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CONTENTS

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THE CEYLON LAW RECORDER.

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fed the Kandy Bar into abject surrender. Berwick was the hastiest judge when irritated, and he had the fatal gift or failing, it depends how you look at it, of not being able to suffer fools gladly. "Mr.———for whom do you appear? Judging from the record you appear for the plaintiff but judging from your questions you appear for the defendant" is historic. He cultivation to perfection the gentle art of making enemies, and he ran up against Advocate Eaton, some time M. L. C. one of the "League heroes." Eaton was an orator, that is to say he could speak for hours on anything or nothing and he was a local preacher of some celebrity. "Sir" he told judge Berwick "I shall call a witness who is a good Christian." Berwick who used to have his whist—these were the pre-bridge days—what time dear old Eaton was holding forth at the Wesleyan Chapel, got out from the witness that he was converted when out of job and immediately after was given something good and said something, not unlike the remark made by Montagu Chambers which caused such a flurry in England, "When about to buy a horse from a Y.M.C.A. man look out." The leading lawyers of Kandy met and decided to send a protest to the judge and this they did, Eaton and some others signing the protest. Berwick sent for them into Chambers told them that they were guilty of gross contempt of Court in interfering with the undoubted right of the judge to use such language as he thought proper, he did not want anybody's approval or dis-approval of the language he as a judge should use and there was only one constituted authority that is to say the Court of Appeal who could review his decisions and language, and if the signatories to that document did not apologise and withdraw it, he would commit them all for contempt. They dutifully complied with his request or rather obeyed his orders and there the matter ended. It is dangerous however to run up against mediocrities as Berwick found to his cost later. Mediocrities never forget and never forgive. He ran up against the Supreme Court a not unusual occurrence in fact as common as earth-quakes in Japan, and the then chief thought he had him and ruled him for contempt. Berwick appeared and submitted an affidavit which the judges accepted as a full apology and discharged the rule. The *Observer* gloated over the discomfiture of its life long enemy but on the following day Berwick added to the gaiety of the world by pointing out that he did not apologise and people read over that affidavit carefully and found it was so. It is a perilous thing to score off against your chief, doubly perilous to make him appear ridiculous in the eyes of the public and Berwick had to pay dear for his barren victory, but that is another story.

VETUS.

THE LATE MR. BAWA, K. C.

Tributes from Bench and Bar.

References were made in the Courts to the late Mr. B. W. Bawa, the first being at the Appeal Court, presided over by Mr. Justice A. St. V. Jayewardene.

The Hon. the Attorney-General said :—May it please Your Lordship,—Your Lordship will have heard the sad news that has come to us of the loss of one of the most eminent of our profession. It is indeed difficult when we throw back our minds a very few months to realize that the handsome presence and vigorous personality of Benjamin William Bawa will no longer be seen amongst us. Mr. Bawa was a man of

very diversified talents, talents which he certainly did not bury, and he attained success in the profession and in the field of sport, and as a volunteer officer. He touched the life of our community at very many different points. Pre-eminently my Lord, Mr. Bawa was a hard worker. He worked hard in his profession, and worked hard, if I may say so, at his play and he lived a very full and very manly life. He was in the front rank of our profession for many years and became a King's Counsel in 1911, when he was forty-six years of age. The success which he attained did not come at once to him. There were many years of work, hard and unrecognised, before his great abilities became patent to all and in that time of waiting he laid the foundation of that knowledge of the law and capacity for handling cases which distinguished him so much in the last years of his life. If I may say so I think that his most distinguishing qualities as a Barrister and Advocate were his subtle mind, his command over the English language, and that power of lucid statement which made a point of law, and particularly his view of that point of law seemed easy and inevitable to the Bench which he was addressing. And it was in the Court of Appeal that those qualities of his were most effective and were most freely used. But, my Lord, after all the eminence in the profession and distinguishing talents, although they may be of great importance in a community are not of the first importance in the case of the individual. My Lord, I should like to refer to Benjamin William Bawa the man, rather than the Advocate, in the last few words I wish to address to Your Lordship. Mr. Bawa took a very great interest in all things that were connected with his special lines of activity. He was easy of access, a man to whom one could go for counsel with the certain knowledge that all the treasures of his abilities will be given to you. He was a very pleasant personality, a man who brought refreshment and whom it was a pleasure to meet and speak to. We shall miss the eminent Advocate that we have lost in him, but we shall still more miss the pleasant companion and the good friend in him.

Mr Justice Jayewardene said: Mr Attorney—I am sorry that there is not present here to-day a permanent member of this Court to voice the sentiment of the Bench on this solemn and sad occasion. However I do not think it entirely inappropriate that the duty of doing so should fall on one who was for many years associated with Mr. Bawa as his colleague, especially at a time when he was the unquestioned Leader of the unofficial side of our Bar. Every member of the Bench I am sure laments his death, his untimely end. To many of us it has come as a personal loss and we share every sentiment that you have expressed and expressed so eloquently on behalf of the Bar. His loss is a loss not only to the Bar and the Bench, but it is a loss to the entire community. He had a distinguished College career and in after life fulfilled the golden promise his youth. You are all familiar with his long and brilliant career at the Bar and the Law Reports in the Island bear testimony to his many forensic triumphs. He had great qualities; he had great gifts and nothing used to give me greater pleasure when I was at the Bar than listening to Mr. Bawa arguing a case. As you said his reasoning was subtle. It was also solid and sound and he always enlivened the driest argument with flashes of wit and humour which were peculiarly his own. His impressive personality, his great ability, his deep

and intimate knowledge of the laws of this country and the force, the extraordinary force and lucidity with which he expressed himself, and pressed his point always produced a deep effect upon the Bench. He was always a formidable opponent, to be feared and respected. He was not merely a lawyer ; he was also an Advocate and his occasional appearances in the original Courts have shown us that he is quite as much at home in dealing with a witness as in arguing a point of law. He was fearless and independent in the discharge of his duty. Where his brethren at the Bar were concerned he was chivalrous and generous. I do not think that any member of the Bar who had occasion to appear against him, has ever been embarrassed in the course of argument or that he ever uttered a word which caused then-pain. I have appeared against him and with him and I can bear testimony to the nobility of his character. He was always fair to the Court and he maintained as few maintained the highest traditions of our great profession. Of his character and of his work outside the Bar you, Mr. Attorney, have spoken and I need not add to what you have said but his career will I hope prove an inspiration to future generations of lawyers. There is one matter for regret and it is this: that Mr. Bawa was not petmitted to enrich the laws of this country by the fruits of his experience, his wisdom and his talents. He you say touched life at many points. Whatever he put his hands to he threw into it that same ardour, that same energy which characterised his life's work and his work at the Bar. Lately though stricken, he faced his illness with fortitude and with a determination to overcome it which evoked the admiration of his friends. But the Fates have ruled against him. A tower of strength to Bar and Bench has been removed. The Bench agrees that our sympathy should be conveyed to the widow and children. I hope that this small tribute that we have been able to pay to day will in some slight degree console them in their present afflication. Out of respect to the memory of Mr. Bawa, the Court will be adjouned to-day until tomorrow morning.

THE LATE COLONEL R. H. MORGAN.

At the Appeal Court before Mr Justice Porter and Mr. Justice Jayewardene, Sir Henry Gollan, the Attorney-General addressing their Lordships said:—

May it please Your Lordships:—I desire my Lords on behalf of the Bar to express our regret at the death of the late Colonel Richard Morgan My Lords, death has been very busy in our midst during the last few days. It is I think only a week ago that I addressed His Lordship Mr. Justice Jayewardene on behalf of the Bar on the occasion of the death of Mr. Benjamin Bawa, who was a leading practitioner in these Courts. Yesterday my lords, died one who whilst he did not attain a high professional position, yet occupied a very well defined position among us because he was the bearer of a very honoured name. He was the eldest son of one who occupied a very high position here as a Lawyer and as Statesman —Sir Richard Morgan. Colonel Richard Morgan may be said to mark on his decease the closing of a very distinctive career in the social and political history of our community. He was an original member of the Ceylon Light Infantry, rose to be its Colonel, commanded the Contingent which went to England on the occasion of the Diamond

Jubilee of Her late Majesty Queen Victoria and he was, I believe the last survivor of those who obtained Commissions at the formation of the Corps. Then my lords, his death recalls to our memory the fact that there was once an ecclesiastical establishment in the Colony, which was supported by the Colony and lastly Colonel Morgan was I think one of the most senior, if not the most senior member of the Bar, and one who was an actual contemporary of men whose names are now only honoured in memory. My lords, to-day we are thinking rather of the kindly gentleman whose courtesy and old world manners, we shall miss from amongst us very much indeed. On behalf of the Bar I des re to express our deep sympathy with his relatives in the loss they have sustained.

