The

Ceylon Law Weekly

containing Cases decided by the Supreme Court of Ceylon, and His Majesty the King in the Privy Council on appeal from the Supreme Court of Ceylon.

VOLUME VI.

WITH A DIGEST.

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DIGEST.

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Advocate—Application for Readmission.

The applicant, who was an Advocate of the Supreme Court was convicted in 1920 of the offence of cheating and was sentenced to undergo rigorous imprisonment for 3 years. Thereafter, his name was struck off the roll of Advocates. In 1926 the applicant applied to be re-admitted on the ground that since his release from prison "he had led an honest life and had endeavoured to conduct himself in all his undertakings, commercial and social, in a manner which he submitted fitted him for reinstatement in his profession."

This application was refused as the Court thought that it was too prematurely made. The applicant renewed his application ten years later.

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proprietor of Kanantota called Wahab Mudalali, with his henchman, is now being inquired into at the Police Court at Avissawella.

"As this is an unheard of and frightful crime which has never taken place in those parts before, a public meeting will be held on the 9th instant at 4 p.m. at the Avissawella Public Market, under the Chairmanship of Proctor Mohandas de Mel Laxapathy and all are requested to be present without fail."

Which said notice had reference to the non-summary proceedings there pending before the Police Court of Avissawella in case No. 12421 wherein one Seleka Marikkar Abdul Wahab alias Wahab Mudalali of Pelangoda Estate, Hanwella, with seven others was charged with having on or about the 19th June, 1936, committed the offence of being members of an unlawful assembly with intent to cause hurt, robbery, and rape on a woman named Mentho Nona, which said publication was calculated to prejudice the fair hearing of the said case before the Supreme Court.

(b) In that he did on or about the 9th July, 1936, preside at a public meeting held near the Public Market at Avissawella in pursuance of the said notice, where he caused the said notice to be read out to the public assembly at the said meeting, which said act was calculated to prejudice the fair hearing of the said case before the Supreme Court.

The notice was published in Sinhalese and the proceedings at the meeting was conducted in the same language.

At the hearing the respondent showed no cause, but explained his position by an affidavit in which he pointed out that he was taken by surprise and that he did not know Sinhalese quite as well as he might, and that he would not have approved the notice if he had appreciated its force, and that he had no intention of prejudicing the fair trial of the case.

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The plaintiff brought a possessory action against the other co-owners of a land. It was admitted that after the death of the donor—a Buddhist priest named Gunatissa—of a certain land in respect of which this action was brought, all his pupils, meaning, thereby the co-owners under the two deeds of donation, came to an understanding that the plaintiff should possess a field and a high land adjoining it in lieu of his shares in the other lands.

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3. That at the time and place aforesaid and in the course of the same transaction as set out in counts 1 and 2, you did commit house-breaking by night by entering the house of one Gabriel Bastianpillai in order to commit theft ; and that you have thereby committed an offence punishable under Section 443 of the Ceylon Penal Code.

4. That at the time and place aforesaid, and in the course of the same transaction as set out in counts 1 and 2, you did in a building used as a human building, the house last aforesaid, commit theft of a torch, two fountain pens, 2 sarees and other articles, property in the possession of the said Gabriel Bastianpillai ; and that you have thereby committed an offence punishable under Section 369 of the Ceylon Penal Code.

Objection was taken to the indictment in appeal on the ground that there was a misjoinder of charges.

Held: That two persons can be jointly charged and tried in respect of two distinct transactions when the offences which are included in these transactions are identical.

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" Notice is hereby given under Section 18 of the rules made under Article, 83 of the Ceylon (State Council Elections) Order in Council, 1934 and 1935 and that an Election Petition has been presented by Hewa Lunuwillage Piyadasa of Meddawatta in Matara, against the election of Raja Hewavitarane as member of the State Council for the Electoral District of Matara at the election held on March 5, 1936. A copy of the said petition together with connected papers may be obtained by the said Raja Hewavitarana, the respondent to the said petition, on application to the Office of the Registrar of the Supreme Court."

H. L. PIYADASA,

Colombo 31st March, 1936. Petitioner.

(ii) That a letter to the Registrar of the Supreme Court in the following form by the Respondent to an Election Petition does not amount to an appointment of the person named therein as agent of the Respondent.

The Registrar,
The Supreme Court,
Colombo.

Sir,

I have the honour to request you to hand over to my Agent Mr. Fred G. de Silva, Proctor S.C. a copy of the charges framed against me in the election petition filed by one Piyadasa of Matara.

I beg to remain,
Your obedient servant,
RAJA HEWAVITARNE.

(iii) That the service of a notice, required to be served on the Respondent to an Election Petition, on his agent's clerk is not sufficient service of such notice.

(iv) That the fact that the Respondent to an Election Petition has entered an appearance cannot cure any defect in the service of the prescribed notice.

(v) That an Election Petition is liable to be dismissed where notice of the proposed security is not given as required by rule 18 of the Election (State Council) Petition Rules 1931.

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Held: (i) That there were no grounds on the evidence taken as a whole upon which any tribunal could, properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty, and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not in law or justice, permissible grounds on which to base a verdict.

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In a mortgage action, of consent a decree was entered directing that order to sell the mortgaged property was not to issue either until the defendant made default in the payment of certain sums which he agreed to pay on certain dates, or till a period of two years from the date of the decree had expired. The consent motion provided that in the event of the full claim not being paid within the period of two years, commission to sell was to issue forthwith without notice to the defendant, but this condition was not included in the decree. After the expiry of that period the plaintiff applied for an order to sell, and the defendant applied for a further period within which he might pay the money. The trial judge held that it was not open to him to enlarge the time fixed in the decree. The defendant appealed from this decision.

Held: That in a mortgage action the Court has power under 343 of the Civil Procedure Code to stay execution of the decree for good reason.

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Held: That in a charge against the owner of a motor car under Section 80 (3) (b) of Ordinance No. 20 of 1927 the onus of proof, that none of the excusatory circumstances specified in paragraph (b) existed, is upon the prosecution.

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The appellant, on a notice from the Commissioner acting under Section 21 of Ordinance No. 60 of 1935 in the preparation and revision of lists of persons qualified to vote and to be elected applied to have

his name placed in both lists. The Commissioner omitted his name on the ground that the application was improperly filled in inasmuch as the number of the appellant's residing house was not correctly given. On inquiry, presumably at the instance of the Commissioner, his rates' clerk had ascertained the correct number which was 66/10 and annual rate Rs. 40/– whereas the application form gave 10/66 and annual rate as Rs. 80/–.

Held: (i) That a mistake such as the one made by the applicant in his application form does not entitle the Commissioner to reject it under Section 21 (1) (h) on the ground that it is improperly filled in.

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(ii) That *kaikuli* means a payment of money and not anything else.

(iii) That where land is given in lieu of *kaikuli* it cannot be followed into the hands of a third party to whom the husband may have alienated it.

(iv) That a husband holding *kaikuli* is trustee for his wife or her heirs.

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(ii) That the Police Reward Fund is not an "informant" within the meaning of Section 27 of Ordinance No. 5 of 1910 and that an order directing the payment of a part of a fine to the Fund cannot be made under the section.

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A person purchased the interest of the first defendant to a partition action at a judicial sale and came into the proceedings after the interlocutory decree. By final decree he was declared entitled to and allotted the interests which, under the interlocutory decree, fell to the first defendant. The final decree went on to decree that the costs of partition be borne *pro rata*. When the 2nd and 3rd defendants took out writ against the added defendant, he disclaimed liability to pay costs incurred prior to the date on which he came into the action.

Held: That the purchaser of the 1st defendant's interest was liable to pay the *pro rata* costs incurred prior to the date on which he came into the action.

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The 2nd appellant, an Ayurvedic Physician, who is the owner of various kinds of drugs published a book for the purpose of advertising his drugs. The book was printed at the press of the 1st appellant. The author claimed that his drugs possessed remedial qualities for a very extensive number of complaints. The reader of the book was exhorted to pass it on to a friend. There were passages in the book which went beyond recommending remedies to the diseased. They suggested artificial stimuli for the increase of sexual energy and the enhancement of sexual satisfaction. The book not only prescribed a remedy for the diseased but also an aphrodisiac for the sound.

Held: That such a book has a tendency to deprave and corrupt those whose minds are open to such influence,

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An application was made for revision of an order of a District Judge postponing an action, pending the decision of an appeal which he considered as having an important bearing on the case. A preliminary objection was taken that as the order made was appealable the application should be rejected.

Held: That application could not be entertained as the order sought to be revised was an appealable one.

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Where a notice of an application for conditional leave to appeal to the Privy Council was served, without the intervention of Court, on an attorney who was specially authorised by the party to be noticed to accept legal processes and notices.

Held: (i) That the notice had not been properly served.

(ii) That the appellant should have applied to Court for leave to serve notice on the attorney.

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Privy Council—Leave to Appeal to the Privy Council in a Criminal case—Principles guiding the granting of such leave.

"It has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal; that the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal, Lord Sumner in a well-known Passage in the case of *Ibrahim* v. *The King* (1914) A. C. 599, pointed out that " misdirection as such, even irregularity as such, will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future."

" The latter danger, it is hoped, is sufficiently guarded against by the observations which their Lordships have thought it right to make. It has been suggested by Mr. de Silva, that the judgment in the recent case of *Lawrence* v. *The King* (1933) A. C. 699 in some way modified or altered that statement of the law. *Lawrence* v. *The King* is a case in which the actual decision was plainly within the authority of previous cases, because their Lordships held, that

sentences had been pronounced which were outside the power of the tribunal which purported to pronounce them. It may be that the precise language of the judgment may have to be considered on a more suitable occasion. It is sufficient to say that the judgment then pronounced did not purport to depart in any way from the well settled principles which have been laid down in previous authorities and cannot be allowed to be construed so as to depart from those principles."

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Promissory Note.

Promissory Note—Undertaking to marry—Illegal consideration.

The plaintiff-appellant sued the defendants on a promissory note made out in Tamil of which the following is a translation.

Rs. 1000/-

This 10th day of Sept: 1933.

