The Ceylon Law Weekly

containing Cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and His Majesty the King in the Privy Council on appeal from the Supreme Court of Ceylon, and Foreign Judgments of local interest.

VOLUME XLII

WITH A DIGEST

The Hon'ble Mr. Justice BASNAYAKE,
(Consulting Editor)

G. P. J. KURUKULASURIYA,
Advocate of the Supreme Court
(Editor)

B. P. PEIRIS, LL.B. (LOND.)
ANANDA PEREIRA | **G. P. A. SILVA,** B.A. (LOND.)
CONRAD DIAS, M.A., LL.B. (CANTAB),
Advocates of the Supreme Court
(Asst. Editors)

1950

Subscription payable in advance. Per Volume of 15 parts inclusive of an Index Rs. 7/50

Past Volumes: Vol. VI onwards available at Rs. 7/50 per Volume. Postage Extra. Copies may be obtained from The Editor, C. L. W. 'Jayanthi' Panadura.

Printed for "The Ceylon Law Weekly" by Stanley Hamer, at the Caxton Printing Works, Colombo 12.

VOL. XLII—INDEX OF NAMES

Acceptance

Advocate

Disbarred on conviction of series of offences involving gross fraud—Application for re-enrolment after interval of thirteen years refused.

The petitioner, a member of the English Bar, who was also an Advocate of the Supreme Court of Ceylon, was disbarred on conviction of the offences of forgery, cheating and abetment of cheating. His application for re-enrolment made after an interval of thirteen years was refused, having regard to the nature of the offences of which he had been proved guilty.

It was further held that it was the duty of the Registrar of the Supreme Court to have reported forthwith to the Inn to which the petitioner belonged the fact that he had been struck off the rolls in Ceylon.

Agent

Appeal

Distinction between 'Final' appeal and 'Interlocutory' appeal—Civil Appellate Rules 1938.

Held : That an appeal from an order made in an application for alimony pending the decision of an appeal against a decree for judicial separation is an 'interlocutory' appeal within the meaning of the Civil Appellate Rules 1938.

Per DIAS, S.P.J.—"A 'Final judgment' means a judgment awarded at the end of an action which finally determines or completes the action, and a 'Final appeal' is an appeal from such judgment. On the other hand, an 'Interlocutory judgment' is a judgment in an action at law given upon some defence, proceeding or default which is only intermediate, and does not finally determine or complete the action. An 'Interlocutory appeal' is an appeal from such a judgment."

Failure to appeal where right of appeal lay—Powers of Supreme Court to act in revision.

Banker

Payment on Customer's cheques alleged to be forged—Amount debited to Customer's Account—Action by customer to recover moneys so paid—Genuineness of signatures set up in defence—Negligence of customer—Burden of Proof.

Held : (i) That where a banker sets up in defence the genuineness of a signature alleged by the customer to be forged, the onus of proving his case beyond all reasonable doubt lies on the banker.

(ii) That however negligent a banker's customer may have been, such negligence would not avail a banker who honours a forged cheque, unless the customer is estopped from pleading the forgery.

Buddhist Law

Right to incumbency—Forms of pupillage recognised by law—Pupillage by adoption—Is such pupillage known to our law—Abandonment of rights to an incumbency by monk—Does such abandonment deprive his pupils of right to succeed him—Does abandonment require notarial deed or other formality—Question of fact in each case.

Held : (i) That it is well settled law that under the ecclesiastical law observed by the Buddhists in Ceylon there are only two forms of pupillage which will confer rights of pupillary succession namely, pupillage by robing and pupillage by ordination.

(ii) That our law does not recognise 'pupillage by adoption' as conferring rights of succession.

(iii) That the abandonment of an incumbency by a monk, who continues to remain in robes thereafter, deprives his pupils of their right to succeed to such incumbency.

(iv) That such abandonment does not require any notarial deed or other prescribed formality, but is a question of fact, and the intention to abandon may be inferred from circumstances.

Ceylon (Constitution) Order in Council, 1946.

Section 14 (1)—Penalty for sitting or voting in House of Representatives when disqualified to be elected—When right to penalty vests in informer.

Held : That the right to the penalties imposed by section 14 (1) of the Ceylon (Constitution) Order-in-Council becomes vested in the informer the moment he instituted the action and not when he applied for leave to proceed further under section 14 (2).

Cheque

Forgery of signature on cheque—Bank's liability.

Civil Appellate Rules 1938

Distinction between 'Final' and "Interlocutory" appeal.

Civil Procedure Code

Section 130—Action for accounting regarding management of estate—Accounts filed by defendant—Commission to examine and report on such accounts before filing objections—Right to issue summons on witnesses to appear before such Commissioner.

Of consent, at the instance of the plaintiff, a commission was issued to an accountant to examine and report on the accounts tendered as well as the books of account and connected papers kept by the defendant to an action to render accounts regarding the working and management of an estate.

The plaintiff applied for summons on certain witnesses to appear before the accountant to explain the accounts tendered by the defendant. The District Judge allowed the summons and the defendant appealed.

Held : (i) That the summons should not have been allowed.

(ii) That a commission under Section 430 can only issue when an examination or adjustment of acounts is deemed necessary by court (and not by the paries) to facilitate it in entering up the decree.

SENEVIRATNE vs. KARIAWASAM 20

Section 530—Testamentary Action—Two independent applications for letters of administration by two rival claimants—Application to Supreme Court for transfer of case by one claimant without disclosing the other—Order made allowing transfer—Subsequent application by other to vacate order of transfer—Intentional omission to disclose heir of deceased and to place full facts before court—Contempt of Court.

Held : (1) That an intentional omission on the part of an applicant for letters of administration to state who the heirs of the deceased are, as required by section 530 of the Civil Procedure Code, amounts to a contempt of Court.

(2) That such an applicant is not absolved from complying with the requirements of section 530, even though in his view the next of kin are not entitled to succeed to the estate of the deceased.

(3) That an order made transferring a testamentary case, from one Court to another will not be vacated merely on the ground that the applicant for the transfer intentionally omitted to disclose an heir of the deceased.

RATWATTA vs. KATUGAHA 24

Section 84—Application of—To inquiry under Workmen's Compensation Ordinance.
See Workmen's Compensation 51

Section 472—Action for ejectment of tenant by administrator *qua* administrator of estate of deceased landlord. Is action maintainable.
See Landlord and Tenant 66

Section 348—Security given in criminal court for due performance of decree in proposed civil action—Can successful party in civil action realise security in execution proceedings under section 348.

Held : That execution proceedings under Section 348 of the Civil Procedure Code should be limited to security taken before the Court under the provisions of the Code and does not apply to security given outside the Court.

JOHN & ANOTHER vs. SILVA 67

Section 189 (1) Scope of—Amendment of decree—Powers of Court.

The appellants petitioned the District Court under Section 189 of the Civil Procedure Code for an amendment of its decree on the ground that it was not in conformity with its judgment in as much as the decree failed to refer to certain rights to which they claimed they were declared entitled to in the judgment.

The amendment was allowed (not by the trial judge) holding that when the judgment is read as a whole the appellants claim appeared to be correct.

Held : (i) That Section 189 of the Civil Procedure Code provides an exception to the general rule that once an Order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the Order is *functus officio* and cannot set aside or alter the Order however wrong it may appear to be.

(ii) The court had no power to amend the decree as it involved the construction of the judgment and the variation did not appear on a perusal of the judgment and decree.

PIYARATANA UNNANSE *et al* vs. WAHAREKE SONUTTARA UNNANSE *et al* 89

Section 218 (j)—"Labourer"—Is Head-Kangany a "labourer"?—Meaning ascertained by reference to "The Service Contracts Ordinance" (Chapter 59) and The Estate Labour (Indian) Ordinance (Chapter 112)—Rule of interpretation.

A head-kangany, whose work was only to supervise a number of estate labourers, and who received for the services a salary, "dearness allowance" and "pence money," successfully claimed exemption in the District Court from seizure of his wages under section 218 (*j*) of the Civil Procedure Code on the ground that he was a labourer within the meaning of that section. On appeal it was held :—

(1) That a "kangany" whose work was purely supervisory and involved no physical or manual labour of any kind would be a "labourer" within the meaning of Section 218 (j) of the Civil Procedure Code.

(2) That (Gratiaen, J. dissenting) in ascertaining the meaning of the term "labourer" as used in the section 218 (*j*), the class of persons especially legislated for by Ordinance No. 11 of 1865 (The Service Contracts Ordinance Chapter 59) should be taken into consideration, and under this Ordinance a kangany whose duty is merely to supervise is a "labourer."

Per DIAS, S.P.J.—"An author must be supposed to be consistent with himself and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal" Maxwell 9th Ed. p. 163.

Per GRATIAEN, J.—"It seems to me that the term "labourer" in section 218 (*j*) must be interpreted solely by reference to the purpose which that section, as explained by previous judgment of the Courts in England, India and Ceylon, was intended to serve. The categories of "labourer" in this context cannot in my opinion either be limited or enlarged in the light of what the term means in other Ordinances and for other purposes."

YAKOOB BAI vs. SAMIMUTTU 99

Commission

Commission appointed by consent of parties to examine accounts—Right to issue summons on witnesses to appear before Commissioner.
See Civil Procedure Code 20

Contempt of Court

Intentional omission on part of applicant for letters of administration to state who the legal heirs of the deceased are amounts to a contempt of court.
See Civil Procedure Code 24

Corroboration

of plaintiffs evidence—When necessary—In action for damages for seduction.
See Damages 31

Court of Criminal Appeal

Conviction for murder—Statement by deceased two or three days prior to death to her mother that appellant made improper suggestion to her—Admissibility of statement—Evidence Ordinance, Section 32 (1).

The appellant was found guilty of the murder of a woman named Elizabeth. The mother of the deceased stated in evidence (*a*) that two or three days prior to her death the deceased complained that the appellant made an improper suggestion to her ; (*b*) that she did not agree to it and that she did not want him to come to the house ; (*c*) that she the witness soon after the complaint went to the appellant and asked him not to come to her house. It was contended in appeal that the statement alleged to have been made by the deceased to her mother was not admissible in evidence under section 32 (1) of the Evidence Ordinance.

Held: That the statement was admissible in evidence as it indicated some of the circumstances of the transaction which resulted in her death.

REX vs. H. D. M. APPUHAMY 4

Court of Criminal Appeal—Accused charged with unlawful assembly and other offences read with section 146 of Penal Code—Accused acquitted of unlawful assembly but convicted of the other offences read with section 32 of Penal Code—Is conviction proper—Scope of section 146 and 32 of the Penal Code.

The appellants were charged with being members of unlawful assembly, the common object of which was (*a*) to commit house breaking and robbery (*b*) house breaking by night (*c*) to cause greivous hurt and (*d*) hurt—offences punishable under sections 140, 443, 380, 386, 382 all read with section 146 of the Ceylon Penal Code. The jury acquitted them on all the charges but under direction from the presiding Judge they brought in a verdict that there was no unlawful assembly but that the offences of house-breaking, robbery, grievous hurt and hurt had been committed by the appellants acting in furtherance of a common intention within the meaning of section 32 of the Penal Code.

Held : That in the absence of a charge with reference to section 32 of the Penal Code the appellants should not have been convicted. Section 146 creates a specific offence and deals with the punishment of that offence. Section 32 declares a principle of law and does not create a substantive offence.

Per JAYATILEKE, S.P.J.—" It seems to us that the *ratio decidendi* in *Reazaddi vs. Emperor* is that when a person is charged with having committed an offence under section 149 he is told that he committed an offence constructively, and, when he is acquitted of that offence, he cannot be convicted of having committed the offence by his own acts in the absence of a charge that he did so."

REX vs. HEEN BABA AND DAVID SINGHO ... 26

Charges of conspiracy and abetment—Judge's reference in address to the jury to the alleged date of conspiracy, which was unsupported by the evidence—Also to appellant's failure in civil case, where issues were similar to the findings of fact in this case—Verdict unreasonable=Prejudice caused to appellant.

The appellant was charged with the offences of (1) conspiracy, (2) abetting another to use as genuine a forged document, (3) abetting another to deceive the accountant of a Bank, and was convicted on the first two counts.

The appellant had on March, 4th 1946, deposited with the assistant shroff of the Bank a large sum of money on a paying-in slip on which he had entered certain details. He received on the same day the counterfoil of the slip P1 which had the seal of the Bank, the letters MAR stamped and " PATH " in ink within the circle of the seal alleged to be the initials of the receiving shroff and a signature alleged to be that of the cashier.

The assistant shroff and the cashier denied both the fact of payment and the writings on P1.

The appellant led evidence to show that P1 was not a forged document, that he had sought to purchase a large rubber estate on March 10th and had interviewed the accountant of the Bank on March 13th as his cheque was dishonoured, and had consulted his legal advisers on that day with P1.

The Judge in his charge to the jury referred to March 13th or 14th as the date on which the appellant caused somebody to forge P1 although the indictment referred to the period of the offence as between the 8th and 15th March.

The Judge also referred to the failure of the appellant to recover the money deposited by him from the Bank in a civil action in the District Court and commented adversely upon the credibility of certain witnesses of the appellant in that case and also upon matters that were irrelevant and prejudicial to the appellant in his trial.

Held : (1) That it is reasonable to conclude that the jury found that the appellant had caused somebody to forge P1 on March 13th or 14th as directed by the presiding judge, and not between the 8th and 15th March as stated in the indictment and therefore the verdict was unreasonable and could not be supported on the evidence.

(2) That the references by the Judge to the civil action were irrelevant and prejudicial to the appellant and that it could not be said definitely as to what view the jury might have taken had no reference been made to the civil case.

REX vs. FERNANDO 56

Courts Ordinance

Section 88—Transfer of magistrate—Power of successor to continue proceedings.
See Criminal Procedure Code 1

Advocate—Disbarred—Application for re-enrolment.
See under Advocate.

Criminal Procedure

Charge of causing simple hurt—Evidence at trial disclosing charge of robbery—Fresh charge on robbery—Trial continued on same day though accused undefended—Conviction—Desirability of giving time to accused.

Held: That it is undesirable that the trial on a serious charge should be sprung upon an undefended accused person without taking every reasonable precaution to ensure that he fully understands and appreciates the implications of the new course which has been taken to his detriment.

Trial—Prosecuting officer contradicting prosecuting-witness by reference to statements recorded in course of investigation—Regularity—Is oral evidence of statements recorded in course of investigation admissible—Oaths Ordinance—Witness dealt with under section 11—Necessity to frame charges.

Held: (i) That it is irregular for a prosecuting officer to seek to contradict prosecution witnesses in the course of the prosecution case by reference to statements made by them to the Police Officer who investigated into the complaint.

(ii) That oral evidence of statements recorded by Police Officers is inadmissible and should not be permitted.

(iii) That before a witness is dealt with summarily under Section 11 of the Oaths Ordinance, it is necessary that a proper charge should be framed against him.

Criminal Procedure Code

Sections 152 (3) and 292—Assumption of jurisdiction by Magistrate as District Judge without recording evidence—Transfer of Magistrate after such assumption of jurisdiction—Successor continuing proceedings without recording that he himself assumed or reassumed jurisdiction and without giving his own mind to the propriety of trying the case under section 152 (3)—Is conviction bad—Courts Ordinance section 88.

On the trial date, the Magistrate without proceeding to hear any evidence recorded " I peruse the B reports and as facts are simple I assume jurisdiction as Additional District Judge." Thereafter the accused were duly charged and the trial was adjourned. On the adjourned trial date the Magistrate who charged the accused had been transferred and his successor proceeded to record the evidence and convict the accused.

It was argued for the accused that on the authority of the case *Hendrick Hamy vs. Inspector of Police, Kandana,* (1948) 50 N.L.R. 116 the conviction was bad inasmuch as the succeeding Magistrate did not give his own mind to the propriety of trying the case under section 152 (3) of the Criminal Procedure Code.

As this view was in conflict with another recent decision—*Gunawardena vs. Veloo,* (1948) 50 N.L.R. 107 —the matter was referred to two judges.

Held: (1) That although the former Magistrate did not—

(i) expressly refer to the section under which he was assuming jurisdiction or to the fact that he was of opinion that the charge might properly be tried summarily under Section 152 (3) of the Criminal Procedure Code.

(ii) record evidence before he assumed jurisdiction,

There was a proper assumption of jurisdiction under Section 152 (3) by him.

(2) That in view of Section 88 of the Courts Ordinance, the failure on the part of the succeeding Magistrate to record his independent opinion, whether the case is one that may properly be tried summarily under Section 152 (3) as District Judge, did not vitiate the conviction.

Overruled: *Hendrick Hamy vs. Inspector of Police, Kandana,* 50 N.L.R. 116.

Section 296 (1)—Failure to comply with the requirements of—Is it fatal to a conviction.

Held: That the failure on the part of a Magistrate to call the attention of an unrepresented accused who elects to give evidence, to the principal points in the evidence against him, is fatal to his conviction

Section 199—Police officer initiating proceedings in Magistrate's Court under section 148 (1) (b)—Is he entitled to appear and conduct prosecution at trial.

Held: That a Police Officer who initiates proceeding in the Magistrate's Court under Section 148 (i) (*b*) of the Criminal Procedure Code is entitled to appear and conduct the prosecution at the trial in preference to a lawyer retained by the party aggrieved.

Crown Land

Instructions by Land Commissioner to Government Agent to issue permit for taking produce of plantations after resuming possession from third party—Assistant

Government Agent agreeing to grant permit to appellant on a particular day without reference to resumption of possession—Payment of annual rent as agreed—Failure to put appellant into possession—Action for damages against Crown.

Agent—Assistant Government Agent acting in excess of authority—Absence of proof of ostensibile authority—Permit to take produce, whether "lease" or "licence"—Applicability of Regulation 2 of Land Sales Regulations—Prevention of Frauds Ordinance, Sections 2 and 17.

On 7th March, 1942, the Government Agent, Uva Province, on instructions from the Land Commissioner, put up to auction "the lease of the right to tap and take the produce of the rubber trees" on certain Crown Land for a period of five years. One S. was the highest bidder and on the 10th of August a permit was issued to him on certain conditions. S. violated the conditions of the permit, and the Land Commissioner wrote to the Government Agent, Uva, on 28-1-1943, to cancel the permit issued to S, to take possession of the land on behalf of the Crown, and *thereafter* to issue a permit to the appellant to take the produce of the plantations thereon for the balance period. Accordingly the permit issued to S. was cancelled and on the 2nd March, 1943, the Assistant Government Agent informed S. of the cancellation and requested him to deliver peaceful possession of the land to the Divisional Revenue Officer of the area on the 15th March, 1943.

The Appellant alleged (*a*) that on the 11th of March 1943 he interviewed the Assistant Government Agent who agreed to give him the lease and to put him in possession of the land on the 15th March 1943 if he the appellant was willing to deposit Rs. 6,000, being one year's rent. (*b*) that he agreed to the terms proposed and paid the sum of Rs. 6,000, by cheque on the same day for which he received a receipt dated 5-3-1943.

The appellant brought this action for damages against the Attorney-General on the ground that he was not given possession of the land in question.

Held : (i) That the Assistant Government Agent had no authority to make the alleged agreement inasmuch as the instructions given by the Land Commissioner in his letter of the 28th January, 1943 were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event.

(ii) That there was insufficient evidence of ostensible authority, a defence open to the appellant, if he presented the case on this issue with the particularity, which, such a plea, always difficult to establish requires.

(iii) That if the appellant wrongly assumed that the instructions given by Land Commissioner to his subordinates went further than they did, he acted at his peril.

(iv) That the permit to be given, under the alleged agreement was a licence, and not a lease and Regulation 2 of the land Sales Regulations did not apply.

(v) That the alleged oral agreement is void as it falls within section 2 of the Prevention of Frauds Ordinance and is not saved by Section 17 of the same Ordinance, as that section deals with instruments, *i.e.*, with transactions which have already been reduced to writing.

Per LORD SIMONDS.—"In this conflict of opinion upon the facts their Lordships have given anxious consideration to all the circumstances of the case and have come to the conclusion that the Supreme Court was not justified in reversing the judgment of the learned Judge, who had in their view ample material for forming the opinion to which he came and though he did not expressly measure the reliability of the appellant's and respondents' witnesses, cannot fail to have been influenced in his decision by the view that he took of them."

Damages

Seduction—Plaintiff's evidence contradicted by defendant—Corroboration of plaintiff's evidence.

Held : That to succeed in a claim for damages for seduction, the plaintiff's evidence, when contradicted by the defendant, must be corroborated in some material particular.

By fire spreading to adjoining land—Degree of care required of person starting the fire—Failure to take necessary precautions—Contributory negligence—Roman-Dutch Law.

The plaintiff sued the defendant to recover damages caused by a fire that spread from the defendant's land which adjoins the plaintiff's.

It was established (*a*) that the defendant knew that the south-west monsoon was on, but took no precautions on that account.

(*b*) That although the defendant's land was 8 acres in extent, he lit the fire about 20 fathoms from the plaintiff's land.

(*c*) That he failed to inform the plaintiff or his servants.

(*d*) That he had no watchers to watch the fire and prevent it from spreading it to the plaintiff's land.

Held : That the circumstances proved that the defendant failed to take the care which the law required him to take and therefore he was liable.

Per BASNAYAKE, J.—"On the plea of contributory negligence raised by the defendant, I wish to observe that it has not been shown that the plaintiff was under any legal duty to take precautions against the spread of fire from the defendant's land to his. In the circumstances there can be no question of contributory negligence on the part of the plaintiff."

Action for damages against Crown for failure to put person into possession of Crown Land.
See Crown Land 77

Decree

Amendment of—Powers of Court.
See Civil Procedure Code 89

Donation

Expression of intention on death-bed to donate a sum of money—Acceptance by donee who was present—Death of donor—Is donee entitled to recover gift from donor's estate—Nature of donee's right—Registration of Documents Ordinance, Sections 17 and 18.

An employer on his death-bed, in the presence of witnesses expressed his intention to give his servant, the plaintiff, a donation of Rupees 10,000. The plaintiff was present and by words and signs signified his thankful acceptance of the gift. Shortly after the donor died.

The plaintiff sued the Public Trustee as executor of the deceased to recover the gift and succeeded in the District Court. The Public Trustee appealed.

Held : (i) That in the circumstances the gift was a *donatio inter vivos* and did not require any specific mode of execution.

(ii) That the plaintiff's right under the donation was a *chose in action* and was not a 'bill of sale' needing registration under the Registration of Documents Ordinance.

Deed of gift subject to fidei-commissum—Muslim minors—Acceptance by mother of minors—Validity of acceptance.
See Fidei-commissum 86

Deed of gift—Revocability—Kandyan Law.
See Kandyan Law 94

Estate Duty

Shares in private Company—Company engaged in business of highly speculative nature—Valuation under Section 20 (1) of Estate Duty Ordinance Chapter 187—Amending Ordinance No. 8 of 1941 inoperative—Proper basis of valuation.

C. W. Mackie, a life-director of a private incorporated company, engaged in the business of purchasing and selling rubber, died leaving as assets cummulative preference and management shares in the company.

The Company's business was admittedly of a highly speculative nature. The course of its business from 1922, the date of its inception, to 6th September, 1940, the death of Mackie, showed violent fluctuations in profits and losses. The articles of association of the company restricted the sale and transfer of shares in the company and provided for the compulsory acquisition of the shares of the members in certain circumstances. The future prospects of the rubber business on 6th September, 1940 were uncertain and conjectural, and as a form of capital investment the business was manifestly hazardous. Under these conditions it was contended that no goodwill attached to the business.

The Commissioner of Income Tax based the valuation of the deceased's shares on the profits basis and refused to accept the valuation of the deceased's executors, which was based on the "tangible assets" value. The learned District Judge accepted the Commissioner's valuation.

On appeal, the Supreme Court had to decide the principle of valuation which was most appropriate to this case under Section 20 (1) of the Estate Duty Ordinance. It was common ground that the Amending Ordinance No. 8 of 1941, which laid down the mode of assessing the value of shares in a similar Company, did not apply as it came into operation after the death of the deceased.

Section 20 (1) of the Estate Duty Ordinance provides :—Subject to the provisions of subsection (2), the value of any property shall be estimated to be the price which, in the opinion of an Assessor, such property would fetch if sold in the open market at the time of the death of the deceased ; and no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time : .....provided that.....

Held : (i) That the measure of value under the section is the price which a willing vendor could reasonably expect to obtain and a willing purchaser could reasonably expect to have to pay for the shares.

(ii) That to determine the market value of the shares all the relevant factors as known at the date of the deceased's death to a prudent investor willing to pay for the shares should be taken into consideration.

(iii) That in valuing shares in a highly speculative business, whose past history lacks evidence of any *steady* earning power and in which it is not possible to assess logically the future maintainable profits, the "balance sheet method" is the most appropriate method.

Per GRATIAEN, J.—(*a*) "In my opinion the chief factors for consideration, *as they existed and were known at the time of Mackie's death*, were (1) the nature of the business of the Company (2) the history of the Company from its inception up to 6th September, 1940 (3) the future prospects of the business generally, and of the Company in particular (4) the state of the investment market at the relevant date and (5) the extent, if any, to which the restrictions contained in the Articles of Association might be expected to depreciate the value of the shares."

(*b*) "The value of a business is on this basis arrived at by adding the value of its goodwill, if any, to the value of its tangible assets.....similarly the value of a "share" in such a business is arrived at by reference to its proper proportion of the sum so computed regard being had to the rights and benefits attaching to such "share" under the Articles of Association."

(*c*) "It is hoped that early steps will be taken to modernise the procedure regulating appeals between the Crown and its subjects in estate duty cases. Proceedings of this kind cannot be conducted satisfactorily unless the substantial points of contest are clarified at the earliest possible stage."

Evidence

Illegal entry into premises by Police—Admissibility of evidence gathered in the course of such entry.

Held: That evidence gathered in the course of an illegal entry on property is admissible, if relevant.

PETER SINGHO vs. INSPECTOR OF POLICE, VEYANGODA 15

Evidence Ordinance

Section 32—Statement by deceased two or three days prior to death to her mother that accused made improper suggestions to her—Admissibility.
See Court of Criminal Appeal 4

Fidei-commissum

Gift, subject to—Donor reserving right to Mortgage property gifted—Mortgage by donor—Transfer of property by donee after donor's death in satisfaction of amount due on bond—Claim to property by donee's children—Effect—Revival of Mortgage.

N and M, husband and wife, donated by deed P1 a property to Y subject to the following among other conditions :—

(1) That the donation should take effect after their respective deaths.

(2) That each of them should be at liberty to sell mortgage or otherwise dispose of the said lot.

(3) That the donee should not be at liberty to sell or dispose of the said lot.

(4) That after the death of the donee hissons and daughters should be at liberty to sell or otherwise dispose of the said lot after they attained majority.

After the death of M, N and Y mortgaged the property in 1929 to S, who assigned the mortgage to the 1st defendant. N died and Y, in settlement of the debt due on the mortgage bond transferred the property in 1931 to the 1st defendant who entered into possession and improved the land.

On the death of Y, his children claimed the property on the footing that P1 created a valid fidei-commissum.

Held: (1) That P1 created a valid fidei-commissum in favour of Y's children.

(2) That the transfer by Y to the 1st defendant was void as against Y's children, but the mortgage revived and the 1st defendant became entitled to recover the principal and interest due on the mortgage bond up to the date of transfer by Y in 1931 and from the date of Y's death tothe date of payment.

CHETTIAPPEN KANGANY vs. YOOSOOF *et al* ... 60

Gift subject to fidei-Commissum—Muslim minors—Acceptance by mother of minors—Its validity—Is Roman-Dutch or Muslim Law applicable?=Preferential right of a Muslim widow to the custody and guardianship of minor children.

Where a Muslim lady by a deed of gift created a fidei-commissum in favour of the minor children of the donees, while reserving to herself the life-interest, and the gift was accepted on behalf of the minors by their mother (the father being dead).

Held: (1) That as the donor created a valid fidei-commissum the Roman-Dutch Law applied, and that therefore the mother, in the absence of the father, was competent to accept the gift.

(2) That where a transaction is intended by the parties to be governed by one system of law, it should not be divided into its component parts, and its validity tested by a different system of law, such as the religious or personal law of the parties.

NOORUL MUHEETHE vs. LEYANDUN ... 86

Fire

Damage by—Liability for.
See Damages 53

Informers' Rewards Ordinance

Section 2—Order under—Should be made at the same time as the order imposing the fine.
See Police Ordinance 64

Inspection

Inspection in Criminal case—Charge of rash and negligent driving—Scene of accident visited and inspected in the presence of parties—Object, better understanding of case—Fresh evidence not taken—Is such inspection irregular.

Held: That an inspection of a scene of an accident (in the course of a trial of a person accused of rash and negligent driving) carried out in the presence of parties in order to arrive at a better understanding of the case and not for the taking of fresh evidence is not irregular and does not vitiate a conviction.

MARTIN vs. S. I. POLICE, KURUNEGALA ... 16

Kandyan Law

Deed of gift—Revocability—Kandyan Law Ordinance No. 39 of 1938—Its applicability.

One P. Bandiya made a gift of lands to his children by a deed dated 11-8-1911, subject to his life-interest and certain other conditions. Subsequently by a deed dated 5-7-1943 he revoked the previous deed of gift.

Held: That the revocation was valid. In Kandyan Law deeds of gift are revocable unless it could be shown in the case of a particular deed that "the circumstances which constitute non revocability appear most clearly on the face of the deed itself."

ROMANIS vs. HARAMANISA & OTHERS ... 94

Landlord and Tenant

Landlord, a shareholder of a company—Action to eject tenant on the ground that premises reasonably required for the purpose of the business carried on by the company—Can landlord maintain action—Rent Restriction Act No. 29 of 1948.

Held:, (1) That a shareholder of a Company who owns houses, is not entitled to make use of the Rent Restriction Act for the purpose of providing his company with a place of business.

(2) The Rent Restriction Act provides for a case where the premises are reasonably required for the immediate use and occupation of the landlord or his family.

(3) That a plaintiff who succeeds in an action for ejectment is entitled to execute his decree immediately and time can only be given by consent of parties, or in the event of an appeal, where execution of the writ would cause irreparable loss to the unsuccessful party.

Section 6—Consideration of Original scheme of partition with notice to parties—Alternative scheme of partition ordered—Consideration by Court without notice to parties—Adoption of alternative scheme—Is it valid?

After considering the original scheme of partition submitted by the Commissioner with due notice to the parties, the court directed an alternative scheme to be submitted afresh. This scheme was considered by the Court and adopted without notice to all the parties.

Held: (i) That the order adopting the alternative scheme was bad in law as notice required by Section 6 of the Partition Ordinance had not been given.

(ii) That the notice required to be given under Section 6 of the Ordinance cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner.

(iii) That the Policy of the Law has been to allot to a co-owner the portion which contain his improvements whenever it is possible to do so.

THEDCHANAMOORTHY & OTHERS vs. APPAKUDDY & OTHERS 107

Partnership

Capital alleged to be over one thousand rupees—No agreement in writing—Prevention of Frauds Ordinance Section 18—Onus of proof—Meaning of "capital."

Held: That where a partnership, not evidenced in writing is established, the party, who pleads the benefit of Section 18 of the Prevention of Frauds Ordinance, must establish the existence of facts which bring the case within the Section.

Per GUNASEKERA, J.—"The capital contemplated by Section 18 of the Prevention of Frauds Ordinance is the original capital contributed by the partners (*de Silva vs. de Silva*, 1935, 37 N.L.R. 276), and the term does not extend to the amount that may stand as capital after additions or withdrawals, at any time during the course of the business.

ARALIS vs. FRANCIS 95

Penal Code

Scope of Sections 32 and 146.
See Court of Criminal Appeal 26

Police Officer

Police officer initiating proceedings in Magistrates' court under Section 148 (1) (*b*) of Criminal Procedure Code—Is he entitled to appear and conduct prosecution at trial.

See Criminal Procedure Code 74

Police Ordinance

Section 72—General fund for the reward of Police Officers—Informers Rewards Ordinance—Section 2—Person convicted and fined on plaint filed by Police Officer—Application on later date to order half-fine be awarded to Police Reward Fund allowed—Validity of order—Effect of proviso to Section 72 of Police Ordinance.

Held: (1) That an order under Section 2 of the Informers Reward Ordinance should be made at the same time as the order imposing the fine and not later.

(2) That the effect of the proviso to Section 72 of the Police Ordinance is that when a police officer acts the part of an "informer" properly so called the share of the fine should be paid to the Reward Fund contemplated therein and not to the "Informer" personally as prescribed by the Informers Reward Ordinance.

ATTORNEY-GENERAL vs. LETCHIMAN NADAR ... 64

Pre-emption

See Thesawalamai 5

Prescription Ordinance

(Chapter 55), Section 3—Acquistion of prescriptive title—Can adverse possession by intestate and his heirs be added together in computing the ten years.

Held: That the possession of an intestate and of her heirs can be added together for the purpose of computing the period of ten years' adverse possession.

CAROLISAPPU vs. ANAGIHAMY *et al* ... 105

Prevention of Frauds Ordinance

Construction of Sections 2 and 17—Validity of oral agreement.
See Crown Land 77
Section 6 See will 23

Section 18—Party pleading benefit of—Onus of proof.
See Partnership 95

Privy Council

See Civil Procedure Code 89
(1) Crown Land 77

Registration of Documents Ordinance

Sections 17 and 18—Donation *inter vivos*—Acceptance by donee—Death of donor—Donee's action to recover gift from donor's estate—Is donee's right a "bill of sale."
See Donation 17

Rent Restriction

See under Landlord and Tenant.

Revision

Supreme Court—Powers of revision—Should Supreme Court entertain application for revision when applicant failed to appeal where right of appeal lay—Courts Ordinance, section 37—Criminal Procedure Code, sections 356 and 357.

Sentence—Conviction for personation under section 78 (1) of the Local Authorities Elections Ordinance—Fine imposed below minimum fixed by Ordinance—Imprisonment till rising of Court—Is it regular—Sections 15A and 15B of the Criminal Procedure Code.

On 28-2-1950 the respondent was convicted of the offence of "personation" punishable under section 78 (1) of the Local Authorities Elections Ordinance No. 53 of 1946, and was sentenced to

pay a fine of Rs. 50 and to be imprisoned until the rising of the Court. This sentence was below the minimum required under section 78 (1) of the Ordinance.

On 22-4-1950 the Attorney-General having failed to appeal within time applied in revision for the enhancement of the sentence and on a preliminary objection taken by Counsel for the respondent that the Supreme Court cannot and should not entertain the application, the matter was referred to two Judges as conflicting views had been expressed by the Supreme Court in similar cases.

Held : (1) That the powers of revision vested in the Supreme Court are wide enough to embrace a case where an appeal lay but, which, for some reason, was not taken, but this power should be exercised in exceptional circumstances.

(2) That the fine imposed by the Magistrate was illegal as it was below the minimum fixed by section 78 (1) of the Local Authorities Elections Ordinance.

(3) That the sentence of imprisonment till the rising of the Court is irregular in view of sections 15A and 15B (as amended by Ordinance No. 59 of 1939) of the Criminal Procedure Code as the effect of these sections is to abolish " imprisonment till the rising of the Court " or any imprisonment which is less than seven days.

(4) That it would have been regular for the Magistrate to have *detained* the respondent until the rising of the Court, such rising being not later than 8 p.m. as such order would be in accordance with section 15B.

(5) That in the circumstances of the case, there has been a miscarriage of justice resulting from a violation of a fundamental rule of judicial procedure calling for the interference of Court.

Per DIAS, S.P.J.—I agree with the observations of Akbar, J., in *Inspector of Police, Avissawella vs. Fernando* (1929) 30 N.L.R. 482 that in such case an application in revision should not be entertained save in exceptional circumstances. In my view such exceptional circumstances would be (*a*) where there has been a miscarriage of justice ; (*b*) where a strong case for the interference of this Court has been made out by the petitioner, or for the interference of this Court has been made out by the petitioner ; or (*c*) where the applicant was unaware of the order made by the Court of trial. These grounds are, of course, not intended to be exhaustive.

ATTORNEY-GENERAL vs. PODISINGHO ... 110

Sale

Sale by anticipation of a contingent interest in land—Is it obnoxious to the Roman-Dutch Law.
See Partition 70

Sale by anticipation of a contingent interest during pendency of a Partition action—Can it become a vested right.
See Partition 70

Seduction

Damages for—When corroboration of plaintiffs' evidence necessary.
See Damages 81

Sentence

Imprisonment till rising of Court
See Revision 110

Testamentary Action

Two independent applications for letters of administration by rival claimants—Suppression of facts by one applicant—Contempt of court.
See Civil Procedure Code 24

Thesawalamai

Pre-emption among co-owners—Right equal and co-existant—Two separate actions by two co-owners against same defendant claiming right of pre-emption —Registration of lis pendens *of action earlier in date—Judgment entered in 2nd action of consent prior to judgment in earlier action—Collusion to defeat rights in earlier action—Failure to register* lis pendens *of 2nd action—Effect on respective decrees.*

Plaintiff, 1st and 2nd defendants (governed by the Thesawalamai) are brothers, who were co-owners of a certain property. Plaintiff who had a decree for costs against the 2nd defendant seized his share in execution. Plaintiff having then found that the 2nd defendant, in violation of the plaintiff's rights of pre-emption had secretly purported to sell his share to N a stranger, instituted action against them in September, 1945 claiming his rights of pre-emption and duly registered the *lis pendens* on the same day. Judgment was eventually entered in favour of the plaintiff in December, 1946 and a conveyance was executed in terms of the decree in March, 1947.

A few days after the institution of the plaintiff's action the 1st defendant instituted action against the same parties claiming the same rights of pre-emption. Judgment was entered of consent in favour of the first defendant and a conveyance was accordingly executed on 26th November, 1945. *Lis pendens* of this action was not registered, but the decree and the conveyance were duly registered.

In the present action the plaintiff claimed that his conveyance of March, 1947 in his favour had priority over the 1st defendant's deed of November, 1945—

(*a*) by reason of prior registration of *lis pendens* of plaintiff's action.

(*b*) because the decree and deed in favour of the 1st defendant had been fraudulently obtained.

Held : (i) That although the decree of the plaintiff was later in point of time, he is entitled to priority because he had registered his *lis pendens*.

(ii) That as the decree in favour of the 1st defendant and the deed in pursuance thereof formed part of a fraudulent and collusive transaction between the 1st and 2nd defendant and N, the conveyance in favour of the plaintiff prevailed over them.

SARAVANAMUTTU vs. MURUGAM & ANOTHER ... 5

Will

Revocation—How it may be effected—Prevention of Frauds Ordinance Section 6.

Held : That under our law a will cannot be revoked except by adopting one or other of the modes of revocation set out in section 6 of the Prevention of Frauds Ordinance.

VELMURUGU vs. ARUMUGAM 23

Words and Phrases

Workmen's Compensation

Inquiry into application—Applicant's absence—Order nisi dismissing application—Subsequent order after lapse of fourteen days setting aside order nisi on cause shown with notice to respondent—Respondent's failure to appeal—Is the order a nullity in view of Rule 30 of Workmen's Compensation Regulations 1935 and Section 84 of the Civil Procedure Code.

On 10th November, 1947, a Commissioner for Workmen's Compensation made an order *nisi* dismissing an application for compensation on the ground of the applicant's failure to appear on that day, being the date fixed for hearing.

On 23rd December, 1947, after inquiry with notice to the respondent the Commissioner made order setting aside the order *nisi* and fixed the application for inquiry. There was no appeal from this order.

At this inquiry on 23rd December, 1948, the respondent contended that in view of Rule 30 of the Workmen's Compensation Regulations 1935, Section 84 of the Civil Procedure Code became applicable to the order *nisi*, which became automatically absolute after fourteen days and therefore the order setting aside the order was a nullity.

The Commissioner accepted this contention and dismissed the application for compensation. The applicant appealed.

Held : (i) That in view of the wide discretion given to the Commissioner under Rule 30 as to whether he should proceed otherwise than in accordance with the relevant provisions of the Civil Procedure Code the Commissioner had jurisdiction to set aside the order *nisi* made on the 23rd of December, 1947, and, therefore, the order was not a nullity but a voidable one.

(ii) That the respondent, not having exercised his right of appeal, is bound by the order.

WEERASOORIYA vs. THE CONTROLLER OF ESTABLISHMENTS 51

Present : WINDHAM, J. & GRATIAEN, J.

WILLIAM PERERA *et. al.* vs. INSPECTOR OF POLICE, MAHARAGAMA

S. C. 375-376—*M. C. Colombo South* 20548.

Argued on : 13th October, 1949.
Decided on : 27th October, 1949.

Criminal Procedure Code, Sections 152 (3) *and* 292—*Assumption of jurisdiction by Magistrate as District Judge without recording evidence—Transfer of Magistrate after such assumption of jurisdiction—Successor continuing proceedings without recording that he himself assumed or reassumed jurisdiction and without giving his own mind to the propriety of trying the case under section* 152 (3)—*Is conviction bad—Courts Ordinance, section* 88.

On the trial date, the Magistrate without proceeding to hear any evidence recorded " I peruse the B reports and as facts are simple I assume jurisdiction as Additional District Judge ". Thereafter the accused were duly charged and the trial was adjourned. On the adjourned trial date the Magistrate who charged the accused had been transferred and his successor proceeded to record the evidence and convict the accused.

It was argued for the accused that on the authority of the case *Hendrick Hamy vs. Inspector of Police, Kandana,* (1948) 50 N. L. R. 116 the conviction was bad inasmuch as the succeeding Magistrate did not give his own mind to the propriety of trying the case under section 152 (3) of the Criminal Procedure Code.

As this view was in conflict with another recent decision—*Gunawardena vs. Veloo,* (1948) 50 N.L.R. 107 †—the matter was referred to two judges.

Held : (1) That although the former Magistrate did not (i) expressly refer to the section under which he was assuming jurisdiction or to the fact that he was of opinion that the charge might properly be tried summarily under Section 152 (3) of the Criminal Procedure Code.

(ii) record evidence before he assumed jurisdiction, there was a proper assumption of jurisdiction under Section 152 (3) by him.

(2) That in view of Section 88 of the Courts Ordinance, the failure on the part of the succeeding Magistrate to record his independent opinion, whether the case is one that may properly be tried summarily under Section 152 (3) as District Judge, did not vitiate the conviction.

Overruled : *Hendrick Hamy vs. Inspector of Police, Kandana,* 50 N. L. R. 116. *

C. E. Jayawardena, for the accused-appellants.
H. A. Wijemanne, Crown Counsel, with *A. Mahendrarajah, Crown Counsel,* for Attorney-General.

WINDHAM, J.

This matter comes before us for the determination of a point reserved—a point of law and procedure arising out of the proper interpretation of section 152 (3) of the Criminal Procedure Code. The facts, in so far as they affect the point reserved, were as follows: The accused-appellants were charged with house-breaking and theft, and the first accused was also charged with dishonestly retaining stolen property. The case came up for trial before the magistrate, Mr. Gunawardena, on January 5th 1949, on which date, without proceeding to hear any evidence, he recorded—" I peruse the B reports and as facts are simple I assume jurisdiction as A.D.J " It is undisputed that by these words the learned magistrate who was also an Additional District Judge, was assuming jurisdiction to try the case summarily, with the powers of punishment of a District Court, under section 152 (3) of the Criminal Procedure Code. Section 152 (3) reads as follows:—

" 152 (3) Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and Magistrate being also a District Judge having jurisdiction to try the offence is of the 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."

After the recording of the above words by the magistrate, the accused were charged from summary form No. 1 B. This completed the hearing on January 5. By the time of the adjourned hearing on February 2nd 1949, Magistrate Gunawardene had been transferred and Magistrate Wijesekera his successor, who was also an Additional District Judge, proceeded to record the evidence and eventually to convict the accused.

The point referred for our decision is whether the proceedings before Magistrate Wijesekere were vitiated by the fact that he himself did not record his independent decision that he was electing to try the case summarily in accordance with section 152 (3); in short, that he did not personally assume jurisdiction under that section. It is contended that the assumption of jurisdiction by Magistrate Gunawardana was

* 39 C. L. W. p 39. † 38 C. L. W. p 63.

insufficient to clothe Magistrate Wijesekere with such jurisdiction.

This question of whether the assumption of enlarged jurisdiction under section 152 (3) by one magistrate vests with such jurisdiction a successor magistrate who takes over the case, where the latter does not record that he is himself assuming or reassuming jurisdiction under that section, has been the subject of two recent conflicting decisions of this Court—*Gunawardena vs. Veloo*, (1948) 50 N.L.R. 107 † in which Wijewardena, A.C.J., held it did so vest him, and *Hendrick Hamy vs. Inspector of Police, Kandana*, (1948) 50 N. L. R. 116,* where Basnayake J., held that it did not.

There appear to be no earlier decisions directly in point. In *Queen vs. Silva*, (1901) 5 N. L. R. 17, the point decided was that the summary proceedings were not regularly initiated because neither the original magistrate nor his successor recorded that he was of opinion that the offence charged might properly be tried summarily by him under section 152 (3), and there was thus no proper assumption of enhanced jurisdiction by anybody in the manner required by the section. It was held that the recorded statement by the successor magistrate that "the charge was one triable by a District Judge, and that he held the dual office of Judge and Magistrate" did not constitute the necessary recorded opinion that the charge might properly be tried summarily, and accordingly did not constitute a proper assumption of jurisdiction under the section. The case thus differs from the present one, where there was an assumption of jurisdiction by the former magistrate and where the only question is whether the succeeding magistrate had independently to record his assumption and the reasons for his assumption of it. I would state at this point that, although in the present case Magistrate Gunawardena did not expressly refer to the section under which he was assuming jurisdiction, section 152 (3) is the only provision to which his words "I assume jurisdiction as A.D.J.", could refer, and he must be deemed to have been assuming jurisdiction under it. Secondly, while he did not in so many words record that he was of opinion that the charge might properly be tried summarily under section 152 (3) his statement that he was assuming jurisdiction "as facts are simple" amounted in effect both to an expression of such an opinion and to the furnishing of his reasons for forming that opinion. And his perusal of the police B reports of the case afforded him sufficient material upon which to form that opinion; for section 152 (3) does not require that his opinion must be formed on evidence recorded by him. There was accordingly a proper assumption of jurisdiction in the present case by the former magistrate Mr. Gunawardena.

It is this fact which also distinguishes another earlier decision from the present case, namely *Silva vs. Kelanitissa*, (1935) 37 N. L. R. 68, where there was only one magistrate concerned, and where it was held that it could not be presumed that the magistrate had acted under section 152 (3), since he had omitted to record two essential things: first, that he was of opinion that the case might properly be tried summarily, and secondly his reasons for forming that opinion. I agree that these things are a condition precedent to the assumption of jurisdiction under section 152 (3) though as I have said, I think that a statement such as that "as facts are simple I assume jurisdiction as A.D.J." amounts at one and the same time both to the expressions of the opinion and to the furnishing of the reasons for it.

We turn, then, to the point referred, which was considered in the recent conflicting decisions in *Gunawardena vs. Veloo*, and *Hendrick Hamy vs. Inspector of Police, Kandana*, (*supra*). It is to be noted that in both of those cases the bearing of section 292 of the Criminal Procedure Code upon section 152 (3) was considered. Section 292, however, has no direct bearing in the present case, since it applies only where the first magistrate ceases to exercise jurisdiction "after having heard and recorded the whole or any part of the evidence." It would not therefore be applicable here, where Magistrate Gunawardena heard no evidence. The section in the light of which section 152 (3) should be interpreted in the present case is in my view, section 88 of the Courts Ordinance. That section provides as follows:—

> "88. In case of the death, sickness, resignation, removal from office, absence from the Island, or other disability of any Judge before whom any cause, suit, action, prosecution or matter whether on an inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such cause, suit, action prosecution or matter may be continued before the successor of such Judge, who shall have power to act on the evidence already recorded by such first-named Judge or partly recorded by such first-named Judge and partly recorded by himself or, if he thinks fit, to re-summon the witnesses and commence afresh:
>
> Provided that in any such case, except on any inquiry preliminary to committal for trial, either party may demand that the witness shall be re-summoned and re-heard, in which case the trial shall commence afresh".

It will be seen that section 88 of the Courts Ordinance, although it largely duplicates section 292 of the Criminal Procedure Code, is wider in

† 38 C. L. W. p 63.

* 39 C. L. W. p 39.

its scope, quite apart from the fact that it covers civil matters as well as criminal. For although it contemplates "the evidence already recorded .....or partly recorded by such named Judge" it is not restricted in its terms to cases where the first judge (or magistrate) has recorded some evidence, as section 292 is; on the contrary the words "has been instituted or is pending" in section 88 indicate that it is designed to cover the case of a prosecution which has merely been instituted before the "first named Judge". The section provides that such prosecution may be "continued before the successor of such judge". It seems to me that this provision necessarily implies that the new judge shall step into the shoes of the original judge and may carry on from the point where he left off. Any act lawfully done in the case by the original judge may therefore be adopted by the new judge as if it had been done by himself, without the necessity of his having to do such act himself afresh. And this, as I see it, would apply to the act of assuming jurisdiction under section 152 (3). There is in my view no question of his having independently to assume or reassume jurisdiction. He is at liberty to vest himself in the cloak of jurisdiction which has already been assumed by his predecessor.

In reaching the contrary view in *Hendrick Hamy vs. Inspector of Police, Kandana*, Basnayake J., relied strongly on the wording of section 152 (3) wherein it is provided that where the magistrate is of opinion that the offence may properly be tried summarily, he may try the same summarily. But with the greatest respect I do not think this use of the word "he" is to be interpreted so narrowly as to rule out the possibility of the magistrate who records his opinion that the case should be tried summarily being replaced by another magistrate who tacitly adopts that opinion and proceeds to try the offence. Section 152 (3) is worded so as to apply to the normal case, where one magistrate conducts the proceedings throughout, and its literal meaning must be modified in the light of section 88 of the Courts Ordinance—and I would add of section 292 of the Criminal Procedure Code likewise —which provide for the abnormal case where one magistrate is replaced by another after the commencement of the proceedings.

It is further pointed out by learned judge in *Hendrick Hamy vs. Inspector of Police, Kandana*, that the succeeding magistrate ought to give his own mind to the property of trying the case under section 152 (3) and from his own opinion as to whether the case is one that may properly be tried by him summarily as District Judge. With this I entirely agree. But the question is whether he is to be required to record these things, which would be necessary if an independent act of assumption of enhanced jurisdiction were required from him, or whether it will be presumed, in the absence of such a recording that he is of the same opinion as his predecessor and for the same reason. Certainly his predecessor's opinion is not binding on him (the wording of section 88 of the Courts Ordinance is permissive only), and it would always be open to him to decline to adopt it, and to refrain from trying the case under the enhanced jurisdiction which his predecessor had assumed under section 152 (3). But if he does proceed to try the case summarily in accordance with the procedure prescribed in section 152 (3) then the presumption of regularity will operate, and it will be presumed that before trying it he looked at the record, including the records opinion and reasons of his predecessor, and that he adopted his predecessor's opinion and his assumption of jurisdiction under that section. And in such case, if his predecessor's assumption of jurisdiction under the section was itself regular, it will enure for his successor, who may then properly try the case in accordance with the procedure laid down in the section, clothed with that jurisdiction.

One further point was argued before us, though not strenuously, namely, that there was no proof nor any indication on the record, that Magistrate Gunawardene was at the time an additional District Judge. I consider, however, that it was not necessary to prove this fact, for Magistrate Gunawardene was in fact gazetted as Additional District Judge for the relevant period, and it was therefore a matter of which his successor was, and this Court is entitled to take judicial notice.

For these reasons I hold that in the case referred to us, the offence was properly tried by Magistrate Wijesekera under section 152 (3) of the Criminal Procedure Code. The appeal will now be listed before a single judge of this Court for determination on its merits.

GRATIAEN, J.

I agree entirely.

Appeal to be listed before a single judge.

IN THE COURT OF CRIMINAL APPEAL

Present : JAYETILEKE, S.P.J. (PRESIDENT), GUNASEKARA, J., PULLE, J.

REX vs. H. D. M. APPUHAMY

Appeal 1 *and Application* 6 *of* 50 *S. C.* 4/*M.C. Negombo* 58963
Argued on : 17th February, 1950
Decided on : 27th February, 1950

Court of Criminal Appeal—Conviction for murder— Statement by deceased two or three days prior to death to her mother that appellant made improper suggestion to her.—Admissibility of statement—Evidence Ordinance, Section 32 (1).

The appellant was found guilty of the murder of a woman named Elizabeth. The mother of the deceased stated in evidence (*a*) that two or three days prior to her death the deceased complained that the appellant made an improper suggestion to her ; (*b*) that she did not agree to it and that she did not want him to come to the house ; (*c*) that she (the witness soon after the complaint went to the appellant and asked him not to come to her house. It was contended in appeal that the statement alleged to have been made by the deceased to her mother was not admissible in evidence under section 32 (1) of the Evidence Ordinance.

Held : That the statement was admissible in evidence as it indicated some of the circumstances of the transaction which resulted in her death.

D. W. F. Jayasekara, for the accused-appellant.
R. R. Crossette-Thambiah, K.C., Solicitor-General, with *A. C. Alles, Crown Counsel*, for the Crown.

JAYETILEKE, S.P.J.

The appellant was charged with having murdered one Wattige Elizabeth on September 19, 1949. He was convicted by a divided verdict of the jury and sentenced by the presiding Judge to death.

The principal witness for the prosecution was Ana Maria, the mother of the deceased. She said that about two or three days prior to the death, the deceased complained to her that the appellant made an improper suggestion to her, that she did not agree to it and that she did not want him to come to the house. Soon after the complaint was made to her by the deceased she went to the appellant and she asked him not to come to her house. On the day of the tragedy at about 1.30 p.m. she and the deceased were standing in front of their house when the appellant came along the road saying "Magay Veday Hari" (my work is right). Then she and the deceased ran along the road towards a neighbour's house, whereupon, the appellant pursued them and stabbed the deceased with a kris knife on the chest. Then the deceased fell down, whereupon, the appellant stabbed her several times. The appellant admitted that he stabbed the deceased, but he stated that he did so under grave and sudden provocation.

The main point taken at the argument before us was that the statement alleged to have been made by the deceased to Ana Maria was not admissible in evidence under S. 32 (1) of the Evidence Ordinance.

Statements written or verbal of relevant facts made by a person who is dead.....are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death or (2) as to any of the circumstances of the transactions which resulted in his death in cases in which the cause of that person's death comes into question. This section is identical with S. 32 (1) of the India Evidence Act, 1872, which was interpreted by their Lordships of the Privy Council in the case of *Swami vs. King Emperor*, (1939) 1 A. E. R. 396. The facts of that case are as follows :—

> The appellant was convicted of the murder of one Kuree Nukaraju and sentenced to death. On March 23, 1937, the body of the deceased man was found in a steel trunk at Puri, the terminus of a branch of line on the Bengal-Nagpur Railway where the trunk had been left unclaimed. The Medical evidence left no doubt that the man had been murdered. There was evidence that the deceased had reached the appellant's house at the critical time, that a trunk had been brought by order of the appellant and taken to his house on March 22, and that the same trunk containing the body of the deceased was placed on the train at Berhampur on March 23, having been conveyed there in a vehicle ordered by the appellant in which he and the trunk travelled to the station. The prosecution proved a statement made by the deceased to his wife that he was going to Berhampur as the appellant's wife had written and told him to go

and receive payment of his dues. It was contended that the statements made by the deceased to his wife was not a statement as to the circumstances which resulted in his death but their lordships held that it was, and that it was admissible under S. 32 (1). In the course of his Judgment Lord Atkin said :—

"It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death and that the circumstances can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of those limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to expect to be killed. The circumstances must be circumstances of the transaction. General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. However statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such a person to meet him, would each of them be circumstances of the transaction and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase, no doubt that conveys some limitation. It is not as broad as the analagous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is, on the other hand, narrower than *res gestae*. Circumstances must have some proximate relation to the actual occurrence, though as for instance, in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that 'the circumstances' are those of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. In the present case the cause of the deceased's death comes into question. The transaction was one in which the deceased was murdered on March 21 or March 22—that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death."

The transaction in this case is the one in which the deceased was murdered on September 19, 1949. The transaction cannot be restricted to the physical cause of death. If events prior to the death can be taken into account, as indeed they can be, according to the judgment of Lord Atkin, the transaction would include the connected events which culminated in death. Whether there is a proximate relation between the commencement of the transaction and the ending thereof is a mater to be determined on the facts of each case. Here there is a clear connection between the complaint, made by the deceased, the warning given by Ana Maria to the appellant and the actual stabbing. The majority of us are of opinion that the statement made by the deceased is a statement as to some of the circumstances of the transaction which resulted in her death within the meaning of Section 32 (1) and was rightly admitted in evidence. We would accordingly dismiss the appeal.

Appeal dismissed.

Present : GRATIAEN, J.

SARAVANAMUTTU vs. MURUGAM & ANOTHER

S. C. 53—C. R. Jaffna 17668.

Argued on : 22nd and 24th November, 1949.
Decided on : 30th November, 1949.

Thesawalamai—Pre-emption among co-owners—Right equal and co-existant—Two separate actions by two co-owners against same defendant claiming right of pre-emption—Registration of lis pendens *of action earlier in date—Judgment entered in 2nd action of consent prior to judgment in earlier action—Collusion to defeat rights in earlier action—Failure to register* lis pendens *of 2nd action—Effect on respective decrees.*

Plaintiff, 1st and 2nd defendants (governed by the Thesawalamai) are brothers, who were co-owners of a certain property. Plaintiff who had a decree for costs against the 2nd defendant siezed his share in execution. Plaintiff having then found that the 2nd defendant, in violation of the plaintiff's rights of pre-emption had secretly purported to sell his share to N a stranger, instituted action against them in September, 1945 claiming his rights of pre-emption and duly registered the *lis pendens* on the same day. Judgment was eventually entered in favour of the plaintiff in December, 1946 and a conveyance was executed in terms of the decree in March, 1947.

A few days after the institution of the plaintiff's action the 1st defendant instituted action against the same parties claiming the same rights of pre-emption. Judgment was entered of consent in favour of the first defendant and a conveyance was accordingly executed on 26th November, 1945. *Lis pendens* of this action was not registered, but the decree and the conveyance were duly registered.

In the present action the plaintiff claimed that his conveyance of March, 1947 in his favour had priority over the 1st defendant's deed of November, 1945 (*a*) by reason of prior registration of *lis pendens* of plaintiff's action.

(*b*) because the decree and deed in favour of the 1st defendant had been fraudulently obtained.