Mr. Justice Porter in replying said Mr. Attorney I wish wholly to associate myself with the remarks which you had the unfortunate duty of making before me this morning. I feel it none the less though Colonel Morgan was absolutely unknown to me. I feel that every word you said has been justified by his past. He was the son of the Acting Chief Justice, at one time, of this Colony and for that reason alone I feel the words which so eloquently addressed to us this morning are by no means misplaced.

SIGNATURE AS "AGENT."

In the recent case of *Universal Steam Navigation Company* v. *James Mc Kelvie and Co.* (Noted 155 L. T. Jour., P. 386) the House of Lords have definitely laid down that the signature to a charter-party "as Agents" is the expression of an intention to exclude any personal liability of the person so signing, and controls the whole document, unless a clearly expressed intention to the contrary appears therein. They have thus practically over-ruled *Lennard* v. *Robinson* (1855, 5 E. & B. 125) and put an end to a long period of controversy. In a number of cases, as the Lord Chancellor pointed out, in which the signatories were referred to in the body of the contract as agents for others, but appended no qualification to their signature, they were held to be personally liable. but in none of them was the signature qualified by any words showing that the signatory signed as agent only. In *Lennard* v. *Robinson* (sup.) the defendants were named in the charter-party itself, as parties, but signed "by the authority of and as agents for" a person named; and it was held that they contracted personally. It was on this case that Mr. Justice Bailhache, in the King's Bench Division, and Lord Justice Scrutton, in the Court of Appeal, relied in holding in the present case that the signatories were personally liable. *Lennard* v. *Robinson*. however, can scarcely stand with *Gadd* v. *Houghton* (1876, 35 L. T. Rep. 222; 1 Ex. Div. 357) and though there may be minute distinctions between the two, the former has now practically received its death blow in the House of Lords. As Lord Summer said "The weight of authority has long been against Lennard *v.* Robinson, though it has been cited often and sometimes has been expressly followed, and I can see no good purpose to be served by keeping it alive as an authority to be followed, if an exactly similar case should arise for decision, but not otherwise. I think that it was ill decided" Their Lordship's decision accords with the dictum of Lord Justice Mellish in Gadd *v* Houghton (Sup.) "when the signature comes at the end you apply it to everything which occurs throughout the contract." The setting to rest of the controversy arising out of Lenard *v.* Robinson should be welcomed, for, as Lord Justice Bankes said in the Court of Appeal, "It is to the interest of the commercial community that a signature "as agent" should have a generally accepted meaning.—"*Law Times.*"

JAYAWARDENE, A. J.

RANKIRA VIDANE *v.* KIRIYA ET AL

130 C. R. Gampola 5633.

16th July, 1923.

Decisory Oath—Should oath be taken in exact terms of challenge?—failure to take oath owing to circumstances beyond control of party accepting challenge—right to take oath subsequently.

Where a person agrees to take a specified oath, the oath must be administered in the very terms in which the oath is worded.

Where a party accepting a challenge is prevented from taking the oath at the appointed time owing to circumstances beyond his control, he has a right to insist upon his being allowed to do so subsequently and the party challenging is not entitled to withdraw from the agreement.

Navaratnam for appellant.

Schokman for respondent.

Jayawardene, A. J.—In this case, the plaintiff sued the defendant to recover a sum of Rs. 300 being principle and interest due on a mortgage bond. The land mortgaged had, during the subsistence of the bond, become the property of the added defendant intervenient. The added defendant filed answer and pleaded his title to the land and added that there was nothing due to the plaintiff in respect of the said bond. On the 27th of January 1923, when the case came on for trial, the intervenient defendant challenged the plaintiff to take an oath at the Maligawa, before Tooth Relic on the 31st of January at 11 a. m., that "the full amount claimed by the plaintiff is due to him and that the receipt annexed D was not given by the plaintiff to the intervenient defendant in full discharge of Kirisaduwa's share of the debt." If the plaintiff took the oath, judgment was to be entered in his favour as prayed for with costs, if he failed to take the oath, his action was to be dismissed with costs. In terms of the agreement, the plaintiff went to the Maligawa on the 31st of January, but refused to take the oath which was sought to be administered to him. He now seeks to justify his refusal on the ground that the oath so sought to be administered differed from the oath which he had undertaken to take. It is conceded that the two oaths are different, the oath which he agreed to take having reference to a full discharge of Kirisaduwa's share of the debt, while the oath which the priest wanted him to take had the words " in discharge of Kirisaduwa's share of the " debt," the word " full " being omitted from the latter oath. The learned Commissioner says that the two oaths are " substantially the same," and that the plaintiff should have taken the oath which the priest asked him to take. I am unable to agree with the learned Commissioner. I think where a person agrees to take a specified oath the oath must be administered in the very terms in which the oath is worded. It is not possible for us to say that the oath which he was asked to take was substantially the same as he undertook to take and that there was therefore no justification for his refusing to take the oath. The omission of the word " full" makes the oath which the priest wanted him to take different from the oath which he had agreed to take. For the circumstances, I think his refusal was justified. He says that he is now prepared to take the oath in the terms in which he agreed to take it. The defendant says that plaintiff should not be given an opportunity of taking the oath again. He says that the plaintiff on the first occasion lost courage and failed to swear before the Tooth Relic at the Maligawa and that now

he he has evidently mustered up sufficient courage to take what he says is a false oath. The failure to take the oath was not due to any design or act on the part of the plaintiff; it was due to circumstances over which the plaintiff had no control. In such cases it has been laid down by this Court, see the case of *Palaniappa* v. *Sinnatamby*, (1) that a party is entitled to insist upon his being allowed to take the oath, and the party challenging is not entitled to withdraw from the agreement. I would therefore set aside the judgment of the learned Commissioner, and I direct that the plaintiff be given an opportunity of taking the oath which he had agreed to take in the very terms of that oath as given in the record. The appellant is entitled to his costs in appeal, all other costs to be costs in the cause.

JAYAWARDENE, A. J.

SAYALOO *v.* SATUWA

IN REVISION.

P. C. Kandy 9841

1st August, 1923

Maintenance action—interests of illegitimate child concerned—May it be decided by the decisory oath?

Where the interests of an illegitimate child are concerned in an action for maintenance, the action cannot be decided by a decisory oath.

No appearance for either party.

Jayawardena, A J.—This is an application for maintenance by a woman on behalf of her illegitimate child. On the day of trial the applicant challenged the respondent to state on oath at Alutnuwara Dewala that he did not visit the applicant and that the child is not his. The respondent accepted the challenge and took the oath. The application was thereupon dismissed. The applicant then petitioned this Court saying that she consented to accept the respondent's oath at the instigation of the Arachchi of the village and praying that the case be reopened. As I felt doubtful whether a maintenance case in which an illegitimate child's interest are concerned could be decided by a decisory oath, I ordered the case to be listed for argument after notice to both parties. Neither party appeared before me.

In *Kiri Menika and another v. Punchirala and another* (1) I find that this Court set aside a decree based on a decisory oath taken by the defendant on the challenge of a next friend who was suing on behalf of two minors. In that case, the action was about some lands. The defendants offered to take an oath in terms of the Oaths Ordinance of 1895. The next friend consented to be bound by such an oath, but later moved to withdraw that consent. The Judge disallowed the motion and the defenants took the oath. The next friend again petitioned making the same application The Court held the minors bound by the oath and dismissed the action. The next friend appealed and Grenier J. said:

"The plaintiffs in this case are minors, and their interests should be jealously guarded by the Court. The case should not have been disposed of in the way it was. The action of plaintiff's next friends was not sanctioned by the Court, and the next friends themselves appear to have petitioned the Court, soon after the reference to the decisory oath, asking the Court to

(1) (1913) XVI. N. L. R. 236.

(1) (1909) i Curr. L. R. 13.

order a trial of the case. It was clearly the duty of the Court to protect the interests of the minors, even if the next friends were inclined to prejudice them. The order appealed from must be set aside and the case sent back for trial in due course."

The Court appears to have treated the acceptance of the offer to take the oath as a compromise under Section 500 of the Civil Procedure Code which forbids a next friend from entering into any agreement or compromise with reference to the action, without the leave of the Court. Implied assent of the Court to such an agreement or compromise is insufficient, but the attention of the Court must be directly called to the fact that a minor was a party to the compromise and the Court must expressly approve of the proposed compromise; see *Silindu* v. *Akura* (2)., Proceedings for maintenance under Ordinance No. 19 of 1899 are civil, see *Justina* v. *Arman* (3). A mother suing for maintenance on behalf of an illegitimate child is in the position of a next friend. It has also been held that an illegitimate child is not bound by any compromise entered into between the parents. See *Jane Hamy* v. *Darlis Zoysa* (4). In view of these decisions, acting in revision, I set aside the order of dismissal, entered by the Magistrate, and send the case back to be decided on evidence.