I, the undersigned, R. M. Vasthiampillai have granted a promissory note and borrowed and received from Pethurupillai Thegopillai of Karampan, who was and is an officer in the G. P. O. Colombo and now at Karampan on leave, Rs. 1000/-. I do hereby promise to pay on demand to him or his order the said sum of Rupees one thousand. together with interest thereon at the rate of 12 per cent. per annum. I have received the amount in full.

Sdg. R. M. VASITHIAMPILLAI,

Witnesses.

1. (Sgd.) B. Saverimuttu.
2. (Sgd.) Sana Vastiampillai.

This note was endorsed by the 2nd defendant respondent to the plaintiff in satisfaction of a debt of Rs. 1000/- due to the latter from the former. When he sued on it, objection was taken that as a matter of law the action was not maintainable, in view of the circumstances in which the note was made. Shortly they are as follows :— A proposal of marriage was made between the 1st defendant and one Saveriachchy, daughter of the 2nd defendant. On the day before the day fixed for the exchange of rings it was agreed between the parties that the 1st defendant should make a promissory note in favour of the 2nd defendant and that the latter and his wife Anapillai should make a promissory note in favour of the 1st defendant. The condition being that both promissory notes should be left in the hands of a common friend, one Vastiampillai, who, if any party backed out of the agreement of marriage, was to hand over to the other the note made by the defaulting party. An agreement regarding dowry was also drawn up and signed on the day the rings were formally exchanged. The 1st defendant backed out of the arrangement after the exchange of rings on the ground the girl was not what she was represented to be to him and thereupon the promissory note made by him was handed by Thambipillai to the 2nd defendant, who, as stated above, endorsed it to the plaintiff.

Held: That the note was for illegal consideration, and was not, therefore, enforceable.

S. C. No. 129 *D. C. Jaffna* 6030. *Rasalingam* v. *Bastianpillai* and another. 35

Money lending transaction—Promissory note given in satisfaction of money borrowed and money due on goods purchased—Is note fictitious—Compound interest—When may it be charged.

The defendant gave the plaintiff a promissory note for Rs. 20,000/-. The sum included the capital sum previously lent plus interest there on and money due on rice purchased by the defendant. To cover the previous loans the defendants had given two cheques, which were returned on the execution of the promissory note for Rs. 20,000/-.

At the trial the defendant took the following objections.

(a) That the note was enforceable as the capital sum actually borrowed did not appear on the face of the note as required by the provisions of Section 10 of the Money Lending Ordinance No. 2 of 1918.

(b) That the note was void as the capital sum of Rs. 20,000/- appearing on the note included compound interest.

(c) That the note came within the ambit of Section 13 of the Money Lending Ordinance as it was a fictitious note within the meaning of the expression in Section 14,. At the trial it was admitted that the sum of Rs. 20,000/- included interest on the money lent previously. The trial Judge did not uphold the defendants objections but held that the plaintiff was not entitled to recover the full amount claimed on the note as compound interest was not in law recoverable. The defendant appealed.

Held: (i) That compound interest may be lawfully charged in Ceylon where there is definite contract to pay such interest.

(ii) That a transaction, in which the promissor, in lieu of cheques already issued by him to the promisee, gives a promissory note for moneys already borrowed plus interest accumulated thereon, and for moneys due on account of goods sold and expenses incurred in connection with the transactions between the promissor and the promisee, does not cease to be a money lending transaction merely because the promisee does not at the time of execution of the note physically lend the money to the promissor.

(iii) That a promissory note given in consideration of

(a) money lent to the promissor previously together with interest thereon.

(b) goods sold to the promissor

(c) travelling expenses incurred in connection with the transactions between the promissor and the promisee is not a "fictitious note" within the meaning of the expression in Section 14 of the Money Lending Ordinance.

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Held: (i) That a person employed in the service of the Colombo Municipal Council on a daily rate of pay paid once a month, and who was entitled to a gratuity and certain privileges as regards sick leave, was a "public servant" within the meaning of the expression in Section 2 of Ordinance No. 2 of 1899.

Stamp Ordinance.

Stamp Ordinance No. 22 of 1909—Section 50—Recovery of duty or penalty imposed under the Ordinance.

Held: That it is wrong to impose a term of imprisonment in default of payment of any duty or penalty to be recovered under Section 50 of the Stamp Ordinance No. 22 of 1909.

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Held: That a gratuity in money paid to a person on his retirement from Government Service is not Thediathetam within the meaning of Section 21 of Ordinance 1 of 1911.

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Trusts Ordinance.

Breach of Agreement to transfer property—Trusts Ordinance—Section 93.—When may specific performance of a contract be enforced?

M. agreed to transfer property to P and a part payment was made in advance. The agreement provided :

(a) that M would on or before 30th June, 1931 discharge the present existing mortgage and convey the premises to P free from all encumbrances.

(b) that if M fails to get the transfer executed M should pay Rs. 250 as damages.

(c) that if the said amount is not paid by M. P can recover it according to law.

On 4th September, 1933 M transferred the property to A. P sued M and A. The District Court held that inasmuch as registration was sufficient notice to A within the meaning of Section 93 of the the Trusts Ordinance, the transfer to A was subject to the agreement in favour of P and decreed A to transfer the property to P.

Held: That on failure to perform the agreement, no specific performance can be enforced in view of the provision for payment of damages.

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Held: (i) That the injuries sustained by the workman were caused by "accident arising out of and in the course of his employment."

(ii) That the "batta" paid to the workman, being part of the wages and not a travelling allowance, can be taken into account in the computation of his wages for the purpose of calculating the compensation payable by the employer.

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Present : ABRAHAMS, C. J., DALTON, S. P. J. & AKBAR, J.

NAIR *vs.* SAUNDIASAPPU.

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Argued on 16th July, 1936.
Decided on 3rd August, 1936.

Motor Car Ordinance No. 20 of 1927—Sections 30 (1) and 80 (3)(b) —Charge against owner of a motor car under Section 80 (3)(b)— What must the prosecution prove in such a charge.

Held: That in a charge against the owner of a motor car under Section 80 (3) (b) of Ordinance No. 20 of 1927 the onus of proof, that none of the excusatory circumstances specified in paragraph (b) existed, is upon the prosecution.

J. E. M. Obeysekere. Deputy Solicitor-General with *M. F. S. Pulle, Crown Counsel* for complaint-appellant.

J. L. M. Fernando with *B. H. Aluvihare* for accused-respondent.

ABRAHAMS, C. J.

The respondent, the owner of a motor car, was charged on the complaint of a Police Sergeant with permitting the car to ply for hire in contravention of section 30 (1) and section 80 (3) (b) of Ordinance No. 20 of 1927. The driver of the car was himself charged with plying for hire in contravention of section 30 (1) of the same Ordinance. Apparently the car was licensed for private use only and the driver conveyed the number of passengers for gain.

The Magistrate convicted the driver and acquitted the owner. The complainant then obtained sanction from the Solicitor General to appeal against the acquittal. This appeal was first heard by Soertsz, A. J. who held that he was faced with conflicting Supreme Court decisions and referred the matter for the decision of a bench of two Judges. The case was then aruged before Koch, J. and Soertsz, A. J. who were unable to agree. Hence this hearing before this Court.

Section 80, upon the construction of which this case hinges, reads as follows :

> "80. (1) If any motor car is used which does not comply with or contravenes any provision of this Ordinance or of any regulation, or of any order lawfully made under this Ordinance or any regulation : or
>
> (2) If any motor car is used in such a state or condition or in such a manner as to contravene any such provision : or

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(3) If anything is done or omitted in connection with a motor car in contravention of any such provision : then, unless otherwise expressly provided by this Ordinance,

(a) The driver of the motor car at the time of the offence shall be guilty of an offence unless the offence was not due to any act, omission, neglect, or default on his part : and

(b) The owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or, if absent, unless the offence was committed without his consent and was not due to any act or omission on his part and he had taken all reasonable precautions to prevent the offence."

As I have said, there have been conflicting decisions as to the liability of an owner under that section where the driver has been proved to have committed an offence thereunder. In the case of *Sub-Inspector of Police, Chilaw v. Croos* (35 N. L. R. 189), the owner of a car was convicted because the car was driven when it was not in a fit condition to be driven. The owner was not present when it was so driven, but Macdonell, C. J. held that the prosecution had discharged the onus placed upon it by proving that something had been done or omitted in contravention of the Ordinance, and it was then for the owner to satisfy the Court that what had been done or omitted was without his consent etc. In *Macpherson v. Appuhamy* (35 N. L. R. 231) heard the day before the abovementioned case, the learned Chief Justice again upheld the conviction of an owner. This appeal seems to have been contested purely on the evidence, and the learned Chief Justice appears to have accepted without any question that there was an onus on the accused to show that he had done everything which was required of him to prevent an offence against the Ordinance. On the other hand, in *de Mel v. Balasuriya* (36 N. L. R. 218) Dalton J. took the view that the owner was not liable unless he abetted the commission of the offence, He said : "The provisions of the Ordinance referred to in sub-sections (1) and (2) are, it seems to me, provisions to which motor cars must comply or conform before they are used, in respect of such matters as equipment construction, registration, licensing, or condition. One can understand the owner being made responsible, for instance, for the proper equipment and safe condition of the car he allows his driver to use. Sub-section (3) refers to a contravention of those same provisions. It would appear to provide for anything that may be committed from sub-sections (1) and (2), for all three sub-sections must be read together." The learned Judge went on to decide that as the owner was prosecuted although it was his driver that contravened what was described in the Ordinance as a driving rule, the prosecution must

fail on this construction of sub-section (3). In the case of *Sub-Inspector of Police* v. *Williamsingho* (14 L. R. 234) this ruling was followed by Soertsz, A. J. It will be observed that Mr. Justice Dalton gave no opinion as to whether the prosecution had done all that the law required by proving that sub-section (3) of Section 80 had been contravened, and that it was then for the accused to show that he was excused under paragraph (b) of that section or whether the onus was upon the prosecution to prove that the accused was not so excused.

While guarding myself against any inference that I agree with Mr. Justice Dalton's ruling in *de Mel* v. *Balasooriya*, it is not necessary for me to come to any decision on that side of the case for I am of the opinion that on a proper construction of paragraph (b) of Section 80 the respondent was not proved to have committed any offence.