Held : (i) That although the decree of the plaintiff was later in point of time, he is entitled to priority because he had registered his *lis pendens*.

(ii) That as the decree in favour of the 1st defendant and the deed in pursuance thereof formed part of a fraudulent and collusive transaction between the 1st and 2nd defendant and N. the conveyance in in favour of the plaintiff prevailed over them.

H. W. Thambiah, with *S. Sharvananda*, for the first defendant-appellant.
C. Thiagalingam, with *V. Arulambalam*, for the plaintiff-respondent.

GRATIAEN, J.

The first defendant and the second defendant in the present action are brothers of the plaintiff although little love seems to have been lost between them in recent years. Each brother owned an undivided share in certain property in Puttur in the Jaffna Peninsula. It is common ground that the parties are governed by the Thesawalamai.

Early in 1944 an acrimonious litigation in which various members of the family had taken part resulted in a decree for costs being entered in favour of the plaintiff against the second defendant. He caused the second defendant's share in the common land to be seized in execution of his unsatisfied decree—but only to discover that he had been circumvented by a sinister device. The second defendant, in violation of the plaintiff's rights of co-ownership under the Thesawalamai, had secretly sold (or purported to sell) this share to an accommodating stranger named Nallathamby. This left the plaintiff, who was thus frustrated for the time being in his dual capacity of co-owner and creditor, no option but to institute action No. 16666 of the Court of Requests of Jaffna on 13th September, 1945 to have the clandestine sale to Nallathamby set aside and to compel vendor and vendee to transfer the property to him in recognition of his right of pre-emption. *Lis pendens* was duly registered on the same day. The action was as hotly contested as all the others had been. Judgment was ultimately entered in favour of the defendant in December, 1946 and in terms of the decree a conveyance was executed transferring the share to the plaintiff on 28th March, 1947.

One would normally have expected that finality had at long last been reached in the dispute between the parties. But once again the plaintiff discovered that his resourceful kinsman had not exhausted his aptitude for strategic counter-measures. The first defendant's aid had been solicited, and on 25th September, 1945 (twelve days after action No. 16666 had commenced its tedious career) the first defendant filed action 16684 in the same Court against the second defendant and Nallathamby claiming the same rights of pre-emption as the plaintiff had done. The action was conducted with the utmost secrecy. *Lis pendens* was not registered, and the plaintiff had no knowledge of the conspiracy to defeat his rights. On this occasion, however, the second defendant and Nallathamby had discarded their customary zeal for contentious litigation. They consented to judgment in favour of the first defendant at the earliest possible opportunity. On 15th November, 1945 the decree was hastily registered in the correct folio. Eleven days later the transfer in favour of the first defendant was executed and was also duly registered. In the meantime the litigation to which the plaintiff was a party was being bitterly contested without any notice to him or to the Court that the defendants had already parted with the property in dispute. As I have already stated, the plaintiff's action was not concluded until December, 1946.

The plaintiff now claims a declaration that the conveyance of 28th March, 1947 in his favour has priority over the first defendant's deed of November, 1945 (*a*) by reason of the prior registration of the *lis pendens* in action No. 16666 (*b*) because the decree in favour of the first defendant and the deed executed in pursuance thereof formed part of a fraudulent and collusive transaction between the first defendant, the second defendant and Nallathamby and could not in any event, prevail over the plaintiff's conveyance. The learned Commissioner of Requests accepted both these submissions, and gave judgment for the plaintiff as prayed for with costs. The present appeal is from this judgment.

In my opinion the view taken by the learned Commissioner on both points is clearly right. Mr. Thambiah contends that the allegations of fraud and collusion has not been pleaded or proved with sufficient particularity. I cannot agree. This is a case in which the facts, as I have narrated them, speak very eloquently for themselves, and the whole transaction is so deplorably suspicious that one finds it quite

impossible to find some charitable explanation for the behaviour of the defendants and of Nallathamby. Indeed, none of these gentlemen gave evidence in the lower Court, and no attempt of any kind was made at the trial to remove the suspicions which the uncontradicted facts must necessarily create in the minds of reasonable men.

This issue really disposes of the case. As the other issue was fully argued before me, however, I shall deal shortly with the submissions of learned Counsel. Mr. Thambiah argues that as the rights of co-owners to claim pre-emption under the Thesawalamai are equal and co-existent, which they undoubtedly are *Ponniah vs. Kandiah*, (1920) 21 N. L. R. 327, the second defendant was entitled during the pendency of action No. 16666 to convey his share to the first defendant who was also a co-owner with rights of pre-emption which were no less valid than those of the plaintiff. This view was certainly taken by the majority of a full Bench of the High Court of Lahore in *Mool Chand vs. Ganga Lal*, (A. I. R. (1930) Lahore 356), where it was decided that although the rule of *lis pendens* applies to pre-emption suits, it does not affect the validity of a voluntary sale effected during the pendency of a pre-emption suit to a person possessing a right of pre-emption equal to that of a pre-emptor. I must confess that I entertain doubts as to the extent to which the learned opinions of the Indian Courts in pre-emption cases may be regarded as applicable to the difficult problems which arise for consideration in connection with the customary personal laws governing the inhabitants of the Jaffna Peninsula. This is, however, a question of academic importance, as the matter is now regulated in this country by the provisions of Ordinance No. 59 of 1947. Be that as it may, the present action is concerned not with the respective rights *simpliciter* of pre-emptors, but with a competition between two decrees of the same Court declaring separate persons to be entitled to conveyances of identical interests in land. In that state of things, the issue must I think be decided by reference to the principles of *lis pendens* and prior registration. Whatever may have been the rights of the plaintiff and the first defendant as rival claimants to pre-empt, I am content to say that their rights under their respective decrees are concluded by the fact that although the decree of the plaintiff was later in point of time he is entitled to priority because he had taken the precaution to register his *lis* whereas the first defendant had not done so.

For these reasons I dismiss the appeal with costs and make order affirming the judgment of the learned Commissioner of Requests.

Appeal dismissed.

Present : DIAS, S.P.J., NAGALINGAM, J. & WINDHAM, J.

IN *RE* BATUWANTUDAWA

Argued on : 31st March, 1950.
Decided on : 5th April, 1950.

Advocate—Disbarred on conviction of series of offences involving gross fraud—Application for re-enrolment after interval of thirteen years refused.

The petitioner, a member of the English Bar, who was also an Advocate of the Supreme Court of Ceylon, was disbarred on conviction of the offences of forgery, cheating and abetment of cheating. His application for re-enrolment made after an interval of thirteen years, was refused, having regard to the nature of the offences of which he had been proved guilty.

It was further held that it was the duty of the Registrar of the Supreme Court to have reported forthwith to the Inn to which the petitioner belonged the fact that he had been struck off the rolls in Ceylon.

Cases referred to:—In *re Monerasinghe*, (1917) 4 C. W. R. 370.
Attorney-General vs. Ellawala, (1931) 29 N. L. R. at p. 32.
In *re Seneviratne*, (1928) 30 N. L. R. 299.
In *re Seneviratne*, (1936) 39 N. L. R. 476.
In *re a Proctor*, (1925) 39 N. L. R. 517.
In *re Wijesinghe*, (1939) 40 N. L. R. 385.
In *re Wickremasinghe*, (1945) 46 N. L. R. 204.

E. B. Wikramanayake, K.C., with *B. H. Aluvihare, G. T. Samarawickrama*, and *C. E. Jayawardene*, for the petitioner-applicant.

R. R. Crossette-Thambiah, K.C., (*Solicitor General*), with *H. A. Wijemanne, Crown Counsel*, for the Attorney-General.

DIAS, S. P. J.

The petitioner, Upali Batuwantudawa, was called to the English Bar at the Middle Temple. By virtue of that call to the Bar, he was on August 4, 1932 admitted and enrolled as an Advocate of the Supreme Court of Ceylon.

In D. C. Colombo Criminal Case No. 11382 the petitioner, who was the 2nd accused, along with his brother and another were indicted for abetting the offence of cheating, the forgery of a valuable security, to wit a promissory note, for Rs. 600, and cheating by personation. On June 19, 1936, he was convicted on each of the counts, and sentenced in the aggregate to undergo a term of six months' rigorous imprisonment. In appeal his conviction was affirmed and the petitioner duly served his sentence. This Court by its order dated October 8, 1937, struck his name off the roll of Advocates holding—"The Advocate in this case was convicted of a series of very serious offences involving gross fraud in each. He has shown no cause against extreme disciplinary measures, and we can do no less than order that he be struck off the register of Advocates". We respectfully concur with that view. The petitioner, who at the material dates was in extreme financial embarrassment, entered into a conspiracy with his co-accused and another to defraud an Afghan money-lender in order to obtain from him money on a forged promissory note purporting to have been signed by one "T. E. Wickremasinghe, Assistant Superintendent of Police". In order to perpetrate this fraud, the petitioner and his brother procured the uniform of an Assistant Superintendent of Police from a friend of theirs in the Police Force, and one Vernon Alexander posing as an Assistant Superintendent of Police cheated the Afghan to lend money on a forged promissory note. We have perused the record of the proceedings and the judgment of the learned trial Judge. The facts prove that the petitioner appears to have been totally devoid of any moral sense, and in order to relieve his financial embarrassment, did not hesitate to conceive and carry through what this Court has described as being "a series of *very serious* offences involving *gross* fraud in each".

After an interval of thirteen years, the petitioner moves this Court to readmit him to the ranks of the honourable profession, the good name of which he disgraced.

That a legal practitioner who has been struck off the rolls for any "deceit, malpractice, crime or offence" may be readmitted to the profession is undoubted. A series of decisions of this Court have laid down the principles on which this Court acts in applications of this kind. The question whether relief should or should not be granted must depend on the facts and circumstances of each case.

The general principles on which this Court acts may thus be summarised: A legal practitioner who has been struck off the rolls may be readmitted to the profession if the Court is satisfied that he has atoned for the errors of the past by an unbroken subsequent career of honesty and industry—In *re Monerasinghe*, (1917) 4 C. W. R. 370. There must be proof of a career of honourable conduct for so long as to convince the Court that there has been complete repentance and a determination to persevere in honourable conduct—*Attorney-General vs. Ellawala*, (1931) 29 N. L. R. at p. 32. The length of time for atonement and repentance depends on the facts of each case. If this Court considers the application to have been made prematurely, it will refuse to act—In *re Seneviratne*, (1928) 30 N. L. R. 299. One can conceive of cases where owing to the heinousness of the offence, it may be considered that a practitioner who has been found to be guilty of such an offence should never be admitted within the ranks of the honourable body of men which forms the legal profession. In every case, this Court as the guardian of the honour of the legal profession, must be very careful in readmitting to its ranks a man who has been guilty of a crime involving dishonesty. A character once lost may, however, be redeemed, and if this Court is satisfied that the applicant had redeemed the past, it would be unjust to prevent him from once more earning his living in the profession for which he is qualified—*In re Seneviratne*, (1936) 39 N. L. R. 476. The grounds upon which a member of the legal profession may be restored to the roll are—a palpable and definite repentance, a manifestation of an honest career during a considerable period of time, and adequate reparation, or, at any rate, an offer of all possible reparation in the man's power—In *re a Proctor*, (1925) 39 N. L. R. 517. In that case, this Court said: "We should be sorry to create a precedent which would make it an easy matter for a man to be once more restored to the legal profession". The question of reinstatement depends, not only on whether the applicant has redeemed his character, but also whether he may with propriety be allowed to return to the practice of an honourable profession? An honest attempt to make reparation is regarded as some evidence of a redeemed character—in *re Wijesinghe*, (1939) 40 N. L. R. 385. In another case, this Court held that before a practitioner could be reinstated the Court has to be satisfied that the efforts of the applicant to live a decent and respectable

life has been continued over a period sufficiently long to make it say with confidence that he can be safely entrusted with the affairs of clients, and admitted to an honourable profession without that profession suffering degradation—In *re Wickremasinghe*, (1945) 46 N. L. R. 204.

Having regard to the nature of the offences of which the petitioner was proved guilty, and all the facts and circumstances of the case, we do not think that the application for reinstatement should be allowed. This case stands apart from the general run of cases of professional misconduct, and a solemn duty is cast upon this Court to make it clear, particularly at a time when public morality is at a low ebb, that it is not an easy matter for a person convicted of offences of this kind to be restored to the ranks of an honourable profession, the good name of which he had degraded by his conduct.

The Solicitor General had drawn our attention to the fact that this is the first occasion when a member of the English Bar, who is also an advocate of the Supreme Court, has been struck off the rolls. We are of opinion that when the petitioner was disbarred in 1937, it was the duty of the Registrar of this Court to have forthwith reported that fact to the Inn to which the petitioner belonged. We direct that this action should now be taken.

The application is dismissed with costs fixed at Rs. 105.

NAGALINGAM, J.
I agree.

WINDHAM, J.
I agree.

Application refused.

Present : JAYATILEKE, S.P.J. & BASNAYAKE, J.

GIVENDRASINGHE vs. DE MEL

S. C. 58 *D. C. (Inty.) Colombo* 19474.

Argued on : 21st September, 1949.
Decided on : 26th October, 1949.

Ceylon (Constitution) Order-in-Council 1946—*Section* 14 (1)—*Penalty for sitting or voting in House of Representatives when disqualified to be elected—When right to penalty vests in informer.*

Held : That the right to the penalties imposed by section 14 (1) of the Ceylon (Constitution) Order-in-Council becomes vested in the informer the moment he instituted the action and not when he applied for leave to proceed further under section 14 (2).

H. V. Perera, K.C., with *E. G. Wickremanayake*, and *E. O. F. de Silva*, for the plaintiff-appellant.
C. S. B. Kumarakulasinghe, with *T. K. Curtis*, and *A. I. Rajasingham*, for the second respondent.

JAYATILEKE, S.P.J.

On May 6, 1948, the appellant presented a plaint against the first respondent claiming from him a sum of Rs. 19,000 as penalties under section 14 of the Ceylon (Constitution) Order in Council, on the ground that he sat and voted on 38 days in the House of Representatives as the member for the Colombo South Electoral district knowing or having reasonable grounds for knowing that he was not at the time of his election qualified to be elected by reason of his interest in a contract with the Government.

The section reads :—

14. (1) Any person who :—

(*a*) having been appointed or elected a member of the Senate or House of Representatives, but not having been, at the time of such appointment or election qualified to be so appointed or elected, shall sit or vote in the Senate or House of Representatives, or

(*b*) shall sit or vote in the Senate or House of Representatives after his seat therein has become vacant or he has become disqualified from sitting or voting therein,

knowing, or having reasonable grounds for knowing that he was so disqualified, or that his seat has become vacant, as the case may be shall be liable to a penalty of five hundred rupees for every day upon which he so sits or votes.

(2) The penalty imposed by the section shall be recoverable by action in the District Court of Colombo instituted by any person who may sue for it ; Provided that no such action, having been instituted shall proceed further unless the leave of the District Judge of the Court is obtained.

(3) Where, after the institution of any action in pursuance of the provisions of this action, no steps in pursuit of the action are taken by the person instituting the action for any period of three months the action shall be dismissed with costs.

The District Judge perused the plaint and returned it to the appellant for amendment as it did not specify the dates on which the first respondent was alleged to have sat and voted.

On May 27, 1948, the appellant presented a fresh plaint and moved for a summons on the first respondent. The District Judge accepted it and made an order that summons should not be issued until the appellant obtained leave under section 14 (2) to proceed further.

On July 23, 1948, the second respondent instituted action No. 19474 against the first respondent claiming the same penalties. In the prayer of his plaint he prayed that he be granted leave to proceed with the action. The District Judge accepted the plaint and ordered notice on appellant to show cause why his action should not be dismissed unless he proceeds further. On July 28, 1948, the appellant moved that he be granted leave to proceed with the action. The second respondent opposed the application on two grounds: (1) that his application was earlier in date, and (2) that the appellant's action was a collusive one. The appellant filed an affidavit explaining his delay in applying to the Court for leave to proceed further. He stated that after he instituted this action a duly registered voter for Colombo South Constituency presented a petition to this Court under the Ceylon Parliamentary Elections Order-in-Council 1946, against the return of the first respondent as a member for the said constituency and he expected the inquiry into the said petition to be over before the period fixed in section 14 (3) for him to take steps expired. The District Judge took the view that the appellant's explanation of the delay could not be accepted, and, even if it could be accepted, the appellant had lost whatever rights he had to the penalties by failing to apply for leave to proceed further under section 14 (2) before the second respondent. He accordingly refused the appellant's application. The appeal is against that order.

The main question that arises for consideration is whether the penalties became vested in the appellant the moment he instituted his action. The law on the point is very clear. In *Grosset vs. Ogilive* (5 Bro. P. C. 527) the House of Lords said that it is a known rule in law that on filing an information the informer has a right to the penalty vested in him. This principle was accepted in a number of cases which are referred to in the case of *Forbes vs. Samuel,* (1913) 3 K. B. 735. In view of the provisions of section 14 (2) the vesting would, of course, be subject to his obtaining the leave of District Judge to proceed further. Section 14 (3) gives him right to make his application to proceed further at any time within three months of his filing the action. If he makes the application within three months the District Judge is bound to consider it under section 14 (2). Section 14 (2) does not specify the grounds on which the District Judge would be entitled to refuse the application. In enacting the subsection the legislature, perhaps, intended that before allowing summons the District Judge should satisfy himself that a prior action for the recovery of the same penalty was not pending before him. However that may be, it is clear to us that in refusing the appellant's application the learned District Judge has acted on a misconception of the law that the penalties vested in the informer not when he instituted the action but when he applied for leave to proceed further under section 14 (2).

We would accordingly set aside the order appealed against and send the case back for inquiry on the second objection taken by the second respondent. The appellant will be entitled to the costs of the appeal and of the inquiry in the Court below.

Order set aside.

BASNAYAKE, J.
I agree.

Present : DIAS J. & WINDHAM, J.

BANK OF CEYLON vs. KOLONNAWA URBAN COUNCIL.

S. C. 421-422—*D. C. Colombo,* 16,562 *M.*

Argued on : 28th and 31st October, 1949.
Decided on : 4th November, 1949.

Banker—Payment on Customer's cheques alleged to be forged—Amount debited to Customer's Account—Action by customer to recover moneys so paid—Genuineness of signatures set up in defence—Negligence of customer—Burden of Proof.

Held : (i) That where a banker sets up in defence the genuineness of a signature alleged by the customer to be forged, the onus of proving his case beyond all reasonable doubt lies on the banker.

(ii) That however negligent a banker's customer may have been, such negligence would not avail a banker who honours a forged cheque, unless the customer is estopped from pleading the forgery.

Cases referred to: *Imperial Bank of India Ltd., vs. Sir S. D. Bandaranaike* 75 D. C. Colombo 45,270 (S. C. M. April 10, 1935).

Bennett vs. London & Country Bank (1886), 2 T. L. R. 763.

S. J. V. Chelvanayagam, K.C. with *C. S. Barr Kumarakulasinghe* and *Izadeen Mohamed* for the appellant in 421 and respondent in 422.

N. E. Weerasooria, K. C. with *S. Nadesan* and *S. Sharvananda* for the respondent in 422 and the appellant in 421.

Dias J.

The Kolonnawa Urban Council instituted this action against the Bank of Ceylon to recover three sums of Rs. 3,000, Rs. 4,000 and Rs. 20,000 said to have been wrongly paid out by the Bank on three forged cheques, D1, D2 and D3 bearing the forged signatures of the Secretary and the Chairman of the Urban Council. The plaintiff's case is that the Bank unlawfully paid this money, and unlawfully debited the plaintiff Council's account at the Bank with those sums. The case for the Bank is that the signatures of the three cheques are genuine, and the cheques having been honoured and honestly paid in the ordinary course of business, the money so paid out was correctly debited to the plaintiff's account. The defendant also raised a plea of estoppel against the Council. This plea was abandoned in the course of the trial.

The law relating to a banker who pays out a customer's money on a forged cheque is clear. Section 24 of the Bills of Exchange Ordinance (Chap. 68) declares that where the signature on a bill (which includes a cheque) is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative. A banker who pays out money on a cheque bearing the forged signature of a customer cannot charge the amount so paid out to the account of the customer, unless facts or circumstances exist which in law preclude or estop the customer from pleading that his signature was forged—see *Imperial Bank of India Ltd. vs. Sir S. D. Bandaranaike*, 75 D. C. Colombo 45,270 (S. C. M. April 10, 1935), Grant's Law of Banking (7th ed.), pages 21-22, Paget's Law of Banking (3rd ed.), pages 368 *et seq.*

The plea of estoppel having been abandoned, the only issue which arose between the parties to this action is a question of fact—Are the cheques D1, D2 and D3 forgeries or not? If the former—the defendant, admittedly, would be liable to bear the loss. If the latter—the plaintiff, admittedly, would have to bear the loss, and the defendant would be legally entitled to debit the plaintiff's account with the value of the three cheques.

When a banker sets up the genuineness of a signature which is alleged by the customer to be forged, on whom does the initial *onus* lie? In this case, at the commencement of the trial, the District Judge has recorded: "On the question of the *onus* of proof, Mr. Chelvanayagam (Counsel for the plaintiff) is willing to take on the burden himself in the first instance, leaving it open to him to lead evidence in rebuttal of any facts which the defendant might prove. Mr. Gratiaen (Counsel for the defendant) agrees and states he is satisfied with the undertaking, as he has always maintained that on the pleadings the burden is on the plaintiff". I may, however, point out that in circumstances such as these, the initial burden of proof was on the defendant. Watson in *The Law of Cheques* (*4th ed.*), *p.* 107, says: "Where a banker sets up the genuineness of a signature alleged by the customer to be forged, the *onus* of proving his case beyond all reasonable doubt lies, it is said, on the banker—*per* Denman J. in *Bennett vs. London & County Bank*" (1886), 2 T. L. R. 763.

The District Judge holds on the facts that the cheques D1 and D2 are not forgeries. He takes the view that the Secretary who was on a holiday in Anuradhapura between May 19 and May 23 had signed his name on several blank cheques, including D1 and D2, in the cheque book before he left Colombo, so that should need arise during his absence for any cheques to be issued, such blank forms could be utilised, which, after being signed by a complaisant Chairman, could be issued to the payees. The District Judge, therefore, holds that D1 and D2 bear the genuine signatures of the two persons who by law were authorized and empowered to sign the Council's cheques. Therefore, when D1 and D2 were presented for payment at the defendant bank and honoured, the loss should fall on the plaintiff Council and not on the bank. The District Judge held that the case of cheque D3 stood on a different footing. He held that the defendant bank had not proved by any sort of evidence to his satisfaction that D3 was signed by the Chairman or the Secretary. In other words, he held that D3 was a forgery, and that the loss resulting from the payment of

such a forged cheque, there being no estoppel against the plaintiff, must fall on the defendant. He, therefore, entered judgment in plaintiff's favour for the sum of Rs. 20,000 (D3) and in favour of the defendant for the two sums of Rs. 3,000 and Rs. 4,000 (D1 and D2).

The evidence discloses an amazing state of affairs, which savours more of comic opera than actual fact, as to the manner in which the business of the Kolonnawa Urban Council was managed during the year 1945. In fact, the impression created by the evidence is that those who were responsible for the Kolonnawa rate-payers' money in the year 1945 did everything they ought not to have done, and did not do what they ought to have done, and there was no "health" in them! The Chairman, who is the chief executive officer, had no "business experience" at all. His educational qualifications, admittedly, are poor. He did not know what his duties and responsibilities were. In most matters he was guided solely by the Secretary who "ran the show". Provided a cheque bore the signature of the Secretary, the Chairman blindly appended his signature to it. In addition to his other shortcomings, the Chairman was an invalid who often could not go to the Council's office in order to attend to his duties. Therefore, the Council's cheque book and other important papers were conveyed without any cover or wrapper to the Chairman's residence. No proper office routine was observed. The evidence demonstrates that subordinate officers, including peons, had free access to the cheque book. Various officers were permitted to write out the body of cheques, and there is evidence that even peons had been allowed to do so. In fact, this fraud was first detected, not by a staff officer of the Council, but by a peon! In order to minimise the possibility of fraud a rubber stamp had been provided which had to be affixed to each cheque before it was submitted to the Secretary and the Chairman for their signatures. This stamp reads as follows:—

"Urban District Council, Kolonnawa
..... Secretary
..... Chairman"

The evidence shows that this rubber stamp was kept in the office, and was indiscriminately affixed to each blank cheque no sooner did a new cheque book reach the office from the bank. Therefore, this safeguard against the unauthorised issue of cheques was frustrated. For the mutual safety of banker and customer, the defendant used to send statements regarding the state of the Council's bank account to the plaintiff every ten days' These statements were expected to be scrutinized and checked by the Secretary, who deputed that duty to a subordinate officer, with the result that no checking was ever done. If those statements when received had been checked with the counterfoils of the cheques issued, any fraud or mistake would at once become apparent. The defendant sent the statement P5 covering the period May 15 1945, to May 21. This was received in the Council on May 25, 1945. One of the cheques debited against the Council is Cheque No. 746 for Rs. 4,000 (D1) which was cashed on May 21. The Chairman stated in evidence that it was the duty of the Secretary to check P5. The Secretary stated that it was the duty of the Chief Clerk to do so. Anyway nothing was done, and the fraud passed undetected. The next statement from the bank—P6—was received on June 5, 1945. This statement covers the period May 22, 1945, to May 30. Had anyone taken the trouble to check the entries in P6 with the cheque counterfoils, it would have been discovered that both D1 for Rs. 3,000 and D3 for Rs. 20,000 had been cashed on May 23 and May 30, respectively. None of the staff officers discovered that anything was wrong. It was left to a peon on June 7 to discover that a cheque for Rs. 20,000 had been cashed. A cheque for such a sum had never been issued by the Council. Even then, the cheques D1 and D2 were not discovered. The Secretary and the Chairman then went to the bank and complained about D3 to the bank officials, and the matter was reported to the C. I. D. It was after that—on July 17, 1945, when a "reconciliation statement" was being prepared, that cheques D1 and D2 and the fact that the counterfoils of those two cheques had been abstracted, were discovered for the first time. "As between a bank and its customers, however, there is no implied agreement by the latter to take precautions in the general course of carrying on his business against forgeries on the part of his servants. Such estoppels will arise if, *after* knowledge of a forgery, the customer does anything to mislead the bank and the position of the bank is thereby prejudiced; but no estoppel will result from mere silence for a period during which the position of the bank is not altered for the worse"—*Grant's law of Banking, pages* 21-22. "Mere carelessness in keeping the cheque book is, of course, no use. In fact, it is generally adduced as the *reductio ad absurdum* of the contention as to estoppel by negligence. The entrusting of the occasional drawing of cheques to an agent, who subsequently draws others without authority, would come rather under the head of "holding out" than of estoppel by breach of duty. The lack of supervision over an agent who might have access to the cheque book and opportunities for concealing forgeries

committed by him is, probably, too remote in this connexion"—*Paget on the Law of Banking, pages* 368 *et seq.*

Both the Chairman and the Secretary have denied on oath that the signatures on D1—D3 are theirs. The evidence of the handwriting experts did not carry the proof very far. Mr. Nagendram who was called by the plaintiff stated that in his opinion the signatures on D1 to D3 were forgeries. Mr. Lawrie Muttukrishna who was called by the defence expressed the view that D1 to D3 were "*probably*" signed by the Secretary, while with regard to the signatures of the Chairman he was of the view that "the probabilities were evenly balanced, there being no obvious feature of forgery". Taking all the circumstances Mr. Muttukrishna was of the view that the signatures were "more probably genuine than spurious". Dealing with the expert evidence, the District Judge said "I do not feel justified in accepting entirely either the opinion of Mr. Nagendram or the opinion of Mr. Muttukrishna. Each of these experts holds a different opinion and gives his reasons for it. These reasons fade when tested by cross-examination and when other signatures are pointed to, which bear the same features emphasised as reasons for the opinions expressed." At the argument in appeal, neither counsel stressed the opinions of the experts. The question must, therefore, be decided without the aid of expert evidence. The officials of the bank, who from their experience and training may be as good witnesses on questions of handwriting as any handwriting expert, are unanimous in their view that the signatures on D1—D3 are genuine. These persons, however, are interested witnesses so far as the question at issue is concerned. The Chairman and the Secretary of the plaintiff Council are equally interested witnesses. Furthermore, there is evidence that since this action was instituted, the Audit has surcharged both of them with the value of these cheque—and that matter is awaiting the decision of this case before any further action is taken.

The authorities which I have cited show that however negligent the banker's customer may have been, such facts would not avail a banker who honours a forged cheque unless the customer is estopped from pleading the forgery. The question of estoppel does not arise in this case. The only question for decision therefore is whether the cheques D1 to D3 were or were not signed by the Secretary and the Chairman of the plaintiff council?

The plaintiff's cheque book for the relevant period is the exhibit P1. This contains two hundred cheque leaves, there being two cheques and two counterfoils to each page.

D1 is cheque No. C 374746. It bears the date May 19, 1945, and has been made out in favour of an admittedly non-existent person called D. J. Perera for the sum of Rs. 4,000. D1 bears the Council's rubber stamp, and purports to have been signed by the Secretary and the Chairman. D1 was presented at the defendant bank for payment by an unidentified person on May 21, 1945, and was honoured, the alleged forgery passing undetected. The evidence conclusively shows that no sum was owing to a person called D. J. Perera from the Council. There is no supporting voucher or receipt for it. This payment of Rs. 4,000 does not appear in any ledger or cash book of the Council. Obviously, some person who was thoroughly familiar with the negligent practices of the plaintiff Council has taken advantage of the situation and perpetrated a fraud on the plaintiff. The Council gained no advantage by the issuing or the cashing of D1. There is no evidence to show that either the Chairman or the Secretary or any other official of the Council gained anything either.

Cheque D1 (C 374746) and cheque D2 (C374745) formed one single page in the cheque book P1. Not only were both the cheque leaves used to commit fraud, but both the counterfoils of D1 and D2 have been skilfully removed from the cheque book, thereby preventing anyone from detecting the abstraction, unless he scrutinized the numbers of the various cheque counterfoils with care. In fact, neither D1 nor D2 were discovered until the C. I. D. commenced their investigation.

Cheque D2 (C 374745) is dated May 21, 1945, and is payable to an admittedly non-existent person named Thomas Perera for the sum of Rs. 3,000. D2 bears the Council's rubber stamp, and purports to bear the signatures of the Secretary and the Chairman. The Council had no dealings with a person called Thomas Perera, nor was a sum of Rs. 3,000 or any sum due from the Council for any work done or service rendered by a Thomas Perera. There is no supporting voucher or any document or entry for this payment in any of the Council's books. Cheque D2 was presented by some unidentified person at the bank on May 23, 1945. He was paid the sum of Rs. 3,000.

The burden of proof lay on the defendant to prove either by direct or circumstantial evidence that the cheques D1 and D2 were signed by the Secretary or the Chairman of the plaintiff Council. There being no direct evidence, this fact had to be established by circumstantial evidence.

On May 22, 1945, the following admitted cheques were written and signed by the Secretary and the Chairman :

No. of Cheque	*Amount*	*Supporting Voucher*	*Date of Payment*	*Entry in Votes' Ledger*
	Rs. c.			
C374739—P17	23 35	No. 67—P44	22-5-45	P33
740—P18	198 72	No. 68—P45	22-5-45	P33
741—P19	90 72	No. 69—P46	22-5-45	P33
742—P20	53 10	No. 70—P47	22-5-45	P35
743—P21	50 70	No. 71—P48	22-5-45	P33
744—P22	448 95	No. 72—P49	22-5-45	P33
745—D2 (abstracted)		D2 is dated 21-5-45.		Paid by the bank 23-5.
746- D1 (abstracted)		D1 is dated 19-5-45.		Paid by the bank 21-5.
747—P23	25 00	No. 73—P50	22-5-45	P33
748—P24	424 03	No. 74—P51	22-5-45	?
749—P25	264 10	No. 75—?	?	?

It is a curious fact that although cheques had been written out and signed by the Secretary and the Chairman on May 18, 1945, there is no single cheque—other than D1—which bears the date May 19, 1945. The defence suggests that the reason for this lies in the fact that the Secretary was absent on leave from Kolonnawa between May 19 (a Saturday) and May 23 (a Wednesday), he having proceeded to Anuradhapura on a holiday. The defence points to the fact that on May 22 (Tuesday) the Secretary, although absent on leave, has signed no less than nine admittedly genuine cheques—P17 to P35. The evidence of the Secretary as to where he was on May 22 is extremely unsatisfactory. He made several contradictory statements on this point before the trial of the civil action. At the trial he swore that he curtailed his holiday, and returned from Anuradhapura by the night train reaching Colombo on the morning of May 22 (Tuesday) " because he did not like to leave his wife and children alone in Colombo ". This is a singularly unconvincing reason, and I cannot wonder at the learned District Judge disbelieving him on the point. Not only was there no reason why his wife and children, who had managed to exist without him until the 22nd May, could not safely wait another twenty-four hours for his return, but if his story is true, there should also be available documentary evidence in the office of the Council to corroborate him. If he had attended office on May 22, there must exist the attendance register and other documents written or signed by him on that day which would prove that his story is true. Furthermore, an officer who curtails his leave, would take steps to see that the unexpired portion of his leave would be noted in his personal file, or the leave register, so that should he at any future time desire to avail himself of more leave, he would be able to utilise this unexpired leave. No evidence on this point was forthcoming. The contention of the defence which the District Judge has accepted is that the Secretary has given untrue evidence on this point, and that he was neither in Colombo nor did he sign the cheques P17—P25 or any cheques at all on May 22, 1945.

Why, then, is the Secretary stating what is untrue ? The defence submits that he is doing so in order to cover up an irregularity he was guilty of before he left the office on leave on May 18. They maintain that before the Secretary left the office on leave, he signed a number of blank cheque leaves (P17—P25, D1 and D2), so that should the need arise during his absence for the Council to make payments, signed cheque leaves would be available to be filled in for the proper amounts and to be submitted to the Chairman who, as the evidence abundantly demonstrates, would have signed any cheque provided it bore the signature of the Secretary. During his absence the cheque book would be in the charge of another officer. The suggestion is that some dishonest person took advantage of this opportunity and utilised the two blank cheques D1 and D2 to perpetuate this fraud. When the cheque book was taken or sent to the Chairman on May 22 in order to sign genuine cheques, he found awaiting his signature no less than eleven cheques (P17—P25, D1 and D2), all of which he blindly signed according to his wonted custom. The guilty person then, undetected, abstracted D1 and D2 and removed the counterfoils in order to make detection difficult.

This is an attractive theory, but, unfortunately, it does not account for one important fact. *The cheque D1 bears the date May 19 (Saturday) and was actually cashed at the bank on May 21 (Monday)*, i.e., *before* P17—P25 *were written out.* Assuming that the contention for the defence is sound, and that the Secretary before he left Colombo signed a number of blank cheque forms including D1, then clearly someone had submitted D1 to the Chairman for his signature either on or *prior to May* 21, because D1 was in fact cashed on May 21. May 20 was a Sunday, and one can assume that the Council office would not be open for work on a Sunday. Therefore, the cheque D1 must have been submitted to the Chairman either on the Saturday (May 19) or on the Monday (May 21). *There are no less than seven cheques in the cheque book earlier than D1, namely, P17—P12, and D2).* Therefore, if the cheque book had been submitted to the Chairman for signature on the Saturday or the Monday, even this negligent Chairman could not have failed to detect the unusual circumstances that he was being asked to sign cheque No. C 374746 (D1) when seven cheques, C 374739

to C 374745 were not filled in, or if filled in, bore the date May 22 in regard to six of them and the date May 21 on D2, while D1 itself bore the date May 19.

It seems to me, therefore, that the chain of circumstantial evidence relied on by the defence is incomplete. They rely on this chain of circumstances in order to establish that the signatures of the Secretary and the Chairman on cheques D1 and D2 are genuine. The *onus* is on the bank. The evidence however does not establish the defence contention beyond reasonable doubt. The abstraction of D1 and D2 took place not necessarily after the Secretary had signed P17—P25. Therefore it does not necessarily follow that D1 and D2 bear the genuine signature of the Secretary. At least there is a reasonable doubt on that point. Therefore the main—if not the only ground—upon which the learned District Judge differentiated the cases of D1 and D2 from the facts relating to the cheque D3 falls to the ground. The finding of the District Judge in regard to D1 and D2, that they bear the genuine signatures of the Secretary and the Chairman, cannot, therefore, be supported on the evidence when fairly considered. In the absence of any estoppel which precludes the plaintiff from alleging that D1 and D2 are forgeries, the finding of the learned Judge on this part of the case cannot in my view be justified on the evidence, and must be set aside.

With regard to the cheque D3 for Rs. 20,000, I agree with the findings of the District Judge and they must be affirmed.

The decree entered in the case will therefore be varied as follows :—The defendants must pay to the plaintiff Council the sum of Rs. 27,000 with legal interest thereon from November 2, 1945, till payment in full.

On the question of costs, these should as a rule follow the event. In this case, however, the conduct of the plaintiff Council has been so negligent, that I feel that each party should be ordered to bear their own costs both here and below.

WINDHAM J.—
I agree.

Decree varied.

Present : BASNAYAKE, J.

PETER SINGHO vs. INSPECTOR OF POLICE, VEYANGODA

S. C. 814—*M. C. Gampaha* 50659

Argued on : 9th September, 1949.
Decided on : 11th October, 1949.

Evidence—Illegal entry into premises by Police—Admissibility of evidence gathered in the course of such entry.

Held : That evidence gathered in the course of an illegal entry on property is admissible, if relevant.

Cases referred to: *Fraser vs· Dias*, (16 N. L. R. 109).
Bandarawella vs. Carolis Appu, 27 N. L. R. 401.
Almeida vs. Mudalihamy, 7 Times 54.
Attorney-General vs. Harthewyck, 1 C. L. W. 280.

Asoka Obeysekera, for the accused-appellant.
E. R. de Fonseka, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The appellant has been convicted of an offence under section 43(*b*) of the Excise Ordinance. The only point urged by learned counsel for the appellant is that the raid on the appellant's house was carried out by two police constables when under the Excise Ordinance police constables are not empowered to exercise the powers conferred by section 34. He contends that a conviction based on evidence given by officers, who have no right in law to enter the premises searched is bad. He relies on the case of *Fraser vs. Dias* (16 N. L. R. 109) and the case reported in 6 T. L. R. 98.

I am unable to find in these two cases any authority for learned counsel's submission that a prosecution cannot be sustained on the evidence of persons who have made search without authority. I agree with him that it is undesirable in the extreme that persons to whom the

functions of searching premises has not been entrusted by law should illegally invade the sanctity of a citizen's home. But that is a different matter from saying that evidence gathered in the course of an illegal entry on property is not legal evidence. Evidence gathered in the course of such an entry is admissible if relevant. (*Bandarawella vs. Carolis Appu*, 27 N. L. R. 401), (*Almeida vs. Mudalihamy*, 7 Times 54), (*Attorney-General vs. Harthewyck* 1 C. L. W. 280).

Learned counsel also asks that I should review the sentence which has been imposed on the appellant. The learned Magistrate has sentenced the appellant to undergo six months' rigorous imprisonment. He has no previous convictions, and I think having regard to the circumstances of this case, which do not present any aggravating factors, a fine of Rs. 250 will meet the ends of justice. If the appellant does not pay the fine he will undergo one month's rigorous imprisonment.

Sentence varied.

Present : GRATIAEN, J.

MARTIN vs. S. I. POLICE, KURUNEGALA

S. C. 988/*P*—*M. C. Kurunegala* 49456

Argued on : 13th December, 1949.
Decided on : 19th December, 1949.

Inspection in Criminal case—Charge of rash and negligent driving—Scene of accident visited and inspected in the presence of parties—Object, better understanding of case—Fresh evidence not taken—Is such inspection irregular.

Held : That an inspection of a scene of an accident (in the course of a trial of a person accused of rash and negligent driving) carried out in the presence of parties in order to arrive at a better understanding of the case and not for the taking of fresh evidence is not irregular and does not vitiate a conviction.

Cases referred to : *Barnes vs. Pinto*, (1938) 40 N. L. R. 125.
Aron Singho vs. Buultjens, (1947) 48 N. L. R. 285.

C. S. B. Kumarakulasinghe, with *Sethukavalar*, for the accused-appellant.
Cecil Jayatilcke, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

This is an appeal against a judgment of the learned Magistrate of Kurunegala convicting the accused of offences in connection with an accident in which an omnibus, of which the accused was the driver, was involved on 9th May, 1949. Six passengers were injured as a result of the accident, and I am satisfied that the charges of criminal negligence have been established against the accused.

Learned Counsel for the appellant argued that the conviction was vitiated by reason of an incident which occurred in the course of the trial. After the first witness for the prosecution had given evidence, the Magistrate, by consent of and indeed at the request of the prosecuting inspector and the lawyers for the defence, adjourned Court for a short time in order to visit the scene of the incident. This inspection took place in the presence of the prosecuting officer and of the accused's Counsel, and the learned Magistrate's observations are recorded in his judgment. It is not suggested that these observations are incorrect in any respect, and it is evident that the sole purpose of the inspection which both parties desired was to enable the Court to follow the evidence of the witnesses with a better understanding. With great respect, I think that this procedure, far from being irregular, was both proper and sensible. This is not a case where a Court attempted, when visiting the scene of an alleged offence, to carry out private investigations of its own. Nor has it in any way converted the learned Magistrate into a witness of fact and as such disqualified to hear the case in an impartial manner. The observations of Macdonnell C.J., in *Barnes vs. Pinto*, (1938) 40 N. L. R. 125, and *Aron Singho vs. Buultjens*, (1947) 48 N. L. R. 285, do not condemn the practice of such an inspection, carried out in the presence of the parties, in order to arrive at a better understanding of the case provided that the inspection is not made the occasion for the taking of fresh evidence.

I see no reason for interfering with the conviction or the sentence imposed on the accused. The appeal is accordingly dismissed.

Appeal dismissed.

Present : DIAS J. & WINDHAM, J.

PUBLIC TRUSTEE vs. UDURUWANA

S. C. 359—*D. C. Kandy*, 2,968.

Argued on : 18th November, 1949.
Decided on : 22nd November, 1949.

Donation—Expression of intention on death-bed to donate a sum of money—Acceptance by donee who was present—Death of donor—Is donee entitled to recover gift from donor's estate—Nature of donee's right—Registration of Documents Ordinance, sections 17 and 18.

An employer on his death-bed, in the presence of witnesses expressed his intention to give his servant, the plaintiff, a donation of Rupees 10,000/-. The plaintiff was present and by words and signs signified his thankful acceptance of the gift. Shortly after the donor died.

The plaintiff sued the Public Trustee as executor of the deceased to recover the gift and succeeded in the District Court. The Public Trustee appealed.

Held : (i) That in the circumstances the gift was a *donatio inter vivos* and did not require any specific mode of execution.

(ii) That the plaintiff's right under the donation was a *chose in action* and was not a 'bill of sale' needing registration under the Registration of Documents Ordinance.

Cases referred to:—*Parasatty Ammah vs. Setupillai*, (1872) 3 N. L. R. 271.
Tillekeratne vs. Tennekoon, Ram. (43-45) 155 ; D. C. Matara 20,862, Vand. (1871) 168.
Wickremasinghe vs. Wijetunge, (1913) 16 N. L. R. 413, 3 C. A. C. 52.
Fernando vs. Weerakoon, (1903) 6 N. L. R. 212.
Welappu vs. Mudalihamy, (1903) 6 N. L. R. 233.
Hendrick vs. Suditaratne, (1912) 3 C. A. C. 30.
de Silva vs. Ondaatjee, (1830) 1 S. C. R. 19.
Lokuhamy vs. John, Ram. (72, 75, 76) 215.
Binduwa vs. Untty, (1910) 13 N. L. R. 259.
Fernando vs. Alwis, (1935) 37 N. L. R. 201.
Fernando vs. Fernando, (1944) 46 N. L. R. 44.
Kanapathipillai vs. Kasinather, (1937) 39 N. L. R. 545.
Parampalam vs. Arunachalam, (1927) 29 N. L. R. 289
Fernando vs Cadar, (1931) 9 T. L. R. at p. 9
Jayawickreme vs. Amarasuriya, (1918) 20 N. L. R. 289.
Fichardt, Ltd. vs Faustman, S. A. L. R. (1910).
Gunetilleke vs. Ramasamypillai, (1919) 21 N. L. R. 203
Appuhamy vs. Appuhamy, (1932) 35 N. L. R. at p. 330.
Charlesworth vs. Miles, (1892) App. Cas. at p. 235 (H of L).
The Chartered Bank vs. Rodrigo, (1940) 41 N. L. R. at p. 451.
In *Julis vs. John* (1925) 6 C. L. Rec. 98,
Mohamed Bhoy vs. Maria Dias, (1908) 11 N. L. R. 325.

E. B. Wikramanayake K. C., with *H. W. Jayawardena* for the defendant-appellant.
H. V. Perera K.C., with *B. H. Aluvihare* and *R. S. Wanasundara* for the plaintiff-respondent.

DIAS, J.

The late Mr. N. D. A. Silva Wijeyesinghe, the "Padikara Mudaliyar", on his death-bed in the presence of witnesses expressed the intention to give the plaintiff, his old and faithful servant, who was then present by the bedside, a donation of Rs. 10,000. Mr. S. J. C. Kadirgamar, Proctor, who had been summoned by the dying man from Colombo to Kandy, testified to that fact. The learned District Judge accepted the evidence of Mr. Kadirgamar. Mr. Kadirgamar is a professional man who has no motive for stating what is untrue. Furthermore, his evidence does not stand alone. The evidence of Mr. Kadirgamar and that of the other witnesses, including two medical men, may be summarised as follows. The dying man stated not once, but several times, that he wanted to write cheques for Rs. 10,000 in favour of the plaintiff, Rs. 10,000 in favour of the Bishop of Kandy, Rs. 1,000 in favour of his motor car driver, and he also expressed his desire to make better provision for his wife, who was not present. The plaintiff, when he heard his master express this intention to donate Rs. 10,000 to him, placed the palms of his hands together in oriental fashion and bowed low to his master saying something which Mr. Kadirgamar did not hear. The plaintiff says that he bowed to his master saying that he

thankfully accepted the donation. That is precisely how a Sinhalese man of lowly status would signify his acceptance and thanks to his master for largess promised. The cheque books however, were not available in the nursing home. The plaintiff was, therefore sent to the Queen's Hotel where the Padikara Mudaliyar had been residing. The plaintiff returned with the cheque books, but the doctors forbade the dying man to write or sign any documents, they believed any exertion on the part of the patient might prove instantly fatal. The Mudaliyar then instructed Mr. Kadirgamar to execute a codicil to his will giving effect to his intentions. Mr. Kadirgamar, however, had no licence to practise as a notary at Kandy. Proctor Mr. Guruswamy was fetched, and the two as notaries busied themselves in drafting the codicil. The plaintiff swore that the dying man repeated his intention to donate Rs. 10,000 to him a second time, and that on each occasion he signified his acceptance and thanked his master Before the codicil could be signed, the Mudaliyar expired.

The plaintiff sued the Public Trustee, the executor of the deceased man, to recover this sum of Rs. 10,000. The District Judge gave him judgment, and the Public Trustee appeals.

The law applicable is the Roman Dutch Law. Under that system of jurisprudence a " donation" is an agreement whereby one person called the " donor ", without being under any legal obligation so to do and without receiving or stipulating for anything in return gives *or promises* to give something to another, who is called the " donee " Voet XXXIX 5. 1., 3 Maasdorp (4th Ed.) p.104, 2 Nathan (2nd Ed.) p. 1155. A donation is perfected in one of two ways : (*a*) either by the donor expressing his intention to make the donation, followed by the actual delivery (*traditio*) of the thing donated to the donee ; or (*b*) by the donor expressing his intention to make the donation coupled with the acceptance of the donation by the donee. Donations are perfected by tradition, or even without tradition, when the donor's intention to give and the donee's intention to receive have been clearly expressed. In that case, the donee can compel tradition—*Parasatty Ammah vs. Setupillai*, (1872) 3 N. L. R. 271 ; *Tillekeratne vs. Tennekoon*, Ram. (43-45) 155 ; D. C. Matara 20,862, Vand. (1871) 168 ; *Wickremasinghe vs. Wijetunge*, (1913) 16 N. L. R. 413, 3 C. A. C. 52 ; *Fernando vs. Weerakoon*, (1903) 6 N. L. R. 212. A donation is a bilateral agreement to which there must be two consenting parties—*Welappu vs. Mudalihamy*, (1903) 6 N. L. R. 233. Under the Roman Dutch Law no particular form is required for the acceptance of a donation *inter vivos*. In every case, it is a question of fact whether or not there are sufficient indications of the acceptance by the donee—*Hendrick vs. Suditaratne*, (1912) 3 C. A. C. 80 ; *de Silva vs. Ondaatjee*, (1890) 1 S. C. R. 19. Acceptance of a donation can be established by circumstantial evidence—*Lokuhamy vs. John*, Ram. (72, 75, 76) 215 ; *Binduwa vs. Untty*, (1910) 13 N. L. R. 259. In some cases acceptance may even be presumed from the facts—*Wickremasinghe vs. Wijetunge* (*supra*), *Fernando vs. Alwis*, (1935) 37 N. L. R. 201, *Fernando vs. Fernando*, (1944) 46 N. L. R. 44. A donation which has not been accepted is void. The right to challenge a donation as being void for non-acceptance is not restricted to the donor—*Kanapathipillai vs. Kasinather*, (1937) 39 N. L. R. 545.

Therefore, if A *with the intention* of making a donation of Rs. 100 to B says " I will donate to you the sum of Rs. 100 " and B signifies his *acceptance* if the gift, provided B can persuade the Court that the facts are as he states, he will be entitled to obtain a decree against A, or his legal representative, for that sum of Rs. 100 if the donation is not paid. In the present case the evidence which the learned District Judge accepted shows conclusively that the deceased man unequivocally intended to donate a sum of Rs. 10,000 to the plaintiff and unequivocally intimated that fact to the plaintiff who accepted the donation both by words and signs. The plaintiff would, therefore, be entitled to sue the executor of the deceased donor to recover that money, unless some other legal fetter exists which prevents him from so doing.

It was argued that if a donation had been created, it was a *donatio mortis causa*, and was therefore invalid for want of proper execution. The question, however, is whether this is a *donatio mortis causa ?*

The requisites of a *donatio mortis causa* are—(1) It must be revocable, otherwise it would be a *donatio inter vivos* ; (2) It must be conditional on the death of the donor ; (3) Some mention must be made in the donation itself of the death of the donor ; and (4) It must be executed before five witnesses, or a notary and two witnesses. Donations *mortis causa* may be created in one or other of three ways ; (*a*) By the donor giving something in mere general contemplation of death, but without any fear of an early death or any imminent danger *upon the understanding* that the property donated is not to become the property of the donee until the donor's death ; (*b*) When the gift is made in fear of death from a present illness, or from a particular imminent danger, *with the understanding* that it is not to become the property of the donee until the death

of the donor from the particular illness or danger; or (*c*) where the donation is made in such special fear of death, but *on the understanding* that the *dominium* is to pass to the donee at once, but that the property is to be returned if the donor recovers or escapes from the particular illness or danger. The first two of these may be made *either with or without delivery*, but in the third there must be delivery, as ownership cannot pass without it. In case of doubt, a donation must be presumed to be one *inter vivos*, rather than *mortis causa* even though at the time of the gift the donor may have been in actual fear of death. (1 Maasdorp (6th Ed.) p. 252 et seq.) 2 Nathan (2nd Ed.) p. 1167 Voet XXXIX 6, 3.

In the case we are considering, not only was there no mention at all made by the donor of his death, or that the donation to the plaintiff was to be *conditional on his death*, but the facts and circumstances also indicate that the donor did not expect to die and he desired to create an unconditional donation. I am clearly of opinion that this was a *donatio inter vivos*, and did not require any special mode of execution.

The case of *Parampalam vs. Arunachalam*, (1927) 29 N. L. R. 289, was cited in this connection. I can find nothing in that case which is inconsistent with the view I have formed. It is to be observed that while Garvin J. based his judgment on the ground that the document sued on was a promissory note, and therefore governed by the English law regarding valuable consideration, Dalton J. based his decision on the ground that the document being a *donatio mortis causa was inoperative for want of due execution*. Dalton J. also held that although the intention of the donor was to create a *donatio mortis causa*, that intention was frustrated by the failure to create it in the presence of at least five witnesses, or the formality of notarial execution—see also *Fernando vs. Cader*. (1931) 9 T. L. R. at p. 9. If the transaction we are considering in this case is a *donatio mortis causa*, which I think it was not, it would be inoperative for want of due execution.

In the case of a *donatio inter vivos*, however, no special mode of execution is necessary. The mere intention to donate when clearly expressed by the donor in writing or verbally when coupled with a clear acceptance by the donee by nods, words or signs, is sufficient to create a valid *donatio inter vivos* which the Courts will enforce provided the plaintiff can persuade the Court to believe his case.

In passing I may be permitted to point out that under the Roman Dutch Law, a promise made by an employer to an employee, *e.g.*, to pay the latter a pension or a gratuity in consideration of his past faithful services, is called a *donatio remuneratoria*, and was enforceable in the Courts. Since the decision of the Privy Council in *Jayawickreme vs. Amarasuriya*, (1918) 20 N. L. R. 289, it is settled law that a lawful promise deliberately made to discharge a moral duty or to do an act of generosity or benevolence, can be enforced under the Roman Dutch Law—the *justa causa debendi* to sustain a promise being something far wider than what the English Law treats as good "consideration" for a promise. In *Fichardt, Ltd. vs. Faustman*, S. A. L. R. (1910) Appellate Division 168, a promise made by an employer to an employee to pay him a pension in view of the servant's past faithful services was held to be enforceable, though not registered.

It was next contended that this donation was a "bill of sale" within the meaning of sections 17 and 18 of the Registration of Documents Ordinance, 1927 (Chapter 101) (as amended by Ordinance No. 13 of 1947, sections 3 and 4), and that, therefore, there having been no handing over of the money which was donated to the donee, the donation was not valid or effectual, as it was not created by a writing and registered as required by section 18 (*b*).

This raises the question as to what precisely is the legal relationship or obligation which is created by a *donatio inter vivos* when the property donated is not handed over to the donee? Van Leeuwen's *Censura Forensis*, (1896 Edition) by Barber & Macfadyen p. 90, has the following passage: "A gift is perfected as soon as the donor has expressed his intention, whether in writing or verbally—even by bare agreement; and, for this reason a gift at the present day *gives rise to an action* (*i.e.*, a cause of action) with this limitation, however—that it is not considered perfected before acceptance on the part of the donee has followed.....And this is understood to take place not only by words, but also by nods, and other signs between persons who are present and consenting". It is, therefore, clear that, whereas in the case of a *donatio inter vivos* where the gift is perfected by the intention to give coupled with the actual handing over of the thing donated to the donee, the latter obtains a *chose in possession*, on the other hand, in the case of a *donatio inter vivos* where the gift is perfected by the intention to give coupled with acceptance by the donee, and there is no transfer of property the latter obtains a *chose in action*, namely a cause of action, or the right to sue either the donor or his legal representative for the payment of the money or handing over the thing donated. In this case we are dealing with a donation which falls within the second category. The plaintiff's right under this donation was a *chose in action* and nothing more.

Section 17 (1) of Chapter 101 (as amended by Ordinance No. 13 of 1947, section 3) enacts that "In this Ordinance, unless the context otherwise requires, the expression "bill of sale" shall include (*inter alia*) a transfer, declaration of trust without transfer "and any other assurance of movable property whether absolute, or by way of mortgage or otherwise". The word "assurance" was defined in *Gunetilleke vs. Ramasamypillai*, (1919) 21 N. L. R. 203, to include "a conveyance". Assuming for purposes of argument that a donation without a transfer of property can be called a conveyance, the appellant is met by the provisions of section 17 (2) which provides that "Nothing in this Chapter shall apply.....to *choses in action*". In my opinion this is fatal to the appellant and and demolishes his argument on this point.

The object underlying sections 17 and 18 of the Registration of Documents Ordinance is to prevent false credit being given to people who are allowed to remain in possession of movable property which apparently is theirs, but the ownership of or title to which they have parted with. Therefore, the law provides that, in certain cases where there is no transfer of the movables, the transaction must be evidenced by a writing which must be registered. If this is not done the transaction is not valid or effectual —see s. 18. The law strikes at the document and not at the transaction itself—*Appuhamy vs. Appuhamy*. (1932) 35 N. L. R. at p. 330, and see *Charlesworth vs. Miles* (1892) App. Cas. at p. 235 (H of L). In that case the deed of gift donated the stock-in-trade, goodwill, *book-debts* and *other debts* of a business without any delivery of posession to the donee. It was held that while the transaction was not valid and effectual in the absence of registration in so far as the stock-in-trade was concerned, it was a valid donation so far as the book-debts and other debts (*choses in action*) were concerned. There are several cases in the law reports which illustrate this principle. In *The Chartered Bank vs. Rodrigo*, (1940) 41 N. L. R. at p. 451, it was held that a debt is a *chose in action*, and, therefore, exempted by section 17 (2). In *Julis vs. John*, (1925) 6 C. L. Rec. 98, it was held that the right to recover under a judgment is a *chose in action* and its assignment need not be registered. The facts of the case of *Mohamed Bhoy vs. Maria Dias*, (1908) 11 N. L. R. 325, are instructive. The plaintiffs and the defendants owned undivided shares in a land which was the subject of a partition action. The defendants by a notarial document duly registered in the Land Registry agreed to convey to the plaintiffs the divided portions which would be allotted to them in the final decree, or, if the Court ordered the land to be sold, they *assigned* to the plaintiff all sums of money which they may become entitled to in lieu of their shares in the land. The Court ordered the land to be sold. When the plaintiffs applied to draw out the money from Court, the defendants objected. It was held that the deed did not deal with movable property, and was, therefore, not a "bill of sale" needing registration under the Registration of Documents Ordinance.

If the appellant's argument is sound, then every donation in which the money donated is not handed over to the donee forthwith would be liable to be impeached for want of registration. I am clearly of opinion that sections 17 and 18 have no application to the facts of this case. What Chapter 101 aims at doing is to prevent the creation of real rights in movable property when there is no delivery of possession except by a writing and registration.

The appeal is dismissed with costs.

WINDHAM, J.

I agree.

Appeal dismissed.

Present : NAGALINGAM J. & WINDHAM, J.

SENEVIRATNE vs. KARIAWASAM

S. C. 11—*D. C. Kandy*, 2,770.

Argued on: 29th March, 1949
Decided on: 12th April, 1949

Action for accounting regarding management of estate—Accounts filed by defendant. Commission to examine and report on such accounts before filing objections.—Right to issue summons on witnesses to appear before such Commissioner. Civil Procedure Code section 430.

