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 XLIV

WITH A DIGEST

1951

Subscription payable in advance. **Rs. 7/50** per Volume.

Printed for "The Ceylon Law Weekly" by Stanley Hamer, at the Caxton Printing Works, Colombo 12, 1951.

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The plaintiff alleged that on an informal agreement with the defendant, he had undertaken to cultivate jungle land and to give the defendant a share of the produce.

The plaintiff further alleged that in breach of the agreement the defendant appropriated the whole of the produce and claimed Rs. 500 as damages. The defendant denied any such agreement and contended that the plaintiff was a labourer employed to clear chena land, for which he had been paid his wages.

The Commissioner found that the plaintiff was not a labourer and that there was an informal agreement by the parties to share the produce of the land. There was no evidence as to the date and duration of the agreement or that the land was chena or paddy.

Held : (1) That the agreement was obnoxious to section 2 of the Prevention of Frauds Ordinance.

(2) That in order to succeed in his claim the plaintiff must establish his case as one coming within the exception referred to in section 3 (1) of the Ordinance.

(3) That a plea under section 3 (1) can only succeed on proof—

(*a*) that the land is a paddy field or chena land.

(*b*) that the informal contract or agreement was for a period not exceeding twelve months ; and

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(2) That in such an action the plaintiff is not entitled to any damages for pain of mind unless it has been established by evidence that such pain of mind resulted in patrimonial loss capable of estimation in terms of money.

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Held : (1) That the notice did not comply with section 756 of the Civil Procedure Code, and the appeal should have been held to have abated.

(2) That no relief should be granted as the failure or omission complained of was completely and immediately within the appellant's power to avoid.

(3) That where a statute prescribes that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form notwithstanding the absence of any reference to the form in the relevant section.

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The petitioner applied for a writ of prohibition on the ground that the Board of arbitrators had no jurisdiction to proceed with the matter as the dispute was not such as could have formed the subject of proceedings under section 45 of the Ordinance. The only respondents to the application were the members of the Board of Arbitration and the Registrar of Co-operative Societies. The 'Union' was not made a respondent, but was later noticed.

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"Defendants would be entitled to the fees paid by them to the Counsel engaged by them for these dates of trial".

The costs as stated by me earlier would be taxed by this Court and the Crown will be liable to pay that amount to the defendants".

Held : That the defendants are entitled to the sum paid to Counsel for the two dates in question as the later part of the order directing that the costs "be taxed by this Court" merely required that the taxing officer should satisfy himself that the amount claimed in the bill of costs represented the sum actually expended in retaining Counsel for the trial.

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In a charge of murder by strangulation the evidence disclosed that the person who strangled the deceased might be A, B or C.

Held : That in order to secure the conviction of A the prosecution had to establish beyond reasonable doubt that the person who strangled the deceased was not B or C.

Held also : That a person who was charged with murder only but whose guilt was not proven, could be convicted under section 198 of the Penal Code, where there was evidence for the purpose, although the indictment contained no charge under that section.

Court of Criminal Appeal—Conviction for murder —Two accused—Absence of evidence of pre-arranged plan—Verdict indicating that jury held each accused responsible for acts of other—Conviction stand?

The two appellants were convicted of murder. Despite the absence of evidence of any pre-arranged plan between them, the verdict of the jury indicated that they held each appellant responsible for the acts of the other.

Held : That the conviction for murder could not stand.

The appellants were convicted of voluntarily causing grievous hurt.

Court of Criminal Appeal—Murder charge— Alternative verdict of lesser offence possible—Failure of judge to direct jury on the lesser offence—Non-direction.

Where in a murder charge the judge failed to explain to the jury the ingredients of the lesser offence of culpable homicide not amounting to murder and did not direct that they could convict the accused of the lesser offence if they were not satisfied that the accused acted with an intention to cause death, but were satisfied that he caused the death of the deceased by doing an act with the knowledge that such an act was likely to cause death.

Held : That it amounted to non-direction and that the conviction for the lesser offence should be substituted for that of murder.

Court of Criminal Appeal—Appellant convicted of robbery and attempted murder—Concurrent sentence of ten and twelve years of rigorous imprisonment—Appellant under 17 years—Judge unaware of—Youthful offender—Sentence altered to Borstal detention—Relevant material for determining appropriate punishment must be placed before Court by prosecuting authorities—Powers of Court of Criminal Appeal to review sentence—Youthful offenders. (Training Schools) Ordinance No. 28 of 1939—Section 4—Meaning of "Criminal habits and tendencies".

The appellant was sentenced to ten and twelve years' rigorous imprisonment for the offences of robbery and attempted murder. The trial Judge did not know and he was not informed that the appellant was only 15 years and 9 months at that time.

On appeal against sentence, the Commissioner of Prisons at the request of the Court of Appeal reported that the appellant was medically and otherwise suitable for Borstal detention and training, and that accommodation could be found at a Training School.

Held : (1) That the sentence of imprisonment should be altered to one of Borstal detention.

(2) That under section 4 of the Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 a Court, in passing sentence on a "youthful offender" convicted of an offence triable only by the Supreme Court, has power to make an order for Borstal detention instead of an order for imprisonment, if it appears to the Court that "by reason of his criminal habits and tendencies", it is expedient that the offender should be subject to detention under such instruction, training and discipline as would be available in a Training School established under the Ordinance.

(3) That the appellant was a youthful offender and had exhibited "criminal habits and tendencies" by his conduct in the present case taken by itself, and that a prolonged period of training and discipline in a Training School for youthful offenders was better calculated to give the appellant an opportunity of rehabilitating himself as a useful member of society.

(4) That in exercising its jurisdiction to review sentences the Court of Criminal Appeal should not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. *The sentence must be manifestly excessive in view of the circumstances of the case, or be wrong in principle before the Court will interfere.*

Court of Criminal Appeal—Accused charged with murder and abetment of—Willing to tender plea of guilt to lesser count—Jury asked by Judge whether or not they would accept the plea—No objection by prosecuting counsel—Jury's return of a verdict instead of answer to the specific question—Correct procedure where accused tenders a plea of guilt to the lesser offence.

The accused who were charged with murder and abetment of murder respectively were willing to tender a plea of guilt to the lesser offence of culpable homicide not amounting to murder and of its abetment. The jury were then invited by the Judge to consider whether or not they would accept this plea after the prosecuting counsel had expressed the view that he had no objection to this procedure. The jury instead of answering the specific question returned a verdict finding them respectively guilty of culpable homicide not amounting to murder and of abetment of that offence.

Held : (1) That the jury should have answered the specific question put to them and that their verdict was both premature and improper.

(2) That the correct procedure to follow when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empannelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment is as follows :—

(i) if the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed normally on the whole indictment ;

(ii) if, on the other hand, the Crown intimates its willingness to accept the plea, the presiding Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magistrate it would be in the

interests of Justice for the Court to accept the plea ;

(iii) if the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment ;

(iv) if, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empannelled to try the case, to state whether they would accept the plea ; and the Judge may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him ;

(v) if the jury state that they are willing to return a verdict on that basis, the unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury ; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly.

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Criminal Procedure

Criminal Procedure—Right of Judge sitting alone to inspect scene of offence—Scope of such right—Criminal Procedure Code, sections 238 and 422 (1) —Evidence Ordinance, section 60, proviso 2—Officer taking leading part in detecting offence acting as prosecutor—Undesirability.

After hearing the prosecution and defence on a charge under the Excise Ordinance, the Magistrate, before recording his verdict, visited the scene the following day. After inspection of the spot he carried out certain tests for the purpose of verifying the veracity of witnesses. The accused was convicted and it was submitted in appeal on his behalf that the procedure adopted by the Magistrate was irregular and has prejudiced the accused.

Held : (1) That the learned Magistrate had the right to visit the scene of offence, but the procedure adopted by him to test the veracity of the oral evidence given is not sanctioned by law and hence the accused was prejudiced thereby.

(2) That section 422 (1) (*c*) of the Criminal Procedure Code appears to recognise the existence of the right of a Judge sitting alone as Judge of both fact and law to view the scene of the offence he is trying.

(3) That the decisions of the Supreme Court recognise the necessity of such a right, which, quite apart from statute, may be regarded as inherent in a Court of Justice.

(4) That power must be exercised within the limits allowed to a jury, for as a Judge of fact his role is the same.

(5) That a view by the jury is intended only for the purpose of enabling them to better understand the evidence and it is not open to a jury on a view to carry out tests for the purpose of verifying the veracity of witnesses or testing their evidence.

(6) That the evidence given by a witness should be tested in one or more of the ways prescribed by the Evidence Ordinance.

(7) That the rule, that an officer, who has played the leading role in the detection of a crime or offence, should not in the interests of justice act as prosecutor in that case, should be strictly observed.

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Damages—Excavations causing damage to contiguous land—Measures of damages.

Where the defendant excavated earth along the boundary of plaintiff's land, which resulted in damage to plaintiff's fence and subsidence of his land, and the defendant for the purpose of preventing subsidence and erosion of his soil in the future erected a wall along the excavated boundary and claimed the cost of the wall as damages.

Held : (1) That the plaintiff as entitled to only actual physical damages caused by the subsidence and such damages flowing naturally from them.

(2) That the plaintiff could not claim as damages the cost of the wall as future washaways on the land could not be regarded as prospective damage from the first subsidence.

(3) That a right of action for damages accrues each time damage is caused by subsidence resulting from excavations.

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C was entitled to a 1/6 share of land. He sold 1/36 to O and his two daughters S and B became entitled to the balance 5/36 share. Thereafter all the co-owners, by an amicable arrangement, divided it up into separate allotments and in lieu of C's 1/6 share a definite block, approximately 1/6 of its total acreage, was allotted to C's successors in title. All the divided allotments were separately and exclusively possessed for over ten years by the respective co-owners or groups of co-owners.

O's interests ultimately devolved on the plaintiff under a series of deeds which referred to the undivided 1/36 share of the larger land and not to the 1/36 share of the divided block.

The plaintiff instituted an action to partition the divided *corpus* possessed by him and the defendant, on whom the interests of S and B had devolved.

It was contended on behalf of the defendant that out of the divided *corpus* to be partitioned the plaintiff was not entitled to anything more than the 1/36 share referred to in his deeds.

Held: That the plaintiff was entitled to 1/6 share of the divided *corpus*.

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In an action for divorce instituted by the wife, the defendant husband filed answer denying the plaintiff's allegations and accusing the plaintiff of misconduct with three named persons but averring that he was all along willing to condone the plaintiff's adultery with them. He however, counter-claimed for a divorce on the ground of plaintiff's adultery with his brother.

This answer was rejected by the learned District Judge on the ground that the defendant had without obtaining an excuse under section 598 of the Civil Procedure Code failed to bring in as parties the said three adulterers disclosed in the answer.

Held: (1) That the defendant—husband was under no obligation to make the three adulterers disclosed in his answer parties to the action as he did not make their adultery the " cause or part of his cause of action " for a divorce.

(2) That the learned Judge was in error when he rejected the answer.

(3) That the principle of reconventional claims has no application to a case where a defendant to an action for dissolution of marriage asks for divorce in his or her favour. Such a claim is permissible only by virtue of section 603 of the Civil Procedure Code.

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Held: That a donor who suffers personal violence at the hands of the donee is entitled to an order of Court revoking the gift on the ground of " ingratitude ".

Per BASNAYAKE, J.—" Whether the Latin word 'impias' is rendered impious as de Sampayo, J., has done or 'sacrilegious' as Krause has done, the legal position is the same. It is impious or sacrilegious for a donee who has derived benefits from a donor to strike him or use personal violence on him ".

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Held: (1) That when two persons have acknowledged, however erroneously, each other's rights of co-ownership, and have agreed to work what is believed to be the common property in *tattumaru*, the occupation of the property at any point of time by either party to the mutual arrangement must, in law, be deemed to be the possession of both.

(2) That the burden of proving that the assumed bond of co-ownership does not in fact exist is on the party who repudiates the earlier arrangement and claims legal title thereto exclusively.

(3) That a party in possession under such an arrangement is not entitled to the benefit of section 110 of the Evidence Ordinance.

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By deed the donor gifted certain properties reserving to himself possession of them during his life time and undertaking not to sell or mortgage them. The deed further stipulated that after the death of the donor " the said donee Juan Agonis Perera Appuhamy and his descendants and his heirs

executors administrators and assigns and authorized persons shall be at liberty to transact the same among each of their co-heirs but shall not in any manner sell or mortgage any one of the said lands with the intention of alienating the same ". The deed contained no direction as to the devolution of properties in the event of the donee or those taking after him violating the prohibition.

Held : That the deed did not create a valid *fidei-commissum* because (*a*) the prohibition to alienate property was limited to sale and mortgage only and consequently the donee was permitted to donate or dispose of the property by last will ; (*b*) the deed did not clearly indicate the class of persons who would be entitled to the property in the event of the donee violating the prohibition ; (*c*) the use of the term " authorized person " in the deed was too uncertain in meaning and too vague to designate clearly the class of persons the donor intended to benefit under the deed.

Per BASNAYAKE, J.—Where the parties are not agreed as to the true rendering into English of a document which is in a language other than English they should produce evidene through the testimony of experts versed in the language in which the document is written so that the Court may decide the dispute on the evidence before it. It is wrong for the Judge however well versed he may be in the language in which the document is written to undertake its translation and adopt a version on which neither party has placed before him.

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The appellant, who carried on a variety of businesses under different limited liability companies, was charged under section 87 of the Income Tax Ordinance in that in his return of the profits derived from his building contracts for the period January 1942 to December 1944, he wilfully with intent to evade tax both omitted and declared certain items of profits and thereby falsified the returns.

The appellant had omitted in the returns certain payments made to him in his contract business but he explained these omissions as being due to clerical error of his book-keeper or as appropriations for materials supplied by him to his sub-contractors or as secret commissions paid to military officials for obtaining the contracts or as being in his view not profits from his business.

No evidence was led by the prosecution to prove that the alleged items of payments were in fact profits from the contract business of the appellant.

Held : (1) That the appellant should be acquitted of the charges as the prosecution had failed to prove that the acts complained of under the section were committed deliberately or purposely by the appellant with the intention to avoid fraudulently the payment of tax.

(2) That it is not an offence under the section for a person to make in his return an omission of income on a mistaken view of law or facts or to enter a false statement inadvertently or in the belief that it is true.

Indian and Pakistani Residents (Citizenship Act

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, section 6 (2) (ii)—Meaning of " Ordinarily resident "—Date in relation to which question of ordinary residence has to be decided.

The appellant applied on 19th November, 1949, for registration as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. He was born in India, but was resident in Ceylon since 1928. In 1938 he married in India where his wife remained till March, 1948. Two children were born to them in India in 1938 and 1945 respectively. In March, 1948, the wife and children came to reside in Ceylon with the appellant intending to settle down in Ceylon permanently. The elder child has been attending school since September, 1948.

Held : (i) That in the circumstances the wife and each of the two minor children had been " ordinarily resident " in Ceylon within the meaning of section 6 (2) (ii) of the Act and the application should be granted.

(ii) That there is no requirement in section 6 (2) (ii) or elsewhere in the Act that the residence should have commenced at a given period of time or that it should have a minimum duration.

(iii) That the date in relation to which the question of ordinary residence under this section has to be decided is the date of the application.

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The plaintiff, who had to leave her residential house owing to compulsory acquisition by the Crown, was induced to purchase from R the premises, where the defendant was living as a tenant of R, on a promise by both R and the defendant that the premises would be vacated on the completion of the purchase.

The defendant later refused to vacate the premises and the plaintiff, who was then expecting, her husband and three children were temporarily accommodated in a small room in the house of plaintiff's father, who was himself under notice to quit.

The plaintiff sought to eject the defendant on the ground that the premises were "reasonably required for occupation as a residence" for the plaintiff and her family within the meaning of the Rent Restriction Act. The learned Commissioner dismissed the action because he was of the view that a person who becomes a landlord by purchase as in the circumstances of this case could not be said to require the premises reasonably within the meaning of the Ordinance and that the plaintiff would have succeeded if she had been the landlord from the commencement of the tenancy.

Held : (1) That the learned Commissioner had misdirected himself. The claim of a landlord, who is a purchaser of premises, to eject a tenant therefrom should be determined solely by reference to the reasonableness of his requirement for occupation, as in the case of any other landlord.

(2) That in considering whether premises are reasonably required for the occupation of a landlord, a Court should take into account, *inter alia*, the degree of hardship caused to the tenant by eviction.

(3) That where the hardship of the landlord either outweighs or is evenly balanced with that of the tenant, the landlord's claim must prevail.

(4) That where a landlord has obtained an order for possession the Courts have power to suspend the order for such a period so as to mitigate the hardship caused to the tenant by eviction.

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Lease of grass and vegetable enclosure only—Are they 'premises' within the meaning of the Rent Restriction Act.

Held : that the word 'premises' in the Rent Restriction Act is used in the sense of a building with the land appurtenant thereto devoted to residential or business purposes and does not apply to a grass land or vegetable enclosure where there is no building.

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The defendant tenant, who was noticed to quit by the plaintiff landlord, refused to vacate the premises and continued to pay the rates as before and sent by post cheques each month to the plaintiff for nearly eight months as payment of rent. The plaintiff, after appropriating the defendant's advance deposit of six months' rent, which he had with him, instituted an action for ejectment and returned all the cheques uncashed.

The learned Commissioner dismissed the action on the ground that the plaintiff's conduct in accepting the cheques as payment of rent month after month after the notice amounted to waiver of the notice and such conduct created a new tenancy between the plaintiff and the defendant.

Held : (1) That in a statutory tenancy under the Rent Restriction Act the mere acceptance of rents by the landlord after notice to quit does not create a new tenancy except where the tenant proves that the landlord had abandoned his rights to eject expressly or by unambiguous conduct.

(2) That where a tenant commits a breach of any of the statutory obligations under the Act, he cannot revive his right to occupation of the premises by remedying the breach later.

(3) That an intention to waive a right or benefit to which a person is entitled is never presumed, but must be proved by the person who asserts it.

(4) That in a contractual tenancy the appropriation of the deposit towards rent falling due after the termination of tenancy under the name of damages or any other may give rise to the inference that by so doing the landlord intended to create a new tenancy.

(5) That a tenant who pays rent by cheque does so at his risk.

Per BASNAYAKE, J.—(*a*) "A deposit of rent in advance is, in reality, a loan by the lessee to the lessor to be returned to the former, either by applying the amount so deposited on the rent or particular instalments of the rent, or by applying it in satisfaction of claims for damages for breaches of other covenants, if it is agreed that it may be so applied, or by repaying, at the end of the term, the amount deposited, if all claims of the lessor

which it was intended to secure are otherwise satisfied. The tenant is entitled to recover from the landlord the excess of the amount of the deposit above the rent due or the damage suffered by reason of the tenant's default, when the landlord has recovered possession by reason of such default ".

(*b*) " But where the tenant pays his rent by cheque and the landlord accepts it as payment and gives a receipt therefor without waiting till the cheque is realised, then if the cheque is dishonoured he cannot sue for the rent if he has by his receipt acknowledged satisfaction of his debt. The position is different if he merely acknowledges the receipt of the cheque without treating it as a discharge of the debt. Where a complete discharge of the debt is given the remedy is an action on the cheque and not an action for rent."

(*c*) " Once the contractual tenancy is ended by notice the landlord loses no rights by accepting rent from the statutory tenant whom he may evict by judicial process without any further notice the moment he fails to carry out his statutory obligations or he is able to satisfy the court that the premises are reasonably required by him ".

Action between landlord and tenant—Appeal to Privy Council—Value of action.

See also under Rent Restriction.

Landlord and tenant—Premises owned by wife—Husband entering into contract of tenancy—Tenant exclusively dealing with husband—Action for ejectment of tenant by husband—Is he entitled to maintain action?—Is jus in re *necessary to maintain such action—Rent Restriction Ordinance No. 29 of 1948—Meaning of the term " landlord ". Interpretation of " Means " and " Includes " in status—Estoppel—Evidence Ordinance, Section* 116.

Some years prior to the institution of this action for ejectment the plaintiff and defendant entered into a contract of tenancy whereby the plaintiff let to the defendant certain premises belonging to his wife. There was no dispute that it was the plaintiff that the defendant exclusively dealt with.

The action was contested in the Court below on the issue as to whether the premises were reasonably required by the plaintiff for the purposes of his business and the Court answered it in plaintiff's favour. Nevertheless, the plaintiff's action was dismissed on the ground that the plaintiff, although entitled to receive rent, did not have a " *jus in re* " in the premises, following the decision in *Hameed vs. Annamalay* reported in (1946) 47 N.L.R. 558.

Held : (1) (By the Divisional Bench) That the plaintiff was entitled to a decree ejecting the defendant.

(2) That the plaintiff was the defendant's landlord within the meaning of the Rent Restriction Act No. 29 of 1948.

(3) (NAGALINGAM, J. *dissentiente*) That a plaintiff, who is a landlord within the meaning of the Rent Restriction Act, can maintain an action under section 13 (1) (*c*) of the Act for ejectment of a tenant although he does not have the *jus in re* in regard to the premises.

Per GRATIAEN, J.—" I would summarise the general conclusions at which I have arrived as follows :—

(1) that, for the purposes of the Rent Restriction Ordinance of 1942 and of the Rent Restriction Act of 1948, the term " landlord " must always be given the meaning attributed to it in the enactments ; and that in this respect *Hameed's case* was wrongly decided ;

(2) that whether the plaintiff who claims *qua* landlord to eject the tenant in occupation be the tenant's original landlord or a subsequent purchaser or lessee of the premises, his right to a decree for ejectment is in the first instance regulated by the principles of the common law affecting the relationship of landlord and tenant, and in accordance with these principles, he must in every case establish that privity of contract between himself and the tenant exists at the relevant date ;

(3) that if privity of contract does exist between the plaintiff and the tenant, the latter is precluded by the provisions of section 116 of the Evidence Ordinance from disputing the plaintiff's title to the premises ;

(4) that, if the provisions of the Rent Restriction Ordinance of 1942 or of the Rent Restriction Act of 1948 are found to apply to the premises, the plaintiff's common law right, *qua* landlord, to claim a decree for ejectment would be restricted by the conditions imposed by section 8 of the earlier Ordinance or by section 13 of the later Act (whichever is applicable."

Per NAGALINGAM, J.—" The plaintiff who had possession of the property before he let them to the defendant thereupon having successfully clothed himself in the mantle of an owner and which cannot be rent asunder by the defendant would therefore be one who has a *jus in re* in respect of property let by him. The plaintiff consequently is a landlord within the meaning of that term as used in proviso (2) to sub-section (1) of section 13 of the Act and as interpreted in *Hameed vs. Anamalay* (supra) and is thus entitled to the benefit of this proviso."

Last Will

Last Will—Death of executor before grant of probate—Grandchildren entitled to largest interest under the Will—Ninth appellant appointed guardian-ad-litem of grandchildren—Application by widow for grant of letters of administration with the Will annexed—Widow's interest in estate comparatively small—Claim for letters by ninth appellant as nominee of grandchildren—Competing claims—Nominee of the largest interest entitled—No preferential right to widow—Civil Procedure Code sections 519, 523.

A. H. M. M. Faluloon Marikar died leaving by a last will properties to the widow of approximately Rs. 15,000, to the daughter to the value of Rs. 5,900, and to the son subject to *fidei commissa* in favour of the son's children the bulk of the estate valued at Rs. 200,000. On the son's death his widow and minor children were made parties and the ninth appellant was appointed the guardian *ad litem* of the minors in the testamentary proceed-

Partition

Partition action—Sale ordered—Case withdrawn—Sale of undivided share in land by co-owner—Sale void—Section 17, *Partition Ordinance—Section* 10, 406 *Civil Procedure Code.*

Where a sale was ordered by the Court in a partition action, and the case was allowed to be withdrawn on plaintiff's motion before sale, and one of the co-owners sold by deed his undivided share in the land.

Held : (1) That the sale was void as it infringed the provisions of section 17 of the Partition Ordinance in that the withdrawal of the action cannot be said to be a refusal by the Court to grant the application for a partition or sale within the meaning of the section.

(2) That the Court had no power to allow the withdrawal of the action.

Amicable partition—Co-owners acquiring prescription title to divided portions—Transfer of Co-owner's interests by reference to undivided shares —Action to partition divided *corpus* by transferee —Is transferee entitled only to fractional share of divided *corpus.*

Payment of Fines (Courts of Summary Jurisdiction) Ordinance

Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 *of* 1938—*Sections* 3 *and* 4—*Sentence of fine without sentence of imprisonment in addition—Magistrate ordering imprisonment in default of fine on same day—Failure to comply with provisions of sections* 3 *of Payment of Fines Ordinance—Practice of ordering "double security" as condition of granting time to pay fine unwarranted —Criminal Procedure Code, section* 312.

Held : (1) That where a person is convicted by a Court of Summary Jurisdiction and sentenced to a fine, without a sentence of imprisonment in addition, it is obligatory on the Court to comply with the provisions of sections 3 and 4 of the Payment of Fines Ordinance No. 49 of 1938 before such person is committed to prison for default.

(2) That the provisions of section 312 of the Criminal Procedure Code must be construed as having been repealed to the extent to which they are inconsistent with the explicit provisions of the Payment of Fines Ordinance of 1938.

(3) That the practice of ordering "double security" as a condition of the granting of time to pay a fine is unwarranted and should be forthwith discontinued.

Penal Code

Penal Code, section 183—*Voluntarily obstructing public servant—Police officer searching without warrant—What the prosecution has to prove—Section* 220A—*Charge of intentionally offering resistance to Police officer in the lawful apprehension of accused on charge of theft—Arrest without warrant —When is such arrest legal—What should be proved.*

Criminal Procedure Code, section 32—*Arrest without warrant—Necessity to comply with provisions of sections* 37, 126 *and* 126A—*Search of premises for stolen property without warrant—Police Ordinance, section* 69—*Police powers to carry out search.*

Arrest without warrant on suspicion—Need to inform suspect of nature of charge —Duty of Court to scrutinise jealously actions of police officers arresting private citizens without warrant.

Held : (1) That to establish a charge under section 183 of the Penal Code it is incumbent on the prosecution to prove affirmatively (*a*) that the public officers concerned were in fact engaged in the lawful exercise of their public functions ; (*b*) that the conduct of the accused as specified in the charge constituted obstruction within the meaning of that section.

(2) That where the charge was that the accused voluntarily obstructed police officers, who, without search warrant, attempted search of premises for stolen property, the prosecution must prove the material upon which the police officers concerned entertained "reasonable suspicion" that the premises in question contained stolen property.

(3) That a suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officers own knowledge or on statements by other persons in a way which justify him in giving them credit.

(4) That a mere verbal refusal to allow a public servant to perform his duty is not obstruction within the meaning of section 183 of the Penal Code.

(5) That to establish a charge of intentionally offering resistance to a police officer in the lawful apprehension of the accused on a charge of theft,

(an offence under section 220A of the Penal Code) the prosecution must affirmatively prove (*a*) that resistance to arrest was offered, and (*b*) that the arrest without warrant on a charge of theft was lawful.

(6) That to prove such an arrest was lawful the prosecution must show that the accused were persons "against whom a reasonable complaint had been made or credible information had been received or a reasonable suspicion existed" of their having been concerned in the commission of the offence of theft.

(7) That in such a charge it is the Magistrate's function to inquire into the state of mind of the officer at the time he ordered the arrest.

(8) That whenever a police officer arrests a person on suspicion without a warrant "common justice and commonsense" require that he should inform the suspect of the nature of the charge upon which he is arrested.

(9) That the procedure laid down by section 126A of the Criminal Procedure Code is intended to be applied only in those rare cases in which the investigation of allegations against a person in police custody suspected of crime cannot be completed in 24 hours.

(10) That when private citizens are arrested without a warrant it is imperative that the provisions of section 37, 126 and 126A of the Criminal Procedure Code should be scrupulously applied. If this is not done, police powers which are designed to protect the community "become a danger instead of protection".

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Penal Code, sections 345, 354—*Kidnapping and use of Criminal force with intent to outrage modesty—Accused acquitted of the latter offence—Evidence relating to latter charge relevant to guilt of accused on charge of kidnapping—Effect of acquittal—Evidence relating to the acquitted charge, is it relevant to the other charge?—What constitutes "kidnapping"—Consent of child immaterial—Criminal Procedure Code* 152 (3).

The accused was charged with the offences of kidnapping a girl of 13½ years and of using criminal force with intent to outrage her modesty, and the Magistrate convicted him of kidnapping but acquitted him of the other offence.

Held: (1) That the evidence relating to the charge of using criminal force with intent to outrage modesty was relevant to the guilt of the accused on the charge of kidnapping and the effect of the accused's acquittal was to shut out that evidence for the purpose of establishing the offence of kidnapping.

(2) That the accused was entitled to rely on his acquittal in so far as it was relevant to his defence in the other charge.

(3) That the effect of a verdict of acquittal is binding and conclusive in the same or subsequent proceedings between the parties to the adjudication.

(4) That where a person is charged on more than one count in the same proceedings a verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial.

(5) That a person is not guilty of "kidnapping" unless he is proved to have taken or enticed the child out of the keeping of the lawful guardian without the consent of such guardian.

(6) That where a minor leaves the immediate custody of his lawful guardian for a temporary purpose the relationship of guardian and child suffers no break in its continuity so long as there is no interference with the child's opportunity of returning to the guardian.

(7) That the offence of kidnapping would have been complete if the complainant had been forced or enticed away for an improper purpose.

(8) That the charge of kidnapping failed in this case because the person of the minor has not been proved to have been transferred from the custody of her guardian into the custody of some person not entitled to her custody.

(9) That a child cannot validly consent to the substitution of some other person's control which is exercised over her by her lawful guardian, and therefore, the girl's consent to the alleged kidnapping is immaterial.

K. NALLIAH *vs.* P. B. HERAT, Inspector of Police, Kotahena 81

False information—Accused charged under section 180, *Penal Code—Ingredients of offence.*

Held: (1) That a charge under section 180 of the Penal Code must (*a*) state precisely the information the accused gave knowing or believing it to be false, (*b*) specify the person to whom injury or annoyance the accused intended or knew that he would by his information cause the public servant to use his lawful power.

(2) That where the person to whom the information is given has himself no power to act on that information without the orders of a superior officer, the offence does not fall within the ambit of section 180.

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Poisons, Opium and Dangerous Drugs Ordinance

Poisons, Opium and Dangerous Drugs Ordinance (Chap. 172)—*Charge under section* 26—*What must be proved—Meaning of "ganja".*

Where a person is charged under section 26 of chapter 172 with cultivating and having in his possession hemp plants, the charge must refer to the plant by the name by which it is known to the law and the prosecution must establish by evidence of a qualified person that the plant possessed by the accused is a plant of the variety prohibited by section 26.

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Police

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Police Ordinance

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Privy Council

Appeals (Privy Council) Ordinance (Cap. 85) Rule 1 (a) of rules set out in Schedule to—Action between landlord and tenant—Right to possession—Value—Test.

• **Held**: That for the purpose of an application for conditional leave to appeal to the Privy Council, the value of an action by the landlord against his tenant for ejectment must be determined by the rental reserved by the contract of tenancy.

Privy Council—Appeal to—Deposit of security for costs before grant of conditional leave—Withdrawal of Appeal—Notice to Privy Council—Communication by Registrar of Privy Council to Registrar of Supreme Court—Order appeal stands dismissed—Request to bring before Supreme Court for steps to terminate proceedings—Can appellant ask for refund of deposit before order terminating proceedings—Respondents' Right to ask for costs—Judicial Committee Rules—Rule 32.

In pursuance of a written notice by the appellant that he desired to withdraw his appeal, the Registrar of the Privy Council notified by letter the Registrar of the Supreme Court that by virtue of Rule 32 of the Judicial Committee Rules 1925 the appeal stands dismissed as from the date of his letter without further order and further proceeded to say "I have accordingly to request you to be good enough to bring this communication before the Lordships of your Court in order that the necessary steps may be taken to terminate proceedings.

The appellant thereafter made application to have refunded to him the sum of Rs. 3,000 deposited with the Registrar by way of security before final leave to appeal was granted.

Held: (1) That in view of the communication addressed to the Registrar of the Supreme Court the appellant should make an application for an order terminating proceedings before asking for a refund of the deposit money.

(2) That the respondent will be entitled at such application to ask for an order for costs in his favour.

Privy Council—Appeal to—Conditional Leave granted—Defendant's failure to act under rule 10 of the Appellate Procedure (Privy Council) Order 1921 —Application by defendant for extension of time under rule 18—No justifiable reason for defendant's inordinate delay—Meaning of "for good cause" in rule 18.

The defendant after obtaining conditional leave to appeal to the Privy Council did not serve on the plaintiff a list of documents necessary for the hearing of the appeal within ten days after the leave to appeal as was required by Rule 10 of the Appellate Procedure (Privy Council) Order 1921, but did so only after a month and twelve days. Even after the plaintiff's Proctor had furnished him with the relevant documents, the defendant did not take any step to lodge with the Registrar a list of the documents relied on by the parties. He thereafter applied under Rule 18 of the Order for an extension of time to comply with the requirements of Rule 10 stating that his failure was due to his Proctor's inability to have access to the record of the case.

Held: (1) That there was no substance in the excuse and the defendant's application should be refused, and the appeal should stand dismissed for non-prosecution.

(2) That when the time allowed by the Rules contained in the Appellate Procedure (Privy Council) Order 1921 for doing any act necessary for prosecuting an appeal to the Privy Council has already expired, this Court should not in my opinion grant an extension of time for the doing of that act unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers.

Prohibition

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Reconvention

Rei Vindicatio

Rei Vindicatio Action—Answer alleging inter alia that plaintiff's predecessor held land in trust for defendant—Defendant in possession—Claim on prescriptive title—Possession as agent—When prescription begins to run—Burden of proof.

Where in an action for declaration of title to a land the defendant who was in possession alleged (*a*) that the plaintiff's predecessor in title held the property for his (defendant's) benefit.

(*b*) that he (defendant) had acquired a prescriptive title.

(*c*) that the plaintiff was not a *bona* ×*de* purchaser for value.

(*d*) that in any event he (defendant) was entitled to compensation and to a *jus retentionis*.

Held: That the learned District Judge was right in calling upon the defendant to begin as legal title was in plaintiff.

That if a person goes into possession of land as an agent for another, time does not begin to run until he has made it manifest that he is holding adversely to his principal.

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The plaintiff alleged that on an informal agreement with the defendant, he had undertaken to cultivate jungle land and to give the defendant a share of the produce.

The plaintiff further alleged that in breach of the agreement the defendant appropriated the whole of the produce and claimed Rs. 500 as damages. The defendant denied any such agreement and contended that the plaintiff was a labourer employed to clear chena land, for which he had been paid his wages.

The Commissioner found that the plaintiff was not a labourer and that there was an informal agreement by the parties to share the produce of the land. There was no evidence as to the date and duration of the agreement or that the land was chena or paddy.

Held : (1) That the agreement was obnoxious to section 2 of the Prevention of Frauds Ordinance.

(2) That in order to succeed in his claim the plaintiff must establish his case as one coming within the exception referred to in section 3 (1) of the Ordinance.

(3) That a plea under section 3 (1) can only succeed on proof—

(*a*) that the land is a paddy field or chena land.

(*b*) that the informal contract or agreement was for a period not exceeding twelve months ; and

(*c*) that the consideration of such contract or agreement is that the cultivator is to give the owner a share of the crop or produce.

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Held : (1) That a reference to arbitration made without complying with the provisions of sections 676 and 677 of the Civil Procedure Code is bad in law.

(2) If parties nominate two or more arbitrators, provision should be made for a difference of opinion among the arbitrators.

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Held : (1) That in an action based on contract against the bailee for compensation for the loss of goods entrusted by the bailors, the assessment of such claim, as in other actions for breach of contract, should be based on the principle of *restitutio in integrum, i.e.* the plaintiff must be placed as far as money can do it in as good a situation as if the contract had been performed.

(2) That in such an action the plaintiff is not entitled to any damages for pain of mind unless it has been established by evidence that such pain of mind resulted in patrimonial loss capable of estimation in terms of money.

(3) That sentimental importance attaching to goods has no relevance where the goods have been entrusted to and lost by a third party under a commercial transaction.

Per Gratiaen, J.—" If it was intended to claim damages from the defendant on the basis of a tort, the allegation of fraud or deceit should have been specifically and unequivocally made so that he could have had the opportunity of meeting it."

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Failure to take objection in lower court—Powers of Supreme Court to entertain objection—Relief under section 756 (3).

Where in a notice of tendering security for costs of appeal served on one of the respondents the appellant failed (*a*) to mention his name as the person in respect of whose costs the appellant proposed to give security ; (*b*) to follow the form prescribed in Form 126 of the Civil Procedure Code.

Held : (1) That the notice did not comply with section 756 of the Civil Procedure Code, and the appeal should have been held to have abated.

(2) That no relief should be granted as the failure or omission complained of was completely and immediately within the appellant's power to avoid.

(3) That where a statute prescribes that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form notwithstanding the absence of any reference to the form in the relevant section.

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In an action claiming either a cartway or a footpath of necessity, the plaintiff filed with the plaint a sketch indicating the tract of the cartway. On a commission issued by the Court a plan showing the cart tract claimed by the plaintiff was filed.

At the trial the District Judge rejected the plaint on the ground that it did not describe the way of necessity as depicted in the plan and that it was silent with regard to the actual right of way, and ordered the plaintiffs to amend the plaint accordingly.

Held : (1) That in such a claim it was sufficient for the claimant to indicate the way claimed and that the claimant was not obliged to describe the way of necessity by physical metes or bounds or by reference to a sufficient sketch, map or plan.

(2) That in this case the plaintiffs had pleaded everything material to sustain a claim for a way of necessity and the Court had ample material to frame the issues for determining the case.

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The plaintiff after purchasing an undivided share in certain lands occupied for convenience a divided allotment of the common land as representing the undivided share. Thereafter the plaintiff advanced money to her father, the first defendant, for the purpose of purchasing another share of the same land in her name. The 1st defendant bought it instead in his name and without conveying it to the plaintiff, inspite of repeated requests, sold it furtively to the second defendant, who purchased it *bona fide* and without knowledge of the above facts. The plaintiff, after the purchase by the first defendant, occupied another divided allotment of the same land in lieu of that share for a period of 19 years on the basis that she was the absolute owner. At the time of the sale to the second defendant, the plaintiff had thus been in occupation of the land for more than the prescriptive period of time.

The District Court dismissed the plaintiff's action to set aside the sale on the ground that although the land was held subject to a constructive trust in favour of the plaintiff the second defendant was protected by section 98 of the Trusts Ordinance, being a *bona fide* purchaser for value without notice of the Trust.

Held : (1) That the plaintiff possessed the land during the period of occupation as an absolute owner and not as a beneficial owner.

(2) That plaintiff's request to the first defendant to convey the share in the land did not constitute an acknowledgment of his rights as trustee and could not be regarded as an interruption of plaintiff's possession *ut dominus*.

(3) That at the time of the sale to the second defendant the plaintiff had acquired prescriptive title as against the first defendant and there was no title which the first defendant could effectively convey.

(4) That the plaintiff's occupation of the land could not be regarded as one of co-ownership with that of the first defendant but was an assertion of her claim to rights of co-ownership additional to those rights enjoyed by her under her earlier purchase and the rule in *Corea vs. Appuhamy*, 15 N. L. R. 65 did not apply.

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Trust—Deed conveying land to trustees on trust for a community—Defendants members of the community—Land subsequently transferred absolutely by trustees to plaintiff—Plaintiff's right as absolute owner to eject defendants—Trustee cannot vary the terms of trust.

Where a land purchased with money contributed by the Catholics of the Catholic Karawa community of Kokuvil West was conveyed by deed to trustees for the use of the community and descendants, and the trustees thereafter transferred by deed

the land to the plaintiff giving him absolute right of ownership, and the plaintiff as owner sought to eject the defendants who were admittedly members of the Catholic Karawa community because they refused to pay tithes to the Catholic Church.

Held : (1) That the deed created a trust for the benefit of the defendants and did not deprive them of their right to the use of the land by reason of non-payment of tithes.

(2) That the trustees had no power to alter the terms on which they held the trust property and could not therefore give the plaintiff absolute right over it.

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Trust—Colonial Secretary, one of the trustees under last will, functus—Proper successor alleged to be Permanent Secretary to Ministry of Home Affairs—Uncertainty of title to trust property—Application by existing trustee to vest property on trustees by summary procedure under section 112 *of Trusts Ordinance (Chapter* 72*)—Is the procedure proper?—Scope of section* 112*—Section* 595 *Civil Procedure Code—Trusts Ordinance—Sections* 101, 102.

Under a trust created by a will in 1909 the testator appointed as trustees the Government Agent, Western Province and the Colonial Secretary and empowered his widow and two others to nominate certain other trustees, where the above-named trustees failed. Owing to changes in the constitution of Ceylon, the office of the Colonial Secretary was abolished and was replaced by that of the Chief Secretary which in turn was abolished leaving some of its functions to the Permanent Secretary to the Ministry of Home Affairs and Rural Development.

The widow in acting under the power in the last will purported to appoint a trustee as successor to the Chief Secretary but was opposed by the appellant, the Government Agent of the Western Province, who contended that the proper successor to the Chief Secretary as trustee was the Permanent Secretary, and that the widow had accordingly no right to appoint a trustee. The appellant thought that in the circumstances there was uncertainty as in whom the title to the trust property vested and moved the District Court under section 112 of the Trust Ordinance by way of summary procedure for an order vesting the properties in him and the Permanent Secretary.

The learned District Judge dismissed the application on the ground that the appellant should have filed a regular action and not moved the Court by summary procedure.

Held : (1) That the District Judge was wrong in dismissing the application.

(2) That where a person asks for a vesting order under section 112 of the Trusts Ordinance without asking for any further remedy, the procedure must be by way of summary procedure and not by way of regular action.

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Wages Boards Ordinance

Wages Board Ordinance—Charges under section 21 *and* 39 (1)*—Employer failing to pay wages to worker directly—Worker failing to return to work or call for Wages—Employer's inability to find worker—Is employer liable.*

An employer's failure to pay the minimum rate of wages to a worker employed under him was due to the fact that the worker, who, with others, went on strike did not call for the wages and could not be found.

Held : That in the circumstances, the employer could not be said to have committed an offence under the Wages Board Ordinance.

SARANADASA *vs.* FERNANDO 30

Wages Boards Ordinance, section 36*—Employer in Engineering trade, workmen in motor transport trade—Is it obligatory on employer to comply with provisions applicable to motor transport trade?*

Held : (1) That where an employer engaged in the engineering trade employs workers to drive lorries, for purposes of transport, it is not obligatory on him to maintain in the premises in which he carried on business one or more registers in the prescribed form applicable to the Motor Transport Trade.

(2) That the words " employer in any trade " in section 36 of the Wages Board Ordinance contemplates the employer's trade and not the worker's.

SINNATHAMBY (INSPECTOR OF LABOUR) *vs.* JINASENA 63

Waiver

An intention to waive a right or benefit to which a person is entitled is never presumed but must be proved by the person who asserts it.
See Landlord and Tenant 19

Warrant

See Penal Code 33

Words and Phrases

" Criminal habits and tendencies ".
See Court of Criminal Appeal 94

" For good cause ".
See Privy Council 88

' Ganja '
See Poisons, Opium and Dangerous Drugs Ordinance 80

" Means " and " includes ".
See Landlord and Tenant 100

" Ordinarily resident ".
See Indian and Pakistani Residents (Citizenship) Act 86

' Waiver of right '
Landlord and Tenant 19

" Wilfully with intent to evade ".
See Income Tax 54

Writ

Of Prohibition.
See Co-operative Societies Ordinance ... 25

Youthful Offender

See Court of Criminal Appeal 94

Present : JAYATILEKE, C.J. & DIAS, S.P.J.

HUNTER, GOVT. AGENT vs. SRI CHANDRASEKERA

S. C. No. 36 I—D. C. Colombo, No. 66 Trust

Argued on : 29th August, 1950
Decided on : 31st August, 1950

Trust—Colonial Secretary, one of the trustees under last will, functus—Proper successor alleged to be Permanent Secretary to Ministry of Home Affairs—Uncertainty of title to trust property—Application by existing trustee to vest property on trustees by summary procedure under section 112 of Trust Ordinance (Chapter 72)—Is the procedure proper ?—Scope of section 112—Section 595 Civil Procedure Code—Trust Ordinance—Sections 101, 102.

Under a trust created by a will in 1909 the testator appointed as trustees the Government Agent, Western Province and the Colonial Secretary and empowered his widow and two others to nominate certain other trustees, where the abovenamed trustees failed. Owing to changes in the constitution of Ceylon, the office of the Colonial Secretary was abolished and was replaced by that of the Chief Secretary which in turn was abolished leaving some of its functions to the Permanent Secretary to the Ministry of Home Affairs and Rural Development.

The widow in acting under the power in the last will purported to appoint a trustee as successor to the Chief Secretary but was opposed by the appellant, the Government Agent of the Western Province, who contended that the proper successor to the Chief Secretary as trustee was the Permanent Secretary, and that the widow had accordingly no right to appoint a trustee. The appellant thought that in the circumstances there was uncertainty as in whom the title to the trust property vested and moved the District Court under section 112 of the Trust Ordinance by way of summary procedure for an order vesting the properties in him and the Permanent Secretary.

The learned District Judge dismissed the application on the ground that the appellant should have filed a regular action and not moved the Court by summary procedure.

Held : (1) That the District Judge was wrong in dismissing the application.

(2) That where a person asks for a vesting order under section 112 of the Trusts Ordinance without asking for any further remedy, the procedure must be by way of summary procedure and not by way of regular action.

Per DIAS, S.P.J.—" By proceedings by way of regular action the petitioner for a vesting order under section 112 would lose the vital and fundamental benefits of section 112 (2). The class of cases for which section 112 was designed are those in which the Court should act summarily and speedily and not by means of a protracted regular action ".

Cases referred to : *Muttucumaru vs. Vaithy* (1937) 18 L. Rec 5.
Tambiah vs. Kasipillai 42 N. L. R. 558.
Ambalavanar vs. Somasundera Kurukkal 48 N. L. R. 61.

H. V. Perera, K.C., with *E. B. Wikramanayake, K.C.* and *L. G. Weeramantry* for the petitioner-appellant.

No appearance for the respondent.

DIAS, S.P.J.

In his will of 1909 one M. James Fernando Sri Chandrasekera created a trust known as " The Sri Chandrasekera Fund." He appointed The Government Agent, Western Province and the Colonial Secretary to be the trustees of the funds and provided that in the event of these two officials, or either of them declining or being in any wise unwilling, or unable to act as trustees, it was to be lawful for his widow and two others named in the will to appoint in writing " a member of the Executive Council " of Ceylon or failing them " any other fit and proper person."

It is obvious having regard to the date of the will that the creator of the trust wanted his trustees to be high officers of the Colonial Government of that time. If those two officials or either of them could not act, their place was to be taken by a member of the Executive Council, an august body consisting mainly of officials. It was only if such an appointment could not be made that an ordinary mortal was to be appointed.

The petitioner-appellant is the Government Agent, Western Province one of the trustees. He moved the District Court of Colombo in summary procedure under section 112 of the Trusts Ordinance, which reads :—

" Section 112 (1) in any of the following cases, namely—

(1) where it is uncertain in whom the title to any trust property is vested,

(2) .....(irrelevant).....the Court may make an order (in this Ordinance called " a vesting order ") vesting the property in any such person in any such manner or to any such extent as the Court may direct."

The appellant says that owing to changes in the Constitution of Ceylon the office of Colonial Secretary was abolished and replaced by that of Chief Secretary, and that this latter office has also been abolished and some of the functions of the Chief Secretary have now devolved on the Permanent Secretary to the Ministry of Home Affairs and Rural Development. The appellant says that this Permanent Secretary is the proper successor to the Chief Secretary as Trustee of the said fund. The widow of the creator of the Trust (the respondent), however, has purported to appoint a trustee as successor to the Chief Secretary in pursuance of an alleged power of appointment given to her by the last will. The appellant says that in the circumstances he has been advised that the widow is not entitled to appoint a successor to the Chief Secretary. He submits that therefore, it being uncertain in whom the title to the said trust is vested, it has become necessary to apply under section 112 of the Trusts Ordinance for a vesting order.

The respondent appeared and objected. The District Judge dealt with a preliminary matter and dismissed the appellant's application on the ground that he should have filed a regular action, and that having moved in summary procedure his application failed.

At the hearing of this appeal the respondent did not enter an appearance.

In my opinion the finding of the learned District Judge is wrong and cannot be supported.

Section 112 does not indicate what procedure should be followed when making an application under that section. In *Muttucumaru vs. Vaithy* (1937) 18 L. Rec, 5 Mosley J. said :—

> " It is, however, contended.....that if he is not entitled to an order under section 102 (of the Trusts Ordinance), he may apply to the Court for a vesting order under section 112 (1) (i). Such an order may be made when it is uncertain in whom the title to any trust property is vested. The plaintiff has not alleged any such uncertainty nor has it been shown that any exists. His claim in this respect must, therefore, fail. Nor is it clear that the Court, except in a proceeding under section 101 or section 102 can make a vesting order under section 112 itself. If it is the intention of the Ordinance to confer such a power upon the Court it is strange that it does not indicate the procedure to be adopted for the purpose."

With the greatest respect, I am unable to agree with the *dictum* that a Court cannot make a vesting order under section 112 except in a proceeding under sections 101 or 102.

In *Tambiah vs. Kasipillai* 42 N. L. R. 558 the plaintiff claiming that he was the lawful hereditary trustee of a Hindu Temple brought an action in regular procedure (*a*) for a declaration that he was the lawful trustee and manager for the protection of the temple and its temporalities ; for an accounting and for the ejectment of the defendant ; and for damages. (*b*) as ancillary relief he prayed for a vesting order under section 112 in regard to the temple and its temporalities on the ground that it was not possible to ascertain the successors in title of the various properties which constituted the temporalities of the trust, and it was uncertain in whom the legal title thereto was vested. (*c*) he also prayed for an injunction. It appeared that in an earlier proceeding the plaintiff had proceeded by way of summary procedure and his application was dismissed. The plaintiff appealed against that order in 40 N. L. R. 298, but his appeal failed on a preliminary point, and the point of law which now arises could not, therefore, be argued. In 42 N. L. R. 558 this Court held that the plaintiff could sue *rei vindicatio* for the trust property without having recourse to section 102 of the Trusts Ordinance. It was further laid down that a claim to a vesting order under section 112 may be asserted in connection with the *rei vindicatio* action. Keuneman, J. said :—

> " Section 112 applies to all cases of trusts and not only to religious trusts.....I have not been able to find, nor has Counsel been able to show me any section which lays down a procedure relating to a vesting order in connection with the ordinary trust as distinct from a religious trust. I do not think, where a power has been expressly given in the Ordinance, we can deny to the parties requiring the exercise of that power some appropriate procedure. In this case in earlier proceedings, it was held that a mere application to Court was not the proper procedure but that a regular action was needed. As there was no appeal from that order for the purposes of this case, that particular point may be regarded as settled. I hold that the claim to a vesting order may be asserted in an action, and that the present action is in order ".

There are certain points which strike the eye in regard to this case. In the first place, Keuneman, J. did not express agreement with the finding by the District Judge in the earlier proceeding that an application for a vesting order should be made by regular action. All he says is that there having been no appeal taken against that order, he is content " for the purposes of the case " he was dealing with to assume that point to be settled. In the second place, this case is an authority for the proposition that where a person having a cause of action files an action in regular procedure, it is open to him to tack on to that action an application for relief under section 112 of the Trusts Ordinance. This case is, therefore, not an authority for the proposition that when a person seeks relief under

section 112 for one of the two reasons specified in that section, without asking for any other relief, he must do so in a regular action.

Finally, we have *Ambalavanar vs. Somasundera Kurukkal* 48 N. L. R. 61. Plaintiff as the hereditary trustee of a madam filed a regular action against the defendants for ejectment and damages. He also added a prayer for vesting order under section 112. Canakaratne, J. said :—

> "No special procedure has been prescribed for obtaining a vesting order; but section 116 (1) makes the enactments and rules relating to civil procedure for the time being applicable to all actions and proceedings under the Trusts Ordinance. The District Court (Supreme Court) can also direct the procedure to be followed in certain cases (sub-section 2). Application for obtaining relief may be made according to the Civil Procedure Code, in one of two ways—either by regular procedure or by summary procedure. The former is the normal mode.....the latter is the exceptional mode.....No complaint can be made against the constitution of this action if the appropriate procedure was to file a regular action; but if the correct mode of proceedings was by petition, the fact that the plaintiff has made his application in the form of a suit may be regarded as a merely formal defect which has done nobody any harm, as the Court has jurisdiction to give relief. The decision in *Tambiah vs. Kasipillai* 42 N. L. R. 61 shows that the claim to a vesting order can be asserted by action".

Ambalavanar vs. Somasundera Kurukkal 48 N. L. R. 61 does not decide the point which now arises. In both the earlier cases, the plaintiff had filed an action in regular procedure on a cause of action against a defendant and he was permitted in both cases to tack on an application for a vesting order to the other relief he claimed. In the present case the Government Agent is not suing the respondent on a cause of action. All he has sought to do is to draw the attention of the proper Court to a certain state of facts and has invited that Court to make a proper order. In these proceedings no contest has arisen between rival claimants to the trusteeship.

I would refer to the provisions of section 595 of the Civil Procedure Code, which, although it does not effect the present case, is interesting as it deals with an analogous matter. Section 595 provides that "Applications to the District Court for the exercise of its jurisdiction for the appointment or removal of a trustee and not asking any further remedy or relief, may be made by petition in the way of summary procedure hereinbefore prescribed".

In my opinion where a person asks for a vesting order under section 112 of the Trusts Ordinance, without asking for any further remedy, the procedure must be by way of summary procedure and not by way of regular action. By proceedings by way of regular action the petitioner for a vesting order under section 112 would lose the vital and fundamental benefits of section 112 (2). The class of cases for which section 112 was designed are those in which the Court should act summarily and speedily and not by means of a protracted regular action. Section 595 gives an indication of what the proper procedure in a case like this should be. If in regard to the appointment and removal of a trustee summary procedure is necessary, it would appear to be equally necessary when it becomes the duty of the Court to vest a person with the status of trustee. The relief indicated in section 112 (3) appears to be more appropriate to summary procedure than to regular procedure. Proceedings under section 112 approach closely to the procedure under the Entail and Settlement Ordinance (cap. 54).

The resultant position which emerges from these considerations is that where a person without making any other claim against a person on a cause of action merely asks for one of the two kinds of relief mentioned in section 112 he should apply by way of summary procedure.

I, therefore, set aside the order appealed against, and direct that the District Judge should proceed with the inquiry. As the respondent did not appear at the hearing there will be no costs of appeal but the respondent must pay to the petitioner the costs of the proceedings in the District Courts.

JAYATILLEKE, C.J.

I agree.

Set aside and sent back.

Present : GRATIAEN, J.

B. G. WEERASINGHE vs. R. S. R. CANDAPPA

S. C. No. 50—C. R. Colombo, No. 23176

Argued on : 14th November, 1950
Decided on : 21st November, 1950

Landlord and tenant—Plaintiff's residential house compulsorily acquired by Crown—Defendant's premises purchased by plaintiff on defendant's promise to vacate premises—Defendant's refusal to vacate—No suitable accommodation—Ejectment—Rent Restriction Act 8 (c)—Premises reasonably required for occupation as a residence—Hardship caused to the tenant should be the basis in assessing reasonableness—Purchase of disputed premises a factor to be considered—Court's power to suspend ejectment order to mitigate hardship to tenant.

The plaintiff, who had to leave her residential house owing to compulsory acquisition by the Crown, was induced to purchase from R the premises, where the defendant was living as a tenant of R, on a promise by both R and the defendant that the premises would be vacated on the completion of the purchase.

The defendant later refused to vacate the premises and the plaintiff, who was then expecting, her husband and three children were temporarily accommodated in a small room in the house of plaintiff's father, who was himself under notice to quit.

The plaintiff sought to eject the defendant on the ground that the premises were " reasonably required for occupation as a residence " for the plaintiff and her family within the meaning of the Rent Restriction Act. The learned Commissioner dismissed the action because he was of the view that a person who becomes a landlord by purchase as in the circumstances of this case could not be said to require the premises reasonably within the meaning of the Ordinance and that the plaintiff would have succeeded if she had been the landlord from the commencement of the tenancy.

Held : (1) That the learned Commissioner had misdirected himself. The claim of a landlord, who is a purchaser of premises, to eject a tenant therefrom should be determined solely by reference to the reasonableness of his requirement for occupation, as in the case of any other landlord.

(2) That in considering whether premises are reasonably required for the occupation of a landlord, a Court should take into account, *inter alia*, the degree of hardship caused to the tenant by eviction.

(3) That where the hardship of the landlord either outweighs or is evenly balanced with that of the tenant, the landlord's claim must prevail.

(4) That where a landlord has obtained an order for possession the Courts have power to suspend the order for such a period so as to mitigate the hardship caused to the tenant by eviction.

Obiter :— The words " in the opinion of the Court " appearing in section 8 (c) of the Rent Restriction Ordinance make the trial Judge the final arbiter in determining the competing claims of landlord and tenant subject to the right of the appellate court to interfere where the trial judge has misdirected himself.

