of the learned Magistrate and I am, therefore, unable to say that he was not justified in coming to that finding. In fact the appellant appears to be bent on causing to the complainant as much trouble and vexation as possible.

There was another charge laid against the appellant of committing house trespass by remaining in the line room with intent to annoy the complainant but the learned Magistrate acquitted him on the ground that it was not the complainant but the accused himself who had actual physical occupation of the line room. There is no appeal against the acquittal and I am not, therefore, called upon to consider whether it is correct or not. Learned Counsel for the appellant submitted that the acquittal on this charge was relevant to a consideration of the first charge : if the occupation of the line room was not criminal remaining on the estate was not criminal. Had the finding of the learned Magistrate been that the occupation of the line room was lawful it would follow that the appellant's entry upon and use of land immediately adjacent to the line room for the purpose of ingress and egress would also have been lawful. But the Magistrate has not found that the occupation was lawful but that actual physical occupation was in the appellant and not in the complainant. The occupation of the line room by the appellant after receipt of the notice (P2) was unlawful. The view of the learned Magistrate that the fact that the accused is not guilty of house trespass in respect of the line room of which he was in actual physical occupation does not preclude his being guilty of criminal trespass in respect of his entry on and use of adjacent property in the occupation of the complainant finds support in the decision reported in 63 Ceylon Law Weekly, page 86. In the result the appeal fails and is dismissed.

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Appeal dismissed.

[Privy Council]

1969 *Present :* **Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn, Lord Wilberforce and Lord Diplock**

V. K. SUBRAMANIAM, Appellant, *and*
K. KADIRGAMAN, Respondent

Privy Council Appeal No. 8 of 1969

S. C. 280/63 (F)—D. C. Point Pedro, 6471

Thesavalamai—Tediatetam—*Devolution on death intestate of non-acquiring spouse—Jaffna Matrimonial Rights and Inheritance Ordinance (prior to amendment by Ordinance No. 58 of 1947)—Sections 6, 7, 19, 20, 21 and 22—Sections 19 and 20 as amended by Ordinance No. 58 of 1947—Whether Amending Ordinance has retrospective effect—Interpretation Ordinance, s. 6 (3)—Wills Ordinance, s. 7.*

Where a half share of *tediatetam* property acquired by a husband had already automatically vested in his wife (as the non-acquiring spouse) by virtue of the provisions of Sections 19 and 20 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911, the subsequent repeal of Sections 19 and 20 by the Amending Ordinance No. 58 of 1947 did not operate retrospectively so as to divest the wife of that share. And if the wife dies intestate after the date when the Amending Ordinance No. 58 of 1947 came into operation, the devolution of her share upon her death is regulated solely by Sections 21 and 22 of the old Ordinance and not by the new Section 20 of the amended Ordinance.

Kumaraswamy v. Subramaniam (56 N. L. R. 44) approved.

Appeal from a judgment of the Supreme Court.

M. P. Solomon, for the substituted defendant-appellant.

Walter Jayawardena, Q.C., with *R. K. Handoo* and *George Candappa*, for the plaintiff-respondent.

Cur. adv. vult.

October 6, 1969. [*Delivered by* Lord Diplock]—

This appeal is about land which was acquired by a husband, the original defendant, at various dates between 1919 and 1945 during the subsistence of his marriage with a wife who died intestate in 1948. Her administrator is the plaintiff in the action. The husband died during the lengthy pendency of this action and his son by an earlier marriage was substituted as defendant.

Husband and wife were Tamils originating from the Jaffna area and the law which governed their matrimonial rights and inheritance is known as *Thesawalamai*. At the date of acquisition of the various parcels of

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1*——J 9347—2,275 (12/69)

land which are the subject of this suit *Thesawalamai* was regulated by the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 (herein called "the Principal Ordinance"); but on 4th July 1947 after the land had been acquired and before the death of the wife the Principal Ordinance was amended.

Under the customary law of *Thesawalamai* as it was before 1911 profits arising from the separate estate of either spouse during the subsistence of the marriage and property acquired out of those profits were known as *tediatetam*. It is unnecessary for the purposes of the present appeal to consider precisely what property was comprised in *tediatetam* before 1911 or what were the legal incidents attaching to it. Section 19 of the Principal Ordinance defined what property should *thereafter* constitute the *tediatetam* of each spouse and section 20 provided what legal incidents should attach to it.

Section 19 of the Principal Ordinance was as follows:

"19. The following property shall be known as the *tediatetam* of any husband or wife—

(*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage;

(*b*) profits arising during the subsistence of marriage from the property of any husband or wife."

Paragraph (*a*) of this section brought within the definition of the expression "*tediatetam*" as used in that Ordinance property which was not included in *tediatetam* under the customary law of Thesawalamai. It is common ground that the land which is the subject of dispute fell within this extended definition though it would not have been included in the *tediatetam* of either spouse under the previous customary law. It would have been the separate property of the husband.

Section 20 of the Principal Ordinance was as follows:

"20. (1) The *tediatetam* 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.

(2) Subject to the provisions of the *Tesawalamai* relating to liability to be applied for payment or liquidation of debts contracted by the spouses or either of them on the death intestate of either spouse, one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation *a mensa et thoro*, each spouse shall take for his or her own separate use one-half of the joint property aforesaid."

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It is common ground that the effect of sub-section (1) of this section was to vest in the non-acquiring spouse from the moment of acquisition an undivided half-share in the property acquired by the other spouse during the subsistence of the marriage. Sub-section (2) provided *inter alia* for the devolution of this half-share upon the death intestate of each spouse. Although referred to indifferently in the section as " joint-property " and " property common to the two spouses ", section 7 of the Wills Ordinance provides in effect that property owned jointly shall be held in common and in particular that the undivided share of a deceased co-owner shall form part of his estate.

It follows from this that the wife acquired an immediate undivided half-share in each of the parcels of land to which this appeal relates from the moment at which they were acquired; and that this proprietary right had vested in her before 4th July 1947. It is not in their Lordships' view necessary to consider the precise legal incidents attaching to it under the Principal Ordinance save to note that her undivided half-share would have devolved upon her heirs upon her death intestate.

Upon 4th July 1947 during the wife's lifetime, Ordinance No. 58 of 1947 (herein called " the Amending Ordinance ") came into force. Among the amendments to the Principal Ordinance it repealed sections 19 and 20 and substituted therefor new sections in the following terms:

" 19. No property other than the following shall be deemed to be the *thediatheddam* of a spouse:

(*a*) Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.

(*b*) Profits arising during the subsistence of the marriage from the separate estate of that spouse."

" 20. On the death of either spouse one half of the *thediatheddam* which belonged to the deceased spouse, and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse."

The new section 19 excluded from the definition of *tediatetam* property which had previously been included in the definition of the same word in the former section 19 of the Principal Ordinance. It is common ground that the land which is the subject of this appeal did not fall within the new definition of *tediatetam*. The new section 20, in contrast to the former section 20 of the Principal Ordinance does not deal with any legal incidents which were thereafter to attach to *tediatetam* as newly defined other than its devolution upon the death of a spouse intestate. Important amendments to earlier sections, 6 and 7, of the Principal Ordinance,

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however, altered the legal incidents attaching during a spouse's lifetime to property which fell within the new definition of *tediatetam*, though in their Lordships' view it is unnecessary for the purpose of the present appeal to consider those alterations in detail.

It is a potential source of confusion that the single expression "*tediatetam*" has been used to describe property falling within a definition of which the scope has been different at different periods viz. before the Principal Ordinance was enacted in 1911; between 1911 and 4th July 1947; and after 4th July 1947. Property such as the land at present in suit which was correctly described as "*tediatetam*" during the period from 1911 to 4th July 1947 may cease to be entitled to that label after the latter date. But the loss of the label does not divest either spouse of the proprietary rights in the land which had already vested in them by virtue of its status as "*tediatetam*" at the date at which it was acquired before the definition of "*tediatetam*" was altered by the Amending Ordinance. This was the decision of the Supreme Court of Ceylon composed of five judges in *Akilandanayaki v. Sothinagaratnam* [1]. In that case it was held that section 6 (3) of the Interpretation Ordinance prevented sections 19 and 20 of the Amending Ordinance from affecting any proprietary right of a spouse which had been already acquired under the repealed sections 19 and 20 of the Principal Ordinance before the date of their repeal.

It has not been contended in the present appeal that the decision in the *Akilandanayaki case* was wrong. Their Lordships accept it as correct. It therefore follows that at the date of her death in 1948 the wife was still entitled to an undivided half-share in the land in suit. But in their Lordships' view it would no longer be correct after the 4th July 1947 to attach either to the land in suit or to her half-share in it the label "*tediatetam*". It is common ground that the land in suit itself did not fall within the definition of "*tediatetam*" in the new section 19 because it was acquired by the husband for valuable consideration which formed or represented part of his separate estate. Neither in their Lordships' view did the wife's half-share in it fall within the new definition because her half-share was not acquired by her for valuable consideration nor was it profits arising during the subsistence of the marriage. The new section 20, which applies only to property within the new definition of "*tediatetam*" in section 19, accordingly did not apply either to the land or to the wife's half-share in it which had vested in her before the Amending Ordinance was passed.

How then did her half-share devolve upon her death intestate? By the date of her death section 20 of the Principal Ordinance had been repealed and could no longer affect the devolution of her half-share. But

[1] (*1952*) *53 N. L. R. 385.*

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it formed part of the property to which she was entitled at the date of her death. Its devolution was accordingly regulated by the general provisions as to inheritance contained in sections 21 *et seq* of the Principal Ordinance none of which was amended by the Amending Ordinance. As the deceased wife left children surviving her the relevant sections are sections 21 and 22, which are in the following items :

> " 21. Subject to the right of the surviving spouse in the preceding section mentioned, the right of inheritance is divided in the following order as respects (*a*) descendants, (*b*) ascendants, (*c*) collaterals.
>
> 22. Children, grandchildren, and remoter descendants are preferent to all others in the estate of the parents. All the children take equally *per capita* ; but the children or remoter issue of a deceased child take *per stirpes*."

Under these sections the wife's half-share in the lands in suit devolve upon her children upon her death intestate and the plaintiff as administrator of her estate is entitled to recover her share from the estate of her husband who is now also deceased.

In so deciding their Lordships are following the decision of the Supreme Court of Ceylon in *Kumaraswamy v. Subramaniam* [1] about other land in respect of which the plaintiff claimed that the deceased wife had similar proprietary rights to those asserted in the present appeal. The grounds of that decision were succinctly stated by Gratiaen J. at p. 47 as follows :

> " the new sections 19 and 20 have no bearing on the present problem. A half share of the *tediatetam* property acquired by [the husband] in 1933 and 1943 had automatically vested in [the wife] (as the non-acquiring spouse) under the old Section 20, and the subsequent repeal of the old Section 20 did not operate to divest her of that share. The devolution of [the wife's] share upon her death in 1948 was regulated solely by Section 21 of the Principal Ordinance because the new section 20 has no application to the case."

Their Lordships are, in effect, asked in the present case to over-rule this decision ; but in their view its reasoning is sound and decisive of the present claim also. They will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

[1] *(1954) 56 N. L. R. 44.*

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1969 *Present*: **H. N. G. Fernando, C.J., and Samerawickrame, J.**

THE COMMISSIONER OF INLAND REVENUE, Appellant,
and D. J. RANAWEERA, Respondent

S. C. 685/64 (F)—D. C. Colombo, 333/AI

Income tax—Issue of certificate to District Court to recover tax by seizure and sale of property—Issue of writ of execution to Fiscal—Application by assessee for stay of execution pending appeal to Commissioner of Inland Revenue—Power of District Court to allow stay of execution—Scope—Right of Commissioner to appeal to Supreme Court from order allowing stay of execution—Civil Procedure Code, s. 761—Income Tax Ordinance, ss. 81 (2), 84 (3).

Where, in consequence of the Commissioner of Inland Revenue issuing a certificate to a District Court in terms of section 84 (3) of the Income Tax Ordinance for the recovery of income tax due from an assessee, the District Court directs a writ of execution to issue to the Fiscal for the seizure and sale of the properties of the assessee, the District Court acts in its judicial capacity and not ministerially if and when an application is made by the assessee to stay the writ which has been issued by the Court in performance of the ministerial duty which the law casts on the Court. Accordingly, an order of the Court allowing stay of execution is appealable at the instance of the Commissioner.

Where stay of execution of the writ is sought by the assessee on the ground that an appeal to the Commissioner of Inland Revenue is pending against the assessment of the tax alleged to be in default, neither section 81 (2) nor any other provision of the Income Tax Ordinance precludes the District Court from staying execution on condition that the assessee should deposit a sum of money so as to enable the Commissioner to obtain payment of the tax in default in the event that the determination of the assessee's appeal wholly or partly confirms the existing assessment.

APPEAL from a judgment of the District Court, Colombo.

P. Naguleswaran, Crown Counsel, for the respondent-appellant.

H. W. Jayewardene, Q.C., with *S. S. Basnayake*, for the petitioner-respondent.

Cur. adv. vult.

June 16, 1969. H. N. G. FERNANDO, C.J.—

The Commissioner of Inland Revenue, who is the appellant in this case, issued a certificate to the District Court of Colombo in terms of s. 84 (3) of the Income Tax Ordinance, stating that a sum of Rs. 689,760 was payable by the respondent as income tax in default. Thereupon the Court on 3rd September 1962 directed a writ of execution to issue to the Fiscal for the seizure of the properties of the respondent.

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On 6th November 1962, Proctors appearing for the respondent filed a petition stating that the respondent had filed an appeal against the assessment of tax and asking for a stay of execution until the appeal is disposed of. The appeal there mentioned was an appeal to the Commissioner in terms of the relevant provision of the Ordinance. The Court on this petition stayed the execution of writ, but directed that notice of the respondent's petition be issued to the Commissioner returnable on 20th December 1962. The respondent however failed to have this notice issued. Thus the order staying execution was in fact made without notice to the Commissioner.

On the 10th January 1964 the Commissioner again applied for the issue of writ, which application was allowed, and the Fiscal thereafter reported to Court that properties to the value of Rs. 660,000 had been seized.

On 24th April 1964, the respondent again filed a petition for the stay of execution and writ, and this application was allowed on 11th November 1964, the learned Judge directing " that execution proceedings be stayed until the determination of the appeal filed on 16.8.62, on the petitioner giving security in a sum of Rs. 500,000 or on the petitioner giving an understanding that he would not alienate, mortgage or encumber any of the properties referred to in the schedule to the certificate of Income Tax filed of record without application to this Court with due notice to the Commissioner. The present appeal is by the Commissioner against this order.

Counsel for the respondent has taken the objection that the order appealed from is not a judicial order, and that accordingly no appeal lies against it. Counsel relied very much on the decision of this Court in *Ranaweera v. Commissioner of Inland Revenue*[1]. In that case writs had issued from the District Court upon the filing of a certificate of collection for the recovery of estate duty in terms of a provision of the Estate Duty Ordinance which is substantially similar to the provision of s. 84 (3) of the Income Tax Ordinance. These writs were stayed on an application made by the assessee and notice of the stay was issued to the Commissioner. The Commissioner filed no objection to the stay and the Court thereafter re-called the writs. Subsequently the Commissioner did file objection and asked for the seizure and sale of properties of the assessee. After inquiry the District Judge dismissed the petitioner's earlier application for stay and directed the Fiscal to execute the writs.

On an appeal from the last-mentioned order of the District Judge, the assessee contended that the District Judge had no power to vacate his own order staying the writs, and his contention was made on the basis that the order of the District Judge on the application for stay is a judicial act and could not be vacated by the Judge. In rejecting the assessee's appeal the Supreme Court did make certain observations to the

[1] *(1965) 67 N. L. R. 131.*

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effect that when a District Judge entertains an application for the stay of execution of a writ issued under such a provision as s. 84 (3) of the Income Tax Ordinance, the Court does not act judicially.

Relying upon these observations Counsel appearing for the respondent in the present appeal has argued that the order of the District Judge in the present case directing a stay of execution on the terms which I have set out above was one made in a purely ministerial capacity, and is not therefore subject to appeal in this Court. The judgment in the case just cited as well as the judgment in a subsequent case reported in *68 N. L. R. p. 573* state quite clearly that the District Court does not exercise its judicial power when it issues a writ of execution upon a certificate being filed by the Commissioner for the recovery of tax. But it does not appear in either of those cases consideration was given to the quite different question whether or not the District Court acts judicially if and when an application is made to stay a writ which has been issued by the Court in performance of the ministerial duty which the law casts on the Court.

Section 84 (3) affords to the Commissioner the privilege of resorting to the process of execution by means of what may be called a short-cut. In this way the Commissioner is entitled to have the process of execution applied against an assessee, without the need for a judicial determination that a debt is due from the assessee. But there is little or nothing in the statute which purports to alter the character of orders or proceedings which have to be made or taken in a Court at a stage subsequent to the issue of a writ of execution.

To take a simple though perhaps quite a theoretical example, an assessee against whose properties a writ of execution has issued may in fact pay up thereafter the amount of the tax in default. In such an event he would naturally wish for a stay of further execution proceedings ; and if he asks for the stay on the ground that payment was actually made after the issue of writ, there would be a need for the Court to determine whether the payment had been made, and such a determination in the event of a dispute on the point must surely be reached after judicial inquiry, and I hold accordingly that such a determination is one made by the Court in its judicial capacity.

Section 84 (3) provides that sections 226 to 297 of the Civil Procedure Code are applicable in relation to a seizure and sale under a writ issued under s. 84 (3), and there is no question that in the course of the application of these sections, the Court would have to act judicially just as much as it does in proceedings for the execution of its own decree.

In the instant case the respondent, in asking for a stay of the writ, invoked the ordinary and inherent jurisdiction of the District Court to stay its own process of execution, and the particular ground upon which the stay was granted was one which is commonly invoked by judgment-debtors

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in civil actions. Section 761 of the Civil Procedure Code expressly provides for the stay of execution of an appealable decree, and the fact relied on by the respondent in the present case, namely that an appeal to the Commissioner was pending against the assessment of the tax alleged to be in default, is fairly comparable to the ground on which execution is occasionally stayed under s. 761 in ordinary civil proceedings.

Learned Crown Counsel has referred to s. 81 (2) of the Income Tax Ordinance which is to the following effect :—

> " Tax shall be paid notwithstanding any notice of objection or appeal unless the Commissioner orders that payment of the tax or any part thereof be held over pending the result of such objection or appeal. "

Crown Counsel has argued in view of this express provision, that the Legislature has by this provision committed to the Commissioner the function of deciding whether or not the recovery of tax in default should await the determination of an appeal. I agree that in view of this provision a Court has no power to stay execution solely on the ground that an assessment of tax is the subject of a pending appeal under the relevant taxing statute. But the order of the District Judge in the present case does not depend solely on this ground. The condition contemplated in the order of the District Judge, that the respondent must deposit a large sum in cash, is a condition upon which a Civil Court ordinarily stays execution of it own decrees, and there is nothing in the Income Tax Ordinance which expressly or by implication precludes the District Court from staying execution on such a condition. This condition in my opinion will sufficiently and certainly enable the Commissioner to obtain payment of the tax in default, in the event that the determination of the respondent's appeal wholly or partly confirms the existing assessment. I hold that the Court does have power to allow a stay of execution upon such a condition.

I note however, that the order of the learned District Judge contains an alternative condition which might well defeat the purposes which the learned Judge thought will be achieved thereby. The condition that the petitioner give an undertaking not to alienate his properties will probably carry with it the sanction that a breach of the condition will be punishable as a contempt of Court; but this condition will not ensure with certainty that the respondent's properties will be available in satisfaction of the debt claimed by the Commissioner. I hold that the District Court has no power, upon such a condition to stay a writ which has issued under s. 84 (3) of the Income Tax Ordinance.

For these reasons the order of the learned District Judge is set aside. The record will be returned to the District Court, and it will be open to the respondent to deposit in cash to the credit of the case a sum of Rs. 600,000 on or before 1st August 1969. If this deposit is made, the District Court

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will order that execution proceedings be stayed until the determination by the Commissioner of Inland Revenue of the appeal filed by the respondent on 16th August 1962. The deposit so made will be available for payment to the Commissioner of the whole or part of the sum determined upon such an appeal to be due as tax from the respondent.

If the deposit is not made on or before 1st August 1969, the District Judge will forthwith order the re-issue of the writ.

In view of the fact that the alternative condition set out in the order of the learned District Judge was entirely unfavourable to the Commissioner, I order that the respondent must pay to the Commissioner the costs of this appeal.

SAMERAWICKRAME, J.—I agree.

Order set aside.

[COURT OF CRIMINAL APPEAL]

1967 *Present:* **T. S. Fernando, A.C.J. (President), Abeyesundere, J. and Manicavasagar, J.**

M. DHARMADASA and others, Appellants, *and* THE QUEEN, Respondent

C. C. A. APPEALS 125 TO 127 OF 1967 (WITH APPLICATIONS NOS. 167 TO 169)

S. C. 174/1966—M. C. Horana, 41988

Evidence—Corroborative evidence—Misdirection.

In a case where corroborative evidence is required, the Court must not leave to the jury as corroborative evidence some evidence which is not capable of amounting in law to corroboration.

APPEALS, with applications, against certain convictions at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *Anil Obeyesekere*, *Kumar Ameresekere*, *U. de Z. Gunawardene*, *N. Wijenathan*, *C. Chakradaran*, *P. P. S. Fernando* and *P. A. de Z. Karunaratne* (assigned), for the accused-appellants.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

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December 2, 1967. T. S. FERNANDO, A.C.J.—

The three appellants as the 1st, 2nd and 4th accused and another man, Karunatilleke, as the 3rd accused stood their trial before a judge and jury on an indictment containing three charges which alleged that all four of them committed the offences of (1) house-breaking by night (s. 443), (2) theft (s. 369) and (3) rape on one Karunawathie (s. 364) of the Penal Code. At the conclusion of a lengthy trial the jury by a unanimous verdict found the 1st, 2nd and 4th accused (the appellants) guilty on all three charges in the indictment and the 3rd accused not guilty of any offence.

In regard to the appeal of the 1st accused, who was well-known to the woman Karunawathie, the jury had before them the evidence of the woman herself who claimed to have identified him as a person who broke into her house on the night in question as well as the evidence of certain injuries found on the person of the 1st accused which could have tended to corroborate the woman's evidence that he was one of the persons who had forcible sexual intercourse with her. We found no reason for interfering in any way with the convictions of the 1st accused or the sentences imposed upon him. We accordingly dismissed his appeal.

A difficulty, however, arose in the case against the other appellants. As the 3rd accused was found not guilty of any offence, in spite of the woman's evidence that she identified not only the 1st accused but all three other accused as well, it was contended that it was unreasonable for the jury to have accepted her evidence implicating the 2nd and 4th accused while refusing to accept her evidence implicating the 3rd accused. There appears, however, to be some ground for the jury to have differentiated between the cases of the 2nd and 4th accused on the one hand and that of the 3rd on the other. While the woman's evidence in so far as it tended to implicate all the accused on the house-breaking and theft charges did not require corroboration, the learned judge, correctly in our opinion, directed the jury to look for corroboration of her evidence before returning a verdict against the accused on the charge of rape. While the judge in marshalling the evidence in the case pointed to some evidence as being capable of providing the necessary corroboration in so far as it tended to incriminate the 2nd and 4th accused, that evidence did not affect the 3rd accused. It is therefore probable that the jury, seeking corroboration so far as the charge of rape was concerned, and not finding any tending to criminate the 3rd accused found him not guilty on that charge, and then somewhat illogically went on to find him not guilty on the other two charges as well. No appeal is competent against an acquittal at a trial by jury, and we need not, therefore, consider any further upon the present appeals the correctness of the verdict in respect of the 3rd accused.

Learned counsel for the appellants has, however, pointed to the nature of the directions given by the learned Commissioner who presided at the trial in respect of the alleged corroboration, and contended that he

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has here left to the jury as corroborative evidence some evidence which is not capable of amounting in law to corroboration. The evidence so left to the jury, while it may have tended in some slight measure to show that the 2nd and 4th accused were in the company of the 1st accused on the evening in question, fell short of evidence tending to show that rape was committed by these two accused persons. In the case of *Goddard and Goddard* [1] Chief Justice Lord Parker, after referring to the well-known observations of Byrne J. in *Zielinski's case* [2] stated as follows :

> "It is only right to say that in the experience of this Court that principle is seldom followed ; indeed, if it is to be treated as a general principle applicable to all cases of corroboration, this court feels that it goes too far. Quite clearly, it is idle to give that direction *simpliciter* in a case where in fact there is no evidence capable of amounting to corroboration because the very fact that the direction is given would leave the jury to infer that there was some evidence capable of amounting to corroboration if they looked for it. Equally, if you get a case, as in many sexual cases, where there is a danger that the jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration, as, for example, a complaint made by the complainant. In the general run of cases, where there is evidence capable of amounting to corroboration, the duty of the judge must depend on the exact facts of the case, bearing in mind that he certainly would not be expected to refer to every piece of evidence which is capable of amounting to corroboration but, in general, in the judgment of this court he should give a broad indication of the evidence which, the jury, if they accept it, may treat as corroboration."

In respect of the two bits of evidence which we are satisfied could not be treated as corroborative of the woman's complaint of rape in so far as they tended to criminate the 2nd and 4th accused, the trial judge referred to them respectively as (1) "a matter you are entitled to take into consideration" and (2) "a matter you will take into consideration". Pointing to an adequate direction given by the learned judge to the jury as to the circumstances in which they could convict on a charge of rape even where the woman's evidence was uncorroborated, Crown Counsel invited us to affirm the convictions. We did not, however, find it possible to agree to this course of action as this Court cannot now speculate on the actual basis on which the jury did act in returning the verdict on the charge of rape. The jury may well have, in the light of the judge's directions, considered as corroborative evidence which we are satisfied could not be deemed to be such. For that reason, while affirming the convictions and sentences imposed on the 2nd and 4th accused on the first two charges, we have quashed their convictions and the sentences imposed upon them on the 3rd charge.

Appeal of 1st accused dismissed.
Appeals of 2nd and 4th accused partly allowed.

[1] *(1962) 46 Cr. A. R. at p. 461.* [2] *(1950) 34 Cr. A. R. 193.*

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1969 *Present :* **Alles, J., and de Kretser, J.**

P. ARUMUGAM, Petitioner, *and* THE OFFICER-IN-CHARGE, POLICE STATION, MIRIHANA, Respondent

S. C. 633/68—Application for a Mandate in the nature of a Writ of Mandamus

Criminal Procedure Code, as amended by Act No. 42 of 1961—Section 122A(1)— Right of an accused person to obtain certified copies of "first information"—Meaning of expression "first information"—Sections 121 (1), 121 (2), 148.

Section 122 A (1) of the Criminal Procedure Code does not enable a person accused of a cognizable offence to obtain certified copies of the "notes and observations" made by a police officer concerning the offence, if the notes and observations do not relate to any part of the first information in regard to the offence.

A report under section 148 (1) (*b*) of the Criminal Procedure Code need not always be preceded by information recorded under section 121 (1). Section 121 (2) of the Criminal Procedure Code contemplates the institution of proceedings without a first information being recorded under section 121 (1).

Panditaratne v. The Assistant Superintendent of Police, Kegalle (72 N. L. R. 273) considered.

APPLICATION for a writ of *mandamus* on the officer-in-charge of the Mirihana Police Station.

Mark Fernando, for the petitioner.

K. Ratnesar, Crown Counsel, for the respondent

Cur adv. vult.

January 25, 1969. ALLES, J.—

This is an application for the issue of a mandate in the nature of a writ of mandamus ordering and requiring the respondent, who is the Officer-in Charge of the Mirihana Police Station to furnish to the petitioner a certified copy of the "notes and observations" of Sub-Inspector Silva of the Mirihana Police made in the course of the investigation in M. C. Colombo South Case No. 87875/B. The petitioner who was charged in M.C. Colombo South Case No. 87875/B with having sold a pound of Bombay onions above the controlled rate to Police Constable Siriwardene of the Mirihana Police, maintained that under section 122A (1) of the amendment to the Criminal Procedure Code introduced by Ordinance No. 42 of 1961, the "notes and observations" of Sub-Inspector Silva constituted a first information given under sub-section (1) to section 121 in consequence of which proceedings were instituted against him in the Magistrate's Court of Colombo South under section 148 of the Criminal

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Procedure Code. The application for the certified copy of this information and the statement made by Police Constable Siriwardene in the course of this investigation was made to the Magistrate, who, by his order of the 4th of March 1968, stated that the petitioner was entitled to the first information given to the Officer-in-Charge of the Mirihana Police Station in consequence of which proceedings were instituted against the petitioner. He also stated in his order that the petitioner was entitled to obtain a certified copy of the statement of Police Constable Siriwardene to whom the accused is alleged to have sold the article in contravention of the Control of Prices Act. The latter statement has been furnished to the petitioner and the only matter presently in issue is whether the petitioner is entitled to the "notes and observations" of Sub-Inspector Silva under the provisions of the law.

It would appear from the proceedings furnished to Court and the submissions of Counsel that the prosecution launched against the petitioner for a contravention of the Control of Prices Act was the result of some information that was received by the Officer-in-Charge of the Mirihana Police Station that the petitioner was suspected to be profiteering in the sale of Bombay onions. This information it is conceded cannot be the first information recorded under section 121 (1) of the Criminal Procedure Code. In *Emperor v. Nazir Ahmad* [1] it was held that

> "In the case of cognizable offences, receipt and recording of a first information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way, but there is no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged."

This observation is in conformity with the provisions of section 121 (2) of the Criminal Procedure Code. That section contemplates that the report to the Magistrate's Court should be preceded by the information recorded under section 121 (1) or *otherwise*. Section 121 (2) therefore contemplates the institution of proceedings without a first information being recorded under section 121 (1). If, for instance, an offence is committed in the precincts of the Police Station, and in the presence of the Officer-in-Charge of the Police Station, it can hardly be said that any information was given in regard to the commission of a cognizable offence. In this connection, I must admit that I was in error when I made the observation in *Panditaratne v. The Assistant Superintendent of Police, Kegalle* [2] that the report under section 148 (1) (*b*) should be preceded by information recorded under section 121 (1) of the Code.

[1] *A. I. R. (32) 1945 P. C. 18.* [2] *(1967) 72 N. L. R. 273 at 276.; 75 C. L. W. 40 at 42.*

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In the instant case, can it be said that the "notes and observations" of Sub-Inspector Silva constituted the first information in regard to which the petitioner was charged with the offence of profiteering ? The offence in respect of which proceedings were instituted against the petitioner presumably took place when the petitioner sold the article to Police Constable Siriwardene. It was after the completion of the sale that statements would have been recorded by the Police officers in connection with the detection. In *Mani Mohan Ghose v. Emperor*[1] the Calcutta High Court gave some useful directions as to what constituted a first information under section 154 of the Indian Criminal Procedure Code, which corresponds to section 121 (1) of our Code. According to Ghose, J., four conditions have to be satisfied before an information can be designated as a first information :

(*a*) The information must relate to the commission of a cognizable offence ;

(*b*) It must be given to the Officer-in-Charge of a Police Station ;

(*c*) It must be put into writing. If already written it must be signed by the person giving it ; if it is oral, it must be taken down in writing and read over to the informant ;

(*d*) The substance of the information should be entered in the Information Book.

It does not appear to me that in the present case those conditions have been satisfied in regard to the "notes and observations" of Sub-Inspector Silva. It may be that these observations, even if they can be termed an information, were entered by Sub-Inspector Silva for his own guidance and to help him in the course of his investigation and probably made before the offence was committed by the petitioner. They were therefore not information in relation to the commission of a cognizable offence and cannot be termed a first information.

Learned Counsel for the petitioner strongly relied on my judgment in *Panditaratne v. The Assistant Superintendent of Police, Kegalle*[2], but in my view, the facts of that case can be distinguished from the facts of the present case. In that case, the Police officer went to the Kegalle Rest-house to investigate the non-cognizable offence of insult. When the Police party arrived at the Rest-house, the accused whom they sought to apprehend, commenced to insult the Police party, offered resistance to his arrest and kicked the Police officers while he was being taken to the Police Station. The events that transpired after the arrival of the Police party at the Rest-House and the offences committed by the accused subsequently, formed the subject matter of a separate report to the Magistrate. The Sub-Inspector who was in charge of the Police party, when he arrived at the Police Station, entered his observations in the Information Book and informed the Officer-in-Charge of the Police Station of the subsequent

[1] *33 Cr. L. J. 1932, 138 at 141.* [2] *(1967) 72 N. L. R. at 273 ; 75 C. L. W. 40.*

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offences committed by the accused at the Rest-House. I held that in that case the Police being the victims of the attack by the accused and the complainants in the case, were the first informants in regard to the offences committed by the accused after the arrival of the Police party at the Rest House and that the observations of the Sub-Inspector in Charge which were contained in the Information Book constituted the first information in that case and that the accused under sction 122A (1) was entitled to those " observations ". In this case, the position is different. The notes and observations whether made before the offence was committed or after, did not constitute any part of the first information in regard to the charge of profiteering. Indeed, in my view, there was no first information in this case and therefore the petitioner is not entitled to the " notes and observations " of Sub-Inspector Silva under section 122A (1) of the Criminal Procedure Code. We therefore refuse the application of the petitioner with costs fixed at Rs. 52/50.

DE KRETSER, J.—I agree.

Application refused.

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

G. A. PUNCHINONA, Appellant, *and* L. J. LEELAWATHIE, Respondent

S. C. 107/63 (F)—D. C. Matara, 1449/M.

Promissory note—Designation of payee—Reasonable certainty—Bills of Exchange Ordinance (Cap. 82), s. 7 (2).

A promissory note which is made payable to a person *or his heirs* on demand is valid. In regard to such a promissory note it cannot be contended that the payee is not specified with certainty.

Peter v. Suriapperuma (20 N. L. R. 318) not followed.

APPEAL from a judgment of the District Court, Matara.

C. Ranganathan, Q.C., with *W. S. S. Jayawardene*, for the plaintiff-appellant.

G. T. Samarawickrame, Q.C., with *E. St. N. D. Tillekaratne*, for the defendant-respondent.

Cur. adv. vult.

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March 7, 1967. H. N. G. FERNANDO, C.J.—

This action for the recovery of a sum of Rs. 4,000, being the amount specified in an instrument proved to have been signed by the defendant, was dismissed solely on the ground that, although the instrument purported to be a promissory note, the payee was not specified with certainty. The promise in the instrument was (according to the translation from Sinhala) to pay *the plaintiff or her heirs* on demand. In dismissing the action on this ground, the learned District Judge properly felt bound to follow the judgment of 2 Judges of this Court in *Peter v. Suriapperuma* [1], where the designation of the payee was in almost identical terms.

In that case, the Court relied on an English decision (*Yates v. Nash*) [2], in which a note had been drawn in favour of the holder of an office for the time being. That decision ceased to be good law with the enactment of the Bills of Exchange Act, 1882, which expressly declared that a bill of exchange may be drawn in favour of the holder of an office for the time being (e.g. S. 7(2) of the Ceylon Ordinance, Cap. 82). With respect, it was in my opinion unsafe for this Court in the Ceylon case to rely on a statement in an English decision the effect of which had been expressly altered by legislation. The particular statement was that the payee must be capable of being ascertained with reasonable certainty *at the time the bill is drawn.* Soertsz, J. in *Silva v. Jayaweera*[3], impliedly criticised the statement by adding after it a mark of exclamation, but it was not necessary in the case before him to dissent from the decision in *Peter v. Suriapperuma.*

A common form of promissory note contains a promise to pay X. Nevertheless, the promise is enforceable at the instance of X's legal representative, whose identity cannot be ascertained with reasonable certainty at the time when the promise is made. Nor is there such reasonable certainty where payee is "X or order". The uncertainty in both these common forms of bills is no less than the uncertainty regarding the identity of heirs when a bill is drawn in favour of "X or his heirs". So long as X is alive, there is perfect certainty that X alone can demand payment; and after the death of X, the difficulty of ascertaining who can demand payment is no different from the difficulty which can arise upon the death of the sole payee of a bill. The "heirs" of X will be either those named in a last will, whether generally or with special reference to the bill, or else the heirs upon intestacy ascertainable in the course of testamentary proceedings.

I must add that Ennis J. (who participated in the decision of *Peter v. Suriapperuma*) held subsequently (at the report appended at 37 N. L. R. 28) that a note (as translated from the Sinhala) in favour of X or "a person who comes into possession of the document in the proper manner" did designate the payee with sufficient certainty. I am satisfied that "heirs" is a designation which is narrower and more certain than that which Ennis J. found acceptable.

[1] *20 N. L. R. 318.* [2] *(1860) 29 L. J. C. P. 306.*
[3] *39 N. L. R. 289.*

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For the reasons stated I must express disagreement with the decision by which the trial Judge was bound. Sitting on a bench of 2 Judges, I am not bound to follow it.

I would allow the appeal with costs and enter judgment for the plaintiff as prayed for.

ABEYESUNDERE, J.—I agree.

Appeal allowed.

1967 *Present :* **Tennekoon, J.**

H. M. PODIMENIKE, Appellant, *and* INSPECTOR OF POLICE, KIRIELLA, Respondent

S. C. 807/67—M. C. Ratnapura, 26330

Control of Prices Act—Price Order relating to maximum retail price of red onions—Sale in contravention thereof—Quantum of evidence as to question whether article sold was red onions—Sale to a decoy in the course of a raid—Whether it is a sale for "consumption or use"—Fixing of maximum price for Ratnapura District at a few cents above the price fixed for Colombo—Validity.

In a prosecution for the sale of a pound of red onions to a decoy at a price in excess of the maximum retail price fixed by the relevant Price Order—

Held, (i) that the failure of the accused to cross-examine the prosecution witnesses who referred to the article purchased and produced in Court as "red onions" was sufficient to justify the inference that the article sold was red onions, even though a letter written to the Magistrate regarding the quality of the onions by a person who called himself a Systematic Botanist was inadmissible in evidence.

(ii) that where a person who is a retailer of red onions sells a quantity less than one hundredweight, the sale is from the point of view of the seller intended for "consumption or use" and it is irrelevant to enquire what, if any, purpose the buyer had in view. In such a case the proper question to ask is not what purpose the buyer had in view, but for what purposes the seller sold the onions. Accordingly, a sale to a decoy in the course of a "raid" is a sale for purposes of consumption or use.

(iii) that the fixing of maximum price for Ratnapura at a figure increased by a few cents over the Colombo price was not an unauthorised delegation or a surrender of his statutory powers by the Assistant Controller of Prices of the Ratnapura District.

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APPEAL from a judgment of the Magistrate's Court, Ratnapura.

L. W. Athulathmudali, for the accused-appellant.

Faisz Musthapha, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 22, 1967. TENNEKOON, J.—

The accused-appellant was convicted of the offences of selling a pound of red onions at a price in excess of the maximum retail price fixed by the Price Order No. R/42/1965 of 8/6/65 read with Price Order No. 420 of 8/1/67.

Counsel for the appellant made three submissions. The first was that in order to prove that the article sold was red onions, the prosecution produced a written opinion from a person who called himself a Systematic Botanist. In a letter addressed to the Magistrate he stated that he had examined the pound of onions that had been sold, that he found it was onions of the variety commonly known as "red onions". The Systematic Botanist was not called, and it needs no discussion to conclude that his letter is completely inadmissible. Counsel for the appellant submitted that the accused should accordingly be acquitted. This does not follow, because the purchaser of the onions and other witnesses have clearly stated that what they purchased on this occasion was red onions. The witness Abeywardena who made the purchase stated in evidence that he asked the accused for a pound of red onions, and the accused sold to him the pound of red onions which was later produced in Court. There was no cross-examination of this or other witnesses who referred to the article purchased and produced in Court as " red onions ". I think that in these circumstances there is ample evidence that the article sold was red onions even when the letter of the Systematie Botanist is rejected as being inadmissible evidence on that question.

The second point taken by Counsel for the appellant is that the onions were not purchased by the decoy Abeywardena for consumption or use, but that it was purchased in the course of a " raid ". The Price Order fixes the maximum price for sales wholesale, and for sales retail, and the following definition is given to what is meant by the sale wholesale, and to a sale retail:—

" (*a*) any sale of any quantity of an article specified in column 1 of the Schedule for the purpose of resale or any sale of such article in a quantity of one hundredweight gross or more at a time shall be a sale by wholesale ;

(*b*) any sale of any quantity of an article specified in column 1 of the Schedule less than one hundredweight gross for the purpose of consumption or use shall be deemed to be a sale by retail ; "

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The charge in this case relates to a sale above the maximum retail price. It is not suggested that a sale of red onions (of a lesser quantity than 1 cwt.) by the accused to any ordinary customer at her boutique would not be a sale by retail within the meaning of the Price Order. What is argued is that the purchaser in this case did not have any need for the onions when he purchased them, nor had the organiser of the "raid" and that neither of them had in contemplation any use for the onions because the only purpose of making the purchase was to test whether the accused was selling by retail above the price fixed by the Price Order.

I am inclined to the view that in deciding whether a particular sale of a quantity of red onions less than one hundredweight gross, was wholesale or retail, the proper question to ask is not what purpose the buyer had in view, but for what purposes the seller sold the onions. This may appear to be somewhat illogical because the seller cannot control the purposes of the buyer. The two tests prescribed are " for purposes of resale " and " for purposes of consumption or use ", both of which appear to refer only to the purposes of the buyer in buying. It is necessary however to remind oneself that the Price Order speaks of a *sale for* one or other of those purposes and not of a *purchase for* those purposes. The definitions given to the terms " sale by wholesale " and " sale by retail " are not intended to introduce a new term or condition into day to day sale and purchase transactions indulged in by the public at large. It is a well-known fact of the political economy of this country that there are dealers who hold themselves out as wholesale dealers and others who hold themselves out as retail dealers. These dealers sell at "wholesale" rates or at "retail" rates irrespective of the purposes of the particular buyer. The wholesaler sells ordinarily for the purposes of resale : the retailer ordinarily for the purpose of consumption or use. Neither pauses to enquire of each particular buyer what *his* particular purpose is. Nor is there anything in the Price Order which requires him to do so. It seems to me therefore that where a person is a retailer of red onions and sells a quantity of red onions less than one hundredweight, the sale is from the point of view of the seller intended for "consumption or use" and it is irrelevant to enquire what, if any, purpose the buyer had in view. I am therefore of opinion that in the instant case the sale of the pound of onions by the accused at the "boutique" of her husband Dingirimahatmaya was intended for purposes of consumption or use and was accordingly a sale by retail.

It is a source of satisfaction to learn that my brother G. P. A. Silva, J. has in an unreported case (which is not available to me at the time of writing this judgment) come to the same conclusion on similar facts.

The 3rd submission which Counsel for the appellant submitted was as follows :—The Price Order No. R/42/65 of 8/6/65 made by the Assistant Controller of Prices (Food), Ratnapura District, and published in the

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Ceylon Government Gazette Extraordinary No. 14,422 of 12/6/65 fixes the price of red onions for the Ratnapura District in this way—

> " BY virtue of powers vested in me by section 4 of the Control of Prices Act (Chapter 173), read with section 3 (2) of that Act, I, John Vincent Gnanapragasam, Assistant Controller of Prices (Food), Ratnapura District, do by this Order—
>
> .....
>
> .....
>
> (3) fix with immediate effect the price for the time being fixed under the Control of Prices Act (Chapter 173), as the retail Dealer's maximum retail price for the Colombo Municipality, increased by amounts specified in column 3 of the Schedule hereto, to be the maximum retail price per pound nett above which the articles specified in the corresponding entry in column 1 of that Schedule shall not be sold within the area or the administrative district specified in column 2, of that Schedule "

It is submitted by Counsel that this is an unreasonable and improper manner of fixing prices for the Ratnapura District, and secondly that it is in substance a delegation of his powers by the Assistant Controller of Prices, Ratnapura District to the officer who makes Price Orders for the Colombo District. I cannot see how it can be suggested that the fixing of a price for the Ratnapura District at few cents above the price fixed for Colombo is an unreasonable exercise of the power of fixing the maximum prices for Ratnapura District. Obviously this manner of fixing the price proceeds on the basis that the market price of red onions in Ratnapura is usually a few cents higher than in Colombo for reasons which are easy to envisage and of the adequacy of which the person given the power to fix prices is the best judge. I accordingly reject this contention. In regard to the further submission that Food Price Order No. R/42/1965 amounts to a surrender of the power of fixing prices for Ratnapura to the officer who fixes prices for Colombo District, it is only necessary to refer to the fact that under section 4 of the Control of Prices Act, a Price Order is capable of being revoked at any time by the officer who makes it or by the Controller. If the prices fixed for Colombo are such that the prices in Ratnapura need to be revised, the officer who has power to make Food Prices Orders for Ratnapura has only to make and sign a fresh order for Ratnapura immediately. I do not accordingly think that there is any substance in the submission that by fixing for Ratnapura District maximum prices at a figure increased by a few cents over the Colombo price is an unauthorised delegation or a surrender of his statutory powers by the Assistant Controller of Prices of the Ratnapura District.

The appeal accordingly fails, and is dismissed. The convictions and sentences passed on the accused are affirmed.

Appeal dismissed.

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1969 *Present* : **de Kretser, J.**

M. T. M. MUSTAPHA, Appellant, *and* SUB-INSPECTOR OF POLICE, BATTICALOA, Respondent

S.C. 1070/68—M. C. Batticaloa, 24128

Control of Prices Act—Price Order relating to sale of Nespray milk food—Charge of contravening it—Quantum of evidence—Statements on label—Relevancy.

Selling a marketed tin of milk food labelled " Nespray 1 pound " at a price in excess of the price permitted by the relevant Price Order is a contravention of that Price Order. In such a case it is not necessary for the prosecution to prove that the tin contained a pound of the milk food, for the price is fixed per tin and not per pound, and the question whether what is stated on the label is factually correct does not arise.

APPEAL from a judgment of the Magistrate's Court, Batticaloa.

G. E. Chitty, Q.C., with *T. W. Rajaratnam* and *G. E. Chitty* (Jnr.), for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 28, 1969. DE KRETSER, J.—

The Magistrate of Batticaloa (Mr. O. S. M. Seneviratne) convicted the accused of the two charges laid against him ; viz. selling a pound tin of Nespray which is Price Controlled at Rs. 2·90 for Rs. 3/- and failing to exhibit conspicuously on the Price Board the controlled price of Nespray. He sentenced the accused to 6 weeks R. I. and a fine of Rs. 1,000/- in default 6 weeks R.I. on count 1, and a fine of Rs. 50/- in default 2 weeks R.I. on count 2. The accused has appealed.

The Magistrate who had the advantage of seeing the school-boy witness Marso giving evidence has accepted that evidence after carefully weighing all that was urged by Counsel against that course. I see no reason to disagree with him. Marso's evidence established that the accused asked him for Rs. 3/- for a one pound tin of Nespray, and when Marso gave him the Rs. 10/- note of which the number has been noted, in payment, the accused gave him the tin of Nespray produced as P3 and a balance of Rs. 7/-. The accused's defence was that he had no ten cent bit at the cashier's table he was at, and that he had intended giving it, taking it from another table in the boutique but that he was arrested before he could do so. It appears to have been a foolish thing to do—so foolish that I find myself unable to believe it happened that he, a trader dealing in Price Controlled goods should have handed over only a balance that established guilt when he could have given the true balance in a minute or two. The fact that I have observed in appeals from convictions in other Price Control cases similar claims of having intended to hand over

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the balance, which makes all the difference between guilt and innocence, but not having had the time to do so, makes me all the more sceptical. The Magistrate did not accept his testimony and I am of the view that the Magistrate was correct in doing so. On the facts, then, it is established that the accused sold to Marso as a one pound tin of Nespray, the production P3 which the Magistrate notes was untampered with and which bore the label " Nespray nett weight 1 pound " (454 grams).

Mr. Chitty for the appellant submits that the prosecution to succeed must prove that the tin P3 contained a pound of the milk food known as Nespray and that the prosecution does not prove that by proving that the accused sold a tin of milk food bearing a label, Nespray nett. weight one pound (454 grams).

Counsel for the Crown relying on the case of *Jalaldeen v. Jayawardene*[1] submits that the accused when he sold to a customer the tin so labelled " adopted the specification on the label and admitted by conduct the weight and contents stated in the label ".

If by this is meant that the accused must be held to have admitted that what was stated on the label was the truth, I must with all respect disagree, for the evidence is that the tin was untampered with. Therefore the accused relied as much as anyone else on what was stated on the label. The fact that he pinned his faith on what was stated on the label does not mean that his faith could not be misplaced.

From the evidentiary point of view the legend Nespray 1 lb. nett on the label is hearsay and the case of *Myers v. Director of Public Prosecutions*[2] cited with approval in *Patel v. Comptroller of Customs*[3], " makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or marking ".

Counsel for the Crown further submits that it is common knowledge that the milk food known as Nespray is marketed by its manufacturer in tins of which the contents weigh 1 pound, $2\frac{1}{2}$ pounds and 5 pounds respectively. His submission is that the Price Order fixes prices for milk food in tins so labelled, and in the instant case, the prosecution having proved that the accused sold the tin P3 bearing such a label for Rs. 3·00 when the controlled price was Rs. 2·90, the accused is guilty of the charge laid against him.

It then becomes necessary to decide what it is that is Price Controlled. Is it a pound of the milk food of the brand known as Nespray ordinarily marketed in tins or is it a tin of milk food labelled Nespray 1 pound nett weight (454 grams.)? The relevant price order is No. 407 of 1.3.66 published in G.G. (Extraordinary) 14,664 of 1.3.66, and what is relevant in it to this case is: (ii) fixes with immediate effect the prices specified in columns 2 and 3 of the Schedule hereto to be the maximum wholesale price per dozen tins and the maximum retail price per tin respectively

[1] *(1968) 70 N. L. R. 476.*

[2] *(1964) 2 A .E. R. 881.*

[3] *(1965) 3 A. E. R. 593.*

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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 ..... What is relevant in the Schedule reads :—

Column 1 *Brand of Milk Food*	*Column 3* *Maximum Retail Price per tin* Rs. c.
Nespray 1 lb.	2 90
Nespray 2½ lb.	7 0
Nespray 5 lb.	13 25

In my view an examination of the Price Order confirms the correctness of the submission of Counsel for the Crown. Milk food is marketed in tins and what the Price Order controls is the price at which such tins can be sold. It is to be noted that the price is fixed per tin and not per pound. So *a tin* of milk food described under column 1 of the schedule as "Nespray 1 pound " for the reason that that is how it is labelled by its manufacturers, is controlled at Rs. 2·90. *A tin* of milk food described under column 1 as Nespray 2½ lbs. is controlled at Rs. 7/- and so on. In these circumstances, it appears to me the question of whether what is stated on the label is factually correct does not arise, and there is no need to comfort oneself with the thought that "it would be absurd to suppose that manufacturers of Nespray adopt any uncommon course of conduct or business practice, and that they understate in their labels the weight of the milk food they sell ". The evidence having established that the accused did sell P3 *a tin* of milk food labelled Nespray 1 pound for Rs. 3/-, when such a tin is Price Controlled at Rs. 2·90, is, in my opinion rightly convicted of the charge.

There remains the conviction on the charge which should be that the accused failed to exhibit conspicuously on a notice board the maximum retail price of Nespray. Apart from the fact that the charge is wrongly drafted in that what it is alleged that he failed to exhibit conspicuously is the notice board, I find that the notice board in question has, for some careless reason, not been produced to enable the Magistrate to decide whether what was stated on it was conspicuous or not. I therefore set aside the conviction on this count.

The next question is what the sentence on count 1 should be. As the accused is a first offender, I do not think a prison sentence is called for. Counsel for the Crown concedes that this is a case in which the right of the Court to apply the provisions of Section 325 of the Criminal Procedure Code has not been taken away by law. I set aside the sentence imposed and direct the accused to enter into a bond in Rs. 1,000 (personal) to be of good conduct and to come up for conviction and sentence if called on within a period of three years, and to pay Rs. 1,000 as Crown costs within one month of entering into the bond. Subject to these variations accused's appeal is dismissed.

Appeal dismissed, subject to certain variations.

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[PRIVY COUNCIL]

1969 *Present:* **Lord Hodson, Lord Devlin, Viscount Dilhorne, Lord Donovan and Lord Pearson**

R. P. D. JAYASENA, Appellant, *and* THE QUEEN, Respondent

PRIVY COUNCIL APPEAL No. 27 of 1968

C. C. A. 25 of 1966

S. C. 17/65—M. C. Kalmunai, 21610

Charge of murder—Admission of intention to kill—Reliance by accused upon private defence entirely—Burden of proof then—Evidence Ordinance, ss. 3, 105, 106—Meaning to be given to the words " burden of proving " in s. 105—Penal Code, ss. 73, 89 et seq., 93, 293, 294.

Where an accused who is charged with murder admits at the trial that the deceased died of wounds deliberately inflicted by him with intention to kill and his defence entirely is that he was acting in self-defence, section 105, read with section 3, of the Evidence Ordinance imposes upon the accused the burden of proof on the issue of private defence. In such a case it cannot be contended on behalf of the accused that he has not got to provide any sort of proof that he was acting in private defence. It is not sufficient for the accused to raise a doubt as to whether he is entitled to the benefit of the right of private defence, the use of which is permitted not only as a general exception by section 93 of the Penal Code but also as a special exception in section 294 of that Code.

In the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by section 105 of the Evidence Ordinance can be anything less than proof in accordance with section 3 of that Ordinance. Even of there is any ambiguity in the language of sections 3 and 105 of the Evidence Ordinance, the decision in *Woolmington v. D. P. P.* (1935 A. C. 462) is not of assistance in resolving it.

R. v. Chandrasekera (44 N. L. R. 97) approved.

(The position however is different when the accused denies intention to kill and says that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution.)

APPEAL, with special leave, from a judgment of the Court of Criminal Appeal.

T. O. Kellock, Q.C., with *Ian Baillieu* and *M. I. Hamavi Haniffa*, for the accused-appellant.

E. F. N. Gratiaen, Q.C., with *M. P. Solomon*, for the respondent.

Cur. adv. vult.

1*——J 9585—2,255 (12/69)

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July 29, 1969. [*Delivered* by LORD DEVLIN]—

This is an appeal from a judgment given by the Court of Criminal Appeal of Ceylon. The accused, who was the appellant in that Court and is now the appellant before the Board, was on 3rd March 1966 convicted of murder. At the trial the accused admitted that the deceased died of wounds deliberately inflicted by him, his defence being that he was acting in self-defence. The sole question in the appeal is whether at the trial the jury was rightly directed on the burden of proof on the issue of self-defence, or private defence as it is more precisely called in the Penal Code.

The Penal Code defines murder in ss. 293 and 294. Since no question arises in this case about the quality of the intention, it is sufficient to say that it is murder if the act by which the death is caused is done with the intention of causing death or bodily injury of a sort that is likely to cause death. The right of private defence is given in the Code by s. 89 and following sections which form part of Chapter IV headed "General Exceptions". Its use as a defence to a charge of murder is permitted not only as a general exception by s. 93 but also as a special exception in s. 294 itself.

The burden of proof is settled by the Evidence Ordinance s. 105, which reads as follows :

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The argument turns upon the construction of s. 105 and the meaning to be given to "burden of proving".

Mr. Kellock for the appellant submits that there are two kinds of burden. One, which he calls the legal burden, is the burden of establishing the case ; the other, called the evidential burden, is the burden of adducing some evidence in support of the case. Mr. Kellock submits that the burden imposed by s. 105 is in the second category. If it were in the first category, the direction given to the jury by the trial judge in his summing-up cannot be criticised by the appellant, to whom it might be said to be unduly favourable. If it is in the second category, it is at least doubtful whether the direction would be adequate. Rather than scrutinise the summing-up to see whether the direction will pass muster in either category, their Lordships will determine whether the appellant's argument on s. 105 is correct.

To understand the argument it is necessary first to understand the position in English law. Before 1935 it was widely believed that in English law killing was presumed to be murder unless the contrary

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appeared from circumstances of alleviation, excuse or justification ; and accordingly that if an accused contended that a killing was accidental or provoked or done in self-defence, the burden of proof on any of these issues rested upon him. There was, as Sankey L. C. said in *Woolmington v. D.P.P.*[1] " apparent authority " for this view, the foundation for it being the statement of the law in Foster's Crown Law written in 1762. In *Woolmington v. D.P.P.* where the accused was charged with murder and gave evidence that the killing was accidental, the trial judge directed the jury in accordance with this view of the law. The House of Lords declared this view to be erroneous. The House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on the prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt. To prove murder the prosecution must prove that the killing was intentional and unprovoked. This does not mean, as the House made clear in subsequent cases, that a jury must always be told that before it can convict, it must consider and reject provocation and self-defence and all other matters that might be raised as an answer to a charge of murder. Some evidence in support of such an answer must be adduced before the jury is directed to consider it ; but the only burden laid upon the accused in this respect is to collect from the evidence enough material to make it possible for a reasonable jury to acquit.

Against this background the appellant's argument can be appreciated and in particular the distinction drawn between what are said to be the two categories of proof,—the establishing of a case, and the adducing of evidence. The argument is not of course that *Woolmington v. D.P.P.* is directly applicable ; it is a decision on the common law and the Board is required to interpret and apply the code. The argument is that the code should be interpreted in the light of *Woolmington v. D.P.P.* In his speech Sankey L. C. dealt in two ways with Sir Michael Foster's statement of the law. While at 482 he made it quite clear that he was prepared, if necessary, to reject it, he had earlier at 480 indicated that it could be reconciled with the principle which the House was laying down. If the statement in Foster can be reconciled with the doctrine, then, as Mr. Kellock argues, so can s. 105. The way of reconciliation is by construing " burden of proving " as referring to the burden of adducing evidence, the so-called evidential burden of proof. In this way the " golden thread ", as the Lord Chancellor described it in a famous passage, can be preserved for the law of Ceylon.

This is an argument which has prevailed in several jurisdictions where there is an Evidence Ordinance containing a provision in the same terms as s. 105. It was adopted in the High Court of Rangoon in the *Emperor v. U. Damapala*[2], by a majority in the High Court of Allahabad in

[1] *(1935) A. C. 462 at 473.*

[2] *(1937) 14 A. I. R. 83.*

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Emperor v. Parbhoo[1] and in Malaysia in *Looi Wooi Saik v. Public Prosecutor*[2]. It has however been decisively rejected by the Court of Criminal Appeal of Ceylon sitting as a court of seven with one dissentient, in *R. v. Chandrasekera*[3]. In the present case the Court dismissed the appeal without giving reasons, doubtless following the previous decision. This appeal is therefore in effect an appeal against *R. v. Chandrasekera* which Mr. Kellock invites the Board to disapprove.

Their Lordships do not understand what is meant by the phrase "evidential burden of proof". They understand of course that in trial by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends upon the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in private defence. So it is a misnomer to call whatever it is that he has to provide a burden of proof,—a misnomer which serves to give plausibility but nothing more to Mr. Kellock's construction of s. 105.

S. 3 of the Evidence Ordinance deals with proof in the following terms:

> "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Their Lordships do not think that proof means anything different in English law. But at any rate in the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by s. 105 can be anything less than proof in accordance with s. 3. Their Lordships will not elaborate further since the incongruities of any such supposition are fully exposed in the judgments of the majority in *R. v. Chandrasekera* particularly the judgment of Soertsz, J.

[1] (*1941*) *A. I. R. 402.*

[2] (*1962*) *28 M. L. J. 337.*

[3] (*1942*) *44 N. L. R. 97.*

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Even if there were any ambiguity in the language of ss. 3 and 105 of the Evidence Ordinance, their Lordships would not be aided in resolving it by the decision in *Woolmington v. D.P.P.* In saying this their Lordships are not questioning the place which this authority now holds in the law of England. But it is not necessary to read more than the speech of the Lord Chancellor himself to see that by far the greater strength of previous authority supported the view which the House rejected. Nevertheless, for some considerable time before 1935 many English judges had in practice been applying the law with less strictness towards the defence than its terms warranted. This is illustrated by the judgment of the Court of Criminal Appeal in the very case as it appears from the speech of the Lord Chancellor at 470. The Court said that while there was ample authority for the trial judge's statement of the law, " it may be that it would have been better " if he had told the jury that if they entertained any reasonable doubt about the accused's explanation they should acquit; and in fact they dismissed the appeal, not as being unfounded in law, but by resorting to the proviso to section 4 (1) of Criminal Appeal Act 1907. Thus the decision of the House of Lords is an example of a change in the content of the law resulting from a change in the manner of applying it. The common law is shaped as much by the way in which it is practised as by judicial dicta. The common law is malleable to an extent that a code is not. Foster's statement of the law is not in their Lordships' opinion reconcilable with the law as laid down by the House of Lords. But there can be no doubt that it was adopted in the codification of the law introduced into Ceylon. It was at that time set out in all the English textbooks (from which it has now been dropped), including Stephens' Digest of the Criminal Law ; and Sir James Stephens, as is well known, was the begetter of the Evidence Ordinance. The code embodied the old criminal law and cannot be construed in the light of a decision that has changed the law.

In support of his argument Mr. Kellock pointed to s. 73 of the Penal Code which includes accident among the General Exceptions. He submitted that the effect upon this of s. 105 would be, unless it is given the modified reading for which he contends, to put the burden on the defence of negativing intention. Their Lordships consider that the language of ss. 3 and 105 in combination is so compelling that they would not be deterred from interpreting it in the way in which they have even if in its application to s. 73 it had the consequences which Mr. Kellock foresees. Having said this and since no case under s. 73 is before them, they do not propose to decide where the burden of proof lies when accidental killing is in question. Such a question would raise different considerations from those material in the present case. Proof of intentional killing does not negative the answer of private defence ; on the contrary, it is only after intentional killing is proved that private

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defence need be put forward. But proof of intentional killing does negative accident. In *R. v. Chandraskera*, Soertsz, J. at 125 dealt with the point as follows:

> " The position is however different in cases in which, by involving the fact in issue in sufficient doubt the accused *ipso facto* involves in such doubt an element of the offence that the prosecution had to prove. That, for instance, would have been the position under our law in the *Woolmington* case, if on the charge of murder, on all the matters before them, the Jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not, for, in that state of doubt, the Jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary cause [sic] of nature to cause death, existed or not. In such a case, the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case."

As at present advised, their Lordships agree with this dictum.

The attention of the Board has been drawn to cases in which the direction to the jury has been that, while the burden of proof of a particular defence is upon the accused, the general burden of proving guilt beyond a reasonable doubt remains always on the prosecution. Such a direction might appear at first sight to lend support to Mr. Kellock's contention that some lighter burden than the ordinary burden of proof is in these cases placed upon the accused. If that is the effect of it, it would in their Lordships' opinion be wrong. But it must be remembered that the evidence on which the accused relies, when an issue of provocation or private defence is raised, may go to challenge the prosecution's case as well as to establishing his own. The present case, as Mr. Gratiaen has said, is a clear case of confession and avoidance; the defence admitted the intention to kill and relied entirely upon private defence. It is however much more frequent for an accused to deny the intention. He will say that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. Likewise provocation and accident often feature together in an accused's story. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution. The point has recently been before the Supreme Court of India in relation to the defence of insanity. In *Dahyabhai v. State of Gujarat* [1] Subba Rao J. at 365 pointed out that evidence that fell short of proof of insanity might yet raise a reasonable doubt about the existence of the requisite intention. In *Bhikari v. State of Uttar Pradesh* [2] Mudholkar J. said at 198:

> " If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence

[1] (*1964*) *7 S. C. R. 361.* [2] (*1965*) *3 S. C. R. 194.*

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including mens rea of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in s. 105 of the Evidence Act. "

Their Lordships respectfully agree with this observation.

Finally, Mr. Kellock points to s. 106 of the Evidence Ordinance which says :

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

He relies upon two decisions of the Board, *Attygalle v. R.*[1] and *Seneviratne v. R.*[2] in which this section was considered and was not applied so as to shift the burden from the prosecution.

The principle involved in this section derives from the English law of evidence, where it has however been sparingly used. The prosecution is usually able to establish that an accused person has special knowledge of the circumstances of the crime with which he is charged. Under some systems of law this is considered to be sufficient for the accused to be called upon at the outset of a trial to say what he knows. Such a procedure would be quite inconsistent with the accused's right to silence which prevails in the English system as adopted in Ceylon.

Their Lordships are concerned with s. 106 only to see whether it gives any support to Mr. Kellock's argument on s. 105. He submits that the right solution lies in treating s. 106 as imposing only an evidential burden of proof ; and that if s. 106 has to be treated in that way, why not also s. 105 ? This submission gets no help from the two authorities cited. In these cases the Board said simply and without elaboration that the section does not cast upon an accused the burden of proving that no crime has been committed. Their Lordships in no way dissent from this conclusion. It may well be that the general principle that the burden of proof is on the prosecution justifies confining to a limited category facts " especially within the knowledge " of an accused ; but their Lordships do not consider that it can alter the burden of proof either in s. 106 or s. 105.

For these reasons, and generally for the reasons given in the majority judgments in *R. v. Chandrasekera*, their Lordships have humbly advised Her Majesty to dismiss this appeal.

Appeal dismissed.

[1] *(1936) A. C. at 338, 2 A. E. R. 116 ; 37 N. L. R. 337.*
[2] *(1936) 3 A. E. R. 36 ; 38 N. L. R. 208.*

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1969 *Present :* **G. P. A. Silva, A.C.J., and Siva Supramaniam, J.**

A. G. FERNANDO, Petitioner, *and* W. W. D. DHARMASIRI (Chairman, Urban Council, Wattegama), Respondent

S.C. 116/69—Application for Writ of Mandamus in D.C. Kandy, 7547/L.

Mandamus—*Whether it lies when a specific statutory remedy is available—Erection of a building in an Urban Council area—Certificate of conformity—Refusal of Chairman of Council to issue it despite order of tribunal of appeal—Remedy then of person who erected the building—Housing and Town Improvement Ordinance (Cap. 268), ss. 15, 16, 88, 95.*

Mandamus does not lie where there is a specific statutory remedy available providing for a mode of enforcement.

The Chairman of an Urban Council refused to issue a proper certificate of conformity to the petitioner in respect of a building although he had been ordered to issue one by the District Court upon an appeal preferred to it by the petitioner in terms of section 16 of the Housing and Town Improvement Ordinance. Thereupon the petitioner made the present application for a writ of *mandamus* on the Chairman directing him to issue the certificate of conformity.

Held, that *mandamus* was not available to the petitioner inasmuch as section 95 of the Housing and Town Improvement Ordinance provided a special statutory remedy whereby it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the enforcement of a decree.

APPLICATION for a writ of *mandamus* on the Chairman, Urban Council, Wattegama.

Nimal Senanayake, with *Sam Silva*, for the petitioner.

H. Wanigatunga, with *J. Weerasekera* and *N. Tiruchelvam*, for the respondent.

Cur. adv. vult.

July 26, 1969. G. P. A. SILVA, A.C.J.—

The petitioner in this application is the owner of certain premises at Wattegama which is within the area of authority of the Wattegama Urban Council and the respondent is the Chairman of the Urban Council. On the 26th December, 1962 the petitioner submitted a plan of a proposed building consisting of a row of five tenements for approval by the respondent as the competent authority under the Housing and Town Improvement Ordinance (Ch. 268 of the New Legislative Enactments). After giving due notice on 2nd June 1963 in terms of section 10 (*a*) of the

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said Ordinance, the petitioner commenced building operations and completed the building in February, 1964. On 24th February, 1964, in terms of section 15 (2) of the said Ordinance, the petitioner applied to the Chairman for a Certificate of Conformity to enable him to occupy the said buildings. As there was no response to this application the petitioner preferred an appeal to the District Court, which was constituted the tribunal of appeal for the purpose by section 88 of the said Ordinance with a view to obtaining an order from the District Court requiring the Respondent to issue the said Certificate of Conformity. On the 23rd November 1968 the parties appear to have arrived at a settlement and the District Judge made the following order. " By consent it is now agreed that the Chairman of the Defendant-Council will issue a certificate of conformity to the Plaintiff in respect of the building which is the subject matter of this application on or before 30.11.68.....

In view of the above I allow the appeal of the plaintiff as aforesaid and direct the Chairman of the Defendant-Council to issue the certificate of conformity as stated above.

This, however, is without prejudice to the rights of parties in respect of the land."

On the 30th November 1968 the respondent issued in terms of the order of the tribunal a document which purported to be a Certificate of Conformity which permitted him to occupy the house but in which certificate the words, " conforms with the requirements of the Urban Council " were deleted by the respondent. As the words which were deleted were themselves the most material words which the petitioner required if the Certificate was to have the effect of the Certificate of Conformity, the petitioner wrote to the respondent a letter informing him that he should issue a Certificate of Conformity in terms of section 15 of the Housing and Town Improvement Ordinance which was the only Certificate contemplated by the tribunal of appeal. To this letter the respondent did not reply. These were the facts that led up to the application made to this Court for a Writ of Mandamus on the respondent directing him to issue a Certificate of Conformity in accordance with the provisions of section 15 (1) (*sic*) of the Housing and Town Improvement Ordinance in respect of the building referred to.

Generally speaking the remedy by way of mandamus, which in any event is a discretionary remedy granted by this Court, would be available where there is a specific legal remedy without a mode of enforcing it. In such an instance the absence of a mode of enforcement would be a defect in the law and the procedure by way of Writ would step in to supply that defect. Counsel for the petitioner has submitted that this remedy would be available not only in cases where there is no provision for the enforcement of a public right but also where the remedy provided by law is not equally effective. In other words he argues that in order

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to exclude the remedy by way of a Writ of Mandamus there must be an alternative and effective remedy. In the case of *Sirisena v. Kotawera-Udagama Co-operative Stores Ltd.*,[1] it was held by Gratiaen J. that even though an alternative remedy was also available a Writ of Certiorari would lie to quash the proceedings of a tribunal which flagrantly exceeded the limited statutory powers conferred on it. This case has only a very remote bearing on the principle involved in the present application. Gratiaen J. was considering in that case the legality of a purported award made by an arbitrator under the Co-operative Societies Ordinance. The award was challenged by the petitioner on the ground that he had ceased to be an officer of the Society at the relevant date and that the purported reference to arbitration was *ultra vires* the powers of the Registrar of Co-operative Societies under Rule 29. As Rule 29 did not empower the compulsory reference to arbitration of a dispute between a registered Co-operative Society and a person who had ceased before the purported reference to be an officer of the Society, it was clear that the award which was challenged by the petitioner was one which was made in excess of the statutory jurisdiction which the second respondent purported to possess. Gratiaen J. in deciding that case appears to have been guided by the observations made by Caldecote L.J. and Humphreys J. in the case of *Rex v. Wandsworth Justices, ex parte Keid* [2] in regard to the availability of an order of Certiorari even where an appeal lay. In allowing the application Gratiaen J. observed : " It is not in dispute that a public officer and an extra judicial tribunal, acting no doubt, through ignorance, have flagrantly exceeded the limited statutory powers conferred on them by the provisions of the Co-operative Societies Ordinance.....I consider that there is no compelling principle of law which fetters this Court's discretion to quash the illegal award....."

From a close examination of the judgment of Gratiaen J. and the observations of Caldecote L.J. and Humphreys J. it would appear that the principle that they intended to enunciate was that a Writ of Certiorari was an appropriate remedy in cases where there was a clear excess of jurisdiction by an inferior tribunal. This is a special remedy intended to grant relief to a person who has suffered by reason of the decision of a tribunal which had no jurisdiction to make any order at all. What the superior court in fact does in that situation is not to set aside or revise the actual finding of the inferior tribunal but to declare the order made to be null and void. Although it has been customary for appellate courts to deal with excesses of jurisdiction, a careful analysis of the provisions of the Courts Ordinance relating to the exercise of appellate jurisdiction may well justify the view that Courts of Appeal can properly correct only errors in fact or in law committed by an inferior court in the lawful exercise of its powers and that, where there is no lawful exercise of such powers, that is, where it acts without jurisdiction, the appropriate remedy is by way of a Writ of Certiorari. For, there is a clear distinction

[1] *(1949) 51 N. L. R. 262.*

[2] *(1942) 1 A. E. R. 56.*

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between an error committed by a Court in assuming a jurisdiction which it does not possess, resulting in subsequent proceedings being a nullity, and an error committed by a Court in matters of law or of fact after a proper assumption of jurisdiction. According to what I have referred to as a justifiable view the correction of the former would fall within the scope of a Writ of Certiorari and the latter within the scope of the appellate court. It does not appear from the judgments of Caldecote L.J. or Humphreys J. or that of Gratiaen J. that any argument on the basis of such a distinction was advanced for consideration by them. In that event they may well have reached the same conclusion they did but through a different approach. Thus no right of appeal being available to revise a nullity committed by a tribunal acting in excess of jurisdiction, that is, without jurisdiction, the decision would have been in favour of Certiorari on the basis of the general principle that was expressed in their judgments, namely, that as a rule Certiorari lay only where the remedy of appeal was not available. A consideration of the converse case would also support the view I have taken. For, in the cases referred to, if the application for Certiorari was against an error of law committed by the tribunal after a proper assumption of jurisdiction, I should imagine that such application would have been refused on the ground that the applicant should have sought his appropriate remedy by way of appeal. If the view that I have expressed is correct, it seems to me that the general principle that Certiorari will not lie where there is an alternative remedy would still prevail because an appeal proper will not lie where there is an excess of jurisdiction. A further reason that inclines me to treat that as the more reasonable view is because it is generally accepted that remedies by way of Writs are extraordinary remedies which have been evolved from their inception to meet situations where no other remedy was available and it is very doubtful whether that remedy would have been extended to cases where there was an alternate remedy.

It is to be noted that even while coming to the conclusion he did in that case Gratiaen J. conceded the general principle that a superior court will not as a rule make an order of Mandamus or Certiorari where there is an alternative and equally convenient remedy. Even if the question adverted to earlier is a matter of doubt, such doubt can arise only in respect of a Writ of Certiorari but not in respect of a Writ of Mandamus, the issue of which is governed by the general principle that the applicant must be without any other remedy. Where such other remedy is not merely one at common law but is one prescribed by the statute itself which created the right, there is no escape for an aggrieved party from pursuing the remedy laid down in the statute.

In the present application there are some further difficulties, even assuming that the existence of an alternative remedy does not preclude the remedy of Mandamus. For, it has been made to this Court not in the first instance but after proceeding half way and obtaining an order from the appropriate tribunal which granted the petitioner's prayer. As

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counsel for the respondent has submitted with justification, I think, the application is in effect for the execution or enforcement of the order obtained from the tribunal of appeal. I am not aware of, nor has counsel for the petitioner brought to the notice of this Court, any decision which supports the view that a Writ of Mandamus is available for this purpose. Document A which contains the order of the tribunal and Document B which is the purported Certificate of Conformity issued in compliance with that order demonstrate that the petitioner has sought the Writ of Mandamus only because the certificate issued is not the certificate contemplated by section 15 of the Housing and Town Improvement Ordinance or, as it is submitted by counsel, because the respondent has refused to comply with the Order.

Section 95 of the Ordinance provides that any award of the tribunal shall be enforced by the District Court as if it had been a decree or order of that Court. In view of this provision, it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the enforcement of a decree. He should therefore follow that procedure in the first instance with a view to enforcing an award made by the tribunal of appeal. It was sought to be argued that that procedure was inapplicable to an order of the type that the petitioner had to enforce. It would, I think, be premature and undesirable for this Court to decide that question at this stage. If for any reason the petitioner exhausted this procedure and, having failed to achieve his object owing to a hiatus in the procedure provided, thereafter approached this Court the problem of course would be different. The petitioner has admittedly not sought the aid of these provisions but instead has come to this Court applying for a Writ of Mandamus for enforcement of an order which should be executed as a decree of the District Court. Not only is this procedure unknown to law but the procedure is being resorted to in the teeth of specific provision for the enforcement of an order by the tribunal having been made by the statute which created the rights and obligations involved. Counsel for the respondent cited to us the case of *The Queen v. The Victoria Park Company* [1] in which this precise question was considered. In the course of the judgment Lord Denman C.J. observed :— "But, assuming the judgment to be correctly entered up in that form, and we think it does not lie in the mouth of the plaintiff to contend that it is not, it seems to us to form a decisive answer to the first part at least of the application : because the plaintiff then has the ordinary legal remedy of an execution ; and we cannot direct a Mandamus to go ordering the payment to be made, merely because, under the circumstances the execution may produce no fruits." The answer which Lord Denman considered to be decisive on the question raised in that case would apply with greater force to the present case in view of the special statutory provision making it obligatory on the District Court to enforce an award of the tribunal as if it had been its own order or decree. By necessary implication, this provision also directs the holder of the award to seek the assistance of the District Court for its enforcement.