Of consent, at the instance of the plaintiff, a commission was issued to an accountant to examine and report on the accounts tendered as well as the books of account and connected papers kept by the defendant to an action to render accounts regarding the working and management of an estate.

The plaintiff applied for summons on certain witnesses to appear before the accountant to explain the accounts tendered by the defendant. The District Judge allowed the summons and the defendant appealed.

Held: (i) That the summons should not have been allowed.

(ii) That a commission under Section 430 can only issue when an examination or adjustment of accounts is deemed necessary by court (and not by the parties) to facilitate it in entering up the decree.

Cases referred to : *Bharatchandra vs. Kiranchandra*, (A. I. R. 1925 Cal. 1060).
Tin Cowri Devi vs. Sotto Dowel, 6 C. L. J. 105.

M. H. A. Azeez, for the defendant-appellant.
Cyril E. S. Perera, with *L. G. Weeramantry*, for the plaintiff-respondent.

NAGALINGAM, J.

The facts which give rise to this appeal may be shortly stated as follows : The plaintiff and the defendant purchased jointly certain landed property known as "St. Martin's Group" and the defendant was placed in charge of it as Superintendent to work and manage the estate. The plaintiff alleging that the defendant had not tendered accounts instituted this action to compel the defendant to render an account and on the basis of that account to compel him to pay such sums as may be found due to the plaintiff. The plaintiff also claimed damages on the basis of mismanagement of the estate by the defendant. The defendant alleged that the accounts for part of the period had already been tendered and that for the remaining period accounts were under preparation by a firm of Chartered Accountants and that he was willing to pay the plaintiff any sum that may be lawfully due to him. He also denied that the plaintiff was entitled to any damages on the ground of mismanagement of the property.

At the date of trial the defendant tendered to Court two sets of accounts covering the period during which he was in charge of the estate and which were duly audited. Plaintiff's counsel thereupon made application to Court that the accounts tendered as well as the books of account and connected papers kept by the defendant "be forwarded with a Commission to Mr. H. L. Pope of the firm of Messrs. Pope & Co., Accountants, for examination and report thereon". Plaintiff's counsel further said that he reserved to the plaintiff the right to file objection to the audited accounts after the receipt of Mr. Pope's report. Defendant's counsel consented to the application and Commission was issued to Mr. Pope.

Mr. Pope apparently met with difficulty in understanding the accounts tendered and wrote to the firm of Messrs. Satchithananda, Schokman & de Silva, the Chartered Accountants who had prepared the accounts, for assistance in investigating the accounts and requesting that the clerk of the firm who was engaged in the work may be directed to attend his office so that he may go through the accounts with him. To this letter Messrs. Satchithananda, Schokman & de Silva replied that the accounts were perfectly understandable without any assistance on their part. Mr. Pope also wrote to the defendant to attend his office and explain the accounts but the defendant sent no reply and did not attend. The plaintiff thereupon applied to Court for summons to issue on Messrs. Satchithananda, Schokman & de Silva and the defendant directing their attendance at Mr. Pope's office. Notwithstanding the defendant's objection, the learned Judge directed summons to issue. The appeal is taken from that order.

The order of the learned District Judge has been sought to be supported by reference to section 430 of the Civil Procedure Code which empowered that "in any action in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit, directing him to make such examination." The first point to be emphasized is that a Commission under section 430 can only issue where an examination or adjustment of accounts is deemed necessary and that must mean, deemed necessary by Court (not by one of the parties), as for instance, where the Court before entering a decree in a partnership action (section 202 of the Civil Procedure Code) or in an action for an accounting of pecuniary transaction between principal and agent (section 203 of the Code) considers it essential that the accounts or disputed items of accounts should be examined to facilitate it in entering up the decree. The corresponding section under the Indian Procedure, Order 26 Rule 11 has been interpreted in this sense : See *Bharatchandra vs. Kiranchandra*, (A. I. R. 1925 Cal. 1060). The normal procedure in an action for accounting would be for the party called upon to account to file his accounts and for the plaintiff then to file his objections to those accounts and the Court would next have to investigate the objections so filed. If the Courts finds that the objections cannot be dealt with conveniently and that it will be more expeditious that an investigation should be made by an accountant to assist it in determining the liability of the

defendant, the Court would then be entitled under section 430 to issue a Commission.

In this case it would be seen from what has been said before that the case did not reach such a stage that the Court did not require the assistance of an accountant to determine the liability of the defendant. In fact the application for a Commission was to enable the plaintiff to have the accounts looked into with a view to formulating his objections to them. Although the term "Commission" was used, one can quite understand why it was used, though not in the sense in which the term has been used in section 430 of the Civil Procedure Code. On the defendant tendering his accounts, the plaintiff would have been entitled to examine the documents and he could examine them only in the Court premises. It may have been inconvenient for bulky accounts to be examined at length in the Courthouse, and the application for the Commission cannot but be regarded merely as an application for an authority of Court to enable the documents to be removed from the Court and to be examined in the more congenial surroundings of an accountant's office. The Commissioner so appointed would not properly be a Commissioner within the meaning of section 430 of the Civil Procedure Code but merely a witness with facilities provided for formulating objections, if any, to the accounts filed. The terms of the Commission are explicit and leave no room for doubt as to the nature of the authority conferred on the Commissioner. They only direct the Commissioner to examine the accounts and make a report. The Commission does not empower the Commissioner to examine the parties or witnesses.

It has, however, been contended that under section 434, a Commissioner appointed to investigate accounts has the power to examine the parties and witnesses. But this section appears in a part of the Chapter headed "General Provisions" and is intended primarily to apply to Commissions for the examination of parties and witnesses in terms of sections 420, 422, &c. Section 436 is a section that throws light on the construction to be placed on section 434. That section provides that when a Commission is issued under this Chapter the Court shall direct the parties to the action to appear before the Commissioner in person or by their recognized agents or Proctors, clearly indicating that where the Commissioner is required to examine parties the Court would give a direction to that effect to the parties. The absence of such a direction in the Commission must be regarded as an implied indication by Court that it withholds from the Commissioner the power to examine parties or witnesses even if section 434 be deemed to apply to a Commission to examine accounts and that the Court intends to avail itself of the exception created by the section by the use of the words, "unless otherwise directed by the order of appointment".

The defendant contends that he would not have agreed to a Commission being issued to Mr. Pope had it been suggested that Mr. Pope was to examine parties or witnesses. The consequences of construing the Commission in the way the learned District Judge has done would be, to put it at the lowest most unsatisfactory. The effect would be to enable a witness of the plaintiff to interrogate the defendant and his witnesses in regard to the defence even before the Court could pronounce its views on the nature of the defence. Even a Commissioner whose appointment under section 430 has been duly made has been held to be not in the position of a Judge or arbitrator. See *Tin Cowri Devi vs. Sotto Dowel*, 6 C. L. J. 105, which case is not available to me but a reference to it is found in Saiker's Commentary on the Indian Civil Procedure Code. 8th Ed. 1919. In a case reported in *All India Reporter*, A. I. R. 1925 Patna 576, where the Court appointed a Commission to investigate and to report on the profits arising from certain property mortgaged it was held that the Commissioner was not entitled to take evidence as to the possession of the property by any of the parties or the extent of that possession.

For the foregoing reasons the conclusion I reach is that Mr. Pope was not appointed a Commissioner within the meaning of section 430 of the Civil Procedure Code and that the order directing the defendant and his witnesses to appear before him was not justified in law. I therefore set aside the order of the learned District Judge. The defendant will have the costs of appeal and of the argument in the lower Court.

WINDHAM J.

I agree.

Appeal allowed.

Present : JAYETILEKE, S.P.J. & CANEKERATNE, J.

VELMURUGU vs. ARUMUGAM

S. C. 137—*D. C. Batticaloa*, 569.

Argued on : 16th June, 1949.
Decided on : 29th June, 1949.

Will—Revocation—How it may be effected—Prevention of Frauds Ordinance Section 6.

Held : That under our law a will cannot be revoked except by adopting one or other of the modes of revocation set out in section 6 of the Prevention of Frauds Ordinance.

Cases referred to: *Reed vs. Harris*, 6 Ad. & E. 198.
Cheese vs. Lovejoy, L. R. (1877) 2 Probate Division 251.

P. Navaratnarajah, for the second respondent-appellant.

C. T. Olegasegaram, for the petitioner-respondent.

JAYETILEKE, S.P.J.

The petitioner-respondent applied in this action to obtain probate of a will dated June 14, 1934, of Arumugam Valliamma who died on March 22, 1947. By this will the testatrix left all her property to her two nephews, the petitioner-respondent and the first respondent. The second respondent who is a niece of the testatrix, opposed the application on the ground that the will was revoked by the testatrix in the year 1937. The second respondent was adopted by the testatrix from her infancy and she lived with the testatrix till the year 1934 when she got married to one Kasupathy against the will of the testatrix. The testatrix executed the will shortly after the marriage of the second respondent. The evidence shows that in the year 1936 the second respondent made up with the testatrix and returned to her house and lived there up to the death of the testatrix. The evidence as to revocation was that of one Abubacker. He said that on several occasions the testatrix requested the petitioner-respondent to return the will to her so that she may distribute the properties among the heirs, and, finally, in the year 1937 she asked the petitioner-respondent whether he would return the will or not. Thereupon the petitioner-respondent went into the room, opened a drawer and brought a long envelope and set fire to it saying "Here is the will. It won't be of any use either to you or to me."

The learned District Judge has not expressed any opinion about the evidence of Abubacker in his judgment. He says that, assuming his evidence to be true, it is not evidence of revocation within section 6 of the Prevention of Frauds Ordinance (Cap. 57).

The section provides that no will or codicil shall be revoked otherwise than by another will or codicil or by a writing executed like a will or by the burning, tearing or otherwise destroying the same by the testator or testatrix or by some person in his or her presence or by his or her direction with the intention of revoking the same. The language of the section is identical with that of section 20 of the English Wills Act of 1937. Theobold, Law on Wills 10th Edition, page 39, says that, though a testator may have done everything which he considered necessary to revoke the will, the will is not revoked if he has not adopted one or other of the modes of revocation pointed out in the section.

Mr. Olegasegaram invited our attention to two cases which are very helpful. In *Reed vs. Harris*, 6 Ad. & E. 198, the testator threw his will on the fire to revoke it, but his niece, Alice Harris, snatched it off without his knowledge and put it away. Hearing that Alice had taken the will away the testator asked her to give it up but she refused. Later she promised to burn the will herself and threw a piece of paper on the fire in the presence of the testator saying "Here it is finished." A bench of four Judges held that the will was not legally revoked.

Williams J. said—

> "It is argued that if a testator throws his will on the fire with the intention of destroying it, and someone, without his knowledge, takes it away that is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire, and he did not, the revocation was still good. Where would such construction end? The effect of them would be to defeat the object of the Statute, which was to prevent the proof of a cancellation from depending on parol evidence. The will must be torn or burnt."

Coleridge J. said :—

> " Here the fire never touched the will. It can only be said that the testator's intention to cancel was defeated by the fraud of another party."

In *Cheese vs. Lovejoy*, L. R. (1877) 2 Probate Division 251, a testator drew his pen through the lines of various parts of his will, wrote on the back of it " This is revoked " and threw it among a heap of waste papers in his sitting-room. A servant took it up and put it on a table in the kitchen. It remained lying about in the kitchen till the testator's death seven or eight years afterwards, and was then found uninjured. It was held that the will was not revoked. James L.J. said :—

> " It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the Court below ' all the destroying in the world without the intention will not revoke a will, nor all the intention in the world without destroying : there must be the two'."

There is no evidence in this case that any act specified in the section has been done and it is therefore not possible for us to say that the will has been revoked.

We would dismiss the appeal with costs.

CANEKERATNE J.

I agree.

Appeal dismissed.

Present : BASNAYAKE, J.

RATWATTE vs. KATUGAHA

Applications Nos. 66 *and* 190

Argued on : 7th February, 1950

Decided on : 4th April, 1950

Testamentary Action—Two independent applications for letters of administration by two rival claimants—Application to Supreme Court for transfer of case by one claimant without disclosing the other —Order made allowing transfer—Subsequent application by other to vacate order of transfer—Intentional omission to disclose heir of deceased and to place full facts before court—Contempt of Court—Civil Procedure Code, section 530.

Held : (1) That an intentional omission on the part of an applicant for letters of administration to state who the heirs of the deceased are, as required by section 530 of the Civil Procedure Code, amounts to a contempt of Court.

(2) That such an applicant is not absolved from complying with the requirements of section 530, even though in his view the next of kin are not entitled to succeed to the estate of the deceased.

(3) That an order made transferring a testamentary case, from one Court to another will not be vacated merely on the ground that the applicant for the transfer intentionally omitted to disclose an heir of the deceased.

Application No. 66 :

N. E. Weerasooria, K.C., with *G. T. Samerawickrame* and *Corbett Jayawardena*, for the applicant.

H. V. Perera, K.C., with *N. Kumarasingham* and *S. Mahadevan*, for the respondents.

Application No. 190 :

H. V. Perera, K.C., with *N. Kumarasingham* and *S. Mahadevan*, for the applicants.

N. E. Weerasooria, K.C., with *G. T. Samerawickrame* and *Corbett Jayawardena*, for the respondent.

BASNAYAKE, J.

The above applications were argued before me at the same time as they relate to the estate of the same deceased person, one P. B. Katugaha. In the first application (hereinafter referred to as Application No. 66) the applicant, Mallika Ratwatte, asks that an order made by this Court under section 68 of the Courts Ordinance transferring District Court, Kandy, Testamentary Case No. 796 (hereinafter referred to as Testamentary Case No. 796) to the District Court of Badulla, be vacated on the ground that it was made without hearing the applicant who claims a half share of the estate of the deceased. In the second application (hereinafter referred to as Application No. 190) the applicant Tikiri Bandara Katugaha asks that District Court, Kandy, Testamentary Case No. 793 (hereinafter referred to as Testamentary Case No. 793) be transferred to the District Court of Badulla. Both applications are opposed by the respective respondents.

The relevant facts relating to these applications are as follows: One P. B. Katugaha who resided at Katugaha Walauwa, Bandarawela, died intestate at the Kandy Nursing Home, leaving property all of which is situate within the jurisdiction of the District Court of Badulla. Tikiri Bandara Katugaha, one of the grandsons of the deceased by his only son who predeceased, him, and Mallika Katugaha Ratwatte Kumarihamy, a daughter of the deceased, claimed to be entitled to letters of administration, each to the exclusion of the other. Tikiri Bandara Katugaha was the first to apply for letters of administration but his papers were returned by the Secretary of the District Court on the ground that there was no schedule of property attached to the application. On 17th January, 1949, Mallika Ratwatte filed her application for letters of administration and on 19th January, 1949, Tikiri Bandara Katugaha made his application. The cases were numbered 793 and 796 respectively. On 27th January, 1949, Tikiri Bandara Katugaha through his Proctor K. V. Nadarajah made an application (Application No. 37) under section 68 of the Courts Ordinance for the transfer of Testamentary Case No. 796 to the District Court of Badulla. In his petition he made the following statements:

"1. The petitioner filed the above testamentary case for Letters of Administration in respect of the estate of his late grandfather P. B. Katugaha aforesaid.

2. He died possessed of properties both movable and immovable valued at about Rs. 40,300·25.

3. He was a permanent resident of the Uva Province and died in the Kandy Nursing Home where he was taken for treatment.

4. All the properties left by the deceased are situated in the District of Badulla of the Province of Uva.

5. The only heirs entitled to the said estate are the petitioner and the respondents the grand-children of the said deceased being the sons of his only son M. B. Katugaha who had predeceased him.

6. The petitioner and the respondent live in the District of Badulla.

7. The daughters of the said deceased had gone out in deega and forfeited their rights in the paternal estate.

8. If the estate is to be administered in the District Court of Badulla it would be of much convenience to the parties entitled to the estate and less expensive.

9. The petitioner therefore desires to apply for a transfer of the above case to the District Court of Badulla."

The petition made no reference to Testamentary Case No. 793 instituted by Mallika Ratwatte in which the applicant was a respondent, nor was Mallika Ratwatte made a respondent to the application.

On 28th January, 1949, the application was allowed. There was no opposition to it by the sole respondent, the applicant's own brother. The case was accordingly transferred.

On 17th February, 1949, Mallika Ratwatte filed Application No. 66 asking that the order for transfer be vacated. In her affidavit she makes the following allegations:

"4. On the 17th January, 1949, I filed papers for the administration of the estate of the said deceased in the District Court of Kandy and an Order *Nisi* was entered in terms of the prayer to the petition returnable on the 28th February, 1949, and the same was published in the (Ceylon Daily News) of the 27th January, 1949.

5. On the 18th January, 1949, the 1st respondent abovenamed had sent papers for the administration of the estate of the deceased which application had been numbered T. 796 of the District Court of Kandy and his Proctor had been informed by letter dated 20th January, 1949, (a certified copy of which is attached hereto marked P1) from the Secretary of the Court that I already filed papers and the 1st respondent was requested to communicate with my Proctor.

6. Without making me a party or giving me notice thereof or communicating with me in any way the respondent thereafter made an application to Your Lordships' Court for the transfer of Case No. T. 796 to the District Court of Badulla and the said application was allowed by Your Lordships' Court on the 28th January, 1949.

7. I verily believe that the respondent has wilfully withheld from Your Lordships' Court the fact of my application for administration of the estate of the deceased and that the said case was pending in the District Court of Kandy. These facts had already been communicated to his Proctor by the letter of the Secretary of the Court dated 28th January, 1949, referred to above."

Section 530 of the Civil Procedure Code requires an applicant for letters of administration not only to state who the heirs of the deceased are but also to make the next of kin of the

deceased respondents to the application. This the applicant appears to have intentionally omitted to do, for, on his own showing the deceased left his daughters surviving him. The applicant also failed to make them respondents to his application to this Court for a transfer of the case to the District Court of Badulla.

The applicant is not absolved from complying with the requirements of section 530 of the Civil Procedure Code even though in his view the next of kin are not entitled to succeed to the estate of the deceased.

While the allegations made by the applicant in Application No. 66, if true, disclose an offence of contempt of Court, they do not afford good ground for setting aside the order of transfer. It is common ground that the entire estate of the deceased is situate within the jurisdiction of the District Court of Badulla, which is the most convenient Court for the administration of the estate of the deceased, for one of the most important duties of an administrator is to collect the effects of the deceased. It was contended by learned counsel for the applicant that difficult questions of law would arise in the case and that the District Court of Kandy was the better forum for arguing those questions. I am afraid I cannot agree that that is a good ground for vacating the order of transfer. The application to vacate the order of transfer is therefore refused.

As the respondent, who had notice of the fact that the applicant in Application No. 66 had filed an application for letters of administration, did not make her a respondent to his application for the transfer of the Testamentary Case No. 796 to Badulla and thereby prevented her from opposing his application at the proper time, I make no order for costs in favour of the respondent although he is the successful party.

Application No. 190 of Tikiri Bandara Katugaha for the transfer of Testamentary Case No. 793 is entitled to succeed. In that case Mallika Ratwatte asks for letters of administration in respect of the estate of the late P. B. Katugaha whose estate Tikiri Bandara Katugaha himself seeks to administer in Testamentary Case No. 796 which stands transferred to the District Court of Badulla. I allow his application but order him to pay the respondent's costs of this application. Testamentary Case No. 793 was the earlier of the two actions and the applicant was aware that it had been instituted at the time he made application No. 37 to this Court for the transfer of the case to the District Court of Badulla. No explanation is given as to why he did not apply for the transfer of both cases at the same time.

In the result, Application No. 66 is refused but without costs and Application No. 190 is allowed but the petitioner will pay the respondent's costs.

In regard to the failure of both the Proctor and the petitioner Tikiri Bandara Katugaha to place the full facts before this Court, I direct the Registrar of this Court to issue a rule against them to show cause why they should not be punished for contempt of Court.

Aplication No. 66 refused.
Application No. 190 allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : JAYETILEKE, S.P.J. (President), GUNASEKARA, J., PULLE, J.

REX vs. (1) U. W. HEEN BABA, (2) P. DAVID SINGHO

Appeal 68 *and Applications* 174—175 *of* 1949/*S. C.* 2/*M. C. Badulla* 7804

Argued on : 15th February, 1950
Decided on : 27th February, 1950

Court of Criminal Appeal—Accused charged with unlawful assembly and other offences read with section 146 *of Penal Code—Accused acquitted of unlawful assembly but convicted of the other offences read with section 32 of Penal Code—Is conviction proper—Scope of section 146 and 32 of the Penal Code.*

The appellants were charged with being members of unlawful assembly, the common object of which was (*a*) to commit house breaking and robbery (*b*) house breaking by night (*c*) to cause greivous hurt and (*d*) hurt offences punishable under sections 140, 443, 380, 386, 382 all read with section 146 of the Ceylon Penal Code. The jury acquitted them on all the charges but under direction from the presiding Judge they brought in a verdict that there was no unlawful assembly but that the offences of house-breaking, robbery, grievous hurt and hurt had been committed by the appellants acting in furtherance of a common intention within the meaning of section 32 of the Penal Code.

Held: That in the absence of a charge with reference to section 32 of the Penal Code the appellants should not have been convicted. Section 146 creates a specific offence and deals with the punishment of that offence. Section 32 declares a principle of law and does not create a substantive offence.

Per JAYATILEKE, S.P.J.—"It seems to us that the *ratio decidendi* in *Reazaddi vs. Emperor* is that when a person is charged with having committed an offence under section 149 *, he is told that he committed an offence constructively, and, when he is acquitted of that offence, he cannot be convicted of having committed the offence by his own acts in the absence of a charge that he did so."

Followed: *Barendra Kumar Ghose vs. Emperor* A.I.R. (1925) P. C. 1.; A.I.R. (1924) Cal. 257.
Reazaddi vs. Emperor (1912) 13 Cr. L. J. 502.

Cases referred to: *Bhondu Das vs. Emperor* A.I.R. (1929) Patna 11.
The Government of Bengal vs. Mahaddin I.L.R. 2 Cal. 871.
Abhiram Jha vs. Emperor 15 C.W.N. 254.
Queen vs. Ramjirar Sirbojirar 12 Bom. H. C. B. 1.

Distinguished: *The King vs. Seyaneris* 39 N. L. R. 148.
The King vs. De Silva 41 N. L. R. 483.

M. M. Kumarakulasingham with *V. S. A. Pullenayagam* and *R. S. Wanasundara* for the accused-appellants.

H. A. Wijemanne, Crown Counsel, for the Crown.

JAYATILEKE, S.P.J.

The appellants were charged with the following offences:—

1. That they with others unknown to the prosecution were members of an unlawful assembly the common object of which was to commit house-breaking and robbery and thereby committed an offence punishable under section 140 of the Penal Code.

2. That they, being members of the said unlawful assembly, in prosecution of the said common object, committed house-breaking by night by entering the house of one Thevani Amma, in order to the committing of robbery and thereby committed an offence punishable under section 443 read with section 146 of the Penal Code.

3. That they, being members of the said unlawful assembly, in prosecution of the said common object committed robbery of cash and other articles of the value of Rs. 2,675, property in the possession of Thevani Amma and thereby committed an offence punishable under section 380 read with section 146 of the Penal Code.

4. That one or more members of the unlawful assembly, at the time of committing robbery, in prosecution of the said common object, caused grevious hurt to one Muthiah, which offence was committed in prosecution of the said common object or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object and they being members of the said unlawful assembly at the time of the commission of the said offence and thereby committed an offence punishable under section 386 read with section 146 of the Penar Code.

5. That they, being members of the said unlawful assembly in committing or in attempting to commit robbery in prosecution of the said common object caused hurt to Thevani Amma and thereby committed an offence punishable under section 146 read with section 382 of the Penal Code.

6. That they, being members of the said unlawful assembly in committing or attempting to commit robbery in prosecution of the said common object caused hurt to one Poornam and thereby committed an offence punishable under section 382 read with section 146 of the Penal Code.

The jury acquitted them on all the charges but, acting on a direction given to them by the presiding Judge that it was competent to them to do so, they found them guilty under sections 443, 380, 383 and 382 read with section 32. The verdict of the jury was that there was no unlawful assembly, but that the offences of house-breaking, robbery, grievous hurt and hurt were committed by the appellants acting in furtherance of a common intention within the meaning of section 32 of the Penal Code.

The main question that arises for our decision is whether it was competent to the jury to return a verdict of guilty under sections 443, 380, 383 and 382 read with the section 32 when those offences did not form the subject of separate charges, but were referred to in charges coupled with section 146. The answer to this question would depend on whether charges under the former sections are implicit in charges under the latter sections.

It is well settled law that section 146 creates a specific offence and deals with the punishment of

* (Section 146 of the Ceylon Penal Code) Edd.

that offence and that section 32 merely declares a principle of law and does not create a substantive offence *Barendra Kumar vs. Emperor* Air (1925) P. C. 1, Air (1924) Cal. 257.

The scope of sections 146 and 32 was defined by the Privy Council in the case of *Barendra Kumar Ghose vs. Emperor* (supra). Lord Sumner said :

(1) " The other part of the appellant's argument rests on sections 114 and 149 (which correspond with sections 107 and 147 of our Penal Code) and it is said that if section 34 (which corresponds with section 32 of our Penal Code) bears the meaning adopted by the High Court—these sections are otiose. Section 149, however, is certainly not otiose for in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, viz. one of those named in section 141 (which corresponds with section 138 of our Penal Code) and then the doing of acts by members of it in prosecution of that object."

(2) " Section 34 deals with the doing of separate acts, similar or diverse, by several persons ; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for ' that act ' ' and the act ' in the latter part of the section must include the whole action covered by ' a criminal act ' in the first part, because they refer to it."

When the charges are read in the light of the first dictum it is clear that the appellants were not charged on counts 2, 3, 4, 5, 6, with having committed the offences of house-breaking, robbery grievous hurt and hurt themselves, but they were charged on the basis that they were constructively liable inasmuch as some person or persons committed the said offences in prosecution of the common object of the unlawful assembly in which they were engaged. In order to establish these charges the Crown had to prove—

(1) That the appellants were members of an unlawful assembly ;

(2) That the offences were committed in prosecution of the common object or that the offences were such as the members knew to be likely to be committed in prosecution of the common object ;

(3) That the appellants were members of the assembly at the time the offences were committed.

It must be noted that in count 4 there is an allegation that the offence was committed in prosecution of the common object or as such as the members of the assembly knew to be likely to be committed in prosecution of the common object. The distinction between the scope of the two sections is brought out very clearly in the following passage in Dr. Gour's well known commentary on the Penal Law of British India, Gour Vol. 1, page 186, 5th edition. :

" It should be observed that the words used here (section 34) are ' in furtherance of the common intention of all ' whereas in section 149, describing a similar community of intention and design of an unlawful assembly, the words used are ' in prosecution of the common object of that assembly ' which cannot mean the same thing as the words used here. What they do mean will, however, be clear by a comparison between the two sections : First, this section is wider as regards the complicity of criminals, since it affects them regardless of number, whereas section 149 limits it to persons whose number is not less than five ; secondly, while the common object under this section is undefined that under section 149 is limited by section 141 ; thirdly, a conviction under this section involves a co-operative criminal act whereas under section 149 all members of an unlawful assembly became constructively liable for an offence committed by one or more of them. In the one case there must be proof of the criminal *act*, while in the other liability would arise for a mere criminal intention or knowledge."

and in the following passage in the judgment of Lord Sumner in *Barendra Kumar Ghose vs. Emperor* (supra) :—

" There is a difference between object and intention for, though their object is common, the intention of the several members may differ and indeed may be similar only in respect that they are all unlawful while the element of participation in action which is the leading feature of section 34 is replaced in section 149 by membership of the assembly at the time of committing of the offence. Both sections deal with combination of persons, who became punishable as sharers in the offence. Thus they have a certain resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

According to Dr. Gour the main distinction between the two sections is that in section 32 criminal liability ensures from the doing of a criminal act in furtherance of the common intention whilst in section 146 it ensures from mere membership of the assembly at the time of the committing of the offence in prosecution of the common object.

There is an illustration in Dr. Gour's commentary at page 187 which shows that the evidence of criminality under the sections varies according to the degree of the criminal intent or criminal act, and that the *mens rea* of the two sections may at times overlap one another. It reads :

" A plans a dacoity and invites B, C and D to join him. They agree to commit dacoity at P's house. Here A has abetted dacoity by B, C and D and all four became members of the criminal conspiracy and would be liable to punishment under section 120 B. They are of course not yet liable under section 34, 114, 149. Now A says to B, C and D ' I am an old man and will only keep a

watch outside P's house'—which he does ; B, C and D enter P's house and rob P. Hence A became liable under section 114 for the dacoity to the same extent as if he had actually joined in robbing P. Now if while proceeding to P's house A, B, C and D meet E and wish him to join them in the dacoity and he refuses A, B, C and D all became liable as abettors under section 115. Now suppose E agrees and joins the four, the five become an unlawful assembly under section 141 ; and suppose E gets hurt while crossing a ditch and remains behind while the remaining four proceed to rob P. A is nevertheless liable with the four by reason of section 149 but section 34 has not yet come into play. But suppose when E joined he warned his companions that while he was for dacoity he was not for shedding blood. But A and B were enemies of P and had previously decided to kill him. Here the common intention of A and B was to kill P though the common object of all the five was to dacoit P. Section 34 begins to function. Now suppose after the dacoity is over B gives P a fatal stroke, B's stroke could be treated as A's stroke as well by reason of section 34 though C, D and E could not be liable for the murder of P. Now suppose in committing dacoity one of them C is seized by P to rescue whom B, C and D strike P with lathis of which P dies, here B had intended to kill P in any case and he with A must share the consequences of B's act, while the common object of the assembly being to dacoit P in prosecution of which B, C and D kill P though by reason of section 149 all five became *prima facie* liable for the murder of P."

The illustration shows the various stages at which sections 32 and 146 came into play and the various offences committed by A, B, C, D and E according to their intentions and objects at various stages. Suppose P was killed by B after the dacoity was over in furtherance of the common intention formed by himself and A, and the prosecution, in ignorance of that fact, charged all five with murder under section 146 read with section 296, could it be said that a charge against A and B for murder under section 296 read with section 32 was necessarily implicit in the former charge? We think not, because they were charged on the basis that the murder was committed either in prosecution of the common object of committing house-breaking and robbery or that they knew that murder was likely to be committed in prosecution of the common object. In a charge under section 296 read with section 32 the prosecution would have to prove that A and or B struck the blow which killed P and that the blow was struck in furtherance of the common intention of A and B to kill P. We are unable to say that there is necessarily implicit in the charge under section 146 read with section 296 an allegation that A, B, C, D and E committed the murder by their own acts. The joint judgment of Holmwood and Imam JJ, in *Reazaddi vs. Emperor* (1912) 13 Cr. L. J. 502 appears to us to be directly in point on this question, and would follow it, as it is in accord with the general principles of law and justice. They said :

"When a Court draws up a charge under section 325 read with section 149 it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves but that they are guilty by implication of such offence, inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. Now when these persons are acquitted of rioting obviously all the offences which they are said to have committed by implication disappear and the defence cannot be called upon to answer to the specific act of causing grievous hurt merely because it may have appeared in the evidence ; for the Court having already declared by its charge that they did not commit a specific act, or not having given effect to the evidence for the prosecution by framing a fresh charge, the defence would not be justified in wasting the time of the Court in defending themselves on a charge which had never been brought against them. This will be perfectly clear if the offence disclosed by the evidence was the heinous one of murder and the Court framed no charge of murder but went on with the charge of rioting obviously in that case the accused could not be called upon to defend themselves on the charge of murder for it is only in the Session Court that the said charge can be tried. The Magistrate appeals to the provisions of section 34, but section 34 can only come into operation when there is a substantive charge of grievous hurt. The considerations which govern section 34 are entirely different and in many respects the opposite of those which govern section 149 and it is now settled law that when a person is charged by implication under section 149 he cannot be convicted of the substantive offence."

Our attention was drawn by learned Crown Counsel to the case of *Bhondu Das vs. Emperor*, A. I. R. (1929) Patna 11, in which Courtney-Terrell, C.J. and Adami J. declined to follow the judgment of Holmwood and Imam JJ. in *Reazaddi vs. Emperor* (supra). The learned Chief Justice said :

"Now follows an important passage in the judgment which shows why in my view the judgment must be considered to be overruled by the decision of the Privy Council :

'The considerations which govern section 34 are entirely those which govern section 149, and it is now settled law that when a person is charged by implication under section 149 he cannot be convicted of the substantive offence.'

The reasoning of the decision (entirely dispelled by Lord Sumner) was based on the view that section 34 necessarily involved specific acts or a group of specific acts of a similar character which brought about the wounding or killing of persons injured. At that time the Court did not understand the real meaning of section 34 and the whole basis of the decision has been destroyed by the judgment of Lord Sumner. Before that judgment it was believed that section 34 only covered a group of acts of a similar character which contributed to a common result but this view has now been dispelled and it follows that the same act on the part of Bhondu Das alleged in the charge and in the evidence in this case in support of section 326 read with section 149 would also support a charge under section 326 read with section 34."

The learned Chief Justice said further that the judgment in *The Government of Bengal vs. Mahaddin*, I. L. R. 2 Cal. 871, *Abhiram Jha vs. Emperor*, 15 C. W. N. 254, and *Queen vs. Ramjirar Sirbojirar*, 12 Bom. H. C. B. 1, illustrate the real test of whether a conviction can be upheld upon a charge which was not expressly formulated, *i.e.*, whether the facts which it was necessaryy to prove and on which evidence was given on the charge upon which the accused is actually tried are the same as the facts upon which he is to be convicted of the substantive offence. If they are and if the accused is put to no disadvantage and would have to adduce no further evidence, then he may be rightly convicted of the substantive offence notwithstanding that the charge was originally framed under sections 147, 148 or 149.

We have examined the cases referred to by the learned Chief Justice and we find that they are by no means helpful on the question we have to decide. In *The Government of Bengal vs. Mahaddin* (supra) the decision was based on section 457 of the Indian Criminal Procedure Code which finds no place in our own Code. In *Abhiram Jha vs. Emperor* (supra) the learned Judge who decided the case said that each case must be decided on its own facts. He said further that though it was sought to implicate the appellant under section 149 the finding was that he was the actual assailant, and, in that sense, the offence under section 326 was included in the constructive offence under section 326 read with section 149. He gave no reasons for his decision. In *Queen vs. Ramjirar Sirbojirar* (supra) a person was charged with—

(1) attempting to commit criminal breach of trust as a public servant ;

(2) framing as a public servant an incorrect document to cause an injury ; and

(3) framing as such public servant an incorrect document to save a person from punishment,

and was acquitted on the ground that he was not a public servant. The High Court held that they ought to have convicted him of attempting to cheat as the facts which he would have had to meet on that charge were the same as he would have had to meet on the charge of criminal breach of trust. With respect, we would say that that case was correctly decided, but it has no application to the present case. It seems to us that the *ratio decidendi* in *Reazaddi vs. Emperor* (supra) is that when a person is charged with having committed an offence under section 149 he is told that he committed an offence constructively, and, when he is acquitted of that offence, he cannot be convicted of having committed the offence by his own acts in the absence of a charge that he did so. It is correct to say that the learned judge said in the course of his judgment that the considerations which govern section 149 are entirely different and in many respects the opposite of those which govern section 34, but we do not agree that the reasoning of that decision is contained in those words. We are of opinion that the safer and the more proper view is that taken in *Reazaddi vs. Emperor* (supra).

Learned Crown Counsel also invited our attention to the judgment of Hearne J. in *The King vs. Sayaneris*, 39 N. L. R. 148, and to the judgment of this Court in *The King vs. De Silva* 41 N. L. R. 483. In *The King vs. Sayaneris* (supra), Hearne J. followed two Indian cases which were cited to him and held that where an accused person is convicted of rioting and causing hurt and grievous hurt under sections 315 and 317 read with section 146 the conviction may be altered by the Supreme Court in appeal to a conviction of causing hurt and grievous hurt under sections 315 and 317 read with section 32 of the Penal Code. Though Hearne J. referred to the opinion of the Privy Council in *Barendra Kumar Ghose* (supra) in his judgment he overlooked the fact that it was decided in that case that section 146 created a specific offence and dealt with the punishment of that offence alone. In *The King vs. De Silva* (supra) there were three charges—

(1) a charge under section 140 ;

(2) a charge under section 146 read with section 296 ; and

(3) a charge under section 296 read with section 32.

The accused was convicted on the first two charges whereupon the Crown withdrew the third charge. On appeal it was found that the conviction on

the first two charges could not be sustained on the question of an unlawful assembly. Learned Crown Counsel contended that the withdrawal of the third charge did not preclude the Court from convicting the accused on that charge. He relied on the provisions of section 185 of the Criminal Procedure Code read with section 6 (2) of the Court of the Criminal Appeal Ordinance No. 23 of 1938. He further contended relying on *The King vs. Sayaneris* (supra) that apart from the third charge the jury could have convicted the accused on count 2 without " unlawful assembly " Howard C.J. who delivered the judgment of the Court said : " We are in agreement with these contentions ". Here again we would repeat what we said before that the learned Chief Justice overlooked the decision of the Privy Council in regard to the scope of section 146.

Learned Crown Counsel addressed another argument to us that the offences of which the appellant were convicted are minor offences within the meaning of section 163 of the Criminal Porcedure Code. The two illustrations given in the section indicate that there is no substance in that argument.

For the reasons given above we are of opinion that in the absence of a charge the appellants could not have been convicted under sections 433, 380, 383 and 382 read with section 32.

On the facts the evidence against both appellants is that of Thevani Amma. She said that she identified both the appellants when they came into the house, but when she was taken to the identification parade she found it difficult to identify the 1st accused appellant by looking at his face. She examined his arms and identified him by the tattoo marks on the arms. That fact leaves room for the suggestion that she had been told by someone that the first accused appellant had tattoo marks on his arms. The evidence against the 1st accused appellant appears to be very weak.

We are of opinion that the convictions of both appellants must be quashed, and we would order accordingly.

Convictions Quashed.

Present : NAGALINGAM, J. & BASNAYAKE, J.

VEDIN SINGHO vs. MENCY NONA

S. C. 491—*D. C. Balapitiya*, 39.

Argued and Decided on : 25th October, 1948.

Damages—Seduction—Plaintiff's evidence contradicted by defendant—Corroboration of plaintiff's evidence.

Held : That to succeed in a claim for damages for seduction, the plaintiff's evidence, when contradicted by the defendant, must be corroborated in some material particular.

Cases referred to :—*Grange vs. Perera*, (1929) 31 N. L. R. 85.
Potas vs. Potas, (1911) C. P. D. 728.
Poggenpoel vs. Morris, (1938) C. P. D. 90.

U. A. Jayasundera, for the defendant-appellant.
K. C. de Silva, for the petitioner-respondent.

NAGALINGAM, J.

The first plaintiff is a minor. Acting by her next friend, the second plaintiff, she instituted this action claiming damages on the ground that the defendant had seduced her under promise of marriage. After trial, the learned judge entered judgment for the first plaintiff in a sum of Rs. 750.

On appeal, it has been contended that there is no evidence which would show that the evidence of the first plaintiff has been corroborated in any material particular, which is made a requirement under our law before an action of this nature can succeed. The learned judge has relied upon one circumstance as showing corroboration of the first plaintiff's testimony, and that is this. He says whether the first plaintiff went to the house of the defendant of her own accord or at the request of her parents or at the request of the defendant was immaterial, but the fact that she did go to the house was in itself corroboration of her testimony, because, unless the defendant had something to do with the first plaintiff, she would not have gone to his house. That is a piece of reasoning with which I find it difficult to agree.

Corroboration must arise from some conduct or from some circumstance other than that of the bare conduct of the first plaintiff herself which in this case is certainly at a date very much later than the alleged act of seduction. The fact that the first plaintiff entered the house of the defendant after a period of fourteen months cannot be regarded as showing that the defendant, by his conduct or by any other method, conducted himself in such a manner as to make any one believe that he had something to do with the first plaintiff herself. The most that can be said is, as the learned trial judge himself remarked, probably the defendant had something to do with the first plaintiff, but what it is that he did or to what extent he had anything to do with the first plaintiff, are matters on which there is no evidence available in this case, or on which it can be said that corroboration has been furnished.

In *Grange vs. Perera*, 1929 31 N.L.R. 85, two possible methods of corroboration were indicated. The conduct of a defendant was there stressed in the second method that was said to be available to a plaintiff who sought to establish a case against a defendant. In this case, as I have remarked, there is no evidence at all of any conduct on the part of the defendant from which it could be said that corroboration of the plaintiff's testimony is proved.

Counsel for the plaintiff contended that there was other conduct on the part of the defendant, upon which, however, the learned judge himself has not relied to sustain his judgment. Counsel contended that the defendant, when he received information of the visit of the first plaintiff to his house, did not make a complaint to the headman, but the evidence is that he did in fact go and make a complaint to the police, and that the police had to come and take the first plaintiff away. So that even that conduct that counsel sought to rely upon does not exist.

In the circumstances, in view of the fact that there is no corroboration of the first plaintiff's testimony, the judgment of the learned judge cannot be allowed to stand. The appeal, is, therefore, allowed and the plaintiff's action is dismissed but there will be no order as to costs.

BASNAYAKE, J. November 9, 1948.

I agree that this appeal should be allowed.

In a contested action for damages on the ground of seduction the rule is that, when the oath of the plaintiff is contradicted by that of the defendant, and there is no evidence *aliunde*, there must be judgment for the defendant, Grotius, 3.35.8—Lee's Translation, Vol. 1, p. 479.

In this case the plaintiff's evidence is contradicted by the defendant. The plaintiff cannot therefore succeed as there is no evidence *aliunde* to support her. By evidence *aliunde* is meant evidence circumstantial or otherwise apart from the plaintiff's evidence which is relevant and leads one to believe the plaintiff and reject the defendant's evidence, *Potas vs. Potas*, 1911 C.P.D. 728. Even a false statement by the defendant may in certain circumstances afford the necessary corroboration, *Poggenpoel vs. Morris*, 1938 C.P.D. 90.

Appeal allowed.

Present : JAYETILEKE, C.J. & GRATIAEN, J.

S. C. 88/M.—D. C. (F) Colombo, 71.

MACKIE vs. THE ATTORNEY-GENERAL.

Argued on : 7th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd, 24th, 28th, 29th, 30th, 31st March, and 3rd, 4th, 5th April, 1950.

Decided on : 22nd May, 1950.

Estate Duty—Shares in private Company—Company engaged in business of highly speculative nature—Valuation under section 20 (1) *of Estate Duty Ordinance Chapter* 187—*Amending ordinance No.* 8 *of* 1941 *inoperative—Proper basis of valuation.*

C. W. Mackie, a life-director of a private incorporated company, engaged in the business of purchasing and selling rubber, died leaving as assets cummulative preference and management shares in the company.

The Company's business was admittedly of a highly speculative nature. The course of its business from 1922, the date of its inception, to 6th September 1940, the death of Mackie, showed violent fluctuations in profits and losses. The articles of association of the company restricted the sale and transfer of shares in the company and provided for the compulsory acquisition of the shares of the members in certain circumstances. The future prospects of the rubber business on 6th September, 1940 were uncertain and conjectural, and as a form of capital investment the business was manifestly hazardous. Under these conditions it was contended that no goodwill attached to the business.

The Commissioner of Income Tax based the valuation of the deceased's shares on the profits basis and refused to accept the valuation of the deceased's executors, which was based on the " tangible assets " value. The learned District Judge accepted the Commissioner's valuation.

On appeal, the Supreme Court had to decide the principle of valuation which was most appropriate to this case under section 20 (1) of the Estate Duty Ordinance. It was common ground that the amending ordinance No. 8 of 1941, which laid down the mode of assessing the value of shares in a similar Company, did not apply as it came into operation after the death of the deceased.

Section 20 (1) of the Estate Duty Ordinance provides :—Subject to the provisions of sub-section (2), the value of any property shall be estimated to be the price which, in the opinion of an Assessor, such property would fetch if sold in the open market at the time of the death of the deceased ; and no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time :.....provided that.....

Held : (i) That the measure of value under the section is the price which a willing vendor could reasonably expect to obtain and a willing purchaser could reasonably expect to have to pay for the shares.

(ii) That to determine the market value of the shares all the relevant factors as known at the date of the deceased's death to a prudent investor willing to pay for the shares should be taken into consideration.

(iii) That in valuing shares in a highly speculative business, whose past history lacks evidence of any *steady* earning power and in which it is not possible to assess logically the future maintainable profits, the "balance sheet method " is the most appropriate method.

Per GRATIAEN, J.—(a) "In my opinion the chief factors for consideration, *as they existed and were known at the time of Mackie's death*, were (1) the nature of the business of the Company (2) the history of the Company from its inception up to 6th September, 1940 (3) the future prospects of the business generally, and of the Company in particular (4) the state of the investment market at the relevant date and (5) the extent, if any, to which the restrictions contained in the Articles of Association might be expected to depreciate the value of the shares."

(b) "The value of a business is on this basis arrived at by adding the value of its goodwill, if any, to the value of its tangible assets.....similarly the value of a " share " in such a business is arrived at by reference to its proper proportion of the sum so computed regard being had to the rights and benefits attaching to such " share " under the Articles of Association."

(c) "It is hoped that early steps will be be taken to modernise the procedure regulating appeals between the Crown and its subjects in estate duty cases. Proceedings of this kind cannot be conducted satisfactorily unless the substantial points of contest are clarified at the earliest possible stage."

H. V. Perera, K.C., with *S. J. Kadirgamar*, for the appellants.

R. R. Crossette-Thambiah, K.C., Solicitor General, with *Jansze, Crown Counsel*, for the Crown respondent.

JAYETILEKE, C.J.

This is an appeal by the applicants, who are the Executors of the last will and testament of C. W. Mackie, deceased, against an order made by the Additional District Judge of Colombo on an appeal preferred by them to the District Court under S. 34 of the Estate Duty Ordinance Chapter 187, confirming the valuation made by the Commissioner for purposes of Estate duty of 5,000 Management Shares held by the deceased in C. W. Mackie & Co., Ltd.

C. W. Mackie died at Aberdeen, Scotland, on September 7, 1940, leaving property in Ceylon which included two assets, namely, 9,201 Cumulative Preference Shares, and 5,000 Management Shares in C. W. Mackie & Co., Ltd.

On December 22, 1942, the appellants delivered to the Commissioner of Estate Duty a declaration of property under section 29 (1) of the Ordinance of which they valued the 9,201 Cumulative Preference Shares at Rs. 758,438·43, and the 5,000 Management Shares at Rs. 4,925 on the figures appearing in the balance sheet as at December 31, 1939 (P8) adopting the method of valuation known as the "tangible assets" method. They valued the Cumulative Preference Shares at Rs. 82·43 per share and the Management Shares at 98½ cts. per share.

On February 15, 1943, the Assessor made a provisional assessment in accordance with the figures furnished by the Executors and on April 21, 1944, he made an additional assessment under section 33 (1) of the Ordinance in which he assessed the 9,201 Cumulative Preference Shares at Rs. 828,090 and the 5,000 Management Shares at Rs. 1,500,000 which works out to Rs. 90 and Rs. 300 per share respectively.

The appellants delivered to the Commissioner of Estate Duty a written notice of objections dated May 19, 1944, by which they objected to the increased assessment on the following grounds :—

1. That the Cumulative Preference Shares could only be valued at par plus the proportion of such profits available for dividend as the holders of the shares were entitled to receive in respect of preference dividends in arrears. On this basis they were prepared to accept a valuation of Rs. 87·601 per share of Rs. 806,017 as certified by the auditors of the Company.

2. That the Management Shares could only be valued on the nett value of the Company's assets at the date of death of the deceased after providing for the value of all the Preference Shares. On this basis they were prepared to accept a valuation of Rs. 203,094 at Rs. 40.6188 per share as certified by the auditors less Rs. 10.6188 for depreciation under the proviso to section 20 (1) of the Ordinance by reason of the death of the deceased.

The appellants raised the figures given by them in their declaration of property to Rs. 806,017 and Rs. 203,094 as a certain sum had accrued as profits between January 1, 1940 and September 6, 1940.

On May 20, 1946, the Commissioner of Estate Duty notified to the appellants his determination to maintain the assessment dated April 21, 1944, subject to a reduction of the valuation of the Management Shares to Rs. 250 per share. The reason for the reduction is not known.

The appellants appealed to the District Court of Colombo against the Commissioner's assessment. Section 40 of the Ordinance says that upon the filing of the petition of appeal and the service of a copy thereof on the Attorney-General, the appeal shall be deemed to be and may be proceeded with as an action between the appellant as plaintiff and the Crown as defendant.

At the trial the following issues were framed :—

1. Is the market value of the Preference and Management Shares in the assessment excessive ?

2. Should the Preference Shares be valued as stated in paragraph 10 (c) of the petition and if not at what sum ?

3. Should the Management Shares be valued as stated in paragraph 10 (c) of the petition and if not at what sum ?

4. Did any goodwill attach to the Management Shares at the date of the death of the deceased and if so what figure ?

5. Was the Management Shares as computed in terms of section 20 (1) of the Estate Duty Ordinance Rs. 1,250,000 and if not what sum ?

After the issues were framed the learned Attorney-General accepted the value placed on the Cumulative Preference Shares by the Executors as the difference was very small and the trial proceeded on issues 1, 3, 4 and 5. After trial the learned Additional District Judge answered the issues as follows :—

1. No.

3. No.

4. Yes, Rs. 250.

5. Yes. The value of the Management Shares is Rs. 1,250,000.

and dismissed the action with costs.

The present appeal is against that judgment.

At the argument before us the claim for depreciation by reason of the death of C. W. Mackie was not pressed.

The appellant's valuation of the shares is based on the "tangible assets" value whilst that of the Commissioner is based on the profits value.

Two questions arise for decision on this appeal (1) whether on the facts of this case the " tangible assets " basis is the appropriate basis of valuation of the shares, (2) if it is not, whether the valuation according to the profits basis is excessive.

The answer to these questions does not depend upon the credibility of the witnesses, which I may say was not questioned at the argument before us. Counsel for the appellants pointed out that the judgment of the learned Additional District Judge is not helpful as he has failed to appreciate the evidence. For instance he failed to appreciate why Mr. Lander raised his valuation of the Management Shares from 98½ cents each to Rs. 40.6188 each.

Mr. Lander, a Chartered Accountant of considerable experience, valued the shares for the appellants. His valuation is as follows :—

	Rs. cts.	Rs. cts.
Total assets ...	2,286,005 02	
Due to creditors		400,186 27
Preference Shares		209,988 00
Dividend arrears 1930-32 Preference Share Dividends 1933-1940		522,720 00
Preference Share Capital		900,000 00
	2,286,005 00	2,121,994 27
Balance ...	164,010 75	
Add profits from 1-1-40 up to 6-1-40 ...	46,982 96	
	210,993 71	
Book value of investments in excess of broker's valuation ...	7,899 30	
	203,094 41	
Divide by 5,000	40.6188	

Mr. Gunasekera, the Assistant Commissioner of Estate Duty, and Mr. Satchithananda, a Chartered Accountant, valued the shares for the Commissioner. Mr. Gunasekera's valuation is as follows :—

	Rs. cts.	Rs. cts.
1936 Profit ...	97,391 00	
1937 Loss ...		42,003 00
1938 Profit ...	149,485 00	
1939 Profit ...	787,640 00	
1940 (1-1-40 6-8-40) Profit ...	454,532 00	
	1,489,048 00	42,003 00
	44,0003 00	

	Rs. cts.	
Total profit ...	1,447,045 00	
Average profit per year ...	310,080 00	
Deduct Preference Share dividends ...	79,200 00	
	230,880 00	
Capitalize at 15% ...	1,539,200 00	
Divide by 5,000	307 84	per share

Mr. Satchithananda's valuation is based on the " weightage method ". He took the nett profits for five years up to the end of 1940 and weighted the profits and losses by multiplying the figures from 1 to 5. His valuation is as follows :—

1-9-35—31-8-36	29,039 00	
1-9-36—31-8-37		5,337 00
1-9-37—31-8-38		73,894 00
1-9-39—31-8-39		489,775 00
1-9-39—31-8-40		507,420 00
When weighted :		
29,039 00×1	29,089 00	
5,337 00×2		10,674 00
73,894 00×3		221,682 00
489,775 00×4		1,959,100 00
507,420 00×5		2,537,100 00
	29,039 00	4,728,556 00
		29,039 00
		4,699,517 00
Weighted average :		
4,699,517 00 / 15		313,300 00
Less Preference dividends ...	67,300 00	
Reserve ...	30,000 00	97,300 00
		215,980 00
Average yield at 16% 215,980×100 / 16		1,349,875 00
Value of share		Rs. 270 00

Mr. Gunasekera's and Mr. Satchithananda's valuation are based on the assumption that the profits would be maintained for at least five years.

Mr. Lander, Mr. Gunasekera and Mr. Satchithananda valued the shares on the footing that the business was a going concern.

In *Abraham vs. Federal Commissioner of Taxation* 70 C. L. R. 23 the report of which is not

available to us but a note of which appears in Adamson, The Valuation of Company Shares and Businesses it was held that the final assessment of the value of the shares must be paid principally on the basis of the income yield but where owing to exceptional circumstances the valuation on this basis presents enormous difficulties it is legitimate to rely more than usual on the assets value.

In *Findlay's Trustees vs. Commissioners of Inland Revenue* 22 A. T. C. 437 Lord Fleming said :—

> " I do not doubt that when one is seeking to ascertain the profits which will probably be earned by a business in the future it is quite usual to do so by taking an average of the profits actually earned for the three preceding years. This probably operates quite equitably when one is dealing with a well-established business which has normal ups and downs but has no violent fluctuations in either direction."

Mr. Lander gave as his reason for adopting the " tangible assets " method that the business carried on by the Company was a highly speculative business and therefore it was not possible to predict that the profits earned in the years preceding the death of the deceased would be maintained in the future. Mr. Gunasekera and Mr. Satchithananda agreed with Mr. Lander that the business was a very speculative one but they thought that as the war was on the profits would be maintained in the future. Mr. Gunasekera said " I cannot think of a more speculative business than Mackie's."

Mr. Satchithananda said " A rubber business can be said to be a speculative business because the risk is greater. It is a very risky business."

Section 20 (1) of the Ordinance which is identical with section 7 (5) of the Finance Act 1894 provides that the value of any property shall be estimated to be the price which, in the opinion of the Assessor, such property would fetch if sold in the open market at the time of the death of the deceased. Section 20 (1) was amended by Ordinance No. 8 of 1941 as follows :—

> " (6) (a) Where the property to be valued consists of shares (not being preference shares) in any company which by its articles restricts the right to transfer its shares or which is a company controlled by not more than five persons, and the Commissioner is satisfied that the shares have not, within the period of twelve months immediately preceding the death of the deceased been quoted in the official list of a recognised stock exchange in the United Kingdom or in a list of a like nature issued in Ceylon by any association of brokers approved by the Financial Secretary for the purposes of this sub-section, the Commissioner may direct that the principal value of such shares for the purposes of this Ordinance shall not be ascertained in the manner provided by sub-section (1), but shall be ascertained by reference to the value of the total assets of the company "

The amending Ordinance does not apply to this case because it came into operation after the death of the deceased but it shows that the " tangible assets " method is an appropriate method to be adopted in the valuation of shares which are subject to restrictions. In *Ellesmere vs. Inland Revenue Commissioners* (1918) 2 K. B. at 740 Sankey J. said :—

> " what is meant by the words ' the price which it would fetch if sold in the open market ' in Section 7(5) of the Finance Act 1894 is the best possible price that is obtainable, and what that it is largely, if not entirely a question of fact ".

The price which the willing vendor could reasonably expect to obtain and a willing purchaser could reasonably expect to have to pay for the shares in question is the measure of the value under the section. In order to estimate the price that a prudent purchaser might reasonably be expected to pay for the shares it is necessary to examine the nature and history of the business, the risks involved and the extent to which the restrictions in the articles might be expected to depreciate the value of the shares.

C. W. Mackie & Co., Ltd., was a private Company incorporated in Ceylon in the year 1922 *inter alia* to take over and carry on the business carried on by the deceased as a dealer in rubber. It had a paid up capital of Rs. 1,000,000 divided into 19,800 8% Cumulative Preference Shares of Rs. 50 each and 5,000 Management Shares of Rs. 2 each. Clause 5 of the Memorandum of Association provides that the Management Shareholders are entitled to all profits and other monies of the Company available for dividend which the directors determine to distribute after making provision for reserve and depreciation and after paying the cumulative preferential dividends and the directors' fees. By Articles 91 and 94 of the Articles of Association the deceased was appointed a life director and was given full control of the business of the Company and the power to arrange the policy of the Company. It appears from P2 that up to the year 1926 the deceased held 3,625 out of the 5,000 management shares and that in that year he purchased the remaining 1,375 shares. The right to transfer shares in the Company was restricted by the Articles of Association.

Article 38 provides that any person proposing to transfer any share shall give notice in writing to the Company that he desires to transfer the

same. Such notice shall specify the sum he fixes as the fair value and shall constitute the Company his agent for the sale of the share so fixed, or, at the option of the purchaser, at the face value to be fixed by the Auditors in accordance with the Articles.

Article 39 provides that the shares specified in the transfer notice shall be offered by the Company in the first place to the Life Director, and, if they are not taken up by him within 90 days, shall be offered by the Company to any person selected by the Life Director whom he may deem it desirable in the interests of the Company to admit to membership. Subject as aforesaid the share shall be offered by the Company to the other members.

Article 41 provides that in case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share the Auditors shall, on the application of either party, certify in writing the sum which, in their opinion, is the fair value and such sum shall be deemed to be the fair value and in so certifying the Auditors shall be considered as acting as Experts and not as Arbitrators.

Article 43 provides that the proposing transferor shall be at liberty to sell or transfer the shares to any person and at any price if the Company fails to find a member willing to purchase the shares. But *Article 45* provides that the Directors may refuse to register any transfer of shares where they are not of the opinion that it is desirable to admit the proposed transferee to membership.

There are certain Articles which relate to the compulsory acquisition of shares, and which prevent a shareholder from owning or being interested in any other business in rubber to which reference should be made. I refer in particular to Articles 46, 47, 48, 49, 50, 53 and 54.