The Deputy Solicitor-General who appeared in support of this appeal argued that Section 105 of the Evidence Ordinance placed upon the respondent the onus of proving that he had done everything to prevent the offence within the requirements of paragraph (b). Section 105 of the Evidence Ordinance is an exact reproduction of Section 105 of the Indian Evidence Act which reads as follows :—

> "105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances.

Now in order to see whether the circumstances of excuse in paragraph (b) of Section 80 constitutes a special exception to an offence, it seems to me necessary that that offence should be defined. I think that one can come to a speedy conclusion as to what the offence is under paragraph (b) by ascertaining what the accused can be properly charged with under that enactment. Let us suppose the accused was present at the time something was done in connection with his car in contravention of the Ordinance, it seems to me that the charge against him should run something like this :—

> That you being the owner of a motor car in respect of which an offence was committed under section—of Ordinance No. 20 of 1927 were present at the time of the said offence."

What the prosecution would have to prove then would be, that the accused was the owner of a car, that an offence in contravention of a certain section was committed in respect of the car and that he was present when that offence was committed. The accused could only exonerate himself by showing that one at least of these three allegations had not been satisfactorily proved. But where the accused was an absentee the charge cannot run in

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that way, nor could he be charged with being absent at the time when the offence was committed in respect of the car as that is no offence. There is is clearly a differentiation between the responsibility of an owner who is present when an offence is committed in respect of the car and an owner who is absent. The difference can be gathered from the wording of paragraph (b) to be in the existence of certain circumstances which the prosecution must prove before the accused can be called upon for his defence. The charge then should run something like this:—

> "That you being the owner of a motor car in respect of which an offence was committed under Section — of the Ordinance, being absent at the time when the said offence was committed did consent to the commission of the offence or (as the case may be) that the said offence was due to such and such an act or omission on your part or (as the case may be) that you did not take all reasonable precautions to prevent the said offence."

It also seems to me that the prosecution in this case unconsciously conceded this construction of paragraph (b) when the accused was charged with having permitted the car to ply for hire, for under paragraph (b) the correct method of proving how the accused permitted the car to ply for hire would be to show that none of the execusatory circumstances specified in paragraph (b) existed.

I think the fallacy underlying this prosecution is due to a misapplication of Section 105 of the Evidence Act to paragraph (b) of Section 80 of Ordinance No. 20 of 1927. What are really the essential elements of an offence have been mistaken for an exception to the offence.

No doubt this construction of paragraph (b) imposes a very heavy burden on the prosecution. That is not to the point. It may be that the legislature actually intended that the owner of a car should prove that he was excused from responsibility for another person's act or omission in respect of the car, but it does not appear to me that, if this was the intention, it can be gathered from the wording of paragraph (b).

In my opinion this appeal fails and should be dismissed.

DALTON, S. P. J.

This appeal by the complainant in the Police Court against an acquittal which originally came before one Judge was referred to a Bench of two Judges on the ground that there are conflicting decisions as to the liability of the owner of a car who is charged with permitting an offence which his driver has committed and of which he has been convicted. When the appeal came up for hearing before two Judges they were not able to agree, and the appeal now comes before us.

The first accused, the owner of a private car was charged with "permitting the said car to ply for hire" in breach of Section 30 (1) and Section 80 (3) (b) of the Motor Car Ordinance, No. 20 of 1927. The driver was convicted of the offence, but the first accused, the owner was acquitted on the ground that the prosecution had not led any evidence to convict him with the driver's offence. The Magistrate purported to follow a decision given by me in the case *de Mel* v. *Balasuriya* (36 N. L. R. 218).

In support of the appeal the Deputy Solicitor-General relies upon the decisions of Sir Philip Macdonell C. J., namely *Sub-Inspector of Police, Chilaw* v. *Croos* (35 N. L. R, 189) and *Macpherson* v. *Appuhamy* (35 N.L.R. 231) which are to the effect that, when in a charge under Section 80 (3) of the Motor Car Ordinance it is established by the prosecution that something was done or omitted by the driver in connection with a car in contravention of any provision of the Ordinance, the onus is on the owner, if he was absent at the time of the contravention of the Ordinance, to satisfy the Court that the offence was committed without his consent and was not due to any act or omission on his part, and that he had taken all reasonable precautions to prevent the offence.

Mr. Obeyesekere has urged that *de Mel* v. *Balasuriya* (supra) was wrongly decided in so far as it holds that the owner could avoid or escape the effect of the provisions of Section 80 (3) (b), in respect of any limited class or offences under the Ordinauce. It seems to me that on the facts *de Mel* v. *Balasuriya* (supra) can possibly be distinguished from the case now in appeal before us. I had to decide in the former case whether or not the owner was liable under Section 80 (3) (b) for a contravention by his driver of what is described in the Ordinance as a driving rule, and nothing that I have heard in the argument before us has led me to doubt the correctness of my decision there. I concede that the legislature has given the Courts a difficult puzzle to solve when we are asked to say what they really intended by the words they use, but I feel quite unable to give Section 80 the wide construction for which the Deputy Solicitor-General contends. I am still of opinion that the Section must be read as a whole, and that the somewhat general words of sub-Section (3) must be read as comprehending only offence of the same kind as those in the two previous sub-Sections. It is true the two earlier decisions of Sir Philip Macdonell relied upon by Mr. Obeyesekere were not brought to my notice when the case of *de Mel* v. *Balasuriya* (supra) was argued. It is not, however, in the circumstances, necessary, in my opinion, in this appeal to consider whether or not *de Mel* v. *Balasuriya* (supra) was rightly decided, for if one holds that the conclusions in *Sub-Inspector of Police, Chilaw* v. *Croos* (35 N. L. R. 189) and *Macpherson* v. *Appuhamy* (35 N. L. R. 231) were not correct, the appeal must necessarily fail. After careful consideration of the arguments

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before us I must respectfully differ from the conclusions there arrived at, as to the meaning and effect of the provisions of Section 80 (3) (b) of the Ordinance.

It is hardly necessary to stress that most highly valued and jealously guarded principle of English law, contained, for us in Ceylon, in the somewhat brief cold and formal words of Section 101 of the Evidence Ordinance. An illustration is added to the Section. If A, wishes a Court to give judgment that B, shall be punished for an offence which A. says B. has committed, A, must prove that B. has committed the offence. Section 105 of the Evidence Ordinance, upon which Mr. Obeysekere relies, contains no real exception to that general rule, since all the elements which go to make up the offence charged have still to be proved by the prosecution against the person charged, before the latter need make any move to bring himself within any exception relied upon. Even then the onus upon an accused person is not so heavy as that upon the prosecution. There are, however, various Ordinances, which make exceptions to the general rules above mentioned. A useful list of these up to 1920 will be found in Mr. R. F. Dias's Commentary on the Evidence Ordinance at pages 136 and 137. To take the Penal Code, 1883, it will be found that Sections 392 A (b), 449 and 467, in clear and express terms, provide that the burden of proof in respect of certain matters, which under the general rule lies upon the prosecution, shall lie upon the accused person. Other Ordinances in the list which I have examined, contain similar and precise terms as to the burden of proof.

In respect of statutes which encroach on the rights of subjects, it is a recognised rule of construction that they should be interpreted, if possible, so as to protect those rights (*Maxwell Interpretation of Statutes*, 7th ed., p. 245. The learned author points out that the paramount duty of the judicial interpreter is to put upon the language of the legislature its plain and rational meaning and to promote its object. It is to be excepted, however, that if the intention is to encroach upon the rights of persons or to impose burdens upon them contrary to other express provisions of the law, it will manifest its intention plainly, if not in express terms, at least by clear implication.

Further, *mens rea*, or a guilty mind, is with some exceptions an essential element in constituting a breach of the criminal law. (Maxwell, *Interpretation of Statutes* p. 88). "The general rule is that unless the contrary is expressed *mens rea* enters into every offence." There is of course a large volume of Municipal law to which, by enactment, this rule does not apply, but whether it applies or not depends upon the construction of the particular statute concerned.

The question to be answered here is whether there is anything contained in Section 80 (3) (b) of the Motor Car Ordinance contrary to the

general rule set out above and throwing the burden of proof upon an owner of a car, whose driver, in his absence, has committed an offence against the Ordinance, of showing that he, the owner, is not guilty, after the prosecution have merely established that the driver has committed the offence and that the other person charged is the owner. Sub-Section (b) is as follows:—

(b) The owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or if absent, unless the offence was committed without his consent, and was not due to any act or omission on his part and he had taken all reasonable precautions to prevent the offence."

It will be noted that there are no words here referring to the burden of proof, as there are in other statutory enactments changing the general rule, to which I have referred. There is no express reference to the burden of proof at all. Further, I can find no words used whence I can say that it is manifest by clear implication that the legislature intended to effect any change in the general law governing the burden of proof. It has been argued that the prosecution might have difficulty in leading evidence against the owner as to what he had or had not done in preventing the offence, but that kind of argument does not help one. I have already pointed out elsewhere that this is not the only section of the Ordinance which is difficult of interpretation. It is suggested that an owner, if present at the time his driver commits an offence, is equally guilty with the driver, without any exception whatsoever, and even if the driver is acting directly contrary to the instructions of the owner and the latter is striving to do all he can to prevent the offence being committed. Fortunately it is not necessary here to decide whether that is so or not. I find it impossible, however, to hold, from the words that are used in Section 80 (3) (b), that the legislature intended to effect any change in this sub-section in the existing law. The words are not, in my opinion, inconsistent with the general rule. If the legislature intended to put the burden of proof here upon the owner, as urged for the appellant, that intention must be plainly expressed or clearly implied. I cannot find that the intention has been expressed in this subsection in either way. If the conclusion is that the prosecution still has to prove that the accused person here has committed the offence with which he has been charged, it may be asked what is the purport of enacting Section 80 (3) (b) at all. It is not for me to supply an answer to that question, but I might suggest as an answer that possibly the legislature was seeking to provide a way in which the defence might meet a charge.

In the result the appeal, in my opinion, must fail.

AKBAR, J.

I agree with the judgment of my Lord the Chief Justice.

Present : ABRAHAMS, C. J. & DALTON S. P. J.

AMEEN *vs.* RASHEED.