[1] *(1841) 1 Q. B. 288.*

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Counsel for the petitioner has submitted to us a number of other decisions in support of his contention. On an examination of these decisions it would appear that they lend some support to his contention only in a limited way and in relation to certain special situations. They do not however support a general proposition that Mandamus will also lie despite the presence of other remedies. It is hardly necessary to embark on a detailed consideration of these decisions as they do not persuade me to take a view contrary to what I have already expressed.

The application is accordingly dismissed with costs.

SIVA SUPRAMANIAM, J.—

I agree to the order proposed by My Lord the Acting Chief Justice. The facts are fully set out in his judgment.

The right which the petitioner seeks to enforce in this case and the corresponding duty imposed on the respondent arise, not under the common law, but under S. 15 of the Housing and Town Improvement Ordinance (Cap. 268). The same statute prescribes the remedy for default or breach of that duty. It provides as follows under S. 16 :— "Any person aggrieved.....by any refusal of a certificate of the Chairman....., or by any delay of the Chairman.....in complying with the provisions under S. 15, may appeal to the tribunal of appeal, and the tribunal on any such appeal (subject always to the provisions of this Ordinance or any other enactment) may make such order as it may deem just." S. 95 provides that "any award or order of the tribunal shall be enforced by the District Court as if it had been a decree or order of that Court."

When the respondent failed to issue the certificate of conformity, the petitioner proceeded under the statute and appealed to the District Court of Kandy which, in terms of S. 88 (1) of the Ordinance, is the tribunal of appeal for the area in question. He obtained an order from that Court directing the respondent to issue a certificate of conformity in terms of S. 15 of the said Ordinance. His substantial complaint is that the respondent has not complied with that order.

In paragraphs 17 and 18 of his petition he has averred as follows:—

> "17. The petitioner respectfully submits that the respondent is under a statutory duty to issue a certificate of conformity in accordance with the provisions of S. 15 of the Housing and Town Improvement Ordinance and is under a duty to comply with the order made by the tribunal of appeal in D.C. Kandy No. 7547/Land. 18. The petitioner respectfully submits that it is illegal and unlawful for the respondent to fail to carry out the order of the tribunal of appeal."

The petitioner, however, failed to take the further steps available to him under the statute to have the order of the tribunal of appeal enforced. He has, instead, applied to this Court for a mandate "directing the

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respondent to issue the certificate of conformity in accordance with the provisions of S. 15 (1) of the Housing and Town Improvement Ordinance".

The learned counsel for the petitioner conceded that he is not entitled to apply to this Court for a writ of mandamus to compel the respondent to carry out the order of the District Court. He submitted, however, that it was open to the petitioner to have applied to this Court in the first instance for a mandate when the respondent failed to comply with his statutory duty under S. 15 of the said Ordinance and the fact that he followed the procedure under S. 16 up to a certain stage is no bar to his present application.

The question, however, is whether the petitioner could have applied to this Court in the first instance for a mandate. In the case of *The Wolverhampton New Waterworks Co. v. Hawkesford*[1] Willes J. said :—

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy : there, the party can only proceed by action of common law. But there is a third class, *viz.* where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

The present case falls within the third class referred to by Willes J.

The case of *Pasmore et al. v. The Oswaldtwistle Urban District Council*[2] is in point. By S. 15 of the Public Health Act 1875, "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purpose of this Act". By S. 299, "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers.....the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order....." The plaintiff who was not satisfied with the adequacy of the sewers to carry the liquids proceeding from his factories made no complaint to the Local Government Board but claimed a mandamus commanding the local

[1] *6 Common Bench Reports (N.S.) 336 at p. 356.* [2] *(1898) Appeal Cases 387.*

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authority to cause to be made such sewers as may be necessary for effectually draining their district. Charles J. allowed the writ on the ground that S. 299 had no application to a case where the question was whether the defendants were bound to provide sewers for liquids flowing from the plaintiff's factories at all, and that, unless excluded expressly the plaintiff had a right to the judgment of a court of law upon the matter. He also held that the section introduced by the words " Where complaint is made " did not make it imperative on the plaintiff to make a complaint to the Local Government Board and to submit to their interpretations of the statute [1]. The Court of Appeal, however, reversed the decision and dismissed the application for mandamus on the ground that the plaintiffs' only remedy was under S. 299 of the Act [2]. The decision of the Court of Appeal was affirmed by the House of Lords. In the course of his speech [3] Lord Halsbury said :—

> " The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* [4]. He says : ' where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner '."

In the case of *Wilkinson v. Barking Corporation* [5] Asquith L.J. observed :

> " It is undoubtedly good law that where a statute creates a right and, in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others."

The principle laid down in the aforesaid cases was adopted by this Court in the case of *Hendrick Appuhamy v. John Appuhamy* [6].

In the present case, as stated already, the same statute which creates the right in favour of the petitioner and the correlative obligation on the part of the respondent has prescribed the remedy to which the petitioner is entitled on a breach of the obligation by the respondent. The rule of law enunciated above provides a sufficient answer to the petitioner's claim for mandamus. The application fails and must be dismissed with costs.

Application dismissed.

[1] *(1897) Appeal Cases 384.*
[2] *Ibid. p. 625.*
[3] *(1898) Appeal Cases p. 394.*
[4] *(1831) 1B. & Ad. 847, 859.*
[5] *(1948) 1 K. B. 721.*
[6] *(1966) 69 N. L. R. 29.*

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1967 *Present :* **T. S. Fernando, A.C.J.**

K. SHANMUGAM, Appellant, *and* THE MUNICIPAL COMMISSIONER, JAFFNA, Respondent

S. C. 921/67 (with Application in Revision No. 385 of 1967)—M. C. Jaffna, 3178

Municipal Council—Municipal accounts—Surcharge—Non-payment of amount surcharged—Whether it is an "offence"—Recovery of surcharge—Procedure—Effect thereon of dissolution of Council—Municipal Councils Ordinance (Cap. 252), ss. 34, 172, 226 (1), 226 (3), 226 (6), 277, 286 (3), 308, 327.

Where an order of surcharge in respect of a sum of money is made against a person under section 226 (1) of the Municipal Councils Ordinance, the non-payment of the amount surcharged does not constitute an offence contemplated in section 308 of the Ordinance.

Where the Municipal Commissioner initiates proceedings in the Magistrate's Court under section 226 (6) of the Municipal Councils Ordinance for the recovery of the surcharge as a fine of court, the proceedings may be continued by the Municipal Commissioner even if the Municipal Council happens to be dissolved subsequently by reason of an Order made by the Minister in terms of section 277 of the Ordinance. It cannot be contended that, with the dissolution of the Municipal Council, the Municipal Commissioner himself ceases to function as such.

APPEAL, with application in revision, from a judgment of the Magistrate's Court, Jaffna.

C. Thiagalingam, Q.C. with *L. W. Athulathmudali*, for the appellant (petitioner).

S. Sharvananda, with *K. Kanag-Iswaran*, for the respondent.

Cur. adv. vult.

November 25, 1967. T. S. FERNANDO, A.C.J.—

The appellant who is also the petitioner on the application in revision was at one time the Municipal Commissioner of the Municipal Council of Jaffna, and there is no dispute that the Auditor-General, acting in terms of section 226 (1) of the Municipal Councils Ordinance (Cap. 252) made on 23rd March 1962 as against him an order of surcharge in respect of a sum of Rs. 3,466·05. It would appear that the appellant failed to appeal to the Minister within the time provided for by section 226 (3) of the same Ordinance, and it was stated at the argument that an application to this Court designed to obtain a hearing of the defective appeal was itself unsuccessful.

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On 10th March 1966, the then Municipal Commissioner, Jaffna, instituted proceedings in the Magistrate's Court to recover the sum surcharged together with a further sum of Rs. 300 said to have been incurred by way of costs and expenses. In spite of several objections raised by the appellant before the Magistrate, the latter made order on 13th July 1967 that the sum of Rs. 3,766·05 be recovered from the appellant as if it were a fine—vide section 226 (6).

It was conceded that an appeal against the Magistrate's order of 13th July 1967 was not competent, and I therefore dismissed the appeal.

On the application presented seeking a revision of the order against which an appeal was not competent, Mr. Thiagalingam raised two points. He first sought for the petitioner a way of escape in section 308 of the Ordinance which imposes a period of limitation for the entertainment of complaints in respect of offences. I was quite unable to agree that non-payment of an amount surcharged in terms of section 226 constitutes an offence contemplated in the said section 308.

The first argument of Mr. Thiagalingam referred to in the above paragraph having failed, he then addressed his second argument which was based on the dissolution of the Municipal Council of Jaffna on 29th May 1966 by Order made by the Minister of Local Government acting in terms of section 277 of the Ordinance. Shortly put, his argument was that, with the dissolution of the Municipal Council, the Municipal Commissioner himself ceased to function as such. The dissolution having taken place after the Municipal Commissioner initiated this proceeding in Court, his submission was that there is now no complainant on the record who is competent to recover the surcharge as a fine of court. He sought to derive some support for his argument in the definition of "Commissioner" contained in the interpretation section 327 of the Ordinance, his point being that, as soon as the Council ceased to exist, the Commissioner himself loses his functionary existence. This argument ignored the effect of many sections of the Municipal Councils Ordinance. For example, section 286 (3) declares that, during the period elapsing between the dissolution of a Council under section 284 and the constitution of a new Council, the Commissioner shall exercise all the powers etc. of the dissolved Council. Again, even in the case of a dissolution by reason of an Order under section 277, between the time of dissolution and the appointment of a Special Commissioner, all the powers etc. of the Council and even of the Mayor and the Deputy-Mayor are exercisable by the Commissioner—section 277 (4). By section 34 a Municipal Council is declared a corporation with perpetual succession and a common seal which remains at all times in the custody of the Commissioner. During the periods contemplated in section 277 (4), contracts may well have to be entered into, and the Commissioner is fully competent to do so as being in the exercise of a part of the power of the Council in spite of its dissolution. Moreover,

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section 172 entrusts responsibility for the custody of all books etc. of the Council solely to the Commissioner. It is unnecessary to undertake an examination of all the provisions of the Ordinance in a search for other examples. It is sufficient to state that section 226 (6) itself imposes the duty of recovering the amounts surcharged not on the Council, but on the Commissioner alone. I was unable to find any merit even in the second argument.

I have indicated shortly the reasons why at the conclusion of the argument I made order that the application in revision be also dismissed.

Appeal and application in revision dismissed.

1967 *Present :* **Tennekoon, J.**

K. V. A. SAMSON, Appellant, *and* INSPECTOR OF POLICE, MARADANA, Respondent

S. C. 742/67—M. C. Colombo, 44070/A

Penal Code—Section 451—Loitering about by reputed thief—Ingredients of offence—Quantum of evidence.

In a prosecution under section 451 of the Penal Code, it is open to the complainant to lead evidence of previous convictions to establish the fact that the accused is a reputed thief. (*Perera v. The Police*, 32 C. L. W. 108, not followed). Further, the fact of the accused being a reputed thief at the time of loitering may be established independently of the arresting officer's knowledge of the accused's reputation. (*Mansoor v. Jayatillake*, 48 N. L. R. 308, not followed).

APPEAL from a judgment of the Magistrate's Court, Colombo.

Anil J. Obeyesekera, for the accused-appellant.

Ranjith Gunatilleke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 6, 1967. TENNEKOON, J.—

The appellant was convicted of the following charge :—

" You are hereby charged, that you did, within the jurisdiction of this Court at Darley Road, Maradana, on 21st April, 1967, being a reputed thief did loiter about a public place to wit : Darley Road, Maradana, with intent to commit theft and that you have thereby committed an offence punishable under section 451 of the Ceylon Penal Code. "

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It is submitted by Counsel for the appellant that there is no evidence on record to support the finding that the accused was a *reputed* thief.

The evidence for the prosecution on this point was that the accused was an "Island Reconvicted Criminal" bearing No. 243/57; and that he had five previous convictions which were as follows :—

"(1) 15–11–52—Theft of a ring val: Rs. 20/- Sec. 369 C.P.C. M.C. Colombo 32195/J. 565. Three years to Hikkaduwa.

(2) 27– 5–57—Theft of a purse with cash Rs. 31/-. Sec. 367 C.P.C. M.C. Colombo 41987/A. Six months R.I.

L—7801

(3) 2–10–58—H. B. and theft of cash and articles val. Rs. 153/52· Sec. 443, 369, C.P.C. M.C. Colombo 10173/A. Three months R.I. on each count to run consecutively.

M—9181

(4) 2– 3–60—(1) Retaining a Carburettor Val. Rs. 50/.

(2) Retaining stolen property Val. Rs. 3/50.

(3) Retaining stolen property Val. Rs. 7/60. Sec. 394 C.P.C. M.C. Colombo 29564/B. One year R.I. and two years P.S.

O—5851

(5) 4–12–63—Theft of cash Rs. 13/- Sec. 367 C.P.C. M.C.Colombo 47053/A. Two years R.I.

R—9885"

The prosecution also called one Police Constable Gunasena of the Maradana Police who testified that he was a supervisor of criminals in the Maradana area. He also said that he knew the accused who was an "Island Reconvicted Criminal" bearing No. 243/57. It was this officer who noticed the accused loitering on the day in question, and arrested him. The accused giving evidence admitted that he was an "Island Reconvicted Criminal", that he had four previous convictions, all of which were for theft. Counsel for the appellant cited in support of his submission the case of *Perera v. The Police*[1] in which it was held that—

> "It is not open to the prosecution to lead evidence of previous convictions to establish the fact that the accused is a reputed thief. The evidence available for the prosecution must be evidence of the reputation of the accused apart from previous convictions."

With all respect I do not agree; it seems to me that "repute" does not mean only false repute but also includes a reputation for what one actually is. Reputation is the estimate or belief that other people have of the nature of a man's character. Nothing could be a better foundation

[1] *(1946) 32 C. L. W. 108.*

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for forming an estimate of another's character than actual instances in which that character is displayed. Such instances of thievery it is true may establish that a man is a thief but may not establish his reputation as a thief. But where the person is caught out, publicly prosecuted and convicted on numerous occasions it can hardly be said that those convictions have not given him a reputation for being a thief among those people who are likely to form any opinion or estimate of his character. Members of his family, his immediate friends, acquaintances and also persons who live in his neighbourhood could not have been unaware of his frequent convictions for theft and of his frequent disappearances from home to serve terms of imprisonment for theft. I think this is a case in which the accused's reputation for being a thief has been established indirectly and circumstantially.

Counsel for the appellant also referred me to the case of *Mansoor v. Jayatillake*[1] in which it was held that on a charge under section 451 of the Penal Code the burden is on the complainant to show at the trial that the accused loitered or lurked about a public place, that he had a reputation of being a thief, and that the prosecution does not discharge that burden by arresting the accused on suspicion, and then *ex post facto* establishing that he was a thief, a fact which was unknown at the time the alleged offence was committed. The proposition that the reputation of being a thief must exist at the time of loitering is unexceptionable, but, with respect, it seems to me that it is irrelevant that the arresting officer did not know that the accused had such a reputation at the time of arrest. The absence of such knowledge on the part of the arresting officer may affect lawfulness or otherwise of the arrest, but I cannot see why the fact of the accused being a reputed thief at the time of loitering which is one of the ingredients of the offence under section 451 of the Penal Code cannot be established independently of the arresting officer's knowledge of the accused's reputation.

I find also another case viz. *Nair v. Velupillai*[2] in which section 451 of the Penal Code has been considered. The question of the nature of the evidence necessary to establish the ingredient of the accused being a "reputed thief" was apparently *not* in question in that case. But it is interesting to note that Soertsz, J. makes this general observation in regard to that section: "The accused man was charged in that being 'reputed thief' he was 'found loitering about on the public road with intention to commit theft, or other unlawful act'. To establish such a charge the prosecution must prove (1) that the accused was a thief or was reputed a thief, (2) that he was loitering about in a public place, (3) that his intention was to commit theft or other unlawful act." In saying that the prosecution had to establish that the accused was a *thief* or reputed thief, I think that Soertsz, J. was also impliedly giving expression to what I have said earlier in this judgment viz. that a person who has repeated convictions for theft is a thief who cannot but have a reputation of being a thief.

[1] *(1947) 48 N. L. R. 308.* [2] *(1935) 37 N. L. R. 248.*

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I hold that the prosecution has placed sufficient evidence before the learned Magistrate for him to conclude that the accused was a reputed thief at the time he was found loitering as alleged in the charge.

The appeal is dismissed. Conviction and sentence are affirmed.

Appeal dismissed.

1969 *Present :* **Samerawickrame, J.**

V. A. MOHAMED, Appellant, *and* M. L. A. WAHAB, Respondent

S. C. 102/67—C. R. Matale, 15263

Rent Restriction Act—Section 12A(1) (a)—Action in ejectment thereunder—Tender of the rent due, before institution of action—Non-liability of tenant to be ejected then.

Where, in a case governed by section 12A (1) (*a*) of the Rent Restriction Act a landlord seeks ejectment of his tenant on the ground that rent has been in arrears for a period of three months or more after it has become due, the tenant is not liable to be ejected if, before the date of institution of action, he tenders to the landlord the rent due.

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

Nihal Jayawickrame, for the defendant-appellant.

E. R. S. R. Coomaraswamy, with *N. R. M. Daluwatte* and *S. K. H. Wijetilleke*, for the plaintiff-respondent.

Cur. adv. vult.

April 26, 1969. SAMERAWICKRAME, J.—

The learned Commissioner of Requests has entered a decree for ejectment of the defendant from premises bearing assessment No. 226 King Street, Matale, of which he was in occupation as tenant, on the ground that rent had been in arrears for a period of over three months after it had become due. Counsel for the defendant-appellant submits that rent had not been in arrear for a period of three months within the meaning of Section 12A (1) (*a*) of the Rent Restriction Act for the reason that the defendant-appellant had made payments before action was filed. Learned Counsel for the plaintiff-respondent contended that a tenant who had failed to make payment of rent for a period of three months was liable to be ejected under the provision in question even

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though he made tender of the rent due before institution of action. He relied on a judgment of a Divisional Bench in the case of *Dias v. Vincent Gomes* [1].

The Divisional Bench considered the provision in s. 13 (1) of the Rent Restriction Act which is as follows :—

> " Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by any court, unless the board, on the application of the landlord, has in writing authorised the institution of such action or proceedings :
>
> Provided, however, that the authorization of the board shall not be necessary, and no application for such authorization may be entertained by the Board, in any case where—
>
> (*a*) rent has been in arrear for one month after it has become due ; "

The Court held that once a tenant has been in arrears of rent for one month after it has become due, he forfeits the protection given to him by the Act against being ejected and that he cannot regain the protection by the mere act of tendering the arrears before the institution of action. The provision which was considered by the Divisional Court sets out the circumstances where authorization of the board was not necessary. It also provides that in those circumstances no application for authorization may be entertained by the board. It would thus appear that the circumstances were considered to be such as have arisen at the stage of an application to the board made prior to the filing of an action. There was, therefore, if I may say so with respect, good ground for the Divisional Court to hold that the provision contemplated rent being in arrear at a time prior to the institution of the action.

Act No. 10 of 1961 amended s. 13 by insertion after sub-section (1) of new sub-sections (1A) and (1B) which are as follows :—

> " (1A) The landlord of any premises to which this Act applies shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises on the ground that the rent of such premises has been in arrear for one month after it has become due,—
>
> (*a*) if the landlord has not given the tenant three months' notice of the termination of the tenancy, or
>
> (*b*) if the tenant has, before such date of termination of the tenancy as is specified in the landlord's notice of such termination, tendered to the landlord all arrears of rent.

[1] *(1954) 55 N. L. R. 337.*

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(1B) Where any action or proceedings for the ejectment of the tenant of any premises to which this Act applies is or are instituted on the ground that rent has been in arrear for one month after it has become due, the court may, on being satisfied that the rent has been in arrear on account of the tenant's illness or unemployment or other sufficient cause, make order that a writ for ejectment of the tenant from those premises shall not issue if the tenant pays to the court the arrears of rent either in a lump sum on such date, or in instalments on such dates, as may be specified in the Order ; and if the tenant pays to the court the arrears of rent on such date or dates, his tenancy of those premises shall, notwithstanding its termination by the landlord of those premises, be deemed not to have been terminated."

After these amendments a landlord could file action for ejectment of a tenant only if a tenant in spite of three months' notice of termination of the tenancy fails to tender arrears of rent within that period. The Court is given further power to give relief to the tenant, if it is satisfied, that rent had been in arrear on account of illness, unemployment or other sufficient cause.

Act No. 12 of 1966 made s. 13 inapplicable to premises where the standard rent does not exceed Rs. 100 per mensem and introduced the new section 12A. Sub-section (2) of that section reproduces in substance s. 13 (1B). The original s. 13, including sub-sections (1A) and (1B) continue to apply to premises where the standard rent exceeds Rs. 100. The relevant part of s. 12A reads :—

" 12A (1) Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies and the standard rent of which for a month does not exceed one hundred rupees shall be instituted or entertained by any court unless where—

(*a*) the rent of such premises has been in arrear for three months or more after it has become due, ... "

It appears to me unlikely that the legislature intended that tenants of premises whose standard rent is below Rs. 100 should be liable to be ejected by reason of arrears of rent, even though there had been a tender of rent before the actual institution of the action. It is not probable that the legislature intended that tenants of such premises should be placed in a worse position in this regard than the tenants of premises whose standard rent is in excess of Rs. 100. Nor is it probable that the legislature intended to place tenants of such premises in a position of so much greater disadvantage compared to that which they enjoyed under the law before it was amended by Act 12 of 1966. It is also relevant that the provision in sub-section (2) which empowers the Court to permit

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a tenant to pay into court the arrears of rent and in such case not to issue a writ of ejectment is some indication that the legislature contemplated arrears due at the date of institution of action.

In the case of *Abdul Samad v. Sirinayake*[1], Alles J., appears to have taken the view that the section referred to arrears of rent due at the date of the institution of the action. He stated :—

> " 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."

The terms in which reference is made in sub-section (2) of s. 12A to an action brought under s. 12A (1) (*a*) is also significant — " Where any action or proceedings for the ejectment of the tenant of any premises referred to in sub-section (1) is or are instituted on the ground that rent has been in arrear for three months or more after it has become due, the court may . . . . "—

I think, this provision indicates the nature of an action brought under sub-section 12A (1) (*a*), namely, that it is brought on the ground that rent has been in arrear for three months or more. One would normally expect a ground of an action to subsist at the date of its institution. The words " has been " may be used to denote a fact continuing to subsist up to the occurrence of a certain event or the performance of some act— *vide Ex parte Kinning*[2]. It appears to me, therefore, that in s. 12A (1) (*a*) the requirement that rent has been in arrear for three months or more after it has become due is not satisfied unless rent is in arrear up to and at the date of the institution of the action.

The learned Commissioner took the view that the plaintiff was entitled to a decree for ejectment because on the date of the termination of the contract of tenancy, the defendant was clearly in arrears of rent for more than three months. Having regard to the conclusion I have arrived at that the matter of arrears of rent must be considered as at the date of the institution of the action, the decision of the learned Commissioner cannot be sustained. I accordingly, allow the appeal and set aside the order appealed from and direct judgment to be entered dismissing the plaintiff's action. The defendant-appellant will be entitled to costs of appeal and costs in the trial court.

Appeal allowed.

[1] *(1967) 70 N. L. R. 47 at 48.*

[2] *16 Law Journal Q. B. 257.*

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[PRIVY COUNCIL]

1969 *Present:* **Lord Hodson, Viscount Dilhorne, Lord Donovan, Lord Pearson, Lord Diplock**

C. KODEESWARAN, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

PRIVY COUNCIL APPEAL NO. 38 OF 1968

S. C. 408/64—D. C. Colombo, 1026/Z.

Constitutional law—Public servant—Contract of service with the Crown—Action for recovery of arrears of salary due—Maintainability—Roman-Dutch law—Effect of Proclamation of 23rd September 1799—Applicability of English law.

A civil servant in Ceylon is entitled to sue the Crown for arrears of salary which have accrued due, by the terms of his appointment, in respect of services which he has rendered during the currency of his employment. In such a case the fact that his appointment as a Crown servant is terminable at will, unless it is expressly otherwise provided by legislation, is not relevant.

" Although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the ' common law ' of Ceylon, it is not the finishing point. Like the common law of England the common law of Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a *cursus curiae* (*Samed v. Segutamby*, 25 N. L. R. 481) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view if long established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves there is no need to go back to see whether any precedent can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law."

APPEAL from a judgment of the Supreme Court reported in (*1967*) *70 N. L. R. 121.*

Sir Dingle Foot, Q.C., with *C. Ranganathan, Q.C.*, *M. P. Solomon*, *S. C. Crossette-Thambiah* and *M. I. Hamavi Haniffa*, for the plaintiff-appellant.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo* and *H. L. de Silva*, for the defendant-respondent.

Cur. adv. vult.

1*—J 10714—2,255 (1/70)
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December 11, 1969. [*Delivered by* LORD DIPLOCK]—

The appellant has been for many years a civil servant in Ceylon. He is one still. He brings this action against the Attorney-General as representing the Government of Ceylon. Its subject matter is the salary which he has received as a civil servant. He says that he was entitled to be paid more under the terms of his appointment and claims the balance which he alleges he has earned but which the Government of Ceylon has refused to pay him. He is a Tamil and the balance of salary that he claims is due to him is an increment which was denied to him because he did not pass a test in the Sinhala language. The requirement that he should pass such a test as a condition precedent to his being paid the increment was imposed by a Treasury Circular expressed to be issued in implementation of the Official Language Act, 1956. In the action he claims that the Official Language Act is unconstitutional and void and that the circular which was issued to implement the Act and which purported to vary the existing terms of his appointment is also void and ineffective to disentitle him to the increment to which he would have been entitled under those terms.

The appellant's action, if it lies at all, thus raises issues of the highest constitutional importance, all of which were argued before the District Judge. There is however a preliminary issue, viz. whether a civil servant has any right of action against the Crown for salary due in respect of services which he has rendered. If, as the Attorney-General contends, there is no such right of action, the broader constitutional issues as to the validity of the Official Language Act and as to the right of the Ceylon Government to impose a language test upon its civil servants as a condition of entitlement to higher pay, cannot be raised by the plaintiff in the present action. It fails *in limine*.

This preliminary issue was decided in the plaintiff's favour by the District Judge. He accordingly went on to deal with the other issues which he also decided in favour of the plaintiff. On appeal to the Supreme Court (Fernando C.J. and Silva J.) the preliminary issue was argued first. On this issue that Court reversed the decision of the District Judge. This made it unnecessary for the two judges who constituted the Supreme Court to enter upon the consideration of the remaining issues which had been dealt with in the judgment of the District Judge. They accordingly heard no argument and expressed no views on them. The learned Chief Justice expressly stated that had it been necessary to decide these other issues he would have exercised his discretion to convene a full court of five judges to adjudicate upon them in view of their outstanding constitutional importance.

Upon this appeal, their Lordships have also confined their consideration to the preliminary issue whether or not a civil servant has any right of action in Ceylon against the Crown for salary due in respect of services which he has rendered. They too have heard no argument and express no view upon any of the other issues raised in the action and dealt with

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in the judgment of the District Judge. They would not think it proper to do so without the assistance of the considered judgment of the Supreme Court.

The preliminary issue is, however, one of importance in its own right. It falls to be decided by the law of Ceylon. English law is relevant only to the extent that it has been adopted as part of that law.

In the case of most former British colonies which were acquired by conquest or cession, the English common law is incorporated as part of the domestic law of the now independent State because it was imposed upon the colony by Order in Council, Proclamation, or otherwise under the prerogative powers of the Crown. But in the case of Ceylon, upon the acquisition of the maritime areas which had previously been settled by the Dutch, the Crown did not impose English law.

By Proclamation of 23rd September 1799, it was proclaimed—

"1. WHEREAS it is His Majesty's gracious command that, for the present and during His Majesty's will and pleasure, the temporary administration of justice and police in the settlements of the island of Ceylon, now in His Majesty's dominion, and in the territories and dependencies thereof, should, as nearly as circumstances will permit, be exercised by us in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations, as may be rendered a departure therefrom either absolutely necessary and unavoidable or evidently beneficial and desirable.

2. We therefore, in obedience to His Majesty's commands, do hereby publish and declare, that the administration of justice and police in the said settlements and territories in the island of Ceylon, with their dependencies, shall be henceforth and during His Majesty's pleasure exercised by all courts of judicature, 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 herein-before mentioned, and to such other deviations and alterations as we shall by these presents, or by any future Proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justices to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

In 1835 this was extended to the whole of the island.

The first problem raised by this Proclamation is whether the Supreme Court were right in thinking that its subject matter is restricted to private law applicable to transactions between subject and subject so as to exclude the whole of the former Roman-Dutch public law applicable

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to transactions between subject and sovereign. The words of the Proclamation must be understood in the meaning attaching to them in the closing years of the eighteenth century and in the light of the historical circumstances in which the Proclamation was made. The East India Company which captured Trincomalee and Colombo from the Dutch in 1795 abolished the existing system of administration through local officials. This led to a revolt in 1797. Governor North was sent out from England and the Proclamation marks his restoration of the old system of civil administration. Furthermore, as the Proclamation itself indicates, the British occupation was expected to be temporary only. It was not until the Peace of Amiens in 1802 that Ceylon became a Crown Colony. Read in this historical context, the actual wording of the Proclamation with its references to "police" (which at that date was commonly used in the generalised sense of "civil administration") to "institutions" and to "ministerial officers", is in their Lordships' view more apt to indicate an intention to restore in the recently acquired territory the previously existing system of law as respects the civil administration of Ceylon, rather than to exclude this branch of public law from its ambit.

But even if the relationship between the Government of the United Provinces and its civil servants in Ceylon had formerly possessed the legal characteristics of a contract of service and they had been entitled to sue that government for arrears of salary, it does not follow that a corresponding contractual relationship and right of suit between the British Crown and its civil servants in Ceylon was created by the Proclamation.

As was pointed out by Lord Stowell in *Ruding v. Smith* [1] when territory is acquired by conquest or cession "no small portion of the ancient law is unavoidably superseded. . . . The allegiance of the subjects and all the law that relates to it—the administration of the law in the sovereign and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change". In the Cape Colony, of which Lord Stowell was speaking, Roman-Dutch law continued in force by virtue of a Proclamation almost contemporaneous with that applicable to Ceylon but which omitted any reference to "police", "institutions" or "ministerial officers". What he said, however, would in their Lordships' view apply also to Ceylon to abrogate any rule of law previously in force there under the government of the United Provinces if it was incompatible with the British concept of the exercise of sovereign authority by the Crown. It is therefore necessary to consider first whether the existence of a relationship which possessed any of the legal characteristics of a contract between the Crown and a person appointed by the Governor in Ceylon to serve in the civil administration of the territory would have offended against the fundamental concept of the rights and immunities of the sovereign at the close of the eighteenth century.

[1] (1821) 2 *Hag. Con. at p. 282.*

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In their Lordships' view there is no such incompatibility. In the eighteenth century the principal officers of the executive government of a colony were appointed directly by the Crown in England by letters patent. This method of appointment may well have been inconsistent with the creation of a contractual relationship between the Crown and the appointee, but the Proclamation was local in its ambit and would not affect the legal relationship between these officers and the Crown. It applied only to subordinate officers in the civil administration of the government of Ceylon who were appointed locally by the Governor and removable by him. It is now well established in British constitutional theory, at any rate as it has developed since the eighteenth century, that any appointment as a Crown servant, however subordinate, is terminable at will unless it is expressly otherwise provided by legislation ; but as pointed out by Lord Atkin in *Reilly v. The King* [1] " a power to determine a contract at will is not inconsistent with the existence of a contract until so determined ". In *Reilly's Case* Lord Atkin, while finding it unnecessary to express a final opinion as to whether the relationship between the Crown and the holder of a public office was constituted by contract, remarked " 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 ". Their Lordships thus see nothing inconsistent with British constitutional theory in the Governor of Ceylon being empowered by the Proclamation of 1799 to enter into a contract on behalf of the Crown with a person appointed to an office in the civil administration of the colony as to the salary payable to him, provided that such contract was terminable at will.

It does not follow, however, even if the Governor was empowered to enter into contractual relations with a civil servant in the Colony as to the payment of salary, that the servant would have a right of suit against the Crown for salary unpaid. A general Crown immunity from suit in respect of obligations *ex contractu* if it existed in the eighteenth century in England might also give rise to the inference that notwithstanding the contractual nature of a civil servant's claim to salary in Ceylon the sovereign attribute of immunity from suit was not intended to be waived by the Proclamation. But by the eighteenth century it had been established that, although no writ could issue against the sovereign, monies due to the subject under a contract with the Crown could be claimed in the English courts by the Procedure of Petition of Right. Their Lordships have not been referred to any case as early as the eighteenth century in which a Petition of Right was brought by a civil servant for arrears of salary ; but in 1820 it was taken for granted by Chitty in " The Prerogatives of the Crown " that a Petition of Right would lie " where the King does not pay a debt, as an annuity or *wages* etc. due from him ". This was a work of high authority which would be familiar to the judges of Ceylon in the first half of the nineteenth century. Stuart Robertson in his " Civil Proceedings by and against the Crown " published in 1908

[1] *(1934) A. C. 176 at p. 180.*

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states categorically that " payment for services rendered may be claimed by Petition of Right " and cites two such petitions brought in the eighteen-sixties of which one was successful and the other settled. It was not until cases decided in 1926 and after that any doubt was cast upon this proposition. Their Lordships will advert to these cases later. It is at present sufficient to state that, as the English law stood at the time of the Proclamation, there was no sufficient ground in constitutional theory to justify the inference that the Crown must have intended to deprive a civil servant engaged in Ceylon of any remedy in the courts of that country for arrears of salary, if a remedy had previously been available under Roman-Dutch law as applied in the island.

If therefore under the Roman-Dutch law, as it was applied in Ceylon under the government of the United Provinces, a person holding office in the civil administration of that Government was entitled to a remedy in the courts for arrears of salary agreed to be paid to him, that remedy was preserved by the Proclamation and the plaintiff is entitled to avail himself of it as against the Crown.

It is not, however, essential that it should be demonstrable that such a remedy was in fact exercised before the British occupation, for although the Roman-Dutch law as applied in Ceylon under the Government of the United Provinces is the starting point of the " common law " of Ceylon, it is not the finishing point. Like the common law of England the common law of Ceylon has not remained static since 1799. In course of time it has been the subject of progressive development by a *cursus curiae* (*Samed v. Segutamby*[1]) as the Courts of Ceylon have applied its basic principles to the solution of legal problems posed by the changing conditions of society in Ceylon. In their Lordships' view if long established judicial authority for a proposition of law not inconsistent with the British constitutional concept of the exercise of sovereign authority by the Crown can be found in the decisions of the Ceylon courts themselves there is no need to go back to see whether any precedent can be found for it in the jurisprudence of the Courts of the United Provinces or the doctrine of the Roman-Dutch jurists of the eighteenth century. Still less is it necessary to find a precedent for it in English common law. The absence of any supporting precedent for the proposition in Roman-Dutch law, as applied in the United Provinces, may be due to a number of reasons. It may have been " taken for granted " law in the United Provinces or it may deal with circumstances which did not exist there or did not attract the attention of writers on Roman-Dutch law in the eighteenth century ; or it may be a development of the common law of Ceylon itself either before or after 1799, of which the nascence and growth may be impossible to trace in the absence of any reports of decisions before 1833 and very incomplete reports thereafter until towards the end of the nineteenth century. Even a clear conflicting precedent in the eighteenth century jurisprudence or doctrine of the United Provinces would not necessarily be a conclusive indication that a later decision of a Ceylon court is

[1] *(1924) 25 N. L. R. 481.*

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erroneous. As Wood Renton J. pointed out in *Colombo Electric Tramway Co. v. Attorney-General* [1] little is known as to the precise extent to which the doctrines of Roman-Dutch law which were applied in the United Provinces themselves were actually introduced into Ceylon while it was under Dutch rule, and if authority were found in the eighteenth century law of the United Provinces which was inconsistent with an old-established line of decisions by the courts of Ceylon, the inference may well be that the authority relates to a part of the law of the United Provinces which was regarded as unsuitable to conditions in Ceylon and was never introduced there.

There is old established precedent in the Supreme Court of Ceylon that an action lies at the suit of an officer in the civil administration for unpaid salary earned during the period of his appointment. In the case of *Jansz v. Tranchell* [2], this was treated by the Supreme Court as " taken for granted " law and conceded by The Queen's Adovcate. The court did not find it necessary to cite any previous authority or to express any view as to the origin of the right of action, but there may have been many unreported instances of this practice known to the judges. The actual point argued was whether such arrears of salary constituted a debt which could be attached by a creditor, but the existence of a debt recoverable by suit by the civil servant against the Crown was an essential step in the reasoning. In 1868 a similar point came before the Supreme Court of Ceylon in *Fraser's Case* [3]. This was a claim for arrears of salary by a civil servant who held concurrent offices under the Imperial Government and the Government of Ceylon. It was held that as respects salary due in respect of his office under the Government of Ceylon prior to his dismissal, this was a debt due to him from the Crown in Ceylon for which he was entitled to bring an action against The Queen's Advocate, though he failed on the facts as nothing was due to him. The Court in this case ascribed the origin of his right of action to Roman-Dutch law and cited the Proclamation of 1799.

Here then is authority dating back more than a hundred years that, under the common law of Ceylon, an action does lie at the suit of a civil servant for remuneration agreed to be paid to him by the terms of his appointment and remaining unpaid.

The Supreme Court in its judgment in the present appeal appears to have regarded these authorities as over-ruled by the decision of the Judicial Committee of the Privy Council in *Siman Appu v. The Queen's Advocate* [4]. In their Lordships' opinion this is not so. *Siman Appu's Case* was concerned with the general question whether a subject had any right of suit against the Crown in Ceylon for breach of contract. The contract sued upon was not one of service and *Fraser's Case* was cited only on the point as to whether an action lay against the Crown on a contract. The Judicial Committee upon the material then before them were unable to conclude with any certainty that a right of suit in

[1] *(1914) 16 N. L. R. 161 at p. 173.*
[2] *(1865) Ram. 160.*
[3] *(1868) Ram. 316.*
[4] *9 A. C. 571.*

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contract against the Government of the United Provinces had formerly existed under Roman-Dutch law, but they nevertheless held that whatever may be the exact origin of the practice of suing the Crown in contract it was then (*i.e.* by 1884) incorporated into the law of Ceylon.

In the present appeal their Lordships have had their attention drawn to a passage dealing with this topic in the third book of *De Jure Belli ac Pacis* by Grotius—

> " According to civil law also a person can be said to be bound by his own act, either in this sense, that an obligation results not from the law of nature alone but from the municipal law, or from both together, or in the sense that the obligation gives a right to action in a court of law. Therefore we say that a true and proper obligation arises from a promise and contract of a king, which he has entered into with his subjects, and that this obligation confers a right upon his subjects ; such is the nature of promises and contracts as we have shown above ; and this holds even between God and man.
>
> Now if the acts are such as may be done by a king, but also by any one else, municipal law will be binding in his case also ; but if they are the acts of the king as king, municipal law does not apply to him. This distinction has not been observed with sufficient care by Vazquez. *Nevertheless, from both these acts a legal action may arise, at least so far that the right of the creditor may be declared ; but compulsion cannot follow on account of the position of the parties with whom the business is conducted.* For it is not permissible for subjects to compel the one to whom they are subject ; equals, however, by the law of nature, have this right against equals, and superiors against inferiors even by municipal law."

The words italicised strongly support the view that there existed in the United Provinces as early as the seventeenth century a right to bring a declaratory action against the government in respect of a contract entered into with the government, although execution could not be obtained upon the judgment. This bears a strong resemblance to the practice in Ceylon described by Cayley C.J. in *Jayawardena v. Fernando* [1] and it may well be that had this passage from Grotius been drawn to the attention of the Board in *Appu's Case* they would have ascribed the then current practice in Ceylon to a Roman-Dutch origin.

The significance of *Appu's Case* is that it recognises the development of an indigenous common law of Ceylon by the decisions of the courts of that country even though the origin of a particular proposition of law cannot be traced back to the Roman-Dutch law of the United Provinces in the eighteenth century. The judgment upholds those parts of the judgments in *Jansz's Case* and *Fraser's Case* which recognised that the subject could bring an action in contract against the Crown in Ceylon although it does not ascribe this, as the Court in *Fraser's Case* had done, to the Roman-Dutch law in force in Ceylon under the Government of the

[1] *(1881) Supreme Court Circular p. 77.*

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United Provinces. It was not concerned with and casts no doubt on the correctness of those parts of the judgments in *Jansz's Case* and *Fraser's Case* which held that unpaid salary due to a civil servant for services rendered during his period of service constituted a debt for which he was entitled to sue the Crown.

Consistently with the attitude adopted by the Board in *Siman Appu's Case* to old established precedent in decisions of the courts of Ceylon it would in their Lordships' view be wrong after this lapse of time to depart from the principle laid down in *Jansz's Case* and *Fraser's Case* that a civil servant in Ceylon is entitled to sue the Attorney-General on behalf of the Crown for arrears of salary.

In coming to the contrary conclusion in the instant appeal, the Supreme Court of Ceylon relied upon the decision of the Privy Council in the Indian Case of *High Commissioner for India v. Lall* [1]. In India, unlike Ceylon, the source of the common law is English common law ; but on the assumption, which their Lordships think erroneous, that *Fraser's Case* had been over-ruled by *Appu's Case* the Supreme Court concluded that any right of the appellant to sue for arrears of salary fell to be determined by that branch of English law relating to the sovereign attributes or prerogative of the Crown which must have been introduced into Ceylon as a necessary consequence of the transfer to the Crown of sovereignty over the island. If this ascription of the origin of the appellant's right of suit to English public law were right *Lall's Case* would have been very much in point and in view of the importance attached to it in the judgment of the Supreme Court and the full argument which has been addressed to them upon it, it is appropriate that their Lordships should deal briefly with it.

As has already been pointed out the current of authority for a hundred years before 1926, though sparse, was to the effect that arrears of salary of a civil servant of the Crown, as distinguished from a member of the armed services, constituted a debt recoverable by Petition of Right. These authorities, including the decision of the House of Lords in *Sutton v. A. G.* [2], are conveniently summarised in a penetrating article by Sir Douglas Logan on "The Civil Servant and his Pay" (1945) 61 L.Q.R. 260 in which he commented on the decision in *Lucas v. Lucas* (1943 P. 68), where Pilcher J., adopting the reasoning of Lord Blackburn in the Scots case of *Mulvenna v. Admiralty* (1926 S.C. 842), reached a contrary conclusion.

Unfortunately, none of these earlier authorities was drawn to the attention of the Board in *Lall's Case*. Most of the argument and of the judgment in that case dealt with the question whether the dismissal of the civil servant was void under the relevant statutory provisions relating to his service, but the Board did decide that, notwithstanding that his purported dismissal was void, he had no right of action for arrears of pay. *Lall's Case* can be distinguished from the instant case in

[1] *(1948) A. I. R. (P. C.) 121.* [2] *(1923) 39 T. L. R. 294.*

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that the terms on which Mr. Lall was engaged contained no express provision as to the pay he was to receive for his services. But the Board did not base their decision exclusively on this. They too adopted as a correct statement of the law the judgment of Lord Blackburn in *Mulvenna v. The Admiralty* (*ubi sup*).

Lord Blackburn's reasoning in *Mulvenna's Case* had not been concurred in by the other two members of the Court of Session, Lord Sands and Lord Ashmore, nor has it been subsequently treated in Scotland as correctly laying down the law. See *Cameron v. Lord Advocate* (1952 S.C. 165). The conclusion which Lord Blackburn reached was that it " must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in the 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 ' ".

The only cases cited in support of this proposition were the well-known cases which establish that the Crown has power to determine the employment of a public servant at will. He treated as an ineluctable consequence of this, too plain to call for further explanation, that a civil servant had no claim in law to arrears of salary accrued due before his dismissal.

In their Lordships' view this is a *non sequitur*. A right to terminate a contract of service at will coupled with a right to enter into a fresh contract of service may in effect enable the Crown to change the terms of employment *in futuro* if the true inference to be drawn from the communication of the intended change to the servant and his continuing to serve thereafter is that his existing contract has been terminated by the Crown and a fresh contract entered into on the revised terms. But this cannot affect any right to salary already earned under the terms of his existing contract before its termination.

In the opinion of their Lordships Lord Blackburn's reasoning in *Mulvenna's Case* is defective and his conclusion is contrary to authority and is wrong. That portion of the judgment in *Lall's Case* which adopts it as a correct statement of the law must be regarded as given *per incuriam* since the relevant and prestigious authorities to the contrary appear not to have been cited to the Board.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed on the preliminary issue upon which alone it was decided by the Supreme Court.

Although in their Lordships' opinion a civil servant in Ceylon does have a right of action against the Crown for arrears of salary which accrued due during the currency of his employment, this answer to the preliminary issue does not dispose of the Crown's appeal to the Supreme Court from the judgment of the District Judge. There are the other important constitutional issues to be decided upon which neither the

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Supreme Court nor their Lordships have heard argument. As already indicated, their Lordships would think it inappropriate to enter upon any of these matters without the benefit of the considered opinion of the Supreme Court of Ceylon thereon. They accordingly express no opinion upon any of the other issues as to the constitutionality of the Official Language Act or the effect of Treasury Circular No. 560 of 4th December 1961, or of any other material facts upon the plaintiff's contract of employment. The case should be remitted to the Supreme Court for further consideration of these other issues and their Lordships will humbly advise Her Majesty accordingly.

The respondent must pay the costs of this appeal to their Lordships' Board and of the appeal to the Supreme Court.

Appeal allowed on a preliminary issue.

1969 *Present :* **Sirimane, J., Samerawickrame, J., and Wijayatilake, J.**

A. H. DINGIRI AMMA, Appellant, *and* R. A. W. D. APPUHAMY, Respondent

S. C. 62/67 (Inty.)—D. C. Kurunegala, 2176/P

Partition action—Non-appearance of plaintiff on trial date—Dismissal of action—Whether it debars institution of a second action—Res judicata—*Partition Act (Cap. 69), ss. 10, 12, 25, 29, 63, 66, 71, 76, 79—Civil Procedure Code, ss. 84, 85, 207, 403, 406, 547—Inapplicability of sections 84 and 85 in a partition action.*

Where a partition action is dismissed in terms of section 84 of the Civil Procedure Code on the ground of the non-appearance of the plaintiff on the trial date and without any adjudication on the plaintiff's rights, the order of dismissal would not operate as *res judicata* in a subsequent action brought by the plaintiff for partition of the same land.

Obiter : The provisions of Chapter 12 of the Civil Procedure Code relating to the consequences and cure of defaults in appearing have no application at all to a partition action instituted under the Partition Act.

APPEAL from an order of the District Court, Kurunegala.

E. A. G. de Silva, with *Ben Eliyatamby* and (*Miss*) *S. M. Senaratne*, for the 1st defendant-appellant.

W. D. Gunasekera, with *W. S. Weerasooria*, for the plaintiff-respondent.

Cur. adv. vult.

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November 13, 1969. SIRIMANE, J.—

The plaintiff had filed an action No. 8067 for the partition of a certain land on the footing that it originally belonged to one Mudiyanse, whose rights devolved on his daughters. He claimed that the rights of two of the daughters passed to him and the 2nd and the 3rd defendants, and those of the third daughter to the 1st defendant.

The 1st defendant filed a statement claiming the entire land on the footing that the two daughters from whom the plaintiff claimed had married in " diga " and inherited no rights to this land.

At the trial in the District Court, the plaintiff succeeded. In appeal, however, the case was sent back for re-trial. The plaintiff was absent on the trial date, and a Decree Nisi dismissing his action had been entered. The plaintiff then purged his default to the satisfaction of the trial Judge who restored the case to the trial roll. On an appeal by the 1st defendant that order, too, was set aside, and the Decree Nisi dismissing the action was made absolute.

The plaintiff thereafter filed this action for partition of the same land.

We cannot now interfere in any way with the order of dismissal in D.C. 8067. But we have to consider what effect that order has on the present case.

A partition action is brought to put an end to the inconvenience of common possession. Apart from the special procedure prescribed for such actions, both in the Ordinance of 1863 and the Partition Act of 1951 (Chapter 69), such an action is very unlike any other action based on a " cause of action " as defined in the Civil Procedure Code. In the present action, like in all other actions for partition, whether filed under the Ordinance or the Act, the plaintiff avers in para. 14 of the plaint that common possession of the land is inconvenient and impracticable. That is the basis on which he comes to Court.

It is true that the title of a plaintiff is often challenged in whole or in part by the defendants. But the filing of a statement of claim raising a contest does not transform a partition action into an action for declaration of title. Such a statement does not, in my view, really affect the nature of the proceeding, which has to be ascertained by looking at the plaintiff's case as stated by him. He does not know, or is not expected to know, at the time he files the action, exactly what the defendants may say. Sometimes many contests are raised in the statements of claim, but one is only too familiar with the very large number of cases where such contests are given up at the trial. In my view there is no difference between a Partition Action, which is contested (before an adjudication on the contests) and one which is not. As far as the plaintiff is concerned, the basis on which he comes into Court is the inconvenience of common possession. It would be different, of course, if there had been an adjudication on the rights he claimed. I referred to this aspect of

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the matter because Counsel for the appellant argued at some length that if a partition action is uncontested (a partition action " simpliciter " as he called it), then an order under section 84 of the Civil Procedure Code would not operate as res judicata, but, according to his submission, once a statement of claim is filed raising a contest, such an order would prevent the plaintiff from coming into court again, in view of section 207 of the Code.

I am in respectful agreement with Ennis, A.C.J. when he said in *Abeysundere v. Babuna* [1],

" Now clearly in a partition action the action itself is not founded upon a wrong. It is an action to give relief against the inconvenience of common possession, so that a partition action at its institution is not an action founded upon a cause of action as defined in section 5, but it would be an action under the definition of ' action ' given in section 6. Section 207, if the limitation contained in the explanation be regarded as a limitation on the main words of the section, would not apply to partition actions, but there is no doubt that in partition actions a contest frequently arises between the parties with regard to the rights of parties and title generally, and with regard to which the parties seek redress, such a contest would be based on a cause of action as defined in section 5, and *the adjudication upon it* might well be *res judicata* under section 207."

He went on to say,

" If one regards a partition action as an action founded on some cause, even if it be not such a cause as would fall within the definition in section 5 of the Civil Procedure Code, then the cause of action would seem to be a recurring one, that is, it is due to a continuance of the common ownership which exists from day to day as the inconvenience of common ownership recurs day by day."

The earlier case (D.C. 8067) was dismissed for want of appearance without any adjudication on the plaintiff's rights. That dismissal, in my view, is no bar to the present action, for the inconvenience of common ownership recurs day by day.

In the case of *Silva v. Juwa* [2] relied on by the appellant, the earlier action brought by the plaintiff was one for declaration of title to a land. Before the defendant intervened in the subsequent partition action, which the plaintiff filed, an order of abatement had been entered in the land case. The Court had to consider the effect of section 403 of the Civil Procedure Code and Garvin, S.P.J. said at page 166 :

" This would, therefore, appear to be a fresh action in the sense that so far as the intervenient and the plaintiff are concerned this action was brought by the plaintiff as against the intervenient subsequent to the date of the order of abatement."

[1] *(1925) 26 N. L. R. 459.*

[2] *(1935) 37 N. L. R. 165.*

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It would appear from the facts of that case, that the second action was a mere subterfuge to circumvent the order of abatement. I think that case is distinguishable from the facts of the present case. In *Kandavanam v. Kandaswamy* [1] the Court again had to consider the effect of an *unconditional withdrawal* by the plaintiff of a partition action under section 406 of the Civil Procedure Code, in view of the statutory bar in section 406 (2) which precludes the plaintiff from bringing a fresh action in such circumstances. The facts there, too, were different from those in the present case, though, with great respect, I venture to think that the Court had gone too far when it held that a defendant who consented to the withdrawal of the action was also prevented from bringing a fresh action.

Jayewardene on Partition at page 107 refers to a case decided in 1920 (*Perera v. Punchirala* [2]) where it was doubted whether section 406 of the Code applied to partition actions.

Nor do I think that those cases, where it has been held that a partition action was one "for the recovery of property" for the purposes of administration required by section 547 of the Civil Procedure Code, can be regarded as authority for the proposition advanced for the appellant, that a partition action is no different from an action for declaration of title to land. Though, with great respect, I am unable to share the view expressed in *Herath v. The Attorney-General* [3] that the provisions of section 207 of the Civil Procedure Code apply *only to decrees entered under Chapter 20* of the Code, yet I think that the learned District Judge was right (this being a partition action) when he held that the order in the earlier case was no bar to the present action.

I have examined the question so far on the basis that an order under section 84 of the Civil Procedure Code is an appropriate order in a partition action.

But I must say, however, that I am very strongly of the view that the provisions of the Civil Procedure Code relating to the consequence and cure of defaults in appearing (Chapter 12) have no application at all to a partition action instituted under the Partition Act.

One consequence of the laws of inheritance obtaining in the Island is the common ownership of small parcels of land. This in turn leads to many disputes, often resulting in violence. The Partition Act was designed to enable a co-owner to put an end to this evil and obtain a *Decree in Rem.* At the same time the legislature has paid heed to the fact that a partition action, once instituted, must be prosecuted with reasonable diligence, not only because of the prohibition against alienation pending such actions, but also because the business of a court should

[1] (*1955*) *57 N. L. R. 241.*

[2] (*1920*) *2 C. L. Rec. 58.*

[3] (*1958*) *60 N. L. R. 193.*

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not be hindered by a number of semi-animate actions pending on its roll. The Act, therefore, provides for the dismissal of an action for many defaults, for example, the failure to deposit survey fees (sections 10 and 29), the failure to comply with the requirements relating to declarations, summonses, notices, etc., at the commencement of the action (section 12), the failure to provide security (section 63), default in payment of costs (section 66) or *non-prosecution of the action* (section 71). But in every one of these instances, when the action is dismissed without an adjudication, section 76 provides that such a dismissal should not operate as a bar to the institution of another action.

Absence of a plaintiff without excuse on the trial date surely amounts to a failure to "diligently prosecute the action". One has to bear in mind that the procedure prescribed under the Act before a case is ready for trial is elaborate and expensive, and also that in a partition action every defendant is in the position of a plaintiff.

Section 71, therefore, provides that :

> "No partition action shall abate by reason of the non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the Court has endeavoured to compel the parties to bring the action to a termination, the Court may dismiss the action :
>
> Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action the Court may, by order, permit any defendant to prosecute that action and may substitute him as plaintiff for the purpose and may make such order as to costs as the Court may deem fit."

In my view, the above section provides for the procedure which is applicable when a plaintiff in a partition action is absent, and section 79 of the Partition Act, relied on by the appellant, which provides for a *casus omissus* has no application.

Even a cursory examination of sections 84 and 85 of the Civil Procedure Code would reveal their inapplicability in a partition action. Section 84, for instance, provides for the dismissal of the plaintiff's action if he fails to appear on a day fixed for the appearance and answer of a defendant. It is very common to find a large number of defendants in a partition case. They are never served with summons at one and the same time, and a case had to be called on several dates before this is done. A plaintiff would be in peril on every date that a defendant appears on summons.

Section 85 provides for the *ex parte* hearing of a case and the passing of a Decree Nisi if the defendant fails to appear on the day fixed for his appearance and answer. Such a procedure, in addition to being obviously impracticable in a partition case, would also be contrary to the provisions of section 25 of the Partition Act which require the

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Court to examine the title of each party before entering an Interlocutory Decree. Even as far back as 1895, in *Wickramasekera v. Fernando* [1], it was shown that a Decree Nisi was altogether irregular in a partition action.

The appeal is dismissed with costs.

SAMERAWICKRAME, J.—I agree.

WIJAYATILAKE, J.—I agree.

Appeal dismissed.

1968 *Present :* **Alles, J.**

IN RE MRS. LILLIAN RAJAPAKSE

IN THE MATTER OF AN OFFENCE OF CONTEMPT OF COURT

S. C. 290/66—M. M. C. Colombo, 36626

Contempt of Court—Tampering with a juror in the course of a pending case—Punishability—Courts Ordinance (Cap. 6), s. 47.

Where, while a trial before the Supreme Court is proceeding, a person attempts to interfere with one of the jurors with the intention of influencing the decision of the juror in the case, he is liable to be punished for the offence of contempt of Court under section 47 of the Courts Ordinance.

RULE under section 47 of the Courts Ordinance.

G. E. Chitty, Q.C., with *Sena Wijewardene, G. E. Chitty* (Junior) and *Sam Silva*, for the respondent.

T. A. de S. Wijesundera, Senior Crown Counsel, as *Amicus Curiae*.

Cur. adv. vult.

July 18, 1968. ALLES, J.—

In this matter the respondent, Mrs. Lillian Rajapakse, was asked by me to show cause why she should not be punished for the offence of contempt in that she did, on 25th June 1968, attempt to interfere with one of the jurors in S.C. 290/66 ; M.M.C. Colombo 36626, then being tried

[1] (*1895*) *Matara Cases 19.*

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by a Judge and a jury before the Supreme Court at Colombo and which interference was likely to influence the decision of the juror in the case.

In S.C. 290/66, four accused were tried before me and a Sinhalese-speaking jury on two counts of an indictment charging them with conspiracy to commit the murder of the Hon. Mr. V. A. Sugathadasa, Minister of Nationalised Services, and with conspiracy to commit the murder of Mr. A. W. A. Abeygunasekera, Chairman of the Port Cargo Corporation. The trial commenced on 11th June 1968 and continued from day to day. On 25th June, the prosecution closed its case and the 4th accused was acquitted by the Jury. On 27th June, it was brought to my notice by learned Crown Counsel for the defence that investigations were being conducted by the Police into an alleged interference of one of the jurors by the respondent, on the evening of 25th June. I was furnished with a statement of the respondent recorded by the Police and I was satisfied that there was a prima facie case of interference of the juror by the respondent. I was also satisfied that there was no misconduct on the part of the juror concerned and that there was no breach of the oath of separation by him. No application was made by the Crown or the defence for a discharge of the jury. The trial was concluded on 30th June and the remaining three accused were unanimously found not guilty of the charges by the jury. After the trial was concluded I summoned the respondent and asked her to show cause why she should not be punished for the offence of contempt under section 47 of the Courts Ordinance. I gave her time till 3rd July to retain Counsel and seek legal advice, and the inquiry commenced on 4th July.

Crown Counsel, who appeared as *amicus curiae*, led evidence to establish the prima facie case against the respondent. Thereafter Counsel for the respondent stated that he had cause to show, led the evidence of the respondent and addressed Court.

The case against the respondent consisted of the evidence of the juror concerned, Gnanaratna, supported by the testimony of Teebal Gajanayake.

Gnanaratne is a peon employed at George Steuart and Company, living at 200/3, Suvisuddharama Road, Pamankade, with his wife and family. His wife Mercy is the daughter of one Jane Akka, living at the same premises. According to Gnanaratne, after jury service on the evening of the 25th, he wore a sarong and shirt and went, carrying his child, to purchase some eggs from a boutique. When he was at the boutique a person, later identified as Teebal Gajanayake, accosted him and asked him "Are you the person who has married Jane Akka's daughter?" to which question he replied in the affirmative. He returned home, left the child and came back to the boutique when Teebal told him that one Sonny who lived in the respondent's house wanted to

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meet him. Teebal accompanied him to the house which was shown to him by Teebal and left him at the entrance. He entered the house, inquired for Sonny and met the respondent who asked him to sit down. Then the respondent asked him whether he was on the jury in connection with the Bomb case. He says he got alarmed when he heard the word "jury" and wanted to leave immediately. The respondent then told him " One of the accused is the father of either four or six children. *It is the jury who have to decide the case. Please give some assistance by acquitting the accused* ". Gnanaratne got frightened and did not reply. He wanted to leave but the respondent insisted that he should have a cup of tea which was offered to him and after hurriedly sipping some tea he left the place immediately afterwards. He says he got alarmed because he knew that the respondent became aware that he was serving on the jury and he thought that she was trying to interfere with his final decision in the case. He stoutly denied the suggestion of Counsel for the respondent that he went to the respondent's house on his own, and that he engaged the respondent in a conversation as to whether she knew any of the accused. He said that when he returned home he informed his wife of his visit to the respondent's house and she reminded him that about two years previously they had gone there on a wedding visit. The juror did not pay heed to the conversation and did not mention it to anybody. In fact the Police advisedly did not record his statement since he was still on jury service at the time.

Gnanaratne's evidence of the visit to the respondent's house is corroborated by Teebal who said that it was at the instance of one Sugathadasa that he pointed out the respondent's house to Gnanaratne. Teebal was known to Sugathadasa for some time as a supporter of the Lanka Sama Samaja Party—some of the accused at the trial were members of the same Party. Teebal says that on the 24th, Sugathadasa met him and showed him a piece of paper with the address 200/3, Suvisuddharama Road written on it and asked him to find out the occupants of the house and whether Gnanaratne was living there. He went with Sugathadasa and verified this information. On the 25th Sugathadasa met him about 5.30 p.m. on the road and as they were walking along the road they saw Gnanaratne carrying a child and Sugathadasa told him that he was the person. Then Sugathadasa told Teebal to show Gnanaratne Sonny Caldera's (the respondent's) house. Teebal met Gnanaratne and told him that he was wanted at the respondent's house, showed him the house and left him at the door-step. Although Teebal was a friend of Sugathadasa, he was a supporter of the United National Party and informed the authorities that an attempt was being made to influence the jurors. It was in consequence of his information that the Police conducted inquiries.

Gnanaratne was cross-examined at length by Mr. Chitty and although he appeared to be excitable and somewhat indignant that he was being questioned in regard to a transaction which was not of his own seeking and over which he had no control, he impressed me as being a truthful

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witness. There was no reason why he should make a false charge against the respondent, who was virtually a stranger to him and I accept his evidence that he was taken to the respondent's house and an attempt made by the respondent to influence him to give a decision in favour of the accused on trial.

The respondent is a young married woman 33 years of age, a trained teacher from the Polgolla Training School, had been a Sinhalese teacher for 10 years and taught in several schools. At the relevant date she was teaching in the 5th Standard at St. John's Vidyalaya, Dematagoda. Her husband was the Manager of a Theatre at Nuwara Eliya. She had known Padma Sugathadasa, the wife of Sugathadasa, when they were both teachers in the same school at Nugegoda and had visited them. She says that she was not interested in the Bomb case and never even read about it in the newspapers and professed ignorance of a juror's duties and did not even know that in trials before the Supreme Court it was the jury who convicted or acquitted. I am unable to accept her evidence on this point particularly as she admits that the juror did inform her just previously, that they had acquitted the 4th accused. In these days of enlightened education it is difficult to believe that a person in the position of the respondent was ignorant of matters which even school children are conversant with.

She says that on the evening of the 25th, Sugathadasa came to her house and showed her a piece of paper with a name written on it and asked her whether she knew Gnanaratne. When she stated she did not, Sugathadasa inquired whether she knew Jane Akka of Suvisuddharama Road and he said that Gnanaratne was the son-in-law of that Jane Akka. Sugathadasa told her that he wanted to meet Gnanaratne. He then said that a friend of his who was the father of six children was involved in the Bomb case and expressed sympathy for the accused. He then left. About half an hour later, a person dressed in a dirty sarong and shirt (identified as Gnanaratne) came to the house and asked her whether it was Sonny Caldera's house. He then said he was the husband of Mercy, the daughter of Jane Akka. He sat down with his legs crossed and smiling. The respondent questioned him about his family because she recognised the juror as a person who was married to an associate of hers, being married to Jane Akka's daughter who was known to her from childhood. She then inquired whether he was coming from his workplace and he replied in a boastful manner that he was a juror in the Bomb case. She was surprised and said " Do they choose people like you for jury service ? ". Gnanaratne then informed her that today they had acquitted the 4th accused. Then she says she remembered what Sugathadasa told her earlier and said that a friend of Sugathadasa was involved in the case and that he had six children. She said that Sugathadasa had felt sorry for him. Gnanaratne did not reply, drank some tea and left the place. Sugathadasa again came to her house a couple of hours later and asked her whether anybody had come to her place. She did not tell him that she had conveyed what he had said to

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the juror although she mentioned to Sugathadasa that a man in a dirty sarong had come to see her. She further said she did not know his name was Gnanaratne. Having regard to Sugathadasa's first visit and as to what transpired on that occasion, it is hard to believe that Sugathadasa did not tell the respondent to speak to the juror and request her to influence the juror—She denied that she asked for any relief from the juror when Gnanaratne appeared half an hour later after Sugathadasa left. Gnanaratne's visit soon after Sugathadasa's departure strongly suggests a link between the two visits and the only reasonable inference to be drawn from the respondent's evidence is that she was asked to influence the juror and that she did not casually convey Sugathadasa's information to Gnanaratne without intending to influence him. Indeed, that there is a link between the two visits is clear from Teebal's evidence. It is also remarkable that she denied having informed Sugathadasa later that evening that she made no mention of the conversation she had with Gnanaratne. The suggestion of Crown Counsel, which is in accordance with the evidence of Gnanaratne and the reasonable probabilities in the respondent's version is that Sugathadasa had approached the respondent to speak to Gnanaratne, whose family was known to the respondent, to try and influence the juror whose visit to the respondent's house was arranged by Sugathadasa. The juror was spoken to by the respondent on the lines suggested by Sugathadasa and Sugathadasa came later to inquire whether the act had been accomplished. Mr. Chitty conceded that Sugathadasa was responsible for involving the respondent in this transaction and was trying to abort the trial by influencing a juror—a fact that might be brought to the notice of the Court—but his position was that, though the respondent might have acted foolishly in speaking to the juror, she did not have any intention of influencing the juror nor was she aware that her conduct might be so construed.

I am satisfied beyond reasonable doubt that Gnanaratne's evidence of the conversation is true and his evidence is supported by the circumstantial evidence relating to the visits of Sugathadasa as spoken to by the respondent. This evidence clearly establishes that the respondent did attempt to influence the juror and that she is guilty of the offence of contempt of Court.

The question of sentence has caused me considerable anxiety. It was brought to my notice that any punishment of the respondent for the offence of contempt would adversely affect the respondent's career as a Government teacher. I agree with Mr. Chitty that the villain of the piece is Sugathadasa, who, according to Teebal had already told him that he had approached three jurors earlier and who, in view of his wife's association with the respondent had used the respondent as a tool to attempt to influence a fourth juror. In view of my findings and having regard to the respondent's educational qualifications it is impossible to accept the defence evidence that the respondent's act only savoured of folly and indiscretion. She must have known that attempting to influence the decision of a juror was an act of impropriety, even if it was

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the result of mistaken sympathy on her part. I would not have hesitated to impose a term of imprisonment on the respondent, had it not been for the fact that I am satisfied that she was a tool in the hands of a more scheming person. The administration of justice must always remain pure and the Court must be ever vigilant against any attempt to pollute the stream of justice. Tampering with jurors in the course of a pending case is a very serious form of contempt. Jurors perform very responsible duties and the Courts must necessarily be gravely concerned at any attempt to tamper with the free exercise of a juror's decision in a pending case.

Section 47 of the Courts Ordinance provides for a term of imprisonment until the contempt is purged or a fine not exceeding Rs. 5,000. The respondent has expressed her regret for what she calls her foolish act of speaking to the juror. But it is essential in the interests of the administration of justice to take a serious view of the respondent's conduct. To impose a nominal fine in a case of this nature is not only farcical but is likely to stultify the Courts of law in the eyes of the public. A substantial fine is essential if only to serve as a deterrent to persons like minded not to interfere with jurors in pending cases. I therefore impose a fine of Rs. 500 on the respondent, in default one month's simple imprisonment. A month's time will be granted for the payment of the fine.

Rule made absolute.

1969 *Present :* **Pandita-Gunawardene, J.**

B. JOSEPH, Appellant, *and* INSPECTOR OF POLICE (Foreshore Police, Colombo), Respondent

S. C. 972/68—J. M. C. Colombo, 38244

Charge of possessing unclaimed goods in the Customs premises—Burden of proof as to place of offence—Customs Ordinance (Cap. 235), ss. 101 (1) (b) [Regulation 26 (a) (3) thereunder], 101 (2) [Notification thereunder], 148.

In a prosecution for handling goods found concealed or unclaimed in the Customs premises at Colombo in breach of regulation 26 (*a*) (3) made under section 101 (1) (*b*) of the Customs Ordinance, the averment by the complainant that the offence was committed at the Dry Dock Gate, Port of Colombo, is sufficient *prima facie* evidence under section 148 of the Customs Ordinance, read with Notification made under section 101 (2), that the offence was committed within the Customs premises.

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APPEAL from a judgment of the Joint Magistrate's Court, Colombo.

K. Jeganathan, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

June 17, 1969. PANDITA-GUNAWARDENE, J.—

The appellant was convicted in the Joint Magistrate's Court of Colombo of the following charge to wit : that he did on the 12th day of November, 1967 at Dry Dock Gate, Port of Colombo within the jurisdiction of this Court, was handling four boxes containing 20 " Maxwell Blue Dry Battery " found concealed or unclaimed in the Customs premises, without first informing the Customs officers or the Police officers on duty in breach of regulation 26 (*a*) (3) made under Section 101 (1) (*b*) of Chapter 235 L.E.C. The learned Magistrate imposed a fine of Rs. 50 in default three weeks' rigorous imprisonment. The appeal is from the conviction and sentence.

The relevant facts are that the appellant came from inside the Harbour and at the Dry Dock Gate he was challenged by Liyanage who was on duty. The appellant attempted to move on without stopping. He was then arrested a little distance beyond the gate by Liyanage, with the help of Constable Somasiri. On searching the appellant, 4 boxes containing Maxwell Batteries described in the charge, were found concealed in his waist. The appellant was produced before Moorthy, designated A. P. O. Customs. The letters A. P. O., I presume, stand for Assistant Preventive Officer. It was found that the Maxwell Batteries were unclaimed goods.

The appellant denied that these batteries were in his possession and asserted that he had been falsely implicated.

The learned Magistrate has accepted the evidence for the prosecution and disbelieved the defence. Learned counsel for the appellant did not seek to canvass the finding of fact.

It was however contended that there is no proof that the offence was committed within the Customs premises, consequently it was said that the charge must fail. In support of this contention, I was referred to the unreported judgment of my brother de Kretser (S. C. 934/'68—J. M. C. 37659, S. C. Minutes of 5.3.1969). In that case too the charge was laid for breach of the same regulation, made under Section 101 (1) (*b*) of the Customs Ordinance, Chapter 235. The regulation is in these terms : " No person shall handle any goods found concealed or unclaimed in the Customs premises or found adrift or washed ashore within the water area forming part of the Customs premises, without first informing a Customs or Police officer on duty ". There too it was alleged that the offence was committed at the Dry Dock Gate, Port of Colombo and the contention was that there was no evidence that the offence was committed in the Customs premises.

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It was held that the limits of any Port or of any territorial waters is not the same as its Customs premises ; that the presumption created by Section 148 of the Customs Ordinance which provides " the averment that such offence was committed within the limits of any Port or the territorial waters of Ceylon, shall be sufficient, without proof of such limits unless the contrary be proved " does not apply ; and the Magistrate was wrong in concluding that it was for the accused to prove that the incident happened outside the Customs premises. I find myself, with great respect, unable to agree with my brother de Kretser.

It is apparent from the evidence that the appellant had on this day worked in the cargo boat named President Haig. He had come along the pier and turned right and reached Dry Dock Gate which he endeavoured to pass when he was challenged and arrested and the articles found on him. The whole of the area, as the evidence shows, belongs to the Port. The question that arises is whether that area could be said to be within the Customs premises. Section 101 (2) enacts " in this section and in any regulation made thereunder, ' Customs premises ' means the Customs premises as defined from time to time by the Principal Collector of Customs by notification in the *Gazette*." The notification provided for in this section appears in Vol. IV Subsidiary Legislation of Ceylon—page 979. The notification proclaims " By virtue of the powers vested in me by Section 101 (2) of the Customs Ordinance (Chapter 235), I, Harry James Leigh Leighclare, Principal Collector of Customs, do by this notifiction :—

(*a*) define the Customs premises at Colombo, and

(*b*) .....

Schedule

Colombo

M. RAJANAYAGAM
24, ABDUL CAFFOOR MAWA
COLOMBO—3.

(1) The Customs premises at Colombo shall be as follows :

(i) The water area enclosed by the Harbour breakwaters, including the Harbour Canal leading to the Beira Lake ;

(ii) The following areas together with all the breakwaters, piers, jetties, landing-places and quays appertaining thereto—

(*a*) the area bounded on the—

north by a line drawn from the root of the south-west breakwater along the quay and round all the jetties to the corner of the quay on the western side of the canal basin ;

west by a line drawn from the root of the south-west breakwater along the sea wall to the northern limit of the Battenburg Battery to Battenburg

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Gate, and thence along the northern and eastern walls of the Government Stores to the Customs main gate; south by Church Street and thence through the barrier opposite the Passenger Jetty and thence along Leydon Bastion road; and

east by the western side of the canal basin.

(*b*)-(*g*) needs no mention.

It is sufficient to say that in accordance with this schedule, the Customs premises includes the Port of Colombo and covers a very wide area, clearly inclusive of the area where this offence has been committed.

In the result I am satisfied that the appellant has been rightly convicted. The appeal is dismissed.

Appeal dismissed.

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[Privy Council]

1969

Present : **Lord Hodson, Viscount Dilhorne Lord Donovan, Lord Pearson and Lord Diplock**

T. P. VEERAPPEN, Appellant, *and* THE ATTORNEY-GENERAL, Respondent

Privy Council Appeal No. 11 of 1968

S. C. 1249/56—M. C. Badulla (holden at Bandarawela), 44156

Criminal law—Charge of forgery—Penal Code, ss. 452, 453, 454—Citizenship Act, s. 6—Defence of autrefois acquit*—Burden of proof—Whether accused should be given an opportunity of calling evidence if the defence that prosecution does not support the charge is not accepted—Sentence—Privy Council will not generally interfere with it—Appeal against acquittal—Conviction thereafter—Desirability of accused being heard in mitigation of sentence.*

The defence of *autrefois acquit* cannot succeed if in the relevant earlier case the accused was discharged because counsel for the prosecution stated that the prosecution was not adducing any evidence against the accused and there is no indication that the accused was called upon to plead to the charge. In such a case it cannot be said that the appellant was ever put in peril on the first occasion.

Where, at the trial of a criminal case, Counsel for the accused states that he is not calling any evidence but makes a submission in law to the effect that the evidence for the prosecution does not support the charge, there is no obligation on either the trial Court or the Supreme Court (on appeal from an acquittal) to give a further opportunity to the accused of calling evidence if the submission made on behalf of the accused is not accepted and the accused is convicted.

The Judicial Committee of the Privy Council does not as a rule interfere with sentences.

In appeals against acquittals it is highly desirable that accused persons should have the opportunity, after conviction by an appellate court, of pleading in mitigation of sentence.

Appeal, with special leave, from a judgment of the Supreme Court.

The appellant was convicted by the Supreme Court of forgery for forging a birth certificate in connection with an application made by him for a certificate of citizenship in terms of section 6 of the Citizenship Act. In the appeal to the Privy Council the appellant by his counsel did not argue that the conclusion of the Supreme Court as to the forgery was not sustainable but relied *inter alia* upon the defence of *autrefois acquit* for setting aside the judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *John Baker*, for the accused-appellant.

Montague Solomon, for the respondent.

Cur. adv. vult

1*——J 11043—2,255 (1/70)

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October 6, 1969. [*Delivered by* LORD HODSON]—

The appellant was convicted in the Supreme Court of Ceylon on 27th February 1967 and sentenced to a term of two years rigorous imprisonment on a charge of forgery punishable under section 454 of the Penal Code which provides for a maximum period of five years imprisonment to be imposed.

He was granted special leave to appeal by Order of Her Majesty in Council on 13th November 1967.

He had been charged on 10th March 1966 in the Magistrate's Court of Bandarawela " that on 26th August 1958 he did sign a document to wit :

> ' Application for a certificate of citizenship by descent, to be issued by the Minister of Defence and External Affairs in terms of Section 6 of the Citizenship Act (Cap. 349) with the intention of causing it to be believed that the said document was signed by Veerappen son of Thiruman, (who was born to Thiruman and Lechemey on Sherwood Estate on 1st May, 1918, and in respect of whose birth the Birth Certificate No. 41904 had been issued by the District Registrar of Badulla on 12.6.58) by whom or by whose authority he knew that the said document was not signed, and he has thereby committed an offence punishable under Section 454 of the Penal Code.' "

The offence with which he was charged is not ordinarily triable summarily by a Magistrate's Court but the Magistrate, being also an additional District Judge, assumed jurisdiction on the grounds (1) that the facts were simple (2) expeditious disposal was desirable for the offence was alleged to have been committed in 1958 and (3) no complicated points of law arose. Though entitled to assume jurisdiction under section 152 (3) of the Criminal Procedure Code the Magistrate had no power to impose any sentence but one which a District Court might lawfully impose. The punishment which he could have imposed if he had found the appellant guilty was therefore limited to two years imprisonment as opposed to the maximum of five years laid down in section 454 of the Penal Code.