Article 45 provides that the holders for the time being of 9/10ths of the issued capital may at any time serve the Company with a requisition to enforce the transfer of any particular shares not held by the requisitionists whereupon the Company shall forthwith give notice to the holder of such shares notice of such requisition; and unless within 14 days afterwards the holder shall give to the Company a transfer notice in respect of his shares in accordance with Article 38 he shall be deemed at the expiration of that period to have certainly given such notice and to have specified therein the amount of capital paid up on the shares as the sum he fixes as the fair value.

Article 49 provides that in the event of the death of an ordinary director the Life Director and the surviving ordinary directors for the time being may at any time within four years thereafter serve the Company with a requisition to enforce the transfer to them in proportion to the existing shares held by them respectively of any shares standing in the name of any ordinary director and the provisions of Article 46 as to giving notice and other relevant Provisions of that Article shall apply to every such requisition.

Article 48 provides that no member of the Company other than the Life Director shall, without the consent of all the members for the time of the Company, or the Life Director, be interested as a shareholder, Director, Partner, Manager or otherwise in any concern carrying on any business in competition with the Company or any interests opposed to those of the Company and if it be proved to the satisfaction of the shareholders that any member has committed a breach of this Article they may serve him with a notice in writing requiring him to retire from or otherwise determine his interest in such concern and stating that in the event of non-compliance with such requisition within 28 days his shares shall be liable to forfeiture and unless within 28 days after the service of such notice it shall be proved to the satisfaction of the Directors that the requisition has not been complied with the whole of or any of the shares of such member may be forfeited by resolution of the Directors to that extent.

Article 49 provides that a member of the Company other than the Life Director shall not, without the Company's consent or the consent of the Life Director, either solely or jointly with or as Director, Manager or Agent of or for, any other Company or person or persons directly or indirectly carry on or be engaged or concerned or interested as a shareholder or otherwise in any business which the Company is authorised to carry on and the Directors may by resolution forfeit without prejudice to the provisions of Article 30 the shares of any member who acts in contravention of this provision. Article 30 provides that a member whose shares have been forfeited shall be liable to pay to the Company all calls made as payable and not paid on such shares at time of forfeiture and interest thereon up to the date of payment without any deduction or allowance for the value of the shares at the time of forfeiture.

Article 50 provides that a person who ceases to be a member of the Company shall not without the Company's consent or the consent of the Life Director at any time within five years from

the date he ceases to be a member, either solely or jointly with, or as Director, Manager or Agent of or for any other Company or person or persons directly or indirectly, carry on or be engaged or concerned or interested in the business of a Merchant, Produce Broker or Commission Agent in the Island of Ceylon or permit or suffer his name to be used or employed in, carry on or in connection with any such business.

Article 54 provides that the Directors may call on the executors or administrators of a deceased member (other than the Life Director) to transfer the shares of the deceased to some person to be selected by such Executors or Administrators and approved by the Life Director or (if the Life Director be dead) by the Ordinary Directors and if the Executors or Administrators do not comply forthwith with such call they shall be deemed to have served the Company with a transfer notice under Article 38 and to have specified therein a sum equal to the amount paid upon the shares as the fair value and the provisions of that and the subsequent Articles shall take effect.

In the case of *Commissioners of Inland Revenue and others vs. Crossman* (1936) 1 A. E. R., 762 where there were restrictions similar to those contained in Articles 38 and 41, the House of Lords held that the value of the shares for the purpose of duty must be estimated at the price which they would fetch if sold in the open market on the terms that the purchaser should be entitled to be put on the Company's register as the holder of the shares and should hold them subject to the provisions of the Articles of Association including those relating to the alienation and transfer of shares in the Company. In the course of his judgment Viscount Hailsham, L. C. said :—

> " I think full justice is done to the meaning of the sub-section if the property to be valued is determined by the earlier Sections and Section 7 is treated as being merely a statutory direction as to the method by which the value is to be ascertained. In order to comply with that statutory direction it is necessary to make the assumptions which the Statute directs. This is not to ignore the limitations attached to the share. In the present case a share in such a company as this, with an unrestricted right of transfer would probably be worth twice as much as the P355, which is fixed by Findlay J ".

The shares must therefore be valued on the basis that in spite of the Articles of Association the notional purchaser would be entitled to be put on the Company's register in respect of them, and if, by reason of the restrictions, the shares have depreciated in value such fact should be taken into consideration.

The business of the Company was to buy and sell rubber on its own account on a very large scale. It was carried on by the deceased himself from 1922 up to 1931 when he retired and settled down in England leaving Mr. Williams in charge. The deceased, however, kept in touch with the business and controlled its policy right up to his death. The Company had a very large store which cost nearly Rs. 300,000 to build in 1926. Between 25% to 30% of the Island's exports of rubber passed through the hands of the Company. The manner in which the business was carried on was described by Mr. Williams. He said :—

> " Mackie kept a large stock of rubber in hand. He bought whether there was an immediate prospect of selling or not. His plan was to buy as much rubber as possible and stock. He used to buy 50 or 60 tons of rubber a day. He would buy in a falling market and try to sell in a rising market. It was very difficult to find out what a falling market was and what a rising market was. We could not wait for a falling market to buy. We had such large stocks that the rubber had to be turned over. In a falling market we had to sell 50 or 60 tons and try to cover up buying it at a lower price. If we had 5000 tons of rubber in stock at any one time and if the price went up by one cent a pound we would make Rs. 110,000 and if the price went down by one cent we would lose that amount. We used to send rubber to Germany, Australia, Holland,Czechoslovakia and London. We had dealer agents and broker agents in London and other places. We ship the rubber and they sell it. They send bids. If we pay more here we send a counter-offer. Sometimes they take, sometimes they don't ".

As I said before Mr. Lander said that the business was a speculative one and the experts called by the Crown admitted it. It may be useful for me to state in detail what the witnesses called by the appellants said on the point.

Mr. Lander said :—

> " The results show quite clearly that it was a business with a very sensitive produce—rubber, and they indicate that a highly speculative policy had been indicated. There were large profits made in certain periods and very large losses in certain other periods. In 1926 there were large reserves about 3/4 million rupees. The losses gradually eliminated that reserve. In 1932 the Company was insolvent. The movements of rubber over history have been unpredictable. Large fortunes have been made in rubber and large fortunes have been lost in rubber. Rumours of extended production in other countries, changes in policy of consumers and also availability of shipping affect the price. At any time it would have been a gamble to buy any interest in the Company ".

Mr. Williams said :—

> " I have a large experience in the commercial aspect of rubber. It is very difficult to predict with any accuracy the future rubber market. It is not known what is going to happen except on a very few occasions.

> Mr. Mackie carried on a very speculative business. Buying of any interest in Mackie's at any time would have been a gamble ".

Mr. Hayward, the Managing Director of the Rubber and Produce Traders' Ltd., which carried on a business similar to that of Mackie & Co. Ltd., up to 1938 when it was closed down owing to heavy losses, said :—

> " Dealing in rubber is a highly speculative business. There is an exchange for dealing in rubber in London, New York and Singapore and in these three places people gamble in the turnover. Change of Government, over-production, rumours of war, synthetic rubber, large production of motor cars all affect the price of rubber. The Company made half a million rupees in 9 months in 1940. All that could have been lost in three months if it took a wrong view of the market ".

Mr. Cumming, a partner in E. John & Co., a firm of produce brokers said :—

> " In a company like Mackie & Co., Ltd. very much risk in the business is involved because one must be certain of taking the right view. It is a speculative business like the races. At normal times the prices fluctuated ".

The fluctuations in the price of rubber between 1922 and 1940 are to be seen in P10 and the profits and losses of the Company and the dividends paid in P7. P7 shows that between 1922 and 1926 there were profits amounting to Rs. 3,441,359, between 1927 and 1932 there were losses amounting to Rs. 1,804,304, and between 1933 and 1940 there were profits amounting to Rs. 1,911,233. It also shows that dividends were paid on the Preference and Management Shares in 1926 and a sum of approximately Rs. 750,000 was carried to the general reserve, that the preference share dividends for 1927 and 1928 were waived, no dividends were paid on the preference shares from 1930 to 1940 and for the first time between 1927 and 1940 the assets exceeded the liabilities in 1940. It is clear from the figures in P7 that any five years is not comparable with the next five years and cannot be taken as a reasonable anticipation of the next five years. The fluctuations in the profits and losses have been so violent that there is no normality in the history of the Company disclosed in the balance sheet P7. One cannot of course expect normality in a business which is not carried on on business principles but is in the nature of a gamble. Yet Mr. Gunasekera said :—

> " If Mackie died in 1926 I would probably have valued the shares still higher than I have done now unless there was some known factor. After a person had bought them he would have received nothing up to 1940. From 1926 up to 1932 he would have lost all his capital and the company would have been wound up ".

It was argued that the losses during that period were due to the world depression. The depression commenced in the latter part of 1929 but there were losses in 1927 and 1928. There are no materials before us which lend the slightest support to that contention. P10 shows that from 1929 to 1932 the price of rubber dropped steadily and the probability is that the losses were due to the Company speculating heavily in a falling market. The passage quoted above from Mr. Gunasekera's evidence demonstrates how fallacious his method of valuation is when it is applied to a speculative business. With regard to the future prospects of rubber he said that as the market in 1940 was good there was no prospect in the fall in the price of rubber in the next six years. This seems to be pure speculation on his part. It is true that rubber was a munition of war but what guarantee was there that there would be no fluctuations in the price of rubber and that the war would go on for years. Mr. Hayward, who according to Mr. Gunasekera had an intimate knowledge of the rubber market and knew much more about the rubber market than he did, said that, though the Company had made half a million rupees in the first nine months of 1940, it could have lost all that in the next three months if it took a wrong view of the market. It must be remembered that the deceased died at a time when the war had reached a very critical stage for England. France was out of the war and England and the Empire were alone against Germany and Italy. The Battle of Britain had begun and everyone was in doubt whether the Royal Air Force would be able to withstand the tremendous attack by the German Air Force which was superior in strength. It is with the price which a hypothetical purchaser must reasonably expect to have to pay for the shares at this critical period with which we are now concerned. A prospective purchaser may be an investor or a speculator. In normal times an investor would probably not have been interested in these shares because no dividends have been paid for 14 years. A speculator may have been interested in them but could the seller have reasonably expected him to pay anything more than the " tangible assets " value for them? I think not. Could the seller have reasonably expected him to pay even that at a critical period like 1940 when there was the possibility of all human affairs being dislocated? I think not. Mr. Williams and Mr. Cumming gave useful evidence on this point. Mr. Williams said that on the death of the deceased if he got the shares very cheap he would have bought them as a gamble. Mr. Cumming said that in 1940 his firm would not have been

willing to make any underwriting proposition for these shares because the risk was too great owing to the nature of the shares and the war conditions. It was difficult to foresee things and people were anxious to keep their money in their Banks.

The learned Additional District Judge says in his judgment that Mr. Hayward was optimistic about the future of rubber when he was coming back from England in August, 1940. If the learned Judge intended to say that Mr. Hayward was optimistic about the future of rubber for a long period it is a clear misdirection because Mr. Hayward explained in his cross-examination that what he meant was that as the war was in progress he could not take a long view. On a short view he was optimistic, that is, for the next three or four months.

For the reasons given by me I am of opinion that Mr. Lander's method is the more appropriate method to be adopted for the valuation of the shares. That is the method contemplated in the amending Ordinance 8 of 1941 for the valuation of shares of this nature and that was the method which was adopted in 1926 when the deceased acquired the outstanding shares which belonged to Mr. Robertson and others. The figures paid by the deceased represented only the value of the "tangible assets" remaining for each share. Nothing was added on account of good will, presumably because in a speculative business there can be no good will.

Leake on Good will says :—

> "There seems to be no doubt about the truth of the proposition that before it is possible to justify value being put upon the goodwill of any undertaking it must be shown that the expected future annual profits exceed the normal annual wage or hire of the capital invested having regard to the nature of the risk".

In a speculative business one cannot expect profits but can only hope for profits.

There remains the question whether Mr. Gunasekera's valuation is excessive. It was mainly on Mr. Gunasekera's valuation that the Crown relied.

Mr. Perera argued that the rate of conversion adopted by Mr. Gunasekera was too low and that Mr. Gunasekera should have made provision for reserves and Income Tax and an allowance for depreciation in view of the restrictions.

There is a conflict of evidence between Mr. Gunasekera and Mr. Satchithananda as to what the risk rate should be in a speculative product like rubber. Mr. Gunasekera said that he took 10% as the risk rate in adopting 15% as the appropriate rate of conversion, but Mr. Satchithananda said that he would allow 20 to 25% for risk. Mr. Satchithananda's evidence is supported by the evidence of Mr. Cumming, who said that, in a business of this kind, a person would expect 25 to 30% as profits. There is the further fact that, when the shares held by one Mr. G. L. Lyon in Heath & Co., were valued in 1943 for purpose of Estate Duty, the rate of conversion adopted was 14% though there was no risk in the business at all. Heath & Co., carried on business as exporters of tea and, occasionally, rubber on a commission basis.

Mr. Gunasekera said that, if the rate of conversion adopted in the valuation of those shares was 14% he would agree that the rate adopted by him in this case should be higher.

If the risk rate is taken as 20% and the rate of conversion as 25% in the present case which in, my opinion, is by no means excessive Mr. Gunasekera's valuation of the shares will be reduced to Rs. 190 per share.

An examination of Mr. Gunasekera's valuation, which I have set forth fully above, shows that he has made no provision for reserves and Income Tax and no allowance for depreciation. Mr. Gunasekera said that he generally allows a reasonable amount for reserves, but he made no allowance in the present case for the reason given in the following passage in his evidence :—

> "I did not apply the principle of weightage because I did not deduct from these figures any tax payable. I also did not allow a sum that should be with held from distribution to maintain reserves as I thought that the two items would be counterbalanced".

Mr. Gunasekera did not demonstrate how the two items were counterbalanced. I find it extremely difficult to understand what he intended to convey in the passage quoted above, and I have no alternative but to ignore his evidence on the point. Mr. Satchithananda said that in valuing shares provision must be made out of the profits for reserves and Income Tax. P7 shows that a sum of Rs. 750,000 which works out to Rs. 150,000 a year was carried to the general reserve in 1926. If that had not been done the Company would, in all probability, have been wound up before 1932, and the necessity to decide the problems we are confronted with would not have arisen. Again, P9 shows that, in the year 1940, when the Company became solvent after a period of about ten years, a further sum of Rs. 150,000 was carried into the general reserve. It seems to me that Rs. 150,000 is not too large a sum to be put into the reserve annually having regard to the highly speculative nature of the business carried on by the Company. If

that sum is deducted out of the average profits Mr. Gunasekera's valuation would be reduced to approximately Rs. 80 a share. If Income Tax at 15% the rate current at the date of death of the deceased is also deducted the nett balance available for the Management Shares would be Rs. 45,248 which when capitalised at 25% would result in reducing Mr. Gunasekera's valuation to Rs. 36 a share.

Adamson says that (The Valuation of Company Shares and Businesses) restrictions on the alienation of shares, either by vesting in the Directors a general power to refuse to register a transferee whom they consider would be an undesirable member, or by specific requirements as to the consideration payable to an intending seller, or as to the method of offering the shares for sale or by giving them or the Auditors the power to fix a fair value to be paid to the sellers, and similar restrictions detract from the value of the shares for certain purposes, unless a controlling interest is being dealt with, namely, a holding of more than 75% of the total issued shares, which would place the purchaser in a position to use his voting power to remove the restrictions. He says further that such restrictions limit the market, and make the shares unattractive to many investors and to Banks for security purposes. Even if all the preference shares belonging to the deceased were sold along with the management shares the purchaser would have had only 14,000 out of 24,000 shares, which would not have given him a controlling interest in the Company. The extent to which restrictions, similar to those contained in some of the Articles referred to above, depress the value of the shares can be gathered from the passage in the judgment of the Lord Chancellor quoted above and from the following observations of Lord Fleming in the *Trustees of J. T. Salveson vs. Commissioners of Inland Revenue* :—9 A. T. C. 43.

> " I may say at once that I regard these restrictions as depreciating their value very considerably..... All the witnesses were agreed that the restrictions would depreciate the value of the shares but the only witness who put money a value on the restriction was Mr. Robertson-Durham who said that, in his opinion, it might make a difference as much as 8*s* 4*d* on his value of £1-6-8 and, in my opinion, this figure is by no means excessive ".

Mr. Lander did not get an opportunity of putting a money value on the restrictions because the Crown did not disclose Mr. Gunasekera's method of valuation either in the pleadings or in his cross-examination. This is indeed a matter to be regretted. On the materials before me I can only say that the value of the shares is depressed by the restrictions I have referred to.

Mr. Satchithananda's method of valuation is, as I have said before, also based on the maintainability of future profits, and for the reasons given by me is inapplicable to a speculative business. But it seems to me that there are other reasons for rejecting it. For instance, according to P16, which Mr. Satchithananda referred to as the Students' Note issued to him by H. Foulk, Lynch & Co., Ltd., when he was a student, there must be a trend of profits to apply the " weightage method ". An examination of P7 shows that there was no trend of profits from August 1, 1935 up to July 31, 1940. There is also the fact that Mr. Satchithananda admitted in his evidence that in valuing shares all abnormal and all war profits must be excluded and that he failed to exclude the abnormal and war profits made in the years 1938, 1939 and 1940. He admitted further that if the profits made in the war years 1939, 1940 and 1941 were excluded the weighted average would be nil.

I would accordingly uphold Mr. Lander's valuation of the 5,000 Management Shares held by the deceased. On the basis of this valuation it is agreed that the appellants are entitled to a refund of Rs. 166,929.57. I would set aside the order made by the learned Additional District Judge and enter judgment in favour of the appellants for the sum of Rs. 166,929·57 with interest as prayed for in para (d) of the prayer of their petition of appeal dated June 14, 1946. The appellants will be entitled to costs here and in the Court below.

GRATIAEN, J.

This appeal relates to the valuation for purposes of estate duty of 5,000 " Management Shares " held by the deceased C. W. Mackie in the firm of C. W. Mackie and Company Ltd., at the time of his death. A separate dispute regarding the value of 9,201 Cumulative Preference Shares belonging to the deceased in the same Company was settled in the course of the proceedings in the Court below.

C. W. Mackie died in Scotland on 7th September, 1940, and was at that date possessed of a considerable estate in Ceylon and abroad. The Company in which he held the " Management Shares " with which this appeal is concerned was a private Company incorporated in Ceylon in

1922. He was the Life Director and as such he had a controlling interest in the Company's affairs under the Articles of Association. The paid up capital was Rs. 1,000,000 divided into 19,800 Cumulative 8% Preference Shares of the par value of Rs. 50 each (of which the deceased held 9,201 and 5,000 " Management " or ordinary shares of the par value of Rs. 2 each (of which he had held the entirety since 31st December, 1926). The Preference Shareholders had a prior right to be paid their dividends at the rate prescribed for them, but had no further right to participate in the profits of the Company. Any profits left over were available for payment as dividends to the Management Shareholders—but only to an extent which the Directors might recommend; in the event of liquidation, all undistributed profits were to be paid to them after repayment of the capital and arrears of dividends due to the Preference Shareholders. I shall refer later to the restrictions imposed by the Articles of Association on the transfer of a shareholder's interests in the Company.

On 22nd December, 1940, the executors of the deceased's estate furnished the Commissioner with a declaration in which, for purposes of estate duty, they valued each of the " Management Shares " at 98½ cents. This valuation was based (by reference to the figures in the last Audited Balance Sheet of the Company available before Mackie's death, *i.e.*, for the year ending 31st December, 1939) on a computation of the nett assets remaining for each " Management Share " after making provision for taxation and for the liability to Preference Shareholders in respect of capital and arrears of dividends. The valuation was accepted by the Assessor in his provisional Assessment dated 15th February, 1943. On 21st April, 1944, however, he made an additional assessment whereby among other items, he increased the estimated value of each " Management Share " to Rs. 300 on a basis of computation which was not disclosed to the executors until December, 1948, when he gave evidence in the Court below. They appealed from this additional assessment to the Commissioner on 19th May, 1944, but stated that they were now willing to accept a valuation of Rs. 40.6188 per " Management Share ". The learned District Judge has wrongly assumed that this higher figure involved a serious inconsistency on their part. In actual fact, the same principle of valuation—*i.e.*, " the Balance Sheet Method " —was again adopted, but the higher figure of Rs. 40.6188 was arrived at by reason of an increase in the amount of the undistributed profits earned since January, 1940, as shown in the later Balance Sheet for the year ending 31st December, 1940,—proportionate adjustments having been made in those figures so as to ascertain the approximate position of the Company as at 6th September, 1940.

On 20th May, 1946, the Commissioner's determination on the appeal (at which there was no formal *inter partes* hearing) was communicated to the appellants, and, apart from items with which we are not now concerned, the Assessor's estimate of the value of each " Management Share " was reduced to Rs. 250. No reasons for the Commissioner's determination were then or at any later date notified to the appellants; nor were they made available during the proceedings before the learned District Judge or in this Court; the record of the evidence and of Counsels' observations indicates that even the Assessor and the (then) Solicitor-General who presented the case for the Crown in the lower Court seem to have been left to speculate as to the process by which the learned Commissioner had computed the value of the shares. Repeated attempts of the executors' lawyers, both before and at the commencement of the litigation which followed, to seek enlightenment as to the case which their clients were required to meet were either resisted or ignored. Full advantage was taken of the defective machinery of the Estate Duty Ordinance (Chapter 187) and of our Code of Civil Procedure for refusing to disclose information which, if available, would have helped to shorten the proceedings which followed. In the result, the executors, on whom lay the burden of disproving the correctness of the Commissioner's computation at the hearing of the appeal which they preferred in June, 1946, to the District Court of Colombo under section 34 of the Ordinance, entered upon a most unusual task. Indeed, the method of computation ultimately relied on by the Crown (whether it was the same as that adopted by the Commissioner is still a closely guarded secret) was not even specifically put in cross-examination to the appellants' expert witnesses for their criticism. I cannot commend this technique of litigation.

It is hoped that early steps will be taken to modernise the procedure regulating appeals between the Crown and its subjects in estate duty cases. Proceedings of this kind cannot be conducted satisfactorily unless the substantial points of contest are clarified at the earliest possible stage. In the present action, the precise nature of the controversy—namely the proper basis of valuing the deceased's shares—did not clearly emerge until after the case for the executors had been closed. In this country the Crown, as a litigant, still enjoys many immunities and privileges which have been swept away by

the provisions of the Crown Proceedings Act, 1947 in England. So long as these and other immunities and privileges continue to exist, officers of the Crown should, for reasons of fairness and in the interests of justice, respect the long estblished and honourable convention " not to throw any difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice where any real point of difficulty that requires judicial decision has occurred.....unless there be some plain overruling principle of public interest concerned which cannot be disregarded " (vide the English decisions approved by Lord Chancellor Simon in *Duncan vs. Cammel Laird and Company* (1942) A. C. 624. There should be no confusion in this connection between the claims of the *public interest* (to which the rights of every private litigant must of course give priority) and the desire for *financial gain* to the public revenue.

After a protracted trial in the Court below the learned District Judge upheld the Commissioner's assessment, and valued the 5,000 " Management Shares " belonging to the deceased at the time of his death at Rs. 250 each. The present appeal is from his judgment. The grounds on which I differ from the learned Judge sufficiently appear in the reasons which follow. The relevant facts are not in dispute, and no questions as to the credibility of witnesses arises for consideration; the main question for decision relates to the principle of valuation which is most appropriate to the present case.

The value of the shares must be estimated to be the price which they would have fetched " if sold in the open market at the time of the death of the deceased ". The language of section 10 (1) of the Estate Duty Ordinance (Chapter 187) corresponds to that of section 7 (5) of the Finance Act 1894, of England. Admittedly the restrictions imposed by the Articles of Association upon the free transfer of shares in C. W. Mackie and Company, Ltd., would have prevented such a sale in the open market from taking place. It is nevertheless necessary to value the shares at the relevant date by reference to the price which they would have fetched at *a notional sale to a hypothetical purchaser* " on the terms that the purchaser should be entitled to be registered and to be regarded as the holder of the shares, and should hold them *subject to the provisions of the Articles of Association, including those relating to the alienation and transfer of shares in the Company* ". *Commissioners of Inland Revenue vs. Crossman* (1937) A. C. 26. This principle of valuation which was laid down by the majority of the distinguished Judges who decided Crossman's case is, I should imagine, seldom easy to apply in a particular case. As Lord Fleming pointed out in *Salveson's Trustees vs. Commissioners of Inland Revenue* (1930) 9 Annotated Tax Cases 43 " the estimation of the value of shares by a highly artificial standard which is never applied in the ordinary share market must be a matter of opinion and does not admit of precise scientific or mathematical calculation ". It was no doubt for this reason that the Legislature decided, shortly after Mackie's death, to prescribe a statutory basis of computation in such cases. *The Estate Duty Amendment Ordinance No. 8 of* 1941, sanctions a method of valuation—*i.e.*, by assessing the value of the deceased shareholder's interest in the Company's assets (*including goodwill, if any*)—which is analogous to that laid down for similar cases in the Finance Act, 1930 and the later Finance Act, 1940 of England.

It is now common ground that the provisions of the amending Ordinance do not operate in the present case. Apart from the question whether the Ordinance may be regarded as having retroactive effect, the Legislature has, for some reason which is obscure, departed from the English model by leaving it entirely to the Commissioner to decide whether these provisions should operate or not in any particular case. There is no evidence that the Commissioner has so decided in regard to Mackie's shares, although the evasive averment in paragraph 4 of the answer filed on behalf of the Attorney-General seems to indicate that the revenue authorities were at one stage undecided as to which alternative position should be adopted in this connection with best advantage to the Crown.

As far as I can judge, the " Balance Sheet Method " is, in some cases, a method which a Court of law may legitimately adopt when the application of other recognised methods for assessing the " market value " of shares presents great difficulty. In other words, whenever the provisions of the amending Ordinance do strictly apply, the method of valuation thereby prescribed is of course imperative; where the Ordinance does not apply, the method is nevertheless permissible if in all the circumstances of the case it is found to be the most appropriate method of estimating " market value " for purposes of estate duty. The value of a business is on this basis arrived at by adding the value of its goodwill, if any, to the value of its tangible assets. If no goodwill, in the commercial sense, exists the value of the business cannot exceed, although it may sometimes be less than, that of its tangible assets. Similarly, the value of a " share " in such a business is arrived at by reference to its proper proportion of the sum so computed, regard being had to the rights and benefits

attaching to such " share " under the Articles of Association.

Various matters must be taken into account in order to assess the " market value " of the " Management Shares " held by Mackie at the time of his death. Of the many decisions which were cited to us, I have found the judgment of Lord Fleming in *Salveson's case* (1930) 9 Annotated Tax Cases 43 specially instructive in the present context. " The problem can only be dealt with ", he says, " by considering all the relevant factors as known at the date of the deceased's death, in order to determine what a prudent investor, who knew those facts, might be expected to be willing to pay for the shares ". I propose to adopt this method of approach in the present case. Having first discussed what appear to me to be the factors for consideration by a prudent purchaser invited to make an offer for the shares, I shall then proceed to apply the method of valuation which seems most appropriate to the case.

In my opinion the chief factors for consideration, *as they existed and were known at the time of Mackie's death*, were (1) the nature of the business of the Company (2) the history of the Company from its inception up to 6th September, 1940 (3) the future prospects of the business generally, and of the Company in particular (4) the state of the investment market at the relevant date and (5) the extent, if any, to which the restrictions contained in the Articles of Association might be expected to depreciate the value of the shares. I shall deal with these questions in the order in which I have set them down.

(1) *The Nature of the Business :* C. W. Mackie & Company, Ltd., had since its incorporation in 1922 been engaged in the business of rubber dealers, regularly purchasing in the open market and taking delivery of large stocks of rubber with a view to their sale and export in due course. Prices in the rubber market have throughout history been notoriously sensitive, and the Company, when dealing in this commodity, had invariably adopted an extremely speculative policy. Mackie and his Co-Directors did not undertake the safer functions of an agency business purchasing rubber for outside principals on a commission basis ; their policy was to make purchases on their own account in the hope, but not the certainty, of selling the rubber at some later date at a higher figure ; when their predictions as to the future of the market proved correct, the Company earned very considerable profits ; but when their predictions proved wrong, the Company had no option but ultimately to sell its stocks at the lower market price and would in consequence sustain correspondingly heavy losses ; the risk of a falling market or the benefit of a rising market was on each occasion voluntarily undertaken by the Company. It was possible of course to tide over brief periods of adverse price fluctuations by holding its stocks, but this policy could not be carried out indefinitely. Mr. Williams, who had been a Director of the Company and its Manager for over twenty years, stated that it was not possible to predict the future market of rubber except on very rare occasions ; indeed, it is this unpredictability in the movements of the market which has tempted so many speculators to deal with this commodity in the world markets in the same manner as Mackie & Company, Ltd., had done since 1922. The element of chance is of the essence of such a business. The witnesses Williams, Hayward, Cumming and Lander spoke with authority regarding the nature of the business, and the witnesses called by the Crown did not seriously dispute their evidence on this point. Mr. Gunasekera, for instance, has had the benefit of long experience as an assessor in estate duty cases, and he admitted that he " could not think of a business which was more speculative than that of this particular Company ", while Mr. Satchithananda, who is a qualified accountant, described the business as " very risky ". The actual trading results of the Company year by year since 1922 themselves provide the most compelling evidence on the point.

(2) *The History of the Company :* The audited annual Balance Sheets and profit-and-loss accounts from 1922 to 1939 would have been available to an intending purchaser, who must be assumed to be " a person of reasonable prudence anxious to ascertain the relevant facts before making a bid for the shares ". *Findlay's Trustees vs. Commissioners of Inland Revenue* (1938) 22 Annotated Tax Cases 436. He would have found in those documents that during the years 1922 to 1926 the Company had, in consequence of very favourable fluctuations in the price of rubber, made enormous trading profits amounting in the aggregate to Rs. 3,441,359. Out of this sum, the preference shareholders regularly received their annual 8% dividends ; and dividends amounting to as much as Rs. 1,950,000 had been declared and distributed on the " Management Shares ". If the story had ended there, one might well have imagined that Mackie and those associated with him had succeeded in discovering some secret which had eluded and has continued to elude so many speculators in the rubber market. Mackie and the other Directors, however, made a more cautious

assessment of their ability to predict the unpredictable. Out of the Company's undistributed past profits, they placed Rs. 747,901 to general and sundry reserves, and carried forward the balance sum of Rs. 356,913 to the trading account for 1927. It was indeed fortunate that at least this precaution had been taken. Within the next six years the Company, in consequence of consistently unfavourable fluctuations in the price of rubber, sustained an aggregate loss of Rs. 1,804,304—so that the Company, by trading on its issued capital as well as its hidden capital of unpaid preference dividends, reserves and undistributed profits of an earlier period, was now virtually insolvent. The same speculative policy was however persisted in after 1932 with the help of overdraft facilities which Mackie, largely by his personal influence, was able to arrange. The years 1933 and 1934 showed favourable trading results. Then followed 1935 with a loss of Rs. 281,907. A slight profit was made in 1936 followed by a comparatively small loss in 1937. In 1938 the profits earned amounted to Rs. 149,846. The year 1939, which was the last year for which the audited Balance Sheet would have been available to an intending purchaser, showed a welcome gross profit of Rs. 787,641. Nevertheless, the position as at 31st December, 1939, was still "far from healthy" as the Assessor admitted. A sum of Rs. 793,000 was due to the Preference Shareholders who had not been paid their dividends since 1927. The overdraft with the Bank stood at Rs. 1,485,471·25, and in spite of an extremely favourable year of business there was still a nett trading deficit of Rs. 150,828 after allowing for taxation and for the accumulated arrears of preference dividends, (ignoring two years for which payment have been waived). One cannot think that any prudent business man would have been greatly attracted by a proposal that he should invest a very large sum of money, inadequately secured by tangible assets, in a business over which he would have no control, and whose fortunes had in the past been subject to such violent fluctuations. Even if the substantial profits earned up to the date of Mackie's death in 1940 (owing to the market prices having continued *for the time being* to show an upward trend under early war conditions) had been ascertained, I do not see how an optimistic view for all time could be considered justifiable. For how long and to what extent this upward trend would continue it was impossible to say. It has been proved that the trading profits during the second half of 1940 appreciably declined in comparison with those of the earlier six months.

During the period 1st January, 1927, to 6th September, 1940, dividends had not been paid on either Preference Shares or on "Management Shares"; and the nett trading loss sustained (after allowing for taxation) amounted to Rs. 107,614. Even if there was a reasonable prospect of history repeating itself and producing in the near future substantial profits comparable to those of 1922 to 1926, it had to be borne in mind that income tax had come into force in Ceylon since 1931 and that, as Mr. Satchithananda admitted, business circles had become apprehensive (justifiably, as things turned out) of the early additional imposition of an excess Profits Duty. Besides, the history of the Company had made it clear that in favourable years it was prudent to build up sufficient reserves to meet the reverses of unfavourable periods which, in a business of this nature, could not be eliminated in spite of the admitted advantages of skilful management. No doubt the war years 1939 and 1940 had, *up to date*, induced a rising market favourable to the speculator. But for how long those conditions would last, no man could sensibly predict. It is relevant in this connection to consider the view which Mackie's fellow directors in Ceylon had themselves taken of the Company's prospects two days before he died. In spite of a marked improvement in trading results since 1939, they recommended to him that, for the time being, only a small proportion of the arrears of preference dividends which had accumulated since 1927 should be paid out. This cautious attitude stands in sharp contrast to the reckless optimism with which, in the submission of the Crown, a hypothetical purchaser would have bid Rs. 1,250,000 for an investment backed at the relevant date by tangible assets worth only Rs. 203,094·41.

(3) *The Future Prospects of the Business :* I can find nothing in the evidence to justify the assumption that, taking a long view of the Company's future trading, the risks and hazards of speculation had now been eliminated, and that a prudent investor could confidently predict that the fortunes of C. W. Mackie & Company, Ltd., would no longer, as in the past, be subject to violent fluctuations. On the evidence, my view is that it still was, as it had always been, unsafe to form a conclusion in either direction. The Assessor claimed that there was good reason to anticipate that the market would continue to rise for about two years after 6th September, 1940, after which smaller profits would again be earned. (He does not tell us why the possibility of losses in future trading should be excluded.) I do not know whether the view which he expressed was actually held by him at the relevant date; it seems more probable that when he gave

evidence at the trial he was fortified by " wisdom after the event " or by what the learned Solicitor, quoting an Australian decision, referred to as " hind-sight ". In prophesying the future of rubber prices, one man's guess is, I should imagine, no better than another's. At any rate, a Court of Law, when called upon to make assessments for estate duty purposes, cannot justifiably assume that a prudent investor would take a view as to the future which is not supported by reliable evidence of facts which were known at the time. The events which happened after 6th September, 1940, cannot be regarded as relevant *unless they were reasonably predictable on that date.* I have examined the Assessor's evidence with care, and I am not at all satisfied that any cautious person, reviewing the past and attempting to gauge the future at the time of Mackie's death, would have been willing to make a firm offer for the shares on the assumption that within the next six years he would receive back an aggregate sum equivalent to Rs. 1,250,000 in the form of annual dividends. The opinion of an expert is of special assistance only when he gives convincing reasons for his faith. In this respect the evidence of the Crown witnesses seems to me to have failed the test. It must not be forgotten that in the past even Mackie's predictions, in spite of all his accumulated experience of the rubber market, had proved completely wrong throughout the six-year period 1927 to 1932. That knowledge would, I think, have satisfied an investor that it is unsafe to attempt a forecast of the prospects of a rubber dealer's business without entering the realms of pure conjecture.

(4) *The Investment Market in September, 1940 :* The notional sale of Mackie's shares in the open market would have taken place during a critical period in world history. France had capitulated before Hitler's invading armies ; Europe was over-run ; the Battle of Britain had commenced, and its issue was still in doubt. The evidence in the case proves that these events had produced a marked reaction on the mood of investors in Ceylon. As far as this particular Company's activities were concerned, the general uncertainty of world conditions had been super-imposed on the special hazards inherent in speculative trading. Mr. Lander stated that it was difficult at that time to find anyone willing to risk large sums of money on speculative investments. Mr. Cuming, who is a senior broker in Colombo, supported this statement. People preferred to keep their money in the Banks, he said, and he doubted if Mackie's shares would in fact have been purchased at all if they could have been offered for sale in the open market. Mr. Cumming asserted that " no broker would have made an underwriting proposition for the sale of Mackie's shares ; at that time the risk was too great ". These witnesses were not expressing mere opinions on this aspect of the case ; they were stating uncontradicted facts. Mr. Williams was asked if he would have been willing to buy the " Management Shares " himself. " I would buy them *if I got them cheap for a gamble* " he replied. A prudent investor, I do not doubt, would have taken into consideration the views of persons conversant with conditions in the rubber market and the investment market before making a bid. The Assessor did not dispute this evidence. He suggested, however, that some buyer from abroad might have been interested in purchasing the shares, though he admitted that such an eventuality was " not very likely ". Mr. Satchithanandan similarly thought that American or Canadian buyers might perhaps be attracted. I think that these vague suggestions carry the notion of a hypothetical purchaser much too far from reality. It is not clear now, at a notional sale, a bidder from abroad, could have been induced to offer very much more than local bidders were prepared to offer. The conclusion at which I have arrived is that under the existing conditions it would have been an extremely difficult matter to find a buyer for Mackie's shares for a figure in excess of such security as was afforded by the proportionate interest at the time in the available tangible assets. There is evidence that at least one comparable business, discouraged by trading losses and diffident as to the future, had closed down in 1939, and that it proprietors had failed at that time even to find a buyer for their rubber store. No suggestion has been made that its " goodwill ", if offered for sale, would have fetched any sum at all.

Had any speculator confidently predicted a rising market for the period immediately following September, 1940, he would surely have preferred, through a reputable broker to make purchases and sales of rubber in the open market during that period on his own account, and to personally control the destinies and the duration of his investments rather than tie up his capital in a business managed by persons whom he could not control. Any advantages which existed in the established business of C. W. Mackie & Company, Ltd., would presumably have been rendered unnecessary by the allegedly universal " knowledge " that prices were certain to rise, and would in any event be counter-balanced by the restrictive covenants imposed by the Articles of Association. I shall now deal with that aspect of the matter.

(5) *The Articles of Association :* The special attraction of an investment in the shares of a public Company is that a shareholder (or, on his death, his legal representative) has under normal conditions little difficulty in selling his holding in the open market whenever he desires to do so. The hypothetical purchaser of Mackie's shares and his heirs would have been placed in a very difficult position in this respect. *Articles 38 to 43* lay down stringent restrictions on the sale and transfer of shares. If a member of the Company were willing to take over the shares of a member who desired to sell out, the price payable would be a sum which *the Company's auditors, and not the transferor* regarded as their " fair value " at the time. If no member of the Company were willing to take them over, the owner could not sell them except to a third party whom the Directors would agree to admit to membership (*Article 45*), and in any event, that third party would himself be discouraged by the same restrictions after securing his registration as a new shareholder.

On the death of a shareholder, his executor could be compelled to transfer the shares to a member of the Company at a price fixed as their " fair value " by the Auditors. (*Articles 54 and 38*). It was argued for the Crown that a purchaser could circumvent this provision by floating a private Company, in which he would hold the major interest, to purchase the shares. No doubt this would be possible, but the depreciatory effect of Article 54 on market value is self-evident.

A purchaser of the 5,000 " Management Shares " belonging to Mackie would further realise that, as the holder of less than 1/10 of the issued capital of the Company, his interests were liable to be compulsorily acquired by the majority holders *at the Auditors' valuation* (*Articles 46 and 38*). When this difficulty was pointed to the Crown witnesses in cross-examination, they were forced to admit that it was very unlikely that any person would buy the holding of the " Management Shares " unless he could protect himself by purchasing at the same time a sufficient number of Preference Shares from Mackie's Estate so as to remove this handicap. This, I imagine, would have greatly damped the enthusiasm and reduced the number of bidders interested in purchasing the " Management Shares." In valuing a deceased person's property for purposes of Estate Duty, it is of course legitimate to consider the possible advantage of pooling all or some of his assets in the hope of fetching a higher figure than would be realized by a sale of each asset separately. *Ellesmere vs. Inland Revenue Commissioners* (1918) 2 K. B. 435. There must be good reason to anticipate, however, that a sale of the properties in this fashion would in fact have proved more advantageous to the seller as well as to the buyer. In the present case, the Assessor and the Commissioner had in the first instance fixed the value of the " Management Shares " on the basis that they would be sold as a separate holding. Having regard to the state of the investment market in September, 1940, I doubt if it would have been desirable to confine the bidding for the " Management Shares " to persons who possessed sufficient capital to purchase Mackie's Preference Shares as well for their agreed value of Rs. 806,017. On the contrary, it might well have been more prudent to offer the " Management Shares " in even smaller blocks so as to attract more bidders willing to risk small sums in such a speculative investment. My own impression is that the belated suggestion of pooling these two groups of Mackie's assets for the purposes of a notional sale was not present in the Assessor's mind until he was confronted at the trial with the implications of Article 46, Mr. Satchitananda obviously did not originally contemplate a pooling of the shares. His valuation report does not refer to the Preference Shares at all in this convention and his evidence indicates that he had not taken the trouble to study the Company's Articles of Association closely before he entered the witness-box.

Further discouraging features in the Articles of Association were the restrictions which prevented a shareholder from holding interests in any other business which the Company was carrying on or was even authorised to carry on (*Articles 48 and 49*).

(6) *The Basis of Valuation :* It is now necessary to consider which method of estimating the " market value " of shares in this particular private Company is, in the light of the unusual circumstances to which I have referred, the most appropriate. By the very nature of things, no quotations in the public share market for investments in the same or in a comparable business are available to guide us. There is, however, a record of a private transaction which took place at the end of the trading year 1926 whereby Mackie had himself purchased 1,375 " Management Shares " from a retiring member of the Company, Mr. N. J. R. Robertson, and from certain others. These transactions took place *as between willing sellers and a willing buyer* at a time in the Company's history when the trading results for five consecutive years had been exceptionally favourable, and when the " goodwill ", *if any*, of the business could not, on any reasonable hypothesis, have been computed at a

lower figure than in September, 1940. The Company's Balance Sheet then showed substantial reserves which were available to meet losses in future trading ; and the introduction of income tax was not in contemplation at that time. In spite of these advantages, the basis of valuation agreed upon by the parties to the transaction in 1926—namely " the Balance Sheet valuation "—was precisely the same as that on which the appellants have relied in the present case. Mackie voluntarily paid, and his sellers voluntarily accepted, a figure representing only the value at the relevant date of the tangible assets remaining for each " Management Share " in the Balance Sheet of the Company as a going concern, *no additional allowance whatsoever being made for goodwill.* This strongly indicates to my mind that the persons best acquainted with the risks attendant on the Company's activities realised that " *goodwill* " (measured in terms of the " *value of the capacity to earn* super-profits ") is non-existent in a speculative business whose profits or losses depend so largely on unpredictable market fluctuations. This same element of uncertainty which existed in 1926 had not been eliminated in September, 1940.

Mr. Lander's opinion is that for a business of this kind " the Balance Sheet method of valuation " is the most appropriate. He has since 1930 been a member of the firm of Messrs. Ford, Rhodes & Thornton, who are the Company's Auditors. His professional qualifications and the honesty of his views were not challenged at the trial, and I think that his opinion is entitled to considerable weight. Certainly, the implications of Article 38 would have led a prospective purchaser to hesitate before he made a higher offer than the figure at which the Company's auditors valued the shares at the relevant date.

The Company's business was no doubt a well-established business conducted by a reputable management ; nevertheless it was essentially the business of a gambler or a speculator (call it what you will). If it were possible to place a market value on the Company's " goodwill "—which, for purposes of valuation, represents " the benefit and advantage of the good name, reputation and connection of a business " (*Commissioner of Inland Revenue vs. Muller* (1901) A. C. 216—the value of Mackie's interests in the tangible assets should undoubtedly, as was done in *Finlay's case* (1938) 22 Annotated Tax Cases 436 be correspondingly increased. Where, however, there is no " goodwill " capable of assessment except by guess-work, it follows that (even if no deductions be allowed for the depreciatory effect of the restrictions contained in the Articles of Association) no prudent investor could reasonably be expected to offer more for a " Management Share " than the value of its present interest in the tangible assets. *This sum represents the full amount which he would be prepared to stake in the hazardous enterprise of speculating on the future price of rubber.* I cannot agree that this method of valuation is applicable only when there is an immediate prospect of liquidation. The figure arrived at does admittedly reflect the amount which would be available for distribution (less a proportionate share of liquidation expenses) in that eventuality. Nevertheless, the sum so calculated may, in an appropriate case, where no commercial " goodwill " exists as a separate asset, properly be regarded as the maximum value at the relevant date of the shareholder's interest in the business of the Company " *as a going concern* ".

Mr. Crown Counsel Jansze, who very ably argued a part of the case for the Crown, suggested that some additional allowance should be made for the fact that the purchaser of a " Management Share " would enjoy the additional advantage of gambling with the capital contributed by the Preference Shareholders. His argument would have much force if it could be demonstrated that such an advantage would attract to a Management shareholder a reasonably predictable assurance of higher dividend returns on his investment. In that event, the measure of this advantage could logically be assessed *in terms of* " *goodwill* " by reference to the super-profits which the " Management shares " would be expected to earn by way of dividends. In the present case, however, the business of C. W. Mackie & Company, Ltd., is such as to leave its future prospects very largely, if not entirely, to chance, and for this reason I fail to see how the " advantage " to which Mr. Jansze refers can be assessed on any scientific basis. An issue was specifically raised at the trial as to whether any " goodwill " attached to the " Management Shares ", and, if so, what value should be placed on it. The Crown chose not to lead any evidence as to how " goodwill ", if it existed in this business, should be valued as a separate assest. I understood the learned Solicitor General to argue that in a Company constituted like C. W. Mackie & Company Ltd., " goodwill " attaching to a " Management Share " cannot be separately assessed. I am not satisfied that this is so except for the difficulty of recognising that it does exist at all. To my mind, if " goodwill ", measured in terms of " the capacity to earn super-profits ", had in fact been established, it would have been a comparatively simple matter to assess its value separately in accordance with recognised accounting principles. In the firm of C. W. Mackie & Company, the " goodwill ", if it existed, of the business would

have attached *exclusively* to the "Management Shareholders" to whom alone the maintainable "super-profits" must be ultimately paid. This presupposes that one could have reasonable predicted a higher investment return on the "tangible assets value" of a "Management Share" as at 6th September, 1940, (*i.e.*, Rs. 40.6188) than a prudent investor would normally expect to receive at the "risk-rate" appropriate to a rubber dealer's business (say, 25% per annum). In that event the value of the goodwill could be computed by capitalising these anticipated annual "super-profits" at the appropriate risk-rate. This sum, added to the value of the shareholder's interest in the tangible assets, would—subject to such allowance as was considered necessary for depreciation owing to the restrictions in the Articles of Association—represent the total value of each share for estate duty purposes.

I am satisfied that the "Balance Sheet Method" of valuing shares in a highly speculative business, whose past history lacks evidence of any *steady* earning-power, is the most appropriate method to adopt because it is not possible to arrive at a logical assessment of the future maintainable profits from which dividends could be paid to the shareholder as a return for his investment. No evidence was led at the trial, and no authorities were referred to us in this Court, to induce me to take a different view.

The learned Solicitor-General asked for a ruling that the only acceptable method of estimating the market value of shares in any business is to capitalise (at the "risk-rate" appropriate to the business) the estimated annual average of future maintainable profits which would be available to the shareholder concerned. I do not see how this principle of valuation can legitimately be extended beyond the limit of its logic. No doubt the method is preferable when it is possible, *by reference to past history and present knowledge*, to predict future maintainable profits under normal conditions. But the principle seems to me to break down when it is sought to be applied to a business where the element of incalculable risk which is inherent in its trading activities cannot be eliminated. As I read the judgment in *Salveson's case* (1930) 9 Annotated Tax Cases 43 the method was not adopted by Lord Fleming in valuing shares in a Company engaged in a speculative whaling business, and he later pointed out in *Findlay's case* (1938) 22 Annotated Tax Cases 436 that to take the average profits of the last few years for this purpose would only "operate quite equitably where one is dealing with a well-established business *which has normal ups and downs, but has no violent fluctuations in either direction*". I therefore reject for the present case the method of valuation adopted by the Assessor who seems to have valued the shares "by the application of what is at last merely a rule of thumb". I do not propose to deal specifically with Mr. Satchithanandan's valuation. Wherever his valuation did not substantially agree with that of the Assessor it was specially unconvincing. I have already expressed my opinion that in a business of this kind it is not possible to estimate future maintainable profits. *A fortiori*, the "weighted average" principle relied on by Mr. Satchithanandan cannot be seriously considered. It is, I think, significant that at no stage of the Company's trading history would a valuation based on the formulae advocated by either of these witnesses have, in the light of subsequent events, been found to be justified. This only proves, in my opinion, that the profits or losses of any particular period of time cannot in this business be regarded as a reliable guide to the prospects of a later period.

I have now disposed of the main point of contest between the parties to the appeal. As the assessment made by the Assessor (and approved by the learned District Judge) was very fully discussed before us, however, I think it proper to state that, even if I had found myself able to accept this method of valuation, I should have held that the ultimate figure arrived at by him was greatly excessive. Taking into account the past history of the Company, I think that to take the average of only the past four and two-thirds years' profits, ignoring altogether the earlier periods when heavy losses were incurred, attributes to a hypothetical purchaser a spirit of reckless optimism. Moreover, the Assessor has wrongly assumed in his calculations that, after the payment of Preference dividends out of anticipated profits, the entire balance would be paid out to the purchaser of the "Management Shares". I do not see how such an improvident policy on the part of the Directors could reasonably have been expected by a prudent investor. Admittedly, a deduction had to be made for income tax payable by the Company on its trading profits, and the unit rate for taxation applicable at the relevant date was 15%. Besides, it would have been a rash and foolish purchaser indeed who would not have realised that a prudent management, with knowledge of what had happened in the past, was certain to build up adequate reserves during profitable years to meet the losses of unsuccessful periods of trading. I have already pointed out that during the first five successful years of the Company's activities, the Directors took the sensible

precaution of accumulating reserves at the rate of approximately Rs. 150,000 a year. In 1940, when funds were available for the first time since 1927, a similar sum was placed to reserve. If the Balance Sheets for 1941 and 1943 are relevant at all, they only serve to show that the Directors acted precisely as one would have expected them to act in successful years of trading. At the end of 1941 the amount standing to general reserve was increased to Rs. 300,000 in 1942, when the Company was fortunate in earning very large profits in consequence of having temporarily undertaken new and safer functions as buying agents for the Ceylon Government on a commission basis (a position not anticipated in September, 1940), the reserves were increased to Rs. 700,000 out of undistributed profits ; and *for the first time since* 1926 a dividend of only Rs. 50,000 was declared on the " Management Shares ". This figure represents only a 25% return on the " tangible assets " value of the shares in September, 1940, and is very considerably less than the *annual* dividends optimistically foreshadowed by the Assessor for his hypothetical purchaser. Moreover, it was reasonable to expect that the Directors, being Preference shareholders, who now at last enjoyed a controlling interest in the business since the date of Mackie's death, would build up adequate reserves from the profits of a good year so as to ensure for themselves the regular payment of their own dividends in spite of any trading losses which might be sustained in future years. Even if the Assessor's anticipated future maintainable profits of the business could be accepted as reliable, the market value of the shares must be substantially reduced if the proper allowances be made for taxation and reserves. I regret to say that I was not convinced by the explanation that he did not make these necessary deductions because, in his belief, they would have been counterbalanced by an increased figure for future maintainable profits on the " weighted average " principle (which principle he does not claim to have used in any of his previous assessments as an Estate Duty officer). No Court can reasonably be invited by a valuer to accept a bald assertion that one material but undisclosed figure in a sum in simple Arithmetic will probably counterbalance another figure which is also undisclosed. Finally, I cannot accept the view that a prudent purchaser investing his money in such a speculative business would have been content with a return of only 15%. Mr. Satchithanandan conceded in cross-examination that a rate of 20% to 25% would be more reasonable. I find that the Crown expert in *Salveson's case* (1930) 9 Annotated Tax Cases 43 took the view that for an investment in the whaling industry (which certainly had not proved less speculative than the business of this Company) an expected return of 40% was not unreasonable. Moreover, in *Salveson's case* (1930) 9 Annotated Tax Cases 43 the financial position of the Company at the date of valuation was such that sufficient reserves had already been accumulated to ensure the payment of dividends for the next five years even if no profits were earned during that period, still leaving an ample margin to meet trading losses as large as those which had ever been experienced in the past. In my opinion the market value of Mackie's shares on the basis of the Assessor's method, after making the necessary adjustments for taxation and sufficient reserves, and after applying a higher " risk-rate ", would not have been appreciably higher than Rs. 40·6188 per share. If, in addition, the depreciating effect of the restrictive clauses contained in the Articles of Association be taken into account, this figure is certainly not too low. In *Crossman's case* (1937) A. C. 26 Lord Hailsham expressed the opinion that the value of the shares under consideration by him, if not subject to rigid restrictions, would probably have been twice as high as the figure which he finally approved. In *Salveson's case* (1930) 9 Annotated Tax Cases 43 Lord Fleming considered a depreciation by approximately 331/3% to be fair and reasonable.

The appellants did not press their earlier contention that the figure of Rs. 40.6188 per share should, in terms of the proviso to section 20 (1) of the Ordinance, be further reduced by reason of Mackie's death. Nor did they claim depreciation on account of the restrictions contained in the Articles of Association. I would therefore hold that the " market value " of each of the deceased's 5,000 " Management Shares " should be fixed for estate duty purposes at Rs. 40.6188, which admittedly represents the proportionate interest of each share in the tangible assets of the Company as at 6th September, 1940. My view is that no sum falls to be added to this sum on account of " goodwill " which, in my judgment and for the reasons which I have given, was non-existent and therefore incapable of assessment as an asset of the business.

Since preparing this judgment I have had the opportunity of reading the judgment of my Lord the Chief Justice. I respectfully agree with him that the appeal should be allowed and that judgment for the appellants should be entered, with costs, as indicated by him.

Appeal allowed.

Present : GUNASEKARA, J.

WEERASOORIA vs. THE CONTROLLER OF ESTABLISHMENTS

S. C. 141—*Workmen's Compensation Case No. C* 30/6,939/42

Argued on : 11th April, 1949
Decided on : 10th May, 1949

Workmen's Compensation—Inquiry into application—Applicant's absence—Order nisi dismissing application—Subsequent order after lapse of fourteen days setting aside order nisi on cause shown with notice to respondent—Respondent's failure to appeal—Is the order a nullity in view of Rule 30 of Workmen's Compensation Regulations 1935 and section 84 of the Civil Procedure Code.

On 10th November, 1947, a Commissioner for Workmen's Compensation made an order *nisi* dismissing an application for compensation on the ground of the applicant's failure to appear on that day, being the date fixed for hearing.

On 23rd December, 1947, after inquiry with notice to the respondent the Commissioner made order setting aside the order *nisi* and fixed the application for inquiry. There was no appeal from this order.

At this inquiry on 23rd December, 1948, the respondent contended that in view of Rule 30 of the Workmen's Compensation Regulations 1935, section 84 of the Civil Procedure Code became applicable to the order *nisi*, which became automatically absolute after fourteen days and therefore the order setting aside the order was a nullity.

The Commissioner accepted this contention and dismissed the application for compensation. The applicant appealed.

Held : (i) That in view of the wide discretion given to the Commissioner under Rule 30 as to whether he should proceed otherwise than in accordance with the relevant provisions of the Civil Procedure Code the Commissioner had jurisdiction to set aside the order *nisi* made on the 23rd of December 1947, and, therefore, the order was not a nullity but a voidable one.

(ii) That the respondent, not having exercised his right of appeal, is bound by the order.

H. W. Jayewardene, for the appellant.

B. C. F. Jayaratne, Crown Counsel, for the respondent.

GUNASEKERA, J.

This is an appeal from an order made by a Commissioner for Workmen's Compensation dismissing with costs an application for compensation made by the appellant against the respondent.

The order in question was made on December 23, 1948. The Commissioner had on a previous occasion, on November 10, 1947, made an order *nisi* dismissing the application with costs on the ground of the appellant's failure to appear on the day fixed for the hearing. It appears that subsequently, at an inquiry held on December 23, 1947, with notice to the respondent, the appellant satisfied the Commissioner that there were reasonable grounds for his default and the Commissioner made order setting aside the order *nisi* and fixing the application for inquiry. The order of December 23, 1947, is not included in the record that has been transmitted to this court, but the order that is appealed from states, and Counsel for both parties are agreed, that such an order was made. At the subsequent inquiry the respondent's counsel contended that the order *nisi* (which fixed a period of fourteen days for showing cause) had already become absolute before the order of December 23, 1947, was made and even before the appellant made his application to have the order *nisi* set aside, which it appears was made on December 8, 1947. This contention was accepted by the Commissioner and he made the order that is the subject of the present appeal, holding that the order *nisi* had become absolute and that therefore there was "no ground for proceeding with the inquiry".

The main ground of the appeal is that the Commissioner has in effect purported to set aside his own order of December 23, 1947, and that this he was not entitled to do.

Regulation 30 of the Workmen's Compensation Regulations, 1935, provides that, "Save as otherwise expressly provided in the Ordinance or these Regulations" the provisions of Chapter XII of the Civil Procedure Code (and certain other chapters of that Code) "shall apply to proceedings before the Commissioner in so far as they may be applicable thereto." There follow two provisos, one of which is that "the Commissioner may, for sufficient reason, proceed otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced." One of the provisions of the Civil Procedure Code applied by this Regulation is section 84,

which provides *inter alia* that—

> "If the plaintiff fails to appear on the day fixed..... for the hearing of the action, and if the defendant on the occasion of such default of the plaintiff to appear is present in person or by Proctor, and does not admit the plaintiff's claim, and does not consent to postponement of the day for the hearing of the action, the Court shall pass a decree *nisi*..... dismissing the plaintiff's action, which said decree shall, at the expiration of fourteen days from the date thereof, become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown to the Court good cause, by affidavit or otherwise, for his non-appearance;"

and that

> "In case of such cause being shown, the Court shall set aside the decree, and shall fix a day for proceeding with the action....."

By the operation of Regulation 30, therefore, the Commissioner has jurisdiction to set aside an order *nisi* made by him dismissing an application on the ground of the applicant's failure to appear on the day fixed for the hearing of the application.