ENNIS A.C.J. AND JAYAWARDENE A.J

MUTTIAH CHETTY *v.* MOHAMED HADJIAR ET AL

85, 85 (a) D. C. Colombo 3904

27th July, 1923.

Paulian action—facta probanda—effect of claim proceedings on prescription of action—Rejection of claim on the ground that it was made too late—Does such rejection operate as res judicata or as an estoppel ?—Plea of estoppel raised for the first time in appeal—Civ: Pro Code Secs: 242—247.

Where a Paulian action is instituted to set aside a deed on the ground of fraudulent alienation, the evidence from which a fraudulent intention may be inferred is usually some or all of the following circumstances,

1. that there was no consideration
2. that the transfer was secret
3. that the transferor, had continued in possession notwithstanding the transfer
4. that the transfer left him without any other property and
5. without enough to pay the debts which he owed at the time or was about to incur.

A Paulian action is prescribed within three years from the cause of action but the running of prescription may be interruped by claim proceedings.

The rejection of a claim under the provisions of Section 242 on the ground that it was made too late does not operate as *res judicata.*

Samarawickrame with him *B. F. de Silva* for the plaintiffs-appellants;

E. W. Jayawardene, K. C. with him *H. V. Perera* for defendant-appellant;

Elliot, K. C., with him *Hayley*, *Keuneman* and *Schokman* for the plaintiff-respondent.

Ennis, A. C. J.—This was an action for a declaration of title to a certain property in Hospital Street, and set aside two deeds, namely, P13, No. 3602, of the 3rd of May, 1913, which was registered on the 7th of May, 1913, by which the first defendant sold his property to the second defendant; and P14 No. 316 of the 7th of October. 1920, which was registered on the 9th of October, 1920, by which the second defendant sold the property to the third defendant. The plaintiff in his plaint alleged that the first document was executed in fraud of creditors, and that the second document was tainted with fraud, and that both were executed

(2) (1907) 10 N. L. R. 193.
(3) (1909) 1 Curr. L.R. 123; 12 N.L.R. 263.
(4) (1909) 12 N, L. R. 70.

without consideration. The learned Judge accordingly allowed the plaintiff's action, and the three defendants appeal. Clearly the first question for consideration on the appeal is the question of fact as to whether the learned Judge was right in holding that fraud had been proved. There is no presumption of fraud, and when it is alleged it must be fully proved. Now in this case the plaintiff sought to prove that the first defendant was practically insolvent at the time he alienated the property to the second defendant. On this point the learned Judge, relying upon the evidence of the plaintiff and his kanakapulle, and the list of actions P11 against the first defendant, which was filed by the plaintiff, came to the conclusion that there was no doubt that in 1913 and onwards the first defendant was in a hopeless condition financially. He then held that because the second defendant was the son-in-law of the first defendant, these two facts together were sufficient to establish fraud. The *facta probanda* in a Paulian action was discussed by Hutchinson, C. J., in the case of *Saravanairumugam* vs. *Kanthar Ponnambalam* (1). There it was laid down that the evidence from which a fraudulent intention can be inferred is usually some or all of the following circumstances:—(1) that there was no consideration; (2) that the transfer was secret; (3) that the transferor had continued in possession notwithstanding the transfer; (4) that the transfer left him without any other property; and (5) without enough to pay th debts which he owed at the time or was about to incur. Now, of these items of evidence, we find that the transfer on the face of it purports to be a conveyance for consideration. It recites that the 2nd defendant gave a consideration of Rs. 10,000 for the property, as the attestation clause recites that Rs. 1,000 was paid by cheque in the presence of the notary and that the remaining Rs. 9,000 was set off against an obligation incurred by the 1st defendant to give a dowry to his daughter at the time of her marriage with the 2nd defendant in 1904. There is no evidence to show that no consideration was in fact paid; nothing to show that the cheque for Rs. 1,000 was a bogus one, or that no money whatever passed. All that was asserted was that there was an obligation under the rules of evidence on the defence to show that the statements in this deed were true; in other words, that the *onus* of proof had shifted without some proof of fraud.

With regard to the next point, we find that there was nothing secret about the conveyance to the 2nd defendant in 1913, for the document was registered four days after its execution. We find, moreover, that the 2nd defendant was in possession of the property from the time of the conveyance. In the result we find that the 2nd defendant has three of the circumstances mentioned by Hutchinson, C. J., strongly in his favour with regard to the evidence that the 1st defendant was in a hopeless condition financially at the time of this conveyance. We find merely the evidence of the plaintiff and his kanakapulle that the 1st defendant was being hard pressed by creditors. But an examination of the document P 11 shows that in 1912 there was only one case against him, and in 1913 there were only three cases against the 1st defendant, and that the bulk of the pressure against the 1st defendant, came in 1915, two years after the alienation. We have no evidence as to the result of any of these cases, or when the cases in 1913 were instituted, or whether they related to obli-

(1) 2 Leader L. R. II.

gations incurred after the execution of the conveyance to the 2nd defendant, or prior to that conveyance. We find, moreover, that the plaintiff seized some property of the 1st defendant in 1914, and released the seizure at the request of the 1st defendant. The evidence, therefore, does not seem to establish either that the 1st defendant was hard pressed by creditors at the time of the execution of the deed, P13, or that he was without other property to meet the demands of his creditors. It would seem, therefore, that the plaintiff has not sufficient evidence to establish any of the points laid down in the judgment of Hutchinson, C.J., already referred to, as necessary to establish the presumption of fraud. Moreover, it appears from the plaintiff's evidence, that he made no attempt to have the 1st defendant examined under Section 219 of the Civil Procedure Code as to his property when he was seeking to execute his judgment. The plaintiff appears to have concentrated his attention to a fact mentioned in the attestation to deed P 13. The 1st defendant alleged that Rs. 9,000 was to be set off against the obligation entered into in 1904. It seems that the plaintiff put in evidence the document P 13 and commented upon the attestation. It would, therefore, seem to be out of place to assert that none of the facts set out in the attestation had been proved, particularly, when the *onus* of proof of fraud was on the plaintiff which has thrown doubt upon the good faith of the statement. The defendant put in the dowry deed D11, which showed that the 1st defendant and his brother Abdul Raheem undertook to convey the lands to the 1st defendant's daughter, on her marriage within six months of the execution of the dowry deed, or in default to pay Rs. 15,000. The two properties mentioned were a property in Prince Street, and a property in Dam Street, and the document D 12 shows that Abdul Raheem duly performed his undertaking under D 11, and conveyed the property in Prince Street. It is said that the first defendant did not carry out his obligation, and we find by the document D 13 that the 1st defendant in fact dealt with the Dam Street property in June, 1912, and mortgaged it. It was, therefore, out of his power to convey this property intact to his daughter until he had redeemed the mortgage. So we find the 1st defendant in 1913 executing the document D 13, and conveying not only the property in Hospital Street, but other properties in 2nd Cross Street and in Bambalapitiya to the 2nd defendant. It appears that these properties were at the time subject to two mortgages, one for Rs. 100,000 to the Loan Board, executed in January, 1913, and another mortgage to one Alim, which was executed in March, 1913, for Rs. 10,000 It would seem, therefore, that up till March, 1913, the 1st defendant had plenty of money. Now, the plaintiff bases his claim on the following facts:—He was the holder of five promissory notes for Rs. 2,000 each, which were dated 13th March, 1913. He puts the notes in suit on the 21st August, obtains a decree on the 24th of September, 1913, and after seizing certain property of the 1st defendant which he released, and making subsequent efforts to execute his judgment, he seized the property in Hospital Street on the 29th September, 1916. The seizure was registered on the 11th of January, 1917. On the 13th of March, 1917, the 2nd defendant claimed the land. The claim proceedings seem to have been drawn out until the 7th of October, 1919, when the 2nd defendant's claim was rejected on the ground that the claim