Application in Revision in D. C. Colombo No. 3584.
Argued on 14th and 15th July 1936.
Delivered on 27th July 1936.

Order postponing action. Is it an appealable order ?

An application was made for revision of an order of a District Judge postponing an action, pending the decision of an appeal which he considered as having an important bearing on the case. A preliminary objection was taken that as the order made was appealable the application should be rejected.

Held : The application could not be entertained as the order sought to be revised was an appealable one.

A. E. Keuneman, K. C. with *J. A. T. Perera* for plaintiff-petitioner.

N. Nadarajah with *E. B. Wickremanayake* for respondent.

ABRAHAMS, C. J.

I am of the opinion that this preliminary objection should succeed. The learned District Judge made an order postponing the action until the decision of an appeal which he considered as having an important bearing on the action. The plaintiff thereupon applied to this Court, under Section 75 of the Courts Ordinance, for revision of this order on the ground that it could not be justified in law. A preliminary objection has been taken to the effect that as the order made is appealable, this application should be rejected.

Is this an appealable order ? There is no specific list of orders which are appealable nor is the definition of "order" in the Civil Procedure Code at all helpful since the practice of these Courts, unlike that of the Courts in India, does not require the drawing up of any order. A number of cases have been cited to us in which different kinds of orders have been held appealable, and it would appear from them that any order made judicially is appealable. Moreover in *Kathirasen Chetty* v. *Thevarasen and others.* 1 Leader L. R. 87, the Court (Hutchinson, C. J. and Went, J.) dismissed an appeal against the order refusing postponement and appeared thereby not to question that such an order was appealable.

Counsel for the petitioner contends that an order for postponement is a ministerial and not a judicial order. I cannot agree that in allowing an application for the postponement of a trial a judge cannot be said to act judicially. Once a case is fixed for trial the parties expect it to be heard on the day assigned, unless good reasons are advanced for its postponement. Postponement may result in embarassing consequences for one or other of the parties—indeed in this instance the petitioner himself complains that he has been subjected to some financial prejudice—and it is obvious that when considering an application for postponement a Judge must bring his mind to bear upon the reasons for the application and the objection made thereto, and decide judicially.

It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in revision. It has been said in this Court often enough that revision of an appealable order is an exceptional proceeding, and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal.

I can see no reason why the petitioner should expect us to exercise our revisional powers in his favour when he might have appealed, and I would allow the preliminary objection and dismiss the application with costs.

DALTON, S. P. J.

I agree.

Present: KOCH, J.

PUBLISAPPUHAMY & OTHERS *vs.* PERERA.

S. C. No. 336—P. C. Puttalam No. 21985.

Argued & Decided on : 16th July, 1936.

Criminal Procedure Code—Does an appeal lie from an order under Section 88.

Held: That an appeal lies to the Supreme Court from an order made by a Police Court under Section 88 of the Criminal Procedure Code.

L. A. Rajapakse for the accused-appellant.

KOCH, J.

The learned Magistrate has made an order in this case which purports to be under Section 88 of the Criminal Procedure Code whereunder he has ordered a man called Peduru to execute a bond for Rs. 100/- with one surety for keeping the peace for six months. In default he has directed that Peduru should undergo simple imprisonment for a period of six months. Peduru has appealed, and Mr. Rajapakse appears for him.

It is not specifically stated in the Chapter under which Section 88 appears, that there may be an appeal to this Court by party dissatisfied with such an order. But it would appear that the practice of this Court has been to regard an appeal from such an order as recognizable. In the case of *Kanagasingham* v. *Tambyah* (1) the late Chief Justice Sir Anton Bertram allowed an appeal from an order made in proceedings taken under Section 83. It is true that the proceedings in this case are not taken under Section 83 but under Section 81, but both those sections appear under the Chapter, namely, Chapter VII, and if an appeal from an order under Section 83 has been recognized to be in order by this Court, I cannot see any reason why an appeal taken from an order under Section 88 which refers to proceedings taken under Section 81 should not equally be in order. There is another case namely, *Inspector of Police, Baddegama* v. *Hendrick* (2) There too there was an appeal from an order under Section 83 of the Criminal Procedure Code made against a person who was alleged to be a dangerous person and etc. Lyall-Grant J. in his judgment dealt with the appeal as if it were in order and set out what was precisely necessary to prove under that Section. In the end he allowed the appeal as

(1) 24 N. L. R. p. 474.
(2) 31 N. L. R. p. 208.

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Sir Anton Bertram, Chief Justice, had done in the case previously referred to.

I therefore think that I shall be justified in regarding this appeal as in order, but even if I am not right in so doing I think there is ample material on record to enable me to deal with the matter in revision.

The learned Magistrate, besides barely saying that "on the evidence on both sides I am of opinion that it is necessary that Peduru, the respondent, should give security for keeping the peace," does not deal with the evidence led in support of the application to have Peduru bound over nor does he make any comments as to passages in that evidence which justify him in regarding that the essentials necessary te be proved under Section 81 (1) have been accepted by him. The essentials under Section 81 (1) which are necessary to be established before an order can be made under Section 88 are, that it must be proved that a person has been convicted of an offence which involves a breach of the peace, or of committing criminal intimidation by threatening injury to person or property, or of being a member of an unlawful assembly, and under Section 81 that a person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace within the local limits of the jurisdiction of the Police Court of such Magistrate.

What appears to have taken place in this case is, that a number of villagers have signed a joint petition which they sent up to the authorities making certain allegations against this man Peduru and his connection with a murder that had been committed a short time previously. Feeling apprehensive, perhaps, that Peduru, if informed of their conduct, might do them harm, they seem to have hit upon the idea of obtaining an order binding Peduru over to be of good behaviour. Each one of these signatories has given evidence in the case and I have read that evidence carefully, but I do not find beyond mere speculation and imagination that there is any definite evidence to show that Peduru is likely to commit a breach of the peace or to do a wrongful act which may probably occasion a breach of the peace. There are one or two passages in the evidence which are inadmissible as being statements made by persons who have not been called. These passsages will have to be excluded from my consideration.

The only passage of some importance is a passage that appears in the evidence of a signatory called Porolis Appuhamy who says this: "A few days after we had given the petition Peduru came in front of my house at about 11 a. m. and told me 'You and your brother gave a petition against me ; beware of what I will do to you within 7 or 8 days." It will be noted that beyond a mere empty threat there does not appear to be any seriousness in what he said. He does not threaten there to either injure or murder any of the signatories. He merely says "Beware of what I will do to you within 7 or 8 days." However, that passage has been discounted by later evidence that has been given, put personally I do not regard that passage as being sufficient material on which to have made the present order. As I said before one does not know whether the Magistrate has accepted that statement or whether it may rightly be regarded as pure romance on the part of the witness, because it would appear that in the evidence of the other signatories that have been called a good deal of their evidence appears to be mere imagination.

I am of opinion therefore, that there is no justification for the order made by the Magistrate. The order will be set aside.

Present : ABRAHAMS, C. J. & DALTON, S. P. J.

PETER *vs.* THE COLOMBO TURF CLUB.

S. C. No. 163 (1)—D. C. Colombo No. 791.
Argued on 13th July, 1936.
Decided on 20th July, 1936.

Civil Procedure Code—Amendment of pleadings—Order under Section 93—Prepayment of costs made a condition precedent to the applicant proceeding further—Is such order valid.

Held. That the power given to the Court under Section 93 of the Civil Procedure Code to make an order as to costs does not extend to making an order, that the costs should be paid before the party, on whose behalf the amendment has been made, should be entitled to proceed with his action.

C. Nagalingam for plaintiff-appellant.

H. V. Perera with *D. W. Fernando* for defendant-respondent.

ABRAHAMS, C. J.

The appellant wished to sue the Colombo Turf Club in respect of a betting transaction. Being under the impression that the Club was incorporated, he proceeded under Section 471 of the Civil Procedure Code and served the Secretary with the summons. At a later date he realised that the Club was not incorporated and sought to correct his error by applying to the District Judge for amendment of the plaint by making certain members of the Club defendants instead of the Club itself, in accordance with Section 16 of the Civil Procedure Code.

The learned District Judge appeared to be of opinion that the error of the plaintiff was *bona fide* and that the amendment ought to be made, he added however, that as the application came so late he would order the plaintiff to pay to the defendant (that is to say the Club Secretary), for whom proxy had been filed, all costs incurred by him up to date. He further stated that a summons should issue in respect of the members named by the plaintiff but only after payment by the plaintiff of costs as ordered. It is against this order for prepayment of costs that plaintiff appeals. It is argued for him that Section 93 of the Civil Procedure Code under which the District Judge made the amendment does not give power to the Judge to make payment of costs a condition precedent to further proceedings in the action.

The material portion of Section 93 is as follows :—

> "At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition or of alteration, or of omission ".

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It is argued for the respondent that Section 93 of the Code permitted the order to be made since, as the District Judge had granted an indulgence to the appellant by making the amendment, he could impose the condition which is in question.

I am of opinion that the contention of the appellant is right. I think the power given to the Court, by Section 93, to make an order as to costs does not extend to making an order that these costs should be paid before the party on whose behalf the amendment had been made should be entitled to proceed with his action. The appellant came to the Court asking to be put into the position in which he would have been had he brought his action according to Section 16 of the Code. The learned District Judge said he would put the appellant into that position and he apparently did so, but he then imposed on him the obligation to fulfil certain conditions before he could take advantage of the rights which accrued from the amendment. It is not reasonable to curtail the appellant's rights in this way, and I do not think such construction can be placed upon Section 93 as can justify the order complained of. It has not been argued that a categorical order for payment of costs ought not to have been made, but either the appellant ought to have had the application refused, in which event he could have brought a fresh action in the proper form (an expense to avoid which presumably he applied for an amendment), or he ought to have been put into a position by the grant of the amendment sought to bring his action unhampered by any such condition imposed.

I am of the opinion that the order for prepayment of costs was made without jurisdiction. I would allow the appeal to the extent of directing that the costs should be paid in the ordinary way and not before the issue of a summons. Costs of this appeal to the appellant.

DALTON, S. P.J.

I agree that this appeal must be allowed, and the order of the Lower Court must be varied to the extent of striking out that part of the order which directs the plaintiff to pay the costs referred to in the order, before the amended summons is issued.