It is well settled, however, that a decree *nisi* entered by a court under section 84 of the Civil Procedure Code becomes absolute automatically at the expiration of fourteen days unless the plaintiff has previously shown good cause for his non-appearance, and that once the decree *nisi* has become absolute the plaintiff has no remedy under that section: *Anamally Chetty vs. Carron* (1921) 3 *Rec.* 48; *Mohideen vs. Marikar*, (1940) 41 N. L. R. 249; *de Saram vs. de Silva*, (1940) 41 N. L. R. 419; *de Mel vs. Kodagoda*, (1945) 46 N. L. R. 150.

It is contended for the respondent that therefore, when the Commissioner has made an order *nisi* dismissing an application, he has no jurisdiction to set it aside after the expiration of the period within which cause must be shown; and that consequently in the present case every step taken by the Commissioner after November 10, 1947, was a nullity.

I am unable to accept this contention. Not only is the Commissioner empowered to set aside in appropriate circumstances an order *nisi* made by him, but he is vested with a wide discretion as to whether he should proceed otherwise than in accordance with the relevant provisions of the Civil Procedure Code. It has been contended that in the present case he did not decide to proceed otherwise than in accordance with those provisions and that therefore his order of November 10, 1947, became absolute upon the expiration of fourteen days. That may be so, and in consequence the Commissioner's order of December 23, 1947, may have been a wrong order against which the respondent could have successfully appealed. It does not follow, however, that the order was a nullity.

The subject matter of the order, whether that subject-matter is regarded as the application for compensation or the application to have the order *nisi* set aside, was within the Commissioners jurisdiction, and, as was pointed out in the case of *Hriday Nath Roy vs. Ram Chandra Barna Sarma*, A. I. R. 1921 Ca.l 34 ,a distinction must be drawn between the existence of jurisdiction and the exercise of jurisdiction. To quote the words of Sir Asutosh Mookerjee, A. C. J. in that case—

> "The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.....
>
> "Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly..... There is a clear distinction between the jurisdiction of a Court to try and determine a matter and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction."

It appears to me to be immaterial for the present purpose whether the order of December 23, 1947, was an erroneous order or not. If it was erroneous it was merely voidable and not a nullity, and not having been set aside in appeal it is binding on the parties. (The Crown Counsel has conceded that the respondent had a right of appeal against that order which he did not exercise). It follows that the Commissioner was not entitled to treat it as a nullity.

I set aside the order made by the Commissioner on December 23, 1948, and direct him to proceed with the inquiry. The respondent will pay the appellant Rs. 157·50 by way of costs of appeal.

Order set aside.

Present : DIAS, J & BASNAYAKE, J.

SELVADURAI vs. JAMIS APPUHAMY

S. C. 523/M—D. C. Batticaloa 606/Misc.

Argued on : 30th January, 1950
Decided on : 5th April, 1950

Damage—By fire spreading to adjoining land—Degree of care required of person starting the fire—Failure to take necessary precautions—Contributory negligence—Roman-Dutch Law.

The plaintiff sued the defendant to recover damages caused by a fire that spread from the defendant's land which adjoins the plaintiff's.

It was established (*a*) that the defendant knew that the south-west monsoon was on, but took no precautions on that account.

(*b*) That although the defendant's land was 8 acres in extent, he lit the fire about 20 fathoms from the plaintiff's land.

(*c*) That he failed to inform the plaintiff or his servants.

(*d*) That he had no watchers to watch the fire and prevent it from spreading it to the plaintiff's land.

Held : That the circumstances proved that the defendant failed to take the care which the law required him to take and therefore he was liable.

Per BASNAYAKE, J.—"On the plea of contributory negligence raised by the defendant, I wish to observe that it has not been shown that the plaintiff was under any legal duty to take precautions against the spread of fire from the defendant's land to his. In the circumstances there can be no question of contributory negligence on the part of the plaintiff."

Cases referred to :—*Van Tonder vs. Alexander*, (1906) E. D. C. 186.
Korossa Rubber Co. vs. Silva, (1917) 20 N. L. R. 65.
Samed vs. Segutamby, (1924) 25 N. L. R. 481.

F. A. Hayley, K.C., with *S. Shanmuganayagam*, for the appellant.

C. Renganathan, for the respondent.

BASNAYAKE, J.

The defendant is the owner of a land of about 8 acres which was in jungle and which at the material date he was preparing to bring under cultivation. On certain days in July and August, 1948, he cleared the jungle and set fire to it. On 23rd August, 1948, he heaped up at a place about 15 or 20 fathoms from the plaintiff's land all the material that had survived the previous fires and set fire to the heap. The fire spread to the plaintiff's land which adjoins and caused damage to a number of coconut trees thereon.

In this action the plaintiff seeks to recover the value of the damage sustained by him which he assesses at Rs. 1,000. The defendant admits that he caused a fire on his land and that it was that fire that spread to the plaintiff's land and caused the damage alleged by the plaintiff. But he denies that he was negligent and alleges that the fire spread to the plaintiff's land owing to his contributory negligence.

The learned District Judge holds that the fire in the defendant's land spread to the plaintiff's land but that the fire spread not as a result of the defendant's negligence but in consequence of the plaintiff's contributory negligence. The plaintiff is dissatisfied with that decision and appeals therefrom.

The defendant admits that he set fire to his jungle on about three previous occasions after informing the Divisional Revenue Officer. He also admits that he did not inform the plaintiff or his servants on any of the occasions on which he caused the fires. He expected the headman to do so. The headman says that he informed the plaintiff's kangany between the 7th and 13th July, 1948, that the defendant's jungle would be set on fire but that he did not inform him of the fire on 23rd August, 1948.

The defendant states in his evidence : " I know that at the time the south-west monsoon was blowing. I know that during that time there would be wind. But when I set the major fire there was no wind. When I set fire to the heaps the wind veered round and carried the sparks. I know that in estates husks are put in drains."

The question that arises for decision is whether on the evidence the defendant is liable in damages. The law applicable to the case is the Roman-Dutch Law the source of which is the *Lex Aquilia* of the Roman Law. Grueber's translation of the relevant text reads :—(Grueber's the *Lex Aquilia*, p. 126-127 :)

"By the action also which arises under the third chapter, *dolus* and *culpa* are provided against. Therefore, if a person has set fire to his stubble or brushwood and the fire has spread and has, in advancing, damaged the crop or vineyard of another, we have to inquire whether this has happened in consequence of his want of experience or of his negligence. For if he has lit the fire on a windy day, he is guilty of *culpa* (for a person also who brings about a state of things from which damage arises is considered to have done the damage), and the same fault lies with him who has not taken precautions to prevent the fire spreading. But if he has done everything which he ought to have done, and a sudden gust of wind has carried the flames on to the neighbour's land, he is free from *culpa*. .....It must therefore be inquired, whether in cases where apparently damage is caused to another's property, it is to be attributed to the *culpa* of a certain person. Accordingly Paulus in the above passage says, in the case when a person has set on fire the stubble on his own ground and the fire has spread to the neighbour's crop or vineyard, it is to be asked whether this damage is due to his want of experience (for 'imperitia culpae adnumeratur', sec. 7, sec. 8 and 8, sec. 1 above) or his negligence. This is obviously the case if a person has made the fire on a windy day, for he either knew or must have known that the fire would spread (8, sec. 1 above) ; but it is also the case if he has lighted the fire on another day, and afterwards has not prevented it from spreading (27, sec. 9 above)..... If, therefore, the man who has set fire to his stubble has done everything to prevent the fire from spreading, and nevertheless, by a sudden gust of wind, the flames have been carried to the neighbour's crop or vineyard, he will not be liable, for he has done all in his power to deprive the act of kindling the fire of its dangerous character, therefore "caret culpa". This decision suggests the question whether a person, in order to escape liability under the Aquilian statute, is bound to be as careful and diligent as possible. It is clear from the following fr. 31, that only such diligentia is required as is peculiar to a *bonus pater familias*. Accordingly, if in the above case the person who has lit the fire has done what a *diligens pater familias* would do under the circumstances of the case, in order to prevent the fire from spreading, he will not be liable, although an extremely cautious or careful man might have avoided the damage."

In the case of *Van Tonder vs. Alexander* (1906) E. D. C. 186, Kotze, J.P., discussing the question of damage by fire after referring to the Digest and Voet says at pages 187-818 :

"As in the present instance the fire was lighted on a windy day, and there is no evidence that the defendant had a competent staff at hand to check the fire if occasion arose, there can be no doubt that, had the wind continued in the same direction as it blew at first, the defendant would have been liable. The only difficulty arises from the fact that the damage to the plaintiff was caused by the wind suddenly veering. But should the simple fact of the wind having changed relieve the defendant of liability? I think not. The defendant lit a fire in a wind, and not having provided a sufficient staff of men or other adequate means of controlling it, he was in the same position on the wind changing as he would have been if the wind had freshened in a high degree in the same direction, in which case he would certainly have been liable."

Voet's opinion is that (Bk. IX, Tit. II, sec. 19—Sampson's Translation, p. 324) "he who sets alight to his stubble or thorns, for the purpose of burning them down, if the fire spreading damages or destroys a wood, vineyard, or crop belonging to some one else, and some negligence appears on the part of the person first lighting it, as when, it may be, he did this on a windy day, or did not take precautions to prevent the fire spreading", is liable in damages.

In the instant case the defendant's evidence indicates that he knew that the south-west monsoon was on but took no precautions on that account. Although his land was 8 acres in extent he lit the fire about 20 fathoms from the plaintiff's land. He failed to inform the plaintiff or his servants. He had no watchers to watch the fire and prevent it from spreading to the plaintiff's land. All these omissions go to prove that he did not take the care which the law required him to take. He is therefore liable. As observed by Kotze, J.P., in the case of *Van Tonder vs. Alexander* (supra) : "It is not necessary in a case of this kind to consider the degree of negligence very minutely, for *in lege Aquilia et levissima culpa venit*, as Ulpian says in the Digest (9, 44 pr.)".

The cases of *Korossa Rubber Co. vs. Silva* (1917) 20 N. L. R. 65 and *Samed vs. Segutamby* (1924) 25 N. L. R. 481, which were cited at Bar, support the view I have taken.

On the plea of contributory negligence raised by the defendant, I wish to observe that it has not been shown that the plaintiff was under any legal duty to take precautions against the spread of fire from the defendant's land to his. In the circumstances there can be no question of contributory negligence on the part of the plaintiff.

The appeal is allowed with costs here and below. The plaintiff's damage will be computed at the rate agreed on by the parties in the course of the trial.

DIAS, J.

I agree.

Appeal allowed.

Present : BASNAYAKE, J.

YOOSUF & OTHERS vs. SUWARIS

S. C. 103—C. R. Kandy 3342

Argued on : 8th March, 1950
Decided on : 3rd May, 1950

Landlord and tenant—Landlord, a shareholder of a company—Action to eject tenant on the ground that premises reasonably required for the purpose of the business carried on by the company—Can landlord maintain action—Rent Restriction Act No. 29 of 1948.

Held : (1) That a shareholder of a Company who owns houses, is not entitled to make use of the Rent Restriction Act for the purpose of providing his company with a place of business.
(2) The Rent Restriction Act provides for a case where the premises are reasonably required for the immediate use and occupation of the landlord or his family.
(3) That a plaintiff who succeeds in an action for ejectment is entitled to execute his decree immediately and time can only be given by consent of parties, or in the event of an appeal, where execution of the writ would cause irreparable loss to the unsuccessful party.

H. V. Perera, K.C., with *M. I. Mohamed*, for the defendants-appellants.

E. B. Wikramanayake, K.C., with *Cyril E. S. Perera*, for the plaintiff-respondent.

BASNAYAKE, J.

This is an action instituted by one A. R. Suwaris against five persons who are carrying on business in partnership under the business name of " Idroos Hardware Stores " at No. 67 Trincomalee Street, Kandy (hereinafter referred to as No. 67). On 1st April 1946 the plaintiff became the owner of the premises in which the defendants are carrying on business. On 25th July, 1947, the plaintiff gave the defendants notice of termination of their tenancy on 30th August, 1947, on the ground that the premises were reasonably required by him " for the purpose of the plaintiff's business called Suwaris & Sons Ltd ". The defendants in resisting the plaintiff's action for ejectment assert that the premises are not reasonably required by the plaintiff as alleged in the plaint " as the plaintiff owns several business places within the Municipal limits of Kandy ".

The plaintiff, who owns several houses and lands in and around Kandy, was a contractor by trade. He started and carried on business under the business name of " Suwaris & Co.". In due course he formed a limited liability company registered under the name of " A. R. Suwaris & Sons Ltd.". The registered company has contracted with the Government of Ceylon to put up buildings for the University of Ceylon. The plaintiff as an individual has no building contracts. The stores and building materials required for the execution of the contract of A. R. Suwaris & Sons Ltd., are kept at Mahaiyawa, and others at Katukelle and Peradeniya, all places around Kandy.

The plaintiff states that he requires No. 67 for the purpose of storing the cement needed for the contract entered into by A. R. Suwaris & Sons Ltd. It is not the only property owned by the plaintiff in Kandy. He has a timber depot in the same street as No. 67, and he has several houses in Peradeniya which is nearer the University site than Kandy.

Learned Counsel for the appellant makes the submission that the plaintiff's action is not entitled to succeed on the following grounds :

(*a*) that the premises are required, not by the plaintiff himself but by another person, viz., the legal person of A. R. Suwaris & Sons Ltd.

(*b*) that in any event the premises are not reasonably required by the plaintiff, and

(*c*) that the plaintiff's request for the premises is not made *bona fide*.

I am inclined to agree with all the submissions of learned counsel. The plaintiff is the landlord of the premises in question and is in his individual capacity only a shareholder of A. R. Suwaris & Sons Ltd., for whose use he claims the premises. The evidence does not disclose how many shares the plaintiff holds in the company. Even if he were the holder of the bulk of the shares he does not come within the ambit of section 8 of the Rent Restriction Act as the premises are not reasonably required for " the purposes of the trade, business, profession, vocation or employment of the landlord ", for A. R. Suwaris & Sons Ltd., is not the landlord. A. R. Suwaris & Sons Ltd., is a legal entity different from the plaintiff.

A shareholder who own houses is not entitled to make use of the Rent Restriction Act for the purpose of providing his company with a place of business. Even if the plaintiff were seeking to get the house for his own personal business, his request is not in my view reasonable as he has not given a sound reason for storing cement in Kandy when his contract has to be executed at Peradeniya where he already has stores and a number of houses.

The defendants have been carrying on business at No. 67 for a long time and the nature of their business is such that it has to be carried on in the locality in which similar businesses are situated. They have tried to get other premises but have failed.

Another circumstance which militates against the plaintiff's claim is that in July, 1946, he instituted an action for ejectment against the defendants in respect of the same premises and withdrew it. Thereafter, about a year later, he instituted this action. Even then the plaintiff expressed the willingness to give the defendants further time to leave the premises. It appears therefore that the plaintiff's need is not immediate. The Rent Restriction Act provides for a case where the premises are reasonably required for the immediate use and occupation of the landlord or his family. It does not enable a landlord to eject a tenant on the off chance of his requiring his house at some future date. His need must be immediate and present in order that the Court may have jurisdiction to entertain his action.

The learned Commissioner has allowed the defendants one year's time to quit the house and has ordered that writ of ejectment should not issue till that period expires. Where a plaintiff is declared entitled to an order for ejectment of his tenant it is not open to the trial Judge, except with the consent of parties, to stay execution in that manner.

This is not the only case which has come up in appeal in which a Judge has taken upon himself the responsibility of delaying execution without an application in that behalf by consent of parties. A Judge is not in law entitled to exercise a sort of patriarchal justice and decide the manner of relief that should be granted to an unsuccessful party without even the consent of the successful litigant. A plaintiff who succeeds in an action for ejectment is entitled to execute his decree immediately and time can only be given by consent of parties or in the event of an appeal where the execution of the writ would cause irreparable damage to the unsuccessful party. The Rent Restriction Act is designed both for the benefit of the landlord and the protection of the tenant. Its provisions would be rendered nugatory if a landlord who has succeeded in bringing himself within the ambit of section 13 were to be kept out of his house merely because the Commissioner thinks that he should give the tenant further time. The Commissioner is not entitled to interpose his will in that way.

The appeal is allowed with costs both here and below.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL.

Present : CANEKERATNE, J. (President), BASNAYAKE, J. AND GUNASEKARA, J.

REX vs. FERNANDO

Appeal 47 of 1949 with Application 122 of 1949.
S. C. No. 13/J. M. C., Colombo No. 21960.

Argued on : 5th and 6th September, 1949.
Decided on : 22nd September, 1949.

Court of Criminal appeal—Charges of conspiracy and abetment—Judge's reference in address to the jury to the alleged date of conspiracy, which was unsupported by the evidence—Also to appellant's failure in civil case, where issues were similar to the findings of fact in this case—Verdict unreasonable—Prejudice caused to appellant.

The appellant was charged with the offences of (1) conspiracy, (2) abetting another to use as genuine a forged document, (3) abetting another to deceive the accountant of a Bank, and was convicted on the first two counts.

The appellant had on March, 4th 1946, deposited with the assistant shroff of the Bank a large sum of money on a paying-in slip on which he had entered certain details. He received on the same day the counterfoil of the slip P1 which had the seal of the Bank, the letters MAR stamped and " PATH " in ink within the circle of the seal alleged to be the initials of the receiving shroff and a signature alleged to be that of the cashier.

The assistant shroff and the cashier denied both the fact of payment and the writings on P1.

The appellant led evidence to show that P1 was not a forged document, that he had sought to purchase a large rubber estate on March 10th and had interviewed the accountant of the Bank on March 13th as his cheque was dishonoured, and had consulted his legal advisers on that day with P1.

The Judge in his charge to the jury referred to March 13th or 14th as the date on which the appellant caused somebody to forge P1 although the indictment referred to the period of the offence as between the 8th and 15th March

The Judge also referred to the failure of the appellant to recover the money deposited by him from the Bank in a civil action in the District Court and commented adversely upon the credibility of certain witnesses from the appellant in that case and also upon matters that were irrelevant and prejudicial to the appellant in his trial.

Held : (1) That it is reasonable to conclude that the jury found that the appellant had caused somebody to forge P1 on March 13th or 14th as directed by the presiding judge, and not between the 8th and 15th March as stated in the indictment and therefore the verdict was unreasonable and could not be supported on the evidence.

(2) That the references by the Judge to the civil action were irrelevant and prejudicial to the appellant and that it could not be said definitely as to what view the jury might have taken had no reference been made to the civil case.

Cases referred to :—*King vs. Bello Singho 48 N. L. R. 542.*
Wijesekera vs. Namasivayam(1920), 22 N. L. R. 118.

Colvin R. de Silva, with *D. Wimalaratne*, *K. C. de Silva* and *K. A. P. Rajakaruna* for the accused appellant.

Ananda Pereira, Crown Counsel, for the Crown.

CANEKERATNE, J.

The appellant was charged on an indictment which contained three counts. The first count contained a charge of conspiracy, the second a charge of abetting another to use as genuine a forged document, and the third a charge of abetting another to deceive the Accountant of a Bank.

The appellant, who apparently was a Sick Berth Petty Officer of the C. R. N. V. R. and had an account at Grindlay & Company, wanted to place bets on horses engaged at various meetings with persons who—using the slang expression which is well known—had bucket shops and opened an account in January, 1946, with the Hongkong and Shanghai Bank. He was then about to be demobilised, and was demobilised in March. The appellant deposited a sum of Rs. 800 with this Bank on February, 19th on a loose paying-in slip and received the counterfoil, P19, which has the seal of the Bank, P9, and also the letters " Path " which have been referred to as the initials of the receiving Shroff within the circle of the impression left by the seal. He deposited a sum of Rs. 700 on March 4, on a similar slip and received the counterfoil, P20, which has another seal of the Bank, P14. His story was as follows :—He placed a bet on three horses with the Agent of one Mudalige, who conducted the business known as the New Grand Hotel Bucket Shop, on March 2, 1946 As the three horses won he came to this bucket-shop on March 4 to obtain what he won and at the request of the agent he came there again on March 9, about 9 or 9-15 a.m., and received the sum of Rs. 78,000 in cash made up of 1,780 notes. He took these notes in a bag to the office of the Hongkong and Shanghai Bank, obtained a loose paying-in slip and having entered certain details on this slip, which is in two parts, handed the slip and the notes to an Assistant Shroff at the Bank, one Pathmanathan. He received the counterfoil of the slip, P1, sometime later. He issued a cheque next day on this Bank for Rs. 7,000 and as he received information from the payee on March 12 that it was dishonoured, he came to the Bank the next day to ascertain the reason for the non-payment of the cheque. After interviewing one of the officers of the Bank he consulted a Proctor and an Advocate on the same day.

The appellant consulted the late Mr. Muthukrishna, who used to give advice as a handwriting expert, late in the evening of March 13. The Advocate, who went accompanied by the appellant and his Proctor, interviewed a responsible officer of the Bank on March 14.

The slip, P1, had the seal of the Bank, P9 ; it has the letters MAR stamped and the letters, " Path " in ink within the impression of the circle left by the seal, the letters in ink purport to be the initials of the receiving shroff. There is on the slip a signature, like this which it is alleged, is the signature of the Cashier. Both the Assistant Shroff and the Cashier gave evi-

dence, the former denied that the letters " Path " were written by him, the latter that the signature on P1 was his. Pathmanathan denied the receipt of this sum of money; at this trial he also said that the seal used on P1 was neither P9 nor P14—this statement being contrary to what he said in the former trial. The deposition of Muthukrishna, who had died before the trial, was read in evidence. The prosecution called the Government Examiner of Questioned Documents, who claimed to be a handwriting expert. He was not able to express an opinion as to whether the signature " Path " in P1 was written by the same person who wrote the words in P19, or that the signature " Peterson " on P1 was that of the person who signed P19 and P20. By direction of the presiding Judge the appellant was acquitted on the third count. On the counts on which he was convicted he was sentenced to undergo rigorous imprisonment for five years. The petition of appeal which is couched in the language of a lawyer, probably of one who was present at the trial and conversant with the proceedings, contained 20 grounds of objection. At the hearing of the appeal Mr. de Silva desired to urge two additional grounds but considering that the appellant was defended by counsel who appeared at the former trial and knew all the facts and considering the nature of the charge, we saw no reason to depart from the general rule relating to the grounds of appeal in *King vs. Bello Singho*, 48 N. L. R. 542 and decided not to hear them.

One of the main grounds urged at the hearing was that there was no evidence on which the conviction on count one could be sustained. It stated that on some day between the 8th day of March, and the 15th of March, the accused " entered into a conspiracy with some unknown persons to forge the document P1....." The learned Judge adverted to the count as stated in the indictment at P15 of the charge and then proceeded to deal with the essentials of the offence. He commenced his comments on the evidentiary part of the case at page 28 and on page 38 referred to the charge of conspiracy in these words :—

> " The case for the prosecution is, as far as I understand it, that the accused having issued dud cheques for the payment of his winnings or otherwise, finding himself so pressed conceived this notion—that is the conspiracy alleged I think—on the 13th or 14th of March, of causing somebody to forge P1....."

There is nothing in the rest of the charge to show that the correct period was the dates between March 8th and March 15th and the fact that the learned Judge prefaced his remarks with the words, " The case for the prosecution is....." makes it difficult to say that the mention of the two days was a slip on his part. One can hardly comprehend by reading the typescript of the evidence the reason which prompted the prosecution to vary the date of the conspiracy. That the document P1 was in the hands of the appellant at the time he went to his legal advisers on March 13th is clear. The probabilities are against the impugned letters (Path) and signature being placed on the document on March 13th; the appellant had issued a cheque for Rs. 7,000 on March 10th, and the evidence of the broker Fernando shows that the appellant himself interviewed the owner of a rubber estate, 180 acres in extent, on March 10th, with a view to a purchase of it by the appellant. The assertion that, when he interviewed the accountant of the Bank at 10 a.m., on March 13th, about the dishonouring of the cheque, he had P1 with him seems to be borne out by these circumstances. If the jury found that the accused had on the 13th or 14th March 1946 caused somebody to forge P1, and from the circumstances it seems reasonable to conclude that that was their finding, the verdict is unreasonable and cannot be supported having regard to the evidence.

The other main ground urged at the hearing was that the conclusion of the jury that P1 was a forged document was vitiated by some of the answers elicited at the trial, and the comments in the charge referring to the civil action. The Assistant Shroff and the Cashier, two apparently credible persons, testified affirmatively that the impugned word " Path " and the signature on P1 were not placed by them respectively. The appellant testified that he handed P1 to the Assistant Shroff, and received it with the impugned words. An apparently credible person gave it as his opinion that the impugned words were not forged. The two bodies of evidence must have been considered and compared by the jury—they decided apparently to accept the story of the two prosecution witnesses and rejected the defence version. They would have guided themselves by the manner in which the witnesses gave their evidence, the consistency of the stories they related, and the probabilities. Complaint is made of the use made of the District Court trial of the action for the recovery of the sum of Rs. 78,000. The learned Judge rightly at the start said that the jury should not have known anything about this trial but at different parts of the charge there creep in unfortunately references to this case. With all respect to the

learned Judge, it appears to us that he has fallen into an error in making these references. One such reference deals with the abating of the appeal filed by the plaintiff in the action; there is no evidence on the record of the proceedings to substantiate this statement. Another refers to this circumstance: "We now know that the plaintiff failed in that action". The fact of the judgment in the civil case was not a matter to be proved in the present case. The judgment cannot be given in evidence to establish the truth of the facts on which it was rendered. It was most important in a case of this nature that the jury should not have had their attention directed to the fact that a trained Judge trying the appellant's action for the recovery of a sum alleged to have been deposited with the Bank on March, 9th 1946—the issues therein having a very close resemblance to some of the facts the jury had to find—had failed. At page 6 the learned Judge used the following words:

> "All we know is that in spite of Mr. Lawrie Muttukrishna's evidence in which he affirmatively was of opinion that P1 was a genuine document, the learned District Judge held against the plaintiff".

The opinion of the Judge who tried the case was irrelevant in the present proceedings. A limitation is placed by the law on questions tending to shake the credit of a witness and it may be useful to refer to the decision in *Wijesekera vs. Namasivayam* (1920), 22 N. L. R. 118.

The learned Judge put certain questions to the witness K. V. de Silva, called by the defence, in examination-in-chief and elicited the following answers:

> "I gave evidence on behalf of the accused in the District Court in connection with this matter."

Then follow these questions and answers:

Q. "Do you know whether the District Judge accepted your evidence or not?

A. I do not know.

Q. But the accused lost that action in the District Court?

A. Yes." (Pages 55 and 56 of the evidence).

In the course of his charge he made the following comments:

> "Undoubtedly he gave evidence in the District Court case. Undoubtedly in spite of the evidence the learned District Judge dismissed the plaintiff's action. Whether K. V. de Silva was disbelieved by the District Judge or not we do not know....."

The jury might thus conclude that the view of the expert witness and the testimony given by the witness K. V. de Silva was not accepted by the Judge who tried the civil case. It is difficult to state definitely what view the jury might have taken of the case had no reference been made to the District Court trial. The evidence may have left the jury unconvinced as to which of the stories was true, the prosecution or the defence, although they may have been conscious that the testimony of the cashier and the probabilities were somewhat stronger than the testimony offered by the defence. It may, on the other hand, have convinced the jury that the testimony offered by the defence was untrue.

The charge against the accused was a serious one. Having regard to the nature of the defence, and the general circumstances, we do not feel able to apply the provision of the proviso to section 5 (1) of Ordinance No. 23 of 1938 and say that the jury would have clearly come to the conclusion they did if the evidence relating to the civil trial and the dismissal of the action had not been given. It was evidence on a vital matter. In these circumstances, we all feel that the conviction should be quashed. In order to do justice in certain cases, it is essential that the Court should order a new trial. This would as a general rule be the most satisfactory solution of a case where the jury have said by their verdict that a person is guilty of conspiracy and of abetment. But considering the fact that this is the second trial of the appellant on these charges and that the appellant has been deprived of his liberty for about four months, the majority of the Court have come to the conclusion that the power given of ordering a new trial should not be exercised.

Conviction quashed.

Present : JAYETILEKE, S.P.J. AND WINDHAM, J.

CHETTIAPPEN KANGANY vs. YOOSOOF *et al*

S. C. 482 D. C. (F) Kandy 1097

Argued on : 22nd July, 1948
Decided on : 2nd August, 1948

Fidei-commissum—Gift subject to—Donor reserving right to mortgage property gifted.—Mortgage by donor—Transfer of property by donee after donor's death in satisfaction of amount due on bond—Claim to property by donee's children—Effect—Revival of mortgage.

N and M, husband and wife, donated by deed P1 a property to Y subject to the following among other conditions.

1. That the donation should take effect after their respective deaths.
2. That each of them should be at liberty to sell mortgage or otherwise dispose of the said lot.
3. That the donee should not be at liberty to sell or dispose of the said lot.
4. That after the death of the donee his sons and daughters should be at liberty to sell or otherwise dispose of the said lot after they attained majority.

After the death of M, N and Y mortgaged the property in 1929 to S, who assigned the mortgage to the 1st defendant. N died and Y, in settlement of the debt due on the mortgage bond transferred the property in 1931 to the 1st defendant who entered into possession and improved the land.

On the death of Y, his children claimed the property on the footing that P1 created a valid fidei-commissum.

Held : (1) That P1 created a valid fidei-commissum in favour of Y's children.
(2) That the transfer by Y to the 1st defendant was void as against Y's children, but the mortgage revived and the 1st defendant became entitled to recover the principal and interest due on the mortgage bond up to the date of transfer by Y in 1931 and from the date of Y's death to the date of payment.

Cases referred to :—*Silva vs. Silva* 13 N. L. R. 33.
Mudalihamy vs. Mudiyanse 2 Ceylon Law Recorder 64.
Kumarappa Chettiar vs. Gunawathie 48 N. L. R. 34.

H. V. Perera, K. C., with *H. W. Thambiah* and *S. Sharvananda*, for the 1st defendant-appellant.
F. A. Hayley, K. C., with *S. Kanagarayar*, for the plaintiffs-respondents.
C. Thiagalingam, with *S. Kanagarayar*, for the 2nd to 6th defendants-respondents.

JAYETILEKE, S.P.J.

The plaintiffs instituted this action against the 1st defendant for a declaration of title to lots 1 and 2 in plan 1D1 and for recovery of damages, but at the trial they abandoned their claim to lot 2. One Hamidu Natchia was the original owner of lot 1. She and her husband Habibu Marikar donated the said lot by P1 of 1914 to their son Yusoof subject to the following among other conditions :—

1. That the donation should take effect after their respective deaths.

2. That each of them should be at liberty to sell, mortgage or otherwise dispose of the said lot.

3. That the donee should not be at liberty to sell or dispose of the said lot.

4. That after the death of the donee his sons and daughters should be at liberty to sell or otherwise dispose of the said lot after they attained majority.

After the death of Habibu Marikar, Hamidu Natchia and Yusoof mortgaged the said lot by 1D4 of 1929 to one Smith for a sum of Rs. 4,000 and interest at 12%. About five months after the execution of 1D4 Hamidu Natchia died. By 1D5 of 1930 Smith assigned 1D4 to the 1st defendant for a sum of Rs. 4,445.32. By 1D6 of 1931 Yusoof sold the said lot to the 1st defendant for a sum of Rs. 5,000. The attestation clause in 1D6 reads :—

> " A sum of Rs. 250 out of the consideration was paid in the presence of the Notary by cheque and the balance was set off in settlement of the principal and interest due by the vendor in respect of mortgage bond No. 1972."

The 1st defendant says that after his purchase he entered into possession of the said lot, planted it with tea and put up a new house, a cattle shed, a milk room and a cistern at an expense of Rs. 7,000.

Yusoof died in 1939 leaving ten children, namely, the plaintiffs and the 2nd, 3rd, 4th and 5th defendants. The plaintiffs alleged that P1 created a valid fidei-commissum and that on the death of their father they and the 2nd, 3rd, 4th and 5th defendants became entitled to the said lot.

The 1st defendant denied that P1 created a valid fidei-commissum and claimed to be entitled to the said lot on 1D6. In the alternative he claimed the amount due on 1D4 and compensation for the improvements effected by him.

The learned acting District Judge held :—

(*a*) that P1 creates a valid fidei-commissum.

(*b*) that the 1st defendant was not entitled to make any claim on 1D4.

(*c*) that the 1st defendant did not make the tea plantation.

(*d*) that the 1st defendant was a *bona fide* improver and was entitled to compensation for the buildings.

He declared the plaintiffs and the 2nd, 3rd, 4th and 5th defendants entitled to the said lot, subject to the right of the 1st defendant to retain possession till he was paid compensation for his improvements, and he awarded to them damages at Rs. 50 a month from January 1st 1939.

The 1st defendant appealed against the findings (*a*), (*b*) and (*c*) and the 1st plaintiff filed a cross-objection against the finding (*d*).

With regard to (*a*) the main contention of Counsel for the appellant was that P1 does not specifically designate the persons to be benefited. Though no persons are specifically indicated in the deed we think that the language of the deed is such that it is difficult to resist the inference that the donor intended to benefit the children of Yusoof. With regard to (*b*) we are of opinion that the decision of this Court in *Silva vs. Silva* 13 N. L. R. 33 is a direct authority in 1st defendant's favour. The head note adequately sums up the position in these terms :—

> "Where a mortgagee purchased the property mortgaged by private sale and discharged the bond, and where such purchase was invalidated under section 238 of the Civil Procedure Code, by reason of a prior duly registered seizure under another creditor's writ, Held that the mortgagee was entitled to fall back on the mortgage and enforce his rights under it."

In the course of his judgment Wood-Renton, J. said that the discharge was merely *prima facie* evidence of the satisfaction of the mortgage debt but it did not prevent the revival of the claim under the earlier mortgage bond. This judgment was followed in *Mudalihamy vs. Mudiyanse* 2 Ceylon Law Recorder 64 and in *Kumarappa Chettiar vs. Gunawathie* 48 N. L. R. 34. In the present case it is clear that 1D6 is void as against the claims of the plaintiffs and the 2nd, 3rd, 4th and 5th defendants. (See Sande on Restraints upon Alienation Chapter 4). We are, therefore, of opinion that the 1st defendant is entitled to recover on 1D4 the principal sum and interest thereon at 12% per annum up to the date of execution of 1D6, and, thereafter, from the date of Yusoof's death up to the date of payment. With regard to (*c*) and (*d*) we are of opinion that the findings of the learned acting District Judge are right. There is ample evidence to support the findings that the 1st defendant did not make the tea plantation and that he was a *bona fide* improver. There remains the question of damages. The 1st plaintiff said in his evidence that he claimed Rs. 40 as rent for the building and Rs. 60 as income from the land. The learned acting District Judge says that the evidence discloses that Rs. 50 a month will be a reasonable sum to be paid as damages. We are unable to say on what evidence he acted. We think that the figure fixed by him is an arbitrary one. In 1929, Yusoof leased the land and the buildings to the 1st defendant for three years at Rs. 12·50 a month. It may be that at that time the price of tea and rubber was not as good as it was after 1939. We think that a fair and reasonable sum to be fixed as damages would be Rs. 25 a month. In the decree that has been entered the plaintiffs have been inadvertently declared entitled to the three lands described in the schedule. That mistake requires correction.

We would set aside the judgment of the learned acting District Judge and send the case back so that he may decide what sum is due to the 1st defendant as compensation for the buildings and on the bond 1D4. We think that the parties should bear their own costs in both Courts.

WINDHAM, J.

I agree.

Set aside and sent back

Present : NAGALINGAM, J.

DON AMARASEKERA vs. RASIAH

Application for a Writ of Mandamus on E. Rasiah No. 96.

Argued and Decided on : 28th May, 1950.

Local Option—Poll—Ballot papers marked with cross on reverse—Rejection by presiding officer—Validity—Local Option Rules, 1928, *Rule* 21—*Form of ballot paper—Mandamus.*

In prescribing the manner in which a voter should record his vote at a Local Option Poll. Rule 21 of the Local Option Rules 1928 states : ".....if he wishes to vote for a closure, mark a cross (X) *in the space provided* " and then fold the ballot paper and place it in the ballot-box."

The Form of the ballot paper contains a direction in the following words : " If you wish to vote for closure, mark a cross *below*."

In counting the ballot papers at a Local Option Poll the presiding officer rejected certain ballot papers which had cross marks not on the face of the ballot paper, but on its reverse.

On an application for writ of mandamus on the presiding officer :—

Held : (i) that the presiding officer acted rightly in rejecting the ballot papers in question.
(ii) that a cross made on the reverse of the ballot paper could not be held to be a cross in the space provided on the face of the ballot paper.

Per NAGALINGAM, J.—" It is necessary to bear in mind that the form given of the ballot paper does not form part of the substantive provision of the law, and it is the substantive provision, namely Rule 21, that should be looked at in order to determine whether the ballot paper is properly marked or not. The Rules themselves have the same force of law as fully as if they had been enacted in the Ordinance."

L. G. Weeramantry, for petitioner.

NAGALINGAM, J.

The question for determination in this case is whether the Presiding Officer was correct in rejecting certain ballot papers which were marked with a cross not on the face of the ballot paper but on its reverse. It has been contended that it is immaterial where the mark appears on the ballot paper so long as the intention of the voter can be gathered from the mark put by him. This contention is advanced based on dicta of English Judges in relation to Parliamentary and Municipal elections. In fact, assistance was even sought by calling to aid a decision of this Court in regard to Parliamentary Elections. I imagine, however, that the correct approach to a decision of the question is to look at the provisions of our law and construe those provisions, and if those provisions are plain, I do not think there is any necessity to have recourse to English or other precedents, unless the identical language of our law has been the foundation for the views expressed in other cases.

The provision of the law that needs to be construed is Rule 21 of the Local Option Rules 1928, Vol. I, Sub. Leg. 309. This Rule prescribes the manner in which the voter should record his vote and requires the voter in a case where a poll is held for the closure of taverns to mark a cross in the space provided in the ballot paper if he wishes to vote for the closure and then fold the paper and place it in the ballot box. It will be seen that the Rule requires the cross mark to be placed ' in the space provided.' The form of the ballot paper itself is to be found at the end of the Rules and on the ballot paper there is a direction to the voter as to what he should do in slightly different words and it runs as follows : " If you wish to vote for closure, mark a cross *below*." The words in the Rule, " In the space provided " have been substituted by the word, " below," in the direction contained in the ballot paper.

It has been argued that the direction to make the cross mark *below* means not only in the space that appears below the cage carrying the instruction in the three languages but also extends to the reverse of the ballot paper, which could also be regarded as a continuation of the space designated ' below '. First of all, if one has to con true the words, ' in the space provided ' to be found in the Rule itself, no argument would be possible that any place outside the space provided can be regarded as the space wherein the mark is to be made. In other words, it cannot be contended that where the mark appears outside the space provided it is a sufficient compliance with the requirements of the Rule. But then, can it be said that merely because in the ballot paper itself the words, ' in the space provided ' have been substituted by the word ' below ' a different construction is to be placed in regard to the direction contained in the ballot paper itself? I do not think so. The directions are in reference to the actual ballot paper itself, and we find that the ballot paper contains a space completely enclosed by four lines immediately under the instructions, so that in reference to the ballot paper the term ' below ' can only mean the space below the printed instructions and enclosed by the four lines. I do not think that the words ' below ' can in the present context at any rate be regarded as having any meaning other than that it is the directions opposite of the term ' above ', not the opposite of the term ' obverse ' or ' the face '. It is true, however, that where persons are called upon to affix their signatures below some legend written on the top of a sheet of paper and where the entire space below is exhausted by a certain number of the signatures, the remaining signatures may happen to be carried on to the reverse of the sheet. But this is an instance where

convenience dictates that the signature should be placed on the reverse rather than that it is in compliance with the requirement that the signature should be placed below. But on the other hand I do not think it can be seriously argued that where the whole space below the legend remains blank and the first signature is placed on the reverse of the documents that the signature is so placed or any other subsequent signatures can be said to have been placed below the writing on the paper.

In any event, in construing a statute one cannot take liberties by assigning to a word a loose practice or vague idea that may be entertained by lay people in regard to it. Counsel has not been able to cite either a definition or an authority where the term 'below' has been held to include in a context such as this the reverse or the back of a sheet of paper. It is necessary to bear in mind that the form given of the ballot paper does not form part of the substantive provision of the law, and it is the substantive provision, namely Rule 21, that should be looked at in order to determine whether the ballot paper is properly marked or not. The Rules themselves have the same force of law as fully as if they had been enacted in the Ordinance. See section 14 (1) (d) (iii) of the Interpretation Ordinance. There can be little doubt that the reverse of the ballot paper can in no sense be regarded as the 'space provided' for the placing of the mark as required by the Rule.

The Rule further says, "Ballot papers which do not comply with this Rule shall not be considered in recording the votes." The only question that the Presiding Officer had to determine was whether the ballot paper had been marked as required by the Rule. From what has been said already, it will be manifest that a cross made on the reverse of the ballot paper cannot be held to be a cross placed in the 'space provided' on the face of the ballot paper and therefore obviously a ballot paper marked on the reverse cannot be held to comply with the Rule. The ballot paper, therefore, so far as the obverse of it is concerned, is one on which there is no mark, and therefore would properly be entitled to be counted as a vote recorded against the closure. The Presiding Officer was therefore right in not counting the ballot papers which had no mark on the face of them but marks on their reverse and treating them as non-effective votes in the closure of the taverns. This disposes of the application.

I should like, however, to say a word or two in regard to the English authorities cited. Counsel relied very strongly upon a passage in Baker, Law of Parliamentary Elections, 1940 Ed. p. 368, which runs as follows :—

> The form of directions which is placarded in the polling station directs the voter to "place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus, X."

Counsel also referred to various instances given therein at pages 372 to 378, where ballot papers containing various types of markings were all held to be good, for instance, where instead of one cross mark two cross marks had been placed and where in addition to a cross mark another X had been rubbed with a damp finger or where one cross mark appears in the space opposite the name while another appears outside the space or where the mark is placed on a straight line or a star. It certainly would appear to be preposterous that a cross placed on the left of the printed name of the candidate should be regarded as a sufficient compliance with the requirement that the mark should be placed on the right side of the name, but the Judges decided nothing so preposterous. It is only necessary to quote the language of the judgment in the case of *Woodward vs. Sarsons*, (1875) L. R. 10 C. P. 746, where Lord Coleridge, C.J., said :—

> "by s. 28, 'the schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act.' The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing "directions." Comparing the sections and the rules, it will be seen that for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states that "the forms contained in this schedule, or *forms as nearly resembling the same as circumstances will admit* shall be used." And on the ballot paper, as given in the schedule, is, "*Directions* as to printing ballot paper," and "Form of *directions for the guidance of voters in voting*," &c. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second, are directory enactments, as distinguished from absolute enactments in the sections in the body of the Act.....the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The 2nd section enacts, as to what the voter shall do, that "the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an enclosed box". This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter shall mark his paper *secretly*. How he shall mark it, is in the directory part of the Statute."

In the light of these observations, it is quite clear that the passage cited from Baker has reference *what was held to be the directory part* of the enactment and not to the absolute; and hence what the Judges did in those cases was to find out what the intention of the voter was.

The English Law on the point correctly summarised in section 49 of the Ceylon Parliamentary Elections Order in Council, 1946, which says in sub-section 2 thereof :—

> "Where the returning officer is satisfied that any mark made on a ballot paper clearly indicates the intention of the voter and the candidates for whom he gives his vote, the returning officer shall not reject the ballot paper on the ground solely that it has not been marked in all respects in accordance with the directions given for the guidance of voters under this Order."

An instance of the application of the English principle and of this provision is to be found in the case of *Kurruppu vs. Hettiarachchi et. al.* Election Petition No. 6 of 1947 (Nivitigala) 49 N. L. R. 320.

It will thus be seen that while under the English Law of Parliamentary Elections the directions have been held not to have the same effect as absolute law, and while under our Parliamentary Elections Order-in-Council non-compliance with directions is expressly regarded as being not sufficient ground upon which to reject the votes, under the Local Option Rules which as observed earlier, have the force of law, non-compliance with the Rule in regard to the marking of the ballot paper is especially declared to be a ground for rejecting the vote. The view expressed by Lord Coleridge, C.J., in regard to the directory character of the act would apply to the form of the ballot paper as given in the Local Option Rules, but no further.

I therefore refuse notice and dismiss the application. *Dismissed.*

Present : BASNAYAKE, J.

In the Matter of an Application to Revise the Order made in M. C. Mannar Case No. 8444

ATTORNEY-GENERAL vs. LETCHIMEN NADAR

Application No. 576—*M. C. Mannar* 8444

Argued on : 9th March, 1950
Decided on : 26th June, 1950

Police Ordinance, Section 72—*General fund for the reward of Police Officers—Informers Rewards Ordinance—Section* 2—*Person convicted and fined on plaint filed by Police Officer—Application on later date to order half-fine be awarded to Police Reward Fund allowed—Validity of order—Effect of proviso to section* 72 *of Police Ordinance.*

Held : (1) That an order under section 2 of the Informers Reward Ordinance should be made at the same time as the order imposing the fine and not later.

(2) That the effect of the proviso to section 72 of the Police Ordinance is that when a police officer acts the part of an "informer" properly so called the share of the fine should be paid to the Reward Fund contemplated therein and not to the "Informer" personally as prescribed by the Informers Reward Ordinance.

A. E. Keuneman (Jnr.), *Crown Counsel,* for the Attorney-General.

No appearance for the respondent.

BASNAYAKE, J.

This is an application by the Attorney-General to have the order of the learned Magistrate, directing the payment to the Police Reward Fund of one-half of the fine imposed by him on the accused, set aside.

Shortly the material facts are as follows. On 24th November, 1948, Police Sergeant Lantra made a report under section 148 (1) (*b*) of the Criminal Procedure Code to the effect that one Periasamy Nadar Letchiman Nadar of Kottadimangalam, Tinnevelly Jilla, did on or about the 10th day of November, 1948, at Talaimannar land in the coast of Ceylon without having obtained a "health pass certificate" from the Port Health Officer, Mandapam Camp, as required by Quarantine Regulation 34 framed under the Prevention of Diseases Ordinance. On 8th December, 1948, on his own plea, Periasamy Nadar was convicted and sentenced to pay a fine of Rs. 50. On 20th January, 1949, Police Sergeant Kandiah filed the following motion :—

> "This 20th day of January, 1949, I, P.S.84 Kandiah on behalf of the District Inspector of Police, Mannar, on instructions from the S.P. N.P., move that Court be pleased to order that half fines in the above case be awarded to the Police Reward Fund, as the prosecuting officers have failed to move and no order has yet been made."

On 24th January, 1949, the learned Magistrate made order directing half the fine to be paid to the Police Reward Fund.

The learned Magistrate does not indicate the provision of law under which he acted. Learned Crown Counsel submits that an order awarding

the payment of any share of a fine not exceeding one-half to the Police Reward Fund can be made in respect of fines imposed for certain offences under section 2 of the Informers Reward Ordinance read with section 72 of the Police Ordinance, but that in this instance the order is bad inasmuch as it was not made at the time the fine was imposed but on a later date. He relies on certain unreported decisions of this Court cited by him. P. C. Mannar 7437—8-3-1917. M. C. Mannar 8548—S. C. 339—29-7-1949. M. C. Mannar 8530—S. C. 369—31-8-1949.

Section 2 of the Informers Reward Ordinance, so far as is material to the consideration of the question arising for decision, reads :—

> "It shall be lawful for the Court before which an offender is convicted of an offence under any of the Ordinances enumerated in the Schedule to direct in respect of any fine that may be imposed for such offence that any share not exceeding one-half thereof or of so much as shall actually be recovered be awarded to the informer."

In my opinion learned Crown Counsel's contention is sound. An order under section 2 of the Informers Reward Ordinance should be made at the same time as the order imposing the fine. The language of the section to my mind does not lend itself to any other construction. The order of the learned Magistrate cannot therefore stand.

But there is a further reason why the order of the learned Magistrate should be set aside in the instant case, and in all the other applications S. C. Applications Nos. 577 to 605 which depend on this decision. The proceedings in this case as stated above were instituted on a written report made under section 148 (1) (*b*) of the Criminal Procedure Code by a person who is a peace-officer within the meaning of that expression in the Criminal Procedure Code. The provisions of the Informers Reward Ordinance are designed for the rewarding of "Informers" in certain cases. The expression "informer" has acquired a definite meaning in English law. It must be understood in our statute in the same sense. It means a person who with a view to gain gives information to a Magistrate or any other authority constituted by law for investigating offences. In certain contexts it is used n the sense of approver. In this country a police officer is a person who is employed by the State in connexion with its functions of maintaining law and order. He is remunerated like any other officer of the public service. His duties are defined by statute. The relevant provisions are section 57 and 72 of the Police Ordinance which are reproduced below.

> "57. Every Police Officer shall for all purposes in this Ordinance contained be considered to be always on duty, and shall have the powers of a Police Officer in every part of this Island.
>
> It shall be his duty—
>
> (*a*) to use his best endeavours and ability to prevent all crimes, offences, and public nuisances,
>
> (*b*) to preserve the peace,
>
> (*c*) to apprehend disorderly and suspicious characters,
>
> (*d*) to detect and bring offenders to justice,
>
> (*e*) to collect and communicate intelligence affecting the public peace ; and
>
> (*f*) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority."
>
> "72. It shall be lawful for any police officer to lay any information before any Magistrate, and to apply for summons, warrant, search warrant, or such other legal process as may by law issue, and may be expedient under the circumstances, against any person committing an offence against any law of enactment, or against any regulation for the protection of the revenue, or against any person committing or failing to remove any public nuisance or unwarrantable obstructions, keeping a disorderly house, harbouring thieves, disturbing the peace, obstructing the due course of justice, and the like : and to prosecute such offenders up to final judgment.
>
> Provided always that any rewards, forfeitures, and penalties, or shares of rewards, forfeitures, or penalties which by law are payable to informers, and all costs of prosecution which may by any enactment be awarded to the prosecutor, shall be paid into a general fund for the reward of police officers to be regulated in manner as the Minister shall from time to time direct."

Section 22 of the Criminal Procedure Code imposes on a peace officer the obligation of communicating to the nearest Magistrate or Inquirer having jurisdiction or to his own immediate superior officer any information which he may have or obtain respecting the commission of any offence within the local jurisdiction in which he is empowered to act.

To treat a person who is under a duty to bring offenders to justice as an informer is to my mind a violation of the language of the statute, and would be an undue extension of the scope of the expression "informer" in the context of the Informers Reward Ordinance. The proviso to section 72 of the Police Ordinance is not designed to alter the entire scope of the Informers Reward Ordinance, nor is it the proper function of a proviso in one enactment to alter the substance of another enactment. In my opinion the effect of the proviso under discussion is that where a police officer acts the part of an 'informer" properly so called, the share of the fine should be paid to the Reward Fund contemplated therein and not to the "informer" personally as prescribed by the Informers Reward Ordinance.

The order of the learned Magistrate ordering that one-half of the fine should be paid to the Police Reward Fund is set aside.

The orders in Applications 577 to 605 are also set aside.

Set aside

Present : BASNAYAKE, J.

RODRIGO vs. PARANGU

S. C. 119—*C. R. Colombo,* 15683.

Argued on : 17th February, 1950.
Decided on : 2nd June, 1950.

Rent Restriction—Premises reasonably required for the occupation of widow and children of deceased —Action for ejectment of tenant by administrator qua *administrator of estate of deceased —Is action maintainable.—Civil Procedure Code, Section 472*

Held : That an administrator of the estate of a deceased person is entitled to maintain an action *qua* administrator for the ejectment of a tenant under Section 13 (*c*) of the Rent Restriction Ordinance on the ground that the premises are reasonably required for the occupation of the widow and the children of the deceased.

Cases referred to:— *Perera vs. Silva,* (1893) C.L.R. 150
Fernando vs. Rosa Maria et al, (1926) 28 N. L. R. 234
The Public Trustee vs. Karunaratne, (1938) 40 N. L. R. 429
De Silva vs. Rambukpota, (1939) 41 N. L. R. 37 at 42.

E. B. Wikramanayake, K.C., with *M. M. Kumarakulasingham,* for the appellant.
H. W. Thambiah, with *Sharvananda,* for the respondent.

BASNAYAKE, J.

The plaintiff-appellant is the administrator of the estate of one D. C. Karunaratne deceased. He seeks to have the defendant-respondent ejected from premises Nos. 414/1 and 414/2 in Baseline Road, Colombo. He claims that he is entitled to maintain the action *qua* administrator as the premises are reasonably required for the occupation of the widow and children of the deceased.

The learned Commissioner holds that the premises are reasonably required for the occupation of the widow and children of the deceased, and that, having regard to the defendant's requirements, the claim of the deceased's heirs to the occupation of the premises is entitled to prevail. But he gives judgment against the plaintiff on the ground that he is not entitled to maintain the action *qua* administrator.

I find myself unable to share the opinion of the learned Commissioner that the plaintiff cannot maintain the action *qua* administrator. There is nothing in Section 13 of the Rent Restriction Act, No. 29 of 1948, or in any other provision of the Act, that supports his decision. Section 13 so far as is material reads :—

> "(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 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 authorisation of the Board shall not be necessary, and no application for such authorisation may be entertained by the Board, in any case where—
>
> (*a*) rent has been in arrear for one month after it has become due ; or
>
> (*b*) the tenant has given notice to quit ; or
>
> (*c*) the premises are, in the opinion of the Court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord, or for the purpose of the trade, business, profession, vocation or employment of the landlord."

In view of the learned Commissioner's findings of fact, the only question that remains for consideration is whether the plaintiff *qua* administrator can maintain the action. I am of the opinion that section 472 of the Civil Procedure Code affords sufficient authority for the plaintiff to maintain this action. That section reads :—

> "In all actions concerning property vested in a trustee, executor, or administrator when the contention is between the persons beneficially interested in such a property and a third person, the trustee, executor or administrator shall represent persons so interested ; and it shall not ordinarily be necessary to make them parties to the action. But the court may, if it thinks fit, order them, or any of them, to be made such parties."

Under our law the estate of a deceased person vests, in the administrator *Perera vs. Silva,* 1893, 2 C. L. R. 150 ; *Fernando vs. Rosa Maria et. al.* 1926, 28 N. L. R. 234 ; *The Public Trustee vs. Karunaratne,* 1938, 40 N. L. R. 429 ; *De Silva vs. Rambukpota,* 1939, 41 N. L. R. 37 at 42, and the plaintiff is, by virtue of the section I have quoted above, entitled to maintain the action he has brought.

I therefore allow the plaintiff's appeal with costs and direct that decree be entered as prayed for in the plaint.

Appeal allowed.

Present : JAYETILEKE, C.J., GUNASEKERA, J. & SWAN, J.

JOHN AND ANOTHER vs. SILVA

S. C. 22—D. C. Galle (Inty.) No. X 247

Argued on : 26th June, 1950
Decided on : 26th July, 1950

Civil Procedure Code—Security given in criminal court for due performance of decree in proposed civil action—Can successful party in civil action realise security in execution proceedings under section 348.

Held : That execution proceedings under Section 348 of the Civil Procedure Code should be limited to security taken before the Court under the provisions of the Code and does not apply to security given outside the Court.

Cases referred to : *Wanigasooriya vs. The Hiniduma Co-operative Society*, 51 N. L. R. 138.
Thirumalai vs. Ramayyer, I. L. R. 13 Madras 1.
Subraya Pillai vs. Sathananda Pandara, A. I. R. (1919), Madras 813.

D. S. Jayewickreme with *Rienzie Wijeratne*, for the sureties-appellants.
G. P. J. Kurukulasuriya with *D. W. F. Jayesekera* and *B. S. Dias* for the plaintiff respondent.

JAYETILEKE, C.J.

In action No. 40699 of the Magistrate's Court of Galle the defendants charged the respondents and five others with theft of certain articles enumerated in a list marked A, Criminal Trespass and hurt.

On the date of trial it was agreed between the parties as follows :—

(1) That the respondents should institute an action against the defendants for a declaration of title to the goods referred to in the list marked A.

(2) That the 1st defendant should give security in a sum of Rs. 4,000, take charge of the said goods, and keep them in his custody till the said action was decided.

In pursuance of the said agreement the defendants executed two bonds bearing numbers 2203 and 2204 dated June 22, 1944, attested by A. M. Saheed Notary Public, and took charge of the said goods, and the respondents instituted this action on August 25, 1944, against the defendants for a declaration of title to the said goods and for the recovery of damages. The appellants became parties to Bond 2204 as sureties. The material portions of the bond are as follows :—

(1) We Don Simon Henry Senanayake, as principal and H. Liyanage John, and H. Liyanage Sopi Nona as sureties are jointly and severally held and firmly bound unto A. Ganapathi Pillai, the Chief Clerk of the Magistrate's Court of Galle, or the Chief Clerk for the time being of the said Court in the sum of Rs. 3,000 for the payment of which we bind ourselves our heirs.....and we the said sureties.....for securing the payment of the said sum hereby mortgage and hypothecate....."

(2) " The condition of this obligation is such that if the above bounden principal.....will restore the articles referred to above or pay their value to the party entitled in accordance with the order of Court in the proposed civil action undertaken to be brought by the 1st and 7th accused or either of them as aforesaid .....then this obligation to be void and of no effect otherwise to remain in full force and virtue."

After a lengthy trial judgment was entered in favour of the respondents declaring them entitled to the said goods and for Rs. 7,850 as damages up to January 23, 1947, and further damages at Rs. 215 a month till they are restored to possession of the said goods. The defendants failed to deliver the said goods to the respondents or to pay their value which was assessed at Rs. 2,500, and the respondents moved to execute the decree against the appellants, under Section 348 of the Civil Procedure Code. The Section is in these terms :—

" Whenever a person has before the passing of a decree in an original action become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against the judgment-debtor, upon application made by the judgment-creditor to the Court for that purpose by a petition to which the persons sought to be made liable as surety shall be named respondent."

The appellants opposed the application on the ground that the section applied only to security furnished to the Court which entered the decree. After hearing argument the learned District Judge allowed the application. The present

appeal is against that order. The appeal came up for hearing before Dias and Pulle JJ. who thought that the question was one which should be considered by a Bench of three Judges. At the argument before us Counsel for the appellants relied entirely on the judgment of this Court in *Wanigasooriya vs. The Hiniduma Co-operative Society.* 51 N. L. R. 138.