had been made too late. The plaintiff accordingly pleads that the rejection of the 2nd defendant's claim in the claim proceedings operated as *res judicata* against him, and that the present claim is accordingly barred, because he did not file an action under Section 247. It was argued that the case is analagous to the case of *Meenachy* v. *Gnanaprakasam* (2). In that case, however, it appears that the claim was not merely dismissed but was disallowed, because the claimant failed to appear on the day fixed for enquiry, and it was, therefore, an order made under Section 245. It would seem that *prima facie* an action under Section 247 is only open to a party against whom an order under Sections 244, 245, and 246 has been passed. But the order in the present case does not purport to have been made under any of these sections. It is expressly made under Section 242, and the facts are not such as in the case of *Meenachy* v. *Gnanaprakasam* (2). In these circumstances the case of *Perera* v. *Fernando* (3) shows that an action under Section 247 need not be brought. I would hold, therefore, that the rejection of the 2nd defendant's claim in the claim proceedings was not *res judicata*. But it was next urged that if not *res judicata* it operated as an estoppel and prevented the defendant from setting up his title now. No issue of estoppel was raised in the Court below, neither was there any assertion that the plaintiff acted upon any belief created by the second defendant's deliberate action. He was not bound to bring an action under Section 247 as he was in possession of the land and had title. Such a procedure would appear to have been unnecessary. Estoppel is a matter of fact on the evidence and as no issue was raised, no evidence has been directed to that point. Consequently one must disregard this reference to estoppel at this stage of the proceedings, especially as there is no evidence to support it. There were further facts in this case which are really unnecessary to go into but which may be briefly mentioned. It appears that the property in question was so'd by the Municipal Council on the 7th of May, 1917, for default of payment of rates. The property was purchased by the Municipal Council, and a certificate dated 28th July, 1920, was duly issued. That certificate was registered on 4th of Aug., 1920. The Municipal Council then sold the property to the 3rd defendant, who at the time was the registered owner, and issued a certificate to him on the 18th of April, 1921. So that the 3rd defendant has title from two sources. But owing to some unfortunate circumstance, these certificates of sale were registered in the wrong folio, and it was urged by the plaintiff that that being so, they came second to his claim because he had priority by virtue of registration. But in view of the fact that the 2nd defendant had the title at the time, the Fiscal's conveyance to the plaintiff, therefore, conveyed nothing to him, and as we have held that no fraud has been established we need not go into this question of regis ration. One other point must be mentioned in the case, and that is the appellants' assertion that the action has been prescribed. There is no doubt that a Paulian action must be instituted within three years from the cause of action; and in this case we find that the plaintiff states that he was aware of the 2nd defendant's conveyance about the year 1916. But, inasmuch as the 2nd defendant made a claim in the claim proceedings which were before the Court until 1919, prescription

(2) 2 C. L. R. 97.
(3) 1 C. W. R. 17.

would not run during that period, and, therefore, it would seem that the three years should be calculated if at all from 1919 when the claim was rejected. It would seem then that the action is not out of time. Inasmuch as we are of opinion that the deed to the 2nd defendant is still good, it is unnecessary to go into the question relating to the deed from the 2nd defendant to the 3rd defendant or to the relations between the 2nd and the 3rd defendants or the question of trust which the learned Judge has found in connection with the holding of the property by the 3rd defendant. I would accordingly allow the appeals with costs, and dismiss the plaintff's action with costs.

Jayewardene, A. J.—I entirely agree.

BERTRAM, C. J. AND SCHNEIDER, J.

LUKMANJEE *v.* FRADD & CO.

62 D. C. Colombo 488.

20th September, 1922.

F. O. B. Contract — Construction—payment against mate's receipts.

Defendants ordered from plaintiff 100 tons of oil for delivery in the course of the month of December. The contract provided that the oil should be in pipes with small packages as customary to suit stowage ; delivery was to be made in December in good merchantable condition, and the price was fixed f. o. b.

Held that as the contract says that delivery shall be made within a certain time f. o. b., it is implied that the buyer will nominate a steamer on board which the delivery is to be made, and from the circumstances of the case it was implied that the nomination will be given within a reasonable time, so as to allow the goods being put into a deliverable state.

Drieberg K.C. with *F. H. B. Koch, M. W. H. de Silva* and *Garvin* for appellants.
Hayley with *Loos* for respondent.

Bertram, C. J.—This is an action for the recovery of Rs. 6500 as damages alleged to have been sustained by reason of the wrongful failure of the defendants to provide freight, or to give due notice for the delivery of 100 tons of cocoanut oil ordered by the defendants from the plaintiff.

I am unable to see that the appellants have made out any case. Defendants ordered from plaintiff 100 tons of oil for delivery in the course of the month of December. The contract provided that the oil should be in pipes with small packages as customary to suit stowage; delivery was to be made in December, 1920, in good merchantable condition, and the price was fixed F. O. B. The plaintiff, therefore, was under an obligation to deliver the oil, packed in the manner described, on board the steamer. Defendants were given to understand that the oil would be ready towards the end of the month. Acting on this understanding, they made provisional arrangements for freight and the steamer, by which they expected to ship the oil, was due on the 31st. On the 31st or the 1st the defendants received an invoice indicating that the goods were at their disposal. No nomination of any steamer was in fact, given by the defendants to the plaintiff until January 1, and it is obvious, to say the least, that it would be extremely difficult for the oil to be put in a state to enable it to be delivered on a steamer at such short notice, as these facts would imply. Every effort was made by the defendants to get the oil shipped by the steamer. Their original arrangements had been provisional, but, on receiving the invoice dated the 31st, December, they booked freight definitely. But the oil was, in fact, not ready for shipment until January 2, and by that time the steamer had sailed. The oil had been

inspected by the defendants' Manager, but at that time it was not packed in the manner provided for by the contract but was in various receptacles ready for inspection. The arrangements for shipping the oil having thus broken down, defendants refused to accept the oil as a delivery under the December contract, and this action was brought to enforce the claim of the defendants.

Before considering the law on the subject, it may be well to say a few words on the facts. The defendants were no doubt naturally annoyed that their arrangements for shipping the oil had broken down, but they themselves were really to blame for this result. Had they made any enquiry from the plaintiff as to the precise date when the oil would be available or had they intimated to the plaintiff the provisional arrangements they had made with regard to freight, there seems little doubt that the oil might have been ready in good time. There is indeed a peculiur circumstance in the relation of parties to such a contract. The buyer may nominate a ship, but the seller may decline to get the goods ready, or to supply them at all up to the end of the month. The solution is that it is implied that there will be between the two parties an interchange of enquiries either by post, or by word of mouth, or by telephone, so that the necessary arrangements may be mutually adjusted. The buyer might enquire "when is the oil likely to be ready"? The seller might intimate " I am making arrangements to ship the oil on a certain date, will it be ready at that time"? But in the present case nothing of this sort was done. It was understood that the oil would be ready in the last few days of the month and both buyer and seller left the question of further adjustment to drift. We have consequently to enquire, what is the strict legal position, ?

Now, in this case, the plaintiff to a certain extent rests his case upon custom. He claims that by the local Mercantile custom certain conditions are annexed to contracts of this description. These conditions have indeed recently been codified by the Chamber of Commerce, and it is definitely stated by two Mercantile witnesses that this codification crystallizes the existing custom. That codification, however, took place after the breach complained of in this action, and we must look to the definite oral evidence of custom called by the plaintiff and in particular to that of Mr Frei. Mr Frei states clearly that in contracts of this description, the custom is for the buyer to nominate a steamer and for the seller to get the goods ready for shipment by that steamer. The goods, according to Mr Frei, are, according to the custom not made ready until the nomination is received. The nomination must be given within a reasonable time, so as to allow the sellers to put the goods into a deliverable state. There is some difference between the two witnesses called by the plaintiff. Mr Frei contemplates two notices. One a notice to inspect the goods, another a notice that the goods are ready for delivery. The other witness called by the plaintiff seems to contemplate only one notice, but the difference is not really material, because in the present case it is clear that two notices are contemplated. The evidence of Mr Frei seems to be quite clear that custom does annex to a contract of this description a condition that the buyer shall give notice of the steamer to the seller, but even in the absence of such evidence, I should be of opinion that this was implied by the terms of the contract. When the contract says that delivery shall

be made within a certain time F. O. B., it is clearly implied that the buyer will nominate a steamer, on board which the delivery is to the made. It seems also implied from the circumstances of the case that the nomination will be given within a reasonable time so as to allow of the goods being put into a deliverable state.