The plaintiff has, in the circumstances, in my opinion, been fortunate in obtaining leave to amend his plaint, and the order that he pay all costs incurred by the defendant up to and including the costs of September 20th 1935 is a most reasonable one. Seeing, however, that the learned Judge was of opinion that the plaintiff was acting *bona fide* and as he was apparently satisfied that the plaintiff had done nothing for which the defendant could not be compensated by costs, I am of opinion that the learned Judge had no power, under Section 93 of the Civil Procedure Code, to go further and order that the application to amend would only be allowed on pre-payment of those costs. I have examined a number of English and Indian cases and can find nothing under the equivalent provisions of the law in England and India to support any such conditional order as has been made here.

Present : AKBAR, J. & KOCH, J.

SADIRISA & ANOTHER *vs.* ATTADASSI THERO.

S. C. No. 115. D. C. (Final) Avissawella, No. 1660.
Argued & Decided on 15th July, 1936.

Co-owners—Action for possession—Nature of possession necessary to enable a co-owner to obtain a possessory decree.

The plaintiff brought a possessory action against the other co-owners of a land. It was admitted that after the death of the donor—a Buddhist priest named Gunatissa —of a certain land in respect of which this action was brought, all his pupils, meaning, thereby the co-owners under the two deeds of donation, came to an understanding that the plaintiff should possess a field and a high land adjoining it in lieu of his shares in the other lands.

Held : (i) That the plaintiff's possession was not *ut dominus.*

(ii) That a possessory action cannot be brought by a person who has not had *possessio civilis.*

N. E. Weerasuriya with *T. S. Fernando* for defendants, appellants.

Rajapakse with *D. W. Fernando* for plaintiffs, respondents.

AKBAR, J.

The plaintiff brought this action originally claiming title to a certain land, alternatively, on a second cause of action, claiming a possessory decree in respect of this land. On the plaint, as regards the first cause of action, he became entitled only to a 1/10th undivided share of the land claimed from the owner of the land on a deed of gift (P1) dated 12th April, 1914 executed by the then owner of the land. The plaintiff also admitted that the persons under whom the defendants claimed were also co-owners of this land, which is the subject matter of the action, under another deed, P2, dated 31st August, 1915. At the trial, the plaintiff abandoned his claim for title and confined his action to one of possession only. I cannot accede to the argument of Counsel for the plaintiff respondent that the plaintiff had not this right ; the learned Judge was right in allowing the trial to proceed on the footing of a possessory action.

The law relating to possessory actions, so far as it affects the rights of one co-owner against another seems to be in some confusion owing to the apparently conflicting decisions of this court. It is, therefore, necessary to state briefly what the effect of these judgments appears to be.

The remedy of possessory action is given by statute—Ordinance No. 22 of 1871 (Section 4.) It will be seen from that section that it is provided that the law that should govern such actions was to be the Roman Dutch Law. In other respects, that section only provides the time within which the action is to be brought, reckoning it from the date of ouster.

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The earliest case we have been referred to by the Supreme Court on this question of a possessory action is the case of *Changarapillai* v. *Chelliah* (5 N. L. R 270), wherein Bonser, C. J. indicated what the nature of the possession should be which would entitle a plaintiff to ask for a possessory decree. This case was quoted with approval by the Privy Council in the case of *Abdul Azeez* v. *Abdul Rahiman* (14 N. L. R. p. 317).

Referring to the case of *Changarapillai* v. *Chelliah* (supra). Their Lordships stated that in their view, "that decision was sound in principle and is applicable to the circumstances of the present case." What the plaintiff in a possessory action had to prove was *possessio civilis*, or, in other words, possession *animo domini* (see Walter Pereira's Laws of Ceylon—2nd Ed. pp. 354 & 544). So that, all that the Roman Dutch Law requires is such possession as the evidence would indicate that the plaintiff regarded himself as the sole owner of the land he was so possessing. If we look at this question from this point of view, it seems to me that one co-owner cannot, strictly speaking, be said to have such possession in a possessory action brought by him against his other co-owners in which he claims to be restored to the possession of his undivided share. As Bertram, C. J. stated in the case of *Tillekeratne* v. *Bastian* (21 N. L. R. p. 18) every co-owner, has a right to possess and enjoy the whole property and every part of it, and the possession of one co-owner in that capacity is in law the possession of all. It will be observed, however, in this case, that the plaintiff claimed not the possession of his undivided share but the possession of the whole land and he claimed to be restored to possession in an action which he brought against the 2 defendants who were claiming to be entitled to remain in possession under two other co-owners.

As regards the cases relating to a possessory action by one co-owner against another co-owner, the first case to which we were referred was the Full Bench case of *Perera* v. *Fernando*. (1 Supreme Court Reports Vol. 1 p. 329) in which case, so far as we have been able to ascertain, the Supreme Court came to the conclusion that the possession of a co-owner was not such an exclusive possession as entitled him to a possessory action in the event of his being dispossessed. It is not clear from the judgment whether the Supreme Court was referring to disturbance of the possession by another co-owner, or by a total stranger. In any event, when this judgment came up for interpretation before the Supreme Court in the case of *Silva* v. *Sinno Appu* (7 N. L. R. p. 5) it was accepted in the sense that it dealt with a possessory action by one co-owner against another co-owner. In the case of *Silva* v. *Sinno Appu* (supra) it was a possessory action brought by one co-owner against other co-owners, and Mr. Justice Wendt stated that whatever the reasons upon which the case of *Perera* v. *Fernando* was decided, that decision was binding upon him, and that if the case before him fell within

the principle of it he would be bound either to follow it or to reserve the question for the consideration of a Full Bench of the Court. In the case before him, however, he held that all the parties being before the Court, the action could proceed and, for this reason, the case was sent back and a new trial was ordered.

It will thus be seen that Mr. Justice Wendt interpreted the Full Court decision to mean that one co-owner could bring a possessory action against another co-owner so long as the other co-owners were parties to the action, whether defendants or plaintiffs. This was the sense in which the Supreme Court, in yet another decision interpreted the case of *Perera* v. *Fernando*, the decision to which I refer being the case of *Fernando* v. *Fernando* (13 N. L. R. p. 164.)

Interpreting the decision in *Silva* v. *Sinno Appu* (supra), Wood Renton J. stated as follows :—

> "It was held by Mr. Justice Wendt in the case of *Silva* v. *Sinno Appu* that the owner of an undivided share of land can maintain a possessory action in respect of such share, provided that he joins the other co-owners as parties, either plaintiffs or defendants....."

He also approved of the legal principle that the possession which the plaintiff had to prove in a possessory action was possession *ut dominus*. The case was sent back for further trial with an expression of opinion of the Supreme Court that that case was to be decided on the principle set forth in that case. It will thus be seen that the effect of the Full Bench case of *Perera* v. *Fernando* (supra) was interpreted in this sense in the two later cases I have quoted.

There is yet another case to which I have to refer before I apply the law to the circumstances of the case now before us, and that is the judgment of Lascelles C. J. in the case of *Abeyaratna* v. *Seneviratne* (3 Balasingnam's Notes of Cases—p. 22). He there referred to the cases I have already cited and added that the Full Court decision of *Perera* v. *Fernando* had not been followed. I cannot understand why he came to this conclusion unless he meant that the later cases of *Silva* v. *Sinno Appu* and *Fernando* v. *Fernando* (supra) to which also he referred, had interpreted the decision of the Full Bench in a certain sense. In that case, Lascelles C. J. came to the conclusion that if there was possession *ut dominus* for more than a year and a day, a person could maintain a possessory action in the circumstances of that particular case. The circumstances were as follows; The plaintiff were the assignees of a lease granted by one Alexander, one of several co-owners; and that possession being disturbed by the other co-owners, a possessory action was brought. From the short judgment of Lascelles C. J. it appears that the plaintiffs had a lease from Alexander for the entire land and that they had been in possession of the entire land; when a lessee takes

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a lease for the whole land without being aware of the fact that his lessor was really entitled only to an undivided share and when he gets into possession of the whole land and holds it for a number of years ; these facts were entirely corroborative of the fact that possession by the plaintiff was *ut dominus*, in other words, that he possessed it fully believing that the lessor was the owner of the whole land and that he was entitled to keep the possession of the whole land against anybody but his lessor. So that, it will be seen that Roman Dutch Law principle which I mentioned at the beginning of this judgment has been always observed by the Supreme Court in the series of cases quoted above—that possession had to be *possessio civilis*.

The case now before us can at once be distinguished from the case I referred to last—*Abeyaratne* v. *Seneveratne*—because here the plaintiff is asking for a possessory decree, not with regard to an undivided share, but with respect to the whole land, and he is asking for a decree against two other co-owners without making the other co-owners parties to the action as required by the decision of the Full Bench according to the interpretation placed on it later by the Supreme Court.

Therefore, it becomes very material to find out whether the possession alleged by the plaintiff was *possessio ut dominus*, or whether it was possession by him with the full knowledge that he was a co-owner, and with the knowledge that the law presumes in such circumstances, namely, that his possession must enure to the benefit of his other co-owners also.

The learned District Judge had a simple point to decide, namely, the nature of the possession which was alleged by the plaintiff which would entitle him to a possessory decree. In his evidence, the plaintiff stated that the original donor of the land, Priest Gunatissa died in 1917, and that after his death, all his pupils, meaning thereby the co-owners under the two deeds of donation, met in a 'pinkama' ceremony in memory of the death of their donor in 1919 and they came to an understanding that the plaintiff should possess this field and a high land adjoining it in lieu of his shares in the other lands mentioned in the deed. In the face of this evidence, I cannot see how the learned District Judge came to the conclusion that the possession which the plaintiff had when he entered upon the land was *possessio ut dominus or animo domini*. The period from the year 1918 till the year in which the action was brought, namely, the year 1934, was too short a period if we reckon this period from the point of view of one co-owner being able to prescribe against another co-owner. The plaintiff knew when he entered upon his possession that the possession was really on behalf of himself and his other co-owners. He nowhere states in his evidence that as a result of his entering solely in possession of this field he gave up his rights to shares in the other lands and that the others had dealt with those shares on the footing that they were owners.