In that case the appellant executed a mortgage bond as security for the due performance by the second respondent of his duties as manager of a co-operative store. A dispute between the 1st and 2nd respondents was referred to arbitration under the Co-operative Societies' Ordinance and an award was made against the 2nd respondent. Writ was issued but was returned to Court. Thereafter the 1st respondent moved for a notice on the 2nd respondent in terms of Section 348 of the Civil Procedure Code to show cause why the property hypothecated should not be sold. It was held that Section 348 applied only where a liability was incurred as surety for the performance of a decree after the institution of the action and before the entering of the decree. Counsel for the respondents differentiated that case on the ground that the security was not given for the performance of a decree, and he pointed out that it was not necessary for the purpose of that appeal to decide that Section 348 applies only to security given after the institution of the action. He contended that the language of the Section was wide enough to include a surety bond given before the institution of the action.

The Civil Procedure Code is divided into ten parts under different headings, and these parts are sub-divided into Chapters under different headings. Part 1 deals with actions in general. It is sub-divided into 25 Chapters and Section 348 is in Chapter 22 in which all the Sections relating to execution are grouped. An examination of the Section shows that it provides a summary remedy for the enforcement of the liability of a surety who has given security for the performance of a decree or any part thereof. It does not create a liability but it provides the machinery for the enforcement of the liability of the surety. If there are provisions in the Code which give the Court the power to call upon a party to give security for the performance of the decree or any part of it, the operation of Section 348, must, in my view, be limited to the enforcement of security taken in the exercise of such power. Section 348 does not indicate the classes of surety bonds to which it applies. The words "for the performance of the decree or any part thereof" can be referred to specific provisions of the Code, for instance, Sections 650, 654, 706 and 763. When a surety makes himself liable under any one of these Sections by giving security, Section 348 enables the party for whose benefit the security was given to enforce the security by execution proceedings in the same manner as if the surety was a party to the decree or order in respect of which security was given. A Court has no power to order execution against a person who is not a party to the action unless he submits to its jurisdiction. A surety who is not a party to the action makes himself amenable to the jurisdiction of the Court in execution proceedings not by virtue of the provisions of Section 348 but by giving security in the face of the Court. The application of Section 348 should, therefore, be limited to security taken before the Court under the provisions of the Code. This view has the support of two judgments of the High Court of Madras under the corresponding Sections of The Indian Civil Procedure Codes of 1882 and 1908.

The language of Section 348 is almost identical with that of Section 253 of The Indian Civil Procedure Code Act 14 of 1882. It reads :—

> "Whenever a person has, before the passing of a decree in an original suit become liable as surety for the performance of the same or any part thereof the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as the decree may be executed against the defendant .....Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

In *Thirumalai vs. Ramayyer* I. L. R. 13 Madras 1 the question arose whether Section 253 could be availed of when security had been given on behalf of the respondent to an appeal under Section 546 for the due performance of the decree. In the course of his judgment Muttuswamy Aiyer J said :—

> (1) "The sections which relate to the liability of the surety and which provide for its enforcement are not one and the same whether in Act 8 of 1859 or in the present Code of Civil Procedure. In the former enactment sections 76 and 83 indicated how a surety became liable for the fulfilment of the original decree.....In the present Code sections 479, 484 and 546 correspond with them. In the former it was section 204 which provided the machinery for its enforcement whilst in the latter the machinery is contained in two sections 253 and 583. The words of section 253 'whenever a person has before the passing of a decree in an original suit become liable for the performance of the same', only premise the case in reference to which the rule of procedure is prescribed, and they do not support the remark that the liability and the machinery for its enforcement are blended together".

(2) "The obligation which a surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or the appellant in the original suit or in appeal *and the obligation is contracted before the Court and is as much a matter of record as the decree undertaken to be fulfilled*".

The Sections in our Code which correspond with Sections 479, 484 and 546 referred to in the passage quoted above are 650, 654 and 763 respectively.

This judgment was followed in *Subaraya Pillai vs. Sathananda Pandara*, A. I. R. (1919) Madras 813 in which the question for consideration was whether a surety bond taken by the judgment creditor outside the Court be enforced under Section 145 of Act 5 of 1908. Section 145 is in these terms :—

"Where any person has become liable as surety :—

(*a*) for the performance of any decree or any part thereof

(*b*) for the restitution of any property taken in execution of a decree or

(*c*) for the payment of any money or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon.

The decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47. Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

Napier J said :—

"As at present advised I think that considering that the language of the various sub-sections can be referred to specific provisions of the Code and considering that the object of the section is to allow execution against a person who is not a party to the suit or legal representative it is more proper to confine it to cases where the liability has been entered in the face of the Court, or has been recorded by the Court in accordance with the provisions of the Code."

Sadasiva Aiyar J said :—

"I do not think that the fact that the Court itself stayed the execution on the report made to it of security having been given outside the Court would enable the Court to allow the security to be realised in execution. The only security which could be so realised is one to be furnished to the Court, or at least filed in Court."

I would, accordingly, set aside the order appealed against and dismiss the respondent's application with costs here and in the Court below.

GUNESEKERA, J.
I agree.

SWAN, J.
I agree.

Set aside.

Present : BASNAYAKE, J.

WILBERT SINGHO vs. THARMARAJAH (S. I. POLICE, FORT)

S. C. 60—*Jt. M. C. Colombo* 33982
Argued and decided on : 15th March, 1950

Criminal Procedure Code, section 296 (1)—*Failure to comply with the requirements of—Is it fatal to a conviction.*

Held : That the failure on the part of a Magistrate to call the attention of an unrepresented accused, who elects to give evidence, to the principal points in the evidence against him, is fatal to his conviction.

Cases followed : *Fernando vs. Perera*, 16 N. L. R. 477.
King vs. Roma, 7 C. W. R. 14.

Dissented from : *Somaliya vs. Kaluwa*, 7 C. W. R. 121.

S. C. E. Rodrigo, for the accused-appellant.

K. Sivasubramaniam, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

Learned Counsel for the appellant submits that the accused-appellant was not represented by a pleader at the trial and that the learned Magistrate has omitted to comply with that provision of section 296 (1) of the Criminal Procedure Code which requires him to call the attention of an unrepresented accused who elects to give evidence to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

In the instant the case accused has given evidence but there is no record that the learned Magistrate called his attention before he did so to the principal points in the evidence for the prosecution which tell against him. That is a provision enacted in the interests of justice and is therefore imperative. In my opinion the omission to observe that requirement of the Criminal Procedure Code is fatal to the conviction of the accused. My view finds support in the case of *Fernando vs. Perera* 16 N. L. R. 477 and in the opinion of Schneider, A.J. in the case of *King vs. Roma* 7 C. W. R. 14. With great respect I find myself unable to agree with the case of *Somaliya vs. Kaluwa* 7 C.W.R. 121.

I set aside the conviction and order a re-trial before another Magistrate.

Conviction set aside and retrial ordered.

Present : DIAS, S.P.J., GRATIAEN, J. & PULLE, J.

SIRISOMA AND OTHERS vs. SARNALIS APPUHAMY AND OTHERS

S. C. 30/L. D. C. Balapitiya L—90.

Argued on : 18th and 19th May, 1950.
Decided on : 29th May, 1950.

Partition Ordinance—Sale of ' undivided ' shares or ' whatever rights, interests, lot or lots that may be allotted' to grantor in partition action—Is such sale obnoxious to Section 17 of the Partition Ordinance—Is it sale or agreement to sell—How determined—Does section 9 invalidate such transaction.

Held : (i) That a deed alienating or hypothecating, pending partition proceedings an interest, to which a co-owner may ultimately become entitled under the final decree, is not obnoxious to Section 17 of the Partition Ordinance.

(ii) That whether such a deed should be construed as an actual alienation or hypothecation of such contingent interest *or* merely as an agreement to alienate or hypothecate such interest (if and when acquired) must be decided in accordance with the ordinary rules governing the interpretation of written instruments.

(iii) That if such an instrument is in effect only an agreement, no rights pass under it to the grantee until and unless the agreement had been duly implemented.

(iv) That if, without implementing the agreement the grantor conveys to a 3rd party the rights acquired under the decree, the competing claims of the 3rd party and the original grantee must be determined with reference to other legal principles such as the application of Section 93 of the Trusts Ordinance.

(v) That if, the instrument is in effect a present alienation or hypothecation of a contingent interest, rights of ownership or hypothecating rights vest in the grantor automatically upon the acquisition of that interest by the grantor.

(vi) That neither any principle of the Common Law nor the provisions of Section 9 of the Partition Ordinance invalidate a sale by anticipation of a contingent interest during the pendency of a Partition Action.

Cases Over-ruled : *Fernando vs. Atukorale*, (1926), 28 N. L. R. 292.
Appuhamy vs. Babun Appu, (1923), 25 N. L. R. 370.

Cases referred to : *Abdul Ally vs. Kelaart*, (1904), Bal. 40.
Louis Appuhamy vs. Punchi Baba, (1904), 10 N. L. R. 196.
Subaseris vs. Prolis, (1913), 16 N. L. R. 393.
Khan Bhai vs. Perera, (1923), 26 N. L. R. 204.
Fernando vs. Atukorale, (1926), 28 N. L. R. 292.
Manchanayake vs. Perera, (1945), 46 N. L. R. 457.
Khan Bhai vs. Perera, (1923), 26 N. L. R. 204.
Appuhamy vs. Babun Appu, (1923), 25 N. L. R. 370.
Rajapakse vs. Gunesekera, (1928), 29 N. L. R. 509.
Salee vs. Natchia, (1936), 39 N. L. R. 259.
Hewawasan vs. Gunesekera, (1926), 28 N. L. R. 33.
Gunetilleke vs. Fernando, (1921), 22 N. L. R. 385.
63 Law Quarterly Review, page 437.

E. B. Wikramanayake, K.C., with *C. V. Ranawake*, and *C. Seneviratne*, for the defendant-appellants.

H. V. Perera, K.C., with *N. E. Weerasooria, K.C.*, *M. M. Kumarakulasingham*, and *J. E. R. Candappa*, for the plaintiffs-respondents.

GRATIAEN, J.

By a notarially attested deed of transfer No. 307 dated 14th March, 1942, the second defendant appellant sold to the plaintiffs, during the pendency of partition proceedings in respect of certain premises, his " undivided " shares in the land " *or whatever rights, interests, lot or lots that may be allotted to (him) in the said partition action* ". He further covenanted with the plaintiffs " *to do and execute or cause to be done and executed all such and other acts, deeds, matters and things whatsoever for the better and more effectually assuring the said premises and every part thereof* " to the plaintiffs.

On 31st March 1947, final decree in the partition action was entered whereby the second defendant became entitled, in lieu of his undivided shares, to certain defined allotments in the larger land. Five days later, ignoring the execution of the earlier deed No. 307, he purported to convey these defined allotments to the first defendant. The present action relates to the competing claims of the plaintiffs and of the first defendant to ownership of the allotments in question. After trial the learned District Judge entered judgment in favour of the plaintiffs with costs.

The defendants have appealed to this Court from the judgment and decree entered against

them. The appeal came up for hearing in the first instance before my brothers Dias and Basnayake. Upon a preliminary question of law the following order was made by my brother Dias (Basnayake J. concurring) :—

> " In this case learned Counsel for the appellants and respondents agree that the case of *Fernando vs. Atukorale*, (1926) 28 N. L. R. 292, is in conflict with the later case of *Manchanayake vs. Perera*, (1945) 46 N. L. R. 457.
>
> " This case deals with the question of the effect of a deed executed by a co-owner during the pendency of a partition action, wherein he transfers the divided shares which he will be allotted in the final decree. It is important that the question whether such a deed prevails over a subsequent conveyance by the co-owner should be settled by an authoritative decision of this Court.
>
> " My brother and I agree that in terms of section 51 of the Courts Ordinance, Chapter 6, this is a proper case to be decided by a Full Bench. We accordingly refer the matter to His Lordship the Chief Justice ".

Upon this recommendation the question was referred by Sir Arthur Wijeyewardene, Chief Justice, for the decision of a Divisional Bench consisting of three Judges of this Court. We are indebted to Mr. H. V. Perera and Mr. E. B. Wikramanayake for the assistance which they have given us in our endeavours to elucidate the present state of the law regarding the validity and effect of transactions relating to interests in land during the pendency of proceedings under the Partition Ordinance.

The deed No. 307, in so far as it purports to dispose of " undivided " interests in property during the pendency of a partition action, is clearly obnoxious to the provisions of the Partition Ordinance. The only question which remains for decision is as to the effect of that part of the deed which disposes of the " rights, interests, lot or lots which may be allotted " (*and which were in fact subsequently allotted*) to the second defendant under the partition decree. The matters which we have been called upon to consider in regard to this purported conveyance are :—

(1) Is such a grant obnoxious to the provisions of section 17 of the Partition Ordinance?

(2) If not, should it be interpreted as an *actual conveyance* of the allotments which might ultimately pass to the second defendant under the final decree for partition *or* merely as an *agreement to convey* his interests in those allotments if and when they passed to him ?

(3) If the first of these alternative interpretations be correct, is such a purported conveyance invalid and inoperative *either* by reason of the provisions of section 9 of the Partition Ordinance *or* because it offends some principle of the Roman-Dutch Law which regulates contracts of sale of this description ?

The conclusion at which I have arrived is that these questions should be answered as follows :—

(1) No ;

(2) As an *actual conveyance* of the allotments which might pass (and which in the present case did eventually pass) to the second defendant under the partition decree ;

(3) No ; the conveyance is not affected by the provisions of section 9 of the Partition Ordinance ; nor is it invalidated by any principle of the common law which governs the case.

It is convenient at this stage to review the judicial opinions expressed in earlier decisions of this Court as to the extent to which the provisions of section 17 of the Partition Ordinance impose a fetter on the free alienation of interests, present or contingent, in property during the pendency of partition proceedings. In *Abdul Ally vs. Kelaart* (1904) Bal. 40. Wendt J. and Sampayo J. held that an assignment by anticipation of " so much of the proceeds realised by the sale (*i.e.*, under a decree for sale in a pending partition action) as shall represent the (vendor's) undivided share " was not obnoxious to section 17. In *Louis Appuhamy vs. Punchi Baba* (1904) 10 N. L. R. 196 Layard C.J. and Moncrieff J. took the same view, and decided that section 17 was " not intended to hinder or prevent persons from alienating or mortgaging the rights to which they become entitled after a partition had been decreed in respect of the land ". In *Subaseris vs. Prolis* (1913) 16 N. L. R. 393 Wood Renton J., sitting alone, held that a party to a pending partition action could deal by anticipation with whatever divided interest he might ultimately obtain. In *Khan Bhai vs. Perera* (1923) 26 N. L. R. 204 the question came up before Bertram C.J. and Porter J. as to the precise point of time up to which the prohibition against the alienation or hypothecation of a co-owner's interests continued *in cases where the decree in the action was for a sale* and not for a partition of the land. Bertram C.J. referred this question for a ruling of the Full Bench of the Court consisting of himself, Ennis J., Schneider J., Garvin J. and A. St. V. Jayawardene J. The unanimous ruling of the Court in regard to the immediate question submitted for its decision was that " the prohibition must be deemed to continue so long as the common bond of co-ownership exists, that is to say (where there is a decree for sale) until the issue of the certificate under

section 8". Apart from the authoritative decision of the Full Bench on this particular point, the occasion was considered appropriate to give a ruling of general application on the question "as to the true interpretation of the prohibition against alienation or hypothecation of the undivided shares or interests in property subject to a partition action". The Judges unanimously decided on this general question that persons desiring to charge or dispose of their interests in a property subject to a partition action could do so "*by expressly charging or disposing of the interest to be ultimately allotted to them in the action*". It seems to me to be a question of academic refinement whether the ruling which was pronounced on this occasion by five distinguished Judges of great learning and experience is, in effect, only an *obiter dictum*—per Maartensz J. in *Fernando vs. Atukorale* (1926) 28 N. L. R. 292 or whether it would be more correct to say, with Soertsz J. in *Manchanayake vs Perera* (1945) 46 N. L. R. 457 that "the pronouncement is of the very essence of the *ratio decidendi* in the case". I am convinced that, apart from technicality, the view expressed in *Khan Bhai vs. Perera* (1923) 26 N. L. R. 204 which I have quoted above should now be regarded as having the force of binding authority. The ruling has influenced the actions of countless vendors and purchasers for over a quarter of a century, and it confirms the opinions previously pronounced by an exceptionally strong Bench of Judges of this Court. Besides, it is unquestionably a correct statement of the law on the point. Section 17 of the partition Ordinance prohibits the alienation or hypothecation of undivided *interests presently vested* in the owners of a land which is the subject of pending partition proceedings. There is no statutory prohibition against a person's common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. "Section 17 imposes a fetter on the free alienation of property, and the Court ought to see that that fetter is not made more comprehensive than the language and the intention of the section require". *Subaseris vs. Prolis* (1913) 16 N. L. R. 393.

It has been argued before us that a conveyance by anticipation of whatever interests a party may acquire upon the termination of partition proceedings must always be interpreted as an *agreement* to convey those interests. This cannot be so. The contrary view is implicit in the ruling of the Full Bench in *Khan Bhai vs. Perera* (1923) 26 N. L. R. 204 and in the earlier decisions to which I have referred. Even if the matter were *res integra*. I would say with little hesitation that the proper interpretation of a conveyance cannot be affected by the question whether or not it was executed during the pendency of a partition action. Where, upon an application of the normal rules governing the interpretation of written instruments, it is in terms a conveyance of a contingent interest (when acquired), effect can only be given to the document, if at all, upon that basis. If such a conveyance were invalid (which it is not) its character could not properly be altered, by invoking some insupportable 'equitable' doctrine, into that of a mere *agreement* to convey. Certain observations of Ennis J. in *Appuhamy vs. Babun Appu* (1923) 25 N. L. R. 370 and of Lyall Grant J. and Maartensz J. in *Fernando vs. Atukorale* (1926) 28 N. L. R. 292 indicate that in their opinion the validity of a sale by anticipation of a contingent interest which the vendor may acquire in a particular action cannot be recognised except by regarding the transaction, contrary to its true intent, as having the effect of an agreement to convey. I venture to doubt if these judges had the advantage which we have enjoyed of a full argument on this question. With great respect, I think that *Fernando vs. Atukorale* (1926) 28 N. L. R. 292 should be over-ruled by the present Divisional Bench, and that *Appuhamy vs. Babun Appu* (1923) 25 N. L. R. 370 should similarly be over-ruled in so far as it purports to decide that a sale by a co-owner, pending a partition action, of the interests which he may ultimately acquire under the partition decree "remains merely an agreement to convey, and would not operate as a conveyance or alienation". I prefer to follow on this point the later rulings of this Court in *Rajapakse vs. Gunesekera* (1928) 29 N. L. R. 509 *Salee vs. Natchia* (1936) 39 N. L. R. 259 and *Manchanayake vs. Perera* (1945) 46 N. L. R. 457 In *Hewawasan vs. Gunasekera* (1926) 28 N. L. R. 33 there was disagreement between Garvin J. and Dalton J. on the one hand, and Jayawardene J. on the other, as to the proper construction of a particular document. On general principles, however, they seem to have agreed that a completed agreement intended to pass an *immediate* interest in land, pending partition proceedings was obnoxious to section 17, but that a dealing by anticipation with divided interest to be ultimately obtained by the vendor was unobjectionable. One should not forget that two of the Judges concerned had contributed to the decision in *Khan Bhai vs. Perera* (1923) 26 N. L. R. 204 and that neither of them, or Dalton J. indicated any doubts as to the correctness of its comprehensive ruling.

I now proceed to deal with two arguments which Mr. Wikramanayake submitted for our consideration. He first argued, but (if my impression be correct) with little enthusiasm, that a sale by anticipation of a contingent interest in land is obnoxious to the Roman-Dutch Law. In my opinion this submission is without merit. In *Gunatillike vs. Fernando* (1921) 22 N. L. R. 385 the Privy Council, although somewhat handicapped by the failure of learned Counsel to cite express authority to them on the point, took the view that there was nothing to indicate that the alienation of a contingent interest in land was prohibited by the policy of the Roman-Dutch Law. Indeed, this view is amply supported by authority which we have had the advantage of considering. As far as the Roman Law is concerned, it is stated in unambiguous terms in the Digest (18-1-18) that "the law recognises the purchase of *res futurae* in the sense that on the occurrence of "the birth" (that is, on the happening of the anticipated event) the sale is regarded as relating back to the time when the bargain was made". These words mean in their context that, if and when the contingent interest intended to be transferred is in fact acquired, it immediately and automatically becomes vested in the purchaser by virtue of the contract of sale which has already taken place. This principle has been taken over in its entirety by the Roman-Dutch Law (*Voet* 18-1-13). When an expectation (*spes*) has been purchased, "the sale is considered as made *iam tunc* when it comes into existence" (vide the footnote to *Berwick's translation* at page 18). What does this mean when the principle is applied to suit the requirements of modern conveyancing? It can only mean, I think, that when an instrument has been executed whereby a present right is conveyed in respect of a contingent interest which the parties to the transaction expect to be realised at some future date, the instrument already executed operates so as to vest that interest in the purchaser as soon as it has been acquired by the vendor. No further conveyance is needed to secure the intended result—although it may well be desirable, as is often stipulated by prudent conveyancers, that the result already achieved should be "confirmed" in a further notarial instrument which will place the purchaser's rights beyond the possibility of controversy. In my opinion *Manchanayake vs. Perera* (1945) 46 N. L. R. 457 was rightly decided on this point.

Mr. Wikramanayake's other submission was that the sale by anticipation of a contingent interest during the pendency of a partition action can never be crystallized into a vested right because, immediately upon the passing of final decree for partition, section 9 operates to extinguish the purchaser's rights under the earlier conveyance. I respectfully think that the decision of Maartensz J. to this effect in *Fernando vs. Atukorale* (1926) 28 N. L. R. 292 is wrong and should be over-ruled. Under section 9, the title to a divided allotment acquired by a co-owner under a decree for partition is no doubt conclusive against interests in that allotment which were vested or were claimed to be vested in any person *at some point of time preceding the date of the decree*. On the other hand, section 9 has no bearing on a purchaser's right to claim that, upon the vesting of the divided allotment in his vendor under the decree, the allotment has automatically passed to him by virtue of the earlier conveyance. This conclusion necessarily follows, in my opinion, from an analysis of the language of the section; there is no need, and indeed there is no scope for reliance on the Roman-Dutch Law doctrine of *exceptio rei venditae et traditae* in this context.

Whether each question which I have discussed be examined by reference to the trend of past decisions of this Court *or* on the assumption that it may legitimately be considered as *res integra*, I think that the following propositions should now be accepted as settled law:—

(1) Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings, of an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending action;

(2) Where an instrument is executed, pending partition proceedings, in respect of an interest to which the grantor may ultimately become entitled upon the decree, the question whether it should be construed as an actual alienation or hypothecation of such contingent interest *or* merely as an agreement to alienate or hypothecate such interest (if and when acquired) must be decided in accordance with the ordinary rules governing the interpretation of written instruments;

(3) If such an instrument is in effect only *an agreement* to alienate or hypothecate a future interest, if and when acquired, no rights of ownership or hypothecary rights (as the case may be) pass to the grantee upon the acquisition of that interest by the grantor *unless and until the agreement has been duly implemented*; if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be

determined with reference to other legal principles such as the application of section 93 of the Trusts Ordinance ;

(4) If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantor automatically upon the acquisition of that interest by the grantor ; and no further instrument of conveyance or mortgage requires to be executed for the purpose ; the execution of " a deed of further assurance " confirming the result which has already taken place may in certain cases be desirable but it is not essential in such a case ;

(5) The provisions of section 9 of the partition Ordinance do not invalidate a transaction whereby an interest (which is not presently vested in the grantor and which could only become vested in him, if at all, upon the passing of a final decree for partition) is intended to pass to the grantee upon its acquisition.

Any earlier decisions of this Court which express or appear to express opinions in conflict with the general propositions enumerated above should now be regarded as over-ruled to that extent. Owners of land, and the practitioners who are called upon to advise them, should not be left in a state of continual doubt as to the scope of the restrictions which the Partition Ordinance imposes upon the alienation and hypothecation of interests in land. As Dr. C. K. Allen points out, it would be disastrous to the public interest if " the vaunted ' certainty ' of our system of precedents has too much in common with the kind of ' certainty ' which is to be found on the race-course and the dog-track " 63 Law Quarterly Review, page 437.

For the reasons which I have given, I think that the answer to the question referred for the decision of the Divisional Bench is that the divided allotments of land which passed to the second defendant under the partition decree of 31st March, 1947, became automatically vested in the plaintiff by virtue of the deed of transfer No. 307 dated 14th March, 1942. Subject therefore to any other defences which properly arise on the defendants' appeal, the conveyance to the plaintiffs must prevail over the later conveyance of the same allotments of land in favour of the first defendant in April, 1947.

The appeal must now be listed for argument in the normal way before a Bench of two Judges for the consideration of any other questions of law or fact which may arise upon the petition of appeal. The defendants will in any event pay to the plaintiffs the costs of the argument before the present Bench.

Sent before two Judges for consideration of other questions.

Present : JAYETILEKE, C.J. & SWAN, J.

THE ATTORNEY-GENERAL vs. KANDE NAIDE

Application 538—*M. C. Kanadulla* 2415

Argued on : 21st June, 1950

Decided on : 14th July, 1950

Criminal Procedure Code—Police officer initiating proceedings in Magistrate's Court under section 148 (1) (*b*)—*Is he entitled to appear and conduct prosecution at trial.*

Held : That a Police Officer who initiates proceedings in the Magistrate's Court under Section 148 (i) (*b*) of the Criminal Procedure Code is entitled to appear and conduct the prosecution at the trial in preference to a lawyer retained by the party aggrieved.

Over-ruled : *De Silva vs. The Magistrate of Gampola*, 44 N. L. R. 320.

Cases referred to : *De Silva vs. The Magistrate of Gampola*, 44 N. L. R. 320.
Grenier vs. Perera, 42 N. L. R. 377.
The Attorney-General vs. Herath Singho, 49 N. L. R. 108.
Thomas vs. Cornelis, 2 Browne 16.

R. R. Crossette-Thambiah, K.C., Solicitor-General, with *H. A. Wijemanne, Crown Counsel* and *S. S. Wijesinghe, Crown Counsel* in support.

H. V. Perera, K.C., with *E. B. Wikramanayake, K.C., N. M. de Silva, J. A. L. Cooray, H. W. Jayewardene, S. J. Kadirgamer, Asoka Obeyesekera* and *C. E. Jayewardene*, for the complainant-respondent.

JAYETILEKE, C.J.

This application was reserved for consideration by a bench of two Judges as there are conflicting decisions of this Court on the question that has arisen.

On July, 19, 1949, Sub-Inspector Perera made a report to the Magistrate under section 148 (1) (*b*) of the Criminal Procedure Code that the accused had committed theft of 325 coconuts valued at Rs. 17 belonging to one Kande Naide. The accused appeared on summons and pleaded not guilty to the charge, and the case was fixed for trial. On the date of trial S. I. Perera stated that he appeared for the prosecution. Mr. O. M. P. Perera, Proctor, appeared and stated that he had been retained by Kande Naide to conduct the prosecution and claimed the right to do so. Sub-Inspector Perera opposed the application on the ground that the prosecution had been initiated by him. The learned Magistrate held that he was bound by the decision of this Court in *De Silva vs. The Magistrate of Gampola* 44 N. L. R. 320 and allowed Mr. Perera's application. The present application is made by the Attorney-General to have the said order revised.

The question that arises for decision is whether a Police Officer who institutes proceedings in the Magistrate's Court under section 148 (1) (*b*) of the Criminal Procedure Code is entitled to appear and conduct the prosecution at the trial. The answer to this question turns on the meaning of the word "complainant" in section 199 of the Code. Section 199 is in these terms :—

> "The Attorney-General, the Solicitor-General, a Crown Counsel or a pleader generally or specially authorised by the Attorney-General shall be entitled to appear and conduct the prosecution in any case tried under this Chapter, but in the absence of the Attorney-General, the Solicitor-General, a Crown Counsel, and any such pleader as aforesaid, the complainant, or any officer of any Government Department, or any officer of any Municipality, District Council, or Local Board may appear in person or by pleader, to prosecute in any case in which such complainant or Government Department or Municipality or District Council or Local Board is interested".

In *Grenier vs. Perera* 42 N. L. R. 377 Keuneman J. took the view that the person making a complaint under section 148 (1) (*a*), that the person making a written report under section 148 (1) (*b*), and that the aggrieved party where a report is made under section 148 (1) (*b*) may be regarded as a complainant. Further that a Police Officer who makes a written report to the Magistrate comes within the words "any officer of any Government Department.....in any case in which..... the Government Department.....is interested".

In *De Silva vs. The Magistrate of Gampola* (*Supra*) De Kretser J. disagreed with the view taken by Keuneman J. and held that a Police Officer who makes a written report to a Magistrate does not come within the words "complainant" or "any officer of any Government Department" in section 199.

In *The Attorney-General vs. Herath Singho* 49 N. L. R. 108, Dias J. disagreed with De Kretser J. and held that a Police Officer who initiates a prosecution in a summary case is a complainant and is entitled to conduct the prosecution. The word "complainant" has not been defined in the Code but the word "complaint" has been defined thus :—

> Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed an offence.

The dictionary meaning of the word "complaint" is an "utterance of grievance". But according to the definition quoted above an utterance of grievance is not a complaint unless it relates to an offence and is made to a Magistrate. In Chapter XII which deals with pre-judicial proceedings an utterance of grievance is referred to as information relating to the commission of an offence. That would be correct because the utterance of grievance is not made to a Magistrate. But in Chapters XV and XVIII which deal with judicial proceedings the word "complaint" is used in the sense indicated in the interpretation clause. In Chapter XII the word "complainant" is used in section 127 (1) and in Chapters XV and XVIII in sections 148 (1) (*a*), 189 (3), 195 and 199.

Chapter XII deals with investigation of offences by Police Officers and Inquirers. Section 121 indicates what steps an officer in charge of a Police Station or an Inquirer should take before he commences an inquiry under Chapter XII. Sub-section (1) provides that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police

Station or to an inquirer, shall be reduced to writing by him or under his direction and be read over to the informant. Sub-section 2 provides that if from information received or *otherwise* an officer in charge of a Police Station or inquirer has reason to suspect the commission of a cognizable offence, he shall forthwith send a report of the same to the Magistrate's Court having jurisdiction in respect of such offence, and shall proceed in person to the spot to investigate the facts and circumstances of the case. Section 127 (1) provides that if upon an investigation under the Chapter it appears to the officer in charge of the Police Station or the inquirer that there is sufficient evidence or reasonable ground as aforesaid, such officer or inquirer shall forward the accused under custody before a Magistrate's Court having jurisdiction in the case, or, if the offence is bailable and the accused is able to give security, shall take such security from him for his appearance before such Court. When an officer in charge of a Police Station or an inquirer forwards an accused person before a Magistrate's Court or takes security for his appearance, he shall send to such Court any weapon or other article which it may be necessary to produce before such Court and shall require the *complainant* (if any) and so many of the persons who appear to such officer or inquirer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before such Magistrate's Court therein named and give evidence in the matter of the charge against the accused. When section 127 is read with section 121 it seems to be fairly clear that the word "complainant" in section 127 refers to the informant in section 121. The words "if any" have been used with reference to the words "or otherwise" in section 121 (2).

Chapter XV deals with the commencement of proceedings before a Magistrate's Court. Section 148 (1) provides that proceedings in a Magistrate's Court shall be instituted in one of the following ways :—

(*a*) on a complaint being made orally or in writing to a Magistrate of such court that an offence has been committed which such court has jurisdiction either to inquire into or try: Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant.

(*b*) on a written report to the like effect being made to a Magistrate of such court by an inquirer under Chapter XII or by a peace officer or a public servant or a Municipal servant or a servant of a District Council or a servant of a Local Board.

(*c*) upon the knowledge or suspicion of a Magistrate of such court to the like effect: Provided that when proceedings are instituted under this paragraph the accused or when there are several persons accused any one of them, shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but shall either be tried by another Magistrate or committed for trial.

(*d*) on any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try.

(*e*) upon a warrant under the hand of the Attorney-General requiring a Magistrate of such court to hold an inquiry in respect of an offence which such court has jurisdiction to inquire into.

(*f*) on a written complaint made by a court under section 147

The complaint under section 148 (1) (*a*) can be made by the aggrieved person or any one else. Suppose A sees B assaulting C when he is going along the road it is open to A to make a complaint to a Magistrate against B under section 148 (1) (*a*). The person who makes the complaint is called the complainant in the sub-section. Section 196 refers to a case instituted under sub-sections (*c*) and (*d*) as one instituted on a "complaint". The words in section 148 (1) (*b*) are on a written report "to the like effect", that is to say, on a written report to such Magistrate alleging that an offence has been committed which such Court has jurisdiction either to inquire into or try. To my mind there is no difference between a complaint made under sub-sections (*a*), (*c*) and (*d*) and a written report to a Magistrate by any of the persons referred to in section 148 (1) (*b*). I am of opinion that a written report made to a Magistrate under section 148 (1) (*b*) is a complaint. If a person who makes a complaint under section 148 (1) (*a*) can be regarded as a complainant I see no reason why a person who makes a complaint under section 148 (1) (*b*) should not also be regarded as a complainant.

S. 150 (1) says that where the offence alleged in any proceedings instituted under S. (148) (1) (*a*) or S. 148 (1) (*b*) is an indictable one the Magistrate may examine on oath the complainant or informant and any other person who may appear to the Magistrate to be able to speak to the facts of the case.

In *Thomas vs. Cornelis* 2 Browne 16, Browne, J. said :—

> " For my own part I would consider that in section 149 ((1) " complainant " relates to head (*a*) of section 148 (1) and " informant " to any of the officers mentioned in head (*b*) or to the person whom they report to have given them the information ".

With great respect I am unable to place upon the words " complainant " and " informant " the restricted meaning the learned Judge has placed upon them. The language of section 148 (1) (*a*) is wide enough to enable a person who knows nothing about the facts of a case to make a complaint to a Magistrate. For instance the proprietor of an estate will be entitled to make a complaint against a person for theft on information given to him by the superintendent. According to section 148 (1) (*a*) the proprietor will be the complainant. I can think of no other word by which the Superintendent can be more accurately described than the word " informant ". Under section 150 (1) it will be open to the Magistrate to examine on oath the proprietor or the Superintendent or any other person who can speak to the facts of the case. I do not think there is any justification for limiting the word " complainant " in section 150 (1) to the person who makes a complaint under section 148 (1) (*a*) and the word " informant " to the person who makes a written report under section 148 (1) (*b*). I am of opinion that the said words are applicable to both sub-sections. The word " complainant " next occurs in Chapter XVIII which lays down the procedure for the trial of cases triable summarily by a Magistrate. Section 189 (1) (3) says that the complainant and accused or their respective pleaders shall be entitled to open their respective cases but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused. According to Mr. Perera's argument the complainant referred to in this section and in section 199 is the aggrieved party. If Mr. Perera's argument is correct there will be five complainants if a person causes hurt to five persons in the course of the same transaction and a Police Officer institutes proceedings under section 148 (1) (*b*). It seems to me that the word " complainant " in those two sections must be taken to be the person who made the complaint under section 148 (1) and initiated the proceedings which necessitated the trial. The words " inquirer " and " peace officer " which appear in section 148 (1) (*b*) have been omitted in section 199 because they come within the word " complainant ". The words " any officer of any Government Department, or any officer of any Municipality, District Council or Local Board " in section 199 have, I think, been inserted in order to give an officer other than the officer who made the written report under section 148 (1) (*b*) the right to appear and conduct the prosecution. For instance if the written report under section 148 (1) (*b*) was made by the Deputy Collector of Customs it will be open to the Collector of Customs to appear and conduct the prosecution in any case in which the Customs Department is interested. Mr. Perera said that he could not argue that a police officer is not an officer of a Government Department. With great respect I am unable to agree with de Kretser J. that a Police Officer is not a member of a department. The Police Department is one of the departments of Government. The words " any officer of a Government Department " would entitle any police officer to appear and conduct the prosecution in a case instituted by a peace officer under section 148 (1) (*b*).

I am of opinion that the order made by the learned Magistrate is wrong. I would, accordingly, set it aside.

Set aside.

SWAN, J.

I agree.

Present : LORD SIMONDS, LORD MACDERMOTT, LORD REID & SIR JOHN BEAUMONT

WIJESURIYA vs. THE ATTORNEY-GENERAL

Privy Council Appeal No. 75 of 1947

S. C. 205—*D. C. Colombo* 15380
Decided on : 26th April, 1950

Crown land—Instructions by Land Commissioner to Government Agent to issue permit for taking produce of plantations after resuming possession from third party—Assistant Government Agent agreeing to grant permit to appellant on a particular day without reference to resumption of possession—Payment of annual rent as agreed—Failure to put appellant into possession—Action for damages against Crown.

Agent—Assistant Government Agent acting in excess of authority—Absence of proof of ostensibile authority—Permit to take produce, whether "lease" or "license"—Applicability of Regulation 2 of Land Sales Regulations—Prevention of Frauds Ordinance, sections 2 and 17.

On 7th March, 1942, the Government Agent, Uva Province, on instructions from the Land Commissioner, put up to auction "the lease of the right to tap and take the produce of the rubber trees" on certain Crown Land for a period of five years. One S. was the highest bidder and on the 10th of August a permit was issued to him on certain conditions. S. violated the conditions of the permit, and the Land Commissioner wrote to the Government Agent, Uva, on 28-1-1943, to cancel the permit issued to S, to take possession of the land on behalf of the Crown, and *thereafter* to issue a permit to the appellant to take the produce of the plantations thereon for the balance period. Accordingly the permit issued to S. was cancelled and on the 2nd March, 1943, the Assistant Government Agent informed S. of the cancellation and requested him to deliver peaceful possession of the land to the Divisional Revenue Officer of the area on the 15th March, 1943.

The Appellant alleged (*a*) that on the 11th of March, 1943, he interviewed the Assistant Governmeng Agent who agreed to give him the lease and to put him in possession of the land on the 15th March, 1943, if he, the appellant, was willing to deposit Rs. 6,000, being one year's rent. (*b*) that he agreed to the terms proposed and paid the sum of Rs. 6,000, by cheque on the same day for which he received a receipt dated 5-3-1943.

The appellant brought this action for damages against the Attorney-General on the ground that he was not given possession of the land in question.

Held : (i) That the Assistant Government Agent had no authority to make the alleged agreement inasmuch as the instructions given by the Land Commissioner in his letter of the 28th January, 1943 were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event.

(ii) That there was insufficient evidence of ostensible authority, a defence open to the appellant, if he presented the case on this issue with the particularity, which, such a plea, always difficult to establish requires.

(iii) That if the appellant wrongly assumed that the instructions given by Land Commissioner to his subordinates went further than they did, he acted at his peril.

(iv) That the permit to be given, under the alleged agrement was a license, and not a lease and Regulation 2 of the land Sales Regulations did not apply.

(v) That the alleged oral agreement is void as it falls within section 2 of the Prevention of Frauds Ordinance and is not saved by Section 17 of the same Ordinance, as that section deals with instruments, *i.e.*, with transactions which have already been reduced to writing.

Per LORD SIMONDS,—"In this conflict of opinion upon the facts their Lordships have given anxious consideration to all the circumstances of the case and have come to the conclusion that the Supreme Court was not justified in reversing the judgment of the learned Judge, who had in their view ample material for forming the opinion to which he came and though he did not expressly measure the reliability of the appellant's and respondents' witnesses, cannot fail to have been influenced in his decison by the view that he took of them."

Cases referred to: *Russo-Chinese Bank vs. Li Yan Sam* (1910) A.C. 174.

Gerald Upjohn, K.C., with *A. A' Mocatta*, for the plaintiff-appellant.

Sir David Maxwell Fyfe, K.C., with *Frank Gahan*, for the defendant-respondent.

LORD SIMONDS

This appeal which is brought from a decree of the Supreme Court of Ceylon allowing the appeal of the Attorney-General of Ceylon from a decree of the District Judge of Colombo raises difficult questions of fact and of law.

The primary question of fact is whether the appellant a landed proprietor in Ceylon, on the 4th March, 1943, made an oral agreement with the Assistant Government Agent, Uva Province, one N. Chandrasoma, on behalf of the Crown, whereby it was agreed that in consideration of payments to the Crown at the rate of Rs. 6,000 per annum the appellant should have the right to tap and take the produce of the rubber trees on certain defined Crown lands in the Badulla District of Uva Province for a period of four years and two and a half months from the 15th March, 1943. The learned District Judge found as a fact that such an agreement was made, but in the Supreme Court a different view was taken, that Court holding that, since the learned Judge had not based his finding on the demeanour or reliablity of the witnesses, it could properly come to a different conclusion upon a consideration of the oral evidence and the relevant documents.

In this conflict of opinion upon the facts their Lordships have given anxious consideration to

all the circumstances of the case and have come to the conclusion that the Supreme Court was not justified in reversing the judgment of the learned Judge, who had in their view ample material for forming the opinion to which he came and though he did not expressly measure the reliability of the appellant's and respondent's witnesses, cannot fail to have been influenced in his decision by the view that he took of them. Moreover, as their Lordships think, the relevant documents are on the whole more consistent with the appellant's story than with that of the respondent.

Before referring to the events of the 4th March, 1943, it is necessary to say something of the surrounding circumstances.

On the 23rd January, 1942, the Land Commissioner had caused to be published in the Govt. Gazette a notification that the Government Agent of the Province of Uva would on the 7th March, 1942, put up to auction "the lease of the right to tap and take the produce of the rubber trees" on certain Crown lands of an area of about 278 acres, of which some 170 acres were in rubber, for a period of five years. The conditions of the auction provided (*inter alia*) that the purchaser should pay one-fifth of the rent immediately after the sale of the balance in four equal instalments. The appellant, who was a rubber planter of experience and the holder of leases of various other Crown lands, was the second highest bidder at the auction, the highest bidder being one Sabapathipillai with a bid of Rs. 44,000 who accordingly became the purchaser. He however, for some time made default in the proper payments and it was not until the 10th August, 1942, that a permit was issued to him in terms which by reason of their importance upon another issue it is convenient here to set out in full. In the meantime negotiations had been entered into with the appellant and it appears that the Assistant Government Agent, Chandrasoma, had recommended to the Land Commissioner that the appellant should be offered the rights purchased by Sabapathipillai for Rs. 30,000 in the event of the latter's default, the large deduction in purchase price being no doubt due to the fact that on the 5th April, 1942, the first Japanese air raid on Ceylon had taken place.

The permit was, however, eventually issued to Sabapathipillai and was as follows :—

"Karuppannenpillai Sabapathipillai of Lemastota Estate, Koslande (hereinafter referred to as 'the permit-holder') is hereby permitted to take the produce of the plantations on the parcel of Crown land called 'Atmagahinna *alias* Madugahinna, Wewelketiyahena, Keenaketiya Estate and Atmagahinna, Madugahahinna, Wewelketiyahena' (hereinafter referred to as 'the land') situated in the village Kiriwanaga and Tittawelgolla in the Chief Headman's Division of Wellawaya of the Badulla District depicted as lots Nos. 127 and 139 in Final Village Plan No. 318 Tittawelgolla, prepared by the Surveyor-General and kept in his charge, and computed to contain in extent two hundred and seventy-eight acres, two roods and eleven perches, subject to the following conditions :—

1. This permit shall expire on the 31st day of May, 1947.

2. The annual rental shall be eight thousand eight hundred rupees. The permit-holder shall pay the annual rental on the 1st day of June in every year to the Government Agent of the Uva Province (hereinafter called the Government Agent) at the Badulla Kachcheri.

3. This permit is personal to the permit-holder. The permit-holder shall not in any manner whatsoever deal with or otherwise dispose of his interest and rights under this permit.

4. The permit-holder shall not erect any permanent buildings or make any plantation on the land.

5. The permit-holder shall not fell or in any way damage or allow to be felled or in any way damaged any rubber trees or any other valuable timber trees growing on the land except with the permission of the Government Agent previously obtained in writing.

6. The permit-holder shall not dig or in any other way whatsoever disturb the soil of the land, nor shall he clean weed the land.

7. Any breach of any of the conditions contained in this permit shall render the permit liable to immediate cancellation without compensation, on the orders of the Government Agent.

8. On the expiry or cancellation of the permit the permit-holder shall deliver quiet possession of the land to any person acting under the orders of the Government Agent and such person may on such expiry or cancellation, enter upon the land and take possession thereof on behalf of the Government Agent.

9. The permit-holder shall not have or make any claim for compensation for improvements effected or expenses incurred, or for damages, or for any other cause or reason whatsoever.

10. The permit-holder shall not have any claim to preferential sale or lease of the land by reason of his having been granted this permit.

Issued on the 10th day of August, 1942.

Sgd. M. Chandrasoma,
Asst. Govt. Agent.

Accepted on the above conditions by the above mentioned permit-holder.

Sgd. K. Sabapathipillai.

It appears that Sabapathipillai continued to meet with difficulties in working his permit. On the 7th January, 1943, he requested the Land Commissioner for sanction to transfer it to another, and the appellant, seeing in this the opportunity to secure the permit for himself, asked Mr. Wijeratne his advocate in Colombo to interview the Land Commissioner on his behalf. This he did and the result of it was that in the words of Mr. Wijeratne the Land Commissioner ordered that the appellant should be granted the lease of the rights in question on the basis of Rs. 30,000 for five years. What in fact the Land Commissioner did—and it is a matter of vital importance in the case—was to write a letter of the 28th January, 1943, to the Govt. Agent Uva, whose name was Coomaraswamy in the following terms :—

> " The conditions of the permit dated 10-8-42 (*i.e.*, to Sabapathipillai) have been flagrantly violated. You should cancel the permit herewith and take possession of the land on behalf of the Crown. You may thereafter issue a permit to Mr. H. E. Wijesuriya to take the produce of the plantations on the land for the balance period of 5 years at the rental approval by my letter No. A/4161 of 25-4-42 ".

The approved rental referred to the basis of Rs. 30,000 for five years.

Their Lordships observe upon this letter that its terms are unambiguous and that it contains no authority to issue a permit before taking possession of the land on behalf of the Crown.

It was thought desirable in view of the fact that Sabapathipillai had entered into some private agreement with one Karunatileke, and the latter had entered on the land in question, to take the advice of the Attorney-General before proceeding further. Upon receipt of his advice that the permit could be cancelled, on the 2nd March, 1943, Chandrasoma the Assistant Government Agent, wrote to Sabathipillai informing him that in terms of clause 7 of the permit the lease granted to him was cancelled for breach of conditions 3 and 5 and that he was required to deliver peaceful possession of the land to the Divisional Revenue Officer, Wellawaya on the 15th March, 1943, at 9-30 a.m., and vacate land immediately thereafter. It is common ground between the parties that it was not expected that either Sabapathipillai or Karunatileke would make any trouble about complying with this notice, nor is it in dispute to the appellant. The question in dispute is whether on the 4th March, 1943, an agreement was made between the appellant and Chandrasoma in the terms alleged by the former. Upon this point the divergence of evidence is remarkable.

The appellant's evidence was to the effect that on that day he first went and saw the chief clerk, whose name was Attanayake, at the Govt. Office at Badulla, that the latter said that he had been asked by Chandrasoma to ascertain whether the appellant was willing to deposit Rs. 6,000 being the annual rent, in order that he might be given the lease, that the appellant then went into the office of Chandrasoma, who confirmed what Attanayake had said, and the appellant then agreed the terms ; that Chandrasoma then said that the appellant would be given the lease and would be put into possession on the 15th March, that the appellant then returned to the Land Department and drew a cheque for Rs. 6,000 for which on the following day he received a receipt dated the 5th March, 1943, in these terms : " Received from Mr. H. E. Wijesuriya the sum of Rupees six thousand only and cents—being rent on Keenapitiya Rubber Estate pending issue of lease ". The next that the appellant heard about the matter was the receipt by him of a letter dated the 6th March, 1943, from the Chena Surveyor stating that he had been instructed by the Government Agent, Uva, to put him in possession of the lands in question as soon as the present lessee vacated it on the 15th March. The Chena Surveyor had in fact been so instructed in a letter of the 4th March, upon the terms of which the appellant relied.

A very different account of the events of the 4th March, was given by Chandrasoma and Attanayaka. The former denied that he had had any interview with the appellant on that day ; the latter agreed that he had had an interview but differed from the appellant in asserting that he told him that he would be put in possession of the land in the event of Sabapathipillai

vacating it and that the Rs. 6,000 would be placed on deposit and would be refunded to him if he was not put in possession of the land.

It appears to their Lordships that upon this evidence supplemented not only by the letter to the Chena Surveyor already mentioned but also by a contemporary minute clearly made before the interview between Attanayaka and the appellant (not, as the Supreme Court appears to have thought, after that interview) the learned District Judge could properly come to the conclusion of fact which was the basis of his decision and that the Supreme Court had no adequate ground for setting it aside.

But, while their Lordships are so far in favour of the appellant, there are other considerations which are fatal to his appeal.

The respondent in his answer to the plaint which alleged the agreement already stated denied that agreement and raised certain other defences but did not specifically plead that, if the agreement was in fact made by the Assistant Government Agent, it was made without authority. When, however, the issues came to be settled the 7th issue was framed as follows: "If the (Assistant) Government Agent, entered into the agreement pleaded in paragraph 3 of the plaint, was he acting without authority?" It would have been open to the appellant to demand that upon this issue he should be at liberty to plead that there was ostensible, if not actual, authority to enter into the agreement, and it would then have been for him to prove the facts upon which he relied as a holding out of authority. This course was not taken with the result that this part of the case was not presented with the particularity which such a plea, always a difficult one to establish, requires. Upon the available material their Lordships have come to these conclusions. First, they are of opinion that the Assistant Government Agent had in fact no authority to make the alleged agreement. The instructions given by the Land Commissioner in his letter of the 28th January, 1943, were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event. The Assistant Government Agent therefore acted in excess of (if not in defiance of) the instructions he had received. Secondly, their Lordships see no sufficient evidence of ostensible authority. On the contrary it became clear from numerous passages in the evidence, and particularly from the steps initially taken by the appellant in January, 1943, that he looked to the Land Commissioner himself for an order that, when Sabapathipillai vacated the land, he should enter in his place. He may have assumed that the instructions given by the Land Commissioner to his subordinates went further than they did, but, if his assumption was a wrong one, he acted at his peril: see *Russo-Chinese Bank vs. Li Yan Sam* (1910) A. C. 174 at 184. Nor, apart from the incidents of this particular transaction, was there any sufficient evidence of a general holding out of the Assistant Government Agent as a person with authority to enter into an oral agreement to grant a lease of, or a permit to take the produce of, Crown rubber lands at a future date. Learned Counsel for the appellant relied on the provisions of the Land Development Ordinance of Ceylon and referred to the Ceylon Government Manual of Procedure, but neither in these nor in any course of conduct of the Assistant Government Agent here concerned or of any other Assistant Government Agent could he find a clear assertion that to that officer had been delegated the duty of making such an agreement. Their Lordships are therefore of opinion that, assuming the agreement to have been made as alleged, it was unauthorized by the Crown and that on this ground the action and appeal must fail.

Two other defences were raised in the action which must be mentioned. First, it was contended that the alleged agreement was contrary to the Land Sales Regulations and was void, and, secondly, that it was unenforceable in that it did not comply with the terms of the Prevention of Frauds Ordinance. It was common ground between the parties that the first point turned solely on the question whether the permit given to Sabapathipillai, which was the model of that agreed to be given to the appellant, was a "lease" or a "licence" if it was a lease, then it is of no effect, since Regulation 2 of the Land Sales

Regulations of 1926 provided that every grant and every lease of land should (with certain immaterial exceptions) be under the signature of the Governor and the Public Seal of the Colony. Upon this question the learned District Judge and the Supreme Court have come to different conclusions, the former holding the instrument to be a licence, the latter a lease. Both Courts have based their conclusion upon a consideration of the whole terms of the document. It appears to their Lordships that, while there are particular provisions which point in either direction, the decisive test is whether upon its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit, and, adopting this test, they are of opinion that all that is granted by the document is the right to tap and take the produce of the rubber trees within a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering upon, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee. In their Lordships' opinion, therefore, the so-called permit was not a lease but a licence. In expressing this opinion they must observe that neither in the judgments under review nor in the arguments presented to the Board has it been suggested that the law of Ceylon upon the question whether an instrument is a "lease" within the meaning of the Land Sales Regulations differs from the English law which would be applicable upon a similar question.

The final question arose under the Prevention of Frauds Ordinance. It is convenient to set out sections 2 and 17 of that Ordinance. They are as follows :—

> "Section 2 No sale, purchase, transfer, assignment of mortgage of land or other immovable property, and no promise, bargain, contract or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month) nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time and unless the execution of such writing, deed or instrument be duly attested by such notary and witnesses.
>
> "Section 17. None of the foregoing provisions in this Ordinance shall be taken as applying to any grants, sales or other conveyances of land or other immovable property from or to Government or to any mortgage of land or other immovable property made to Government or to any deed or instrument touching land or other immovable property to which Government shall be a party, or to any certificates of sales granted by fiscals of land or other immovable property sold under writs of execution".

It is plain that the alleged oral agreement falls within section 2 whether as an agreement for effecting the sale of immovable property or as an agreement for establishing an interest affecting land or other immovable property. If so it would not be "of force or avail in law" unless it was saved by section 17, for it was not in writing as prescribed by the section and necessarily its execution was not notarially attested. Was it then saved by section 17? In their Lordships' opinion it was not. It appears to them that, while section 2 deals with transactions and enacts that they must be reduced to writing as therein prescribed, section 17 deals with instruments *i.e.*, with transactions which have already been reduced to writing, and exempts certain classes of instruments from the necessity of notarial attestation. The language of the section "grants, sales, or other conveyances" and "any deed or instrument touching land etc.," points irresistibly to this conclusion. There is nothing therefore in the section which saves oral agreements for the sale of immovable property by Government from the necessity of being reduced to writing. Nor is there any reason to suppose that this is a *casus omissus*. The present case is sufficient to show how desirable it is that an agreement for the sale of immovable property should be in writing even if one of the parties to the agreement is the Crown through one of its servants. On this ground also, therefore, the appeal must fail.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

Present : WINDHAM, J & GUNESEKARA, J

PUNNANANDA vs. WELIWITIYA SORATHA

S. C. 396—*D. C. Galle*, 786.

Argued on : 21st, 22nd, 23rd February, 1950.
Decided on : 22nd March, 1950.

Buddhist Law—Right to incumbency—Forms of pupillage recognised by law—Pupillage by adoption—Is such pupillage known to our law—Abandonment of rights to an incumbency by monk—Does such abandonment deprive his pupils of right to succeed him—Does abandonment require notarial deed or other formality—Question of fact in each case.

Held : (i) That it is well settled law that under the ecclesiastical law observed by the Buddhists in Ceylon there are only two forms of pupillage which will confer rights of pupillary succession namely, pupillage by robing and pupillage by ordination.

(ii) That our law does not recognise ' pupillage by adoption ' as conferring rights of succession.

(iii) That the abandonment of an incumbency by a monk, who continues to remain in robes thereafter, deprives his pupils of their right to succeed to such incumbency.

(iv) That such abandonment does not require any notarial deed or other prescribed formality, but is a question of fact, and the intention to abandon may be inferred from circumstances.

Cases referred to : *Gunanda Unnanse vs. Dewarakkita Unnanse*, (1924) 26 N. L. R. 257.
Dhammajoti vs. Sobita, (1913), 20 N. L. R. 408.
Terunanse vs. Terunanse, (1929), 31 N. L. R. 161.
Saranankara Unnanse vs. Indajoti Unanse, (1918), 20 N. L. R. 385.
Somaratna vs. Jinaratna, 42 N. L. R. 361.
Dammaratna Unnanse vs. Sumangala Unnanse, (1910), 14 N. L. R. 400.

F. A. Hayley, K.C., with *H. W. Jayewardene* and *J. W. Subasinghe*, for the defendant-appellant.

H. V. Perera, K.C., with *N. E. Weerasooria, K.C.*, and *W. D. Gunasekera*, for the plaintiff-respondent.

WINDHAM, J.

The plaintiff-respondent brought an action for a declaration that he was entitled to the incumbency of a Buddhist temple, namely the Sri Nagaramaya temple situated in the village of Nalagasdeniya in the Galle District, and for the ejection of the defendant-appellant from the temple.

It is common ground that the original incumbent was one Arugamuwa Rewata, and that he died in 1894 leaving four pupils, Hikkaduwe Sri Summangala, Habarakade Sonuttara, Mabotuwana Siddhartha, and Majuwane Ananda. Sumangala, the senior-pupil, had two pupils Jinaratna (his senior pupil, who is still alive) and Gnaniswara. Jinaratna has a pupil Wachiswara. While the plaintiff claimed to be a pupil of Gnaniswara, his claim to the incumbency was based not on that pupilship, but on the contention, upon which the learned trial judge found in his favour, that Sumangala surrendered and abandoned his rights to the incumbency, thereby depriving his own pupils of such rights as they could otherwise have claimed through him, coupled with the contention that he the plaintiff was (*a*) the sole pupil of one Pemaratna, who was the sole pupil of Sonuttara and (*b*) a pupil of one Pemanada who was the senior pupil of Ananda.

The learned trial judge found in the plaintiff's favour on the ground that Sumangala had forfeited all claims for himself and his pupils, and that the plaintiff was the " adopted " pupil of Pemananda, who had in fact been the incumbent until his death in 1942.

Now I will consider presently the findings that Sumangala had abandoned for himself and his pupils all rights to the incumbency. But the *de facto* position, which the learned judge found upon sufficient evidence, was that Sumangala never functioned as incumbent, but that according to the wishes of Rewatta the original incumbent, Sonuttara became incumbent of another temple, while Siddhartha and Ananda became joint incumbents of the Sri Nagaramaya temple until Siddhartha's death in 1906, when Ananda continued to function as sole incumbent until he died in 1922 leaving as sole pupil Pemananda.

The defendant-appellant was admittedly not a member of Rewata's paramparawa, but he had for many years been officiating in the temple having gone there upon the invitation of the dayakayas at a time when there was in fact

nobody residing in the temple. Upon the conclusion of the evidence, however, his counsel was forced, in the face of strong evidence against him, to abandon his original position that Pemananda had never been the incumbent after Ananda's death in 1922, and to admit that Pemananda had been the incumbent from that time until his death in 1942 and that the defendant had been functioning at the temple with Pemananda's permission.