We are, therefore, in this position. Plaintiff was ready and willing at a time within the interval stipulated for viz., the month of December, on receiving reasonable notice that freight had been secured on board a steamer, to deliver the goods free on board the steamer. The defendants failed to give the necessary notice. They did indeed after the month had expired give a notice, which was not a reasonable notice. I express no opinion on the point whether the sellers might have refused altogether to accept this notice. However, they did accept it and endeavoured to get the goods ready, but the goods could not be got ready in time. They then bring this action calling upon the defendants to pay for the oil which they had ordered. The defendants on their side, set up an entirely different interpretation. They say, on this contract it was for the sellers to take the initiative; we could not fix anything; it was for the seller to tell us that the oil was ready; it was for them to declare the oil ready for inspection or shipment and for us then to find freight, and indeed the contract itself provided that if defendants did not find freight, the sellers, having given us notice of inspection, could put the oil into deliverable state and call upon us to pay within three days I will not say that this is not a possible interpretation of the contract, but if it were the true interpretation of the contract, then the codification of local mercantile custom recently enacted by the Chamber of Commerce would not be a crystallisation of that custom but a revolution. The experts are clear that it is a crystallisation, and it appears to me that the evidence of custom given by Mr. Frei must be accepted and that, if the contract be read in the light of that custom, it is clear that the true interpretation of the contract is that which I have above stated and not the interpretation which, not without plausibility, is suggested by the defendaut.

Mr. Drieberg, however, carries the argument further. He says, even though it be assumed they were bound to give reasonable notice of the steamer, and failed to do so, nevertheless, even so, the plaintiffs have failed in their obligations, they were under an obligation, so he contends, to put the oil into a deliverable state before the expiration of the 31st of December and to put it at defendants' disposal before that time. This obligation, he says, was the essence of the contract. If this had been done, and if the oil had been ready packed as contracted for by the end of the 31st of December, it could easily have been shipped on the steamer for which defendants had secured freight. From what source does Mr. Drieberg get this supposed obligation on the part of the plaintiff to have the oil ready for shipment by the evening of the 31st December? He gets it from a clause in the contract which runs as follows:—

> "Payments against Mate's receipts; but in the event of shipment being in any way hindered by buyers, payment shall be made not later than three days after notice has been given buyers that the oil is ready for shipment, due notice being given them when it is ready for inspection."

From this clause Mr. Drieberg wishes us to deduce the obligation suggested. This

argument however is based upon what in my view is a misconception of the place of the clause in the scheme of the contract. This clause merely deals with the question of payment. Payment ordinarily is to be made on Mate's receipts, but, in the event of anything being done by the buyers to hinder shipment, the contract gives the sellers the right, after first giving due notice that the oil is ready for inspection, to get it ready for shipment, and having given notice of shipment, to call upon the buyers to pay within three days. This is a privilege which the clause confers upon the sellers; it is not an obligation which it imposes upon them. I do not think any such obligation can be deduced from this clause, all the more so, as the suggested obligation is quite inconsistent with the course of business described by Mr. Frei, who says explicitly that it is usual tor inspection to take place before the goods are made finally ready for shipment.

Only one other point was raised: the question of damages. This was a forward contract. The only evidence of the loss sustained by the plaintiff was evidence of another foward contract made by himself early in January for delivery at the end of February. Mr. Drieberg argues that he ought to have evidence of the free market price at the date of the breach. But the evidence is that there was no such market price. It is agreed that the market was falling, and it appears clear that the only method of testing the extent to which the market had fallen and consequently the loss of the plaintiff, was by comparing the price of this forward contract with a similar forward contract. I think, therefore that the learned District Judge, who has gone very fully into the matter, was justified in acting on this evidence.

In my opinion therefore the appeal must be dismissed with costs.

Schneider, J.—I agree.

JAYAWARDENE A. J.

CAREEM *v.* MALIS APPUHAMY

154 C. R. Anuradhapura 11771.

Sequestration before judgment—Claim to property sequestered—Should the inquiry be to determine the question of title or possession? Materials on which sequestration should issue—Civ: Pro: Code Secs: 244, 245 and 653, 658, 659.

Where a claim is preferred to property which has been sequestered and an inquiry is held under the provisions of Sections 658 and 659 of the Civil Procedure Code the question of possession is not decisive in such an investigation. What the Court has got to decide is who has the title to the property and its decision must be guided by the conclusion it comes upon the question of ownership.

A mandate of sequestration should not be issued unless the provisions of Section 653 have been strictly complied with.

E. W. Jayawardene K. C. with *H. V. Perera* for appellant.

J. Joseph for respondent.

Jayewardene, A. J.:—This is an appeal from an order of the Commissioner of Requests of Anuradhapura disallowing the appellant's claim to certain timber seized under a mandate of sequestration issued under Section 653 of the Civil Procedure Code. The plaintiff instituted this action on a promissory note against two defendants on the 14th of May, 1923. The note itself is dated the 23rd of May, 1922. On the same date, his proctor moved for a mandate of sequestration on the ground that the plaintiff had no security to meet the amount of his claim, and that he was credibly informed, and verily believed, that the res-

pondents were fraudulently alienating their property with the intention of defrauding him. A mandate of sequestration signed by the chief clerk of the Court issued on this motion, and timber worth Rs 1,500 was seized by the Fiscal as the property of the second defendant.

The seizure was on the 23rd of March, and the appellant made his claim on the 26th of March. His claim was based on a notarial deed of sale No. 4402 of 30th of March, 1923. The claim was investigated under §658 and the Court rejected the claim on the ground that the property seized was still in the possession of the judgment-debtor even though he had sold it to the plaintiff. Now the learned Commissioner does not say that the sale to the claimant was a fraudulent alienation and that notwithstanding the sale, the judgment-debtor still remained owner of the property. He rejects the claim because the property was in the possession of the judgment-debtor. Such an order might have been possible under Sections 244 and 245 of the Civil Procedure Code, in the case of property seized in execution of a decree, but under Section 659, where the Court upon investigation is satisfied that the property sequestered was not the property of the defendant, it shall pass an order releasing such property from seizure, and shall decree the plaintiff to pay such costs and damages by reason of such sequestration as the Court shall deem meet. In this case, the Commissioner has, I take it, found that the timber was not the property of the defendant at the time it was sequestered. In fact the plaintiff himself in his affidavit which he swore in support of his application for sequestration said that the defendant had negotiated the sale of this timber to the claimant and that part of the timber had already been removed. It is contended for the plaintiff-respondent that under Section 659 it is sufficient for the plaintiff to satisfy the Court that the property sequestered was in the possession of the defendant, and that Sections 244 and 245 applied to the results of investigations under Section 658. I do not think so. I think under Section 659 the Court has to be satisfied before releasing he property from seizure that the property was not the property of the defendant and the Court should disallow the claim when the property is the property of the defendant. The question of possession is not decisive in an investigation under Section 658 or Section 659. What the Court has got to decide is who has the title to the property seized and its decision must be guided by the conclusion it comes to upon the question of ownership. This view is supported to some extent by the judgment of Wendt, J., in the case of *Carimjee Jafferjee vs. Andrew Pavin* (1). I may also invite attention to the case of *Karuppan vs. Ussanar* (2) and to *Saibo Marikar* v. *Anthony Fernando* (3). In the circumstances, I think the order made by the Commissioner is wrong and should be set aside. The appellant is entitled to his costs here and in the Court below.

There is one other matter I wish to point out. The record does not show that the application for sequestration was ever allowed by the Court. There is no entry on the motion paper. There is a minute in the journal which merely shows that the plaintiff moved for a mandate of sequestration, but there is nothing to show that it was either allowed or disallowed. The issue of a mandate of sequestration before judg-

(1) (1906) 3 Bal. 69.
(2) (1895) 4 N. L. R. 379.
(3) 1 Tambyah 68.

ment is not an ordinary step in the proceedings; no such mandate should be issued by the Court unless and until it is satisfied on the two grounds referred to in §653 and these two grounds require the serious attention of the Court, and the Court should not exercise its discretion in favour of allowing the application for sequestration unless the applicant has strictly complied with the requirements of that section. In this case, as I have said, there is nothing to show that the Court had allowed or disallowed the application, and on this ground alone I would have had to set aside all the proceedings relative to the sequestration if the objection had been taken by the appellant. I therefore direct that the claim be upheld, and that the property be released from seizure.

SCHNEIDER, J.

KALU BANDA *v.* APPUHAMY.

115 C. R. Gampola 5757.

31st July, 1923.

Informal lease for a period over one month—Lessee in possession—Is he a tenant-at-will or a tenant from month to month?

Where a person entered into possession of premises under a lease for three years which was in writing but not notarially attested,

Held that he was not a trespasser nor a tenant-at will or by sufferance, but a tenant for a period not exceeding a month.

Navaratnam for appellant.

H. V. Perera for respondent.

Schneider, J.—In this case, the plaintiff sued the defendant for ejectment from an allotment of land alleging that the defendant was in wrongful possession of it to the plaintiff's loss and damage. He claimed possession by virtue of a notarially attested deed dated November 4th, 1922, whereby one Ukku Banda had demised the land to the plaintiff for a period of five years from the date of the instrument. In his answer the defendant denied knowledge of the lease pleaded by the plaintiff and stated that he was in possession of the land by virtue of a lease granted to him by the plaintiff's lessor by a writing, not notarially attested for a period of three years from November 4th, 1921, and that he had paid the rent in full for the said term of three years.