The appellant pleaded " not guilty ", was not called as a witness nor did he offer other evidence save that he put in a document to which reference will be made hereafter. He was acquitted on the ground that, on the facts proved by the prosecution, the charge of forgery had not been established, his offence, if any, being that of cheating.

Upon appeal by the Attorney-General to the Supreme Court against the acquittal the Court held that upon the facts found by the Magistrate forgery within the meaning of section 453 of the Penal Code had been made out.

The appellant was an Indian Tamil resident in Ceylon. He had been a watcher on an estate in Haputale. In July 1958 he wrote to the Permanent Secretary, Ministry of Defence and External Affairs, at Colombo asking

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that his position as a citizen of Ceylon by birth under section 6 of the Citizenship Act, No. 18 of 1948, should be clarified and also asking for an application form. He signed the letter in Tamil.

A form was sent and filled in by him as " THIRUMALAI alias PALANIMALAI VEERAPPEN ". No point was made of the difference between Thiruman and Thirumalai. The appellant did however state, in answer to the questionnaire, that his father had been born in Ceylon and that he could produce documentary evidence of his own birth in Ceylon, the point being that he would then qualify under section 4 of the Citizenship Act as a citizen of Ceylon by descent. The appellant subsequently signed and sent to the Department a form of application verified by affidavit in which he gave his date and place of birth as 1.5.1918 Sherwood Estate, Haputale and also gave his father's date and place of birth as 1898, Koslande, that is to say representing that he and his father were born in Ceylon. The application was accompanied by a birth certificate recording the birth of one " Veerapen " the son of " Tiruman " on 1st May 1918 at the Sherwood Estate. A certificate of Citizenship was accordingly issued to the appellant stating his name and place of birth as set out in his application.

The prosecution proved that the appellant was not the person to whom the birth certificate related. They produced (1) a birth certificate of the appellant's grandson based on information supplied by the appellant which showed that the appellant was not born in Ceylon, (2) a Provident Fund record card filled in on information supplied by the appellant showing that he was born in South India, and (3) a Labour discharge certificate of less significance.

The decision of the Magistrate was that by enclosing the false birth certificate with his application form the appellant was seeking to pass himself off as the " Veerappen " son of Tiruman who had the qualification for citizenship of Ceylon by descent.

The Supreme Court, upon these facts, reversing the decision of the Magistrate, held that a verdict convicting the appellant of forgery should be recorded. Forgery is defined by the Penal Code sections 452 and 453 as follows :

" *Section 452*

Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to the Government or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery.

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Section 453

A person is said to make a false document :

Firstly who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed, by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed . . . "

The appellant by his counsel did not argue before their Lordships that the conclusion of the Supreme Court as to the forgery was not sustainable but relied upon other matters as substantial grounds for setting aside the judgment of the Supreme Court.

First he relied on the defence of "*autrefois acquit*". This defence was raised before the Magistrate on 7th May 1968 by counsel who tendered in evidence the Charge Sheet and Record of Discharge in Joint Magistrate's Court Colombo, Case No. 29950, 28th October 1963 to 24th February 1965. The Charge Sheet reads as follows :

" Accused Palanimalay Veerappan.

1. That between the 2nd day of July, 1958 and the 22nd day of September, 1959 at Colombo within the jurisdiction of this Court, you did by submitting Birth Certificate bearing No. 41904 issued by the District Registrar of Births, Badulla with your application for a certificate of Citizenship in terms of Section 6 of the Citizenship Act (Chapter 349 L.E.C.) attempt to deceive the Hon. S. W. R. D. Bandaranayake, Minister of Defence and External Affairs into the belief that the said Birth Certificate which referred to the birth of Veerappan S/O Tiruman born at Sherwood, Haputale on 1st May, 1918, referred to your birth, and thereby fraudulently attempted to induce the said Hon. S. W. R. D. Bandaranayake to issue you with a certificate of Citizenship in terms of Section 6 of the Citizenship Act (Chapter 349 L.E.C.) which act he would not have done had he not been so deceived, and which act was likely to cause loss or damage to the Government and you have thereby committed an offence punishable under Section 400 read with Section 490 of the Penal Code.

2. That at the time and place aforesaid and in the course of the same transaction you did for the purpose of procuring a certificate of Citizenship issued in terms of Section 6 of the Citizenship Act (Chapter 349 L.E.C.) make a statement to wit : that you were Veerappan S/O Tiruman born at Sherwood Estate, Haputale Ceylon on 1st May, 1918, knowing such statement to be false in a material particular to wit, that you were Veerappan S/O Tiruman a Citizen of Ceylon by descent and you are thereby guilty of an offence punishable under section 25 of the Citizenship Act."

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The Record of Discharge in this case shows that the accused was present. Then follows the word " Evidence " and underneath appears the following :

" Mr. Adv. Sittampalam instructed by Mr. Siva Subramaniam for the accused.

Mr. W. Paul C.C. for the prosecution states that the prosecution is not adducing any evidence against the accused in this case.

I discharge the accused."

There is no indication that the appellant was called upon to plead to the charge. This case can be contrasted with the procedure followed on the trial with which this appeal is concerned ; when the appellant on being asked if he had any cause to show why he should not be convicted stated " I am not guilty ".

The Magistrate rejected the plea of *autrefois acquit* on the ground that the charge made under section 454 was not one of the charges in case No. 29950 but in their Lordships' view it is unnecessary to consider the question whether the substantial issues raised in the second proceedings are the same as those raised in the first.

The Record does not show that the appellant was ever put in peril on the first occasion. It shows the reverse namely that counsel for the prosecution stated that the prosecution was not adducing any evidence against the accused in the case whereupon he was discharged.

There is nothing to indicate that the appellant was ever called upon to plead and a search of the Court journal has not shown any indication that he was called upon. The burden being upon appellant to establish the plea of *autrefois acquit* and there being no evidence to support it this ground of appeal is not established.

A second point, taken somewhat tentatively on behalf of the appellant was that when his Counsel stated that he was not calling any evidence but made a submission in law to the effect that the evidence for the prosecution could not support a charge of forgery, he was making a submission of " No case to answer " ; and that if the Magistrate had over-ruled that submission justice required that he should then have given the appellant an opportunity of leading evidence. Further it was submitted that the Supreme Court should not have set aside the verdict of acquittal entered by the Magistrate without giving the same opportunity to the appellant since the Supreme Court was in effect doing no more than over-ruling a submission of " No case to answer ".

There is no substance in this point. When the case for the prosecution was closed on 8th July 1966 the Magistrate called on the appellant for his defence. His Counsel then indicated that he was calling no evidence and confined himself to tendering the Charge Sheet and the record of the earlier proceedings. The appellant's counsel in whose hands he was,

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indicated plainly that he was calling no evidence apart from the document to which reference has been made. In so far as it can be inferred that Counsel submitted there was no case to answer that submission was not over-ruled but was accepted and the Magistrate, upon the facts proved before him came to the conclusion, afterwards reversed by the Supreme Court, that the offence of forgery was not established.

The Supreme Court, upon those facts, the only facts which the appellant had sought to put forward substituted a verdict convicting the appellant of forgery for the verdict of acquittal which the Court set aside.

No injustice was done to the appellant in that the Supreme Court did not, before giving judgment, give him a further opportunity of calling evidence.

Finally it was submitted that there was a grave irregularity in the Supreme Court in that the Judgment in its final paragraph imposed a sentence of two years rigorous imprisonment without giving an opportunity for the appellant to be heard in mitigation of sentence in the event of a conviction being entered against him.

Their Lordships cannot uphold this objection. They will not as a rule interfere with sentences. Moreover on the face of it the sentence is not in their Lordships' opinion an excessive one.

It is recognised that, since the judgment was handed out by the Court to the parties, there was no separate opportunity given to the appellant by himself or his counsel to plead in mitigation. Nevertheless notice had been given by the Petition of Appeal that the Attorney-General was praying not only to have the order of acquittal made by the Magistrate reversed but also that sentence might be passed on the appellant according to law.

It was therefore open to the appellant to deal at the hearing before the Supreme Court with the question of punishment. It is true that this is a course which an appellant will not readily take when the question of conviction is still in suspense. Their Lordships do not regard with satisfaction the practice, if such there be, of dealing with sentences without hearing a plea in mitigation.

Even though appeals against acquittals may be few in number they regard it as highly desirable that accused persons in such cases should have the opportunity after conviction by an appellate court of pleading in mitigation.

For the reasons given above their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

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1969 *Present :* **H. N. G. Fernando, C.J., and Samerawickrame, J.**

A. PUNCHIRALA, Appellant, *and* M. GNANESWARA, Respondent

S.C. 199/67 (F)—D. C. Kandy, 6936/L

Buddhist Temporalities Ordinance (Cap. 318)—Section 23—" For his exclusive personal use "—Improvements effected on pudgalika *property—Claim for compensation—Maintainability.*

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

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

Held, that the words " acquired for his exclusive personal use " relate to the kind of title obtained by the *bhikkhu* in the property, namely, a title for his own benefit and not for the benefit of any other person. They have no reference to the purpose for which the property is acquired, or to the manner in which the property is to be enjoyed, by the *bhikkhu* acquiring it.

Dhammadara Thero v. Sederahamy (41 N. L. R. 236) followed.

Hanwelle Piyaratana Thera v. Jinananda Thera (68 N. L. R. 178) not followed.

Held further, that a person is entitled to claim compensation for improvements effected by him on *pudgalika* property in good faith and with the consent of the owner.

APPEAL from a judgment of the District Court, Kandy.

C. R. Gunaratne, for the defendant-appellant.

N. E. Weerassoria, Q.C., with *W. S. Weerasooria*, for the plaintiff-respondent.

Cur. adv. vult.

November 20, 1969. H. N. G. FERNANDO, C.J.—

This was an action by the Viharadhipathy of a temple for a declaration of title to a land which had been purchased in 1912 by one Sumangala Unnanse who had belonged to that temple. The claim of the plaintiff was that Sumangala Unnanse died possessed of this land and it became the property of the temple by virtue of s. 23 of the Buddhist Temporalities Ordinance, Cap. 318.

The learned trial Judge upheld the claim of the plaintiff despite the judgment in the case of *Hanwelle Piyaratana Thera v. Jinananda Thera*[1]. In that case Basnayake C.J. held that a party cannot call s. 23 in aid " unless he can establish that the property was acquired by the deceased

[1] *(1963) 68 N. L. R. 178.*

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for his exclusive personal use ". The trial Judge has distinguished the instant case on the ground that, in the English translation of the habendum clause in the deed of 1912, the words " for his use " occur. I do not think the mere occurrence of these words in the deed satisfies the test which Basnayake C.J. thought to be applicable. According to that test, the section will not apply unless it is proved that the property was acquired for the sole use of a Bhikku and not for use by any other person whomsoever.

The judgment in the cited case does not refer to the earlier case of *Dhammadara Thero v. Sederanhamy*[1], in which a similar construction of s. 20 was rejected after full and careful consideration. In this case Keuneman J. pointed out that the words " for his exclusive personal use " were probably intended only to exphasise that the section applies solely to " pudgalika " property. He further explained that—

> " . . . . . it is only a small step for us to hold that, where the Ordinance employs the phrase ' acquired for this exclusive personal use ' in relationship to property, these words merely relate to the kind of title obtained by the person in the property, namely, a title for his own benefit and not for the benefit of any other person, and have no reference to the purpose for which the property is acquired, or to the manner in which the property is to be enjoyed, by the person acquiring it ".

With much respect I am in entire agreement with the opinion of Keuneman J., and much prefer it to that expressed in the more recent judgment, which latter contains no discussion of the point involved. The conclusion of the learned trial Judge in the instant case has therefore to be affirmed.

The decree under appeal has allowed to the plaintiff damages for the defendant's wrongful possession of the land, but the learned Judge disallowed the defendant's claim for compensation for a house which he had erected thereon.

The defendant is the brother of the deceased Sumangala Unnanse, and it appears that he built this house on the land in 1930. This erection of a house on his brother's land, particularly because the brother was a monk, must in the absence of any evidence to the contrary be presumed to have been in good faith and with the consent of the monk.

The defendant in his evidence claimed that the house is worth about Rs. 16,000/-, but his witness Punchi Banda who has been a Vel Vidane and a member of the Cultivation Committee stated that the house is worth about Rs. 4,000/-. We think that a sum approximate to this amount can fairly be taken as the amount of the compensation for the house. There is however to be set off in favour of the plaintiff damages payable by the defendant for his wrongful occupation of the land after he was called

[1] *(1939) 41 N. L. R. 236.*

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upon to deliver up possession. Allowing for this set off, and allowing also for costs in both Courts to which the plaintiff is entitled, we fix the amount due as compensation for the house at Rs. 1,000/-.

The decree under appeal is affirmed subject to the deletion of the orders for the payment of damages and costs, and to the insertion in the decree of the following orders :—

" It is hereby further ordered and decreed that the plaintiff do pay to the defendant a sum of Rs. 1,000/- in respect of compensation for the house.

And it is hereby further ordered and decreed that the defendant do pay to the plaintiff damages at the rate of Rs. 15/- per month from 1st January 1970 until peaceful possession of the premises is yielded to the plaintiff.

And it is hereby further ordered and decreed that writ of ejectment shall not issue until the sum due as compensation for the defendant is duly paid or adjusted."

SAMERAWICKRAME, J.—I agree.

Appeal mainly dismissed.

1969 *Present :* **Sirimane, J.**

A. RUBASINGHE, Appellant, *and* T. WELGAMA (Food and Price Control Inspector), Respondent

S. C. 596/69—M. C. Matara, 41099

Control of Prices Act—Contravention of Food Price Order—Area where offence was committed—Requirement of evidence that the Price Order applies to the area.

In a prosecution for contravention of a Food Price Order, there must be very clear evidence that the offence was committed in an area to which the Price Order applies.

APPEAL from a judgment of the Magistrate's Court, Matara.

Miss Suriya Wickremasinghe, for the accused-appellant.

Kosala Wijayatilake, Crown Counsel, for the Attorney-General.

October 27, 1969. SIRIMANE, J.—

The accused was convicted for a contravention of Food Price Order No. MT/11/68 published in the *Government Gazette* No. 14,798/1 of April 20, 1968, in that he sold a pound of bombay onions at a price in excess of the maximum controlled price fixed by that price order.

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Counsel for the appellant urged only one point in appeal, namely, that there is no evidence that this order applies to the area in which the accused's boutique is situated. According to the charge the offence was committed at a place called Pitabeddara. The price order sets out in Column 2 the areas to which it is applicable, e.g., "Matara U. C., Dondra T. C., V. C. areas of Kekanadura, Aparekka, Babarenda, Malimboda etc." There is no reference to Pitabeddara, nor is there any evidence that Pitabeddara falls within any of the areas set out in Column 2. The only evidence on this point was the evidence of the Price Control Inspector who said that the boutique is in the administrative district of Matara. There is nothing in column 2 to indicate that the price order applies to the whole of that district. In fact, there is no reference to that district, at all. In cases of this nature, there must be very clear evidence that the offence was committed in an area to which the relevant Price Order applies.

Crown Counsel does not seek to support the conviction.

I set aside the conviction and sentence and acquit the accused.

Appeal allowed.

1967 *Present :* **Tennekoon, J.**

N. ROHANA, Appellant, *and* S. SENARATNE (Police Sergeant, C. I. D.), Respondent

S. C. 470/67—M. C. Hambantota, 53269

Criminal breach of trust—Charge—Error in stating date of offence—Effect—Burden of proof—Penal Code, s. 389—Criminal Procedure Code, ss. 6, 168, 171.

Where a person is charged with having committed criminal breach of trust in respect of a certain sum of money on a particular day, it is sufficient for him to show that there is no evidence that he misappropriated any money on that day. Disbelief of evidence given by him at the trial that, on a subsequent date, he gave the money to the person to whom it was due is not a valid reason for convicting him.

APPEAL from a judgment of the Magistrate's Court, Hambantota.

George E. Chitty, Q.C., with *U. A. S. Perera* and *G. Dissanayake*, for the accused-appellant.

Ranjith Dheeraratne, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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October 12, 1967. TENNEKOON, J.—

The appellant was convicted by the Magistrate, Hambantota, of the offence of criminal breach of trust and sentenced to 3 months rigorous imprisonment.

The charge on which the accused was tried was as follows :—

" You are hereby charged that you did within the jurisdiction of this Court at Malpeththawa on the 10th July, 1965, you being entrusted with dominion over property to wit Rs. 91, did commit criminal breach of trust of the same and that you did thereby commit an offence punishable under section 389 of the Penal Code. "

The case for the prosecution was as follows :—

After the General Elections held in March, 1965 and the formation of the present government, certain persons made arrangements for a pinkama the main purpose of which was to offer dana to a number of Buddhist monks and to invoke blessings upon the Prime Minister and his government and transfer merit to the late Mr. D. S. Senanayake and other national heroes. The pinkama was to be financed from collections made from the public of Malpeththawa village. The organising committee consisted of the Rev. Wimalasiri, Edirisuriya, Dharlis, one Simon Appu and the accused. The pinkama was held on 10th July 1965 and the committee of management met after the ceremonies were over to go into the accounts. The accused prepared the statement of accounts P1. There was, after all expenses had been met, a balance of Rs. 232·25. Edirisuriya suggested that of this a sum of Rs. 100 be gifted to " the government " and Rs. 25 be spent on a newspaper publication about the pinkama that had been held. On a suggestion made by the accused the amount of gift to the government was reduced to Rs. 66·00—a figure whose oddity, it transpired in evidence, is explained by the fact that there were 66 U. N. P. members of Parliament in the government. However the evidence does not make clear whether the sum of Rs. 66·00 was to be a gift to the Nation or to the political party or parties which had formed the new government; it is in this latter sense that Edirisuriya used the word " government " when in a letter directed to the Minister of Finance P8 he described himself as " Sympathiser of Government ". The total sum of Rs. 91 was placed in the hands of the accused and he was to go to Colombo on the following day to apply this sum of money in the manner decided upon by the Committee.

The prosecution case then was that the accused had not gone to Colombo on the following day and that he had not then or on any other date either paid Rs. 66 to " the government " or applied the Rs. 25 for the purposes of a notice in the papers.

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The prosecution called one Thenuwara, Director of Accounts, of whose evidence the Magistrate says—

> " Witness Thenuwara has testified that no sum whatsoever has been paid by the accused to Revenue (*sic*). Witness Thenuwara was the Director of Accounts at the Treasury, Colombo, and his evidence was not even challenged by the defence. I therefore accept his evidence that this money was never paid to Revenue."

In regard to the question of dishonest misappropriation, the learned Magistrate had this to say :

> " The prosecution has proved that this money has not been paid by the accused to Revenue. There is however no direct evidence that the accused misappropriated this money. However the only irresistible conclusion that could be drawn from the accused's failure to pay the money and his false explanation about handing the money to Ratnasekera is that he had misappropriated it."

The learned Magistrate's inferences from Thenuwara's evidence are somewhat overdrawn ; he failed to notice that it was entirely inconclusive ; it was not the prosecution case that the trust imposed on the accused was to pay the money at Mr. Thenuwara's office. That was perhaps one of the ways in which it could have been discharged. The obligation to pay to " the government " could, because of its very vagueness, have been effected in more ways than one. Indeed the accused understood the trust as meaning that he should pay the money to Mr. Wanninayake, the Minister of Finance. Further when the money came back into the hands of Edirisuriya he enquired of Mr. Wanninayake by P8 whether he should pay the money to "you or Mr. Dudley Senanayake, the Honourable Prime Minister, or to any other Officer " and he was informed that he should pay it to the Secretary to the Treasury (P9).

In regard to the Magistrate's reference to Ratnasekera it is necessary to say that the accused stated in evidence (and he had also said so before when questioned by the police), that he had gone to Colombo, not on the 11th July but on a subsequent date and having been unable to hand the money over to Mr. Wanninayake, he gave the money to a friend of his, one K. L. Ratnasekera, to be handed over to the Minister. He said further that Ratnasekera was dead and unable to testify for him and also that he had asked his lawyers to summon Ratnasekera's wife to speak to that fact. There were also according to him two persons who saw him hand over the money to Ratnasekera, i.e., the M. P. for Gampola and another person from Mamandala ; he further testified that having come to hear that Ratnasekera had not paid the money to the Minister, he on 23rd November, 1965 paid the sum of Rs. 91 to the Rev. Wimalasiri Thero. The defence adduced no evidence other than that of the accused.

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The learned Magistrate's comment on this part of the defence is as follows :—

" According to the accused he gave the money to one Ratnasekera. Ratnasekera according to him is now dead. He has not called anyone to support his version that Ratnasekera is dead. He has not called any person to corroborate his evidence that this money was paid to Ratnasekera although according to him the M. P. for Gampola and another person from Mamandala were present at the time."

At the conclusion of the case, the lawyer appearing for the accused submitted that the charge on which the trial proceeded was in respect of an offence committed on 10th July 1965 and that the evidence did not establish the commission of any such offence on that date.

The learned Magistrate while accepting the position that the evidence did not establish the commission of the offence on the 10th July purported to follow a judgment of Swan, J. in *Panditakoralage v. Selvaranayagam* [1] and rejected the defence submission that the accused should be acquitted on the English principle supposed to have been laid down in the case of *Severo Dossi* [2] " that a date specified in a charge has never been considered a material matter unless time was the essence of the offence ". It is I think necessary to deplore this tendency to run to English rules of procedure in criminal law when there is express provision in our own. Section 6 of the Criminal Procedure Code permits recourse to English Law only when " no special provision has been made by this Code or by any other law for the time being in Ceylon ". It may be that the English law is the same and the English cases are relevant for that reason ; but that must be established first before the English cases are used.

What provision is made in our law in regard to the specifying of the date in a charge ? Section 168 of the Criminal Procedure Code reads as follows :—

" (1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 179 :

Provided that the time included between the first and last of such dates shall not exceed one year. "

[1] *(1954) 56 N. L. R. 143.* [2] *13 Cr. App. R. 158*

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Section 171 then proceeds to say :

> " 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. "

The question then for the court was not the vague test of whether " time is the essence of the offence " but whether the error in stating that the offence was committed on the 10th of July could have *misled the accused.*

The main ground on which the learned Magistrate held that there was dishonest misappropriation was that the accused was giving a false story when he said that he had given the money to Ratnasekera to be given over to the Minister. The failure to prove that Ratnasekera was dead as an explanation for his not being called and the failure to call other witnesses who were present when the money was supposed to have been given over to Ratnasekera to be paid over to Mr. Wanninayake seem to have been the foundation for his disbelief of the accused. Now, where the charge alleges misappropriation on the 10th of July it was not necessary for the accused to adduce evidence in regard to the handing over of the money to Ratnasekera on some later date, because such evidence is irrelevant if misappropriation had already taken place on the 10th of July. Accordingly it seems to me completely unjust to have drawn inferences adverse to the accused from his failure to substantiate his story about Ratnasekera ; his lawyers may well have advised themselves and the accused that proof of honest application of the money on a date subsequent to the date of misappropriation alleged in the charge will not help to obtain an acquittal, any more than proof that he handed the money to the Rev. Wimalasiri Thero on the 23rd of November 1965 would help to secure that result.

It seems to me that in a charge involving what is sometimes referred to as " temporary misappropriation ", the specification of a named date or " a date unknown " between two terminal dates, is that kind of particular relating to the matter with which the accused is charged which is almost invariably material, for the reason that the defence is virtually being told that evidence of honest dealing with the property after the alleged date of offence is irrelevant and need not therefore be produced at the trial.

The case dealt with by Swan, J. in 56 N. L. R. 143 was not a case of misappropriation, temporary or otherwise ; it related to a charge of possessing ganja and upon an application of section 171 of the Criminal Procedure Code Swan, J. held that in that particular case the accused had not been misled by the reference in the charge to the date of the

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offence as "*on or about March 28, 1954*" when the evidence disclosed that the ganja was actually found in the accused's possession on the *29th March 1954.*

The case of *The Attorney-General v. Dheen*[1] was also cited to the learned Magistrate. This is a judgment of Gunasekara, J. It is sufficient to state the facts of that case to show how indistinguishable it is from the instant case. That too was a case of "temporary misappropriation". The prosecution case was that the accused who was a proctor had been entrusted by one Gunasekera with a sum of Rs. 340·09 on the 18th December 1951 to be paid before 14th January 1951 to the credit of an action in the Court of Requests of Galle in terms of the Decree in that case. The money had not been deposited in Court but when a complaint was made by Gunasekera to the Law Society, the accused had, before any inquiry was held, paid the money back to Gunasekera. The charge against the accused was in the following terms: "……that you did ……at Galle on 18th December, 1951, you being entrusted with property to wit, a sum of Rs. 340·09 in your capacity as agent…… did commit criminal breach of trust in respect of the said property and that you have thereby committed as offence punishable under section 392 of the Penal Code."

At the trial, it was contended on behalf of the accused that the charge meant that the offence was committed on 18th December, 1951, but that there was no evidence to prove the commission of an offence on that day. Upholding this contention the learned Magistrate discharged the accused. The Attorney-General appealed against this order.

In appeal, it was submitted on behalf of the Attorney-General that the charge did not mean that the offence was committed on 18th December, 1951, but that it was committed in respect of money that was entrusted to the accused on that date. It was further argued (*a*) that the averments in the charge, taken together, were reasonably sufficient to give the accused notice of the matter with which he was charged; (*b*) that it was not necessary that the charge should particularize the time of offence; (*c*) that even if the Magistrate thought the time should have been stated, he should have amended the charge to supply the omission. It was further contended that the Magistrate should have convicted the accused as he had held both that the money had been entrusted to the accused on 18th December, 1951, and that the accused had misappropriated it.

Gunasekara, J. held—

(1) That the charge meant that the offence was committed on 18th December, 1951, and that the prosecution had failed to prove this charge. All the accused had to do was to show that there was no evidence that he misappropriated any money on the day in question.

[1] *(1961) 61 C. L. W. 74.*

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(2) That there was no omission in the statement of the particulars of the offence that had to be supplied by an amendment.

(3) That as the accused was not tried on a charge of having committed an offence at any time other than the 18th December, 1951, it was not open to the learned Magistrate to find that the accused misappropriated the money.

In the course of his judgment Gunasekara, J. said : " In order to defend himself against the charge that he was called upon to answer, *it was sufficient for the accused to show that there was no evidence that he misappropriated any money on the day in question.* It was not necessary for him to give or adduce evidence contradicting or explaining other items of incriminating conduct imputed to him by the prosecution, such as was imputed in the evidence that he claimed to have deposited the money to the credit of the civil case. Nor was it necessary for him to adduce evidence in support of his explanation of his omission to deposit it. Under these circumstances an inference that he misappropriated the money at some other time, though he may not have done so at the time in question, cannot be drawn from the fact that he has not chosen to refute any particular allegation. In my opinion there was no sufficient ground for the learned Magistrate's finding that the accused misappropriated the money. He was not tried on a charge of having committed such an offence at any time other than the 18th December, 1951. The appeal is dismissed."

It is clear from this passage that the test being applied by Gunasekara, J. was that set out in section 171 of the Criminal Procedure Code ; it was obviously the view of Gunasekara, J. that in a case where a date of offence is alleged in a charge relating to temporary misappropriation the accused is under no duty, and that it would be irrelevant for him to show that he had not misappropriatd the money on a subsequent date or that he had properly applied it on such subsequent date.

The only reason for the learned Magistrate not following this case was that Gunasekara, J. had not referred to or considered English case-law whereas Swan, J. in 56 N.L.R. 143 had. It is necessary however to add that even this approach would have led to a different conclusion had not the learned Magistrate misunderstood and so misapplied, a dictum of Atkin, J. in the case of *Severo Dossi* (reported more fully in 13 Cr. App. R. than in 87 L.J. K.B. 1024). The learned Magistrate quotes the following passage from that judgment :—

" From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence, and although the day be alleged, yet if the jury finds him guilty on another day, the verdict is good.....Thus although the date of an offence should be alleged in an indictment it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows therefore that

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the jury were entitled, if there was evidence that they could come to that conclusion, to find the appellant guilty of the offence charged against him even though they found that it had not been committed on the actual date specified in the indictment."

The learned Magistrate then adds : "It is my view that in a charge of Criminal Breach of Trust, time is not of the essence of the offence". This statement indicates that the Magistrate understood Lord Atkin as saying that the test to be applied is an abstract one, having reference to the offence as defined in the law and not to the particular instance of it alleged to have been committed by the accused in the charge or indictment. It seems to me plain that what Lord Atkin was saying was that if the date is an essential part of the criminal act alleged in the charge, then it is material but not otherwise. If Lord Atkin's dictum is applied in this sense, it is somewhat similar to the test that would be applied under section 171 of our Criminal Procedure Code. But it must be a matter of special note that prejudice to the accused is the essence of the test under section 171 while the test of time being the essence of the alleged offence does not bring that element to the forefront.

Reference should also be made in this judgment to the fact that Counsel for the appellant tendered to this Court an affidavit from Mrs. Ratnasekera and a certified copy of the death certificate of Ratnasekera which proved that he had in fact died on the 31st of October 1965, long before the trial in the Magistrate's Court, thus showing that the accused had been disbelieved on a matter, which was irrelevant in meeting the charge as framed but which might have been met by cogent and perhaps decisive evidence if the proper date had been alleged.

In the result I am of opinion that the error in stating the date of the offence was material and that the conviction cannot stand.

Crown Counsel urged that the case be sent back for a fresh trial on a suitably amended charge. It is only necessary to say that the prosecution had every opportunity of moving the Magistrate to alter the charge suitably before he gave his verdict. This the prosecution did not do because, presumably it was not prepared to let the accused have the benefit of a fresh trial which would have been inevitable if the Magistrate did alter the charge ; the prosecution instead elected to go on with the charge as it stood. This is not a case in which having regard to the date and nature of the offence and the amount involved, and the totality of the other circumstances, the accused should be vexed again.

I accordingly set aside the conviction and sentence and acquit the accused.

Appeal allowed.

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1969 *Present :* **Weeramantry, J.**

S. A. SUMATHIPALA and another, Appellants, *and* INSPECTOR OF POLICE, CRIMES, Respondent

S. C. 1057-1058/68—M. C. Colombo South, 90707/A

Jurisdiction—Robbery on a highway between sunset and sunrise—Not triable by Magistrate's Court—Penal Code, s. 380—Criminal Procedure Code, Schedule I —Legislative Enactments of Ceylon, 1938 Revised Edition—Ordinance No. 19 of 1937, ss. 3, 6 (1), 10—Powers of the Commissioner thereunder—Incapacity of the Commissioner to alter the law.

The offence of robbery (Section 380 of the Penal Code), when it is committed on a highway between sunset and sunrise, is not triable summarily by a Magistrate's Court even if the value of the property in respect of which the offence is committed does not exceed two hundred rupees. The only Court other than the Supreme Court by which the offence is triable is the District Court.

The alteration effected in the 1938 edition of the Legislative Enactments of Ceylon so as to give jurisdiction to a Magistrate to try a case of robbery committed on a public highway between sunset and sunrise was not based on pre-existing law or on the general powers given to the Commissioner by Ordinance No. 19 of 1937.

Observations on the powers of the Commissioner.

APPEAL from a judgment of the Magistrate's Court, Colombo South.

Mark Fernando, for the accused-appellants.

Kumar Amarasekera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 29, 1969. WEERAMANTRY, J.—

The appellants in this case were convicted of robbery after summary trial by a Magistrate.

In appeal the Magistrate's findings of fact have not been canvassed but the point is taken that the Magistrate had no jurisdiction to try this case summarily. This contention is based on the fact that the offence was committed between sunset and sunrise on a highway, circumstances which in the submission of the appellants render the offence triable exclusively by a District Court.

The first schedule to the Criminal Procedure Code as appearing in the current revised edition of the Legislative Enactments (the 1956 edition) contains, in respect of section 380 of the Penal Code, two separate

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entries in the Column headed "Offence". The first entry deals with the offence of "Robbery" and the second with the offence of robbery "If committed on the highway between sunset and sunrise". I shall in this judgment refer to these offences as the "first offence" and the "second offence" respectively.

Against the first offence column 7 states that the punishment is rigorous imprisonment for ten years and fine, with whipping in addition, and goes on to state further that if committed on the highway between sunset and sunrise the punishment is rigorous imprisonment for fourteen years. Against these entries column 8 states that the offences are triable by the District Court, or in cases where the value of the property does not exceed Rs. 200, by the Magistrate's Court. These entries would appear to suggest that a Magistrate's Court would have jurisdiction to try a case of robbery even though committed on the highway between sunset and sunrise, if the property does not exceed Rs. 200 in value.

The second entry under section 380 deals exclusively and specifically with the second offence, namely robbery committed on the highway between sunset and sunrise, and provides in column 8 that the offence is triable by the District Court alone.

The learned Magistrate has quite clearly tried this case in reliance on the entries against the first offence under section 380 for he has apparently assumed that his Court has jurisdiction if an offence though committed between sunset and sunrise on the highway, involves property worth less than Rs. 200 in value.

The property in this case has been valued at Rs. 107·75.

The contention for the defence is that the entry to which I have just referred appears against the first offence by error and that against the first offence there should not appear in column 7 any reference to offences committed on the highway between sunset and sunrise.

A perusal of the earlier editions of the Legislative Enactments indicates that the entry we are concerned with appears in its present form for the first time in the 1938 Revision of the Enactments. The earlier edition of the Enactments, namely the 1923 edition, did not contain any words against the entries relating to the first offence indicating any jurisdiction in a Magistrate's Court to try the second offence, the only Court having such power being the District Court, by virtue of the entry relating to the second offence. In the earlier editions in column 7 against the first offence there did not appear any words dealing with the second offence, and indeed it would appear to be out of place for such entries to appear against the first offence, seeing that there is a separate set of entries devoted exclusively and particularly to the second offence. The position was the same in all the earlier editions of the Enactments, and despite general revisions of the Schedule such as that effected by Ordinance No. 1 of 1910, the entries in the 1923 edition under section 380 go all the way back to the actual enactment of the Code in 1898.

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It is worth observing, further, that in the Penal Code as contained in the 1923 edition of the Enactments [1], there is an editors' footnote against sections 380–385 to the effect that they are triable by the Supreme Court and District Court except sections 380 and 381 which are also triable by a Police Court, *unless under section 380 the offence is committed on a highway between sunset and sunrise.* An identical editors' footnote appears in the 1913 edition of the Enactments.[2]

The question then is whether when this alteration was made in the 1938 edition there was any authority for effecting such alteration, whether by virtue of statutory provision altering the law to such effect or by virtue of any power in the Commissioner appointed for the purpose of preparing the revised edition.

Learned Crown Counsel has been unable to point to any statutory provision altering the law so as to give jurisdiction to a Magistrate to try a case of robbery between sunset and sunrise on a public highway; nor have I been able to discover any such. Indeed in the schedule appearing in the 1938 edition the learned Commissioner who prepared the same has made reference to statutory provisions altering the law between the earlier edition and his own and has with reference to section 380 indicated that a change had been effected by Ordinance 13 of 1938. Had there been a statutory alteration of the Schedule giving Magistrates' Courts jurisdiction to try cases of robbery between sunset and sunrise, where the property involved was under Rs. 200 in value, I have no doubt such statute would have been referred to in the Schedule in the same manner as the reference to Ordinance 13 of 1938. I proceed therefore on the basis that there is no statutory provision effecting such an alteration in the law.

Indeed upon a consideration of the matters to which I have referred it appears extremely doubtful that the departure in this respect of the 1938 edition from the earlier editions was deliberate. A further factor indicative of this is the fact that the punishment for the second offence is "rigorous imprisonment for fourteen years, and fine, whipping in addition", whereas in the entry relating to the second offence as appearing against the first offence, the only punishment stated is rigorous imprisonment for fourteen years. If the insertion we are considering had been the result of a conscious and deliberate departure from the earlier editions it is scarcely likely that the editor would have failed to give his mind to this discrepancy.

Whether the alteration be deliberate or accidental the next question then is whether the authority of the Commissioner given to him by Ordinance No. 19 of 1937 was wide enough to empower him to introduce such an alteration into the first schedule.

Section 3 of that statute gave the Commissioner very wide powers in regard to such matters as omission, rearrangement, consolidation, incorporation of subordinate legislation, renumbering of sections, alteration of form or arrangement of sections, insertion of definitions

[1] vol. iv, p. 116. [2] vol 1, p. 122.

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of terms and expressions and the correction of grammatical, typographical and other mistakes. There would appear however to be no provision entitling the Commissioner to effect such an insertion into the schedule, which amounts in effect to an alteration of the pre-existing law. Furthermore, section 6 (1) of the same statute expressly states that the powers conferred on the Commissioner by section 3 shall not be taken to imply any power in him to make any alteration or amendment in the matter or substance of any legislative enactment. It would appear that the alteration effected has precisely this effect. Indeed the same section contains a procedure by which the Commissioner may cause such alterations in the law to be made, for it entitles him if he thinks fit to draft a bill authorising such alterations or amendments for submission to the legislature.

It seems clear therefore that the alteration effected in 1938 was one not based on pre-existing law or on the general powers of the Commissioner.

It is urged on behalf of the Crown that the alteration is rendered valid by section 10 of the Ordinance which provides that upon the passing of a resolution in the State Council authorising him to do so the Governor may by proclamation order that the Revised Edition shall come into force from such date as he may think fit, and also by the provision that from the date appointed in such proclamation the Revised Edition shall be deemed to be and shall be without any question whatsoever in all Courts of Justice and for all purposes whatsoever the sole and only proper statute book of Ceylon in respect of the enactments therein contained. The sub-section goes on to state that the revised edition shall be substituted for previous editions of the Enactments.

It seems clear however that the provision that the Revised Edition shall be substituted for previous editions can only be given effect to in respect of such revisions incorporated therein as have been legally effected. It would be contrary to principle to extend it so far as to give validity to an alteration made in excess of the powers conferred on the Commissioner, and, moreover, such a view is clearly negatived by such a provision as that contained in Section 6 (1).

The requirement that the Revised Edition shall without any question be deemed to be the sole and only proper statute book does not take the matter any further in respect of revisions contained therein which are unauthorised by law. Further, the provision that the Governor may by proclamation order that the Revised Edition shall come into force from such date as he may deem fit does not in any way give legislative approval to unauthorised alterations in the revised edition, but is aimed rather at enabling the Governor to fix a date on which the Revised Edition should come into operation. What comes into operation, however, is only the revised edition in so far as it contains law made by the legislature or as revised within the powers given to the Commissioner.

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The insertion in column 7, against the first offence, of an indication that the second offence, namely robbery committed on a highway between sunset and sunrise, is triable by a Magistrate's Court if the property does not exceed Rs. 200 in value, is therefore one for which there was no authority in law, and for the reasons I have stated, I uphold learned Counsel's contention to this effect.

It follows that where a robbery is committed on a highway between sunset and sunrise the only Court other than the Supreme Court by which the offence is triable is the District Court.

The trial had before the learned Magistrate being therefore invalid, I quash the convictions and direct a retrial of the accused in accordance with law. The fresh proceedings will be had before another Magistrate.

Conviction quashed.

1968 *Present :* **Wijayatilake, J.**

G. P. NANDIAS SILVA, Appellant, *and* T. P. UNAMBUWA, Respondent

S. C. 3/67—C. R. Colombo, 89415 (R. E.)

National Housing—Right of tenant to sue sub-tenant—Procedure—National Housing Act, Part V—Inapplicability of Rent Restriction Act.

Plaintiff was a tenant of certain premises of the National Housing Department under an agreement which provided that he should not let or sub-let any part of the premises. The defendant occupied a distinct portion of the house as a sub-tenant on a monthly rental of Rs. 90. Plaintiff stated in his evidence that he obtained the necessary permission from the Commissioner of National Housing.

Held, that the plaintiff was entitled to sue the defendant for ejectment from the annexe on the basis of a monthly tenancy. In such a case neither the Rent Restriction Act nor the special procedure prescribed in Part V of the National Housing Act is applicable.

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

H. W. Jayewardene, Q.C., with *W. S. Weerasooria*, for the defendant-appellant.

Walter Jayawardena, Q.C. with *Lakshman Kadirgamar*, for the plaintiff-respondent.

Cur. adv. vult.

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November 25, 1968. WIJAYATILAKE, J.—

In this case the plaintiff has sued the defendant for ejectment from the annexe to premises 623, Nawala Road, Rajagiriya, on the basis of a monthly tenancy. The learned Commissioner entered judgment for the plaintiff as prayed for.

Admittedly the premises in question are owned by the National Housing Department and the plaintiff is a tenant of this Department (*vide* tenancy agreement D1 of 2.12.60). It would appear that the plaintiff, who is a President, Labour Tribunal, was transferred to Kandy and one P. S. Perera came into occupation as his tenant and sometime thereafter the defendant occupied a distinct portion of this house as a sub-tenant on a monthly rental of Rs. 90.

Learned Counsel for the appellant has raised several defences : Firstly, whether this action is properly constituted as admittedly the National Housing Department is the landlord under the agreement DI. Clause 8 of this agreement provides that the tenant (the present plaintiff) shall not let or sub-let any part of the premises. The National Housing Act No. 37 of 1954 has in Part V set out the procedure for the recovery of possession of houses let out by the Department. In fact the defendant in the present action was a party to an application made under the aforementioned procedure by the Commissioner of National Housing in respect of these very premises, and it was held by this Court that the procedure referred to 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. The Amending Act No. 36 of 1966 clarifies the position (vide *G. P. N. Silva v. Commissioner of National Housing*)[1]. Therefore in my view the objection to this action on this ground cannot be sustained.

Secondly the question has been raised as to whether the defendant is a tenant of the plaintiff. Counsel for the appellant submits that on the evidence of plaintiff himself it is clear that there is no privity of contract as between the plaintiff and the defendant ; the defendant having come into occupation as a ' tenant ' of the plaintiff's ' tenant ' P. S. Perera. Counsel for the respondent has drawn my attention to the original answer which categorically admits the tenancy averred in the plaint, although in the amended answer the defendant has sought to deny it. The plaintiff has produced a series of letters PI to P9 for the period 11.3.63 to 10.1.64 showing that the defendant had forwarded the monthly rent in respect of these premises to the plaintiff; so that there can be no doubt whatever that although it was through P. S. Perera the defendant had come into occupation of the premises the defendant had recognised the plaintiff as the landlord. In my view this affords adequate proof of the privity of contract.

Thirdly, the Counsel for the appellant submits that the sub-letting is void in law in view of clause 8 of the agreement D1. Counsel for the respondent has met this submission by relying on the principle set out by

[1] *(1968) 70 N. L. R. 573.*

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Wille in Landlord and Tenant (3rd ed.) at page 18 that a person may let to another immovable property without having any right or title in it or any authority from the true owner. Vide *de Alwis v. Perera*[1]. No doubt sub-letting in breach of a prohibition contained in the contract of tenancy gives a landlord a right to cancel the tenancy. However, in the instant case, despite clause 28 of the agreement which provides for a termination the Commissioner of National Housing has not availed himself of it to terminate the tenancy. (*Vide* Wille pp. 114-116 and 176 and the case of *Robert v. Rasheed*[2].) I might state that the only witness in this case is the plaintiff and his evidence is that in view of clause 8 of the agreement he got the necessary permission from the Commissioner of National Housing. It is true that he has not called any evidence in support but the defendant has not made any attempt to controvert this assertion. I do not think the submission of the appellant on this ground can be accepted in the circumstances.

Fourthly, the Counsel for the appellant submits that the premises are governed by the Rent Restriction Act and therefore a sub-tenant can rely on the statutory protection given to a tenant. *Ibrahim Saibo v. Mansoor*[3]. He further contends that the principle set out in the case of *Fonseka v. Wanigasekera*[4] in which Sri Skanda Rajah J. held that the Rent Restriction Act does not apply to the premises belonging to the Crown is of no avail to the plaintiff in the light of the judgment of Gratiaen J. in the case of *Davith Appu v. Attorney-General*[5]. The facts in the case of *Fonseka v. Wanigasekera* appear to be analogous to the facts before me and with respect I see no substantial reason to take a different view. In the earlier case the question was the right of the Crown to eject an over-holding tenant, and I think it can be distinguished from the instant case.

Learned Counsel for the respondent has submitted that the issue raised by him as to whether the defendant is estopped in law from denying the tenancy under the plaintiff had been wrongly rejected by the learned Commissioner. He relies on the cases of *Jayawardene v. Jayawardene*[6] and *Sumanatissa Therunanse v. Pangnananda Therunanse*[7]. Learned Counsel for the appellant has drawn my attention to the fact that estoppel has not been pleaded and therefore the learned Commissioner was well within his right in rejecting this issue. I am inclined to agree with him.

As I have already observed I see no merit in the several points raised in this Appeal by the appellant. I would accordingly dismiss the appeal with costs.

Appeal dismissed.

[1] *(1951) 52 N. L. R. 433.*
[2] *(1954) 55 N. L. R. 517.*
[3] *(1953) 54 N. L. R. 217.*
[4] *(1963) 65 N. L. R. 552.*
[5] *(1948) 49 N. L. R. 356.*
[6] *(1939) 40 N. L. R. 467. (P. C.)*
[7] *(1968) 70 N. L. R. 313. (P. C.)*

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

P. ABEYSINGHE, Appellant, *and* P. L. BAUDHASARA and 10 others, Respondents

S. C. 285/63(F)—D. C. Colombo, 8930/P

Adoption of Children Ordinance (Cap. 61)—Section 6 (3)—Deed of fideicommissum—Designation of lawful children or lawful heirs of donee as fideicommissaries—Adoption of child by donee subsequently—Death of donee without issue—Whether adopted child acquires any rights under the fideicommissum.

A condition in a deed of gift of 3rd February 1930 burdened the donated property with a fideicommissum in favour of the lawful children of the donee M or, failing such children, in favour of the lawful heirs of M. M died unmarried and without issue. But shortly before his death, M adopted a child under the Adoption of Children Ordinance.

The question to be decided in the present action was whether the adopted child became entitled to the property or any interest in it.

Held, that the proviso to section 6 (3) of the Adoption of Children Ordinance prevented the adopted child from acquiring any right, title or interest in the property whether as M's lawful child or as M's lawful heir.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *N. S. A. Goonetilleke, D. C. Amerasinghe* and *D. S. Wijewardene*, for the substituted plaintiff-appellant.

H. W. Jayewardene, Q.C., with *C. D. S. Siriwardene* and *B. Bodinagoda*, for the 21st defendant-respondent.

Cur. adv. vult.

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

This appeal involves an interesting and somewhat difficult question as to the property rights acquired by persons adopted under the Adoption of Children Ordinance (Cap. 61). It arises in an action for the partition of valuable residential property situated in the city of Colombo.

It is common ground that the property formerly belonged to one Aranolis Appuhamy, who by the deed P5 of 3rd February 1930 donated the property to his son Manis, subject to the following condition :—

" that the said donee shall not be entitled to sell, mortgage or lease for more than six months at a time or otherwise alienate the said premises during his life time and that after his death the said premises shall devolve on his lawful children. In the event of his dying without issue the said premises shall devolve on his lawful heirs. "

1*—J 11642—2,255—(2/70)

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It is not disputed that the condition had the effect of burdening the property with a Fideicommissum in favour of the lawful children of Manis or, failing such children, of the lawful heirs of Manis. Manis died unmarried and without issue. But shortly before his death, Manis adopted a child Tharika under the Adoption of Children Ordinance, the relevant Order (marked 21D3) having been made by the competent Court, the Court of Requests of Colombo. On 21st January 1959, Manis made a Last Will appointing Tharika his sole heiress to all his property.

The main dispute in this case was whether the corpus of this action passed on the death of Manis to his surviving three sisters (the 1st, 2nd and 3rd defendants), and to the 4th to 10th defendants and the plaintiff (all of whom are the children of a deceased sister of Manis), or else whether it passed under the Last Will or otherwise to Tharika the adopted child of Manis.

The learned trial Judge has held that Manis had no right in the property of which he could dispose by will. This finding has not been challenged at the hearing of the appeal, and I hold that it is correct. The question to be decided is whether Tharika, *qua* the adopted child of Manis, became entitled to the property or any interest in it.

Section 6 (3) of the Adoption of Children Ordinance provides as follows :—

> " Upon an adoption order being made, the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopter :
>
> Provided, however, that unless the contrary intention clearly appears from any instrument (whether such instrument takes effect *inter vivos* or *mortis causa*), such adopted child shall not by such adoption—
>
> (*a*) acquire any right, title or interest in any property—
>
> (i) devolving on any child of the adopter by virtue of any instrument executed prior to the date of the adoption order ;
>
> (ii) burdened with a fideicommissum in favour of the descendants of the adopter ; or
>
> (iii) devolving on the heirs *ab intestato* of any child born in lawful wedlock of the adopter ;
>
> (*b*) becomes entitled to any succession (whether by will or *ab intestato*) *jure representationis* the adopter.

The first sentence of the sub-section (read without the Proviso) has the clear effect that for the purposes of any instrument an adopted child must be regarded as a child born in wedlock to the adopter. If that sentence had stood alone, therefore, Tharika, being deemed in law to be the sole " lawful child " of Manis, would have become entitled

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to this property as a designated fideicommissary heir under P5. But Tharika becomes excluded by two of the clauses of Proviso (*a*), because she is prevented from acquiring any right title or interest in any property—

(i) devolving on any child of the adopter by virtue of P5, which was executed prior to her adoption ; or

(ii) which was by P5 burdened with a Fideicommissum in favour of the descendants of Manis.

Thus far, the opinion of the learned District Judge accords with mine, and I need add nothing to the reasons which he has stated for the opinion that the devise of the property by P5 to the *lawful children* of Manis was ineffective to pass the property to an adopted child. But the learned trial Judge nevertheless reached the conclusion that since an adopted child is by virtue of the first sentence in sub-section (3) of Section 6 of the Ordinance a lawful child of the adopter, he is therefore *the lawful heir* of Manis and thus the person entitled to succeed under the clause in P5 providing " in the event of his (Manis) dying without issue the premises shall devolve on his *lawful heirs* ". In reaching this conclusion, the learned trial Judge considers that the Proviso to s.6(3) excludes an adopted child only to the extent that he is not to be regarded as a lawful child or a descendant of the adopter for the purposes of any devise in an instrument in favour of *lawful children* or *descendants*. The final clause in the condition in P5, being a devise to *lawful heirs*, is not in his opinion a devise the benefit of which is denied to an adopted child by the Proviso.

With respect, and with some hesitation in a case of first instance, I must disagree with this opinion. Let me consider first the intention of the Legislature evidenced in the Proviso, in its reference to instruments executed prior to an adoption, and to properties burdened with a Fideicommissum in favour of descendants of an adopter. The Legislature appears to have taken into account the contemplation of a person executing such an instrument or so burdening property ; in this context, that children will be born in wedlock to the devisee. The adoption of children of a devisee would not ordinarily or naturally be within the contemplation of an executant. This aspect of the matter is emphasised in the clause (ii) of the Proviso, if, *even after the adoption* of a child by X, someone makes a devise to X, burdened with a Fideicommissum in favour of X's descendants, the Proviso excludes the adopted child from the devise, unless a contrary intention clearly appears from the terms of the devise. This clause of the Proviso confirms the impression that its purpose is to make effective the true intention of the executant, the intention to exclude being presumed unless the contrary is expressed. In my opinion therefore, a Court must, even if there be doubt, lean towards the construction that the Legislature had no intention that an instrument like P5 should benefit adopted children. The existence of any such intention in the mind of the donor in this case is completely

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negatived by the fact that P5 was executed at a time (1930) when an adoption by Manis could not have in law passed any rights to an adopted child even in property owned absolutely by Manis.

Secondly, the learned Judge appears to have misunderstood the terms of the Proviso to sub-section (3) when he formed the opinion that its purpose is only to exclude an adopted child in a "conflict" with a lawful child or other descendant of the adopter. Clause (i) of the Proviso denies rights to an adopted child *under an instrument* executed prior to his adoption ; and clause (ii) denies to him rights *to any property burdened with a fideicommissum* in favour of descendants of the adopter. The Legislature has thus laid stress on the character of an instrument or of property, in its declarations that an adopted child cannot acquire an interest under such an instrument or in such property. The question whether Manis had or had not lawful children is therefore not relevant in construing or applying the Proviso.

The instrument in this case (P5) is, by reason of the time of its execution, clearly within clause (i) of the Proviso. The conclusion that Tharika takes under P5 conflicts with clause (i). The property in this case is brought within clause (ii), because it is burdened in the manner specified in that clause. The fact that it is subject to an additional burden does not in my opinion take it outside the scope of that clause.

The conclusion of the trial Judge in this case permits the adopted child Tharika to acquire title to the property on the ground that she is a lawful heir of Manis. But she is a lawful heir only because, by the first sentence of sub-section (3), she is the deemed lawful child of Manis, and such a child is denied rights in the present case by the first two clauses of the Proviso.

I must hold that the property which is the subject of this litigation is property in which the adopted child Tharika is prevented by the Proviso to s. 6 from acquiring any right title or interest, and also that the instrument P5 is one under which she is prevented from acquiring any right title or interest.

The learned District Judge has entered decree dismissing the plaintiff's action with costs payable to the 21st defendant. He has found that the 12th defendant is entitled to a sum of Rs. 9000/– for compensation for improvements to the property and for a *ius retentionis* until compensated, and this finding was not challenged before us.

I set aside the decree of dismissal and for costs, and I hold that the minor represented by the 21st defendant has no interest in the property in suit. I affirm the findings in favour of the 12th defendant, who will be entitled also to his costs of contest in the District Court.

The case is now remitted to the District Court for decree of partition to be entered in favour of the plaintiff and the 1st to 10th defendants in terms of the shares proved at the trial, and declaring the rights of the

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12th defendant in terms of the judgment of the District Judge. If the parties desire a decree for sale, such a decree may be granted in the discretion of the Court. In the circumstances, the 21st defendant will not be liable for costs in either Court.

SIRIMANE, J.—I agree.

Appeal allowed.

[COURT OF CRIMINAL APPEAL]

1969 *Present :* **Alles, J. (President), Wijayatilake, J., and Pandita-Gunawardene, J.**

W. L. SIRISENA and 6 others, Appellants, *and* THE QUEEN, Respondent

C. C. A. APPEALS 41–47, WITH APPLICATIONS 54–60, OF 1969

S. C. 235/67—M. C. Horana, 45658

Criminal Procedure Code—Section 122 (3)—Scope—Charge of murder—Joint offenders —Liability to be convicted of lesser offence of culpable homicide on the ground of knowledge—Common intention—Penal Code, ss. 32, 33, 35, 36.

(i) By section 122 (3) of the Criminal Procedure Code, " No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it ..... "

Held, that in the opening sentence of Section 122 (3) no distinction is intended between the oral statement or oral evidence of such statement and its written record. The statement therefore in whatever form cannot be used to *corroborate* the evidence of the witness. Such corroborative evidence may, however, be elicited by the Court in the course of contradicting a false answer given by the police officer when, while giving oral evidence, he refers to the written record for the purpose only of refreshing his memory, without the necessity of proving the written record.

Per Curiam : " In view of the frequent occasions when the interpretation of Section 122 (3) has come up for consideration in our Courts we are constrained to draw the attention of the legislature once again to the necessity of redrafting Section 122 (3). "

(ii) In a prosecution for murder, joint offenders can be convicted, by virtue of the provisions of section 32 of the Penal Code, of the lesser offence of culpable homicide on the ground of knowledge. In such a case, it is open to the Judge to direct the jury to consider the verdicts of murder, culpable homicide and grievous hurt on the basis of joint responsibility.

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APPEALS against certain convictions at a trial before the Supreme Court.

G. E. Chitty, Q.C., with *A. M. Coomaraswamy, K. Sivanandan, G. E. Chitty* (Jnr.) and *T. S. P. Senanayake* (assigned), for the accused-appellants.

A. C. de Zoysa, Senior Crown Counsel, with *Kenneth Seneviratne*, Crown Counsel, for the Crown.

Cur. adv. vult.

August 6, 1969. ALLES, J.—

Seven accused were charged in this case with the murder of one Jayasekera. At the conclusion of the trial by divided verdicts of five to two the 1st, 2nd and 3rd accused were convicted of culpable homicide not amounting to murder and the 4th to the 7th accused were convicted of voluntarily causing grievous hurt. The 1st and 2nd accused were sentenced to seven years rigorous imprisonment, the 3rd accused to five years simple imprisonment, the 4th and 5th to two years rigorous imprisonment and the 6th and 7th to six months rigorous imprisonment. Pending their appeal to this Court the 3rd accused died and the present appellants are the other accused. The 1st, 2nd and 4th appellants are brothers and the 5th and 6th appellants also brothers. The two sets of brothers are related to each other as cousins. At the hearing of this appeal Counsel for appellants commented on the strange coincidence of the able bodied men of two families being jointly charged, suggesting thereby that some of them may have been falsely implicated but this is a comment that should properly have been made to the jury for their consideration who, in spite of this relationship, chose to convict all the accused.

The deceased Jayasekera was the recently appointed watcher on Halbarawa Estate, to which post the 3rd accused had also been an applicant. As a result of a long standing feud, the families of the appellants were not well disposed towards the family of the deceased.

On the 28th of June, the deceased visited the house of his mother Sederawathie who lived in the neighbourhood of the estate, spent the morning at his mother's house and left for Halbarawa Estate about 2 p.m. About 4.30 p.m. Sederawathie and her daughter Kamalawathie were attracted by hoo shouts, the barking of dogs and the shouts of people from the direction of the estate and ran in that direction. When they had proceeded some distance they heard the voice of the deceased and saw the 6th and 7th appellants holding him from either side. The 5th appellant then jumped forward and struck the deceased on the head with a club. As he was assaulted the 6th and 7th appellants released him and immediately the 4th appellant Emis struck him again on the

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head with a club. Then the 1st, 2nd and 3rd accused who were present armed with knives stabbed the deceased. As he was stabbed, the deceased collapsed and Sederawathie and Kamalawathie ran towards the deceased to hold him. As they ran forward the 1st and 2nd appellants tried to stab them but failed. The two women went up to the deceased and raised cries. According to Kamalawathie at that stage the 4th appellant pushed them aside and the 1st and 2nd appellants carried the deceased and took him away. The two women followed the deceased some distance and then the 1st and 2nd appellants dropped the deceased on the ground and chased them with knives. An uncle of the 5th appellant then arrived on the scene and intervened saying, " Are you fellows trying to kill these two also after you killed that man ". The appellants then left the scene and went away. When the two women went up to the place where the deceased lay fallen they found him dying. There is no doubt that the deceased was the victim of a murderous attack with knives and clubs. The autopsy revealed that the deceased had six external injuries—four stab wounds on the chest and abdomen and two lacerated injuries on the head. The injury over the abdomen had cut the small intestine and the right lobe of the liver and two of the stab injuries on the chest had cut the lung. Underlying the head injuries was a linear fracture of the parietal bone. The Doctor expressed the opinion that the injury to the lung was necessarily fatal while the other injuries on the chest were sufficient in the ordinary course of nature to cause death. In regard to the injuries to the head the Doctor was of the view that it was the result of two separate blows although he did not exclude the possibility of both injuries being caused by one blow. It was the submission of the defence at the trial that Sederawathie and Kamalawathie were not eye-witnesses to the assault and that they were not present at the time of the transaction, having gone to attend a funeral at the relevant time. The jury however have discounted this suggestion and accepted their evidence and we must therefore proceed on the basis that their account of the transaction has been accepted by the jury.

The first matter raised by Mr. Chitty was that the defence was prejudiced by the inability of Queen's Counsel and Junior Counsel, who appeared for the appellants at the abortive trial, to appear at the present trial, thereby depriving the appellants of the services of Counsel of their choice. It was submitted that both Senior and Junior Counsel were unable to appear due to circumstances beyond their control and that the application for a postponement of the trial should have been allowed. It was also urged that Counsel who had been assigned to defend the appellants being a Tamil and unfamiliar with the Sinhala language was handicapped in the conduct of the trial by not being able to obtain instructions from his Sinhalese clients. We are unable to agree that this was a substantial ground for obtaining a postponement of the trial. If retained Counsel was unable to appear, the Proctor instructing them should have made an application for a postponement. At least he could have been present in Court to watch the interests of his clients. When

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Counsel offered himself for assignment and when the appellants agreed to be defended by assigned Counsel of their choice, it must be assumed that Counsel was able to obtain proper instructions from his clients and that such instructions could properly be given by the clients to their Counsel. No such objection was taken by the appellants to the conduct of the trial by assigned Counsel, the only application being made by the second appellant for time to have the services of retained Counsel. From the conduct of the trial by assigned Counsel it is quite apparent to us that the proceedings had not in any way suffered by the trial being conducted by assigned Counsel. The witnesses for the prosecution have been cross-examined exhaustively on all relevant matters and relevant submissions have been made to Court. Mr. Chitty was constrained to admit that the trial had in no way been prejudiced by its conduct by assigned Counsel and was only able to base an argument on the rather tenuous ground that the appellants would have preferred Senior Counsel to conduct the trial. We are therefore unable to say that on this ground the appellants have in any way been prejudiced.

It was next submitted by Counsel that there was a misdirection in regard to the burden of proof. In explaining 'reasonable doubt' the learned Commissioner has given the following direction :—

> 'In fact a reasonable doubt means nothing more than a doubt for which you can give a *substantial reason*.'

It was the submission of Counsel that to require a 'substantial' reason for the creation of a doubt, the Jury were invited to expect a higher burden than was necessary from the defence to disprove the prosecution case. We are unable to agree with the submission in the context of this summing-up. It seems to us that what the learned Judge had in mind was a 'substantial reason' as opposed to a 'fanciful and imaginary reason'. Although the adjective 'substantial' is inappropriate, in the light of his very fair summing-up on the burden of proof, we are of the view that it could not have misled the jury and caused any prejudice to the accused. It was also submitted in this same connection that the learned trial Judge gave a wrong impression to the Jury when he referred to certain items of evidence which he described as coming from an independent source and tending to corroborate the evidence of the eye-witnesses. The evidence in point, to which attention has been drawn by the Judge, was the medical evidence of the injuries on the deceased and the circumstantial evidence of the presence of blood stains at the scene which were observed by the Police. As Counsel for the appellants correctly submitted this evidence could not be strictly designated as independent evidence which corroborated the evidence of the eye-witnesses. Even if the witnesses were not present at the time of the transaction, as suggested by the defence, they could have testified to these matters if they arrived on the scene at a later stage. Independent evidence that tends to corroborate a witness must be evidence which tends to connect the *accused* with the crime. This is the usual direction

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given in those cases which require corroboration in law and learned Counsel for the appellants was justified in his criticism of the Judge's language. The language used by the Judge is no doubt unfortunate, but we do not think, having regard to the other parts of the charge where the Judge has correctly directed the jury on the burden of proof, that this direction would have misled the jury to accept the evidence of Kamalawathie and Sederawathie only for the reason that they testified to this so called ' corroborative evidence '.

It was submitted by Mr. Chitty that even accepting the evidence of Kamalawathie and Sederawathie, the complicity of the appellants was involved in some measure of doubt and consequently he urged that, at the least, the appellants were entitled to a re-trial.

In regard to the 6th and 7th appellants it was his submission that the evidence did not establish beyond reasonable doubt that they held the deceased with the intention of facilitating the 5th appellant to cause grivous hurt or that they shared a common intention with the other appellants to commit the offence of causing grievous hurt. In dealing with the case of the 6th and 7th appellants the learned trial Judge asked the Jury to consider whether they entertained a common murderous intention not only with the 4th and 5th appellants but also with the 1st, 2nd and 3rd appellants, in which case even though they held the deceased and moved away they would be guilty of murder. The alternative put to the jury was to acquit them. On the verdicts of the jury, it must be assumed that the jury negatived the possibility of a common murderous intention in regard to these two appellants but found that they shared a common intention with the 4th and 5th appellants to commit the offence of voluntarily causing grievous hurt, which was a verdict that was possible on the evidence. The convictions of the 6th and 7th appellants were therefore justified on the evidence.

In regard to the 4th appellant, the submission of Mr. Chitty was that there was inadmissible evidence led against him which prejudiced him in his defence. Kamalawathie had stated in cross-examination that she told the Police that the 4th appellant had hit the deceased on the head with a club. In the course of the trial it would appear that assigned Counsel had been furnished with the extracts of the Information Book by the Court. It is not clear, for what reason and on what ground, this concession had been made to the defence. When Police Inspector Perera who had recorded Kamalawathie's statement was being cross-examined the following question was put to her by Counsel :—

1043. *Q.* In the course of her statement did Kamalawathie tell you that the 4th accused Emis Singho dealt a blow on the head of the deceased with a club . . . . ?

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Before an answer could be given Crown Counsel interposed and the record reads as follows :—

Crown Counsel :

> My Lord, my learned friend is seeking to make a point of it that there is no reference to Emis giving a blow with a club. My learned friend should not create the impression that Emis is not mentioned totally.

Court to defence Counsel :

> You can mark if you want this passage ' At the time of the attack I saw Emis armed with a club ', that Kamalawathie has stated in her statement that at the time of the attack she saw Emis armed with a club.

Defence Counsel :

> Very well, I will mark that passage as D 1 A.

It is apparent from the record that although Crown Counsel did not dispute that Kamalawathie could be contradicted from her Police statement, he insisted and the Court agreed, that the written record should be produced lest a wrong impression be created if the answer to Question 1043 was in the negative that the 4th appellant was never at the scene.

It may now be accepted as settled law after the decision of the Privy Council in *Ramasamy* [1] that in regard to the 'statement' in the opening sentence of Section 122 (3) no distinction was intended between the oral statement or oral evidence of such statement and its written record. The statement therefore in whatever form cannot be used to *corroborate* the evidence of the witness. Mr. Chitty's complaint is that when the defence was compelled to produce D 1 A there was placed before the jury material which substantially corroborated Kamalawathie's evidence of the presence of the 4th appellant at the scene, which was categorically prohibited under the provisions of S. 122 (3). In his submission the defence could elect whether it should prove the contradiction by leading oral evidence through the Police officer or prove the written record. The *ratio decidendi* in *Ramasamy* was that a statement made by an accused under Section 27 of the Evidence Act was not subject to the prohibitions in Section 122 (3) of the Code by virtue of the application of the maxim ' Generalia specialibus non derogant '—a view which had commended itself to Pulle J. who was one of the five Judges who heard the earlier case of *Jinadasa* [2]. Viscount Radcliffe only confined his observations on Section 122 (3) to the limited purpose of considering the interpretation of the word ' statement ' in the opening sentence of the sub-section and had no occasion to consider whether the oral statement of a contradiction could be proved. There is however a hint in the course of his observations at p. 274 that for the limited purpose specified in the sub-section a

[1] (*1964*) *66 N. L. R. 265.* [2] (*1950*) *51 N. L. R. 529.*

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reference to the written record would be sufficient without the necessity of proving the written record. If it is sought to contradict a witness (which includes an accused person) from the written record the law requires that the passage should be put to the witness, produced and marked in evidence—Vide *Queen v. Wilbert* [1] and *Queen v. Jayasena* [2]. This is in conformity with the principle laid down in *Haramanisa* [3], that since the statement under Section 122 must be reduced to writing, no evidence can be given of it except the document itself. In regard to the production of the written record there are however two matters in regard to which one has to be cautious. The prosecutor who cross-examines an accused must guard himself against eliciting any material which is confessional in nature or so inextricably interwoven with the confessional part of the statement that the contradiction becomes inadmissible. Secondly, counsel must be careful in producing a contradiction that it does not contain material which is prohibited under the provisions of Section 122 (3).

The above observations do not meet the problem raised by Mr. Chitty but I do not think, having regard to the wording of Section 122 (3), it is without a solution. The law permits the police officer to refresh his memory from the written record. This may arise when the police officer is being examined in regard to his observations at the scene of the crime. It may also arise when counsel seeks to find out whether any part of the evidence of a witness is correct. When a Police officer refreshes his memory from the notes of his investigation it is in order to assist the Court by giving oral evidence in regard to relevant material. For instance if a witness has made a vital omission in his evidence, I see no objection to the Police officer refreshing his memory from his record and giving oral evidence of the omission. This is not evidence of a different statement made at a different time but the proper use of the provisions of the law in regard to the refreshing of memory. I am therefore of the view that the answer to Question 1043 was wrongly shut out by the Court and that the Police officer should have been permitted to give the answer in the negative. The law ensures that if a false answer is given by a dishonest police officer he could be contradicted by the Court.

In spite of the inadmissible evidence contained in D1A the question still arises whether this evidence would have affected the decision of the jury in regard to the culpability of the 4th appellant. The evidence of Kamalawathie is that the 4th appellant not only attacked the deceased but pushed her and her mother when they went to the assistance of the deceased. Sederawathie's evidence has not been contradicted as to the part played by the 4th appellant. We are therefore inclined to take the view that the production of D1A has not materially prejudiced the case against the 4th appellant.

In view of the frequent occasions when the interpretation of Section 122 (3) has come up for consideration in our Courts we are constrained to draw the attention of the legislature once again to the necessity of

[1] *(1962) 64 N. L. R. 83.* [2] *(1966) 68 N. L. R. 369 at 371.*

[3] *(1944) 45 N. L. R. 532.*

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redrafting Section 122 (3). In 1944 in *Haramanisa* (supra) Howard C.J. observed that the sub-section bristles with difficulties and is so difficult to interpret that " in the view of the Court it is the duty of the legislature to redraft the section so as to make its meaning clear ". Since then there has been a violent controversy whether the statement referred to in the opening sentence of the sub-section referred to the oral statement or the written record and that controversy appears to have been now set at rest by the decision of the Privy Council in *Ramasamy* but it is open to lawyers to argue that the observations of the learned Law Lord though entitled to the highest respect is only *obiter*. In *Ramasamy* the Privy Council was compelled to have recourse to a legal maxim to enable Section 27 of the Evidence Act and Section 122 (3) to function side by side. In India this controversy has been set at rest by introducing a specific saving of Section 27 in the sub-section. Except for a minor amendment in 1961 caused as a result of the introduction of Section 122A and 122B in the Code, the section in its original form still adorns the statute book and continues to be a fruitful source of discussion for lawyers and raises difficult questions of interpretation. The legislature, in spite of the observations of a former Chief Justice and a judicial pronouncement from the highest tribunal, appears to be serenely complacent in regard to the controversy that has been raging in our courts with regard to the interpretation of this sub-section. It is hoped that even at this late stage the observations of Chief Justice Howard pronounced twenty-five years ago will receive serious consideration on the part of the legislature to ensure a redrafting of the sub-section.

Finally there remains for consideration the submission of Mr. Chitty that there was a misdirection in regard to the directions of the trial Judge on common intention and that the verdict against the 1st, 2nd and 3rd accused was both illegal and illogical and not in conformity with the directions of the trial Judge. The Crown presented the case against all seven accused on the basis that they all shared a common murderous intention to cause the death of the deceased. Although this was the basis of the Crown case it was open to the Jury, as judges of fact, to find a common intention to commit a lesser offence, and this they did when they found the 4th to the 7th appellants guilty of the offence of voluntarily causing grievous hurt—the injury caused to the head being a grievous injury. Logically therefore the 1st, 2nd and 3rd accused, who caused the serious injuries on the chest and the abdomen must have had at the least a common intention to cause grievous hurt. The learned trial Judge directed the jury that the basis of liability was under Section 32 of the Penal Code. In our view his directions on common intention were unexceptionable—he invited the jury to consider whether there was evidence of pre-concert ; whether the accused shared a common intention among themselves and he distinguished between a common intention and a similar intention. He also directed them to consider the case of each accused separately. His directions are in conformity with the rules laid down by the Court of Criminal Appeal in *Queen v. Asappu* [1]. Mr. Chitty's

[1] *(1948) 50 N. L. R. 324.*

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contention was that in the light of the directions of the Judge the first three accused could not have been found guilty of culpable homicide on ground of knowledge. In his contention such a verdict can only be founded if the basis of liability was under Section 33 of the Penal Code and for Section 33 to apply it must be established that each of the accused had the particular knowledge that their act was likely to cause the death of the deceased. This evidence was absent in the present case. It was his further submission that under Section 32, which refers to a ' common intention ' the offence of culpable homicide on the ground of knowledge could not be established.

Since the decision of the Divisional Bench in *Attorney-General v. Munasinghe*[1] it has been authoritatively laid down that Section 32 only lays down a principle of liability and need not be mentioned in the charge containing the offence. As Tennekoon J. stated in that case "each accused is clearly given notice 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". When directing a Jury therefore it is necessary for the Court to determine whether the basis of liability is under Section 32, 33 or 35, as the case may be. Too readily in our Courts do judges direct the jury only on the basis of liability contained in Section 32 ignoring the other sections relating to joint responsibility. In this case the trial Judge has referred particularly to Section 32 and directed the jury that if they could not find a common murderous intention it was open to them to convict all the accused of culpable homicide on the ground of knowledge. Mr. Chitty submits that since Section 32 refers to a common intention this direction is wrong. The common intention referred to in Section 32 must not be confused with the particular intention necessary to commit the offence of murder. In Section 32 the common intention contemplates a meeting of the minds and refers to the doing of separate acts by several persons and if all such acts are done in furtherance of a common intention each person is liable for the result of them as if he had done them himself—*Barendra Kumar Ghosh*[2]. The Supreme Court of India in *Afrahim Sheik v. The State of West Bengal*[3] which was relied on by learned Crown Counsel in dealing with Section 34 (which corresponds to our Section 32) stated :

> "A person does not do an act except with a certain intention ; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of the criminal act. That circumstance is completely fulfilled in a case like the present where a large number of persons attack an individual, chase him, throw him on the ground and beat him till he dies. Even if the offence does not come to the grade of

[1] *(1967) 70 N. L. R. 241.*

[2] *A. I. R. 1935 P. C. 1.*

[3] *A. I. R. 1964 S.C. 1263 at 1268.*

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murder, and is only culpable homicide not amounting to murder, there is no doubt whatsoever that the offence is shared by all of them, and Section 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was caused as a result of the beating. This circumstance is completely fulfilled in the present case, and we are, therefore, satisfied that the conviction of the appellants was proper, and see no reason to interfere."

The facts in the Indian case are very similar to the present case. There were in both cases several persons who participated in the criminal act using different weapons and playing different parts. The Supreme Court did not accept the submission of Counsel that S. 34 did not apply to the offence of culpable homicide on the ground of knowledge. Hidaytullah J., who later became Chief Justice of India, in a very illuminating judgment indicated the difference in the basis of liability between Sections 34, 35, 37 and 38 of the Penal Code which correspond to Sections 32, 33, 35 and 36 of our Code. There is therefore high authority of the Supreme Court of India that under Section 32 of our Penal Code joint offenders can be convicted of culpable homicide on the ground of knowledge.

In the present case however a difficulty arises as the jury have separated the culpability of the 1st, 2nd and 3rd accused on the one hand and that of the 4th to the 7th accused on the other. The learned trial Judge in my view directed the jury correctly when he invited the jury to consider the verdicts of murder, culpable homicide and grievous hurt on the basis of joint responsibility. Having found the 4th to the 7th appellants guilty of grievous hurt on the basis of joint responsibility they should have found the other three accused also guilty of the same offence unless there was clear evidence that any one of them had gone beyond the common criminal intention to cause grievous hurt and caused injuries from which the murderous intention or the knowledge requisite for the offence of culpable homicide could be established, in regard to each one of them. There is no evidence which of them caused the particular knife injuries. Therefore following the *ratio decidendi* in the Indian case we would substitute convictions for grievous hurt under section 317 of the Penal Code in regard to the 1st and 2nd appellants. Since we have altered the verdicts in regard to these two appellants we would reduce their sentences to 5 years rigorous imprisonment each. There is a reasonable possibility that the learned trial Judge himself would have imposed on them a lesser punishment had they been found guilty of voluntarily causing grievous hurt. Subject to this variation in the convictions and sentences of the 1st and 2nd appellants the appeals are dismissed.

Subject to a variation in the convictions and sentence of the 1st and 2nd appellants, appeals dismissed.

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1966 *Present :* **G. P. A. Silva, J.**

A. W. JOACHIM (Inspector of Police), Appellant, *and*
L. D. DHARMADASA, Respondent

S. C. 20/66—M. C. Horana, 37433

Motor vehicle—Charge of negligent driving—Evidence that accused did not have full control of steering wheel—Effect—Motor Traffic Act, s. 240.

A person who is at the steering wheel of a motor vehicle is not liable to be convicted of the offence of negligently driving that vehicle unless he has full control of the vehicle at the wheel, whether the vehicle moves by mechanical propulsion or by gravitation. He cannot be convicted if he is deprived of the control of the vehicle by an external agency.