That being so, and subject to the question whether Sumangala can be held to have abandoned his rights for himself and his pupils, the plaintiff's claim to be declared the lawful incumbent of the temple must succeed if it can be shown that the plaintiff was the senior of the preferred pupil of Pemananda: *Gunananda-Unnanse vs. Dewarakkita Unnanse*, (1924) 26 N. L. R. 257. Now admittedly, he was not the senior pupil, for one Wachiswara (already mentioned as being also a pupil of Sumangala's senior pupil Jinaratna) was Pemananda's senior pupil. The Plaintiff, however, produced a deed P 17 of 17th February, 1942, whereby Pemananda appointed the plaintiff as his successor in preference to Wachiswara. This he was clearly entitled to do in accordance with the Sisyanu sisya paramparawa rule of descent, (and see *Dhammajoti vs. Sobita* (1913) 16 N. L. R. 408; *Terunanse vs. Terunanse*, (1929) 31 N. L. R. 161, provided that the plaintiff himself was a pupil of Pemananda and had become his pupil either by robing or by ordination. For after the exhaustive statement of the position as expounded in *Saranankara Unnanse vs. Indajoti Unnanse*, (1918) 20 N. L. R. 385, followed in *Somaratna vs. Jinaratna*, (42 N. L. R. 361), it must now be taken as settled law upon which this court will act, that under that ecclesiastical law observed by Buddhists in Ceylon there are only two forms of pupillage which will confer rights of pupillary succession, namely pupillage by robing and pupillage by ordination.

Now in the present case it was not claimed by the plaintiff that Pemananda was his robing tutor. But it was his contention that Pemananda was one of his three ordaining tutors, the other two being Pemaratne (who was also his robing tutor) and Gnaniswara. The learned District Judge, however, found on the evidence that the plaintiff had failed to prove that Pemananda was one of his ordaining tutors. But he found that the plaintiff was "adopted" by Pemananda as his pupil after his ordination by those other two priests, and that this subsequent adoption constituted a recognised form of pupillage upon which the deed P 17 could operate so as to entitle him to the incumbency upon Pemananda's death in 1942. In holding that there was any such recognised form of pupillage as pupillage by adoption, conferring rights of succession, the learned Judge had no legal authority to support him, and in view of the position set out in the authorities to which I have referred I consider that he was wrong. But it has been strenuously contended for the plaintiff that, while the learned judge may have been wrong in his conclusion that the plaintiff was Pemananda's pupil by adoption, and as to the legal effect if he was, his ultimate conclusion that the plaintiff was entitled to the incumbency was correct, because his findings that the plaintiff was not a pupil of Pemananda by ordination was an unreasonable one on all the evidence and ought to be reversed.

Upon careful consideration I have reached the conclusion that this finding was against the weight of evidence, and that in particular it was rooted in a failure by the learned judge to appreciate the evidentiary value of an original ola entry which was made in the lekammitiya kept at Malwatte where the ordination took place in 1917. This ola was produced not by the plaintiff but by the defendant, as D 11, and in my view its effect was convincingly to corroborate the oral evidence of the plaintiff and other witnesses that Pemananda, as well as Pemaratne and Gnaniswara, had been one of his ordaining tutors.

The evidence of the plaintiff on this point briefly, was that all three priests had ordained, him in 1917. With regard to the entry of Pemananda's name on the ola leaf as one of his ordaining tutors, his evidence was that at the ordination Pemananda's name was so entered, along with those of his other two ordaining tutors Pemaratne and Gnaniswara, but that thereafter Pemaratne and Pemananda had a quarrel as a result of which Pemaratne caused the name of Pemananda to be deleted from the entry, and that upon Pemaratne's death in 1931 Pemananda had his own name inserted again.

Now the learned trial judge held that this story of the plaintiff was not borne out by an examination of the ola leaf itself, wherein, he observed the name and description of Pemananda, "Hikkaduwa Pemananda Istavira the incumbent of Nalagasdeniya Sri Nagaramaya at Hikkaduwa" appear as an interpolation, while there was nothing (he thought) to show that what was earlier deleted from the ola was the name of Pemananda, but merely an indication that some unidentifiable word or name had been scraped out with a penknife. But a careful scrutiny of the original ola leaf shows that, while the learned judge was quite right in holding that the above-quoted long description of Pemananda was an

interpolation, in the sense of something inserted later, he entirely failed to observe that, next to the unidentifiable word which had been scraped out to make room for the first word of the interpolation, there appears clearly visible the name " Pemananda " in the original part of the ola entry between the descriptions of the other two ordaining priests Pemaratne and Gnaniswara and that this name, which could not have been interpolated, has been crossed out by criss-cross lines. This cuts the ground from under the learned judge's finding that it is "most unlikely " that the Chapter would have permitted the deletion of Pemananda's name. For the name was in fact patently deleted. And if further real evidence were needed in corroboration of there having been three and not two ordaining priests, there appear in the ola entry, after the description of the priest Gnaniswara the words—" the three (" tunnama ") priests being the tutors of Weliwitiya Samenera priest " (*i.e.*, the plaintiff).

The learned judge, in rejecting the plaintiff's evidence on this point was clearly misled by his erroneous reading of the ola leaf P 11. Nor did the plaintiff lack other corroboration. One Dheerananda, Secretary of the Malwatte Chapter, who had been present at the ordination, testified that Pemananda had been one of the ordaining priests. So also did another witness, Abraham Goonewardene. The learned judge rejected the evidence of the latter for no stated reason, and that of the former on the ground that he was unable to rely on the witness's memory and that his rejection of their evidence on the point sprang from his inability to reconcile it with what he mistakenly took to be the effect of the ola entry P 11. Lastly, no witness testified that Pemananda was not one of the plaintiff's ordaining tutors.

For these reasons I hold that the learned judge's finding that the plaintiff had failed to prove that he was a pupil of Pemananda by ordination was unreasonable and against the weight of evidence, and must be reversed. I hold that the plaintiff has established that he was Pemananda's ordained pupil.

This fact, coupled with the deed P 17 whereby Pemananda, shortly before his death appointed the plaintiff as his successor in preference to his senior pupil Wachiswara, is sufficient to establish the plaintiff's claim to the incumbency, unless it can be shown that the learned trial judge was wrong in holding that Summangala, the senior pupil of the original incumbent Rewata, had abandoned his claims to the incumbency and that this abandonment operated to deprive his pupils of any similar claims.

Now it is undisputed that Sumangala in fact never exercised the rights of an incumbent over the Sri Nagaramaya temple. That alone would not necessarily constitute an abandonment of such rights. But Sumangala, from the death of his tutor Rewata in 1894 until his own death many years later, officiated as incumbent neither personally nor through a deputy, for as I have observed earlier, his co-pupils Siddhartha and Ananda functioned as joint incumbents upon Rewata's death until 1906, when Siddhartha died and Ananda functioned as sole incumbent until his death in 1922. Furthermore, in a letter P 9 written to one Goonewardene as early as July 1893, the year before Rewata's death, Sumangala wrote, with regard to what the defendant's advocate admitted to be the Sri Nagaramaya temple among others—" I do not want those temples now, nor did I want them in the past either. Further, I do not want them at all at present ". This expression of his desire not to be burdened with the temple, coupled with his failure at any time to exercise any rights or functions of an incumbent in respect of it, either personally or through any deputy, may in my view rightly be taken as having constituted an abandonment of those rights. Abandonment of such rights does not require any notarial deed or other prescribed formality, but is a question of fact, and the intention to abandon may be inferred from the circumstances, as it was in my view rightly inferred by the learned District Judge in the present case.

With regard to the question whether such an abandonment by Sumangala operated to deprive his pupils of such rights to the incumbency as they might otherwise have claimed, I think the learned District Judge was right in holding that it did so operate. The question appears not to be covered by authority. It has been held in *Dammaratna Unnanse vs. Sumangala Unnanse*, (1910) 14 N. L. R. 400 that when a tutor disrobes himself for immorality, this does not deprive his pupils of their rights of pupillary succession. But I think the case is different where the tutor abandons his rights to an incumbency. Disrobing, with the intention of giving up the priesthood, is the equivalent, ecclesiastically, of personal demise, and it does not entail, any more than death entails, an abandonment of rights, but merely a personal incapacity to exercise them. These rights can accordingly descend to a pupillary successor. The abandonment of an incumbency by a priest, on the other hand, constitutes the forfeiture of that to which his pupils' rights of succession are attached, namely the incumbency itself. The priest remains a priest, but abandons his rights to the incumbency,

upon which the pupillary rights of succession are dependent. There accordingly remain no rights for the pupil to inherit.

I am accordingly of the opinion that, upon the evidence led in the present case, the plaintiff has shown that he, rather than Sumangala's senior pupil, Jinaratna or anyone else, is the person entitled to the incumbency in dispute, and that his action for a declaration that he is entitled to the incumbency in dispute, and that his action for a declaration that he is entitled to the incumbency must succeed. No doubt, since Jinaratne is not a party to this action, this finding would not bind him, in the event of his bringing an action against the plaintiff for a declaration that he Jinaratna, was the lawful incumbent. But so far as concerns the present action the plaintiff has successfully established, not merely that he has a better right to the incumbency than the defendant has—for that is not the declaration he asks for in his prayer—but that he is the lawful controlling incumbent of the temple.

For these reasons the appeal is dismissed with costs.

GUNASEKARA, J.

I agree.

Appeal dismissed.

Present : DIAS, S.P.J. & PULLE, J.

NOORUL MUHEETHE vs. LEYANDUN

S. C. 374 L—D. C. Colombo No. 2997.

Argued on : 17th May, 1950.
Decided on : 26th July, 1950.

Gift subject to fidei commissum—Muslim minors—Acceptance by mother of minors—Its validity—Is Roman-Dutch or Muslim Law applicable?—Preferential right of a Muslim widow to the custody and guardianship of minor children.

Where a Muslim lady by a deed of gift created a fideicommissum in favour of the minor children of the donees, while reserving to herself the life-interest, and the gift was accepted on behalf of the minors by their mother (the father being dead).

Held : (1) That as the donor created a valid fideicommissum the Roman-Dutch Law applied, and that therefore the mother, in the absence of the father, was competent to accept the gift.

(2) That where a transaction is intended by the parties to be governed by one system of law, it should not be divided into its component parts, and its validity tested by a different system of law, such as the religious or personal law of the parties.

Per PULLE, J.—" Before Muslim Law could be applied there must be a *cursus curiae* in favour of applying that law. There is no *cursus curiae* of which I am aware which deprive a Muslim widow of a preferential right to the custody and guardianship of her minor children and to be in charge of their property,"

Cases referred to : *Weerasekere vs. Peiris*, (1933), 34 N. L. R. 281.
Fernando vs. Weerakoon, (1903), 8 N. L. R. 212.
Wellappu vs. Mudalihamy, (1903), 6 N. L. R. 233.
Cornelis vs. Dharmawardena, (1907), 2 A. C. R. 13.
Fernando et. al. vs. Cannangara, (1900), 3 N. L. R. 6.
Silva vs. Silva, (1909), 11 N. L. R. 161.
Imambandi and others vs. Mutsaddi and others, (1917-18), Law Reports Indian Appeals 73.
Rahiman Lebbe and another vs. Hassan Ussan Umma and others, (1916), 3 C. W. R. 88 at 99.
In the matter of the Application of Sego Meera Lebbe Ahamadu Lebbe Marikar for a Writ of Habeas Corpus, (1889-91), 9 S. C. C. 42.
Junaid vs. Mohideen et. al., (1933), 34 N. L. R. 141.
Wappu Marikar and Ummaniumma, (1912), 14 N. L. R. 225.

E. B. Wikramanayake, K.C., with *S. Canagarayer* and *M. A. M. Hussain*, for the defendant-appellant.

H. V. Perera, K.C., with *H. W. Jayawardene* and *G. F. Sethukavaler*, for the plaintiffs-respondents.

PULLE, J.

The appellant in this case is the defendant against whom the plaintiffs have obtained a decree declaring them entitled to the premises described in the schedule to the plaint and for ejectment and damages.

The parties are Muslims. The plaintiffs based their title on a deed of gift No. 1428 of the 28th

June, 1927, marked P1, executed in their favour by one Saffra Umma. The defendant relied on a later deed of gift No. 1483 of 4th February, 1928, marked D1 by which Saffra Umma after purporting to revoke deed No. 1428 gifted the same premises to the defendant. The only point urged in favour of the appeal was that the gift made by P1 was bad for want of a valid acceptance.

One Idroos Lebbe Marikar Mohamed Zain the son of Saffra Umma was married to Sheka Marikar Fatheela Umma. Their children are the plaintiffs of whom the first, who is the eldest, was born on 4th January, 1914. At the time the deed P1 was executed, Mohamed Zain, the father, was dead and the plaintiffs were minors.

By the deed of gift P1 Saffra Umma reserved to herself the right to enjoy the rents and profits of the premises during her life time and created a *fidei commissum* in favour of the children of the donees. There were other conditions and restrictions to which it is not necessary to refer for the purpose of deciding the question arising on this appeal. The gift was accepted by Fatheela Umma in the following words :—

> " And these presents further witness that I Sheka Marikar Fatheela Umma who is the mother of the said donees do hereby thankfully accept the foregoing gift for and on behalf of the said donees who are all minors ".

The validity of this acceptance was attacked on the ground that the parties to the deed of gift being Muslims, Fatheela Umma, as the mother of the donees, did not have the capacity to accept the gift on behalf of her children.

It is not disputed that Saffra Umma did not intend to make a gift such as is recognised in Muslim Law but that she did, in the words of the Privy Council in the case of *Weerasekere vs. Peiris*, (1933) 34 N. L. R. 281, intend to create and that she did create a valid *fidei commissum* such as is recognised by the Roman-Dutch Law.

Learned counsel for the appellant contends that to constitute a valid donation acceptance by the donee is essential. Where the donee is a minor it is not every person who is empowered to accept the donation on behalf of the minor. He relies on the cases of *Fernando vs. Weerakoon*, (1903) 6 N. L. R. 212, and *Wellappu vs. Mudalihami*, 8 (1903), 6 N. L. R. 233. The former case decided that a minor cannot accept a gift, until at least he attains majority and that a grandparent and parents, when not also the donors, may accept for the minor. Both cases specifically held that a father who is the donor cannot act in the dual capacity of donor and acceptor. Reliance was also placed on *Cornelis vs. Dharmawardene*, (1907) 2 A. C. R. 13, according to which Middleton, J. held, " that the acceptance of a deed of gift made by a father in favour of his minor child by an uncle of the minor on behalf of the minor is not a valid acceptance as not having been an acceptance of a legal or conventional guardian ". The capacity of a legal or natural guardian to accept is also recognised in *Fernando et. al. vs. Cannangara*, (1900), 3 N. L. R. 6, and *Silva vs. Silva*, (1909) 11 N. L. R. 161. It is argued on these authorities that if Fatheela Umma did not at the time she purported to accept the gift come within the description of legal or natural guardian of her children the gift failed and that the question whether she was the natural guardian fell to be determined by the Muslim and not the general law of the land.

There is undoubtedly authority for the statement that in Muslim law a mother is not the natural guardian. See the judgment of Mr. Ameer Ali in the Privy Council case of *Imambandi and Others vs. Mutsaddi and Others*, (1917-18) Law Reports Indian Appeals 73.

Great stress was laid on the following passage in Minhaj Et Talibin, P. 169 :—

> " A father is the guardian of his children during their minority. In default of the father the guardianship reverts to the father's father, and then to a testamentary executor appointed for that purpose by the father or fathers' father, and as a last resort to the Court, which, however, may depute some reliable person as administrator. A mother can never be guardian in her own right, but the father or father's father may so appoint her by will ".

The soundness of the argument urged on behalf of the appellant rests on the validity of two propositions :—

(1) That a transaction, the efficacy if which depends on the Roman-Dutch law, ought to be split up into its component parts and the legality of each part tested in order to ascertain whether or not it is obnoxious to the personal or religious law of the parties to the transaction.

(2) That the entirety of the Muslim law of guardianship is part of the personal or religious law applicable to Muslims in Ceylon.

The judgment of the Privy Council in *Weerasekera vs. Peiris*, (1933), 34 N. L. R. 281, is itself a warning against dividing up a transaction, intended to be governed by one system of law, into parts and pronouncing against its validity because one part does not survive a test by the application of the personal or religious law governing the contracting parties. It is clear

that under the Roman-Dutch Law upon the death of the father, the mother is vested with the rights of control over the person and property of her children, in the absence of special arrangements made by the father in a testamentary disposition. In the present case there is no suggestion that any one else besides Fatheela Umma exercised, *de facto*, the rights of a guardian over her children. On the death of her husband she was appointed administratrix of his estate. Further in 1933 she was appointed by Court curator of the estate and guardian of the persons of the minors. I do not see anything intrinsically objectionable, in these circumstances, in regarding Fatheela Umma, in the Roman-Dutch Law sense as a natural guardian entitled to. accept the gift for and on behalf of her minor children.

The subject is not free from difficulty. Difficulties always arise when a single transaction falls within the orbits of different systems of law. Though not exactly in point I would quote Professor Cheshire who says in his work on Private International Law (3rd Edition) p. 259, "The desideratum of Private International Law is to reduce as far as possible the number of laws that govern the ordinary dealings of life. The ideal is that a single transaction should be governed by a single law, and though, of course, this is not completely attainable, it is at least possible and desirable in the matter of capacity". I appreciate that guardianship is perhaps more a matter of status than of capacity but even here judicial opinion does not favour the rigid application of the *lex domicilli*. Lord Greene, M.R., is quoted at p. 256 (ib.) as saying :—

> "It would be wrong to say that for all purposes the law of the domicil is necessarily conclusive as to capacity arising from status.....There cannot be any hard and fast rule relating to the application of the law of the domicil as determining status and capacity for the purpose of transactions in this country".

In my judgment the validity of the acceptance by Fatheela Umma has to be determined solely within the framework of the Roman-Dutch Law. If she were governed by that law, she would on the facts of the case be the natural guardian of her children and, therefore, empowered to accept the gift on their behalf.

If the conclusion which I have reached is not correct, it still remains to be determined whether the principles of Muslim Law on which the appellant has relied can be regarded as part of the law applicable to Muslims in Ceylon. In the case of *Rahiman Lebbe and another vs. Hassan Ussan Umma and others*, (1916), 3 C. W. R. 88 at 99, Schneider, A.J., said "The reported cases show that since 1862 our Courts have consistently followed the principle that it is so much and no more of the Mohammedan Law as has received the sanction of custom in Ceylon that prevails in Ceylon.....It is true the treatises on the Mohammedan Law generally are frequently referred to in our Courts. But this is done only to elucidate some obscure text in our written Mohammedan Law or in corroboration of evidence of local custom. I cannot find a single decision that has gone to the length of holding that apart from the the prevalence of a local custom Mohammedan Law has any application in Ceylon". Ennis, J., said much to the same effect. No authority has been cited showing that a Muslim widow in Ceylon is not regarded as the natural guardian of her minor children.

Learned counsel for the plaintiffs cited the case of *In the matter of the Application of Sego Meera Lebbe Ahamadu Lebbe Marikar for a Writ of Habeas Corpus*, (1889-91), 9 S. C. C. 42, as authority for the general proposition that whatever might be the Muslim Law according to the Koran a question of guardianship has to be determined according to the general law applicable to all inhabitants of the country. In the case cited the custody of a Muslim child was claimed both by the father and the maternal grandmother, the mother being dead. It was held that there was no Muslim Law in force depriving the father of his right to such custody in preference to all other persons. Dias, J., said "the Mohammedan law on this point, as it is found in books, is mixed up with various considerations peculiar to their faith ; and in the absence of evidence to the contrary, I am inclined to uphold the right of the father as against the grandmother. It is a rule recognised by all civilised countries and consonant to natural justice". The judgment of Drieberg, J., in *Junaid vs. Mohideen et. al.* (1933) 34 N. L. R. 141, indicates that the particular ruling that a father is preferred to a grandmother as a guardian has not been followed in numerous cases since the judgment of Wood-Renton, J., in *Wappu Marikar and Ummaniumma*, (1912) 14 N. L. R. 225. The principle enunciated by Dias, J., however, remains unaffected. One point, therefore, clearly emerges from a consideration of the cases on this point that before Muslim law could be applied there must be a *cursus curiae* in favour of applying that law. There is no *cursus curiae* of which I am aware which deprives a Muslim widow of a preferential right to the custody and guardianship of her minor children and to be in charge of their property. It would indeed be strange if a Muslim widow having the preferential right to administer her husband's estate under Section 523 of the Civil Procedure Code, the title

to a part of which estate would vest in her children, is not to be regarded as their natural guardian.

In the result I find that the appellant is not entitled to have recourse to Muslim Law to defeat the plaintiff's claim that Fatheela Umma was empowered by the general law of the land to accept the gift.

For the reasons which I have stated the appellant's contention that the gift to the plaintiffs was bad for want of a valid acceptance fails.

I would dismiss the appeal with costs.

DIAS, S.P.J.

I agree.

Appeal dismissed.

IN THE PRIVY COUNCIL

Present : LORD SIMONDS, LORD MACDERMOTT, LORD REID AND SIR JOHN BEAUMONT

PIYARATANA UNNANSE *et al.*

vs.

WAHAREKE SONUTTARA UNNANSE *et al.*

Privy Council Appeal No. 20 *of* 1948
S. C. 289—*D. C. Kandy*, 45,415
Decided : 18th April, 1950.

Civil Procedure Code, Section 189 (1) Scope of—Amendment of decree—Powers of Court.

The appellants petitioned the District Court under Section 189 of the Civil Procedure Code for an amendment of its decree on the ground that it was not in conformity with its judgment in as much as the decree failed to refer to certain rights to which they claimed they were declared entitled to in the judgment.

The amendment was allowed (not by the trial judge) holding that when the judgment is read as a whole the appellants claim appeared to be correct.

Held : (i) That Section 189 of the Civil Procedure Code provides an exception to the general rule that once an Order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the Order is *functus officio* and cannot set aside or alter the Order however wrong it may appear to be.

(ii) The court had no power to amend the decree as it involved the construction of the judgment and the variation did not appear on a perusal of the judgment and decree.

SIR JOHN BEAUMONT.

This is an appeal against a decree of the Supreme Court of Ceylon dated the 17th May, 1944, setting aside an Order of the District Court of Kandy, dated the 22nd March, 1943, whereby a decree of the said District Court, dated the 6th February, 1941, in favour of the appellants was directed to be amended in the manner specified.

The power of a court in Ceylon to amend its own Order is conferred by section 189 (1) of the Civil Procedure Code which is in the following terms :

> " The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment."

In the application giving rise to this appeal the contention of the appellants was that the decree of the District Court dated the 6th February, 1941, omitted to give to the appellants the right to certain land edged green on "Spencer's Plan" hereinafter mentioned, whereas, according to the contention of the appellants, the judgment on which such decree was based had conceded such right. The learned District Judge before whom the said application came, who was not the same judge as the one who had passed the decree, accepted the contention of the appellants and amended accordingly the decree passed by his predecessor. In appeal the Supreme Court held that the judgment upon which the decree of the 6th February, 1941, was based had decided against the title of the appellants to the said land, and that there was no case for amending the decree.

The first question which arises for decision by the Board is whether the learned District Judge had any power on the application before him to amend the decree of his predecessor. If this question be answered, as their Lordships think it must be, against the appellants, the appeal must fail, and it is unnecessary to determine any other question.

The facts giving rise to this appeal are not in dispute. The litigation started in the District Court of Kandy on the 4th July, 1934. The parties were all Buddhist priests and the question in issue related to the ownership and right to possession of a monastic building known as the "Meda Pansala" as appurtenant to a larger monastic temple known as Degaldoruwa Vihare. The plaint did not describe the property claimed by metes and bounds or by reference to any plan as it should have done under section 41 of the Civil Procedure Code, nor did the defence raise any question as to the boundaries or area of the Meda Pansala. At the trial twelve issues were raised relating to (1) the title of the Meda Pansala of the plaintiffs, present appellants; (2) the claim of the defendants, present respondents, to have acquired a right to the said Meda Pansala by prescription; and (3) the claim of the defendants to the cost of improvements alleged to have been made by them to buildings comprised in the Meda Pansala and a consequent right to a *jus retentionis*. No issue as to area was raised.

On the 10th February, 1936, the District Judge gave judgment in the suit holding that the plaintiffs had proved their title to the Meda Pansala but that such title was barred by limitation. Accordingly he dismissed the action.

In appeal the Supreme Court agreed with the District Judge in thinking that the plaintiffs had proved their title but differed from him in thinking that such title was barred by limitation. Accordingly the decree of the District Judge was set aside and issues 9, 10 and 11 (which dealt with claim of the defendants to the cost of improvements and the *jus retentionis*) were remanded to the lower court.

In dealing with the remanded issues it was agreed between the parties that it would be necessary to define the Meda Pansala, and accordingly a commission was issued to a surveyor named Spencer to make a plan of the Meda Pansala. Mr. Spencer duly prepared a plan (Which is the plan hereinbefore referred to as "Spencer's Plan") in which he showed the Meda Pansala as consisting of buildings, marked lots 1-10 inclusive, and some open land (presumably garden land) which was edged green on the plan. The present dispute relates to that piece of open land. The plaintiffs claimed that the Meda Pansala comprised the whole property shown on the plan, but informed the court that they raised no claim in the present action to lots 7-10 since rights of persons not parties to the action were involved. The learned judge thereupon raised a fresh issue, No. 13, in these terms:

> "Do the buildings marked 1, 2, 3, 4, 5 and 6 and the land shown in the inset edged green, in Mr. Spencer's plan, represent the Meda Pansala which is the subject-matter of this action?"

At a subsequent date, namely on the 28th August, 1940, counsel for the plaintiffs informed the court that lots 3 and 6 were in the same position as lots 7-10 and that he did not propose to raise the title to those lots in the action. The learned judge thereupon stated that issue 13 would be modified by substituting in place of the lots referred to in that issue the following lots only 1, 2, 4 and 5.

At the trial of the remanded issues it was common ground that lot 2 was comprised in the Meda Pansala and the dispute was as to lots 1, 4 and 5. The learned District Judge in his judgment delivered on 6th February, 1941, after noticing that the titles to lots 3 and 6-10 were not being investigated in the suit, stated that issue No. 13 had been modified so as to include in it only lots 1, 2, 4 and 5. Whether the learned judge was right in treating issue No. 13 as not embracing the land edged green may be open to question, but their Lordships think it clear that the learned judge, having treated the issue as so limited, confined his judgment to that issue. After considering the evidence submitted the learned judge said this:

> "Upon a consideration of the evidence placed before the Court by the parties, I have come to the conclusion on the issues submitted for adjudication that the Meda Pansala is comprised of lots 1, 2, 3, 4 and 5 and not merely of lot 2 as contended for the defendants."

The learned judge summed-up his conclusions at the end of the judgment in these words:—

> "In the result, I would hold on issue 13 as framed by me that the Meda Pansala which is claimed to be an appurtenant of the Degaldoruwa is comprised of lots 1, 2, 4 and 5 subject to the reservation as regards the further claims to the buildings which have been made in the course of the trial."

On this judgment the decree of the 6th February, 1941, was drawn up. It ordered and decreed that the 1st plaintiff be and he was thereby

declared entitled to the possession of the Meda Pansala as an appurtenance and endowment of the Degaldoruwa Vihare as comprised of lots 1, 2, 4 and 5 in plan dated the 16th July, 1938, made by Mr. P. Spencer and filed on record in this case.

The respondents filed an appeal from this decree but on the 1st October, 1942, the Supreme Court dismissed the appeal on a preliminary objection. It is common ground between the parties that as the Supreme Court did not enter upon the merits of the dispute its order in appeal has no relevance in these proceedings.

On the 11th January, 1943, the appellants presented a petition to the District Court of Kandy praying that the decree of the 6th February, 1941, be amended by including in the declaration of the plaintiff's title the right to the land edged green in Spencer's plan. The basis of the petition was that there was a variance between the judgment and the decree. At the hearing of the petition the then District Judge of Kandy accepted the contention of the appellants and amended the decree of the 6th February, 1941, by the interpolation after the figure "5" of the words:

"and the land shown in the Inset edged green."

The learned judge was of opinion that reading the judgment of his predecessor as a whole it amounted to a finding in favour of the title of the plaintiff to the land edged green. In appeal the Supreme Court set aside the Order of the District Judge. The judges of the Supreme Court did not consider the question whether the District Judge had power to amend the decree made by his predecessor, but held that the judgment on which the decree of the 6th February, 1941, was founded had held against the plaintiff's title to the land edged green. "It is obvious" said the learned Chief Justice in delivering the judgment of the court, "that he (the District Judge) held that the plaintiffs were not entitled to the land shown in what is described as the inset edged green."

Their Lordships find themselves in agreement with the conclusion reached by the Supreme Court but not with the reasons upon which such conclusion was founded. The general rule is clear that once an Order is passed and entered or otherwise perfected in accordance with the practice of the court, the court which passed the Order is *functus officio* and cannot set aside or alter the Order however wrong it may appear to be. That can only be done on appeal. Section 189 of the Civil Procedure Code of Ceylon, which embodies the provisions of Order XXVIII, Rule 11 of the English Rules of the Supreme Court and the inherent jurisdiction vested in every court to ensure that its order carries into effect the decision at which it arrived, provides an exception to the general rule, but it is an exception within a narrow compass. The section does not take away any right of appeal which the parties may possess; it merely provides a simple and expeditious means of rectifying an obvious error. In the present case there was no clerical error or accidental omission in the decree and the case of the appellants is based on an alleged variance between the judgment of the court and the decree based upon it. In such a case the variations should appear on a perusal of the judgment and decree. No such variation is apparent in the present case. The decree embodies the declaration which the judge expressed himself as prepared to make. The argument of the appellants is that when the judgment is read as a whole the judge really decided more than he professed to decide. That involves the construction of the judgment, a matter open to serious doubt as is shown by the fact that the trial judge thought the decision to be in favour of the plaintiff, whilst the appeal court thought it to be against the plaintiffs. In their Lordships' view that is not the type of case which falls within section 189 of the Civil Procedure Code, and that is sufficient to dispose of this appeal. Their Lordships would add, however, that, having carefully considered the terms of the judgment of the 6th February, 1941, and having heard an elaborate argument as to its meaning and effect they do not find themselves in agreement with the view of either of the courts in Ceylon. They are satisfied that in his judgment of the 6th February, 1941, the learned judge did not decide or intend to decide, upon the title to the land edged green. The highest the case can be put on behalf of the appellants is that there are passages in the judgment which suggests that if the judge had been minded to decide the question he would have decided it in favour of the appellants. The judge may have had good reasons for not deciding the question. He may have thought it inappropriate to decide on the title to a piece of open land when he was dealing only with issues relating to the cost of improvements in buildings, or he may have thought that any such decision might be embarrassing to parties not before the court who had interests in the land. At any rate whatever his reasons may have been their Lordships are satisfied that the learned judge deliberately refrained from deciding the title to the land edged green and that matter is still at large.

For these reasons their Lordships will humbly adivse His Majesty that the appeal be dismissed. The appellants must pay the costs.

Appeal dismissed.

Present : DIAS, S.P.J. & PULLE, J.

JAN SINGHO vs. ABEYWARDENE AND ANOTHER

S. C. 613—Application for revision in D. C. Negombo 15, 116.

Argued and Decided on : 16th May, 1950

Appeal—Distinction between 'Final' appeal and 'Interlocutory' appeal—Civil Appellate Rules 1938.

Held : That an appeal from an order made in an application for alimony pending the decision of an appeal against a decree for judicial separation is an 'interlocutory' appeal within the meaning of the Civil Appellate Rules 1938.

Per DIAS, S.P.J.—"A 'Final judgment' means a judgment awarded at the end of an action which finally determines or completes the action, and a 'Final appeal' is an appeal from such judgment. On the other hand, an 'Interlocutory judgment' is a judgment in an action at law given upon some defence, proceeding or default which is only intermediate, and does not finally determine or complete the action. An 'Interlocutory appeal' is an appeal from such a judgment."

Cases referred to : *Manchohamy vs. Appuhamy*, (1905), 8 N. L. R. 307.
Arlis Appuhamy vs. Siman, (1947), 48 N. L. R. 298.
Egerton vs. Shirley, (1945), 1 K. B. 107.

Cyril E. S. Perera, with *T. B. Dissanayake*, for the petitioner.

G. T. Samarawickreme, for the 1st defendant-respondent.

DIAS, S.P.J.

The plaintiff petitioner instituted proceedings for divorce against his wife the 1st respondent, who, while denying her husband's charges counter-claimed for a judicial separation. She had obtained before trial an order against the petitioner for the payment of alimony *pendente lite*.

The District Judge dismissed the petitioner's action against the 1st respondent, and entered a decree for judicial separation on her counter claim. The decree said nothing about the payment of permanent alimony. The petitioner appealed against that judgment and decree and that appeal is now pending.

The 1st respondent applied to the District Judge for alimony until the appeal was decided. The petitioner opposed that application. The District Judge directed that the original order for alimony *pendente lite* was to be operative until the pending appeal was decided. The Judge held that after that appeal was decided an order for permanent alimony would be made by him after inquiry, if it became necessary to do so. From that order too the petitioner filed an appeal; and it is with that appeal we are now concerned.

The question for decision is whether that appeal is a "Final Appeal" or whether it is an "Interlocutory Appeal" within the meaning of the Schedule to "The Civil Appellate Rules 1938". Ceylon Government Gazette No. 8441 of March 24, 1939, and also reproduced at p. 4 of the 1941 Supplement of The Subsidiary Legislation of Ceylon between June 30, 1938, and January 1, 1941.

Those Rules were framed by the Judge of the Supreme Court under section 49 and 50 of the Courts Ordinance. They provide for the typing of the briefs in civil cases in which appeals have been filed. These briefs are made by the staff of the original Court, and the appellant has to pay the fees prescribed in the Schedule to the rules. Rule 4 provides that the failure of an appellant to make application for typewritten copies in accordance with the requirements of the rules, renders the appeal liable to be abated.

The Schedule to the rules provides for three classes of civil appeals (*a*) Final appeals from District Courts, (*b*) Interlocutory appeals from District Courts and (*c*) Appeals from Courts of Requests. There are no "Interlocutory appeals" in Court of Requests cases, *Manchohamy vs. Appuhamy*, (1905) 8 N. L. R. 307. In the case of "Final appeals" from District Courts in "Matrimonial cases" such appeals are to be paid for as prescribed in Class 4 *i e.*, the fee is Rs. 15. In the case of "Interlocutory appeals" from District Courts, while for "Partition actions" the fee is Rs. 12, "in all other interlocutory appeals" the fee is fixed at Rs. 8.

The petitioner treated his appeal as being an "Interlocutory appeal" but by mistake paid a sum of Rs. 12, whereas the prescribed fee is only Rs. 8. The 1st respondent, however was able to persuade the District Judge that this appeal

was a " Final appeal " and succeeded in obtaining an order that the appeal had abated on the ground that the proper fee of Rs. 15 had not been paid. Hence this application in revision.

Unlike in the Courts of Requests an appeal lies as of right against every order, judgment, or decree in a Distirct Court s. 73 Courts Ordinance. The Courts Ordinance however, draws no distinction between appeals which are " final " and those which are " interlocutory ". It has nevertheless, been the practice to classify appeals in District Court cases into these two categories ; and the Legislature has, at least in one case recognised this distinction see section 27 of the Land Acquisition Ordinance (Chapter 203) where it is provided that appeals to the Supreme Court under that Ordinance, shall be subject to the rules and practice provided for and observed in appeals from " interlocutory " orders of District Courts. The Civil Appellate Rule 1938 also recognise that distinction.

What then is the distinction between a " Final appeal " and an " Interlocutory appeal " ? There is no statutory definition of either expression.

Counsel for the 1st respondent cited the case of *Arlis Appuhamy vs. Siman*, (1947) 48 N. L. R. 298, and similar cases in regard to the construction placed on the words " final judgment " as used in section 36 of the Courts Ordinance in regard to appeals from Courts of Requests. In my opinion those cases have no relevance to the question which arises in the present case. A " Final judgment " means a judgment awarded at the end of an action which finally determines or completes the action, and a " Final appeal " is an appeal from such judgment. On the other hand, an " interlocutory judgment " is a judgment in an action at law given upon some defence, proceeding or default which is only intermediate, and does not finally determine or complete the action. An " Interlocutory appeal" is an appeal from such a judgment. Mozley and Whitley's Judicial Dictionary, pp. 139, 177 : also see Stroud's Judicial Dictionary and Wickremenayake's Judicial Dictionary. I am indebted to my learned brother who has drawn my attention to the recent case of *Egerton vs. Shirly*, (1945) 1 K. B. 107. It is regrettable that the Bench should have to search for authorities which it is the duty of the Bar to have cited at the argument. *Egerton vs. Shirly* makes the meaning of these expressions clear. It was held in that case that an order made by a master under R. S. C. Order 14 giving leave to the plaintiff to sign judgment against the defendant in action brought under R. S. C. Order 3 Rule 6 is a " Final order " which finally disposes of the rights of parties. Where at the same time the master gives leave to the plaintiff to proceed to execution under the Courts (Emergency Powers) Act. 1943 and a Judge affirms that order it is an " interlocutory order " within the Supreme Court of Judicature (Consolidation) Act. 1925 section 15 Du Parcq L.J., said " No definition of the terms " Final " and " Interlocutory " is contained either in the rules of the Supreme Court or in the statute..... In our opinion the rights of the parties in this case were finally disposed of when leave to sign judgment was given by the master. All that remained was to set in motion or to retard the machinery for enforcing and in that sense working out those rights. The order made by Cassels J. merely removed a stay which the statute imposed in the absence of such an order. It no more finally disposed of the rights of the parties, than does, for instance, the issue of a writ of possession to a plaintiff whose right to possession has already been determined. On this ground we are satisfied that the order was an ' interlocutory ' one within the meaning of the Rules.

Applying these principles to the facts of this case it is clear that a " final " Judgment was pronounced when the District Judge entered decree dismissing the plaintiff petitioner's case and ordered a judicial separation on the counterclaim of the 1st respondent's application for a continuance of alimony thereafter and the order shows that it finally determines nothing. The appeal from that order therefore must be deemed to be an " Interlocutory appeal."

The petitioner was, therefore, right in treating his appeal as being an " Interlocutory appeal " and the District Judge was wrong in ordering that appeal to abate. The order of abatement is set aside with costs. The District Judge is directed to transmit the record and the briefs to this Court for disposal in due course.

PULLE, J.

I agree

Order set aside.

Present : WINDHAM J. & BASNAYAKE, J.

ROMANIS vs. HARAMANISA & OTHERS

S. C. 341—*D. C. Kegalle* 4615

Argued on : 25th January, 1950
Decided on : 30th March, 1950

Kandyan Law—Deed of gift—Revocability—Kandyan Law Ordinance No. 39 *of* 1938—*Its applicabitity*

One P. Bandiya made a gift of lands to his children by a deed dated 11-3-1911, subject to his life-interest and certain other conditions. Subsequently by a deed dated 5-7-1943 he revoked the previous deed of gift.

Held : That the revocation was valid. In Kandyan Law deeds of gift are revocable unless it could be shown in the case of a particular deed that " the circumstances which constitute non revocability appear most clearly on the face of the deed itself."

Cases referred to : Armour's Grammar of the Kandyan Law (Perera's) pp. 90-91.
Bologna vs. Punchi Mahatmaya, Ramanathan's Reports, 1863-68, p. 195.
Kiri Menicka vs. Cau Rala & others, Lorenz's Reports, 1858-59, p. 76.
Dharmalingam vs. Kumarihamy et. al. (1925), 27 N. L. R. 8.
Ukku Banda vs. Paulis Singho, (1926), 27 N. L. R. 449.

V. A. Kandiah with *Kandasamy*, for the plaintiff-appellant.
E. B. Wikramanayake, K.C., with *C. E. S. Perera*, for the defendant-respondents

BASNAYAKE, J.

This is an appeal from the judgment of the District Judge of Kegalle holding that a deed of revocation of a deed of gift executed by one Bandiya is valid and effectively revokes the gift made by him. Shortly the facts are as follows :

One Pallewalayalage Bandiya made a gift of certain lands to his five children by deed No. 7819 of 11-3-1911 attested by D. G. Fernando, Notary Public. The material portion of that deed reads :

" I hereby gift grant and assign the said premises subject to my life interest in them unto my affectionate children Pallewalayalage Leisa, Pallewalayalage Haramanisa, Pallewalayalage Thepanisa, Pallewalayalage Allissa and Pallewalàyalage Romanisa all of Ambuangala aforesaid, for and in consideration of the love and affection I bear for them and other generous reasons more particularly in expectation of succour and assistance from them. Wherefore the said donees are hereby empowered to have and to hold the said premises with all my right title and interest in them subject to my life interest and to the injunction herein contained. The said donees shall not sell mortgage exchange or otherwise alienate the said premises nor shall they lease them for a period exceeding one year. At their death the said premises shall devolve on their heirs executors administrators and assigns to be held and possessed by them for ever or to be dealt with as they please."

By deed No. 3532 of 5-7-43 attested by R. V. Dedigama, Notary Public, Bandiya revoked the above deed in the following terms :—

" Whereas I the said Pallewalayalage Bandiya by Deed of Gift No. 7819 dated 11th March, 1911, attested by D. G. Fernando, Notary Public, donated, granted, conveyed and assigned subject to the terms and conditions set forth in the said deed the lands mentioned in the schedule hereto to Pallewalayalage Leisa, Pallewalayalage Harmanisa, Pallewalayalage Thepanisa, Pallewalayalage Allisa, and Pallawalayalage Romanisa, all of Ambuangala aforesaid subject to a life interest in my favour.

And whereas I the said Pallewalayalage Bandiya am desirous of revoking, annulling and making void the said Deed of Gift No. 7819 dated 11th March, 1911 attested by D. G. Fernando, Notary Public.

Now Know Ye and These Presents witness that I the said Pallewalayalage Bandiya do hereby revoke, annul and make void the said deed of gift No. 7819 dated 11th March, 1911, attested by D. G. Fernando, Notary Public."

The question that arises for decision is whether the revocation of deed No. 7819 is valid or not. On the question of revocability of gifts Armour contains the following passage Armour's Grammar of the Kandyan Law (Perera's) pp. 90-91 :—

' " All deeds or gifts," says Sawers, " excepting those made to priests and temples whether conditional or unconditional, are revocable by the Donor in his life time." ' (Section 3).

"A revocable deed of gift becomes null and void under various circumstances.

1. If the Donor did by a subsequent Deed revoke the former Deed." (Section 4).

In the case of *Bologna vs. Punchi Mahatmaya* Ramanathan's Reports, 1863-68, p. 195 the Full Bench of this Court has held that the general rule is clear that deeds of gift are revocable in Kandyan Law and that before a particular deed is held to be exceptional to this rule it should be shown that " the circumstances which constitute non revocability appear most clearly on the face of the deed itself."

The above view is consistent with that expressed earlier in *Kiri Menicka vs. Cau Rala and others* Lorenz' Reports, 1858-59, p. 76 where a Full Bench held that a renunciation of the right to revoke expressed on the face of the deed makes it irrevocable.

The law as stated in these cases has been consistently followed since. The deed in question in the instant case is, therefore, revocable.

There are numerous decisions of this Court on this point and it is unnecessary to recapitulate all of them here. The later authorities are all collected in the cases of *Dharmlingam vs. Kumarihamy et al* (1925) 27 N. L. R. 8 and *Ukku Banda vs. Paulis Singho* (1926) 27 N. L. R. 449.

The Kandyan Law Ordinance No. 39 of 1938 which enacts the law applicable to Kandyan deeds of gift does not apply to deeds executed before 1st January, 1939, and need not therefore be discussed for the purpose of this case.

For the above reasons we agree with the conclusion of the learned District Judge.

The appeal is dismissed with costs.

Appeal dismissed.

WINDHAM, J.
I agree.

Present : DIAS, S.P.J. & GUNASEKARA, J.

ARALIS vs. FRANCIS

S. C. No. (F) 510/1949—D. C. Galle No. X 591
Argued on : 6th June, 1950
Decided on : 15th June, 1950

Partnership—Capital alleged to be over one thousand rupees—No agreement in writing—Prevention of Frauds Ordinance section 18*—Onus of proof—Meaning of " capital ".*

Held : That where a partnership, not evidenced in writing is established, the party, who pleads the benefit of Section 18 of the Prevention of Frauds Ordinance, must establish the existence of facts which bring the case within the Section.

Per GUNASEKERA, J.—" The capital contemplated by section 18 of the Prevention of Frauds Ordinance is the original capital contributed by the partners (*de Silva vs. de Silva*, 1935, 37 N. L. R. 276), and the term does not extend to the amount that may stand as capital after additions or withdrawals, at any time during the course of the business (*Sinno vs. Punchihamy*, 1916, 19 N. L. R. 43, at 46.).

Cases referred to : *de Silva vs. de Silva*, (1935), 37 N. L. R. 276.
Wickremaratne vs. Fernando, (1916), 2 C. W. R. 154, at 155.
Sinno vs. Punchihamy, (1916), 19 N. L. R. 43 at 46.

E. B. Wikramanayake, K.C., with *Christie Seneviratne*, for the plaintiff-appellant.
N. K. Choksy, K.C., with *S. W. Walpita*, for the defendant-respondent.

GUNASEKARA, J.

The plaintiff-appellant alleging a partnership between himself and the defendant-respondent, who is his brother, brought this action for a dissolution of the partnership and an accounting and for the recovery from the defendant of a sum of Rs. 6,382·54 or such sum as might be found to be due to him upon an accounting. The learned District Judge held there was a partnership as alleged in the plaint but he dismissed the action on the ground that the capital of the partnership exceeded Rs. 1,000 and there was no agreement in writing as required by section 18 of the Prevention of Frauds Ordinance (Cap. 57).

The learned District Judge's finding that there was a partnership is supported by the defendant's own admissions that he and the plaintiff " started the business on a partnership basis " and that a part of the capital was contributed by the plaintiff. In view of this finding the burden lay on the defendant to prove the existence of facts bringing the case within section 18 of the Prevention of Frauds Ordinance. *De Silva vs. de Silva.* (1935) 37 N. L. R. 276.

According to the case for the defendant, which was accepted on this point, the business in question was started on the 9th May, 1935, with a stock-in-trade of the value of Rs. 6,999·22, which was supplied on that day by Mendis, a brother of the parties. The learned District Judge holds that this sum was the capital of the business.

" By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in that business." *Lindley on Partnership, Book :*

It appears from the evidence that the goods supplied by Mendis were supplied by him to the partnership (and not to the plaintiff or the defendant) and were later paid for by the partnership (and not by the plaintiff or the defendant). Thus, the evidence of Mendis himself, who was called as a witness by the defendant, is as follows :

" The business of M. M. Francis & Co., was started in May, 1935. To start that business I bought Rs. 7,000 worth of goods as stock. That sum was paid back by the firm of M. M. Francis & Co."

(M. M. Francis & Co., was the name under which the partnership carried on business.) It seems clear, therefore, that no part of this stock was property contributed by either of the partners to be risked in the business, but the whole of it was property purchased by the partnership. It was not part of the capital. " Neither the stock-in-trade nor the assets of the partnership at any particular time necessarily represent the capital of the firm, which is the actual cash and the value of the property contributed by the partners to the common property of the firm to be used for the purpose of the joint business." *Wickremaratne vs. Fernando,* (1916) 2 C. W. R. 154, at 155.

The defendant has also given evidence to the effect that he contributed as capital a sum of Rs. 2,715 on the 10th May, 1935, and the plaintiff a sum of Rs. 2,034 on the 24th May, 1935. The learned District Judge accepts this evidence and holds that even if the value of the stock supplied by Mendis was not capital, there were these contributions to capital and it is " idle for the plaintiff to state that the business did not start with a capital of over Rs. 1,000." Both here and in a later passage in the judgment, where the learned Judge holds that " the registration of the business does not help the case for the plaintiff to establish the fact that the business was run on a partnership basis with a capital of under Rs. 1,000," the language of the judgment suggests an assumption that the burden lay on the plaintiff to prove that the capital of the partnership was less than Rs. 1,000. Not only does the burden on this issue lie on the defendant but that burden is, in the language of Sir Thomas de Sampayo in *Sinno vs Punchihamy,* (1916) 19 N. L. R. 43, at 46 a " heavy " one and, in the words of the same distinguished Judge, " the defendant having admitted the partnership, the Court will exact from him the most strict proof of any facts on which he may rely as entitling him to take refuge under the Ordinance."

The capital contemplated by section 18 of the Prevention of Frauds Ordinance is the original capital contributed by the partners (*de Silva vs. de Silva*) (1935) 37 N. L. R. 276 and the term does not extend to the amount that may stand as capital after additions or withdrawals, at any time during the course of the business : (*Sinno vs. Punchihamy*) (1916) 19 N. L. R. 43, at 46. It cannot be said that the defendant has furnished strict proof that the sums of Rs. 2,715 and Rs. 2,034, or either of them, were contributions to the original capital. Indeed the effect of his evidence is that they were contributions made after the partnership had been formed and after it had commenced business on the 9th May, 1935.

In my opinion the defendant has failed to prove the existence of facts that would bring the case within section 18 of the Ordinance. I would set aside the learned District Judge's order dismissing the plaintiff's action and send the case back to the District Court so that an order may be made for the dissolution of the partnership and an accounting and for determination of the plaintiff's claim in due course. The plaintiff will have the costs of the trial that has been held in the District Court and the costs of this appeal. The costs of further proceedings will be in the discretion of the District Court.

Set aside and sent back.

DIAS, S.P.J.

I agree.

Present : GRATIAEN, J.

SIMEN COORAY vs. WEERASURIYA (S. I. POLICE)

S. C. 264/*P—M.C. Colombo South* 26134
Argued on : 17th May, 1950
Decided on : 19th May, 1950

Criminal Procedure—Charge of causing simple hurt—Evidence at trial disclosing charge of robbery—Fresh charge on robbery—Trial continued on same day though accused undefended—Conviction—Desirability of giving time to accused.

Held : That it is undesirable that the trial on a serious charge should be sprung upon an undefended accused person without taking every reasonable precaution to ensure that he fully understands and appreciates the implications of the new course which has been taken to his detriment.

S. C. E. Rodrigo, for the appellant.
S. S. Wijesinghe, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

On 16th November, 1949, the accused assaulted a boutique-keeper named Sivaguru. Sivaguru promptly complained to the police, and in due course the accused was charged in the Magistrate's Court with having committed the offence of voluntarily causing simple hurt, punishable under section 314 of the Penal Code.

In the course of recording Sivaguru's evidence the learned Magistrate seems to have taken the view that a more serious offence—namely, that of robbery punishable under section 380 of the Code—was involved. He therefore altered the charge accordingly ; the accused, *who was undefended*, pleaded not guilty, and the proceedings on this fresh charge were continued without further interruption on the same day. At the end of the trial the learned Magistrate convicted the accused ; in due course, as certain previous convictions were proved against the accused, he was sentenced to a term of six months' rigorous imprisonment, and to pay a fine of Rs. 100. He was also sentenced to two years' Police supervision.

I regard it as undesirable that the trial on a serious charge of robbery should be sprung upon an undefended accused person without taking every reasonable precaution to ensure that he fully understands and appreciates the implications of the new course which has been taken to his detriment. A man who attends Court to conduct his own defence on a charge of simple hurt might very well prefer to obtain legal advice before he is tried on an additional and unexpected charge of robbery. It would therefore have been far more satisfactory if, after the charge of robbery was framed, the accused was informed that, if he so desired, a postponement of the trial would be granted so that he might re-consider his position and obtain legal assistance for this purpose. In the present case I am not at all convinced that the accused sufficiently realised the new situation in which he had been placed. Indeed, in his petition of appeal, draft by himself after the trial, he purports to appeal only against what he believed to be a conviction *on the original charge* of having caused simple hurt to Sivaguru.

No doubt the evidence of Sivaguru at the trial, if true, discloses the more serious offence of robbery. During the hearing of this appeal, it struck me as a matter for inquiry as to why, in the circumstances, the Police contented themselves with confining their original complaint against the accused to an allegation of simple hurt. I accordingly requested learned Crown Counsel to make available to me the terms of Sivaguru's first complaint which was recorded by the Police. I now find, upon a perusal of the relevant extracts in the Information Book, that the language of Sivaguru's original complaint raises serious doubts as to whether any offence other than that of simple hurt had in fact been committed. This demonstrates to my mind the unwisdom of criminal proceedings being conducted at too rapid a pace against accused persons who are undefended.

I quash the conviction of the accused on the charge of robbery and substitute in its place a conviction of having caused simple hurt under section 314 of the Penal Code. In lieu of the sentences passed on the accused I order him to pay a fine of Rs. 100, in default three weeks' rigorous imprisonment. It will be open to the accused to make an application in the Court below for permission to pay the amount of this fine by instalments.

Conviction altered.

Present : BASNAYAKE, J.

JOHN PERERA vs. JOHNSON (S. I. POLICE, BAMBALAPITIYA)

S. C. 1211-1212—*M. C. Colombo South* 24782
Argued and decided on : 9th March, 1950

Criminal Procedure—Trial—Prosecuting officer contradicting prosecuting-witness by reference to statements recorded in course of investigation—Regularity—Is oral evidence of statements recorded in course of investigation admissible—Oaths Ordinance—Witness dealt with under section 11—Necessity to frame charges.

Held : (i) That, it is irregular for a prosecuting officer to seek to contradict prosecution witnesses in the course of the prosecution case by reference to statements made by them to the Police Officer who investigated into the complaint.

(ii) That oral evidence of statements recorded by Police Officers is inadmissible and should not be permitted.

(iii) That, before a witness is dealt with summarily under Section 11 of the Oaths Ordinance, it is necessary that a proper charge should be framed against him.

M. M. Kumarakulasingham with *A. K. Premadasa*, for the accused-appellants.
Arthur Keuneman, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The accused-appellant in S. C. 1211 has been found guilty of a charge under section 486 of the Penal Code and sentenced to a term of three months' rigorous imprisonment. The learned Magistrate rests his finding on the evidence of one Mrs. Kelaart, whose testimony he accepts without question. I am not prepared to say that he should not have done so. In the course of the prosecution case the prosecuting officer sought to contradict the prosecution witnesses Ratnawathie and Seelawathie by reference to the statements made by them to the Police Officer who investigated the complaint. This is highly irregular and should not have been allowed. A further irregularity in the proceedings is that Police Constable Wijewardena, another prosecution witness, has been permitted to give oral evidence of statements recorded by him. In spite of these irregularities I am not disposed to reverse the decision of the learned Magistrate because independently of the evidence which has been improperly admitted there is sufficient evidence to justify his decision. The appeal of the appellant in Supreme Court Appeal No. 1211 is therefore dismissed.

I now come to the appeal of the appellant in Supreme Court Appeal No. 1212. The appellant has been punished under section 11 of the Oaths Ordinance. That section provides that if any person giving evidence on any subject in open Court in any judicial proceeding gives in the opinion of the Court before which the proceeding is held false evidence within the meaning of section 188 of the Penal Code he may be punished as for a contempt of the Court. It also requires that the Magistrate should record the reasons for punishing the offender.

In the instant case the record of the learned Magistrate reads as follows :—

"I am satisfied on the evidence of P. C. Wijewardene that witness Ratnawathie *alias* Alice did make a statement to him on the night of 1-9-49 and that she is denying it because she had not signed it as she does not know to sign it.

I call upon the witness to show cause why I should not deal with her under section 11 of the Oaths Ordinance.

Mr. Wijesuriya for accused.

The witness states : 'I did not make a statement to the Police. If I did, show me the signature.'

The witness's explanation is worse than the offence she has committed. I have no doubt whatever that she made a statement to the constable. The statement of a witness when recorded need not be signed by the witness provided it was done in the course of an inquiry under Chapter 12 of the Criminal Procedure Code. In this instance the falsity or truth of her statement does not arise because the issue is whether she made a statement or not. I sentence accused to pay a fine of Rs. 50 or 1 month's R. I."

Although a person against whom action under section 11 of the Oaths Ordinance is taken may in terms of that section be summarily sentenced, it is necessary that a proper charge should be framed against him. In this instance no proper charge has been framed against the appellant, nor has the learned Magistrate stated that in his opinion she has given false evidence within the meaning of section 188 of the Penal Code. The appellant when giving evidence denied that she made a statement to a police officer. She stated "Police Officer asked for a statement. I refused saying that I had never been to a Court of law and that I was not going to state anything. I cannot sign my name."

It appears from what I have quoted above that the appellant has been convicted without a proper charge and without the charge being explained to her. Apart from that, the ingredients necessary to establish a charge under section 11 of the Oaths Ordinance are not clearly proved.

The appellant's conviction cannot, therefore, stand and must be set aside.

Appeal in 1212 set aside.

Present : DIAS, S.P.J., NAGALINGAM, J. & GRATIAEN, J.

YAKOOB BAI vs. SAMIMUTTU

S. C. 381—D. C. Kandy, M. S. 1,972.

Argued on : 19th May, 1950.
Decided on : 26th May, 1950.

Civil Procedure Code—Section 218 (j)—"Labourer"—Is Head-Kangany a "labourer"?—Meaning ascertained by reference to "The Service Contracts Ordinance" (Chapter 59) and The Estate Labour (Indian) Ordinance (Chapter 112)—Rule of interpretation.

A head-kangany, whose work was only to supervise a number of estate labourers, and who received for the services a salary, "dearness allowance" and "pence money", successfully claimed exemption in the District Court from seizure of his wages under section 218 (j) of the Civil Procedure Code on the ground that he was a labourer within the meaning of that section. On appeal it was held :—

(1) That a 'Kangany' whose work was purely supervisory and involves no physical or manual labour our any kind would be a 'labourer' within the meaning of section 218 (j) of the Civil Procedure Code.

(2) That (Gratiaen, J. dissenting) in ascertaining the meaning of the term "labourer" as used in the section 218 (j), the class of persons especially legislated for by Ordinance No. 11 of 1865 (The Service Contracts Ordinance Chapter 59) should be taken into consideration, and under this Ordinance a kangany whose duty is merely to supervise is a "labourer".

Per DIAS, S. P, J. "An author must be supposed to be consistent with himself and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal" Maxwell 9th Ed. p 163.

Per GRATIAEN, J. "It seems to me that the term "labourer" in section 218 (j) must be interpreted solely by referrence to the purpose which that section, as explained by previous judgments of the Courts in England, India and Ceylon, was intended to serve. The categories of "labourer" in this context cannot in my opinion either be limited or enlarged in the light of what the term means in other Ordinances and for other purposes."

H. W. Thambiah with *G. T. Samarawickrama* for the plaintiff-appellant.
H. W. Jayawardene for the defendant-respondent.

DIAS S.P.J.