The material issues upon which the parties went to trial raised the question, whether the plaintiff could maintain his action against the defendant, whether the defendant was in wrongful possession, and whether the answer disclosed a lawful defence to plaintiff's claims? The plaintiff gave evidence, and stated that after the execution of the deed in his favour he went to the land and found the defendant in possession under the informal writing. He also stated that he did not get possession of the land. It is noticeable that the plaintiff does not expressly state that he demanded possession from the defendant. In the informal writing granted by the owner of the land, Ukku Banda to the defendant it is set out that the informal writing was entered into till a regular lease was executed. Ukku Banda also declares in this writing that he thereby leases the premises to the defendant for a term of three years.

The learned Commissioner dismissed the plaintiff's action on the ground that the defendant, being in possession of the land under an informal agreement, was not in wrongful possession, and was entitled to a month's notice before his tenancy could be terminated. From this judgment the plaintiff appealed.

On behalf of the appellant, Mr. Navaratnam contended that the defendant's tenure was that of a tenant-at-will and not a monthly tenant. He relied on the case of *the Secretary of State for the War Department* v. *Ward.*, (1), in which Moncreiff, A. C. J., and Browne, J., held that the defendant in that case was only a tenant-at-will and not a monthly tenant. To my mind that case is no authority for the proposition of law put forward in support of the plaintiff's claim in this case. The facts of that case are clearly distinguishable. The plaintiff there leased to the defendant a portion of land by an informal writing in which the defendant promised to pay to the plaintiff a certain sum as rent for a year, and in which both parties agreed that the tenancy might be terminated by six months' notice on either side. The plaintiff in accordance with this agreement terminated the tenancy by due notice, but the defendant instead of quitting the land, continued to forward moneys as if the tenancy were on foot. The plaintiff accepted these payments under protest, and claimed to hold them as security for the damage he would sustain. Upon these facts it is obvious that the defendant was in the position of an over-holding tenant and therefore liable to be ejected without notice at the instance of the plaintiff, his landlord. No question as to the effect of the informal lease was involved because, admittedly, the lease was terminated by due notice. I must, therefore, regard whatever is said by the learned Judges, whe decided that case as to the effect of the informal lease as mere *obiter dicta*. Both Judges expressed the opinion that the informal lease was bad and did not operate to create a monthly tenancy, but neither Judge discussed the bearing of the provisions of Ordinance No. 7 of 1840 as to the effect of an informal lease, where the tenant is put in possession and continues to be in possession, and where he has paid the rent.

On behalf of the respondent the case of *Wambeek* v. *Le Mesurier* (2) and *Buultjens* v. *Carolis* (3) were cited and relied upon. The former of these cases was considered by Browne, J., in the case of The *Secretary of State for the War Department* v. *Ward* (1) to which I have already referred. He refused to follow it I am unable to appreciate the reasons he gives, and as I have already stated, what he says in that case is mere *obiter dicta*. The case of *Wambeek* v. *Le Mesurier* (2) was decided by Lawrie, J., sitting by himself. The plaintiff had let the defendant into possession of a land upon an informal writing, agreeing to grant a lease of it for five years. The plaintiff in breach of this agreement sued the defendant in ejectment, and Lawrie, J., held that the defendant upon entering into possession under the informal lease became a tenant from month to month upon the terms of the writing, as far as they were applicable to and not inconsistent with a monthly tenancy. He cited two English cases *Doed-Rigge* v. *Bell* (4) and *Clayton* v. *Blakey* (5) and also two local cases one from Grenier's Reports (C. R., 1873) page 16 and *Perera* v. *Fernando* from Ramanathan's Reports (64-68) page 83. There is one other local case which might be grouped with these two local cases, that is a case decided by Creasy, J., and reported in Grenier's Report (C. R. 1874) page 1. In

(1) (1901) 2 Brown 256.

(2) (1898) 3 N. L. R. 105.
(3) (1919) 21 N. L. R. 156.
(4) 5 T. R. 471; 2 R. R. 642.
(5) 8 T. R. 3; 4 R. R. 575.

all these three cases the question considered was the right of a landlord to recover rent from a tenant who had been let into possession upon an informal agreement of lease for a term exceeding a period of one month, and in all three cases this Court held that the landlord could sue for use and occupation upon a quasi-contract which was created *ex re*. Accordingly, they did not decide the precise question which arises on this appeal.

In this case of *Perera* v. *Fernando* in the judgment of this Court, the provisions of the English statute of frauds corresponding to Section 2 of our Ordinance No. 7 of 1840, were compared with the provisions of our Ordinance and discussed. It was pointed out that the English Act provides that no action shall be brought upon parol agreements as not complying with the provisions of the law as regards the form of the agreement, whereas our Ordinance enacts that such agreements are to be of no "force or avail in law." The view was there adopted that the effect of our Ordinance was to render such agreements invalid for want of formality, but not invalid as being illegal. Several English cases were cited in the judgment, and there is clear indication all through the judgment that the Court accepted the English cases as authority supporting the view it took of the effect of Section 2 of the Ordinance No. 7 of 1840. This judgment is referred to in the case of *Nanayakkara et al* v. *Andris et al*(6) by Bertram, C.J. who states that the difference of phraseology between the English enactment and our own had been minimised in *Perera* v. *Fernando*. He also states that he found it difficult to believe that the change of phraseology in our Ordinance was intended to exclude or had the effect of excluding the application of the legal principle, which had been developed in England for mitigating the strict rigour of the enactments of the statute of frauds. He also cited Lord Halsbury's judgment in *Rochefoucald* v. *Boustead*, where speaking of Section 2 of our Ordinance No. 7 of 1840, Lord Halsbury said "that section does not appear to affect equitable rights."

The English cases cited by Lawrie, J., in *Wambeek* v. *Le Mesurier* (2) support his judgment. The case of *Buultjens* v. *Carolis* (3) was decided by Loos, J., and myself. In that case, I did not discuss the law applicable, but decided it upon the assumption that the case of *Wambeek* v. *Le Mesurier* (2) had been rightly decided. When, therefore, the point was again raised in this appeal, I thought it desirable to reserve judgment in order that the authorities might be carefully considered by me before judgment was delivered. I have since looked into a large number of English cases, and consulted Woodfall's law of Landlord and Tenant.

The English law might be shortly summarised as follows :—

(1) By the statute of frauds leases for more than three years and all agreements for leases, however short, must be in writing (29 Car. 2 ch. 29).

(2) By the Real Property Act, 1845, leases for more than three years must be by deed (8 and 9 Vict ch. 106).

(3) Although a contract for a lease must be in writing and signed to be sued upon as such, yet he who enters and pays or agrees to pay rent, under an oral contract for a lease, otherwise partly performs the contract may obtain a decree for a lease, that is for specific performance (Statute of Frauds, Section 4 [*Nunn vs. Fabian*-(1884) L. R. 1 ch. 35].

(6) (1921) 23 N. L. R. 193.

(4) "If the tenant enter into possession under a void lease he thereupon becomes tenant from year to year upon the terms of the writing, so far as they are applicable to and not inconsistent with a yearly tenancy (k). Such tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof (l); and it will determine, without any notice to quit, at the end of the term mentioned in the writing (m). But if the lessee does not enter, he will not be liable for not taking possession (n). nor, on the other hand will an action lie against the lessor for not giving possession at the time appointed for the commencement of the term, but before the lease is executed (o). The effect of the Real Property Act, 1845 (8 and 9 Vict. ch. 106), is not to put an end to oral leases, but merely to superadd to such leases as are required by the Statute of Frauds to be in writing, the necessity of their being *by deed.*" *Woodfall's Law of Landlord and Tenant*, 18th Edtn. p. 148 and the cases referred to in the notes at the foot of that page).

(5) Although in Section 1 of the Statute of Frauds it was enacted that all leases *et cetera* created by livery and seism only or by parole shall have the force and effect of leases etc., at will only, yet it has been held that such leases etc. may change into tenancies from year to year when any of the agreed rent is paid and received.

(*Tress* v. *Savage* 4 E and B. 36, *Doed Riffe* v. *Bell* (1793) S. T. R. 471; 2 R. R. 642.)