The accused-respondent was charged with having negligently driven a motor vehicle on a public highway. The evidence showed that at the time of the accident the accused was at the driving wheel and that the vehicle was being pushed backwards up a hill by four or five people for the purpose of getting the engine started, when it struck a pedestrian who was legitimately using the road on his correct side and injured him.

Held, that, at the moment of the impact, there was hardly anything which the accused was doing of his own volition, apart from sitting at the driving seat and holding the steering wheel. In the circumstances, the accused was entitled to be acquitted.

Held further, that when the character or attribute of mechanical propulsion is absent in a vehicle even for the time being, such vehicle cannot be regarded as a " motor vehicle " within the meaning of that term in section 240 of the Motor Traffic Act.

APPEAL from a judgment of the Magistrate's Court, Horana.

L. B. T. Premaratne, Senior Crown Counsel, with *F. C. Perera*, Crown Counsel, for the complainant-appellant.

L. W. Athulathmudali, for the accused-respondent.

Cur. adv. vult.

August 28, 1966. G. P. A. SILVA, J.—

The accused-respondent in this case was charged on two counts, namely, that he drove a van on a public highway negligently or, in the alternative, that he drove it without taking such action as may be necessary to avoid an accident. After trial he was acquitted by the learned Magistrate who held that in the circumstances of this case, though the driver manipulated the steering wheel, the vehicle had been set in motion not by the driver but by an outside agency, namely, those who pushed it, and

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that the driver was not therefore driving the vehicle. The complainant, with the sanction of the Attorney-General, has appealed against the acquittal by the Magistrate.

The main question that arises for consideration is whether a person can be said to drive a motor vehicle when he is at the wheel and the vehicle is being pushed in the circumstances borne out by the evidence of the witnesses. The evidence on which the learned Magistrate found it prudent to act was that at the time of the accident in question the vehicle, lorry No. CY 4683, was being pushed back by four or five people for the purpose of getting the engine started. It is not clear from the evidence what the state of the road was where this accident occurred but the accused's evidence was that the vehicle was being pushed back up a hill and this position was suggested in the cross-examination of the victim of the accident and the Police Officer. Nor has it been made clear why the vehicle was being pushed up a hill for the purpose of starting, and the reasonable inference one can draw is that the people wanted to push it up to a point and release it so that the driver will have the advantage of getting the vehicle started thereafter when it came down the incline. It can safely be assumed therefore that the vehicle was being pushed backwards up the hill on a public road when it struck a pedestrian who was legitimately using the road on his correct side and injured him.

The decisions on which the learned Magistrate relied as well as some others have been cited by Crown Counsel in support of the appeal. In the case of *Wallace v. Major*[1] a Bench of three Judges, presided over by Lord Goddard C.J., unanimously held that a person, who was at the wheel of a disabled vehicle for the purpose of steering while it was being towed by another motor vehicle, was not a driver and was not driving a mechanically propelled vehicle within the meaning of section 11 of the Road Traffic Act, 1930. Lord Goddard expressed the matter in simple language when he said that a Penal Statute must be strictly construed and that before a person could be convicted of being a person driving a motor car in a dangerous manner it must be shown that he was at least driving it, that is to say, making the vehicle go. Humphreys J., while fully agreeing with these observations, added that it would be a contradiction in terms to say that the person at the wheel of the disabled vehicle which was being drawn by a motor vehicle in those circumstances was driving it. The principle underlying this decision is that a person who is at the driving wheel of a vehicle cannot be convicted of any offence in respect of his driving of that vehicle unless he had control over the vehicle and he propelled it or made it go. This decision was followed by Gunasekara J. in the case of *Fernando v. Queen* [2], in which the driver of a bus was indicted with having caused the death of a person by a negligent act. It transpired in evidence that the bus, which the accused was alleged to have driven, was being towed by a smaller one at the end of a chain 17½ feet long and steered by the accused.

[1] *(1946) I K. B. 473.* [2] *(1954) 56 N. L. R. 228.*

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Gunasekara J. held that in the circumstances the prosecution had failed to prove that the accused was driving the bus in the sense in which Lord Goddard had used the term.

In *Saycell v. Bool*[1], the question arose whether the owner of a lorry which had no petrol in the tank and which stood at the head of an incline could be held to have driven the vehicle when he released the brake and set the lorry in motion by pushing it and later got into the driving seat and steered it into the garage. Goddard C. J. expressed the view that he drove the vehicle.

On a consideration of the two cases decided by Goddard C.J. it seems to me that the fundamental point is whether the person who steers has control of the vehicle and whether there is an external agency which deprives him of that control which he would have otherwise had. In this view of the matter the case of *Shinwell v. Fisher and others*[2], which was cited by Crown Counsel in support of his contention is of no assistance to decide the question, except to emphasise that full control of the vehicle at the wheel is a *sine qua non* before a person is found to have driven the vehicle, whether the vehicle moves by mechanical propulsion or by gravitation.

Mr. Premaratne has also drawn my attention to the case of *Regina v. Spindley* referred to in the Criminal Law Review (1961), page 486, which in many ways bears the closest resemblance to the instant case. The facts of that case would show that a person, who was disqualified from driving, committed the offence of driving a motor vehicle when he steered a van sitting in the driving seat of the vehicle which was being pushed from behind by another. Counsel for the defendant sought to distinguish this case from *Saycell v. Bool* on the ground that in that case only one man had anything to do with the vehicle and that, when the defendant in that case pushed the vehicle downhill and then jumped in and steered, he made it go. The Court held, however, that the fact that propulsion was coming from somebody pushing from behind and not from the force of gravity did not distinguish the case from *Saycell v. Bool.*

The Commentator in this case referring to the cases of *Saycell v. Bool* and *Wallace v. Major* goes on to say at page 488, *inter alia* :—

> "This would seem to mean that the control must extend to the forward motion of the vehicle. The driver in *Saycell v. Bool* clearly had this as he could have stopped the vehicle at any time by applying the brake whereas the driver in *Wallace v. Major* might have been liable to be dragged along by the towing vehicle even if he did apply the brake. Where the vehicle is being pushed by manpower it is clearly possible for a person at the controls to stop it at any moment. The case is then not inconsistent with the previous authorities—but the distinction is not a happy one."

[1] *(1948) 2 A. E. R. 83.* [2] *35 C. A. R. 100.*

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The cases in which the respective Courts found against the defendants had the following features :—

(i) forward movement of the vehicle,

(ii) the driver in full control of the steering and brakes,

(iii) the movement of the vehicle by gravitation or by force used from behind the vehicle by one human being.

In the instant case, however, the vehicle was being moved backwards by a number of people and the accused was thus not in possession of full control of the vehicle nor had he a clear view of the objects behind him as it happened in the cases cited where the defendants were found guilty. In other words, in the present circumstances, at the moment of the impact, there was hardly anything which the accused was doing out of his own volition apart from sitting in the driving seat and holding the steering wheel. He was not making the vehicle go in any sense of the term and the force exerted by several people may have been of such a degree as to prevent him from exercising full control even if he wanted to, the position being so very different from a case where the vehicle would be moving downhill by gravitation with a man seated in the driving seat and in control of the steering and brakes or from a case where one person would be pushing forwards with the person in control having a clear view of objects facing him. In these circumstances I do not feel sufficiently justified in setting aside the acquittal of the accused basing my decision on the cases cited by Crown Counsel in support.

There is another aspect of this matter which strikes me as being not unimportant. The offences under the Motor Traffic Act, for the purposes of this case, relate to the driving of a motor vehicle. A motor vehicle is defined in section 240 of the Act as meaning any mechanically propelled vehicle intended or adopted for use on roads, and includes a trolley vehicle and a trailor and a tractor. Mechanical propulsion is therefore an essential attribute of a vehicle in order that it may be treated as a motor vehicle. In that view of the matter it seems to me that when one deals with offences such as those referred to in this case one is entitled to consider only vehicles which are not divested permanently or temporarily of the character or attribute of mechanical propulsion at the time of the alleged offence. When this character or attribute of mechanical propulsion is absent in a vehicle even for the time being I do not think that a Court is justified in treating such a vehicle as a motor vehicle. This character, in my view, is implicit in the term " Motor Vehicle " and is inseparable from it. If, for instance, the entire engine is removed from what was a motor vehicle and some sort of brakes remained and a person should be seated at the driving wheel and be steering it either over an incline or being pushed by others from behind I should imagine that the driver cannot be convicted of an offence under the Motor Traffic Act if he caused some injury to a pedestrian on the road by reason of ineffective brakes or for some such reason for which he could have been found guilty if the vehicle was in fact a motor vehicle within the meaning of the Act.

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If that be so, the fact that there is an engine attached to the vehicle which is not functioning at the time of the accident would seem to me to make no difference to the question. Viewed from this angle too, there is no reason for me to interfere with the decision of the Magistrate.

I might add that even if I had sufficient grounds to disagree with the learned Magistrate's view of the law, this is a case in which I should have had considerable difficulty on the facts to find the accused-respondent guilty of criminal negligence in doing any of the acts alleged in the charge. Nor would I have found it possible to convict the accused of the alternative charge in the face of the authority of the case of *Perera v. Perera*[1] cited by Mr. Athulathmudali in support of his contention.

The appeal is accordingly dismissed.

Appeal dismissed.

1969 *Present :* **Samerawickrame, J.**

R. VEERIAH and another, Appellants, *and* FOOD AND PRICE CONTROL INSPECTOR, BADULLA, Respondent

S. C. 703-704/67—M. C. Badulla, 2612

Control of Prices Act—Sections 4 (1) and 8 (8)—Extent of employer's liability for his employee's offence—Price Order made for an outstation district—Regulation prices according to prices for the time being fixed for the Colombo municipal area—Meaning of words "for the time being"—Validity of the Price Order.

(i) Where an employer and his employee are charged together for selling an article at a price in excess of the controlled price, the employer is not liable under section 8 (8) of the Control of Prices Act for the offence of his employee unless he is charged on that footing and is given an opportunity of proving the matters stated in that statutory provision.

(ii) A Price Order applicable to the Badulla municipal area provided for the fixing of the maximum retail price of red onions according to the maximum retail price for the time being fixed for the Colombo municipal area.

Held, that the Badulla Price Order contemplated not only the Price Order for the Colombo municipal area in existence at the time it was made but also Price Orders for the Colombo municipal area that might be made thereafter.

Held further, that the Badulla Price Order was not invalid on the ground of uncertainty or of being *ultra vires* of the provisions of section 4 (1) of the Control of Prices Act.

[1] *(1957) 59 N. L. R. 64.*

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APPEAL from a judgment of the Magistrate's Court, Badulla.

Nimal Senanayake, with *Bala Nadarajah*, for the accused-appellants.

L. D. Guruswamy, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 25, 1969. SAMERAWICKRAME, J.—

The first and second accused-appellants have been convicted of offences under the Control of Prices Act on the ground that they sold a pound of red onions for 35 cents when the maximum controlled retail price was 31 cents.

Learned Counsel for the appellants submitted that the conviction of the 2nd accused-appellant cannot stand because it is not supported by the evidence. The decoy stated that he purchased the pound of red onions from the 1st accused-appellant and that when he tendered the money he was requested by the 1st accused-appellant to pay the money to the 2nd accused-appellant who, according to the decoy, inquired from the 1st accused-appellant the amount that was payable and received a sum of 35 cents. There is no evidence that the 2nd accused-appellant was aware what commodity it was that the decoy had purchased. The 2nd accused-appellant has given evidence and stated that he did not see the decoy buying the provisions.

Learned Crown Counsel submitted that as the 2nd accused-appellant had stated in evidence that he was the proprietor of the boutique he was, in any event, liable under s. 8 (8) of the Control of Prices Act, but the 2nd accused-appellant was not charged on that footing. Further, that provision provides that the employer will be free from liability if he proves to the satisfaction of the Court that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence. As s. 8 (8) of the Act was not relied upon by the prosecution, the 2nd accused-appellant did not have an opportunity of proving these matters. Although there is grave suspicion in regard to the 2nd accused-appellant, I think that he is entitled to the benefit of the doubt and that his conviction must be set aside.

The Price Order relied upon fixed the maximum retail price for red onions in the Badulla municipal area at 3 cents above the maximum retail price for the time being fixed for the Colombo municipal area. Learned Counsel for the appellants submitted that the only meaning that could be given to this Price Order was that the price fixed was 3 cents over the retail price for the Colombo municipal area at the time the Badulla Price Order was made and that as the Price Order in the Colombo municipal area operative on 21st May, 1965, had not been produced, there was no evidence as to the maximum retail price fixed.

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The words "for the time being" have different meanings according to the context. Stroud's Judicial Dictionary (Third Edition) states :—

> "The phrase 'for the time being' may, according to its context, mean the time present, or denote a single period of time; but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time."

In the case of *The Solicitor-General v. Thangamani Pitchai*[1], Alles, J., considered a Price Order similarly phrased and held that it contemplated not only the Price Order of the Colombo Municipality which was in existence on the date when the Ratnapura Order came into operation but also any Price Order fixing the price of the commodity for the Colombo Municipality which was in force subsequent to that date. With respect, I agree with his decision. I am of the view that the Badulla Price Order contemplated not only the Price Order for the Colombo municipal area in existence at the time it was made but also Price Orders for the Colombo municipal area that may be made thereafter.

Learned Counsel for the appellants further submitted that if it was intended that the prices at Badulla should fluctuate in the same manner as the Colombo prices, then the Price Order was invalid as it was ambiguous and lacking in certainty. I am unable to see that the Order was ambiguous or lacking in certainty though it may cause traders some inconvenience in that they will have to have recourse to the Price Order for the Colombo municipal area before they could ascertain the prices operative in their area. A Price Order made for an outstation district by relation to the prices in Colombo was considered by Sirimane J., in the case of *K. R. Gnanasivam and another v. A. C. H. Mohamed*[2], and he held that there was no uncertainty about the prices and that the Order was a valid Order.

Counsel for the appellants also submitted that the fixing of prices for Badulla by reference to the prices fixed for the Colombo municipal area was bad, inasmuch as it was not an exercise of the deputy Controller's function under section 4 (1) of the Act but was in effect a surrender of his functions to the authority fixing the prices for the Colombo municipal area. The function of fixing the prices has been entrusted to the deputy Controller, and it may well be that in the circumstances of a particular trade he may find that the most equitable price to be fixed for his area should be some amount above the prices at which a trader could purchase his goods in the Colombo municipal area in which most wholesalers operate. In the absence of any evidence to show that this mode of fixing prices was unreasonable having regard to the circumstances of a particular trade, I am unable to hold that the deputy Controller by adopting this mode failed to exercise his function and surrendered his authority to the authority fixing prices for the Colombo municipal area. This matter has been considered by Tennekoon, J., in the case of *H. M.*

[1] *(1965) 69 N. L. R. 442.* [2] *(1964) 67 N. L. R. 479.*

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Podimenike v. The Inspector of Police, Kiriella [1], and he took the view that this mode of fixing prices was not an unreasonable or improper way of fixing them. With respect, I agree with his view and I hold that the Badulla Price Order was valid.

In view of the findings that I have arrived at it is unnecessary to consider whether s. 4 (7) of the Act which provides that upon a notification of the Minister's approval an Order shall be deemed to be as valid and effectual as if it were enacted in the Act, would have the effect of rendering the Order a valid one in spite of the objections raised to it by Counsel for the appellants.

In the result the conviction and sentence imposed on the 1st accused-appellant is affirmed and his appeal is dismissed. The appeal of the 2nd accused-appellant is allowed and the conviction and sentence imposed on him are set aside.

Appeal of 1st ascused dismissed.

Appeal of 2nd accused allowed.

1969 *Present :* **Wijayatilake, J.**

M. P. WILLIAM, Appellant, *and* INSPECTOR OF POLICE, MIRIGAMA, Respondent

S. C. 969/68—M. C. Gampaha, 19645/B

Criminal procedure—Magistrate's Court—Trial of indictable offence with offences triable summarily—Failure of Court to assume jurisdiction under s. 152 (3) of Criminal Procedure Code—Effect—Criminal Procedure Code, ss. 152 (3), 180 (1), 425.

Where a number of offences are alleged to have been committed in the course of the same transaction, the joinder, at one summary trial, of an indictable offence with offences triable summarily vitiates the entire proceedings if the Magistrate omits to assume jurisdiction in terms of section 152 (3) of the Criminal Procedure Code. In such a case, the mere fact that the accused has been acquitted in respect of the indictable offence is of no consequence.

Ramasamy v. Gunaratne (72 N. L. R. 187) followed.

Joseph v. Wootler (72 N. L. R. 213) not followed.

APPEAL from a judgment of the Magistrate's Court, Gampaha.

S. C. E. Rodrigo, for the accused-appellant.

Sarath Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] (1967) 72 N. L. R. 306.

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June 17, 1969. WIJAYATILAKE, J.—

A very important question with regard to the failure on the part of the learned Magistrate to assume jurisdiction under section 152 (3) of the Criminal Procedure Code has been raised in this Appeal.

The accused was charged under five counts :

1. That he held out threats to a public servant—G. V. Madurapperuma, Grama Sevaka No. 16 . . . . with intent to cause alarm to the said Grama Sevaka an offence punishable under section 186 of the Penal Code.
2. At the same time and place and in course of the same transaction he did attempt to cause simple hurt to the said public servant . . . . an offence punishable under section 323/490 of the Penal Code.
3. That in the course of the same transaction he did intentionally insult the said Grama Sevaka . . . . an offence punishable under section 486 of the Penal Code.
4. Or in the alternative to count 1 he did commit criminal intimidation to the said Grama Sevaka an offence punishable under section 486 of the Penal Code.
5. Or in the alternative to count 2 above in the course of the said transaction as set out in counts 1, 2 and 3 he did attempt to assault the said Grama Sevaka . . . . an offence punishable under Section 314/490 of the Penal Code.

As would appear from the Schedule to the Criminal Procedure Code count 1 under Section 186 of the Penal Code is not triable by the Magistrate's Court. However, the Magistrate could have, if he was so inclined, assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and proceeded to trial summarily. The learned Magistrate has failed to do so. There is nothing on the face of the record to show whether he had given his mind to the question of jurisdiction at all. He had purported to try the accused on all the counts as Magistrate. After "trial" he had acquitted the accused under count 1 and convicted him under counts 2 and 3. As I have already stated counts 4 and 5 are alternative to counts 1 and 2.

Mr. S. C. E. Rodrigo, learned counsel for the appellant, submits that all the proceedings at the trial have been vitiated as the Magistrate clearly had no jurisdiction to proceed to trial on count 1. If he was so inclined he could have assumed jurisdiction but he has failed to do so. Mr. Rodrigo submits that it is clear on the face of the charge sheet that there has been a joinder of the charges as contemplated in section 180 (1) of the Criminal Procedure Code as all the acts alleged refer to the same transaction. He accordingly submits that it is clear that despite the several charges there has been only one trial. The Magistrate having acted outside his jurisdiction in seeking to try the accused under count

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1 the proceedings would be illegal *ab initio* in respect of all the counts. In my opinion this is a substantial objection. The mere fact that the accused was acquitted under this particular count is of no consequence if the proceedings in Court do not constitute a " trial " within the meaning of the Criminal Procedure Code. The counts 2 to 5 were triable by the Magistrate but as would appear from the Charge Sheet these counts have been joined with count 1. I do not think the trials in respect of the five counts are severable. It is one trial and the Magistrate has purported to so record the evidence in respect of all the counts. If the Magistrate had no jurisdiction to do so in respect of count 1 and he proceeded to record evidence at this trial clearly he was acting illegally. I do not think such an illegality can be cured by resorting to section 425 of the Criminal Procedure Code.

My attention has been drawn to two recent judgments of this Court which dealt with an analogous situation, except that in the instant action the accused has been acquitted under the count in question. In *Ramasamy et al. v. Gunaratna*[1] Pandita-Gunawardene J. held that it is not permissible to separate an illegal trial from the trial on the counts triable by a Magistrate where there has been a joinder of charges under section 180 (1) of the Criminal Procedure Code and that an illegality of this nature is not curable under section 425 of the Criminal Procedure Code. de Kretser J. in the case of *Joseph v. Wootler*[2] has discussed this judgment at length and he has taken a different view. I have given my anxious consideration to the matter before me in the light of these conflicting decisions but with great respect I am inclined to adopt the principle as set out by Pandita Gunawardene J. I do not see how the principle set out by Ennis J. in the case of *King v. Jayasinghe*[3] can salvage this case, the proceedings at the Trial being illegal *ab initio*. With great respect I am unable to subscribe to the view that the trials are severable in a situation such as this where there has been a joinder of charges relating to the same transaction. Furthermore, how is it possible to distinguish the evidence led in respect of count 1 from the rest of the evidence ?

Here we are concerned not with the sentences the Magistrate has sought to impose but with something more fundamental and that is with the verdicts he has pronounced on the " evidence " led. If it was an illegality or irregularity in regard to the sentences we could invoke the provisions of section 425 of the Criminal Procedure Code but in a situation such as this where in fact there has been no trial as the Magistrate had no jurisdiction, in my opinion, it would not be open to this Court to invoke these provisions.

I would accordingly quash the proceedings and send the case back for proceedings *de novo* before another Magistrate.

Proceedings quashed.

[1] *(1968) 72 N. L. R. 187 ; 75 C. L. W. 85.* [2] *(1969) 72 N. L. R. 213.*
[3] *(1915) 18 N. L. R. 374.*

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1969 *Present:* **H. N. G. Fernando, C.J., Weeramantry, J., and Wijayatilake, J.**

SUJATHA KUMARIHAMY, Appellant, *and* S. R. M. DINGIRI AMMA and others, Respondents

S. C. 121/1965—D. C. Kurunegala, 1432/P

Kandyan law prior to 1938—Inheritance of paternal property by intestate heirs—Subsequent physical division of some of the undivided lands by the co-heirs by notarial deed—Whether a land owned dividedly thereafter by a co-heir should be regarded as entirely paraveni—Concept of "paraveni" prior to 1938—"Acquired property"—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, ss. 10, 27.

Held by H. N. G. Fernando, C.J. and Weeramantry, J. (Wijayatilake, J. dissenting), that, under the Kandyan law prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, when co-heirs who inherited several lands from their father who died intestate divided some of the lands physically between themselves by subsequent mutual agreement by the execution of a notarial deed in such a manner that they became sole owners of specific and separate portions, any one of such separate lands became "paraveni" property entirely in the hands of its owner and no portion of it partook of the character of "acquired" property.

One Appuhamy, who was subject to the Kandyan law, died intestate leaving as his heirs two children K and D and several lands. By deed P1 of 13th October 1893, K and D divided part of their inheritance in such a manner that K became the sole owner of sixteen lands and D the sole owner of twenty. It was further agreed that the other lands which they inherited were to be possessed in common.

The question for adjudication in the present appeal was whether Paragahapitiyahena, which was one of the lands of which K became sole owner under the deed P1 of 13 October 1893, was entirely "paraveni" in the hands of K or whether it partook of this character only in part. It was held by the trial Judge that inasmuch as K and D each became entitled on Appuhamy's death to an undivided half share in each of his lands, and inasmuch as K's title to the other half share of Paragahapitiyahena rested solely on the document P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted "acquired" property in his hands.

Held, by the majority of the Court, that Paragahapitiyahena was entirely paraveni in K's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source, despite the fact of the execution of P1. In such a case, prior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, what paraveni in effect means is that which each heir gets in his capacity as heir, and, in considering what property was paraveni and what acquired, the old Kandyan law would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

1*—J 11985—2255 (2/70)

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APPEAL from a judgment of the District Court, Kurunegala.

H. V. Perera, Q.C., with *T. B. Dissanayake, Sepala Moonesinghe* and *Nalin Abeysekera*, for the 2nd defendant-appellant.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera, M. Sanmuganathan* and *W. S. Weerasooria*, for the plaintiffs-respondents.

Cur. adv. vult.

October 28, 1969. H. N. G. FERNANDO, C.J.—

I have had the advantage of considering the drafts of the two judgments prepared by the other members of this Bench. I agree entirely with the reasons which have been stated by my brother Weeramantry for his conclusion that the appeal be allowed and the plaintiffs' action be dismissed with costs in both Courts. I need only to add some brief observations of my own.

The proposition that in ancient societies a physical division or distribution of property was made among the heirs of a deceased person is so reasonable that one scarcely needs for it the support furnished by the references cited in my brother's judgment. In the earliest times, chattels were probably the sole subject of such a division or distribution, for the concept of ownership of land developed only at a later stage. That being so, the custom of a physical division of chattels would probably have been followed and applied subsequently in the case of land as well.

The right which an heir in early times enjoyed on the occurrence of a death was the right to take a portion of the deceased's chattels or land, and his ownership or title would in reality have commenced only after he came into possession of the portion in the exercise of his right to a division. The concept that at a moment of a death each heir became the owner of some portion of a deceased's chattels or land, would in my opinion be too sophisticated for recognition in an ancient society, for physical possession was the distinctive mark of ownership.

In the case of land, a division among heirs could take different forms, but it is easy to envisage that ordinarily the division took one or two forms. *Firstly*, that each heir took for himself some separate lands, or separate portions of land, and *secondly*, that instead of a physical division the heirs decided that each of them should own a share of all the lands. But in either case each heir ultimately held his separate lands or separate portions, or else his shares in each land, by virtue of the fact of division. If this was not the case, then upon the death of every person leaving a plurality of heirs, the stage of separate ownership would invariably have been preceded by some interval, however long or brief or momentary, during which each heir had a right of ownership over all the property of the deceased. In the case where the heirs ultimately held only shares in one or more lands, the legal position in my understanding is that the right of ownership in common flowed either from an actual decision for

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the holding of property in such shares, or else from an implication, arising upon the known facts, that such a decision had actually been made. Such an implication could well arise even from the single fact that the heirs did not exercise their rights to take separate portions on a physical division. I think therefore that when heirs who are subject to the Kandyan Law do possess in common the lands of the deceased, there is a presumption that they have decided to hold shares in common. But if a division into separate portions takes place within a reasonable time after the death, then the division is referable to an antecedent intention to take separate portions, and the presumption of common ownership is thus displaced.

I accordingly agree that the lands which Kiribanda took separately under the division by P1 of 13th October 1893 were lands which he inherited from his father and were therefore paraveni property.

WEERAMANTRY, J.—

One Appuhamy, a person subject to the Kandyan law, died intestate leaving two children, Kiribanda and Dingiri Amma. The several lands belonging to him thereupon devolved upon these two persons, who by deed P1 of 13th October 1893 divided their inheritance in such a manner that Kiribanda became the sole owner of sixteen lands and Dingiri Amma the sole owner of twenty. It was further agreed that the other lands inherited from Appuhamy were to be possessed in common.

The question arising on this appeal is whether a particular land, known as Paragahapitiyehena, which fell to Kiribanda upon this division, was entirely paraveni in his hands or whether it partook of this character only in part. The question assumes importance in the context of a partition action instituted by certain illegitimate children of Kiribanda who claim interests in Paragahapitiyehena on intestacy. The appellant, a transferee from some of Kiribanda's legitimate children, seeks the dismissal of this action on the ground that this land was entirely paraveni property in the hands of Kiribanda, and that the plaintiffs, being illegitimate children, are not entitled to any share therein.

The learned District Judge has held that these lands were paraveni only in regard to an undivided half share therein, and acquired, in regard to the other undivided half. This conclusion was reached on the basis that inasmuch as Kiribanda and Dingiri Amma each became entitled on Appuhamy's death to an undivided half share in each of his lands, and inasmuch as Kiribanda's title to the other half share of this land rested solely on the document P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted acquired property in his hands.

On behalf of the appellant it is argued that Paragahapitiyehena was entirely paraveni in Kiribanda's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source, despite the fact of the execution of P1.

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The question before us is one which arose long anterior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, and is not therefore affected or governed by the definition of paraveni property therein contained. Moreover this definition is partly declaratory of the pre-existing law and partly amending, and the Ordinance by itself would hence be an uncertain guide in regard to the pre-existing law. It is hence necessary to examine the nature of the concept of paraveni in the Kandyan law independently of this statute.

The expression "paraveni" carries varying connotations in varying contexts. For example Hayley enumerates a number of paraveni tenures in relation to lands alienated in fee simple.[1] So also the word is sometimes used in contradistinction to maruveni tenure.[2] Again, the expression may bear different meanings depending on the class of heir who claims a share in the property.[3] However, in the context with which we are concerned, the word is used in a sense opposed to acquired property, the word paraveni carrying the contrasting connotation of that which is inherited.[4]

Property derived by any other source of title or by any other means than inheritance was regarded as acquired,[5] and the average Kandyan spoke of paraveni property as contrasted with "athmudalatagath" or purchased property.[6] So important was this distinction that the Kandyan Law Commission observes in its Report that it is the pivot on which the whole law of succession turns, and, according to Hayley, it was rooted in the desire to keep the family property in the hands of those who bore the family name.[7]

I must stress that the problem we are here considering is one relating simply to the classification of property into one or other of the broad categories of paraveni and acquired, and not the question of the precise manner of devolution of property under the Kandyan law today. The concepts of paraveni and acquired property come down to us from the past and since their meaning has, so far as we are aware, been constant, the ancient bases of classification must still hold good. In order to decide the matter before us it seems necessary therefore to view the transaction as it would have been viewed under the Kandyan law, before the advent of modern notions of testamentary law and procedure; and if in the instance before us the Kandyan law would have regarded the property in the hands of Kiribanda as paraveni, rather than acquired, or vice versa, the fact that we are considering the problem in modern times should not be permitted to affect this result, or to cause property falling within one category to move over into the area of the other.

[1] *Sinhalese Laws and Customs, p. 249.*

[2] *Modder, Kandyan Law pp. 100,491; Kiri Menika v. Muthu Menika (1899) 3 N.L.R. 376.*

[3] *Hayley, Sinhalese Laws and Customs, p. 221.*

[4] *Lebbe v. Banda, (1928) 31 N.L.R. 28 at 31.*

[5] *See also paragraph 122, Report of the Kandyan Law Commission; Komalie v. Kiri (1911) 15 N.L.R. 371 at 374; Kiri Menika et al. v. Muthu Menika (1899) 3 N.L.R. 376.*

[6] *Report of the Kandyan Law Commission, paragraph 118.*

[7] *p. 347.*

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Hayley reminds us that " before the introduction of British ideas the formal administration of estates, the appointment of administrators, filing of accounts and all the paraphernalia of modern testamentary or partition proceedings were practically unknown ".[1] In view of this the learned author observes that a vagueness of legal ideas and terminology was only to be expected and that the administration of justice was largely empirical, often taking the form of equitable settlement. The respect paid to the mother and the desire to keep the family property together would in many cases lead to a common enjoyment of the estate under the direction of the mother or elder brother until such time as one or the other of the heirs wished to have his portion divided off. At this stage the sons and the binna-married daughters took the property to themselves absolutely, while the acquired property was given to the widow for life.[2]

There are also many other passages in the texts indicating that the notion of physical division of an inheritance among intestate heirs was one with which the Kandyan law was quite familiar. Thus Sawers[3] speaks of the division of an inheritance into two or more shares when a man has children by different wives, and goes on to speak of estates which are enjoyed undividedly by two or three brothers. In this context it is clear that in certain instances there was division and in certain others there was not.[4] Physical division of an inheritance is also implicit in the passage to which I shall shortly refer, relating to the assignment of the mulgedera to the eldest son. Again, Hayley, while observing that there did not appear to have been any proceeding among the Kandyans in the nature of formal administration, notes that certain practices were recognised regarding management of assets, payment of debts and division of the property.[5]

If upon such a division between two heirs of a person who left two parcels of land, each heir took the entirety of one land, would the Kandyan law have regarded such land in the hands of one heir as partly paraveni and partly acquired from his co-heir or as entirely paraveni ? If the contention of the respondent is to succeed, we must be able to say that the Kandyan law looked upon this situation by considering that the estate devolved in such a manner as to give equal undivided shares in each property to each heir and that the heirs notionally went through a process of cross conveyances to each other. It accords far more with reality to expect this situation to be viewed as one of simple inheritance by each heir to the property of his choice.

Much light is thrown upon this by the reference we find in Hayley[6] to the practice by which the eldest son out of respect for his age was generally allowed the " mulgedera " or the ancestral home. Upon the contention

[1] *pp. 350–1.*
[2] *p. 351.*
[3] *Memoranda at p. 5—see Hayley appendix at p. 8.*
[4] *See also Sawers pp. 12–13.*
[5] *Hayley 492. See also pp. 359–61.*
[6] *op. cit., p. 331.*

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of the respondent this home would in every case where there are more children than one be held by such eldest child only as paraveni in regard to such undivided shares of his father's estate as have devolved upon him and acquired in regard to such undivided shares as have come to him by exchange from his brothers and sisters. Thus a mulgedera falling to the eldest of five children upon such a family division would, in his hands, be paraveni only in regard to an undivided one fifth share thereof and the other four fifths would upon his death pass outside the legitimate line. It seems manifest that such a situation does not accord with the spirit of Kandyan law or with the nature of the division that must have been so common a feature in ancient times ; and it seems inconceivable that the mulgedera should be permitted so easily to pass out of the family by reason of its paraveni content being rendered subordinate to its acquired content in the very act of division of an inheritance.

Mr. Perera for the appellant rightly submits that what paraveni in effect means is that which each heir gets in his capacity as heir, and that the Kandyan law in considering what property was paraveni and what acquired, would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

This view fits all the more readily into the framework of a law of succession which did not operate through the elaborate processes of modern administration or the precise logic of an immediate vesting. Against this background it is difficult to think that the Kandyan law in every case treated every item of property of a deceased person as vesting immediately in undivided shares in his heirs. If this be so it would lead to the curious result that there would be no single item of property to which a person could become entitled exclusively as paraveni where the deceased has left more than one child, for since death would precede division even by a moment of time, a separate item of property falling to one heir upon a division would always come to him partly by succession and partly by acquisition. This is indeed a situation too far removed from reality to command acceptance when one considers such common examples as the mulgedera which had so much significance for that society.

Moreover under the Kandyan law no deed of transfer was essential in order to pass title to land, so that the question whether a particular heir succeeded to a particular land was dependent not on legal formalities such as deeds executed by the heirs but on practical facts such as actual possession and enjoyment, whether following upon an actual division, or upon a division which might fairly be presumed from known facts. The authorities show that upon a division, which would usually be by mutual agreement, each heir might take particular lands or parts of land for his inheritance, or that alternatively the heirs may take undivided shares in one or more lands which would then be held in common ownership. The title of each heir would thus depend on mutual agreement either actual or presumed, as to the succession. Such lands or separate portions or alternatively each such share, would to the mind of the heir

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so succeeding and to the society in which he moved, be attributable to no other source of title than succession. Furthermore inasmuch as the concept of paraveni evolved and had its being in the informal setting where deeds were not requisite, it is against that setting that it is necessary to view the question before us. The requirement of a deed is no doubt essential today for a conveyance of legal title upon such a division, but to lay too much stress on this modern and adventitious requirement is to obscure the practical simplicity of the Kandyan law of inheritance by a reliance on alien concepts and technical modes of thought.

Mr. Perera, in the course of his submissions, stressed the concept of a unity of title in the heirs as a group. In so doing he drew our attention to the fact that Hayley commences his discussion of the Kandyan law of intestate succession[1] by citing a significant passage on this principle from Maine's Ancient Law[2]. In this passage that distinguished jurist observes : " We know of no period of Roman jurisprudence in which the place of the heir or universal successor might not have been taken by a group of co-heirs. This group succeeded as a single unit, and assets were afterwards divided among them in a separate legal proceeding . . . The mode of distribution is the same throughout archaic jurisprudence . . . "

This passage contains the idea which seems in early systems of law to have characterised intestate succession and may well contain the basic idea underlying intestate succession among the Kandyans as well.

Indeed, though the modern law of Ceylon is entirely different, the same idea seems not unfamiliar even to the Roman-Dutch law. In discussing the *actio familiae erciscundae*, the action for the division of a family inheritance, Voet observes[3] that division may take place by consent among co-heirs and that such division is fettered by no fixed rules but is carried out in the manner appearing most advantageous and convenient to the persons dividing. They may decide for example that the elder divides the property and the younger chooses, or settle by lot to whom each share ought to fall, or let each single property go to the highest bidder, or plan that the whole inheritance should stay with one person and that he shall pay the rest a fixed sum of money.

Moreover, interesting traces of the concept of the heirs' unity of title are still discernible in such provisions of modern law as Item 29 of Schedule A, Part I of the Stamps Ordinance, and section 741 of the Civil Procedure Code. The former renders deeds of exchange between co-heirs subject to only a nominal stamp duty, while deeds of exchange even between co-owners attract the stamp duty appropriate to the value of the property exchanged. The latter provides for delivery of items of movable or immovable property to persons entitled to distribution of an estate, where all interested parties consent in writing to such arrangement.

[1] *Hayley op. cit. p. 330.* [2] *p. 227.*

[3] *10.2.2.*

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It would thus appear that in attributing to the Kandyan law the notion that an heir taking a particular property takes it by inheritance, we give effect to no principle which is unfamiliar to the law but rather to one which accords with the mode of thinking of many a legal system and which one of the foremost authorities on the Kandyan law thought fit to set out in the forefront of his discussion of the Kandyan attitude to intestate succession.

Had the matter before us been then a division of paternal property under the Kandyan law prior to the superimposition on that system of modern testamentary and conveyancing rules, Paragahapitiyehena would unquestionably have been considered as paraveni in Kiribanda's hands. Considering as I do that the same classification must apply to the same type of division occurring at the present day, I have little difficulty in concluding that the appellant's contention is entitled to succeed. I would therefore allow this appeal and dismiss the plaintiffs' action with costs both here and in the court below.

WIJAYATILAKE, J.—

The principal question in this appeal is one of the Kandyan Law of inheritance. The answer to this question involves the construction and interpretation of the deed 15496 of 13.10.1893 (P1)/(2D13).

It is common ground that the parties are subject to the Kandyan Law. One Sri Ratnayake Mudiyanselage Appuhamy was the owner inter alia of the 36 lands dealt with in P1. He had died intestate in respect of these lands leaving as his heirs his children Kiri Banda and Dingiri Amma who became entitled to all these lands in equal shares. Admittedly, the lands they so inherited constituted their paraveni property. Thereafter they had executed the deed in question P1 in 1893. According to the plaintiff's translation it recites that " the undermentioned lands were possessed by the said two persons in common by right of paternal inheritance from their father Sri Ratnayake Mudiyanselage officer and the said Kiribanda and Dingiri Amma have divided the said lands in the following manner : The undermentioned lands are allotted to the said Kiri Banda (20 lands set out). The following lands are allotted to the said Dingiri Amma (16 lands set out) ".

It would appear that the land called Paragahapitiyehena which is the corpus sought to be partitioned in this case is the first of the 20 lands allotted by deed P1 to Kiribanda. This deed further provides that the other lands be held in common by the said Kiribanda and Dingiri Amma. The relevant clause in the translation 2D13 reads as follows : " The said Kiribanda and Dingiri Amma by right of paternal inheritance from Sri Mudiyanselage Appuhamy officer are held and possessed in common of the following lands and they have amicably agreed to divide the said lands between them in the following manner :—And that in the said

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division the following lands were given to the said Kiribanda, to wit (20 lands set out). The following lands were given to the said Dingiri Amma (16 lands set out) ".

The question which has arisen for adjudication is whether on the execution of deed P1 the half share of Dingiri Amma in the 20 lands, of which the corpus is one, to which Kiribanda became entitled shed its "paraveni" character and became his "acquired" property.

Therefore, it would appear that the crucial question for consideration is the effect of this transaction in the context of the Kandyan law of inheritance.

Mr. H. V. Perera, learned Queen's Counsel, appearing for the 2nd defendant-appellant has stressed the necessity to take a realistic view of this " amicable division " of family property and not to give too legalistic an interpretation to this transaction by permitting the deed P1 to nullify the intentions of the parties. He submits that although these properties were acquired by Appuhamy on deed No. 3741 of 15.5.1881 they were paraveni in the hands of his children on his death intestate and they continued to be paraveni despite the deed P1 of 1893 whereby they sought to make a " distribution " of some of the properties they had inherited from their father. Mr. Perera very strenuously submitted that it would be quite contrary to the spirit of the Kandyan Law of intestate succession to permit the deed P1 to destroy the essential character of these paraveni properties. He has drawn our attention to the observations made by the Kandyan Law Commission as to the meaning of "paraveni" property. See Sessional Paper 24/1935, pages 16 to 19. The Ordinance No. 39 of 1938 which adopted some of these recommendations sought to define the expressions "paraveni" and "acquired". However, as Mr. H. W. Jayewardene, learned Queen's Counsel, appearing for the respondents submits the definition given in this Ordinance is of no relevance in the instant case as section 27 expressly enacts that its provisions shall not have and shall not be deemed or construed to have any retrospective effect except where express provision is made to the contrary. Therefore we have to fall back on the Kandyan Law as it was prior to this Ordinance.

We have to constantly keep in mind that the Kandyan Law classifies property with reference to the manner in which a person becomes entitled to property. The distinction would really be between inherited and property acquired otherwise than by inheritance. Vide *Kalu Banda v. Mudiyanse* [1]; *Lebbe v. Banda* [2]. It has even been held that a gift or sale by a father of his inherited property to his son becomes acquired property in the hands of his son. Vide *Ukkuwa v. Banduwa* [3]; *Tennekoongedera Ukkurala v. S. W. Tillekeratne* [4]. No doubt, section 10 of the Ordinance No. 39 of 1938 seeks to bring about a change on the lines of

[1] *(1926) 28 N. L. R. 463.*
[2] *(1929) 31 N. L. R. 28.*
[3] *(1916) 19 N. L. R. 63.*
[4] *(1882) 5 S. C. C. 46.*

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Mr. Perera's submissions but I am inclined to agree with Mr. Jayewardene that it has no application to the facts before us. Section 27 makes it quite clear that it is not retrospective in operation. In my view the Report of the Kandyan Law Commission and the subsequent legislation are of little avail to the appellant. In fact, in the light of section 27 they appear to confirm the position of the respondents.

Mr. Perera has very cogently argued that on a first appraisal of the question before us one may be led to an erroneous conclusion by the intervention of the deed P1 and he has therefore submitted that the background of this transaction has to be kept in mind and we should take a realistic view of this "distribution" of family property. With great respect it appears to me that there is a two-fold fallacy in his submissions; firstly in regard to the character of the property and secondly in regard to the nature and effect of the deed P1.

The character of "paraveni" is not something that the property acquires at the time of the death of the owner, but it is a character that the property assumes at the time that a person becomes entitled to it. In the instant case when the two children succeeded to Appuhamy's properties they assumed the character of "paraveni" but when the children sought by the deed P1 to put an end to the common ownership of 36 lands of this inheritance clearly Kiribanda became entitled to the half-share owned by Dingiriamma in the 20 lands not by virtue of succession from his father but by virtue of the deed P1. On this deed Kiribanda has, in my view, clearly acquired the rights of Dingiriamma to the 20 lands dealt with, of which the corpus in this action is the first. In this context we have to recognise the significance of only a portion of the inheritance being dealt with in P1. With great respect in my view the legal effect of P1 is the crucial point in this case. The question is not what the parties intended to do by entering into this deed, but what is the meaning of the words used in the deed and what is their legal effect. Vide *Jinaratna Thero v. Somaratna Thero* [1].

As Mr. Jayewardene submitted the simple question is how Kiribanda became entitled to the half-share of his sister. The answer is clear that it is by virtue of P1. Therefore this half share on the execution of P1 ceased to be "paraveni" property and it assumed the character of "acquired" property in the hands of Kiribanda. This deed has been called a deed of partition and/or a deed of exchange. However, on a perusal of its terms it would appear that it contains cross-conveyances. Dingiriamma has parted with her half share in the 20 lands and got in return a half share of 16 lands. These parties may have had good reason to part with these shares in these particular lands. This would, in my opinion, provide the consideration for the cross-conveyances contained in this deed which ultimately vests title in the parties in respect of the half-shares dealt with.

[1] (*1946*) *47 N. L. R. 228.*

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The expressions "ancestral" property and "paraveni" property are not synonymous. It was submitted that the people in the area would continue to refer to these lands dealt with in this deed as the ancestral property of Kiribanda ; but here we are concerned with the distinction between "paraveni" property and "acquired" property and we have to face the legal effect of the transaction contained in P1.

Mr. Perera has relied on a passage from Hayley at page 221 dealing with the meaning of "acquired" property, but I do not think it is of much avail or significance in the context of this case where the deed P1 plays such a vital role. In the absence of P1, if there was only an oral arrangement, for instance, the position would have been different. With great respect I am unable to agree with judgments of My Lord the Chief Justice and my brother Weeramantry.

I would accordingly dismiss the Appeal with costs.

Appeal allowed.

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

A. DHARMASENA, Appellant, *and* B. K. NAVARATNE, Respondent

S. C. 574/65 (F)—D. C. Colombo, 6399/D.

Divorce action—Evidence—Wife's confession, outside Court, of adultery—Inadmissibility against co-respondent—Standard of proof for proving adultery.

In a divorce action instituted by a husband, statements made outside Court by the defendant (the wife) admitting adultery cannot be used against the co-respondent in proof against him of an act of adultery.

Proof beyond reasonable doubt is necessary for proof of adultery.

APPEAL from a judgment of the District Court, Colombo.

E. R. S. R. Coomaraswamy, with *E. C. Chakradaran*, for the 2nd defendant-appellant.

D. R. P. Goonetilleke, with *M. D. K. Kulatunga*, for the plaintiff-respondent.

Cur. adv. vult.

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

The plaintiff brought this action for divorce from his wife on the ground of her adultery with the 2nd defendant. The plaintiff and the 2nd defendant are both Police Constables who at the relevant time lived with their wives in the married quarters at the Cinnamon Gardens Police Station ; the quarters of the two families adjoined each other.

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At about 5.30 in the morning of 7th February, 1964, the plaintiff left his quarters in order to report at the Station ; his wife remained in the quarters with her young child and the plaintiff's brother. When the plaintiff returned about a half-hour later, his wife was not in the quarters and on inquiry from his brother, he was told that she had gone towards the kitchen at the rear of the premises. The plaintiff stated that a while later he saw his wife " being pushed out " by the 2nd defendant from a doorway in the latter's quarters. The plaintiff immediately assaulted his wife, and she then confessed that she had been called by the 2nd defendant into the latter's quarters and there had intercourse with the 2nd defendant. (The latter's wife, a hospital attendant, had been away from home on night duty.) Thereafter, according to the plaintiff, his wife was " dragged " by the 2nd defendant into the latter's quarters and only emerged from there after the lapse of some minutes. The plaintiff immediately informed an Inspector of the incident, and of his wife's admission, but the Inspector was unable to record statements until after 10 o'clock. At that stage, the plaintiff's wife admitted in a statement to the Inspector an act of intercourse with the 2nd defendant. The latter, however, denied any intimacy and further denied that he had ever spoken to the 1st defendant.

The evidence for the plaintiff at the trial was that which I have summarised above. The wife retracted her confession, stating that she had been forced to make it because of threats by the plaintiff. Both she and the 2nd defendant, however, did admit that she had been called by the 2nd defendant towards the entrance to the latter's room, and had there some conversation about an incident which had occurred in the quarters a few days earlier. The learned trial Judge was satisfied that the confession of adultery had been made voluntarily by the wife, who has not appealed against the finding that she had committed adultery and the decree for divorce.

But in holding against the 2nd defendant that he was guilty of adultery, the trial Judge nowhere refers to the long-established principle that statements made outside Court by the defendant (the wife) in a divorce action are not admissible as evidence against the co-respondent (*Eliatamby v. Eliatamby* [1]). The Judge failed to direct himself that the wife's alleged confession to the Inspector in this case could not be used against the 2nd defendant in proof against him of an act of adultery.

When the confession is excluded from consideration in the case against the 2nd defendant, the only circumstances which remain are :—

(1) that the 1st defendant had apparently entered the neighbouring quarters early in the morning, and that a while later the 2nd defendant pushed her out of those quarters ;

[1] (*1925*) *27 N. L. R. 396.*

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(2) that after the plaintiff had assaulted his wife, the 2nd defendant dragged her into his quarters, where she remained for some little time ;

(3) that the 2nd defendant falsely denied to the Inspector that he had ever spoken to the woman, whereas he later admitted in evidence that he did call to her and speak to her on this particular morning.

The plaintiff admitted at the trial that the 1st defendant and the wife of the 2nd defendant used to visit each other. Despite this admission, the learned trial Judge refused to believe that the two women had been on friendly terms, and had gone out together to witness the Independence Day celebrations. The reason stated for this disbelief arose from a misdirection on the facts. It would appear that the plaintiff and his wife had only occupied the quarters a few weeks before this incident. There was evidence that the 2nd defendant's wife had been on night duty at the hospital during the preceding two weeks. The Judge thought that there was little chance for the women to meet, because one of them had been on duty at the hospital. It was a misdirection to think so, because the duty was night duty, which did not by any means exclude the possibility of meetings during the day. But for the statements in the confession, the visit to the 2nd defendant's quarters on this particular morning was in the circumstances open to an "innocent" explanation.

So far as the 2nd defendant was concerned, there was nothing in the evidence to contradict his version of an innocent conversation with the plaintiff's wife. Even if she did enter his quarters, the plaintiff's own evidence is that the 2nd defendant *pushed* her out, a circumstance which at the least casts doubt on the theory that an act of intimacy had taken place. Counsel for the plaintiff in appeal could point only to the fact which I have mentioned at (3) above : but a false denial by a man that he has ever spoken to a woman does not raise any strong inference that when he did speak to her he did so to entice her to intercourse.

Had the trial Judge reminded himself of the principle that the wife's confession was not evidence against the co-respondent, and of the further principle that the general standard of proof beyond reasonable doubt applies for proof of adultery (*Jayasinghe v. Jayasinghe* [1]), I do not see how he could have found the charge proved against the 2nd defendant on such tenuous material.

The decree awarding damages against the 2nd defendant and the finding that he committed adultery with the 1st defendant are set aside with costs in both Courts.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

[1] (*1954*) *55 N. L. R. 410.*

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1969 *Present :* **H. N. G. Fernando, C.J., and Weeramantry, J.**

THE COCONUT RESEARCH BOARD, Petitioner, *and* N. R. SUBRAMANIAM *et al.*, Respondents

S. C. 85/68—Application No. L. T. 8/16766

Industrial Disputes Act—Section 49—Coconut Research Board—Incapacity of the Board to claim Crown privilege in an industrial dispute—Corporations depending on and controlled by the Government—Whether they can claim to be servants or agents of the Crown—Interpretation Ordinance, s. 3—Coconut Research Ordinance (Cap. 440) s. 4 (7).

The Coconut Research Board, which is a body corporate established and incorporated under the provisions of the Coconut Research Ordinance, does not perform functions and duties which have traditionally been performed by the Crown or the Government. Therefore the Board is not entitled to invoke the provisions of section 49 of the Industrial Disputes Act, in order to claim as against its employees the privileges available to the Crown in respect of Crown employees.

A Corporation, such as the Coconut Research Board, depending on and controlled by the Government, may nevertheless be the employer of persons in its services within the meaning of the definition of "employer" in the Industrial Disputes Act. In such a case, such Governmental control does not bring the Corporation within the scope of the exemption provided by section 49 of the Industrial Disputes Act.

APPEAL from an order of a Labour Tribunal.

Walter Jayawardena, Q.C., with *Lakshman Kadirgamar* and *V. Kandasamy*, for the petitioner.

N. Satyendra, for the 2nd respondent.

H. L. de Silva, Crown Counsel, for the Attorney-General, on notice.

Cur. adv. vult.

June 23, 1969. WEERAMANTRY, J.—

In this application the petitioner contests the right of the second respondent, one of its employees, to invoke the provisions of the Industrial Disputes Act. It is the petitioner's contention that it performs functions and duties which have traditionally been performed by the Crown or the Government and that it is therefore entitled to claim as against its employees the privileges available to the Crown in respect of Crown employees.

The petitioner is a body corporate established and incorporated under the provisions of the Coconut Research Ordinance (Cap. 440) for the purpose of establishing and maintaining a coconut research institute and otherwise managing, conducting and furthering scientific research in

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respect of coconuts and problems connected with the coconut industry. In particular the Board is concerned with the growth and cultivation of coconut palms, the prevention and cure of diseases and pests and the utilisation and marketing of the products of the coconut palm.

Though dependent on Government funds, the Board has full power and authority generally to govern, direct and decide on all matters connected with the appointment of its officers and servants, the administration of its affairs and the accomplishment of its objects and purposes [1]. There is also express provision in the Ordinance that any such officers or servants when appointed shall for the purposes of discipline and otherwise be subject to the control and supervision of the Chairman of the Board [2].

Dependence on the Crown for funds does not of course have the effect, by itself, of making a Corporation a Government institution or a Government undertaking [3] nor does Government control necessarily render a Corporation a servant or agent of the Crown [4]. Furthermore, as this Court recently decided in *Air Ceylon Ltd. v. Rasanayagam* [5], provisions in an Act creating a corporation which show Governmental contributions of capital, Governmental control of appointments and Governmental rights to the surplus remaining out of nett receipts does not have the effect that in law the Crown or the Government is the employer of persons employed on the staff of such Corporations.

Having regard to these principles Mr. Jayawardena for the petitioner rightly stated that he was not submitting that his client was a servant or an agent of the Crown, and conceded that the second respondent employee was an employee of the petitioner and not of the Government. His position however was that his client performed functions and duties traditionally performed by the Crown or the Government and as such was *in consimili casu* with a servant or agent of the Crown and entitled to claim the privileges of Crown servants or agents.

Reliance was placed, in support of this contention on the *Mersey Docks Case* [6] where Blackburn, J. recognised that a Corporation not subject to control by the Crown or by a Minister and whose revenues were not Crown revenues, could claim Crown privilege on the ground that it was performing a public duty. Blackburn J. observed:[7] "In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign so as to make the occupation that of her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of

[1] *Section 4 (7).* [2] *Section 4, proviso.*

[3] *Ceylon Tea Propaganda Board v. Commissioner of Inland Revenue (1963) 67 N. L. R. 1.*

[4] *Ceylon Bank Employees' Union v. Yatawara (1962) 64 N. L. R. 49.*

[5] *(1968) 71 N. L. R. 271.*

[6] *Mersey Docks and Harbour Board Trust v. Cameron (1865) 11 H. L. C. 443.*

[7] *ibid at p. 501–2.*

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this country, fall within the province of Government and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign might be considered *in consimili casu.*"

No detailed inquiries are necessary for an appreciation of the manifest distinction between the cases of the Mersey Docks and Harbour Board Trustees and the Coconut Research Board, for applying the tests formulated in that judgment itself, the functions performed by the former were public purposes which by the constitution of Great Britain fell within the province of Government and were committed to the Sovereign. On the other hand the functions performed by the Coconut Research Board cannot be said to be of a kind which by the constitution of this country fall within the province of Government and are committed to the Crown. The constitution of this country is written and neither under the constitution nor under any of the other laws of this country can any provision be pointed out which makes coconut research a function or duty of the Government or commits such matters to the Crown.

Mr. Jayawardena contended that agriculture has traditionally been a Governmental function and duty in this country, and that scientific research pertaining to a major crop is likewise a Governmental function or duty. There is no material before us on which we can arrive at the conclusion that " the management conduct and furthering of scientific research in respect of coconuts and problems connected with the coconut industry " (to borrow the words of the Statute itself) has traditionally been a function of the Government of this country. The Coconut Research Ordinance goes as far back as the year 1928 and we are unable to say that the functions for which the Board was set up had been traditionally performed by the Government prior to this date. Even if we were in a position to arrive at this conclusion, the tests set out in the *Mersey Docks* case would still remain unsatisfied, for this function could not under our laws be described as one committed to the Government.

It is of importance also to note that what was contemplated in the *Mersey Docks* case was not the question of the employer-employee relationship but the question of Crown privilege in regard to liability to rates of premises occupied by such an agency for the purposes of the Government.

Learned Crown Counsel appearing as *amicus curiae* referred us to a number of cases in which Crown privilege was successfully claimed by statutory bodies which, though not strictly servants of the Crown, were considered as being *in consimili casu.* All these cases likewise turned out to be cases of a claim of privilege vis-a-vis the State or the public, as for example in matters of taxation, rating and patent rights. We have not been referred to any decision dealing with a claim of privilege in regard to the employer-employee relationship subsisting between such Boards and their employees.

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It is hence unnecessary to refer in detail to the various cases cited or to the tests therein propounded for determining the question whether such an agency may claim Crown privilege. We may however make reference to the case of *Pfizer Corporation v. Ministry of Health*[1] where it was held that the supply of drugs to National Health Service Hospitals for administration to out-patients and in-patients was a use for the services of the Crown and was accordingly within the authority conferred by section 46 (1) of the Patents Act of 1949 granted to a Government Department to use and exercise a patented invention for the services of the Crown. The speeches in this case are of interest for the observations they contain in relation to the changed nature of " Services of the Crown " in the present age. Lord Reid observed[2] that " although in Victorian times the armed services—the Navy and the Army—the Civil Service, the foreign colonial and consular services, the Post Office and perhaps some others comprise the services of the Crown ", today there are many newer services, such as hospital service, which are nevertheless services of the Crown. So also Lord Evershed pointed out[3] that there is not and cannot be in this day and age a true antithesis between the services of the Crown in the sense of services related to the functions of Government as such and services of the Crown in the sense of the provision of facilities commanded and defined by Act of Parliament for the general public benefit. "

This view still does not avail the applicant in the present case, for the Hospital Boards and Committees which administered these hospitals were manifestly discharging duties laid upon the Minister by statute. The National Health Services Act of 1946 placed upon the Minister, in specific terms, a statutory obligation to promote the establishment of a comprehensive health service designed to secure improvement in the physical and mental health of the people, and the Boards and Committees were discharging these duties committed by statute to the Minister. No such statute placed upon any section or Department of the Government of this country at any time the specific function of conducting scientific research in respect of coconuts, and government did not therefore stand charged or committed with such a duty.

Section 49 of the Industrial Disputes Act provides that nothing in the Act shall apply to or in relation to the Crown or the Government in its capacity as employer or to or in relation to a workman in the employment of the Crown or the Government. In *Air Ceylon Ltd. v. Rasanayagam*[4] this Court has already held that a Corporation depending on and controlled by the Government was nevertheless the employer of persons in its services within the meaning of the definition of " employer " in the Industrial Disputes Act and that such Governmental control did not bring such a corporation within the scope of the exemption provided by section 49. Mr. Jayawardena has failed to satisfy us that there is any distinction between the corporation there under consideration and the Coconut

[1] *(1965) A. C. 512 (H. L.)*
[2] *ibid at p. 533.*
[3] *ibid at p. 543.*
[4] *Supra.*

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Research Board, and the cases to which we have been referred only serve to confirm this court in the view taken in that case. Moreover we see no merit in the contention that this view in any manner affects the rights of the Crown which are protected by section 3 of the Interpretation Ordinance, for what we are here considering are admittedly not the rights of the Crown or of a Crown agent or servant.

For these reasons we are of the view that the contention that Crown privilege may be claimed by the Coconut Research Board as a Crown agent must fail, and that the Board would be amenable to the jurisdiction of a Labour Tribunal in terms of the Industrial Disputes Act.

Another ground of attack upon the order of the Tribunal was that the application by the second respondent was out of time. This ground was not however pressed by Mr. Jayawardena as it rested on a very technical view of the nature of the amendment to the original application.

For the reasons set out the petition fails and is dismissed with costs payable to the second respondent which we fix at Rs. 315.

H. N. G. FERNANDO, C.J.—I agree.

Application dismissed.

1969 *Present :* **Sirimane, J., and de Kretser, J.**

V. T. JOSEPH and another, Appellants, *and* A. J. THIRUCHELVAM and another, Respondents

S.C. 57/1967 (Inty.)—D.C. Jaffna, 4885/MB

Mortgage—Hypothecary sale—Conditions of sale—Whether they can be varied after sale has taken place—Mortgage Act (Cap. 89), ss. 50 (3), 50 (4) (d), 61—Civil Procedure Code, ss. 260 to 262.

Where a hypothecary sale of mortgaged property has already taken place, subject to the conditions of sale prescribed by the Court, the provisions of section 50 (4) (*d*) of the Mortgage Act debar the Court from varying the conditions of sale at the instance of the purchaser, except with the consent of all the parties who would be affected by such variation.

APPEAL from a judgment of the District Court, Jaffna.

S. Sharvananda, with *M. A. M. Baki* and *M. Waniappa*, for the 7th and the 8th respondents-appellants.

C. Ranganathan, Q.C., with *K. Kanag-Iswaran*, for the 3rd and the 4th defendants-respondents.

Cur. adv. vult.

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October 11, 1969. SIRIMANE, J.—

This is an appeal by a purchaser from an order by the District Judge setting aside a mortgage sale.

According to the Conditions of Sale on which the property was put up for sale by public auction, 1/4th of the purchase price had to be deposited immediately after the sale, and the balance paid within one month. If this was not done, the purchaser had to forfeit the deposit, and the property had to be put up for re-sale.

These conditions were made known to the purchaser and all other bidders, and in addition the purchaser had also signed these conditions of sale.

After 30 days had elapsed, the 3rd and the 4th defendants (who are the respondents to this appeal) moved that the deposit be forfeited and the property put up for re-sale in accordance with the conditions referred to above. Though the 3rd and the 4th defendants had conveyed their rights in this property to the 8th defendant, and litigation had followed on this sale yet there was sufficient evidence to show that they (3rd and 4th defendants) were still vitally interested in the property.

Before the lapse of the 30 days, the purchaser had obtained an order enlarging the time for the payment of the balance purchase money, without notice to the 1st, 2nd, 3rd and 4th defendants who were the owners of the property mortgaged.

It was submitted for the purchaser that under section 50 (3) of the Mortgage Act, Chapter 89, the Court had power to alter the earlier directions given to the Fiscal.

Conditions of Sale are prescribed by the Court *before* a sale takes place, and there can be no doubt that by subsequent directions the Court may alter those conditions. But once a sale has taken place subject to the conditions so prescribed the purchaser is bound by those conditions.

Section 50 (4) (*d*) enacts that

> " Every person making a bid at the sale shall be bound by the Conditions of Sale prescribed by the Code under the preceding provisions of this section whether or not he signs an agreement to be bound thereby ; "

After the sale has taken place, a condition can be altered by the Court only with the consent of all the parties affected by such alteration.

At the argument, Counsel for the purchaser conceded that if sections 260–262 of the Civil Procedure Code were applicable, the order setting aside the sale was correct. Section 260 provides for the deposit of 1/4th of

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the purchase money, and section 261 for the payment of the balance within 30 days. Section 262 provides as follows :—

> " In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to, and shall go in reduction of, the claim of the judgment-creditor, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claims to the property and to any part of the same for which it may subsequently be sold. "

(Condition 5 is in practically the same terms as this section).

It was argued that the trial Judge was in error when he referred to these sections of the Civil Procedure because they are not applicable to mortgage sales, as provided by section 61 of the Mortgage Act, Chapter 89.

But section 50 (4) (*d*) of that Act read with the Conditions of Sale has the same effect as section 262 of the Civil Procedure Code.

The case of *Zahan v. Fernando*[1] was decided under the provisions of the old Mortgage Ordinance 21 of 1927. The purchaser bought the property on the 14th of October, and paid the deposit. He brought in the balance purchase money on the 14th of November. At the highest he was late by a few hours, and the Court held that it would be inequitable to penalise the purchaser for the breach of a Condition of Sale which may be regarded as a mere technicality. Garvin, J. said,

> " I think that this is a case in which the Court is entitled in its discretion to accept the balance purchase money and direct the issue of the conveyance even if in law the purchaser is out of time by a few hours. "

Under the Mortgage Ordinance of 1927 there was no section corresponding to section 50 (4) (*d*), and the Court appears to have been influenced by the fact that the objection to the confirmation of sale was very highly technical.

But in the later case of *Suleha Umma v. Nagoor Mohamadu*[2] it was held (in a partition sale) that the Court had no discretion to allow the money to be deposited after the time fixed had elapsed.

I think that this case sets out the better view. Once the purchaser buys, subject to conditions which are binding on him, the Court is left with no discretion " to give vent to its own generous and good-natured impulses " as Soertsz, J. put it, and vary the conditions, except with the consent of all the parties who would be affected by such variation.

The appeal is dismissed with costs.

DE KRETSER, J.—I agree.

Appeal dismissed.

[1] (*1931*) *33 N. L. R. 279.*

[2] (*1945*) *46 N. L. R. 415.*

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1969 *Present :* **de Kretser, J.**

N. A. ALGIN, Petitioner, *and* D. KAMALAWATHIE, Respondent

S.C. 53/68—Application for a Writ of Habeas Corpus

Habeas Corpus—*Divorce action—Decree in favour of plaintiff husband—No order of court in regard to custody of children—Right of husband to claim custody from the wife pending appeal in the divorce action.*

There is no rule of law that the plaintiff in a divorce action must necessarily ask for the custody of his children.

Petitioner obtained a decree for divorce and, during the pendency of the appeal in the divorce action, filed the present application for *habeas corpus* against his wife for the custody of his children. In the divorce action he had not sought an order for the custody of the children and the Court made no order on the application of the wife for their custody, because the decree for divorce was entered in the absence of the wife who failed to appear on the trial date.

Held, that the divorce action was not a bar to the application for *habeas corpus*.

APPLICATION for a writ of *habeas corpus*.

Nimal Senanayake, with *M. W. Amarasinghe*, for the petitioner.

Nalin Abeysekera, for the respondent.

Cur. adv. vult.

November 20, 1969. DE KRETSER, J.—

The Petitioner in this Application is the husband of the Respondent against whom he has obtained a Decree for Divorce which is now in Appeal. In the Divorce Case he did not seek an Order for the custody of the 4 children of the marriage and the Court made no Order on the Application of the wife that she should have their custody for the Decree for Divorce was entered in the absence of the wife who was absent on the Trial date. The Petitioner filed this Application for Habeas Corpus seeking an Order that the Respondent should hand over the children into his custody.

The Magistrate of Badulla to whom Mr. Justice Weeramantry has sent the Petition for Inquiry and Report has reported that the Petitioner should be given the custody of the children. The matter was thereafter placed for further argument as Counsel wanted an opportunity to make further submissions. Counsel for the wife now submits that the remedy by way of Habeas Corpus is not open to the petitioner in that he had filed the Divorce Case No. 4298 Badulla in which he should seek any Order he wants in regard to the custody of the children of the marriage. He relies on the Case *In re B. S. Liyana Aratchie*[1].

[1] (1958) 60 *N. L. R.* 529.

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The question for decision in that Case was whether the proper procedure for obtaining the *custody of a child entrusted to a parent by a competent Court of Law* in the exercise of its matrimonial jurisdiction is by way of Habeas Corpus. The Court decided it was not, for the Writ is not granted for the purpose of testing a decision made by a Court which has acted within its jurisdiction. Halsbury Third Edition Vol. 11 Page 36 Section 69 which points out that the Writ is not granted where the effect of it would be to question the decision of an inferior Court on a matter within its jurisdiction or where it would falsify the Record of a Court which shows jurisdiction on the face of it was quoted with approval.

In the present Case the Plaint shows that the Plaintiff did not seek an Order from the District Court of Badulla in regard to the custody of the children when he filed his Divorce Case No. 4298. There is no Rule of Law that a Plaintiff in a Divorce Case must necessarily ask for the custody of the children for it may well be that he is satisfied by the fact that the Law recognizes him as the natural guardian of his children and therefore entitled to their legal custody in preference to all others.

It will be seen that the question of the Court having made an Order in regard to the custody of the children does not therefore arise in the present Case.

A Parent or Guardian or other person who is legally entitled to the custody of a child can regain that custody when wrongfully deprived of it, the unlawful detention of the child being regarded as equivalent to unlawful imprisonment.

The Law recognizes that the father is the natural guardian of his children and entitled to their legal custody unless he has been deprived of it by the Order of a competent Court. Anyone keeping the children without his consent unless armed with the Order of a Competent Court can be said to be keeping them in unlawful detention. His remedy would be by way of Habeas Corpus.

It is not the fact that a Divorce Case was filed but the fact that the Court made an Order in regard to custody of children in it that is the bar to a Habeas Corpus Application being filed in reference to that same custody.

It appears to me therefore that the Petitioner is entitled to bring this Application. A perusal of the Report of the Magistrate satisfies me as to the correctness of his conclusion. I order the Respondent to hand over the children to the Petitioner in the presence of the Magistrate in the Magistrate's Court of Badulla on such date as the Magistrate will find convenient or to satisfy the Magistrate on that date that this Order has been complied with. I make no order as to Costs. The Respondent will be entitled to see the children on each Poya Day.

Application allowed.

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1969 *Present :* **Wijayatilake, J.**

W. H. AGNES NONA, Appellant, *and* PALIPANA (S. I. Police), Respondent

S. C. 413/68—M. C. Galle, 32796

Brothels Ordinance—Section 2 (a)—Offence of keeping or managing a brothel—Sentence of imprisonment—Duty of Court to exercise its discretion on proper material.

Before an accused is sentenced to a term of imprisonment under the Brothels Ordinance, the trial Court is expected to exercise its discretion on proper material, in the circumstances of each case.

APPEAL from a judgment of the Magistrate's Court, Galle.

H. Rupasingha, for the accused-appellant.

Shibly Aziz, Crown Counsel, for the Attorney-General.

October 1, 1969. WIJAYATILAKE, J.—

The accused has been charged with keeping or managing a brothel an offence under Section 2 (*a*) of the Brothels Ordinance. She was convicted and sentenced to six months rigorous imprisonment and a fine of Rs. 500. She was also bound over for a period of twelve months in a sum of Rs. 300.

Learned Counsel for the appellant submits that the only evidence led by the prosecution in regard to the charge is that of two accomplices. On their evidence, it would appear that they were common prostitutes and in those circumstances the version given by them has to be assessed with great care and caution. However, on a perusal of the evidence, particularly that of the accused herself, I am satisfied that the learned Magistrate has arrived at a correct verdict. He has stressed the fact that the witnesses are not of sound moral character, but that in a case of this nature it would be difficult to expect better witnesses and with the necessary care and caution he has assessed the evidence.

There is nothing against the accused and learned counsel for the appellant submits that the learned Magistrate has chosen to impose a sentence of imprisonment rather than a fine only although this is a first offence, without giving adequate reasons for the same. He has referred me to the case of *Podinona Perera v. Haniffa*[1] where Swan J. held that "where a magistrate chooses to impose a sentence of imprisonment rather than a fine for a first offence under the Brothels Ordinance, he must give reasons for so doing or at least the proceedings must show that he has exercised his discretion properly".

[1] (1953) 56 N. L. R. 165.

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On a reference to the Brothels Ordinance, it would appear that even on a second or subsequent conviction under this Ordinance, the Magistrate is given the same discretion. Thus it would seem that the Legislature has thought it fit to stress that before an accused is sentenced to a term of imprisonment under the Brothels Ordinance, he is expected to exercise his discretion on proper material, in the circumstances of each case. In the instant case, after conviction, the prosecuting Inspector of Police had mentioned that the accused had escaped a charge against her all these days although she was carrying on this trade on a large scale in the heart of the Galle city. This statement appears to have impressed the learned Magistrate. However, it is strange why the Galle Police was not sufficiently vigilant in checking the trade carried on by this woman if it was on such a large scale and why the Police had not taken any action till their services were called for by the Probation Department in this case.

In view of the fact that there is nothing against this woman, I delete the sentence of imprisonment and impose a fine of Rs. 500 in default six weeks rigorous imprisonment. Also acting under Section 2 of the Brothels Ordinance, I order her to enter into a bond in a sum of Rs. 500 with one or two sureties to be of good behaviour for a period of twelve months, in default of which she shall serve a period of three months rigorous imprisonment.

Sentence reduced.

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

M. V. G. FERNANDO, Appellant, *and* MEL MENDIS LTD., Respondent

S. C. 400/63—D. C. Hatton, 6635

Contract—Presumption of undue influence—Applicability as between employer and employee.

The presumption of undue influence does not apply in the case of a strictly contractual relationship of employer and employee, which is not of a fiduciary character. Accordingly, where an employee, having freely admitted his liability to pay a sum of money to his employer, enters into a contract voluntarily to pay that amount, no presumption of undue influence attaches to such contract, even though the motive for the contract on the part of the employee may be to avoid a criminal prosecution.

APPEAL from a judgment of the District Court, Hatton.

H. W. Jayewardene, Q.C., with *T. S. P. Senanayake* and *S. S. Basnayake*, for the defendant-appellant.

C. Ranganathan, Q.C., with *E. Gooneratne*, for the plaintiff-respondent.

Cur. adv. vult.

June 8, 1967. H. N. G. FERNANDO, C.J.—

Counsel for the appellant in this case did not request us to review the findings of fact which the learned trial Judge reached—that the defendant had voluntarily admitted his liability to pay to the plaintiff company the amount of about Rs. 26,000 representing the value of kerosene oil found short on a verification of stocks, and had agreed by his letter P1 to pay that amount, and that the defendant executed the conveyance P2 and the promissory note P3 voluntarily, and not in consequence of undue influence or in consideration of any agreement by the Managing Director of the company to desist from instituting criminal proceedings against the defendant.

The argument pressed in appeal was one of law : that because of the relationship of employer and employee subsisting between the company and the defendant, there is a presumption that undue influence was exercised, and that the presumption is either not rebuttable, or else was not rebutted by the evidence in this case. We do not agree that such a presumption is applicable merely because of the existence of the relationship of employer and employee—Chitty on Contracts (21st Ed. 573) and Wille's Principles of South African Law (p. 322—5th Ed.) refer to the presumption as being applicable in the case of an

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1*——J 12282—2,255 (3/70)

attorney and his client, a doctor and patient, a parent and child, a guardian and ward, a spiritual adviser and his disciple. In all these cases, the one party occupies a position of a fiduciary nature to the other, and the other party reposes a trust or confidence in him. The presumption arises because of this special relationship, and does not attach in the case of the strictly contractual relationship of employer and employee, which is not of a fiduciary character. Even the cases in which the presumption has been held to apply are easily distinguishable from the present case. Here there was an admitted antecedent liability to pay to the plaintiff company a specific sum of money. The liability was discharged by the conveyance P2 and the promissory note P3. Thus the facts establish that the *causa* for the conveyance was the discharge of the defendant's liability (in part) to pay the sum of money to the company. The case then is no different from one in which an employee, having freely admitted his liability to pay a sum of money to his employer, makes a cash payment to discharge the liability. Even though the defendant may have entertained a hope that he might avoid a criminal prosecution, that was only a motive for his executing the conveyance ; the *causa* or consideration was the discharge of the admitted liability.

For these reasons, I would affirm the judgment and decree, and dismiss the appeal with costs.

SIRIMANE, J.—I agree.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

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

L. PIYADASA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 94 OF 1966, WITH APPLICATION NO. 157

S. C. 37—M. C. Balapitiya, 47067

Evidence Ordinance—Section 27—How much of information received from accused may be proved—"Fact discovered"—Statement made by accused from the dock—Summing-up—Non-direction.

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(i) When the Police Inspector who recorded a statement of the accused-appellant in the course of his inquiry under Chapter XII of the Criminal Procedure Code was being examined as a prosecution witness, Crown Counsel sought to prove in evidence, through the witness, two sentences (barring the words " close to the spot ") out of that statement (P22), in terms of section 27 of the Evidence Ordinance. The two sentences were :—

" I hid the sword under some leaves close to the spot. I can point out the place to the police. "

The trial Judge then directed that the word " sword " should be substituted for the word " place " and that all that should be elicited from the witness were the words " I can point out the sword to the police ".

Held, that, inasmuch as both sentences appearing in document P22 were admissible under section 27 of the Evidence Ordinance, it was not possible to say that the admission of the document, with the substituted word, could have caused any prejudice to the accused.

(ii) In regard to an exculpatory statement made by the accused from the dock, the trial Judge directed the Jury thus :—

" If you take the view—this is important—that his statement is true or at least it is probably true, then the case for the Crown must fail because it must cause a reasonable doubt in your mind. "

Held, that the charge to the Jury in respect of the dock statement of the accused was unduly unfavourable to the accused and constituted a non-direction on a necessary matter. It was capable of leaving in the minds of the jury the impression that even if the appellant's statement raised a reasonable doubt as to the probable truth of the Crown's case, that was not sufficient to enable him to claim a verdict of acquittal.

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

Colvin R. de Silva, with *Nihal Jayawickrama*, *U. de Z. Gunawardena* and *Miss A. P. Abeyratne*, for the accused-appellant.

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

Cur. adv. vult.

January 27, 1967. T. S. FERNANDO, J.—

At the conclusion of the argument upon this appeal we quashed the conviction of the appellant on the charge of murder but, acting in terms of the proviso to section 5 (2) of the Court of Criminal Appeal Ordinance, ordered a new trial on the same charge.