The plaintiff appellant obtained judgment against the defendant-respondent for a sum of Rs. 1,147·50 on a promissory note and issued writ. Under that writ the Fiscal seized the wages, dearness alowance and pence money of the defendant in the hands of the latter's employer. The defendant claiming that he is a "labourer" within the meaning of section 218 (*j*) of the Civil Procedure Code successfully moved the Court to have that seizure withdrawn. From that order the plaintiff appeals.

The appeal was first argued before my Brothers Nagalingam and Gratiaen; but as they disagreed as to whether the defendant was a "labourer", the question now comes before a Bench of three Judges.

In the caption to the plaint and answer the defendant is described as "Samimuttu K. P. Kelevitotem, Hatton". In the promissory note dated 1947, on which the defendant was sued, he has signed as Samimuttu K.P. I presume "K. P." means "kanakapulle", *i.e.*, a man who keeps accounts. At the inquiry held by the District Judge the witness Paul Raj, a clerk on the estate where the defendant is employed, stated that though the defendant was formerly a "kanakapulle", he was since 1948 the "Head Kangany" of the estate, and is described as such in the estate register D1. He further stated that the head kanganies have a number of labourers under them, and that the duty of a head kangany is to supervise labourers who do the manual work. For this work the head kangany is entitled to draw what is called "pence money". No contrary evidence having been led, we must take it as established that the defendant does no manual or physical labour of any kind, and that his duties are purely supervisory. The question is whether such a person can be described as being a "labourer" within the meaning of section 218 (*j*) of the Civil Procedure Code?

Section 218 provides that in the execution of a money decree, the judgment creditor may seize and sell and realize in money in the hands of the Fiscal "except as hereinafter mentioned" all saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which the judgment-debtor has

a disposing power &c."; provided that the following shall not be liable to such seizure or sale, namely (*inter alia*) :—

(*j*) The wages of labourers and domestic servants.

The Civil Procedure Code contains no definition of the word "labourer". According to Webster's Dictionary, "A labourer" is one who does physical labour; one who works at a toilsome occupation, especially a person who does work that requires strength rather than skill, as distinguished from artisans and from the professional classes. The Concise Oxford Dictionary says that a "labourer" is one who does for wages work which requires strength and patience rather than skill or training. In "Words and Phrases Judicially Defined" there occurs the following passage: "What degree of skill is sufficient to raise a manual worker out of the labouring class is a question upon which widely varying opinions may be, and frequently are held".

There are decided cases under section 218 (*j*) where this Court has considered whether persons employed in certain occupations are "labourers" —but they do not help us to solve the problem whether a "kangany" is a labourer.

In *Girigoris vs. The Locomotive Superintendent*, (1912) 15 N. L. R. 117, a *mechanic* employed on daily wages by the Ceylon Government Railway was held not to be a "labourer" within the meaning of section 218 (*j*). Wood Renton J. referred to the case of *Jechand Khusal vs. Aba*, (1880) 5 Bom. 132, where Melville J. said that persons are "labourers" who earn their daily bread by personal manual labour, or in occupations which require little or no art, skill, or previous education. In *Reddiar vs. Abdul Latiff* (1928) 30 N. L. R. 95, it was held that a *lorry driver* was not a "labourer" within the meaning of section 218 (*j*). Drieberg J. said: "A lorry driver whose occupation needs previous training, some degree of skill, and is not manual in the strict sense of the word, is not a 'labourer' within the meaning of section 218 (*j*) of the Civil Procedure Code". In *Wickrematunge vs. Perera*, (1939) 41 N. L. R. 95, de Kretser J. held that a *tramway conductor* was not a "labourer". He said that in appointing tramway conductors the employer looks to their character and honesty, and that it was clear from the description of the work done by such persons that they do not come within the meaning which one naturally and ordinarily attaches to the word "labourer". In *Nagasamy vs. Hamid*, (1942) 43 N. L. R. 525, the defendant was the *tindal of a boat*. He was the chief man of the crew, whom he engaged. The work of the crew was to load and unload cargoes. The defendant allotted the work to be done by the crew, and he himself worked with them in the task of loading and unloading. Soertsz J. held that on these facts the defendant was a "labourer" within the meaning of section 218 (*j*). "The fact that the respondent is called the *tindal*, that he deals directly with the employing firm, that he is responsible to the harbour authorities for the observance of the port regulations and things like that, do not in any way alleviate the burden of his manual labour. They may, perhaps, give him a certain standing in his little world of labourers by putting him in the position of *primus inter pares* : but the crucial fact—the fact whereby there hangs the tale, is that the respondent takes, more or less, an equal hand with others in loading, unloading and arranging cargo, which is their substantial business".

Had the matter ended here, one would be inclined to hold on the evidence before the Court that a "kangany" whose work was *purely supervisory*, and involved no physical or manual labour of any kind, could not be called a "labourer". I am, however, of opinion that there is another approach to this problem.

Ordinance No. 11 of 1865 is described as "An Ordinance to consolidate and amend the law relating to Servants, *Labourers*, and Journeymen Artificers under contracts for hire and service". That Ordinance, and others which followed it, dealt with the relationship of master and servant, principally from the point of view of penal consequences, (Isaac Tambyah's Planters' Legal Manual, p. 1.), but that Ordinance, nevertheless, still remains in the Statute Book under the new name given to it by the Editor of the Revised Edition as "The Service Contracts Ordinance" (Chapter 59) in Volume 2, page 109, while the connected Ordinance No. 13 of 1889 under the name of "The Estate Labour (Indian) Ordinance" (Chapter 112) has been relegated to Volume 3, page 337, although section 2 of the latter Ordinance provides that "This Ordinance shall, so far as is consistent with the tenor thereof, be read and construed as one with the Service Contracts Ordinance".

Ordinance No. 11 of 1865 (Chapter 59) in its present form gives statutory effect to the contracts of service between masters and servants in this Island. By an amendment in 1912 (Chapter 60) the main Ordinance was made applicable to "chauffeurs" as if they were "domestic servants".

Section 2 of Chapter 59 defines the word "Servant" as follows: "The word 'Servant'

shall, unless otherwise expressly qualified, extend to and include—menial, domestic, and other like servants, pioneers, *kanganies*, and other *labourers*, whether employed in agricultural, road, railway, or other like work ".

In *Ferguson vs. Olivera*, (1867), Ram. 63-68 p. 288, a Full Bench of the Supreme Court in 1867 said : " The interpretation clause is worded in such a manner that we cannot apply to it the ordinary rule of making the special words at the commencement control all the general words that follow. Neither a 'pioneer' nor a 'kangany' is an 'other like' servant. Yet, both pioneers and kanganies are clearly included. The true meaning seems to us to be that it includes all menial and domestic servants, and also all out-door labourers, whether employed in a private family, or on agriculture, or on road, railway, or other like work. It also includes pioneers and *kanganies*, and persons in employments similar to the employment of pioneers and kanganies. The present defendant seems to us to be in employment similar to that of a kangani. He is not a superintendent of work, in a position far superior to that of the labourers, but he is like a kangany bound to accompany labourers, and to set them to work, and to exact their full amount of labour, and to direct the manner in which they perform their labour. Though not actually doing manual labour himself, he is closely connected with those who do, and approaches nearer to them than to his superior masters as to position "—*per* Creasy C.J., Temple and Stewart JJ. In the late Mr. Isaac Tambyah's book previously cited, the position of a kangany under Chapter 59 is thus summarised with reference to the case law, Planters' Legal Manual, pp. 21-22.: " As regards a kangany his status has been explained *to be dependent on circumstances*. Where his name is on the estate check-roll, he receives advances of rice, resides on the estate, supervises the work of coolies and had received head-money as per cooly working per day—*he is a labourer—Horsfall vs. Juanis*, (1908) 3 A. C. R. App. ix ; and it is enough if he receives head-money and supervises coolies—*Nicol vs. Kandasamy*, (1906) 1 S. C. D. 38, or even if he merely received head-money. But a kangany, though ordinarily liable under Ordinance No. 11 of 1865, has been held *not to be a labourer*, where he was credited with head-money, but he received neither pay, nor rice, nor did any work. A kangany who has no work to do and is not paid, may not be put on to cooly work. It would seem that residence on the estate is not necessary to fix a kangany with liability if his name is on the check-roll, and he has a line and coolies to look after. *He is a labourer* when he has coolies whose work he has to superintend. *He is a labourer* if he is paid by the month though he may also be a contractor. As a rule a kangany, or head kangany, or kanakapulle under a monthly contract to do agricultural work, *is a labourer*, if he has such work to do, to weigh leaf, to keep check-rolls and to supervise the manual labour of others ".

Therefore, a kangany whose duty it is merely to supervise the work of the labour force and for which work he is paid head-money or pence money would be a " labourer " within the meaning of Ordinance No. 11 of 1865 (Chapter 59),

Ordinance No. 13 of 1889 (Chapter 112),which is required by section 2 of that Ordinance to be read and construed as one with Ordinance No. 11 of 1865 (Chapter 59) " so far as is consistent with the tenor thereof ", by section 3 defines a " labourer " to mean " any labourer and kangany (commonly known as Indian coolies) whose name is borne on an estate register, and includes the Muslims commonly known as Tulicans ". The District Judge in considering whether this defendant was a " labourer " imported the definition in section 3 of Chapter 112 into his judgment. Counsel for the appellant has strenuously argued that he erred in so doing, and contends that he is not entitled to construe section 218 (*j*) of the Civil Procedure Code by resorting to a definition contained in an entirely different statutory enactment. He relied on the decision of the House of Lords in the case of *Macbeth & Co. vs. Chislett.* (1910) 79 L. J. K. B. 376. In that case it was held that in considering whether a man was a " seaman " within the meaning of the Employers Liability Act 1880, the definition of the word " seaman " as used in The Merchant Shipping Act 1854 could not be utilised. Lord Loreburn L.C. said : " It would be a new terror in the construction of Acts of Parliament if we were required to limit a familiar word to an unnatural sense because, in some Act which is not incorporated or referred to, such an interpretation is given to it for the purposes of that Act alone ". In my view, with the greatest respect, I think that case is distinguishable from the facts of the present case. It is clear that long before Ordinance No. 11 of 1865 was enacted, Ordinance No. 13 of 1858 had made kanganies liable as " labourers " for refusing to work. Bel. & Vand. p. 86. The Legislature then by Ordinance No. 11 of 1865 amended and consolidated the law relating to servants, labourers and journeymen artificers, and pioneers and kanganies were classified as " labourers ". Then came the Civil Procedure Code, No. 2 of 1889. which by section 218 (*j*) exempted from seizure the wages of

labourers and domestic servants. In the same year was enacted Ordinance No. 13 of 1889 (Chapter 112) when the Legislature declared that a "labourer" meant "any labourer and kangany". " An author must be supposed to be consistent with himself and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal". Maxwell 9th Ed., p. 163. I am, therefore, of opinion, that the Legislature in section 218 (*j*) of the Civil Procedure Code had in view the class of persons especially legislated for by Ordinance No. 11 of 1865 (Chapter 59). The Legislature in effect said ; " The wages of 'labourers' and domestic 'servants' as defined by section 2 of Chapter 59, shall not be liable to seizure under the writ of a judgment-creditor." In the circumstances, I do not think it is improper to ascertain the meaning of the term " labourer " as used in section 218 (*j*) of the Civil Procedure Code by reference to the labour laws and the cases decided thereunder.

For the reasons I have already given, the facts of this case indicate that this defendant respondent is a " labourer ". I would, therefore, affirm the order appealed against with costs.

NAGALINGAM J.—

I have had the advantage of reading the judgment prepared by my brother Dias which so fully and exhaustively sets out the views I held both at the original and second hearing of this appeal that it seems to me to be entirely unnecessary to write out a separate judgment. I was pleasantly surprised to find that the point referred to the Divisonal Bench had already been determined by a Full Bench of this Court in the case of *Ferguson vs. Olivera*, (1867) Ram. 63-68, p. 288, which is cited in the judgment but which was not brought to our notice by Counsel at either the first or the second argument of this appeal. This Full Bench case reflects clearly the opinion I had expressed at the first hearing of this appeal, and if this case had been cited at the first hearing there would have been no necessity to have referred the appeal to a Divisional Bench.

GRATIAEN J.—

It is with very much regret that I find myself in disagreement with my brothers Dias and Nagalingam in this case.

The defendant claims to be a " labourer " within the meaning of section 218 (*j*) of the Civil Procedure Code, and that his " wages ", including " pence money ", are therefore exempt from seizure at the instance of his judgment-creditors. The admitted evidence is that, at the relevant date, he was employed as a Head Kangani on Harrington Estate in Kotagala ; and that in this capacity he was employed to supervise a number of estate labourers. The manual work on the estate was performed by the labourers themselves, his functions being of a purely disciplinary character. In return for these services he received from his employers a salary and " dearness allowance ". He was also paid " pence money " which was calculated according to the number of labourers in his gang who turned out in the field each day. I had understood Mr. Jayawardene to concede that " pence money " was in any event not exempt from seizure.

The term " labourer " is not defined in the Code. Nor is it defined in analogous legislation either in England or in India. Section 218 (*j*) was taken over in identical terms from the corresponding part of section 166 of the Indian Code of 1882 (now section 60 of 1908, where certain words have been added which are immaterial to this case). The language of the Indian section substantially incorporates the provisions of the Wages Abolition Act, 1870, of England (33 and 34 Vic., Cap. 30, section 1) whereby it is declared, *without defining the term " labourer "*, that " no order for the attachment of the wages of any servant, labourer or workman shall be made by the Judge of any Court of Record or inferior Court ".

Judges of this Court, in interpreting section 218 (*j*) in the past, have invariably been guided by authoritative rulings of the English and the Indian Courts as to the scope of the analogous legislation to which I have referred, and, indeed, these rulings have been substantially incorporated in the judicial pronouncements which my brother Dias has reviewed in his judgment. I therefore regard it as settled by the earlier precedents that the object of section 218 (*j*) is " to protect persons who are considered to be in a position in which they are unable to protect themselves.....and who might otherwise be prevented from providing subsistence for their families "—*Gordon vs. Jennings*, (1882) 9 Q. B. D. 45 ; or, as Baron Parke said in connection with a Truck Act which was designed to achieve a somewhat similar purpose, " to protect such men as earn their bread by the sweat of their brow, and who are for the most part an unprovided class "—*Riley vs. Warden.* (1848) 2

Exch. 59 at p. 68. For this reason, it has been decided in India, following the English decisions, that, for the purposes of the section in the Indian Code corresponding to section 218 (*j*), the term "labourer" is restricted to persons "who earn their daily bread by *personal manual labour, or in occupations which require little or no art, skill or previous education*". *Jechand Khusal vs. Aba.* (1880) 5 Bom. 132. There are cases in which the necessary attainment of some degree of skill in the performance of an employer's duties has been held to be sufficient to elevate even a manual worker from the category of "labourers" in the present context; similarly, persons whose employment involves some degree of physical exertion have nevertheless been refused exemption from attachment of their salary because their remuneration was paid to them for performing duties *substantially of a disciplinary character*, or functions which were based on the *confidence which the employer reposed in their honesty*. As against these instances (which are to be found among the authorities cited by my brother Dias) not a single judicial decision has been brought to our notice in which exemption under section 218 (*j*) of our Code or under analogous legislation in other countries was granted to any person who was not a "labourer" in the sense in which the word is popularly understood. In my opinion, this term is inappropriate in such a context except to someone who is engaged "in manual work..... in some unskilled operation" (*per* Soertsz J. in *Nagasamy vs. Hamid*, (1942) 43 N. L. R. 525, or in some equally humble occupation which may not even involve physical exertion. That is the interpretation I place upon the decision in *Jechand Khusal vs. Aba.* (1880) 5 Bom. 132.

For these reasons I respectfully agree with my brother Dias that (*if section* 218 (*j*) *be construed apart from the application of some special enactment which may be found to extend the general rule*) a person whose duties are purely of a disciplinary nature, involving no physical or manual labour of any kind, is not entitled to be called a "labourer" within the meaning of section 218(*j*). Indeed, I would go further, and refuse exemption under the section to any person whose duties may to some extent involve physical labour but whose "*substantial business*" involves responsibilities of a disciplinary character. That is, in in my opinion, the *ratio decidendi* of Soertsz J's ruling in *Nagasamy vs. Hamid.* (1942), 43 N. L. R. 525.

Mr. Jayawardene invited us to adopt the argument that a person engaged to supervise *unskilled* labourers is himself a "labourer" within the meaning of section 218 (*j*), whereas a supervisor of *skilled* workmen admittedly falls outside the exempted class. This seems to me an untenable proposition. One can conceive of circumstances in which personal qualifications of a far superior nature are demanded in the case of a man employed to handle a large number of unskilled labourers than would be necessary, for instance, in the case of a supervisor of skilled technicians who are well-disciplined and take pride in the quality and output of their work.

It remains to consider the question in regard to which I am constrained to dissent, with great respect, from the views expressed by my brothers Dias and Nagalingam. As I understood the argument of Mr. Jayawardene, he submitted that even if a person who is paid for supervising "labourers" cannot *as a general rule* be regarded as a "labourer" for the purposes of section 218 (*j*), a "kangany" must necessarily fall within that class by reason of certain statutory definitions which have been given to the term "labourer" in Legislative enactments other than the Civil Procedure Code. Let me first examine this argument by reference to the enactment relied on, and then consider the principles of interpretation which seem to be applicable.

The Civil Procedure Code, in which section 218 (*j*) appears, was enacted as Ordinance No. 2 of 1889. I have already stated that the term "labourer" is nowhere defined in this Code. As far as I have been able to ascertain, no definition of this term appeared (either generally or for any special purposes) in any enactment which was on the Statute Book at the time that the Code was passed by the Legislature. *Ordinance No. 5 of* 1841 "for the better regulation of servants, labourers and journeymen artificers under contracts of Hire and Service, and of their employers", *Ordinance No. 13 of* 1858 "to amend and explain Ordinance No. 5 of 1841", and *Ordinance No.* 20 of 1861 "relating to contracts for the Hire and Service of Labourers in this Colony" had all been previously repealed by the provisions of Ordinance No. 11 of 1865. Of these repealed enactments, only the Ordinance of 1858 purported to define a "labourer". It declared, "*in order to remove doubts which had arisen*", that "*in reading and interpreting Ordinance No. 5 of* 1841, the term "labourer" shall be taken to mean, include and apply to every overseer of labourers commonly known as..... *Kangany.*"

Ordinance No. 11 of 1865 was enacted "to consolidate and amend the Law relating to servants, labourers and journeymen artificers under contracts for hire and service". It now

appears in the Statute Book under the designation "Service Contracts Ordinance" (*Chapter* 59) in a form which happily no longer prescribes certain penalties (now regarded as odious), to which "servants" and "labourers" had been subjected in former days. Be that as it may, no statutory definition had been given to the term "labourer" in this enactment. No doubt the generic term "servant" (as contrasted with "journeymen artificers") is there defined as extending to and including "kanganies" for the special purposes of the Ordinance, and no doubt "other labourers" are also classified as "servants" in the same connection, but I do not think that the circumstances indicates an intention on the part of the Legislature to lay down *by implication* a comprehensive definition of a "labourer" for purposes unconnected with the Ordinance. In *Ferguson vs. Olivera.* (1867) Ramanathan's Reports, 288, the Full Bench of this Court dealt with a criminal charge against a person who was not a kangani but "whose employment was similar to that of one". The Court held that this person was a "labourer" *within the meaning of the Ordinance* because "his status more closely approached that of the manual workers whom he supervised than that of his superior masters". I am not prepared to concede that this test, which was no doubt appropriate to the special case under consideration at the time when the judgment was pronounced, can help us now in solving a problem which arises under section 218 (*j*) of the Civil Procedure Code. I am not bold enough to attempt a precise assessment of a kangany's present status in comparison with that of his estate Superintendent on the one hand and of his labourers on the other. Still more dangerous would such an assessment be if it were intended to guide future generations.

The other legislative enactment which was suggested to us as being *in pari materia* with section 218 (*j*) of the Code was the Estate Labour (Indian) Ordinance (Chapter 112) which was introduced as Ordinance No. 13 of 1889 "to amend the law relating to Indian Coolies employed on Ceylon Estates". In this Ordinance, both in its original as well as its amended form, a "Labourer" is defined "*for the purposes of this Ordinance*" (that is, for an expressly limited purpose) as meaning "any labourer and Kangani.....*whose name is borne on an estate register*", and this term is further restricted by the interpretation clause to "labourers" on estates "*of which ten acres or more are actually cultivated*". I do not think it legitimate to extend this special meaning of "labourer" beyond the limits of the Ordinance when we are called upon to interpret a section in which the same word appears in another Ordinance intended to achieve an entirely different end. I confess that I derive little assistance in the present context from the judgment in *Nicol vs. Kandasami*, (1906) 1 S. C. D. 38, where Wendt J. held that a kangani was rightly convicted and imprisoned for an alleged offence against section 7 (since repealed) of Ordinance No. 13 of 1889.

The Civil Procedure Code (*Chapter* 86) was enacted earlier than *Chapter* 112 but seems to have come into operation a few months later. It is designed to regulate the procedure in Courts of Civil jurisdiction, and the various exemptions contained in section 218 were introduced *in the public interest* to curtail the rights of judgment-creditors against certain specified classes of judgment-debtors. The Service Contracts Ordinance (*Chapter* 54) was introduced to regulate the relations of the parties to "contracts of hire and service" of a certain kind. The Estate Labour (Indian) Ordinance (*Chapter* 112) came into force to secure a similar but nevertheless a special purpose connected with the affairs of the larger agricultural holdings. In my opinion these latter Ordinances cannot properly be deemed to be *in pari materia* with section 218 (*j*) of the Civil Procedure Code so as to justify all three enactments being "*taken and construed together as one system and as explanatory of each other*". (*Rex vs. Loxdale*) 97 E. R. 394.

It seems to me that the term "labourer" in section 218 (*j*) must be interpreted solely by reference to the purpose which that section, as explained by previous judgments of the Courts in England, India and Ceylon, was intended to serve. The categories of "labourer" in this context cannot in my opinion either be limited or enlarged in the light of what the term means in other Ordinances and for other purposes. Many anomalies would result if it were otherwise. A "journeyman artificer" might well be regarded, I think, as a "labourer" under section 218 (*j*) although he falls outside the definition of a "servant" under the Service Contracts Ordinance. Finally, it would be strange, indeed, if a "kangani "of an estate with over ten acres under cultivation were found to enjoy greater immunity than a person performing similar functions for a lower remuneration on a smaller estate which is excluded from the operation of the Estate Labour (Indian) Ordinance.

The conclusion at which I have arrived is that the defendant has not discharged the onus of establishing that he is a "labourer" within the meaning and the spirit of section 218 (*j*) of the Civil Procedure Code. He cannot claim any

special advantage over the other judgment-debtors in this connection by relying, *simpliciter*, on the fact that he is an estate "kangani". It is a matter of common knowledege today that the services performed by kanganies vary widely from estate to estate. The question whether any of these persons is a "labourer" entitled to claim exemption from attachment of his "wages" must in each case be considered as a question of fact.

In my opinion the appeal should be allowed but as the majority of the Court have decided otherwise decree must, of course, be entered in terms of the judgment of my brother Dias.

Appeal dismissed

Present : NAGALINGAM, J. & WINDHAM, J.

CAROLISAPPU vs. ANAGIHAMY *et al*

S. C. 456—*D. C. Tangalla*, 5,617.

Argued on : 25th November, 1949.
Decided on : 30th November, 1949.

Prescription Ordinance (Chapter 55), section 3—Acquistion of prescriptive title—Can adverse possession by intestate and his heirs be added together in computing the ten years—

Held : That the possession of an intestate and of her heirs can be added together for the purpose of computing the period of ten years' adverse possession.

C. E. S. Perera with *T. B. Dissanayake* for the plaintiff-appellants.

G. W. Wijayaratne for the defendant-respondents.

NAGALINGAM J.

This is an appeal from a judgment of the District Court of Tangalla dismissing the plaintiff's action for declaration of title to an allotment of land on the ground that though the plaintiff may have the documentary title to it the defendants have acquired a title by prescription to the allotment as against the plaintiff.

One A. M. A. Carolis who was the owner of the land under Crown grant P1 of 1914 hypothecated the allotment with the plaintiff who put the bond in suit and at the sale in execution one David Silva became the purchaser thereof in whose favour deed of conveyance P3 of 1935 was duly executed. David Silva died, and his widow and children conveyed the land to the plaintiff by deeds P5 of 1936 and P6 of 1941. That notwithstanding the execution sale of 1935 A. M. A. Carolis continued to possess the land up till the date of his death in 1937 is clear from the evidence. It is also equally clear that after A. M. A. Carolis's death his widow and children continued in possession up to the date of the institution of the action which was on May 23, 1947.

Learned Counsel for the appellant contends that the possession of A. M. A. Carolis between the years 1935 and 1937 cannot be tacked on to the possession of his widow and children for the purpose of computing the period of ten years required to acquire prescriptive title under the Ordinance. He amplified his argument by asserting that it had to be shown either that A. M. A. Carolis had himself possession for ten years subsequent to the date of the execution sale against him or that the widow and children had possession themselves for a complete period of ten years before advantage could be taken of section 3 of the Prescription Ordinance by the defendants, and that it was not permissible to aggregate the broken periods of possession of A. M. A. Carolis and of the wife and children which separately did not amount to over ten years in each case. Learned Counsel relied upon two judgments of this Court in support of the proposition he advanced. One is the case of *Fernando vs. Podisinno*, (1925) 6 C. L. Rec. 73, and the other an unreported judgment. S. C. 90—91 D. C. Kandy, 48,783, S. C. Minutes 11-11-40.

In the former of the two cases the facts were that a co-owner who had possessed in lieu of his undivided share certain divided portions of the common land and acquired a prescriptive title to the divided portions, in transferring his interests conveyed not the specific allotments to which he had acquired a prescriptive title but his undivided interest in the entirety of the land. On a contest as to the right of the transferee to the specific allotments to which the vendor had

acquired a title by prescription it was held that the transferee was not entitled to take advantage of the possession of his vendor but that if he relied upon prescription for his title he had to show that his possession had been for the required prescriptive period. The reason underlying the judgment is easy to see. The vendor did not convey the specific portions of his land and it cannot be said that the transferee was a person who was claiming under the vendor in so far as the specific allotments which he claimed were concerned. This case, therefore, is authority for the proposition that a person who does not derive his right to the land from another cannot fall back on the possession of that other in order to establish a prescriptive title but that he would have to establish it by his possession for over the prescriptive period.

In the latter case, too, the principle enunciated was similar. There too for a number of years well over the prescriptive period certain successive owners had been in possession of a large tract of land. When a conveyance was executed by the last of these owners to the plaintiff, a certain parcel of land was omitted from the deed of conveyance. Plaintiff himself had not been in possession for over ten years at the date of the institution of the action by him against a third party trespasser. It was held that as the vendor had not conveyed the parcel of land, the plaintiff could not rely upon the prescriptive title of his vendor or of the latter's predecessors in title, for he was not on who was claiming the parcel under his vendor.

In the present case, however, the question that arises for determination is one that is altogether different. Here the question is whether the possession of an intestate and of his heirs can be added together for the purpose of computing the period of ten years' adverse possession. Under the common law, that the tacking of broken periods of possession of an intestate and his heir was permitted is clear from Voet. Voet 41.3.16 to to 20. Nathan also refers to this passage of Voet Nathan Vol. 1, sec 581, p. 354. The proposition is viewed by him from the point of interruption of possession, for where an intestate possesses the land and before completing the full term required to confer acquisitive title dies, it may be said that there is an interruption of his possession by his death and that when the heir continues in possession it is a possession distinct and separate from that of the intestate. It was having regard to this aspect of the question that Nathan states :

> "There are some cases of actual interruption where the possession is by legal fiction regarded as continuous. This happens where a property passes from a deceased person to his heir, from a seller to a purchaser and in the case of similar universal or particular successors."

Grotius too enunciates the same principle. Maasdorp's Translation, 3rd Ed. p. 65. sec. 272. "The periods of occupation of a seller and a purchaser were reckoned together." This, no doubt, is set out by Grotius as the Roman Law, but no modification of that principle was introduced in the Dutch Law. When our Prescription Ordinance was enacted the Legislature merely embodied the common law when it permitted proof of possession by a defendant *or by those under whom he claims.*

In the case of *Charles vs. Nona Hamy*, (1923) 25 N. L. R. 233, the question that arose was whether a fideicommissarius could call to his aid the possession of the fiduciarius. That a fideicommissarius is not a successor in title to the fiduciarius is a proposition well understood and hence it was that the contention was put forward that the possession of the fiduciarius cannot be relied upon by the fideicommissarius in asserting a prescriptive title. Jayewardene A.J., in the course of his discussion of the law said :—

> "Section 3 of the Ordinance does not enact any new law when it says that a party can tack to his possession the possession of the person under whom he claims. It merely declares a well known principle of our common law which seems to obtain for all the countries where title to immovable property can be acquired by adverse and continuous possession for the prescriptive period."

The law on the point is correctly set out by Mr. Balasingham in his *Laws of Ceylon*, Bal Vol. 3, Pt. II, p. 295, as follows :—

> "For the purpose of computing this period of prescription the possession of a deceased person and his executors or heir and of a person and his particular successor whether legatee or purchaser will be reckoned together."

I am therefore of opinion that the learned District Judge was right in tacking the possession of A. M. A. Carolis to that of the defendants in considering the question whether the defendants had acquired a title by prescription. Doubtless if such tacking is permitted the defendants have established possession by themselves and by the deceased Carolis for a period of over ten years. The judgment appealed from is therefore right ; the appeal fails and is dismissed with costs.

WINDHAM, J.
I agree.

Appeal dismissed.

Present : JAYETILEKE, S.P.J. & GUNASEKARA, J.

THEDCHANAMOORTHY AND OTHERS *vs.* APPAKUDDY AND OTHERS

S. C. 393—*D. C. Jaffna*, 1,159.

Argued on : 8th February, 1950.
Decided on : 10th March, 1950.

Partition Ordinance, Section 6—Consideration of Original scheme of partition with notice to parties—Alternative scheme of partition ordered—Consideration by Court without notice to parties—Adoption of alternative scheme—Is it valid?

After considering the original scheme of partition submitted by the Commissioner with due notice to the parties, the court directed an alternative scheme to be submitted afresh. This scheme was considered by the Court and adopted without notice to all the parties.

Held : (i) That the order adopting the alternative scheme was bad in law as notice required by section 6 of the Partition Ordinance had not been given.

(ii) That the notice required to be given under section 6 of the Ordinance cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner.

(iii) That the Policy of the Law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so.

S. J. V. Chelvanayagam, K.C. with *S. Thangarajah* for the 13th to 16th Defendants-appellants.

H. W. Thambiah with *A. Nagendra* for the 20th to 23rd and 26th to 29th Defendants-respondents.

C. Shanmuganayam for the plaintiffs-repondents.

JAYETILEKE S.P.J.

This is an action for the partition of a land called Puthiyanputhukadu. The plaintiffs alleged in para. 21 of the plaint that, about 20 years earlier, the land was amicably partitioned among the co-owners, and that divided lots were possessed by the co-owners since then, but the title deeds dealt with undivided shares. In para. 22 they alleged that the parties were in possession of the lots referred to therein, and were entitled to the improvements effected by them on the said lots. They alleged that lot 3 in the sketch annexed to their plaint with the margosa trees and young palmyrahs in it was possessed by the 13th, 15th and 16th defendants.

On February 18, 1944, the District Judge issued a commission to C.J. Sabapathy, Licensed Surveyor, to make a survey of the land and to furnish the Court with a plan. On March 23, 1944, the Commissioner returned the Commission to Court with a plan bearing No. 784 and his report.

Paragraph 2 of the report reads—

"The 1st plaintiff stated that the land was amicably partitioned and they are claiming the respective lots for the past several years and that lots 1, 6, 7, 15 and 16 do not form part of the land under partition. According to him the respective lots with their appurtenances are claimed as follows :—

Lot 2 by 24th defendant.
Lot 3 by 23rd defendant.
Lot 4 by 7th and 8th defendants.
Lot 5 by 10th and 12th defendants.
Lot 9 by 1st, 2nd, 4th and 6th defendants.
Lot 10 by 7th, 8th and 9th defendants.
Lot 11 by 17th, 18th and 19th defendants.
Lot 12 by 13th, 15th and 16th defendants.
Lot 14 by plaintiff."

When plan No. 784 is compared with the sketch it is clear that lot 12 corresponds with lot 3 in the sketch.

Several defendants filed answers. The 7th, 8th, 9th, 10th, 17th, 19th and 24th defendants filed a joint answer in which they alleged that lot 2 was possessed by the 24th defendant, lots 4 and 10 by the 7th and 8th defendants, lot 5 by the 10th and 12th defendants and lot 11 by the 17th, 18th and 19th defendants. In para. 10 of their answer they alleged that they had acquired a title by prescription to the said lots, and they prayed that they may be declared entitled to and allotted the said lots.

The 1st, 3rd, 4th, 5th and 6th defendants filed a joint answer. They alleged that the 1st, 2nd, 4th and 6th defendants were in possession of lot 9 and the houses and plantations standing thereon.

On April 3, 1944, the 29th defendant moved to be added as a party and his application was allowed. In his statement of claim he alleged that he had purchased from the 25th defendant a 1/8th share of a portion that was dividedly possessed for a period of over ten years, which portion was to the South of the portion belonging to the plaintiff. He prayed that a $\frac{1}{8}$th share be allotted to him out of that portion.

At the trial which was held on July 2, 1945, the plaintiff gave evidence. He stated that the land was possessed dividedly for convenience of possession, and that he was in possession of lot 14, the 13th, 15th and 16th defendants were in possession of lot 12, and various other defendants were in possession of other lots.

On August 23, 1946, interlocutory decree was entered. Paragraphs 1, 4 and 10 read as follows :—

> Para. 1. A divided 32/288 share with its appurtenances and the shop building lying in lot 9 be allotted and given to the 1st and 2nd defendants.
>
> Para. 4. A divided 1/18th or 16/288th share which is reduced out of the 1st and 2nd defendants' share be allotted and given to the 29th defendant.
>
> Para. 10. A divided 24/288th share with its appurtenances and with the improvements in lot 12 be allotted and given to the 13th, 15th and 16th defendants.

It is clear from the plaint and the answers filed by the defendants that all the parties desired that they should be allotted the shares to which they were entitled out of the lots they were in possession of. When the learned District Judge used the word "divided" in the paragraphs referred to above and in all the other paragraphs in the interlocutory decree, it seems to me that what he meant was that an extent equal to the undivided shares he referred to should be given to the various parties out of the divided lots they were in possession of. That would amount to a special direction to the Commissioner as to the manner in which the partition was to be made. Quite apart from the direction, one of the rules to be observed by a Commissioner in partitioning is that, whenever possible, owners should be allotted the portions containing their improvements.

On August 27, 1946, a commission was issued to the same Commissioner authorising and requiring him to make a partition of the said land and of the appurtenances thereto belonging. He returned the commission to Court on January 15, 1947, together with a plan bearing No. 1,010 and his report. In that plan he allotted to the 13th, 15th and 16th defendants lot 14 which is a portion of lot 12 in plan 784, and he allotted to the 29th defendant lot 12.

On the same day the District Judge appointed February 11, 1947, for consideration of the Commissioner's return and directed notice to be given to all the parties as required by section 6 of the Partition Ordinance.

On February 11, 1947, the inquiry could not be held as notices were not served on some of the parties. The 29th defendant appeared in Court and stated that he objected to the scheme of partition. The Court gave him time till March 11, 1947, to file his objections, and directed notices to be re-issued on the parties who were not served. On March 11, 1947, the notices were reported to have been served, and the 29th defendant filed his objections. The Court thereupon, fixed the inquiry into the objections for April 1, 1947.

The 29th defendant's objection to the scheme was a curious one. He said that he had agreed to sell his share to his lessees, the 26th, 27th and 28th defendants, and received an advance of Rs. 1,000, and that the 26th, 27th and 28th defendants requested him to get his share allotted adjoining the lot that was allotted to the 21st defendant who was a sister of the 26th defendant. It was really not an objection but an application by him to amend his statement of claim and the interlocutory decree, and it should not have been entertained by the Court. On the date of inquiry the 29th defendant asked the Court to give him a lot adjoining lot 15 which had been allotted to the 21st defendant, and moved that the Commission be re-issued to the Commissioner to submit a fresh scheme. The District Judge allowed the application and issued a Commission to the same Commissioner returnable on June 9, 1947.

On June 9, 1947, the Commissioner moved for and obtained time till June 30, 1947, for the return of the Commission, on which date he returned the Commission with a plan bearing

No. 1,010A and his report, and the District Judge fixed the inquiry for July 21, 1947. In plan No. 1,010A the Commissioner allotted to the 29th defendant lot 14 which he had previously allotted to the 13th, 15th and 16th defendants. On July 21, 1947, the 13th, 15th and 16th defendants were absent, and the District Judge after examining the Commissioner adopted plan No. 1,010 subject to the modifications in plan No. 1,010A.

On July 30, 1947, the 13th, 15th and 16th defendants filed an affidavit in which they stated that they were not aware that consideration of the scheme of partition had been fixed for July 21, 1947, and moved that the order made on July 21, 1947, be vacated. The District Judge refused to allow the application for the following reasons :—

(1) That the affidavit did not disclose any grounds for setting aside the order.

(2) That there was much cogency in the argument of the 29th defendant that he should be allotted lot 14 which adjoins lot 15 allotted to the 21st defendant as the 29th defendant had agreed to sell his share to the 26th defendant, a sister of the 21st defendant.

(3) That the 13th, 15th and 16th defendants had been given compensation for the improvements.

The present appeal is against that order. Mr. Chelvanayagam argued that the order made on July 21, 1947, is invalid as notice was not given to the 13th, 15th and 16th defendants that the alternative scheme No. 1,010A would be considered by the Court on July 21, 1947. He relied on section 6 of the Partition Ordinance which provides as follows :—

> "On the receipt of the return of such Commission the Court shall fix a day, of which notice shall be issued to all the parties and which said notice shall be served in the same way as the original summons for considering the return ; and on that day or such other day as the Court shall then appoint, the Court after summarily hearing the parties, and if need be, making such further reference as the Court shall deem necessary, shall either confirm or modify the partition proposed by the Commissioner and enter final judgment accordingly in the cause."

The section provides that on the return of the Commission (1) the Court shall fix a day for consideration of the return and (2) the Court shall give notice to all the parties that it would consider the return on that day. It provides further that on the day fixed by the Court or on such other day as the Court shall then appoint the Court shall confirm or modify the partition proposed by the Commissioner.

In this case notice was given to the parties that the first scheme of partition would be considered by the Court on February 11, 1947, but no notice was given to the parties that the second scheme of partition would be considered by the Court on April 1, 1947. The requirement regarding notice is imperative. In *Dissanayake vs. Dias*, (1919), 6 C.W.R. 137, it was held that if the scheme of partition is confirmed and final decree entered without notice the Court has inherent power to set aside the decree so entered. In my opinion the notice which the Court has to give to the parties cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner, because the original scheme may not be acceptable to the parties and the Commissioner may be ordered by the Court to furnish an entirely different scheme. The order made by the learned District Judge on July 21, 1947, is, in my opinion, wrong and must be set aside.

It seems to me to be unnecessary to send the case back for a consideration of the second scheme of partition. I think it is wrong in principle to allot to one co-owner a lot which has been improved and possessed by another co-owner in order to enable him to sell that lot to a person who is not allotted a share in the decree. The policy of the law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so. The only person who objected to the original scheme of partition was the 29th defendant and his objection appears to me to be one which cannot be supported in law. I would set aside the order made on July 21, 1947, and direct the District Judge to make an order confirming the original scheme of partition. The appellant will be entitled to the costs of appeal and of the inquiry in the Court below.

GUNASEKARA, J.

I agree.

Appeal allowed.

Present : DIAS, S.P.J. AND SWAN, J.

ATTORNEY-GENERAL vs. PODISINGHO

S. C. 187 *Application for Revision in M. C. Kandy* 7,020
Application to revise a sentence passed by the Magistrate's Court, Kandy.

Argued on : 3rd July, 1950.
Decided on : 5th July, 1950.

Supreme Court—Powers of revision—Should Supreme Court entertain application for revision when applicant failed to appeal where right of appeal lay—Courts Ordinance, section 37*—Criminal Procedure Code, sections* 356 *and* 357.

Sentence—Conviction for personation under section 78 (1) *of the Local Authorities Elections Ordinance—Fine imposed below minimum fixed by Ordinance—Imprisonment till rising of Court—Is it regular—Sections* 15A *and* 15B *of the Criminal Procedure Code.*

On 28-2-1950 the respondent was convicted of the offence of " personation " punishable under section 78 (1) of the Local Authorities Elections Ordinance No. 53 of 1946, and was sentenced to pay a fine of Rs. 50 and to be imprisoned until the rising of the Court. This sentence was below the minimum required under section 78 (1) of the Ordinance.

On 22-4-1950 the Attorney-General having failed to appeal within time applied in revision for the enhancement of the sentence and on a preliminary objection taken by Counsel for the respondent that the Supreme Court cannot and should not entertain the application, the matter was referred to two Judges as conflicting views had been expressed by the Supreme Court in similar cases.

Held : (1) That the powers of revision vested in the Supreme Court are wide enough to embrace a case where an appeal lay but, which, for some reason, was not taken, but this power should be exercised in exceptional circumstances.

(2) That the fine imposed by the Magistrate was illegal as it was below the minimum fixed by section 78 (1) of the Local Authorities Elections Ordinance.

(3) That the sentence of imprisonment till the rising of the Court is irregular in view of sections 15A and 15B [as amended by Ordinance No. 59 of 1939) of the Criminal Procedure Code as the effect of these sections is to abolish " imprisonment till the rising of the Court " or any imprisonment which is less than seven days.

(4) That it would have been regular for the Magistrate to have *detained* the respondent until the rising of the Court, such rising being not later than 8 p.m. as such order would be in accordance with section 15B.

(5) That in the circumstances of the case, there has been a miscarriage of justice resulting from a violation of a fundamental rule of judicial procedure calling for the interference of Court.

Per DIAS, S.P.J.—I agree with the observations of Akbar, J., in *Inspector of Police, Avisawella, vs. Fernando* (1929) 30 N. L. R. 482 that in such case an application in revision should not be entertained save in exceptional circumstances. In my view such exceptional circumstances would be (*a*) where there has been a miscarriage of justice ; (*b*) where a strong case for the interference of this Court has been made out by the petitioner, or for the interference of this Court has been made out by the petitioner ; or (*c*) where the applicant was unaware of the order made by the Court of trial. These grounds are, of course, not intended to be exhaustive.

H. A. Wijemanne, Crown Counsel, with *S. S. Wijesinha, Crown Counsel*, for the Attorney-General.

T. W. Rajaratnam, for the accused-respondent.

DIAS, S.P.J.

This is an application by the Attorney-General for the revision of the sentence passed by the Magistrate on the accused respondent, P. Podisingho.

The charge against him was that on December 17, 1949, at the Kandy Municipal Elections he applied for a ballot paper in the name of another person, to wit, G. W. James Perera, and that he thereby committed the offence of " personation " punishable under section 78 (1) of the Local Authorities Elections Ordinance No. 53 of 1946. The respondent having pleaded guilty to this charge, the Magistrate convicted and sentenced him to pay a fine of Rs. 50 and to be imprisoned until the rising of the Court.

The seriousness of offences of personation was pointed out by Howard, C.J. in *Attorney-General vs. Sinnathamby* (1948) 49 N.L.R. 385, when he said " I agree that personation is a very serious offence, and that the sentences passed by the

Magistrate are not only inadequate, but farcical." In the present case, the Attorney-General submits that not only is the sentence totally inadequate and farcical, but also that it is illegal.

Section 78 (1) of the Local Authorities Elections Ordinance No. 53 of 1949, provides that on conviction after summary trial the personator "shall be liable to rigorous imprisonment for a term and exceeding one year, or to a fine not less than two hundred and fifty rupees and not more than one thousand rupees, or to both such imprisonment and such fine." It is, therefore, clear that the Legislature did not treat this offence in any spirit of levity. For reasons of public policy the summary punitive jurisdiction of the Magistrate was not only enhanced, but a minimum sentence of fine was also imposed. It is conceded by counsel for the respondent that one part at least of the sentence imposed by the Magistrate is not in accordance with the law.

A preliminary objection, however was raised by counsel for the respondent. He contends that the Supreme Court cannot and should not entertain this application by the Attorney-General. As this question is one of practical importance, and as the decision in the case of *Attorney-General vs. Kunchihambu* (1945) 46 N.L.R. 401 appeared to be inconsistent with other decisions of the Supreme Court and as there are similar cases in which the Attorney-General has moved in revision to enhance the sentences passed by this Magistrate on personators who pleaded guilty, I considered that this case merited reference to a Bench of two Judges.

The matter has now been fully argued. Two questions emerge for consideration (*a*) Has the Supreme Court in this case power to revise the sentence passed by the Magistrate? and (*b*) if so, is this case in which the Supreme Court ought to interfere?

The powers of the Supreme Court to revise any order made by a Judge of inferior jurisdiction are to be found in section 37 of the Courts Ordinance, and sections 356 and 357 of the Criminal Procedure Code.

Section 356 provides that the Supreme Court may call for and examine the record in any case, whether already tried, or pending trial in any Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein, or as to the regularity of the proceedings of such Court. Section 357 provides that in cases where the record has been called for under section 356 " or which otherwise comes to its knowledge " the Supreme Court may in its discretion exercise any of the powers conferred by sections 346, 347 and 348 that is to say, order the arrest of the accused commit him to prison pending the disposal of the case in revision, or admit him to bail s.346 direct that further inquiry should be made, order a new trial, direct him to be committed for trial, or pass sentence on him according to law, alter the verdict maintaining the sentence or without altering the verdict, increase or reduce the amount of the sentence, or the nature thereof s.347 taking fresh evidence in the Supreme Court or direct it to be taken by any Judge of a District Court or Magistrate's Court, 348.

It will be seen therefore, that when acting in revision in a criminal case, the Supreme Court can act *ex mero motu*, or be moved by some person who is dissatisfied with the conduct of the proceedings or the order made in a Court of inferior jurisdiction. Section 358 makes it clear that no party has any right to be heard either personally or by pleader, before the Supreme Court when exercising its powers of revision provided the court may, if it thinks fit, when exercising such powers hear any party either personally or by pleader. The only limitations imposed on the powers of the Supreme Court in revision are (*a*) that no order shall be made to the prejudice of an accused person in revision unless he has been afforded the opportunity of being heard either personally or by an advocate in his own defence. 357 (2) and (*b*) the Supreme Court acting revision may not convert a finding of acquittal into one of conviction 357 (3).

Except in those cases where the Supreme Court of its own knowledge calls for the record under section 356, some person must bring the alleged irregularity committed in the lower Court to the notice of the Supreme Court. This is usually done by the party complaining against the order by filing a motion and affidavit. This motion is supported by counsel and the proceedings at that stage are *ex parte*. If the Judge considers that a *prima facie* case has been made out calling for the exercise of revisional powers, he will direct that the record be called for, and at the same time direct that notice of the application should be served on the other party and to any other person affected. It has been held that a case may come " to the knowledge " of the Supreme Court while an appeal is being argued as in *Soysa vs. Punchirala* (1910) 13 N.L.R. at p. 117 *Clara vs. Pedrick* (1900) 1 Browne at p. 215.

In the course of time, a body of case law has been evolved in regard to the principles on which the Supreme Court should act when disposing of an application in revision—particularly, cases where the Supreme Court has been moved by an aggrieved party.

Most of the decided cases are judgments of single Judges. The leading case is *R. vs. Noordeen* (1910) 13 N. L. R. at p. 117, where Wood Renton, J. laid it down that section 357 (1) " invests the Supreme Court with full power in all criminal cases. I do not think that that power is at all limited to those cases in which either an appeal lies or, for some reason or other, an appeal has not been taken. I hold without hesitation that as a matter of law it extends to cases in which the Attorney-General has refused to sanction an appeal from an acquittal, provided that proper materials have been laid before the Court to call for its exercise." This case has been consistently followed in the later cases. In *Ossen vs. Excise Inspector Ponniah* (1932) 34 N.L.R. at p. 52 Dalton, J. said : " It was urged that this Court should not deal with a matter in revision when leave to appeal had been refused by the Attorney-General. The nature of the onus that rests upon the applicant who comes before this Court for the purpose of inviting it in effect to override the deliberate refusal of the Attorney-General to sanction an appeal, is referred to by Wood Renton, J. in *R. vs. Noordeen* (supra). If however, he makes out a strong case amounting to a positive miscarriage of justice in regard either to the law or to the Judge's appreciation of the facts, this Court will deal with the matter." In *Punchi Mudiyanse vs. Jayasuriya* (1940) 41 N.L.R. 431. Howard, C.J. laid it down that the powers of revision of the Supreme Court under section 357 of the Criminal Procedure Code are not limited to cases where there is no appeal, or where no appeal has for some reason not been taken. In *Muttukrishna vs. Hulugalle* (1942) 43 N.L.R. 421 a Bench of two Judges considered the scope of section 37 of the Courts Ordinance in regard to the revisional powers of the Supreme Court. The question was whether an order made by a District Judge in an application made under s.133 of the Companies Ordinance could be revised by the Supreme Court. The Court, while approving of the principle laid down by *R. vs. Noordeen* (supra) namely that the Supreme Court has power to act in revision in all criminal cases whether or not an appeal lies, it was held that in the matter then under consideration, revision would not lie. It is to be noted however that *R. vs. Noordeen* (supra) has been approved by a Bench of two Judges. In *Wickremasinghe vs. Fay* (1943) 44 N.L.R. 369, Moseley, J. in following *R. vs. Noordeen* (supra) said that the onus on the applicant was a heavy one, when he moved to revise an order of acquittal where the Attorney-General had refused to sanction an appeal. It was incumbent on him to prove a positive miscarriage of justice. Finally in *Perera vs. Muthalib* (1944) 45 N.L.R. 412, Soertsz, J. held that the revisionary powers of the Supreme Court are not limited to those cases in which no appeal lies or in which no appeal has for some reason been taken. The Court would exercise those powers where there has been a miscarriage of justice owing to the violation of a fundamental rule of judicial procedure. The question arises whether this decision of Soertsz, J. is in conflict or inconsistent with his later decision in *Attorney-General vs. Kunchihambu* (supra). It is therefore necessary to examine in some detail the facts of the latter case.

It appears that a provision of the Control of Prices Regulations, 1942 made the imposition of a term of imprisonment imperative when the convict had a previous conviction. It is clear from the judgment of Soertsz, J. that after the Magistrate had convicted the accused and imposed the sentence, the prosecuting Price Control Inspector brought it to the notice of the Magistrate that the accused had a previous conviction. The Magistrate, however, imposed no sentence of imprisonment. The Attorney-General moved in revision to enhance the sentence and Soertsz, J. refused to interfere. What is the *ratio decidendi* of that case ? Soertsz, J. held (*a*) that the order of the Magistrate was appealable by the Attorney-General under section 338 (2) of the Criminal Procedure Code (*b*) that the error of the Magistrate was an error of law and not of fact (*c*) that a sentence is a part of the judgment (*d*) that the Supreme Court has a discretion as to whether or not a particular order should be revised. Soertsz, J. declined to exercise that discretion as to whether or not a particular order should be revised—Soertsz, J. declined to exercise that discretion in favour of the Crown because after the Magistrate had imposed the sentence of fine he was belatedly informed of the previous conviction, and (*e*) Soertsz, J. also indicated that

there appeared to have been delay in making the application in revision. Soertsz, J. said "For these reasons I refuse to exercise my discretion and I reject the application for an alteration of the sentence." With great respect, I assent to the reasons given by Soertsz, J. That case, however, has a limited application and is clearly distinguishable from the facts of the present case. In the present case, the Legislature has imposed a minimum punishment, which does not depend on whether the convict has or has not a previous conviction. I am unable to hold that there has been any unusual delay in bringing this case to the notice of this Court. As was pointed out by Wendt, J. in *Corea vs. Girigoris Appu* (1908) 11 N.L.R. at p. 332 "A distinction should be drawn between the case of an acquittal and that of a conviction with an inadequate sentence and also between the sentence of a District Court in which the Attorney-General has not as a rule, any direct cognizance." It is a matter of common knowledge that before the Attorney-General moves to revise the order made by a Magistrate, the prosecuting public officer has to obtain a certified copy of the proceedings. He then makes a report to his superior officers who after considering the matter, communicates with the Attorney-General. The case has then to be considered by a Crown Counsel who may be on circuit at the other end of the island. The case may thereafter have to be considered by the Law Officers, after which the application in revision is filed. All this must take some time. In the case before us the conviction took place on February 28, 1950 and the application in revision was filed on April 22, 1950. It is impossible to hold that there has been any avoidable delay in this case infiling this application so as to cause the slightest prejudice to the respondent.

At first sight it would appear that the case of *Attorney-General vs. Samarakoon* (1910) 14 N.L.R. 5 is decisive of this matter. In that case it was laid down that where there has been a conviction and a lawful sentence the Attorney-General has no right of appeal for enhancement of punishment; and that he should move in revision. That case laid down a proposition of sound law at the date it was decided. At that date the Attorney-General could only appeal against an acquittal. By Ordinance No. 19 of 1930 section 2, section 338 (2) of the Criminal Procedure Code was amended. This amendment was necessitated by the decision in *Nona vs. Wijesinghe* (1926) 29 N.L.R. 43 and *Nonis vs. Appuhamy* (1926) 27 N.L.R. 430, and the Attorney-General was given the right to appeal "against any judgment or final order pronounced by a Magistrate's Court or District Court in any criminal case or matter" and he was given twenty-eight days within which to prefer as appeal. The *ratio decidendi* of *Attorney-General vs. Samarakoon* (supra) (1910) 14 N.L.R. 5 therefore does not apply to the present case. The Attorney-General in the present case had the right to appeal against this admittedly irregular sentence. Not having done so, should this Court refuse to deal with the matter in revision? The answer to this question will be found in the cases which I have cited earlier. The powers of revision of the Supreme Court are wide enough to embrace a case where as appeal lay but which for some reason was not taken. I agree with the observations of Akbar, J. in *Inspector of Police, Avissawella vs. Fernando* (1929) 30 N.L.R. 482 that in such case an application in revision should not be entertained save in exceptional circumstances. In my view such exceptional circumstances would be (*a*) where there has been a miscarriage of justice (*b*) where a strong case for the interference of this Court has been made out by the petitioner, or for the interference of this Court has been made out by the petitioner or (*c*) where the applicant was unaware of the order made by the Court of trial. These grounds are, of course not intended to be exhaustive.

It is quite clear that the sentence of fine imposed by the Magistrate is not sanctioned by law. Learned Crown Counsel argues that the order that the respondent should be "imprisoned till the rising of the Court" is equally open to objection. It is, therefore, necessary to consider this submission.

Section 2 of Ordinance No. 47 of 1938 added two new sections to the Criminal Procedure Code namely sections 15 A and 15 B. Section 15*a* provides that :—

> "Notwithstanding anything in this Code the Ceylon Penal Code or any other written law to the contrary, no Court shall sentence any person to imprisonment,

whether in default of payment of a fine or not, for a term which is less than seven days."

Section 15*b* (which was amended by Ordinance No. 59 of 1939 *a* 2) reads :—

"Any Court may, in any circumstances in which it is empowered by any written law or other law to sentence an offender to imprisonment, whether in default of payment of a fine or not in lieu of imposing a sentence of imprisonment, order that the offender be detained in the precincts of the Court until such hour on the day on which the order is made not being later than 8 p.m. as the Court may specify in the order."

These sections were considered in the unreported case of 325 M.C. Kurunegala 40.284 (S.C.M. May 6 1948) when Canekeratne, J. altered a sentence of "imprisonment for a day" to one of "detention in the precincts of the Court till 4 p.m. on the day on which the appellant appears in Court after the return of the record to the Magistrate's Court" I agree with Crown Counsel that the effect of Ses. 15*a* and 15*b* of the Criminal Procedure Code is to abolish "imprisonment till the rising of the Court" or any prisonment which is "less than seven days". Therefore there is force in the contention that the order of the Magistrate in imprisoning the respondent till the rising of the Court is technically irregular. Had he ordered the respondent to be "detained" until the rising of the Court, such rising being not later than 8 p.m. the order would have been in accordance with the provisions of Sec. 15*b* . This Court however is faced with an order of the Magistrate which is partly quite illegal and partly irregular.

I am of opinion that the Attorney General's application for enhancement of sentence is entitled to be heard and decided on its merits. The question then is whether this is a case in which this Court ought to exercise its powers of revision ?

I am clearly of opinion that it should. The Magistrate should have been aware, not only of the imperative provisions of Sc. 78(1) of the Local Authorities Elections Ordinance No. 53 1946 and of Ses. 15*a* and 15*b* of the Criminal Procedure Code, but also of the fact that both the Legislature and this Court have regarded the offence of personation at elections as being an extremely serious one. In spite of these facts the Magistrate has thought fit either through ignorance or because he did not agree with the Legislature or this Court, to treat the offence of personation as a venial offence. In my opinion there has been a miscarriage of justice calling for the interference of this Court. Following the words of Soertsz J. in *Perera vs. Muthalib* (*supra*) (1944) 45 N.L.R. 412 I hold that this is a case where there has been a miscarriage of justice owing to the violation of a fundamental rule of judicial procedure *viz.*, that a Magistrate must obey the law.

I desire to point out that in exercising its powers of revision this Court is not tramelled by technical rules of pleading and procedure. In doing so this Court has power to act whether it is set in motion by a party or not and even *ex mero motu*. A Judge of this Court has power to call for a record and in proper cases to revise the order of a Court of inferior jurisdiction. In doing so of course this Court will act on the principles laid down by learned Judges in the past. Whether the application in revision has been irregularly brought before this Court or not once an irregularity has "come to the knowledge" of this Court it can in a proper case act on such knowledge. I cannot agree with the submission of learned counsel for the respondent that "The law was made for man and not man for the law". If that means anything, learned counsel would have this Court to stand by powerless, while illegal orders are made by Magistrates and District Judges. That is a proposition to which I am unable to assent.

I quash the sentence imposed by the Magistrate and in lieu thereof I direct that the accused respondent should pay a fine of Rs. 250 and to be detained till the Court rose on February 28, 1950. In default of payment of the fine I sentence the respondent to undergo rigorous imprisonment for a term of three months. The Magistrate will, I have no doubt, consider on its merits any application for time in which to pay the fine.

SWAN, J.

I agree.

Application allowed.