The case of *Perera v. Fernando* was decided by a Full Bench of this Court, and the question as to the interpretation of Section 2 of Ordinance No. 7 of 1840 was essential to the decision of the case. It seems to me, therefore, that it should be regarded as a decision binding upon this Court in regard to the construction of Section 2 of Ordinance No. 7 of 1840. If I may so say with all respect, I agree with the opinion expressed in that judgment as to the effect and intention of Section 2 of Ordinance No. 7 of 1840. The words of Section 2 applicable to the case are the following :—

"No contract or agreement for establishing any interest affecting the land (other than a lease-at-will or for any period not exceeding one month) shall be of force or avail in law, unless the same shall be in writing and signed by the party making the same in the presence of a licensed Notary Public and two other witnesses, and unless the execution of such writing be duly attested by such Notary and witnesses."

The intention of the Ordinance is the prevention of frauds and perjuries, and, therefore, when it says that a lease not executed with the prescribed formalities shall be of no force or avail in law, it seems to me, that what was intended was to shut out evidence, other than that of a notarially attested instrument, to prove a lease for any period exceeding one month. It was not intended to shut out oral documentary evidence contained in an informal document of a tenancy for a period not exceeding one month. The Ordinance is careful to expressly exclude tenancies of such a nature from its provisions.

In this case the defendant was placed in possession by Ukku Banda, the plaintiff's lessor. The defendant, therefore, was lawfully in possession. He cannot be treated as a trespasser until the relation of landlord and tenant between him and Ukku Banda

is terminated. How the relationship can be terminated would depend upon the question whether the defendant is a tenant-at-will or monthly tenant. The informal writing which he relies upon, is unavailing to invest him with the rights of a lessee under a lease for a term of three years, because of the provisions of the statute law that such a lease shall be by a notarially attested instrument. But does that provision of the law render the agreement under which the defendant entered an agreement constituting a tenant-at will? I think not. It was not the intention of either party that the tenancy should be of that description; on the contrary their intention was to create a tenancy for a term of three years, but the Ordinance then steps in and says that the agreement is not enforceable as a lease for that term of years. It seems to me, therefore, equitable and consistent with the spirit of of the Ordinance and the intention of the parties to hold that the defendant is entitled to say, if I am not tenant for the term of years contemplated by me and my lessor, there there is no provision of the law which prevents me from being regarded as, at least, holding the land upon a footing of a monthly tenancy. Such an interpretation of our Ordinance would be in accordance with the principles developed by English jurisprudence on the interpretation and application of the English Statute of Frauds I would adopt the language of Bertram, C. J, in *Nanayakkara et al* v. *Andris et al* (6) and say "it is open to our own Courts to apply these same principles to our own correspond ng Ordinance, and it can hardly be contested that it is reasonable that they should do so."

Giving that interpretation to Section 2 of our Ordinance would create no hardship in the case of a person claiming possession under a formal lease. It is the duty of his lessor to give him vacant possession. If the lessor fails to do that he has his remedy against the lessor, and it would be always open to his lessor to terminate the tenancy of the person in possession by due notice. When the tenancy has been so terminated, the lessee himself would be entitled to use the person in possession in ejectment, but so long as the tenancy of the person in possession has not been terminated by the lessor, and the tenant in possession has not attorned to the lessee, the lessee has no right of action against the tenant in possession.

In *Woodfall's Law of Landlord and Tenant* (18 Edition) at page 258 he says "a tenancy-at-will is where lands or tenements are led by one man to another, to hold at the will of the lessor: in this case the lessee is called tenant-at-will, because he has no certain or sure estate: for the lessor may put him out at any time he pleases." The relation betweet Ukku Banda and the defendant clearly does not come within this description, therefore defendant was not a tenant-at-will. At page 259 in the same work it is stated "if a man enter under a void lease, he is not a disseisor but a tenant-at-will (b), under the terms of the lease in all other respects except the duration of time (g); and when he pays or agrees to pay any of the rent therein expressed to be reserved he becomes a tenant from year to year upon the terms of the void lease, so far as they are applicable to and not inconsistent with a yearly tenancy (g)." It is said that such a person becomes a tenant-at-will because of the provisions of the Statute of Frauds, Section 1; that all parol leases for terms of years shall have the force and effect of leases at will only.

The defendant is not a tenant by sufferance as Browne, J., thought was the case in the *Secretary of State for the War Department vs. Wara* (1), because a tenant by sufferance is one who comes in by right and holds over without right as if a tenant for the life of another continues to hold after the death of him for whose life he entered. The defendant's claim is that his tenancy was not terminated. It seems to me that the defendant in the circumstances cannot be regarded as a trespasser, nor as a tenant-at-will or by sufferance, but only as a tenant for a period not exceeding a month. He is entitled to claim that the relation between him and Ukku Banda should be terminated by due notice, that is of a month. That has not been done, and he is entitled to remain till it is done.

I would, therefore, dismiss the appeal with costs.

PORTER, J. AND SCHNEIDER, J.

MUDALIHAMY *vs.* PUNCHI BANDA.

225 D. C. Kegalle 5790.

27th October, 1922.

Registration—wrong folio—side entries connecting wrong and right folio—Land Registration Ord. 14 of 1891 Secs. 15 & 16.

The defendant's deed was registered in the wrong folio but there was a side entry containing a reference to the right folio. The plaintiff's deed was registered in the right folio which also contained a reference to the folio in which defendant's deed was registered.

Held that defendant's deed was duly registered.

Per Schneider, J.—"The references establish a connection between the volumes and folios in which the two competing deeds are registered sufficient to facilitate reference to all existing alienations or encumbrances affecting the land within the meaning of Sections 15 and 16 of the Land Registration Ordinance.

H. J. C. Pereira K. C. with *R. C. Fonseka*, for defendants-appellants.

No appearance for the plaintiff-respondent.

Porter, J.—The judgment in this case depends entirely upon the priority of two deeds. One was deed No. 1509 of 5-11-19 (D 2) registered on 21-11-19 in folio A96/100 and the other deed No. 52 of 14-6-05 and registered on 27th October 1920 (P 1.)

The sole issue is :—Does deed No. 1509 prevail over deed No. 52 by reason of prior registration ?

It is admitted that the earliest registration of a deed in respect of this land was in folio A 11/358 and there is a regular succession of registration in that folio leading up to the deed (P1.)

The deed (D 2) is registered in folio A 96/100 which was opened on the 21-11-19, before the space in folio A 45/236 (P3) a folio in the regular succession, was filled up.

The defendant relies on a side entry in red ink in folio A 45/236 to the following effect 'for a similar land see A 96/100" and a corresponding side entry in 96/100 "for a similar land see A 45/236." From this he maintains that by means of those side entries his deed was duly connected up with the regular succession leading back to the earliest registration.

Wood-Renton, C. J. in *Cornelis* v. *Abeysinghe* makes the following interesting observations :—

"Section 17 of the Land Registration Ordinance 1891 confers a privilege upon the grantees of deeds affecting land. It is quite reasonable that they should be required to see that their deeds are registered in accordance with the requirements of the law, so 'as to facilitate reference' in the

language of Section (15) 1 of the Ordinance itself "to all existing alienations or encumbrances" affecting the same lands. It may be well to add however that the decisions in question have turned on the presence of negligence of some kind or other on the part of the applicant for registration. The Supreme Court has not yet I think held that an applicant for registration, would be deprived of his priority by the sole and gratuitous fault or mistake of the registering officer."

The side entries in folio 45/236 and folio 96/100 would on a proper search have disclosed to the plaintiff the prior registration of (D 2). It may be that the writing of the side entries by the registering officer was not a usual method of registering, but at most it would be a sole and gratuitous fault or mistake of the registering officer. But I am of the opinion that the two side entries provide a sufficient connecting link between the volumes and folios in which the two competing deeds are registered "to facilitate reference to all existing alienations or encumbrances affecting" the land in claim within Section 15 and 16 of the Land Registration Ordinance of 1891.

I would allow the appeal with costs and set aside the decree of the District Court and dismiss plaintiff's action with costs.

Schneider, J.—This appeal which appeared at first to raise an important question regarding the law of the registration of deeds, eventually resolved itself into a simple question of fact.

The deed relied on by the plaintiff is marked (P1,) is dated the 14th of May, 1905, and was registered on the 27th of October, 1920, in Division A, Volume 45, and folio 236. This folio is connected by a reference with Division A, Volume 2 and folio 358. There is no question that the deed has been registered in the right book.

The deed relied on by the defendants is marked (D2) is dated 3rd November, 1919, and was registered on the 21st of November, 1919. This deed is registered in Division A, Volume 96, folio 100. The column "Brought forward from Volume—folio—" is blank, but there is a prominent entry in red ink at the top of the folio "for a similar land see A 45/236." There is no evidence when this entry was made, but it may fairly be presumed that it was done in the ordinary course of business when the defendant's deed was registered on the 21st of November, 1919. Then at A 45/236 there is the connecting reference for a similar land see A 96/100.