Mr. de Silva, on behalf of the appellant, raised three grounds of appeal which may be set out as follows :—

(1) There was an illegal reception of oral evidence of part of a statement made by the appellant which had been recorded under section 122 of the Criminal Procedure Code ;

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(2) That even if it was part of the document that was sought to be admitted in terms of section 27 of the Evidence Ordinance, what was actually led in evidence was a part of the recorded statement as revised in accordance with a direction of the trial judge ; and that such revision was not legally permissible ;

(3) That certain directions to the jury relating to the manner in which the appellant could claim an acquittal constituted a misdirection in law.

The first two grounds above set out may conveniently be considered together. When the Police Inspector who recorded a statement of the appellant in the course of his inquiry under Chapter XII of the Criminal Procedure Code was being examined as a witness called by the prosecution, Crown Counsel informed the judge, in the absence of the jury, that he proposed to prove in evidence, through the witness, two sentences out of that statement. These sentences both appear in document P22 and they are reproduced below :—

"I hid the sword under some leaves close to the spot. I can point out the place to the police."

He said he did not propose to elicit in evidence the last four words of the first of these two sentences, i.e. the words "close to the spot". After hearing argument, the learned judge ruled that he would only allow part of these two sentences to be elicited, and directed that all that should be elicited were the words "I can point out the sword to the police ".

Now the words directed to be so elicited were not the actual words used by the appellant. He had said "I can point out the place to the police". The word "sword" which was substituted for the word "place" was one to be found in the earlier sentence which, according to the judge's direction, was not to be admitted. The relevant part of the direction as appearing in the record of the trial was in the following terms :—

"Omit the words from the statement "I hid the sword under some leaves close to the spot"."

After the making of this ruling and the giving of this direction, the questioning of the Inspector and his answers took the following form :—

Q. "What is that portion of the statement which led you to discover the sword ? "

A. "I can point out the sword to the police."

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Q. " You produce a certified copy of that marked P 22? "

A. " Yes ".

In view of the learned judge's ruling and the submission of both counsel thereto which must naturally be assumed in the circumstances, we must also assume that, in spite of the text of P 22 as it appears on record, all that was placed in evidence were the words

" I can point out the sword to the police."

The first ground of appeal was dependent on the criticism that what was placed before the jury was not part of the document forming the record of the statement of the appellant but oral evidence as to its contents. The statement being one required by law to be reduced to writing, its contents could have been proved only by a production of the written document. As to this ground of appeal we are bound to observe that the record shows on its face that P 22 (or that part of it which was allowed) was actually produced in the case as evidence. No doubt, there was a substitution for one of the words ; but that substitution is the subject of complaint in the second ground of appeal to which we could now turn our attention. As to this, Mr. de Silva submitted that what was placed before the jury was part of the appellant's statement in a form that was not employed by the appellant himself. There is some technical merit in this submission, and a trial judge should be careful not to attempt to interpret, or to call upon the jury to interpret, any part of a person's recorded statement except by reference to such other parts of that same statement as may have been admitted in evidence. Moreover, if what an accused person is proved to have stated is to be used against him, it is important to restrict that use to the words actually employed by him and not to embrace other words alleged to be an interpretation of his actual words. In the instant case, however, both sentences appearing in document P 22 were, in our opinion, admissible under section 27 of the Evidence Ordinance, and Mr. de Silva conceded that they were so admissible. In these circumstances we do not find it possible to say that the admission of the document (with the substituted word) could have caused any prejudice to the appellant. The first two grounds of appeal fail.

We note that Crown Counsel, on behalf of the prosecution, expressly informed the judge that he did not seek to lead in evidence the words " close to the spot " appearing in P 22. This was a concession on the part of the prosecution, and our opinion that both sentences in P 22 were admissible under section 27 of the Evidence Ordinance should not be treated at the re-trial as indicating any view on our part that the prosecution is bound to seek to admit them. This concession indicated a fair attitude on the part of the prosecutor, acting within his discretion, and we have no desire to fetter in any way that kind of exercise of discretion.

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It would not have been necessary to say anything more here in regard to what took place at the trial in respect of the appellant's statement to the Inspector but for the form (reproduced below) of the question put by Crown Counsel.

Q. " What is that portion of the statement which led you to discover the sword ? "

As we have ordered a retrial, I should like to refer on this occasion also to the observations of the Privy Council in the case of *Kottaya v. Emperor* (1947) A. I. R. (P. C.) at p. 70 in respect of section 27 of the Evidence Ordinance :—

> " The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence ; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."
>
> . . . . . .
>
> "In their Lordships' view it is fallacious to treat the " fact discovered" within the section as equivalent to the object produced ; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this ; and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discoverd. Information supplied by a person in custody that " I will produce a knife concealed in the roof of my house " does not lead to the discovery of a knife ; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ' with which I stabbed A ' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The third ground of appeal relates to a direction by the learned trial judge as to the circumstances in which the appellant could have claimed a verdict of acquittal. The appellant did not give evidence by entering the witness box ; instead, he made a statement from the dock in the course of which he related how he surprised the deceased up a coconut tree belonging to the estate of which he was the watcher at this time.

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that the deceased came down the tree, pulled out a knife and attempted to stab him whereupon he used a club he had with him to hit the deceased. The blows which proved fatal had been inflicted with a cutting weapon ; the appellant in the course of his dock statement said that these blows had been struck by another man who, he claimed, had turned up in response to cries he raised. In respect of this statement, the trial judge directed the jury thus :—

> " If you take the view—this is important—that his statement is true or at least it is probably true, then the case for the Crown must fail because it must cause a reasonable doubt in your mind."

I may here observe that if the jury thought that the statement was true or probably true, then it must follow that the case for the Crown was false or probably false, not merely that a reasonable doubt was raised in regard to its truth. Moreover, in the form in which the direction was given, we cannot rule out the likelihood of the jury falling into the error of supposing that for a reasonable doubt to arise in regard to the Crown case the statement of the appellant must at least be probably true, the more so in this case where the learned judge did not attempt to explain what constitutes a reasonable doubt except to say that it " must be a real doubt as opposed to a doubt roused by imagination or fancy".

What the learned judge went on to say immediately after the passage reproduced above only served to emphasize what he had already said :

> " You will have to make up your mind whether you can accept it as a truthful statement or as a probably true statement. But if you hold that it is improbable or that it is impossible or that you disbelieve him, then, of course, you must reject that statement."

While there was nothing in this part of his charge that was erroneous in law so far as it went, his direction to the jury did not go far enough. Even if the jury did not consider the appellant's statement to be true or probably true, yet if the statement could have caused them to entertain a reasonable doubt as to the truth of the Crown case the appellant was entitled to claim a verdict of acquittal. There was an omission to give the jury a direction of this nature, a direction which we consider was necessary in the circumstances. Instead, towards the close of his charge, the learned judge repeated himself in the following words :—

> " What is the opinion you form in regard to the statement of the accused ? Do you think it is true or probably true ? If you think it is true or probably true, then you must acquit him because it casts a reasonable doubt on the Crown's case."

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The appellant's complaint that the charge to the jury on this point was unduly unfavourable to him and constituted a non-direction on a necessary matter is in our opinion well-founded. It was capable of leaving in the minds of the jury the impression that even if the appellant's statement raised a reasonable doubt as to the probable truth of the Crown's case that was not sufficient to enable him to claim a verdict of acquittal. The ground of misdirection had to succeed and the appeal had therefore to be allowed.

There was a further point arising out of a direction of the learned judge in respect of the defence of person that arose from the appellant's statement. Complaint was made that the judge overlooked the existence in that statement of a reference to what the deceased did with a knife which, the appellant stated, the deceased had with him. Said the judge : " Now, what is the evidence to show that he was exercising the right of private defence of his person ? We know that the deceased had that knife. . . . . One does not know what he did with that knife." This complaint too was well-founded ; but in view of the nature of the order we have made on this appeal it is not necessary to examine further what effect this misdirection on a question of fact was likely to have caused in relation to the verdict.

Case sent back for new trial.

1969 *Present :* **Siva Supramaniam, J.**

T.W. CHARLES SILVA, Appellant, *and* Mrs. D. C. MANCHANAYAKE, Respondent

S. C. 125/66—C. R. Colombo, 90762

*Rent Restriction Act (Cap. 274), as amended by Act No. 12 of 1966—Sections 9, 12 A, 13, 23—Sub-letting of rented premises—Word " premises " in s. 12 A (b) includes " part of the premises "—Rent Restriction (Amendment) Act, No. 10 of 1961, s. 11—Servitude—*Jus superficiarium.

If a tenant of premises to which section 12 A of the Rent Restriction Act applies sublets a part of the premises without the written authority of the landlord, he is liable to be ejected from the premises.

A tenant of premises governed by section 12 A of the Rent Restriction Act erected, with the consent of the landlord, certain temporary buildings on the land which formed part of the premises and let those buildings to a third party S without the landlord's written authority. During the period of the tenancy, the local authority assessed separately for rating purposes the temporary buildings and the land on which they stood. The rates in respect of the newly assessed buildings were paid by the tenant and not by the landlord.

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Held, (i) that it could not be contended that what was let by the tenant to S was a *jus superficiarium*.

(ii) that, despite the variation of language between section 9 (1) and section 12 A (*b*) of the Rent Restriction Act, the latter section prohibited the subletting not only of the entirety of the premises let but also of part of the premises. Therefore, when the tenant let the temporary buildings, he necessarily let also the land on which the buildings stood, and that land was unquestionably part of the premises of which he was tenant. He was thus liable to be ejected on the ground of subletting.

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

H. W. Jayewardene, Q.C., with *P. Nagendran, B. Eliatamby* and *M. Devasagayam*, for the defendant-appellant.

C. Ranganathan, Q.C., with *D. T. P. Rajapakse*, for the plaintiff-respondent.

Cur. adv. vult.

July 31, 1969. SIVA SUPRAMANIAM, J.—

The question that arises for decision on this appeal is whether a tenant of rent controlled premises, the standard rent of which does not exceed Rs. 100 per month, who, after erecting with the consent of the landlord, certain temporary buildings on the land which forms part of the said premises lets those buildings to a third party without the landlord's written authority is liable to ejectment on the ground that he has sublet the premises in terms of S. 12 A of the Rent Restriction Act (Cap. 274) as amended by Act No. 12 of 1966.

The defendant took on rent from the plaintiff's husband premises No. 46 (renumbered later as No. 128), Subadrarama road, Nugegoda, which consists of a tiled house and land appurtenant thereto at a monthly rental of Rs. 20. The defendant erected on the appurtenant land, with the permission of the plaintiff's husband certain temporary buildings. The defendant undertook to demolish the said buildings on termination of the tenancy and to remove the materials without causing any damage to the land. On the death of the plaintiff's husband, the defendant became the tenant of the plaintiff on the same terms and conditions.

During the pendency of the tenancy, the local authority assessed separately for rating purposes the temporary buildings and the land on which they stood and numbered that portion as No. 128/1. The rates in respect of No. 128/1 were paid by the defendant while the plaintiff continued to pay the rates in respect of No. 128. It is admitted that the defendant, without the consent of the plaintiff, gave on rent the portion numbered 128/1 to one Subramaniam at a monthly rental of Rs. 90 and that Subramaniam continued to be the tenant of that portion even after the date of the commencement of the instant case.

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The plaintiff's case is that the defendant sublet the premises of which he was the tenant without her written consent and is consequently liable to be ejected therefrom in terms of S. 12A of the Act. The word "premises" was not defined in the Act as it originally stood but by an amendment effected by S. 11 of the Rent Restriction (Amendment) Act No. 10 of 1961, it was defined as follows :—

> "Premises mean any building or part of a building together with the land appertaining thereto."

It was submitted by Mr. Jayewardene that the buildings which bore the assessment No. 128/1 were erected by the defendant at his own expense with the permission of the plaintiff and what was let to Subramaniam was the right of a superficiary and that there was no subletting of the premises of which the defendant was the tenant. *Jus superficiarium* is a servitude recognised by our common law. Quoting Grotius 2. 46. 9. Layard C.J. in *Ahamado Natchie v. Muhamadu Natchie*[1] explained the right as follows :—

> "The *jus superficiarium* is the right which a person has to a building standing on another's ground . . . . .It is the right to build on the soil and to hold and use the building so erected until such time as the owner of the soil tenders the value of the building, if the amount to be paid has not been previously agreed upon."

Lascelles C.J., commenting on this right, stated as follows in the same case when it came up on appeal after a retrial :—

> "It is, however, clear that agreement between the landowner and the person who acquires the right is the foundation of the right. Voet 43, 17 defines "superficies" as denoting things such as trees, plants and especially buildings, growing or built on the surface of the soil which anyone has erected on land belonging to another with the consent of the owner on the condition that he may keep them in perpetuity or for a considerable period and generally on payment of rent."

It is unnecessary for the decision of this case to consider the question whether in Ceylon the servitude of *jus superficiarium* can be created otherwise than by a notarial agreement.

The permission that is granted by a landlord to a tenant to erect a temporary building on a land which is the subject matter of the tenancy, subject to the condition that the building is dismantled on the termination of the tenancy and the materials are removed, is not *jus superficiarium*. The nature of the permission in such a case negatives the grant of a right to the builder to remain in possession of the building in perpetuity or for a considerable period or until the owner tenders the value of the building. The submission, therefore, that what was let by the defendant to Subramaniam was the *jus superficiarium* must fail.

[1] *(1905) 8 N. L. R. 330 at p. 331.*

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It is common ground that the defendant did not sublet the entirety of the premises of which he was the tenant. But when he let the temporary buildings, he necessarily let also the land on which the said buildings stood, and that land was unquestionably part of the " premises " of which he was the tenant under the plaintiff. The question, then, is whether the subletting by the tenant of a part of the premises without the written authority of the landlord entitles the latter to institute an action for ejectment of the tenant. S. 12A of the Act permits a landlord to institute an action to eject the tenant of any premises the standard rent of which for a month does not exceed one hundred rupees where " such premises have been sublet without the written authority of the landlord of such premises ". Mr. Jayewardene submitted that it is only where the entiretv of the premises have been sublet that the landlord has a right of action, as the words " such premises " in S. 12A do not include " part of the premises ". He argued that since S. 9 of the Act which imposes a general prohibition on subletting by a tenant without the authority of the landlord specifies " the premises or any part thereof ", the legislature must have deliberately intended to exclude the subletting of a part of the premises from the ambit of the prohibition in cases where the standard rent does not exceed Rs. 100 per month. In further support of the argument it was said that S. 12A was enacted to give additional protection to tenants of small premises and that, therefore, the legislature had intentionally narrowed down the grounds for ejectment by omitting certain grounds applicable to other premises under S. 13. The question, then, is whether the legislature, by implication, intended to permit tenants of premises to which S. 12A applies, to sublet part of the premises, despite the express prohibition contained in S. 9 (1) against the subletting of any part of any premises to which the Act applies.

If a prohibition is imposed on alienation by way of sale, gift or lease of any premises, such prohibition would ordinarily apply to alienation of any part of the premises. If the provisions of S. 12A had been contained in an independent statute and not in an amending Act, there would have been little room for the argument that the prohibition against subletting does not apply to the subletting of a part of the premises. The difficulty in the present case arises from the fact that there is a variation of language between the principal Act and the amending Act and according to the ordinary canons of construction, the variation would be deemed to have been made deliberately.

S. 9 (1) of the Act prohibits the subletting by the tenant without the written consent of the landlord of the whole or any part of any premises irrespective of the rental value and under S. 23 a contravention of the prohibition constitutes an offence. Mr. Ranganathan submitted that S. 9 (1) has not been repeated by any provision in the amending Act and that it would be unreasonable to impute to the legislature an implied intention to permit under S. 12A (*b*) what had been prohibited under S. 9 (1) . Mr. Jayewardene, however, argued that subsections (1) and (2) of S. 9 refer to " any premises or any part thereof " and if the legislature

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intended S. 12A (*b*) also to apply to the whole or part of the premises, S. 12A (*b*) was superfluous as S. 9 (1) and (2) would have covered the case. He submitted that the legislature would not have enacted a superfluous provision of law.

S. 12A is so framed as to categorise all the circumstances under which a landlord may institute an action to eject his tenant, in cases where the authorised rent of the premises does not exceed Rs. 100 per month. The section provides that unless anyone of those circumstances is present, no action may be instituted by the landlord " notwithstanding anything in any other law ". If, therefore, the provision relating to subletting had not been included in S.12 A, it could have been contended that subletting was not a ground for ejectment in respect of premises to which S. 12A applied. Hence the contention of Mr. Jayewardene that if Mr. Ranganathan's argument is accepted, S. 12A would be a superfluity cannot prevail.

The best way to find out the intention of the legislature is to examine in what sense the word " premises " has been used in other similar clauses of the same section. S. 12A (*c*) authorises an action where " such premises have been used by the tenant thereof or by any person residing or lodging with him or being his subtenant for an illegal or immoral purpose". Can it be argued that the use of a part of the premises for an illegal or immoral purpose will not entitle the landlord to institute an action? Obviously, in this clause the word " premises " includes " part of the premises ". Similarly S. 12A (*d*) authorises an action where " wanton destruction or wilful damage to such premises has been caused by the tenant thereof or . . . . . " Does it mean that the landlord should wait till wanton destruction or damage is caused to the entirety of the premises before he can institute an action ? Obviously, in this clause too the word " premises " includes " part of the premises ". The legislature could not have intended the word " premises " to include " part of the premises " in clauses (*c*) and (*d*) but to exclude " part of the premises " in clause (*b*). It is therefore reasonable to hold that despite the variation in language between S. 9 and S. 12A, the legislature intended the word " premises " to include " part of the premises " in S. 12A (*b*). As Maxwell (Interpretation of Statutes, 11th Edition, p. 316) says : " Though the statute is the language of the three estates of the realm, it seems legitimate in construing it to take into consideration that it may have been the production of many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention. "

I am therefore of opinion that a tenant of premises to which S. 12A applies who sublets a part of the premises without the written authority of his landlord is liable to be ejected from the premises.

I dismiss the appeal with costs.

Appeal dismissed.

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1968 *Present :* **Samerawickrame, J.**

L. T. Z. ABDEEN, Appellant, *and* A. W. H. WICKREMASINGHE (Food and Price Control Inspector), Respondent

S. C. 734/67—M. C. Kalmunai, 28152

Control of Prices Act—Food Price Order C. 418—Dried chillies—Sale to a decoy—Applicability of maximum retail price to a consumer.

A sale of a small quantity (half a pound for instance) of dried chillies to a decoy is a sale to which the maximum retail price to a consumer laid down by Food Price Order C 418 applies, even though the decoy does not require the chillies for consumption but wants them only for the purpose of the raid.

APPEAL from a judgment of the Magistrate's Court, Kalmunai.

A. H. C. de Silva, Q.C., with *K. C. Kamalanathan* and *P. Nagendran*, for the accused-appellant.

F. Mustapha, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 2, 1968. SAMERAWICKRAME, J.—

This appeal raises the question whether a sale to a decoy of an article in respect of which Food Price Order No. C 418 had been made under the Control of Prices Act, is one in respect of which a price in excess of the maximum retail price to a consumer may not be paid. The Price Control Inspector who sent the decoy to make the purchase said that he asked the decoy to buy any price controlled article and that, at that time, he did not require chillies for consumption and that he wanted them only for the purpose of the raid.

The relevant part of Food Price Order No. C. 418 is as follows :— " I, Mahinda Brian Senanayake, Deputy Controller of Prices (Food), for the Island do by this Order—

(i) fix with immediate effect the prices specified in Columns 2 and 3 of the Schedule hereto to be a wholesale dealer's maximum wholesale price per hundredweight gross and a retail dealer's maximum retail price per pound nett to a consumer, respectively, above which the article specified in the corresponding entry in Column 1 of the Schedule shall not be sold within the Island of Ceylon ;

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(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 purpose of re-sale, or any sale of an article specified in column 1 of the Schedule in a quantity of one hundredweight gross 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 hundredweight gross for the purpose of consumption or use shall be deemed to be a sale by retail ; ".

Learned Counsel for the accused-appellant referred me to the fact that the price fixed was a maximum retail price to a consumer and also that by reason of paragraph (ii) (*b*) of the Order, a sale to be deemed to be a sale by retail had to be one for the purposes of consumption or use. He, accordingly, submitted that upon the evidence in the case, the sale of chillies to the decoy was not one that was caught up by the provisions of the Food Price Order and was, therefore, not one in respect of which the price was controlled.

The ordinary meaning of the term " wholesale " is selling in bulk or selling of articles in large quantities to be retailed by others. The ordinary meaning of the term " retail " is the sale of goods in small quantities. The sale in small quantities may be either to a dealer who buys it for the purposes of resale or to an user of the article. It appears from paragraph (ii) (*a*) of the Food Price Order that for the purpose of this Order it was intended that the sale of small quantities for the purposes of resale should be considered a sale by wholesale. It was apparently for the purpose of indicating that a retail sale was limited to one made to the user of an article that the words "Maximum retail price to a consumer" have been used. In paragraph (i) of the Order, therefore, the term ' consumer ' has been used as opposed to a dealer, who buys articles for the purpose of resale to others for retailing, and in this context, means a person who buys for his own use or for a purpose other than that of resale.

I should point out that the Order contains no definition of the terms ' wholesale ' and ' retail '. Paragraph (ii) of the Order merely provides that certain sales which may not ordinarily have been sales by wholesale or sales by retail should, for the purposes of the Order, be deemed to be such sales. Thus, it provides that the sale of any quantity for the purpose of resale should be deemed to be a sale by wholesale. It has also provision that the sale of a quantity of one hundredweight or more shall be deemed to be a sale by wholesale. A doubt may arise in respect of a sale of a quantity slightly less than one hundredweight as to whether it was a sale by wholesale or by retail. For example, as wholesale has not been defined and as one of the primary meanings of wholesale is a sale in bulk, the question may arise whether a sale of a hundred pounds of chillies to a user was not a sale by wholesale. Accordingly, paragraph (ii) (*b*) has the

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provision that the sale of any quantity less than one hundredweight for the purpose of consumption or use should be deemed to be a sale by retail.

In this case, if one takes the view, upon the evidence given by the Price Control Inspector, that the sale of chillies was not for the purpose of consumption or use, paragraph (ii) (*b*) would not apply, but the question would still remain whether it was sale by retail giving the terms ' sale by retail ' its ordinary meaning. The amount alleged to have been sold to the decoy was half a pound of dried chillies. This was certainly a sale of an article in a small quantity and, in my view, falls within a sale by retail. The decoy was not buying for the purpose of reselling the chillies and on the view that I have taken as to the meaning which that term has in paragraph (i), he is a consumer. I am of the view, therefore, that the sale of dried chillies made to the decoy was a sale to which the maximum retail price to a consumer applied and that the accused has charged a price in excess of the said maximum retail price.

Learned Counsel for the accused-appellant referred to the judgment in *Brierley v. Phillips, Brierley v. Brear* [1] in which Lord Goddard, C.J., dealing with the price control order in respect of the sale of eggs said, " What does ' consumer ' mean? If I were asked what ' consumer ' meant in an order or a statute, the first thing I would direct myself to do would be to give to the word the ordinary meaning which the English language attaches to it. The ordinary meaning which the English language would attach to that word in relation to an egg is a person who is going to eat the egg or to use it in the process of cooking in his own house. If I buy an egg for the purpose of putting one of my hens on it to hatch it, I do not consume that egg. I should not have thought anybody could by any possibility have said that a person who buys an egg for the purpose of hatching it is a consumer of an egg. "

The provision that he was dealing with prohibits the buying or selling the eggs where the seller was a producer owning 25 head of poultry or less to a consumer at a price above the maximum price laid down. There were apparently also other provisions which prohibit the producer who owned 25 head of poultry or less from selling eggs to any person for the purpose of a catering establishment and any person from buying eggs from such producer for resale to a catering establishment. Price was controlled under that provision, therefore, in respect of a transaction in which both the seller and the buyer belonged to different categories and were on the one side a producer owning only 25 head of poultry or less and on the other side a consumer. There were, therefore, indications in that legislation that the term ' consumer ' was used in a limited sense and Lord Goddard, C. J. held that it must be given its ordinary meaning and that, therefore, it did not include a person who bought the eggs for the

[1] (1947) 1 K. B. 541.

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purpose of hatching. In the price order under consideration by me, however, the indications are not that the term ' consumer ' has been used in a limited sense but rather the contrary.

Lord Goddard, C.J., stated that orders should be stated in a language which ordinary persons who will be affected by them can understand. He said, " It is surely desirable that orders creating criminal offences should be stated in language which the persons who may commit the offences—in this case, quite humble people, like cottagers—can understand. It is a very serious thing to produce orders, whether under Defence Regulations or otherwise, which create serious offences, if they are couched in language which does not make it clear whether a person is committing an offence or not. I am certainly not prepared to support such orders and to find persons guilty of criminal offences when the orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the persons to whom they apply cannot know whether they are acting legally or not, unless possibly they get counsel's opinion, or at any rate a solicitor's advice. "

Unlike the Order in that matter, the price order under consideration, in my view, is not couched in language which is open to all sorts of meanings and likely to cause all sorts of difficulties. The meaning of the provision is reasonably plain. While there is no obscurity or want of clearness, a semblance of them was made to appear, quite legitimately of course, by the adroit use of legal technicalities and by forensic ingenuity of a high order. The mists of uncertainty so caused, however, yield to and are dispelled by careful examination of the language of the provisions unhampered by preconceived notions as to the meanings which are to be attributed to the terms used in them.

I am, therefore, of the view that the sale to a decoy of the said chillies was one to which the maximum retail price to a customer laid down by Food Price Order No. C. 418 applied. I am fortified with the view that I have taken by the fact that G. P. A. Silva, J. in *K. A. Martin v. Kandy Police* [1] and Tennekoon, J. in *H. M. Podimenike v. Inspector of Police, Kiriella* [2] have held that a sale to a decoy was a sale by retail for the purpose of the Price Control Act and an order made thereunder. They have gone beyond what I have found it necessary to do and held that such a sale was one for consumption or use and fell within the provisions in paragraph (ii) (*b*) of the Order. I am, therefore, of the view that the conviction of the appellant must be affirmed.

Learned Counsel for the appellant submitted that the sentence of three months rigorous imprisonment was without justification. There is nothing on the record to show that the appellant had any previous convictions and I do not see any reason why the Magistrate should have imposed anything more than the mandatory term of four weeks R. I.,

[1] (*1967*) *70 N. L. R. 141.* [2] (*1967*) *72 N. L. R. 306.*

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which the Legislature, in its wisdom has enjoined on Courts to impose on all persons found guilty of this offence, irrespective of ages, previous record, antecedents and physical or other conditions. I, accordingly, alter the sentence of imprisonment to one of four weeks R. I. The fine of Rs. 2,000 in default six weeks R. I. imposed by the Magistrate will stand. Subject to this variation, the appeal is dismissed.

Appeal mainly dismissed.

1969 *Present :* **Weeramantry, J.**

M. H. M. HASSAN, Appellant, *and* INSPECTOR OF POLICE, PANADURA, Respondent

S. C. 748/68—M. C. Panadura, 5169

Control of Prices Act—Sections 3 (2) and 4 (1)—Contravention of Price Order of 7th November 1964 relating to sale of beef—Place of offence—Proof as to whether it fell within Kalutara district—Judicial notice—Power of Court to consult appropriate books of reference—Evidence Ordinance, s. 57—Administrative Districts Act (Cap. 392), Schedule 1—Ordinary meaning of " beef "—Whether it includes buffalo meat—Butchers Ordinance (Cap. 272), s. 2.

The accused-appellant was convicted of selling beef at a rate above the maximum controlled price. It was contended on his behalf (1) that there was no proof that the offence was committed within the administrative district of Kalutara to which the relevant Gazette notification applied, and (2) that the prosecution, by failing to eliminate the possibility that what was sold was the flesh of a buffalo, had failed to prove that the item sold was " beef " within the contemplation of the Price Order of 7th November 1964.

Held, (i) that, for the purpose of ascertaining whether the village of Keselwatte, which was the place where the offence was committed, fell within Panadura, section 57 of the Evidence Ordinance empowered the Court to consult, as an appropriate book of reference, the compilation of the Department of Census and Statistics known as An Alphabetical and Numerical List of Villages in the Western Province. Panadura in its turn was within the administrative district of Kalutara, as would appear from the second entry in the first Schedule to the Administrative Districts Act.

(ii) that the ordinary meaning of beef does not exclude the flesh of a Ceylon buffalo.

APPEAL from a judgment of the Magistrate's Court, Panadura.

Colvin R. de Silva, with *M. T. M. Sivardeen* and *I. S. de Silva*, for the accused-appellant.

Shibly Aziz, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

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November 12, 1969. WEERAMANTRY, J.—

The accused appellant in this case stands charged, under Section 4 (1) of the Control of Prices Act read with Section 3 (2) of the Act, with the sale of beef at a rate above the maximum price fixed in terms of the Act and notified in Government Gazette No. 14,218 of 7.11.64. The accused is alleged to have sold a pound of beef without bones for Re. 1, whereas the maximum controlled price was 90 cents.

The two principal points taken on behalf of the appellant are firstly that there is no proof that the offence was committed within the administrative district of Kalutara to which the relevant Gazette notification applies, and secondly that the prosecution has failed to prove that the item sold was "beef" within the contemplation of the order in question.

The first contention is based on the fact that the stall at which the sale occurred has been described variously in the proceedings as the Keselwatte-Panadura stall and as the Sarikkamulla beef stall. It is submitted for the defence that there is no proof that Keselwatte-Panadura or alternatively Sarikkamulla are places falling within the administrative district of Kalutara.

In support of this contention the appellant submits certain decisions of this Court where appeals have been allowed against convictions on the basis of the failure of the prosecution to prove by affirmative evidence that the place where the offence was committed fell within the area to which the relevant Order applied. In *Jinadasa v. Edirisuriya* [1] the offence was committed at No. 135, Main Street, Deniyaya while in the area of operation of the price order the only reference to Deniyaya was a reference to the V.C. area of Deniyaya. There was no evidence that No. 133, Main Street, Deniyaya, was within the V.C. area of Deniyaya. It was held in that case that the prosecution had failed to prove that the sale took place in an area covered by the Price Order.

Another decision referred to was that in S.C. 1250/61/MC Matara 63947 [2] where Herat J. upheld the point taken for the appellant that there was no direct evidence tendered by the prosecution that the scene of offence, namely, Kotuwegoda, was within the administrative limits of Matara. The Court disapproved of an observation by the Magistrate that he could take judicial notice of this fact from his knowledge of the area. Again in *Hamza Naina v. Inspector of Police, Gampaha* [3] the place of offence was "Yakkala, in the Gampaha-Kirindiwela road", whereas the Price Order applied to the Colombo District outside the Municipal Limits of Colombo. It was held that the prosecution had failed to prove that the offence was committed within the Colombo District, as

[1] *S.C. 75/1968/M.C. Matara 36840/S.C. Minutes 13/1/69.*

[2] *S.C. 1250/61/M.C. Matara 64397/S.C. Minutes 14/6/62.*

[3] *(1968) 72 N. L. R. 166; 75 C. L. W. 90.*

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the Sub-Inspector of Police had admitted that he could not speak to the limits of the Colombo District. The Court observed that the Magistrate was not justified in presuming that the stall in question was within the Colombo District as the judicial districts of Ceylon with which the Magistrate might have been familiar did not correspond to the administrative districts of Ceylon as set out in the Administrative Districts Act No. 4 of 1955, Cap. 392. This case cited with approval another judgment of this Court in *Mendis v. Jayawardena* [1] where de Kretser J. arrived at a similar conclusion.

For reasons which I shall immediately mention it does not appear that any one of these decisions can assist the appellant in this case.

Though the description Sarikkamulla stall as well as the description Keselwatte-Panadura stall are found in the evidence in this case, it would appear that these are not descriptions of different stalls but of one and the same stall. Thus Inspector Rasanayagam speaks of the Sarikkamulla beef stall and says that he saw the decoy Jamis and Police Sergeant Saputantri at the beef stall meaning thereby the Sarikkamulla stall. Jamis speaks of the Sarikkamulla stall to which he proceeded on the instructions of the Inspector. Sergeant Saputantri on the other hand speaks of having proceeded to the Keselwatte-Panadura meat stall with Jamis on the instructions of Inspector Rasanayagam. The learned Magistrate as well, who presumably knows the area, has understood the evidence of all these witnesses to relate to the same stall, and has analysed their evidence on this basis. In a careful and comprehensive order he has made no reference to any contention that the descriptions relate to different stalls and it may therefore be safely assumed that no such suggestion was urged by the defence even at the stage of addresses. There can be no doubt then that the stall which Rasanayagam and James were referring to is the identical stall referred to by Saputantri and I must therefore conclude that this same stall is known by both descriptions. It follows that the evidence of Sergeant Saputantri constituted evidentiary material before the court indicating that the stall is situate in Panadura, and if further proof were wanting that Keselwatte is situate in Panadura, this is provided by a compilation of the Department of Census and Statistics known as An Alphabetical and Numerical List of Villages in the Western Province, to which the Crown has referred me. This work shows that the village of Keselwatte falls within Panadura. It is a work published by authority and an appropriate book of reference which in terms of section 57 this court may consult and act upon if indeed that were necessary.

Now Panadura in its turn is within the administrative district of Kalutara, as would appear from the second entry in the first Schedule to the Administrative Districts Act No. 24 of 1955, Cap. 392, and there is thus conclusive proof in this case that the beef stall in question falls within the administrative district of Kalutara.

For all these reasons I consider that there is sufficient material to satisfy the Court that the sale occurred within the area proclaimed.

[1] *S.C.543/68/M.C. Avissawella 30838/S.C. Minutes 23.10.68.*

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This suffices to distinguish the present case from the decisions cited in each of which there was no evidence showing the connection between the place of offence and the district proclaimed. A given place in Deniyaya could not be presumed to be within the V.C. area of Deniyaya or a place on the Gampaha-Kirindiwela road to be within the Colombo District in the absence of evidence to such effect or proof by alternative means.

I pass now to the second question urged on behalf of the appellant, namely that there is no proof adduced by the prosecution that the subject matter of the sale was " beef ".

It has been strenuously urged at the argument of this appeal that the prosecution has failed to exclude the possibility that the meat sold is buffalo meat, a species of meat which is often sold in butchers' shops as beef, and that so long as such a reasonable possibility exists, there can be no conviction of this offence.

This submission is made in view of the report of the Government Analyst which states that the production was found upon analysis to be beef within the meaning of that term in the Butchers Ordinance. A perusal of the Butchers Ordinance shows however that the word beef as therein used includes the flesh of any of the animals which in the Ordinance are denoted by the term " cattle "[1]. The word " cattle " is explained in section 2 of that Ordinance as including oxen, bulls, cows, calves and *tame buffaloes*. The only expert evidence before Court thus leaves open the possibility that the flesh in question is that of a buffalo and it is for that reason that the contention is advanced that the prosecution by failing to eliminate that possibility, has failed to prove that what was sold was beef.

It is necessary to note that the Price Order, which appears in Government Gazette No. 14,218 of 7th November 1964, directs among other matters that for the purpose of that order the expression " beef " does not include imported beef whether frozen, salt or chilled or any form of offal. Beyond that explanation the order does not seek to propound a definition of the expression " beef ". Indeed on this matter later orders such as the order produced by the defence and marked D4 do attempt a definition of beef and specify that beef shall mean the flesh of neat cattle or buffaloes and shall exclude any form of offal.

We have no such definition to guide us in regard to the present Price Order and we can therefore only proceed on the basis that the expression " beef " must be given the normal meaning which it bears in the English language. It is necessary then to ascertain whether the ordinary meaning of beef would exclude the meat of buffaloes.

The Oxford Dictionary defines beef as the flesh of an ox, bull or cow, used as food. The word also has certain extended meanings and is applied in this extended meaning to the flesh of any animal " of the ox kind ". Is then the buffalo an animal of the ox kind ?

[1] *Section 24.*

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Turning now to the meaning of the word " buffalo " one sees from the same Dictionary that the word, though properly denoting a kind of antelope, is the name of several species of *oxen*. According to the Dictionary it is applied to the animal *bos bubalus* originally a native of India, inhabiting most of Europe, Southern Europe and Northern Africa, which, the Dictionary observes, is tamed in India, Italy and elsewhere.

Now, the question before us is whether the Ceylon buffalo falls within the description of buffalo or *bos bubalus* which according to the Oxford Dictionary is a species of oxen, and thus an animal of the ox tribe, whose flesh would be beef.

The expression *bos bubalus* being a scientific term it becomes necessary for the ascertainment of its true meaning to consult appropriate works of reference, which this Court is entitled to do in terms of section 57 of the Evidence Ordinance[1]. I am assisted on this matter by the case of *Annakumaru Pillai v. Muthupayal*[2] where to ascertain the meaning of the word " chanks " the Court referred *inter alia* to the Encyclopaedia Britannica and Emerson Tennent's Ceylon.

I consider therefore that I would be entitled to seek further guidance on these matters from the Encyclopaedia Britannica and also from standard works on the fauna of Ceylon of which W. W. A. Phillip's Treatise on the Mammals of Ceylon is perhaps the most comprehensive and authoritative.

The Encyclopaedia Britannica while stating that *bubalus* (the buffalo) is a member of the ox family, goes on to describe as a variety of *bubalus* the Indian buffalo which it states is larger than the ox, less docile, and is employed as a draught animal. One learns from the same Encyclopaedia that the animal *bubalus* belongs to the sub-family *bovinae* of the mammal family known as *bovidae*.

W. W. A. Phillips in his treatise on the mammals of Ceylon[3] states that the family *bovidae* is subdivided into several divisions—*bovinae* (the cattle) *caprinae* (the sheep and goats) and so forth. The sub-family *bovinae* though represented in India by three genera is represented in Ceylon by only one—the *bubalus bubalis*, commonly termed the buffalo.

All this material indicates that the buffalo of Ceylon is the animal *bubalus* which is scientifically grouped as a member of the ox family, and is therefore an animal of the ox kind. Consequently its flesh would be " beef " as defined in the Oxford Dictionary and, in the absence of a definition in the Price Order, would be " beef " for the purposes of that Order. It follows that even if the prosecution has failed to eliminate the possibility that the article sold was buffalo meat, it has still proved that it is " beef " for the purposes of the Order in question.

For these reasons the appeal must fail and it is accordingly dismissed.

Appeal dismissed.

[1] See *Menon v. Lentin, (1941) 43 N. L. R. 34 at 35 ; 22 C.L.W. 24 at 25.*

[2] *(1904) I.L.R. 27 Madras 551 D.B.*

[3] *p. 318.*

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1969 *Present :* **H. N. G. Fernando, C.J.**

J. M. SHERIFDEEN, Appellant, *and*
M. B. GIRIHAGAMA (Inspector of Police), Respondent

S.C. 371/69—M. C. Kandy, 57043

Control of Prices Act—Charge of profiteering in sale of beef—Proof—Requirement of evidence of the accuracy of the scales in which the beef was weighed—Failure to seal the parcel of the beef—Effect.

In a prosecution for selling beef at a price in excess of the maximum controlled retail price—

Held, that, in view of the possibility that the scales used to weigh the beef could have been inaccurate and also of the possibility that, on account of failure to seal properly, there could have been tampering with the beef sold, there was doubt as to the guilt of the accused.

"Having regard to the fact that prison sentences are quite usual in cases of profiteering, it is important that when the alleged offence consists of selling under-weight there should be satisfactory evidence of the correctness of the scales in which articles are weighed before prosecutions are launched in respect of the sale of them."

APPEAL from a judgment of the Magistrate's Court, Kandy.

K. Thevarajah, with *S. Sittampalam*, for the accused-appellant.

Kosala Wijayatilake, Crown Counsel, for the Attorney-General.

November 26, 1969. H. N. G. FERNANDO, C.J.—

The appellant in this case has been convicted of selling 15 ounces of beef for Re. 1·20 in an area in which the maximum controlled retail price for a pound of beef is Re. 1·15. The evidence of the prosecution was that a police constable was instructed to purchase a pound of beef without bones from the appellant and that the appellant delivered some beef to the constable and charged him Rs. 1·20. The evidence was that the beef was weighed at a Co-operative store in the presence of the accused and found to weigh 15 ounces, and that it was taken to the police station and parcelled and sealed in the presence of the accused. Thereafter the parcel was sent to the Veterinary Surgeon who identified it as containing beef without bones.

The Veterinary Surgeon however was definite that the parcel when he examined it was not sealed. His evidence casts serious doubt on the truth of the prosecution case that the accused was present right throughout from the time of the sale of the beef up to the time when the parcel was examined by the Veterinary Surgeon. If as the evidence of this witness reveals, the parcel was not sealed when it was brought to him,

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there was every possibility that some portion of the beef which had been sold by the appellant to the police constable had been abstracted, thus reducing the weight of the beef which had been sold to the constable.

Moreover there was no evidence to show that the scales on which the beef was weighed was accurate. Having regard to the fact that prison sentences are quite usual in cases of profiteering, it is important that when the alleged offence consists of selling under-weight there should be satisfactory evidence of the correctness of the scales in which articles are weighed before prosecutions are launched in respect of the sale of them. In view of the possibility that the scales used in this case may have been inaccurate and also of the possibility that there could have been tampering with the beef sold by the appellant, there was in my opinion doubt as to his guilt.

The appeal is allowed, and the conviction and sentence are set aside.

Appeal allowed.

1969 *Present :* **de Kretser, J.**

A. NADARAJAH, Appellant, *and* GOVERNMENT AGENT, JAFFNA, Respondent

S. C. 52/69—M. C. Point Pedro, 2399

Motor vehicles—Prosecution of registered owner for possessing a vehicle without a licence—Presumption of possession by registered owner—Rebuttability—Motor Traffic Act, s. 25 (2).

A person is not liable to be convicted of the charge of possessing a motor vehicle without a licence in contravention of section 25 (2) of the Motor Traffic Act if he proves that, although he is for the time being the registered owner, he neither used the vehicle nor was in possession of it at the time relevant to the charge.

APPEAL from a judgment of the Magistrate's Court, Point Pedro.

R. L. N. de Zoysa, for the accused-appellant.

Kosala Wijayatilake, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 4, 1969. DE KRETSER, J.—

The Magistrate of Point Pedro (Mr. K. Viknarajah) convicted the Accused of the charge of possessing a motor vehicle for which a licence was not in force on 1.1.67. He fined him Rs. 10 in addition to sentencing him to pay the licence fee of Rs. 95 as a fine. The accused has appealed.

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The Magistrate says, " Under Section 25 (2) (of the Motor Traffic Act) the person for the time being who is the registered owner shall be presumed to possess that vehicle unless the contrary is proved. The Accused has not proved anything to the contrary. I hold that the accused is presumed to possess the vehicle as he is the registered owner."

It appears to me that what the Magistrate meant to say is that as the presumption arising under the section had not been rebutted, he held that the vehicle was in the possession of the accused, the registered owner, who was therefore guilty of the offence.

The reason why he came to the conclusion of that " the accused has not proved anything to the contrary " is because he disbelieved T. Kanagaratnam, called for the Defence, who said that he was now the owner of the car in question having bought it on 1.8.65, and in fact had come to Court in it. He gave the history of how it came to be his as follows : the Accused had sold the car to one Ratnam, Ratnam sold it to Siviah Sivanandan, and he had bought it from Sivanandan. He did not send the relevant transfer to the Registrar until 30.11.66, and in sending it he put down the Accused as the previous owner. The Registrar wanted him, on 28.10.67, to get the signature of the Accused, and he contacted the Accused and the Accused said he would furnish the necessary information to the Registrar but he had not done so. In the result the car was still not registered in his name. Ratnam was also called for the Defence. He admitted that he had bought the car from the Accused and he sold it, he says, within a month of his purchase. He did not say to whom, nor was he asked.

The Magistrate says he does not accept the evidence of Kanagaratnam or Ratnam. He does not say why. It appears to me that Kanagaratnam's evidence that the car is in his possession should be accepted, more especially as no attempt was made to contradict that as far back as 30.11.66 he had claimed to be registered as the new owner, and that the Registrar had refused to do so without the signature of the Accused on the transfer form. The Registrar apparently had good reason for wanting that done, but the issue at this trial is one of possession.

The evidence called proves affirmatively who is in possession of this vehicle at the time relevant to this charge. That evidence rebuts the presumption under Section 25 (2) that the registered owner is in possession. The result is that the accused should not have been convicted for he neither used the vehicle nor was in possession of it.

The appeal that the conviction and sentence be set aside is allowed.

Appeal allowed.

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1969 *Present :* **H. N. G. Fernando, C.J., Sirimane, J., Alles, J., Weeramantry, J., and Wijayatilake, J.**

Mrs. LILY M. DE COSTA, Appellant, *and*
BANK OF CEYLON, Respondent

S. C. 365/64 (F)—D. C. Colombo, 51102/M

Cheques and dividend warrants—Collecting banker—Proceeds of a cheque credited to account of a person other than the true owner—Negligence—Liability of the banker to the true owner—Burden of proof—English law doctrine of conversion—Inapplicability of it in Ceylon—Applicability to a cheque transaction—Roman-Dutch law—History and scope of its applicability in Ceylon—Proclamation of 23rd September 1799—Adoption of Roman-Dutch Law Ordinance (Cap. 12)—An inaccuracy in s. 2 thereof—Ordinance No. 5 of 1852, s. 2—Scope and effect of it—Bills of Exchange Ordinance (Cap. 82), ss. 22, 27, 82, 98 (2)—Lost cheque—Secondary evidence—Evidence Ordinance, ss. 65 (5), 65 (3)—Banker's liability in English law—Applicability in Ceylon—Civil Law Ordinance (Cap. 79), s. 3—Action for money had and received—Maintainability—Prescription Ordinance (Cap. 68), s. 7—Quasi contractual liability—Condictio indebiti—*Unjust enrichment.*

Where a crossed " not negotiable " cheque in the form of a dividend warrant is indorsed by the payee with the words " Credit my account only ", a banker who collects payment of it and credits the proceeds to the account of a person other than the true owner is liable to pay the sum to the true owner if he acted negligently in crediting the collected sum to a wrong Account. In such a case section 82 of the Bills of Exchange cannot protect the collecting banker, and his liability has to be determined by the application of the English law of conversion in respect of cheque transactions. The Bills of Exchange Ordinance (read with section 2 of Ordinance No. 5 of 1852) has the effect that the liability of a negligent collecting banker in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

Alternatively, the collecting banker is liable to the true owner on the basis that he received the money for the use and benefit of the true owner and, accordingly, an action for money had and received would lie.

Where a collecting banker is sued by the true owner of a cheque for the recovery of the proceeds of the cheque credited by the banker to the account of a person other than the true owner, the onus, according to section 82 of the Bills of Exchange Ordinance, is on the banker to show that he was not negligent and that at the time when he received the cheque for collection there was something on the face of the cheque which justified the action taken by him ; in other words, the banker should show that the cheque was altered in such a manner as to mislead his officers.

Per FERNANDO, C.J., ALLES, J., and WEERAMANTRY, J.—The English law doctrine of conversion is not part of the common law of Ceylon.

Per SIRIMANE, WEERAMANTRY and WIJAYATILAKE, JJ.—The conversion of a cheque by a collecting banker is also a matter of banks and banking, and thus affords another basis for the application of English law.

2—J 12371—2,255 (3/70)

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Per SIRIMANE, J.—The general law of conversion has been considered to be part of our law from very early times. But it is not necessary to decide it in the present case.

Per WEERAMANTRY, J.—The plaintiff is also entitled to succeed on the basis of the law relating to unjust enrichment.

Daniel Silva v. Johanis Appuhamy (67 N. L. R. 457) discussed.

APPEAL from a judgment of the District Court, Colombo.

The plaintiff, who was a shareholder of Deniyaya Tea and Rubber Estates Company, received from the Company a dividend warrant in her favour for a sum of Rs. 30,637·13. The warrant was crossed "Not Negotiable" and was drawn on National & Grindlay's Bank. The plaintiff made on the back of the warrant the indorsement "Credit my account only" and duly affixed her signature. She then put the warrant in an envelope, addressed it to her Bank, viz., the City Office of the Bank of Ceylon, and gave it to a servant to be posted, but there was no proof of posting. The warrant got into the hands of a third party, one Loganathan, who was said to be the proprietor of "Movie & Co.". It was presented for payment at the Wellawatte Branch of the defendant Bank of Ceylon and the money realised was credited to the account of "Movie & Co.". The resultant position was that the amount collected by the defendant Bank on the dividend warrant, the true owner of which was the plaintiff, was paid by the defendant to a person other than the true owner.

In the present action, the plaintiff sued the defendant for the recovery of the amount of the dividend warrant on the basis that the Bank had wrongfully deprived the plaintiff of the proceeds of the warrant, or alternatively that the Bank had recovered the proceeds for the use of the plaintiff.

It was found by the Supreme Court, in the present appeal filed by the plaintiff, that the defendant's officers acted negligently in crediting the amount of the dividend warrant to the account of "Movie & Co." and that the trial Judge was wrong in his decision that there was no such negligence.

H. W. Jayewardene, Q.C., with *D. S. Wijewardane, M. Shanmuganathan, Mark Fernando* and *B. Eliyatamby*, for the plaintiff-appellant.

C. Ranganathan, Q.C., with *N. Satyendra, C. Sandrasagara, N. Tiruchelvam* and *V. Jegasothy*, for the defendant-respondent.

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Cur. adv. vult.

December 18, 1969. H. N. G. FERNANDO, C.J.—

The plaintiff sued the defendant, the Bank of Ceylon, for the recovery of a sum of Rs. 30,637·13, being the amount of a dividend warrant, on the basis that the Bank had wrongfully deprived the plaintiff of the proceeds of the warrant, or alternatively that the Bank had recovered the proceeds for the use of the plaintiff. The following facts as found by the learned District Judge are not now disputed.

In April 1958, the plaintiff received a dividend warrant drawn in her favour " pay Mrs. L. M. de Costa " by a Company of which she was a share-holder. The warrant was for a sum of Rs. 30,637·13 and was drawn on the National Overseas and Grindlays Bank, Colombo, which maintained a Dividend Account for the Company. The warrant when issued by the Company had been marked " & Co.", and bore a rubber stamping " Not Negotiable "; the plaintiff then made on the back of the warrant the endorsement " Credit my account only — Mrs. L. M. de Costa " and affixed her signature " Lily de Costa " below the endorsement ; the plaintiff had an account with the City Office of the Bank of Ceylon, and placed the warrant in an envelope addressed to the City Office ; she had given the envelope containing the warrant to a servant to post, but there was no evidence of posting, and the warrant was not received in the post by the City Office of the Bank. It was however common ground at the trial that the dividend warrant was in fact presented for payment on 30th April 1958, by the Bank of Ceylon to the National Overseas & Grindlays Bank, which paid out to the Bank of Ceylon Rs. 30,637·13 being the amount of the warrant. This amount, however, was not credited to the plaintiff's account.

The case for the Defendant Bank can be briefly stated : one Loganathan, under the business name " Movie and Co.", had a current account at the Bank's Wellawatte Branch, and had as its customer deposited to the credit of that account the dividend warrant for Rs. 30,637·13 referred to in the plaint for the purpose of the proceeds thereof being collected and credited to the said account ; the Bank had received payment of the amount of the dividend warrant for the said customer and had credited the proceeds to that customer's current account ; in receiving payment of the dividend warrant and crediting the proceeds to the account of "Movie & Co." the Bank had acted in good faith and without negligence ; and the Bank had in good faith in the ordinary course of its business as a Banker paid out the proceeds of the warrant on cheques drawn by "Movie & Co." on the said current account, before the Bank had notice of the plaintiff's alleged right in or to the dividend warrant or its proceeds.

The position for the plaintiff at the trial was that the first basis of the claim against the defendant Bank was in delict, and that on this basis the plaintiff was entitled to recover as for a conversion if the English law applies. The position for the plaintiff also was that even if the Roman-Dutch Law be applicable the defendant Bank was yet liable in delict. The learned District Judge over-ruled a submission for the

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defendant that the first cause of action pleaded in the plaint was based on contractual liability and not on conversion ; I am in agreement with this ruling of the District Judge, which was not challenged in appeal by defendant's Counsel, and I have nothing to add to the reasons stated by the Judge for his ruling.

In so far as the plaintiff claimed that the defendant was liable as for a conversion as known to the English Law, the learned District Judge considered himself bound by a decision of this Court in the *Bank of Ceylon v. Kulatilake*[1] holding that the Law of Ceylon on the subject of a Banker's liability is the same as in England. He nevertheless proceeded to hold further on the facts that the Bank had established that it had acted in good faith and without negligence, and that accordingly the Bank was protected from liability by s. 82 (2) of the Bills of Exchange Ordinance (Cap. 82).

Subsequent to the delivery of the judgment of the District Judge in the present case, a Bench of three Judges of this Court decided the case of *Daniel Silva v. Johannis Appuhamy* [2] and held that the English doctrine of conversion is not applicable in Ceylon, and Tambiah, J. further held that the case of *Kulatilake v. Bank of Ceylon* had been wrongly decided. It thus appeared, when this appeal was first argued before my brother Sirimane and myself, that there was need to settle the conflict of opinion as to the Law of Ceylon governing a matter of great commercial importance, and hence the present appeal was reserved for a decision of a Bench of five Judges. The long delay in the final disposal of the appeal by this Court is attributable to these circumstances.

One argument of Counsel for the Appellant was that the English doctrine of conversion is part of the law of Ceylon, because the doctrine has been applied in this country in judgments of this Court. Before referring to the judgments which were relied on for this argument, it is of interest to consider the question whether the law of Ceylon authorised such a doctrine to be applied by our Courts, especially since the profitable researches of Mr. Satyendra have revealed that the Statute law relevant to that question may not have been properly understood in the past. Our consideration of this matter has been much facilitated by the Collection of Documents in Volume II of Dr. G. C. Mendis's edition of the *Colebrook-Cameron Papers*.

The first formal Commission to a British Governor of Ceylon, the Letters Patent issued on 19th April 1798 to Governor Frederick North, declared the pleasure of His Majesty (George III) that the Government of Ceylon be "placed as far as circumstances will permit under the Direction" of "the United Company of Merchants of England trading to the East Indies". A similar declaration was contained in the Royal Instructions of 26th March 1798 also issued to Governor North. The 5th clause of these Instructions declared His Majesty's Pleasure that the Administration of Justice in Ceylon should nearly as circumstances will permit be exercised by the Governor in conformity to the Laws and

[1] *(1957) 59 N. L. R. 133.* [2] *(1965) 67 N. L. R. 457.*

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Institutions that subsisted under the ancient Government of the United Provinces. This clause permitted some deviations from those Laws, and the extent of the permitted deviations were set out in the Proclamation of 23rd September 1799, the Preamble and the first clause of which it is useful to set out here fully :—

"WHEREAS it is His Majesty's gracious Command, that for the present and during His Majesty's will and pleasure, the temporary Administration of Justice and Police in the Settlements of the Island of Ceylon now in His Majesty's Dominion, and in the Territories and Dependencies thereof, should, as nearly as circumstances will permit, be exercised by us, in conformity to the laws and Institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations as may render a departure therefrom, either absolutely necessary and unavoidable, or evidently beneficial and desirable ; subject also to such directions, alterations, and improvements, as shall be directed or approved of by the Court of Directors of the United Company of Merchants of England trading to the East Indies, or the secret Committee thereof, or by the Governor-General in Council of Fort William in Bengal.

We therefore, in obedience to His Majesty's Commands, do hereby publish and declare, that the administration of Justice and Police in the said Settlements and Territories in the Island of Ceylon, with their Dependencies, shall be henceforth and during His Majesty's pleasure exercised by all Courts of Judicature, 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 we shall by these presents 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."

The Proclamation of 1799 thus declared that the Administration of Justice shall be exercised by the Courts according to the Roman-Dutch Law, subject to deviations or alterations—

(*a*) in consequence of emergencies, or absolutely necessary and unavoidable, or evidently beneficial and desirable ;

(*b*) by the Court of Directors of the East India Company or the Secret Committee thereof or the Governor of Fort William ;

(*c*) by Proclamation of the Governor ;

(*d*) by lawful authority ordained.

But the Proclamation did not authorise any such deviations or alterations to be made by the Courts of law.

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There were in fact several subsequent Proclamations passed by the Governor under the power reserved by the Proclamation of 1799. But these became obsolete or inapplicable after a somewhat comprehensive Charter of Justice was enacted in 1833. Consequently, Ordinance No. 5 of 1835 was enacted by the Governor with the advice and consent of the Legislative Council. This Ordinance repealed the Proclamation of 1799 and several other Proclamations, but the repeal of the Proclamation of 1799 was made subject to an express exception in the following terms :

> " except in so far as the same (i.e. the Proclamation of 1799) 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 Courts of Judicature, Civil and Criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces ; which laws and institutions it is hereby declared still 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 be by lawful authority ordained."

Thus the Legislature of Ceylon declared in 1835 that the Roman-Dutch Law shall continue to apply in Ceylon by virtue of the Proclamation of 1799, and after the enactment of the Ordinance of 1835, deviations and alterations from or of the Roman-Dutch Law were not permitted to any of the authorities specified in the Preamble to the 1799 Proclamation, and were permitted only if they were *ordained by lawful authority*. The meaning of this expression becomes clear when account is taken of the fact that the Letters Patent of 23rd April 1831 (*Mendis*, Vol. II, p. 138) had established a Council of Government in Ceylon, the membership of which was prescribed in the Royal Instructions of 30th April 1831 (idem p. 142), and of the provision in the ninth clause of these Instructions which required the Governor ordinarily to act with the advice of that Council. From 1831 therefore, the power to make laws for Ceylon was committed to the Governor, acting with the advice and consent of the Council, subject of course (as in all British Colonies) to the Governor's special powers to act without such advice. What is important for present purposes is that the Proclamation of 1799 and the Ordinance of 1835 did not authorise *the Courts* to alter or deviate from the Roman-Dutch Law or to apply in Ceylon principles of English Law which conflict with the Roman Dutch Law. From 1835 at least, such deviations or alterations could be effected only by Ordinance.

This examination of the relevant Documents and of the Ordinance of 1835 has shown that Chapter 12 of the Revised Edition of the Legislative Enactments of 1956 is not an accurate reproduction of the provisions of law relating to the application in Ceylon of the Roman-Dutch Law ; Section 2 of Chapter 12 is incorrect in purporting to permit any deviations or alterations other than those ordained by lawful authority.

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I pass now to refer to the judgments which, according to the argument of Counsel for the Appellant in this case, were instances of the application in Ceylon of the English doctrine of liability for the conversion of chattels. The note of a case in *1877 Ram. 17*, C. R. Matale 34526, states that the defendant unlawfully detained and would not produce jewels which had been entrusted to him. The Court apparently held that the refusal to produce the jewels "raised a strong presumption in favour of the opposite party". This finding could well have been a reference to the establishment as against the defendant of *culpa*, that is, of negligence or fraud, which would be necessary for the Aquilian action in Roman-Dutch Law; the note does not indicate that the Court regarded the case as being one of "conversion" of the jewels. In a case reported in *7 S. C. C. 86*, the plaintiff had leased a still to the 1st defendant for a term, and alleged that the 1st defendant had converted the still to his own use by fraudulently transferring it to 2nd defendant. The plaintiff sued both defendants for restoration of the still and for damages. The plaintiff obtained judgment against the 1st defendant for the value of the still and there was no appeal by the 1st defendant against the judgment. But the plaintiff himself appealed asking for judgment against the 2nd defendant for restoration of the still. This appeal was dismissed on the ground that having got judgment for the value of the still against the 1st defendant the plaintiff could not also get judgment against the 2nd defendant for the return of the still. While the Court may have assumed that the 1st defendant was liable as for a conversion, there is nothing in the statement of facts or in the judgment to indicate that the 1st defendant would not have been liable otherwise than for a conversion, or that the Court admitted a basis of liability which did not arise under Roman Dutch Law. The case of *Williams v. Baker & Another*[1] was one in which the plaintiff sued the defendants expressly on the allegation that they had "unlawfully converted" some coffee to the possession of which the plaintiff was entitled. But the only question which was disputed in the case was whether for purposes of limitation the action had to be regarded as one *ex delicto*, and this question was answered in the affirmative. Here again the Court was not called upon to decide whether or not the acts of the defendants constituted a delict under Roman-Dutch Law.

In the much later case of *Samed v. Segutamby*,[2] Bertram C.J. and Jayewardene A.J. had occasion to consider the effect of decisions in Ceylon which had apparently applied English Law in preference to Roman-Dutch Law, on a question concerning delictual liability. Bertram C.J. made the following observations in this connection :—

> "Are we then to consider our own common law as superseded because certain eminent Judges in previous decisions and dicta have ignored or repudiated it ? On what principle can this be justified. These eminent Judges base their view upon the proposition that 'the Roman-Dutch Law, pure and simple, does not exist in this

[1] *(1888) 8 S. C. C. 165.*

[2] *(1924) 25 N. L. R. 481.*

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country in its entirety', and that 'it is not the whole body of Roman-Dutch Law, but only so much of it as may be shown or presumed to have been introduced into Ceylon' that is now applicable here. With the very greatest deference to the high authority of these Judges, I hesitate to apply such propositions to fundamental principles of the common law enunciated by authorities recognized as binding wherever the Roman-Dutch Law prevails. Such principles may no doubt, in course of time, become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place. But if our previous local authorities be examined, it will be found that they are by no means so formidable as might at first sight appear."

It seems to me that the judgments relied on for the appellant in the present case, some of which merely used the word " conversion ", are not even " formidable " at first sight. If, as well may have been the case in some of the instances, the facts were such as to found liability in delict under Roman-Dutch Law, there was no purpose for a defendant to contend that the more strict principle of liability for conversion under English law is not applicable in Ceylon. None of the early decisions I have thus far examined has been shown to be one in which the liability of the defendant would not have arisen under Roman-Dutch Law, nor can it be said that they constitute " a series of unbroken and express decisions " applying an English law principle of liability unknown to the Roman-Dutch Law.

Jayewardene A.J., in the case last cited (25 N. L. R. at p. 495), quoted a statement from Black in his " Law of Judicial Precedents ", p. 43 :—

" The authority of a precedent extends only to rules or principles of law expressly decided or tacitly assumed by the Court itself. In either case, there must have been an application of the judicial mind to the question of law involved, whether the result is explicitly stated or not. Hence when counsel in the argument of a case assume a certain principle advanced by them as correct law, and the Court decides the case upon the assumption thus made by counsel, without discussing the correctness of the assumption, the opinion is not authority as to the legal validity of the principle so taken for granted. The rule is the same as to matters which, without being submitted to the Court for determination, are simply treated as settled by the parties on both sides without objection."

At the best, the Ceylon decisions in what are claimed to have been cases of conversion have applied the English principle merely on a presumption that the principle is applicable in Ceylon, and without any deliberately expressed intention to introduce a basis of liability unknown to the Roman-Dutch Law of Delict.

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In the case of *Dodwell & Co. v. John* [1] their Lordships of the Privy Council did not pronounce upon the question I am now considering. Although one of the causes of action pleaded in that case was that of conversion, an alternative cause, namely that cheques were received by the defendants with notice of a breach of trust on the part of the drawer of the cheque, was quite clearly established on the facts of the case, and their Lordships dealt with the case on this latter footing. They did however make the observation that "it may well be true that the principles of the English common law have been so far recognised in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place. If so, undoubtedly there was a conversion according to these principles". But this observation was not preceded by any reference to the decisions of the Ceylon Courts which I have considered, nor was there need for Their Lordships (as there has been for the present Bench) to examine the effect of the Proclamation of 1799 and the Ordinance of 1835.

The case of *Punchi Banda v. Ratnam* [2] was one in which the Court and Counsel quite obviously *assumed* that the English doctrine of conversion was part of our law. Neither in the judgment nor in the notes of Counsel's argument is there anything to show that the question whether the doctrine does apply was in any manner disputed ; the only matter in dispute appears to have been the question of the time from which and until which damages were payable for the wrongful deprivation of the plaintiff's property. Considering that there had not been in fact any previous pronouncement by our Courts which considered and decided that the doctrine of conversion is applicable in Ceylon, and that the Court in *Punchi Banda v. Ratnam* was not invited to decide whether or not the doctrine is so applicable, the decision does not support the Appellant's argument.

I hold for these reasons that decisions of our Courts have not introduced and adopted the basis of liability for conversion which obtains under the English common law. This conclusion is, however, not decisive of the question whether, as was held in the *Bank of Ceylon v. Kulatilake*, the liability of a collecting Banker to the true owner of a cheque is the same in Ceylon as it would be in England. It has been argued for the appellant in this case that such liability does exist in Ceylon in view of certain provisions of our Statute law which have now to be considered.

Ordinance No. 5 of 1852 introduced into Ceylon the law of England in certain cases. Section 2 of the Ordinance provided as follows :—

> "The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes, and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the

[1] *(1918) 20 N. L. R. 206.* [2] *(1944) 45 N. L. R. 198.*

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like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."

At the time of the enactment of this section, the law of England concerning contracts upon bills of exchange, promissory notes and cheques, was the common law, including the law merchant as developed at that stage, and s. 2. had accordingly the effect that the rights, duties and liabilities of parties to the contract upon any such negotiable instrument would be regulated by the English common law. But this was not the only effect of the section ; for it provided that the English law would apply also in respect of *all questions relating to such instruments* and of all matters connected with such instruments. If then a question arose as to the liability of a collecting Banker to the true owner of a cheque, it could fairly be said that there was involved a question relating to a cheque : one of the special incidents affecting a cheque, and perhaps the most important such incident, is the collection of a cheque by one Bank from another, and indeed the commercial practice of the making of payments in discharge of monetary liabilities by means of cheques is rendered effective through the system of the collection by Banks of the proceeds of cheques, and if in English law a Banker incurred a liability to the true owner of a cheque because he had collected the proceeds and credited them to the account of a customer, the law by reason of which that liability arose could fairly be regarded as the law in respect of a question relating to a cheque.

Counsel for the Bank in this appeal have contended that the English doctrine of conversion is a doctrine which relates to all dealings with chattels inconsistent with the rights of the true owner, and is not therefore a law in respect of questions relating to cheques within the contemplation of s. 2. This contention pre-supposes that the framers of s. 2 had consciously in contemplation certain particular principles or doctrines of English law, and intended only these to apply in the cases referred to in the section. But the terms of the section indicate an intention that, in respect of the specified *contracts*, *questions* and *matters*, the English law as prevailing at the relevant time, shall be applicable. Emphasis was thus laid in the Section rather on the cases in which the prevailing English law shall apply, than on any contemplated principles or doctrines of English law which are to be applicable. Indeed s. 2 had the effect that some principle defined or recognised in England even subsequently to the enactment of the Section would apply in such cases.

The particular provision of s. 2 of the Ordinance of 1852 which I am now examining is the declaration that "in all questions relating to cheques, the law to be administered shall be the same as would be administered in England in like case". The construction of this provision requires primarily a determination whether there is for decision

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some question relating to a cheque ; and if the determination is that there is such a question, then the English law must be administered to decide the question. I can concede that not every matter concerning a cheque, such as the mere theft of a cheque or the placing of a cheque in the custody of some person, is a " question " contemplated in the provision. But where the alleged or proved circumstances indicate some dealing with a cheque which is peculiar to its character as a cheque, and which is for a purpose connected with that character, and some question then arises as to the effect or consequences of such dealing, does not that question relate to a cheque ? If this be not so, the reference in the provision under consideration to " questions relating to cheques " apparently adds nothing to the matters denoted in the earlier reference in s. 2 to " contracts " upon cheques. Moreover, the subsequent reference in s. 2 to " all matters connected with cheques " would appear to be quite without purpose if a dealing of the nature I am contemplating is not to be regarded as such a matter. I rely in this connection on the reasons stated by Lord Denning for the opinion that the collection of cheques by a Banker is characteristic of a Banker's business. (*United Dominions Trust v. Kirkwood* [1]).

A further and ingenious argument of Counsel for the defendant Bank depends on the fact that the English doctrine of conversion is one which applies to the taking of a chattel, and that what is taken in the present context is *a piece of paper*, and not a cheque in its character of *an order in writing*. Having pointed to this distinction, Counsel argued that when s. 2 referred to the law to be administered in respect of a question relating to a cheque, what was contemplated is a question relating to the order in writing, and not one relating to the paper on which it is written, or in other words a question relating to a chose in action and not one relating to a chattel. Since the doctrine of conversion is part of the English common law affecting chattels, there was no intention in s. 2 of the Ordinance of 1852 to introduce such a doctrine, the intention of the section being only to introduce the English law relating to certain choses in action, including cheques in their character as such. The same argument was presented in connection with a subsequent Ceylon enactment, and I shall have to consider it later in this judgment in that connection. But in the case of s. 2 of the Ordinance of 1852, the problem for solution is not which principles of English law were intended to be introduced, but (in the present context) which questions relating to cheques were intended to be determined by the administration of English law. Even on a concession that a question properly relates to a cheque only in its character of " an order in writing ", a collecting Bank does not deal with a mere piece of paper ; the Bank takes a piece of paper upon which is inscribed the order in writing, and the tort of conversion is not complete until the Bank uses the paper in its character as an order in writing by presenting it for payment. Indeed, in the instant case, the defendant Bank would have committed no tort even by so using the paper, if ultimately the

[1] (1966) 1 *A. E. R.* 968.

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proceeds of the payment had been credited to the account of the plaintiff. There thus appears to be a clear distinction between a case of a cheque which a Bank merely retains and refuses to surrender to the true owner, and of a cheque on which a Bank collects a payment which is not credited to the true owner. In the former case, there may be conversion of the piece of paper with some writing on it ; but in the latter case, there is conversion of the paper in its character as a cheque. I thus reach the conclusion that, even if the intention of s. 2 was only to introduce the English law relating to cheques in their character as choses in action, the intention covered a case in which a collecting Bank deals with a cheque and the proceeds thereof in the manner established in the instant case.

I have not found it necessary to rule upon the submissions of Counse for the appellant regarding the history of the action for conversion in English Law, and the manner in which that action became available to afford relief to the true owner of a cheque against a Bank which collects payment of the cheque for a person other than the true owner. It suffices to point out that the utilisation by the Courts in England of a legal fiction, for the purpose of rendering a collecting Bank liable to the true owner of a cheque, establishes the concern of the Courts with a problem which specially concerned Banks and cheques. That being so, there is much force in the submission of Counsel for the appellant that the English law of conversion, in its application to the facts of a case such as a present one, should be regarded as a law relating to the collection of cheques by a Bank and therefore as being within the contemplation of s. 2 of the Ordinance of 1852.

For the reasons which have been now stated, I am satisfied that so long as s. 2 of the Ordinance of 1852 was in force, the liability of a collecting Bank in Ceylon in circumstances such as exist in the instant case had to be determined by the application of the English law. At first the relevant English law would have been the common law, including the law Merchant.

When and after the Bills of Exchange Act was passed in England in 1882, to amend and codify the law relating to negotiable instruments, the effect of s. 2 of our Ordinance of 1852 was that the liability of a collecting Bank had to be determined in Ceylon under the English Act. Accordingly a collecting Bank in Ceylon could rely on s. 80 of the English Act and would not be liable to the true owner of a cheque if it could discharge the burden of proving that it had acted in good faith and without negligence (*Marfani v. Midland Bank Ltd.*[1]).

In connection with the argument that s. 2 of our Ordinance of 1852 introduced only the principles of English Law relating to negotiable instruments, Counsel contended that s. 80 of the English Act was a special exception to the operation of the English doctrine of conversion, i.e., an

[1] *(1967) 3 A. E. R. 967, at 973.*

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exception to a general principle of the common law and not to any principle of liability applicable to dealings with negotiable instruments, as such. It is relevant however to consider the purpose of s. 97 (2) of the English Act, which provided that " the common law, including the law of merchant, shall continue to apply to Bills of exchange, promissory notes and cheques ".

Counsel who argued this appeal have not been able to discover any decision in which an English Court has after 1882 considered the question whether s. 97 (2) of the Act had to be invoked in order to render a collecting Bank in England liable in conversion to the true owner of the cheque. The absence of such a decision however creates no doubt in my mind as to the true answer to this question. The terms of s. 97 (2) are so wide and general that any basis of liability under the common law would be included in its scope. Even if it was not strictly necessary to enact s. 97 (2) in order to continue the application of such a basis of liability, the enactment of that section was expedient at least *ex abundanti cautela.*

In *Daniel Silva's* case[1] T. S. Fernando J. construed s. 98 (2) of the Ceylon Bills of Exchange Ordinance, which corresponds to s. 97 (2) of the English Act. In his opinion, the section was intended only to apply to any omissions or deficiencies in the Ordinance, *in respect of the law relating inter alia to cheques.* The words which I have just italicised do not however occur in the section ; if they did so occur in the English s. 97 (2) they would have implied a contemplation that, apart from the rules as codified in the Act, there remained some residuum of rules *concerning negotiable instruments* which it was expedient to preserve. But the language of s. 97 (2) as actually enacted did not seek to define in that narrow way the nature or substance of the rules of the common law which the section intends to preserve, and there is no justification for reading into the section words upon which to found the narrow construction. The opinion to which I refer was expressed without consideration of decisions in England, which resorted to s. 97 (2) for the purpose of applying rules of the English common law relating to estoppel (1907, 2 K.B. at p. 746) and to the conflict of laws (1904, 2 Q.B. 870). In neither instance was there merely the question of supplying any deficiency or omission in the Act's codification of the rules of law relating to negotiable instruments.

Having examined the English Act of 1882, I am satisfied that all its provisions applied in Ceylon by virtue of our Ordinance of 1852, and that from 1882 the liability of a collecting Bank in Ceylon was the same as that which arose in England in similar circumstances.

At the present time however it is not the Ordinance of 1852 which determines the law to be applied in Ceylon to negotiable instruments. The Legislature in 1927 enacted the Bills of Exchange Ordinance (now Cap. 82). Counsel for the defendant Bank contended in this appeal

[1] *(1965) 67 N. L. R. at p. 461.*

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that a proper consideration of the question of law disputed in this case should commence with an examination of this Ordinance, and that reference to the Ordinance of 1852 is only permissible if some provision of Chapter 82 necessarily requires such a reference to be made. I must explain why I have chosen the opposite course.

The Legislature in enacting the Ordinance of 1927 stated in the long title its purpose " to *declare the law* relating to bills of exchange, cheques, banker's drafts, and promissory notes ". A statement of the same purpose was contained in the Statement of Objects and Reasons which was appended to the draft Ordinance in the *Gazette* No. 7,539 of July 30, 1926 (Part II). This statement included as a reason for introducing the draft ordinance the fact that Judges of our Courts did not readily have available copies of the English Bills of Exchange Act, which at that stage was the law which those Judges had to apply. So unusual a reason for the introduction of a draft Ordinance which professed to *declare* the law would justify a departure from the rule that resort to a Statement of Objects and Reasons should not ordinarily be made when constructing a Statute; but I rely on the Statement in this instance only for the lesser purpose of under-lining the Legislature's intention *to declare the law*. The Statement of Objects further emphasizes this intention, when in reference to clauses 22 & 27 of the draft Ordinance, the point is made that the intention is only to avoid doubt or to declare what is the existing law. Apart from the clauses specially explained in the Statement, the Ordinance is a straight copy of the English Act, subject to one significant difference: whereas the English Act was enacted to " amend and codify " the law, the object of the Ceylon Legislature was only to " declare " the law. I have held that the former law of Ceylon in respect of questions relating to cheques was the English Act and (by reason of s. 97 (2) thereof) English common law, and it was therefore that law which the Ceylon Legislature intended to declare. That precisely is my reason for having examined in the first place the scope and effect of s. 2 of the Ordinance of 1852.

Our Bills of Exchange Ordinance, like its " original " the English Act, has no provision which declares or defines the liability of a collecting bank to the true owner of a cheque, but s. 82 of the Ordinance purports to afford to a collecting bank a defence against liability which is necessary and explicable only on the basis that the Legislature assumed the law to be that a collecting bank would be liable as for a conversion. I have already stated my reasons for the opinion that the same assumption which underlies the corresponding s. 80 of the English Act was a correct one, because in s. 97 (2) of the same Act the Legislature of England declared that the rules of the common law " shall continue to apply " to negotiable instruments. Considering that s. 98 (2) of our Ordinance is in terms almost identical with those of s. 97 (2) of the English Act, there is every reason for regarding as correct the assumption upon which our Legislature enacted s. 82 of the Ordinance.