Cases referred to : *Gunasena vs. Sangaralingam Pillai* (1948) 49 N. L. R. 473.
Koch vs. Abeyasekera (1949) 51 N. L. R. 546.
Mendis vs. Ferdinands (1950) 51 N. L. R. 427.
Epps vs. Rothnie (1945) K. B. 562.
Coplans vs. King (1947) 2 A. E. R. 393.
Yoosuf vs. Suwaris (1950) 51 N. L. R. 381.
Wheeler vs. Evans (1949) L. J. R. 1022.

H. V. Perera, K.C., with *Ramalingam*, for the plaintiff-appellant.
H. W. Jayawardene, for the defendant-respondent.

GRATIAEN, J.

The defendant was the tenant of a bungalow in Colpetty under M. S. Raju who, at a later date, sold the premises to the plaintiff. The plaintiff and her family had earlier lived in her own house in Nugegoda, but this property was compulsorily acquired by the Crown in April, 1949, and a few months later she was obliged to vacate it on an order of Court. She accordingly negotiated with Raju for the purchase of the premises occupied by the defendant, and it was made clear to Raju and to the defendant that, in the circumstances in which she and her family were placed, vacant possession would be a condition of the purchase. The defendant gave an undertaking to vacate the house on the completion of the transaction, and there is no question that it was on the faith of this promise that the plaintiff purchased the property in August, 1949. Thereafter, for reasons which, owing to the acute housing shortage in Colombo, are understandable though not commendable, he refused to honour his undertaking. The plaintiff, her husband and three young

children were accordingly placed in a most embarrassing position, and they were compelled to make certain makeshift arrangements for their shelter. They were given temporary accommodation in a small room in the house occupied by the plaintiff's father who was himself under notice to quit. The situation was further complicated by the circumstance that the birth of yet another member of the family was anticipated in May, 1950. The defendant nevertheless pointed to his own difficulty in finding suitable accommodation for himself and his family, and he adamantly refused to quit the premises.

The plaintiff sued the defendant in the Court of Requests of Colombo on 6th October, 1949, to have him ejected. The defence was that the premises were "not reasonably required for occupation as a residence" for the plaintiff and her family within the meaning of the Rent Restriction Ordinance. This contention prevailed in the lower Court, and the present appeal is from the judgment of the learned Commissioner dismissing the plaintiff's action.

It is now settled law that in considering whether premises are reasonably required for the occupation of a landlord, a Court must take into account, *inter alia*, the degree of hardship which an order for eviction would cause to the tenant *Gunasena vs. Sangaralingam Pillai*, (1948) 49 N. L. R. 473. As Windham, J. points out, the lack of alternative accommodation for the tenant sought to be evicted is a relevant and indeed a very important factor for consideration, but "a case might well occur where, after duly considering the fact that there was no alternative accommodation, the Court might still consider that the landlord's requirement was reasonable". Mr. Jayawardene reminds me that in *Koch vs. Abeyasekera*, (1949) 51 N. L. R. 546, I had expressed the view that "the claims of a tenant who, in spite of diligent search, has failed to find alternative accommodation should be preferred to those of a landlord whose family does at least possess *a home in which they can continue to live*". This is still my view, but the principle cannot apply where, as in the present case, the landlord who claims to be restored to occupation of his own house is, at the relevant date, living precariously and in great discomfort in circumstances which make continuity of tenure in the other premises uncertain.

In *Mendis vs. Ferdinands*, (1950) 51 N. L. R. 427, my brother Dias, if I may say so with respect, had exhaustively analysed the effect of the earlier decisions as to the rules which should guide a Court in deciding between competing claims for premises to which the Rent Restriction Ordinance applies. He pointed that the landlord's claim must prevail when, in the Court's opinion, the hardship to the landlord either outweighs or is evenly balanced (as far as such matters can be assessed) with that of the tenant.

If the present case be considered on this basis in the light of the facts which have been accepted by the learned Commissioner, I think that the hardship to the plaintiff if eviction be refused would certainly not be less than the hardship which would be caused to the defendant if eviction were ordered. Indeed, the impression I have formed is that the learned Commissioner would himself have taken the same view in determining the balance of hardship *if the plaintiff had been the landlord from the commencement of the defendant's tenancy*. The learned Commissioner seems to have thought, however, that the circumstance that the plaintiff had only become a landlord by purchase and subsequent attornment was a disqualifying factor in her case. "A person who becomes a landlord in such fortuitous circumstances as have been established in this case", he said, "cannot be said to require the premises reasonably within the meaning of the Ordinance. The mere purchase of premises would not create in the purchaser a reasonableness which the law would recognise so as to entitle that person to eject the occupier. I therefore.....dismiss this action with costs".

In my opinion the learned Commissioner has gravely misdirected himself in permitting this factor to influence his judgment. It is no doubt true that *in England* a person who becomes a landlord by purchasing a dwelling house after a prescribed date is disqualified by statute from claiming an order for ejectment on the ground that the premises are reasonably required for his occupation (23 and 24 *Geo. vs. Cap.* 32 Schedule 1 para (*h*)). The intention of Parliament in introducing this enactment was to protect a tenant from having the house in which he lives bought over his head *Epps vs. Rothnie*, (1945) K. B. 562. The Ceylon Legislature, however, for reasons which it is not the function of this Court either to question or to praise has advisedly chosen not to disqualify persons who become landlords by purchase from claiming possession under the Rent Restriction Ordinance. The claim of such a person to eject his tenant must, as in the case of any other landlord, be determined solely by reference to the reasonableness of his requirement for occupation of the premises at the relevant date. In my opinion the circumstances in which the plaintiff came to enjoy the

status of a landlord cannot affect the issue one way or the other. It is the reasonableness of his present requirement for the premises which the Court must adjudicate upon.

Mr. Jayawardene argued that the words " in the opinion of the Court " appearing in section 8 (*c*) of the Rent Restriction Ordinance make the trial Judge the final arbiter in determining the difficult questions arising from the competing claims of landlord and tenant. This is certainly the view taken by the Court of Appeal in regard to analogous proceedings in England, subject, of course, to the right of the appellate Court to interfere where the trial Judge has misdirected himself—(*Vide Coplans vs. King*, (1947) 2 A. E. R. 393). As I have not had the advantage of a full argument on this point, I am content to assume for the purposes of this appeal—although I do not hold—that this principle should be adopted in Ceylon. In my opinion, for the reasons which I have already given, the learned Commissioner's judgment in the present case is vitiated by a clear misdirection in law, and I am satisfied that but for that misdirection he would himself have entered judgment in favour of the plaintiff. I accordingly allow the appeal and enter judgment in favour of the plaintiff as prayed for with costs here and in the Court below. Justice demands, however, that in order to mitigate the hardship which the order for ejectment will undoubtedly cause to the defendant, he should be given reasonable time within which to make other arrangements for the accommodation of himself and his family. I accordingly order that the writ of ejectment should not issue until 1st January, 1951.

In making this order, I am aware that in *Yoosuf vs. Suwaris*, (1950) 51 N. L. R. 381, my brother Basnayake questioned the legality of an order suspending the operation of a decree for ejectment in rent restriction cases except by consent of parties. I respectfully agree that where a Court has decided that the present requirement of a landlord for his promises is reasonable it is quite fantastic to make an order that he should nevertheless be deprived of possession for a very long period. On the other hand, there is precedent in England for suspending an order for ejectment for a short time so as to mitigate the hardship caused to the tenant, and it does not seem to me that these precedents can be traced to the differences in language which undoubtedly exist between the English Act and the local Ordinance. In both countries the question of reasonableness must be determined by reference to existing conditions, but, as Scott L.J. points out in *Wheeler vs. Evans*, (1949) L. J. R. 1022, " it is obvious that consideration of the question of hardship must, to some extent, include the future as well as the present ". In the same case, Asquith L.J. said, " An order for *immediate* possession may cause greater hardship to the tenant than its refusal would to the landlord, yet it may be that if the order were suspended for (a short time) it would cause less hardship to the tenant than its refusal would to the landlord ". The Court of Appeal accordingly upheld an order in favour of the landlord upon the condition that the order should be suspended for a period of four months. I see no compelling reason why the Courts in this country should be precluded from making similar orders when justice requires that they should be made.

Appeal Allowed.

Present : BASNAYAKE J. & GUNASEKERA, J.

MANUELPILLAI vs. NALLAMMA

S. C. No. 217—D. C. Jaffna, No. 4704

Argued on : 5th December, 1950
Decided on : 30th January, 1951

Donation—Revocability—Grounds for—Ingratitude—Personal violence—Laying of impious hands —Meaning of—Roman-Dutch Law,

Held : That a donor who suffers personal violence at the hands of the donee is entitled to an order of Court revoking the gift on the ground of " ingratitude ".

Per BASNAYAKE, J.—" Whether the Latin word ' impias ' is rendered impious as de Sampayo, J., has done or 'sacrilegious' as Krause has done, the legal position is the same. It is impious or sacrilegious for a donee who has derived benefits from a donor to strike him or use personal violence on him ".

Cases referred to : *Sivarasipillai vs. Anthonypillai* (1937) 40 N. L. R. 47.

Text Books referred to : Voet—Book XXXIX, Title V, Section 22, p. 25. (De Sampayo's translation.)
Voet—Book XXXIX, Title V, Section 22, p. 50. (Krause's translation.)
Van Leuwen's Censura Forensis—Book IV, Part I, Chapter XII, Section 20, p. 91 (Barber's translation).
Van Leuwen's Commentaries—Kotze's translation, Vol. 2, p. 235-236.
Huber's Jurisprudence of My Time—Vol. I, Sections 35-37, p. 477.
Maasdorp, Book III, Chapter II, Sections 16-17, p. 206.
Grotius, Book III, Chapter II, Sections 16-17, p. 287.
Lee's Grotius, pp. 310-311.
Burge's Commentaries on Colonial and Foreign Laws, Vol. 2, p. 146.
Domat—Vol. I, Treatise on the Civil Law, p. 406, Part I, Book I, Title X, Section III, Paras, 941-942.

S. J. V. Chelvanayakam, K.C., with *S. Thangarajah*, for the defendant-appellant.
S. Nadesan, with *H. W. Thambiah*, for the plaintiff-respondent.

BASNAYAKE, J.

This is an appeal from a judgment of the District Judge of Jaffna ordering the revocation of a deed of gift made by the plaintiff-respondent one Nallamma in favour of her husband one Soosaipillai Manuelpillai, the defendant-appellant.

Shortly the facts are as follows : The plaintiff is a Hindu and the defendant a Roman Catholic. Since the death of her first husband one Nagamany in July, 1943, the plaintiff lived with the defendant, her husband's carter, as man and wife till February, 1946, when they were married in Church. Both before and after the marriage the defendant acted cruelly towards the plaintiff. He assaulted her, extracted money from her, and forced her to execute transfers of her property. As life with the defendant was becoming intolerable, in May and December, 1946, she lodged complaints at the Chankanai Police Station. But in January, 1947, despite the harsh treatment meted out to her by the defendant, the plaintiff made a gift of all her lands to him reserving a life interest. Thereafter on 25th April, 1948, the defendant assaulted the plaintiff again and drove her out of the house. On the 26th of April, 1948, she once more lodged a complaint at the Chankanai Police Station. It reads :

> " Last night about 9 p.m., while I was in my house my husband Soosaipillai Manuelpillai came drunk and abused me in indecent language and assaulted me with hands all over my body and pulled me down and kicked me several times on my back. I raised cries. He then brought an axe and said that he will kill me with it by cutting if I raise cries. Through fear I did not cry out after. He then came up and held my hand and pulled me out and asked me to go out and not to step into his house."

The plaintiff did not thereafter make up with the defendant and on 27th July, 1948, the present action was instituted.

In the course of the trial it was admitted by both sides that this case was governed by Roman Dutch Law and it is on that footing that the case has been argued in the trial Court as well as here.

Learned Counsel for the appellant submitted that in the instant case there was no proof of ingratitude and that the plaintiff was therefore not entitled to revoke the donation. He cited the case of *Sivarasipillai vs. Anthonypillai* (1937) 40 N. L. R. 47 and contended that an assault committed by the husband on the wife did not come within any of the following five instances of ingratitude indicated in the judgment of Soertsz, J.—

> (1) the laying of impious hands of the donee on the donor,
> (2) the donee outrageously defaming the donor,
> (3) the donee causing the donor enormous loss,
> (4) the donee plotting against the donor's life,
> (5) the donee failing to fulfil the conditions annexed to the gift.

For the purpose of this case it is not necessary to discuss instances (3), (4), and (5).

Learned Counsel submitted that instance (1) does not apply to a case where the husband assaults the wife. He submitted that it applies only to cases where the donee is under a duty to treat the donor with respect as in the case of parent and child. He relies on the word " impious ", which is the rendering of the Latin word *impias* in de Sampayo's translation of Voet. Book XXXIX, Title V, Section 22, p. 25 Krause Book XXXIX, Title V, Section 22, p. 50 translates the relevant passage of Voet thus : " If the donee has laid sacrilegious hands on the donor (*i.e.*, has assaulted him.")

Reference to the other Roman Dutch commentators makes it clear that what de Sampayo has rendered as " if the donee should lay impious hands upon the donor " is only another way of saying that the donee has used personal violence on the donor.

In order to obtain a clear picture of the Roman Dutch Law on the point I have examined the works of the various commentators, whose statements of the law on this point are set out below.

(*a*) Van Leeuwen's Censura Forensis (Barber's translation) Book IV, Part I, Chapter XII, Section 20, p. 91.

"And so a duly constituted gift can never be revoked by the donor, unless the donee has turned out to be ungrateful, as, for instance, when he has damaged the honour of the donor, has used personal violence towards him, or has made an attempt on his life, or has wasted his property, or has not observed the agreement attached to the gift."

(*b*) Van Leeuwen's Commentaries Kotze's translation, Vol. 2, p. 235-236.

"Donations again may also be revoked and cancelled by reason of great ingratitude and injury done to the donor; as where the donee has attempted the life of the donor, assaulted him, or publicly slandered him, or has refused support to the donor who has been reduced to poverty, and the like."

(*c*) Huber's "Jurisprudence of My Time" Vol. I, Sections 35-37, p. 477.

"Yet there are also cases in which donations already made are invalidated, not through repentence or death of donor or donee, nor through loss of the deed of gift, nor alienation of the property donated, nor on the pretext that the donation would be to the prejudice of another, nor finally through command of the princeps or sovereign power of the country;

"36. But for two reasons only, firstly, on the ground of ingratitude of the donee towards the donor; and secondly, through subsequent birth of children.

"37. Ingratitude has five species or cases:

(1) If the donee has sought to take the life of the donor;

(2) If he has laid violent hands upon him;

(3) If he has grievously insulted him;

(4) If he has wrought great damage to his property; and

(5) If he has not observed the terms and expressed object of the donation which was made.

To this the jurists have added, not without reason, if one, who has obtained the donation of all or most of a person's property, refuses maintenance to the donor, when he has fallen into property."

(*d*) Grotius:

(i) Maasdorp's translation Massdorp, Book III, Chapter II, Sections 16-17, p. 206.

"16. A donation once made is valid and irrevocable.

"17. Unless the acceptor attempts the life of the donor, or strikes him, or attempts to ruin his estate. Malicious slander or any other great injury gives the same right, except to mothers who marry a second time. Causes of equal or greater weight are also held to have the same force, amongst others the neglect of the acceptor (if he has the means) to maintain the donor in his utmost need."

(ii) Herbert's translation Grotius, Book III, Chapter II, Sections 16-17, p. 287.

"A donation once made is binding and irrevocable.

"Unless the acceptor has attempted the life of the donor, or inflicted on him personal violence, or has contemplated making all his property of no value. Slander, or reproach, or other grievous injury, confers the same legal effect except to mothers who have married a second time. Matters of the same or greater weight are also considered to be of the same consequence and amongst these also the refusal of the acceptor (should he have the means) to support the donor in his utmost need."

(iii) Lee's translation, Lee's Grotius, pp. 310-311.

"A gift once made retains its force and cannot be revoked.

"Unless the donee has attempted the donor's death, beaten him, or sought to deprive him of all his property. Outrageous slander or other great injury gives the same right of revocation, except to mothers who contract a second marriage. Causes of equal or greater weight are held to have the same effect, and amongst them if the donee, having the means, has refused to support the donor in his utmost need."

I have also consulted Burge and Domat. Burge Burge's Commentaries on Colonial and Foreign Laws, Vol. 2, p. 146 expresses his view thus:—

"A donation may become revoked by the non-performance of the condition to which it has been made subject, or *ob ingratitudinem donatarii*. In the first case, the donation is determined by the very terms in which it is granted; in the latter, it is not revoked *ipso jure*, but only by the sentence of the Judge, *post plenam causae cognitionem*. The causes for which it may, on the latter ground, be revoked consist of personal violence against the donor, attempts on his life, or some great damage to his property."

Domat Vol. I, Treatise on the Civil Law, p. 406. Part I, Book I, Title X, Section III, Paras 941-942 says:—

"The first engagement of the donee is to satisfy the charges and conditions of the donation, when there are any; and if he fails in it, the donation may be revoked, according to the circumstances. (Art, I, Para, 941)."

"The second engagement of the donee is thankfulness for the benefit received; and if he is ungrateful to the donor, the donation may be revoked according as the deed of the donee may have given occasion for it. Thus, the donor may revoke the donation, not only if the donee makes any attempt upon his life or honour, but likewise if he commits any violence or outrage upon his person, or does him any injury; or if he occasions him any considerable loss by unfair practices. (Art II, Para, 942)."

I have quoted extensively from the commentators both ancient and modern in order to show that there is no difference of opinion among them on the question before us. Whether the

Latin word *impias* is rendered "impious" as de Sampayo has done or "sacrilegious" as Krause has done, the legal position is the same. It is impious or sacrilegious for a donee who has derived benefits from a donor to strike him or use personal violence on him. It is in that sense that I understand that these words have been used by the learned translators and not in the sense in which learned Counsel submits they should be construed.

It is clear therefore that in the instant case as the donee has used violence on the donor, the donor is entitled to an order of Court revoking the deed of gift, except in so far as it affects those who have prior to the institution of this action purchased any of the lands gifted to the donee by the donor by her deed No. 1730 of 13-1-47.

The appeal is dismissed with costs.

Appeal dismissed.

Gunasekera, J.
I agree.

Present : Dias, S.P.J.

W. UKKU BANDA vs. M. TIKIRI BANDA

S. C. No. 185, 1950—*C. R. Panwila, No.* 814

Application for Leave to Appeal

Argued on : 21st December, 1950
Decided on : 17th January, 1951

Agreement—Cultivation of land in Anda—*No evidence of duration of contract or of land being chena or paddy—Enforceability—Section 2 of the prevention of Frauds Ordinance (Chapter 57)—Exception to—Section 3 (1) of the Ordinance—What must be proved.*

The plaintiff alleged that on an informal agreement with the defendant, he had undertaken to cultivate jungle land and to give the defendant a share of the produce.

The plaintiff further alleged that in breach of the agreement the defendant appropriated the whole of the produce and claimed Rs. 500 as damages. The defendant denied any such agreement and contended that the plaintiff was a labourer employed to clear chena land, for which he had been paid his wages.

The Commissioner found that the plaintiff was not a labourer and that there was an informal agreement by the parties to share the produce of the land. There was no evidence as to the date and duration of the agreement or that the land was chena or paddy.

Held : (1) That the agreement was obnoxious to section 2 of the Prevention of Frauds Ordinance.

(2) That in order to succeed in his claim the plaintiff must establish his case as one coming within the exception referred to in section 3 (1) of the Ordinance.

(3) That a plea under section 3 (1) can only succeed on proof—
(*a*) that the land is a paddy field or chena land.
(*b*) that the informal contract or agreement was for a period not exceeding twelve months ; and
(*c*) that the consideration of such contract or agreement is that the cultivator is to give the owner a share of the crop or produce.

Cases referred to : *Sayatoo vs. Kalinguwa* (1887) 8 S. C. C. 67.
De Silva vs. Thelenis (1916) 3 C. W. R. 130.
Eliyas vs. Savunhamy (1914) 18 N. L. R. 82.

T. B. Dissanayake, for the petitioner and the defendant-appellant.
P. Somatilakam, for the plaintiff-respondent.

Dias, S.P.J.

The defendant-appellant had obtained leave and licence from the Superintendent of Hatale Estate to cultivate a piece of jungle land belonging to the estate. The appellant says it was "a little more than ¼ of an acre".

The plaintiff's case is that by an informal oral agreement he and the appellant agreed that the plaintiff was to cultivate this land and that he should appropriate ¾ of the produce and render to the appellant a ¼ share. The plaint does not state, nor does the evidence indicate, when this informal agreement was entered into or for what

period it was to continue. These facts have a material bearing on this case.

Plaintiff's complaint is that the appellant on August, 21st 1949, wrongfully appropriated the whole of the produce to the plaintiff's loss and damage of Rs. 500. The appellant's case is that there was no agreement between plaintiff and himself, and that the plaintiff was a labourer who was employed to clear half an acre of chena land, and that the plaintiff worked for about a week and was paid his wages.

The Commissioner of Requests has held, and his finding cannot be disturbed, that plaintiff was not a labourer, but that there was an informal agreement between the parties under which the plaintiff and the appellant were to share the produce.

The manner in which the issues have been framed and the evidence led have tended to mask the real issue which arose for decision. At the commencement of the trial the parties framed six issues. After the plaintiff had closed his case, and the appellant was in the witness box, the defence raised the real issue in the case, viz., No. 7, which the Commissioner noted as Issue 1. On July, 21, 1950, after the case was closed, the Judge reserved his judgment until August, 4, 1950. On that day the date was put off until August, 11. On that day the Commissioner recorded "I am framing the following additional issues," which he proceeded to number 5 to 8, overlooking the fact that there were already in existence the earlier issues 5 to 7. In his judgment he has answered Issues 1 to 8 and has ignored the other three. Furthermore, both Counsel and I found it difficult to ascertain what the issues were which he was dealing with.

The real question for decision is this : It being conceded that the informal oral agreement is one which is obnoxious to the provisions of section 2 of the Prevention of Frauds Ordinance (Chapter 57) is it saved by the provisions of section 3 (1) of that Ordinance ?

The onus on that issue lies on the plaintiff, but the evidence is far from clear. It is plain from the difficulties which the Commissioner encountered in writing his judgment, that it was the vague manner in which the plaintiff either deliberately, or inadvertently, led his proof, that caused all the trouble.

Section 3 (1) of Chapter 57 reproduces the provisions of Ordinance No. 21 of 1887. This statute was enacted by reason of the decision of the Full Bench in *Sayatoo vs. Kalinguwa* (1887) 8 S. C. C. 67 where it was laid down that an agreement between parties for the cultivation of land in *anda* is a contract or agreement for establishing an interest affecting land within the meaning of section 2 of the Prevention of Frauds Ordinance. Burnside C.J. said :—

> "I do not think we should concern ourselves in interpreting the law, whether our decisions would encourage or discourage agriculture, or impose hardships. We should not make law"

Clarence J. said :—

> "If the operation of the enactment will be to inflict hardship, we must leave it to the Legislature to interpose ; we are not at liberty on that account to legislate ourselves" Dias J. was of the view that the provisions of section 2 of the Prevention of Frauds Ordinance was 'to do away with *anda* cultivation' naturally, this was a severe blow to the peasants who from time immemorial had given their paddy fields and chenas for cultivation in consideration of the cultivators being paid for their labour by a share of the produce. The Legislature therefore intervened.
>
> The preamble to Ordinance No. 21 of 1887 says :— "Whereas it is expedient to exempt certain contracts for the cultivation of paddy fields and chena lands from the operation" of Ordinance No. 7 of 1840 (Chapter 57). Section 1 of the Ordinance enacts :—
>
> "The provisions of section 2 of the Ordinance No. 7 of 1840 shall not be taken to apply to any contract or agreement for the cultivation of paddy fields or chena lands for any period not exceeding twelve months, if the consideration for such contract or agreement shall be that the cultivator shall give the owner of such fields or land any share or shares of the crop or produce thereof."

This section with a few immaterial amendments has been reproduced as section 3 (1) of Chapter 57 in the Revised Edition of the Ordinances.

It is therefore, clear that in order to obtain the benefits of this provision it must be proved :

(*a*) that the land is a paddy field, or a chena land ;

(*b*) that the informal contract or agreement must be for a period not exceeding twelve months ; and

(*c*) the consideration of such contract or agreement must be that the cultivator is to give the owner a share of the crop or produce.

Should the proof fail on any one of these points, section 3 (1) will not apply, and the case will be caught up by the general rule in section 2 which makes the informal agreement of no force or avail.

In *de Silva vs. Thelenis* (1916) 3 C. W. R. 130 referring to section 3 (1) de Sampayo J. said :—

> "When an exception is introduced into the general law, the rule I think is to construe the exception strictly, so that the general law may have full operation, subject only to the particular exception."

Therefore, the onus lay upon the plaintiff in this case to bring his case fairly and squarely within the exception, and not leave it, as he has done, in a nebulous state.

This land is not a paddy field. The plaintiff has not satisfied the Commissioner that it is a chena, for the Judge says that "the nature of the crop suggests that this land was more a chena land and not a regularly cultivated land." Section 3 (1) does not apply to a land which is "more a chena than a regularly cultivated land." It was the duty of the plaintiff to have proved to the Judge's satisfaction that it was a chena at the date he took it for cultivation. There is, however, a more serious obstacle in the way of the plaintiff. It was his duty also to prove that his agreement with the defendant was for a period "not exceeding twelve months." If it was for a longer period, the provisions of section 3 (1) will not apply.

The case of *Eliyas vs. Savunhamy* (1914) 18 N. L. R. 82 is in point. The informal agreement in that case was for an indefinite period of future cultivation, and it established in effect a kind of partnership in the land. The facts also disclosed that this partnership had continued for seven years prior to the action being filed. Therefore, de Sampayo J. held that the case fell under section 2 and not under section 3 (1). I respectfully agree.

I set aside the judgment and decree appealed against and send the case for a new trial on the following specific issues :—

(*a*) On what date was the informal agreement entered into between the plaintiff and the defendant ?

(*b*) Was the said agreement for a period not exceeding twelve months ?

(*c*) Was the said land a "chena" land within the meaning of section 3 (1) of Chapter 57 at the date of the agreement ?

Plaintiff will be entitled to succeed only if he proves that the agreement was for a period not exceeding twelve months, and that at the date of the agreement the land was a chena.

The new trial shall take place before another Commissioner.

The parties shall not be at liberty to canvas the question that plaintiff was a cultivator and not a labourer.

Each party will bear their costs of the first trial and of this appeal. All other costs will be in the discretion of the Commissioner of Requests.

Set aside and sent back for trial on specific issues.

Present : Basnayake, J. & Pulle, J.

PERERA AND OTHERS vs. PERERA

S. C. No. 58—*D. C. (Inty.) Colombo, No.* 6329/*S*

Argued and decided on : 13th October, 1950

Civil Procedure Code—Money decree—Examination of debtor under section 219—*Writ issued but unexecuted for want of debtor's address—Subsequent application to re-issue writ—Due diligence—Section* 337 *Civil Procedure Code.*

The plaintiff, a decree holder against the defendant, discovered after examination of the defendant under section 219 of the Civil Procedure Code, that his assets were so small that no useful purpose would be served by selling them in execution. He, however, obtained a writ, which was returned unexecuted owing to plaintiff's failure to furnish the defendants' address. Two years thereafter, the plaintiff applied to the Court for a re-issue of the writ, which was refused on the ground that on the last preceding application the plaintiff had not exercised due diligence to procure complete satisfaction of the decree.

Held : That in the circumstances the plaintiff could not be said not to have used due diligence and the application to re-issue should have been allowed.

Case referred to : *Palaniappa Chetty vs. Gomes et al* (1895) 1 N. L. R. 356 ; *Perumal Chetty vs. Perera* 2 Brown 29 ; *Ephraims vs. Silva* (1903) 6 N. L. R. 301.

H. W. Thambiah, for the plaintiff-appellant.

G. T. Samarawickrema, for the defendant-respondent.

BASNAYAKE, J.

The appellant appeals from the judgment of the District Judge refusing his application to execute a decree in his favour on the ground that he has not satisfied the Court that on the last preceding application due diligence was used to procure complete satisfaction of the decree.

The facts shortly are as follows :—

The defendants to this action were sued on a promissory note and it was ordered and decreed that they do jointly and severally pay to the plaintiffs a sum of Rs. 868·50 with interest thereon at 18 per centum per annum from 13th January, 1945.

Within a month of the decree the plaintiff applied for the execution of the decree against the 2nd defendant, and he was examined under section 219 of the Civil Procedure Code. He stated : " I have no movable property in Kalutara nor in Horana. I have two deeds pertaining to certain lands within the Kalutara District. I have the particulars of those deeds. I have no other immovable property nor have I any sort of business. I am jobless and am being supported by my relatives. I have been sick for a long time ".

An examination of the deeds referred to by the 2nd defendant revealed that his interests thereunder were so small that no useful purpose would be served by proceeding to sell them in execution. That examination was in September, 1947. Writ was however issued and it was returned unexecuted as the 2nd defendant's residential address was not furnished by the plaintiff. The plaintiff explains his omission to do so. He says he did not know the 2nd defendant's address. Thereafter in June, 1949, the plaintiff applied for a re-issue of the writ and objection was taken and upheld on the ground abovementioned.

The material portion of the provision of the Code under which the learned District Judge has acted reads : " Where an application to execute a decree for the payment of money or delivery of other property has been made under this Chapter and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree....."

In the instant case before taking out writ of execution the plaintiff had the 2nd defendant examined under section 219 of the Civil Procedure Code. His evidence disclosed that his assets were a share in a land worth Rs. 30 and an interest in a mortgage bond for Rs. 50. In those circumstances the plaintiff cannot be blamed for not proceeding to execution at that stage.

The prohibition is against granting a second application when due diligence was not used to obtain complete satisfaction of the decree. It would be unwise to lay down a general rule as to what constitutes due diligence in the context of section 337. Each case would depend on its own circumstances. But where the defendant when examined under section 219 of the Civil Procedure Code discloses that he has no assets which the plaintiff may usefully seize in execution of his decree and the plaintiff desists from proceeding to execution immediately, he cannot in our opinion be said not to have used due diligence. Our view is in accord with the previous decisions of this Court. *Palaniappa Chetty vs. Gomes et al.*, (1895) 1 N. L. R. 356. *Perumal Chetty vs. Perera*, 2 Brown 29. *Ephraims vs. Silva*, (1903) 6 N. L. R. 301.

We see no ground on which the plaintiff's present application can be refused.

The appeal is allowed with costs here and in the Court below.

Appeal allowed.

PULLE, J.

I agree.

Present : BASNAYAKE, J.

PAKIADASAN vs. MARSHALL APPU

S. C. 182—*C. R. Colombo* 24821

Argued on : 22nd January, 1951.
Decided on : 27th February, 1951.

Landlord and tenant—Lease of grass land and vegetable enclosure only—Are they " premises " within the meaning of Rent Restriction Act No. 29 of 1948 ?

Held : That the word " premises " in the Rent Restriction Act (No. 29 of 1948) is used in the sense of a building with the land appurtenant thereto devoted to residential or business purposes and does not apply to a grass land and vegetable enclosure where there is no building and where nobody lives.

Cases referred to : *Beacon Life & Fire Assurance Co. vs. Gibbs* (1 Moore, P. C., N. S., p. 97).
Poynten vs. Cran, (1910) A. D. 205 at 218.
Maxwell on Interpretation of Statutes, 9th Edn., p. 6.

S. Canagarayar, for the defendant-appellant.
H. A. Koattegoda, with *Ratwatte*, for the plaintiff-respondent.

BASNAYAKE, J.

The question that arises for decision on this appeal is whether a grass field within the Municipality of Colombo comes within the ambit of the Rent Restriction Act No. 29 of 1948 (hereinafter referred to as the Act).

The land in question is a grass land and vegetable enclosure within the Municipal limits of Colombo in extent five acres let at a monthly rent of Rs. 190. There is no dwelling house on the land and nobody lives thereon. The defendant claims to have improved it by planting grass and vegetables at considerable expense.

Section 2 (4) of the Act provides that so long as it is in operation in any area, its provisions " shall apply to all *premises* in that area, not being excepted premises ". The expression " premises " is not defined in the Act. We have therefore to ascertain the sense in which the word is used in section 2 (4). In a deed the " premises " are all the parts preceding the *habendum*. In popular language it is applied to buildings, *Beacon Life and Fire Assurance Co. vs. Gibbs* (1 Moore, P. C., N. S. p. 97). Its original meaning in law was the thing previously expressed. The development of the expression is thus stated by Innes J., *Poynten vs. Cran*, (1910) A. D. 205 at 218. :

" It was the English custom, in leases and other dispositions of real estate, to set out initially the names of the parties, and also a detailed description of the property dealt with. This was referred to in subsequent portions of the document as the " premises "—the things already premised. Gradually the expression was also used to indicate not the description of the property leased, but the property itself. Hence its popular meaning came to be a building with the ground and other movable adjuncts belonging to it."

The golden rule of interpretation is that the words of a statute must *prima facie* be given their ordinary meaning, Maxwell on Interpretation of Statutes, 9th Edn., p. 6. I have examined the various provisions of the Act and find therein nothing that requires the word to be given any special meaning. In fact sections 5, 6, 7, 10 and 11 appear to my mind to indicate that the Act uses the word " premises " in the sense of a building with the land appurtenant thereto devoted to residential or business purposes.

I therefore hold that the grass field and vegetable enclosure in question do not come within the ambit of the Act.

The appeal is dismissed with costs.

Appeal dismissed.

Present : BASNAYAKE, J. & SWAN, J.

FRANCISCO vs. SWADESHI INDUSTRIAL WORKS LIMITED

S. C. 305—*D. C. Colombo* 3759/*L*

Argued on : 14th December, 1950.
Decided on : 27th February, 1951.

Fidei-commissum—*Deed of gift prohibiting only sale or mortgage—No direction in the event of sale or mortgage—Beneficiaries not clearly designated—Term " authorized person " in deed too vague to denote class of beneficiaries—Translation—Not proper for Judge to substitute his own version in place of official version of document in language other than English.*

By deed the donor gifted certain properties reserving to himself possession of them during his life time and undertaking not to sell or mortgage them. The deed further stipulated that after the death of the donor " the said donee Juan Agonis Perera Appuhamy and his descendants and his heirs executors administrators and assigns and authorized

persons shall be at liberty to transact the same among each of their co-heirs but shall not in any manner sell or mortgage any one of the said lands with the intention of alienating the same". The deed contained no direction as to the devolution of properties in the event of the donee or those taking after him violating the prohibition.

Held: That the deed did not create a valid *fidei-commissum* because (*a*) the prohibition to alienate property was limited to sale and mortgage only and consequently the donee was permitted to donate or dispose of the property by last will; (*b*) the deed did not clearly indicate the class of persons who would be entitled to the property in the event of the donee violating the prohibition; (*c*) the use of the term "authorized person" in the deed was too uncertain in meaning and too vague to designate clearly the class of persons the donor intended to benefit under the deed.

Per BASNAYAKE, J. Where the parties are not agreed as to the true rendering into English of a document which is in a language other than English they should produce evidence through the testimony of experts versed in the language in which the document is written so that the Court may decide the dispute on the evidence before it. It is wrong for the Judge however well versed he may be in the language in which the document is written to undertake its translation and adopt a version on which neither party has placed before him.

Cases referred to: *Cornelis vs. Uluwitike*, (1895) 1 N. L. R. 248.
Sellamani Ammal vs. Thillai Ammal (1946) A. I. R. Privy Council 185 at 187.
Rai Harendra Lal Roy Bahadur Estates Ltd. vs. Hem Chandra Naskar and another (1949) A. I. R. Privy Council 179.
Salonchi vs. Jayatu (1926) 27 N. L. R. 366; Van Leeuwen's Censura Forensis, Bk. III. Ch. VII. Sec. 7.
Cruse vs. Executors of Pretorius, (1879) 9 Buchanan 124.
Siti Kadija et al vs. de Saram et al, (1948) 47 N. L. R. 171.
Salonchi vs. Jayatu, (1926) 27 N. L. R. 366 at 371.
Meiya Nona vs. Dawith Vedarala, (1928) 31 N. L. R. 104 at 106.

E. Amarasinghe with *J. W. Subasinghe*, for the plaintiff-appellant.
N. E. Weerasooria, K.C., with *W. D. Gunasekera*, for the defendant-respondent.

BASNAYAKE, J.

The only question that arises for decision on this appeal is whether Deed No. 867 dated 16th May, 1856, attested by W. B. Fernando, Notary Public, creates a *fidei-commissum*. By that deed one Jackovis Perera Appuhamy gave a gift of two portions of land called Millagahawatte and a field called Halpankotuwa to his brother Juan Adonis Perera in the following terms:—

"I, Wattege *alias* Kanugalawattege Jackovis Perera Appuhamy of Ekala in the Ragam Pattu of Alutkuru Korale, in consideration of the love and affection which I have and bear unto my brother Wattege *alias* Kanugalawattege Juan Agonis Perera Appuhamy of Kandana in the said Pattu with my free will and consent do hereby give grant and assign by way of gift unto the said Juan Agonis Perera Appuhamy, the following lands..... (here follows a description of the lands) .....

"And I the said Jackovis Perera Appuhamy shall be at liberty to possess the said lands from this date during my lifetime, but shall not sell or mortgage the same. And I do hereby declare that I or my heirs executors administrators and assigns shall not have any right or title hereafter against this gift.

"That after the possession of the said premises by me the said Jackovis Perera Appuhamy and after my death the said donee Juan Agonis Perera Appuhamy and his descendants and his heirs executors administrators and assigns and authorised persons shall at all times subject to the rules and regulations of the Government be at liberty to transact the same among each of their co-heirs but shall not in any manner sell or mortgage any of the said lands with the intention of alienating the same and such acts are hereby cancelled.

"That all the right title and interest which I the said Jackovis Perera Appuhamy have held in and to the said premises shall after my death devolve on the said Juan Agonis Perera Appuhany under and by virtue of this deed of gift."

The deed is in Sinhalese, and I have quoted from the translation produced by the appellant. The defendant also produced a translation, but there is no material difference between the two.

Learned counsel invited us very earnestly to read the original Sinhalese deed which the learned trial Judge appears to have examined. He submitted that the word "pradanakota" therein had not been properly rendered in either translation. We refused to accede to learned counsel's invitation as we were of opinion that it was not our proper function to attempt to translate the Sinhalese document. English is the language of our Courts, *Cornelis vs. Uluwitike*, (1895) 1 N. L. R. 248. Whether a document in a language other than English has been correctly rendered into English is a question of fact. Where the parties are not agreed as to the true rendering into English of a document which is in a language other than English they should produce evidence through the testimony of experts versed in the

language in which the document is written so that the Court may decide the dispute on the evidence before it. It is wrong for the Judge however well versed he may be in the language in which the document is written to undertake its translation and adopt a version which neither party has placed before him, *Cornelis vs. Uluwitike* (1895) 1 N. L. R. 248. The danger of such a course has been pointed out more than once by the Privy Council. It will be sufficient here to refer to two of its most recent decisions. In the case of *Sellamani Ammal vs. Thillai Ammal* (1946) A. I. R. Privy Council 185 at 187 the High Court formed the opinion that the official translation was incorrect without the aid of expert testimony and having corrected it based its findings of fact thereon. Lord Simonds delivering the judgment of the Privy Council observed in that case : "Their Lordships would once more express the view that it is not legitimate for the Court to depart from the official translation except upon expert evidence which the parties should have an opportunity of testing ".

In the later case of *Rai Harendra Lal Roy Bahadur Estates Ltd. vs. Hem Chandra Naskar and another* (1949) A. I. R. Privy Council 179, Sir John Beaumont stated : " Their Lordships have laid it down in several cases that it is the duty of Courts in India to act upon the official translation of documents unless there is expert evidence which justifies the rejection of such translation. It may no doubt often happen that a Judge in India knows the vernacular in which a document is written, and he may be as well qualified as the official translator, or even better qualified, to render a correct translation of the document into English. The trouble, however, is that the Judge is not a witness, and the parties are not in a position to test the translation which he makes ; whilst if the matter is taken in appeal to the Privy Council, the Board have no material upon which they can estimate the linguistic qualifications of the Judge."

I shall now proceed to consider the submission of learned counsel that the deed in question constitutes a *fidei-commissum*. Etymologically the expression *fidei-commissum* signifies something entrusted to one's good faith, because originally the heir or executor was free either to comply with the testator's request or not as he thought fit. Afterwards the heirs or executors were compelled by law to execute such fiduciary bequests. According to Van Leeuwen, Van Leeuwen's Roman Dutch Law, Kotze's translation, Book III, Chap. VIII, Section 1, a *fidei-commissum*, or inheritance over the hand (*ervenis over de hand*), otherwise, entailed or fastened inheritance, occurs where in the reliction of inheritance the heir is enjoined after a certain time, or after his death, to hand over the inheritance, either in whole or in part, to another. *Fidei-commisum* can be imposed not only by will but also by an act *inter vivos*, Voet, Book XXXVI, Title 1, Section 9, MacGregor's translation. In the title on Donations, Voet, Book XXXIX, Title 5, Section 43, Krause's translation observes : " It has been said in the title *ad Senatusconsultum Trebellianum* (Voet 36-1-9) that donees can be burdened by the donor with a *fidei-commissum*, and that the *fidei-commissary* has an equitable action *in personam*, not *in rem*, and that in this respect *fidei-commissa* attached to a donation differ from those bequeathed by last will ". In the earlier title , Voet, Book XXXVI, Title 1, Section 9, MacGregor's translation, Voet says : " There is no doubt that *fidei-commissa* can be imposed not only by will but also by an act *inter vivos*, if only a stipulation be attached to the donation providing for the restitution of the gift to a third party, so much so that the party to whom restitution has to be made has the *utilis actio personalis* (equitable action *in personam*) founded on equity, for the recovery of the object so held in trust. But no real action would lie ; and in this respect *fidei-commissa* constituted by act *inter vivos* differ in Roman Law from those constituted by last will. With us also it has become the accepted practice that *fidei-commissa* can unquestionably be made by act *inter vivos*, especially in ante-nuptial contracts, and in such wise as to constitute a real charge on the property, provided the *fidei-commissa* be duly registered ".

No particular words are necessary to create a *fidei-commissum*. The language used must clearly express the intention of the testator or donor that the gift is not absolute to the donees and there must be an unambiguous indication of the persons to be benefited and when they are to benefit, (1926) 27 N. L. R. 366, *Salonchi vs. Jayatu* Van Leeuwen's Censura Forensis, Bk. III, Ch. VII, Sec. 7.

Where there is a doubt as to whether a *fidei-commissum* has been constituted the construction should be preferred which will give the legatee, heir or donee the property unburdened, *Cruse vs. Executors of Pretorius*, (1879) 9 Buchanan 124. Doubt as to whether a valid *fidei-commissum* has been created includes such a doubt as to the identity of the beneficiaries as will prevent their ascertainment by a Court of law, *Sitti Kadija et al vs. de Saram et al*, (1946) 47 N. L. R. 171.

Now when we turn to the deed we find that the donee and those taking after him are prohibited

only from selling or mortgaging the property. A prohibition against alienation is under our law strictly construed and is not extended to modes of alienation other than those expressly mentioned in the instrument, Voet, Book XXXVI, Title I, Section 27. Voet says: "But in those cases where a simple prohibition against alienation is valid, according to what we have just stated, and has to be carried out, the prohibition is strictly interpreted, and not extended to modes of alienation other than those expressly mentioned by the testator. And so, although it be true that under the general prohibition of alienation even alienation by last will is forbidden, yet, if any one by last will should forbid the heir to sell or encumber the property left him, *no* fidei-commissum *is constituted by such a disposition*, nor is the heir considered to be restrained from disposing of such property by last will, more especially if you bear in mind that dispositions by last will are more favoured than those which come about through an act *inter vivos*. So that a prohibition contained in a will against any alienation by act *inter vivos* must not be extended to testamentary disposition".

On this same topic Sande on Restraints—Webber's translation, pp. 184-185 and 187; Burge—Colonial & Foreign Laws, Vol. II, p. 114, says: "And, therefore, we should construe neither contracts, nor last wills, nor enactments, nor statutes, in such a manner as, when a sale is prohibited, to say that every other form of alienation is also prohibited; unless it is perfectly clear that a sale is mentioned with regard not so much to the special mode of alienation, but rather to the transfer of dominium, an object which we have in view just as much in other forms of alienation as in a sale, for then the mention of a sale is considered to be made only for the sake of supplying an example. Moreover, when a sale, a donation, and a pledge are prohibited, alienation by last will is considered to be permitted".

The donee Adonis was therefore in law free to donate the property or dispose of it by last will. In those circumstances there can be no *fidei-commissum*.

The deed is subject to a further infirmity. It does not contain a stipulation restoring the property to a third person in case the property is sold or pledged contrary to the prohibition therein,—Burge—Colonial & Foreign Laws, Vol. II, p. 113. The deed speaks of descendants, heirs, executors, administrators, assigns and authorised persons. What was to happen if Adonis himself violated the prohibition? To whom was the property to go? Was it to his descendants or heirs or his assigns or authorised persons? The instrument provides no answer to these questions.

There is a further difficulty in the way of the appellant. The instrument mentions "authorised persons" among the class of persons to be benefited but contains no clue as to its meaning. It is not an expression the meaning of which is established, nor am I able to ascertain what class of persons the donor had in mind when he used it. He must therefore fail for the further reason that the donor has not designated clearly the persons whom he seeks to benefit, for, a prohibition against alienation will not create a *fidei-commissum* but is perfectly nugatory, unless the persons are designated in favour of whom the testator or donor declares the prohibition, *Salonchi vs. Jayatu* (1926) 27 N. L. R. 366 at 371.

If the donor meant to constitute a *fidei-commissum* I am afraid the Notary has effectively thwarted his intention. The instrument being a donation it must be construed according to the written word, *Meiya Nona vs. Davith Vedarala*, (1928) 31 N. L. R. 104 at 106. The intentions of donors and testators have been defeated by notaries not only today but also in times past, for Van Leeuwen says Censura Forensis, Book III, Chapter V, Section 3: "Notaries frequently through long established custom make use of improper expressions and do not always use the right terms and words, and their want of skill furnishes a harvest to advocates, especially in respect of last wills, in which they insert very frequently, on account of their ignorance of law, clauses taken from old fashioned forms of theirs, which they themselves do not understand, and which are clearly superfluous, and sometimes inconsistent with the intention of the testator". Van Leeuwen even goes to the extent of quoting the disparaging observations of Carpzovius, who says: "Notaries for the most part are like singers who by practice learn to sing well, but do not know the meaning of their song, like parrots which stand in the palaces of their owners and do not know what they are saying, and they wish to heal all diseases with one medicine: ..... the brothers of ignorance, amongst whom for every one learned and skilful man to be found there are twenty-five unlearned ones, who have no knowledge of law".

Clearly, the deed does not constitute a *fidei-commissum*.

The appeal is dismissed with costs.

SWAN, J.

I agree.

Appeal dismissed.

Present : GRATIAEN, J. & GUNASEKARA, J.

MOHAMED SALIH vs. FERNANDO *et. al.*

S. C. No. 258—*D. C. Colombo, No.* 17762/*M*

Argued on : 31st January, 1951
Decided on : 13th February, 1951

Bailment—Contract of—Loss of goods entrusted to bailee—Action for compensation for loss—Measure of damages—Can damages for pain of mind be awarded—Sentimental value of goods—When should it be taken into consideration.

Held : (1) That in an action based on contract against the bailee for compensation for the loss of goods entrusted by the bailors, the assessment of such claim, as in other actions for breach of contract, should be based on the principle of *restitutio in integrum, i.e.* the plaintiff must be placed as far as money can do it in as good a situation as if the contract had been performed.

(2) That in such an action the plaintiff is not entitled to any damages for pain of mind unless it has been established by evidence that such pain of mind resulted in patrimonial loss capable of estimation in terms of money.

(3) That sentimental importance attaching to goods has no relevance where the goods have been entrusted to and lost by a 3rd party under a commercial transaction.

Per GRATIAEN, J.—"If it was intended to claim damages from the defendant on the basis of a tort, the allegation of fraud or deceit should have been specifically and unequivocally made so that he could have had the opportunity of meeting it."

Cases referred to : *British Westinghouse Co. vs. Underground Railways of London* (1912) A. C. at 688.
Rodacanachi vs. Milburn (1886) 18 Q. B. D. 667.
Law of Contract in South Africa (Vol. 2, page 921, para. 3192).
Wessels, Vol. 2, page 944, paras. 3281 to 3283).

Cyril E. S. Perera, with *A. M. Ameen,* for the appellant.
C. Thiagalingam, K.C., with *N. M. de Silva* and *J. V. M. Fernando,* for the respondents.

GRATIAEN, J.

The respondents to this appeal are husband and wife. On the occasion of their marriage in 1937 the 2nd plaintiff received from her father a substantial dowry including certain valuable articles of jewellery which had belonged to her mother. In October, 1945, a brilliant necklace and three gold bangles which formed part of this gift were in need of repairs, and the plaintiffs entrusted them for this purpose to the defendant who was a jeweller. The arrangement was that the work should be completed within 10 days ; the plaintiffs called twice at the defendant's shop after the due date, however, but were put off with various excuses and requested to return later. On 27th December, 1945, they called again, and on this occasion they were informed that the jewellery had been lost. The circumstances relating to the disappearance of these valuable articles were wrapt in mystery, and it is not at all surprising that the learned District Judge took the view, which I share, that the defendant's conduct in the matter is open to very grave suspicion.

The defendant was at all relevant times carrying on his activities as a jeweller under the registered business name of "A. Ahamad & Company" at premises No. 167, Main Street, Pettah. Having lost their jewellery in 1945, the plaintiffs spent the greater part of the next year in a fruitless search for the person (or persons) whom they could run to earth as the proprietor of the particular firm of "A. Ahamed & Company" who was legally responsible to them for what taken place. They commenced an abortive litigation against four persons (relatives of the defendant) who were registered as the proprietors of a different business carried on under the trade name of "A. Ahamed & Company" on the same premises. In due course, on 21st March, 1947, they sued the proper party in these proceedings for the recovery of their property or, in the alternative, for the recovery of a sum of Rs. 15,000 as damages which they estimated to be the measure of their loss. The defendant filed an answer denying liability on grounds which he failed to substantiate at the trial. The jewellery entrusted to him was not forthcoming, and in consequence the only serious issue which arose for the adjudication of the learned District Judge was as to the sum which should be awarded to the plaintiffs as compensation for their loss.

On 23rd March, 1948, the learned District Judge entered judgment in favour of the defendants for a sum of Rs. 11,500 representing (*a*) Rs. 10,260, which he estimated to be the market value of the missing jewellery entrusted

to the defendant, (*b*) Rs. 1,240 as damages for the pain of mind which was undoubtedly occasioned by the loss of the family heirloom and greatly aggravated by the evasive tactics of a dishonest debtor.

The present appeal, dated 23rd March, 1948, is from the judgment entered against the defendant who claimed that the plaintiffs' action should have been dismissed *in toto*. Mr. Perera has however abandoned this wholly untenable position, and restricted his argument before us to the contention that the additional award of Rs. 1,240 as damages " for pain of mind " is not justified in law. The appeal was listed for argument before us on 31st January, 1951,—5 years and 10 months after the notification of the loss of the jewellery—and the only question for our determination is whether the defendant's liability should, as Mr. Perera now contends, be restricted to the sum of Rs. 10,260 which his counsel accepts as the market value of the jewellery. *Even this liability, which is now admitted, has not yet been discharged.*

The question for our determination turns on the measure of damages which should be awarded to the injured party in a transaction of this nature. The relevant part of the agreement of 31st October, 1945, is a contract of bailment, and the cause of action is the failure of the bailee, in breach of his obligations under the contract, to deliver the goods entrusted to him by the bailors. The plaintiffs in the first instance demanded the return of their property and, in the alternative, claimed compensation for their loss. The issues framed at the trial, and the evidence led in support of those issues, proceeded upon the basis that the goods were, for a reason which must remain obscure owing to the defendant's unwillingness to explain their disappearance, no longer available to be delivered to the plaintiffs. In these circumstances the Court is required (vide section 191 of the Civil Procedure Code which gives effect to the common law principle applicable) to fix " the amount of money to be paid as an alternative if delivery cannot be had ". There is no difference between the principles of the Roman-Dutch Law and the English Law as to how the damages should be assessed where a bailee has, in breach of his contractual obligation, failed to return the property to the bailor. The dominant rule of law in such cases is the principle of *restitutio in integrum*. The true *damnum* in contract is a compensation for patrimonial loss (Voet 39-2-1). In other words, " the plaintiff must be placed, *as far as money can do it*, in as good a situation as if the contract had been performed. The fundamental basis is the compensation for *pecuniary* loss naturally flowing from the contract ". " *British Westinghouse Co. vs. Underground Railways of London* " (1912) A. C. at 688. It is on this basis that the learned Judge awarded to the plaintiffs a sum of Rs. 10,260 as representing the market value of the missing jewellery.

Mr. Thiagalingam has contended with much force that the assessment of the jewellery at their market value is in the present case inadequate having regard to the special sentimental importance attaching to as a family heirloom. There is no doubt that the plaintiffs would have greatly preferred to have retained their jewellery *in specie*, which they had no desire to place on the market for sale. But this, unfortunately, has no relevance where the goods have been entrusted to and lost by a third party under a commercial transaction. The value of the goods in assessing damages *for breach of contract* is " their market value independently of any circumstances peculiar to the plaintiff ". *Rodacanachi vs. Milburn* (1886) 18 Q. B. D. 667. It is not difficult to contemplate a situation where an article offered for sale in the open market may be family heirloom possessing such historical or sentimental interest as to materially enhance its value *to prospective bidders*. But where this is not the case, it is not possible to place a pecuniary value on the special personal significance, however real, which attaches to it *in the owner's mind*. The principle is well illustrated by *Wessels* in his treatise on the " *Law of Contract in South Africa* " (*Vol. 2 page 921 para. 3192*). " A person lets his horse, of which he is particularly fond, and for which in fact, as he tells the hirer, he would not accept £100. The hirer, by his negligence, cause the death of the horse. In reality, the horse is not worth more than £25. Can the owner recover more than £25 as damages?.....The answer is in the negative, because the Court cannot award as damages any *pretium affectionis* or any other amount than an indemnity for patrimonial loss ". The authority for this proposition is *Voet*—45-1-9 who declares that in such cases " account can in no way be taken of any special predilection ".

It seems to me therefore that, if the present action be regarded as an action for breach of contract, the learned Judge was not entitled to award damages to the plaintiffs for pain of mind because it has not been established by the evidence that such pain of mind resulted in patrimonial loss capable of estimation in terms of money. Mr. Perera's objection to the award

of Rs. 1,260 under this head must therefore be upheld. I agree with Mr. Thiagalingam that "in estimating the scope of the liability of the defaulting party, our law draws a distinction between *a breach of contract accompanied by fraud or deceit* and the case of *a simple breach of contract.* The truth of the matter is that where there is a breach of contract accompanied by fraud, our law awards compensation both on contract and on tort.....and the guilty party is liable not only for the *id quod* interest as in a breach of contract where no fraud exists, *but for other damages as well*". (*Wessels, Vol.* 2 *page* 944 *paras.* 3281 *to* 3283). The question however is whether this principle can be applied in the present case. It seems to me that it cannot, because neither the averments in the plaint nor the issues framed at the trial sufficiently raise the allegation that fraud or deceit on the part of the defendant accompanied the breach of his obligations under the contract of bailment. If it was intended to claim damages from the defendant on the basis of a tort, the allegation of fraud or deceit should have been specifically and unequivocally made so that he could have had the opportunity of meeting it. The present action is, in my opinion based on contract *simplicitor*, and it does not therefore arise for consideration whether, if damages had been claimed on the basis of a tort, some additional compensation for pain of mind could properly have been awarded to the plaintiffs. The conclusion I have reached is that in the present state of the pleadings and the issues, the damages awarded should have been restricted to Rs. 10,260 which was the market value of the jewellery.

It is unfortunate that the plaintiffs did not file a cross-appeal against the learned Judge's decree, as there was, in my opinion, a substantial ground which would have justified this Court in granting them some additional relief against the defendant. The plaint specially claimed a decree awarding the plaintiffs legal interest on the sum which the defendant should be condemned to pay to them by way of compensation. A decree for interest in such cases is, I think, expressly authorised by the provisions of section 192 of the Civil Procedure Code, and no award of interest, possibly inadvertently, was made by the learned District Judge. In the absence of a cross-appeal, however, it is not open to this Court to order an amendment to the decree by awarding interest at this stage.

For the reasons which I have set out, I would allow the defendant's appeal by ordering him to pay to the plaintiffs a sum of Rs. 10,260 only. The defendant has substantially failed in his appeal and he must therefore pay to the plaintiffs the costs incurred by them both here and in the Court below.

Decree varied.

GUNASEKARA, J.
I agree.

Present : BASNAYAKE, J.

FERNANDO vs. SAMARAWEERA

S. C. 206—*C. R. Colombo* 26034

Argued on : 31st January, 1951
Decided on : 6th March, 1951

Landlord and tenant—Notice terminating tenancy—Cheques subsequently sent by tenant for payment of rent—Landlord returning them uncashed after institution of action for ejectment—Is a new tenancy created—Rights and obligations of statutory tenant and landlord—Legal effect of payment of rent by cheques —Deposit—Right of landlord to appropriate for rent—"Waiver" of right—Presumption of—Rent Restriction Act.

The defendant tenant, who was noticed to quit by the plaintiff landlord, refused to vacate the premises and continued to pay the rates as before and sent by post cheques each month to the plaintiff for nearly eight months as payment of rent. The plaintiff, after appropriating the defendant's advance deposit of six months' rent, which he had with him, instituted an action for ejectment and returned all the cheques uncashed.