These references, in my opinion, establish a connection between the Volumes and folios in which the two competing deeds are registered sufficient "to facilitate reference to all existing alienations or encumbrances affecting" the land in claim within the meaning of Sections 15 and 16 of "The Land Registration Ordinance 1891."

I am unable to understand why the Registrar had not registered the defendant's deed in the same volume and folio in which he had registered the plaintiff's deed. The name of the land, the boundaries and other particulars are identical.

As the defendant's deed has been "duly registered" and is prior in date of registration, it prevails against the plaintiff's deed.

I allow the appeal with costs, set aside the decree of the District Court and dismiss the plaintiff's action with costs.

JAYAWARDENE, A. J.

THE KING *v.* MARTIN.

62 D. C. Criminal Colombo 6811.

22nd August, 1923.

Penal Code §450—Vagrants' Ordinance No. 4 of 1841 sec: 4—"Failure to give a satisfactory account of himself"—Is actual apprehension on the premises necessary?—Are habitual criminals entitled to bail?—Crim: Pro: Code §341:

Section 450 of the Penal Code contains two offences, (1) being found in or upon any building or enclosure for any unlawful purpose, and (2) being so found, fails to give a satisfactory account of himself.

Where a person is charged of the latter offence, he need not give a satisfactory or lawful excuse for his *presence*. He has only to give a satisfactory *account* of himself viz: who he is and what he is; where he resides and such other facts personal. Actual apprehension on the premises is not necessary.

Habitual criminals are entitled to bail under the provisions of section 341 of the Criminal Procedure Code.

J. S. Jayawardene with *J. E. M. Obeyesekere* for appellant.

Dias C. C. for Crown-respondent.

Jayawardene, A. J.—In this case the accused-appellant has been convicted of an offence under Section 450 of the Ceylon Penal Code and sentenced to undergo 18 months' rigorous imprisonment and

two years' police supervision, being a habitual criminal. The charge against him was that he was found in an enclosure, to wit, the premises of one Abeyedeera, and failed to give a satisfactory account of himself. The learned District Judge accepted the evidence for the prosecution and found that the accused had been seen in Abeyedeera's garden, which was enclosed by a barbed-wire fence, on the night of the 29th April last, and that he had failed to account for his presence on Mr. Abeyedeera's land. In my opinion, this conviction cannot be sustained. Section 450 which has been amended by Ordinance No. 16 of 1898, Section 16, by the addition of the words "of either description" after the word "imprisonment" is a reproduction of Section 4, clause 6 of the Vagrants' Ordinance No. 4 of 1841. The Ordinance of 1841 was based on the English Vagrancy Act of 1824 (5 Geo. IV. ch. 38) and Sections 3 and 4 of the English Act have been taken over with certain alterations and form Sections 3 and 4 of the local Vagrants' Ordinance of 1841. The English Act Section 4 declared inter alia (A) "Every person wandering abroad and lodging in any barn or outhouse or in any deserted or unoccupied building or in the open air, or under a tent or in any cart or waggon not having any visible means of subsistence and not giving a good account of himself." and (B) "every person being found in or upon any dwelling-house, warehouse, coach-house, stable or outhouse, or in any enclosed yard, garden, or area, for any unlawful purpose," shall be deemed a rogue and a vagabond, within the true intent and meaning of the Act. (A) With certain variations to suit local conditions, forms Sections 3 (4) of our Ordinance, and (B), also with similar variations, formed the repealed Section 4 (6), but the local legislature had added the words "or not giving a satisfactory account of himself." (B) so altered and with some verbal modifications, now forms the subject matter of Section 450 of the Penal Code. This section contains two offences: (1) being found in or upon any building or enclosure for any unlawful purpose, and (2) being so found, fails to give a satisfactory account of himself. It is of the latter offence that the accused has been convicted. As alleged in the indictment the prosecution has to prove two things, first, that the accused was found in a building or enclosure, and second that he failed to give a satisfactory account of himself. Accepting for the moment the learned Judge's findings on the facts, the prosecution has proved that the accused was discovered in an enclosure, that is, Abeydeera's enclosed garden. The question arises, has the prosecution also proved that the accused failed to give a satisfactory account of himself? The learned Judge says that the accused has failed to account for his presence on Abeydeera's land. Is that sufficient? It must be noted that the words of the section are not "fails to give a satisfactory or lawful excuse for his presence," but fails to give a satisfactory account of himself." In my opinion, what the accused has to prove on a charge of this kind is who he is and what he is; where he resides, and such other facts personal. These words "giving a satisfactory account of himself" would apply appropriately to persons wandering about the country without any visible means of subsistence and unknown in the places where they are found. It can have no application to persons having a fixed abode, visible means of subsistence and well known to the persons on whose premises they were found. Such persons should, if the facts justify it, be charged under the first part of the section of being found in a building or enclosure for an unlawful purpose. In fact, I find, on reference to the Police report, that the accused was charged with being found in an enclosed garden with intent to commit an offence viz., theft, that is, for an unlawful purpose. But the indictment is based upon a charge he was never called upon to answer in the lower Court.

The English Act uses the words "not giving any good account of himself" only in connection with persons wandering abroad, and lodging in barns, deserted buildings, etc., and not having any visible means of subsistence. The man may be properly called upon to explain who he is, and what he is. Such an explanation would be very appropriate in cases of that kind. Our law has, however, gone further and created a new offence, but I hold that such an offence cannot be said to have been committed by a person who is not a wanderer, has visible means of subsistence, and has a known place of residence. The learned Judge has convicted the accused of failing to satisfactorily account for his presence in Abey-

deera's enclosure, but that is not an offence under Section 450. The accused is not called upon to account for his presence, he has only to give an account of himself. The evidence for the prosecution shows who he is, and where he resides about one hundred yards from Abeydeera's house. He was well-known to Abeydeera and one of his servants has given evidence against the accused in another case. Even the Police did not think that the accused could not give a satisfactory account of himself as their charge against him was that he was found in the enclosure for an unlawful purpose. I think that the evidence for the prosecution itself affords a satisfactory account of the accused. It was also contended for the accused that to bring him under the section he should have been arrested in the building or enclosure where he was found and there and then called upon to give an account of himself. In the present case the accused went away after he had been seen or "found" and was not arrested till seven days after. I do not think this contention is sound. It has been held in construction of the clause of the English Act which I have marked (B) above and from which the local section has been borrowed that the accused must be discovered upon the premises, but that actual apprehension upon the premises is not necessary: In *Morar vs. Jones* (1), Lord Alverstone, C. J., said, "In my opinion the words found in or upon any dwelling-house, warehouse, stable or outhouse, or in any enclosed yard, garden or area for any unlawful purpose" ought to be construed too strictly, and if a charge had been made against the defendants under that section on the night of the 11th (that is, the day on which they were alleged to have been found in the house) or on the next day, the fact that they were not arrested until late the following afternoon would not in my judgment, prevent the magistrates from convicting him."

Bray and Bankes, J. J., said: "In order to be found upon the premises a person must be upon those premises and the offence therefore consists in being upon premises for an unlawful purpose and being found there. It is not, in my opinion, sufficient for a person to be upon the premises for an unlawful purpose unless he was also found there. What constitutes a finding within the meaning of the section? The simplest case would be a case af apprehension upon the premises. Actual apprehension upon the premises is, however, in my opinion, not necessary to constitute the offence. I think that there may be many cases in which a person is found upon the premises within the meaning of the section although he is not apprehended until he has quitted the premises within the meaning of the section. To constitute the offence, a person must, in my opinion, be discovered upon the premises doing the acts or things which of themselves constitute the unlawful purpose." Even on the merits, I am inclined to suspect the truth of the charge. Abeydeera himself did not see the accused. His servants say they saw him. There has been some unpleasantness between the servants of Abeydeera and the accused. It appears that the patrol constables came to the spot soon afterwards and the servants reported the facts to them, but they have not been called. They ought to have been called to corroborate the servants and to state what steps, if any, they took on the receipt of the information. This is the sort of case which required prompt and and expeditious action. Abeydeera di not give any information to the police till the following morning when he wrote the letter P1, giving the name of the accused, but he did not there state that these servants had seen the accused. It would be unsafe to act upon the evidence called for the prosecution.

I set aside the conviction and direct the acquittal of the accused.

There is one other matter I wish to refer to. I find that after the petition of appeal was filed the proctor for the accused made an application for bail. This application was refused by the District Judge on the ground that the accused was an habitual criminal. In making this order the learned District Judge has evidently overlooked the provisions of Section 341 of the Criminal Procedure Code by which a Court is bound to make an order for the release on bail of every convicted person who prefers an appeal. Habitual criminals are not excluded from the privilege granted by this section.

(1) (1911) 104 L. T. 1921.