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Counsel for the defendant Bank relied on certain South African decisions holding that under the law of that country a collecting bank was not liable to the true owner of a cheque in the absence of proof of *culpa*. These decisions were reached despite the inclusion in the relevant South African Statute of a provision corresponding to s. 82 of our Ordinance. The Courts in South Africa regarded that provision as being superfluous in purporting to make an exception to a liability which did not in fact arise under the South African Law because the English common law doctrine of conversion was not part of the South African law. Our Section 82 was similarly regarded by Tambiah J. in *Daniel Silva v. Johanis Appuhamy*[1]. With respect, the learned Judge, although he did consider s. 98 (2) of our Ordinance in his judgment, lost sight of the fact that the South African Statute contained no provision which corresponded to our s. 98 (2), and he took no account of the previous adoption of English law by s. 2 of our Ordinance of 1852, and of our Legislature's intention in 1927 to *declare* the Law which previously applied in Ceylon. With reference therefore to the argument which depends on the decisions in South Africa, it suffices to point out that the question decided in South Africa was quite different from that which we have to decide. It would appear that the question which was decided in South Africa was only whether s. 80 of the Bills of Exchange Proclamation had by implication recognized a ground of liability as against a collecting bank. which had not been previously a ground arising under the law applicable in that country ; the question before us however is whether, by reason of the long title to our Ordinance of 1927, considered together with s. 98 (2) of that Ordinance and the pre-existing law of Ceylon, the Legislature in enacting s. 82 of our Bills of Exchange Ordinance correctly assumed that a collecting bank is liable to the true owner of a cheque for a conversion in the sense understood in the English common law.

Counsel for the defendant bank relied also upon the difference in phraseology between s. 2 of the Ordinance of 1852 and that of s. 98 (2) of our Ordinance of 1927. Conceding in this connection that between 1852 and 1927 a collecting bank in Ceylon may have been liable as for a conversion in the circumstances of the instant case, he argued that s. 98(2) of the Ordinance of 1927, in providing that the rules of the common law of England shall apply to negotiable instruments, did not include within its scope any rule depending on a general principle of liability which is not a rule specially relating to dealings with cheques. Had we to consider s. 98 (2) by itself, I think there would have been much force in this argument, for that Section could have expressed more clearly the intention that the English common law should apply in Ceylon to the same extent as it had applied before 1927. But having regard to the express intention of the Legislature to declare, and not to amend, our law, and to the assumption which under-lies s. 82 of the Ordinance, I am satisfied that the terms of s. 98 (2) sufficiently expressed that intention. Section 98(2) is fairly open to the construction that a case such as the present one must

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[1] (1965) 67 N. L. R. 457.

be decided by the application of the rules of the English common law ; to construe it otherwise would be to discount the intention of the Legislature in 1927 to declare our law.

I hold for these reasons that, although the English doctrine of conversion is not part of the common law of Ceylon, the Bills of Exchange Ordinance (Cap. 82) has the effect that the liability of a collecting Bank in Ceylon to the true owner of a cheque is the same as would arise in England in a like case.

As stated towards the commencement of this judgment the learned trial Judge in the instant case had held that the defendant Bank established at the trial that it had acted in good faith and without negligence and is thus protected from liability to the plaintiff by s. 82 of the Bills of Exchange Ordinance. The grounds for this finding were : *firstly* that the dividend warrant did not reach the City Office of the Bank through the post despite the plaintiff's intention that her letter containing the warrant was to be posted by her servant ; *secondly*, that in the absence of the warrant (because it had been stolen after being paid at the drawee Bank) there was no evidence as to what endorsement the warrant bore at the time when it was paid in at the defendant's Wellawatte Branch to the credit of Messrs Movie & Co. ; *thirdly*, that in the absence of the warrant it was impossible to demonstrate that any doubt as to the title of Movie & Co. would have been apparent to the naked eye or under examination under an ultra violet ray, and also that the defendant Bank could not be held negligent for failure to examine the warrant under the ultra violet ray ; and *fourthly*, that there was no proof of negligence on the part of the defendant Bank in opening the account at the Wellawatte Branch in the name of Movie & Co.

Counsel appearing for the plaintiff in appeal has strongly challenged the correctness of all these grounds, save the first one.

The fact that the dividend warrant was paid in to be credited to the account of Movie & Co. was established by the Paying-in-slip P18 purporting to show that " cheque item No. 8 Rs. 30,637.13 " was paid to the credit of Movie & Co., Account No. 3341 on 29th April 1958. The slip bears the signature of Loganathan as the depositor of the cheque and the signature of one Handy who at the relevant time was the Manager of the Wellawatte Branch. The collection register or schedule, P20A, of the Wellawatte Branch for the 29th April 1958 includes an item relating to this dividend warrant as having been paid in to the Bank for the credit of Movie & Co.

The evidence of Handy as to the practice concerning cheques presented by customers was as follows :—

" *Examination-in-chief :*

This paying-in-slip is dated 29th April 1958. This is signed by me above the words Sub Accountant. When this comes it comes with

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the document to which it refers. Along with this paying-in-slip and the document to which it refers come the collection register schedule of which P19 is a photostat copy.

Q. When the schedule comes to you what is that you do with regard to the cheques or dividend warrants?

A. When the schedule comes with the cheque I am supposed to see whether there are credit instructions and whether there are no contradictory instructions and if they are in order I intitial.

The credit instructions on the reverse of the cheque must tally with the credit instructions in the credit slip. I always look at the reverse of the cheque to see whether credit instructions tally with the instructions in the paying-in-slip. When I look at the reverse of the cheque if there are no suspicious circumstance or something unusual I pass it but if there are any suspicious circumstance or something unusual I wont send the cheque for collection."

In cross-examination he said :

"A cheque is presented with a paying-in-slip. Normally it is received by a clearing clerk. I can trace who the clearing clerk was on 29th April 1958. He receives and puts the receipt stamp on receipt portion of the paying-in-slip and he crosses the cheque and enters it in a schedule and takes it up to the officer for signing. At that time one Thuraiappah was the officer (clearing clerk). Thuraiappah would have seen that the name of the payee on the receipt portion was the same as the name of the payee in the bank paying-in-slip. He will also see the credit instructions. He would have seen whether the credit instructions on the paying-in-slip tallies with the credit instructions on the back of the cheque."

"Altogether there about 60 cheques here. These cheques would be put to me at about 6.30 in the night. I know that these cheques would have been already examined by Thuraiappah for irregularities. I have to check the observations made by Thuraiappah. Usually I have to scrutinize each cheque. It takes about 2 or 3 minutes for each cheque.

Q. Is it that you would have taken about 3 hours to pass these cheques?

A. It would have taken about half an hour to clear this."

It will be seen from this evidence that Handy did not directly or of his own knowledge testify to any matter concerning the receipt of this dividend warrant at the Wellawatte Branch or to the particulars which appeared on this warrant when it was so received. He testified only to what should have occurred according to the practice prevailing in April 1958 ; namely that Thuraiappah "would have seen" that the name of the

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payee (i.e., the Bank's customer) was the same on both halves of the paying-in-slip, and that the credit instructions on the paying-in-slip (i.e., 'credit Movie & Co.') were repeated on the back of the warrant; that being satisfied as to these two points Thuraiappah accepted the warrant for collection, crossed it and entered it in the register or schedule P20A, and that thereafter the paying-in-slip, together with some 60 other slips and cheques and the collection register, were submitted to Handy. Handy himself knowing that each cheque had been already examined by Thuraiappah would check any observations made by Thuraiappa and presumably there were no such observations in this instance. Further, having regard to his evidence in chief, Handy himself must have been satisfied that the last endorsement on the back of the warrant must have been "credit Movie & Co.".

The learned trial Judge has obviously inferred from the testimony of Handy that the clerk Thuraiappah would not have accepted this warrant if there had been any apparent irregularity on its face or reverse, and that therefore there could have been no such irregularity. As to this matter, however, the only facts established by the evidence were that the warrant was payable to Mrs. L. M. de Costa and that it bore on its reverse the endorsement signed by her "credit my account only". The inference drawn by the trial Judge assumed that either the name of the payee on the warrant or her endorsement on its reverse, or both, had been altered or defaced in such manner that the last endorsement "credit Movie & Co." appeared to have been made by the true owner. The possibility of a defacement of the name of the payee can however be safely ruled out, since the Company for whom the warrant was drawn was a private Company and it is improbable that National & Grindlays Bank would have made payment on a warrant which did not bear the name as payee of the plaintiff or of one of the other few shareholders of the Company. Thus there remains only the question of the validity of the Judge's inference as to the apparent regularity of endorsements on the reverse on the warrant.

It seems to me that in a case where a defendant Bank had the burden of establishing the absence of negligence, it was unsafe lightly to apply the presumption that the common course of business was followed by officers of the Bank itself. Thuraiappah, the Bank's clearing clerk, was the person best able to testify as to his examination of this warrant and of the regularity of its acceptance for credit of Movie & Co., which the Manager Handy assumed must have been performed by Thuraiappah and which the learned trial Judge inferred was actually performed by him.

Section 63 (5) read with s. 65 (3) of the Evidence Ordinance entitled the defendant Bank in this case to adduce the oral evidence of Thuraiappah in proof of the particulars on the warrant. He had been named as one of the Bank's witnesses and was in Court during the trial, and was yet in the Bank's employment. Had he given such evidence, the judge might

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properly have reached the conclusion that the endorsements on the warrant established the apparent regularity of its collection for Movie and Co., or even the lesser (though perhaps inadequate) conclusion that Thuraiappah must have acted in good faith and without negligence. In reaching both these conclusions despite the lack of Thuraiappah's evidence, the learned Judge fell twice into error. Since the burden under s. 82 of the Bills of Exchange Ordinance lay on the defendant, it was not for the plaintiff to demonstrate that there was anything suspicious on the warrant which could have been visible on simple or technical examination ; the learned Judge failed to realise that the defendant had to adduce proof to the contrary. Again, in assuming Thuraiappah's good faith and care, the Judge did not act on his own judgment concerning Thuraiappah which could have been properly formed only upon consideration of the evidence and demeanour of Thuraiappah ; instead the Judge acted on the evidence of Handy, who did not even venture an opinon as to Thuraiappah's honesty or diligence.

The plaintiff's position was that because the account of Movie & Co. had been recently opened, and had rarely been in credit for more than about Rs. 400, the presentation of a dividend warrant (and not an ordinary cheque) for Rs. 30,000 by Loganathan should have placed the defendant Bank on inquiry as to Loganathan's rights, and that again there was opportunity for inquiry when nearly the whole of this large sum was withdrawn 3 days after it was credited to the account. In fact on this latter occasion some inquiry might have been made, had not Thuraiappah intervened to identify Loganathan as the drawer of the cheque for withdrawal. Whether the comparatively large amount of the warrant was in fact a matter which was or was not taken into consideration by Thuraiappah was a matter specially within Thuraiappah's knowledge and he was best able to relate and justify his own actions. Handy's evidence did not show that his own "checking" of paying-in-slips and cheques involved consideration by himself at that stage of such matters and could not establish either the fact that Thuraiappah had no grounds for suspicion, or even the fact that Thuraiappah knew that the Bank had a duty of care, not only to its own customers, but also to the true owners of cheques.

The only facts clearly proved in this case were that the warrant bore the endorsement of the plaintiff " credit my account only ", and that the Defendant Bank did collect the proceeds of the warrant. There was no evidence to show that the Bank's Collection Department scrutinizes cheques in order to ascertain whether the true owner of a particular cheque is in fact the customer of the Branch which forwards the cheque for collection. That being so, the defendant Bank failed to exclude the possibility that the proceeds of this warrant were allocated to the Wellawatte Branch merely because this Branch had forwarded for collection a warrant which bore on its reverse the endorsement of the named payee.

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There was produced without objection at the trial the letter P10 written by the lawyers for National Overseas and Grindlays Bank in which it was stated that payment of the dividend warrant had been made on the genuine endorsement of the payee ; this statement at least tends to support the possibility that the plaintiff's endorsement remained in the warrant when it was paid in at the Wellawatte Branch. Even if there had been some subsequent endorsement such as " Credit Movie & Co.", Handy did not claim that it was his practice to scrutinize all endorsements on a cheque with a view to checking on the regularity of the last endorsement. Knowing that Thuraiappah had accepted this warrant for the credit of Movie & Co., Handy may well have been satisfied to pass this warrant for collection if the last endorsement in appearance tallied with the credit instructions on the paying-in-slip P18. Thuraiappah alone was the person competent to negative the possibilities just envisaged, each of which is sufficient to establish negligence on the part of the defendant Bank.

The circumstances lead at least to a suspicion that Thuraiappah either deliberately or carelessly aided Loganathan's criminal activity. If this suspicion be unfair to a person whose own explanations are not before the Court, Thuraiappah's employer, the Bank, must take the blame for that. The Bank of Ceylon at all relevant times enjoyed a monopoly in the maintenance of current accounts for Ceylonese nationals. As such it is of extra-ordinary importance that the Bank should maintain the confidence of the public and should display concern for the interests of its numerous compulsory customers. Whatever may have been the grounds of law upon which the Bank relied for its denial of liability to the plaintiff in this case, the denial of liability was morally justifiable only if the Bank had actual confidence in Thuraiappah's integrity and diligence. The failure to call Thuraiappah as a witness has negatived the existence of such confidence.

The learned trial Judge thought that the failure of the defendant Bank to call Thuraiappah as a witness was of no importance because " Handy had the ultimate responsibility in regard to the disposal of this warrant". I have tried to show however, that Handy relied largely on an assumption that Thuraiappah scrutinized this warrant, and also that Handy could well have passed this warrant after a cursory half-minute's examination without noticing that Movie and Co. was not its true owner. The conclusion that the Bank disproved negligence was based, not on any fact deposed to by Handy concerning this warrant, but on inferences which virtually begged the matters of fact which the Bank had to prove. I have no hesitation in deciding that the Bank failed to establish the defence available under s. 82 of the Ordinance.

I wish only to make a few further observations. The action in *Daniel Silva v. Johanis Appuhamy*[1] was one, not against a collecting Bank, but against a person who had received through his Bank the proceeds of a cheque bearing an endorsement purporting to be made by the payee,

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[1] *(1965) 67 N. L. R. 457.*

but being in fact a forged indorsement. Since that action did not involve a decision as to the liability of a collecting Bank, it is not now strictly necessary to consider whether the judgment correctly decided that the defendant in the action was not liable to the true owner of the cheque. But the later decision in *Don Cornelis v. de Soysa & Co., Ltd.*[1] has held on similar facts that a person who is credited with the proceeds of a cheque bearing the forged indorsement of the payee is liable to pay those proceeds to the true owner. In view of this conflict of decisions, the present is a suitable opportunity for a Bench of superior numerical strength to express an opinion which should serve to resolve that conflict, especially as the arguments addressed to this Bench have fully covered all relevant considerations.

In reaching the conclusion that the English Law applies in the instant case, I have relied greatly on the consideration that the collection of a cheque by a collecting Bank is so much an activity peculiar to the commercial practice of the use of cheques that it renders that activity a matter relating to a cheque. But I am not able with the same confidence to hold that when a person who receives a cheque in the ordinary course of business and transmits it to his Bank for the purpose of being credited with the proceeds, any question which may then arise as to his liability to the true owner of the cheque is one which "relates to a cheque" within the meaning of those words in s. 2 of the Ordinance No. 5 of 1852. I do entertain some doubt whether the English law, that such a person may be held liable as for a conversion, is applicable in such a case.

Nevertheless, the draft judgments which have been prepared in this case indicate that a majority of my colleagues on the present Bench are in agreement with the decision in *de Soysa's* case, holding that the defendant in that case was liable to the true owner on the ground that he had and received money which he was liable to restore to the plaintiff. With some hesitation, I express my own agreement with that decision.

I should like to express my appreciation of the valuable assistance afforded to the Court by the full and able arguments of Counsel for both parties in this appeal and by their fruitful study of many matters which were relevant to the questions which arose for consideration.

The appeal is allowed with costs, and judgment will be entered for the plaintiff as prayed for in her plaint.

SIRIMANE, J.—

This appeal raises an important question of law relating to the liability of a Banker in Ceylon, in circumstances which frequently arise in transactions between a Banker and a customer.

The facts are shortly as follows :

[1] (1965) 68 N. L. R. 161.

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The Plaintiff received a Dividend Warrant for a sum of Rs. 30,637/17cts. drawn on National & Grindlays Bank from Messrs Carson Cumberbatch & Co. This money was due to her as a dividend declared by the Deniyaya Tea & Rubber Estates Company Ltd., in which she held a large number of shares, and for which Messrs Carson Cumberbatch & Co. acted as Agents and Secretaries.

She was the true owner of the Warrant. It had been crossed and made payable to her. She endorsed it on the reverse and made it payable to her Account at the Defendant Bank. She had received similar Dividend Warrants before, and on those too she had made similar endorsements, as evidenced by the old Warrants produced in the case.

Her Account with the Defendant Bank was at its branch known as the City Office. Having endorsed the Warrant she put it in an envelope, addressed it to the Bank of Ceylon and gave it to a domestic servant to be posted. As this servant was not available as a witness at the time of the trial, there is no proof of posting.

This Warrant had got into the hands of one Loganathan, said to be the sole proprietor of " Movie & Co. ".

Loganathan had opened an Account in the name of " Movie & Co." with the Defendant Bank at its brach at Wellawatte. The Account had been opened about 7 months prior to May 1958, in circumstances which appear to be suspicious. It commenced with the modest sum of Rs. 1,171·40 cts., and the person introducing Loganathan, and recommending his application to be a customer had not filled in the column in which he had to state the number of years for which he had known the person whom he introduced. The initial amount was drawn out in small sums from time to time until on 5th May 1958 there was only a sum of Rs. 386.87 cts. to the credit of " Movie & Co.". On that day the sum of Rs. 30,637·17 cts. was credited to this Account.

Loganathan had presented this Dividend Warrant at the Wellawatte Branch of the Defendant Bank with the Paying-in-slip P18. An officer of the Bank named Thuraiappah, described as its " Accountant-Cashier " or " Cashier-Supervisor ", had received the Dividend Warrant and the Paying-in-slip. His signature appears on it. He is therefore the *one* officer in the Bank who would be able to state with some degree of certainty what appeared on the face of the Warrant, and exactly how it was endorsed, at the time it was presented for collection by Loganathan.

It was a very large sum of money which the Bank had to collect for a customer who, up to that time never had even a tenth of that sum to his credit.

I find it difficult, for reasons which will presently appear, to resist the inference that Thuraiappah was acting in collusion with Loganathan in furtherance of a plan to misappropriate the proceeds of the Plaintiff's

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Warrant. The amount appearing on the Warrant was collected from Grindlays Bank on 30th April 1958 and thereafter credited to the Account of "Movie & Co." on the 5th of May 1958 as already stated. The Dividend Warrant had then been stolen from Grindlays.

Three days later a sum of Rs. 29,814/13 cts. was drawn out from this Account on a cheque drawn by Loganathan in favour of "Thomas Felix de Costa" or bearer. The Agent the Wellawatte Branch on that day (one Fonseka) had felt suspicious at that stage, but on the drawer of the cheque being produced before him and identified by Thuraiappah, this large sum had been paid out apparently to Loganathan himself as he has endorsed the cheque on the reverse after the name "Felix de Costa". No one ever saw the Payee on the cheque.

The resultant position is that the amount collected by the Defendant Bank on a Dividend Warrant, the true owner of which was the Plaintiff, was paid by the Defendant to a person other than the true owner.

The Warrant had in fact reached the Defendant Bank, and in my view the onus was on the Defendant to show that at the time that it received the Warrant for collection there was something on the face of it which justified the action taken by the Bank. In other words, the Defendant should be able to show that the Warrant had been altered in such a manner so as to mislead its officers.

Thuraiappah, who had so much to do with the Warrant, and with the man who presented it was not called as a witness, but the Defendant Bank relied on the evidence of one Handy who was the Agent at this branch on the day that Thuraiappah received the Warrant and the Paying-in-slip.

The credit instructions on Paying-in-slips are checked with the bills presented with those slips by Thuraiappah, and at the end of the day all such bills and slips are placed before the Agent, for the slips to be initialled. A person like Handy would scrutinize such slips and bills, only if Thuraiappah had drawn his attention to some irregularity in the endorsements. Though Handy says "I always look at the reverse of the cheque to see whether the credit instructions tally with the instructions in the Paying-in-slip", it is clear from a reading of his evidence that he has no independent recollection of the particular bill which had been placed before him with several others on that day. His evidence shows that he must have dealt with about 60 bills and Paying-in-slips in the space of about half an hour. If a thief is acting in collusion with an officer in the Bank it is not difficult to get a busy Agent to initial the Paying-in-slip without in any way altering the bill which would be sent for collection. In this case the letter P10 which had been admitted in evidence without objection indicates that when the Warrant reached Grindlays Bank there was no alteration on it.

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The disappearance of the Warrant from that Bank in no way helps the thief—in this instance Loganathan has been convicted and sent to jail—but it does help a dishonest officer in the Bank with whose aid the money collected on the Warrant was credited to the thief's account. I have little doubt that Thuraiappah was not called because the Defendant knew that he had acted in collaboration with the thief.

The only evidence in regard to what appeared on the Warrant was that of an officer of Carson Cumberbatch & Co. who said that he wrote out the Warrant in favour of the Plaintiff and stamped it "Not negotiable", and the evidence of the Plaintiff in regard to the endorsement she made.

I do not see any reason for concluding that the Warrant had been altered, and in my view the Defendant as the collecting Banker was negligent in crediting the amount collected to the wrong account.

In dealing with this question the learned trial Judge said :

> " What was on the Warrant at the time it left Mrs. de Costa is then proved, but what was on the Warrant when it was presented to the Bank cannot be ascertained for the evidence is that the Warrant which should ordinarily have been in the custody of National & Grindlays Bank is no longer there having been stolen by a peon in the employ of that Bank."

He then *assumed* that Mrs. Costa's endorsement was missing when the Warrant reached the Bank and that there must have been such an alteration which was not visible to the naked eye but could only have been detected under the ultra violet ray. He therefore held that the *failure of the Defendant to examine the Warrant under the ultra violet ray was not negligence.* It was only on the assumption that the Warrant and the endorsement on it had been altered that the trial Judge held that there was no negligence. I am of the view that he was in error there, and that issue No. 17 which raised the question whether the Defendant acted bona fide and without negligence should have been answered in the negative.

The main argument addressed to us was on the footing that in the absence of negligence the Defendant could be held liable only on the tort of conversion. It was argued that this doctrine was unknown to the Roman-Dutch Law, (*Daniel Silva v. K. H. G. Juanis Appuhamy*)[1], and that the Defendant was therefore not liable. This argument proceeded on the basis that the Roman-Dutch Law and not the English Law applied to the claim in this action.

Counsel for the Appellant did not contest the position that the *tort of conversion* as known to the English Law was not part of the Roman-Dutch Law, and that in the action under Roman-Dutch Law—the action *ad exhibendum*—there must be proof of *dolus or culpa.*

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[1] *(1965) 67 N. L. R. 457.*

He contended however that "Conversion" of movables has been introduced into our law by judicial decision. The summaries of two old cases—1870 Vanderstraten Reports, page 42, 1877 Ramanathan Reports, page 17, and the judgments in *Don Jeronis v. Don Bastian* [1] and *Williams v. Baker* [2] favour the view that conversion was considered to be part of our law from very early times. Though a scrutiny of the facts in those cases may reveal a delict as known to the Roman-Dutch Law, I do not think that the learned Judges decided those cases on that basis.

In the first Schedule to the Civil Procedure Code of 1889 (Chapter 101) our legislature has set out specimen forms of plaints. Under the Head "Plaints for compensation upon wrongs" is a form "for the conversion of movable property".

In *Dodwell & Co. v. John* [3] the Privy Council expressed the view (obiter) "It may well be true that the principles of the English Common Law have been so far recognised in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place". In *Punchi Banda v. Rutnam* [4] the Plaintiff's omnibus had been forcibly removed by the Defendant who thereafter sold it to a third party. The only matter in dispute in appeal was the quantum of damages—which were awarded to the Plaintiff on the basis of a wrongful conversion. The Defendant's liability for a conversion was never disputed. But earlier in 1935 in *Thomson v. The Mercantile Bank* [5] the Defendant prevented the Plaintiff from removing a car which he (Plaintiff) had purchased at a Fiscal's sale until he produced some documentary proof of his title. The Defendant remained in possession of the car, but when the Plaintiff produced the proof required, said that a third party had taken possession, and the Plaintiff lost the car. The Plaintiff was awarded damages and Akbar J. said "If this is an action in tort it is the Roman-Dutch Law which should be applied".

Even long before that in *Wall & Co. v. Fernando* [6] it was held that to maintain an action for the value of stolen property against a purchaser who had dispossessed himself of it, there must be mala fides on his part.

These are some of the reported cases.

In our original courts however, actions for conversion of movable property in the form of the plaint prescribed in the Civil Procedure Code are frequently filed and as far as I know such plaints have never been rejected on the ground that conversion is not part of our law.

Though I am inclined to agree with the submission of learned Counsel for the Plaintiff Appellant that conversion of chattels has now been introduced into our law, I do not think it is necessary to decide that question for the purpose of this case.

[1] (*1885*) *7 S. C. C. 86.*
[2] (*1886*) *8 S. C. C. 165.*
[3] (*1918*) *20 N. L. R. 206.*
[4] (*1944*) *45 N. L. R. 198.*
[5] (*1935*) *15 C. L. Rec. 61.*
[6] (*1876*) *Ramanathan 301.*

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In order to arrive at a decision in this case I would ask myself the question : " What is the liability of the Banker here in Ceylon on the facts established by the Plaintiff ?". In answering that question I have no doubt in my mind that there arises in this case " a question relating to a bill of exchange " or at least " a matter connected " with such bill and also " a question relating to the law of Banking ". I am convinced that the English Law applies and that the Banker's liability is the same as in England.

I am quite unable to agree with the contention of Counsel for the Defendant Respondent that the question of the liability of the Defendant in this case is not one connected with a Bill of Exchange and not one to which the law of banks and banking applies.

The basis of the Plaintiff's claim is that there has been an infringement of her rights, as the true owner of a bill of exchange, and that when the Defendant Bank collected on her bill—an act which only a Banker can perform—the Defendant received the money for her use and benefit.

Our law relating to Bills of exchange and Banks and Banking is the same as in England. By Section 2 of Ordinance 5 of 1852 the law of England relating to bills of exchange was introduced into Ceylon in the following terms :—

> " The law to be hereafter administered in this colony in respect of contracts and questions arising within the same, upon or relating to bills of exchange, promissory notes, and cheques, *and in respect of all matters connected with any such instruments*, shall be the same in respect of the said matters as would be administered in England in the like case at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case other provision is or shall be made by any ordinance now in force in this colony or hereafter to be enacted."

I have no doubt in my mind that had this action been filed in 1853 for example the Banker would have been liable as under the English Law. To my mind it does not matter on what ground that liability was founded—whether on the doctrine of conversion, or on any other principle of law—but a Banker who was liable in England would be liable here too.

In 1882 the English Bills of Exchange Act was passed, and the provisions of that Act by the operation of Section 2 quoted above became our law relating to bills of exchange.

The English Law then, was the law here for 75 years until 1927. In that year the Bills of Exchange Ordinance (Chapter 82) was passed by our legislature. It was " an ordinance to declare the law relating to bills of exchange, cheques, banker's drafts and promissory notes."

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It reproduced practically all the provisions of the English Act, and also enacted Section 98 (2) in the following terms :—

" The rules of the Common Law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques."

The old Ordinance 5 of 1852 was repealed.

I find it impossible to think that in 1927 our legislature intended to reintroduce the Roman-Dutch Law relating to bills of exchange, which is, in effect, the contention of the Defendant Respondent.

With great respect I am unable to share the view expressed by T. S. Fernando J. in *Daniel Silva v. Juanis Appuhamy* (supra) that Section 98 (2) was only intended to apply to any omissions or deficiencies in the ordinance in respect of the law relating to cheques, and cannot form the basis of a proposition that where the delict of conversion was in relation to a cheque therefore the English Common Law of conversion is introduced into our law.

In consequence of the two enactments referred to above (Section 2 of 5 of 1852, and Section 98 (2) of Chapter 82) I am of the view that in all matters connected with bills of exchange a person who would be liable in English Law would also be liable in Ceylon, and to that extent the English Law of conversion is part of our law.

Section 82 (1) of our Ordinance reads as follows :—

" Where a banker in good faith and without negligence receives payment for a customer on a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

This section *had* to be enacted, as the law here, at the time the Ordinance was passed, was the English Law.

I am certainly not prepared to hold that in enacting this section our legislature was merely making " a blind copy " of the English Act, as submitted for the Defendant Respondent.

Tambiah J. in *Daniel Silva v. Juanis Appuhamy* (supra), in reaching the conclusion that this section was superflous was apparently influenced by the decision in the South African case *Yorkshire Insurance Co. v. Standard Bank* [1] where the view was expressed that the corresponding section in the South African Bills of Exchange Act (Section 80) was a superfluity. Counsel for the Defendant Respondent conceded that in

[1] *(1928) W. L. D. 251.*

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South Africa there was no enactment which corresponded to Section 2 of Ordinance 5 of 1852, nor even one similar to Section 98 (2) of Chapter 82.

In the absence of such vital legislation, the interpretation of a section similar to our section 82 (1) can be of little assistance in ascertaining the true intention of our legislature. In *Daniel Silva v. Juanis Appuhamy* the attention of the learned Judges had apparently not been drawn to Section 2 of Ordinance 5 of 1852 for there is no reference to it at all in the judgment.

I would respectfully dissent from the decision in that case.

Apart from the question of the law relating to bills of exchange, the Defendant in this case is the collecting Banker.

It was conceded at the argument that a Banker in England placed in the position of the Defendant in this case would be liable to make good the Plaintiff's loss, without proof of fault or bad faith.

By Section 3 of the Civil Law Ordinance of 1853 (Chapter 79) the English Law relating to Banks and Banking was introduced into Ceylon. The section enacts that—

> "In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereafter to be enacted :
>
> Provided that nothing herein contained shall be taken to introduce into Ceylon any part of the Law of England relating to the tenure or conveyance or assurance of, or succession to, any land or other immovable property, or any estate, right or interest therein."

It was argued for the Defendant-Respondent that the liability of the banker in England was based on the doctrine of conversion, and had nothing to do with the law of Banks and Banking.

I am unable to accept this argument.

Different branches of the law often overlap, and cannot be looked at in separate water-tight compartments. Conversion has been adapted, modified, and applied to bankers and the business carried on by them, so much so that no book on the law of banking can be complete without

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a discussion on this subject. It has grown with the law of banks and banking, and become part of that law. If the Plaintiff in this case had consulted a lawyer in regard to the liability of the banker, I would not expect the latter to refer to a treatise on the doctrine of conversion, or the Roman Dutch Law relating to delicts, or the Principles of Negligence but rather to a text book on the law of banks and banking. I am in respectful agreement with the decision of Basnayake, Chief Justice, in the *Bank of Ceylon v. Kulatilaka*[1] that our law on the subject of a banker's liability is the same as in England except where special provision has been made in our law.

There is one other matter to which I would like to refer, and that is the alternative claim in the plaint for money had and received by the Defendant for the use of the Plaintiff.

In *Daniel Silva v. Juanis Appuhamy* (supra) Tambiah J. alone expressed the view that an action for money had and received does not lie in Ceylon.

After that case, the question came up again for decision before Chief Justice Sansoni and myself in *Don Cornelis v. De Soysa & Co. Ltd.*[2] and we were of the view that such an action is maintainable in Ceylon. I do not wish to repeat here the reasons for our view which have been so lucidly set out in the judgment of the learned Chief Justice. I am still of that view, and only wish to add that the action for money had and received has been filed and relief obtained by parties in all parts of our Island from the very inception of our courts. Nothing that was urged at the argument has led me to think that for the last hundred years or more our Courts have granted a remedy where none existed. Section 7 of the Prescription Ordinance (Chapter 68) which laid down the prescriptive period for a claim "for money received by the Defendant for the use of the Plaintiff" was enacted in 1872.

The argument urged for the Defendant-Respondent was that there must be "a waiver of the tort" before a claim for money had and received could be made, and that since the tort of conversion was not part of the Roman Dutch Law there can be no waiver of the tort.

The remedy was granted by our Courts on the broad equitable principles of unjust enrichment and the *condictio indebiti*. It had nothing to do with the waiver of a tort. My view is that this phrase merely means that where the remedy in tort is also available the Plaintiff cannot claim twice over.

Lord Denning in the Law Quarterly Review of 1949, Vol. 65, commented on the phrase "waiver of a tort". He said at page 40 :

"This was a misleading phrase. It referred only to the form of the action, not to the substance of the claim. After the forms of action were abolished, the phrase remained, but its origin was forgotten.

[1] *(1957) 59 N. L. R. 188.* [2] *(1965) 68 N. L. R. 161.*

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Lawyers began to think that the bringing of this action was in fact a waiver of the tort : that it was assumed that there was no wrongful act in receiving the money : and that therefore the Plaintiff could not complain if it was paid over by the Defendant to another before the Plaintiff asserted his claim. This was the view expressed by Phillimore L. J. in *Morrison's case*, and considered by the Privy Council in *John v. Dodwell*. But this and similar fallacies have now been set right by *United Australia v. Barclay's Bank*, which shows that the action for money had and received does not, and never did, involve any waiver of the tort but was, and is, an insistance on the Plaintiff's right to money to which he is entitled."

Counsel for the Defendant-Respondent laid great stress on one sentence in the judgment of Lord Simon in *United Australia v. Barclay's Bank* [1] referred to above. That sentence which appears at page 29 is :

" Indeed, if it were to be understood that no tort had been committed, how could an action in *assumpsit* lie ? "

It was argued for the Defendant-Respondent, that the action for money had and received was dependent on the existence of the tort of conversion. The facts in that case were shortly as follows :—

One Emons, the Secretary and a Director of the Plaintiff, had authority to endorse cheques for collection by the Plaintiff's bank *but not otherwise.*

He however endorsed a cheque made payable to the Plaintiff, to another company—M. F. G. Trust Limited. The Defendant Bank collected on the cheque and credited the proceeds to M. F. G. Trust Limited. The Plaintiff first filed an action against M. F. G. Trust Limited, which went into liquidation, and that action automatically abated.

The Plaintiff then sued the Defendant Bank. The only defence raised by the Bank which came up for consideration in appeal was, whether, having first sued M. F. G. Trust Limited the Plaintiff could now sue the Defendant Bank, and it was in this context that the question whether the Plaintiff had waived the tort arose.

Lord Simon quoted with approval a Restatement of the Law of Restitution promulgated by the American Law Institute, as follows :—

" A person upon whom a tort has been committed and who brings an action for the benefits received by the tort feasor is sometimes said to " waive the tort ". The election to bring an action of *assumpsit* is not however a waiver of tort but is *the choice of one of two alternative remedies.*"

[1] *(1940) 4 A. E. R. 20.*

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Lord Atkin in the course of his judgment said at page 36 :

" In cases where the money had been received as the result of a wrong, he still had the remedy of claiming damages for tort in actions for trespass, deceit, trover and the like, but he obviously could not compel the wrong doer to recoup him his losses twice over. Hence he was restricted to one of two remedies, and herein, as I think, arose the doctrine of " waiver of the tort ". Having recovered in contract it is plain that the Plaintiff cannot go on to recover in tort."

Lord Romer said at page 40 :

" A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrong doer. He may sue for the proceeds of the conversion as money had and received to his use, or he may sue for the damages which he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. In my opinion however this is due not to his having waived the tort but to his having finally elected to pursue one of his two alternative remedies."

In the sentence relied on by the Defendant-Respondent I think his Lordship was emphasizing the fact that the action for money had and received was an *alternative remedy* and did not imply " a waiver ". In the preceding sentence he said, "When the Plaintiff ' waived the tort ' and brought *assumpsit* he did not thereby elect to be treated from that time forward on the basis that no tort had been committed". In that case the Plaintiff sued for—(*a*) damages for conversion ; *alternatively*—(*b*) damages for negligence, and (*c*) in the further alternative, for money had and received.

As stated earlier the action for money had and received was recognised in Ceylon, as it was considered that the Defendant was doing something " wrongful " when he refuses to return to the Plaintiff money which justly belongs to the latter, and to which the Defendant has no right. The action was not dependent " on the waiver of the tort of conversion " as contended for by the Defendant-Respondent.

Lord Denning in *Kiriri Cotton Co. Ltd. v. Dewani* [1] referring to the action for money had and received said :

" It is simply an action for restitution of money which the Defendant has received but which the law says he ought to return to the Plaintiff".

It was this same idea which he put forward earlier in 65 Law Quarterly Review 1949 (supra) at page 48 when he said :

" The action at law for money had and received was in fact a remedy for unjust enrichment—"

[1] (1960) A. C. 192.

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and it was on this basis that our Courts have always given relief. I am of the view that the Plaintiff is entitled to succeed on his alternative cause of action as well and that issues 6 and 7 should have been answered in favour of the Plaintiff.

After the arguments in this appeal were concluded, the Registrar at the request of learned Counsel for the Appellant has sent up a reference to an old case decided by the Privy Council—*Page v. Cowasjee Aduljee* [1]—for consideration by the Bench.

In that case the Defendant had bid for, and purchased the hull of a stranded ship put up for sale at a public auction by the Master, and paid a deposit. For certain reasons the Defendant declined to complete the purchase, whereupon the vendor resumed possession and resold the hull at a loss. The action was brought by him to recover the difference between the original price bid by the Defendant and the sum realised at the re-sale. The Defendant denied liability and claimed damages in reconvention. It was held *inter alia* that though the act of the Plaintiff in retaking the hull of the ship and selling her was wrongful, *it entitled the Defendant to bring an action for trover* but did not amount to a rescission of the contract.

It supports the contention of the Plaintiff Appellant that conversion was part of our law from early times. I have already expressed my views on this question and do not wish to say more.

I would set aside the judgment and decree entered in this case, and enter judgment for the Plaintiff as prayed for with costs both here and below.

ALLES, J.—

The Deniyaya Tea & Rubber Estates Co. Ltd. by its Agents & Secretaries, Messrs Carson Cumberbatch & Co. Ltd., sent to the plaintiff, Mrs. L. M. de Costa a Dividend Warrant on 17th April 1958 for Rs. 30,637·13 being her share of the final dividend of the Company for the year 1957. The Dividend Warrant was crossed "not negotiable" and according to the Dividend Account was numbered No. 8 and issued in favour of Mrs. Costa payable at the National & Grindlay's Bank. Mrs. Costa received the Warrant, signed it and endorsed on the reverse that it should be credited to her account and gave the letter addressed to the Bank of Ceylon, Colombo, containing the warrant to her servant boy to be posted. The warrant was not received in the post by the defendant Bank and Mrs. Costa became aware only several months later of the loss of the warrant when the Police came and questioned her. It has been established in evidence that this Warrant No. 8 for Rs. 30,637·13 was credited to the account of Messrs Movie & Co., the sole proprietor of

[1] (1866) 1 A. C. 127.

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which was one Loganathan, at the branch of the Bank of Ceylon at Wellawatte on 29th April 1958. On 30th April 1958 the National & Grindlay's Bank paid out the money on presentation of the warrant by the Wellawatte bank and on 5th May 1958 the account of Movie & Co. was credited with this sum. On 8th May 1958 Loganathan drew a cheque for Rs. 29,413·13 on account of Movie & Co. in favour of one Felix de Costa and the money was paid to Felix de Costa after Loganathan had identified him as the payee. Loganathan and several others were subsequently charged in the criminal courts in connection with this same Dividend Warrant and Loganathan was convicted of a criminal offence.

In the present case Mrs. Costa is suing the defendant Bank for the recovery of the sum of Rs. 30,637·13, being the proceeds of the said Dividend Warrant, which she alleged was cashed and converted into money by the defendant Bank. Alternatively she claims that the defendant Bank is liable to pay her the said sum which was received by the defendant Bank for her use.

In my view many of the complex questions of law that have been argued in the course of this appeal can be resolved once there is a correct appreciation of the facts. The important question of fact that has to be determined is whether it has been established that the defendant Bank was negligent or acted in bad faith or had the knowledge that Movie & Co. had no right to the Dividend Warrant and that Loganathan was intending to misappropriate the proceeds. The trial Judge after a consideration of the evidence has held that the defendant Bank has disproved negligence on its part and that its good faith was never in issue. In coming to this conclusion he has considered certain items of evidence and also the submissions of Counsel, but in my view, he has unfortunately failed to consider adequately certain very important questions of fact and paid too much stress to matters of lesser importance. Had he considered all the attendant circumstances in their proper light he could not have failed to arrive at a finding adverse to the defendant Bank.

In 1957–1958 there was a spate of cheque frauds and this was well known in banking circles. Alwis, the clerk at Carson, Cumberbatch & Co. states that " in the latter part of 1957 and early in 1958 it appeared in the papers about the theft of cheques or forgeries of cheques " and it was thereafter that he put the crossing " not negotiable " rubber stamp on Dividend Warrants posted to shareholders. Sparks, a Senior official of the Bank, admitted that there were cheque frauds in 1957 and that in connection with these frauds the Head Office thought of installing ultra violet light in its various branches in order to detect erasures and alterations. There is evidence that the Wellawatte branch was supplied with such equipment sometime in 1958. Handy, the Manager of the Wellawatte branch, testified to the use of ultra violet rays for the examination of forgeries. The defendant Bank did not choose to place

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evidence before the Court as to when the Wellawatte branch was supplied with such equipment but the probabilities point to the fact that such equipment was available at the Wellawatte Branch when the Dividend Warrant was credited to the account of Movie & Co. When Sparks was giving evidence for the defendant, Counsel for the plaintiff in cross examination moved to mark in evidence the deposition of one Thuraiappa, an employee of the defendant Bank, in the Magistrate's Court, where, Thuraiappa had stated that he examined this cheque under an ultra violet light. On objection being taken by Counsel for the Bank however the objection was upheld and this evidence was not available at the trial. Although the learned trial Judge was justified in his observation that there was no legal obligation to have cheques for large amounts examined under the ultra violet light to discover any erasures or alterations, it was incumbent on the defendant bank in order to rebut the allegation of negligence, to place evidence that the light apparatus was not available in April 1958 or alternatively that the cheque was examined under the ray and revealed no alterations. These were matters peculiarly within the knowledge of the defendant Bank but the Bank chose to adopt an attitude of silence on this issue. There is next the circumstance in regard to the opening of Loganathan's account. The Manager of the Wellawatte Branch in October 1957, when this account was opened, was one Anthony. Anthony was not available at the trial as a witness to testify to the circumstances under which this account was opened. The account was opened in favour of Movie & Co. with an initial deposit of Rs. 1,171·40 (the minimum required being Rs. 1,000) and apart from the deposit of the sum of Rs. 30,637·13 on 5th May 1958 and the withdrawal of Rs. 29,814·13 three days later the transactions only showed small deposits and withdrawals. Loganathan was introduced as a customer to the Bank by an Audit clerk called Ariaratnam who had a modest account at the Bank. In the absence of Anthony to testify to the circumstances under which Loganathan was accepted as a customer, some general evidence was given by Sparks that if a person had a regular employment and if his cheques were not returned, he may be considered as a good referee. Ariaratnam, who was a fellow lodger with Loganathan at the Y. M. C A. stated that he knew Loganathan ; that he used his room as an office ; that he told him he wanted to do business and asked him to recommend him as a customer. As the learned Judge rightly remarked the opening of Loganathan's account "played a major role in the fraud in connection with the Dividend Warrant" and one of the matters that must be considered is whether the Bank has discharged its statutory liability and its obligations to the public, in exercising sufficient care in regard to the opening of Loganathan's account. While the learned trial Judge has addressed himself correctly in regard to the questions of law pertaining to the opening of new accounts, learned Counsel for the appellant has drawn our attention to a serious discrepancy in the printed form opening the account where Ariaratnam has not filled the caption in which he was required to state how long he had known Loganathan. In regard to a person who recommends a customer to a Bank, this cannot

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be considered a trifling matter. In the absence of Anthony to testify to the circumstances under which Loganathan was accepted as a customer, particularly at a period when the Bank had to be circumspect in regard to the opening of new accounts, and the lapse on the part of the Bank in not scrutinising whether the form opening the account had been properly filled, I am inclined to accept the submission of Counsel for the appellant that the defendant Bank has been remiss in accepting Loganathan as a customer. These are matters that have not been considered by the learned Judge in the course of his judgment. In order to disprove negligence, the defendant Bank has relied on the evidence of Handy and some general observations in regard to banking practice deposed to by Sparks. In my view this evidence falls far short of the requisite proof necessary to discharge the burden that rests on the collecting Bank under Section 82 of the Bills of Exchange Ordinance.

Handy was the Manager of the Wellawatte branch on 29th April 1958. He identified the paying in slip, P 18, for Rs. 30,637·13 crediting this sum to the account of Movie & Co. He says that P 18 must have been sent to him with the Dividend Warrant and the Collection Register. He admits that he was aware that it must be a Dividend Warrant and not a cheque as it bore only one numeral "8" whereas a cheque has usually five numerals. According to him he examines the reverse of the cheque to see whether any credit instructions tally with the instructions on the paying in slip and if there are no suspicious circumstances he passes the cheque for collection. His duties were to initial the register, the paying in slip and the cheque. It is however apparent from his evidence that he relied considerably on the judgment of the cashier clerk, Thuraiappa. According to Handy's evidence Thuraiappa would have seen the name of the payee on the receipt portion and verified whether it was the same as the name of the payee on the paying in slip and he would have also examined the credit instructions on the reverse of the cheque. He admitted that Thuraiappa would have examined the cheques for irregularities. Handy would therefore have to depend largely on the observations of Thuraiappa. On this day there were about 60 cheques put up to Handy for scrutiny and the largest amount credited to a single account was that on this Dividend Warrant. In spite of the fact that this was a Dividend Warrant and not a cheque and although a large sum was credited to a small account, Handy's suspicions were not aroused and he passed the Warrant for collection. If Handy had been a little more alert he could not have failed to have discovered the fraud. In this connection I think the facts in *National Housing Committee v. Cape of Good Hope Bank*[1] are relevant. In that case a cheque for a large sum crossed "not negotiable" was posted and addressed to "J. Daniels". It was received by one John Daniels, an ex-Railway employee who had received certain small amounts by cheque as gratuity. Honestly believing that this was also one such sum, he took the cheque to the defendant Bank to whom he explained the situation. On the face of the cheque appeared

[1] *(1963) (1) S. A. L. R. 230.*

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the stamp of the National Housing Office and it was purported to be signed by the Secretary. The Judge quoting from Paget on the Law of Banking, p. 301, where the learned author stated—

> "The most obvious circumstances which should put the banker on his guard (is) ..... one where a cheque is presented for collection which bears on its face a warning that the customer may have misappropriated it....."

was of the view that the teller in that case was obviously put on his inquiry and held that the Bank was negligent. In the instant case on the face of it the Dividend Warrant was for a very large amount which was to be credited to a small account opened comparatively recently. Handy was not so pressed for time as not to make inquiries in regard to this matter, particularly as it was the largest amount of the 60 cheques which he had to scrutinise that evening.

The Dividend Warrant was stolen subsequently at the National & Grindlay's Bank by a peon and is therefore not available for checking. It seems unlikely that the Warrant would have been stolen at the instance of Loganathan who would not have been interested in the movements of the Warrant once the proceeds were credited to the account of Movie & Co. at the Wellawatte branch which enabled him to draw the money.

Handy's evidence leaves a great deal to speculation and to say the least is unsatisfactory and hardly sufficient to disprove negligence on the part of the Bank. The position has however been made infinitely more onerous for the defendant Bank by Thuraiappa not being called as a witness. He was on the list of witnesses for the defendant and was present in Court. It was he who first examined the Warrant, checked on the endorsements, initialled the paying in slip, entered the particulars in the Collection register and submitted the documents to Handy. According to the Ledger Officer Alwis, when the cheque for Rs. 29,413·13 was cashed by Felix de Costa, the drawer Loganathan was identified by Thuraiappa. Alwis stated that normally large amounts are not paid to third parties and that was the reason why he called in the drawer and wanted him to endorse the Warrant and take the money. The drawer signed the cheque identifying the person who took the money as the payee. In view of the important role played by Thuraiappa in this transaction he was an essential witness for the defendant on the vital issue as to whether there was negligence on the part of the Bank. He could have given first hand evidence of the contents of the Warrant in the absence of the Warrant as a production. The learned trial Judge has dismissed the failure to call Thuraiappa as a witness in one sentence by stating that any default in doing so was cured by Handy's evidence. I am unable to agree.

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The reasons given by the learned trial Judge for exonerating the defendant Bank from its obligation to disprove negligence do not appear to be substantial. He states that it was not unusual for large sums to be credited to Company accounts for the purpose of evading Debits Tax; that there was nothing unusual in the opening of Loganathan's account and that there was no obligation on the part of the defendant to establish that the cheque was examined under the ultra violet light. These, in my view, are inadequate reasons for holding in favour of the Bank in the light of the more substantial matters referred to earlier. When, therefore, one looks at all the attendant circumstances it seems to me that the Bank has failed to disprove negligence. I would go further and hold that the facts establish that the Bank had knowledge that Movie & Co. had no right to the Warrant and that Loganathan intended to misappropriate the proceeds. There is no doubt that a fraud has been perpetrated in connection with this Warrant and this could not have been done without the connivance of one or more members of the Wellawatte branch. The defendant Bank therefore, in my view, has not rebutted the presumption under Section 82 of the Bills of Exchange Ordinance. In that view of the facts it matters not whether the Bank's liability is based on the English Law or the Roman-Dutch Law because in either case the Bank would be liable.

This case has been referred to a Bench of five Judges in view of the decision in *Daniel Silva v. Johanis Appuhamy* [1] where three Judges of the Court unanimously held that the English doctrine of conversion was not applicable to Ceylon since the tort of conversion was unknown to the Roman-Dutch Law.

The tort of conversion is one that had its origins in the early English forms of action and Tambiah J. in the above case at pp. 462, 463 has traced its historical background. By the fiction of treating a cheque as a chattel the doctrine of conversion was extended to cheques. The question that arises for consideration in this reference is whether the tort of conversion, which is really alien to the Roman-Dutch law of delict, has been received into our legal system. There are two methods in which such a law could be introduced into the law of Ceylon—either by statutory provision or by an unbroken line of judicial decision which recognised such a law.

The Proclamation of 23rd September 1799 and Ordinance No. 5 of 1835 (now incorporated as the Adoption of Roman-Dutch Law Ordinance—Ch. 12) declared that the Roman-Dutch law was to be the law of Ceylon "subject to such deviations and alterations..... as the authorities shall deem it proper and beneficial for the purpose of justice to ordain and publish or which shall or may hereafter be by lawful authority ordained

[1] *(1965) 67 N. L. R. 457.*

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and published ". Since 1835 various branches of the English law have been introduced into our legal system by special enactment. Section 2 of Ordinance 5 of 1852 reads as follows :—

> " The law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England in the like case, at the corresponding period, if the contract had been entered into, or if the act in respect of which any such question shall have arisen, had been done in England ; unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted."

This provision of the law was not brought to the notice of the Judges who heard *Daniel Silva's* case (supra) and enabled Counsel for the appellant to make the submission that had it been done the decision in that case might have been otherwise. It was Counsel's submission that by this enactment the entirety of the English law relating to Bills of Exchange including the principles of the law of conversion has been introduced into our legal system. A close consideration of the language of Section 2 would seem to indicate that the legislature in 1852 did not contemplate the introduction of the English doctrine of conversion into our law dealing with cheques. Indeed at that stage the law even in England had not been fully developed and the only source of law at the time would have been the common law including the law merchant as it was developed at that stage. Section 2 may be recast in the following manner :—

The law to be hereafter administered in Ceylon—

(*a*) in respect of *all contracts* relation to bills of exchange, promissory notes and cheques ;

(*b*) in respect of *questions arising* (within the contract) upon or relating to bills of exchange, promissory notes and cheques ; and

(*c*) in respect of all matters connected with such instruments shall be the English law in respect of the *said matters* as would be administered in the like case, at the corresponding period—

(i) if the *contract* had been entered into in England ; or

(ii) if the *act in respect of which any question* (arising upon the contract) had been done in England.

Although there must have been an inherent desire of the Englishmen of the time, for the purposes of promoting trade and commerce in their colonies to introduce bodily the law of England of the relevant period relating to bills of exchange, it does not appear to me, that the language of S. 2 gave effect to that intention. Under S. 2 the law of England of the

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corresponding period that would be applicable in Ceylon was the law " in respect of a contract and any question arising within the contract relating to bills of exchange, promissory notes and cheques ". One can envisage a situation where, in a contract relating to a bill of exchange ancillary questions within the contract may arise. For instance, where a person signs a bill in his capacity as an agent or in a representative capacity there can arise a question relating to the law of agency or partnership. The English law of the corresponding period on the law of agency or partnership would be applicable in such a case. Again where a bill in one country is negotiated in another country the rights and liabilities of the parties to the contract may have to be determined, not only under the contract relating to the bill of exchange but also under the law relating to the conflict of laws which would be an ancillary question arising within the contract. I can appreciate the arguments of Counsel for the appellant in regard to the liability of the collecting banker to the true owner of the cheque. The collection of cheques and the payment of the proceeds thereof to the true owner is perhaps the most important function of the banker's business. Could it however be fairly said to be a question arising within the contract or would it rather constitute a function of the banker's duties for which the liability falls outside the contract ?

The *wrong* of conversion consists in " an act of wilful interference with a chattel, done without lawful justification whereby any person entitled to it is deprived of its use and possession " (Salmond on Torts, 7th Edition, p. 375). I am inclined to take the view that it cannot fairly be said, without doing violence to the language of S. 2, that a tort, which had its origins in the early English forms of action, and which by a fiction of the law had been extended in England to cheques, can be said to be " a contract or a question arising within the same upon or relating to bills of exchange, promissory notes and cheques."

It might appear at first sight that the words " matters connected with such instruments " would be wide enough to include the liability of the collecting banker as for conversion, but having regard to the concluding words of the section which refers to the " said matters " as being the contract or act " in respect of which any question shall have arisen " these words cannot possibly mean that all matters connected with such instruments should be governed by the English law. It may properly be conceded that the theft of a cheque, which is broadly " a matter connected with a cheque " is not governed by the English law. The reason for its exclusion, I should imagine, is because theft is a wrong against the State and cannot be included as one of the matters referred to in S. 2 just as conversion is a wrong and being a tort is excluded from the purview of matters which strictly fall within the province of S. 2.

I am therefore attracted by the submission of Counsel for the bank that the bank's liability, when it deals with the chattel of another—inconsistent with that other's rights, is not a question that arises on a

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bill of exchange or a matter connected with any such instrument. The act of the Bank constitutes a wrong and is not based on any contractual liability. Therefore even if the provisions of Ordinance 5 of 1852 had been brought to the notice of the Judges who heard *Daniel Silva's* case, I am of opinion that the provisions of this law would not have persuaded them to accept the view that the doctrine of conversion applied to the collecting banker. In any event the action in *Daniel Silva's* case was not against the collecting banker but against a third party who had received the proceeds of the cheque on a forged endorsement.

When the law in regard to negotiable instruments was codified in England in 1882, the law of England in respect of negotiable instruments in so far as that law had been *introduced* into Ceylon by Ordinance 5 of 1852, became part of our law. In 1882 the position, in my view was no different from that in 1852, except that there was certainty in regard to the codified parts of the English Act which dealt with the contractual aspect of the law and matters ancillary to the contract. Therefore the introduction of Section 80 (which corresponded with our later s. 82) of the Act did not impliedly introduce the doctrine of conversion into Ceylon although it did so in England. In my view even s. 97 (2) of the English Act (which corresponded with our later s. 98 (2)) only introduced such parts of the common law of England in respect of contracts relating to negotiable instruments and questions arising upon the same and did not extend to the common law rules relating to tortious liability. It is perhaps this uncertainty in the state of the law which prompted Viscount Haldane in *Dodwell & Co. v. John* [1] from deliberately refraining from making a definite pronouncement as to whether the doctrine of conversion formed part of our law or not. I am therefore unable to agree with the Statement of Objects and Reasons to the Draft Bill of the 1927 Act, when it assumed that the English Act of 1882 in its entirety was in force in Ceylon by virtue of s. 2 of Ordinance 5 of 1852.

Our law in regard to Bills of Exchange underwent a radical change in 1927 and it is this change which, in my view, enabled Counsel for the appellant to successfully argue that the English doctrine of conversion in so far as it affected the liability of the collecting banker to the true owner of the cheque formed part of our law. Under Section 97 (3) of Ordinance 25 of 1927, Act No. 5 1852, which up to that time constituted our law on the subject, was repealed. The draft Bill appeared in Government Gazette No. 7,539 of 30th July 1926 and the long title to the Act stated that it was an Act *to declare* the law relating to Bills of Exchange, cheques and promissory notes. The Act which came into operation in March 1928 also stated in the long title that the Ordinance was passed to *declare* the law relating to bills of exchange, promissory notes and cheques. When the Statement of Objects and Reasons gave as one of its reasons the unusual one that it was desirable that the law should be reproduced in a local enactment for the benefit of the District Judges who were not furnished with copies of the English Act, I think

[1] *(1918) 20 N. L. R. 206.*

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there was an erroneous assumption that the entirety of the 1882 Act applied to our law. Be that as it may, it would appear from the other objects and reasons therein stated that the legislature gave careful consideration as to what should be our law on the subject and in particular dealt with the impact of the Roman-Dutch Law on our law relating to Bills of Exchange. Clause 3 of the Statement states that "Section 22 makes it clear that capacity to contract is to be determined by the Roman-Dutch Law as modified by Ordinance No. 7 of 1865 and Section 502 of the Civil Procedure Code, 1889 and not English law. But for this provision, it might be arguable that Section 98 (2) makes English law applicable. Section 22 leaves open the question by what law capacity to contract is determined. . . .". Clause 4 states that "S. 27 (1) (*a*) makes it clear that 'cause' as understood in Roman-Dutch law does not constitute valuable consideration for a bill of exchange or promissory note. This is *declaratory* of the present law".

Counsel for the appellant therefore strongly argues that the legislature gave its mind to what portions of the Roman-Dutch law it intended to retain and what parts it considered could be omitted in declaring what our law of Bills of Exchange should be. The doctrine of conversion being alien to the principles of the Roman-Dutch law, in introducing Section 82 into our law, our law impliedly accepted this doctrine as part of our law in regard to the liability of the collecting banker. I am inclined to agree with this submission. The liability of the collecting banker for negligence or lack of good faith can only be assumed on the footing that there was a denial to the true owner of the cheque of his lawful rights. The South African courts have taken the view that this section was a superfluity since the rules of the common law of England were not introduced under the various Acts in that country. But we in Ceylon must consider the section in the light of the historical background and in particular, that in 1927 our legislature declared Section 82 to be part of our law. With all respect therefore to Tambiah J. who seemed to take the view in *Daniel Silva's* case that the same considerations which applied in South Africa applied in Ceylon for the rejection of Section 82 as part of our law, I do not think it can be said that Section 82 of our law is superfluous. If it can fairly be urged that the law in Section 82 of our Act impliedly introduced the English doctrine of conversion as far as the collecting banker was concerned, I do not think it is necessary to consider further whether this doctrine has become part of our law under Section 98 (2) of the Act.

It was further submitted by Mr. Jayewardene for the appellant that as Section 3 of the Civil Law Ordinance had introduced into Ceylon the law of England with respect to Banks and Banking that the common law doctrine of conversion was part of the law of Ceylon in respect of the conversion of cheques. Tambiah J. in the Divisional Bench case has drawn attention to the difference between the English law and the Roman-Dutch law in regard to the liability of the collecting Banker. I agree with the views expressed by Tambiah J. that the rights and

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liabilities of the banker under our law are not affected by the introduction of the English law of Banks and Banking. The decisions in *Krishnapillai v. Hongkong & Shanghai Bank Corporation* [1] and *Mitchell v. Fernando* [2] support this view.

I shall now proceed to consider whether the decisions of our Courts have introduced the doctrine of conversion into our legal system. Bertram C.J. in *Samed v. Segutamby* [3] stated that the principles of the Roman-Dutch law " may no doubt, in course of time, become modified in their local application by judicial decisions but it would be only by a series of unbroken and express decisions that such a development could take place". Jayewardene A. J. in the same case expressed sentiments to the same effect at pp. 495 and 496. Can it be said that there is in Ceylon a series of unbroken and express decisions which have introduced the English law of conversion in relation to cheques into this country ? The decisions of the Courts during the last century can hardly be said to have made any contribution to the law on the subject. Prior to 1852, although the Courts had declared that commercial matters had to be determined in accordance with the Roman-Dutch law, the Judges who were trained in the principles of the English common law, decided the questions in accordance with the English law—Vide *Boyd v. Staples* [4] and *In re Poonan* [5]. Although the English common law in regard to negotiable instruments has been applied in our Courts prior to 1882 (Vide *Thompson v. Nannytamby* [6] and *C. M. Bank v. Silva & Co.*[7]) there is no case reported where the conversion of a cheque has been considered by the Supreme Court. The decisions cited by Counsel for the appellant only refer to the conversion of movables—(1861 Beven & Siebel's Reports 117 ; (1870) Vanderstraaten's Reports 42 ; (1877) Ramanathan's Reports 17 and (1888) *Williams v. Baker* 8 S.C.C. 165). In all these cases it has been assumed that the English doctrine of conversion applied and there has been no discussion in regard to the impact of the Roman-Dutch law. The first occasion when reference has been made to the law of conversion in reference to a cheque is in the obiter dictum of Viscount Haldane in the Privy Council case of *Dodwell & Co. v. John* [8] in 1918 where he made the following observation :—

> " It may well be true that the principles of the English common law have been so far recognised in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place. If so undoubtedly there was a conversion according to these principles."

But the Supreme Court does not appear to have been impressed by the dictum for 17 years later in *Thompson v. Mercantile Bank* [9], Akbar J. with whom Koch J., agreed held that the English common law doctrine of conversion found no place in the law of Ceylon. In *Punchibanda v*

[1] *(1932) 33 N. L. R. 249.*
[2] *(1945) 46 N. L. R. 265.*
[3] *(1924) 25 N. L. R. 481 at 487.*
[4] *(1820–33) Ram. Reports 19 at pp. 20 and 21.*
[5] *(1820–33) Ram. Reports pp. 80 and 81*
[6] *(1860) Ram. Reports 81.*
[7] *(1866) Ram. Reports 199.*
[8] *(1918) 20 N. L. R. 206.*
[9] *(1935) 15 Ceylon Law Recorder 61 at 63*

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Ratnam[1], also in regard to a movable, it was assumed by Howard C.J. that the English doctrine of conversion was part of our law and in *Bank of Ceylon v. Kulatilake*[2] in the case of a cheque, Basnayake J. has held that the Bank was liable in conversion. The question whether the English doctrine of conversion in relation to a cheque formed part of law was considered for the first time in *Daniel Silva's* case.

Although the statutory provision in Section 2 of Ordinance 5 of 1852 was not considered by the Judges in *Daniel Silva's* case, I am of the view, that the English doctrine of conversion is no part of our law subject to the qualification that in the case of the collecting Banker he would be liable as for conversion to the true owner of the cheque. Since the defendant bank has not rebutted the defences available to it under S. 82, the plaintiff would be entitled to succeed on the first cause of action.

In South Africa the rejection of the English doctrine of conversion has been made less complicated for two reasons. Firstly there was no historical background similar to that created in Ceylon by the introduction of the English law in enactments similar to Ordinance 5 of 1852 and Ordinance 22 of 1866 and secondly when the provinces in South Africa (Natal in 1887, Orange Free State in 1902, Transvaal in 1902 and Cape of Good Hope in 1893) introduced the provisions of the English Act of 1882 they did not include what corresponded to our Section 98 (2) into their legislation. South Africa therefore deliberately refrained from introducing the rules of the common law of England including the law merchant into their legal system. It was therefore possible for the South African courts very early in their legal history to decide that the law of conversion formed no part of their law—Vide *Leal & Co. v. Williams*[3]. The decision of Innes C.J. in this case has been subsequently followed by the Appellate Division in South Africa—Vide *Morobane v. Bateman*[4] and *John Bell & Co. v. Esselen*[5]. In view of these decisions the South African Courts have held that their Section 80 (which corresponded to our Section 82) was a superfluity. Section 80 of the South African Act has now been replaced by a new section, which gives some limited protection to the true owner and affords a remedy akin to the English action for conversion (Cowen—The Law of Negotiable Instruments in South Africa—3rd Ed., p. 372).

As early as 1906 Innes C.J. in *Leal & Co. v. Williams* (supra) at p. 559 realised the hardship that would be caused to the true owner by the doctrine of conversion not being available in South Africa, which made it impossible for the true owner to sue the collecting Bank and described the position as being " unfortunate ". In 1943 by the Bills of Exchange Amendment Act (now Section 81 of the South African Act of 1964) provision has been made which afforded a remedy akin to the English action for conversion, to the true owner of a crossed cheque bearing the words

[1] *(1944) 45 N. L. R. 198.*
[2] *(1967) 59 N.L. R. 189.*
[3] *1906) T. P. D. 554.*
[4] *(1918) A. D. 460.*
[5] *(1954) A. D. 147 of 153.*

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"not negotiable", an action even against the collecting banker—See however the observations of Rosenow J. in *National Housing Commission v. Cape of Good Hope Bank*[1] (supra) at pp. 236, 237. Tambiah J. in *Daniel Silva's* case remarked that "Legislation on the lines enacted in South Africa would be necessary in Ceylon to protect commerce" but with respect I am of the view that such a course is unnecessary since S. 82 is today part of our law.

I will now pass to the second cause of action relied upon by the plaintiff and in my view she is also entitled to succeed in her alternative cause of action for money had and received. I do not agree with the observation of Tambiah J. in *Daniel Silva's* case that such an action is unknown to our law. Indeed in the subsequent case of *Don Cornelis v. de Soysa & Co. Ltd.*[2], where the decision in *Daniel Silva's* case was considered, the Court held that such an action was available in Ceylon. Sansoni, C.J. in the course of his judgment stated that—

> "there is no inconsistency in applying the principle of the action for money had and received, which is founded on the same principle of equity as the Roman-Dutch law action of 'condictio indebiti' and is a liberal action, founded upon large principles of equity where the defendant cannot conscientiously hold the money."

The learned Chief Justice has stated why in such a case restitution must be made to the true owner. It is on the basis of the doctrine of unjust enrichment that a defendant cannot conscientiously hold the money belonging to another. "He who has come into possession of property not his own, even though the acquisition might have been made accidentally or by mistake and without deliberate fraud, is under a strict obligation to return it or its value to the owner. This was the foundation of the important action of condictio indebiti." (per Schneider J. in *The Imperial Bank of India v. Abeysinghe*[3].)

In regard to the Banker's liability the position has been succintly stated by Cowen (supra) at p. 372—

> "If a bank knowing that its customer's title to a cheque is defective, collects payment thereof, it will be liable at common law to the true owner. But a collecting banker who receives payment of cheques, whether crossed or not, on behalf of a customer who has no title thereto is not liable at common law to the true owner of the cheques for any loss sustained by him in consequence thereof, on the ground of negligence only; he is liable only *if he had knowledge that the customer had no right to the cheques and was intending to misappropriate the proceeds.*"

The learned author cites *Yorkshire Insurance Co. Ltd. v. Standard Bank*[4] where Tindall J. at pp. 278–283 draws attention to the difference between the banker's liability in the English law and the Roman-Dutch law.

[1] *963) (1) S.A.L.R. 230.*
[2] *(1) 68 N. L. R. 162.*
[3] *(1927) 29 N. L. R. 357.*
[4] *(1928) W. L. D. 251.*

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There is also a passage in *Morobane v. Bateman* (supra) which explains the basis of liability in the Roman-Dutch law. That was a case where property was obtained by the defendant contrary to an express provision of law and which imposed a criminal liability on the purchaser. Innes C.J. in allowing the plaintiff's claim said :—

> "The English doctrine of conversion finds no place in our law; but the purchaser of property belonging to a third person who has redisposed of it may nevertheless under certain circumstances be held accountable to the true owner. Voet (Ad Pand. 6-1-10) discusses the remedies which one who has been unlawfully deprived of his property has against a third person through whose hands it has passed. If the latter acquired and resold the property mala fide and with knowledge of the theft, then he would be liable to the owner, because he would virtually be a party to the delict, and would be regarded in the same position as if he has fraudulently parted with possession. But if the acquisition and the re-sale had been bona fide then there would be no liability to make good the value. Because the good faith of the purchaser would protect him against a claim ex delicto, and there would be no contractual relationship and no consideration of natural equity. Now the position, though not identical with the example discussed by Voet closely resembles it, and must be decided on the same broad principles. It is a very analagous case. If exactly the same test had to be applied, it would be impossible, broadly speaking, to say that an acquisition which constituted a criminal offence was a bona fide acquisition. But the expression bona fides was used by Voet merely to denote *knowledge of the tainted title ;* and here it may be said there was no such knowledge. But the illegality of the contract leads to the same result as if there had been knowledge. Because it prevents any justification of the admitted handling and disposal of the owner's property."

On the facts established in the present case it seems obvious that one or more officials of the Wellawatte branch of the defendant's Bank had knowledge of the fraud that was being perpetrated by Loganathan. The Bank received the Dividend Warrant with knowledge of its tainted title and was aware that Loganathan was going to misappropriate the proceeds. Consequently the defendant would be liable to the true owner and the plaintiff is entitled to succeed on the action for money had and received. I would allow the appeal with costs.

WEERAMANTRY, J.—

This appeal raises matters of rare interest under our law. Among these are the questions whether the English doctrine of conversion forms part of the general law of Ceylon, and whether in any event it forms part of the particular sections of our law which relate to negotiable instruments and matters of banks and banking. The resulting examination of the

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precise areas of applicability of English and Roman-Dutch law has stimulated far reaching researches into the manner in which a body of mercantile law, English in origin, was worked into the texture of a legal system primarily Roman-Dutch. Indeed the basic fabric itself was subjected to a searching scrutiny at the argument before us and counsel minutely examined the mode of introduction not only of our special commercial law but of our general common law itself. Other problems as well emerged, no less attractive and no less complex, relating to the nature and scope of the principles of quasi-contractual liability under both English and Roman-Dutch law.

The plaintiff's claim arises in consequence of a clever fraud relating to a dividend warrant for Rs. 30,637·13 crossed and made payable to the plaintiff. This warrant, though endorsed by the plaintiff and made payable to her account, had found its way into the hands of one Loganathan, an account holder of the defendant bank at its Wellawatte branch. This Loganathan, who has since been prosecuted to conviction for a criminal offence relating to this dividend warrant, had some months earlier opened his account with the defendant bank in the name of " Movie & Co.". It was to this account that the warrant was credited, but how it came to be accepted to the credit of that account, when the plaintiff had already endorsed it and made it payable to her account, is by no means clear, and constitutes one of the crucial questions of fact in this case.

Apart from Loganathan, the key figure in this curious episode was one Thuraiappah, the accountant-cashier at the bank, who according to the evidence in the case, was the official entrusted with the duty of receiving cheques and checking paying-in-slips presented to the bank. Handy, the manager of the Wellawatte branch, has stated that it was Thuraiappah's duty to examine the paying-in-slips and the accompanying cheques or warrants to see that they tallied in regard to the credit instructions, and also to examine the cheques or warrants for irregularities. After this process, the paying-in-slips, cheques or warrants and collection register are passed on to Handy who initials these documents, and passes the cheques or warrants for collection, after himself seeing that the credit instructions on the cheques or warrants tally with those on the paying-in-slips.

Irrespective of the question on whom lay the burden of proof, there was then evidence placed before the court by the plaintiff in regard to crossing and endorsement, which required adequate contradiction or explanation by the bank if the inference of negligence arising therefrom was to be displaced, for a cheque so crossed and endorsed at the time of presentment could not without negligence find its way into an account other than that of the payee. This evidence thus involved the bank in the necessity of proving the circumstances in which the endorsement referred to was overlooked, or alternatively, such facts as alteration or obliteration of the endorsement at the time of crediting. On these matters the bank has signally failed to provide the court with satisfactory proof.

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The witness best able to speak to these matters was Thuraiappah, who admittedly handled and examined the warrant at the time of presentment. As far as Handy was concerned, he was the officer charged with managerial and supervisory duties and unable to give individual transactions the detailed care and attention expected of officers specially entrusted with the performance of those particular duties. It is in evidence that some sixty cheques had been put up at the end of that day to Handy in the space of half an hour, and it would be reasonable to suppose that he relied to a large extent on the due performance by his cashier clerk of the specific duties entrusted to him. In any event it is evident that he does not have, nor indeed may he be expected to have, a clear recollection of this particular transaction.

Now, this Thuraiappah was a witness listed by the defendant bank summoned to give evidence, and admitted by a senior official of the bank to have been in attendance in court. He was not however called as a witness by the defendant bank, nor any ground of excuse offered therefor, and without him we have no proper evidence of any endorsements which would have justified the bank in placing this warrant to the credit of Loganathan's account. Further, although the reluctance to call Loganathan may well be understood and does not attract the same adverse comment as the failure to call Thuraiappah, it is noteworthy that Loganathan was listed as a witness by the defendant, directives obtained on the superintendent of the Prison on more than one occasion to produce him in court, special batta deposited for his expenses and indeed a postponement of the trial obtained on the ground of his illness. Nevertheless, Loganathan was not called although he was the only other person who could have spoken to the endorsements on the warrant at the time of presentment.

The warrant itself is not now available, having been stolen from Grindlays' Bank, on which it was drawn, and though the paying-in-slip P18 has been produced, it can by itself throw no light on the endorsements upon the warrant. It is significant also that interrogatories were served on the bank containing a question as to whether it made inquiries to ascertain how " Movie & Co." became holders of a dividend warrant made out in favour of the plaintiff. To this question the bank has given the singularly unhelpful reply that the record of any inquiries made would appear on the dividend warrant and that in the absence of the dividend warrant no answer was possible.

The matter does not however rest there.

It is in evidence that at or about the time when this cheque was presented, the Wellawatte branch of the defendant bank had been provided with an ultra violet ray apparatus capable of detecting alterations on cheques which would escape detection by the naked eye. If indeed an ultra violet device had been available to the Wellawatte branch on this date it was material both to the question of endorsements and to the

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question of negligence whether the apparatus had been used in regard to this warrant which, as far as the transactions of that branch went, was for a conspicuously large amount. In fact the transaction was by the standards of that branch so large as to dwarf all other transactions for the day, and indeed any transaction ever recorded in the account in question. It is significant that during the entire history of this account after the initial deposit with which it was opened, there were only four sums credited prior to the crediting of this sum of Rs. 30,637·13, and these were trifling amounts of Rs. 144·88, Rs. 95·00, Rs. 49·50 and Rs. 231·39. Hence although there would be no obligation on the bank to submit all transactions to the scrutiny of such a device, it may well be contended that this was precisely the type of transaction for whose proper scrutiny such a device was intended. If on the other hand the device had not yet been provided to the bank, that was a matter capable of easy proof, thus negativing any possibility of adverse comment arising from failure to use the ray. This was clearly a matter one would expect to be reflected in the records of any well-ordered bank, and it is noteworthy that Sparkes, the senior branch manager of the defendant bank, admitted in cross examination that Handy could have looked up the records and ascertained when the ray was supplied to the Wellawatte branch. Despite attention being focussed on this matter at the trial, the bank has failed to assist the court on the question whether the device was available to it on the day in question.

I am not here expressing any view as to whether the failure to use this device, if available, constitutes negligence or not in the circumstances of this case, but the availability of the device on that day was as I have said a material question indeed. Here again, then, the bank has failed to make available to the court evidentiary material of the most obvious value.

This matter is rendered all the more significant when one sees that, at one stage in the cross examination of Sparkes, counsel for the plaintiff moved to mark in evidence, presumably as an admission, the deposition of Thuraiappah in the criminal case, wherein he had stated that he had examined this cheque under ultra violet light. Counsel for the bank objected to this evidence and the objection was upheld.

It may well be contended that the order upholding this objection was wrong, on the basis that the passage referred to was an admission of an agent of the defendant. However, without in any way taking into account the contents of that deposition as evidence, one sees from this episode what significance could attach to the question whether the ray was available and if available whether it was used. These were moreover matters peculiarly within the knowledge of the bank, and the conclusion seems inevitable that the bank has failed to place the best evidence before court of the endorsements on the cheque at the time of presentment.

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There is another piece of evidence concerning this device which I find most difficult to understand. Sparkes has stated in evidence that this ray was procured because around that time there had been a spate of frauds connected with cheques which had been stolen in the post and altered through the use of chemicals. Handy, the manager of the Wellawatte Branch at the relevant time, sought however to maintain in cross examination that he had never heard of any endorsements on a cheque having been chemically removed. Quite apart from his lack of opportunity to examine the endorsements on the cheque, I am afraid the bank was resting its case upon a most insecure foundation when it chose to depend entirely on such a witness on the question of the endorsements on the cheque at the time of presentment.

The conduct, then, of the bank in receiving this warrant to the credit of Loganathan's account, is shrouded in mystery, and one feels assailed by the strongest doubts as to the innocence of Thuraiappah, its officer who received this warrant, compared it with the paying-in-slip and put it up to Handy. My brothers have in their judgments set out other reasons strongly indicative of his complicity in Loganathan's guilt and with these observations I would respectfully agree.