The learned Commissioner dismissed the action on the ground that the plaintiff's conduct in accepting the cheques as payment of rent month after month after the notice amounted to waiver of the notice and such conduct created a new tenancy between the plaintiff and the defendant.

Held : (1) That in a statutory tenancy under the Rent Restriction Act the mere acceptance of rents by the landlord after notice to quit does not create a new tenancy except where the tenant proves that the landlord has abandoned his rights to eject expressly or by unambiguous conduct.

(2) That where a tenant commits a breach of any of the statutory obligations under the Act, he cannot revive his right to occupation of the premises by remedying the breach later.

(3) That an intention to waive a right or benefit to which a person is entitled is never presumed, but must be proved by the person who asserts it.

(4) That in a contractual tenancy the appropriation of the deposit towards rent falling due after the termination of tenancy under the name of damages or any other may give rise to the inference that by so doing the landlord intended to create a new tenancy.

(5) That a tenant who pays rent by cheque does so at his risk.

Per BASNAYAKE, J.—(*a*) "A deposit of rent in advance is, in reality, a loan by the lessee to the lessor to be returned to the former, either by applying the amount so deposited on the rent or particular instalments of the rent, or by applying it in satisfaction of claims for damages for breaches of other covenants, if it is agreed that it may be so applied, or by repaying, at the end of the term, the amount deposited, if all claims of the lessor which it was intended to secure are otherwise satisfied. The tenant is entitled to recover from the landlord the excess of the amount of the deposit above the rent due or the damage suffered by reason of the tenant's default, when the landlord has recovered possession by reason of such default".

(*b*) "But where the tenant pays his rent by cheque and the landlord accepts it as payment and gives a receipt therefor without waiting till the cheque is realised, then if the cheque is dishonoured he cannot sue for the rent if he has by his receipt acknowledged satisfaction of his debt. The position is different if he merely acknowledges the receipt of the cheque without treating it as a discharge of the debt. Where a complete discharge of the debt is given the remedy is an action on the cheque and not an action for rent."

(*c*) "Once the contractual tenancy is ended by notice the landlord loses no rights by accepting rent from the statutory tenant whom he may evict by judicial process without any further notice the moment he fails to carry out his statutory obligations or he is able to satisfy the court that the premises are reasonably required by him ".

Cases referred to : *Gerber vs. Van Eyssen*, (1947) 1 S. A. L. R. 705 at 709 .
Park vs. Shell Oil Co. of Canada Ltd., (1950) 4 D. L. R. 283.
Johnson vs. Johnson, (1948) 3 D. L. R. 590 at 595.
Re Swinburne (1926) L. R. Ch. 41.
Hewitt vs. Kaye, (1868) L. R. 6 Eq. 198).
Die Afrikaanse Pers. Bpk. vs. Perestrello and another, 1949 (2) S. A. L. R. 346 at 349.
Shuter vs. Hersh, (1922) 1 K. B. D. 438 at 448-449.
Hunt vs. Bliss, (1919) W. N. 331.
Meenatchee vs. Anthony (1930) Natal Law Reports, 204.
Barret vs. New Oceans Transvaal Coal Co. Ltd., (1903) Transvaal Supreme Court, p. 431 at 442
Morrison vs. Jacobs (1945) 1 K. B. D. 577 at 581.
Attorney-General vs. Ediriwickramasuriya, (1940) 41 N. L. R. 499 ; *Virasinghe vs. Peris*, (1943) 46 N. L. R. 139.
Clarke vs. Grant and another (1949) 1 All E. R. 768.
Doe d. Cheny vs. Batten
Hartell vs. Blackler (1920) 2 K. B. 161).
Davies vs. Bristow, (1920) 3. K. B. D. 428 at 437.
Van Niekerk and Union Govt. (Minister of Lands) vs. Carter, (1917) A. D. 359.
Nolte vs. Kotze, (1938) S. W. A. 25.
Van Heerden vs. Pretorius, (1914) A. D. 69.
Laws vs. Rutherfurd, (1924) A. D. 261 at 263 ; *Dias Sandaranayake vs. Perera*, (1948) 49 N. L. R. 212.
North Eastern Districts Association vs. Sukheny Ltd., (1932) W. L. D. 181.

C. Thiagalingam, K.C., with *S. Canagarayar*, for the plaintiff-appellant.
N. E. Weerasooria, K.C., with *Haniffa* and *Ratwatte*, for the defendant-respondent.

BASNAYAKE, J.

This is an appeal by the plaintiff-landlord in an action in ejectment. The question that arises for decision is whether the retention by the landlord of cheques sent by post by the tenant in payment of rent for a period subsequent to the determination of the tenancy, can give rise to the inference that the landlord by so doing intended to create a new tenancy. The learned Commissioner of Requests has held that such an inference can be drawn.

Shortly the facts are as follows : The plaintiff is the owner of premises Nos. 236 (hereinafter referred to as No. 236) and 238 Gas Works Street and No. 4 Dam Street, and the defendant is his tenant. As the plaintiff required No. 236 for the purposes of his own business, in 1945, he terminated the defendant's tenancy after due

notice. The defendant failed to quit the premises on the termination of the tenancy. The plaintiff therefore instituted proceedings in ejectment. In March, 1947, that action was dismissed. Thereafter the defendant continued to remain in the premises and pay rent. In May, 1949, the plaintiff again gave notice of termination of the defendant's tenancy of No. 236 at the end of June, 1949. This time too the defendant did not vacate the premises, and notwithstanding the termination of his tenancy continued to send by post each month a cheque for the amount of the rent and also to pay the rates in accordance with previous practice. The plaintiff retained the cheques but did not cash them. Proceedings in ejectment were however not instituted till March, 1950. A day after the institution of the action, the cheques were returned to the defendant by the plaintiff's proctor with the intimation that an action had been filed and that as the defendants deposit of six months' rent with the plaintiff had been appropriated as damages for the period July to December, 1949, the cheques were being returned.

It is admitted that the defendant had deposited with the plaintiff six months' rent in advance. The terms of the deposit are not precisely indicated either in the pleadings or in the evidence. No issue has been raised as to the legality or the consequences of the plaintiff's action in appropriating the deposit. But as the legal effect of the appropriation by a landlord of a deposit towards rent is mixed with the other questions that arise in this case, I shall briefly refer to the legal aspects of a deposit in the case of landlord and tenant.

A deposit of rent in advance is, in reality, a loan by the lessee to the lessor to be returned to the former, either by applying the amount so deposited on the rent or particular instalments of the rent, or by applying it in satisfaction of claims for damages for breaches of other covenants, if it is agreed that it may be so applied, or by repaying, at the end of the term, the amount deposited, if all claims of the lessor which it was intended to secure are otherwise satisfied. The tenant is entitled to recover from the landlord the excess of the amount of the deposit above the rent due or the damage suffered by reason of the tenant's default, when the landlord has recovered possession by reason of such default.

In a contractual tenancy the appropriation of the deposit towards rent falling due after the termination of the tenancy under the name of damages or any other may give rise to the inference that by so doing the landlord intended to create a new tenancy. *Gerber vs. Van Eyssen*, (1947) 1 S. A. L. R. 705 at 709. *Park vs. Shell Oil Co., of Canada Ltd.*, (1950) 4 D. L. R. 283 But in a case where the tenant after the termination of his contractual tenancy retains his possession of the premises by virtue of the Rent Restriction Act, different considerations arise. The considerations will be discussed later.

I shall now proceed to consider whether the sending of cheques by the defendant amounted to payment of rent and if so whether the payment of rent after the determination of his tenancy gave rise to a new tenancy.

The giving of a cheque does not operate as an assignment *pro tanto* of the maker's funds or credit at the bank upon which it is drawn. The maker can stop payment, or, in the event of his death, the authority of the bank to make payment is revoked. *Johnson vs. Johnson*, (1948) 3 D. L. R. 590 at 595. The law on the point is thus stated by Sir Ernest Pollock, M. R., in *re* Swinburne (1926) L. R. Ch. 41 :—

> "Now a cheque is clearly not an assignment of money in the hands of a banker. A cheque, as explained by Lord Romilly, M.R., in *Hewitt vs. Kaye*, (1868) L. R. 6 Eq. 198, is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is with the bankers or elsewhere. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. Let me assume, therefore, that there was money in the current account ready to meet this cheque as and when it was accepted for payment by the banker, but it is clear law that the fact that this cheque was outstanding did not indicate that there had been any assignment of the money on current account to meet the cheque. It is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it."

A practice of "certifying" or "marking" cheques for payment has grown up among bankers. In the United States "certified" cheques have received statutory recognition but in our country the practice has not been recognised by law. "Certification" is taken in practice as a representation that the bank, at the time of certifying, has funds of the drawer to carry out the order of the drawer. A certified cheque remains a cheque and the giving of such a cheque does not amount to payment in cash nor does it operate as an assignment of funds. Chalmers', Bills of Exchange, 11th Edn., p. 245. Byles on Bills, 20th Edn., pp. 22-23.

The tenant pays by cheque at his risk. The loss of or delay of the cheque in transit or the negligence of the bank may not excuse his default. The fact that the cheque is as a matter

of practice sent by post will not change the character of the payment made by cheque. *Die Afrikaanse Pers Bpk vs. Perestrello and another*, (1949) 2 S. A. L. R. 346 at 349. But where the tenant pays his rent by cheque and the landlord accepts it as payment and gives a receipt therefor without waiting till the cheque is realised, then if the cheque is dishonoured he cannot sue for the rent if he has by his receipt acknowledged satisfaction of his debt. The position is different if he merely acknowledges the receipt of the cheque without treating it as a discharge of the debt. Where a complete discharge of the debt is given the remedy is an action on the cheque and not an action for rent. In the instant case no receipts were given and the cheques were not cashed.

I shall now turn to the next question whether the retention by the plaintiff of the cheques sent by the defendant gave rise to a new tenancy. Under our common law of letting and hiring the landlord may in terms of the contract terminate a contract of tenancy by notice. Voet, Book XIX, Title II, Section 18. Upon the expiration of the notice the tenant is bound to quit. If he does not he is liable to be ejected by process of law. *Ibid.* But since the enactment of legislation relating to rent restriction the position is different. The Rent Restriction Act does not fetter the landlord's right to terminate the contract of tenancy by adequate notice, but it prohibits the landlord from instituting an action for ejectment of a tenant without the written authority of the Rent Control Board except 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 purposes of the trade, business, profession, vocation or employment of the landlord ; or

(*d*) the tenant or any person residing or lodging with him or being his sub-tenant has, in the opinion of the Court, been guilty of conduct which is a nuisance to adjoining occupiers, or has been convicted of using the premises for an immoral or illegal purpose, or the condition of the premises has, in the opinion of the Court, deteriorated owing to acts committed by or to the neglect or default of the tenant or any such person.

It appears from the foregoing that a landlord who has terminated the contract of tenancy through a desire to get back his premises but is unable to satisfy the above requirements has to submit to the continued occupation of his premises by a person whom he does not want there but whom the statute will not permit him to eject therefrom by process of law. Such a person cannot be described as a treapasser for his occupation of the premises is not unlawful. He is, since the termination of the tenancy, under no contractual relationship with the landord.

This creature of the statute whose counterpart is to be found in England has been called the " statutory tenant " by Lord Justice Scrutton *Shuter vs. Hersh*, (1922) 1 K. B. D. 438 at 448-449 who also describes him as that anomalous legal entity who would not ordinarily be described as a tenant. Lord Coleridge *Hunt vs. Bliss*, (1919) W. N. 331 describes the resulting legal relationship as a " statutory tenancy ". What are the rights and obligations of this " anomalous legal entity " ? For the answer we have to turn to the Rent Restriction Act. Under that Act he—

(*a*) must pay the authorised rent within one month after it has become due,

(*b*) may by notice to the landlord terminate his " statutory tenancy ",

(*c*) or any person residing or lodging with him or being his sub-tenant may not be guilty of conduct which is a nuisance to adjoining owners,

(*d*) may not be convicted of using the premises for an immoral or illegal purpose,

(*e*) may not allow the condition of the premises to deteriorate owing to acts committed by him or by his sub-tenant or by any person residing or lodging with him or owing to his neglect or default or of any person residing or lodging with him,

(*f*) may not without the prior consent in writing of the landlord sublet the premises or any part thereof,

(*g*) may not except with the prior consent of the landlord use or permit any other person to use any residential premises for any purpose other than that of residence.

The landlord on his part—

(*a*) may not demand or receive more than the authorised rent,

(*b*) must receive the authorised rent if it is tendered within one month after it has become due or earlier,

(*c*) must issue a receipt for every payment made to him by way of rent or advance,

(*d*) may not receive an amount exceeding three months' authorised rent in advance,

(*e*) may not receive any premium, commission, gratuity or other like payment or pecuniary consideration,

(*f*) may not without reasonable cause discontinue or withhold any amenities previously provided for the benefit of the tenant,

(*g*) must carry out all repairs or redecoration necessary to maintain the premises in proper condition,

(*h*) may not institute proceedings in ejectment—

(i) unless the premises are reasonably required for occupation as a residence for himself or any member of his family or for the purpose of his trade, business, profession or employment, or

(ii) unless the "statutory tenant" commits a breach of his statutory obligations enumerated above.

Once the tenant commits a breach of any one of his statutory obligations the bar against the institutions of proceedings in ejectment imposed by section 13 of the Act is removed and there is nothing the "statutory tenant" can do to regain his immunity from eviction. His rights and obligations are governed by the statute and immediately he violates its provisions the consequences of such violation begin to flow. For instance if he is in arrears of rent for one month after it has become due the landlord becomes free to institute proceedings in ejectment. He cannot prevent his eviction by process of law by tendering the rent out of time either before or after the institution of legal proceedings. The consequences of the failure to observe the obligations imposed by the statute cannot be avoided by doing late what should have been done in time. This view finds support in the case of *Meenatchee vs. Anthony* (1930)Natal Law Reports, 204 where it was held that when a tenant has already lost his statutory right to continue in occupation, he cannot revive that right by the simple expedient of paying rent long after it fell due. Even in a contractual tenancy the tenant cannot by tendering the rent after forfeiture deprive the landlord of his right. *Barrett vs. New Oceana Transvaal Coal Co., Ltd.*, (1903) Transvaal Supreme Court, p. 431 at 442.

I shall now proceed to consider the consequences of the acceptance of rent by the landlord from a statutory tenant. Under the Act as shown above the statutory tenant is bound at the risk of eviction to pay rent within a month of its becoming due. That obligation carries with it an implied obligation on the part of the landlord to receive the rent so tendered. For if such an obligation were not implied the tenant would for no fault of his lose the immunity provided by the statute. A statute should not be read as compelling the impossible—*Lex non cogit ad impossibilia.* If therefore acceptance of rent from a "statutory tenant" is one of the statutory obligations of the landlord no new contract of tenancy can arise when he does what the statute compels him to do. A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can only arise where the parties are *ad idem* as to its essential particulars.

The resulting position is that by accepting rent from a statutory tenant for however long a period a landlord does not create a contractual tenancy. Similarly the defendant acquired no right to a contractual tenancy by continuing to pay rates in accordance with the arrangement that subsisted between the plaintiff and himself. That was only the payment of rent by deduction, for, the rates paid were deducted from the rent. Once the contractual tenancy is ended by notice the landlord loses no rights by accepting rent from the statutory tenant whom he may evict by judicial process without any further notice the moment he fails to carry out his statutory obligations or he is able to satisfy the Court that the premises are reasonably required by him. This is what the statute says and it is right that the statute should be strictly construed, for, legislation which interferes with freedom of contract must be construed strictly and not carried further than the words and necessary implications demand. (1930)Natal Law Reports, 204. In the English case of *Morrison vs. Jacobs* (1945) 1 K. B. D. 577 at 581 Lord Justice Scott observes in commenting on similar legislation :—

> "The contractual tenancy having expired, it was not necessary for the landlord to serve the tenant with any notice to quit : all that was necessary was that he should come to Court and satisfy the Judge that he reasonably required possession of the dwelling-house for his own occupation as a residence."

In the instant case the learned Commissioner of Requests says : "His (landlord's) conduct in this case in accepting those cheques as payment of rent month after month after the termination of this notice and returning them only after he filed this action clearly gives rise to the inference that he had waived his notice and had allowed the tenancy to continue. On the facts of this case, a new tenancy by implied agreement can be presumed and the notice must be deemed to have been waived."

It is clear that the learned Commissioner has fallen into the error of treating the tenancy as a contractual tenancy and also assuming that there is a presumption in favour of the waiver of rights. I have demonstrated above that the appellant's tenancy was not, after its termination by notice, a contractual tenancy. But even in a contractual tenancy the mere acceptance of rent is insufficient to create a new tenancy. (1930) Natal Law Reports, 204. The agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms *Attorney-General vs. Ediriwickramasuriya*, (1940 41 N. L. R. 499; *Virasinghe vs. Peris*, (1943) 46 N. L. R. 139. Some of the earlier English decisions on this point are quoted in the decisions of this Court cited above. It will be sufficient therefore to refer to the recent case of *Clarke vs. Grant and another* (1949)1 All E. R. 768 from which I propose to quote at length as the legal position in England is clearly set out in the judgment of Goddard C.J. who says :—

> " If a landlord seeks to recover possession of property on the ground that breach of convenant has entitled him to a forfeiture, it has always been held that acceptance of rent after notice waives the forfeiture, the reason being that in the case of a forfeiture the landlord has the option of saying whether or not he will treat the breach of convenant as a forfeiture. The lease is voidable, not void, and if the landlord accepts rent after notice of a forfeiture it has always been held that he thereby acknowledges or recognises that the lease is continuing. With regard to the payment of rent after a notice to quit, however, that result has never followed. If a proper notice to quit has been given in respect of a periodic tenancy, such as a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy. That has been the law ever since it was laid down by the Court of King's Bench in *Doe d. Cheny vs. Batten* where Lord Mansfield said (1 Cow p. 245): 'The question therefore is, *quo animo* the rent was received, and what the real intention of both parties was ? '
>
> " It is possible to say that the parties in this case intended that there should be a new tenancy. The landlord always desired to get possession of the premises. That is why he gave his notice to quit. The mere mistake of his agent in accepting the money as rent which had accrued is no evidence that the landlord was agreeing to a new tenancy. The importance of the present case is that it gives this Court an opportunity of overruling once and for all the decision of the Divisional Court in *Hartell vs Blackler* (1920) 2 K. B. 161."

I shall now pass on to discuss the matter raised in issue No. 10 in these words " there has been a waiver of the notice by subsequent acceptance of rent ". Waiver is the voluntary relinquishment of a right. The expression waiver of notice is used in the context not for the purpose of conveying the idea that the landlord waived any right he had to receive a notice but to indicate that by accepting the rent the landlord created a new tenancy. It is a wrong use of the expression. Once a notice of termination of a tenancy is given and the term of the notice expires without the notice being withdrawn no question of the waiver of the notice can arise. This expression is of English origin and it is therefore pertinent to refer to English cases in this connexion. Lush J. says *Davies vs. Bristow*, (1920) 3 K. B. D. 428 at 437.

> " The expression ' waiver of a notice to quit ' though convenient as a description of the position where both landlord and tenant agree that a notice which has expired shall be treated as inoperative, is an inaccurate expression, and if one attempts to found a proposition of law upon it it is likely to lead one astray."

In the case of *Davies vs. Bristow*, (1920) 3 K. B. D. 428 at 437, Shearman J. observes : " After the time has expired the lease is at an end and a landlord can no more waive his notice to quit than he can waive the effluxion of time." The same Judge calls it a " loose and unscientific expression in that connection."

Before I conclude I should like to refer to the erroneous view of the law relating to waiver taken by the learned Commissioner. He appears to think that waiver is presumed. An intention to waive a right or benefit to which a person is entitled is never presumed. *Van Niekerk and Union Government* (*Minister of Lands*) *vs. Carter*, (1917) A. D. 359. The presumption is against waiver, *Nolte vs. Kotze*, (1938) S. W. A. 25 for though everyone is under our law at liberty to renounce any benefit to which he is entitled the intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct *Van Heerden vs. Pretorius*, (1914) A. D. 69. The onus of proof of waiver is on the person who asserts it. Where the tenant alleges that the landlord waived his rights he must prove that the landlord with full knowledge of his rights decided to abandon them either expressly or by unambiguous conduct inconsistent with an intention to enforce them. *Laws vs. Rutherfurd*, (1924) A. D. 261 at 263. *Dias Bandaranayake vs. Perera*, (1948) 49 N. L. R. 212.

Lastly I wish to deal with the question of delay in instituting this action. It was instituted eight months after the second notice of termination of the tenancy. The plaintiff's explanation

is that he was endeavouring to recover the premises by negotiation without recourse to law. One can believe him especially in view of his previous unsuccessful attempt to obtain possession by process of law. His explanation has not been seriously challenged. Apart from that the conduct of the plaintiff in relation to these premises since about the middle of 1945 left none of the persons concerned in doubt as to his true intentions. Mere delay in enforcing a legal right does not cause the loss of that right. *North Eastern Districts Association vs. Sukheny Ltd.*, (1932) W. L. D. 181.

For the above reasons the plaintiff is entitled to judgment as prayed for, as the learned Commissioner has held that the premises are reasonably required for the purposes of the plaintiff's trade or business.

The appeal is allowed with costs both here and below.

Appeal allowed.

Present : Nagalingam, J.

V. R. MURUGESU vs. H. E. AMARASINGHE *et. al.*

In the Matter of an Application for a Writ of Prohibition
Application No. 451 of 1949

Argued on : 24th November, 1950
Decided on : 27th February, 1951

Writ of prohibition—Application for—Dispute between Co-operative Union and officer—Arbitration—Only Arbitrators and Registrar of Co-operative Societies made parties—Co-operative Union not made a party—Is the application properly constituted Co-operative Societies Ordinance, section 45—Co-operative Societies Ordinance (Cap. 107) section 45.

The petitioner was an employer of a duly registered Co-operative Society or 'Union'—A dispute between him and the 'Union' was referred to a Board of Arbitrators under section 45 of the Co-operative Societies Ordinance (Cap 107).

The petitioner applied for a writ of prohibition on the ground that the Board of arbitators had no jurisdiction to proceed with the matter as the dispute was not such as could have formed the subject of proceedings under section 45 of the Ordinance. The only respondents to the application were the members of the Board of Arbitration and the Registrar of Co-operative Societies. The 'Union' was not made a respondent, but was later noticed.

On a preliminary objection taken on behalf of the respondents,

Held : That the application was not properly constituted as the party who would be affected by the grant of the application had not been made a party.

H. V. Perera, K.C., with *C. Shanmuganayagam*, for the petitioner.
C. Thiagalingam, K.C., with *E. R. S. R. Coomaraswamy*, for the party noticed.
H. W. R. Weerasuriya, Acting Solicitor-General, with *E. H. C. Jayatileke, Crown Counsel*, for the Registrar of Co-operative Societies.

Nagalingam, J.

This is an application for a Writ of Prohibition. A preliminary objection has been taken to the application on the ground that the party whose interests would be affected if the application were granted has not been made a party and that the application must therefore fail.

The facts so far as they are material for a consideration of the preliminary point, are : The petitioner who is the applicant for the Writ was in the service of the Northern Division Agricultural Producers' Co-operative Union Ltd., a Society registered under the Co-operative Societies Ordinance No. 16 of 1936 and hereinafter referred to as the Union. Certain disputes arose between the petitioner and the Union. In regard to a claim amounting to a sum of Rs. 42,500·12 made by the Union against the petitioner. Pursuant to the provisions of section 45 of the Ordinance the Union referred the dispute to the Registrar of Co-operative Societies, who by virtue of the powers vested in him by sub-section 2 of the same section referred it for disposal to a Board of Arbitrators, the composition of which suffered a change and at the dates

relevant to the present application the first three respondents constituted the Board of Arbitrators.

The petitioner's case for the Writ is based upon the allegation that the disputes between him and the Union are not such as could have formed the subject of proceedings under section 45 of the Ordinance and that the Board of Arbitrators in entering upon the arbitration proceedings were usurping to themselves powers which had not been legally vested in them. To his application the petitioner named four respondents, the first three being, as remarked earlier, the three arbitrators and the fourth being the Registrar of Co-operative Societies. The Union has not been made a party respondent.

At the hearing of this application the arbitrators did not enter appearance. The 4th respondent, however, was represented by the learned Acting Solicitor-General who put forward the contention that neither the 4th respondent nor the arbitrators were interested in the result of the application but the party who would be affected by grant of the application would be the Union and that as the Union had not been made a party the application could not be entertained by Court. The learned Acting Solicitor-General also submitted that it was one of the fundamental principles of the administration of justice that no order prejudicial to or affecting the right of a party should be made without the party being first given an opportunity of showing cause against the making of such an order.

Learned Counsel for the petitioner strenuously argued that the Union was not a necessary party and that the Writ could issue if no cause was shown by the respondents named in the petition. No authority was cited at the Bar by Counsel. It seems to me, however, that the party who invoked the machinery provided by section 45 of the Ordinance, namely, the Union, would be the party that would vitally be interested in demonstrating that the procedure adopted by it has the sanction of law and that no occasion for the issue of a Writ of Prohibition has arisen.

I think it is quite correct to say that the Registrar is not interested in the application made by the petitioner. The Registrar has exercised the powers which he considered were vested in him by law and is *functus*. The application of the petitioner is in fact for a Writ of Prohibition against the 1st, 2nd and 3rd respondents and not against 4th respondent. The Registrar, therefore, is not only unconcerned but it seems to me is wholly an unnecessary party to these proceedings. I do not see the object of giving notice to him of this application because any notice he may have at this stage cannot have the effect of enabling him to undo what he has done. Insofar as the first three respondents, the arbitrators, are concerned, they are not a statutory body with statutory powers, nor are they even persons versed in the law. They are three gentlemen of eminence and standing in the community who have been selected by the Registrar for their integrity and impartiality to arbitrate between the Union on the one hand and the petitioner on the other. One can understand their attitude in not putting in an appearance. They would be ignorant of irregularities if any, in the proceedings that took place prior to their appointment as arbitrators. In these circumstances if they are indifferent to the consequences of the petitioner's application, one need not be surprised.

The Union, however, stands on a different footing. It was the Union that invoked the provisions of section 45 of the Ordinance and applied to the Registrar to settle the dispute in pursuance thereof. If as the petitioner contends, section 45 of the Ordinance has no application to the disputes between him and the Union, it is for the Union to establish the contrary but the Union is not given an opportunity of doing so and as stated by the learned Acting Solicitor-General, there can be no question but that if a writ does issue it will be to the detriment of the Union and would have issued without the Union having been given an opportunity of contesting the propriety of such an issue.

Should it be held that section 45 of the Ordinance has no application and that the disputes cannot be submitted to the Registrar for settlement, the Union would have no alternative but to sue the petitioner in a regular action in the Ordinary Courts of law; but then questions of prescription would arise which it may not be possible for the Union to surmount at the present time.

The Union not having been made a party, I am of opinion that the application as constituted is bad.

The only other question that had to be considered was whether the Union should be added a party to these proceedings even at this stage. In fact the proctor for the petitioner did file papers on 25th October, 1950, praying that after notice the Union be made a party respondent to the application. The notice of the filing of

these papers was given to the Union and Counsel on behalf of the Union entered appearance at the hearing and stated that he opposed the application to have the Union added as party.

Learned Counsel for the petitioner, however, took up the position that as this Court had made no order directing the issue of notice on the application to add the Union as a party, no Counsel had a right to appear for the Union or to be heard on its behalf. He further stated that he was making no application to add and did not support the application filed to add the Union as a party respondent. In these circumstances no question arises of adding the Union as a party at this stage.

There remains for consideration the question of costs. That the respondents are entitled to their costs there can be no doubt; whether the Union which did enter appearance by Counsel is entitled to costs has, however, to be determined. In paragraph 6 of the affidavit filed with his papers on 25th October, 1950, the petitioner expressly states that he has already notified the Union direct regarding his application to add the Union as a party and had furnished it with copies of all documents filed up to that date by the various parties to the application. In view of the service of the notice on the Union I think it is idle to contend that Counsel should not have appeared on behalf of the Union. Had Counsel not appeared on behalf of the Union. It may properly have been assumed that as after due notice the Union too had not put in an appearance it was not contesting the application the appearance on behalf of the Union was therefore proper and the Union is also entitled to its costs.

In the result, I refuse the application with costs payable by the petitioner to the respondents and to the Union.

I much regret the delay occasioned by my illness in delivering this order.

Application refused.

Present : GRATIAEN, J. AND GUNASEKERA, J.

SENEVIRATNE *et. al.* vs. ASSISTANT GOVERNMENT AGENT, COLOMBO DISTRICT

S. C. No. 120—*D. C. Negombo, No.* 15412.

Argued on : 2nd February, 1951.
Decided on : 14th February, 1951.

Costs—Order that defendants would be entitled to fees paid by them to Counsel—Further order that costs as stated would be taxed by this Court—Effect of order—Interpretation.

In making an order for costs the learned District Judge stated as follows :—" In my opinion it would be reasonable to order the Crown to pay the costs incurred by the defendants in retaining Counse for these two trial datef'.

" Defendants would be entitled to the fees paid by them to the Counsel engaged by them for these dates of trial ".

The costs as stated by me earlier would be taxed by this Court and the Crown will be liable to pay that amount to the defendants ".

Held : That the defendants are entitled to the sum paid to Counsel for the two dates in question as the later part of the order directing that the costs " be taxed by this Court " merely required that the taxing officer should satisfy himself that the amount claimed in the bill of costs represented the sum actually expended in retaining Counsel for the trial.

N.E. Weerasooria, K.C., with *H.W. Thambiah* and *Mackenzie Pereira*, for the defendants-appellants.

M. Tiruchelvam, C.C. for the plaintiff-respondent.

GRATIAEN, J.

On 12th August, 1949, the respondent, who is the Assistant Government Agent of the Colombo District, Western Province, filed a libel of reference under the Land Acquisition Ordinance (Chapter 203) in regard to a dispute which had arisen between himself and the appellants as to the sum payable to them as compensation for the compulsory acquisition by the crown of certain immovable property owned by them. The amount in dispute was fairly considerable. The trial of the action was fixed for 16th and 17th May, 1950.

In the meantime, on 9th March, 1950, the Land Acquisition Ordinance, No. 9 of 1950, came into operation whereby, *inter alia*, the land Acquisition Ordinance was repealed. The respondent thereupon made an application on 10th May, 1950, in terms of section 61 of the new Ordinance asking that the matter in dispute in the pending action be referred to the Board of Review (constituted under that Ordinance) for determination. It is conceded that an application of this nature was open to either party to a pending action, and that the respondent's application was properly granted by the learned District Judge on 24th May, 1950.

The present appeal is concerned with the interpretation of that part of the learned Judge's order which, in granting the respondent's application for a transfer, awarded to the appellants the costs incurred by them in the preparation of their case in connection with the trial of the abortive action in the District Court. The relevant part of the order reads as follows :—

> " The Crown argued that the defendant will not be entitled to any costs incurred by them. This case has been specially fixed for two days and the Crown had notice of the two days of trial and application to take this matter away from the Court was made on 10-5-50 and it may be presumed that Counsel appearing for the defendants would have been retained much earlier than that date. In my opinion it would be reasonable to order the Crown to pay the costs incurred by the defendants in retaining Counsel for these two trial dates.
>
> Defendants would be entitled to the fees paid by them to the Counsel engaged by them for these dates of trial.
>
> The costs as stated by me earlier would be taxed by this Court and the Crown will be liable to pay that amount to the defendants ".

In pursuance of this order the appellant's proctor submitted to the Secretary of the Court a bill of costs for Rs. 1,470 representing the fees paid to Counsel who had been engaged to appear for them on the trial dates, namely, 16th and 17th May, 1950. It is not denied that this expenditure was in fact incurred or suggested that the amount of the fees paid to Counsel was unreasonable or excessive. Nevertheless, the sum claimed by the appellants as costs was reduced by the Secretary to Rs. 204·75. The matter was referred to the decision of the learned District Judge who on 24th July, 1950, upheld the Secretary's taxation on the ground that the Secretary was justified in taxing the fees according to the scale of charges payable under the Schedule to the Civil Procedure Code.

The question arising on this appeal turns solely on the interpretation of the order for costs made by the learned Judge on 24th May, 1940, in favour of the appellants. Whether or not that order was properly made cannot now be canvassed, as no appeal questioning its validity has been preferred to this Court by either of the parties. No useful purpose would therefore be served by addressing ourselves at this stage to Mr. Tiruchelvam's argument that the language of section 61 of the new Ordinance confers no power on the District Judge to make any order for costs in favour of either party. The learned Judge did *in fact* and in terms of an order which has not been challenged by an appeal filed within the prescribed period, direct the Crown " to pay *the cost incurred* by the defendants in retaining Counsel for.....two trial dates " and declared the defendants " entitled to the *fees paid by them* " (i.e. by their proctor on their behalf) " to the Counsel engaged for these dates of trial ". I doubt very much if clearer language could be employed in making an award of *the costs actually incurred* as opposed to an award of costs payable only in accordance with an antiquated scale of charges prescribed by the Civil Procedure Code. Mr. Tiruchelvam has argued that the later part of the learned Judge's order directing that the costs awarded to the appellants should " be taxed by this Court " has the effect of limiting the meaning of the unambiguous words which I have already quoted. I do not agree. To my mind, no inconsistency is inherent between the earlier part of the order and the words on which Mr. Tiruchelvam relies. The order for " taxation " merely requires that the taxing officer should satisfy himself that the amount claimed under the bill of costs represented the sum actually expended in retaining Counsel for the trial.

I would set aside the order appealed from and direct that the Crown should pay to the appellants the sum of Rs. 1,470 in terms of the learned District Judge's order dated 24th July, 1950. The appellants are also entitled to their costs of this appeal as taxed in accordance with the scale of charges applicable under the Civil Procedure Code.

Set aside.

Present : NAGALINGAM & BASNAYAKE, J.

KARUNATILLEKE vs. KARUNATILLEKE

S. C. 131—*D. C. Colombo* 2094/*D*

Argued on : 29th and 30th November, 1950
Decided on : 16th February, 1951.

Divorce—Action by wife for—Husband's answer disclosing persons committing adultery with plaintiff—Only one adulterer made party to action and divorce counter-claimed on the ground of adultery with that party—No claim for divorce on ground of adultery with others—Failure to obtain excuse under section 598 of Civil Procedure Code—Rejection of answer—Is it justified—Is counter-claim for divorce a reconventional claim—Sections 75 and 603 of the Civil Procedure Code.

In an action for divorce instituted by the wife, the defendant husband filed answer denying the plaintiff's allegations and accusing the plaintiff of misconduct with three named persons but averring that he was all along willing to condone the plaintiff's adultery with them. He however, counter-claimed for a divorce on the ground of plaintiff's adultery with his brother.

This answer was rejected by the learned District Judge on the ground that the defendant had without obtaining an excuse under section 598 of the Civil Procedure Code failed to bring in as parties the said three adulterers disclosed in the answer.

Held : (1) That the defendant—husband was under no obligation to make the three adulterers disclosed in his answer parties to the action as he did not make their adultery the "cause or part of his cause of action" for a divorce.

(2) That the learned Judge was in error when he rejected the answer.

(3) That the principle of reconventional claims has no application to a case where a defendant to an action for dissolution of marriage asks for divorce in his or her favour. Such a claim is permissible only by virtue of section 603 of the Civil Procedure Code.

Cases referred to : *Ziegan vs. Ziegan et al* (1891) 1 S. C. R. 3.
Jasline Nona vs. Samaranayake (1948) 49 N. L. R. 381.
Voet, Book V, Title I, Sections 78-79, Sampson's translation.
Section 603 of Civil Procedure Code.
Voet, Book XXIV, Title II, Section 5.
Jones vs. Jones, (1896) L. R. P. D. 165 ; *Kenworthy vs. Kenworthy*, (1919) L. R. Prob. 65 ; *Carryer vs. Carryer & Watson*, (1865) 4 Sw. & Tr. 94.
Commissioner of Stamps, St. Settlements vs. Oei Tjong Swan, (1933) A. C. 387.

E. B. Wikramanayake, K.C., with *Fernandopulle*, for the 1st defendant-appellant.
E. G. Wikramanayake, K.C., with *C. E. Jayawardena*, for the plaintiff-respondent.
Izzadeen Mohamed, for the 2nd defendant-respondent.

BASNAYAKE, J.

This is an appeal from a judgment in an action for divorce, rejecting the answer of the defendant husband on the ground that he had without obtaining an excuse under section 598 of the Civil Procedure Code (hereinafter referred to as the Code) failed to bring in as parties to the action certain adulterers whom he discloses in the answer.

It is urged by learned Counsel for the respondent that the provisions of section 598 of the Code are imperative and that the defendant is not entitled to ask for a divorce on the ground of his wife's adultery without complying with the requirements of that section. He relies on the cases of *Ziegan vs. Ziegan et al* (1891) 1 S. C. R. 3 and *Jasline Nona vs. Samaranayake* (1948) 49 N. L. R. 381.

Learned Counsel contends that the defendant's claim for divorce is a claim in reconvention and that that part of his answer should be treated as a plaint. On that footing he seeks to bring the defendant's claim within the ambit of section 598.

In my opinion that argument is untenable. The principle of reconventional claims is well known to Roman-Dutch Law and is discussed by Voet Voet, (Book V, Title I, Sections 78-79, Sampson's translation) at length, and has no application to a case where a defendant husband to an action for dissolution of marriage asks for a decree for divorce in his favour. Such a claim can be made by a defendant husband only by virtue of section 603 of the Code.

It is not contended that the defendant's answer violates the provisions of section 75 of the Code which prescribes the requisites of an answer. Its rejection was not therefore warranted by the provisions of section 77 which empowers the Court to reject an answer which is substantially defective in any of the particulars defined in section 75 or is argumentative or prolix or contains matter irrelevant to the action.

The objection to the answer arises in this way. The defendant while denying the plaintiff's allegations accused the plaintiff of misconduct with three persons named Peter Keus, Freddy Hirst, and Lewis, between the years 1942 and 1945. He claims a divorce on the ground that the plaintiff is living in adultery with his brother Harry Beauclerk Karunatilleke. He avers that he was all along willing to condone her acts of adultery with the others.

The question for decision then is whether those others against whom judgment is not asked for should be made parties to this action. In proceedings instituted for dissolution of marriage, if the defendant opposes the relief sought on any ground which would have enabled him to sue as a plaintiff for such dissolution, the Court may in such proceedings give to the defendant on his application the same relief to which he would have been entitled in case he had presented a plaint seeking such relief. Section 603 of Civil Procedure Code. In the instant case if the defendant had presented a plaint containing the allegations in his answer, should he have either made the others whom he accused of adultery with his wife co-defendants or obtained an excuse under section 598 of the Code? The answer to that question must be sought in section 598, which provides that upon a plaint presented by a husband, in which the adultery of the wife is the cause or part of the cause of action, the plaintiff shall make the alleged adulterer a co-defendant to the action, unless he is excused, upon application, by the Court from so doing. The defendant does not make the adultery of his wife with those whom he has not made parties to the action " the cause or part of the cause of action ". He is under no obligation therefore to make them parties to the action. Apart from statute even the rules of natural justice do not require that a party against whom no judgment or order is asked for should be afforded the opportunity of a hearing. A husband is free to condone his wife's adultery with any person against whom he does not wish to proceed. For everyone is allowed by our law to renounce his right and forgive the person at whose hands he has suffered injury. Voet, Book XXIV, Title II, Sections 5—What the law does not allow him to do, except in the circumstances stated in section 598, is to obtain a decree for divorce on the ground of his wife's adultery with any person whom he does not bring in as a party to the action.

Learned Counsel for the respondent in the course of his argument invited our attention to certain decisions *Jones vs. Jones*, (1896) L. R. P. D 165. *Kenworthy vs. Kenworthy*, (1919) L. R. Prob. 65. *Carryer vs. Carryer & Watson*, (1865) 4 Sw. & Tr. 94 of the English Courts in support of his submission. He also sought the aid of the statutory provisions relating to the procedure in matrimonial causes in England for the purpose of interpreting section 598 of our Code. In my opinion it is wrong to construe our Code in that way. The best guide to the intention of legislation is afforded by what the legislature has itself said. In construing our Code the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law or from similar legislation in other countries even though such legislation be anterior to our Code. The construction of a statute by instituting a textual comparison of its provisions with those of similar statutes elsewhere and the drawing of inferences from the variations between the local and the foreign enactments have been aptly described by the Privy Counsel as a perilous course to adopt. *Commissioner of Stamps. St. Settlements vs. Oei Tjong Swan*, (1933) A. C. 387.

For the foregoing reasons I am of opinion that the judgment of the learned District Judge should be set aside. I accordingly allow the appeal with costs, both here and below.

NAGALINGAM, J. *Appeal allowed.*

I agree.

Present : PULLE, J.

SARANADASA vs. FERNANDO.

S. C. No. 677—M. C. Negombo No. 60888.

Argued on : 26th and 27th July, 1950.

Decided on : 27th Sept. 1950.

Wages Board Ordinance—Charges under sections 21 and 39 (1)—Employer failing to pay wages to worker directly—Worker failing to return to work or call for wages—Employer's inability to find worker—Is employer liable.

An employer's failure to pay the minimum rate of wages to a worker employed under him was due to the fact that the worker, who, with others, went on strike did not call for the wages and could not be found.

Held : That in the circumstances, the employer could not be said to have committed an offence under the Wages Board Ordinance.

E. H. C. Jayatileke, Crown Counsel, for the appellant.
H. W. Jayawardene, for the respondent.

PULLE, J.

This is an appeal from an acquittal on a charge that the respondent did on or about the 10th February, 1949, being an employer in the Toddy, Arrack and Vinegar Trade, in breach of section 21 of the Wages Board Ordinance, No. 27 of 1924, fail to pay to one T. R. Vasudevan, a worker employed in the trade, the minimum rate of wages for piece work payable to toddy tappers and that the respondent did thereby commit an offence punishable under section 39 (1) of the Ordinance.

The learned Magistrate held in favour of the respondent on three points. The first was that the prosecution had not been instituted *within* one year of the commission of the offence, because the obligation to pay the wages arose on the 10th February, 1949, and the prosecution was instituted only on 10th February, 1950. The second ground was that in the events that occurred after Vasudevan left the employment of the respondent it was not possible for the respondent to comply with the provisions of section 2 of the Ordinance which required that the employer shall pay wages in legal tender *directly* to the worker. The third ground was that under section 21 employer is liable to the penal consequences provided in section 39 only where he fails to pay a minimum rate of wages and not a balance due after a calculation based on the legal minimum rate. It is submitted that the learned Magistrate was wrong on all the points on which he has based his decision.

I do not propose to deal with each of the grounds mentioned as it is possible to dispose of the appeal on the second ground. The facts relevant to this issue which are not contested have been found by the learned Magistrate as follows :—

> " Vasudevan went away on the 24th January, and did not return thereafter. His address was not known, so much so that it was difficult even to serve summons on him. He did not go to the accused to demand his wages, and the accused could not have known where Vasudevan was. It was therefore not possible for the accused to pay the money to Vasudevan. Not even an agent demanded the money from the accused ".

Now section 2 of the Ordinance is clear that every employer in a trade must pay wages in legal tender directly to the worker. If, as in this case, Vasudevan and the other workers went on strike on the 24th January, 1949, because the respondent refused to sign an agreement relating to the terms and conditions of work and did not thereafter call for the wages and could not be found I fail to see what offence the respondent had committed. It would be wrong to punish a person for failing to do an act which was impossible.

I dismiss the appeal.

Appeal dismissed.

Present : BASNAYAKE J. & GUNASEKARA, J.

MARY NONA *et al* vs. JAYAWARDENA

S. C. 296—*D. C. Avissawella* 4687

Argued and decided on : 25th October, 1950
Reasons delivered on : 2nd March, 1951

Partition action—Sale ordered—Case withdrawn—Sale of undivided share in land by co-owner—Sale void—Section 17, *Partition Ordinance—Section* 10, 406 *Civil Procedure Code.*

Where a sale was ordered by the Court in a partition action, and the case was allowed to be withdrawn on plaintiff's motion before sale, and one of the co-owners sold by deed his undivided share in the land,

Held : (1) That the sale was void as it infringed the provisions of section 17 of the Partition Ordinance in that the withdrawal of the action cannot be said to be a refusal by the Court to grant the application for a partition or sale within the meaning of the section.

(2) That the Court had no power to allow the withdrawal of the action.
Cases referred to : *Peiris vs. Peiris et al* 6 Law Recorder 1.

N. E. Weerasooria, K.C., with *S. W. Jayasuriya*, for the plaintiff-appellants.
H. V. Perera, K.C., with *S. E. J. Fernando*, for the defendant-respondent.

BASNAYAKE, J.

The only question that arises for decision is whether deed No. 4926 dated 30th August, 1933, (hereafter referred to as the deed) is rendered void by operation of section 17 of the Partition Ordinance. That section reads as follows :—

> " Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, unless and until the Court before which the same were instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale, as the case may be ; and any such alienation or hypothecation shall be void."

Legal proceedings for the partition of the land referred to in the deed were instituted in 1928 and in July, 1929, decree for sale was entered, and in 1933, a commission for sale was issued to an auctioneer. Before the sale could take place the proctor for the intervenient moved that the sale be stayed. The sale was accordingly stayed. Thereafter on 23rd June, 1933, the plaintiffs' proctor filed the following motion :—

> " We move to withdraw the above case ".

That motion which was signed by the plaintiffs as well as their proctor was allowed. The relevant journal entry reads : " Allowed. Case withdrawn."

It was thereafter that the deed was executed. By it one of the plaintiffs sold to one Kadahettige Jayawardena an undivided 1/3rd share of the land called Pansalagawawatte and building standing thereon.

It is clear from section 17 that once an action for obtaining a partition or sale of any property is instituted any of the owners may not lawfully alienate his undivided share or interest therein unless and until the Court has refused to grant the application for the partition or sale as the case may be. In the instant case there was no such refusal and the alienation of an undivided share in the property in respect of which the action was instituted is unlawful and void.

Undivided ownership is terminated only by either the final judgment contemplated in section 6 or by the issue of the certificate of sale provided for in section 8. The true interpretation of the statutory prohibition is stated thus in the judgment of the full Court *Peiris vs. Peiris et al* 6 Law Recorder 1.

> " Where the application for partition or sale is refused the prohibition endures up to the refusal. The question is, up to what point does the prohibition endure, when the application for a partition or sale is granted? No difficulty arises when the Court grants a decree for partition, because in the case of a partition decree there is no interval between a decree and its execution. The only difficulty that arises is where a decree for sale is granted, as in that case there is an interval between the decree for sale and the issue of the certificate under section 8, and the point to be determined is, whether the prohibition is in force during this interval. The Court is of opinion that the prohibition must be deemed to continue so long as the common bond of co-ownership exists, that is to say, until the issue of the certificate under section 8."

The withdrawal of the action cannot in this instance be said to amount to a refusal to grant the application for a partition or sale as the Court actually entered a decree ordering a sale of the land, Under our law the only provision for the withdrawal of an action is to be found in section 10 of the Civil Procedure Code. It provides for the withdrawal of an action from one Court and for its transfer to another on the orders of the Supreme Court.

What was done in the partition action does not come within the ambit of that section, nor does it fall within the scope of section 406, whereunder a plaintiff may in certain circumstances with the permission of the Court withdraw from an action.

The Court had no power to allow the plaintiffs' motion and its order allowing the withdrawal of the action must be regarded as a nullity.

At the close of the argument of this appeal we delivered our judgment dismissing it and indicated to Counsel that we proposed to deliver our written reasons later. We have accordingly set out the grounds for our decision.

GUNASEKARA, J.
I agree.

Appe al dismissed.

Present : GRATIAEN, J.

K. MUTTUSAMY *et al* vs. INSPECTOR OF POLICE, KAHAWATTA

S. C. No. 1160-1163—*M. C. Ratnapura, No.* 21,205

Argued on : 14th March, 1951.
Decided on : 19th March, 1951.

Penal Code, section 183—*Voluntarily obstructing public servant—Police officer searching without warrant—What the prosecution has to prove—Section* 220A—*Charge of intentionally offering resistance to Police officer in the lawful apprehension of accused on charge of theft—Arrest without warrant—When is such arrest legal—What should be proved.*

Criminal Procedure Code, section 32—*Arrest without warrant—Necessity to comply with provisions of sections* 37, 126 *and* 126A—*Search of premises for stolen property without warrant—Police Ordinance, section* 69—*Police powers to carry out search.*

Arrest without warrant on suspicion—Need to inform suspect of nature of charge—Duty of Court to scrutinise jealously actions of police officers arresting private citizens without warrant.

Held : (1) That to establish a charge under section 183 of the Penal Code it is incumbent on the prosecution to prove affirmatively (*a*) that the public officers concerned were in fact engaged in the lawful exercise of their public functions ; (*b*) that the conduct of the accused as specified in the charge constituted obstruction within the meaning of that section.

(2) That where the charge was that the accused voluntarily obstructed police officers, who, without search warrant, attempted search of premises for stolen property, the prosecution must prove the material upon which the police officers concerned entertained " reasonable suspicion " that the premises in question contained stolen property.

(3) That a suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officers own knowledge or on statements by other persons in a way which justify him in giving them credit.

(4) That a mere verbal refusal to allow a public servant to perform his duty is not obstruction within the meaning of section 183 of the Penal code.

(5) That to establish a charge of intentionally offering resistance to a police officer in the lawful apprehension of the accused on a charge of theft, (an offence under section 220A of the Penal Code) the prosecution must affirmatively prove (*a*) that resistance to arrest was offered, and (*b*) that the arrest without warrant on a charge of theft was lawful.

(6) That to prove such an arrest was lawful the prosecution must show that the accused were persons "against whom a reasonable complaint had been made or credible information had been received or a reasonable suspicion existed" of their having been concerned in the commission of the offence of theft.

(7) That in such a charge it is the Magistrate's function to inquire into the state of mind of the officer at the time he ordered the arrest.

(8) That whenever a police officer arrests a person on suspicion without a warrant " common justice and commonsense " require that he should inform the suspect of the nature of the charge upon which he is arrested.

(9) That the procedure laid down by section 126A of the Criminal Procedure Code is intended to be applied only in those rare cases in which the investigation of allegations against a person in police custody suspected of crime cannot be completed in 24 hours.

(10) That when private citizens are arrested without a warrant it is imperative that the provisions of sections 37, 126 and 126A of the Criminal Procedure Code should be scrupulously applied. If this is not done, police powers which are designed to protect the community " become a danger instead of a protection ".

Per GRATIAEN, J.—(*a*)" As Scott, L.J., pointed out in *Dumbell vs. Roberts* (ibid), The principle of personal freedom, that every man should be presumed innocent until he is found guilty, applies also to the police function of arrest."

(*b*)" I am in accord with the view expressed by the learned Magistrate that attempts on the part of any person to delay or deter the administration of justice should not be tolerated. But it is no less important, as I have pointed out, that the actions of police officers who seek to search private houses or to arrest private citizens without a warrant should be jealously scrutinised by their senior officers and above all by the Courts."

Cases referred to : *Miskin vs Dingiri Banda* (1922) 4 Cey. Law Rec. 166,
McCardle vs. Egan (1933) 30 Cox C. C. 67.
Laurensz vs. Jayasinghe (1913) 16 N. L. R. 505.
Police Sergeant, Hambantota, vs. Silva (1939) 40 N. L. R. 534.
Dumbill vs. Roberts (1944) 1 A. E. R. 326 at 329.
Davis vs. Lisle (1936) 105 L. J. R. 593.
Christie vs. Leachinsky (1947) L. J. R. 757.

G. E. Chitty with *N. Nadarasa*, for the accused-appellants.
Ananda Pereira, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

This case has caused me much anxiety, and I am indebted to Mr. Chitty and to learned Crown Counsel for the assistance they have given me. Important questions have been raised regarding the powers of police officers to search premises or to arrest persons without prior judicial authority. That such powers should be vested in them, within circumscribed limits, is necessary so as to facilitate the prevention and detection of crime. Nevertheless, such powers are always attended by grave responsibilities, and justice requires that the Courts should be very vigilant to ensure they are not abused through inexperience, excess of zeal or " insolence of office ".

There are four accused in this case, a man and his wife and their two sons. They are Indian estate labourers employed on No. 6 division of Pelmadulla Group in Kahawatte. The 1st accused is 50 years of age and is a sub-kangany in charge of a gang of 18 tappers including his wife the 4th accused who is also 50 years of age, and his married sons the 2nd and 3rd accused. The family occupied a set of adjacent line rooms on the estate, and the evidence seems to indicate that prior to the incident which took place on the night of 31st August, 1950, they were of a peaceful disposition.

On the evening of 25th August, 1950, the 1st accused had complained to the Kahawatta police that one of his sons had been assaulted by a man named Gunapala, whose father Andirishamy was a kangany of the same division of the estate as that on which they were employed. The complaint was recorded by police constable Dharmasena. There is no evidence as to what official action was taken upon this complaint, and I only mention it because it has been suggested, but not proved, by the defence that Dharmasena was disposed to show some partiality towards Andirishamy and Gunapala in regard to the dispute. For the purposes of my findings in the present case, it is sufficient to record that, whether this theory of favouritism be justified or not, it was in fact genuinely entertained by the members of the accused family—and particularly so by reason of the events which occurred a few days after the complaint had been recorded by Dharmasena. I have been careful to remind myself that the police officers concerned are not on trial in these proceedings and that their conduct calls for comment only in so far as is relevant to the charges framed against the accused.

On the night of 31st October, 1951, Sergeant Wambeck of the Kahawatta Police and Constable Dharmasena arrived in uniform without prior warning at the line rooms occupied by the accused at 10-40 p.m. They were accompanied by Andirishamy the father of Gunapala, and they informed the 1st accused, who was seated on the verandah reading a newspaper, that they had decided to search the line rooms occupied by himself and his family for the possession of rubber alleged to have been stolen. It is not difficult to understand that the presence of Andirishamy on this occasion induced the belief in the 1st accused's mind that it was Andirishamy who had engineered the proposed raid at this late hour as a counterblast to the earlier complaint against his son. Admittedly, no search warrant had been obtained by the Police to search the lines, nor had they thought it necessary to obtain the permission of the Superintendent of the estate or even the conductor of the division to search the rooms. As one would expect in such a situation, considerable commotion followed and, although there is a conflict of evidence as to what actually took place, I will accept it as proved that, as narrated by Wambeck, the 1st, 2nd and 3rd accused " refused to allow him to search the line rooms ", that the " 1st accused asked him to get out of the compound ", and that " the 2nd and 3rd accused also came up and asked him to get out of the place ". Wambeck states that in these circumstances he " did not enter any of the rooms ". He decided—in my opinion, wisely—to send an urgent message summoning Police Inspector Kannangara, the officer in charge of the Kahawatta police station, to the scene. In the meantime Wambeck took no action to press his demand to be allowed to search the rooms. " I pacified the accused ", he says, " and asked them to keep quiet till the Inspector arrived ".

It is convenient at this stage to consider whether, upon this evidence, the prosecution had established the guilt of all four accused on the 1st charge framed against them. I shall refer later to the incidents which took place after Inspector Kannangara arrived on the scene at 11-50 p.m., with his police reinforcements.

The case for the prosecution on this charge is based solely on the testimony of Wambeck. It is alleged that all four accused " did voluntarily *obstruct* two *public servants*, to wit Police Sergeant Wambeck and P. C. Dharmasena of the Kahawatta Police, at 10-40 p.m., *in the lawful discharge of their public functions*, to wit, in searching the line rooms of the 1st, 2nd and 3rd accused (*a*) *by obstructing and preventing* them from entering into the said line rooms for the purpose of the aforesaid search (*b*) *by threatening to do bodily harm* to the said police officers and *by damaging*

articles in the said line rooms in order to deter the said police officers from carrying out the said search". Dharmasena, the alleged partisan of Andirishamy, was not called as a witness.

In order to prove the commission of an offence punishable under section 183 of the Penal Code it was incumbent upon the prosecution affirmatively to prove (*a*) that the public officers concerned were in fact engaged in the lawful exercise of their public functions when they attempted to search the accused's premises on the night in question, and (*b*) that the conduct of the accused as specified in the charge constituted "obstruction" within the meaning of the section.

Were Wambeck and Dharmasena entitled to search the premises occupied by the accused on the night of 31st August, 1950? If this question be answered in the negative, the charge must necessarily fail. Admittedly, they had not obtained the authority of a Magistrate to search the premises in terms of section 70 of the Criminal Procedure Code. Nor is it suggested that they acted under the provisions of section 124 of the Code, as neither of them was an officer in charge of a Police Station or an "inquirer" holding an investigation under Chapter 12 of the Code. Learned Crown Counsel submitted that their purported powers of search existed, if at all, by virtue of the provisions of section 69 of the Police Ordinance which *inter alia* authorises any Police Officer without a warrant to enter and search "any locality.....which he reasonably suspects to *contain stolen property*". (Vide *Miskin vs. Dingiri Banda*, (1922) 4 Cey. Law Rec. 166.