Mr. Rājapakse who appeared for the respondent argued that the object of possessory decrees under the Roman Dutch Law was to preserve possession and not to allow it to be interfered with by acts of violence on the part of others. Although this may be one of the reasons for the granting of such decrees, the Roman Duch Law requires that the possession which the law would protect in this way should be a possession described in the Roman Dutch Law as *possessio civilis*. I think, the evidence negatives what was required by the law on this point, and it is needless to discuss the other points arising in this case. The judgment of the learned District Judge should therefore be set aside.

The appeal is allowed with costs in this Court and the Court below, the judgment and decree of the lower court being set aside.

KOCH, J.

I agree.

Present: ABRAHAMS, C. J, & DALTON, S. P. J.

KADAPPA CHETTIAR *vs.* RAMANAYAKE and others.

S. C. No. 289. D. C. Colombo No. 49485.
Argued on 13th & 14th June, 1936.
Decided on 3rd August, 1936.

H. V. Perera with *Tissaverasinghe* for plaintiff-appellant.

D. J. R. Gunawardene with *Colvin R. de Silva* for 1st defendant-respondent.

M. T. de S. Amerasekera with *E. B. Wickremanayake* for 2nd & 3rd defendants-respondent.

Mortgage—Failure to join secondary mortgagee and transferee of the mortgagor in the mortgage action—Can primary mortgagee bring a second action against the mortgagor, the secondary mortgagee, and the transferee of the mortgagor.

The plaintiff, the primary mortgagee, put his bond in suit. At the time of action there was a secondary mortgage over the property and the mortgagor had sold it. The plaintiff failed to join the secondary mortgagee and the transferee in the first action. Decree was entered but the plaintiff did not have it executed. He later brought the present action against the mortgagor, the secondary mortgagee and the transferee so as to obtain a decree binding on all,

Held: That the action was maintainable.

PER DALTON, S. P. J.

There seems to have been some misunderstanding as to the meaning of the term "necessary party" as used in the Mortgage Ordinance, No. 21 of 1927. This term appears to have been adopted by the draughtsman from one of the earlier judgments of this Court which was cited to us. Having regard to the different provisions of that Ordinance the term does not mean necessary or essential for the proper constitution of the action, but necessary if the plaintiff mortgagee desires to obtain a decree binding up any particular person in that particular action. This seems to be clear from the provisions of Section 10 of the Ordinance.

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This is an appeal by the plaintiff against a judgment of the lower Court of July 18th 1934, dismissing his action against the three defendants on a mortgage bond.

On November 4th 1929 the 1st defendant executed a bond No. 1101 for Rs. 40,000 in favour of the plaintiff. Subsequently on February 24th 1931, the 1st defendant executed a secondary mortgage over the same premises by bond No. 2542 in favour of the 2nd defendant. He then, on March 10th 1931, executed a conveyance of the mortgaged property to his wife, the third defendant.

In ignorance of the secondary mortgage and subsequent conveyance above mentioned, the plaintiff on October 2nd, 1931, instituted action No, 46.335 in the District Court Colombo, on bond No. 1101. In that action the mortgagor, the present 1st defendant, was the only defendant. Judgment was obtained by the plaintiff on a warrant of attorney to confess judgment, and the usual mortgage decree was entered in terms of the plaint on October 8th 1931. The plaintiff took no further steps on that decree, as he appears shortly thereafter to have heard of the existence of the secondary mortgage and the conveyance. He then on July 7th 1932 instituted the present action No. 49485, making the mortgagor, the secondary mortgagee, and the wife of the first named as transferee of the mortgaged property, parties to the action, claiming, however, no remedy against the 1st defendant against whom he already had a decree in action No. 46335. He brought this second action, as he sets out in his plaint, for the realisation of the mortgage debt and to have the property mortgaged declared bound and executable as against the 2nd and 3rd defendants.

At the trial certain issues were framed, but only the first two were dealt with by the trial Judge, as he stated they appeared to go to the root of the case. They were as follows :—

1. Can the plaintiff maintain this action against the defendants, as the 2nd and 3rd defendants who were necessary parties to D. C. No. 46335 have not been joined in that action and decree had been entered in that action without the 2nd and 3rd defendants having been joined ?

2. The plaintiff having obtained a decree against the 1st defendant in D. C. 46335, is the 1st defendant liable to be made a party in this action ?

The first issue has been answered against the plaintiff. The trial Judge is of opinion, as regards the second issue, that the 1st defendant was a necessary party to the action on the assumption that the action was properly maintainable against the 2nd and 3rd defendants, but inasmuch as this action is not maintainable against these two latter defendants, it follows that it must fail against the 1st defendant also.

The judgment of the lower Court has proceeded upon the basis that inasmuch as the 2nd and 3rd defendants were necessary parties to action No. 46335, under the provisions of Ordinance No. 21 of 1927 since they were not made parties to that action, the plaintiff has exhausted his rights and cannot now maintain this second action against them.

There seems to have been some misunderstanding as to the meaning of the term "necessary party" as used in the mortgage Ordinance, No. 21 of 1927. This term appears to have been adopted by the draughtsman from one of the earlier judgments of this Court which was cited to us. Having regard to the different provisions of that Ordinance the term does not mean necessary or essential for the proper constitution of the action, but necessary if the plaintiff mortgagee desires to obtain a decree binding up any particular person in that particular action. This would seem to be clear from the provisions of Section 10 of the Ordinance. The question to be decided here is whether the mortgagee has thereafter a right of action against persons who were "necessary" parties in the earlier action, who were not made parties to that action or are not bound by the earlier decree.

Prior to the enactment of Ordinance No. 21 of 1927 before the repeal of certain Sections of Chapter XLVI of the Civil Procedure Code, this Court had held that Chapter XLVI provided for one action only to realise moneys due or secured upon mortgage, within which the mortgagee must embrace all claims against all persons concerned. It has been held that it superseded the common law remedies open to mortgagees prior to the Civil Procedure Code of 1889. This conclusion, as pointed out by Bertram C. J. in *Moraes* v. *Nallan Chetty* (24 N. L. R. at p. 301) is the result of Section 640 of the Code. It is urged by Mr. Perera on behalf of the appellant that the effect of Ordinance No. 21 of 1927 is to restore the position, so far as remedies are concerned which obtained under the Roman-Dutch law prior to the enactment of the Code.

Ordinance No. 21 of 1927 repealed Sections 640/644, amongst other Sections, of the Civil Procedure Code. Mr. Wickramanayake urged, however, that Section 6 of the Ordinance in effect re-enacted the repealed Sections 643 and 644, subject to slight changes with regard to registration and giving of notice. Even, however, if that is taken to be so, as Mr. Perera has pointed out Section 640 is repealed and that is the Section, according to Bertram C. J., upon which all the determining decisions since the enactment of the Code have been given. It was not suggested, as I followed the argument, that Section 640 of the Code has been re-enacted in the Ordinance, nor do, I think any such suggestion can be maintained.

An examination of some of the decisions prior to the Ordinance of 1927, however, would show that Section 34 of the Code is the Section

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which has been regarded as prohibiting more than one action to realise moneys due upon a mortgage bond. The effect of those decisions and of the application of Section 34 of the Code is now repealed by Section 16 of the Ordinance. Mr. Wickramanayake in the course of his argument had considerable difficulty, I think, with Section 16. At one point he argued that the Section merely gave a mortgagee a right to bring an action on a personal claim for a money decree, and a separate hypothecary action. He conceded, however that Section 16 (2) had no meaning if that sub-Section applied only to actions for a money decree.

It seems to me that, although there are difficulties in construing some of the provisions of the new Ordinance, the effect of it is to restore the position in respect of remedies to what it was before the Civil Procedure Code was enacted. This seems to be the conclusion to which Fisher C.J. and Drieberg J., came in *Ramanathan* v. *Perera* (31 N. L. R. 304). The learned trial Judge has referred to that decision in the course of his judgment, but he has, in my opinion, put a very much narrower interpretation upon it than the decision will properly bear.

The conclusion to which I have come on the material before us is that the plaintiff was, in the present state of the law, entitled to maintain this action, and the first issue should, therefore, have been answered in the affirmative.

With regard to the position prior to the Civil Procedure Code, a case cited in the course of the argument, *Mohideen Saibo* v. *Walters* (1887 8 S. C. C. 99) is not on the facts exactly on all fours with the case before us, but it is authority for the proposition that prior to the Code where the mortgaged property has, subsequent to the mortgage, passed into the ownership of another, the mortgagee is not restricted to only one action against the mortgagor and the purchaser. He may, however, under the provisions of Section 16 (2) of the Mortgage Ordinance, now be refused costs in any action except the first action.

The second issue, whether or not the plaintiff was right in making the 1st defendant a party to this action, has been answered in the affirmative and there was no appeal against that conclusion. Inasmuch, however, as the answer to the first issue was in the negative, the action against the 1st defendant was also dismissed. The results of the appeal must be therefore, that the decree of the lower Court dismissing the action against the three defendants must be set aside, and the case will go back to the lower Court for the further issues now to be tried.

The appeal is allowed with costs here and with the costs of July 11th 1934 in the lower Court. Other costs of proceedings in the lower Court will be dealt with by the trial Judge when he deals with the further issues in the action.

ABRAHAMS C. J.

I agree.

Present: DALTON, S. P J.

SOURJAH (Inspector of Police) *vs.* HENDRICK.

S. C. No. 362 P. C. Galle No. 10821.
Argued on 23rd July, 1936.
Decided on 3rd August, 1936.

Criminal Procedure Code—Section 340 (3)—Appeal by a public officer in a Criminal case instituted by him in his official capacity—should the petition of appeal be stamped.

Held: That in an appeal by a public officer in a criminal case instituted by him in his official capacity the petition of appeal should be stamped in the manner required by Section 340 (3) of the Criminal Procedure Code.

M. F. S. Pulle, Crown Counsel for complainant-appellant.

L. A. Rajapakse with *J. R. Jayawardene* for accused-respondent.

DALTON, S. P. J.

This is an appeal by the complainant, an Inspector of Police, Galle, against the acquittal of the accused, with the written sanction of the Attorney-General.