On feels constrained to observe that the defendant in this case was not a litigant principally concerned with success in the immediate litigation, but a public institution—indeed the leading bank in the country and one entrusted by the legislature for some time with a monopoly of the right to open current accounts. Such a defendant was in my view under a duty to be of greater assistance to the court in placing before it the evidentiary material necessary for a determination of the difficult matters it was called upon to decide.

Next in the history of this fraud is the manner in which the proceeds collected upon this cheque and deposited to Movie & Co.'s account, were withdrawn. It would appear that three days after this sum had been credited to the account of Movie & Co., a cheque for an amount nearly corresponding in value to this credit, namely a sum of Rs. 29,814·13, was withdrawn from the account upon a cheque drawn by Loganathan in the name of one Thomas Felix de Costa. Fonseka, the agent at the Wellawatte branch on that day, had wanted confirmation of the identity of the payee, but the drawer of the cheque, Loganathan, was produced before the agent and identified by Thuraiappah and the money was paid out to the drawer himself. The payee was not seen by anyone on that day and we see again the hand of Thuraiappah at work in association with Loganathan.

Another aspect of alleged negligence on the part of the bank is in regard to the very opening of the account by Loganathan in the name of Movie & Co. It would appear that one Ariaratnam, the person introducing Loganathan to the bank, had not even stated how long he had known the proposed customer—an important piece of information a bank

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would ordinarily be expected to require before it accepts a new customer. The manager of the Wellawatte branch at the time, who interviewed the prospective customer and decided on his suitability and also initialled the account opening form D2, was one Anthony, who at the time of trial was still in the service of the defendant bank at its London branch. This case was important enough and the circumstances of the opening of this account sufficiently material, to warrant his evidence being placed before the court either directly or by other means available under our law. This again was not done by the bank, although it has been observed that if a bank manager fails to make inquiries which he should have made, " there is at the very least a very heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner."[1] There would appear therefore even at that stage to have been an apparent want of care on the part of the bank which the bank has failed to explain. However, for the purposes of the present case, mindful of the observation in *Marfani & Co. Ltd. v. Midland Bank Ltd.*[2] that one must resist the tendency in these cases to show wisdom after the event, I shall not take this circumstance into account as a factor against the bank. I consider that without resort to this factor the matters to which I have already referred are amply sufficient to bring into play the legal principles which I shall discuss.

I may add that I too incline to the view indicated in the judgment of my brother Sirimane that a fraudulent official of a bank acting in collusion with a fraudulent account holder would not find it difficult to get a busy bank manager in the rush of business to initial a paying-in-slip for the deposit of a cheque into a particular account without altering the endorsements on the cheque itself. Consistently with this view we have the indication from letter P10 that when the warrant was received by Grindlays' bank, on which it was drawn, it was still apparently unaltered.

One further circumstance to which I should refer is that the evidence of a spate of banking frauds, involving thefts and forgeries of cheques during the period in question, should have served to underline the need for caution when a transaction of this nature presented itself, attended as it was by so many circumstances of suspicion, and involving as it did so large a sum of money.

The standard of care required of a banker as stated by Lord Warrington of Clyffe in *Lloyds Bank Ltd. v. E. B. Savory & Co.*[3] is that it must be judged " by reference to the practice of reasonable men carrying on the business of bankers and endeavouring to do so in such a manner as may be calculated to protect themselves or others against fraud." Moreover a particular circumstance which should have called for care on the part of the banker was whether the transaction of paying in any given cheque coupled with the attendant circumstances was so unusual

[1] *Baker v. Barclays' Bank Ltd., (1955) 2 All E. R. 571 at 584.*

[2] *(1968) 2 All E. R. 573.*

[3] *(1933) A. C. at 221.*

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that it should have placed the banker upon inquiry. To quote Scrutton, L.J. in *Lloyds Bank Ltd. v. The Chartered Bank of India, Australia and China*[1] "I accept the measure of duty stated by Lord Dunedin in *Commissioners of Taxation v. English, Scottish and Australian Bank*[2] where he says: "Mr. Justice Isaacs says, 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison v. London County and Westminster Bank Ltd.*[3] and relevant to the present, are (1) that the question should in strictness be determined separately with regard to each cheque; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present', their Lordships think this is an accurate statement of the law." Lord Dunedin adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that therefore there must be something markedly irregular in the transaction." I consider these tests of negligence to be sufficiently satisfied by the circumstances to which I have referred.

I must however make it clear that when I hold there was negligence I do not mean the bank had *knowledge* of Loganathan's tainted title. Though there was certainly negligence—and that of a high standard—it means no more than that there were strong circumstances of suspicion necessitating inquiry by the bank in regard to the title of its customer. Knowledge is a more definite state of mind than suspicion, however strong, and it would be unsafe in the absence of more specific evidence of knowledge and more particularly in the absence of the warrant itself, to hold that the bank, at the time it collected the cheque, had guilty *knowledge* of Loganathan's tainted title.

It is this state of facts which highlights the importance of the question whether the transaction we are here examining is one which attracts the principles of the English law of conversion or the normal principles of our common law.

The essential difference between the two systems on this matter is that a cause of action in conversion would not require fault or fraud on the part of the defendant. The position in English law is explained by Diplock, L.J. in *Marfani & Co. Ltd. v. Midland Bank Ltd.*[4] in the terms that: "At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case,

[1] (*1929*) *1 K. B. 40 at 59.*
[2] (*1920*) *A. C. 683 at 688.*
[3] (*1914*) *3 K. B. 356.*
[4] (*1968*) *All E. R. at p. 578.*

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it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute ; he acts at his peril."

By way of contrast, the Roman-Dutch law would not attach delictual liability in the absence of *dolus* or *culpa*.

It is true there exists a general principle of the *Lex Aquilia* that a person shall not injure another's property by unlawful physical acts [1] and that the right each person enjoys that others shall not injure him in his person or property by their conduct involves a duty in such others to exercise proper care [2]. However in the specific case of the purchaser of stolen property, in consequence of the special treatment of that subject in connection with the *actio ad exhibendum*, the Roman-Dutch law would appear to attach no liability on the ground of mere negligence but to require mala fides, meaning, in this context, knowledge of defective title. Thus there would appear to be no liability in such a case merely on the ground that there has been an omission of a precaution which might have suggested itself to a careful person [3]. By analogy this principle has been held applicable to the case of a collecting banker.[4]

In the words of Cowen [5] " Of course if a bank knowing that its customer's title to a cheque is defective, collects payment thereof, it will be liable at common law to the true owner. But a collecting banker who receives payment of cheques, whether crossed or not, on behalf of a customer who has no title thereto, is not liable at common law to the true owner of the cheques for any loss sustained by him in consequence thereof, on the ground of negligence only ; he is liable only if he had knowledge that the customer had no right to the cheques and was intending to misappropriate the proceeds."

It would appear then that in the circumstances of this case, there is an absence of the ingredients necessary to the maintainability of an action under the Roman-Dutch law, for even though the facts reveal negligence, they fall short of proving mala fides on the part of the bank. This explains the necessity for the appellant to invoke the English doctrine of conversion.

In *Daniel Silva v. Johanis Appuhamy* [6] a Divisional Bench of this Court expressed the view that the English doctrine of conversion is not part of our law. In that case a not negotiable cheque on which the payee's endorsement was forged was transferred by the forger or someone

[1] *Grueber, Lex Aquilia, p. 231.*
[2] *Union Govt. v. National Bank of S. Africa Ltd. (1921) A. D. 129.*
[3] *Broughton v. Pinson & Co. (1877), Nat. L. R. 164.*
[4] *Yorkshire Insurance Co. Ltd. v. Standard Bank of South Africa Ltd., supra p. 283.*
[5] *The Law of Negotiable Instruments in S. Africa, 3rd ed. p. 372.*
[6] *(1965) 67 N. L. R. 457.*

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on his behalf to the defendant. The value of the cheque was credited by the defendant's bank to the account of the defendant and a like sum debited in the same bank to the account of the plaintiffs who were the drawers of the cheque. The plaintiffs averred that the defendant had no title to the cheque inasmuch as the endorsement of the payee had been forged and that he consequently had no lawful authority to convert the cheque to his own use. It was held that the defendant being a bona fide holder for value in due course would not incur liability under the Roman-Dutch law of delict and that he could not be held liable for the tort of conversion as the English doctrine of conversion has not been introduced into Ceylon and the tort of conversion is unknown to the Roman-Dutch law. The Court further took the view that section 98 (2) of the Bills of Exchange Ordinance which makes the rules of the common law of England including the Law Merchant applicable to bills of exchange, promissory notes and cheques, so far as not inconsistent with the express provisions of the Ordinance or any other enactment for the time being in force, does not draw in the English law on this matter.

I take the view, with respect, that that judgment is correct in its conclusion that the doctrine of conversion forms no part of the general law of Ceylon. However that case did involve the rights of a bona fide holder for value of a negotiable instrument and in regard to such instruments we are governed by the English law. For reasons which will appear later in this judgment such a transaction does in my view attract the English law relating to conversion although the doctrine of conversion forms no part of our general law. On this point therefore, I would with the greatest respect, differ from that decision.

Moreover, it will be observed that the case of *Daniel Silva v. Johanis Appuhamy*[1] was one relating to the liability not of the banker but of a person to whom the cheque had been transferred by the forger or someone on his behalf. That case therefore does not determine the question whether the law applicable to the *collection* of a cheque *by a banker* is the English law and we are faced in the present case with the further question whether the transaction under examination attracts the English or the Roman-Dutch law by reason of its connection with matters of banking—a matter on which *Daniel Silva v. Johanis Appuhamy* can afford us no guidance.

I will first set out my reasons for concluding that the doctrine of conversion forms no part of our general common law and then examine the question whether it forms part of our special commercial law applicable to a transaction such as the present.

A consideration of the first question is best prefaced by a brief historical discussion of certain aspects of the introduction of the Roman-Dutch law as the common law of this country. Against this background the precise limits of the inroads made thereon by the reception of English law will appear with greater clarity.

[1] *(1965) 67 N. L. R. 457.*

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I do not propose in this judgment to re-traverse the well explored ground concerning the question whether the whole of the Roman-Dutch law has been received in Ceylon. The many comprehensive judgments of this Court on this question more than adequately deal with this matter. I shall however concern myself with the somewhat different question urged on this appeal, that the terms in which the Roman-Dutch law was introduced into this country were not absolute but subject to a power expressly given to the courts to deviate from the general principle that the common law was to be Roman-Dutch. In other words it is submitted that a principle of English law may become part of our legal system not merely by tacit adoption by the courts over a long period of time, but in fact that the courts may, by virtue of express legislative authorisation in that regard, effect a deliberate deviation from the Roman-Dutch law.

In this connection reliance is placed upon the phraseology of the Adoption of Roman-Dutch Law Ordinance which has its origin in Governor North's Proclamation of 23rd September 1799, and now appears as Chapter 12 in the current edition (1956 edition) of the Enactments.

Section 2 of that Statute declares that " the administration of justice and police in the island shall henceforth and during His Majesty's pleasure be *exercised by all courts of judicature, 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 we shall by these presents, 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."

This provision follows upon a Preamble which reads :

" WHEREAS it is His Majesty's gracious command that for the present and during His Majesty's will and pleasure the temporary administration of justice and police in the settlements of the Island of Ceylon, now in His Majesty's dominion, and in the territories and dependencies thereof, should, as nearly as circumstances will permit, be exercised by us in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies, or to such expedients and useful alterations as may render a departure therefrom either absolutely necessary and unavoidable or evidently beneficial and desirable."

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The phraseology of section 2 provokes inquiry into the identity of the powers and authorities therein mentioned, and it was the submission of the appellant that, in the absence of any specification of these powers and authorities in any earlier portion of the Ordinance or in the Preamble, one must seek them in the earlier words of section 2 itself. On this basis these powers and authorities would include the Courts of Judicature, civil and criminal, of the Island.

If such indeed were the position, the burden of satisfying this court that the English principle of conversion had been adopted in preference to the differing rule of Roman-Dutch law would be more easily discharged than if reliance must be placed upon the unbroken and unequivocal chain of authority required to prove the tacit adoption of a principle of English law.

One is apt however to be misled on this matter by the form in which this Proclamation now appears in the Enactments, for upon a perusal of the Proclamation in its original form, it becomes clear what these "powers and authorities hereinbefore mentioned" are; and these "powers and authorities" are certainly not the courts of law.

The Proclamation of 23rd September 1799, reproduced in its original form in Dr. G. C. Mendis' work on the Colebrooke-Cameron Papers[1], shows that the Preamble in its original form did not stop at the words "beneficial and desirable", as in recent editions of the Enactments, but continued with these words: "subject also to such deviations, alterations and improvements, as shall be directed or approved by the *Court of Directors of the United Company of Merchants of England, trading to the East India Company or the secret Committee thereof, or by the Governor-General in Council of Fort William in Bengal.*" The words quoted were omitted in later editions of the Enactments for the reason that they were inconsistent with later legislative developments, as we shall presently see. When one has regard to the terms of the actual Proclamation, there can be little doubt that "the respective powers and authorities hereinbefore mentioned", in section 2, are the powers and authorities just mentioned and referred to in the deleted portion of the Preamble. However when that deletion was made, the words in section 2 "subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned" were retained although the respective powers and authorities referred to were none other than the powers and authorities that had been specified in the deleted portion of the Preamble. It would be wrong therefore to construe the expression "respective powers and authorities" as appearing in section 2 today by reference only to such powers and authorities as appear in the form in which recent editions of the Legislative Enactments carry the Proclamation.

The same result becomes clear also from the Royal Instructions which Governor North received from King George IV dated 26th March 1798[2], for these are in terms similar to those of the Proclamation of 23rd

[1] *Vol. 2 p. 154.* [2] *Mendis, ibid, p. 70.*

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September, 1799. Article 5 of this Instrument states that " for the present the temporary administration of justice and police in the settlement of the Island of Ceylon, now under our Dominion, and in the dependencies thereof should as nearly as circumstances will permit be exercised by you in conformity to the laws and institutions that subsisted under the Ancient Government of the United Provinces subject to such directions as you shall now and hereafter receive from the *Court of Directors of the East India Company or the secret Committee thereof or the Governor-General of Fort William in Council.*" Likewise also the Instructions from the Court of Directors of the East India Company to Governor North[1] contain a corresponding provision (Article 5).

This view, that there was no such authority expressly given to the courts, is further confirmed by a perusal of the revised Royal Instructions issued to Governor North on 18th February 1801[2]. Article 4 required that the temporary administration of justice and police should as nearly as circumstances would permit be exercised in conformity to the laws and institutions that subsisted under the ancient Government of the United Provinces subject to such deviation in consequence of sudden and unforeseen emergencies and to such expedients and useful alterations as may render a departure therefrom either absolutely necessary and unavoidable or evidently beneficial and desirable. The same article required the Governor immediately to report to one of the Principal Secretaries of State for His Majesty's ratification any such deviations or alterations which he chose to make in terms of this Instruction. The Letters Patent re-commissioning Governor North dated 18th April 1801[3] revoked the earlier Letters Patent and everything therein contained.[4]

The picture emerging from these documents becomes complete when one has regard to the courts in existence in 1799. There was at that time a breakdown of the administration of justice, for the Dutch judicial system had come to a complete standstill after the capitulation of Colombo and " there was an utter absence of courts for trying private civil disputes."[5] On 1st June 1796 there had indeed been passed an " Act of Authorisation " renewing the Dutch courts of justice at Colombo, Galle and Jaffna[6] but the Act could not be implemented,[7] and there were still no courts of civil jurisdiction. When Governor North arrived in Ceylon the only courts in existence were the Courts Martial, the Collectors' Courts and a Court of Equity which had been established by de Meuron, the leader of the Swiss Mercenary Regiment originally raised for the Dutch East India Company but whose men had subsequently enlisted in the British Army and assisted in wresting the maritime provinces from the Dutch.[8] This Court of Equity was established to try in a summary manner and according to Dutch laws petty causes in Colombo, but the members had refused to take the oath of allegiance.

[1] *Mendis, ibid p. 89.*
[2] *ibid, p. 96.*
[3] *ibid, p. 91.*
[4] *ibid, p. 92.*
[5] *Colvin R. de Silva, Ceylon under the British Occupation, p. 291.*
[6] *ibid.*
[7] *ibid, p. 292.*
[8] *Mills, Ceylon under British Rule, p. 35.*

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Indeed, since the acquisition of the maritime provinces in 1796, there had been, to quote Governor North himself [1], "a suspension of almost all criminal and civil justice whatsoever." Even after Governor North's arrival the civil judges refused for some time to take the oath of allegiance. It thus seems evident that the established Courts were at the time of the Proclamation by no means the appropriate authorities to decide upon the deviations and alterations which the Proclamation envisaged.

For all these reasons I conclude that in terms of the Proclamation of 23rd September 1799 the common law of Ceylon was the Roman-Dutch law, subject to such deviations and alterations as the specified authorities might determine but that the authorities thus expressly empowered to make deviations did not include the Courts.

These specified authorities were later replaced by legislative institutions within the Island itself, and we see that when Governor Horton received his Royal Instructions dated 30th April 1831 he was given full power and authority with the advice and consent of the Council of Government to enact, ordain and establish laws for the peace and good government of the Island.[2] The Council of Government referred to was a Council consisting of the Chief Justice, the Officer in command of the Forces, the Chief Secretary, the Chief Commissioner of Revenue and the Vice Treasurer and Commissioner of Stamps. This Council Governor Horton was empowered to create by Letters Patent dated 23rd April 1831[3] commissioning him to set up a Council of Government of Ceylon. It would appear therefore that after the creation of this Council there was a body empowered to ordain legislation namely the Governor and Council and this authority took the place of the authorities mentioned in the original Instructions to Governor North. There followed the Charter of Justice of 1833 and Ordinance No. 5 of 1835 which repealed the Proclamation of 1799 but expressly retained that part of it which provided that justice should be administered according to the laws and institutions that subsisted under the ancient Government of the United Provinces subject to deviations by lawful authority.

This Ordinance also significantly goes on to declare, in terms even more categorical than those of the Proclamation of 1799, that those laws and institutions "still are and shall henceforth continue to be binding and administered throughout the Maritime Provinces and their dependencies" subject to the aforesaid deviations and alterations.

The Roman-Dutch Law was thus firmly enthroned as the common law of this country subject to such deviations as might be legislatively ordained.

[1] *Undated despatch to the Directors, written from Madras, and cited by Mills, Ceylon under British Rule, p. 35.*

[2] *Article 10—vide Mendis, ibid, p. 146.*

[3] *Mendis, ibid. p. 138.*

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Since, then, there was no express legislative authority conferred on the courts to vary the Roman-Dutch law, the plaintiff, in seeking to establish that the English tort of conversion has been adopted into our legal system, must fall back upon the alternative and more difficult basis of the tacit reception of that principle into our legal system. Reference has been made in this connection to a series of cases where, it is submitted, our courts have invoked and applied the English rules of conversion.

An examination of these cases does not in my view support the contention of the appellant that they indicate an unequivocal adoption of the principles of English law in this regard. The mere use in some of them of the expression " conversion " is not conclusive of the deliberate and conscious application therein of the English principles relating to conversion, to the exclusion of Roman-Dutch principles, and indeed many of the cases cited may equally well have been decided the same way upon the basis of the Roman-Dutch principles relating to wrongful appropriation of property.

These decisions have been analysed in the judgment of my Lord the Chief Justice, and agreeing as I do with his assessment of these authorities, it is unnecessary for me to consider them further, except for the brief reference I shall make to *Dodwell v. John* [1].

It will suffice to observe that in any event this thin line of decisions is too tenuous to form a current of authority of the very high degree which alone would suffice as a basis for the view that a principle of English law foreign to and at variance with the principles of the Roman-Dutch system has now become ingrained in our law. As was observed in *Samed v. Segutamby* [2], although fundamental principles of the common law may in course of time become modified by judicial decisions, it would be only by a series of unbroken and express decisions that such a development could take place. The principle that delictual liability does not attach under the *lex Aquilia* in the absence of *dolus* or *culpa* is such a fundamental principle of the common law.

A special word is necessary in regard to the Privy Council opinion in *Dodwell v. John* [1] in view of the importance of that authority. Although in South Africa it has been expressly dissented from,[3] we in Ceylon are of course bound by that decision ; and if it did in fact apply the principle of conversion, that recognition of the principle would no doubt greatly advance the appellant's case.

Tambiah, J. has, with respect, rightly observed in *Daniel Silva v. Johanis Appuhamy,* [4] that the Privy Council did not in *Dodwell v. John* express a firm view that the principles of conversion applied in Ceylon. Their Lordships merely made a passing observation on this matter and would appear deliberately to have refrained from making it the subject

[1] *(1918) 20 N. L. R. 206.*
[2] *(1924) 25 N. L. R. 481.*
[3] *Bell v. Esselen, (1954) 1 S. A. L. R. 147.*
[4] *(1965) 67 N. L. R. 457.*

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of a definitive pronouncement. The basis of that decision is the receipt of money with notice of the trust affecting it, and it was on the footing that those facts gave rise to a right of recovery that their Lordships formed their opinion. Their Lordships were there applying what they referred to as "principles of jurisprudence based in part, though not wholly, on a foundation of Roman law." They went on to observe immediately thereafter, "If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondent. It is on this footing that their Lordships propose to deal with the question." The principle so relied on was the principle underlying the action for money had and received, but viewed against the liberal background, which their Lordships considered was available in an appeal from a Court not confined to administering the common law of England, that money is recoverable which the defendant *ex aequo et bono* ought to refund. Therein, and not in the principle of conversion, lies the ratio of that case, a matter evident also from the cautious language employed in reference to the applicability of the latter principle in Ceylon. Indeed their Lordships went on to observe[1] that in any event relief *could not be granted* upon the latter basis in view of the provisions of the Prescription Ordinance. *Dodwell v. John* is therefore no authority for the applicability in Ceylon of the tort of conversion.

It is indeed true that there is a specimen form of plaint for the conversion of movable property, set out in the schedule to the Civil Procedure Code, which bears all the marks of the English tort of conversion. Moreover the averments contained in that specimen would appear insufficient to reveal any cause of action under the Roman-Dutch law. However, this circumstance constitutes insufficient material on which to base a proposition that the English law of conversion of movables has become part of our law, for any introduction of such a new principle of liability into our common law could not be effected through the medium of a specimen form in the schedule to the Code. The schedule does not make law and at the most shows the Legislature's understanding of the existing state of the law—an understanding which though we should be slow to depart from it, is not binding upon us if upon a careful examination of the whole question we should be convinced that it is wrong. I do not consider, either, that we have before us sufficient evidence to be able to say that there has been a settled practice in our courts of first instance to accept plaints containing only the requirements of the English tort of conversion, as containing a good cause of action.

For these reasons I am in agreement with the view expressed by the Divisional Bench in *Daniel Silva v. Johanis Appuhamy* that the tort of conversion forms no part of the general law of this country.

The conclusion that the English law of conversion does not as a general doctrine form part of the law of this country does not of course dispose of the matter before us, in view of the further questions whether, in so far as concerns cheques and matters of banks and banking, the English principles of conversion are drawn into our legal system.

[1] *(1918) 20 N. L. R. 206 at 210.*

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Dealing first with the question of cheques, reference must be made to section 2 of Ordinance No. 5 of 1852 which provided that " the law to be hereafter administered in this Colony in respect of all contracts and questions arising within the same upon or relating to bills of exchange, promissory notes, and cheques and in respect of all matters connected with any such instruments, shall be the same in respect of the said matters as would be administered in England at the corresponding period, if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted. "

Three quarters of a century later there was passed the Bills of Exchange Ordinance No. 25 of 1927 described by the Legislature as an Ordinance to declare the law relating to bills of exchange, promissory notes, cheques and bankers' drafts. Containing as it did a series of specific statutory provisions in regard to such instruments, it obviated the need to retain on the statute book the general provision relating to these instruments, contained in section 2 of Ordinance No. 5 of 1852. Accordingly that provision was repealed, but the legislature took the precaution of inserting in the Bills of Exchange Ordinance a provision contained in section 98 (2) thereof, to the effect that the rules of the common law of England, including the law merchant, except in so far as they are inconsistent with the express provisions of that Ordinance, or any other enactment for the time being in force, shall apply to bills of exchange, promissory notes and cheques.

One notes at once the difference in phraseology between the provisions relating to English law contained in the Ordinance of 1852 and 1927, and the fact that the first enactment is in terms far wider than the second. Not only does it make the English law applicable in respect of contracts and questions relating to these instruments but it extends the applicability of that system to *all matters connected with any such instruments.* Indeed it does not halt there but goes on to provide that the law to be administered would be the same as would be administered in England in the like case at the corresponding period *if the contract had been entered into or the act in respect of which the question arises had been done in England.*

These terms are sufficiently ample in their scope to place it beyond doubt that had the matter we are now considering fallen to be determined by the terms of the first enactment it would unquestionably have attracted the English law of conversion.

The question before us is however whether the terms of the later and less sweeping provision are sufficient for this purpose. In order to determine this question, it would be necessary to view this provision not as an isolated piece of legislation but in the setting against which it made its appearance.

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When in 1927 the Bills of Exchange Ordinance was promulgated, the English law had unquestionably been the law applicable in respect of all matters connected with bills of exchange, promissory notes and cheques during that long span of our legal history which reached back three quarters of a century to the Civil Law Ordinance. During this vital formative phase, our commercial law, till then amorphous, was settling into the moulds set for it by the Ordinance of 1852. The keynote of this phase, during which our commercial law assumed the broad outlines of its present aspect, was the total displacement of the Roman-Dutch law on the matters specified in section 5 of the Ordinance of 1852.

It would be unrealistic, moreover, to lose sight of the fact that no mood of experimentation underlay the decision to introduce the English law in 1852, but rather the urgent and growing need to provide a stable legal base for a burgeoning economy. This was the era when the British had consolidated their hold over the entirety of the Island and attempted insurrections against their rule—in particular the Kandyan revolt of 1848—had been subdued. The British planter was making his ubiquitous appearance in the remotest corners of the country desiring naturally to carry with him his native law to govern his commerce—a commerce conducted almost exclusively with his own compatriots centred in Colombo or in London. Coffee, having passed through a crisis in 1847 which paralysed the industry for three years, was now recovering and in 1852 was about to enter upon a period of increasing prosperity[1] during which the industry acquired a dominant position in the coffee market of the world. The new prosperity was based on sound finance and management as opposed to the unmethodical ways that had prevailed in the 'forties',[2] for " A reckless adventure towards El Dorado had become a sober business enterprise ; and the new prosperity was based on much firmer foundations than the old ".[3] Such a systematisation of commerce provided the climate for a systematisation of commercial law on lines which had the multiple advantages of being at once familiar, practical, modern and international. The decision so to systematise the commercial law and to do away with a system which to the British was both unfamiliar and vague could well be understood against this background, more especially as the ancient economy of the country had died out and there was little commerce in indigenous hands.

We learn from the address of Governor Sir John Anderson to the Legislative Council on 2nd September 1851[4] that in January of that year the Chamber of Commerce had, in an address presented to him, made certain complaints " as to the ill working of the present laws in some respects " and that he had referred certain passages of that address to the judges of the Supreme Court requesting the judges to state if any amendments in the law as desired by the Chamber were called for.

[1] *Mills, Ceylon under British Rule, p. 236.*

[2] *Mills, ibid, p. 237.*

[3] *Mills, ibid.*

[4] *Addresses delivered in the Legislative Council of Ceylon by Governors of the Colony, vol. I p. 339.*

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The judges had suggested several alterations in the laws and among others indicated that they considered that all matters connected with shipping and all questions regarding bills of exchange should be decided by the law of England. The Council in its address in reply dated 5th September 1851 fully concurred in the need for important changes and expressed the hope that the measures brought forward would have the desirable effect among others " of terminating some of those difficulties in legal proceedings in commercial cases, which have at times occasioned much public inconvenience."[1] Such a decision, then, reached as it was on the considered advice of the Judges of this Court, was one not lightly taken nor such as would lightly be reversed—and far less after it had gathered around it the accretions of seventy-five years of judicial decision.

We see moreover that this policy of introducing the English law was carried forward by the Legislature through Ordinance No. 22 of 1866. In that year Governor Sir Hercules Robinson, addressing the Legislative Council[2] on 5th January observed that in 1852 an Ordinance had been enacted introducing the law of England in the colony in maritime matters and in contracts and questions arising out of bills of exchange, promissory notes and cheques. He went on to observe that there were other commercial questions in which it was desirable to assimilate our law with that of England such as questions relating to the laws of partnership, joint stock companies, corporations, banks and banking, principals and agents and life and fire insurance. He observed that " the English law has been for years virtually administered in these matters though it has not been formally declared in force " and that for this purpose an Ordinance would be laid before the Council.

The Judges of this Court were again consulted on this matter and their view was that an Ordinance on these lines was desirable, their only opposition to it being one in connection with immovable property which does not concern us here.[3]

Against this background of clear policy and settled law, the legislation of 1927 can scarcely be viewed as stemming from any desire to end the long reign of English law as the established common law relating to bills of exchange and to revert to the long abandoned rules of Roman-Dutch mercantile law. Had there been any intention on the part of the legislature to cut across three generations of development on lines consciously laid down by it in 1852, one would expect the clearest possible indication to such effect. We see none such in section 98 (2).

Moreover, this section though not framed in the ample terms of section 2 of Ordinance No. 5 of 1852, contains language wide enough to bear the meaning that in regard to the conversion of a cheque our

[1] *at p. 246.*

[2] *Addresses delivered in Legislative Council by Governors of the Colony Vol. 2, p. 97.*

[3] *See Sessional Paper No. 12 of 1866.*

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law would be the English law. To adopt the phraseology of that section, the doctrine of conversion is a rule of the common law of England which is applicable to cheques according to the law of that country, and is a rule not inconsistent with the Bills of Exchange Ordinance or any other legislation in force in this country. A consideration of the section against its historical background reinforces this construction.

It should also be observed that by virtue of section 2 of Ordinance No. 5 of 1852, the entirety of the English law governing these instruments was introduced into this country. By virtue of that provision therefore all English statutes relating to those instruments automatically became the ruling statute law of this country as well. Hence when in 1882 the English common law relating to bills of exchange was codified and assumed the shape of the Bills of Exchange Act, that Act became an Act applicable to this country from the day it was passed. The formal promulgation of the Bills of Exchange Ordinance in 1927 therefore marked the introduction of no new legislation. Indeed the statement of objects and reasons for the introduction of this legislation[1] states, somewhat curiously but most significantly, that "In view of the fact that many of the District Judges are not provided with the English Acts, it is considered desirable that the law should be reproduced in a local enactment." This observation serves again to emphasize that what the legislature was doing in 1927 was not to introduce fresh matter into our statute book or to alter the law then prevalent but merely to declare law that had already found a place therein. These circumstances militate against the suggestion that in 1927 there was a reversion to the Roman-Dutch law as our residuary common law in matters relating to bills of exchange, promissory notes and cheques.

On behalf of the respondent a distinction is sought to be made between rules of the English common law which are of general applicability to any subject matter and rules of the English common law which are specially applicable to bills of exchange considered as such. It is submitted that the doctrine of conversion is a rule of tortious liability which is of general application to chattels and that its application to negotiable instruments is but a particular application of that general rule, resulting from the fiction that it is a physical object, namely the paper on which the instrument is written, that has been converted. On this basis it is submitted that the rule applied is none other than a rule relating to chattels pure and simple, and not one relating to negotiable instruments, and that the provision in section 98 (2) drawing in the English common law applicable to negotiable instruments does not therefore draw in the English law in so far as it concerns the conversion of a cheque.

It is of course clear that the mere circumstance that the transaction under review happens to involve a bill of exchange would not in all cases suffice to subject that transaction to the English law. For example

[1] *See* Government Gazette *No. 7,538 of 23rd July 1926, p. 551 and* Government Gazette *No. 7,539 of 30th July 1926, p. 599.*

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if there be a contract of deposit of a bearer cheque and it is lost through the negligence of the depositee, the rules applicable in determining the depositee's liability would perhaps be no different from those determining his liability for the loss of any other valuable such as a diamond in similar circumstances. There is in such cases no situation peculiar to cheques nor the application of any rule particularly concerning or specially evolved to govern such instruments. Where on the other hand we are dealing with the conversion of a cheque, we are dealing with a rule specially evolved for the particular case of negotiable instruments. It is clear that but for its special development to cover such cases the notion of conversion of a comparatively valueless piece of paper is unmeaning in regard to cheques whose intrinsic quality and worth depend not upon the paper containing the writing but upon the writing itself.

The common law doctrine of conversion by its very nature postulates the existence of a physical object and is inappropriate and inapplicable to a chose in action. The gulf separating the realm of physical objects from that of intangibles, which the doctrine of conversion may not cross, is, so to speak, bridged by a legal fiction, namely that it is the physical piece of paper on which the instrument is written which is converted; and it is by this bridge that the doctrine of conversion is enabled to cross over into the territory of the chose in action and thereby gain applicability to the subject of cheques. But the employment of this fiction to cover this case represents not merely an *application* of the law of conversion to cheques but a *special development* of that law. Thus Lord Chorley [1] speaks of the extension of the doctrine of conversion to cover negotiable instruments as "a difficult but on the whole successful *development* of the common law." So also Street [2] observes of the extension of conversion to negotiable instruments, that it "makes substantial inroads on any possible rule, traceable to the former fiction of losing and finding, that conversion does not lie in respect of rights in intangible property. But this is not the limit of the doctrine; in *Bavins, Junr. and Sims v. London and South Western Bank* [3] all the judges in the Court of Appeal thought that the full value of a non-negotiable document evidencing a debt could be recovered in an action for conversion."

The very use, moreover, of a legal fiction to achieve this result is another indication that what we have here is indeed a development or alteration of the law and not the unchanged application of an existing rule. Paton [4] in discussing legal fictions observes that they are useful at a time when legal stability is desired, but a change in the application of the law is felt to be imperative, and proceeds to cite Maine's definition of a fiction in a very broad sense as "any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."

[1] *Lectures on Banking, p. 31.*
[2] *Law of Torts, 4th ed. p. 43.*
[3] *(1900) 1 Q. B. 270.*
[4] *Jurisprudence, 2nd ed. p. 42.*

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Are we then in the broad open spaces of the common law when we are examining the conversion of a cheque or would it not be more correct to say that we have entered the specialised field of the law relating to negotiable instruments ? The answer, clear enough upon a consideration of the matters to which I have referred, becomes clearer still when we consider the nature of legal classification.

It is of course true that in the ultimate analysis all law is so closely intertwined as to attract frequent comparison to a continuous and seamless web. There is, viewed from this standpoint, no rule of law which belongs exclusively to any one section or department without at the same time having affinities with other areas of the law and thus belonging in a sense to the greater body of law in general. Nevertheless, with the growth and development of the law over the centuries, the process of division does set in, commencing with the division into great branches or departments such as the law of Property and the law of Obligations, and proceeding therefrom to a division into smaller and finer groupings. The latter result when, with the continued growth of each of these great departments, in due course there became discernible within them the outlines of sub-divisions which assume a shape and character of their own. These in time assume an independent status when they gather within their ambit a sufficient body of principles dealing with their particular field to make it the general sense of the profession that such a field of law now exists as an independent entity. In this way the law of Contract, for example, threw out shoots and branches such as the law of partnership, the law of insurance, the law of agency, the law of bills of exchange and the law of banking. No firm rules exist for determining whether a new branch of law has come into being, for while some are accorded early recognition, the recognition of others is sometimes long delayed. Thus even as late as 1870 so eminent an authority as Mr. Justice Holmes was inclined to think that torts was not a proper subject for a law book, and it was apparently not till 1859 that the collective name of torts was given to a treatise on the wrongs for which trespass and trespass on the case were permitted in various situations [1]. By way of contrast other titles of the law acquired their independent standing comparatively early, as for example the law of motor insurance, which emerged comparatively soon after the appearance of the class of vehicles with which it was concerned.

Once however the stage is reached when the existence of such a section of law has received general recognition, there would be legal principles undeniably falling within its ambit for such reasons as that they have particular reference to that field or have been specially developed to meet its needs.

In determining whether a principle falls within such a specialised field, we must of course always pay due regard to the fact that the emergence of a new department of law does not mean that rigid frontiers have been

[1] *See 54 L. Q. R. at 337.*

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demarcated for it or fences erected to close it in. As with all things else, the different sections of the law are in continuous change and development, ever extending or contracting their limits and in so doing drawing on other territories or yielding ground before them ; and thus these fresh fields in the course of their continued growth will undoubtedly draw upon and if necessary develop principles having particular relevance to that special field even though such principles may have their origin in some other department of the law. As Plucknett observes [1] of the law of tort, in terms applicable to most other divisions of the law, "this field is really the result of the enclosure of many different acres, and the old boundaries between them are still visible." In the same way, while the law of negotiable instruments and the law of banking may have copious resort to the principles of contract, there will at the same time be a drawing upon such other branches of the law as the law of trusts or the law of limitation or the law of tort. It was thus, after the emergence of the law of negotiable instruments, that that body of law drew on the principle of conversion from the law of torts and developed that principle to meet the case of cheques. It seems to me that in its special development to cover the case of cheques, the law of conversion has unmistakably become part of the law of negotiable instruments, in so far as it concerns the conversion of a cheque, though the principle of conversion would no doubt belong also to the general law of tort whence it derived. When in this way there has been an assimilation of such a principle to the particular topic of law concerned, it would be unreal to consider such principle as still belonging exclusively to the department whence it came, for by its adoption, modification and adaptation in that specialised field, it becomes also an integral part thereof.

If therefore the legislature had intended to bring in the English law in respect of matters connected with such instruments in 1852, and in 1927 to preserve this applicability of English law, by the provisions of section 98 (2), it could scarcely have intended that on so important a matter as the conversion of a cheque, on which the English law had evolved its own special rule, the English law was to be excluded.

A reference to section 98 (2) of our Ordinance would be incomplete without a reference also to section 97 (2) of the English Act, which is similarly phrased, and was inserted as a safeguard against the contention that, once the common law relating to such instruments had crystallised into a Code, the entire law governing the subject was thereafter contained within its confines.

It should be noted that in their discussions of section 97 (2), the commentators on the English Bills of Exchange Act cite even cases of the application to bills of exchange of common law rules not specially relating to bills of exchange but of general applicability to any subject matter. For example, Chalmers on Bills of Exchange [2] and Byles on

[1] *Concise History of the Common Law, 5th ed. p. 460.*

[2] *11th ed. p. 287.*

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Bills [1] cite under this provision such general rules as those relating to estoppels and the rules of private international law. These are quite clearly rules of general applicability brought to bear on bills of exchange in a manner no different to their application to any other subject matter. Indeed an examination of the judgment of the Commercial Court in *Embiricos v. Anglo-Austrian Bank* [2] shows that in applying to a negotiable instrument the rule applicable to any chattel, that the law governing the transfer is the law of the place of transfer, the Court has made express reference to section 97(2). Walton, J. observed [3] that " even if section 77(2) of the Act did not govern the case, he thought the general principle did apply, and that the effect was the same as if a chattel other than a negotiable instrument had been transferred at Vienna."

This consideration lends support to the view that the scope of section 98 (2) is by no means as rigidly circumscribed as the argument on behalf of the respondent would suggest. It is not necessary however for the purpose of this matter to invoke the principle implicit in *Embiricos v. Anglo-Austrian Bank* [4], for it has already been sufficiently indicated that conversion of cheques depends on no ordinary application of the general law.

The arguments advanced by the respondent do not for all these reasons impose any barriers in my view to the applicability in this country of the English doctrine of conversion in relation to cheques.

I turn now to the question whether conversion of a cheque by a collecting banker is a matter of banks and banking, and thus affords an alternative basis for the application of English law.

One can see, of course, that where a particular transaction which is not part of the ordinary course of a banker's business as a banker is carried out by a person who happens to be a banker, that transaction does not attract the law of banks and banking. For example, if a banker advances money upon a mortgage, the law of banks and banking is not attracted to the transaction merely because the mortgagee or pledgee happens to be a banker, and I concur with respect in the decisions of this Court in *Krishnapulle v. Hongkong and Shanghai Banking Corporation* [5] and *Mitchel v. Fernando* [6] where this Court held that in such circumstances the English law was not drawn in.

The position is manifestly different however where the transaction in question is, as here, a transaction into which the bank enters in its capacity as a banker. It is *qua* banker that the cheque in this case was collected by the respondent and it is *qua* banker that its liability for this act is under review.

[1] *21st ed. pp. 242 et seq.*
[2] *(1904) 2 K. B. D. 870.*
[3] *ibid, p. 876.*
[4] *(1904) 2 K. B. D. 870.*
[5] *(1932) 33 N. L. R. 249.*
[6] *(1945) 46 N. L R. 265.*

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As was observed in *United Dominions Trust Ltd. v. Kirkwood*[1] "money is now paid and received by cheque to such an extent that no person can be considered a banker unless he handles cheques as freely as cash. A customer nowadays who wishes to pay money into his bank takes with him his cash and the cheques, crossed and uncrossed, payable to him. Whereas in the old days it was characteristic of a banker that he should receive *money for deposit*, it is nowadays a characteristic of a banker that he should receive *cheques for collection* on behalf of his customer. How otherwise is the customer to pay his money into the Bank ? It is the only practicable means, particularly in the case of crossed cheques." Any modern definition of banking therefore gives prominence to the collection of cheques. In the language of Paget[2] "No one and no body, corporate or otherwise can be a ' banker ' who does not (1) take current accounts ; (2) pay cheques drawn on himself ; (3) *collect cheques* for his customer." It emerges from these observations that the collection of a cheque by a banker is a function forming an essential and integral part of the business of banks and banking.

This function of a banker receives recognition also in section 82 of the Bills of Exchange Ordinance, for this provision recognises that the banker would in the ordinary course receive payments for customers of cheques crossed generally or specially to such customers.

A large body of decided cases in England has held the doctrine of conversion to be applicable to a banker who collects a bill, note or cheque with a forged endorsement or to which the customer has no title[3]. As already observed in relation to conversion and cheques, so also in regard to conversion and banking, it is by the legal fiction referred to that the remedy of conversion, drawn from the law of tort, while still bearing the marks of its tortious origin, is linked with the law of banking and made part and parcel also of the latter body of law. As Salmond observes, specific coins in a bank are not the property of a specific customer, and a bank which pays out to some other person part of what it owes to its customer is not at first sight converting its customer's chattels[4]. Notions of conversion are thus wholly inapplicable, but for the fiction which has specially developed the law to meet the needs of banking. No treatise on banking is complete today without a section on the law of conversion and no banker is properly instructed in the rudiments of his calling if he has no instruction on this subject. It would be unrealistic in this situation to take the view that the law relating to conversion forms no part of the law of banks and banking, and it follows therefore that the Civil Law Ordinance as amended by Ordinance No. 22 of 1866 brought into this country the English rules relating to conversion in so far as they had become the subject of special application to the law of banks and banking.

[1] *(1966) 1 All E. R. 968 at 975.*
[2] *Paget, Law of Banking, 6th ed. p. 304.*
[3] *Law of Banking, 6th ed. (1961) p.8.*
[4] *Salmond on Torts, 14th ed. p. 145.*

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The applicability of the English Law of conversion to the transaction we are examining thus results from the twofold consideration that the transaction is both within the special sphere of cheques and within the special sphere of banking, either of which factors by itself would suffice to draw in the English Law.

Of compelling weight in confirming the conclusion thus reached, is the assumption in section 82 of the Bills of Exchange Ordinance, of the applicability of the English Law of conversion to a banker who collects a cheque for a customer. This provision, redundant and meaningless against a background of pure Roman-Dutch Law, at once acquires a purpose and a meaning against a background of English Law and its doctrine of conversion. It is our duty to give to this section an effective meaning and to presume against redundancy. Moreover, we in Ceylon have section 98 (2) which is amply sufficient, as already observed, to invest this section with a force and efficacy denied to its former counterpart in South Africa, to which I shall presently refer.

It will be observed moreover that section 82 is not, as has been submitted, a mere reproduction of the corresponding English provision, for there is contained within it as sub-section 2 a provision which derives from the Crossed Cheque Act of 1906 and not the original English Act of 1882. The legislature therefore when it promulgated this Ordinance in 1927 has manifestly given its mind specifically to section 82 and adapted it to bring it into line with the statute law of England as it stood in 1927. The Ordinance bears other indications as well of a careful consideration by the legislature of the respective spheres of applicability of the English and the Roman-Dutch law. For example, section 27 particularly preserves the English doctrine of consideration, conscious no doubt of the differences between consideration and causa, while section 22 preserves the Roman-Dutch law of this country in so far as concerns the capacity of parties. Indeed in its statement of objects and reasons the legislature specifically indicated its awareness that but for section 22 it might be arguable that section 98 (2) makes English law applicable[1]. A legislature giving its mind to the conflicting claims of the Roman-Dutch law and the English law in certain spheres of the area for which it was legislating, must then be taken to have specifically intended that, but for section 82, there would be liability attaching to a banker in respect of cheques collected by him for a customer without fault or fraud. There is in my view no room in this context for a contention that this statutory provision is a redundancy, and with much respect I would differ from the view to this effect expressed by this Court in *Daniel Silva v. Johanis Appuhamy*.

This judgment would not appear, firstly, to have paid due regard to the historical background against which section 98 (2) of the Bills of Exchange Ordinance appeared, and in particular to the fact that by

[1] *See Govt. Gazette No. 7,538 of 23rd July 1926 p. 551 and Govt. Gazette No. 7,539 of 30th July 1926, p. 599.*

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section 2 of Ordinance 5 of 1852 the English law had been made the law applicable to bills of exchange, promissory notes and cheques. Secondly it leaned too heavily, as I shall endeavour to show, on the law in South Africa and in Canada relating to the inapplicability to cheques of the English doctrine of conversion.

It is necessary at the outset to distinguish the legal position in South Africa by observing that the South African statutes which have from time to time been introduced in the several provinces of that country, do not embody a provision corresponding to section 98 (2) of our Ordinance. Moreover in South Africa the series of enactments appearing in the various provinces shortly after the codification of the English law in 1882, did not appear against a background such as that existing in Ceylon consequent on the Ordinance of 1852. Lacking a background of the applicability of English law in matters relating to negotiable instruments and lacking also an express statutory provision drawing in the law of England in residuary matters, the South African courts were driven inevitably to the view that the law of conversion did not apply in regard to negotiable instruments in South Africa. It followed also that the South African provision[1] corresponding to section 82 of our Ordinance, which denies liability where a banker receives payment of a cheque for a customer in good faith and without negligence, was a redundant provision, for indeed even the common law attached no liability in the absence of these requisites[2].

We do not have in Ceylon any reasons of so cogent a nature as compelled the South African courts to the view that this provision was a redundant section in the statute book of that country. The South African decisions on the redundancy of this statutory provision have thus no applicability in this country. Moreover a finding that a section in an Act of the legislature has been redundantly introduced is one which the Courts should be very slow to arrive at, and should avoid except for reasons of the greatest cogency.

In regard to the Canadian law relating to bills of exchange, section 10 of the present statute (omitted from the Act of 1890 but restored by an amending Act of 1891), provides that the rules of the common law of England including the Law Merchant save in so far as they are inconsistent with the express provisions of that Act, shall apply to bills of exchange, promissory notes and cheques. Falconbridge observes[3] that the effect of this provision would appear to be that the background of law applicable to transactions in which such bills, notes or cheques play a part may be either the common law of England so far as that background consists of rules of the law of bills and notes in the strict sense, or the commercial law of a particular province outside the limits of the law of bills and notes in the strict sense. The question arising

[1] *Section 80.*

[2] *Yorkshire Insurance Co. v. Standard Bank (1928) W.L.D. 251 at 278, 280.*

[3] *Banking and Bills of Exchange in Canada, 6th ed. p. 46.*

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is whether item 18 of section 91 of the British North America Act covers legislation relating to bills and notes and whether federal legislation or provincial legislation would prevail on this matter. The learned author expresses the view that in the field of transactions involving the use of bills or notes as opposed to the law of bills and notes in the strict sense, the applicable law may be the law of a particular province and not the common law of England. In this field provincial legislation may be valid so far as it comes within any of the classes of subjects assigned to the provincial legislatures by section 92 of the British North America Act and so far as it is not inconsistent with valid federal legislation.

The conflict arising in Canada between federal and provincial legislation has no counterpart here, and it would be unsafe to draw any guidance from the law of Canada on the question we have before us. It is true that the same author observes[1] that the specific rules of the common law relating to conversion are not specifically in force in the Province of Quebec under the Civil Code of Lower Canada—and indeed this is only to be expected in a legal system based on the Civil law—but this affords us no guidance on the question whether the conversion of a bill of exchange would attract the principles of conversion or the principles of the Civil law. Furthermore, the case of *Norwich Union Fire Insurance Society Ltd. v. Banque Canadienne Nationale*[2] referred to in *Daniel Silva v. Johanis Appuhamy* is not an authority to the effect that the English doctrine of conversion is not in force in the Province of Quebec in relation to the conversion *of a bill or note.*

Neither the case law therefore nor the statute law of Canada would be of assistance to us in the matter we have to decide.

Discarding, then, the legislation of South Africa and of Canada as affording no material guidance, we fall back simply upon the position that the terms of section 82 of the Bills of Exchange Ordinance tellingly confirm the applicability of the English law to the matter before us. For this and the other reasons earlier mentioned, the doctrine of conversion becomes applicable, and, upon the facts of this case, entitles the plaintiff to judgment as prayed for on her first cause of action.

I pass now to a consideration of the defendant's position viewed by the principles of quasi-contractual liability.

Our law relating to quasi-contractual liability is of course basically the Roman-Dutch law, but there would appear to have been from time to time an importation of some of the terms and concepts of the English law, as for example in the case of the *quantum meruit* of English law. So also the action for money had and received, a product of the English law, has often been referred to and assumed to be applicable in this country.

[1] *ibid, p. 571.* [2] *(1934) 4 Dominion Law Reports, p. 223.*

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Indeed the alternative cause of action set out in the plaint is couched in terms appropriate to the English action for money had and received, and the question has been much debated before us whether the action for money had and received forms part of our law. On the basis of the applicability in this country of the English action for money had and received we have been addressed at much length on the technicalities of the English doctrine and on such questions as the necessity to waive the tort in order to claim this relief. The applicability of the action for money had and received raises also the question of the extent of similarity or difference between this action and the enrichment actions of the Roman-Dutch law and whether the availability of the English action supersedes in Ceylon any of the Roman-Dutch principles relating to enrichment.

I shall first examine the question what constitutes the enrichment in this case and thereafter proceed to consider the place in our legal system of the action for money had and received and whether any recognition of this action involves a departure from the principles of Roman-Dutch law. I shall conclude by examining whether in the circumstances of the present case, unjust enrichment relief would be available according to the principles of the Roman-Dutch law.

To deal first with the question of enrichment, it is true that the defendant has paid out the money collected by it on the plaintiff's cheque, but this circumstance would suffice neither by the principles of Roman-Dutch law nor by those of English law to negative enrichment. The bank in so paying out was parting with the proceeds of the plaintiff's warrant when it was not obliged to do so, and when, if it had not been negligent, it would have realised that the warrant had not belonged to Loganathan, and a relevant time for determining whether the banker has complied with his duty of care towards the true owner of the cheque is when the banker pays out the proceeds of the cheque to his own customer and so deprives the true owner of his right to follow the money into the banker's hands.[1]

Consequently in paying out this money upon Loganathan's cheque the bank was by its own negligent act depriving itself of an asset which the plaintiff had a right to follow into its hands.

Under the Roman-Dutch law there must, for unjust enrichment, be an increase or benefit to the estate of the defendant, so that when the enrichment in the hands of the defendant diminishes or disappears, this would ordinarily have the effect of liberating him either *pro tanto* or entirely as the case may be. However it would appear that the defendant is entitled to be so liberated only if he is in a position to show that neither

[1] *See per Diplock, L. J. observed in Marfani & Co. Ltd. v. Midland Bank, Ltd., (1968), 2 All E. R. at 580 d.*

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dolus nor *culpa* on his part had led to such diminution or disappearance.[1] There is always a duty on the party enriched not to allow the enrichment to diminish in consequence of blameworthy conduct on his part.[2]

We see also from Grotius[3] that if a party has enjoyed an asset and it is no longer with him he is nevertheless held to have been enriched. In the same context Grotius states with reference to minors that if they have lost what they have received or spent it in some unusual way, enrichment is not, *in their case*, held to have taken place. The implication seems clear that in the case of persons other than minors, if they lose the enrichment or spend it in some unusual way, enrichment would nevertheless be held to have occurred.

Viewed again from the standpoint of English law, the same result ensues, for both at law and in equity, the defence of change of position based on a parting with the money will not avail a party merely because he no longer has with him the money which he received. In *Durrant v. The Ecclesiastical Commissioners in England and Wales*[4] and in *Standish v. Ross*[5] the court rejected the existence of any general defence of change of position either at law or in equity. There had been earlier cases where change of position had been relied on as a defence to a claim for money which the defendant had received from the plaintiff, but the two decisions referred to laid down for the common law the rule that the mere parting with the money is not by itself sufficient to establish the defence. In equity as well a similar position was reached through the case of *in Re Diplock*[6] where Lord Simonds observed "The broad fact remains that the Court of Chancery in order to mitigate the rigour of the common law or to supply its deficiencies established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid."

It is also of importance to note, as Lord Chorley observes,[7] that in cases where the bank is liable in conversion for collection of a cheque a right exists to be indemnified by its customer, and therefore in the present case the defendant is not devoid of all benefits resulting from the money it had received, but has the advantage of a right of recourse against Loganathan to the extent of the sums paid out to him from the proceeds of the dividend warrant.

Reference should be made at this point to the decision of a Divisional Bench of this Court in *Imperial Bank of India v. Abeysinghe*[8] where Chief Justice Fisher applied some of the English decisions to which I have

[1] *de Vos, Unjustified Enrichment in South Africa, 1960, Juridical Review at p. 243.*
[2] *de Vos, ibid*
[3] *3.30.3.*
[4] *(1880) 6 Q. B. D. 234.*
[5] *(1849) 3 Ex. 527 at 534.*
[6] *(1948), Ch. 465 affd. (1950) 2 All E. R. 1137 sub nom. Ministry of Health v. Simpson.*
[7] *Law of Banking, 3rd ed., pp. 120-1.*
[8] *(1927) 29 N. L. R. 257.*

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referred. In that case the defendant, a proctor, had received a cheque in part payment of the consideration on the transfer of a land attested by him. He had very little, if any, previous knowledge of either transferor or transferee. He presented the cheque drawn in his favour by the alleged transferee at the bank, and on receiving payment, handed the money to the transferor. It turned out however that the signature on the cheque was a forgery and that the land transaction was entirely fictitious. The proctor had acted bona fide throughout. In an action by the bank against the defendant for the recovery of the proceeds of the cheque it was held by the majority of a Divisional Bench that the bank was entitled to recover the money despite the fact that the money had been paid out by the defendant. Fisher, C.J. observed [1] in regard to the trial judge's finding that the proctor was negligent, that there was some foundation for it, inasmuch as the appellant, an experienced proctor dealing with two strangers, had " rather rashly jumped to the conclusion that the matter was an ordinary bone fide piece of business." The proctor had paid out the money " under a supposed but non-existent duty " [2], and there was no difference in principle between such a case and one where, on his leaving the bank, the money had been stolen or where the proctor had paid it to the forger himself. The defence that the money had been paid out did not therefore avail the proctor even though he had acted with perfect good faith throughout the transaction and had become unconsciously an unwilling participant in the scheme of fraud.

The fact then that the bank had paid out the money would not in the light of all these principles negative the availability of an enrichment action to the plaintiff, inasmuch as the bank in the present case was negligent not only in collecting but also in paying out the proceeds of the warrant and thus depriving itself by its own act of the right to invoke the fact that this enrichment has been diminished or disappeared. Since the requisites of enrichment under both systems are thus satisfied, I shall proceed to consider the question of unjust enrichment under each system.

It is necessary to commence this discussion by referring once more to the Divisional Bench case of *Daniel Silva v. Johanis Appuhamy* [3] where the view was expressed by Tambiah, J. that the action for money had and received has never been received into our legal system. As Sansoni, C.J. observed in *Don Cornelis v. De Soysa & Co. Ltd.* [4], the view expressed by Tambiah, J. on this point has not been expressed by either of the other two judges who participated in that decision and cannot therefore be said to represent the views of the majority of that court. Moreover the learned judge was in that case giving his attention mainly to the question whether the English doctrine of conversion forms part of our law.

[1] (*1927*) *29 N. L. R. 257 at 263.*
[2] *ibid, at p. 262.*
[3] *Supra.*
[4] (*1965*) *68 N. L. R. 161.*

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The view of Tambiah, J. was perhaps unexceptionable in so far as concerns the action for money had and received in its strict common law form, with all its attendant technicalities. As Sansoni, C.J. has pointed out in *Don Cornelis v. de Soysa & Co. Ltd.*, the action in its common law form no longer exists even in England since the abolition of the forms of action in that country by the Judicature Act of 1873. In any event it is unlikely therefore, that when this particular form of action was abolished in England, it continued to survive in Ceylon if indeed it had ever been introduced here. The position is different however if in referring to the action one refers to its underlying principles rather than to its historical form ; for the similarity between this underlying principle and that underlying enrichment in the Roman Dutch law is too close to admit of its being considered foreign to our law.

If then we take the view that the true question before us is not whether the action in its original form is part of our law but whether, when we consider the action as it exists today, shorn of its trappings of form, we can say that its underlying principle is known to our law, the answer would, with respect, appear to be in the affirmative.

The old action for money had and received was but one of several particular actions such as the action for money paid, the *quantum meruit* and the *quantum valebat*, and it lay in particular circumstances, as where the plaintiff had paid money to the defendant under a mistake or for a consideration which had wholly failed.

Bertram, C.J. in *Saibo v. Attorney General*[1] endeavoured to show that the underlying principle of the action for money had and received coincides with that of the *condictiones* of Roman law. Bertram, C.J. there pointed out that the action for money had and received may be treated as identical with the *condictio* available under our law and drew attention to the close similarity between Lord Mansfield's exposition of the principles of the English action in *Moses v. Macfarlen* and the Roman principles evolved in regard to the *condictio indebiti*. Moreover Evans, the learned translator of Pothier's Law of Obligations, points out in an interesting appendix to his work, that every passage in Lord Mansfield's observations has its exact parallel in the Roman law and the translator concludes therefrom that even a slight comparison would evince the source of Lord Mansfield's principles to have been "the juridical wisdom of ancient Rome". It is no doubt for this reason that the English rules have been said to display a basically Romanesque architecture.

Schneider, J. expressed the same view in *Imperial Bank of India v. Abeysinghe*[2] when he observed that even if the English law were not applicable to the case before him, the English decisions on money had and received would still be applicable as that action was founded on the same principle as the *condictio indebiti* of the Roman-Dutch law.

[1] *(1923) 25 N. L. R. 321.* [2] *(1927) 29 N. L. R. 255 at 264.*

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In more recent years Sansoni, C. J. in *Don Cornelis v. de Soysa & Co. Ltd.*[1] stated again that the principle of the English action for money had and received would be applicable under our legal system on the basis that there is no inconsistency between that principle and the principle of equity which underlies the Roman-Dutch action of *condictio indebiti*. The learned Chief Justice there expressly dissented from the view expressed by Tambiah, J. in *Daniel Silva v. Johanis Appuhamy*. The views expressed by Chief Justices Bertram and Sansoni and by Justice Schneider may, perhaps, with much respect, involve some measure of over-simplification if they are intended to suggest a complete identity between the action for money had and received and the *condictio indebiti*, but such an approach seems in broad outline to be an aid to the appreciation of the question before us in its correct perspective.

One obstacle however to such an attempt at equation of the governing principles in both systems is the theory that quasi-contractual relief is based in English law upon the existence of an imputed or fictional contract, in the absence of which such relief would not be available. This view which achieved perhaps its highest expression at the hands of Lord Haldane in *Sinclair v. Brougham*[2] and still has its powerful advocates, has to a large extent hampered the English law in its forward movement towards the liberal view that quasi-contractual relief arises from the broad principle of unjust enrichment. The difficulties resulting from it were highlighted for us in the case of *Dodwell v. John* where Viscount Haldane pointed out that if an imputed contract had to be found as the basis for the action of money had and received, there would be difficulty in maintaining such an action. However the Privy Council did not consider itself obliged to decide the matter before it upon the application of such a restrictive rule of English law, as it took the view that in a jurisdiction such as ours where the courts administer both law and equity and the courts are not confined to administering the common law of England, " it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund."

It would appear then that if the English concept of unjust enrichment is tied to the theory of a notional contract, many a case of true unjust enrichment would fall outside its scope. Even the facts of the present case are such that there would be no little difficulty in spelling out from them a fictional contract, and if such a contract be the peg on which the action for money had and received must hang, the present action would appear to rest precariously indeed.

Any attempt then, to equate the principles of the English action for unjust enrichment with that of the Roman-Dutch law becomes impossible if this theory of notional contract and not the principle of enrichment be the governing view in English law, and if the view favoured by Chief

[1] (*1965*) *68 N. L. R. 161.*

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[2] (*1914*) *A. C. 398.*

Justices Bertram and Sansoni and by Mr. Justice Schneider is to be applied to this case we must assure ourselves that the theory of implied contract is not of compelling authority in English law.

We are assisted in this regard by the fact that though there is high authority in favour of the implied contract theory, there is authority of equal eminence and growing strength which stands four square against the notion that an implied contract provides the juristic basis for unjust enrichment in the English law. Which school of thought represents the true position in English law is still not settled, and though the clash of controversy set off by Lord Haldane in *Sinclair v. Brougham* still re-echoes in the field of quasi contract, one perceives through the dust of conflict, the field being slowly gained by forces ranged against the imputed contract.

One starts any examination of the rival theory by referring, of course, to *Moses v. Macferlan* [1], and it would be well at this point to refer to the actual words of Lord Mansfield. He observed [2] " if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit*) founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu* " as the Roman law expresses it)" and again he followed this up by stating [3] " it lies for money paid by mistake ; or upon a consideration which happens to fail ; or for money got through imposition (express, or implied) ; or extortion ; or oppression ; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word the *gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*"

As Fifoot the learned authority on the history and sources of the common law has observed [4], the single strand running through all the decisions was the unfair advantage secured by the defendant at the plaintiff's expense and " the precedents were so numerous and the current of opinion so steady that it wanted but the advent of a dominant personality to proclaim the principles of unjust enrichment as a single and all sufficient *ratio decidendi*." Lord Wright has emphasised that in *Moses v. Macferlan* Lord Mansfield did not say that the law implies a promise, but that the law implies a debt or obligation, which is a different thing. The obligation is a creation of the law just as much as an obligation in tort. It is as efficacious as if it were on a contract but Lord Mansfield denies that there is a contract. Moreover Lord Wright observes that Lord Mansfield's statement of the law has been the basis of the modern English law of quasi-contract notwithstanding the criticisms which have been launched against it and that in substance the juristic concept remains as Lord Mansfield left it, the gist of the action being a debt or obligation (but not a contract) implied or imposed by the law.

[1] *(1760) 2 Burr. 1055.* [2] *ibid at p. 1012.*
[3] *ibid, at. p. 1008.* [4] *History and Sources of the Common Law, p. 598.*

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Lord Denning has in *Kiriri Cotton Co. Ltd. v. Dewani* [1] referred to a misunderstanding of the origin of this action for money had and received. He observed that it was not an action on contract or imputed contract but was simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. All the particular heads of money had and received such as money paid under a mistake of fact, money paid under a consideration which has wholly failed and so on were observed by Lord Denning to be only instances where the law says the money ought to be returned.

Lord Atkin has likewise expressed his distaste for "fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared."[2]

It would appear therefore that although there is high authority for the imputed contract theory, opinion is hardening in favour of the more liberal view of Lord Mansfield. Apart from the support of such eminent authorities as Lords Wright, Atkin and Denning, the more liberal view commands also the approval of the majority of writers in the field of contract who consider the alternative theory inadequate.[3] Indeed one of the more recent texts on the subject of restitution describes the concept as a "meaningless, irrelevant and misleading anachronism." [4] Viewed from the angle of legal theory, the notion of implied contract has again attracted censure, for Professor Friedmann has observed of it [5] that "it has had a deplorable effect upon the development of that branch of English law, an effect from which English law is trying to free itself."

It will suffice finally to observe of *Sinclair v. Brougham* that though it is a decision of the highest tribunal, its rationale is largely the assumption, untenable today, that all actions must fall into one or other of the rigid and exclusive compartments of contract and tort.[6] Moreover, Lord Sumner's observations were obiter dicta, as Lord Wright has observed in the *Fibrosa case*.[7] Lord Wright has there taken the view that *Sinclair v. Brougham* has not closed the door to any theory of unjust enrichment in English law, and to carry the metaphor forward in the manner done by an academic writer [8] there are others such as Professor Winfield who take the view that even if it locked the door for the purposes of that case, it left the key hanging on a nail so that if anyone now wishes to enter he can still do so.

[1] *(1960) 1 All E. R. 177 at 181.*
[2] *United Australia Ltd. v. Barclay's Bank (1940), 4 All E. R. 20 at 37*
[3] *Chitty, 22nd ed. s. 1559; see also Cheshire & Fifoot, 6th ed. p. 550; Anson, 22nd ed. p. 603.*
[4] *Goff & Jones, The Law of Restitution, p. 10.*
[5] *53 L. Q. R. 449.*
[6] *(1914) A. C. at 452.*
[7] *Fibrosa v. Fairbairn Lawson Combe Barbour Ltd., (1942), 2 All E. R. 122 at 136.*
[8] *H C. Gutteridge, 5 Cam. L. J. at 223.*

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We see then that the theory of imputed contract is not nearly as compelling as it would otherwise appear and is not an obstacle to the reconciliation of the underlying principles of the English law with those of the Roman-Dutch. Lord Denning observed no less when he wrote : " The action at law for money had and received was in fact a remedy for unjust enrichment."[1] Such a conclusion enables us, on the lines indicated by Chief Justices Bertram and Sansoni and Mr. Justice Schneider, to seek out the fundamental principle underlying the English action for money had and received, without involving ourselves in the technicalities of the English law, and to note that this principle is no stranger to our legal system inasmuch as it underlies the *condictio indebiti* of our law.

The technicalities of the English action need not therefore trouble us but I would, because it was much debated before us, say a word on the question whether the action is dependent on the waiver of a tort. On this matter I would only wish to refer to the case of *United Australia Ltd. v. Barclay's Bank*[2] where many of the technicalities of this doctrine were explained. Lord Warrington there observed that " where waiving the tort was possible it was nothing more than a choice between possible alternatives, derived from a time when it was not permitted to combine them or to pursue them in the alternative and when there were procedural advantages in selecting the form of assumpsit." So also Lord Atkin dispelled many of the mysteries associated with it by pointing out that " in the ordinary case however the plaintiff has never the slightest intention of waiving, excusing, or in any kind of way palliating the tort. If I find that a thief has stolen my securities and he is in possession of the proceeds, when I sue him for that, I am not excusing him. I am protesting violently that he is a thief and because of his theft, I am suing him. Indeed he may be in prison upon my prosecution."[3] It was in this same case that Lord Atkin administered his celebrated warning to judges not to entangle themselves in the niceties of out-moded doctrines, but to pass undeterred through these " ghosts of the past who stand in the path of justice clanking their mediaeval chains." This technicality may then be dismissed, there being no necessity to launch upon any further inquiry into the niceties of this ancient doctrine.

The principle underlying the action for money had and received is thus satisfied in this case, for the proceeds of the plaintiff's cheque lying in the bank's hands were moneys which the bank was obliged by ties of natural justice and equity to refund. The bank in carrying on its functions as a banker has, through the negligence or fraud of its own servant or servants, collected the money due to the plaintiff upon her dividend warrant and by a further act of negligence deprived her of her right to follow the money into its hands. In these circumstances the duty in natural justice and equity to refund is too clear to enable the bank to ride off upon any technicality.

[1] *(1949) 65 L. Q. R. at 48.* [2] *(1940) 4 All E. R. 20.*
[3] *(1940) 4 All E. R. at pp. 36–7.*

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If therefore the English action for money had and received be the determining factor,there would in my view be little difficulty in bringing the facts of this case within the scope of that action.

Passing now to the question of unjust enrichment under the Roman-Dutch law, I proceed to consider the very interesting submission made on behalf of the respondent that the facts of this case fail to conform to the requirements of any of the standard Roman-Dutch enrichment actions, and that this is a case in which the Roman-Dutch law relating to unjust enrichment would therefore afford no relief.

The principal submission made in this connection was in regard to the *condictio indebiti* and it was submitted that its requisites were not satisfied as the sum claimed had not been knowingly paid by the plaintiff to the defendant. It was further submitted that a direct payment by the plaintiff or his agent is a requisite of all the *condictiones* through which quasi-contractual relief may be sought.

No discussion of the question of unjust enrichment in the modern Roman-Dutch law is complete without reference to the valuable academic discussions which have in recent years done much to clarify the law, and from which the highest tribunals in South Africa have derived much assistance [1]. I refer to the writings of such jurists as Professor Scholtens, Professor Wouter de Vos and Dr. Honore whose specialised study of this difficult branch of the law has time and again received recognition in South African decisions. I would have welcomed more adequate reference at the argument to these juristic discussions, and my observations in regard to them are subject to the infirmity that they are largely the result of my own inquiries and would no doubt have been more comprehensive had I the benefit of such fuller assistance.

I am in agreement with the submission for the respondent that the facts of this case do not fit the *condictio indebiti* for that action requires a conscious payment or transfer. Dr. Honore in a comprehensive article on *condictio* and payment [2] in which he has sought to give an extended meaning to the concept of payment, has exhaustively analysed into seven categories the various cases that amount to payment or transfer for the purpose of the *condictio indebiti* and the *condictio ob rem dati*. The facts of the present case do not fit into any one of those categories, and it is clear that the *condictio indebiti* (or for that matter the *condictio ob rem dati*) would not be available to the plaintiff.

This would appear further to be a case where the facts cannot be brought within the requisites of any of the other standard enrichment actions of the Roman–Dutch law, such as the *condictio causa data causa non secuta* or the *condictio ob turpem vel injustam causam* or the *condictio sine causa* in the sense of recovery of money on failure of consideration.

[1] See for example *Nortje en'n Ander v. Pool, N. O.* supra (1966), 3 S. A. 96 (A.D.) ; *Gouws v. Jester Pool (Pty.) Ltd.* (1968), 3 S. A. 563.

[2] *1958 Acta Juridica, p. 135.*

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The *condictio furtiva* likewise would not be available because the defendant was acting bona fide in receiving and cashing the cheque.[1] Consequently, relief by way of unjust enrichment in the Roman-Dutch law would not be available except on the basis of the recognition of a general principle of enrichment as giving rise to an obligation to restore. It becomes necessary therefore to examine whether such a comprehensive general action, which may be described as a *condictio sine causa generalis*, receives recognition in the modern Roman-Dutch law, as a means of relief in those enrichment situations which do not fit into the framework of any of the classical enrichment actions.

Statements of a general nature suggestive of the existence of a broad underlying basic principle are indeed not lacking in the works of the Roman-Dutch writers. Thus Grotius[2] states with regard to obligations arising from enrichment (*baettrekking*): "Inequality which profits or might profit another (i.e., apart from contract) binds the person profited to make compensation, without regard to the way in which he came by the profit, and this with regard not only to things *in specie* but also to things *in genere*; e.g., if one man were fed with another man's food; for by the law of nature he is bound to make compensation, that is, to re-establish equality." He also observes[3] "Obligation from enrichment (*baettrekking*) arises when some one without legal title derives or may derive advantage from another person's property." Further, Professor Scholtens in an illuminating article on the subject[4] has pointed out that not only Grotius but also Van Leeuwen and Huber mention *baettrekking* (enrichment) as a source of obligation.

There are however certain pronouncements both of this Court and of the Appellate Division of South Africa which would appear to militate against this view.

In *Silva v. Fernando*[5] Lascelles, C.J. observed that he could find no authority in the text books in which the principle that no one should be enriched at the expense of another had been extended to a case like that before him and that as far as he could ascertain the application of the principle was limited to certain well defined cases.

However for Ceylon there are other decisions of co-ordinate authority indicating a broader view[6] and the question is therefore an open one.

In South Africa however a bench of five judges of the Appellate Division has quite recently examined the question in very great detail in the case of *Nortje en'n ander v. Pool N.O.*[7] and the majority decision in that case,

[1] See *Bell v. Esselen*, (*1954*) *1 S. A. L. R. 147.*
[2] *3.1.15.*
[3] *3.30.1.*
[4] (*1966*) *83 S. A. L. J. 391 at 394–5.*
[5] (*1912*) *16 N. L. R. 114 at 116.*
[6] See *Jayetilleke v. Siriwardane*, (*1954*) *56 N. L. R. 73 at 80.*
[7] (*1966*) *3 S. A. 96 (A.D.).*

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one of compelling authority in that country, creates much difficulty in the way of the acceptance of a general principle of unjust enrichment. That decision rejected the contention that there is a general enrichment action in the Roman–Dutch law, and if that decision be correct, the plaintiff in the present case would not be able to succeed on her claim for unjust enrichment at any rate in so far as the Roman–Dutch law is concerned. It would also indicate much divergence in practical application between the English principle of unjust enrichment and that of the Roman–Dutch law, and seriously undermine any effort to relate them as was attempted in *Saibo v. Attorney-General*[1], *Don Cornelis v. de Soysa & Co. Ltd.*[2] and *The Imperial Bank of India v. Abeysinghe*[3].

Now, the decisions of the Appellate Division of South Africa have always been treated in this country with the greatest respect as containing authoritative statements of the Roman-Dutch law by the highest tribunal of the world's largest Roman-Dutch jurisdiction, and though not bound by these decisions, this Court has consistently treated them as of the greatest persuasive value. However, upon a very careful examination of the principle emerging from that decision I find myself to be of a different view, and being free in this jurisdiction to consider this matter as still an open one, I would with the utmost respect, venture to take a broader view of the scope of unjust enrichment.

In *Nortje's case* considerable expenditure had been incurred in discovering kaolin on land which was the subject of an invalid contract, and the plaintiffs claimed enrichment of the owner's estate in that the market value of the property had been enhanced by the exposure of deposits of kaolin in exploitable quantities. The unjust enrichment averred was the expense incurred by the plaintiffs in finding the kaolin. Relief was claimed by way of an extension of the action of the bona fide possessor for *impensae utiles*, and alternatively by way of an extension of this action to the bona fide occupier and in any event upon the basis of a general action for unjust enrichment. On this last ground the defendants urged that the claim did not come under any one of the recognised enrichment actions of the Roman-Dutch law—a contention which the court upheld by a majority judgment.

In reaching this conclusion the court relied *inter alia* on an observation of Professor Wouter de Vos, one of the foremost writers on the subject of unjust enrichment in the Roman–Dutch law, that there did not appear to have been a general enrichment action in the classical Roman–Dutch law.

Professor de Vos in his writings[4] whilst strongly expressing the view that such a general action has been recognised and ought to be recognised by the modern law, had pointed out[5] that there did not appear to be a

[1] *(1947) 48 N. L. R. 574.*
[2] *(1965) 68 N. L. R. 161 ; 69 C. L. W. 24.*
[3] *(1927) 29 N. L. R. 255 at 264.*
[4] *Verrykingsaanspreeklikheid in die Suid Afrikaanse, 1958 and to the same effect in 1960 Juridical Review pp. 125 and 126.*
[5] *1960 Juridical Review p. 142.*

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recognition in the Roman-Dutch law of the sixteenth and seventeenth centuries of a general principle of enrichment. Professor de Vos stated in these works that he had been able to discover only one case where the Hooge Raad had allowed an action *ex aequitate* because the case could not be brought within one of the recognised actions. The case so referred to was one reported by Bynkershoek [1] in which the court simply allowed a claim on grounds of equity and made no attempt to classify. Professor de Vos thought that it did not appear warrantable to conclude on the strength of that one case that the classical Roman–Dutch law recognised a general enrichment liability. It was this conclusion to which the Appellate Division referred.

However since the publication of Professor de Vos to which I have referred[2] there has appeared in print the Observationes Tumultuariae Novae of W. Pauw, a President of the Hooge Raad, who reported decisions commencing where Bynkershoek left off, and covering the years 1743 to 1755. This publication, the work of four editors, appeared in the year 1964, and the cases there reported make it clear, in the words of Professor Scholtens[5] that " the Roman-Dutch law of the eighteenth century had advanced far on this road of progress (i.e., towards a general principle of enrichment [3]) nay, that it had arrived at its destination." The particular decisions reported by Pauw which conclusively show the existence of such a general principle include Nos. 12, 196 and 558, which may be found conveniently summarised in the South African Law Journal [4].