I have examined Wambeck's evidence with care, and I am content to say that, as far as these proceedings are concerned, it has not been affirmatively proved that he "reasonably suspected" that the line rooms which he claimed the right to search without a warrant did contain stolen property. All he testifies to on this point is that "on receipt of information, while on night patrol", he "went to the line rooms of the 1st, 2nd and the 3rd accused". He "explained to them that he wanted to search their rooms for possession of rubber said to have been stolen". Under cross-examination, he refused, as he was of course entitled to do, to disclose the name of his informant, but stated that he had "noted the information in his notebook" (which he did not produce). This is all the material on which the learned Magistrate was invited to hold that Wambeck entertained a "reasonable suspicion" that there was stolen rubber on the premises. I find it impossible to understand how a Court of law could hold that this vital ingredient of the offence was established. A suspicion is proved to be reasonable if the facts disclose that it was "founded on matters within the police officer's own knowledge or on statements by other persons *in a way which justify him in giving them credit*". (*McCardle vs. Egan* (1933) 30 Cox C. C. 67). No evidence was led from which it could be inferred that Wambeck and Dharmasena were discharging lawful functions on the occasion when they complain that they were frustrated in their purpose. The charge under section 183 therefore fails *ab initio*. It makes no difference at all that Inspector Kannangara says that *after the event* he discovered some rubber in the line rooms. The sole issue which I am now investigating relates to Wambeck's knowledge and state of mind *before he decided to search the premises* Indeed, this alleged discovery of rubber, insinuated but not proved to have been stolen, was irrelevant to any charge before the learned Magistrate in these proceedings.

I am not satisfied that the conduct of the accused in any event constituted "obstruction" within the meaning of section 183. A mere verbal refusal to allow a public servant to perform his duty is not "obstruction" (*Laurensz vs. Jayasinghe* (1913) 16 N. L. R. 505). The learned Magistrate has taken the view that the alleged "threat to do bodily harm" to the Police Officers was not substantiated, as is evident from his order acquitting all the accused of the charge of intimidation. The only other allegation made by Wambeck in this connection was that the 1st, 2nd and 3rd accused "broke pots and pans and created a commotion". With great respect, I do not see how, even if this uncorroborated evidence be true, such senseless destruction by the accused of their own property could seriously be regarded as calculated to obstruct or prevent a policeman from entering the line rooms. (Vide *Police Sergeant, Hambantota vs. Silva* (1939) 40 N. L. R. 534). The impression which I have formed is that when Wambeck and Dharmasena were refused permission to carry out their intended search, they very wisely decided to stay their hand until a senior officer arrived on the scene. The accused must be acquitted of the charge framed under section 183.

The outstanding charges are based upon the alleged conduct of the accused after Inspector Kannangara arrived on the scene with two constables. I shall first narrate what actually took place according to the evidence of Kannangara and Wambeck. The position now was that four hysterical but unarmed estate labourers

(one of whom was a woman of 50) were confronted by a Police Inspector, a Police Sergeant and 3 police constables all of whom were armed with batons or other tangible aids to the gentle art of persuasion. The Inspector says that he too demanded that he should be permitted to search the line rooms without a warrant. This permission was refused. He immediately ordered Wambeek and the others to arrest the 1st, 2nd and 3rd accused *on a charge which he did not specify*. After a slight scuffle, these three accused persons were taken into custody and forcibly removed to the police station. In the meantime the 4th accused hurried away to the Assistant Superintendent of Police, Ratnapura, and complained the treatment which her family had suffered at the hands of the police party. Her complaint was recorded, she was examined by the doctor, and was *kept in police custody until the next morning*. She has then produced before the Magistrate and, on the application of the police, *remanded to Fiscal's custody for 5 days without any charge being framed against her*. The other accused were similarly remanded for 6 days until charges were framed against them. How any Magistrate, acting judicially, could have lent his sanction to such an indefensible proceeding I really cannot understand. The procedure laid down by section 126A of the Criminal Procedure Code is intended to be applied only in those rare cases in which the investigation of allegations against a person in police custody suspected of crime *cannot be completed within 24 hours*. In this case the facts relating to the present charges were matters within the personal knowledge of the Police Officers who took part in the transaction. No material was placed before the Magistrate to justify a decision that, pending the framing of charges, justice required that the accused should be placed on remand. When private citizens are arrested without a warrant, it is imperative that the provisions of sections 37, 126 and 126A of the Criminal Procedure Code should be scrupulously applied. If this is not done, police powers which are designed to protect the community "become a danger instead of a protection". (Per Scott L.J. in *Dumbill vs. Roberts* (1944) 1 A. E. R. 326 at 329).

The second charge against the accused was that they "obstructed A. Kannangara, Inspector of Police at 11-50 p.m., in the lawful discharge of his public functions, to wit, in searching the line rooms for stolen scrap rubber". This charge must also fail for the same reasons which I have set out in relation to the earlier charge of obstruction. No evidence was led upon which the learned Magistrate could hold that Kannangara was entitled to search the premises without a warrant. Kannangara was therefore not proved to have been engaged in the lawful discharge of his public functions at the time. Indeed, I would say that, *upon the material placed before the Court*, the Inspector would probably have been a trespasser if he had persisted in entering the premises without a warrant when permission to enter was refused him. (*Davis vs. Lisle* (1936) 105 L. J. R. 593). In any event no evidence was led of any "obstruction" other than the bare verbal refusal by the 1st, 2nd and 3rd accused to authorise the attempted invasion of their homes. The 2nd charge therefore fails.

I shall now deal with the third and most serious charge against the accused. It is alleged that they did "intentionally offer resistance to Inspector Kannangara in the *lawful apprehension* of the 1st, 2nd and 3rd accused *on a charge of theft* of scrap rubber, property belonging to the Pelmadulla Group, and thereby committed an offence punishable under section 220A of the Penal Code".

To establish this charge it was incumbent upon the prosecution affirmatively to prove that *resistance* to arrest was offered, and that the *arrest without a warrant on a charge of theft was lawful*.

That some resistance was offered by the 1st, 2nd and 3rd accused has, I think, been established. They are unarmed, but in the scuffle that followed upon their arrest Wambeek sustained a few abrasions and so did Dharmasena and constable Arifdeen. Inspector Kannangara, himself apparently fell down—with the minimum loss of dignity, I trust—and sprained his left thumb when he was dragging one of the accused into his car.

It is no doubt regrettable that four out of five police officers armed with batons should sustain even trivial injuries when they were performing an alleged public duty in arresting three unarmed estate labourers. But the fact remains that they inflicted far more bodily harm than they themselves received in the course of the scuffle. Apart from a number of abrasions, the 1st accused, aged 50, sustained six contusions caused by blows from a police baton, or as the doctor surmises, a cane or a belt. One of the contusions was 9 inches long, another 8 inches long and a third six inches long. Two months later, at the trial, the 1st accused was able to remove his shirt and point out to the learned Magistrate

two of the scars of the unequal battle. The 2nd accused also sustained abrasions, a contusion on his chest and other contusions two inches long on the upper part of his left thigh, which, according to the doctor, were caused by a cane, a belt or a baton strap. The 3rd accused sustained an abrasion, a contusion on the top of his right shoulder and two contusions 4 inches long on his abdomen. In the opinion of the doctor these injuries were caused by a cane, a belt or a baton strap. Finally, the 4th accused who was an old woman, sustained an abrasion and 3 contusions, one of them 2½ inches long on the small of her back. The doctor says that these contusions could have been caused by blows with a cane or a baton. Inspector Kannangara further admits that at one stage he " pulled her by her hair and pushed her aside ".

The learned Magistrate had held, and I will therefore assume, that the four accused were assaulted by the police officers after the male members of the family made some show of resistance to their arrest. The view taken by the Magistrate is that they " merely asked for trouble by their unseemly and obstinate conduct ". My own reaction to this disagreeable incident is to register the hope that the average disciplined and well-trained police officer is competent to apprehend unarmed private citizens, however hysterical and rebellious they may be, without inflicting as much bodily harm as Inspector Kannangara and the four subordinate officers who acted on his orders seem to have considered necessary.

Assuming, then, that resistance was offered by the accused, the question to be determined is whether their arrest without a warrant was a lawful arrest. The accused were not prosecuted for common assault, but for resisting the lawful apprehension by a police officer in the execution of his official duty. It is alleged in the charge that the purported arrest was *on a charge of theft*, and learned Crown Counsel has, with characteristic fairness, conceded that no evidence was led by the prosecution to prove that Kannangara was entitled to order the arrest of the 1st, 2nd and 3rd accused without a warrant on the night of 31st August, 1950. On the facts of this case, the legality of the arrest depended upon whether the accused were persons " against *whom a reasonable complaint* had been made or *credible information* had been received or a *reasonable* suspicion existed " of their having been concerned in the commission of the offence of theft. (*Section* 32 (1) (*b*) *of the Criminal Procedure Code*). Inspector Kannangara has nowhere in the course of his evidence referred to any complaint or information or suspicion the reasonableness of which could have been tested by the learned Magistrate, whose function it was to inquire into the officer's state of mind at the time that he ordered the arrest. (*McCardle vs. Egan* (*ibid*). As Scott L.J. pointed out in *Dumbell vs. Roberts* (*ibid*). " The principle of personal freedom, that every man should be presumed innocent until he is found guilty, applies also to the police function of arrest.....For that reason it is of importance that no one should be arrested by the police except on grounds which in the particular circumstance of the arrest really justify the entertainment of a reasonable suspicion ". Where a citizen is charged with offering resistance to his lawful apprehension, it is incumbent on the prosecution to prove without doubt that the apprehension was in fact lawful and justified in the circumstances of the case.

There is another aspect which calls for emphasis. When a police officer arrests a man *on the authority of a warrant* issued by an order of Court, section 53 of the Criminal Procedure Code requires that he " shall notify the substance of the warrant to the person arrested, and if so required shall show him the warrant or a copy thereof issued by the person issuing the same ". *A fortiori*, whenever a police officer arrests a person on suspicion *without a warrant*, " common justice and commonsense " require that he should inform the suspect of the nature of the charge upon which he is arrested. This principle has been laid down in no uncertain terms by the House of Lords in *Christie vs. Leachinsky* (1947) L. J. R. 757, and it is indeed very much to be desired that the following general propositions enunciated by Lord Chancellor Simon should be borne in mind by all police officers in this Country :—

> " (1) If a police officer arrests without warrant upon reasonable suspicion, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself, or to give a reason which is not the true reason. In other words, *a citizen is entitled to know on what charge or on suspicion of what crime he is seized*;
>
> (2) If a citizen is not so informed, but is nevertheless seized, the policeman, *apart from certain exceptions*, is liable for false imprisonment.

The evidence on record shows how widely these elementary rules have been departed from. Neither the accused nor the junior officers who were instructed to effect the arrest were informed of the reason for the drastic action ordered to be taken. Indeed, the accused were in police custody for one night and in Fiscal's custody

for 5 days before any charges were formulated against them. How then can it be argued that the accused were not entitled to resist their attempted apprehension without a warrant and on an unspecified charge? "Is Citizen A", asked Lord Chancellor Simon, "bound to submit unresistingly to arrest by Citizen B in ignorance of the charge against him? I think, My Lords, that cannot be the law of England. Blind unquestioning obedience is the law of tyrants and slaves; it does not yet flourish on English soil". Let us not forget that the law of Ceylon coincides with the English law on this fundamental matter affecting the rights of private citizens. I acquit the accused on the 3rd charge framed against them.

All the accused were acquitted by the learned Magistrate on the charge of intimidation. There remains for consideration only the charge under which the 4th accused is alleged to have "intentionally offered resistance to Inspector Kannangara and others in the lawful apprehension of the 1st, 2nd and 3rd accused". For the reasons which I have already set out, this charge also fails because the arrest has not been proved to have been lawful. Apart from that, the accusation has not been substantiated on its merits. All that this unfortunate woman is alleged by the Inspector to have done in her distress was to cling on to the police officers when they were overpowering her husband and her sons in order to arrest them. Her own version is much the same. "I saw the police officer assaulting my husband and my sons", she explained to the Magistrate, "I held the officers and asked them not to arrest my sons. The police officer pushed me to a side and I fell down". To attribute to this woman's behaviour a *criminal* intention to interfere with the lawful functions of public officers is to betray the lack of a sense of proportion. I quash the conviction.

In the result, all four accused must be acquitted of all the charges framed against them. My decision is, of course, based only on my assessment, as an appellate Judge, of such evidence as the prosecution thought fit to place before the learned Magistrate at the trial. I am in accord with the view expressed by the learned Magistrate that attempts on the part of any person to delay or deter the administration of justice should not be tolerated. But it is no less important, as I have pointed out, that the actions of police officers who seek to search private homes or to arrest private citizens without a warrant should be jealously scrutinised by their senior officers and above all by the Courts. In cases of this nature, the facts should in the first instance be reported to the Law Officers of the Crown so that, after an impartial examination of all the available material, the real transgressors, whoever they might be, could be brought to justice.

Accused acquitted.

Present: BASNAYAKE, J. & PULLE, J.

SIVAGURUNATHAN vs. DORESAMY *et al.*

S. C. No. 13 *(F)—D. C. Colombo* 4707/*P.*

Argued on: 4th October, 1950
Decided on: 6th February, 1951

Preliminary objection—Appeal—Notice tendering security for costs—Failure to mention name of respondent on whom notice served informing that security will be given for his costs of appeal—Names of other respondents mentioned—Does such notice comply with section 756 *of Civil Procedure Code—Form No.* 126 *given in schedule—Interpretation.*

Failure to take objection in lower court—Powers of Supreme Court to entertain objection—Relief under section 756 (3)

Where in a notice of tendering security for costs of appeal served on one of the respondents the appellant failed (*a*) to mention his name as the person in respect of whose costs the appellant proposed to give security; (*b*) to follow the form prescribed in Form 126 of the Civil Procedure Code.

Held: (1) That the notice did not comply with section 756 of the Civil Procedure Code, and the appeal should have been held to have abated.

(2) That no relief should be granted as the failure or omission complained of was completely and immediately within the appellant's power to avoid.

(3) That where a statute prescribes that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form, notwithstanding the absence of any reference to the form in the relevant section.

(4) That as the Supreme Court has power to reject an appeal that is not properly before it the respondent is not precluded from taking objection to the hearing of an appeal although he had not asked the trial Judge to hold that the appeal had abated.

Per BASNAYAKE, J.—"The rule of construction of statutes containing schedules is that where the enacting part and the schedule cannot be made to correspond, the latter must yield to the former. *Reg. vs. Baines* (1840) 12 Ad. & E. 210 at 227; *Dean vs. Green* (1882) 8 P. D. 79 at 89, 90. In regard to the forms themselves the rule is that they are to be followed implicitly so far as the circumstances of each case may admit. *Bartlett vs. Gibbs* (1843) 5 Man & G. 81 at 95, 96; 13 L. J. C. P. 40 at 42. Section 756 and form No. 126 not being in conflict, the notice required by the section should be in the prescribed form and no other. *Ryan vs. Oceanic Steam Navigation Co* (1914) 3 K. B. 731".

Cases referred to: *de Silva vs. Seenathumma* (1940) 41 N. L. R. 241.
Reg. vs. Lumsdaine (1839) 10 A. &. E. 157 at 160; 8 L. J. M. C. 69 at 71.
Attorney-General vs. Lamplough (1878) 3 Ex. D. 214 at 229; 47 L. J. Ex. 555 at 562.
Reg vs. Baines (1840) 12 Ad. & E. 210 at 227.
Dean vs. Green (1882) 8 P. D. 79 at 89, 90.
Bartlett vs. Gibbs (1843) 5 Man & G. 81 at 95, 96; 13 L. J. C. P. 40 at 42.
Ryan vs. Oceanic Steam Navigation Co. (1914) 3 K. B. 731.
Vanderpoorten vs. Settlement Officer (1942) 43 N. L. R. 230.
Kanagasunderam vs. Podihamine (1940) 42 N L. R. 230.
Attorney-General vs. Karunaratne et al (1935). 37 N. L. R. 57.
British Ceylon Corporation Ltd. vs. United Shipping Board et al (1934) 36 N. L. R. 225.

H. V. Pereraa K.C., with *C. Renganathan* and *A. Nagendra*, for the 10th defendant-appellant.
S. J. Kadirgamar with *G. L. L. de Silva*, for the 15th to 17th defendants-respondents.
H. W. Tambiah with *Sharvananda*, for the 7th defendant-respondent.
E. B. Wikramanayake, K.C., with *H. W. Jayawardena*, for the 8th defendant-respondent.

BASNAYAKE, J.

This is an application for the sale under the Partition Ordinance of a land called Villiagama Estate in extent 136 acres and 11 perches owned in common by the applicant and seventeen others. Of the defendants the 8th, 10th and 11th filed a claim praying that the land be partitioned, while the 15th, 16th, and 17th who are resident outside the Island disputed the shares allotted to them in the libel. The 1st to 7th, 12th, and 13th defendants took no part in the proceedings. The learned District Judge decreed a sale of the common property as prayed for. The 10th defendant who is dissatisfied with the learned Judge's apportionment of shares and his order as to costs has appealed.

The appellant served notice of tending of security on all the respondents. The notices contained the names of all the parties to the action and were addressed to the Proctors of some of the respondents and personally to the others. In the case of the 7th respondent who takes objection to the appeal being heard, the notice was addressed to the Proctor, and it reads thus:

"Take notice that the petition of appeal presented by the above-named 10th defendant appellant on the 26th day of November, 1948, against the order of the District Court of Colombo dated 15th November, 1948, in the said action having been received by the said Court, I will on the 1st day of December, 1948 at 10-45 o'clock in the forenoon or so soon thereafter move to tender security by depositing a sum of Rs. 500 and by hypothecating the same by bond for any costs which may be incurred by the 8th, and 15th to 17th defendant-respondent in appeal in the premises and will on the said day deposit in Court a sufficient sum of money to cover the expenses of serving notice of appeal on the plaintiff-respondents and defendant-respondents. Copy of petition of appeal annexed."

It is dated 26th November, 1948, and bears the following endorsement dated 3rd December, 1948:

"This notice is extended and re-issued for service on the within-named 7th defendant-respondent for 6th December, 1948."

The submission of learned Counsel for the respondent is that as the notice expressly mentions the other respondents but makes no mention of the 7th defendant-respondent, it is not a notice to the 7th respondent though served on her. He submits that the service of a notice which does not purport to be a notice informing her that security will be given for her costs of appeal on the date mentioned herein is not a

notice under the section. Section 756 requires that the appellant shall give notice to the respondent, meaning thereby to the respondents where there is more than one respondent to an appeal. Learned Counsel submits that the requirements of the section are not satisfied unless the notice is addressed to the respondent for whom it is meant and informs that person that on the specified date security in respect of her appeal costs will be tendered. He relies in support of his argument on the language of section 756 and the form of notice prescribed in the Schedule. That form reads as follows :

" To (respondent).

Take notice that the petition of appeal presented by me in the above-named action on the.....day of.....19.....against the (order or decree) of the.....Court of.....dated the..... day of.....19.....in the said action, having been received by the said Court, Counsel on my behalf will, on the.....day of.....19.....at .....o'clock of the forenoon, or so soon thereafter as, &c., being within.....days from the day of the date of such (order), move to tender security by (mention how) for any costs which may be incurred by you in appeal in the premises, and will on the said day deposit in Court a sufficient sum of money to cover the expenses of serving notice of appeal on you.

(Signed).....Party Appellant."

The notice which has been given to the 7th respondent is not in the prescribed form and does not inform her that the appellant proposes to give security for costs which may be incurred by her in appeal. She is clearly not included among those in respect of whose costs the appellant proposed to give security. Although the bond executed by the appellant secures the costs of all the respondents to this appeal, including the 7th respondent, the omission to give the requisite notice is not in my opinion thereby cured.

Learned Counsel submits that the omission to give the 7th respondent the prescribed notice is fatal to the appeal and relies strongly on the Full Bench decision of this Court in the case of *de Silva vs. Seenathumma* (1940) 41 N. L. R. 241. That case lays down that the requirements of section 756 are imperative and that failure to comply with those requirements is fatal to an appeal. In my opinion the respondent's objection is entitled to succeed. Section 756 provides that when a petition of appeal has been received by the Court of first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in the notice tender security for the respondent's costs of appeal. That section when read with the form prescribed by the Code clearly indicates that the notice given thereunder should inform the respondent on whom it is served that security for that respondent's costs will be tendered on the date mentioned therein. In the instant case the notice served on the 7th respondent does not do so. The notice cannot therefore be taken as a notice to the 7th respondent that security will be tendered for her costs in appeal on the date mentioned therein. The 7th respondent was therefore under no duty to appear on the date mentioned in the notice and show cause, if any, against the security which the notice indicated would be tendered in respect of the other respondents.

Where a statute prescribes that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form. A notice under section 756 must be addressed to the party to whom notice has to be given and delivered to the party and inform him that on the date specified therein security for his costs in appeal will be tendered. The fact that section 756 makes no express reference to Form No. 126 in the First-Schedule to the Code—Form of Notice to respondent that appellant will tender security in appeal—does not in my opinion permit an appellant to ignore that form and act as if it had not been enacted.

A schedule in a statute is as much a part of the statute and as much an enactment as any other part *Reg. vs. Lumsdaine*, (1839) 10 A. & E. 157 at 160 ; 8 L. J. M. C. 69 at 71. *Attorney-General vs. Lamplough*, (1878) 3 Ex. D. 214 at 229 ; 47 L. J. Ex. 555 at 562. The rule of construction of statutes containing schedules is that where the enacting part and the schedule cannot be made to correspond, the latter must yield to the former *Reg. vs. Baines*, (1840) 12 Ad. & E. 210 at 227. *Dean vs. Green*, (1882) 8 P. D. 79 at 89, 90. In regard to the forms themselves the rule is that they are to be followed implicity so far as the circumstances of each case may admit *Bartlett vs. Gibbs*, (1843) 5 Man & G. 81 at 95, 96 ; 13 L. J. C. P. 40 at 42. Section 756 and form No. 126 not being in conflict, the notice required by the section should be in the prescribed form and no other *Ryan vs. Oceanic Steam Navigation Co.*, (1914) 3 K. B. 731.

Learned Counsel for the appellant contends (*a*) that the notice is sufficient, and (*b*) that it is not open to the respondent to take objection to the hearing of the appeal on the ground of non-compliance with section 756 in this Court, but

that he should have done so in the Court of trial. I have already dealt with (*a*), and only (*b*) remains to be discussed. The limb of section 756 under which an appeal abates on failure to give security in the prescribed manner reads as follows :—

> " And when a petition of appeal has been so received, but the petitioner has failed to give security and to make the deposit as in this section provided, then the petition of appeal shall be held to have abated, and the further proceedings in this section prescribed shall not be necessary."

The further proceedings that are prescribed in the section are—

> (*a*) the issue of the notice of appeal on the respondents,
>
> (*b*) the forwarding of the petition of appeal to the Supreme Court together with the certificate of the Secretary or Clerk of the Court,
>
> (*c*) the transmission to this Court of the Fiscal's return to the process issued under the section.

The meaning of the expression " abated " in this context is indicated by the words which follow. The failure to observe the requirements as to security results in no further steps being taken by the Court on the petition of appeal. The words " shall be held " in the context " the petition of appeal shall be held to have abated " suggest that the Court has to give its mind to the matter and hold that the provisions as to security have or have not been observed. The language of the second limb of section 756 (2) enables a party to invite the Court of first instance to hold that an appeal has abated in consequence of non-compliance with the requirements of sub-section (1) of that section, but if the respondent to an appeal omits to do so it does not follow that this Court is bound to hear an appeal which has no right to come here.

In my opinion the power to decide whether an appeal is properly before it is implied in the power to hear an appeal and an appellate tribunal has power to reject an appeal that is not properly before it. This Court has always exercised that power and rejected appeals by appellants who have no right to be heard. *De Silva vs. Seenathumma et al* (1940) 41 N.L.R. 241. *Vanderpoorten vs. Settlement Officer*, (1942) 43 N.L.R. 230. *Kanagasunderam vs. Podihamine*, (1940) 42 N. L. R. 230. *Attorney-General vs. Karunaratne et al*, (1935) 37 N. L. R. 57. *British Ceylon Corporation, Ltd., vs. United Shipping Board et al*, (1934) 36 N. L. R. 225 That being the case the respondent is not precluded from taking objection to the hearing of this appeal although he has not asked the trial Judge to hold that the appeal has abated.

Finally, learned Counsel for the appellant submitted that if in our view the appellant had failed to give the requisite notice this was a case in which the relief provided by section 756 (3) of the Civil Procedure Code should be granted. That provision reads :—

> " In the case of any mistake, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just."

In the instance case we have no explanation for the appellant for his failure to give the 7th respondent notice of tendering security as provided in the section. The omission to mention the 7th respondent in the notice appears to be not accidental but deliberate. There has therefore been no intention to give her the prescribed notice. It is now settled by the case of *de Silva vs. Seenathumma* (supra) that " the failure on the part of the appellant to comply with the matters immediately and completely in his power " cannot be excused.

For the above reasons I uphold the objection and make order rejecting the appeal with costs.

Pulle, J.

I agree.

Objection upheld.

Present : Dias, S.P.J., & Pulle, J.

BANDAPPUHAMY vs. SWAMY PILLAI

S. C. No. 527—D. C. Colombo 119 *Z*

Argued on : 10th May, 1950
Decided on : 24th May, 1950

Damages—Excavations causing damage to contiguous land—Measure of damages.

Where the defendant excavated earth along the boundary of plaintiff's land, which resulted in damage to plaintiff's fence and subsidence of his land, and the defendant for the purpose of preventing subsidence and erosion of his soil in the future erected a wall along the excavated boundary and claimed the cost of the wall as damages.

Held : (1) That the plaintiff was entitled to only actual physical damages caused by the subsidence and such damages flowing naturally from them.

(2) That the plaintiff could not claim as damages the cost of the wall as future washaways on the land could not be regarded as prospective damage from the first subsidence.

(3) That a right of action for damages accrues each time damage is caused by subsidence resulting from excavations.

H. W. Jayewardene, for the defendant-appellant.
Kingsley Herat, for the plaintiff-respondent.

PULLE, J.—

The defendant in this case appeals from a judgment awarding the plaintiff a sum of Rs. 400 as damages for cutting earth on his own land so as to deprive a contiguous allotment of land belonging to the plaintiff of lateral support.

In his plaint the plaintiff alleged that the defendant in August, 1944, cut earth not only on his own land but encroached on the plaintiff's land by excavating and cutting into his soil below the surface level. At the trial, however, the scope of the action was restricted to the issues whether the defendant in or about August, 1944, cut earth from his own premises so as to deprive the plaintiff of his right of lateral support, and if so, to what damages was plaintiff entitled. A survey had previously established that the surface under plaintiff's land had not been cut into.

On the facts the learned District Judge found substantially in favour of the plaintiff. It would appear that the defendant's land is contiguous to and lies on the south-west of plaintiff's land. They were separated by what is described as a barbed wire live fence. The plaintiff's land was at a higher elevation and sloped gradually down to defendant's land. During the passage of rain water the plaintiff's land would not suffer from anything more than the normal wear and tear of bad weather but the position would be entirely different if along the boundary the defendant cut earth to an average depth of about five feet. Water falling on plaintiff's land would gather an abnormal momentum causing substantial loss by erosion in course of time.

It is clear from the evidence that in or about August, 1944, the defendant had cut earth on his own land practically along half the length of the boundary, a distance of seventy-two feet, causing a perpendicular drop of about five feet. Along this portion of the boundary were two trees which formed part of the fence. These and an arecanut tree collapsed as a result of the excavation and earth washed off in this area exposed the roots of other fence trees.

It is not contested that the collapse of the two fence trees and the arecanut tree and some damage to the fence were due to the subsidence of the soil caused by the excavation. Had the plaintiff sought compensation for the loss of the trees and cost of consolidating the fence, his claim would have been unanswerable. He thought, however, that he should protect himself against all damage in the future and requested a carpenter-mason to prepare an estimate for the construction of a 13-foot wall, 16 inches thick to prevent the washing away of his land. It was on the basis of this estimate that plaintiff claimed Rs. 1,090 as damages.

On the authority of the case of *Pedris vs. Batcha*, (1924) 26 N. L. R. 89 it was submitted to the trial Judge on behalf of the defendant that the plaintiff was not entitled to claim damages in respect of the subsidence which the plaintiff feared might occur in the future and that damages could not be assessed on the basis of the costs of constructing a retaining wall to prevent the surface erosion of the land. On this point the learned Judge expressed himself as follows :—

> "So long as there is some injurious consequence as a result of the cutting of earth from his land by the defendant the plaintiff has a cause of action against him and that the damages that may be claimed are not to be restricted to the immediate damage caused. It is obvious that even after the falling of the two trees on the boundary there must have been a gradual washaway of earth from plaintiff's land and I am unable to agree with defendant's counsel's contention which would mean that plaintiff must wait until there is some big subsidence of earth before he can claim damages."

It is clear from the authorities cited to the learned Judge that under the English Law which is applicable to Ceylon the excavations in themselves give no right of action. A right of action

only accrues when damage is caused by subsidence resulting from the excavations. That every new subsidence gives rise to a fresh cause of action is set out clearly by Lord Halsbury in the following passage in *Darley Main Colliery Company vs. Mitchall* (1886) 11 A. C. 127 :—

> "Since the decision in this house in *Bonomi vs. Backhouse* it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered."

At the hearing of the appeal learned counsel for plaintiff-respondent accepted the correctness of the propositions stated above but proceeded to argue that upon the application of those propositions the assessment of damages was right. He relied on the following passage in Mayne on Damages (11th Edition p. 140) :—

> "If the owner of land by working out his own minerals deprives his neighbour of the support to which he is entitled for his land, the latter has no cause of action until some subsidence results from the working. On that happening, he is entitled to claim for all damage, actual or prospective, from that subsidence, and cannot afterwards claim for any additional damage in respect thereof suffered subsequently."

Had the learned Judge awarded Rs. 400 as damages for actual physical damage caused by the subsidence and the damages flowing naturally from that physical damage one could accept the argument adduced on behalf of the plaintiff. Unfortunately for the plaintiff that was not the basis on which the damages were assessed. As I understand the judgment of the learned District Judge he assessed as damages the cost to the plaintiff of putting up a retaining wall to prevent further washaways. I fail to see how the further washaways on the whole land can be regarded as prospective damage resulting from the first and only subsidence which caused the collapse of three trees and the washing away of some soil near the fence exposing the roots of other trees along the fence. In my opinion the basis on which damages have been awarded in this case cannot be supported.

It was, however, strenuously argued that if the excavations in question caused an abnormal erosion of plaintiff's land by the rapid passage of rain water he ought to be in a position to claim the expenses which he must incur to prevent such erosion. Without expressing a concluded opinion, the position might have been different had the plaintiff alleged that his right, as the owner of a dominant tenement, to discharge rain water on his land to the defendant's along a natural gradient, was interferred with by the acts done by the defendant and that he was entitled to take all reasonable measures for the conservation of his soil. In that case the act of excavation would by itself have amounted to an infringement of plaintiff's right of property. He chose, however, to make his claim only on the basis of loss of lateral support. I think it is too late now, in the sixth year of litigation, for the plaintiff to found a claim on an additional cause of action which was not pleaded or tried in the lower Court. I cannot say with confidence that it is possible to come to a finding on the new cause of action on the existing evidence. Besides, one should not overlook that the pleading of a new cause of action by way of amendment ought not to be allowed if it would result in depriving the defendant of a plea of prescription.

In my opinion this appeal should be allowed, with costs. It would not serve any practical purpose to send the case back for assessment of damage, actual or prospective, as a result of the subsidence. Any damages that the plaintiff is likely to be awarded on a proper basis will fall far short of the amount claimed by him and thus he might have to pay a substantial part of the costs of a fresh inquiry. In the result the plaintiff's action should be dismissed but each party will bear his own costs. The defendant took up the position that he did not make any excavations in August, 1944, that his own land extended to a ditch lying on plaintiff's land and that water falling on plaintiff's land was drained along that ditch and not into his land. On all these points the learned Judge has rightly found against the defendant.

Appeal allowed.

DIAS, S.P.J.

I agree.

COURT OF CRIMINAL APPEAL

Present : DIAS, S.P.J. (President), NAGALINGAM, J. & GUNASEKERA, J.

REX vs. KARUPPIAH SERVAI

Application 20 *of* 1950

S. C. 22—*M. C. Colombo* 19,660

Argued on : 3rd April, 1950
Decided on : 5th April, 1950

Court of Criminal Appeal—Charge of murder by strangulation—Evidence showing commission of crime by A or B or C—What prosecution has to prove—Charge of murder not proven—Evidence of disposal of body—Can accused be convicted under section 198, *Penal Code, though indictment contained no such charge—Criminal Procedure Code section* 182.

In a charge of murder by strangulation the evidence disclosed that the person who strangled the deceased might be A, B or C.

Held : That in order to secure the conviction of A the prosecution had to establish beyond reasonable doubt that the person who strangled the deceased was not B or C.

Held also : That a person who was charged with murder only but whose guilt was not proven, could be convicted under section 198 of the Penal Code, where there was evidence for the purpose, although the indictment contained no charge under that section.

M. M. Kumarakulasingham with *J. C. Thurairatnam* and *H. A. Chandrasena* (assigned), for the accused-appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

DIAS, S.P.J.—

Sallaiappen Karuppiah Servai (the first accused appellant) and Suppiah Karuppiah Servai were jointly charged with committing the murder of a man named M. Vairavan on October 3, 1948. The jury unanimously convicted this appellant of murder and by a majority of five to two acquitted the second accused.

The evidence clearly established that on the night of October 2/3, 1948, the deceased man had been done to death by manual strangulation, after which he had been decapitated and his headless trunk thrown into the sea. The evidence of Dr. Gerald de Saram, the Judicial Medical Officer, proves that the hyoid bone at the base of the tongue of the deceased was absent, and the whole of the right horn of the hyoid bone had been fractured at its inner ends. Although the doctor at first was inclined to the view that the cause of death was decapitation, he stated that on further consideration it was clear that the decapitation had been done after death, which had been caused by manual strangulation causing asphyxia. The fracture of the hyoid bone is a characteristic sign of manual strangulation. This view the jury accepted.

Death by natural causes, accident and suicide having been negatived, the jury was, therefore, face to face with a case of homicide. The manner in which the deceased had been killed made it clear that he had been murdered.

On the question as to the identity of the persons who committed the murder, the jury has acquitted the second accused. The only question for consideration, therefore, is whether the evidence proved the guilt of the appellant beyond all reasonable doubt ?

The case against the appellant was entirely circumstantial in character, there being no direct evidence of any kind. The appellant gave evidence on his own behalf and denied that he had anything to do with the death of the deceased. The second accused gave evidence on oath, and brought the appellant on the scene about the time the deceased was killed, but his evidence, although admissible against his co-accused, did not help the prosecution on the vital question as to who strangled the deceased man.

According to the second accused, he met the appellant when he was asked to persuade the deceased man to pay to the appellant some money which was owing to him. Therefore, on the night of October 2, the two accused, Sinniah, the deceased man, and Sinnathamby met, and after drinking arrack the five of them proceeded to the sea-beach near the railway line to discuss the question of the payment of the money. It was a very dark night. They sat down besides the railway line. The second accused then went to a place about twenty-five yards distant to answer a call of nature. He was absent for about ten minutes. When he returned, he discovered,

by the aid of the electric torch which he had, "the first accused (i.e., the appellant) pressing the buttocks of the deceased who was lying on the ground, while Sinniah was cutting his neck". If that evidence is true, then the *strangulation* of the deceased man must have taken place during the ten minutes when the second accused was absent from his companions. There is no other evidence in the case. The evidence of the second accused, even if accepted *in toto*, does not throw any light on the question as to which of the three men who remained with the deceased strangled him. There is no assignable motive as to why the appellant should have strangled the deceased. There is no evidence that the appellant abetted the strangulation or shared a common murderous intention with the strangler. All the five men had partaken of arrack. Why they went to the sea beach in the dead of night to discuss whether the deceased man should repay his debt to the appellant is unexplained.

The situation in which the prosecution found itself may be reduced to the following propositions :—X (the person who strangled the deceased may be A, B or C. In order to secure the conviction of A, the prosecution had to establish beyond reasonable doubt that X is *not* B or C. It is then, and only then, that the guilt of A can be said to have been established beyond reasonable doubt. In the present case the prosecution was unable to do that. When to that is added the absence of any motive why the appellant should strangle the deceased, it seems clear that the case for the prosecution against this appellant is bound to collapse. In a case of circumstantial evidence in order to secure the conviction of the appellant the facts must be totally inconsistent with any reasonable hypothesis of his innocence. The fact that the appellant *after the man was strangled* helped to dispose of the dead body may be a suspicious circumstance, but on the facts deposed to, it does not indubitably point to his having strangled the deceased. Had the death of the deceased been caused by decapitation and not by strangulation, the position of the appellant might have been different, for then there was evidence, which the jury accepted, that while the man's throat was being cut, he was holding down the deceased by his buttocks. It is unnecessary to consider this aspect of the matter further.

We are, therefore, of opinion that the conviction of the appellant for murder cannot stand.

The verdict of the jury indicates that they believed that this appellant was at the scene when the man was done to death, and that thereafter he helped in the decapitation and in the disposal of the body in order to screen the offender from punishment (section 198 of the Penal Code).

In the case of *Emperor vs. Begu*, (1925) A. I. R. Privy Council 130, the Privy Council affirmed the conviction of a person under section 198 who was only charged with murder, but whose guilt was not proven. It was held that he could be convicted under section 198 of the Penal Code although the indictment contained no charge under that section. In the unreported case *S. C.* 38 *M. C. Hambantota No.* 13,140 C. C. A. Minutes of September 13, 1949 the Court of Criminal Appeal followed *Emperor vs. Begu* (1925) A. I. R. Privy Council 130. The Court said : "It was not disputed at the argument that they could be properly convicted of this offence (*i.e.*, section 198). The case of *Emperor vs. Begu* (1925) A. I. R. Privy Council 130, to which Crown Counsel referred us, bears this out. There was ample evidence in the case to establish a charge under section 198 of the Penal Code against the 2nd, 3rd and 4th appellants. In these circumstances we feel that the conviction of these appellants under section 296 should be quashed, and a conviction under section 198 substituted". Such an order is clearly justified by the provisions of section 182 of the Criminal Procedure Code.

We, therefore, quash the conviction of the appellant under section 296 of the Penal Code, and convict him under section 198 of the Penal Code and sentence him to undergo seven years rigorous imprisonment.

Conviction altered.

Present : Jayetileke, C.J., & Swan, J.

SUBBIAH PILLAI vs. FERNANDO

Application 366—*S. C.* 209/*D. C. Colombo* 17,332

Argued on : 15th September, 1950
Decided on : 26th September, 1950

Appeals (Privy Council) Ordinance (Cap. 85) Rule 1 (a) of rules set out in Schedule to—Action between landlord and tenant—Right to possession—Value—Test.

Held : That for the purposes of an application for conditional leave to appeal to the Privy Council, the value of an action by the landlord against his tenant for ejectment must be determined by the rental reserved by the contract of tenancy.

N. E. Weerasooria, K.C., with *V. Arulambalam* and *C. Chellappah*, for the defendant-petitioner.

Vernon Wijetunge, for the plaintiff-respondent.

JAYETILEKE, C.J.—

This is an application by the defendant for conditional leave to appeal to the Privy Council. Under rule 1 (*a*) of the rules set out in the schedule to the Appeals (Privy Council) Ordinance (Chapter 85) an appeal lies as of right from any final judgment of the Supreme Court where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards or where the appeal involves directly or indirectly some claim or question to or respecting property of some civil right amounting to or of the value of five thousand rupees or upwards. The plaintiff opposed the application on the ground that the matter in dispute on the appeal is less than Rs. 5,000. The test to be applied in considering the question whether the matter in dispute is of the value of less than Rs. 5,000 is thus stated by Lord Selborne in *Allan vs. Pratt.* L. R. 13 A. C. 781.

> "The judgment is to be looked at as it affects the interests of the plaintiff who is prejudiced by it and who seeks to relieve himself from it by appeal."

The plaintiff alleged in his plaint that in the year 1944 he took on rent from the defendant the northern half portion of premises No. 130, Fourth Cross Street, Pettah, at a monthly rental of Rs. 165 and that on September 18, 1946, the defendant wrongfully and unlawfully prevented him from entering the said premises by locking the gate at the entrance. He claimed a sum of Rs. 6,000 as damages from September 18, 1946, up to the date of the institution of the action, an injunction to restrain the defendant from interferring with his occupation of the said premises and further damages at Rs. 500 per day till the defendant removed the obstruction. He valued the subject matter of the action at Rs. 6,000 which represents approximately the amount he claimed as damages from September 18, 1946, up to the date of the institution of the action.

The defendant denied that the plaintiff was a tenant. He alleged that he gave the plaintiff permission to store his goods in a portion of an open room in the said premises and charged the plaintiff a sum of Rs. 165 as hire for the use of it and on September 27, 1946, he gave the plaintiff notice to vacate the said premises at the end of October, 1946. He alleged further that the plaintiff caused loss and damage to him by forcing open a gate leading to the said premises on October 5, 1946, and by failing to remove his belongings from the said premises at the end of October, 1946. He claimed in reconvention a sum of Rs. 165 as rent for December, 1945, and Rs. 2,000 as damages.

After trial the learned District Judge entered judgment in favour of the plaintiff as prayed for in his plaint with damages at Rs. 5 a day from September 18, 1946, and dismissed the defendant's claim in reconvention.

The defendant appealed from this judgment and this Court by its judgment dated June 30, 1950, reduced the damages to Re. 1 a day.

The total amount payable by the defendant on the decree of this Court is Rs. 1,380. The defendant is clearly not entitled to appeal against that part of the decree to the Privy Council. The decree, however, condemned him to pay damages till he removed the obstruction. That part of the decree involves the right to possession. The District Judge was not invited to assess that right and there are no materials before us on which we can say that it amounts to or is of the value of five thousand rupees or upwards. On the pleadings it appears to us that the relationship of landlord and tenant existed between the defendant and the plaintiff. The defendant says that he hired a portion of the premises to the plaintiff to store his goods and the plaintiff says that he took a portion of the premises on rent from the defendant to carry on his business. In an action between the landlord and the tenant the right to possession must be valued at the rental reserved by the contract of tenancy. The applicant is not entitled as of right to appeal in this case and I would therefore refuse his application with costs.

Application refused.

SWAN, J.

I agree.

Present : NAGALINGAM, J. & PULLE, J.

VANDER POORTEN vs. VANDER POORTEN *et al*

S. C. 444—Application to withdraw the sum of Rs. 3,000 deposited with the Registrar of the Supreme Court in S. C. 79—D. C. (Inty.) Colombo 6889/T

Argued on : 16th October, 1950
Decided on : 18th October, 1950

Privy Council—Appeal to—Deposit of security for costs before grant of conditional leave—Withdrawal of Appeal—Notice to Privy Council—Communication by Registrar of Privy Council to Registrar of Supreme Court—Order appeal stands dismissed—Request to bring before Supreme Court for steps to terminate proceedings—Can appellant ask for refund of deposit before order terminating proceedings—Respondents' right to ask for costs—Judicial Committee Rules—Rule 32.

In pursuance of a written notice by the appellant that he desired to withdraw his appeal, the Registrar of the Privy Council notified by letter the Registrar of the Supreme Court that by virtue of Rule 32 of the Judicial Committee Rules 1925 the appeal stands dismissed as from the date of his letter without further order and further proceeded to say "I have accordingly to request you to be good enough to bring this communication before the Lordships of your Court in order that the necessary steps may be taken to terminate proceedings.

The appellant thereafter made application to have refunded to him the sum of Rs. 3,000 deposited with the Registrar by way of security before final leave to appeal was granted.

Held : (1) That in view of the communication addressed to the Registrar of the Supreme Court the appellant should make an application for an order terminating proceedings before asking for a refund of the deposit money.

(2) That the respondent will be entitled at such application to ask for an order for costs in his favour.

B. H. Aluwihare, for the petitioner.

L. G. Weeramantry, for the 2nd to 6th respondents.

NAGALINGAM, J.—

This is an application by the appellant who had obtained final leave to appeal to His Majesty the King in Council to have refunded to him the sum of Rs. 3,000 deposited by him with the Registrar of this Court by way of security as a condition precedent to his being granted final leave to appeal. The appellant in pursuance of the final leave granted appears to have taken the necessary steps to have the record despatched to England and in fact the record was despatched by the Registrar of the Privy Council on January 7, 1947.

Under the Judicial Committee Rules, 1925, an appellant, in the case of an appeal from Ceylon, is allowed a period of four months from the date of the arrival of the printed record in England to lodge his petition of appeal. In this case the record in fact was printed in Ceylon. The appellant therefore had time till May 8, 1947, to lodge his petition of appeal, but prior to that date, namely on April 8, 1947, he appears to have given notice in writing to the Registrar of the Privy Council that he desired to withdraw his appeal, and the Registrar of the Privy Council thereupon in terms of Rule 32 of the Rules referred to notified by letter the Registrar of this Court that the appeal had been withdrawn.

Rule 32 proceeds to declare that in such an eventuality the appeal should stand dismissed as from the date of the letter of the Registrar of the Privy Council without further order. The letter of the Registrar of the Privy Council is filed of record and, besides setting out the fact that by virtue of Rule 32 of the Judicial Committee Rules the appeal stands dismissed as from the date of his letter without further order, proceeds to say, "I have accordingly to request you to be good enough to bring this communication before the Judges of your Court in order that the necessary steps may be taken to terminate the proceedings". It is important to note that though the appeal is said to stand dismissed, nevertheless the communication indicates that some further steps should be taken to terminate the proceedings.

Although no petition of appeal had in point of fact been filed in the Privy Council and all that was done by the appellant was to have obtained final leave of this Court to appeal to His Majesty in Council and to have the printed record transmitted to the Registrar of the Privy Council, Rule 32 of the Judicial Committee Rules uses language which recognises the proceedings which were had prior to the filing of the petition of appeal as an appeal. It may be said that the language of Rule 32 is not exact, but whatever that may be, the terms or the letter of the Registrar of the Privy Council indicates that though the "appeal" may stand dismissed without further order in terms of Rule 32, yet other steps have to be taken to "terminate the proceedings."

Ordinarily, when one uses the phraseology, "the appeal stands dismissed" one would infer that nothing further need be done, for the proceedings are in fact terminated by the order that the appeal stands dismissed. In this case it does not appear to be so. The appellant seeks to withdraw the fund deposited by him on the footing that the proceedings have terminated, and that nothing further remains to be done. But this is in the teeth of the communication addressed by the Registrar of the Privy Council to the Registrar of this Court. Besides, as I have pointed out, the term "the appeal stands dismissed" must receive a special meaning having regard to the stage at which the order was made and must mean that the appellant does not desire to lodge his petition of appeal and to proceed further with the appeal, in other words, that he does not wish to prosecute the appeal.

The foundation for the application made by the appellant therefore fails for no order has been made terminating the proceedings; such an order appears to be essential before it could be said that finality has been reached in regard to the appeal proceedings commenced by the appellant. The appellant must in these circumstances take steps to have the proceedings terminated, and to secure an order of this Court terminating the proceedings. That will then be the stage at which the respondents could apply for any order for costs which they say they are entitled to claim from the appellant.

In this view of the matter the application fails and is dismissed with costs.

Application dismissed.

PULLE, J.
I agree.

COURT OF CRIMINAL APPEAL

Present: JAYETILEKE, C.J. (President), GRATIAEN, J. & PULLE, J.

PONNAMBALAM *et al* vs. THE KING

Appeals 49—50 *with Applications* 92—93 *of* 1950

S. C. 16—*M. C. Jaffna* 18,500

Argued on. 13th November, 1950
Decided on: 17th November, 1950

Court of Criminal appeal—Conviction for murder—Two accused—Absence of evidence of pre-arranged plan—Verdict indicating that jury held each accused responsible for acts of other—Can conviction stand?

The two appellants were convicted of murder. Despite the absence of evidence of any pre-arranged plan between them, the verdict of the jury indicated that they held each appellant responsible for the acts of the other.

Held: That the conviction for murder could not stand.

The appellants were convicted of voluntarily causing grievous hurt.

M. M. Kumarakulasingham with *K. A. P. Rajakaruna*, for the accused-appellants.

H. A. Wijemanne, Crown Counsel, with *A. Mahendarajah, Crown Counsel*, for the Crown.

JAYETILEKE, C.J.

The appellants were convicted of murder and sentenced to death.

The case for the prosecution rested on the evidence of one Sinnan and on a statement alleged to have been made by the deceased to one Andy Arumugam. The learned Judge in his summing-up indicated to the jury that the evidence of Sinnan was unreliable and that it would not be safe for them to base their verdict upon it. We do not know what view the jury took of Sinnan's evidence but in view of the observations made by the learned Judge it would be safe to assume that they did not act on it. Andy Arumugam said that the deceased told him that Ponnambalam, the son of Kidnar, and Kanagasabai, the son of Ponnu, stabbed him. The medical evidence shows that the deceased had two stab injuries one of which was necessarily fatal and the other sufficient in the ordinary course of nature to cause death. On the deceased's statement it is not possible to say which injury was caused by each appellant. The verdict indicates that the jury held each appellant responsible for the acts of the other. They could have done so only if there was evidence of a pre-arranged plan on the part of the appellants to inflict the injuries on the deceased. There was no such evidence. In the circumstances we are of opinion that the conviction must be set aside and the appellants convicted of voluntarily causing grievous hurt. We would sentence each of the appellants to undergo rigorous imprisonment for a period of seven years.

Conviction altered.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

(In revision under section 356 C. P. C.)

Present : GRATIAEN, J.

REX vs. W. A. D. VELIN
M. C. Matugama, No. 11984

REX vs. SETTU, SON OF ALAGAN
M. C. Avissawella, No. 53121

REX vs. M. HEMASIRI
M. C. Kalutara, No. 10325

REX vs. W. A. D. MARKU
M. C. Gampaha, No. 179

REX vs. L. WILSON PERERA *et al*
M. C. Colombo, No. 6203c

REX vs. M. WILLIAM
M. C. Colombo, No. 81462

REX vs. MARIMUTTU, SON OF RAMIAH
M. C. Balangoda, No. 24590

Argued on : April, 24th 1951.
Delivered on : April, 25th 1951.

Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No 49 of 1938—Sections 3 and 4—Sentence of fine without sentence of imprisonment in addition—Magistrate ordering imprisonment in default of fine on same day—Failure to comply with provisions of sections 3 of Payment of Fines Ordinance—Practice of ordering " double security " as condition of granting time to pay fine unwarranted —Criminal Procedure Code, section 312.

Held : (1) That where a person is convicted by a Court of Summary Jurisdiction and sentenced to a fine, without a sentence of imprisonment in addition, it is obligatory on the Court to comply with the provisions of sections 3 and 4 of the Payment of Fines Ordinance No. 49 of 1938 before such person is committed to prison for default.

(2) That the provisions of section 312 of the Criminal Procedure Code must be construed as having been repealed to the extent to which they are inconsistent with the explicit provisions of the Payment of Fines Ordinance of 1938.

(3) That the practice of ordering " double security " as a condition of the granting of time to pay a fine is unwarranted and should be forthwith discontinued.

Per GRATIAEN, J.—(*a*) " An examination of the provisions of the Payment of Fines (Courts of Summary Jurisdiction Ordinance No. 49 of 1938 makes the following propositions abundantly clear in regard to any case in which a Magistrate considers that the mere imposition of a fine on a convicted person would meet the ends of justice :—

(*a*) that the means of the offender must, among other considerations, be taken into account in fixing the amount of the fine (Section 2) ;

(*b*) that unless special circumstances (*the nature of which must be recorded in the proceedings*) are proved or admitted to exist, at least seven days' time *must* be given for the payment of the fine ; that the grant of further extensions of time is permissible (Section 3) ; and that in consequence, an order that a fine should be paid forthwith, except in one or other of the grounds *specified* in *Section* 3, is not authorised by law ;

(*c*) that where time for the payment of a fine is granted as required by section 2, it is illegal *on that occasion* to impose a term of imprisonment in default of payment (Section 4) ; there are a few special exceptions to this general rule, but if they are considered to apply, *the Magistrate's decision to that effect must be based on reliable material and must be recorded in the proceedings,* together with the reasons for such decision ;—*proviso to Section* 4 (1), *and Section* 4 (2) ;

(*d*) that generally, and subject to these few exceptions, a Magistrate, after the date of conviction, is precluded by law from imposing a term of imprisonment on a defaulter unless, on an occasion subsequent to the conviction, *there has been an inquiry as to the defaulter's means—Section* 4 (3) ; if, after such inquiry, the Magistrate is satisfied that the defaulter does not possess the means to pay the fine, there is no jurisdiction to commit him to prison for default. (*R. vs. Woking Justices* (1942) 2 K. B. 248).

(*e*) that in any event it is not obligatory on a Magistrate to commit a defaulter to prison ; an order for detention in the precincts of the Court is permissible, and may in some cases be quite appropriate—*Section* 6 ;

(*f*) that it is illegal to commit a defaulter under 21 years of age to prison unless the conditions laid down by *Section* 8 have been satisfied.

(*a*) "Prosecuting officers should be ready, at the appropriate time, with the evidence which must be placed before the Court at the "means inquiry" which must normally follow each default of payment. The services of probation officers (*under Section* 7) for the supervision of convicted persons pending payment should be more readily availed of, and their reports under Section 7 (3) would be of great assistance at the "means inquiry".

Cases referred to : *Rex vs. W. A. D. Velin* M. C. Matugama, No. 11984.
Rex vs. Settu, son of Alagan M. C. Avissawella, No. 53121.
Rex vs. M. Hemasiri M. C. Kalutara, No. 10325.
Rex vs. W. A. D. Marku M. C. Gampaha, No. 179.
Rex vs. L. Wilson Perera et al M. C. Colombo, No. 6203/c.
Rex vs. M. William M. C. Colombo, No. 81462.
Rex vs. Marimuttu, son of Ramiah M. C. Balangoda, No. 24590.
Wije vs. Abeysundera, 51 N. L. R. 71.
R. vs. Woking Justices (1942) 2 K. B. 248.
Nadarajah Chettiar vs. Walauwa Mahatmee (1950) A. C. 481.

T. S. Fernando, Crown Counsel for the *Attorney-General* (on notice by Court).

GRATIAEN, J.

Statistics recently furnished by the Prison authorities to the Criminal Courts Commission, of which I am a member, disclosed that no less than 6,100 (including 845 youthful offenders) out of 12,068 convicted persons admitted to jail during the year 1950 had in the first instance been sentenced only to pay fines, but had, owing to default of payment and for no other reason, been sentenced *automatically* to terms of imprisonment. The total number of prison inmates belonging to this category on 17th April, 1951, was as high as 171. The provisions of the Payment of Fines (Courts of Summary Jurisdiction Ordinance) No. 49 of 1938 are specially designed to prevent such a lamentable state of affairs. The figures disclosed led me to doubt whether the beneficial provisions of this Ordinance are as conscientiously applied and clearly understood by most Magistrates in the Island as they ought to be. In order to explore the matter further I decided, under the powers vested in me as a Judge of the Supreme Court under section 356 of the Criminal Procedure Code to call for the records in a number of cases, selected at random from different Courts in the Island, in which convicted persons are now serving terms of imprisonment for non-payment of the fines imposed on them. When these records arrived, I requested the Attorney-General's Department to be good enough to arrange for Crown Counsel to assist me in examining these records. I am much indebted to Mr. T. S. Fernando, Senior Crown Counsel, for the help he has given me in arriving at a decision in the matter, and particularly for appearing so readily before me at fairly short notice.

It is convenient that the relevant facts in each of the proceedings before me should be set out, after which I shall proceed to summarise the main provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938 (to which I shall hereafter refer as "The Ordinance"). The legality or propriety of the order for imprisonment in each case can then be considered :—

(1) In *M. C. Matugama, No.* 11984 the accused was convicted of two offences on 14th March, 1951, and sentenced to pay fines aggregating Rs. 125. At the same time and in the same order a term of 3 months rigorous imprisonment was imposed in default of payment. He was granted time until 28th March to pay the fines, provided that he furnished "double security"—*i.e.*, in the sum of Rs. 250 but as he was unable to pay the fines or to furnish the security, he was forthwith committed to prison in the Hulftsdorp Jail for a period of three months.

(2) In *M. C. Balangoda No.* 24590 the accused was convicted of two offences on 6th April, 1951, and was sentenced to pay fines aggregating Rs. 110. The Magistrate had recorded that the accused was "not paying the fine" (whatever that might mean). A default term of 2 months rigorous imprisonment was accordingly imposed and the accused was thereupon committed to prison in the Hulftsdorp Jail for a period of two months.

(3) In *M. C. Avissawella No.* 53121 the accused was convicted of an offence on 13th March, 1951, and the case was put off for sentence till 20th March. On that date he was sentenced to pay a fine of Rs. 75. At the same time and in the same order a term of 2 months rigorous imprisonment was imposed in default of payment. No time was granted for the payment of the fine, and as he was unable to pay the amount he was forthwith committed to prison in the Hulftsdorp Jail for a period of 2 months.

(4) In *M. C. Kalutara, No.* 10325 the accused was convicted of an offence on 12th April, 1951, and was sentenced on that date to pay a fine of Rs. 100 or in default to undergo a term of 3 months rigorous imprisonment. He was allowed time until 26th April to pay the fine provided that he furnished "double security"—*i.e.*, in the sum of Rs. 200. He was unable, however, to pay the fine or furnish the security on the date of his conviction and he was forthwith committed to prison in the Kalutara Jail for a period of three months.

(5) In *M. C. Gampaha, No.* 179 the accused was convicted of an offence on 15th March, 1951. He was sentenced to pay a fine of Rs. 100 or in default to undergo a term of 6 weeks rigorous imprisonment. As he was unable to pay the fine he was forthwith committed to prison in the Hulftsdorp Jail for a period of 6 weeks.