The accused was charged with abetting an offence by Mr. H. Wijenathan, Municipal Engineer, Colombo, by asking him to accept, or offering to him, an illegal gratification of Rs. 100/- or half of two months' salary, in the event of the accused being appointed to a post as Sub-Inspector in the Works Department of the Colombo Municipality, for which post he was an applicant. The offence abetted is stated to be a contravention of Section 158 of the Penal Code, punishable by Section 109 of the same Code. The charge is most crudely and carelessly drawn, but no objection was raised on that ground and the accused, no doubt, fully understood the charge.

The accused pleaded not guilty. Four witnesses were mentioned in support of the prosecution in the complaint, but after hearing the first and the principal witness, Mr. Wijenathan, who was not cross-examined, the Magistrate of his own motion held that the letter (P2) from the accused which was produced did not amount to the offer of a bribe. He, therefore, heard no further evidence and acquitted the accused.

The Magistrate was clearly wrong in so holding, and counsel for the respondent (accused) has to admit he cannot support the acquittal on the ground given by the Magistrate. The evidence of Mr. Wijenathan clearly establishes the offer of an illegal gratification, as set out in the charge.

When the appeal first came before me, a preliminary objection was taken thereto on behalf of the respondent, on the ground that the petition

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of appeal was not stamped, as required by Section 340 (3) of the Criminal Procedure Code. It is conceded that the appellant is a public servant employed by the Government of Ceylon but it was argued by Mr. Rajapakse that there is no exception in the Ordinance to the requirement of stamping all petitions of appeal.

Crown Counsel for the appellant, in reply to the objection argued that he had never heard of a petition of appeal by a Government Servant as such being stamped, but I pointed out that there was no exception at all in the Ordinance although Section 377 (2) expressly refers to appeals by the Attorney-General. Counsel could refer me to no other provision of the law making any exception in his case. The provision for a Rs. 5/-. Stamp on a petition of appeal would seem, from the terms of Section 340, sub-Section (3) (4) and (5) to be a method designed for the purpose of putting some small check on a person launching a frivolous or worthless appeal, which check would apply equally to Government servants as to all others. The former might find, in certain circumstances, that he had to pay the fee himself and not out of public funds.

Mr. Pulle then asked me to deal with the matter in revision arguing that the appellant had done nothing that had not been consistently done in similar previous appeals, and I gave him an opportunity of producing evidence to support of his contention that, according to the past practice recognised by the Court, no petition such as this had previously been required to be stamped. The respondent was also allowed to file affidavits if he wished to do so.

The matter then came before me again and Crown Counsel supported his application with an affidavit from the Registrar of this Court. In that affidavit Mr. Grenier sets out that since the year 1915 when he first acted as Deputy Registrar and up to date no stamps have been affixed to petitions of appeal by public servants in the employment of the Government of Ceylon under Section 340 (3) to his knowledge, with one exception. He states further that the practice has been that if an appellant, not being a public servant employed by the Government of Ceylon, has not stamped his petition, the record is sent back to the Police Magistrate, or District Judge, from whom it is received and he is asked to state whether he is prepared to allow the payment of the stamp fee to stand over until judgment on the appeal is given (see provisions of Section 340) (3). If the Magistrate or District Judge is not prepared to allow the payment of the stamp fee to stand over, the appeal is listed in the ordinary course for argument and it is the duty of the officiating Registrar to bring to the notice of the Judge hearing the appeal the fact that the petition of appeal has not been duly stamped. The exception referred to was an appeal by the Rubber Controller in 1935. There is an affidavit

before me by his deputy explaining why his petition of appeal in 1935 was stamped and setting out that all expenses incurred by him, including the stamp on the petition of appeal in question, are defrayed out of a Rubber Control fund, which is no part of general revenue of the Government.

Mr. Rajapakse for the respondent did not contest the correctness of these affidavits. In that event, I think Crown Counsel has shown good ground for asking me, in the event of my holding that the petition of appeal should have been stamped, to deal with the matter in revision, since the appellant in not stamping his petition has followed the consistent practice approved of by the Registry for the last 21 years a practice tacitly if not expressly sanctioned by this Court.

As I have stated, counsel can show no provision excepting such a petition of appeal as this from payment of stamp duty, and I must hold that it should therefore have been stamped, as required by Section 340 (3). In the circumstances however, he has shown sufficient ground for me to deal with the matter in revision. As a general rule this court will not deal with a matter in revision where the petitioner has right of appeal, but the circumstances which I have set out make it, in my opinion, a proper case to go outside the general rule, and for the exercise of the revisionary powers of the court.

The acquittal will therefore be set aside and the case will go back to the Police Court for the Magistrate to hear any further evidence which the parties may wish to put before him, and he will then proceed to adjudicate afresh.

Present : MACDONELL C J., DALTON, S. P. J., POYSER & KOCH, J. J.

ZAINAMBU NATCHIA *vs.* USUF MOHAMMADU AND ANOTHER.

S. C. No. 320/33 (F) D. C. Puttalam No. 4432.
S. C. No. 22/34 (F) D. C. Puttalam No. 4468.
Argued on 6th, 7th and 10th February, 1936.
Decided on 11th March, 1936.

Muslim Law—What is kaikuli—Is land given in lieu of kaikuli to the husband alienable by him without the wife's consent.

The facts of the first case No. 320/33 are shortly as follows: The parents of the plaintiff who are Muslims entered into a deed No. 6077 described as " Kaikuli Transfer" before the marriage of their daughter (plaintiff) to the 1st defendant, her husband. The deed contained the following recitals:

"Know all men by these presents that I, (father of the bride) of Puttalam, having agreed to give my daughter (plaintiff) to (1st defendant), bachelor, as early as possible and

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the *kaikuli* prior to marriage, according to the rites of our Mohammedan religion payable to the bridegroom having been agreed upon by me at Rs. 1000/-, as and for a transfer of this sum of Rs. 1000/- I do hereby grant, sell, set over and deliver the property appearing below unto the said bridegroom (1st defendant) and to his heirs, attorneys and assigns."

"That the said property and all things belonging thereunto together with my right, title and interest in respect of the same, the bridegroom (1st defendant) and his heirs and attorneys and assigns shall from date hereof possess and enjoy for ever."

"I the aforementioned bridegroom (1st defendant) have with full consent accepted the aforesaid property as for the kaikuli Rs. 1000/- which this person agreed to give me."

The deed was notarially attested and the marriage took place. Thereafter the 1st defendant mortgaged the property conveyed by the deed to the 2nd and 3rd defendants and the 2nd defendant put the bond in suit, obtained decree, and with the permission of Court, purchased the land at the sale in execution. The plaintiff, thereafter, brought this action for a declaration that he is entitled as beneficial owner to the property conveyed by deed No. 6077 and to a declaration that, that deed creates a trust in favour of her the plaintiff, and that the land is held by the 1st defendant upon the said deed for the use and benefit of the plaintiff.

The District Judge dismissed the plaintiff's claim and she appealed.

In the second case S. C. 22/34 the parents of the bride, the plaintiff, all being Muslims intending to give her in marriage to the 1st defendant, also a Muslim executed on the 13th January, 1920 a deed which contained the following recitals.

"Know all men by these presents that as we (the parents) of Puttalam Town have agreed to give our daughter (plaintiff) in marriage to (1st defendant) as soon as possible, we have agreed to pay as *kaikuli* to the bridegroom (1st defendant) by the said marriage, according to the rites of our Mohammedan religion the sum of Rs. 2750/-. For this sum of Rs. 2750/- we do hereby set over and assign a transfer the undermentioned property unto the said bridegroom (1st defendant) his heirs, executors, administrators and assigns."

"We do hereby make known that the (1st defendant) his heirs, executors, administrators and assigns shall from the time of the said marriage possess the aforesaid property and all things belonging, connected, used or enjoyed thereto together with all our right, title and interest therein, that the said property has not been encumbered or alienated in any way, that it is my own and that if any dispute or irregularity arise regarding this, we shall settle the same."

The deed was notarially executed and the marriage took place. Unlike in the former deed, this contained no acceptance clause but it is admitted that the bridegroom went into possession in accordance with the deed. Hereafter the bridegroom (1st defendant) mortgaged the property to the 3rd defendant, taking at the same time a guarantee from the 2nd defendant of his debt to the 3rd defendant. The latter put the bond in suit and obtained judgment and advertised the property for sale. The plaintiff thereafter brought this action asking that she be declared entitled to the property as beneficial owner and for a declaration that deed No. 4524 created a trust in her favour and that the land was held by the 1st defendant for her use and benefit.

The District Judge dismissed the plaintiff's action and she appealed.

Held: (i) That the deeds in question do not constitute a trust.

(ii) That *kaikuli* means a payment of money and not anything else.

(iii) That where land is given in lieu of *kaikuli* it cannot be followed into the hands of a third party to whom the husband may have alienated it.

(iv) That a husband holding *kaikuli* is trustee for his wife or her heirs.

PER MACDONELL, C. J.

"Now it is to be noticed that *kaikuli* seems to mean money and not anything else. The original way of expressing it seems to have been to give as and for *kaikuli* so many 'kalanjies of gold', some obsolete currency, but clearly a payment of money."

"If the recitals show an intention to create a trust, (let that be conceded), and the operative part is a clear and unqualified transfer of the dominium, and it can hardly be disputed that it is, then it is necessary to apply the well understood rules on this point: per Lord Esher, M. R. in ex parte Dawes 17 Q. B. D. at 286, "Now there are three rules applicable to the construction of such a question. If the recitals are clear and the operative part is ambiguous the recitals govern the construction. If the recitals are ambiguous and the operative part is clear the operative part must prevail. If both the recitals and the operative part are clear, but they are in consistent with each other, the operative part is to be preferred."

Cases referred to:—2 C. W. R. 263; Vanderstraaten 162; 1877. Ramanathan 65; 4 A. C. R. 61; 21 N. L. R 221; 31 N. L. R. 230; 17 Q. B. D. 286; 6 C. B. 662; 136 E. R. 1407; 37 Allahabad 369.

In S. C. No. 320. L. A. Rajapakse with *Ismail* and *B. P. Peiris* for plaintiff-appellants.

H. V. Perera with *F. A. Tisseverasinghe* and *G. E. Chitty Jr.* for 2nd and 3rd defendants-respondents.

In S. C. No. 22—N. Nadarajah with *E. B. Wickremanayake* for plaintiff-appellants.