Professor Scholtens, in criticising the judgment of the Appellate Division in *Nortje's case*, has drawn attention to the fact that these decisions in the Observationes Tumultuariae Novae were not available to the Bench. Indeed Professor de Vos himself has acknowledged that Professor Scholtens is undoubtedly right when he contends that as a consequence of the further cases where a general enrichment action was granted, which have now become known as a result of the publication of Pauw's Observationes Tumultuariae Novae, it must be accepted that the Roman-Dutch law had in practice advanced beyond the point of a mere patchwork of specific actions and that a general action on unjust enrichment had developed[5]. Professor de Vos himself considers it a moot question whether the decision in *Nortje's case* may not indeed have gone the other way if the attention of the court had been drawn to the Observationes Tumultuariae Novae.

The factors to which I have referred are indicative of the possibility that with fuller material based on valuable sources of Roman-Dutch law recently made available, the court may well have decided differently. Furthermore it is my view with much respect that relief for unjust enrichment in the Roman-Dutch law has not in the past and should not in the future be confined strictly to the various specific enrichment actions evolved by that system to meet specific classes of situations.

[1] *Observationes Tumultuariae No. 303.*
[2] *See Note [1] Supra.*
[3] *(1966) 83 S. A. L. J. at 402.*
[4] *(1966) 83 S. A. L. J. pp. 396–7.*
[5] *(1969) 86 S. A. L. J. at 230.*

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It would be well to refer briefly at this point to certain other decisions in the modern law which are indicative of the recognition of such a general enrichment action. In *Hauman v. Nortje*[1] it was permitted to a contracting party who was debarred from instituting a contractual action to institute an action directly on the ground of unjust enrichment without the necessity to invoke any particular form of action. This judgment is of importance as establishing the availability of an enrichment action in modern law under circumstances which could not be fitted into any of the accepted categories of the classical Roman-Dutch law.

Another significant development of the principle of general liability in the modern law is the application of the principle in cases of compensation for improvements, which did not fall within any of the established categories of the classical law. Even more importantly the case of *Pretorius v. Van Zyl*[2] contained the following observation by de Villiers, J. P.: "The doctrine against enrichment is well established . . . The doctrine has been recognised by the Appellate Division in several cases, for instance, *Rubin v. Botha*, *Fletcher v. Bulawayo Waterworks Co. Ltd.* and *Lechoana v. Cloete*. It is true that these three cases deal with the occupation of land, but the doctrine against enrichment is in them applied to circumstances where the law as to compensation for improvement to landed property does not apply: in other words, in circumstances which would equally well have warranted its application to any other cases of enrichment. On general reasoning too, it seems reasonable to suppose that the doctrine against enrichment, as it exists at all, must necessarily be of general application. I come to the conclusion that the doctrine against enrichment at the expense of another is of general application."

The principle underlying such cases as *Rubin v. Botha* and *Fletcher v. Bulawayo Municipality* was applied by the Privy Council in the Ceylon case of *Hassanally v. Cassim*[3] where their Lordships proceeded on the basis that the claim of the improver "was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment."[4] The Privy Council in that case corrected a long standing view of the Ceylon Courts based upon *Soysa v. Mohideen*[5] that it was not competent to a lessee to set up a claim for compensation for improvements, observing that this view was based on the error of not applying this cardinal rule. Their Lordships went on to observe that in allowing the appeal they "entertain no doubt that they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago."

[1] *(1914) A. D. 293.*
[2] *(1927) O. P. D. 226.*
[3] *(1960) 61 N. L. R. 529.*
[4] *at p. 539.*
[5] *(1914) 17 N. L. R. 279.*

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To the same effect Gratiaen, A.C.J. observed in *Jayatilleke v. Siriwardene* [1] : "In England, the rule against unjust enrichment has been adopted by gradual stages, with the assistance of legal fictions such as the 'quasi-contract' and in more recent times, the 'quasi-estoppel'. But in countries which are governed by the Roman-Dutch law, this broad and fundamental doctrine is unfettered by technicalities, and there is no need to insist on proof that the general rule has been previously applied in a precisely similar situation. The comprehensiveness of the Roman-Dutch law principle must be enforced whenever the 'enrichment' asked for would in the facts of a particular case, be demonstrably 'unjust'."

Dicta suggestive of a broad view of the scope of the equitable principle as affording a general cause of action, are also to be found in *Knoll v. South African Flooring Industries.* [2]

The effect of these decisions may be summarised in the words of Professor de Vos [3] in terms that : "The courts have not merely added a few more classes of cases in which the person impoverished would have a claim—they have in truth decided that, *in all cases* where there has been unjustified enrichment of one person at the expense of another, and where the case does not fall into one of the old categories, there shall be a liability except where public policy militates against this."

The view that such a general enrichment principle exists in the modern law finds support also in treatises on the modern law. Thus Hahlo & Kahn observe, [4] after noting the opposing view on the matter, that the better view is that a general subsidiary action on unjust enrichment forms part of the modern law. So also, Wille [5] observes that "today the old classification has been discarded in our law, and unjustified enrichment is recognised as a distinct source of obligation." This latter statement has received express judicial approval in *Krueger v. Navratil* [6] though of course it must not, as de Vos points out, [7] be understood to mean that the old remedies no longer apply. To quote Professor de Vos [8] "It has been shown that there has been a tendency for centuries towards making the maxims in the *Corpus Iuris* aimed against unjustified enrichment progressively more effective by granting remedies over an ever-widening field. This enlargement of the remedy against unjustified enrichment which has taken place in South Africa is thus merely the logical advance along this ancient road."

[1] *(1954) 56 N. L. R. 73 at 80.*
[2] *(1951) 1 S. A. 404 (T).*
[3] *1960 Juridical Review, pp. 230-9.*
[4] *The Union of South Africa, 2nd ed. p. 570.*
[5] *Principles of South African Law, 5th ed. p. 408.*
[6] *(1952), 4 S. A. 405 S. W. A.*
[7] *1960 Juridical Review, p. 237.*
[8] *Ibid, p. 240.*

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This case of *Krueger v. Navratil*, just referred to, is a case of some particular relevance to us in the context of the facts of the present case, as it deals with enrichment resulting from appropriation of stolen property. In that case the plaintiff claimed that the plaintiff's agent had wrongfully and unlawfully appropriated certain items of property of the plaintiff to the benefit and profit of the defendant and that the defendant received the benefits and profits arising from this wrongful act. The property appropriated included a motor lorry, a number of pelts and four hundred sheep. The plaintiff averred that he was entitled to the recovery of this enrichment which consisted in the items of stolen property enumerated.

The court applied the broad general doctrine of enrichment and found that a cause of action in unjust enrichment had accrued to the plaintiff. In so doing it relied on the passage from Wille just referred to, and also on the statement of Grotius that obligation from enrichment arises when someone without legal title derives or may derive advantage from another's property. This judgment went on to hold that the plaintiff was entitled not only to the actual benefit accruing to the defendant but also to the benefit which the defendant may have derived from the use of such property and in that respect has probably been too liberal in its assessment of the scope of relief available[1]; but the special interest of the case so far as we are concerned lies in its discussion of the availability of the general enrichment principle to meet a case of the appropriation of stolen property by a receiver from the thief.

In thus recognising the existence of a general principle of enrichment, the modern Roman-Dutch law, it is important to note, is by no means breaking fresh ground in regard to the extension and development of the original Roman prinicples but is, as de Vos observes, only keeping in step with other Romanistic legal systems. The departure from the original comparmentalised attitude is to be found also in other related jurisdictions.[2] Thus although the Roman law did not recognise a general enrichment liability, the German law gradually enlarged the specific enrichment actions of the Roman law into a general enrichment action (see now section 812 of the German Civil Code). So also Switzerland has followed a not dissimilar course in recognising a general enrichment liability as arising at common law and in recognising and regulating it by the Federal Code of Obligations, section 62 of which provides that "Any person who is enriched without legal cause at the expense of another is bound to make restitution. The enrichment must particularly be returned where it was received without a valid cause because the cause was not realised or because the cause has ceased to exist." In other jurisdictions such as Quebec and Belgium the general liability would appear to be the creation of the Courts.

[1] See (*1953*) *70 S. A. L. J. 9.*

[2] *See generally on this aspect Gutteridge & David, 1933-5 Cam L. J. 204; McGregor, 55 SALJ and de Vos, 1960 Juridical Review pp. 125-9.*

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It is true that the French Code Civile does not contain a general principle of unjust enrichment but contains several specific provisions based on this principle. Even under that system, however, it would appear that writers have urged that the special provisions therein contained can only be explained on the basis of a general principle of liability, and under the influence of the text writers a great change has taken place towards the end of the last century, since when there has been recognition of unjustified enrichment as a source of obligations.[1] It would appear that since a decision of June 15, 1892 the Courts have consistently held that one person may not without justification derive an enrichment from the detriment of another and that although this is only case-made law, and no precedent is binding in France, no defendant now questions the existence of such a rule.[2]

It is also of much interest to note that although the draftsmen of the Code Napoleon preferred to refer to the special instances of enrichment known to the French law rather than to codify an all-embracing underlying principle, Pothier who has so much significance for us as an expounder of the Civil law, and on whose writings so much also in the Code Napoleon is based, had indeed taken the view that the principles of *Equite* (natural justice) must prevail over the niceties of the law, " so that ' natural justice ' is a sufficient foundation for a civil obligation and a cause of action."[3] So also Potheir has observed [4] in regard to quasi-contracts that " the law alone, or natural equity, produces the obligation, by rendering obligatory the fact from which it results. Therefore these facts are called quasi-contracts, because without being contracts, . . . they produce obligations in the same manner as actual contracts."

A comparison with these systems assists us then in arriving at the conclusion that there is no element of inconsistency with the Roman groundwork of our legal system in formulating such a general principle and that in taking such a step we are not voyaging into the unknown or venturing out alone.

Since then there is nothing in principle which militates against the recognition of such a liability in a system stemming from the Roman law, and since the better view would appear to be that the modern Roman-Dutch law does recognise such a general principle of liability, it only remains to examine what requisites may be extracted from the learning upon the subject as being essential pre-conditions for the availability of relief. These requisites cannot be better stated than they have been by Professor de Vos [5] who has set them out as being : (*a*) the

[1] *1960 Juridical Review pp. 126-7 ; 5 Cam L. J. at 208.*

[2] *5 Cam L. J. at 208-9.*

[3] *Pothier, Oeuvres, vol. 5 No. 182—See the references thereto in 5 Cam. L. J. at p. 206.*

[4] *Obligations, Pt. 1 c 1. s. 1 art 114.*

[5] *Verrykingsaanspreeklikheid in die Suid Afrikaanse, pp. 180-206; 1960 Juridical Review pp. 241 -2.*

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defendant must be enriched ; (*b*) the enrichment must be at the expense of another (i.e., the plaintiff must be impoverished and there must be a causal connection between enrichment and impoverishment) ; (*c*) the enrichment must be unjustified ; (*d*) the case should not come under the scope of one of the classical enrichment actions ; (*e*) there should be no positive rule of law which refuses an action to the impoverished person.

All these requisites are satisfied by the circumstances of the present case.

It is true the present case is not one of direct enrichment by a party to the transaction but of enrichment by a third party. This circumstance does not however prevent an enrichment action from being available. In Roman, Roman-Dutch and South African law alike there are some cases in which a remedy for enrichment is given against third parties who have indirectly or incidentally derived benefit from a transaction in which the plaintiff is impoverished.[1] The reluctance to extend the enrichment principle to cover benefits received by third parties is, as Dr. Honore [2] observes, traceable to the importation into the sphere of unjust enrichment of notions pertaining to the law of contract.

One may also note in this context an observation by Dr. Honore [3] who, in criticising, though on another ground, the refusal to allow the *condictio indebiti* in *Bell v. Esselen*,[4] made the significant observation that the plaintiff should have been permitted to condict the money from the defendant " not because the English notion of conversion is applicable to Roman-Dutch law but by the well developed principles of Roman law which are amply sufficient to deal with the complexities of payments made by cheque or bill of exchange."

For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment, I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development ; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts.

If the view in *Nortje's case* be correct we have, with much respect, reached the end of the development of the principle of unjust enrichment. A principle vibrant with life and struggling for growth, would then be

[2] *See A. M. Honore : Third Party Enrichment, Acta Juridica, 1960 p.236.*
[3] *ibid, p. 253.*
[4] *1958 Acta Juridica pp. 135-40.*
[5] *(1951) 1 S. A. L. R. 17.*

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locked for ever in tight compartments, a prisoner of the past. Such a view bodes ill for the future, for it cramps development in what truly is and surely ought to be an area of significant advance. We cannnot thus cry halt at one of the vital frontiers of the law.

I hold therefore, that the plaintiff would be entitled to recover the sum claimed from the defendant on the basis of the general principle of enrichment which is recognised by the Roman-Dutch law.

In the result, then, the plaintiff is in my view entitled to succeed both on the basis of conversion and on the basis of unjust enrichment, and, reversing the judgment of the learned trial judge, I would enter judgment for the plaintiff in the amount claimed. The plaintiff will be entitled to her costs both here and in the court below.

WIJAYATILAKE, J.—

On the evidence led in this case two important questions of Law have arisen for determination—firstly whether the English Law of conversion in respect of cheque transactions as in the instant case is part of our law and if so whether a Banker is liable under the Law of conversion ; secondly whether the plaintiff is entitled to the alternative remedy on the basis of an action for restitution of money had and received which is in fact a remedy for unjust enrichment.

On a close scrutiny of the facts of this case, with great respect, I agree with the views expressed above that both these questions have to be answered in the affirmative. I do not think it necessary for me to repeat the views already expressed but considering the importance of the questions raised I would make a few general observations.

As the argument proceeded at a very high academic level I was beginning to wonder whether the system of law in this country is so anaemic and outmoded that the plaintiff should be shut out from recovering what is justly due to her. This case has been referred to a Bench of five Judges in view of the decision of the Divisional Bench in the case of *Daniel Silva v. Johanis Appuhamy*[1]. Now that the judgments in this far reaching case have been discussed and dissected in great detail it is doubtful whether that Bench would have taken the same view in regard to the applicability of the Law of Conversion in Ceylon in respect of cheques if only its attention had been drawn to Section 2 of Ordinance 5 of 1852.

In my opinion the intention of the Legislature to bring a case of this nature within the scope of Ordinance 5 of 1852 is clear when referring to cheques it uses the words " . . . . . and in respect of *all matters connected with such* instruments . . . . . , or if the act in respect of which *any question* shall have arisen, had been done in England ". During the period of this enactment shortly after the coffee crisis in 1847 and world-wide depression in 1848 the British commercial interests were foremost and one could well appreciate the urge on the part of the Banks which were entirely British

[1] *(1965) 67 N. L. R. 457.*

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except for The Bank of Ceylon which had failed with the coffee crisis and the leading Commercial firms and Agency houses mostly British to safeguard their transactions by adopting the Law of their country. No doubt, our common law was then as it is now, the Roman-Dutch Law. In the interpretation and construction of a statute there is a presumption against altering the common law. As Devlin J. observed " It is a well established principle of construction that a statute is not to be taken as effecting a fundamental alteration of the general law unless it uses words that point unmistakably to that conclusion ". (*National Assistance Board v. Wilkinson* [1].) As Dias in his treatise on " Jurisprudence " (2nd ed.) at page 122 comments this principle is based on the belief in the self-sufficiency of the common-law. Could we say that in 1852 our common-law was self-sufficient to meet a situation such as the one that has arisen in this case ? The answer to this question is in the negative and it is set out fully in the judgments of the Divisional Bench in the case of *Daniel Silva v. Johanis Appuhamy* referred to earlier. I am of opinion that the Bills of Exchange Ordinance though it is not in the same terms is sufficiently wide enough for us to hold that in regard to a transaction of this nature pertaining to a cheque it is the English Law which applies.

T. S. Fernando J. observes that " section 98 (2) of the Bills of Exchange Ordinance was only intended to apply to any omission or deficiencies in the Ordinance in respect of the law relating, inter alia, to cheques, and cannot form the basis of a proposition that, where the delict of conversion was in relation to a cheque, therefore the English common law of conversion is introduced into our law ". Tambiah J. observes that, " this provision was intended to bring the substantive law of bills of exchange, promissory notes and cheques and was not intended to affect the consequence and the rights and liabilities of persons under the general law of the land when a bank enters into transactions ". There is nothing to show in their judgments that their attention was drawn to the very vital Ordinance 5 of 1852. Perhaps, if they were made aware of it the provisions of the Bills of Exchange Ordinance would have been seen in a different background.

Tambiah J. has referred to the operation of the Bills of Exchange Ordinance in South Africa and Canada : but so far as Ceylon is concerned there was this important historical land mark—Ordinance 5 of 1852. In my opinion this is of great significance and it is a beacon light we have to constantly keep in mind when seeking to interpret the relevant provisions of our Bills of Exchange Ordinance. With great respect, I might observe that there is a real danger in relying on foreign judgments interpreting statutes without reference to the background of these statutes.

In the interpretation and construction of a statute we have to keep in mind the several rules laid down by judicial precedent and lest we get entangled and enmeshed in them it would be well to remember how a

[1] *(1952) 2 Q. B. 648 at 661.*

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shrewd writer summed up the position. Dias quotes this in his treatise at page 108 : " A Court invokes whichever of the rules which produces a result that satisfies its sense of justice in the case before it ".

The history of this form of action has been discussed at length in *Daniel Silva's* case but that too being a case pertaining to a cheque transaction the omission to deal with the Ordinance of 1852 is so vital that this decision is open to question although the defendant there was not a Banker. I might also state that in discussing these legal concepts one has to guard against taking a too rigid and a parochial view of them. It would be quite unrealistic and academic to confine them to water-tight compartments, or barbed-wire encampments. One has to recognise the fact that jurisprudence today does not stress the distinctions between these legal concepts as in the past. Today jurists recognise the fact that they fuse into one another with the ultimate object of serving the public interest. It is the essence of justice that we have to keep in mind with a view to suppressing the mischief and advancing the remedy and to suppress subtle inventions and evasions for continuance of the mischief and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico* (Heyden's Case—see Dias, page 134). It would be well to remember the words of Bertram C.J. in *Gunatilake v. Fernando*[1] : " But we are no longer tied to forms of action. If the law recognizes a right, it will provide its own forms for enforcing it ".

In Ceylon, although our common law is the Roman-Dutch Law, the principles of English Law have been introduced from time to time, particularly in the field of banking. Vide Section 3 of the Civil Law Ordinance. Learned counsel for the respondent submits that the facts in this case do not constitute a transaction governed by the law of banking as such. In my opinion it would be highly unrealistic to say that this transaction falls outside the pale of " the law of banks and banking ". It may be noted that the section refers not only to the *law of banking* but the *law of banks*. To quote the words of Lord Denning M. R. in a recent case : " We (the Judges) are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them "—*Allen v. Thorn Electrical Industries*[2]. Much has been said about the necessity to apply the principle of our common law—the Roman-Dutch Law—without adulterating it with the English Law. This view appears to be far too out-dated and quite contrary to the progress and development of our law. In fact Tambiah J. in *Kamalawathie v. de Silva*[3] observes that Law like race is not a pure blooded creature and he stresses the inroads made by English Law into the legal system of Africa.

As Tambiah J. states the English Courts granted this remedy by a process of extension by treating the cheque, the subject matter of conversion, as a chattel, which was converted into money. Now that this appeal has been argued very fully before us the question does arise whether

[1] *(1919) 21 N. L. R. at 268.* [2] *(1968) 1 Q. B. 487 at 502.*

[3] *(1961) 64 N. L. R. 252.*

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the conclusion arrived at in *Daniel Silva's case* that this particular remedy was not available under our Law in the context of the facts in that case is correct—assuming that in the instant case the remedy is in fact available. In my opinion the mere fact the defendant in that case was apparently a bona fide holder for value in due course would not absolve him as the Bills of Exchange Ordinance (read with Ordinance 5 of 1852) does not restrict the cause of action as against a Banker only. It may be argued that if we hold that the view taken by this Court in *Daniel Silva's case* is erroneous it will seriously hamper cheque transactions but, in my view, cheques cannot be equated with Government currency. It may well be that the English Courts granted this remedy by a process of extension with a view to checking careless and fraudulent transactions in the field of commerce. The facts in *Daniel Silva's case* are a pointer to this.

On the question of undue enrichment the facts are so cogent that I need hardly repeat them. The Bank failed to call Thuraiappah who was in Court. Surely it was the duty of the Bank to make a frank disclosure of all the facts. Why did the Bank fail to call Thuraiappah ? One need hardly answer the question. The answer is so eloquent. Obviously, the chief actor in the transaction has been kept out and a volume of evidence has been led leading the Court to a realm of speculation. The question did arise as to the use of the ultra-violet ray machine to check any alteration on the dividend warrant. It is significant that although Thuraiappah appears to have in the Magistrate's Court spoken to the use of this machine for examination of this particular dividend warrant the Bank far from seeking to rely on this in these proceedings objected to the plaintiff eliciting this fact ! Furthermore, the loss of the dividend warrant at National & Grindlay's suggests that an officer or officers of the Bank of Ceylon (Wellawatte Branch) have been actively interested in this transaction. The mere fact that Handy has given evidence is of little value—when Thuraiappah who played the most vital part in this transaction was not called. A public institution like the Bank of Ceylon should have made a full disclosure instead of keeping the Court guessing on a matter of this nature. The dividend warrant was marked " not negotiable " and endorsed by the plaintiff to her account. This was the largest sum changed on this day and the only dividend warrant of the transactions. I am satisfied that the negligence on the part of the Bank has been clearly proved to found an action for money had and received. With great respect I am of the view that the principle set out by Sansoni C. J. in *Don Cornelis v. de Soysa & Co. Ltd.*[1] and by Schneider J. in *The Imperial Bank of India v. Abeyasinghe*[2] applies with equal force to the facts in this case.

I would accordingly allow the appeal and enter judgment for plaintiff as prayed for with costs in both Courts.

Appeal allowed.

[1] *(1965) 68 N. L. R. 161.*

[2] *(1927) 29 N. L. R. 257.*

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1969 *Present :* **Alles, J., and Pandita-Gunawardene, J.**

A. R. G. FERNANDO, Petitioner, *and* W. S. C. FERNANDO, Respondent

S. C. 192/1968—Application in Revision in D. C. Colombo, 7655/D

Revision when right of appeal lies— Requirement of exceptional circumstances— Matrimonial action—Order for maintenance of children pendente lite*—Whether application in revision lies for enhanced maintenance—Civil Procedure Code, ss. 619, 624—Courts Ordinance, s. 73.*

Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision.

Where, in a matrimonial action, the wife, without exercising her right of appeal, moved the Supreme Court, by way of revision, to enhance the sum awarded by the District Court as maintenance *pendente lite* for the five children of the marriage—

Held, that the facts of the case did not warrant the exercise of the extraordinary powers of revision.

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

Walter Jayawardena, Q.C., with *S. G. Wijeyasekera*, for the petitioner.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the respondent.

Cur. adv. vult.

May 18, 1969. ALLES, J.—

Counsel for the defendant-respondent has taken a preliminary objection to this application on the ground that the petitioner should have appealed from the order of the Judge. Section 73 of the Courts Ordinance read with Sections 61 and 624 of the Civil Procedure Code make it abundantly clear that it was open to the petitioner to exercise her right of appeal from the order directing the respondent to pay alimony *pendente lite* and maintenance for the five minor children of the marriage. Counsel relied on the decisions of this Court in *Goonewardene v. Orr* [1], *Carlina v. Mary Nona Silva* [2] and *Alima Natchiar v. Marikar* [3] in support of his submission that no application in revision should be entertained by this Court where a right of appeal lies. Counsel for the petitioner did not seriously contest the position that a right of appeal did lie from the order of the learned Judge but sought to argue that the facts of this case

[1] *(1907) 2 A. C. R. 172.* [2] *(1945) 47 N. L. R. 16.*
[3] *(1945) 47 N. L. R. 81.*

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warranted the exercise of the revisionary powers of this Court. He only confined his present application to one of enhanced maintenance in respect of the minor children.

The powers of the Supreme Court to act by way of revision have been succinctly stated by Soertsz, J. in *Atukorale v. Samynathan* [1]. Said the learned Judge :

> " The powers by way of revision conferred on the Supreme Court are very wide indeed, and clearly this Court has the right to revise any order made by an original Court whether an appeal has been taken against that order or not. Doubtless that right will be exercised in a case in which an appeal is already pending only in exceptional circumstances. For instance this jurisdiction will be exercised in order to ensure that the decision given on appeal is not rendered nugatory. "

In *Atukorale v. Samynathan* an appeal had been filed by the defendant-petitioner against the order of the Judge allowing an application for execution of writ. Pending the hearing of the appeal, the defendant moved the Supreme Court by way of revision to stay execution on the ground that if the writ was executed in the manner execution was prayed for any order favourable to him in the ultimate appeal would be of doubtful value to him. There was therefore an exceptional circumstance which required the intervention of the Court by way of revision while the appeal was pending in order to ensure that the decision given in appeal would not be rendered ineffective.

Similar considerations exist in the other decisions of this Court to which our attention has been drawn by Counsel. In *Ranasinhe v. Henry* [2] an appeal was filed when there was no right of appeal but the revisionary powers of the Supreme Court were exercised because the order was *wrong ex facie.* In *In the Matter of the Insolvency of Hayman Thornhill* [3] the Court was satisfied that the proceedings were conducted in a *most perfunctory manner* and that there were a *number of irregularities.* The " due administration of justice " therefore required the exercise of the Court's revisionary powers.

In *Sabapathy v. Dunlop* [4] the revisionary powers of the Supreme Court were exercised where there was no appeal and where the Court below wrongly passed a decree on a consent order without satisfying itself of the legality of the agreement which was challenged on grounds of fraud, fear, mistake, surprise, *et cetera.*

In *Abdul Cader v. Sittinisa* [5] there was a mistake in the sum tendered for typewritten copies of the brief and accepted as correct by the Secretary of the Court and the respondents. On objection being taken that the

[1] *(1939) 41 N. L. R. 165 at 166.*
[2] *(1836) 1 N. L. R. 303.*
[3] *(1895) 2 N. L. R. 105.*
[4] *(1935) 37 N. L. R. 113.*
[5] *(1951) 52 N. L. R. 536.*

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appeal had abated, both Gratiaen and Pulle, JJ. held that no prejudice was caused to the respondents and heard the appeal by way of revision. Gratiaen, J. stated that " it would be a travesty of justice if some mere technicality were to deprive a party of his right of appeal to the Supreme Court from a judgment which seriously affects his interests. "

In similar circumstances, the Supreme Court in *Sinnathangam v. Meeramohaideen*[1] acted by way of revision where there was an *erroneous decision* of the court even though the appeal against that decision had been correctly held to have abated on the ground of non-compliance with some technical requirements in respect of the notice of security.

Mr. Jayewardene for the petitioner also relied on *Appuhamy v. Weeratunga* [2] a partition case in which a party who was not a party on the record moved the Supreme Court in revision to exclude a lot to which he lay claim and which was erroneously included in the decree of sale—to support an argument that even such a party is entitled to apply to the Supreme Court by way of revision.

Finally in *Peries v. Silva* [3] Garvin, J in dealing with a case where the trial Judge rejected a plaint although it was " by no means clear that the correct procedure was not to appeal " to the Supreme Court, chose to deal with the matter in revision in view of a practice that had hitherto prevailed. In all the above cases it will be noted that there were " exceptional circumstances " of varying kinds which necessitated this Court exercising its revisionary powers, the paramount consideration being the due administration of justice. Reference must also be made to *Silva v. Silva*[4], a matrimonial action in which the Supreme Court, while an appeal was pending, dealt in revision with an application by the husband for the custody of the child *pendente lite* because of a genuine fear that some harm would come to the child if it continued to remain in the custody of the mother until the appeal was heard. Wijeyewardene, J. (as he then was) in that case cited with approval the observations of Soertsz, J. in *Atukorale v. Samynathan* (supra).

What are the " exceptional circumstances " in the present case which would warrant this Court in exercising the extraordinary powers of revision ? The application to the District Court was made by the petitioner for payment of Rs. 1,000 as alimony *pendente lite* and Rs. 1000 as maintenance for the children. It has been submitted by learned Counsel for the petitioner that the respondent in his affidavit of 27th January 1968 stated that he was willing to pay Rs. 75 for each of the five children in addition to their school fees which was a sum in excess of the amount of maintenance ordered in respect of the children. It is admitted that the petitioner was in receipt of an income from the Municipality till the end of December 1967 and even in January 1968 she received a sum of Rs. 281 from her employer. It was therefore not unreasonable

[1] (*1958*) *60 N. L. R. 394.*
[2] (*1921*) *23 N. L. R. 467.*
[3] (*1934*) *12 Times L. R. 2.*
[4] (*1943*) *44 N. L. R. 494.*

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for the respondent to assume on 27th January 1968 that the petitioner was not in need of alimony and for that reason he was prepared to pay more for the children than the amount ultimately decreed because in his view no alimony was payable to his wife. Indeed it may well be that the petitioner being a Doctor and having been in receipt of a steady income from December 1965 could secure employment without difficulty even after her services were determined by the Municipality. The learned District Judge in his order has granted alimony *pendente lite* to her and reduced by about Rs. 200 per month the sum which the respondent was willing to pay for the children. In making this order, the Judge may well have considered the status of the parties (both being Doctors) and the reasonable possibility of the petitioner obtaining further employment. The learned District Judge had to make his order on a consideration of the matters referred to in the affidavits and it is difficult to agree with the submissions of petitioner's Counsel that he had misdirected himself in regard to the quantum of maintenance payable to the children. Learned Counsel for the petitioner stressed the fact that the real parties affected in this matter were minor children whose interest should be paramount, and in regard to whom the Courts of law have a special duty and consequently that these are exceptional circumstances that should weigh with us. While I agree that the Courts should be particularly vigilant where the interests of minors are concerned, it would be an unhealthy precedent for this Court to interfere in a case of this kind when the application is in effect one for payment of enhanced maintenance to the children.

The decision of the learned Judge in this case was arrived at on the material placed before him by the parties themselves and it is impossible for us to say that this is a case which falls within the exceptional circumstances referred to in the decisions of this Court to warrant the exercise of our revisionary powers. The preliminary objection is therefore upheld and the application refused. There will be no order as to costs.

PANDITA-GUNAWARDENE, J.—I agree.

Application refused.

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[Privy Council]

1969 *Present :* **Lord Morris of Borth-y-Gest, Lord Donovan, Lord Wilberforce, Lord Pearson and Lord Diplock**

D. J. RANAWEERA, Appellant, *and* C. B. E. WICKRAMASINGHE (Deputy Commissioner of Inland Revenue), Respondent

Privy Council Appeal No. 16 of 1968

S. C. 317/64—Application for a Mandate in the nature of a Writ of Certiorari under section 42 of the Courts Ordinance

Income tax—Penalty for making an incorrect return—Power of Commissioner of Inland Revenue to inpose such penalty—Whether the Commissioner exercises judicial power and requires appointment by Judicial Service Commission—Nature of his duties—Difference between administrative functions and judicial functions—Effect of alternative proceedings before Magistrate—Certiorari—*Ceylon (Constitution) Order in Council (Cap. 379), Articles 3, 53, 55, 58, 60—Income Tax Ordinance (Cap. 242), ss. 2, 3, 23, 58 et seq., 73, 80 (1), 90, 92.*

Section 80 (1) of the Income Tax Ordinance reads as follows :—

" 80. (1) Where in an assessment made in respect of any person the amount of income assessed exceeds that specified as his income in his return and the assessment is final and conclusive under section 79, the Commissioner may, unless that person proves to the satisfaction of the Commissioner that there is no fraud or wilful neglect involved in the disclosure of income made by that person in his return, in writing order that person to pay as a penalty for making an incorrect return a sum not exceeding two thousand rupees and a sum equal to twice the tax on the amount of the excess."

The only question for decision in the present appeal was whether the Commissioner of Inland Revenue had power to impose penalties under section 80 of the Income Tax Ordinance. It was argued on behalf of the appellant (a taxpayer) that such imposition was an exercise of a power which is judicial and not administrative, and that judicial power could, under the Constitution of Ceylon, be exercised only by a judicial officer appointed by the Judicial Service Commission. In support of the submission that the Commissioner exercised judicial power, reliance was placed on the words " unless that person proves to the satisfaction of the Commissioner " in section 80 and upon the alternative course which the Commissioner could elect by causing proceedings to be instituted before a Magistrate under sections 90 and 92 of the Income Tax Ordinance.

Held, that where the resolution of disputes by some Executive Officer can be properly regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function. This is particularly so in the field of income tax though it is certainly not confined thereto. The Commissioner, when he acts under section 80 of the Income Tax Ordinance, is still performing his administrative duties albeit that he must act judicially in exercising the powers conferred upon him by the section. The conclusion that this is not the same thing as the exercise of judicial power is unaffected by the circumstance that penalties may be imposed as an alternative by a Magistrate acting under sections 90–92 of the Income Tax Ordinance.

1*—J 12777—2,255 (4/70)

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APPEAL from a judgment of the Supreme Court.

Sir Dingle Foot, Q.C., with *M. P. Solomon* and *M. I. Hamavi Haniffa*, for the assessee-appellant.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo*, for the respondent (Deputy Commissioner of Inland Revenue).

Cur. adv. vult.

December 11, 1969. [*Delivered by* LORD DONOVAN]—

The appellant (hereinafter called "the taxpayer") owns considerable landed property in Ceylon and has a large income. The respondent (hereinafter called "the Commissioner") is the Deputy Commissioner of Inland Revenue, Colombo.

The taxpayer appealed against assessments to Income Tax made upon him for the years of assessment 1950/51–1957/58 inclusive : and against assessments to profits tax for the years 1950–56, also inclusive. Following negotiations the taxpayer agreed with the Commissioner the figures of his income for these years. These agreed figures were, it seems, considerably in excess of the figures shown in the relevant returns which the taxpayer had made. The agreed figures were computed at the end of an examination of the increase in the taxpayer's wealth occurring between the years 1949 and 1957. As a result, the taxpayer agreed that Rs. 2,400,000 should be included in the assessments upon him as being undisclosed income. This agreement was reached on 27th March 1961 when it was reduced to writing and signed by the taxpayer and an Assistant Commissioner of Income Tax. The last paragraph of the document reads thus :

> "I have been informed that the settlement of my appeals on the above basis is without prejudice to the powers the Commissioner has to take action against me under the penal provisions of the Income Tax Ordinance in respect of any offences committed by me in connection with my returns for the years 1950/51 to 1957/58 and the information I have furnished in connection with the inquiries made into the appeals for these years."

The Commissioner thereafter considered the question of penalties and on 3rd July 1963 the taxpayer, in consideration of proceedings not being taken against him for the recovery of penalties, agreed in writing to pay to the Commissioner of Inland Revenue as penalties incurred for the years 1950/51–1957/58 the sum of Rs. 450,000. The date for payment was first fixed at not later than 8th September 1963. Notwithstanding an extension of this date to 27th December 1963, the money was not paid and has not since been paid.

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The agreement thus dishonoured plays no further part in this case. The Commissioner instead of seeking to enforce it, turned instead to the alternative remedy which he considered was available to him under the Income Tax Ordinance.

The relevant section is section 80 (1) which reads as follows :

" 80. (1) Where in an assessment made in respect of any person the amount of income assessed exceeds that specified as his income in his return and the assessment is final and conclusive under section 79, the Commissioner may, unless that person proves to the satisfaction of the Commissioner that there is no fraud or wilful neglect involved in the disclosure of income made by that person in his return, in writing order that person to pay as a penalty for making an incorrect return a sum not exceeding two thousand rupees and a sum equal to twice the tax on the amount of the excess. "

On 10th February 1964 the Commissioner wrote to the taxpayer giving him notice that the Commissioner intended to proceed against him for penalties under s.80 (1) for the years of assessment 1955/56–1957/58 inclusive, and inviting him to shew cause on or before 3rd March 1964 why an order for such penalties should not be made. The claim for penalties was limited to these three years of assessment, since section 80 was first enacted in 1956.

Upon the taxpayer's request, an extension of time of one month was granted, but cause was not shewn. The Commissioner accordingly proceeded on 21st April 1964 to make an order under section 80 (1) the final paragraph of which order reads—

" As the assessee has not satisfied me that there was no fraud or wilful neglect involved in the disclosure of income in his returns for the years of assessment 1955/56, 1956/57 and 1957/58, I order him under section 80 (1) of the Income Tax Ordinance to pay the following sums as penalties for making incorrect returns :

For 1955/56	..	.. Rs. 180,000
For 1956/57	..	.. Rs. 50,000
For 1957/58	..	.. Rs. 120,000 "

Under the terms of section 80 (2) of the Income Tax Ordinance, the taxpayer was entitled to appeal from this order to the Board of Review set up under section 74 of the Ordinance and did so. One ground of appeal was that the Commissioner was without jurisdiction to impose the penalties in question. Another was that a proper opportunity for him to shew cause why these penalties should not be inflicted had not been afforded, and thus that the rules of natural justice had been broken. Both these pleas failed. Other matters were canvassed by the taxpayer before the Board of Review but these are no longer in issue. The Board dismissed the taxpayer's appeal and confirmed the penalties on 6th

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October 1964. Shortly before this, namely on 19th September 1964 the taxpayer presented a petition to the Supreme Court of Ceylon praying that a Mandate in the nature of a Writ of *Certiorari* be issued directing the Commissioner to forward to the Supreme Court the record of the proceedings imposing the aforesaid penalties, and that the order be quashed. The petition again alleged that the order was a nullity in that the Commissioner was without jurisdiction to make it, and further was made in violation of the principles of natural justice on the ground already indicated above. The petition made no mention of the taxpayer's appeal to the Board of Review. That Board's decision of 6th October 1964 was made the subject of a later petition to the Supreme Court on 23rd November 1964.

The proceedings on this latter petition form the subject of a separate appeal to their Lordships which will be dealt with presently.*

The petition of 19th September 1964 which sought the quashing of the Commissioner's order imposing penalties was dismissed by the Supreme Court on 29th September 1966. Final leave to appeal to their Lordships was granted on 3rd June 1967.

The allegation of a breach of the rules of natural justice is not now pursued. The sole ground of appeal is that the Commissioner was not entitled in law to impose penalties under section 80 of the Income Tax Ordinance. It is said that such imposition is an exercise of judicial power : that judicial power can, under the Constitution of Ceylon, be exercised only by a judicial officer appointed by the Judicial Service Commission : and that the Commissioner is not such an officer.

The Supreme Court of Ceylon gave no reasoned judgment dismissing this contention. The explanation is that counsel for the taxpayer presented no argument to the Court in view of a previous decision which it had recently pronounced, and the reasoning of which was conclusive against him. This was the decision in *Xavier v. Wijeyekoon and Others*[1] delivered on 22nd July 1966. In that case Xavier had sought a writ of prohibition against the Ceylon Commissioner of Inland Revenue to restrain him from recovering a penalty also imposed by section 80 of the Income Tax Ordinance. The petition for the writ was likewise founded upon the contention that such penalties could be imposed only by the holder of a judicial office. This contention was unanimously rejected by the Court which held that an executive officer could lawfully impose them. The taxpayer in the present case argues that this decision was wrong.

The issue now presented involves considering the Constitution of Ceylon, the Income Tax Ordinance of Ceylon and the nature of the Commissioner's duties under that Ordinance.

* *Page 562 (infra)*

[1] *(1966) 69 N. L. R. 197.*

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The Constitution of Ceylon brought into force by the Ceylon (Constitution) Order in Council 1946 deals in Part VI thereof with the judicature. It provides by Article 53 that there shall be a Judicial Service Commission consisting of the Chief Justice (as Chairman), a Judge of the Supreme Court, and one other person who is, or has been a judge of the Supreme Court. The members of the Commission, other than the Chairman, are to be appointed by the Governor-General. Article 55 then provides that the appointment dismissal and disciplinary control of judicial officers is vested in the Judicial Service Commission. "Judicial Officer" is defined by the same article as meaning the holder of any judicial office but the term is not to include a Judge of the Supreme Court or a Commissioner of Assize. "Judicial Office" is defined by Article 3 of the Constitution as meaning any paid judicial office.

Part VII of the Constitution deals with the public service. By Article 58 it provides that there shall be a Public Service Commission of three persons appointed by the Governor-General. Article 60 enacts that the appointment transfer dismissal and disciplinary control of public officers is vested in the Public Service Commission. Article 3 of the Constitution defines a "public officer" as meaning any person who holds a paid office, other than a judicial office, as a servant of the Crown in respect of the Government of the Island, but with certain named exceptions. The Commissioner is admittedly a "public officer" within this definition.

The argument for the taxpayer is that if section 80 of the Income Tax Ordinance involves the exercise of judicial power then a judicial officer, appointed by the Judicial Service Commission, can alone exercise it. On the other hand, it would not be disputed that if the section does not involve the exercise of judicial power, but instead the doing of an administrative act, then the Commissioner in the present case had jurisdiction to make the order for the payment of penalties by the taxpayer.

The provisions of the Income Tax Ordinance may be conveniently considered at this point. By section 2, the term "Commissioner" includes the Commissioner of Inland Revenue and any Deputy Commissioner, so that nothing turns upon the fact that the respondent in this case was the Deputy Commissioner. Section 23 indicates that Income Tax in Ceylon is a yearly tax imposed at rates fixed each year by the House of Representatives; and it may be presumed that it is intended for the service of each such year. For the administration of the Act, section 3 provides, *inter alia*, that there may be appointed a Commissioner, a Deputy Commissioner, Assistant Commissioner and Assessors. Returns of income are to be made in a prescribed form to the Assessors (section 58 *et seq.*) and the same persons are to make the assessment. Any person aggrieved by the assessment made upon him may appeal to the Commissioner requesting him to review and revise the assessment. (Section 73). The Commissioner hears the appeal (unless it is disposed of by

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agreement beforehand) and may confirm, reduce, increase, or annul the assessment. Any person dissatisfied with the Commissioner's determination may appeal to the aforesaid Board of Review.

Then come the provisions of section 80 which have already been quoted. The taxpayer argues that here, at the very least, the Commissioner is given a power which is judicial and not administrative. He has to make up his mind whether a taxpayer has " proved " the absence of fraud or wilful neglect, which is essentially a judicial function, and one which, when performed leads either to his discharge from all liability for penalties, or the infliction of them upon him. Reliance is also placed upon the provisions of sections 90 and 92 of the Income Tax Ordinance, which provide, as an alternative to proceedings under section 80, a prosecution for making incorrect returns etc. before a Magistrate who can inflict a fine or imprisonment or both. This it is said would clearly be an exercise of judicial power : and in essence the Commissioner, if he elects to proceed under section 80 instead, exercises the same kind of power.

The problem thus posed has confronted Courts in a number of countries, particularly those with written constitutions embodying a separation of powers. In those countries, as in the United Kingdom, Government agencies have been created for the discharge of some particular function, and for the task thus imposed upon them Executive Officers have been necessarily entrusted with the resolution of differences which may arise between the subject and the particular agency in the course of the agency's work. This is particularly so in the field of income tax though it is certainly not confined thereto. Accordingly officers appointed by the Executive may find themselves hearing evidence, weighing it, testing it, and coming to a conclusion upon it : and all the time having to do their best to be fair and impartial, In a word they have to act judicially. Yet in ordinary everyday language they would not be called " Judges " or " members of the Judiciary " or " holders of judicial office ". What is it then which distinguishes them from those who do hold and exercise such an office, seeing that the nature of the task which these Executive Officers have to perform and the qualities they must bring to bear upon it correspond on such occasions so closely, if not exactly, with the exercise of his office by a judge ? The answer which has generally been given is that where the resolution of disputes by some Executive Officer can be properly regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function.

This is the reasoning which appears to their Lordships to underlie the decision of the Supreme Court of Ceylon in *Xavier and Wijeyekoon* (*supra*) and it is matched by decisions in other jurisdictions.

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Thus in *Oceanic Navigation Company v. Stranahan* [1] the Supreme Court of the United States upheld the imposition upon the company of a penalty which it had incurred for an infringement of section 9 of a statute entitled " An Act to regulate the immigration of aliens into the United States." It was argued for the Company that section 9 of the Act which empowered an executive officer to inflict a penalty for such infringement and to refuse clearance of the vessel while it remained unpaid, violated the constitution since it was an exercise of judicial power. The Court rejected the argument, saying "..... the legislation of Congress from the beginning, not only as to tariff but as to internal revenue,..... has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

A similar conclusion was reached in *Helvering, Commissioner of Internal Revenue v. Mitchell* [2], which concerned the imposition of a monetary penalty by such Commissioner upon a taxpayer for committing a fraud with intent to evade tax.

In 1930 their Lordships considered an appeal by the *Shell Company of Australia Ltd*, against the *Federal Commissioner of Taxation for Australia* [3]. In an earlier case the Company, then known as British Imperial Oil Company, had successfully contended that a Board of Appeal created under the Australian Income Tax Assessment Act of 1922 to consider income tax appeals, exercised part of the judicial power of the Commonwealth contrary to sections 71 and 72 of the Constitution of Australia. Not being established in accordance with these provisions the Board of Appeal was invalidly constituted and its decisions were of no effect. This ruling was given by the High Court of Australia and it was not appealed against. Instead, an amending Federal Statute was passed abolishing the Board of Appeal. A new Board was created called the Board of Review and its constitution was altered so that it not merely heard income tax appeals but its powers were closely equated with those of the Commissioner of Taxes himself. The Shell Company nevertheless objected to the Board of Review contending that it also exercised judicial power and was therefore as invalid as had been the superseded Board of Appeal. The High Court of Australia rejected that contention, and its decision was upheld by their Lordships on appeal. The following extracts from the judgment delivered by Lord Sankey may be quoted :

> " The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It is conceded in the present case that the Commissioner himself exercised no judicial

[1] (*1908*) *United States Reports, Vol. 214, p. 320.*
[2] (*1937*) *United States Reports, Vol. 303, p. 391.*
[3] (*1931*) *A. C. p. 275.*

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power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was in truth a Court.

In that connection it may be useful to enumerate some negative propositions on this subject :

> 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body. See *Rex v. Electricity Commissioners* (1924) 1 K. B. 171.

Their Lordships are of opinion that it is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, either by another administrative body, or by a Court strictly so called, or, to put it more briefly, to say to the taxpayer 'If you want to have the assessment reviewed judicially, go to the Court. If you want to have it reviewed by business men, go to the Board of Review.' " (pp. 296–7).

* * * *

" An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a Court of judicial power.

Their Lordships find themselves in agreement with Isaacs J., where he says : 'There are many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action . . . If consistent with either strictly judicial or executive action, the matter must be examined further . . . The decisions of the Board of Review may very appropriately be designated . . . " administrative awards ", but they are by no means of the character of decisions of the Judicature of the Commonwealth.' They agree with him also when he says that 'unless . . . it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.'

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In that view they have come to the conclusion that the legislation in this case does not transgress the limits laid down by the Constitution, because the Board of Review are not exercising judicial powers, but are merely in the same position as the Commissioner himself—namely, they are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive."

Their Lordships now turn to a consideration of the Commissioner's functions under the Ceylon Income Tax Ordinance. By section 3 he is appointed "for the purpose of this Ordinance": and by subsequent sections a variety of duties are laid upon him. They concern the ascertainment of the taxpayer's statutory income, and the due collection of the proper tax. A number of powers and discretions are conferred upon the Commissioner to assist him in his work: power to compel the production of documents: power to restrict liability in certain cases: power to make repayments of over-paid tax: certain discretions in relation to the taxation of non-residents: a discretion to alter the basis of assessment in certain cases: to determine the allowances to be made for depreciation in plant and machinery, and so on. All this is clearly part and parcel of the Commissioner's administrative function. He is also given power to hear the appeals of persons aggrieved by the assessments made upon them: and though, when hearing such appeals the Commissioner must act judicially in the sense of being fair and impartial, this work is simply another step in the process of ascertaining the true amount of tax to be collected, and as such, should be regarded as administrative in character, and not as the exercise of judicial power.

Then come the provisions of section 80 of the Ordinance which have already been set out: and it is clear that before imposing a penalty under this section the Commissioner must give the taxpayer concerned an opportunity of proving the absence of fraud or wilful neglect. A taxpayer will no doubt generally plead an honest mistake or venial carelessness; and the Commissioner will have to make up his mind whether such a plea has been established. This question of fact should ordinarily be no more difficult than others upon which, under the Ordinance, the Commissioner is directed to come to a conclusion; and their Lordships do not see such a marked differentiation between the Commissioner's other duties and his duties under section 80 as to enable them to say that the latter involve the exercise of judicial power. The better view, in their opinion, is that under section 80 the Commissioner is still performing his administrative duties albeit that he must act judicially in exercising the powers conferred upon him by the section. Their conclusion that this is not the same thing as the exercise of judicial power is unaffected by the

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circumstance that penalties may be imposed as an alternative by a Magistrate acting under sections 90–92 of the Ordinance. Indeed the fact that this procedure is an alternative might be said to support it.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The taxpayer appellant must pay the costs of the appeal.

Appeal dismissed.

[PRIVY COUNCIL]

1969 *Present :* **Lord Morris of Borth-y-Gest, Lord Donovan, Lord Wilberforce, Lord Pearson and Lord Diplock**

D. J. RANAWEERA, Appellant, *and* R. RAMACHANDRAN and others, Respondents

PRIVY COUNCIL APPEAL No. 17 of 1968

S.C. 430/64—Application for a Mandate in the nature of a Writ of Certiorari under section 42 of the Courts Ordinance

Income tax—Board of Review—Validity of its appointment by Minister and not by the Judicial Service Commission or the Public Service Commission—Functions of the Board—Power of the Board to hear appeals—Whether it involves the exercise of judicial power—"Public officer"—"Servant of the Crown"—"The Crown"—"Her Majesty"—Ceylon (Constitution) Order in Council (Cap. 379), ss. 3, 55, 60—Income Tax Ordinance (Cap. 242), ss. 11 (1) (a), 11 (7), 15, 36 (1), 37, 43 (3), 56 (9), 73–77, 80—Certiorari.

In this appeal by a taxpayer against an order of the Board of Review which was appointed by the Minister of Finance under section 74 (1) of the Income Tax Ordinance, the first contention for the appellant was that the work of the Board of Review involved the exercise of judicial power and that, therefore, the members of the Board should have been appointed, according to section 55 of the Constitution, by the Judicial Service Commission and not by the Minister. Alternatively, it was contended that the members of the Board were "public officers" within the meaning of the Constitution and that their appointment to the Board was invalid because it was made by the Minister and not by the Public Service Commission as required by section 60 of the Constitution.

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Held, (i) that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance, and that as such its work is administrative though judicial qualities are called for in its performance. It was irrelevant therefore that members of the Board were not appointed by the Judicial Service Commission.

(ii) that members of the Board of Review cannot properly be described as "servants of the Crown" within the meaning of the definition of "public officer" in section 3 of the Constitution. They are more like independent arbitrators which the legislature has thought it right to appoint as an administrative check in favour of the taxpayer and as an additional assurance that his liability to tax will be correctly ascertained.

Per LORD DIPLOCK in dissenting judgment—"The members of the Board of Review if not 'judicial officers' are 'public officers' and were not validly appointed as such."

APPEAL from a judgment of the Supreme Court.

Sir Dingle Foot, Q.C., with *M. P. Solomon* and *M. I. Hamavi Haniffa*, for the assessee-appellant.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo*, for the 4th respondent.

No appearance for the 1st, 2nd and 3rd respondents.

Cur. adv. vult.

December 11, 1969. [*Majority Judgment delivered by* LORD DONOVAN]—

The appellant ("the taxpayer") appealed to the Board of Review in Colombo against penalties imposed upon him by the Commissioner of Inland Revenue under section 80 of the Income Tax Ordinance in the circumstances set out in their Lordships' judgment in the connected appeal to them by the taxpayer entitled *Ranaweera v. Wickramasinghe*.* As narrated in that judgment, the Board of Review dismissed the appeal by Order dated 6th October 1964. Thereafter on 23rd November 1964 the taxpayer presented a petition to the Supreme Court praying for the issue of a mandate in the nature of a writ of *certiorari* to quash the said Order. The Supreme Court dismissed the petition on 16th October 1966, but granted leave to appeal to Her Majesty in Council.

The first, second and third respondents to this appeal are members of the Income Tax Board of Review ("the Board"). They did not appear and were not represented. The fourth respondent was joined in the proceedings by the taxpayer simply to give him notice of his petition. No relief is claimed against him. He was, however, represented on this appeal and opposed the taxpayer's contentions.

* *Page 553 (supra).*

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In his appeal to the Board the taxpayer first argued that the imposition of a penalty upon him under section 80 was an exercise by the Commissioner of Income Tax of judicial power and was therefore a nullity since the Commissioner had not been appointed by the Judicial Commission. The Board rejected this contention, as their Lordships have now rejected it in the connected appeal.* Other issues were raised by the taxpayer before the Board none of which were successful and none of which now remain.

The contentions which their Lordships now have to consider are that the Board in hearing and determining the taxpayer's appeal were exercising judicial powers : that the first, second and third respondents who constituted the Board on this occasion could not exercise such powers, not having been appointed by the Judicial Service Commission. Alternatively the first, second and third respondents were not validly appointed to the Board because they were at least " public officers " but had not been appointed by the Public Service Commission. For either of these reasons the order of the Board dated 6th October 1964 was null and void.

In dismissing the taxpayer's petition the Supreme Court of Ceylon gave no reasons since Counsel for the taxpayer intimated that in view of the Court's decision in *Xavier v. Wijeyekoon and Others* [1] he again proposed to present no argument.

Under the heading " Appeals to the Board of Review " section 74 (1) of the Income Tax Ordinance provides as follows :

> " For the purpose of hearing appeals in the manner hereinafter provided, there shall be a board of review (hereinafter referred to as ' the board ') consisting of not more than twenty members who shall be appointed from time to time by the Minister. The members of the board shall hold office for a term of three years but shall be eligible for reappointment. "

The Minister referred to is the Minister of Finance.

Section 74 then goes on to deal with the constitution of the Board. Two members are to form a quorum, though in certain cases it is to be five. The Board is to have a legal adviser. The remuneration of members is to be fixed by the Minister.

Sections 75–77 confer jurisdiction upon the Board to hear appeals by taxpayers who are dissatisfied by a determination of the Commissioner of Inland Revenue on an appeal to him under section 73, and prescribe the procedure to be followed. Appellants are to attend in person or by an authorised representative : the assessor who made the assessment, or some other person authorised by the Commissioner of Inland Revenue is

* *Page 553 (Supra)*

[1] *(1966) 69 N. L. R. 197.*

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also to attend in support of the assessment : all appeals are to be heard in camera : the Board may summon and examine on oath or otherwise, any person they consider able to give evidence respecting the appeal. At the conclusion of the appeal the Board is to confirm, reduce, increase or annul the assessment, or it may remit the case to the Commissioner of Inland Revenue with the opinion of the Board thereon.

Section 76 of the Ordinance permits the Commissioner of Inland Revenue to refer an appeal direct to the Board if he considers that no useful purpose would be served by his hearing it.

The only provision concerning costs is to be found in section 77 (9) which empowers the Board to order an unsuccessful appellant to pay a sum not exceeding 100 rupees as costs of the Board.

Section 78 gives both the appellant and the Commissioner the right to require a case to be stated on a point of law for the opinion of the Supreme Court.

The first contention for the taxpayer is that the work of the Board involves the exercise of judicial power. The Board does nothing else, it is said, save hear and determine appeals. Unlike the Commissioner of Inland Revenue it has no administrative duties to perform such as, for example, the exercise of discretions which affect the quantum of a taxpayer's liability. Its work cannot therefore be properly described as administrative. When appeals come before the Board there is a *lis inter partes* to be determined, namely a dispute between the Commissioner of Income Tax on the one hand, and the taxpayer on the other ; and so far as disputed questions of fact are concerned the Board's decision is final.

Counsel for the fourth respondent contended that when the Board hears appeals it is conducting one phase of the operations which go to determine a taxpayer's liability ; and this is just as much part of the administration of the tax as is the hearing of appeals by the Commissioner himself.

Their Lordships think it is desirable to examine the functions of the Board a little more closely. When this is done it appears that the Board's functions on appeal are not limited to deciding disputed issues of fact or law, but that they are empowered to review matters which were the subject of a discretion exercised by executive officers. Thus under section 11 (7) of the Ordinance an Assessor has certain discretions regarding the assessment of interest. After conferring these the subsection concludes—

> " Any decision of an Assessor in the exercise of any discretion conferred upon him by this subsection may be questioned in an appeal against an assessment in accordance with Chapter XI. "

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In Chapter XI is to be found *inter alia* the power of the Board to hear appeals.

Section 15 gives other discretions to the Assessor in arriving at the amount of assessable income, and subsection (2) contains a similar provision to that above quoted.

Section 56 confers important discretions on the Assessor in relation to the taxation of certain undistributed profits of companies, and in relation to transactions artificially reducing the amount of tax.

Again subsection (9) of the section says—

> "Nothing in this section shall prevent the decision of an Assessor in the exercise of any discretion given to him by this section from being questioned in an appeal against an assessment in accordance with Chapter XI."

The Ordinance also confers a number of discretions upon the Commissioner of Inland Revenue which, being exercised, will affect the quantum of an assessment upon the taxpayer. See, for example, section 11 (1) (*a*) (depreciation allowances for wear and tear of plant, etc.): Section 36 (1) (liability of certain non-resident persons): section 37 (profits of certain businesses to be computed on a percentage of the turnover): and section 43 (3) (ascertainment of the profits of a non-resident insurance company). There appears to be no such express enactment of a right to question the manner in which such discretions are exercised as there is in the case of Assessors: but since the amount of the assessment will be affected, and section 73 gives the right to a taxpayer to appeal if he is aggrieved by the amount of an assessment, their Lordships think that such a right must be implied. Indeed this would help to explain the existence of section 76 of the Ordinance which empowers the Commissioner to send an appeal direct to the Board if he thinks that no useful purpose would be served by his hearing it. If the Commissioner's own decision as to the exercise of a particular discretion affecting the amount of the assessment were the point at issue, he might well think it right to send the appeal direct to the Board.

The foregoing provisions show that the Board could become closely associated with the administration of the tax. Even otherwise, however, it would not follow in their Lordships' opinion that the Board when hearing appeals was exercising judicial power strictly so called. A broad and not a narrow approach to this problem is appropriate, and is exemplified by what was said in the Court of Appeal in England in the case of *Inland Revenue Commissioners v. Sneath*.[1] Greer L.J. speaking of Commissioners of Taxes in the United Kingdom said (p. 385)—

> "I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers

[1] (1932) 2 K. B. 362.

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whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax, and though the figure determined in one year is final for that year, it is not final for any other purpose. It is final not as a judgment *inter partes* but as the final estimate of the statutory estimating body. No *lis* comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no *lis* until the rights and duties are ascertained and thereafter questioned by litigation."

Romer L.J. added (p. 390)—

"If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax. In estimating the total income of the taxpayer the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact or law. But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question."

In a recent decision in England (*Slaney v. Kean*[1]) Megarry J. was inclined to think that these expressions of opinion were out of date since the passing of the Income Tax Management Act of 1964 which transferred many functions previously exercised by General and Special Commissioners of Income Tax to Inspectors of Taxes and the Board of Inland Revenue. He says (p. 246) "It seems to me that today the Commissioners discharge functions which are essentially judicial in nature. Virtually all their administrative functions have now gone, and their basic functions are judicial."

The taxpayer in the present appeal naturally quoted these observations in support of his argument : but the attention of the learned judge seems not to have been drawn to paragraph 3 of Schedule 4 of the Income Tax Management Act which enacts as follows :

"On an appeal to the General Commissioners or Special Commissioners, the Commissioners shall have jurisdiction to review any relevant decision taken by an inspector or the Board in exercise of the functions transferred to the inspector or the Board by this Schedule."

[1] *(1969) 3 W. L. R. 240.*

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The functions so transferred are identified in the Schedule by references to numerous provisions of the Income Tax Act 1952 and later Finance Acts : and if these are examined it will be seen that " relevant decisions " may be involved which will relate to many matters of administration and these the General and Special Commissioners are empowered to review. Their Lordships respectfully doubt therefore whether it is right to say that these Commissioners have virtually lost all their administrative functions, and that the observations of Greer L.J. and Romer L.J. above quoted must now be regarded as spent. On the contrary they would still appear to have persuasive force in relation to a case such as the present even if the Board of Review's functions were confined to the determination of disputed issues of fact and law as a step in the determination of the taxpayer's income for the year of assessment in question.

Other authorities were canvassed in the course of the argument. They included *British Imperial Oil Company Ltd. v. Federal Commissioner of Taxation* [1] and *Caffoor v. Income Tax Commissioner of Ceylon* [2] : neither of which decisions call for detailed comment here. Both sides relied upon *Shell Company of Australia Ltd. v. Federal Commissioner of Taxation* [3] already noted in the connected appeal. On the whole of the material put before them on this part of the case their Lordships' conclusion is that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance, and that as such its work is administrative though judicial qualities are called for in its performance. It is irrelevant therefore that members of the Board were not appointed by the Judicial Service Commission.

The alternative contention of the taxpayer is that if the first second and third respondents are not " judicial officers " they are " public officers " within the meaning of the Constitution : and that their appointment to the Board was invalid since it was made by the Minister and not by the Public Service Commission as required by section 60 of the Constitution.

" Public Officer " is defined in section 3 of the Constitution as meaning " any person who holds a paid office, other than a judicial office, as a servant of the Crown in respect of the Government of the Island ". Certain persons are declared not to be included in this definition, e.g. the Governor-General, the President, the Speaker or Minister, Senator or Member of Parliament and a number of others.

The narrow question here is, therefore, whether the first three respondents, as members of the Board, are correctly described a servants of the Crown in respect of the Government of Ceylon.

[1] *35 C. L. R. 422.* [2] *(1961) A. C. 584 ; 63 N. L. R. 56.*
[3] *(1931) A. C. 275.*

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A specimen letter of appointment to the Board by the Minister of Finance was shown to their Lordships. It appoints the addressee for a period of three years and fixes his remuneration at 50 rupees for each meeting of two hours' duration or less, and 75 rupees for each meeting of more than two hours' duration, subject to an over-riding maximum of 500 rupees a month.

For the taxpayer it is said that a dilemma confronts the first three respondents from which there is no escape. If they are not " judicial officers " they must be " public officers ". The fourth respondent asserts, however, that the Constitution does not purport to be a code governing the method of appointment to every office to which are attached functions in the nature of public duties.

Their Lordships think they must find the solution to this problem in the meaning to be accorded to the words in the definition " servants of the Crown ". They regard this language as inapt to describe members of the Board having regard to the duties they have to perform. They recognise that the part-time nature of the work and the modest remuneration it attracts are not strictly relevant considerations. It is true, as the fourth respondent says, that the Crown in Ceylon cannot give members of the Board instructions as to how they are to do their work. What is also important is that although it is engaged, as their Lordships have held, in the administration of the Income Tax Ordinance, it is of the essence of the Board's function that its members remain independent and impartial; and this does not accord with any conception of them as " servants of the Crown ". They are more like independent arbitrators which the legislature has thought it right to appoint as an administrative check in favour of the taxpayer and as an additional assurance that his liability to tax will be correctly ascertained. It was urged on behalf of the taxpayer that unless they were " public officers " members of the Board would lose the protection enjoyed by those who are appointed by the Public Service Commission, and that the framers of the Constitution must have intended that protection to be afforded to persons entrusted with tasks similar to those of the Board. Their Lordships must nevertheless still come to a conclusion on the language of the definition; and they have reached the conclusion that members of the Board of Review cannot properly be described as " servants of the Crown " within the meaning of section 3 of the Constitution.

They will accordingly humbly advise Her Majesty that this appeal should also be dismissed. The taxpayer appellant must pay the costs of the appeal.

[*Dissenting Judgment by* LORD DIPLOCK]

I feel reluctantly compelled to record my own dissent from the view of the majority that a member of the Board of Review does not hold his office as a " servant of the Crown " within the meaning of that

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expression in the Constitution of Ceylon. The reasons stated for that conclusion are: "that once they are appointed the Crown in Ceylon cannot give members of the Board instructions as to how they are to do their job", "it is of the essence of their function that they remain independent and impartial" and "They are more like independent arbitrators which the legislature has thought it right to appoint. . . ."

These reasons would be conclusive that a member of the Board was not a "servant" if one were considering whether there existed between him and some other person the legal relationship of master and servant in private law. But the Constitution of Ceylon is concerned not with private law but with public law in which the compound expression "servant-of-the-Crown" has become a term of art descriptive of persons by whom the functions of Government of State are carried out.

In the context of public law I myself should have regarded the characteristics of the office of member of the Board of Review which are relied upon to negative their being "servants" in private law, as pointing to the conclusion that their functions as "servants of the Crown" were more appropriately classified as judicial rather than executive or administrative so that they were "judicial officers" rather than "public officers" within the meaning of the Constitution.

I recognise however that within the special field of taxation there is a line of authorities anterior in date to the Constitution of Ceylon which discloses a tendency to treat as executive or administrative the function of deciding disputes between the Government and the taxpayer as to his legal liability under fiscal legislation although the decision-making function is of a kind which would have all the indicia of being judicial if the subject-matter of the legal liability were anything other than tax. I am not myself convinced that even these authorities compel the conclusion that the functions of the Board of Review under the Income Tax Ordinance of Ceylon are not judicial. But I do not find the reasoning of *Shell Co. of Australia v. Federal Commissioner of Taxation*[1] easy to apply beyond the particular statute with which it was concerned. It enumerates characteristics of a tribunal which are not conclusive to constitute it a "court" but throws little light upon what characteristics are conclusive either of its exercising judicial functions or of its exercising executive or administrative functions. Despite my doubts however I should not have felt justified in expressing positive dissent to a decision that the members of the Board of Review were "public officers" rather than "judicial officers".

[1] (1931) *A. C. 275.*

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The Constitution of Ceylon takes the form of a constitutional monarchy modelled upon that of the United Kingdom. Under such a constitution all functions of central government of the State, legislative, executive and judicial, are carried out in the name of the reigning monarch. In such expressions as " servant of the Crown " or " member of Her Majesty's service ", " the Crown " and " Her Majesty " are used not in the personal but in a metaphorical sense to connote the central government of the State. No one would suggest that except as respects her personal staff there exists between Her Majesty as a natural person and a " servant of the Crown " a legal relationship which possesses the characteristics of the relationship of master and servant at common law, namely, that Her Majesty can give instructions as to the manner in which the servant of the Crown performs his work. On the contrary Her Ministers, by their advice, control the manner in which Her Majesty herself performs her duties under public law. Yet so far as I am aware it has never been suggested that Ministers of the Crown are not included in the expression " servants of the Crown ". So clear was this thought to be by the United Kingdom parliament in 1947 that in the interpretation section (S. 38 (2)) of the Crown Proceedings Act 1947, it is provided : " Officer ", in relation to the Crown, includes any servant of His Majesty, and *accordingly* (but without prejudice to the generality of the foregoing provision) includes a " Minister of the Crown ". A similar recognition that the expression " servant of the Crown " is wide enough to include a Minister of the Crown is to be found in the Constitution of Ceylon itself in which a Minister of the Crown is expressly excluded from the definition of " public officer " within which he would otherwise have fallen as holding " a paid office as a servant of the Crown in respect of the Government of the Island ".

Control by some other person of the manner in which a person performs functions for the purposes of the central government of the State is not in my view a relevant test of whether or not he is a " servant of the Crown ". The legislation under which he is appointed may confer upon him a wide personal discretion to act as he thinks fit. If his responsibilities are of a judicial nature this may be inconsistent with any power in any other person to control the decisions which he makes in discharging them provided that he acts within his jurisdiction. Yet a person who performs judicial functions is none the less a " servant of the Crown ". (*Terrell v. Secretary of State for the Colonies*[1]). There may be room for argument as to whether in view of their unique constitutional history judges of the Supreme Court of the United Kingdom are excluded from the category of servants of the Crown or " persons in His Majesty's service " as Sir William Holdsworth thought they were in 1931 (48 L.Q.R.); though I recall that in the oath of office I took as a Lord Justice of Appeal

[1] *(1953) 2 Q.B. 482.*

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I swore that I would " well and truly *serve* our Sovereign Lady Queen Elizabeth the Second in the Office of one of the Lords Justices of Appeal ". However this may be as respects judges of the Supreme Court who in the Ceylon Constitution are expressly excluded from the definition of " judicial officer ", so far as I am aware it has never been suggested that persons appointed to other judicial offices are not servants of the Crown ; and this too is implicitly recognised in Section 2 (5) of the Crown Proceedings Act, 1947, of the United Kingdom and in the definition of " public officer " in the Constitution of Ceylon.

There may be cases where a function of central government such as the maintenance of order is carried out through officers appointed locally and paid out of local funds. Police constables are a well known example and there may be room for doubt whether in view of the manner of their appointment and the source of their pay they are strictly " servants of the Crown " or are as Blackburn J. put in *Mersey Docks v. Cameron*[1] only *in consimili casu*. This however does not arise in the present appeal.

A member of the Board of Review under the Income Tax Ordinance holds an " office ". It is so described in Section 74 (1). It is a " paid office ", for Section 74 (6) provides for his remuneration which is paid out of the revenues of the central government of Ceylon. In my opinion, the test whether or not he is a " servant of the Crown " in the sense in which that expression is used in public law is whether or not the functions conferred or imposed by the Income Tax Ordinance upon the Board of Review which he is appointed to perform are under the Constitution of Ceylon functions of central government.

The assessment and collection of taxes to defray the expenses of the central government of the country is a classic constitutional function of central government itself. The performance of this function must needs be undertaken by natural persons for the purpose of administering the fiscal legislation on the central government's behalf. Those natural persons who so administer it, at any rate if appointed by a Minister of the Crown acting in his official capacity and if paid out of the central revenues of Ceylon, are in my view " servants of the Crown ".

For this reason I myself would allow this appeal on the ground that the members of the Board of Review if not " judicial officers " are " public officers " and were not validly appointed as such.

[1] *11 H. L. C. 443 at pp. 464–5.*

Appeal dismissed.

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[Court of Criminal Appeal]

1969 *Present :* **H. N. G. Fernando, C.J. (President), Sirimane, J., and Samerawickrame, J.**

Y. P. SETHUWA and 4 others, Appellants, *and*
THE QUEEN, Respondent

C. C. A. 96–100 of 1968, with Applications 144–148

S. C. 154/67—M. C. Kegalle, 65250

Trial before Supreme Court—Examination of a Crown witness—Judge must not perform functions of prosecutor—Opinion of Judge as to credibility of a witness—Duty of Judge not to express it during the examination of the witness.

At a trial before the Supreme Court, the Judge must not take on the examination of a prosecution witness in such a manner that the whole of his evidence incriminating the accused is elicited in answer to questions put by the Judge. In such a case, the Jury can scarcely resist the impression that the Judge is presenting the evidence of the witness as being evidence in which the Judge himself has confidence.

However much a trial Judge may be entitled, in his summing-up, to express an opinion as to the credibility of the evidence of a witness, there is no sanction in law for the course of intimating to the Jury, during the examination of a witness, that the Judge considers his evidence to be trustworthy.

Appeals against certain convictions at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *T. Joganathan*, *Kosala Wijayatilake* and *S. C. B. Walgampaya*, for the 1st, 3rd and 5th accused-appellants.

Y. C. David, for the 2nd accused-appellant.

Colvin R. de Silva, with *Bala Nadarajah*, *I. S. de Silva* and *C. Sandrasegera*, for the 4th accused-appellant.

J. Muthiah (assigned), for the accused-appellants.

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

Cur. adv. vult.

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June 8, 1969. H. N. G. FERNANDO, C.J.—

Five accused were indicted in this case on charges of being members of an unlawful assembly the common object of which was to cause the death of one Siyathuwa, of the murder of Siyathuwa, and also of causing grievous hurt to the son of Siyathuwa. On the 4th and 5th counts the five accused were charged with the murder of Siyathuwa, on the basis that the murder was committed by these accused and others in pursuance of a common intention, and the 5th count was of causing grievous hurt to the son of Siyathuwa also on the basis of common intention. All five accused were convicted on the first three counts, but only on the footing of a common object to cause grievous hurt. On the 4th and 5th counts also the first four accused were convicted of causing grievous hurt to Siyathuwa and to his son.

The prosecution called two alleged eye witnesses, the first of whom was Karunaratne the son of Siyathuwa. This witness was examined by Crown Counsel on some preliminary matters as to the inmates of Siyathuwa's house and the relationship between Siyathuwa and some of the accused. At this stage the learned trial Judge took on the examination of the witness, with the result that the whole of his evidence incriminating the accused and describing alleged assaults by some of them on Siyathuwa, his wife and his son was presented to the Jury in answer to questions by the Judge ; some of these questions were of a leading nature. In fact, Crown Counsel had nothing further to ask this witness, except a couple of formal questions which elicited the fact that the witness had made a statement to the Police. It was most unfortunate that the Judge thus performed the functions of the prosecutor, for the Jury could scarcely have resisted the impression that the trial Judge was presenting the evidence of the witness as being evidence in which the Judge himself had confidence.

The evidence both of this witness and the other principal prosecution witness (one Wimalaratne) fell short of establishing that the seven persons came armed to the scene. On the contrary, it was clear from both witnesses that the 1st accused had on previous occasions been in the habit of coming near the house of the deceased and of abusing him, and that on these prior occasions events had not proceeded beyond the stage of abuse. The learned trial Judge himself appears to have appreciated at one stage that the evidence fell short of proving that the persons who came on the night of the commission of these alleged offences had entertained a common object of killing or injuring the deceased man. This point was made in the following passage in the summing-up :—

"The evidence in this case—I have not dealt in detail with the evidence of Wimalaratne and Karunaratne ; I will do so in due course—seems to indicate that these five persons with others came there not with the object of causing the death of Siyathuwa, because if that was the case they could have waylaid him and attacked him without making

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their presence felt ; they had come there abusing, challenging Siyathuwa to come out and, gentlemen, the evidence is that there were some fence sticks closeby and some of these assailants may have pulled out the fence sticks ; there is no evidence that they came there armed. The only indication that one of them had come armed was that small kitul club P1. We do not know who it was who brought that."

We agree entirely that this was a correct direction on the facts. It follows that unless there was some impressive evidence of the actual conduct of the members of the accused's party which might have justified an inference of a common object to kill or injure the deceased man, the prosecution could not establish any of the charges based upon the existence of an unlawful assembly.

The second prosecution witness Wimalaratne fell into somewhat serious difficulty in the course of cross-examination, when he contradicted himself as to what he claimed to have been the acts done by some or other of the accused in the course of their alleged assaults on the deceased, his wife and his son. At more than one stage, the learned trial Judge interposed with remarks such as this :—

"*Q.* Are you quite sure : Please don't say ' yes ' to everything, think and answer—are you quite sure that it was Gunasekera who assaulted you ?

A. Yes."

I want to remind you that there is really no harm if you say ' You cannot say or you did not see.' If you say that all of them came and assaulted you all, that is quite sufficient. No one expects you to give evidence in such details."

With great respect it seems to us that observations such as these were bound to create in the minds of the Jury an impression that the trial Judge himself fully accepted the evidence of the witness to the effect that the accused did participate in the alleged assaults, even though the witness was unable to speak with certainty to any act done by each or any of the accused. However much a trial Judge may be entitled in his summing-up to express an opinion as to the credibility of the evidence of a witness, there is no sanction in law for the course of intimating to the Jury, during the examination of a witness, that the Judge considered his evidence to be trustworthy. Moreover, the remark that the witness need not give details concerning alleged assaults by various people on the deceased's party was in fact highly prejudicial to the defence. Wimalaratne gravely contradicted the 1st witness Karunaratne as to the identity of the persons responsible for the assault on the deceased and also on the deceased's wife and Karunaratne. In respect therefore of each one of the accused the defence was quite entitled to ask the Jury to disbelieve the evidence as to these alleged assaults, on the ground that the two principal witnesses contradicted each other on questions of

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identity ; and if evidence as to any one of the accused was disbelieved on this ground, that disbelief would then cast doubt on the truth of the evidence that that accused had even been present at the scene. The defence was entitled to a consideration by the Jury of the entire evidence before it reached a conclusion that any one of the accused had been a member of the alleged assembly, and it was a mis-direction to leave it open to the Jury to reach such a conclusion independently of the evidence which related to the alleged assaults.

On the grounds which have already been stated, we are satisfied that, but for these misdirections the Jury could not have reasonably reached the conclusion that there had been an assembly the common object of which was to kill or cause hurt to Siyathuwa, and on this ground we directed a verdict of acquittal of all the accused on the first three counts. We saw no reason however to interfere with the conviction of the 3rd accused for the offence of causing grievous hurt.

All the accused acquitted on counts 1 to 3.

Conviction of the 3rd accused for the offence of causing grievous hurt affirmed.

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