(6) In *M. C. Colombo No.* 6203/*c* the accused was convicted of an offence on 13th January, 1951. He was "imprisoned till the rising of Court" and was also sentenced to pay a fine of Rs. 750 or in default to undergo a term of 6 months rigorous imprisonment. He was unable to pay this fine and was on the same day committed to prison in the Hulftsdorp Jail for a period of 6 months.

(7) In *M. M. C. Colombo No.* 81462 the accused was convicted of an offence on 11th April, 1951, and was sentenced to pay a fine of Rs. 75 or in default to undergo a term of 6 weeks rigorous imprisonment. There appears to be a record to the effect that time for the payment of the fine was granted until 25th April, 1951. Nevertheless for some reason which is not stated in the record he was, on 11th April 1951, committed to prison for a period of 6 weeks rigorous imprisonment.

Was the order for the imprisonment in the case of each of these defaulting persons justified in law? Let me first examine the provisions of the Ordinance with special reference to their historical development. They are substantially taken over from certain parts of the Criminal Justice Act, 1914, and of the Money Payments (Justices Procedure) Act, 1935 of England. During the five years preceding the passing of the Act of 1914 the average number of annual committals to English prisons in default of the payment of fines was as high as 83,187. It was felt that this state of affairs could only be explained by the *inability* of most of the persons concerned to pay the fines imposed on them at the time of conviction, and that many of the resulting committals were in effect "punishments for poverty". At that time the law of England—which was similar to that laid down in section 312 of the Criminal Procedure Code of this Country—*only authorised but did not compel* Magistrates to allow time for the payment of fines. Moreover, Magistrates were then required, *at the time of ordering a convictetl person to pay a fine*, to fix a term of imprisonment in default of payment. Finally, there was no statutory requirement that the amount of the fine should bear some reasonable relation to the offender's income. The Act of 1914 which was described as "An Act to diminish the number of cases committed summarily to prison", made it *obligatory* to allow at least seven days for the payment of a fine except for very special reasons which must be stated in the warrant of commitment. The judicial duty *to have regard to the means of the offender* when fixing the amount of the fine was also expressly imposed on Magistrates. The position resulting from this legislation was that by 1934 the annual average number of committals for default of payment had considerably declined in comparison with the figures before the passing of the Act of 1914. It was considered however, that there was still room for improvement, and that too many convicted persons whose offences were not in the first instance considered to call for terms of imprisonment were nevertheless committed to prison through *inability* (*as opposed to wilful refusal or neglect*) to pay their fines. A Departmental Committee was accordingly appointed to investigate the question, and on its recommendation the Money Payments (Justices Procedure) Act, 1935 was passed. This Act introduced substantial amendments to the earlier Act. The effect of the new legislation *inter alias* was (1) to limit the categories of "special reasons" which would justify non-compliance with the obligation to give time for the payment of fines, (2) to prohibit, as a general rule, any Court of summary jurisdiction, when giving time for the payment of a fine in terms of this earlier obligation, from imposing *at the same time* a term of imprisonment in default of payment. *This could only be done after a subsequent inquiry into the means of the defaulter had been held.* The result of this "legislative assault on imprisonment for poverty" (Penal Reform in England" page 27) was that the number of annual committals for default in England sharply declined until the total figure for the year 1947 was only 2,592. The figures for 1948, 1949 and 1950 are not available to me. This decline was "manifestly due to the obligations placed upon the Courts by successive Acts of Parliament and to the increased attention which has been directed from various quarters to *the great need of avoiding imprisonment wherever*

possible without detriment to the ends of justice". (The Journal of Criminal Science—Volume 2—page 47). Indeed the successful working of the Act was in large measure attributable to the willingness with which the obligations so imposed on the Magistrates were fulfilled by them.

In 1938, the Legislature in Ceylon decided to introduce similar legislation with a view to achieving the same results. The Ordinance of 1938, now imposes the same obligations on Courts of summary jurisdiction as those which were imposed by Parliament on the English Courts in 1935. Unfortunately, the Ordinance did not come into operation immediately. The Proclamation in Gazette No. 8697 of December 20, 1940, fixing *February, 1st* 1941, as the date on which it was to come into operation seems to have received none of the publicity which the new policy demanded. In the result, the provisions of the Ordinanee seem to be known, notwithstanding the passage of ten years, by hardly anyone, and to be observed by extremely few (if any) Magistrates. The Courts of summary jurisdiction continue—presumably, through ignorance of the true legal position—to violate the imperative provisions of the Ordinance. The "bad old habit"—both obsolete and in most cases expressly prohibited—of passing an *automatic* sentence "to pay a fine of Rs. X or in default to undergo Y months rigorous imprisonment" still persists. The consequence is that in this small country the number of convicted persons (unnecessarily, thoughtlessly, and very often, in my belief, illegally) sentenced to imprisonment for non-payment of fines in 1950 *was more than double the number of persons committed in similar circumstances in England in* 1947.

I had occasion in September, 1949, to refer to the apparent disregard by Magistrates of the provisions of the payment of Fines Ordinance. (*Wije vs. Abeysundera*, 51 N. L. R. 71), and I am discouraged to find that the position has not improved since then. It is to be hoped that the fact that the Ordinance has been in operation since February, 1941, will even now receive some belated publicity, and that the indefensible incarceration, contrary to law, of convicted persons *whose offences were considered to be adequately met by the imposition of fines which they can afford to pay,* will forthwith cease. It is equally desirable that in future every case of apparent non-compliance with the provisions of the Ordinance should be brought to the notice of the Attorney-General by the Prison authorities, so that, after examining the record, he may take steps, wherever necessary, to ensure that any improper or premature committal to imprisonment for default of payment of a fine is appropriately revised by this Court. Such a precaution is of special importance in cases where convicted persons, ignorant of their statutory rights, are not legally represented in the lower Court.

An examination of the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938 makes the following propositions abundantly clear in regard to any case in which a Magistrate considers that the mere imposition of a fine on a convicted person would meet the ends of justice:—

(*a*) that the means of the offender must, among other considerations, be taken into account in fixing the amount of the fine (section 2);

(*b*) that unless special circumstances (*the nature of which must be recorded in the proceedings*) are proved or admitted to exist, at least seven days time *must* be given for the payment of the fine; that the grant of further extensions of time is permissible (section 3); and that in consequence, an order that a fine should be paid forthwith, except in one or other of the grounds *specified* in *section* 3, is not authorised by law;

(*c*) that where time for the payment of a fine is granted as required by section 2, it is illegal *on that occasion* to impose a term of imprisonment in default of payment (section 4); there are a few special exceptions to this general rule, but if they are considered to apply, *the Magistrate's decision to that effect must be based on reliable material and must be recorded in the proceedings,* together with the reasons for such decision;—*proviso to section* 4 (1), *and section* 4 (2).

(*d*) that generally, and subject, to these few exceptions, a Magistrate, after the date of conviction, is precluded by law from imposing a term of imprisonment on a defaulter unless, on an occasion subsequent to the conviction, *there has been an inquiry as to the defaulter's means—section* 4 (3); if, after such inquiry, the Magistrate is satisfied that the defaulter does not possess the means to pay the fine, there is no jurisdiction to commit him to prison for default. (*R. vs. Woking Justices* (1942) 2 K. B. 248).

(*e*) that in any event it is not obligatory on a Magistrate to commit a defaulter to prison; an order for detention in the precincts of the Court is permissible, and may in some cases be quite appropriate—*section* 6.

(*f*) that it is illegal to commit a defaulter under 21 years of age to prison unless the conditions laid down by *section* 8 have been satisfied.

It is clear that if the spirit of the Ordinance is to be conscientiously applied so that the mischief which it seeks to avoid may be remedied, some additional expenditure of time will be involved in the business of a Magistrate's Court where the pressure of work is already considerable. *But there can be no excuse for circumventing the Ordinance.* Prosecuting officers should be ready, at the appropriate time, with the evidence which must be placed before the Court at the "means inquiry" which must normally follow each default of payment. The services of probation officers (*under section* 7) for the supervision of convicted persons pending payment should be more readily availed of, and their reports under section 7 (3) would be of great assistance at the "means inquiry". If one starts with the hypothesis that there has already been a judicial decision that the convicted man deserves to be spared the stigma of imprisonment, it is in the public interest that imprisonment in such a case should as far as possible be avoided. What happens invariably or at any rate far too often today is that an accused who was ordered in the first instance to pay a small fine is automatically committed to prison on the same day through no-compliance by the Magistrate with the imperative provisions of the Ordinance. He is then placed under arrest and transported at the public expense to a prison which is often several miles away from the place of arrest. He is there detained for several weeks, also at the public expense. The cost to the public revenue far exceeds the amount of the fine, and the resulting profit to society or to the convicted man is precisely "nil". Indeed, the whole transaction is positively harmful to all concerned and is calculated to bring the administration of Criminal Justice into disrepute.

I shall now proceed to consider whether the committal to imprisonment in each of the cases which I have sent for was justified. It is apparent that in each of the cases before me the commitment of the defaulting accused to a term of imprisonment for non-payment of the fine or fines imposed on him was premature, unauthorised and in express contravention of the provisions of the Ordinance. In some of the cases the accused was not, as he should have been, granted time for the payment of his fine as required by section 3. I say so because there is no finding on the record that any of the reasons specified in sub-section 3 existed which would justify a refusal to allow time for payment. In two of the cases the accused was granted time for payment, but only upon the condition that he should furnish "double security". Presumably the learned Magistrate in these cases purported to act under the provisions of section 312 (4) (*c*) of the Criminal Procedure Code which authorises an order for security in cases "where an offender had been sentenced to fine only *and* to imprisonment in default of the fine." In my opinion the provisions of section 312 must now be construed as having been repealed to the extent to which they are inconsistent with the explicit provisions of the Payment of Fines Ordinance of 1938, which was enacted at a later date. In other words, the operation of section 312 (4) (*c*) is now applicable only in cases where a Magistrate is empowered to fix a term of imprisonment in default of payment—that is in a contingency which is specifically mentioned in the New Ordinance. In the case from Balangoda the accused was not given time to pay the fine but the warrant of commitment to prison did not issue until the learned Magistrate had recorded that the accused was "not paying the fine." The reason for non-payment is not recorded. If one assumes that the learned Magistrate was aware of the provisions of the Ordinance, he was presumably purporting to refuse time for the payment of the fine on the ground that "upon being asked by the Court whether he desired that time should be allowed for payment, the offender did not express any such desire". (Vide section 3 (1)). In the present case however it may well be, and indeed it seems highly probable, that the only reason for non-payment of the fine on the date of conviction was that the accused did not possess the means to pay the fine forthwith. I therefore hold that in this case too the warrant of commitment was premature and unauthorised by law. For the reasons I have given I quash the orders committing the accused to jail in M. C. Matugama No. 11984, M. C. Avissawella, No. 53121, M. C. Kalutara, No. 10325, M. C. Colombo, No. 6203/c, M. M. C. Colombo, No. 81462 and M. C. Balangoda No. 24590. I order that each of these accused persons should forthwith be released from prison, and that the Superintendent of the Hulftsdorp Jail should be notified immediately of these orders. The order for committal in M. C. Gampaha, No. 179 was also premature and unauthorised by law, but in this case I understand that the accused has already served the sentence improperly passed upon him, I am therefore powerless to give him redress.

I desire, in conclusion, to state that I do not wish to be unduly unjust to the Magistrates. I

am very conscious that the pace at which business is conducted in their extremely busy Courts is such that there is often little time available for taking a detached view of the principles of modern criminal policy. Moreover, it is by no means an easy matter for any person, with far more leisure at his disposal than Magistrates possess, to find his way through the maze of legislation which in recent years is added from time to time to our increasingly cumbersome Statute Books. Time was, I understand, when it was the practice for the Attorney-General to issue circulars to Magistrates in order to bring to their notice the effect of any new legislation which directly concerned the administration of business in their Courts. This practice has been abandoned in recent years—no doubt because changes in the Constitution have curtailed the supervisory functions previously exercised by the Attorney-General over the minor judiciary. It is very desirable, I think, that some machinery should be devised whereby the "appropriate authority" can, *without in any sense interfering with the independence of the minor judiciary*, keep Magistrates constantly advised on matters of general policy and at any rate inform them of the reforms which new legislation is intended to introduce. Who this "appropriate authority" should be, and what machinery should be devised to achieve the desired end, are subjects which fall outside my province. We were recently reminded by the Privy Council that "there is no presumption that the people of Ceylon know the law of England". *Nadarajah Chettiar vs. Walauwa Mahatmee* (1950) A. C. 481. Let us at least avoid the reproach that it is doubtful whether the Magistrates in this Country are fully acquainted with even the local statute law which vitally effects the efficient administration of criminal justice in the Courts.

In conclusion I desire to say that the practice of ordering "double security" as a condition of the granting of time to pay a fine is unwarranted and should, in my opinion, be forthwith discontinued. To order a man, on pain of imprisonment, to furnish security in double the amount of a fine which he cannot pay immediately, is a travesty of justice and a cynical violation of the spirit of the Ordinance.

All orders committing the accused quashed.

Present : BASNAYAKE, J.

CHELLAPPAH vs. COMMISSIONER OF INCOME TAX

S. C. 1260—*M. C. Colombo* 5317/A

Argued on : 26th, 27th, 28th, and 29th September, and 2nd October, 1950
Decided on : 18th April, 1951

Income Tax—Appellant charged with false return of Income under section 87 Income Tax Ordinance (Chap. 188)—*What must be proved—Onus on the prosecution to establish offence—Meaning of "wilfully with intent to evade".*

The appellant, who carried on a variety of businesses under different limited liability companies, was charged under section 87 of the Income Tax Ordinance in that in his return of the profits derived from his building contracts for the period January 1942 to December 1944, he wilfully with intent to evade tax both omitted and declared certain items of profits and thereby falsified the returns.

The appellant had omitted in the returns certain payments made to him in his contract business but he explained these omissions as being due to clerical error of his book-keeper or as appropriations for materials supplied by him to his sub-contractors or as secret commissions paid to military officials for obtaining the contracts or as being in his view not profits from his business.

No evidence was led by the prosecution to prove that the alleged items of payments were in fact profits from the contract business of the appellant.

Held : (1) That the appellant should be acquitted of the charges as the prosecution had failed to prove that the acts complained of under the section were committed deliberately or purposely by the appellant with the intention to avoid fraudulently the payment of tax.

(2) That it is not an offence under the section for a person to make in his return an omission of income on a mistaken view of law or facts or to enter a false statement inadvertently or in the belief that it is true.

Per BASNAYAKE, J.—(*a*) "It being quite a legitimate thing to avoid tax by taking advantage of the provisions of the Income Tax or Excess Profits Duty Ordinance, the word "evade" must be understood in section 87, which penalises the acts enumerated therein, not in the innocuous sense of avoid tax by taking advantage of the statute, but in the sense of unlawfully escape or avoid by fraud, misrepresentation or underhand contrivance."

(*b*) " I wish to observe that in the instant case the prosecution appears to have regarded the proceedings under section 87 in the same way as a proceeding to recover tax under the Excess Profits Duty Ordinance. That is an incorrect approach to a prosecution under a highly penal provision. The admissions made by the appellant in proceedings for the recovery of tax cannot by themselves afford proof of a charge under section 87. An offence under section 87 is not easy to establish involving as it does the proof of such mental elements as " wilfulness " and " intention to evade tax ". Those elements have to be proved largely by circumstantial evidence. The prosecution is under a duty to place before the Court facts which lead necessarily to the inference that the accused committed the act alleged with the requisite mental element. The difficulty of proof is no reason for relaxing in a proceeding under section 87 the obligation that lies on the prosecution in all criminal cases ".

Cases referred to : *Piyasena vs. Vaz*, (1945) 47 N. L.R. 1.
In re Young vs. Harston 31 Ch. D. 174.
R. vs. Badger 25 L. J. M. C. 81 at 90.
Simms and Others vs. Registrar of Probates (1900) A. C. 323.
Bullivant and Others vs. Attorney-General for Victoria (1901) A. C. 196 at 207.
Sims and Others vs. Registrar of Probates, (1900) A. C. 323 at 335.
In re Mayor of London vs. Tubbs Contract, (1894) 2 Ch. 524.

H. V. Perera, K. C., with *S. Nadesan* and *Nadarasa* for the appellant.

J. A. P. Cherubim and *Jayetilleke, Crown Counsel*, for the *Attorney-General.*

BASNAYAKE, J.

The appellant, John Chellappah, has been convicted on nine charges in respect of offences under the Excess Profits Duty Ordinance No. 38 of 1941. Section 12 (5) of that Ordinance incorporates therein Chapter XV of the Income Tax Ordinance, which prescribes offences and penalties. The penal provision that arises for consideration in the instant case is section 87 of the Income Tax Ordinance. That section, omitting paragraphs (*e*), (*f*), and (*g*) of sub-section (1), and sub-section (2), which are not material to this case, reads as follows :—

" 87 (1) Any person who wilfully with intent to evade or to assist any other person to evade tax—

(*a*) omits from a return made under this Ordinance any income which should be included ; or

(*b*) makes any false statement or entry in any return made under this Ordinance ; or

(*c*) makes a false statement in connection with a claim for a deduction or allowance under Chapter V or Chapter VI ; or

(*d*) signs any statement or return furnished under this Ordinance without reasonable grounds for believing the same to be true ;

shall be guilty of an offence, and shall for each such offence be liable on summary trial and conviction by a Magistrate to a fine not exceeding the total of five thousand rupees and treble the amount of tax for which he, or as the case may be the other person so assisted, is liable under this Ordinance for the year of assessment in respect of or during which the offence was committed, or to imprisonment of either description for any term not exceeding six months, or to both such fine and imprisonment."

To succeed in a prosecution under this section the Crown must prove that the appellant " wilfully with intent to evade tax " committed any one of the acts specified therein *Piyasena vs. Vaz*, (1945) 47 N. L. R. 1. In order to understand the scope of the section it is necessary to ascertain the meaning of the words " wilfully " and " evade ".

The dictionary (New Standard Dictionary) gives the following meanings of the word " wilfully " : " with free exercise of the will ; voluntarily ; intentionally ; in law, designedly, as opposed to inadvertently ; in a penal statute, purposely, with evil intent ; maliciously ". In commenting on this word in the case of *In re Young vs. Harston* (31 Ch. D. 174,) Bowen L. J. observes :—

" Wilful is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used as a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

In the case of *R. vs. Badger*, 25 L. J. M. C. 81 at 90, it was held that a surveyor was not guilty of " wilfully " receiving a higher fee than he was entitled to, when acting under an honest mistake.

It will be seen from the above that ordinarily the word " wilfully " means deliberately or purposely without reference to *bona fides* but that in penal statutes it is used in a sense denoting deliberately or purposely and with an evil intention. Section 87 is a highly penal provision. The word should therefore be construed as meaning deliberately or purposely with the evil intent of committing the act or acts enumerated in the section.

The word " evade " has several meanings according to the dictionary (New Standard Dictionary.) It means : " to avoid by artifice ; elude or get away from by craft or force ; save oneself from, as an impending evil ; to escape ; get away." It is also used in the sense of " defeat

the intention of the law while complying with its letter", and, especially in income tax law, of avoiding the incidence of tax by a judicious and skilful use of the various provisions of the statute, especially those dealing with exemptions and such other benefits allowed therein. Certain enterprising text-book writers have even gone to the extent of writing treatises under such titles as "Tax Evasion" and "How to Evade Income Tax". The words "evasion" and "evade" are in those contexts used in the sense of lawful avoidance. It will be helpful to refer to some of the judicial dicta on the meaning of the expression. In *Simms and others vs. Registrar of Probates* (1900) A. C. 323, Lord Hobhouse observes;

> "Everybody agrees that the word is capable of being used in two senses: one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable."

In the case of *Bullivant and others vs. Attorney-General for Victoria* (1901) A. C. 196 at 207. Lord Lindley observes:—

> "The word 'evade' is ambiguous. There are various ways of evading a statute."

and proceeds to illustrate what he has in mind thus:—

> "As I have said, there are two ways of construing the word 'evade': one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, 'Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it.' That is an Act of quite a different character."

It being quite a legitimate thing to avoid tax by taking advantage of the provisions of the Income Tax or Excess Profits Duty Ordinance, the word "evade" must be understood in section 87, which penalises the acts enumerated therein, not in the innocuous sense of avoid tax by taking advantage of the statute, but in the sense of unlawfully escape or avoid by fraud, misrepresentation or underhand contrivance. To construe the expression in the sense of avoidance of tax would be to deny the taxpayer of the legitimate benefits of the statute. It is also a rule of construction of statutes that where there are two meanings each equally satisfying the language of the statute and great harshness is produced by one of them and not by the other, the legislature is taken to have intended to use the word in the sense in which the great harshness is avoided and in the sense which least offends our sense of justice. *Simms and others vs. Registrar of Probates*, (1900) A. C. 323 at 335.

Bearing in mind the meaning I have given to each of the expressions "wilfully" and "evade", I shall examine the material paragraphs of the section.

Paragraph (*a*) penalises the omission from a return of any income which should be included therein. The mere omission of any income from the return does not constitute the offence. The omission may be due to an oversight or it may even be deliberate but not wilfully with intent to evade tax. A taxpayer is entitled to construe the taxing statute and make his return in accordance with his understanding of it. An omission based on a mistaken view of the law or facts does not attract punishment. The taxing authorities are not bound by the taxpayer's views of the law or by his methods of accounting. They are free to reject his interpretation and assess him on what they think is the correct basis. If the taxpayer is dissatisfied he may appeal. To attract punishment the omission must be done deliberately and with the evil intention of defeating unlawfully the object of the statute by knowingly presenting a false picture of the income of the person making the return by omitting therefrom material which the taxpayer knows should properly be there.

Similarly, for the purposes of paragraphs (*b*) and (*c*), the mere fact that a statement or entry is false in fact does not bring the person making it within the ambit of the provision. In the first place the statement or entry must in fact be false for if it is not there is no offence. The false statement or entry must be deliberately made with the knowledge that it is false and with the evil intention of thereby misleading the taxing officer. The object of the false statement or entry should be to defeat the purpose of statute, to deny to the revenue its legitimate dues. A statement or entry which is in fact false if made inadvertently or honestly or in the belief that it is true does not attract punishment even if the taxpayer stood to gain by the statement or entry if it passed undetected.

In applying the highly penal provisions of the Income Tax Ordinance, the Crown should not lose sight of the fact that our taxing statute, though still not so complex as the law of England, is complex enough to baffle the average taxpayer who finds himself unable to complete the return unaided. Many of them have to seek the aid of their legal advisers or income tax advisers or their accountants, by whom they are guided. A taxpayer who seeks a professional adviser's aid as a matter of course adopts the view his adviser takes of the tax law and his earnings. If the taxpayer is himself not an accountant he

is also largely in the hands of his book-keeper who decides the proper head under which entries relating to his income and expenditure should be made. A psychological factor which cannot be ignored in such a situation is that the taxpayer rarely imposes his will on his adviser. In the instant case too it must be remembered that the appellant, though he was himself conversant with book-keeping, engaged an approved accountant to prepare his income tax accounts. His business activities were varied. They ranged over a wide field—from textiles to fruit drinks and building contracts.

The appellant commenced business as a building contractor about 1937. After the company of Terrazzo Tile Works Ltd., of which he became Managing Director, was formed, he transferred a section of his business to it, on condition that the company was not to compete with him in his business as a building contractor. When the war came with its programme of urgent constructional works the appellant was able to obtain a large share of it. He executed some himself and took the profits. Others he passed over to the Terrazzo Tile Works Ltd. The company gave him one-third share of the profits for supervising the contracts. The Commissioner of Income Tax claims that the income he derived by supervising the contracts is profits from his business as a building contractor (hereinafter referred to as the contract business). With that view I am unable to agree. The payment though made by way of a share of the profits was made for the appellant's services as a supervisor. The amount paid shows that his technical skill was highly valued by the company. The fact that the payment for supervision was related to the profits does not alter its nature. The payments made by the Terrazzo Tile Works Ltd., are in my view remuneration for services rendered and are not profits from the appellant's contract business.

The first set of charges, viz., 1, 2, and 3, relates to the accounting period January to December, 1942. The appellant has disclosed in his return for that period a sum of Rs. 44,992 as the profits of his contract business, but the Commissioner asserts that the amount is much more. His figure is Rs. 131,000. It appears from the evidence that the appellant has in fact omitted two items, one of Rs. 3,500 and the other of Rs. 102, which properly fall within the profits of his contract business. He says that this omission is due to a clerical error on the part of his book-keeper. The mere omission of those two items from the return as I have stated above does not prove the charge. Omitting them from the return is the same as not including them. But the appellant cannot be said to have omitted them wilfully unless it can be shown that having made up his mind not to include them he did not include them. If he did not think about them at all or if they did not occur to him, then his omission is not wilful. (In *re Mayor of London and Tubbs' Contract*, (1894) 2 Ch. 524.) There is no evidence to establish that their omission was wilful and with intent to evade duty. The sum of Rs. 3,500 is only one item of a total payment of Rs. 78,500, while the sum of Rs. 102 was a late payment for a disputed item. The other amounts that go to make the total amount of profits according to the Commissioner are :—

(*a*)	Rs.	6,459
(*b*)	,,	5,000
(*c*)	,,	11,064
(*d*)	,,	20,118
(*e*)	,,	1,473
(*f*)	,,	3,750
(*g*)	,,	6,000
(*h*)	,,	13,870

The prosecution offers no evidence in support of the charge in respect of items (*d*), (*e*), (*f*), and (*g*). Item (*a*) represents one-third share of the profits of a military contract paid to the appellant by the Terrazzo Tile Works Ltd., for supervising the contract. Item (*b*) relates to a sum paid to an architect named S. H. Peiris who was engaged by the appellant for ten months for supervising St. Thomas' Hospital Contract No. D. C. R. E. 7. Item (*c*) is an amount appropriated by the appellant against stores supplied through him by the Royal Engineers' Stores in respect of a contract passed over to another. Item (*h*) represents a sum of money handed to the appellant by various British officers to be transmitted to destinations named by them. They were secret commissions obtained by them, and they did not therefore use the normal channels for transmitting the money. The appellant explains how the amount came into his books. He says this sum was in cash in his safe. One Saturday afternoon he had to make some cash payments and he utilised it and replaced the same by drawing from his account. The learned Magistrate has acquitted the appellant in respect of this item in charge 2.

In addition to these amounts the Commissioner has arbitrarily included 20 per cent. of their total. There being no foundation for that claim it cannot be entertained in a prosecution under section 87. The prosecution offers no evidence

to establish that in fact items (*a*), (*b*), (*c*), and(*h*) are profits of the contract business of the appellant. There is no reason to reject the appellant's explanation of these items. S. H. Pieris denies the receipt of money. But he is contradicted by the cheque P. 32 for Rs. 3,000 in his favour, and the document D.10 given by the appellant to enable him to obtain supplies of petrol. Peiris's evidence does not impress me. In fact it is extremely unsatisfactory. Though he is an architect he has joint bank accounts with more than one contractor and his conduct does not seem to be above board. Tudawe, the other witness who has been called by the prosecution, does not explain why he has taken no action to recover the large sums which he claims are due to him from the appellant. His conduct adds considerable weight to the appellant's claim that item (*c*) was retained against materials issued to him. Charges 1, 2, and 3 must therefore fail as the prosecution has not proved the necessary ingredients of those charges.

I shall now proceed to charges 4, 5, and 6. They relate to the accounting period January to December, 1943. The appellant disclosed the profits from his contract business at Rs. 10,554. The Commissioner claims that they are more. According to his computation they should be Rs. 51,000. He arrives at that figure by adding the following items and increasing the total by 20 per cent.

(*a*)	Rs.	10,140
(*b*)	,,	1,442
(*c*)	,,	2,229
(*d*)	,,	917
(*e*)	,,	933
(*f*)	,,	1,171
(*g*)	,,	6,500
(*h*)	,,	551
(*i*)	,,	10,094

Item (*c*) has been withdrawn by the Commissioner as it has nothing to do with the appellant's contract business. There is no evidence as respects item (*g*). Items (*a*) and (*b*) represent the appellant's share of the profits for supervising contracts passed on to the Terrazzo Tile Works Ltd. Items (*d*), (*e*), (*f*), (*h*), and (*i*) represent final payments made on contracts D. C. R. E. 68, 82, 319, 36 and 91. The appellant says that the amounts shown against those items were paid out in secret commissions to military officials who were instrumental in giving the contracts and form no part of the profits on those contracts. The commissions were as a rule paid out of the final payments Document P39 seems to support the explanation of the appellant :

D. C. R. E. 68 : 16,500, 6,380, 1,880, 917·43
D. C. R. E. 82 : 6,000, 2,620, 933·19.
D. C. R. E. 319 : 15,200, 1,171·25.
D. C. R. E. 36 : 11,290, 4,880, 551·25.
D. C. R. E. 91 : 48,000, 24,000, 18,475, 10,094·30

The prosecution relies on the bare omission of these items from the computation of the appellant's profits. That is not sufficient to establish an offence under the section. It must prove that the appellant actually received these profits in his contract business and wilfully with intent to evade tax omitted to disclose them. The paying of secret commissions is not unknown and the Assessor admits in his evidence that large claims are made by taxpayers who carry on certain classes of business in respect of sums paid as commissions. He gives the instance of ship chandlers. In practice he says as a matter of indulgence a certain percentage of such a claim is allowed. That being the case, in the absence of evidence to establish that the sums in question were in fact not paid as commissions the appellant cannot be punished under section 87 (1). The fact that he has submitted to pay tax on these sums by itself does not bring him within the ambit of the penal provision. The appellant is therefore entitled to be acquitted on these charges as well.

Lastly I come to charges 7, 8, and 9. They relate to the accounting period January to December, 1944. The appellant is charged with making a false statement to the effect that he incurred a loss of Rs. 21,132 in respect of his business. This loss was incurred in respect of a contract known as the Kandy contract. The statement of account of this contract P45A is as follows :—

Dr.

	Rs.	cts.
To Amt. pd. for labour sub-contractors as per statement ...	45,157	47
,, Amt. pd. for labour as per check-roll	11,765	92
,, Amt. pd. for small odd jobs ...	1,375	00
,, Amt. pd. for Timber to different suppliers as per statement ...	64,438	70
,, Amt. pd. for Hinges and Iron materials	7,081	06
,, Amt. pd. for Cadjans, Bricks, and Sand	4,684	12
,, Salaries to Clerks, Overseers and Supervisors	1,860	00
Rs. ...	136,362	27

Cr.		
By Amt. recd. from Chief Engineer :		
„ 19-7-44	22,500	00
„ 12-8-44	35,880	00
„ 19-9-44	39,420	00
„ Amt. recd. for extra works ...	1,713	21
„ Amt. due as at 31-12-44 on closing a/cs from Chief Engineer and recovered in August, 1945 ...	15,716	20
„ *Loss* incurred on Contract ...	21,132	86
Rs. ...	136,362	27

The prosecution has offered no evidence to prove that the statement respecting the loss is false. In fact the Commissioner admits that there was a loss on the Kandy contract but he puts the figure at Rs. 10,000. The onus is on the prosecution and not the appellant and in the absence of proof of the ingredients of the offence the charge must fail.

I shall now discuss the allegation respecting the omission of the three items of Rs. 788, Rs. 11,643, and Rs. 13,370 in P17C from the appellant's return. They represent payments received on account of the Victoria Park Vehicles Shed Contract (D. C. R. E. 527), the Madampitiya Contract (D. C. R. E. 565) and the Boralesgomuwa Contract (D. C. R. E. 594). The Victoria Park Vehicles Shed Contract was given over to Tudawe by the appellant who was to get 10 per cent. of the amount of the contract. The sum of Rs. 788 was according to the appellant appropriated against monies due from Tudawe for materials supplied. The Madampitiya contract was a contract passed on to the Terrazzo Tile Works Ltd., Tudawe being the sub-contractor. The sum of Rs. 11,643 was retained against monies due from Tudawe for stores and materials supplied to him. The payment on account of the Boralesgomuwa contract of which also Tudawe was the sub-contractor, is claimed by the appellant against monies due from Tudawe for materials supplied.

The prosecution offers no evidence to prove the charge beyond showing that the payments were made by the Command Paymaster. That fact alone is insufficient to establish the charge and the appellant is entitled to an acquittal. As stated by me earlier, I am not prepared to act on Tudawe's evidence, for it appears to be unsatisfactory. I quote below his evidence on the point with the learned Magistrate's note on it. Tudawe says :—

" I know the accused Mr. John Chellappah. I had not authorised him to appropriate a sum of Rs. 11,643 which was due to me from the Terrazzo Tile Works, under Military Contract D. C. R. E. 565 Madampitiya. I did not agree to his appropriating any sum of money due to me as a set-off as against any money I owed him. (I should note here that the witness first answered this question by saying ' I don't think ' and then ' don't remember '.) "

I wish to observe that in the instant case the prosecution appears to have regarded the proceedings under section 87 in the same way as a proceeding to recover tax under the Excess Profits Duty Ordinance. That is an incorrect approach to a prosecution under a highly penal provision. The admissions made by the appellant in proceedings for the recovery of tax cannot by themselves afford proof of a charge under section 87. An offence under section 87 is not easy to establish involving as it does the proof of such mental elements as " wilfulness " and " intention to evade tax ". Those elements have to be proved largely by circumstantial evidence. The prosecution is under a duty to place before the Court facts which lead necessarily to the inference that the accused committed the act alleged with the requisite mental element. The difficulty of proof is no reason for relaxing in a proceeding under section 87 the obligation that lies on the prosecution in all criminal cases.

On a perusal of the documents produced by the appellant I am unable to escape the conclusion that the taxing officers were endeavouring to intimidate the appellant into submission by threatening each time to raise his assessment. The materials relating to the charges have all been obtained from the appellant's books and information furnished by him. Each of his income tax returns contained statements of accounts certified by an approved accountant. Having taken a certain view of his remuneration for supervising the contracts passed on to the Terrazzo Tile Works Ltd., he kept his accounts in accordance with that view. The system of book-keeping adopted by an assessee does not bind the taxing authorities and an assessee cannot escape tax by adopting a particular method of book-keeping. But he cannot be punished for taking a view of his income which does not accord with that taken by the taxing authorities.

By this conduct the appellant appears to have invited the suspicion of the revenue officers. He seems to have exploited the modern device of the same group of leading members forming separate limited liability companies for carrying

on each different branch of their business activities in order to escape the rigour of ever-mounting taxation on income and profits. He was Managing Director of Terrazzo Tile Works Ltd. He was Managing Director of John Chellappah & Co., Ltd. John Chellappah & Co., Ltd., were agents and secretaries for Terrazzo Tile Works Ltd. His contract business he carried on under his personal name. He assigned contracts to Terrazzo Tile Works Ltd., and obtained a share of the profits. Documents P63*a*, P63*b*, and P63*c* show that the activities of the appellant as an individual, the Terrazzo Tile Works Ltd., and John Chellappah & Co., Ltd., were so closely knitted as to appear as the activities of one person. The result is that he has been subjected to the peril of this prosecution.

The appeal is allowed and the accused is acquitted on all the charges.

Accused acquitted.

Present : DIAS, S.P.J. AND GRATIAEN, J.

K. D. LUCIA PERERA vs. K. D. MARTIN PERERA *et al.*

S. C. No. 371—*D. C. Gampaha, No.* 159/13462.

Argued on : April, 24th and 25th 1951.
Delivered on : May 2nd, 1951.

Trust—Land purchased with plaintiff's money in first defendant's name—Request by plaintiff to re-convey land—Land furtively sold by first defendant to second defendant—Bona fide purchaser—Plaintiff in occupation of land for prescriptive period at time of sale—Plaintiff's acquisition of title by prescription—Sale void—Rights of co-ownership as between trustee and beneficiary—Section 98 *Trusts Ordinance Chapter.*

The plaintiff after purchasing an undivided share in certain lands occupied for convenience a divided allotment of the common land as representing the undivided share. Thereafter the plaintiff advanced money to her father, the first defendant, for the purpose of purchasing another share of the same land in her name. The 1st defendant bought it instead in his name and without conveying it to the plaintiff, inspite of repeated requests, sold it furtively to the second defendant, who purchased it *bona fide* and without knowledge of the above facts. The plaintiff, after the purchase by the first defendant, occupied another divided allotment of the same land in lieu of that share for a period of 19 years on the basis that she was the absolute owner. At the time of the sale to the second defendant, the plaintiff had thus been in occupation of the land for more than the prescriptive period of time.

The District Court dismissed the plaintiff's action to set aside the sale on the ground that although the land was held subject to a constructive trust in favour of the plaintiff the second defendant was protected by section 98 of the Trusts Ordinance, being a *bona fide* purchaser for value without notice of the Trust.

Held : (1) That the plaintiff possessed the land during the period of occupation as an absolute owner and not as a beneficial owner.

(2) That plaintiff's request to the first defendant to convey the share in the land did not constitute an acknowledgment of his rights as trustee and could not be regarded as an interruption of plaintiff's possession *ut dominus*.

(3) That at the time of the sale to the second defendant the plaintiff had acquired prescriptive title as against the first defendant and there was no title which the first defendant could effectively convey.

(4) That the plaintiff's occupation of the land could not be regarded as one of co-ownership with that of the first defendant but was an assertion of her claim to rights of co-ownership additional to those rights enjoyed by her under her earlier purchase and the rule in *Corea vs. Appuhamy* 15 N. L. R. 65 did not apply.

Cases referred to : *Silva vs. de Zoysa* (1931) 32 N. L. R. 199.
Ranhamy vs. Appuhamy (1945) 46 N. L. R. 279 at page 280.
Corea vs. Appuhamy, 15 N. L. R. 65.

E. G. Wickremanayake, K. C., with *T. B. Dissanayake* and *Christie Seneviratne* for the plaintiff-appellant.

H. V. Perera, K. C., with *Kingsley Herat*, for the defendant-respondent.

GRATIAEN, J.

There was a sharp conflict of testimony in the the Court below on certain points of controversy, but our task as an appellate tribunal has been made easier because Counsel have agreed that the learned District Judge's findings of fact should form the basis of our decision.

The plaintiff was the married daughter of the 1st defendant Abeyeratne. In December, 1925, she had purchased an undivided one-fifth share in certain premises. She thereupon, for con-

venience of possession as a co-owner, went into occupation of a divided allotment, being assessment No. 25B, on which a thatched house had previously been erected by her predecessors in title. In March, 1926, she desired to purchase an additional one-fourth share in the larger land. At that time she and her husband were living in Kadugannawa, and she therefore requested her father Abeyeratne to negotiate the deal on her behalf. The transaction went through and the agreed purchase price was paid to Abeyeratne by the plaintiff. The understanding between father and daughter was that the conveyance should, as on the earlier occasion, be obtained in her name, but on 12th March, 1926 Abeyeratne, acting contrary to his mandate to this extent, obtained from the vendor a conveyance in which he was named as the purchaser. Shortly thereafter the plaintiff, under the belief that she had now become the absolute owner of this additional share by right of purchase, went into occupation of another divided allotment (bearing assessment No. 25) which represented the undivided share conveyed by the vendor. The premises No. 25 and 25B adjoined one another, and continuously from that date she regarded herself as entitled to occupy both blocks of land on the basis that she was entitled to the separate undivided shares purchased in 1925 and 1926 respectively. Since 1935 these two divided allotments were treated for purposes of assessment and in all other respects as one consolidated block, and it is very significant that on some date between the years 1930 and 1935 the plaintiff and her husband pulled down the old thatched house standing on lot No. 25B and erected in its place a more substantial dwelling house the foundations of which still stand not only on lot 25B but on lot 25 as well.

I return now to the circumstance that the conveyance of 12th March, 1926, had been obtained by Abeyeratne in his own name instead of that of his daughter. This complication first came to her knowledge some months later, and when he was taxed with it he plausibly explained that this had been done merely for convenience because she, the true purchaser, had not been able to be present at the notary's office at the time of the conveyance. The explanation was accepted, and Abeyeratne promised from time to time to execute a fresh conveyance in favour of his daughter. Relations between father and daughter were extremely cordial at the time, and, procrastination being a not uncommon characteristic of our race, his failure to implement his obligations in the matter was not regarded by his daughter as having any Sinister significance. Abeyeratne died pending the present action and before he could explain his behaviour in the matter. It would therefore be uncharitable, and it is certainly unnecessary, for us to decide that his action in having the conveyance made out in his own name was in the first instance actuated by improper motives. Be that as it may, it is not possible to take a lenient view of his conduct 19 years later. On 6th March, 1945, he secretly, and without the knowledge of his daughter, conveyed the one-fourth share for valuable consideration to the 2nd defendant. As soon as this transaction came to the plaintiff's notice, she sued her father and the 2nd defendant in this action to vindicate her title to this share.

The learned District Judge has held that, although Abeyeratne's legal estate in the share had been held by him subject to a constructive trust in favour of the plaintiff, the 2nd defendant was a *bona fide* purchaser for value without notice of the trust. He was therefore protected by the provisions of section 98 of the Trusts Ordinance in so far as the plaintiff's claim was based on the footing of a trust. To this extent the learned Judge's view was clearly right.

Mr. Wickremanayake contends that the plaintiff is nevertheless entitled to succeed in the action notwithstanding her inability to rely on a constructive trust in her favour. Her claim is that she had acquired prescriptive title to the land before the date on which the share was conveyed to the 2nd defendant. On this issue, too the learned Judge held against the plaintiff but his judgment does not indicate the grounds on which he arrived at the conclusion. The view I have formed is that Mr. Wickremanayake's contention must prevail in view of the strong finding on fact in her favour on all the questions which seem to me to be material to the issue of prescription.

Let me shortly recount the relevant facts. In 1926 the plaintiff, believing herself to be not only the beneficial but the absolute owner of the undivided one-fourth share in question, went into occupation of the divided allotment of land represented by that share, and remained in occupation of it for over 19 years on the basis that she was entitled to possession *in her own right*. It therefore follows that, on the expiry of 10 years from the date of the conveyance of 12th March, 1926, she acquired prescriptive title to the premises not only against the original vendor but also as against her father who, by acting contrary to his mandate, had acquired under the conveyance only the "bare bones" of the legal estate. At the time of the purported sale to the 2nd defendant in 1945, the plaintiff had already become the absolute owner of the

share and Abeyeratne had no title which he could effectively convey to the 2nd defendant. The present case seems to be indistinguishable in principle from the ruling of this Court in *Silva vs. de Zoysa* (1931) 32 N. L. R. 199, which was recently adopted with approval in *Ranhamy vs. Appuhamy* (1945) 46 N. L. R. 279 at page 280.

Out of respect for Mr. Perera's argument, I desire to explain more fully the reasons for my conclusion on this issue. He contends (*a*) that the plaintiff's claim to prescriptive title failed because her possession throughout the period 1926 to 1945 was only the possession of a "beneficial owner" and not that of an "absolute owner", (*b*) that whatever her state of mind may have been when she first entered into possession of lot No. 25, she soon realised and in deed acquiesced in the possession that her father was a trustee vested with legal title to this share. Mr. Perera argued that the subsequent "acknowledgment" by the plaintiff of her father's status and powers as a "trustee" interuppted her possession *ut dominus* long prior to the time when prescriptive title could have been acquired by her. Finally, he argues, the plaintiff was already a co-owner of the larger land in respect of the share purchased by her in 1925, and her possession of lot 25 after 1926 was *prima facie* referable to her position as a co-owner to that limited extent. Indeed, according to this argument, Abeyeratne must himself be regarded as a co-owner by reason of his so called rights as the transferee named in the conveyance of 1926, and the plaintiff's claim to prescribe against her father, *qua* co-owner, is negatived by the principle laid down by the Privy Council in *Corea vs. Appuhamy*, 15 N. L. R. 65.

I find myself unable to accept any of these attractive submissions of Mr. Perera. It seems to me that questions as to the acquisition of prescriptive title must be examined in relation to the realities of a given situation. It is no doubt true that for at least 10 years since 12th March, 1926, Abeyeratne must be regarded by operation of law as a trustee vested with "legal title" to the disputed share because, acting contrary to his mandate, he had obtained the conveyance in his own name instead of that of his daughter who was intended to become the real purchaser. This circumstance immediately imposed upon him an "obligation in the nature of a trust" (section 82 of the Trusts Ordinance) which required him to hold what he had acquired for the benefit of his daughter (section 84). In this particular case—although it makes little difference either way—this obligation was created not because "it stood upon the presumed intentions of the parties to the transaction" but because it "*was forced upon the conscience of the party* (i.e., Abeyeratne) *by operation of law*". (*Story on Equity—3rd Edition—paragraph* 1195). How can it be reasonably contended that in such a situation the plaintiff's later discovery of her father's unauthorised action and her repeated requests thereafter that he should give her a conveyance of what he had improperly acquired constituted an "*acknowledgment of his rights*" to the property so as to interrupt her possession *ut dominus*? If the behaviour of parent and child be examined in the cold light of reason, I would rather say that her demand for a conveyance constituted not an acknowledgment of his rights but an assertion of hers—and indeed his promise to make good his obligation in the matter was an acknowledgment *on his part* of her right to regard the property as her own. As Story put in (paragraph 1262) "in cases of this sort the beneficiary is not at all bound by the acts of the other party (*i.e.*, the constructive trustee). He had the option to insist upon taking the property or he may disclaim any title thereto and proceed upon any other remedies to which he is entitled". In the present transaction, the plaintiff exercised the option of insisting upon retaining the property, and she remained in possession thereof *ut dominus* without interruption. By permitting a long delay in the execution of a conveyance, she took the risk of her rights being defeated by a clandestine sale by the "trustee" to an innocent third party for value, but after the prescriptive period had elapsed (as has happened here) her rights were completely immune.

To regard the relationship between plaintiff and her father as that of "co-owners" seems to me equally unreal. *Corea vs. Appuhamy*, (ibid) lays down the principles to be applied in dispute between co-owners who are jointly entitled to enjoy *dominium* in the common property. The facts here are entirely different. The plaintiff's occupation of lot 25 after March, 1926, was a clear assertion of her claim to rights of co-ownership additional to those which she had previously enjoyed as a co-owner under her earlier purchase.

In my opinion the judgment appealed from should be set aside. The plaintiff is entitled to a decree against the 2nd defendant declaring her entitled to an undivided one-fourth share of the land described in the schedule to the plaint. She is also entitled to her costs both here and in the lower Court.

DIAS, S.P.J.

I agree.

Appeal allowed.

Present : BASNAYAKE, J.

SINNATHAMBY (INSPECTOR OF LABOUR) vs. JINASENA

S. C. 1174—*M. C. Colombo* 5500

Argued and decided on : 25th January, 1951.

Wages Boards Ordinance, section 36—Employer in Engineering trade, workmen in motor transport trade—Is it obligatory on employer to comply with provisions applicable to motor transport trade ?

Held : (1) That where an employer engaged in the engineering trade employs workers to drive lorries, for purposes of transport, it is not obligatory on him to maintain in the premises in which he carries on business one or more registers in the prescribed form applicable to the Motor Transport Trade.

(2) That the words " employer in any trade" in section 36 of the Wages Board Ordinance contemplates the employer's trade and not the worker's.

T. S. Fernando, Crown Counsel, with *A. Mahendrarajah, Crown Counsel*, for the complainant-appellant.

H. W. Jayawardena with *C. E. Jayawardena* and *Lyn Weerasekera* for the accused-respondent

BASNAYAKE, J.

The respondent to this appeal has been acquitted by the learned Magistrate of the offence of failing to maintain and keep in the premises in which he is carrying on business one or more registers in the prescribed form applicable to the Motor Transport Trade as specified in Gazette No. 9481 of 2nd November, 1945.

It is admitted that the respondent is not engaged in the Motor Transport Trade, but it is submitted that the workers whom he employs to drive his lorries are workers in the Motor Transport Trade and that the employer must therefore keep a register in the form prescribed for that trade. I am unable to assent to that proposition. Section 36 provides that every employer in any trade for which a Wages Board is established shall maintain and keep in the premises in which that trade is carried on, one or more registers in the prescribed form showing—

(*a*) the name and sex of each worker employed by him, and in the case of a worker who is a woman or under the age of twenty-one years the age of the worker.

(*b*) the class of work performed by each worker employed by him.

(*c*) the wages paid to each such worker,

(*d*) the number of hours or work performed by each such worker,

(*e*) the number of hours of overtime work performed by each such worker,

(*f*) the dates on which wages are paid to each such worker,

(*g*) the holidays allowed to each such worker,

(*h*) the amount of the maternity benefits paid to each such worker,

(*i*) such other particulars as may be prescribed by regulations or required by any decision of the Wages Board.

The trade contemplated in the section is the trade of the employer and not that of the worker. In the instant case the trade of the employer is the engineering trade and the trade of the worker is the Motor Transport Trade. The obligations imposed by section 36 in respect of an employer in the Motor Transport Trade do not therefore fall on him. It is submitted by learned Crown Counsel that the words " in any trade " in section 36 are wide enough to catch up not only the employer's trade, but also the worker's trade. By themselves they are words of wide import but their meaning is controlled by the context in which they occur.

When the other provisions of the Ordinance are examined it becomes apparent that when the Ordinance uses the words " employer in any trade " it contemplates the employer's trade and not the worker's. Section 35 speaks of a worker in any trade, while section 37 speaks of every person engaged in any trade. The latter section also makes it clear that the obligation imposed thereby is imposed in respect of the trade of the employer and not that of the worker. When it comes to the payment of wages the Ordinance provides that the employer shall pay the minimum wages applicable to the worker's trade (section 21).

The acquittal of the respondent is therefore in my opinion right, and the appeal is dismissed.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : NAGALINGAM, J. (President), GRATIAEN, J. AND PULLE, J.

Appeal No. 45 of 1950 with Application No. 87 of 1950.
S. C. No. 6—M. C. Kanadulla No. 2912.

REX vs. NADAR

Argued on : 6th November, 1950.
Decided on : 10th November, 1950.

Court of Criminal Appeal—Murder Charge—Alternative verdict of lesser offence possible—Failure of judge to direct jury on the lesser offence—Non-direction.

Where in a murder charge the judge failed to explain to the jury the ingredients of the lesser offence of culpable homicide not amounting to murder and did not direct that they could convict the accused of the lesser offence if they were not satisfied that the accused acted with an intention to cause death, but were satisfied that he caused the death of the deceased by doing an act with the knowledge that such an act was likely to cause death.

Held: That it amounted to non-direction and that the conviction for the lesser offence should be substituted for that of murder.

Fred de Silva, with *J. G. Jayatilleke*, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, with *L. B. T. Premaratne, Crown Counsel*, for the Attorney-General.

GRATIAEN, J.

The appellant was convicted of the murder of a man named Thangasami Nadar, whom he was alleged to have stabbed during the early hours of the morning of 2nd October, 1949. Two main questions arose for the determination of the jury :—

(*a*) whether it was the accused who stabbed Thangasami Nadar, and if so

(*b*) whether he was guilty of murder or, in the alternative, of any lesser offence.

The conviction has been attacked on two grounds. It was contended, in the first instance, that the learned Judge had not adequately directed the jury on the evidence as to the identity of Thangasami Nadar's assailant. In our opinion there is no substance in this contention.

The other ground of appeal which was pressed before us is that there was no proper direction to the jury as to the alternative verdicts which were available in the event of their taking the view that, although the appellant had caused Thangasami Nadar's death, he had not acted with a murderous intention. We think that this ground of appeal is entitled to succeed. The learned Judge had no doubt adequately directed the jury as to the circumstances in which a conviction of murder would be justified. He gave them no direction, however, as to the ingredients of the lesser offence of culpable homicide not amounting to murder, and did not direct them that they should convict the appellant of this offence if they were not satisfied that he acted with an intention to cause death but were satisfied that he caused the death of the deceased by doing an act with the knowledge that such an act was likely to cause death. On the contrary he directed the jury as follows : "If you find that it was his (*i.e.*, the appellant's) hand that caused the injury but if you come to the conclusion that he did not intend to kill the deceased, then the verdict will be one of *grievous hurt* because the injury inflicted is what in law is described as grievous hurt". In precisely similar circumstances this Court recently quashed a conviction of murder and substituted for it a conviction of culpable homicide not amounting to murder. In the words of my brother Gunasekara, "The learned Judge did not leave it open to the jury to find the appellant guilty of culpable homicide not amounting to murder. His omission to do so may well have led the jury to regard an act done with the knowledge that it was likely to cause death as indistinguishable from an act done with the intention of causing death. We are unable to say that they would without doubt have convicted the appellant of murder even if their attention had been drawn to the distinction between the two states of mind, particularly as the learned Judge himself took the view that it was open to the jury to find the appellant guilty of voluntarily causing grievous hurt merely". (Appeal No. 28 and application No. 63 of 1950—S. C. Minutes of 31-7-50).

In the present case, and for the same reasons, we make order substituting for the conviction of murder a conviction of culpable homicide not amounting to murder. For this conviction we sentence the appellant to a term of eight years rigorous imprisonment..

Conviction and sentence varied.

Present : GRATIAEN, J. & GUNASEKARA, J.

U. DINGIRI MENIKA *et al* vs. M. HEEN APPU

S. C. No. 70—D. C. Nuwara Eliya, No. 2704

Argued on : 30th January, 1951
Decided on : 26th February, 1951

Evidence Ordinance, section 110—Tattumaru possession of property by arrangement—Can party in possession under such arrangement claim benefit of section 110—Subsequent repudiation of arrangement—Burden of proof.

Held : (1) That when two persons have acknowledged, however erroneously, each other's rights of co-ownership, and have agreed to work what is believed to be the common property in *tattumaru*, the occupation of the property at any point of time by either party to the mutual arrangement must, in law, be deemed to be the possession of both.

(2) That the burden of proving that the assumed bond of co-ownership does not in fact exist is on the party who repudiates the earlier arrangement and claims legal title thereto exclusively.

(3) That a party in possession under such an arrangement is not entitled to the benefit of section 110 of the Evidence Ordinance.

U. A. Jayasundera, K.C., with *C. G. Weeramantry*, for the defendants-appellants.
H. V. Perera, K.C., with *A. L. Jayasuriya*, for the plaintiff-respondent.

GRATIAEN, J.

The 1st and 3rd defendants appellants were the intestate heirs of their mother Ran Menika and, on her death, became entitled to whatever interests she possessed in the land in dispute. They claim that their mother had owned the entirety of the property. It is common ground, however, that Ran Menika's sister Punchi Menika had purported in 1944 to sell to the plaintiff by a notarial conveyance an undivided half share which she claimed in the property. The appellants' position is that Punchi Menika had no title to any share in the land ; that their mother Ran Menika had owned the property exclusively not by inheritance but by virtue of a deed of gift (which they were unable to produce) from her grand-aunt, also named Ran Menika, and they contended, in the alternative, that her sister Punchi Menika, the plaintiff's vendor, having married out in *diga*, had lost her title to any share which might otherwise have been transmitted to her by inheritance from her mother.

The allegation that Punchi Menika had been married out in *diga* was not substantiated at the trial to the satisfaction of the learned Judge, and this position was abandoned in appeal. It is significant in this connection that the sisters had inherited and possessed in common other lands belonging to their mother.

The only outstanding dispute was as to whether, as the appellants contend, Ran Menika owned and possessed the land to the exclusion of her sister Punchi Menika *or* whether, as the plaintiff successfully contended in the lower Court, these two sisters jointly inherited the land from their mother. I have examined the evidence led by the parties at the trial on this important issue of fact, and I am driven to the conclusion—which I understood to be conceded by both Mr. Jayasundera and Mr. Perera at the concluding stages of the argument before us—that neither of the respective positions contended for by the appellants and the respondent has been satisfactorily proved. In this state of things it is necessary to decide whether the learned District Judge was justified in entering judgment declaring the plaintiff entitled to an undivided half-share of the land in dispute.

Mr. Jayasundera has argued that, if neither of the contesting claimants had established legal title to the land, the defendants were entitled to succeed because they were admittedly in physical occupation of the entire land at the date of institution of this action. His submission is based on the provisions of section 110 of the Evidence Ordinance which provides that—

> " When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner ".

The principle of law relied on by Mr. Jayasundera is clear enough. Section 110 of the Evidence Ordinance lays down the well-established doctrine that a person claiming to dispossess another of immovable property can only recover by the strength of his own title. It is necessary, however, to examine the nature of the appellants' purported " possession " of the property during

the period preceding the institution of this action in order to consider whether the benefit of section 110 is available to them.

The plaintiff's action was instituted in December, 1946, and the reliable evidence in the case has established that after the date of his purchase of a half-share from Punchi Menika in 1944, he had for sometime been acknowledged as a co-owner by the appellants on the assumption that Ukku Menika and Punchi Menika had been entitled to the property in equal shares. The land was accordingly worked in *tattamaru*, and during the year 1944-1945 the plaintiff exercised proprietory rights on this basis under the Government-controlled internal Purchase Scheme which was at that time in operation. Similarly, in 1945-1946 the appellants occupied the land on the same basis. In the succeeding year, however, when the plaintiff claimed that it was his turn once again to work the property under the arrangement which the parties had adopted for convenience of possession, the appellants for the first time repudiated the earlier arrangement and disputed the plaintiff's right to any share in the land. In this state of things I do not see how the appellants can claim the benefit of section 110 of the Evidence Ordinance. In my opinion they did not enjoy that kind of "possession" which must be established for the burden of proof to be shifted to the party seeking to challenge a possessor's legal title to immovable property.

When two persons have acknowledged, however erroneously, each other's rights of co-ownership, and have agreed to work what is believed to be the common property in *tattamaru*, the occupation of the property at any point of time by either party to the mutual arrangement must in law be deemed to be the possession of both. If this be so, the burden of proving that the assumed bond of co-ownership does not in fact exist is on the party who repudiates the earlier agreement and claims legal title to the property in his own right to the exclusion of the other.

If this principle be applied to the facts of the present case, I would hold that the burden of proof was on the appellants to show that they were the sole owners of the property in dispute when the action commenced. This burden they have failed to discharge, and the judgment under appeal must, although for reasons different from those which weighed with the learned trial Judge, be affirmed.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

GUNASEKARA, J.
I agree.

PRIVY COUNCIL APPEAL No. 15 OF 1950

Present : LORD OAKSEY, LORD RADCLIFFE, LORD TUCKER, SIR JOHN BEAUMONT, SIR LIONEL LEACH

KUDA MADANAGE SIYANERIS vs. JAYASINGE ARACHCHIGE UDENIS DE SILVA

FROM THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Decided on : 8th February, 1951

Rei Vindicatio Action—Answer alleging inter alia that plaintiff's predecessor held land in trust for defendant—Defendant in possession—Claim on prescriptive title—Possession as agent—When prescription begins to run—Burden of proof.

Where in an action for declaration of title to a land the defendant who was in possession alleged (*a*) that the plaintiff's predecessor in title held the property for his (defendant's) benefit.
(*b*) that he (defendant) had acquired a prescriptive title.
(*c*) that the plaintiff was not a *bona fide* purchaser for value.
(*d*) that in any event he (defendant) was entitled to compensation and to a *jus retentionis*.

Held : That the learned District Judge was right in calling upon the defendant to begin as legal title was in plaintiff.

Held also : That if a person goes into possession of land as an agent for another, time does not begin to run until he has made it manifest that he is holding adversely to his principal.

R. O. Wilberforce, with *M. L. S. Jayasekera* (Ceylon Bar) for the plaintiff-appellant.
Stephen Chapman, for the defendant-respondent.

(*Delivered by* Sir Lionel Leach)

This is an appeal from a judgment of the Supreme Court of Ceylon, dated the 1st October, 1948, reversing a judgment of the District Court of Matara, dated the 12th March, 1946. The action out of which it arises was brought by the appellant in the District Court for a declaration of title to some five acres of land in the Matara District and for consequential relief. The respondent (the defendant) was in possession and claimed to be the true owner of the property. The appellant succeeded in the trial Court, but the Supreme Court disagreed with its material findings and dismissed the action. As the appeal to His Majesty in Council involves questions of fact it is necessary for their Lordships to examine the evidence in some detail.

In 1919 the land in dispute belonged to one David Samaraweera. By a deed dated the 10th October, 1919, Samaraweera conveyed it to one Appuhamy for the sum of Rs. 5,500, of which Rs. 4,630 was paid in cash and the balance of Rs. 870 was set off against a mortgage debt due to Appuhamy and secured on other property belonging to the vendor. Appuhamy sold the land to the appellant and conveyed it to him by a deed dated the 28th June, 1944.

Appuhamy was adopted in his infancy by the mother-in-law of the respondent and was brought up as a member of her family. The respondent's explanation of the fact that the land was purchased in Appuhamy's name was that Appuhamy wished to contract an advantageous marriage, but could not do so without being able to show that he was possessed of immovable property. The respondent alleged that he had arranged to buy the property for himself, but in order to help Appuhamy to secure a suitable bride he caused the conveyance to be drawn up in Appuhamy's name. Appuhamy having agreed to hold the property for the respondent's benefit. The respondent also averred that he had acquired a prescriptive title to the land by being in possession thereof adverse to Appuhamy since the 10th October, 1919, that the appellant was not a *bona fide* purchaser for value without notice of the respondent's claim and that in any event he was entitled to recover from the appellant the sum of Rs. 35,000 in respect of improvements which he said he had caused to be made to the property, and to a *jus retentionis* until the compensation was paid. On all these pleas the appellant joined issue. He maintained that Appuhamy had bought the property out of his own resources, that the respondent had acted as Appuhamy's agent in the transaction, that Appuhamy had himself paid for the improvements and that the respondent had remained in possession as a mere licensee of Appuhamy. Appuhamy gave evidence for the appellant and supported these contentions.

The District Judge held that Appuhamy had provided the money for the purchase of the property, that the respondent had acted as his agent in carrying the transaction through and in obtaining possession and that he had remained in possession ever since as a licensee of Appuhamy. The District Judge did not decide who had provided the money for the improvements which admittedly had been made to the property, but he held that the respondent could have no claim for compensation against the appellant. He accepted the respondent's plea that the appellant could not be treated as a purchaser without notice of the respondent's claim to be the true owner, but in view of his findings on the other issues this did not affect the result. He granted the appellant a declaration of title and directed that the respondent should be ejected from the premises. He further ordered the respondent to pay to the appellant damages at the rate of Rs. 40 a month from the 16th September, 1944, until possession was given.

The Supreme Court preferred the respondent's version of the transaction. It considered that the District Court had wrongly thrown the burden of proof on the respondent and as the result of this it had arrived at a conclusion unfavourable to him. It also held that the respondent had established a prescriptive title to the land. It agreed with the District Court that the appellant had bought with notice of the respondent's claim. In accordance with these findings it allowed the appeal and dismissed the action with costs in both Courts.

The main question in the case is whether Appuhamy had the means to provide the Rs. 4,630, which was paid in cash to Samaraweera. Appuhamy started life as a personal servant to the principal of the Training College at Colombo. At first his salary was only Rs. 15 a month, but it was increased from time to time until it became Rs. 30 a month. But his salary

did not constitute his only source of income. The college was a residential one and attached to it was a large English school for boys, to which some of the wealthiest families in Ceylon sent their sons. Appuhamy bought the provisions for the catering at the College and from 1912 to 1918 he ran the tuck shop, the profits of which he took. Evidence was given on behalf of the appellant by Mr. James Bleakley, a former lecturer and vice-principal of the College, who was associated with it from 1912 to 1943. Mr. Bleakley stated that Appuhamy had much opportunity of making money in this connection, so much so that the principal of the College had changed the system and had put the catering on a contract basis. While Mr. Bleakley was at the College Appuhamy was taken seriously ill and as he was afraid that his relations would raid his residence he asked Mr. Bleakley to take charge of his movable property and supply him with an inventory. Mr. Bleakley did so and was amazed at the quantity of jewellery and gold coins which Appuhamy possessed. Corroboration of Mr. Bleakley's evidence, if corroboration be needed, is to be found in the testimony of Mr. E. H. de Silva, the secretary of the Urban Council of Weligama, within whose jurisdiction the disputed land lies. Mr. de Silva, who was called as a witness by the respondent, attended the English school attached to the Training College at the time Appuhamy was running the tuck shop. He stated that it was quite evident that Appuhamy was making very much more than his salary.

Appuhamy had accounts in two savings banks; in one he had deposited Rs. 1,000 and in the other Rs. 700. In 1918 he made the loan to Samaraweera which was set off when the property with which the appeal is concerned was conveyed to Appuhamy in 1919. The fact that Appuhamy had money to lend on mortgage in 1918 did not fit in with the reason given by the respondent for causing the property to be conveyed to Appuhamy, and in dealing with this matter in the course of his evidence the respondent at first alleged that he himself had made the loan to Samaraweera, but then said that the money lent belonged to his mother-in-law, who asked him to arrange for the mortgage bond to be written in Appuhamy's name. The District Judge disbelieved the respondent's explanation, but the Supreme Court accepted it on the ground that Appuhamy's own testimony corroborated the respondent on the point. The Supreme Court was here under a misapprehension. Appuhamy made no such admission. On the contrary he expressly denied the truth of the respondent's allegation.

It is worthy of note that for two years after the conveyance the title deeds remained with the respondent. He then delivered them to Appuhamy, who held them until he sold the property to the appellant. In 1919 Appuhamy was about 36 years of age, and he remained unmarried until he was 60. He became engaged in 1941 to a woman, who was employed as a seamstress at the Training College, and he married her in 1943, much to the annoyance of the respondent and the members of his family. These facts have naturally been stressed on behalf of the appellant as militating against the respondent's story.

There is ample evidence to support the finding of the District Judge that Appuhamy was the real purchaser of the property. The District Judge believed the evidence adduced by the appellant and their Lordships see no justification for its rejection by the Supreme Court. The District Judge had the great advantage of seeing the witnesses in the witness box and he did not err on the question of onus of proof, as the Supreme Court has suggested. Admittedly he rightly called upon the respondent to begin, the legal title being in Appuhamy, through whom the appellant claimed. Having considered the evidence led by the respective parties he accepted that given on behalf of the appellant. The Supreme Court considered that it was incredible that Appuhamy could have made between Rs. 15,000 and Rs. 18,000 in six years, as he had stated. Be this as it may, Appuhamy required less than Rs. 5,000 in cash to buy the property from Samaraweera and there is evidence on which the trial Court could with reason hold that he had the money and that he used it for the purchase of the property.

Their Lordships will now turn to the question whether the Supreme Court was justified in its conclusion that the respondent had acquired a title by prescription. It is true that he took possession of the property on its conveyance by Samaraweera in 1919, that he remained in possession thereafter, that he let the property out to tenants and appropriated to himself the rents, that he was assessed to municipal taxes as the owner of the property and treated as such by the tenants and that in 1938, after the dwelling on the land had been rebuilt, he went to live there. It is common ground that, so far as is relevant to this point, the law of Ceylon with regard to adverse possession is the same as it is in England. Consequently if a person goes into possession of land in Ceylon as an agent for another time does not begin to run until he has made it manifest that he is holding adversely to his principal. It is not suggested that the

respordent ever expressly set up a claim adverse to Appuhamy until the latter had decided to sell the property, but it is said on his behalf that the facts just stated in themselves are sufficient to justify the conclusion that the respondent was throughout holding adversely to Appuhamy. Their Lordships consider that the facts referred to, viewed in the light of the surrounding circumstances, do not warrant this conclusion.

The property lies some 90 miles from Colombo, where Appuhamy lived and earned his livelihood. Appuhamy regarded the house on the land as the home to which he would go on his retirement. He had installed a safe in the house and had sent there a buggy cart and a bull. While he was living so far away naturally he required someone to look after the property for him. Who could do it better than the respondent who resided in the neighbourhood? He regarded the respondent as his brother-in-law and was on very good terms with him. Apart from the respondent and his family Appuhamy had no relations. He was not in need of the rents which the property brought in. He earned in Colombo more than sufficient for his needs. He was quite content to allow the respondent to enjoy the property until he wanted to live there himself.

The District Judge found that the respondent's possession was that of a relative who was occupying the property without paying rent and he expected it to devolve on him or his children on Appuhamy's death. The respondent admitted in the witness box that it was understood that whatever Appuhamy had would come to the respondent's family when he died. The happy relations between the respondent and Appuhamy continued until 1941 when Appuhamy became engaged to be married. There can be no doubt that the respondent strongly resented the fact that Appuhamy intended to marry. He did not attend the wedding and he confessed that he had not spoken to Appuhamy or to his wife since the marriage.

On the 16th March, 1944, Appuhamy wrote, through his proctor, to the respondent intimating that he contemplated selling the property. He said that he had received two offers for it and he desired to know whether the respondent had any intention of buying it. It is not a letter which a person who was contemplating a fraud would be likely to write. Appuhamy held the title deeds, which stood in his name and had he chosen to do so he could have conveyed the property to the appellant without any reference to the respondent. But it is a letter which a person might well write to a relative who had looked after the property for him in his absence for many years and who was then living in the house.

Their Lordships have said sufficient to indicate their reasons for agreeing with the District Court's finding that the respondent had not acquired a prescriptive title to the property and as the respondent has not established a case for compensation their Lordships consider that the decree of the District Court should be fully restored.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Supreme Court of Ceylon, dated the 1st October, 1948, be set aside. The respondent will pay the costs incurred in Ceylon and in the appeal to His Majesty in Council.

Appeal allowed.

Present : Basnayake, J. & Pulle, J.

De SILVA vs. PERERA

S. C. 12—*D. C.* (*Inty.*) *Anuradhapura* 2936

Argued and decided on : 17th October, 1950

Arbitration—Reference to, without complying with provisions of Civil Procedure Code—Sections 676, 677 and 678.

Held : (1) That a reference to arbitration made without complying with the provisions of sections 676 and 677 of the Civil Procedure Code is bad in law.
(2) If parties nominate two or more arbitrators, provision should be made for a difference of opinion among the arbitrators.

C. V. Ranawake, with *B. H. Aluwihare*, for the defendant-appellant.
E. B. Wikramanayake, K.C., with *Sri Perera* and *E. A. G. de Silva*, for the plaintiff-respondent.

BASNAYAKE, J.

This action was instituted by one N. W. K. Perera against one K. T. de Silva, wherein the plaintiff prayed that the defendant be ordered and decreed to pay him Rs. 3,193·73 with legal interest thereon till payment in full.

The defendant filed answer claiming a sum of Rs. 5,443·25. In the replication the plaintiff resisted the claim of the defendant and asked that the claim in reconvention be dismissed. Thereafter the case was set down for trial for the 29th day of September, 1949. On that day Counsel addressed the Court and a motion was filed in these terms :—

> " Whereas we the plaintiff and the defendant are desirous that the matters in the above action should be referred to the final decision of an arbitrator ; it is hereby agreed between us, the said plaintiff and the defendant that all matters arising, or deemed to arise in this action be referred to the sole arbitration of Messrs. Satchithananda, Schokman and de Silva, Chartered Accountants of Colombo."

That document is signed by the plaintiff and the defendant in person as well as by their Proctors.

The learned District Judge made the following order thereon : " Allowed. Issue commission. Returnable 22-12-49." On 22nd December the following minute was recorded by the learned Judge.

> " Commission *re* arbitration not issued. (Defendant to support motion for revocation of proxy.) Mrs. P. C. Fernando files proxy of defendant. I accept it. Commission not issued. There seemed to have been a misunderstanding regarding the issue of the Commission.
>
> " Mr. Sivacolundu moves that the case be fixed for trial. I vacate the order for reference to arbitration."

The present appeal is from that order vacating the order made by the Judge on the 29th of September, 1949. Reference to arbitration in the course of an action is governed by Chapter 51 of the Civil Procedure Code. Sections 676, 677 and 678 of that chapter read :—

> " 676. (1) If all the parties to an action desire that any matter in difference between them in the action be referred to arbitration, they may at any time before judgment is pronounced apply, in person or by their respective proctors, specially authorised in writing in this behalf, to the Court for an order of reference.
>
> (2) Every such application shall be in writing, and shall state the particular matters sought to be referred, and the written authority of the proctor to make it shall refer to it, and shall be filed in Court at the time when the application is made, and shall be distinct from any power to compromise or to refer to arbitration which may appear in the proxy constituting the proctor's general authority to represent his client in the action.
>
> (3) The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.
>
> (4) If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.
>
> " 677. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the order.
>
> (2) When once a matter is referred to arbitration, the Court shall not deal with it in the same action, except as hereinafter provided.
>
> " 678. (1) If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—
>
> (*a*) by the appointment of an umpire ; or
>
> (*b*) by declaring that the decision shall be with the majority if the major part of the arbitrators agree ; or
>
> (*c*) by empowering the arbitrators to appoint an umpire ; or
>
> (*d*) otherwise as may be agreed between the parties ; or if they cannot agree, as the Court determines.
>
> (2) If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act."

In the instant case the proceedings make it clear that neither the application for reference to arbitration nor the order of the Court has been made in accordance with the provisions of the Code. The proceedings are therefore bad and we quash all orders made on and after 29th September, 1949, and send the case back with liberty to the parties to proceed to trial or make a proper application for arbitration if they so desire. If the parties elect to refer any matter or matters in dispute to arbitration and nominate more than one arbitrator as they appear to have done when they named Messrs. Satchithananda, Schokman and de Silva, the learned Judge should bear in mind the provisions of section 678 of the Code and provide, in the order, for a difference of opinion among the arbitrators.

There will be no costs of this appeal.

PULLE, J.

I agree.

Set aside and sent back.

Present : BASNAYAKE, J. & GRATIAEN, J.

ANTHONY GASPAR *et al* (Appellants) vs. THE BISHOP OF JAFFNA (Respondent)

S. C. 90—*D. C. Jaffna* 3,312

Argued on : 25th August, 1949
Decided on : 7th October, 1949

Trust—Deed conveying land to trustees on trust for a community—Defendants members of the community—Land subsequently transferred absolutely by trustees to plaintiff—Plaintiff's right as absolute owner to eject defendants—Trustee cannot vary the terms of trust.

Where a land purchased with money contributed by the Catholics of the Catholic Karawa community of Kokuvil West was conveyed by deed to trustees for the use of the community and descendants, and the trustees thereafter transferred by deed the land to the plaintiff giving him absolute right of ownership, and the plaintiff as owner sought to eject the defendants who were admittedly members of the Catholic Karawa community because they refused to pay tithes to the Catholic Church,

Held : (1) That the deed created a trust for the benefit of the defendants and did not deprive them of their right to the use of the land by reason of non-payment of tithes.

(2) That the trustees had no power to alter the terms on which they held the trust property and could not therefore give the plaintiff absolute right over it.

C. Thiagalingam with *V. Arulambalam*, for the defendant-appellant.

H. W. Tambiah with *D. Vivekanandan*, for the plaintiff-respondent.

BASNAYAKE, J.—

The plaintiff, the Bishop of Jaffna, is an incorporated person by virtue of section 2 of the Roman Catholic Archbishop and Bishops of Ceylon Incorporation Ordinance. His case is that two persons by name Simeon Raphiel and Anthony Gaspar, the first defendant to this action, who were the owners of a land called Thookumarakadu (hereinafter referred to as the land) by virtue of deed No. 6804 of February 8, 1912 (hereinafter referred to as D1) transferred the land to him by deed No. 6138 of May 16, 1918 (hereinafter referred to as P1) with absolute power to do what he liked with it. He alleges that the defendants have unlawfully and wrongfully erected a shed thereon and are claiming to be entitled to be in possession of it.

In this action he seeks to have the fifteen persons whom he has named as defendants ejected therefrom and to recover damages in a sum of Rs. 300 with continuing damages at Rs. 300 per mensem until he is restored to possession.

The case for the fourteen defendants who filed answer is that the land was purchased by the fishermen of Anaicottai and Kokuvil West who were also members of the congregation of the Church of the Lady of Refuge situated at Anaicottai with their own money and that by D1 it was transferred in trust to the first defendant and one Simeon Raphiel, who by P1 transferred it subject to the same trust to the plaintiff who holds the land in trust for the defendants and other fishermen of Anaicottai and Kokuvil West. The defendants claim that they and other fishermen of the above-mentioned villages who also form the congregation of the Church at Anaicottai are the beneficial owners of the land and ask for a declaration that the plaintiff holds the land and its appurtenances in trust for them and the other fishermen of those two villages.

According to Anthony Gaspar, one of the transferors on P1 and the only witness who can claim to know personally the history of the transactions relating to the land, about 35 elders of the community of fishermen at Anaicottai and Kokuvil West contributed towards the purchase of the land which is 5 lachams in extent. It was acquired for the beaching of boats and the storing of fishing tackle, which up to that time used to be done at a place called Navanturai. A shed was erected thereon by the fishermen for housing their fishing tackle and as a place of rest and protection from the weather. It was later enlarged by the parish priest, one Rev. Father Iyan, with funds provided by the fishing community, and a watcher appointed. He was paid in kind. The catch of each fisherman was also sold on that land and a tithe paid to the Church through its collector. About the year 1946 the driver of the present parish priest, Rev. Father Tarcisius, contracted a marriage in the village of Anaicottai. He invited one and

all. As the union was disapproved by the entire fishing community of the village, the wedding was boycotted by the villagers. Of the villagers the collector of tithes alone attended it. In consequence the defendants marked their disapproval of his conduct by refusing to pay the tithes to him. They tendered the tithes to the Bishop of Jaffna, who referred them to the parish priest. They then tendered the tithes to the parish priest, who insisted on their payment through the collector. Then they asked that another collector be appointed. This request was refused. They then paid the tithes into a special account opened by them at the Bank of Ceylon. The parish priest retaliated by excluding from the shed on the land those who did not pay the tithes to the collector. Thereupon the defendants constructed another shed for their fishing tackle on the same land. These actions resulted in both the parish priest and the defendants seeking the aid of the Police, who refused to take action on the ground that the dispute was of a civil nature. This action was thereupon commenced.

The following issues were determined at the trial :—

"(1) Are the defendants entitled to be in possession of the land referred to in the plaint ?

(2) If not, is the plaintiff entitled to eject the defendants from the said land ?

(3) Damages.

(4) Is the plaintiff the absolute owner and proprietor of the land described in the schedule to the plaint ?

(5) If not, is the plaintiff's action maintainable ?

(6) Is plaintiff holding the land in question subject to an express trust in favour of the defendants and other fishermen of Anaicottai and Kokuvil West and their descendants ?

(7) If so, is the plaintiff's action maintainable ?

(8) Are the defendants and other fishermen of the villages of Anaicottai and Kokuvil West entitled to the beneficial interest in the land in question ?

(9) If so, is plaintiff's action maintainable ? "

The learned District Judge has held that—

(*a*) the defendants are not entitled to be in possession of the land,

(*b*) the plaintiff is entitled to eject the defendants therefrom,

(*c*) the plaintiff is the absolute owner and proprietor thereof,

(*d*) the plaintiff does not hold it subject to an express trust in favour of the defendants and other fishermen of Anaicottai and Kokuvil West and their descendants, and

(*e*) that the defendants and other fishermen of the villages of Anaicottai and Kokuvil West are not entitled to the beneficial interest therein.

The defendants dissatisfied with the decision of the learned District Judge have appealed to this Court.

The question arising for decision on this appeal have in my opinion to be resolved by an examination of the documents D1 and P1. The plaintiff has also produced marked P4 a translation of D1. The differences in the two translations are not material. The relevant portions of D1 read—

"Know all men by these presents that I Murugesar Ponnampalam of Vannarponnai West Jaffna do hereby execute deed of transfer in favour of Simon Raphiel and Anthony Kasparu of Kokuvil West, to wit—

Land situated at Anaicottai in the parish of Manipay Valikamam West Division of the Jaffna District Northern Province called "Thookkumarakadu" in extent 2 acres and 28 perches of this on the south western side the extent of 5 lms p/c is bounded on the east and north by the remaining portion of this land belonging to me, west by lane intended for leading cattle, and south by road ; the whole within these boundaries is hereby sold and transferred to the said persons at the price of the said sum of rupees forty two and cents fifty (Rs. 42·50). *I have received this sum of rupees forty two and cents fifty from the said transferees in full who declared that the said amount has been entrusted to them by that section of the catholics of those catholics belonging to the Church of Lady of Refuge Anaicottai who form the Catholic Karava Community of Kokuvil West. This sum of money they stated was collected among the said section of the catholics for the purpose of purchasing a land to be used by the said section of the catholics and their descendants as a place for keeping implements and selling fish.* I having received the said amount do hereby sell and transfer the said

land to the said section of the Catholic Karava Community for the aforesaid purpose."

It is clear from the passage italicized that the first defendant and Simon Raphiel held the land on that deed as trustees for the group of persons whom they represented, viz., "that section of the catholics of those catholics belonging to the Church of Lady of Refuge Anaicottai who form the Catholic Karava Community of Kokuvil West."

The declaration of the first defendant and Simeon Raphiel in deed P1 is as follows :—

"We Simeon Raphiel and Anthony Kasparu both of Kokuvil West in Jaffna do hereby declare.

Whereas the Catholic people belonging to the Church of Lady of Refuge at Anaicottai and the Karava Catholic people of Kokuvil West belonging to the said Church have collected money and given us to go in for a piece of land for use by them and their descendants as a Port and for selling fish and whereas we having out of the said money purchased a piece of land described below and whereas it is not proper for us to retain the land in our names bought out of public funds and as it is but just and reasonable to surrender all properties common to the Catholic cause to the Catholic Mission.

Now know all men by these presents that we Simeon Raphiel and Anthony Kasparu both of Kokuvil West do hereby convey transfer and set over and assign to Dr. Henri Julain O.M.I. Bishop at Jaffna of the Catholic Mission the following property.

Land belonging to us by right of purchase and possession of the said Karava people as per transfer deed dated the 8th day of February 1912 and attested by S. Sivaprakasapillai Notary under No. 6804.

For reasons above described we do hereby transfer unto the said Rt. Rev. Dr. Henry Julian and his successors in office and his and their assigns the said property with its appurtenances.

Therefore that the said Rt. Rev. Dr. Henry Julain Bishop and his successors his or their assigns may for ever have the absolute right and power and title to sell, mortgage, to exchange for another the whole or any portion of the said land and that he or they have the right to deal with this property in any way they like and utilise the proceeds or the land exchanged for whatever purposes he or they desire."

P1 indicates in no uncertain terms that the transferors were trustees for the community of persons described therein. Although the transferors give the transferee absolute right and power to sell the land and to deal with the property in any way he likes that power cannot be exercised in derogation of the trust created by the instrument under which the transferors derive their title. As trustees they had no power to alter the terms on which they held the property. Even the plaintiff has up to the date of the dispute which gave rise to this action acted on the footing that he is the trustee for the community of persons indicated by P1 and D1. There is no provision of the Trust Ordinance which invalidates the trust created by D1 and there is no reason why it should not prevail. A community of persons can hold property or acquire rights in property. In the same way a community of persons can be beneficiaries under a trust deed. It is not disputed that the defendants belong to the class of persons for whose benefit the land has been provided. But it is claimed that they have forfeited their right to its enjoyment by non-payment of tithes. Although Rev. Father Tarcisius says : "The shed in question is used only by those fishermen who pay tithes. The fishermen who refuse to pay tithes are not entitled to use it", there is nothing in the instruments from which they derive their rights which makes the right to use the land dependent on payment of tithes. Nor is there any precise evidence to show that a fisherman who does not pay tithes ceases to be a Roman Catholic. Father Tarcisius says : "It is the practice of the Catholic fishing community to pay 1/10 of their catch to the Church. If they do not pay they are not entitled to their rights." The witness does not explain what he means by "their rights". In the absence of a clear definition of those words I am not prepared to read them as including a forfeiture of such rights as they are entitled to under the instruments in question.

It is unnecessary for the purposes of this appeal to discuss the questions of law relating to charitable trusts which learned Counsel for the respondent raised.

The appeal of the defendants is allowed and the plaintiff's action is dismissed with costs.

Appeal allowed.

Gratiaen, J.

I agree.

Present : BASNAYAKE, J.

SAMARANAYAKE vs. WIJESINGHE (INSPECTOR OF POLICE, GALLE)

S. C. 1315—*M. C. Galle* 18832
Argued on : 24th January, 1951
Decided on : 15th May, 1951

Criminal Procedure—Right of Judge sitting alone to inspect scene of offence—Scope of such right—Criminal Procedure Code, sections 238 *and* 422 (1)—*Evidence Ordinance, section* 60, *proviso* 2—*Officer taking leading part in detecting offence acting as prosecutor—Undesirability.*

After hearing the prosecution and defence on a charge under the Excise Ordinance, the Magistrate, before recording his verdict, visited the scene the following day. After inspection of the spot he carried out certain tests for the purpose of verifying the veracity of witnesses. The accused was convicted and it was submitted in appeal on his behalf that the procedure adopted by the Magistrate was irregular and has prejudiced the accused.

Held : (1) That the learned Magistrate had the right to visit the scene of offence, but the procedure adopted by him to test the veracity of the oral evidence given is not sanctioned by law and hence the accused was prejudiced thereby.

(2) That section 422 (1) (*c*) of the Criminal Procedure Code appears to recognise the existence of the right of a Judge sitting alone as Judge of both fact and law to view the scene of the offence he is trying.

(3) That the decisions of the Supreme Court recognise the necessity of such a right, which, quite apart from statute, may be regarded as inherent in a Court of Justice.

(4) That power must be exercised within the limits allowed to a jury, for as a Judge of fact his role is the same.

(5) That a view by the jury is intended only for the purpose of enabling them to better understand the evidence and it is not open to a jury on a view to carry out tests for the purpose of verifying the veracity of witnesses or testing their evidence.

(6) That the evidence given by a witness should be tested in one or more of the ways prescribed by the Evidence Ordinance.

(7) That the rule, that an officer, who has played the leading role in the detection of a crime or offence, should not in the interests of justice act as prosecutor in that case, should be strictly observed.

Per BASNAYAKE, J.—(*a*) The enactment provides for what may be called a bare view of the scene by the jury. It does not require that the Judge or Counsel should accompany them. They are to be conducted in a body under the care of an officer of the Court to the place in which the offence was committed and the place shown to them by a person appointed by the Judge. No other person is permitted to communicate with the jury. No power is granted for the conducting of experiments at the scene or the carrying out of any tests. The sole object of the visit appears to be to enable the jury to better understand the evidence. There is no doubt that after a view the jurors will appreciate the evidence better. At the same time it cannot be denied that they will be impressed by what they see at the place and will not hesitate to reject the testimony of a witness if it is in conflict with what they have seen.

(*b*) There remains the question as to the stage of the trial at which a view may be granted. No hard and fast rule can be laid down. In certain cases a view at the very outset would help, in others a view after the important features of the case are known to the jury may be profitable, in still others the end of the case may be the most desirable stage for a view. In the case of *R. vs. Martin* it was held that an order for a view may be made even after the summing up by the Judge.

(*c*) The difference between a view of the scene and an inspection under the proviso to section 60* seems to me to be that until there is oral evidence which refers to the existence or condition of a material thing the Court cannot inspect it.

Cases referred to : *Perumal vs. Fonseka and another* (1937) 9 C. L. W. 151.
Barnes vs. Pinto (1938) 40 N. L. R. 125.
Jayawickrema vs. Siriwardena and others (1939) 14 C. L. W. 85 ; 18 Law Recorder 182.
Aron Singho vs. Buultjens (1947) 48 N. L. R. 285.
The King vs. Gnanapiragasam (1948) 50 N. L. R. 77.
King vs. Seneviratne (1936) 38 N. L. R. 208.
Denver T. & F. W. R. Co. vs. Ditch Co., (11 Colo. App. 41, 52 Pac. 224).
Washburn vs. R. Co. (59 Wis. 364, 368, 18 N. W. 328.).
State vs. McCausland (82 W. Va. 525, E. 96 S. E. 938).
Synder vs. Massachusetts (1934) 291 U. S. 97.
MacDonald vs. Goderich (1948) 1 D. L. R. 11.
R. vs. Martin (1872) L. R. 1 C. C. R. 378 ; 12 Co. Cr. 204 ; 41 L. J. M. C. 113.

G. E. Chitty with *A. W. W. Gunawardena*, for the accused-appellant.
H. A. Wijemanne, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The appellant Peter Samaranayake has been convicted of the offence of selling fermented toddy without a licence and ordered to pay a fine of Rs. 150. The conviction is challenged on grounds of law and fact. The case for the prosecution is that in consequence of certain information received by him Inspector Wijesinghe arranged a trap for the appellant and obtained a search warrant to enter and search the premises known as Danwela Group, Badde-

* Of the Evidence Ordinance (EDD.)

gama, owned by one Henry Abeywickrema who manufactures vinegar therein. The appellant is an employee in the vinegar manufactory, his duty being to supervise the collection of toddy and its disposal into the appropriate vats.

The technique adopted was the usual one of sending a decoy with a currency note the features of which were previously noted. In this instance Police Constable Banda acted as the decoy and he was accompanied by Police Constable Suraweera. It was a ten-rupee note that he tendered for the two bottles of toddy purchased by him, the total cost of which was Rs. 1·40. The evidence relating to the sale of toddy, if true, is sufficient to warrant a conviction on the charge.

The case for the defence is that this is a trumped-up charge. The allegations of the prosecution are denied and counter allegations of using violence on the appellant and others and of destruction of property and the breaking open of doors and windows and the fabrication of false evidence, are made against the police.

After hearing the case for the prosecution and the defence the learned Magistrate without recording his verdict made the following order :—

> " In view of the sketch I propose to visit the scene tomorrow after the day's work. It is not possible to visit the scene today (4-30 p.m. now). As it is late and the road is said to be muddy and the distance is over 13 miles, I propose to visit the scene tomorrow after 4 p.m. Accused to be present in Court tomorrow morning. On same bail."

On the following day the learned Magistrate visited Danwela Group. The appellant and the prosecution witnesses were present. The following is the Magistrate's note of his visit :—

> " I first inspected the spot where the alleged sale is said to have taken place. I was shown the spot by P. CC. Banda and Suraweera. I got the wire netting measured and found it to be 4 feet 10 inches in height. I stood at the gate marked D in the sketch marked D1 and I left the two P. CC. in charge of the Court Interpreter and on a signal given by me I got the two P. CC. to run from the spot where they alleged they bought the toddy as they gave chase to witness Dissanayake and the accused. I could see the two Constables run though their view was at times obstructed by the intervening trees.
>
> " Inspector Dole also pointed out the spot to where he saw the alleged chase. I got the two Constables to repeat the run and I stood watching at the spot pointed by Inspector Dole which spot is close to the pond. I could see the two Constables run."

On 19-10-50 Inspectors Wijesinghe and Dole and Police Constables Banda and Suraweera were examined by the Magistrate on the respective part each of them played on his visit to the scene. On the following day the learned Magistrate made his order convicting the appellant.

It is submitted for the appellant that the procedure adopted by the learned Magistrate is irregular and has prejudiced the appellant. The question raised by learned Counsel is of some importance.

The reported decisions of this Court are to the effect that though there is no express provision in that behalf it is not illegal for a judge trying a case without a jury to visit the scene of the crime. But no definite rule as to the scope of such a visit has been laid down. It will be useful therefore first to review those decisions.

In the case of *Perumal vs. Fonseka and another* (1937) 9 C. L. W. 131. Mosely J. characterised an inspection of the house of the accused after the close of the case for the prosecution and defence as " irregular procedure ". He went on to say :—

> " If an inspection was considered desirable, it should have been made during the course of the trial, where the further evidence of the Inspector could have been taken as to the re-arrangement of the furniture."

In the next case of *Barnes vs. Pinto* (1938) 40 N. L. R. 125 the Magistrate visited the scene after notice to both parties at the close of the case for the prosecution before he called on the defence. At the scene a witness was made to act the part the accused is alleged to have played. The visit to the scene appears to have convinced the Magistrate of the truth of the prosecution case. Abrahams C.J. in setting aside the conviction states :—

> " Now in order to arrive at a better understanding of the evidence the Court is entitled to view the *locus in quo*. But experience of Courts going beyond the purpose of a view has shown that this inspection should be carried out with great care and ought not to be made the occasion for the taking of fresh evidence. In my opinion if anything is said or done which amounts to the taking of fresh evidence and the correction of any doubts which may be in the mind of the Court prior to the view it is essential that that evidence should be repeated in the witness-box in order that no prejudice should be occasioned to the accused. In this instance the inspection does appear to have imported a certain amount of fresh evidence, but what to my mind is rather serious is that the demeanour of the witness Vincent de Alwis outside the Court was employed by the Magistrate to correct an unfavourable impression which was created when he was in the witness-box. This is tantamount to the Magistrate using his own personal knowledge to correct an unfavourable opinion that he has formed as a Magistrate of a witness."

In the third case of *Jayawickrema vs. Siriwardena and others* (1939) 14 C. L. W. 83 ; 18 Law Recorder 182, the Magistrate inspected the scene of the offence and appears to have been influenced by what he saw. The conviction was set aside and a re-trial ordered on the ground that the procedure adopted by the Magistrate was not fair to the accused. Soertsz A.C.J. observes in that case :—

"The Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates. Section 238 provides for a view by the jury of the place where the offence was committed, but, perhaps, there can be no objection to an inspection by a District Judge or a Magistrate provided it is held with the care and caution."

In the fourth case of *Aron Singho vs. Buultjens*, (1947) 48 N. L. R. 285 the Magistrate after notice to the accused inspected the goods waggon from which it was alleged rice was stolen by the adoption of a special device and carried out an experiment himself with the very implement with which the alleged crime was committed. The experiment convinced him that the offence could have been committed in the way described by the prosecution witnesses. My brother Dias set aside the conviction on the main ground that by performing the experiment himself the Magistrate had made himself a witness on a question of fact.

Lastly in the case of *The King vs. Gnanapiragasam*, (1948) 50 N. L. R. 77 the Magistrate in the course of the prosecution case inspected the scene at 7-30 a.m., the time of the alleged offence, after notice to and in the presence of the accused. His object was to test the evidence of identification of the accused. In appeal objection was taken to the conviction on the ground that there was no provision in the Criminal Procedure Code which enabled a Magistrate to view the scene of an offence. Canakaratne J. overruled the objection and enunciated the principle on which he held that the Magistrate was entitled to do what he did, thus :—

"Whenever facts are tried by a Judge sitting alone, the Judge's use of real evidence becomes an equally appropriate mode of ascertaining facts, and is a corollary of his general power to obtain evidence. The Judge, therefore, may equally well proceed from the Court room to the place in issue, whenever such a proceeding would be a suitable one, to take a view, provided only that he observes the usual rule of fairness for a jury view, viz., that he notify the parties and allow them to attend him at the view."

The above decisions show that there are several aspects to the present question. They are—

(*a*) May the scene of the crime be viewed for the purpose of obtaining a better understanding of the evidence ?

(*b*) May it be visited for the purpose of testing the oral evidence already given ?

(*c*) May it be visited for the purpose of carrying out experiments which will either confirm or destroy the impression created by the oral testimony ?

(*d*) May it be visited for the purpose of obtaining evidence ?

As the considerations that apply to a view of the scene by a jury will equally apply to a view by a Judge sitting alone, for both view the scene in their capacity as triers of fact, it will be helpful in the first instance to examine the provisions of law that provide for a view by a jury and the judicial decisions thereon.

Section 238 of our Criminal Procedure Code provides :—

"(1) Whenever the Judge thinks that the jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect ; and the jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge.

"(2) Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any of the jury ; and unless the Court otherwise directs they shall when the view is finished be immediately conducted back into Court."

The enactment provides for what may be called a bare view of the scene by the jury. It does not require that the Judge or Counsel should accompany them. They are to be conducted in a body under the care of an officer of the Court to the place in which the offence was committed and the place shown to them by a person appointed by the Judge. No other person is permitted to communicate with the jury. No power is granted for the conducting of experiments at the scene or the carrying out of any tests. The sole object of the visit appears to be to enable the jury to better understand the evidence. There is no doubt that after a view the jurors will appreciate the evidence better. At the same time it cannot be denied that they will be impressed by what they see at the place and will not hesitate to reject the testimony of a witness if it is in conflict with what they have seen. To that extent the matters they see will be taken into account in deciding the case although there may be no oral testimony on the point. I am not aware of any decision of this Court on the subject of this section. The dearth of decisions may be due to the fact that a view is rarely ordered. Before a view is granted the Judge must satisfy himself that no material change has taken place in the surroundings since the date of the offence. For if a change has taken place the object of the view would be defeated. In the case of *King vs. Seneviratne* (1936) 38 N. L. R. 208 wherein the propriety of certain experiments carried out on a visit to the scene by Judge, jury, Counsel and witnesses came up for consideration, the Privy Council while discouraging the procedure adopted in that case refrained from saying anything as to the scope of the section. Nevertheless as its

observations are pertinent to this discussion I shall quote them :—

> " Section 258 of the Criminal Procedure Code (No. 15 of 1896) provides for a view by the jury and lays down definite and strict conditions for its conduct. Section 165 of the Evidence Ordinance provides for the Judge asking questions at any time of any witness. The proceedings of June 8, 1934, seem to have been a combination of a view and a further hearing with the introduction of some features permitted by neither procedure, such as the performance of an experiment with chloroform by a Dr. Peiris, who does not appear to have been sworn as a witness, the Judge and the foreman of the jury being present with Dr. Peiris in a room and the rest of the jury being somewhere else. The jurors seem also to have been divided for the purpose of other experiments in sight and sound and to have been asked questions as to the impressions produced on their senses. Their Lordships have no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sound or smells : but they feel bound to record their view that there were features in the proceedings of June 8 which were irregular in themselves and unnecessary for the administration of justice."

The American and Canadian cases which are cited *in extenso* in Wigmore on Evidence discuss the scope of a view of the scene by a jury in greater detail than has been attempted in the English Courts. A survey of the legislation both in England and elsewhere on this point will doubtless be of assistance in understanding the decisions of the foreign Courts.

A statute of 1705 (4 Anne, c. 16, s. 8) provided that in any action at Westminster where it shall appear to the Court that it will be " proper and necessary " that the jurors who are to try the issues should have the view of the lands or place in question " in order to their better understanding the evidence " to be given at the trial the Court may by special writ order a view. It was later provided by section 23 of 6 Geo. IV, c. 50, (1825), as follows :—

> " Where in any case, either civil or criminal, or on any penal statute, depending in any of the said Courts of record at Westminster, it shall appear to any of the respective Courts, or to any Judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such Court, or any Judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such Court or Judge shall so think fit, the party applying for the view to deposit in the hands of the under Sheriff a sum of money to be named in the rule for payment of the expenses of the view."

In 1854, 17 and 18 Vict., c. 125, s. 58, provided that either party shall be at liberty to apply to the Court for an order for inspection by the jury of any real or personal property the inspection of which may be material to the proper determination of the question in dispute.

In 1883, Rules 3 and 4, Order 50, of the Rules of Court, made very wide and sweeping provision for inspection by both judge sitting alone and by jury in civil trials. They went on to empower the taking of samples, the making of observations and the carrying out of experiments that may be necessary or expedient for the purpose of obtaining full information or evidence.

In Canada provision for a view in criminal cases is made by section 958 of the Criminal Code which reads :—

> " On the trial of any person for an offence against this Act, the Court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which and the persons by whom, the place, thing or person shall be shown to such jurors, and may for that purpose adjourn the trial, and the cost occasioned thereby shall be in the discretion of the Court.
>
> " 2. When such view is ordered, the Court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors : Provided that no breach of any such directions shall affect the validity of the proceedings."

The South African Criminal Procedure and Evidence Act 1917, enacts :—

> " 212. (1) The Judge may, in any case, if he thinks fit, direct that the jury shall view any place or thing which the Judge thinks it desirable that they should see and may give any necessary directions for that purpose.
>
> " (2) The validity of the proceedings is not affected by disobedience to any such directions, but, if the fact is discovered before the verdict is given, the Judge, if he is of opinion that such disobedience is likely to prejudice the fair trial of the accused, may discharge the jury and may direct that a fresh jury be sworn during the same session of the Court or may adjourn the trial."

The American statutes are too numerous to bear citation. I shall therefore content myself with the law as enunciated in the Law Institute, Code of Criminal Procedure, section 317 :—

> " *View by Jury :* When, in the opinion of the Court, it is proper that the jury should view the place where the offence appears to have been committed, or where any other material fact appears to have occurred, it may order the jury, in the custody of the proper officer, to be conducted in a body to such place ; and the officer shall be admonished to permit no person to speak to or otherwise communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into the Court room without unnecessary delay, or at a specified time. The trial Judge shall be present and the prosecuting attorney and counsel for the defendant may be present at the view by the jury."

The Indian Criminal Procedure Code which has many features in common with our Criminal Procedure Code provides as follows :—

> " 293. (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make

an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

"(2) Such officer shall not, except with the permission of the Court, suffer any person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court."

The enactments I have cited make it abundantly clear that a view of the scene of the crime is limited in its scope. It is intended only for the purpose of enabling the jury to better understand the evidence. But it cannot be denied that a view does incidentally provide matter which the jury cannot help taking into account in considering their verdict. Certain Judges have held that a jury's "view" does not involve the obtaining of evidence, but in America at least that opinion has not been accepted by the majority of the Courts. The majority opinion has been very effectively put by Bissell J. *Denver T. and F. W. R. Co., vs. Ditch Co.*, 11 Colo. App. 41, 52 Pac. 224 thus :—

"We are very frank to say we do not appreciate the refined distinction which is drawn by some of the authorities, wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case, but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind, and the well-understood processes by which juries arrive at conclusions. Many illustrations which forcibly express these ideas may be found in the cases. If a dozen witnesses should testify that there was no window on the north side of the house from which one man had sworn that he viewed the affray, and the jurors on view should see the window, all lawyers would know that it would be futile, on the argument, to insist to the jury that their verdict must be based on the non-existence of the window since the point had been sustained by a vast preponderance in the number of witnesses."

Lyon J. puts the matter thus *Washburn vs. R. Co.*, 59 Wis. 364, 368, 18 N. W. 328 :—

"The object of a view is to acquaint the jury with the physical situation, conditions and surroundings of the thing seen. What they see they know absolutely... For example, if a witness testify that a farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned; no contrary testimony of witnesses on the stand is needed to authorize the jury to find the fact as it is, in disregard of testimony given in Court."

In the case of *State vs. McCausland* 82 W. Va. 525, B 96 S. E. 938 Ritz J. put the matter thus :—

"As to whether or not a view by the jury of some place connected with the matter before it is a taking of evidence is a question upon which there is a very decided conflict of authorities. Many of the Courts hold that it is not, but is a part of the deliberations of the jury in arriving at a verdict; others say it is not the taking of evidence, but is simply allowing the jury to see the physical conditions in order that it may better understand the oral testimony; while still others assert that it is the presentation of physical conditions to the jury from which it may be informed as to some pertinent matter of inquiry. The purpose of introducing evidence is to inform the jury of the transaction in regard to which the trial is had, and anything pertinent to that end is proper for the purpose. Frequently in the trial of such cases material objects are introduced before the jury. In homicide cases the garments worn by the deceased are often introduced for the purpose of showing the place at which the wounds were inflicted. Can it be said that this is not evidence? It is stronger and more convincing to the jury than the oral testimony of any witness could possibly be. There can be no difference in the proffer of objects to the jury in the Court room and such exhibition by taking the jury to view such objects, when they are not susceptible of being brought into Court. The reason the jury is taken to view the ground is simply because it is physically impossible to bring it into the Court room, and it is therefore necessary, in order that the jury may have all of the light obtainable upon the subject to which the inquiry is directed, that it be taken and shown these objects which form a part of the subject of inquiry."

The renowned Cardozo, J. in discussing this matter in the case of *Snyder vs. Massachusetts* (1934) 291 U. S. 97 expressed the view that the inevitable effect of the view is that of evidence, no matter what label the Judge may choose to give it.

In a Canadian case *MacDonald vs. Goderich*, (1948) 1 D. L. R. 11 the view was expressed that the only purpose to be served by an inspection was to enable the Judge by a view to better understand the evidence. One of the Judges who took part in the decision, Roach J.A., said (p. 20) :—

"I have never understood that a Judge, by taking a view, can place what his senses there perceive into one or the other of the pans of the scales of justice. All that goes into those pans is the evidence, nothing else.'

I have devoted so much attention to the consideration of the law relating to a view by the jury as the principles that apply to a view by a Judge, if he has power to inspect, must necessarily be the same. Where a Judge alone is trying the action, he is judge of both the law and the facts. There cannot be one rule for a jury as the Judge of the facts and another rule for a Judge as judge of the facts.

It is convenient at this point to deal with the questions I have posed hereinbefore. The statutes cited clearly point to the fact that the jury may view the scene of the crime in order to obtain a better understanding of the evidence. The purpose of a view is not to find out the truth or falsity of the oral evidence although incidentally a view may have the effect of exposing the false witnesses. Nor is it intended to be a means of obtaining evidence. The carrying

out of experiments also seem to fall outside the scope of a view.

There remains the question as to the stage of the trial at which a view may be granted. No hard and fast rule can be laid down. In certain cases a view at the very outset would help, in others a view after the important features of the case are known to the jury may be profitable, in still others the end of the case may be the most desirable stage for a view. In the case of *R. vs. Martin* (1872) L. R. 1 C. C. R. 378 ; 12 Cox Cr. 204 ; 41 L. J. M. C. 113 it was held that an order for a view may be made even after the summing up by the Judge.

This brings me to the question whether under our law a Judge sitting alone as judge of both fact and law has power to view the scene of the offence he is trying. The Criminal Procedure Code makes no express provision in that behalf but section 422 (1) (c) appears to recognise the existence of such a right. It provides that one of the grounds on which a case may be transferred from the Court having jurisdiction to try the offence to another is "that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same." The Code seems to proceed on the assumption that the right exists. The decisions of this Court recognise the necessity of such a right, which quite apart from statute may be regarded as inherent in a Court of Justice. In fact the opinion has been expressed that even the provision which regulate a view by the jury are designed not so much to confer the power as to regulate it. For the power to view is inherent in a Court. It may therefore be assumed that both our Code and the decisions of this Court recognise the power of a Judge sitting as a judge of fact and law to view the scene. He must however exercise that power within the limits allowed to a jury for as a judge of fact his role is the same. As I have pointed out above, it is not open to a jury on a view to carry our tests for the purpose of verifying the veracity of witnesses or testing their evidence. Likewise a Judge sitting alone may not do so. Such a procedure is not sanctioned by law. A witness's evidence must be tested in one or more of the ways prescribed by the Evidence Ordinance.

In the instant case therefore the learned Magistrate was acting within his powers in viewing the scene of the offence. But the same cannot be said of the tests described by him in the journal entry which I have cited above. The course adopted by the learned Magistrate is one fraught with danger especially in a case such as this where all the witnesses are police officers who must be taken to know the points made at the trial by the defence in the course of their cross-examination. It cannot be asserted with certainty that when they rehearsed before the Magistrate they did exactly as they acted on the day of the offence, and that their actions were uninfluenced by their knowledge of the defence.

The trial of a case by the adoption of a procedure which has not the sanction of law cannot but result in prejudice to the accused. I think the conviction cannot be sustained and must be set aside.

Before I leave this topic I should not fail to refer to the second proviso to section 60 of the Evidence Ordinance which prescribes that if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

This procedure is followed every day in the Criminal Courts where bloodstained clothes, skulls, and bones with injuries, pieces of plaster, knives, clubs, and other weapons of offence and a whole host of other things too numerous to detail are produced for the inspection of the Court.

The question that arises is whether the Court's power of inspection under this section is confined to things that can be brought into the Court-house. Can it not inspect things outside its walls ? Take for example a motor vehicle which cannot be taken inside. Has the Court no power to go out into the place where it is left ? Let us now go a step further. Cannot the Court inspect under this section a thing that is immovable by proceeding to where it is ? I am inclined to think that it may. To deny such a power would amount to an undue and unreasonable restriction of the power conferred by it. It seems to be a provision designed to provide a visual aid to the understanding of the oral testimony. At the same time it may operate as a means of checking the oral evidence.

The difference between a view of the scene and an inspection under the proviso to section 60 seems to me to be that until there is oral evidence which refers to the existence or condition of a material thing the Court cannot inspect it.

Before I conclude this judgment I must express my stern disapproval of the conduct of Sub-Inspector Wijesinghe who not only planned and led the raid but also prosecuted in the case despite objection by learned Counsel for the defence. This Court has in a series of cases laid down the rule that an officer who has played the leading role in the detection of a crime or

offence should not in the interests of justice act as prosecutor in that case. That rule seems to be disregarded by public officers. It is a rule that must be strictly observed. The disregard of this rule in the instant case is an additional reason for setting aside the conviction of the appellant.

The appeal is allowed and the conviction is quashed.

Appeal allowed.

Present : BASNAYAKE, J.

SAMARASEKERA vs. SOYSA (EXCISE INSPECTOR, WADDUWA)

S. C. 1316—*M. C. Panadura* 14752
Argued and Decided on : 31st January, 1951

Poisons, Opium and Dangerous Drugs Ordinance (Ch. 172)—*Charge under section* 26—*What must be proved—Meaning of "ganja".*

Where a person is charged under section 26 of chapter 172 with cultivating and having in his possession hemp plants, the charge must refer to the plant by the name by which it is known to the law and the prosecution must establish by evidence of a qualified person that the plant possessed by the accused is a plant of the variety prohibited by section 26.

Cases referred to : *Wilson vs. Kotalawela* (1946) 47 N. L. R. 45.
Ukku Banda vs. Ukku Banda (1904) 7 N. L. R. 205.

S. P. M. Rajendram, for the accused-appellant.
L. B. T. Premaratne, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The appellant is charged with cultivating and having in his possession two hemp plants in breach of section 26 of the Poisons, Opium, and Dangerous Drugs Ordinance (hereinafter referred to as the Ordinance).

The evidence for the prosecution is that on certain information received by Excise Inspector Soysa of Wadduwa a raid on the appellant's house was made about 6 a.m. on 22nd June, 1950. The excise party consisted of Inspector Soysa, Excise Corporal William Singho, and some others. They reached the neighbourhood of the appellant's house about 4-55 a.m. and were lying in wait. At 6 a.m. the appellant was observed to open his door, go towards the rear compound, return with a bucket of water, and pour it on some plants in an enclosure. The raiding party then went up and noticed two plants in a tin (P1). According to their evidence it was the two plants which were produced in Court that the appellant was watering. The Excise Inspector and the Excise Corporal both say they are "Ganja" plants. Excise Inspector VanTwest who conducted the prosecution in the Magistrate's Court also gave evidence, and he identified the plants as "Ganja" plants.

Now the section under which the appellant is charged provides that no person shall without a licence sow, plant, cultivate, obtain, or have in his possession any poppy plant, coca plant, or hemp plant, or collect or have in his possession the seeds, pods, leaves, flowers, or any part of any such plant.

Section 25 of the Ordinance defines the expression "hemp plant" as follows :—

"'Hemp plant' means the plant known as *Cannabis sativa L.*"

'Ganja' according to section 28 is the name by which the preparation of or extracts from the hemp plant are commonly known. For the prosecution to succeed it must establish that the plant which was in the possession of the appellant was a hemp plant of the variety defined in the Ordinance, *i.e., Cannabis sativa L.* There is no such evidence in the instant case.

Learned Crown Counsel referred me to the case of *Wilson vs. Kotalawela*, (1946) 47 N. L. R. 45) wherein it has been held that "Ganja" comes within the definition of hemp plant in the Ordinance. With great respect I find myself unable to subscribe to that view. "Ganja" is not a plant. It is a preparation of or extract from a plant. The case of *Ukku Banda vs. Ukku Banda*,(1904) 7 N. L. R. 205), is a decision under section 16 of Ordinance No. 5 of 1899. In that Ordinance there was neither a definition of "Ganja" nor of "hemp plant". The Ordinance which I am called upon to consider states what it means by the "hemp plant" and "Ganja". A charge under section 26 should therefore refer to the plant by the name by which it is known to the law and the prosecution must establish by evidence of a qualified person that the plant possessed by the accused is a plant of the variety prohibited by section 26.

For the foregoing reasons the appeal is allowed and the conviction is quashed.

Appeal allowed.
Conviction quashed.

Present : GRATIAEN, J.

K. NALLIAH vs. P. B. HERAT, INSPECTOR OF POLICE, KOTAHENA

S. C. No. 1322—*M. C. Colombo, No.* 8874/*A*

Argued on : 25th April, 1951
Decided on : 2nd May, 1951

Penal Code, sections 345, 354—*Kidnapping and use of Criminal force with intent to outrage modesty—Accused acquitted of the latter offence—Evidence relating to latter charge relevant to guilt of accused on charge of kidnapping—Effect of acquittal—Evidence relating to the acquitted charge, is it relevant to the other charge ?—What constitutes " kidnapping " ?—Consent of child immaterial—Criminal Procedure Code* 152 (3).

The accused was charged with the offences of kidnapping a girl of 13½ years and of using criminal force with intent to outrage her modesty, and the Magistrate convicted him of kidnapping but acquitted him of the other offence.

Held : (1) That the evidence relating to the charge of using criminal force with intent to outrage modesty was relevant to the guilt of the accused on the charge of kidnapping and the effect of the accused's acquittal was to shut out that evidence for the purpose of establishing the offence of kidnapping.
(2) That the accused was entitled to rely on his acquittal in so far as it was relevant to his defence in the other charge.
(3) That the effect of a verdict of acquittal is binding and conclusive in the same or subsequent proceedings between the parties to the adjudication.
(4) That where a person is charged on more than one count in the same proceedings a verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial.
(5) That a person is not guilty of " kidnapping " unless he is proved to have taken or enticed the child out of the keeping of the lawful guardian without the consent of such guardian.
(6) That where a minor leaves the immediate custody of his lawful guardian for a temporary purpose the relationship of guardian and child suffers no break in its continuity so long as there is no interference with the child's opportunity of returning to the guardian.
(7) That the offence of kidnapping would have been complete if the complainant had been forced or enticed away for an improper purpose.
(8) That the charge of kidnapping failed in this case because the person of the minor has not been proved to have been transferred from the custody of her guardian into the custody of some person not entitled to her custody.
(9) That a child cannot validly consent to the substitution of some other person's control which is exercised over her by her lawful guardian, and therefore, the girl's consent to the alleged kidnapping is immaterial.

Obiter : per GRATIAEN, J.—If ever there was a criminal proceeding which, by reason of the gravity of the charges and the intrinsic difficulties of the case, called for a preliminary investigation before committal and trial, this was one. It seems to me that the Magistrate acted unwisely in exercising his discretion to dispose of the case summarily.

Cases referred to : *Sambasivam vs. Public Prosecutor, Federation of Malaya* (1950) A. C. 458 at page 479.
Ratanlal on Crimes, 16th Edition, page 855.
Gurdit Singh vs. Emperor, A. I. R. (1916) Lahore 230.
R. vs. Booth (1872) 12 Cox 231.

H. V. Perera, K.C., with *C. S. Barr Kumarakulasingham* and *K. Rajaratnam*, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, with *E. H. C. Jayetilleke, Crown Counsel*, for the Attorney-General.

GRATIAEN, J.

The appellant who is a married man with a long period of service in the Railway Department, was charged in the Magistrate's Court of Colombo with having on 3rd October, 1950, committed the following offences :—

(*a*) Kidnapping a girl aged 13½, named Rita La Faber, from the lawful guardianship of her mother—an offence punishable under section 354 of the Penal Code ;

(*b*) using criminal force on the girl Rita with intent to outrage her modesty—an offence punishable under section 345 of the Penal Code. The learned Magistrate decided to try these grave charges summarily in terms of section 152 (3) of the Criminal Procedure Code.

At the conclusion of the trial the appellant was acquitted of the charge of using criminal force, but was convicted on the charge of kidnapping. The present appeal is from this conviction.

Rita La Faber's version is that when she and her younger sister were leaving the precincts

of St. Anthony's Church at Kochchikade on the afternoon of the day in question they met the appellant (who was well known to them and had until recently been their mother's landlord). He invited Rita to go with him to the Regal Cinema as his guest. She joined him in a bus, having parted company with her sister who went home alone. Rita has made some suggestion in her evidence that she was taken into the bus "by force", but this allegation can safely be discounted in view of her earlier statement to her mother that she had accepted the invitation. Indeed, she subsequently admitted at the trial that after she entered the bus, she "went to the pictures quite willingly". I am satisfied from an examination of the evidence for the prosecution that during the earlier stages of the transaction, at any rate, Rita had no reason to think that the appellant entertained any sinister motives in making his offer to "treat" her to a visit to a cinema. On the way to the entertainment they had some light refreshments at his expense at a "buriyani" shop.

So far there is no substantial dispute as to what took place. The appellant says that he was kindly disposed towards this young girl and that his only motive was to give her a pleasant "outing" until it was time for her to return to her mother and for him to return to his wife. If that be true, he would certainly be well advised to restrict his future manifestations of genuine affection for other people's children by first consulting the parents concerned.

The main dispute is as to what took place after this incongruous couple had taken their seats together at the Regal Theatre. Rita complains that after the lights went out the appellant put his arms round her and acted improperly towards her. She was considerably upset, she says, and wished to leave the cinema immediately. The appellant then took her away, but instead of accompanying her home direct, he took her by force to the Galle Face green, and taking advantage of the darkness in a secluded spot which he selected for the purpose, took advantage of her in a manner in which to my mind would not only have warranted convictions under sections 345 and 354 of the Penal Code but called for sentences far beyond the jurisdiction of a Magistrate or a District Judge to impose. Indeed, the original complaint to the police was that rape had been committed, but this charge was not persisted in because it was negatived by a medical examination. This part of Rita's story is stoutly denied on oath by the appellant; he says that the whole transaction was perfectly innocent; they saw the picture to its conclusion and then went home together. It is common ground that, within a reasonable time of the hour when the Theatre would have closed after the performance they returned together by bus to their respective homes which are situated in close proximity to one another.

In this sharp conflict of testimony, the learned Magistrate examined the evidence and acquitted the appellant of the charges of using criminal force on Rita with intent to outrage her modesty. I agree with Mr. Wijemanne that the grounds on which this order of acquittal was based are not very convincing, but it seems to me that so long as this acquittal stands—and the prosecution has not appealed against it—the appellant is entitled, for the purposes of his defence to the outstanding charge of kidnapping, to claim the full benefit of the order in his favour on the other charge. This is a fundamental principle of the criminal law which was recently emphasised by the Privy Council in *Sambasivam vs. Public Prosecutor, Frederation of Malaya*, (1950) A. C. 458 at page 479 :—

> "The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim '*res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial.....the prosecution was bound to accept the correctness of that verdict at the second trial. *And the accused was no less entitled to rely on his acquittal in so far as it might be relevant to his defence.*"—(*Per* LORD MACDERMOTT).

In that case the Judicial Committee of the Privy Council was concerned with the effect of an acquittal on a particular charge in an earlier trial on a connected but different charge at a subsequent trial. But the rule is of general application and has equal force when one considers the effect which an order of acquittal on one charge would have on a connected charge in the same proceedings. A verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial.

It is in the light of this principle that the evidence on the charge of kidnapping outstanding against the appellant must be approached. Rita's version of the alleged offence against her modesty had considerable bearing on the question of the appellant's guilt or innocence on the charge of kidnapping. This evidence, in the learned Magistrate's judgment, could not with safety be acted upon in regard to the charge of criminal

force. It necessarily follows, I think, that as long as the order for acquittal stands on that count, this evidence cannot be taken into account for any purpose whatsoever in connection with the kidnapping count. If then the conviction for kidnapping is to be established, it must be supported by evidence in the case other than that which must be regarded as having already been rejected by the learned Magistrate. This represents the main difficulty which I have encountered in deciding the present appeal.

The view I have taken is that the charge of kidnapping fails because the rest of the evidence is insufficient to establish the appellant's guilt, and it is not permissible to act upon Rita's evidence as to what occurred after she and the appellant took their seats together at the Regal Theatre. Up to that point of time, no "kidnapping" within the meaning of section 352 of the Penal Code was proved to have been committed. As to what happened thereafter, it is impossible to say because one's vision is blurred so to speak, by the impenetrable "smoke screen" set up by the order of acquittal on the second count. When the smoke screen lifts, the parties are observed returning together by bus to their respective homes in circumstances which are by themselves consistent with the theory that Rita's removal from her parental custody had never been intended.

A person is not guilty of "kidnapping" a female child under 16 years of age unless he is proved to have "taken or enticed" her "out of the keeping of her lawful guardian". Can it be said that a person necessarily "kidnaps" a young girl by merely taking her to a cinema show without her guardian's express consent but without the proved intention of depriving the girl of her unrestricted freedom to return to her guardian's protection whenever she chose to do so? I do not think so. It seems to me that in such a case the girl has not, even temporarily, left her mother's "keeping". Where a minor leaves the immediate custody of his lawful guardian for a temporary purpose he must be deemed to be still in the guardian's keeping. (Ratanlal on Crimes, 16th Edition, page 855), and the correct view is that the relationship of guardian and child suffers no break in its continuity *so long as there is not interference with the child's opportunity of returning to the guardian.* Although Rita's mother was absent at the time, Rita remained in her mother's "keeping" when she first met the appellant near the Church—and there is no proof that she did not so remain when she was a passenger in the bus or a guest at the "Buriyani Shop" and later at the cinema. The offence of kidnapping would have been complete if she had been forced or enticed away for an improper purpose. But this vital part of the case for the prosecution has not been established by evidence on which it is permissible to act. As the case now stands, I am logically compelled to hold that the offence of kidnapping has not been made out because the person of the minor Rita has not been proved to have been "*transferred from the custody of her guardian into the custody of some person not entitled to her custody*". *Gurdit Singh vs. Emperor*, A. I. R. (1916) Lahore 230. I agree that Rita's so-called "consent" to her alleged kidnapping would be immaterial. *R. vs. Booth* (1872) 12 Cox 231. A child cannot validly consent to the substitution of some other person's control for the control which is exercised over her by her lawful guardian. But, apart from the issue of consent, the accused must be acquitted because "kidnapping"—involving an even temporary severance of parental control—has not been established.

I allow the appeal and quash the conviction on the charge of kidnapping, but I feel constrained to say that my order would have given me greater satisfaction if I were convinced that the appellant is in fact innocent of both offences which were framed against him at the trial. If ever there was a criminal proceeding which, by reason of the gravity of the charges and the intrinsic difficulties of the case, called for a preliminary investigation before committal and trial, this was one. It seems to me that the Magistrate acted unwisely in exercising his discretion to dispose of the case summarily. I had at one stage considered whether I should quash the proceedings and order a fresh inquiry to be held under Chapter 16 of the Criminal Procedure Code. But Mr. Perera has pointed out that there are many infirmities in Rita's evidence, and in all the circumstances I do not think it would be right to place the appellant "in peril" for a second time after the lapse of many months. The appellant is acquitted.

Appellant acquitted.

Present : BASNAYAKE J. & PULLE, J.

ABDULLA & ANOTHER vs. JUNAID & OTHERS

S. C. 84 (Inty.)—D. C. Galle 3226/L
Argued on : 11th October, 1950
Decided on : 21st March, 1951

Right of way—Claim by plaintiff of a cartway or footpath of necessity—Sketch filed with plaint—A Surveyor's plan of cart track subsequently filed—Plaint rejected and ordered to be amended to define strictly cartway—sufficient if plaint indicates way claimed—Civil Procedure Code, section 41—Amendment of plaint.

In an action claiming either a cartway or a footpath of necessity, the plaintiff filed with the plaint a sketch indicating the tract of the cartway. On a commission issued by the Court a plan showing the cart tract claimed by the plaintiff was filed.

At the trial the District Judge rejected the plaint on the ground that it did not describe the way of necessity as depicted in the plan and that it was silent with regard to the actual right of way, and ordered the plaintiffs to amend the plaint accordingly.

Held : (1) That in such a claim it was sufficient for the claimant to indicate the way claimed and that the claimant was not obliged to describe the way of necessity by physical metes or bounds or by reference to a sufficient sketch, map or plan.

(2) That in this case the plaintiffs had pleaded everything material to sustain a claim for a way of necessity and the Court had ample material to frame the issues for determining the case.

C. E. S. Perera, for the appellants.
H. W. Jayawardena, for the respondents.

BASNAYAKE, J.

I agree that this appeal should be allowed.

The learned District Judge appears to have misread section 41 of the Civil Procedure Code. He says :—

> " I might refer to section 41 of the Civil Procedure Code which runs as follows :
>
> ' The right-of-way of necessity or interest in a specific portion of land should be described in the plaint as far as possible by reference to physical metes and bounds or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only ' "

Section 41 which appears in the Revised Edition of the Legislative Enactments reads :—

> " When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only."

That section does not require that when a right of way of necessity is claimed over a servient tenement the path or way claimed should be described by physical metes and bounds or by reference to a sufficient sketch, map or plan. It provides that :—

(*a*) where a specific portion of land is claimed that portion of land must be described in the prescribed manner,

(*b*) where some share or interest in a specific portion of land is claimed then the *portion of land* in which the share or interest is claimed must be described in the prescribed manner.

In the instant case the plaintiffs claim a way of necessity—cartway or footpath—in lieu of the right of way which they allege they had acquired and lost in consequence of it not being conserved in the decree for the partition of the servient tenement. They claim a right of necessity to proceed along a defined path which has been indicated in the sketch annexed to the plaint and the plan subsequently prepared on a commission issued by the Court. Although a person claiming a way of necessity has no right to a specific way of necessity until it is constituted by a grant or a decree of Court, it is open to the claimant to indicate the path along which he wishes to proceed so that the Court may decide whether the claim is reasonable or not and grant the right either along the path claimed or prescribe another which causes the least amount of detriment to the servient tenement. The onus of proving the necessity is on the claimant.

Appeal allowed.

PULLE, J.

The plaintiffs appeal from an order requiring them to amend the plaint in an action filed by them claiming a cartway of necessity or, in the alternative, a footpath of necessity over two contiguous allotments of lands named Muhandiramgewatta and Serasinghagewatta. A sketch was filed with the plaint depicting the position of each of the lands, the land and house of the plaintiffs and the track of a cartway from plaintiffs' house to the high road.

The case came on for trial on the 4th July, 1949. It was not then suggested that the plaint was insufficient to enable the Court to frame the proper issues. The learned District Judge however made the following order :—

> " In view of the nature of the action brought by the plaintiff and the nature of the dispute between the parties I think it would be best that the plaintiff takes out a commission to file a plan in this action setting out the right of cartway or footway of necessity which he prays for in this action as against the defendants.
>
> " Take case off trial roll and issue commission at the instance of plaintiff for a plan to be made."

A commission was duly issued and a return thereto was filed on the 28th July, 1949, with a plan No. 545 shewing the cart track, marked P and Q, claimed by the plaintiffs. At the instance of the defendants a further commission was issued to the surveyor to mark on the same plan a cart track and certain footpaths said to lead to plaintiffs' house from the main road. The second commission was executed and a report with the plan amended was filed on the 13th October and the 27th October was fixed for filing objections, if any, to the plan. On the latter date no objections were filed and the trial was fixed for the 31st January, 1950.

When the trial was taken up the submission was made on behalf of the 1st defendant that the plaint should be amended defining strictly the cartway used by the plaintiffs. The learned Judge accepted this submission and made order that the plaintiffs should amend their plaint and condemned them to pay the taxed costs of the 1st and 2nd defendants. The present appeal is from this order.

In my opinion the order appealed from cannot be supported. After the proceedings of the 4th July it is clear that the parties intended that plan No. 545 should take the place of the sketch filed with the plaint. The material difference between the plan and the sketch is that the former was drawn according to scale and the latter was not. The learned trial Judge states in his order that there is no mention in the amended plaint of the way of necessity as depicted in plan No. 545 and went on to add that paragraph 8 of the amended plaint was silent with regard to the actual right of way which the plaintiffs claimed. With great respect, I do not think that the Judge was right on this point. Paragraph 8 reads :—

> " A cause of action has thus accrued to the plaintiffs to sue the defendants for a right of cartway of necessity or in the alternative a right of footway by necessity over the land called Lot A of Muhandiramgewatta and Lot 2 of Serasinghegewatta and for damages as aforesaid."

When this averment is tested in the light of the sketch it is apparent that the plaintiffs had pleaded everything material to sustain a claim for a way of necessity and the Court had ample material before it to frame the issues necessary for the determination of the case.

In support of his order the learned Judge has relied on section 41 of the Civil Procedure Code. According to his reading of the section the way of necessity must be described in the plaint as far as possible by reference to physical metes and bounds or by reference to a sufficient sketch and not by name only. Assuming for a moment that this manner of reading section 41 can be justified the sketch filed with the plaint is in substantial compliance with the section and more so when it is remembered that a way of necessity cannot be claimed by a plaintiff over a definite track determined by him. The plaintiff cannot claim more than a means of access to the high road convenient alike to him and the owners of the servient tenement. It is out of the question for the plaintiff to pre-determine along which track he is entitled to exercise his right.

I would set aside the order appealed from and remit the case for trial on the issues arising on the pleadings or on such issues as the parties may agree.

The plaintiffs will be entitled to the costs of appeal.

Present : BASNAYAKE, J.

BADURDEEN vs. COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS

In the Matter of an Appeal under Section 15 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949

Application No. 1114 of 1950
Argued on : 23rd and 24th January, 1951.
Decided on : 18th May, 1951.

Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, section 6 (2) (ii)—Meaning of "ordinarily resident"—Date in relation to which question of ordinary residence has to be decided.

The appellant applied on 19th November, 1949, for registration as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. He was born in India, but was resident in Ceylon since 1928. In 1938 he married in India where his wife remained till March, 1948. Two children were born to them in India in 1938 and 1945 respectively. In March, 1948, the wife and children came to reside in Ceylon with the appellant intending to settle down in Ceylon permanently. The elder child has been attending school since September, 1948.

Held : (i) That in the circumstances the wife and each of the two minor children had been "ordinarily resident" in Ceylon within the meaning of section 6 (2) (ii) of the Act and the application should be granted.
(ii) That there is no requirement in section 6 (2) (ii) or elsewhere in the Act that the residence should have commenced at a given period of time or that it should have a minimum duration.
(iii) That the date in relation to which the question of ordinary residence under this section has to be decided is the date of the application.

Cases referred to : *Levene vs. Commissioners of Inland Revenue* (1928) A. C. 217 at 225.
Inland Revenue Commissioners vs. Lysaght (1928)) A. C. 234 at 243.
Gout and another vs. Cimitian (1922) 1 App. Cases 105.

N. K. Choksy, K.C., with *C. Shanmuganayagam* and *M. A. M. Hussain*, for the appellant.

D. Janze, Crown Counsel, for Commissioner for the Registration of Indian and Pakistani Residents, respondent.

BASNAYAKE, J.

This is an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. The appellant-applicant (hereinafter referred to as the applicant), Mohideen Abdul Cader Badurdeen, is 34 years of age and was born in India. He has since 1928 resided in Ceylon. In February, 1938, he married in India. But his wife did not come to Ceylon. She remained in India with her parents in accordance with their wishes. The applicant has two children born in India in 1938 and 1945 respectively. It was not till March, 1948, that his wife and children came to reside here. During their stay in India they visited the applicant occasionally.

The applicant has the residential qualification contemplated in section 3. The only question that arises on this appeal is whether the conditions of section 6 (2) (ii) are satisfied in the case of the applicant. That provision reads :—

> "Where the applicant is a male married person (not being a married person referred to in paragraph (*a*) of section 5 (2)), that his wife has been ordinarily resident in Ceylon, and in addition, that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent."

The Commissioner holds that the requirements of the above provision are not satisfied unless—

(*a*) the wife of an applicant has been resident in this country from the date of her marriage or from 1st January, 1939, whichever is later, and

(*b*) each minor child dependent on him has been resident from 1st January, 1939, or the date of birth whichever is later.

The result of the Commissioner's interpretation is that a person married before 1st January, 1939, cannot secure registration unless—

(i) his wife has been resident in this country from at least 1st January, 1939, and

(ii) each of his dependent minor children (if any) born after 1st January, 1939, has been born here and has remained here since birth till the date of the application, and

(iii) each of his dependent minor children (if any) born before 1st January, 1939, has resided here from that date at least.

I am afraid that this view of the enactment is supported neither by the Act nor by the canons of construction of statutes. For a correct interpretation of section 6 (2) (ii) the meaning of the words "ordinarily resident" as used therein should first be ascertained. Those words are

not uncommon in English legislation, especially in the Income Tax Acts. Some assistance can be gained from the judicial dicta of the English Courts. But before referring to them I shall examine the ordinary meaning of those words. For, the golden rule of interpretation is that the words of a statute must *prima facie* be given their ordinary meaning. "Reside" according to the dictionary means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place", "to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile". The word "ordinary" means "belonging to what is usual", "having or taking its place according to customary occurrence or procedure; usual; normal".

It will be sufficient for the purposes of this case to confine my attention to the remarks of Viscount Cave in Levene's case (*Levene vs. Commissioners of Inland Revenue*, (1928) A. C. 217 at 225) and of Lord Sumner in Lysaght's case. (*Inland Revenue Commissioners vs. Lysaght*, (1928) A. C. 234 at 243.) In the former case, Viscount Cave said:—

> "The expression 'ordinary residence' is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word 'residence' as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here."

In the latter case, Lord Sumner observed:—

> "My Lords, the word 'ordinarily' may be taken first. The Act on the one hand does not say 'usually' or 'most of the time' or 'exclusively' or 'principally', nor does it say on the other hand 'occasionally" or 'exceptionally' or 'now and then'; though in various sections it applies to the word 'resident', with a full sense of choice, adverbs like 'temporarily' and 'actually I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'. Having regard to the times and duration, the objects and the obligations of Mr. Lysaght's visits to England, there was in my opinion evidence to support, and no rule of law to prevent, a finding that he was ordinarily resident, if he was resident in the United Kingdom at all."

I now turn to the facts of the instant case bearing in mind the words of the section, the definitions, and the judicial dicta quoted above.

Since March 1948, the applicant's wife has had a settled abode in Ceylon with her children. During that time she had no residence in any other country. There is no requirement in the section or elsewhere in the Act that the residence should have commenced at a given period of time or that it should have a minimum duration. It is clear from the Act that the date in relation to which this question of ordinary residence has to be decided is the date of the application, for no other date is indicated expressly or by necessary implication. At the date of his application, viz., 19th November, 1949, the applicant's wife had lived here with her children for one year and eight months with the intention of remaining in Ceylon permanently. That coupled with the fact that she had no other residence elsewhere clearly proves that she had been ordinarily resident in Ceylon at the relevant date.

Now, coming to the applicant's children, the evidence is that they too have been here since March, 1948. The child of school-going age has been attending school here since September, 1948. The children are minors dependent on the applicant. I think in their case too it can be definitely said that they have been ordinarily resident here while dependent on the applicant. The section does not say that the period of residence here should be co-extensive with the period of dependence. The words are "while being so dependent", not "during the period of dependence". The words "while being so dependent" connote a state and not a time. The eminent qualification is "ordinarily resident". Considerations of time are involved in those words. Wife and minor children alike must satisfy the condition of "ordinary residence" at the date of the application. The children have to satisfy a further qualification, viz., that during their period of ordinary residence they were dependent on the applicant.

Gout's case (*Gout and another vs. Cimitian* (1922) 1 *App. Cases* 105) which the Commissioner regarded as inapplicable has in my opinion a bearing on the point and is of assistance as it holds that the question of "ordinary residence" is one of fact and the motive with which residence is taken up is immaterial.

The appeal is allowed.

Appeal allowed.

Present : GRATIAEN, J. & DE SILVA, J.

E. M. SAMEL APPUHAMY *vs.* E. M. PETER APPUHAMY

Application to declare the appeal to the Privy Council in D. C. Avisawella, No. 3046—S. C. No. 359 to stand dismissed for non-prosecution (160)

Argued on : 6th June, 1951
Decided on : 11th June, 1951

Privy Council—Appeal to—Conditional Leave granted—Defendant's failure to act under rule 10 of the Appellate Procedure (Privy Council) Order 1921—Application by defendant for extension of time under rule 18—No justifiable reason for defendant's inordinate delay—Meaning of "for good cause" in rule 18.

The defendant after obtaining conditional leave to appeal to the Privy Council did not serve on the plaintiff a list of documents necessary for the hearing of the appeal within ten days after the leave to appeal as was required by Rule 10 of the Appellate Procedure (Privy Council) Order 1921, but did so only after a month and twelve days. Even after the plaintiff's Proctor had furnished him with the relevant documents, the defendant did not take any step to lodge with the Registrar a list of the documents relied on by the parties. He thereafter applied under Rule 18 of the Order for an extension of time to comply with the requirements of Rule 10 stating that his failure was due to his Proctor's inability to have access to the record of the case.

Held : (1) That there was no substance in the excuse and the defendant's application should be refused, and the appeal should stand dismissed for non-prosecution.

(2) That when the time allowed by the Rules contained in the Appellate Procedure (Privy Council) Order 1921 for doing any act necessary for prosecuting an appeal to the Privy Council has already expired, this Court should not in my opinion grant an extension of time for the doing of that act unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers.

H. V. Perera, K.C., with *A. L. Jayasuriya*, in support.
N. E. Weerasooria, K.C., with *W. D. Goonesekera*, for the 5th defendant.

GRATIAEN, J.

On the 13th October, 1950, a Bench of two Judges of this Court refused an application of the 5th defendant to interfere, either by way of revision or *restitutio in integrum*, with an order against him in favour of the plaintiff in D. C. Avissawella, No. 3046. On 13th November, 1950, he obtained conditional leave to appeal to the Privy Council against the judgment of this Court. The usual conditions having been complied with, final leave to appeal to the Privy Council was granted to the 5th defendant on 18th January, 1951.

It now became necessary for the 5th defendant, in terms of Rule 23 in the Schedule to the Appeals (Privy Council) Ordinance, to take active steps to prosecute his appeal in accordance with the Rules which regulate the practice and procedure in appeals to His Majesty in Council. These latter Rules, which have been in force since July 29, 1921, are specially designed to ensure that, having obtained leave to appeal, an applicant should proceed expeditiously to have the record printed and transmitted to the Privy Council so that his appeal may be disposed of in that tribunal without delay. Vide *The Appellate Procedure (Privy Council) Order*, 1921, published in *Volume 1 of the Subsidiary Legislation of Ceylon at page* 464. Failure to show "due diligence in taking all necessary steps for the purpose of procuring the dispatch of the record to England" exposes a dilatory appellant to the risk of a declaration of this Court that his appeal shall stand dismissed for non-prosecution. *Rule 25 in the Schedule to the Appeals (Privy Council) Ordinance.*

It is not in dispute that the 5th defendant, having obtained final leave to appeal on 18th January, 1951, failed to comply with the requirements of *Rule* 10 of the Appellate Procedure (Privy Council) Order, 1921. Under this rule, he should within 10 days of 18th January, have served on the plaintiff (who was the respondent to his appeal) a list of all the documents which he required to be included in the printed record for the hearing of his appeal ; had this been done, the plaintiff should within 5 days after receipt of such list, have returned it to the petitioner together with a list of such additional documents, if any, as he desired to be added to the record ; it was then the 5th defendant's duty within further 3 days to lodge the complete list of documents, relied on by both parties, with the

Registrar of this Court. The 5th defendant and his proctor should, therefore, have fully realised that the maximum period allowed for compliance with the requirements of Rule 10, was 18 days. In point of fact, no list of the documents relied on by the 5th defendant was furnished to the plaintiff's proctor until 9th March, 1951—*i.e.*, one month and 12 days after the limit of 10 days fixed by the Rule had been passed. The plaintiff's proctor replied within 5 days of receipt of this letter, protesting that this notice was out of time but furnishing, without prejudice to his client's rights, a list of further documents relied on by the plaintiff. The 5th defendant's proctor, on hearing from the plaintiff's proctor, has taken no further steps to furnish the Registrar with a complete list of the documents relied on by both parties to the intended appeal.

The 5th defendant has now applied under *Rule* 18 of the Appellate Procedure (Privy Council) Order, 1921, for an extension of time within which to comply with the requirements of Rule 10. This application, which is now before us, is dated 26th May, 1951, which is more than 3½ months after the final date fixed by law for compliance with the Rule. No doubt Rule 18 permits an extension of time to be granted after the date of compliance with the requirements of the Rule, but this privilege can only be granted to a party "*for good cause*". It is therefore necessary to examine the explanation offered by the 5th defendant's proctor, in an affidavit dated 26th May, 1951, for his client's delay in complying with the requirements of Rule 10.

I regret to say that I can find nothing in this affidavit which can be accepted as a satisfactory explanation of the 5th defendant's default. The 5th defendant was, or should have been aware, *as early as 13th November, 1950*, on which date condition l leave to appeal to the Privy Council was obtained, that he would be required within 10 days of the granting of final leave to furnish the plaintiff with a list of the documents necessary for the printing of the record. It follows therefore that he was forewarned for a period of over 3 months of the necessity to proceed with a due sense of urgency if he desired to avail himself of the right to take his appeal before a higher tribunal. The only explanation which he now offers is that his proctor was "unable to have access to the record of the case" because that record had on 21st October, 1950, been returned by the Registrar to the District Court of Avissawella. There is no substance whatsoever in this excuse and the affidavit is significantly silent as to what endeavours were in fact made to obtain access to the record. Had his proctor applied to the District Judge for permission to examine the record in the lower Court, I do not doubt that permission would have been readily and quite properly granted. But no such application was in fact made; nor was the Registrar even requested to arrange for the record to be sent up from Avissawella to the Registry to suit the proctor's convenience. Indeed, it is open to argument whether an examination of the record was *essential* to due compliance with the provisions of the Rule. The intended appeal to the Privy Council related solely to the correctness of the decision of this Court on 13th October, 1950, in proceedings *initiated not in the District Court but in this Court*. All the papers and documents relevant to the application were admittedly available to the 5th defendant in the Registry. Finally, the 5th defendant having realised—as I assume he did—that the time for compliance with Rule 10 had now expired, took no steps to apply for an extension of time until long after the plaintiff had filed his application, dated 21st March, to have the appeal dismissed for want of prosecution.

When the time allowed by the Rules contained in the Appellate Procedure (Privy Council) Order 1921 for doing any act necessary for prosecuting an appeal to the Privy Council has already expired, this Court should not in my opinion grant an extension of time for the doing of that act *unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers*. It is in this sense that I interpret the words "for good cause" in Rule 18.

For the reasons which I have given I would refuse the 5th defendant's application for an extension of time, and I would allow the plaintiff's application for a declaration that the 5th defendant's appeal shall stand dismissed for non-prosecution. The 5th defendant will pay to the plaintiff the costs of both applications. The privilege of preferring appeals to His Majesty in Council carries with it an obligation to exercise a sense of vigilence in complying with the very simple Rules which regulate the procedure for perfecting such appeals.

DE SILVA, J.

I agree.

Application for extension of time dismissed. Appeal dismissed for non-prosecution.

Present : BASNAYAKE, J.

DISSANAYAKE (INSPECTOR OF POLICE, PT. PEDRO) *vs.* KRISHNAPILLAI

S. C. 1054—*M. C. Pt. Pedro* 13072

Argued and decided on : 30th January, 1951

False information—Accused charged under section 180, *Penal Code—Ingredients of offence.*

Held : (1) That a charge under section 180 of the Penal Code must (*a*) state precisely the information the accused gave knowing or believing it to be false, (*b*) specify the person to whom injury or annoyance the accused intended or knew that he would by his information cause the public servant to use his lawful power.

(2) That where the person to whom the information is given has himself no power to act on that information without the orders of a superior officer, the offence does not fall within the ambit of section 180.

Cases referred to : *Ranghamy vs Rajepakse Mudalihamy* 6 Tambyah 47.
Ukku Banda Korala vs. M. Cassim, Koch's Reports 28.
Perera vs. Silva, 4 A. C. R. 33.
I. L. R. 14, Calcutta 314 ; I. L. R. 13, Allahabad 351 ; I. L. R. 44, Allahabad 647.

H. A. Wijemanne, Crown Counsel, with *A. Mahendrarajah, Crown Counsel*, for the Attorney-General appellant.

H. Wanigatunge, for the accused respondent.

BASNAYAKE, J.

This is an appeal by the prosecuting police officer from the acquittal of Kanavati Krishnapillai, the respondent to this appeal (hereinafter referred to as the accused), on the following charge :—

"That you did, within the jurisdiction of this Court at Point Pedro on 7-6-50 give P. C. 2934 Fernando of Point Pedro, a public servant, certain information which he knew to be false, to wit, that his cycle No. AD. 51572 was stolen by some person unknown at the Court premises on 7-6-50 knowing it to be likely that he would thereby cause the said public servant to use his lawful power as a public servant to the injury or annoyance of the said unknown person and thereby committed an offence punishable under section 180 of the Ceylon Penal Code."

The facts shortly are as follows. On 7th June the accused made the following statement (P1) at the Point Pedro Police Station. "Today at about 12 noon I came to M. C. Point Pedro on my pedal cycle in order to meet Mr. Sabapathipillai, a proctor. I left the cycle opposite the Magistrate's Court and went inside. After an hour later when I came I found the cycle missing. I searched for it till now but there is no trace of it or no information as to who removed it. There were other cycles also close to the place. I questioned from several people who were there at that time, but they do not know as to who has removed it. The description of the cycle is as follows :—

Raleigh Standard, 22", repainted with black very recently. No. AD. 51572. There is a small hole in the rear mudguard and some dent marks on the front mudguard, luggage carrier with stand, fixed with a dynamo light, make not known, Brooks seat, fitted with a messenger bell, new handle grips, a mud flap fitted on to the front mudguard, valued Rs. 75.

The cycle was bought by me from one Karuval Ramu of Karanavai South. I produce the receipt. The dynamo light is new in working order. I do not suspect any particular person at present. This is all.

This statement was recorded by Police Constable 2934 Fernando. Having recorded it he conveyed the information to his superior officer, Sub-Inspector Perera, who investigated the complaint, but was unable to trace the bicycle. On 12th June, on information received from the accused, the Inspector went with him to the house of one Simon in whose house there was a bicycle which was identified as the stolen bicycle. Simon's explanation was that he purchased the bicycle from one Paramanathan and that he had nothing to do with the accused in respect of the bicycle. Simon was arrested, the bicycle was taken into custody, and a report in the following terms was sent to the Magistrate's Court :—

"I hereby report that one Kanapathy Krishnapillai of Velvetty made a complaint on 7-6-50, that he kept his Raleigh bicycle No. AD. 51572 in front of the main entrance to the Magistrate's Court, and that when he

came back from the Court house in about an hour's time, he found his bicycle missing. I made inquiries into the case, and on 12-6-50 traced his cycle with one Simon, son of Pallali. I hereby produce suspect Simon before Court, and move that he be remanded till 20-6-50 as inquiries have not been completed."

On that report Simon was remanded. Thereafter on 14th June, Sub-Inspector Dissanayake made a further report in which he stated :—

"The Police are not proceeding with the case. I move that respondent be released. I beg that the complainant Kanapathy Krishmapillai be noticed to appear in Court."

There is nothing on the record to show that the accused was given the option of proceeding with the charge.

Thereafter the present prosecution appears to have been instituted. Simon and Paramanathan who negotiated the purchase of the accused's bicycle both gave evidence for the prosecution. The learned Magistrate while holding that the information given by the accused to P. C. Fernando was false to his knowledge has acquitted him on the ground that the facts do not establish an offence under section 180 of the Penal Code. He refers to a dictum of Petheram C.J. in an Indian case to which no reference is cited.

To decide the question arising on this appeal it is not necessary to seek the aid of the Indian Penal Code. The matter can be decided by reference to the section of our Code alone. Section 180 reads :—

> "Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

An analysis of the section reveals that to come within its ambit :—

> (*a*) a person must give information to a public servant,
>
> (*b*) the informant must know or believe the information to be false,
>
> (*c*) he must intend thereby to cause or know it to be likely that he thereby will cause the public servant to whom the information is given, either
>
> (i) to use his lawful power to the injury or annoyance of any person, or
>
> (ii) to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him.

To succeed in a prosecution under the section the prosecution must allege and prove the ingredients (*a*), (*b*), and (*c*) indicated above.

In the instant case the prosecution has in the first place failed to discharge the onus of stating in the charge the information which it alleges the accused gave knowing or believing it to be false. The mere statement that the accused gave P. C. Fernando "certain information" does not satisfy the requirements of the section *Ranghamy vs. Rajepakse Mudalihamy*, 6 *Tambyah* 47. The charge is also defective in that it does not specify the person to whose injury or annoyance the accused intended or knew that he would cause P. C. Fernando to use his lawful power. An allegation as in the instant case that the accused knew it to be likely that P. C. Fernando would use his lawful power as a public servant "to the injury or annoyance" of "the said unknown person" is not sufficient. It has been so held by this Court in the case of *Ukku Banda Korala vs. M. Cassim*, *Koch's Reports* 28 and I am in respectful agreement with that decision. The charge must specify the person to whose injury or annoyance the accused intended or knew he would by his information cause the public servant to use his lawful power. Neither the recorded statement nor the evidence indicates that the accused intended or knew that his information to P. C. Fernando would cause him to use his lawful power to the annoyance of Simon. It has been held in *Perera vs. Silva*, 4 A. C. R. 33 that where the person to whom the information is given has himself no power to act on that information without the orders of a superior officer the offence does not fall within the ambit of section 180. In the instant case it appears from the evidence of P. C. Fernando that when information is received by him he has to pass it on to his superior officer without whose orders he is not empowered to go for inquiry. It does not appear that in the instant case the information has been recorded under section 121 of the Criminal Procedure Code for P. C. Fernando is neither the officer in charge of the Point Pedro Police Station nor an inquirer.

Learned Crown Counsel cited certain Indian decisions I. L. R. 14 Calcutta 314. I. L. R. 13 Allahabad 351. I. L. R. 44 Allahabad 647 in support of his appeal. But it is needless to consider them in view of the numerous infirmities of the prosecution.

The prosecution cannot succeed in any event.

The appeal is dismissed.

Appeal dismissed.

Present : GRATIAEN, J. & DE SILVA, J.

MARIAM BEEVI *et al. vs.* M. M. M. H. RUQQIAH UMMA

S. C. No. 40—*D. C. Puttalam, No.* 806

Argued on : 5th June, 1951
Decided on : 12th June, 1951

Last Will—Death of executor before grant of probate—Grandchildren entitled to largest interest under the Will—Ninth appellant appointed guardian-ad-litem of grandchildren—Application by widow for grant of letters of administration with the Will annexed—Widow's interest in estate comparatively small—Claim for letters by ninth appellant as nominee of grandchildren—Competing claims—Nominee of the largest interest entitled—No preferential right to widow—Civil Procedure Code sections 519, 523.

A. H. M. M. Faluloon Marikar died leaving by a last will properties to the widow of approximately Rs. 15,000, to the daughter to the value of Rs. 5,900, and to the son subject to *fidei commissa* in favour of the son's children the bulk of the estate valued at Rs. 200,000. On the son's death his widow and minor children were made parties and the ninth appellant was appointed the guardian *ad litem* of the minors in the testamentary proceedings commenced on the application by the executor of the last will.

The executor died before grant of probate and both the widow of the testator and the ninth appellant as nominee of the son's widow and children asked for a grant of letters of administration with the will annexed.

Held : (1) That other considerations being equal, a Court should, in granting letters of administration with the will annexed, exercise its discretion with due regard to the claims and wishes of those legatees or devisees who have the greatest interest in the estate to be administered.

(2) That in the absence of good grounds for rejecting the appointment of the ninth appellant as a fit and proper person to protect the minors' interest in the administration proceedings, his claim as the person nominated by those who have the largest interests in the estate should prevail over that of the testator's widow, whose interests are by comparison of small extent,

(3) That when the persons with the largest interests in the estate are minors, there is precedent for making a grant of letters with the will annexed to someone for their benefit.

(4) That in an application for letters of administration with the will annexed, the principles of English Law would be applicable under the Charter of 1833 except to the extent, if any, to which they are found to be inconsistent with the provisions of the local statutes.

Cases referred to : *Sethukavalar vs. Alvapillai* (1944) 36 N. L. R. 281.
Williams on Executors (12th Edition), Volume 1, page 322.
Atkinson vs. Barnard, 2 Phill, 316 at 318 (161 E. R. 1156)
In *re Gardiner*, L. R. 9 Q. D. 66.

H. V. Perera, K.C., with *S. Nadesan*, for the 4th to 12th respondents-appellants.
N. K. Choksy, K.C., with *Cyril E. S. Perera* and *M. H. M. Naina Marikar*, for the 1st respondent-respondent.

GRATIAEN, J.

This appeal relates to a competition between claims for the grant of letters of administration, with the will annexed, in respect of the estate of A. H. M. M. Faluloon Marikar who died on 3rd January, 1947, leaving property of considerable value. Mr. L. E. David, Proctor, was the executor named in the will. He applied for probate, and order *nisi* in his favour was entered on 5th November, 1947.

Under the deceased's will certain properties of the aggregate value of approximately Rs. 15,000 were devised to the widow Ruqqiah Umma, subject (with one exception) to a *fidei commissum* in favour of one or other of their two surviving children (*i.e.* their son Abdul Hameed Marikar and their married daughter Samsunnehar). To the daughter Samsunnehar certain other properties, of the aggregate value of only Rs. 5,900, were devised subject to a *fidei commissum* in favour of "her child or children according to Muslim Law, the males taking two shares and the females one share". Apart from a few minor charitable bequests, the bulk of the estate, valued at about Rs. 200,000, was devised by the testator to his son Abdul Hameed Marikar, subject to *fidei commissa* in favour of either his male or his female descendants upon the condition stipulated in the will. Provision was also made that the remaining property, which had not been specially devised, should be sold for the payment of debts and that the residue should devolve upon Abdul Hameed Marikar and Samsunnehar, the former taking two shares and the latter one share.

The son Abdul Hameed Marikar died intestate on 10th November, 1949, pending the testamen-

tary proceedings leaving as his heirs his widow and 7 minor children. On Mr. David's application these heirs were added as parties to the action, and the 9th appellant was appointed guardian *ad-litem* of the minors. The 9th appellant is the father of Abdul Hameed Marikar's widow and, incidentally, the brother of the testator's widow. It is common ground that upon Abdul Hameed Marikar's death, the bulk of the testator's estate passed, mainly under the terms of the will but to a limited extent under the Muslim Law, to Abdul Hameed Marikar's children and widow who, as interested parties, had now been joined in the action.

On 27th July, 1950, the executor Mr. David died, and it therefore became necessary for the Court to appoint someone else to administer the estate in terms of the will which had been propounded. The testator's widow Ruqqiah Umma claimed that the grant of letters of administration with the will annexed should be made in her favour, and her claim was supported by her daughter Samsunnehar. This application was, however, strenuously opposed on behalf of the heirs of Abdul Hameed Marikar who, being the persons admittedly possessing the largest interests in the estate to be administered, claimed that letters should be issued to their nominee the 9th appellant.

A somewhat half-hearted attempt was made by each claimant to suggest that the other was, for one reason or another, disqualified on personal grounds from being entrusted with the responsibilities of administering a large estate. These allegations were discounted by the learned trial Judge, and at the closing stages of this appeal learned Counsel agreed that the dispute should be decided solely with reference to the question whether in the circumstances of the present case, Ruqqiah Umma (though vested with a comparatively small interest in the estate) should in law be regarded as having a preferential claim, *as widow* of the testator, over that of a person selected or nominated by those who now stood in the place of the devisee to whom the largest interests in the estate had passed under the testator's will.

The case for the widow was presented in the lower Court on the basis that, in terms of section 523 of the Civil Procedure Code, her claim "should be preferred to all others" in the sense in which these words have been interpreted by a Divisional Bench of this Court in *Sethukavalar vs. Alvapillai* (1944) 36 N. L. R. 281. In my opinion the learned Judge was right in rejecting this contention. The provisions of section 523 which confer upon the spouse of a deceased person a preferential right to a grant of letters of administration are expressly stated to apply only *in cases of intestacy*. The present dispute, on the other hand, relates to a grant of letters where, owing to the failure of an executor, the Court is required to appoint someone other than the executor to administer the estate *according to the tenor of the testator's will*. In such cases, the principles of the English Law would be applicable under the Charter of 1833 except to the extent, if any, to which they are found to be inconsistent with the provisions of our local statutes. Section 519 (1) of the Civil Procedure Code directs a Court, in exercising its discretion, to pay regard to considerations of "consanguinity, amount of interest, the safety of the estate, and the probability that it will be safely administered". Section 519 (2) clearly has no application except that it introduces certain rules and regulations which come into force *after* but not before a grant has been made. The only other relevant statutory provision is to be found in the earlier part of section 523 which provides that "the claim of a creditor shall be postponed to the claim of a residuary legatee or devisee under the will". Indeed, these express statutory directions seem to be in complete accord with the guiding principles of the English Law on the subject, and I would hold, in accordance with what is admitted to be well-accepted practice, that, *other considerations being equal*, a Court should, in granting letters of administration with the will annexed, exercise its discretion with due regard to the claims and wishes of those legatees or devisees who have the greatest interest in the estate to be administered. Williams on Executors (12th Edition) Volume 1 page 322. In the words of Sir John Nicholl in *Atkinson vs. Barnard* 2 Phill. 316 at 318 (161 E. R. 1156) "the residuary legatee is the testator's choice, he is the next person in his election to the executor". When the persons with the largest interests in the estate are minors who in consequence lack the capacity to administer the property themselves, there is precedent for making a grant of letters with the will annexed to someone *for their benefit, in* re *Gardiner*, L. R. 9 Q. D. 66. In the present case the 9th appellant was, on the application of the original testator and by consent of parties, appointed by the Court as a fit and proper person to protect the minors' interests in the administration proceedings, and, in the absence of good grounds for rejecting his present appointment, I think that, as the person nominated by those who have by far the largest interests in the estate, his claim

should prevail over that of the testator's widow whose interests are by comparison of small extent. If one rejects the argument that the widow has, irrespective of the extent of her vested interests in the estate, a preferential right such as she could have put forward in the case of an intestacy, one cannot lose sight of the fact that a Muslim lady in *purdah* is by no means ideally qualified to administer a valuable estate of the gross value of Rs. 300,000 saddled with debts to the extent of Rs. 100,000.

I would set aside the order of the learned District Judge dated 25th January, 1951, and direct that the record be returned to the lower Court with a direction that a grant of letters with the will annexed be made in favour of the 9th appellant K. T. M. M. Mohamed Ismail Marikar, subject to such terms and conditions as to security and otherwise as the learned District Judge may in his discretion deem necessary. I would order that in the circumstances of this case, the costs of the parties both in this Court and in the contest in the Court below should be borne by the deceased's estate. I would also direct that, in order to give further protection to the minors' interests, some other person should be appointed as their guardian *ad-litem* when the 9th appellant enters upon his appointment as administrator.

DE SILVA, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Appeal No. 16 *of* 1951 (*with leave obtained*)

Present : DIAS, S.P.J. (PRESIDENT), GRATIAEN, J. & DE SILVA, J.

REX vs. A. G. MARTIN

S. C. No. 50—*M. C. Tangalle, No.* 3378

Argued on : 30th April, 1951

Reasons delivered on : 7th May, 1951

Court of Criminal Appeal—Appellant convicted of robbery and attempted murder—Concurrent sentence of ten and twelve years of rigorous imprisonment—Appellant under 17 years—Judge unaware of—Youthful offender—Sentence altered to Borstal detention—Relevant material for determining appropriate punishment must be placed before Court by prosecuting authorities—Powers of Court of Criminal Appeal to review sentence—Youthful offenders. (Training Schools) Ordinance No. 28 of 1939—Section 4—Meaning of " Criminal habits and tendencies ".

The appellant was sentenced to ten and twelve years' rigorous imprisonment for the offences of robbery and attempted murder. The trial Judge did not know and he was not informed that the appellant was only 15 years and 9 months at that time.

On appeal against sentence, the Commissioner of Prisons at the request of the Court of Appeal reported that the appellant was medically and otherwise suitable for Borstal detention and training, and that accommodation could be found at a Training School.

Held : (1) That the sentence of imprisonment should be altered to one of Borstal detention.

(2) That under section 4 of the Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 a Court, in passing sentence on a " youthful offender " convicted of an offence triable only by the Supreme Court, has power to make an order for Borstal detention instead of an order for imprisonment, if it appears to the Court that " by reason of his criminal habits and tendencies ", it is expedient that the offender should be subject to detention under such instruction, training and discipline as would be available in a Training School established under the Ordinance.

(3) That the appellant was a youthful offender and had exhibited " criminal habits and tendencies " by his conduct in the present case taken by itself, and that a prolonged period of training and discipline in a Training School for youthful offenders was better calculated to give the appellant an opportunity of rehabilitating himself as a useful member of society.

(4) That in exercising its jurisdiction to review sentences the Court of Criminal Appeal should not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. *The sentence must be manifestly excessive in view of the circumstances of the case, or be wrong in principle before the Court will interfere.*

Per GRATIAEN, J.—This case seems to illustrate how desirable it is that the prosecuting authorities should, in fairness both to the accused and to the presiding Judge, adopt the practice, long since established in England, of placing all the relevant material before the Court, after conviction, " as an aid to determining the appropriate punishment ". (*Archbold, 32nd Edition, page* 211). In *R. vs. Campbell*, 6 *C. A. R.* 131, the Court of Criminal Appeal considered that " in all trials after conviction there should be given accurate information to the sentencing Court as to the general character and other material circumstances of the prisoner—and that such information should be taken into consideration by the Judge in determining the question of punishment ". (*Vide* also *R. vs. Stratton*, 10 *C. A. R.* 35 ; *R. vs. Bright* (1916) 2 *K. B.* 441). The gravity of the offence committed is of course a very important factor but is no longer regarded as the *sole* factor which should guide a Court.

Cases referred to : *R. vs. Sherkewsky*, 28 T. L. R. 364 ; *R. vs. Gumbs*, 19 C. A. R. 74 and *Archbold*, 32nd Edition, page 328.
R. vs. Walding, (1931) 22 C. A. R. 178 at page 179.
Archbold, 32nd Edition, page 211.
R. vs. Campbell, 6 C. A. R. 131.
R. vs. Stratton, 10 C. A. R. 35 ; *R. vs. Bright* (1916) 2 K. B. 441.
R. vs. Van Pelz (1943) K. B. 157.

M. M. Kumarakulasingham, for the accused-appellant.
H. A. Wijemanne, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

This was an appeal, with leave obtained, against sentences of ten years rigorous imprisonment and twelve years rigorous imprisonment (to run concurrently) imposed on the appellant for offences of robbery and attempted murder respectively. The appellant and, the 1st accused, who was his elder brother Podi Appu, were jointly tried and convicted of these offences at the Kandy Assizes, and identical sentences were passed on both of them. Podi Appu's application for leave to appeal against his convictions and sentences was refused. The appellant was granted leave to appeal but only against the sentences passed on him.

When one examines the evidence for the prosecution, it is apparent that the appellant had in a sense played a secondary part in the concerted attack on the injured man Hendrick. It was the appellant's elder brother Podi Appu, the 1st accused, who had first set upon Hendrick and caused him grievous injury which, but for medical skill, would necessarily have caused his death. Nevertheless, the appellant's conduct, both by reference to his individual acts and the common intention which the jury must have deemed to have imputed to him, clearly justified his conviction on both charges. We think that, under normal circumstances, the learned presiding Judge, in passing sentence, would have been entirely justified in refusing, as he did, to differentiate between the cases of the appellant and Podi Appu. Our sole reason for varying the sentences passed on the appellant is that one particular circumstance of fundamental relevancy to the determination of the question of sentence had not been brought to the learned Judge's notice by either the prosecution or the defence. Had the learned Judge been aware of this circumstance, we do not doubt that he himself would have been influenced by it to the same extent as we have been. We emphasise this point because we have not sought in any way to depart from the well-established principle that " in exercising its jurisdiction to review sentences the Court of Criminal Appeal should not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. *The sentence must be manifestly excessive in view of the cirumstances of the case or be wrong in principle before the Court will interfere* ". (*R. vs. Sherkewsky*, 28 T. L. R. 364 ; *R. vs. Gumbs*, 19 C. A. R. 74 and *Archbold*, 32nd Edition, page 328).

The relevant circumstance which had not been brought to the learned Judge's notice was that whereas Podi Appu, the chief author of the crime, was 24 years of age, the appellant (whose birth certificate was produced before us by learned Crown Counsel) was only 15 years and 9 months

old at the time of the commission of the offence, and under 17 years of age at the date of his conviction The appellant did not give evidence at the trial, and the learned Judge could have had no opportunity of even making his own assessment of the lad's age before passing sentence unless his attention was directly drawn to the matter by either the prosecution or the defence. This was not done.

Section 4 of the Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 empowers a Court in passing sentence on a "youthful offender" (as defined in the Ordinance) convicted of an offence triable only by the Supreme Court, to make an order for Borstal detention instead of an order for imprisonment if it appears to the Court that "by reason of his criminal habits and tendencies" it is expedient that the offender should be "subject to detention under such instruction, training and discipline as would be available in a Training School" established under the Ordinance. When the case first came up before us for disposal, we decided to call for a report from the Commissioner of Prisons in terms of section 4 (2) (*a*) of the Ordinance. The Commissioner in due course reported to us that in his opinion the appellant was medically and otherwise suitable for Borstal detention and training "*if found by the Court to be eligible under the Ordinance for such detention*". He also confirmed that accommodation could be found for the appellant at the Training School at Watupitiwella.

In our opinion the appellant is clearly eligible for Borstal detention under the Ordinance. He is now only 17 years old, and the requisite qualification of being addicted to "criminal habits and tendencies" has been sufficiently established, we think, by his proved conduct in the present case *taken by itself*. As Hewart, L. C. J. pointed out in *R. vs. Walding*, (1931) 22 C. A. R. 178 at page 179, "the very nature of the offence committed would justify a Court in drawing the inference that the accused had criminal tendencies" qualifying him for Borstal detention. In these circumstances we decided that the order for imprisonment, involving as it does association with adult criminals, was not expedient, and we accordingly substituted in its place and order for Borstal detention under section 4 (1) of the Ordinance. The judgment which I now pronounce on behalf of the Court sets out the grounds for our decision. We believe that, had he been informed of the relevant circumstances which have influenced us, the learned Judge would have shared our view that a prolonged period of training and discipline in a Training School for youthful offenders is better calculated to give the appellant an opportunity of rehabilitating himself as a useful member of society.

This concludes the appeal, but I desire to add, on my own account, that this case seems to illustrate how desirable it is that the prosecuting authorities should, in fairness both to the accused and to the presiding Judge, adopt the practice, long since established in England, of placing all the relevant material before the Court, after conviction, "as an aid to determining the appropriate punishment". (Archbold, 32nd Edition, page 211). In *R. vs. Campbell*, 6 C. A. R. 131, the Court of Criminal Appeal considered that "in all trials after conviction there should be given accurate information to the sentencing Court as to the general character and other material circumstances of the prisoner—and that such information should be taken into consideration by the Judge in determining the question of punishment". (Vide also *R. vs. Stratton*, 10 C. A. R. 35 ; *R. vs. Bright* (1916) 2 K. B. 441). The gravity of the offence committed is of course a very important facter but is no longer regarded as the *sole* factor which should guide a Court. I take the liberty of quoting certain observations by Caldecote, L. C. J. in *R. vs. Van Pelz*, (1943) K. B. 157, as to the manner and form in which such evidence should be placed before the Court by prosecuting Counsel :—

> "When a police officer is called to give evidence about a man who has been convicted, he should in general limit himself to such matters as previous convictions, if any, and antecedents of the prisoner, including anything that has been ascertained about his home and upbringing in cases where the age of the person convicted makes this information material. *It is the duty of the police officer*, we think, to inform the Court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the Court. Police officers should inform the Court of anything in the prisoner's favour. We think that it is *the duty of Counsel for the prosecution* to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner. It must not be taken that we are attempting to lay down a rule in such wide, and at the same time such exact terms, as would cover every case, for the simple reason that this would be impossible, but it is hoped that these observations may be some guide to the right practice. The only other observation we need to make is this, and I hope it is unnecessary. Nothing I have said is intended to affect in the least degree the right of the Court to inquire into any matter in any individual case upon which the Court itself thinks it right to ask for information".

Sentence varied.

Present :. GRATIAEN, J. & GUNASEKARA, J.

JAYARATNE vs. RANAPURA

S. C. No. 22—D. C. Galle No. 3752

Argued on : 11th June, 1951
Decided on : 19th June, 1951

Deed—Interpretation—Amicable partition—Co-owners acquiring prescriptive title to divided portions in lieu of undivided shares in larger land—Notwithstanding amicable partition and exclusive possession transfer of co-owner's interests by referring to fraction in larger land—Failure to refer to fraction in divided land—Action to partition divided corpus by such transferee—Is such transferee entitled only to fractional share out of the divided corpus.

C was entitled to a 1/6 share of a land. He sold 1/36 to O and his two daughters S and B became entitled to the balance 5/36 share. Thereafter all the co-owners, by an amicable arrangement, divided it up into separate allotments and in lieu of C's 1/6 share a definite block, approximately 1/6 of its total acreage, was allotted to C's successors in title. All the divided allotments were separately and exclusively possessed for over ten years by the respective co-owners or groups of co-owners.

O's interests ultimately devolved on the plaintiff under a series of deeds which referred to the undivided 1/36 share of the larger land and not to the 1/36 share of the divided block.

The plaintiff instituted an action to partition the divided *corpus* possessed by him and the defendant, on whom the interests of S and B had devolved.

It was contended on behalf of the defendant that out of the divided *corpus* to be partitioned the plaintiff was not entitled to anything more than the 1/36 share referred to in his deeds.

Held : That the plaintiff was entitled to 1/6 share of the divided *corpus.*

Per GRATIAEN, J.—With respect, the decision in *Appuhamy vs. Elisahamy,* 43 C. L. W. 111, which takes a contrary view, does not refer to and certainly does not purport to over-rule the decision in *Fernando vs. Fernando.* I must confess that, if the question was at large, I would find some difficulty in justifying a departure from the strict rules laid down for construing written instruments. But this Court seems for many years to have preferred to adopt a more generous approach in situations where it is manifest that no prejudice could result to the interests of others. Possibly the correct solution may lie in the jurisdiction of a Court to rectify, or treat as rectified, documents in which, by a mutual mistake, the true intention of the parties is not expressed.

Followed : *Fernando vs. Fernando* (1921) 23 N. L. R. 266.
Disapproved : *Appuhamy vs. Elisahamy* (1950) 43 C. L. W. 111.
Cases referred to : *Bernard vs. Fernando* (1913) 16 N. L. R. 438 ; *Fernando vs. Podi Singho* (1925) 6 Law Recorder 73.
Don Andiris vs. Sadinahamy (1919) 6 C. W. R. 64,
Fernando vs. Fernando (1921) 23 N. L. R. 483.

N. E. Weerasooria, K.C., with *W. D. Gunasekara,* for the defendant-appellant.
S. P. Wijewickreme with *T. B. Dissanayake,* for the plaintiff-respondent.

GRATIAEN, J.

The plaintiff instituted this action for the partition of an allotment of land depicted in plan No. 549 made by Mr. K. V. P. A. de Silva, Surveyor. The *corpus* is admittedly a defined portion of a larger land and contains an area approximately one-sixth its total acreage. A man named Ando Appu had over 75 years ago owned an undivided one-sixth share of the larger land, and he sold this share in 1876 to K. Cornelis who is admittedly a predecessor in title of the plaintiff as well as of the defendant.

It will be convenient if I first set out the chain of title upon which interests in the *corpus* now sought to be partitioned passed to the defendant. In 1892 Cornelis gifted an undivided 3/36 of the larger land to his daughter Sopinona. At a later date, by an instrument to which I shall later refer, he sold an undivided 1/36 to an outsider, so that he still retained an undivided 2/36 share in the property. This share passed to his daughters Sopinona and Baby Nona, whose total interests in the larger land now amounted to 5/36.

The evidence establishes that at some date prior to 1908 all the co-owners in the larger land, by an amicable arrangement, divided it up into 6 separate allotments of more or less equal extent, and each co-owner or group of co-owners thereafter possessed a separate allotment exclusively. The separate allotment which is the subject matter of the present action has continued, as from the date of this amicable partition, to represent the original 1/6 share which passed in 1876 to Cornelis. There can be no

doubt that, long prior to the institution of these proceedings, the other co-owners of the larger land, and those who claimed under them, had abandoned such interests as they previously owned in the present *corpus*; similarly, those who claimed under Cornelis gave up their interests in the rest of the land and became exclusively entitled, by prescriptive possession, to this *corpus* in lieu of their undivided interests in the larger extent.

By deed D2 of 1908 Sopinona and Baby Nona sold their interests to a man named Sadiris. This deed correctly purports to convey to Sadiris their undivided 5/6 share of the divided portion (*i.e.* of the present *corpus*) which had been substituted for the undivided 5/36 of the larger land. The language of the deed D2 affords intrinsic evidence of the fact that the amicable partition previously agreed upon by the original co-owners had by that date been implemented. This 5/6 share was conveyed by Sadiris to Marthenis in 1941 and, as the result of a series of deeds, the details of which are not material for the purposes of this appeal, was ultimately sold to the defendant by the deed D7 of 1947. On the basis of this title the defendant, by virtue of the conveyance in his favour and long prescriptive user enjoyed by his predecessors, became the owner of an undivided 5/6 share in the divided allotment which is the subject matter of these proceedings. This share has been conceded to the defendant by the plaintiff in the proposed partition. The defendant's claim to have acquired title in some way or other to the remaining 1/6 share of the *corpus* has been rejected by the learned District Judge, and there was ample evidence to support his finding on this issue.

I shall now consider the chain of title upon which the plaintiff claims the outstanding 1/6 share in the *corpus*. I have already referred to a transaction by which Cornelis, the father of Sopinona and Baby Nona, had sold certain interests to an outsider. This is the transaction whereby, in terms of the deed P1 of 1908, he purported to convey "an undivided 1/36 in (the larger land)" to two persons named Babanis and Charles. The amicable partition to which I have referred had already taken place, but this circumstance does not seem to have been brought to the notice of the notary who drafted the conveyance. The interests of Babanis and Charles ultimately passed, by a series of deeds in which various successive purchasers were concerned, to the plaintiff by the deed P10 of 1947. The evidence establishes very clearly that each such purchaser in turn possessed, by virtue of his title, the outstanding 1/6 share of the *corpus* and made no claim to possess any interests in the other allotments comprising the larger land. Unfortunately, however, as so often happens in loose notarial practice, the shares which Babanis and Charles and their successors-in-title purported to deal with in their respective deeds were described on each occasion *with reference to the undivided* 1/36 *of the larger land* and not, as they were intended to do, the undivided 1/6 share in the smaller *corpus*. The same error was perpetuated in the deed P10 executed in favour of the plaintiff.

Mr. Weerasooria has invited us to hold that the effect of P10 and of the earlier conveyances was to pass title only to an undivided 1/36 of the present *corpus* which is admittedly included in the larger lands described in the deeds. While conceding that these notarial instruments were intended to convey the 1/6 share in the *corpus* which the plaintiff and his predecessors in title had successively possessed by virtue of these deeds, he submitted that it is not open to a Court to give effect to this intention unless and until the manifest error is corrected by a notarially executed deed of rectification. The manner in which the deeds were acted upon and the intrinsic evidence in the later deeds, under which reference is made specifically to the assessment number of the present *corpus* clearly establish what was the real intention of the vendors.

Mr. Weerasooria relies on the earlier rulings of this Court in *Bernard vs. Fernando* (1913) 16 N. L. R. 438; *Fernando vs. Podi Singho* (1925) 6 Law Recorder 73 and *Appuhamy vs. Elisahamy* (1950) 43 C. L. W. 111. As against this view, there are other decisions of this Court which have on some occasions been differentiated but never, as far as I am aware, expressly dissented from. In *Don Andris vs. Sadinahamy* (1919) 6 C. W. R. 64, certain deeds relied on in an action for the partition of a larger land purported only to dispose of smaller defined allotments which were enjoyed by co-owners for convenience of possession (but not in such a manner as to acquire prescriptive title to the separate allotments). Sampayo J. with whom Schneider J. agreed, held that it was not justifiable to take "too narrow a view of the effect of these deeds", and that "of the *real intention* is to dispose of the interests of the parties in the entire land, this Court has found no difficulty in giving a broad construction to such deeds". Mr. Weerasooria has argued that such an equitable method of construing written instruments should not be applied to the converse case where a person intending to convey a share in a divided allotment of the entire extent has purported through

an error, to convey a proportionately smaller share in the entire extent. I find however that this is precisely what was done by Bertram C. J. and Sampayo J. in *Fernando vs. Fernando* (1921) 23 N. L. R. 483. The facts of that case require to be closely examined. The plaintiff had sued the defendant for the partition of lot B which originally formed part of a larger land, and it was admitted that the common predecessor in title of both the plaintiff and the defendant had acquired prescriptive title to lot B in its entirety by exclusively possessing it in lieu of his original undivided half share in the larger land. His other co-owner had, apparently, similarly possessed the adjacent allotment exclusively. The later deed conveying title to the plaintiff had, however, through the same kind of error as that which has occurred in the present case, purported to convey an undivided 3/8 share in the entire land and not, as was intended, an undivided 3/4 share in lot B. It was therefore contended, just as Mr. Weerasooria now contends, that in the proposed partition of lot B the plaintiff could only be allotted a 3/8 share in accordance with the strict language of his deed. *Bernard vs. Fernando* (ibid) was relied on in support of this submission. Bertram C. J., however held that *Bernard vs. Fernando* would apply when "other undivided interests come into consideration", whereas, in the case with which he was dealing, "the question was not as to what is the precise share stated in the deeds of the plaintiff, but in *what proportion, as between the plaintiff and the defendant*, the land is to be divided". He pointed out that the common predecessor of both parties had acquired prescriptive title to lot B and that as no other person had any interests to lot B, justice required that, as between the plaintiff and the defendant, this specific allotment should be divided in the same proportion as their respective deeds had *intended* to give them shares. It is important to note that Sampayo J. who wrote the judgment in *Bernard vs. Fernando*, agreed with Bertram J.'s ruling in the later case. Turning now to *Fernando vs. Podisingho* (ibid), I find that Bertram C. J. referred specifically to his judgment in *Fernando vs. Fernando* (ibid), and indicated that the equitable principles enunciated there and in *Don Andiris vs. Sandirishamy* could conveniently be applied in a partition action but was not appropriate in an action *rei vindicatio*.

It seems to me that the decision in *Fernando vs. Fernando* (1921) 23 N. L. R. 488, which has never been expressly over-ruled, is on all fours with the present case. The plaintiff and the defendant now possess between them the entirety of the interests of their common predecessor in title Cornelis, and those interests have for very many years been represented by the *corpus* which is the subject matter of this action. Moreover, the plaintiff's immediate predecessor, who together with his wife conveyed Cornelis' outstanding interests to the plaintiff, had acknowledged in evidence that they placed him in possession of 1/6 share of the *corpus* by virtue of the deed in his favour. No one else claims interests in this particular share. I do not therefore see what prejudice could be caused by giving what Sampayo J. calls "a broad construction" to the deeds under which the plaintiff claims title so as to give effect to their true intention. I would therefore hold that the plaintiff should, by virtue of the deed P10, and of his possession of the share which he has claimed, be allotted 1/6 and not merely 1/36 in the *corpus*. With respect, the decision in *Appuhamy vs. Elisahamy*, 43 C. L. W. 111, which takes a contrary view, does not refer to and certainly does not purport to over-rule the decision in *Fernando vs. Fernando*. I must confess that, if the question was at large, I would find some difficulty in justifying a departure from the strict rules laid down for construing written instruments. But this Court seems for many years to have preferred to adopt a more generous approach in situations where it is manifest that no prejudice could result to the interests of others. Possibly the correct solution may lie in the jurisdiction of a Court to rectify, or treat as rectified, documents in which, by a mutual mistake, the true intention of the parties is not expressed. *Fernando vs. Fernando* (1921) 23 N. L. R. 266. Be that as it may, I consider that I cannot legitimately refuse to follow the earlier precedents, where, in precisely similar circumstances, judges of great experience have declined, on equitable considerations, to pay too scrupulous a regard to the language of a written instrument.

I would affirm the judgment of the learned District Judge, and dismiss the defendant's appeal with costs.

Appeal dismissed.

GUNASEKARA, J.
I agree.

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

DE ALWIS vs. PERERA

S. C. 7—C. R. Colombo 27027

Argued on : 8th June, 1951
Decided on : 4th July, 1951

Landlord and tenant—Premises owned by wife—Husband entering into contract of tenancy—Tenant exclusively dealing with husband—Action for ejectment of tenant by husband—Is he entitled to maintain action?—Is jus in re *necessary to maintain such action—Rent Restriction Ordinance No. 29 of 1948—Meaning of the term "landlord". Interpretation of "Means" and "Includes" in statutes—Estoppel—Evidence Ordinance, Section* 116.

Some years prior to the institution of this action for ejectment the plaintiff and defendant entered into a contract of tenancy whereby the plaintiff let to the defendant certain premises belonging to his wife. There was no dispute that it was the plaintiff that the defendant exclusively dealt with.

The action was contested in the Court below on the issue as to whether the premises were reasonably required by the plaintiff for the purposes of his business and the Court answered it in plaintiff's favour. Nevertheless, the plaintiff's action was dismissed on the ground that the plaintiff, although entitled to receive rent, did not have a "*jus in re*" in the premises, following the decision in *Hameed vs. Annamalay* reported in (1946) 47 N. L. R. 558.

Held : (1) (By the Divisional Bench) That the plaintiff was entitled to a decree ejecting the defendant.
(2) That the plaintiff was the defendant's landlord within the meaning of the Rent Restriction Act No. 29 of 1948.
(3) (NAGALINGAM, J. *dissentiente*) That a plaintiff, who is a landlord within the meaning of the Rent Restriction Act, can maintain an action under section 13 (1) (c) of the Act for ejectment of a tenant although he does not have the *jus in re* in regard to the premises.

Per GRATIAEN, J.—"I would summarise the general conclusions at which I have arrived as follows :—
(1) that, for the purposes of the Rent Restriction Ordinance of 1942 and of the Rent Restriction Act of 1948, the term "landlord" must always be given the meaning attributed to it in the enactments ; and that in this respect *Hameed's case* was wrongly decided ;
(2) that whether the plaintiff who claims *qua* landlord to eject the tenant in occupation be the tenant's original landlord or a subsequent purchaser or lessee of the premises, his right to a decree for ejectment is in the first instance regulated by the principles of the common law affecting the relationship of landlord and tenant, and in accordance with these principles, he must in every case establish that privity of contract between himself and the tenant exists at the relevant date ;
(3) that if privity of contract does exist between the plaintiff and the tenant, the latter is precluded by the provisions of Section 116 of the Evidence Ordinance from disputing the plaintiff's title to the premises ;
(4) that, if the provisions of the Rent Restriction Ordinance of 1942 or of the Rent Restriction Act of 1948 are found to apply to the premises, the plaintiff's common law right, *qua* landlord, to claim a decree for ejectment would be restricted by the conditions imposed by Section 8 of the earlier Ordinance or by Section 13 of the later Act (whichever is applicable)."

Per NAGALINGAM, J.—"The plaintiff who had possession of the property before he let them to the defendant thereupon having successfully clothed himself in the mantle of an owner and which cannot be rent asunder by the defendant would therefore be one who has a *jus in re* in respect of property let by him. The plaintiff consequently is a landlord within the meaning of that term as used in proviso (2) to sub-section (1) of section 13 of the Act and as interpreted in *Hameed vs. Anamalay* (supra) and is thus entitled to the benefit of this proviso."

Overruled : *Hameed vs. Annamalay* (1946) 47 N. L. R. at 55.
Cases referred to : *Gough vs. Gough* (1891) 2 Q. B. at 665.
Clarke vs. Nourse Mines (1910) T. S. at 521.
The British Trams and Carriage Co. vs. The Mayor of Bristol, 59 L. J. Q. B. 441 at p. 449.
Maroof vs. Leaff (1944) 46 N. L. R. 25.
Allis vs. Sigera (1897) 3 N. L. R. 5 ; *Silva vs. Silva* (1913) 16 N. L. R. 315.
Wijesinghe vs. Charles (1915) 18 N. L. R. 168 ; *Fernando vs. Appuhamy* (1921) 23 N. L. R. 476.
Wijeratne vs. Hendrick (1895) 3 N. L. R. 158.
Rajapakse vs. Cooray, 2 Times C. L. R. 209.
Arnolis vs. Mohideen Pitche (1907) 3 Bal. 159.
Flax vs. Vanderlind (1928) C. P. D. 495 at page 498.
Ukkuwa vs. Fernando (1936) 38 N. L. R. 125.
Coustald vs. Legh (1869) L. R. 4 Exch. 126.
Thames Conservators vs. Smeed Dean & Co. (1897) 2 Q. B. 334.
Tadman vs. Henman (1893) L. R. 2 Q. B. 168.
Dolby vs. Iles, 12 (1840), 9 L. J. Q. B. 51.

H. W. Jayewardene with *D. R. P. Gunetilleke,* for the plaintiff-appellant.
E. B. Wikremanayake, K.C., with *A. M. Charavanamuttu,* for the defendant-respondent.

JAYETILEKE, C.J.

The plaintiff sued the defendant in this action to have him ejected from a house bearing assessment No. 70 Havelock Road, Colombo, on the ground that he "reasonably required" it in order to carry on a trade or business. In the course of his evidence he said that the house belonged to his wife and that he let it to the defendant on behalf of his wife but he did not say that he informed the defendant of that fact or that the defendant was aware of it. The rent receipts D2 and D3, which were issued by him in 1946 and 1947, and which were not signed by him in a representative capacity, indicate that he did not inform the defendant that he was acting as the agent of his wife. That the defendant did not recognise anyone but the plaintiff as his landlord is supported by the fact that the plaintiff's wife withdrew an earlier action which she had instituted against the defendant for ejectment. On the evidence contract of tenancy must, in my opinion, be taken to have been entered into by the plaintiff in his personal capacity as the landlord and the defendant as the tenant.

The parties went to trial on five issues of which those relevant to the decision of the appeal are :—

1. Are the premises in suit reasonably required by the plaintiff for use and occupation for the purposes of his business within the meaning of section 8 (*c*) of the Rent Restriction Act.

5. Can the plaintiff maintain this action under section 13 (1) (*c*) inasmuch as he is not the owner of the premises in suit.

After trial the learned Commissioner held in favour of the plaintiff on issue 1 and the correctness of that finding was not challenged at the argument before us. On issue 5 he followed the judgment of this Court in *Hameed vs. Annamalay* 47 N. L. R. at 55 and held that the plaintiff could not maintain the action as he did not have a *jus in re* in the premises. He accordingly dismissed the action with costs. The present appeal is against that part of the judgment. The appeal came up for hearing before my brother Gratiaen and, at his request, I directed it to be listed for argument before a Bench of three Judges.

The result of the appeal turns on the simple question as to what is meant by the word "landlord" in section 13 (1) of the Rent Restriction Act No. 29 of 1948. The sub-section reads :—

"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 purposes of the trade, business, profession, vocation or employment of the landlord ; or

(*d*) the tenant or any person residing or lodging with him or being his sub-tenant has, in the opinion of the Court, been guilty of conduct which is a nuisance to adjoining occupiers, or has been convicted of using the premises for an immoral or illegal purpose, or the condition of the premises has, in the opinion of the Court, deteriorated owing to acts committed by or to the neglect or default of the tenant or any such person.

For the purposes of paragraph (*c*) of the foregoing proviso :—

(1) "member of the family" of any person means the wife of that person, or any son or daughter of his over eighteen years of age, or any parent, brother or sister dependent on him ;

(2) any premises of which the landlord is a religious body or association shall be deemed to be required for the purposes of the business of the landlord, if they are, in the opinion of the Court, reasonably required for any of the objects or purposes for which the body or association is constituted ".

The word "landlord" is defined in section 27 the relevant portion of which reads :—

"In this act unless the context otherwise requires "landlord" in relation to any premises, means the person for the time being entitled to receive the rent of such premises, and includes any tenant who lets the premises or any part thereof to any sub-tenant ".

In *Gough vs. Gough* (1891) 2 Q. B. at 665 Lord Esher M. R. said that where the word "means" is used in a statutory definition it is not permissible to give any other meaning to the word which is defined than that which is stated in the definition.

Under the common law all things may be the subject of the contract of letting and hiring whether they belong to the lessor or are the property of a third party since lease does not affect the ownership of the thing let (Voet 19-2-34) ; and if the tenant receives the undisturbed enjoyment of the premises he is liable for his corresponding obligations, and he is not allowed, when sued by his landlord to set up the defence that the latter had no right to let the

property to him (Voet 19-2-32); *Clarke vs Nourse Mines* (1910 T. S. at 521. Section 116 of the Evidence Ordinance (Cap. 11) is based on this rule. It follows therefore that under the Common Law the plaintiff is, in relation to the defendant, the landlord of the premises as defined is section 27, and the defendant is not entitled to deny the plaintiff's title as a ground for refusing to pay the rent or to give up possession. The question then is whether there is anything in section 13 (1) or in any other section of the Act to alter the plaintiff's position as landlord or to prevent him from instituting this action. In this connection it is relevant to point out that where the Act does intend to interfere with the operation of the common law it does so in express terms. In sections 9 (1), 10, 13 and 18 we find the expression "notwithstanding anything in any other law". There is no such provision in section 13 (1). The 1st sentence of section 13 (1) requires the authorisation of the Board for the institution of an action for ejectment. The proviso preserves intact the common law rights of ejectment in the four cases mentioned in paragraphs (*a*) to (*d*). The proviso does not state who is to institute the action, nor does it in any way designate as the person who may institute the action anyone other than the person who would be entitled to institute it under the common law. Hence in any case which comes within one of the paragraphs (*a*) to (*d*), the common law remains unaffected.

Counsel for the respondent invited our attention to section 26 of the Act which provides that in certain cases the owner is deemed to be the landlord. It is no doubt correct that in a case to which that section applies the Act recognises as landlord a person different from the person who under the common law, as followed in the definition in section 27, would be the person entitled to institute the action. But it would be unsafe to infer an intention on the part of the legislature to abolish a right of action under the common law unless such an intention is either expressed in the law or arises by necessary implication. The terms of section 26 do not justify such an inference on either of the grounds I have mentioned. It is possible that section 26 was enacted to prevent an evasion of the penal provisions of the statute.

Counsel for the respondent contended that if a person who does not have a real right in a property is given the right to institute an action for ejectment under section 13 (1) it will be open to a dishonest landlord to execute a lease in favour of a nominee and to get the latter to institute the action. If that is a correct statement of the law, the matter may well be one for the legislature in order to remedy the inconvenience. But we cannot be affected by it. All we can do is to construe the Act. For the reasons given above I am of opinion that the plaintiff is entitled to maintain the action although he does not have a real right in the property. I would, accordingly, set aside the judgment appealed from and send the case back for trial on issues 2, 3, and 4. The plaintiff is entitled to costs here and of the trial in the Court below.

GRATIAEN, J.

This is an action for ejectment in respect of premises to which the provisions of the Rent Restriction Act, No. 29 of 1948, are admittedly applicable. For the purposes of the present appeal, Counsel were agreed that the following facts may be assumed to be correct:—

The premises belong to the plaintiff's wife to whom they had been donated by her parents on the occasion of her marriage with the plaintiff. The premises were let to the defendant on the basis of a monthly tenancy some years prior to the institution of this action. The contract of tenancy with the defendant was, however, entered into *not by the wife who was in law the owner of the premises*, but by her husband. In other words, the principal parties to the contract were the plaintiff, as *landlord*, and the defendant, as *tenant*. It therefore follows that, as far as the tenant was concerned, the principal with whom he exclusively dealt with was the plaintiff. Indeed, an earlier action for ejectment had been instituted against the defendant in the name of the plaintiff's wife, but this action was withdrawn at an early stage because she was not privy to the contract of tenancy and was therefore assumed not to have an enforceable cause of action on the contract. It is conceded that the plaintiff was at all relevant times "the person .....entitled to receive the rent" of the premises within the definition of the term "landlord" in section 27 of the Act.

The action was contested in the Court below on the issue as to whether the premises were "*reasonably required*" *by the plaintiff* for the purpose of his business, and this issue was answered in favour of the plaintiff. Nevertheless, the plaintiff's action was dismissed by the learned Commissioner on the ground that, on the authority of the decision of this Court in *Hameed vs. Aramalay* (1946) 47 N. L. R. 558, the

plaintiff was not a "landlord" within the true meaning of the Ordinance, because "although entitled to receive the rent, he did not have a *jus in re* in the premises".

The appeal came up for hearing before me in the first instance, and learned Counsel informed me on that occasion that certain difficulties have in recent years arisen in tenancy actions owing to the interpretation placed by Courts and litigants on the ruling in *Hameed's case*. As it is very desirable that the rights of parties in tenancy actions should not be left in doubt, I considered that an authoritative ruling of a fuller Bench of this Court should be obtained on the point. On the directions of My Lord the Chief Justice, this appeal was accordingly argued before a Divisional Bench of 3 Judges on 8th June, 1951.

The earlier Rent Restriction Ordinance of 1942 declares that, "unless the context otherwise requires" the term "landlord" in relation to any premises "means" (this word is important) "the person for the time being entitled to receive the rent of such premises". The later Act of 1948, which governs the present case, adopts the same definition but proceeds to "include" within the term "landlord" *a tenant who lets the premises to any sub-tenant*. The additional words seem to have been introduced by the legislature out of an abundance of caution, and have no bearing on the problem now under consideration.

Lord Esher points out in *Gough vs. Gough* (1891) 2 Q. B. 665 that the use of the word "means" as opposed to "includes" in statutory definitions indicates a clear intention by Parliament to adopt "a hard and fast definition, and the result is that you cannot give any other meaning to the word "landlord" in the Act than that which is stated in the definition". Vide also *The British Trams and Carriage Co. vs. The Mayor of Bristol*, 59 L. J. Q. B. 441 at p. 449. The question arises, therefore, whether the "context" of the Act necessarily requires that in applying the provisions of section 13, a meaning different from that which is specified in the "hard and fast definition" of the term "landlord" should be invoked so as to give efficacy to the scheme of the enactment.

It is important to bear in mind in considering this question that section 8 of the Rent Restriction Ordinance of 1942 and section 13 of the Act of 1948 which superseded it were not designed to vest in Courts of law some new jurisdiction affecting the rights and obligations of landlords and tenants in actions for ejectment. *Maroof vs. Leaff* (1944) 46 N. L. R. 25. On the contrary, as Keuneman J. points out, they "*merely impose a curb or fetter on the existing jurisdiction*" to grant relief to a landlord who seeks, in the enforcement of his contractual rights under the common law, a decree for the ejectment of his tenant from the premises in the latter's occupation. The sections must therefore be regarded as pre-supposing that a cause of action would have accrued *under the common law* entitling the landlord to claim a decree for ejectment. If, therefore, no such cause of action exists either by reason of a termination of the tenancy by notice or effluxion of time, or for any other ground which normally justify proceedings by a landlord for ejectment, the Court would possess no jurisdiction to grant the landlord relief. In that event, no occasion arises for applying any fetters on a jurisdiction which already does not exist. If, therefore, the question be approached in relation to the rights of landlords under the common law, it seems to me, with great respect, that certain difficulties visualised in the judgment in *Hameed vs. Annamalay* (1946) 47 N. L. R. 558 would be found to disappear.

I would state, with great respect, that it is neither legitimate nor necessary to decide that "for the purpose of section 8 proviso (c) of the Ordinance of 1942 (or, of section 13 of the Act of 1948) a landlord must be *defined* as not only one who is entitled to receive his rent but as one who has a *jus in re* in regard to the premises". If a landlord, in the sense in which that term is commonly understood, can establish that he has a right under the common law to claim ejectment, the definition adopted in the enactments seem to be perfectly adequate. If, on the other hand, no such right is established in any particular case, an enlargement of the definition, even if permissible, would not carry the proceedings, which must fail *ab initio*, any further.

It would be convenient at this stage to examine the status which every landlord must necessarily enjoy before the common law can recognise his right to claim ejectment in proceedings against a tenant in occupation. The essential prerequisite to his cause of action, *qua* landlord, is that *privity of contract* exists between himself and the tenant in occupation, and if that relationship exists the tenant is precluded by the principles of the common law and the provisions of section 116 of the Evidence Ordinance from denying that his landlord had title to the premises at the commencement of the tenancy—*i.e.* at the time when privity of contract between them was established.

Where, as has happened in the present case, the plaintiff is the person who placed the tenant

in occupation of the premises under the original contract of tenancy, he would be entitled to a decree to have the tenant ejected provided that (1) events have occurred which under the common law would give rise to an action for ejectment (2) he also satisfies the Court that, *if the Rent Restriction Act applied to the premises*, the jurisdiction of the Court to order ejectment is not fettered by the provisions of the statute. It is apparent, I think, that in every case of this nature the plaintiff is necessarily the person "entitled to receive the rent" of the premises within the meaning of the Act.

I shall next consider the position of a person to whom the original landlord has sold the premises which are, at the date of the sale, in the occupation of a monthly tenant. In such a case the purchaser can elect, with notice to the tenant, and "provided that the tenant is willing to pay him rent", *Voet*, 19-2-19, "to step into the landlord's shoes and receive all his rights and become subject to all his obligations, so that he is bound to the tenant and the tenant is bound to him, in the relationship of landlord and tenant". *Allis vs. Sigera* (1897) 3 N. L. R. 5; *Silva vs. Silva* (1913) 16 N. L. R. 315. If there is a mutual acknowledgment by the purchaser, and by the person in occupation, of each other's rights and obligations as landlord and tenant, there is a complete and effectual attornment, and *privity of contract* is established between the parties as from that date. If, on the other hand, the purchaser does not elect to take the property with his vendor's tenant remaining in occupation, the original contract of tenancy as between the vendor and the tenant subsist. In that event, only the original landlord would be the person competent to terminate the contract. *Wijesinghe vs. Charles* (1915) 18 N. L. R. 168; *Fernando vs. Appuhamy* (1921) 23 N. L. R. 476. In the earlier of these decisions, Sampayo J. with whom Wood Renton C.J. agreed points out, on the authority of a passage from *Bayne's Landlord and Tenant* that the tenant himself has "the privilege either to remain the tenant of the new landlord or to cancel the lease". If the tenant exercises the former privilege, and the purchaser has also agreed to recognise him as the tenant, privity of contract is established between the purchaser and the tenant in occupation, and the rights and obligations of the parties in an action for ejectment would be governed by the common law subject to the fetters imposed on the jurisdiction of the Court by the provisions, if applicable to the premises, of the Rent Restriction Act of 1948. The purchaser in such a case is the "person for the time being entitled to receive the rent" and therefore comes strictly within the definition of section 27 of the Act. Finally, there is the position arising where the purchaser elects to recognise the tenant but the tenant does not specificially attorn to him. Sampayo J. took the view, "but not without some hesitation" 16 N. L. R. at page 317 that in such a case the purchaser would enjoy the right not only to claim rent but also to sue for damages and ejectment. In 18 N. L. R. 168, the earlier ruling was re-affirmed. It would therefore be seen that a tenant who remains in occupation with notice of the purchaser's election to recognise him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish *privity of contract* between them.

The rights under the common law of a person who obtains from the original landlord a notarial lease for a term of years, of premises in the occupation of the lesser's monthly tenant have also been considered in earlier decisions of this Court. In *Wijeratne vs. Hendrick* (1895) 3 N. L. R. 158, the plaintiff, who obtained a lease of certain premises for a term of years, sued his lessor's monthly tenant for *rent* only but not for ejectment. Withers J. held that the action must be dismissed on the ground that the plaintiff could not maintain his action for rent purely on the strength of his lease, and he had not proved either an attornment by the tenant or an *assignment with notice to the tenant*, by the lesser (*i.e.* the original landlord) of his rights under the contract of tenancy. In *Rajapakse vs. Cooray*, 2 Times C. L. R. 269 a person who had obtained a notarial lease of premises sued his lessor's monthly tenant for *ejectment*. Ennis J. held that the action could not be maintained because the tenant had "never attorned to the plaintiff" and there was therefore "*no privity of contract between the parties*". In *Arnolis vs. Mohideen Pitche* (1907) 3 Bal. 159 (see also the South African case of *Flax vs. Vanderlind* (1928) C. P. D. 495 at page 498 Middleton J. for similar reasons, made order dismissing an action for *rent and ejectment* instituted by a subsequent lessor against the original monthly tenant. These rulings were followed by a Bench of two Judges in *Ukkuwa vs. Fernando* (1936) 38 N. L. R. 125. It was there held by Soertsz J. and Abrahams C.J. that, in the absence of privity of contract between the person in a position equivalent to that of a monthly tenant and a person who had a subsequent notarial lease from the original landlord, the tenant could not be ejected *except upon a notice to quit issuing from the original landlord*. The Court held, however, that once the lawful holding by the monthly tenant (who had not attorned to the subsequent lessee) had in such a case been determined by due notice from the

original landlord, his occupation became unlawful, and he was therefore liable to be ejected *as a trespasser* in proceedings instituted by the *lessee*. Such an action is not based on rights flowing to the plaintiff under the contract of tenancy but on his proprietory right as *protanto* alienee to eject anyone in unlawful possession of the leased premises. We are not called upon in the present context to decide whether and to what extent the jurisdiction of a Court to grant relief to a subsequent lessee in an action of this nature would now be regulated by the provisions of the Rent Restriction Act of 1948. It is sufficiently clear, I think, that the status of a landlord is not enjoyed by a subsequent lessee unless privity of contract has been established between him and the tenant in occupation. Payment of rent by the tenant to the lessee after notice of the execution of the lease would afford *prima facie* evidence of attornment so as to justify the inference that all the parties (*i.e.* the original landlord, the new lessee and the monthly tenant) have mutually agreed that the rights and obligations of the original landlord under the contract of tenancy should pass to the new lessee. Privity of contract is then established between the lessee and the tenant, and the former is empowered in that event, *qua* landlord, to eject the tenant on any ground recognised by the common law. This right is, of course, curtailed at the present time by the provisions of section 13 of the Rent Restriction Act of 1948 whenever they apply to the premises.

In *Hameed vs. Annamalay* (1946) 47 N. L. R. 558, a person who had taken a notarial sublease of certain premises for a term of years sought to eject from the premises a person who was a monthly tenant under the lesser. The plaintiff had for some months received rental from the monthly tenant and had then given him notice to quit. It seems to me that his right to this remedy would depend upon whether, since the date of his sub-lease, the monthly tenant had effectually attorned to him and acknowledged him as his new landlord. Vide *Wille's Principles of the South African Law*, pages 277-279. If in the circumstances of that particular case, it was legitimate to hold that the lessee was merely the cessionary of a bare right to receive rents (as opposed to an assignee of all the rights and obligations of the original landlord), it would in my opinion follow that this limited right was by itself insufficient upon which to base an action for *ejectment*. If, on the other hand, the correct position was that there had been a complete attornment by the tenant to the lessee (as the payment of rent would very strongly indicate), I would say, with great respect, that *Hameed's case* was wrongly decided. The plaintiff was in either event the tenant's "landlord" within the plain meaning of the Ordinance, and *subject to its provisions*, his cause of action depended solely on whether he had a common law right to enforce the contract of tenancy.

I would summarise the general conclusions at which I have arrived as follows :—

(1) that, for the purposes of the Rent Restriction Ordinance of 1942 and of the Rent Restriction Act of 1948, the term "landlord" must always be given the meaning attributed to it in the enactments ; and that in this respect *Hameed's case* was wrongly decided.

(2) that whether the plaintiff who claims *qua* landlord to eject the tenant in occupation be the tenant's original landlord or a subsequent purchaser or lessee of the premises, his right to a decree for ejectment is in the first instance regulated by the principles of the common law affecting the relationship of landlord and tenant, and in accordance with these principles, he must in every case establish that privity of contract between himself and the tenant exists at the relevant date ;

(3) that if privity of contract does exist between the plaintiff and the tenant, the latter is precluded by the provisions of section 116 of the Evidence Ordinance from disputing the plaintiff's title to the premises ;

(4) that, if the provisions of the Rent Restriction Ordinance of 1942 or of the Rent Restriction Act of 1948 are found to apply to the premises, the plaintiff's common law right, *qua* landlord, to claim a decree for ejectment would be restricted by the conditions imposed by section 8 of the earlier Ordinance or by section 13 of the later Act (whichever is applicable).

Turning now to the facts of the present case, I would say that the plaintiff is clearly entitled to a decree ejecting the defendant. He was the original landlord under the contract of tenancy, and his right under the common law to claim ejectment has been clearly established. The fact that he was not the owner of the premises is irrelevant because his rights are *founded on contract and not on ownership*. The premises were admittedly subject to the provisions of the Rent Restriction Act, 1948, but he was "the person entitled to receive rent" and was therefore the defendant's "landlord" within the meaning of the Act. As he proved to the satisfaction of the learned Commissioner that the premises were "reasonably required for the purposes of his business", it follows that section 13 does not therefore fetter the jurisdiction of the Court to grant him the relief to which he is entitled under

the common law and in terms of his contract of tenancy.

Since preparing this judgment I have had the advantage of reading the judgments of My Lord the Chief Justice and of my brother Nagalingam J. My purpose in referring this appeal to a Divisional Bench was to obtain an authoritative decision for the guidance of Judges of first instance, and I desire respectfully to state that I am in agreement with My Lord the Chief Justice on every point on which his views differ from those expressed by my brother Nagalingam.

I reaffirm as a fundamental proposition that under the Roman Dutch Law, as under the English Law, "*the question of the landlord's* title is foreign to an action for rent and ejectment against the tenant". The relationship of landlord and tenant is created by contract, and the action for ejectment is essentially an action for the enforcement of the tenant's *contractual* obligation to return the property at the expiration of the tenancy. If that be so, I suggest with very great respect that no necessity arises in this context for attempting to fathom the mysteries of what the jurists describe as a *jus in re*, which term is distinguished from a *jus in rem* or a *jus ad rem*. (Vide *Lee's South African Law* (3rd edition page 127; *Bell's South African Legal Dictionary* pages 303-304). My brother Nagalingam has referred to *Vanderlinden* (*Henry's Translation*) page 113 where four different kinds of *jus in re* are emunerated. It must be borne in mind, however, that Vanderlinden (page 114) proceeds immediately afterwards to discuss an entirely different category of rights which are personal rights varying according to the extent of the cause or origin of the *obligation* from which they arise. It is in this group of rights that he places *rights which arise from contracts*, including contracts of *letting and hiring* (pages 236-241) with which we are now concerned. Under the common law, therefore, a person suing for the enforcement of the tenant's contractual obligation to quit the premises must affirmatively prove *either* that he is the original landlord under the contract of tenancy *or* that he has subsequently become a party to the contract by assignment. In either of these events it is neither necessary nor relevant to investigate whether the plaintiff also possesses a *jus in re*, whatever precisely that Latin idiom may be intended to connote.

In my opinion the extended definition given to the term "landlord" in *Hameed's case* was not legitimate.

I would allow the plaintiff's appeal, and I agree to the order proposed by My Lord the Chief Justice.

NAGALINGAM, J.

The right of a landlord who is not the owner of the premises let to avail himself of the provisions contained in proviso (*c*) to sub-section 1 of section 13 of the Rent Restriction Act No. 29 of 1948 arises on this appeal, and in view of the judgment in the case of *Hameed vs. Annamalay* 47 N. L. R. 558 the case has been reserved for adjudication by a Divisional Bench by My Lord the Chief Justice on a reference made by my brother Gratiaen J. before whom the appeal came up for hearing in the first instance.

The facts as found by the learned Commissioner are not in dispute and so far as they are material may be shortly stated as follows: The plaintiff-appellant let the premises in question to the defendant-respondent and placed the latter in possession thereof. The defendant continued to pay rent to the plaintiff for a number of years. Though the plaintiff let the premises he had no title to them and in reality it was his wife who was the owner thereof. The capacity in which the plaintiff let the premises is said to be as agent of his wife but so far as the defendant is concerned the wife was an undisclosed principal; the plaintiff when he entered into the contract of letting with the defendant did not expressly contract as agent of his wife. On the basis that the premises were reasonably required for his occupation for the purpose of carrying on a trade the plaintiff gave notice to the defendant terminating the tenancy and instituted this action. The learned Commissioner found in favour of the plaintiff on all these questions of fact but dismissed his action on the ground that the plaintiff was not a landlord within the meaning of that term as interpreted by this Court in the case of *Hameed vs. Anamalay* (supra).

In that case I had occasion to point out that the term "landlord" in proviso (*c*) to section 8 of the Rent Restriction Ordinance No. 60 of 1942 "must be defined as not only one who is entitled to receive the rent but also as one who has a *jus in re* in regard to the premises." Addressing his mind to this added qualification that the landlord must also be one who has a *jus in re* the learned Commissioner held that the plaintiff had no *jus in re* and found himself unable to grant the plaintiff the relief he claimed.

In this state of the record, two questions were argued at the hearing before us, firstly whether decision in the case of *Hameed vs. Annamalay* (supra) is right, and secondly whether the plaintiff is one who has a *jus in re*.

The case of *Hameed vs. Annamalay* was decided under the earlier Rent Restriction Ordinance No. 60 of 1942, and if the case had to be decided again under the new Act No. 29 of 1948, the result would be identical, for the objects of both enactments are the same and the relevant provisions of the two enactments are materially not different. Nothing was said at the argument to show that the case should have been decided otherwise. Learned Counsel for the appellant contented himself with the observation that the judgment in that case should be limited to its own facts and if so limited no exception could be taken to it. Counsel for the respondent, however, said he fully supported the judgment. I have given my reasons at some length for the view I expressed in that case. Not one of the reasons has been assailed. I therefore do not propose to recapitulate them.

There is, however, an aspect of the matter not adverted to in that judgment but to which attention may profitably be drawn. The proposition formulated in that case was that where, after an owner lets the property to a tenant on the terms of a monthly tenancy and puts him in possession, he subsequently executes a notarial lease in respect of the same premises for a term of years in favour of a lessee to whom possession is, however, not delivered, but to whom the monthly tenant pays the rent accruing subsequent to the lease, the lessee in those circumstances is not one who is entitled to terminate the tenancy and claim possession of the property on the ground that the premises are reasonably required by him for his own purposes. Proviso (*c*) of sub-section (1) of section 13 of the new enactment corresponding to section 8 (*c*) of the old Ordinance enables only two categories of persons to claim possession of the premises on the ground set out therein: (1) the landlord himself (2) a member of the family of the landlord. The contrary of the proposition set out in *Hameed vs. Annamalay*, if upheld, would lead to create a third class of persons not contemplated by the enactment who would be entitled to recover possession of the premises on the ground that the premises were reasonably required for their own purposes.

If the Legislature intended this third class of person should be benefited by virtue of this proviso, it could very well have expressly said so, but little reflection would show that had the Legislature such an intention and in order to give effect to such an intention added some such words as "a lessee or a subsequent lessee from the landlord" immediately after the words "any member of the family of the landlord", the Legislature would then have defeated the very purpose which it had in view enacting these provisions, for then a landlord need only relet the premises to a third party who may be in need of the premises for his own occupation. There would therefore be no curb on the activities of a landlord in regard to his letting the premises and reletting them any number of times he chooses to, for the only test to be applied in turning out a tenant who is already in occupation would be whether there was anyone in the wide world who could show that he reasonably required the premises for his own occupation either as a residence or as a place of business. The solicitude plainly evinced by the Legislature in the Act itself to protect the tenant from eviction at the mere will and pleasure of the landlord would be rendered ineffectual and would continue to have habitation only in the realm of unrealised pious wishes.

I am therefore of opinion that in section 13 (1) proviso (*c*) of the Act too the term "landlord" must be interpreted as meaning one who in addition to receiving the rent has a *jus in re* in respect of the demised premises.

A supposed difficulty that would flow from this interpretation was pointed to by postulating the question whether a lessee who had been recovering rents from the monthly tenant as in the case of *Hameed* that is, a lessee who had no *jus in re*, *Hameed vs. Annamalay*, (supra) could sue for recovery of rent and for ejectment where the tenant admittedly had fallen into arrears with his rent and laid himself open to an action by virtue of proviso (*a*) to sub-section (1) of section 13. To my mind there is not the slightest difficulty in answering that question emphatically in the affirmative; for there is nothing in the context of proviso (*a*) which would require that the meaning given to the term "landlord" by section 27 of the Act should be qualified in any manner in order to prevent a resulting absurdity or to avoid the enactment being reduced to a nullity. In fact in the case of *Hameed vs. Annamalay* I have indicated by a pointed reference to two of the sections, namely sections 3 and 7 that the term "landlord" need only be given the meaning which the Legislature has given to it in section 27 and nothing beyond that, so that where a tenant in occupation falls into arrears with his rent and becomes liable in terms of proviso (*a*) to be ejected, a lessee without possession to whom the tenant had paid rent would be entitled to maintain an action in ejectment against him.

An objection may be raised to this view on the ground that the term " landlord " is being given different meanings in different parts of the same statute and indeed in the different parts of the same section. It is true that " it is a sound rule of construction to give the same meaning to the same words occuring in different parts of an Act of Parliament or other document." See *Coustald vs. Legh* 1869 L. R. 4 Exch. 126. But this is not an inflexible rule, for " many instances occur of a departure from the cardinal rule that the same word should always be employed to mean the same thing "—per Chitty L. J. in *Thames Conservators vs. Smeed Dean & Co.* (1897) 2 Q. B. 334. We have several other enactments of our own where this cardinal rule is not followed.

I am satisfied, having regard to the entire frame-work of the Act and the objects of the Legislature as deducible from the provisions enacted that in proviso (*c*) the term " landlord " should receive a more restricted meaning than that it bears in other parts of the Act.

I next proceed to consider the second question debated, whether the plaintiff is a person who has a *jus in re*. The answer to this question depends upon a proper appreciation of the term as used in Roman Dutch Law. Vanderlinden Bk 1 Ch. 6 sec. 1 p. 112 Henry's translation (1828) defines it thus :—

> " The right *in* a thing (*jus in re*) is that right whereby the thing itself is bound to me so that I may pursue this right in the thing against any possessor whatsoever ".

and in section 2 he sets out the different kinds of right in a thing (*jus in re*) and follows with the observation that " some writers have also added to this enumeration though not with strict accuracy the right of possession." Having made this observation, he embarks Bk 1 Ch. 12 upon a discussion of the right of possession as a species of real rights or *jus in re*. Next he proceeds to explain the meaning of the word " possession " which he says " is the actual retention of a thing with the purpose of keeping it for oneself ". Wille says Landlord and Tenant of South Africa, 3rd ed. pp. 126-7.

> " A real right is usually defined as a right available against the world. This is a vague statement but elaborated it means that it is a right in property ; it may be ownership in the property or something less than ownership.....If less than ownership, the right, to be a real right must persist in the property and must be enforceable by its holder notwithstanding any change in the ownership of the property, that is, whether the owner of the property transfers his ownership voluntarily, for example, in consequence of a sale or donation or whether he is deprived of the ownership involuntarily, for example, by death or insolvency or by a sale or execution ".

It would be manifest from a consideration of the passages cited that a person in possession of immovable property who claims to hold it for himself as against everybody else would be a person who would have a *jus in re* ; so that even a person with no title whatsoever in himself, in other words a trespasser, who is in actual possession of property defying the claims even of the true owner would be a person who would have a *jus in re* in respect of that property.

Applying this principle, it would be seen that the plaintiff in this case, if he were holding the property for himself, though without any shadow of title, would be a person who would have a *jus in re* ; but it is said that the evidence of the plaintiff himself discloses the fact that he is not holding the property for himself, in other words, that he is not even a trespasser, but that he merely holding it as agent of his wife, who is the lawful owner of it.

The question then arises whether the plaintiff in these circumstances can be said to have a *jus in re*. There can be little doubt that the answer must be in the negative, for he does not hold it for himself. But this does not necessarily conclude the question whether the plaintiff is entitled to maintain the action, for there is another salutary principle in law which must be considered before the rights of the plaintiff can finally be determined.

It is well settled law that a person who is not the owner of property may let it and such letting would be a valid one—Voet 19-2-3. And Wille Landlord and Tenant of South Africa, 3rd ed. p. 19 expatiates on this topic.

> " A person may let another immovable property without having *any right or title in it* or any authority from the true owner.....As between the parties the lease is binding and they acquire the rights and become subject to the obligations of a landlord and a tenant respectively."

and in regard to the obligations of the tenant he continues :—

> " If the tenant receives the undisturbed enjoyment of the premises he is liable for his corresponding obligations and he *is not allowed when sued by his landlord to set up the defence that the latter had no right to let the property to him. It would be against good fait' in these circumstances for the tenant to raise such a defence and in an action for rent it might under the Roman Law*

have been met by the exceptio doli mali. This rule or maxim which is generally stated in the form " a tenant may not dispute his landlord's title " has been fully developed in the English Law where it is based on estoppel. The rule is briefly referred to by Voet who says that a tenant may not plead the *exceptio domini* ".

This principle underlying the Roman, Roman Dutch and English Law has been fully adopted by us in section 116 of the Evidence Ordinance, the first part of which runs as follows :—

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

This rule has been applied in a variety of cases. Where a person had been let into possession as tenant by a plaintiff he was held by virtue of the provision to be estopped from denying the plaintiff's title without first surrendering possession (1905), 28 Madras 526. P. C. (1915), 37 Allahabad 557. In *Tadman vs. Henman* (1893) L. R. 2 Q. B. 168 it was held :—

" The estoppel will also enure for the benefit of a lessor who has no title whatever and the person let into possession will not be permitted to set up this want of title. The question of the *landlord's title is foreign to an action for rent or ejectment against the tenant* ".

And

" So strict is the rule that even if a landlord while proving his own case for an action against the tenant for use or occupation disclosed the fact that he himself had only an equitable or a joint estate in the premises, the tenant cannot avail himself of that circumstance as a defence to the action ". *Dolby vs Iles* (1840), 9 L.J. Q. B. 51.

Having, therefore, regard to the doctrine of estoppel, the plaintiff having let the defendant into possession of the premises, the defendant cannot be permitted to deny that the plaintiff had a sufficient title to let the premises to him or even raise the question of what that title was, for such a question, as already observed, is entirely foreign to the action by the landlord against the tenant whom he had placed in possession—and this though the plaintiff, as stated earlier, himself may have given evidence of the fact that he had no title. In fact the Court would not go and should not have gone into the question as to what the title was, once it was satisfied that the plaintiff had let, and placed the defendant in possession of, the premises as his tenant. There is also another rule of law which must not be lost sight of in this connection and that is that a person who is in possession of property is presumed to be the owner thereof. The plaintiff who had possession of the property before he let them to the defendant thereupon having successfully clothed himself in the mantle of an owner and which cannot be rent asunder by the defendant, would therefore be one who has a *jus in re* in respect of property let by him. The plaintiff consequently is a landlord within the meaning of that term as used in proviso (*c*) to sub-section (1) of section 13 of the Act and as interpreted in *Hameed vs. Annamalay* (supra) and is thus entitled to the benefit of this proviso. These observations serve to dispose of the claim of the plaintiff, and the judgment of the lower Court is set aside.

I should, however, wish to make a few general remarks in regard to the various classes of persons who could be said to have a *jus in re* in view of the statement of Counsel that difficulties have been experienced in determining them in the several cases that come up before the Courts. Without attempting to be exhaustive, I should for purposes of section 13 (1) proviso (*c*) enumerate the following as landlords having a *jus in re*: (1) an owner of property (2) a purchaser or donee from an owner (3) an heir or legatee of an owner (4) a trespasser (5) a tenant or lessee *in possession* ; where a tenant or a lessee who has been granted possession by the lessor lets the premises to be a sub-tenant or a sub-lessee whom he, the tenant or lessee, places in possession, the tenant or lessee would himself be one who would have a *jus in re* and as such entitled to maintain an action against the sub-tenant or sub-lessee in ejectment ; (6) a trustee (7) an agent who without disclosing the existence of his principal lets property ; acting as the principal himself (by the combined application of the doctrine of estoppel).

For the reasons given, I answer issue 5 in the affirmative. Issue 1 has already been answered in favour of the plaintiff. No findings have been recorded in respect of issues 2, 3 and 4, and for this purpose the case will go back to the lower Court and for a decree to be entered in the light of findings on these issues and in conformity with the answers recorded in respect of issues 1 and 5.

The plaintiff will be entitled to the costs of appeal and of the lower Court.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : GRATIAEN, J. (PRESIDENT), GUNASEKARA, J. & PULLE, J.

REX. vs. K. SITTAMPALAM *et al*

Applications 28 *to* 29 *of* 1951
S. C. No. 23—*M. C. Point Pedro, No.* 13520

Argued on : 3rd May, 1951
Decided on : 8th May, 1951

Court of Criminal Appeal—Accused charged with murder and abetment of—Willing to tender plea of guilt to lesser count—Jury asked by Judge whether or not they would accept the plea—No objection by prosecuting counsel—Jury's return of a verdict instead of answer to the specific question—Correct procedure where accused tenders a plea of guilt to the lesser offence.

The accused who were charged with murder and abetment of murder respectively were willing to tender a plea of guilt to the lesser offence of culpable homicide not amounting to murder and of its abetment. The jury were then invited by the Judge to consider whether or not they would accept this plea after the prosecuting counsel had expressed the view that he had no objection to this procedure. The jury instead of answering the specific question returned a verdict finding them respectively guilty of culpable homicide not amounting to murder and of abetment of that offence.

Held : (1) That the jury should have answered the specific question put to them and that their verdict was both premature and improper.

(2) That the correct procedure to follow when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empannelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment is as follows :—

(i) if the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed normally on the whole indictment ;

(ii) if, on the other hand, the Crown intimates its willingness to accept the plea, the presiding Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magisrate it would be in the interests of Justice for the Court to accept the plea ;

(iii) if the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment ;

(iv) if, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empannelled to try the case, to state whether they would accept the plea; and the Judge may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him ;

(v) if the jury state that they are willing to return a verdict on that basis, the unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury ; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly.

Cases referred to : *R. vs. Hancock* (1931) 23 C. A. R. 16 ; *R. vs. Soanes* (1948) 1 A. E. R. 289 ; and *R. vs. Heyes* 34 C. A. R. 161.
R. vs. Jowsey, 11 C. A. R. 241 ; *R. vs. Thomas,* 28 C. A. R. 21.

M. M. Kumarakulasingham, for the accused-appellants.
T. S. Fernando, Crown Counsel, with *H. A. Wijemanne, Crown Counsel,* for the Attorney-General.

GRATIAEN, J.

The first petitioner was indicted at the Jaffna Assizes for the murder of Thamotherampillai Selvakulasingham, and the second petitioner was indicted in the same proceedings for the abetment of the commission of this offence. Both petitioners pleaded " not guilty ", and a jury was duly empannelled to try the case.

After three witnesses for the prosecution had given evidence, but before the case for the Crown had been closed, Counsel for the defence requested permission to make a submission to the learned presiding Judge in the absence of the jury. The jury then retired, and Counsel for the defence informed the Judge that the 1st petitioner was willing, on his advice, to tender a plea of guilt on the lesser count of culpable homicide not

amounting to murder, and that the 2nd petitioner was similarly prepared to tender a plea on the lesser count of abetment of culpable homicide not amounting to murder. What took place thereafter is recorded as follows :—

" *Court :* What do you say, Mr. Crown Counsel ?
Crown Counsel : It is a matter for the jury.
Court : Do you have any objection to my putting it to the jury ?
Crown Counsel : No ".

We infer from the shorthand note of the proceedings that Crown Counsel intended by his first reply to indicate that he was not disposed to accept a plea of guilty to a lesser offences in the case of either petitioner. His second reply, however, indicates equally clearly that, although he had earlier stated what his attitude was in the matter, he had no objection to the jury being invited by the learned Judge to indicate whether they were willing to accept the pleas tendered by the defence. The jury were then recalled, and were addressed at some length by the learned Judge. He pointed out to them what seemed to him to be the effect of the evidence which had so far been led by the prosecution, and also of the medical evidence which would be led if the trial on the charges of murder and abetment respectively were to continue. " Evidently ", he said, " their intention (*i.e.* the intention of the petitioners) was not to kill the man but to punish him. That seems to be the intention ". He then informed the jury that the petitioners had, through their Counsel, expressed their willingness to plead guilty to the lesser offences, and concluded his address to the jury in the following terms :—" It is for you to say whether you are prepared to accept the plea of culpable homicide not amounting to murder in which case they are prepared to plead that way. It is a matter for you. If you like we can go on with the case ".

The foreman replied that they wished to retire in order to consider this proposal. What took place when they returned to the Court is recorded as follows :—

" *Court :* Are you prepared to accept that plea ?
Foreman : Yes. We unanimously find the 1st accused guilty of culpable homicide not amounting to murder, and the 2nd accused guilty of aiding and abetting the commission of culpable homicide not amounting to murder. We are also of opinion that the accused be given the maximum punishment.
Court : That is a matter for me to decide ".

It is apparent from what took place that instead of answering the specific question which was put to them—namely, whether they were prepared to accept the pleas which the petitioners proposed to tender, the jury prematurely and, we think improperly, returned a verdict finding them respectively guilty of culpable homicide not amounting to murder and of the abetment of that offence. After the verdict had been pronounced, each petitioner pleaded guilty in accordance with the verdict which had already been pronounced against him. Previous convictions were then proved against the petitioners, and the learned Judge sentenced the 1st petitioner to a term of 12 years rigorous imprisonment and the 2nd petitioner to a term of 10 years rigorous imprisonment.

The petitioners applied to this Court for leave to appeal against their convictions and also against the sentences passed on them. At the conclusion of the argument, we made order dismissing the applications for leave to appeal against the convictions and the application of the 2nd petitioner to appeal against his sentence. We reduce the sentence passed on the 1st petitioner to one of 10 years rigorous imprisonment. I now proceed to pronounce the reasons for our decisions.

It seems to us that the procedure which was adopted after Crown Counsel had refrained from expressing willingmess to accept the pleas on the lesser offences was unsatisfactory. Our reason for taking this view will I think become sufficiently clear if we indicate what we regard as the correct procedure to follow when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empannelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment :—

(1) If the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed normally on the whole indictment ; we think that, in practice, there would be little likelihood of the necessity arising for the presiding Judge to consider whether it would be proper for him to override the discretion of prosecuting Counsel in this matter.

(2) if, on the other hand, the Crown intimates its willingness to accept the plea, the presiding

Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magistrate it would be in the interests of Justice for the Court to accept the plea;

(3) if the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment;

(4) if, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empannelled to try the case, to state whether they would accept the plea; and the Judge may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him;

(5) if the jury state that they are willing to return a verdict on that basis, the unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly.

The principle which I have summarised above are in accordance with the judgments of the Court of Criminal Appeal in England in *R. vs. Hancock*, (1931) 23 C. A. R. 16; *R. vs. Soanes* (1948) 1 A. E. R. 289; and *R. vs. Heyes*, 34 C. A. R. 161.

In the present case Crown Counsel did not express his willingness to accept the plea tendered by Counsel for the petitioners, and the trial should therefore have proceeded on the whole indictment. At a later stage, however, the position became complicated by the agreement of Crown Counsel to the learned Judge's proposal that the matter should nevertheless be put to the jury. If he thought that the pleas ought not to have been accepted, he should not have surrendered his undoubted right, as prosecuting Counsel, to claim that the case should proceed on the whole indictment. Having examined the evidence and the depositions, we think that there are substantial grounds in support of his view that the case was eminently one for the jury to decide, after a complete trial, whether the charges of murder and abetment respectively had been established beyond reasonable doubt. In *R. vs. Soanes* (ibid) Goddard, L. C. J. said, "while it is impossible to lay down a hard and fast rule in any class of case as to whether a plea for a lesser offence should be accepted by Counsel for the Crown—and it must always be in the discretion of the Judge whether he will accept it or not—in the opinion of the Court, where nothing appears on the depositions which can be said to reduce the crime from the more serious offence to some lesser offence for which, under statute, a verdict may be returned, the duty of Counsel for the Crown would be to present the offence charged in the indictment, leaving it a matter for the jury if they see fit in the exercise of their undoubted prerogative, to find the lesser verdict". In that case it was held that prosecuting Counsel was not justified in accepting a plea for infanticide by a woman charged with murder, and that the presiding Judge was "*not only right, but, indeed, bound*" to insist on the prisoner being tried for murder".

Having regard to the fact that Crown Counsel seems at a later stage to have waived his right to demand that the trial should proceed on the more serious counts, and to the further fact that the irregularity on the part of the jury in returning a premature verdict was cured by the unqualified admissions of the petitioners, subsequently recorded, that they were guilty of the offence for which sentences were passed on them, we do not think that this is a case in which the applications for leave to appeal against the convictions should be allowed.

With regard to the applications for leave to appeal against the sentences, the verdict against them were recorded on the basis that the offences were not committed with the intention to cause death, and the maximum sentence which the learned Judge was empowered to impose in each case was therefore a term of 10 years rigorous imprisonment. Having regard to the brutal attack on the deceased and the previous bad records of the petitioners, we cannot say that the decision to impose the maximum sentence was not fully justified in each case. The sentence of 12 years passed on the 1st petitioner, however, exceeded the maximum term which the law authorises, and we accordingly reduced it to one of 10 years. In such a case this Court has power to substitute a legal sentence when dealing with the application for leave to appeal. *R. vs. Jowsey*, 11 C. A. R. 241; *R. vs. Thomas*, 28 C. A. R. 21. It would involve needless expenditure of public time and money to grant leave to appeal and to bring the 1st petitioner up a second time for a reduction of his sentence. Besides, Mr. Fernando, who appeared before us, very properly informed us that, if leave to appeal was granted, the Crown would concede that the sentence of 12 years imprisonment could not be supported.

END OF VOLUME XLIV.