H. V. Perera with *F. A. Tisseverasinghe* and *G. E. Chitty Jr.* for defendants-respondents.

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The point raised in these appeals was the same in each and was sent by Akbar and Koch JJ. to a bench of four Judges for decision, namely whether the deed in each case created a trust in favour of the plaintiff. The appeals raise a question as to the meaning of 'Kaikuli' among the Muslims of Ceylon.

In the first case, No. 320/33, the parents of the bride, the plaintiff, wishing to give her in marriage to a Muslim, executed on the 15th July 1925, a deed headed as follows, "No. 6077 Kaikuli Transfer," which proceeds to say, "Know all men by these presents that I (father of the bride) of Puttalam having agreed to give my daughter (plaintiff) to (1st defendant) bachelor, as early as possible and the *kaikuli* prior to marriage according to the rites of our Mohammedan religion payable to the bridegroom having been agreed upon by me at Rs. 1000/- as and for a transfer of this sum of Rs. 1000/- I do hereby grant, sell, set over and deliver the property appearing below unto the said bridegroom (1st defendant) and to his heirs, attorneys and assigns." Then follows a description of the property transferred, and the deed goes on "that the said property and all things belonging thereunto together with my right, title and interest in respect of the same, the bridegroom (1st defendant) and his heirs, attorneys and assigns shall from date hereof possess and enjoy for ever." There follows the usual recital that the property has not been encumbered and a covenant for further

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assurance, and then follows the acceptance clause, "and I the aforementioned bridegroom (1st defendant) have with full consent accepted the aforsaid property as for the *kaikuli* Rs. 1000/- which this person agreed to give me."

The deed was notarially executed and the marriage took place. Thereafter, the 1st defendant mortgaged the property conveyed by deed No. 6077 to the 2nd, 3rd defendants, and the 2nd defendant put the bond in suit, obtained decree, and with the permission of the Court, purchased the land at the sale consequent on the decree. The plaintiff, the wife now sues for a declaration that she is entitled as beneficial owner to the property conveyed by deed No. 6077, and to a declaration that that deed creates a trust in favour of her, the plaintiff, and that the said land is held by the 1st defendant upon the said deed for the use and benefit of the plaintiff. When this action came on for trial issues were framed but no evidence was led, and the plaintiff's claim was dismissed in a judgment in which the following is an important passage, "In all the cases where the wife's claim to *kaikuli* has been allowed, the *kaikuli* claim was money and in such cases proof was always procurable to prove that the money was 'in charge of' the bridegroom 'in trust' for the bride who had the right to demand it at any time. Following the case of Meera Saibo v. Meera Saibo, 2 C. W. R. 263, I would hold that the deed No. 6077 was a transfer to the 1st defendant in consideration of marriage and that although the word 'Kaikuli' was used in the deed no trust was constituted either express or implied..... A very reading of the deed seems to indicate that the parties to the deed did not understand *kaikuli* to be anything other than the absolute property of the husband."

In the second case, S. C. 22/34—D. C. Puttalam No. 4468, the parents of the bride, the plaintiff, all being Muslims, intending to give her in marriage to the 1st defendant, also a Muslim, executed on 13th January 1920 the following deed P1, which is headed as follows :—"Know all men by these presents that as we (the parents) of Puttalam Town have agreed to give our daughter (the plaintiff) in marriage to (1st defendant) as soon as possible, we have agreed to pay as *kaikuli* to the bridegroom (1st defendant) by the said marriage, according to the rites of our Mohammedan religion the sum of Rs. 2750/-. For this sum of Rs. 2750/-, we do hereby set over and assign as transfer the undermentioned property unto the said bridegroom (1st defendant) his heirs, executors, administrators and assigns." There follows description and extent of the property referred to, and it then proceeds as follows :—"We do hereby make known that the (1st defendant) his heirs, executors, administrators and assigns shall from the time of the said marriage possess the aforesaid property and all things belonging, connected, used or enjoyed thereto together with all our right, title and interest therein, that the said property has not been encumbered or alienated in any

way that it is my own and that, if any dispute or irregularity arise regarding this, we shall settle the same." The deed was notarially executed. It contains, as will be seen, no acceptance clause, but it is common cause that the bridegroom went into possession in accordance with the deed and that the marriage duly took place. Thereafter the bridegroom, (1st defendant) mortgaged the property conveyed to him by deed No. 4524 to the (3rd defendant) for money lent to him by the 3rd defendant, taking (it would appear) at the same time a guarantee from 2nd defendant of his debt to the 3rd defendant. The 3rd defendant mortgagee put his bond in suit, obtained judgment thereon and advertised the property for sale. The plaintiff wife thereupon brought this action on 27th February, 1933 asking that she might be declared entitled to the property as beneficial owner and for a declaration that the deed No. 4524, quoted from adove, created a trust in favour of her the plaintiff and that the land was held by the 1st defendant upon the said deed for the use and benefit of the plainiff. When the case came on for trial the plaintiff called no evidence and the 2nd defendant called the local Marikar who proved that, at any rate at Puttalam, *kaikuli* is always looked upon as the absolute property of the bridegroom and that the wife has no claim to it. That, he said, was the acknowledged custom at Puttalam, and he went on to say that even in cases of divorce the *kaikuli* is never demanded by the bride or her parents and is never repaid by the husband. He adds, "What is demanded by the wife and insisted on by custom is the *maggar* which the husband has got to pay to the wife. The *maggar* which is promised by the husband to the wife depends on the *kaikuli* given to him, the maggar being always double the kaikuli. The reason is that in case the wife is discarded she kept back her maggar as a penalty.....Kaikuli is not necessary for a marriage, *maggar* is essential. Without *maggar* there cannot be any marriage. What I have stated above is the universal custom in Puttalam. "Kaikuli is not mentioned in our religious books, it is regulated by custom only. I have not heard of any case of Kaikuli being considered property of the bride or held in trust for her by the bridegroom. There is no such custom. Whereever there is *kaikuli* the *maggar* is always double. When there is no kaikuli the maggar may be anything according to the means of the parties". The Marikar does not seen to have been cross-examined on this opinion of his as local custom. The learned Judge who had already decided the earlier case No. 320-33—D. C. Puttalam No. 4432, gave a judgment to the same purport in this case, basing himself on the Meera Saibo case in 2 C. W. R. 263 ; he also accepted the evidence of the Marikar quoted from above. He accordingly dismissed the plaintiff's action.

It is from the two decisions of the same learned Judge to the same effect that the present appeals were brought, and it will be seen from the above recital of the facts that the facts are substantially the same in each

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case and that the trial of the two cases only differs in that there was evidence of local custom as to *kaikuli* in the second case but no such evidence in the first one. The argument for the plaintiff was this. Kaikuli is given by the bride's parents to the bridegroom to be held by him in trust for the bride. The mortgage in each case is affected with knowledge of the *kaikuli* deed through which alone the bridegroom came to be the owner of the land mortgaged, and as each deed describes itself as a *kaikuli* deed the mortgagee took a bond with full knowledge that he was taking over kaikuli property, that is property impressed with a trust, and that therefore he must hold that property in trust for the plaintiff, the wife. This argument necessitates an examination of the authorities on *kaikuli*.

It is a legal conception unknown to the ordinary Mohammedan Law and no mention of it is to be found in such recognised authorities as Ameer Ali or Tyabji, and it seems to be a feature of Muslim marriages known only in Ceylon. Kaikuli, we are told, is a Tamil word and in Winslow's Tamil Dictionary it is translated (1) 'bribe' and (2) 'among Moormen money from the father-in-law and mother-in-law to the bridegroom'. It is therefore a word which doubtless has a local significance in Ceylon, (probably on the Malabar Coast also), but is not a term of art beyond what decided cases have said to be its meaning. It is referred to in a case in Marshall but examination of that case shows that it really decided nothing on the point. The case which does go into it at great length is one reported in Vanderstraaten at page 162, D. C. Colombo 3107, decided in 1871. The report begins by quoting from the judgment in the Court below, as follows. "The point reserved for consideration was whether after the dissolution of a Mohammedan marriage by the death of the wife, the surviving husband is bound to account to her heirs for money which formed the '*kaikooly*' gifted by her father as owner at the time of the marriage.....On the marriage of Mohammedans it is usual for the bride's father to contribute or to stipulate for payment of a certain sum which is called the '*Kaikooly*', while the bridegroom contributes or stipulates for a certain other sum called the '*Maggar*'. The aggregate amount, although it remains in the hands of the husband and under his control and management, only does so, until it is demanded from him by the wife, and it forms a settlement intended exclusively for her sole personal benefit, independent of her husband and children and all others. It is payable to her heirs at her death if she has not previously received it, and forms a first charge on husband's property. It is also payable to her on divorce, but not only so, it has been decided yesterday after careful examination of the authorities that it may be demanded by her at any time, even during the subsistence of the marriage..... It follows from all this that although the dower may be permitted to remain in the husband's custody during the pleasure

of the wife, it is only as a temporary depositee or trustee of her private and separate property, and that if she has not demanded or received it from him, or expressly disposed or authorised the disposal of it during her life, it passes to her heirs, and even seem to form a preferent debt on the husband's property unless she has without cause deserted him." The report then simply says that in appeal this judgment was affirmed. It is said to have been a judgment of the whole Court which at that time consisted of three judges only and it is perfectly clear that by '*kaikuli*' was meant a sum of money. The order of the Court below was that a certain sum was to be appropriated to the deceased wife's heirs as *kaikuli* and another sum of money as *maggar*. There is *nothing* in the report suggesting that *kaikuli* could be land.

Another case cited was that reported in 1877 Ramanathan 65, where the Supreme Court held that the effect of the case in Vanderstraaten was that it only establishes the right of a Mohammedan wife to preference in respect of her *maggar* and *kaicooly* upon the unencumbered effects of her husband.

The next case to be mentioned is that of Meera Saibo vs. Meera Saibo 2 C. W. R. 263, decided in 1916. This was a case where the surviving husband claimed as against the intestate heirs, i.e. the parents, a half share of certain lands given by the parents as dowry after the marriage to the wife who had died intestate and childless. The material parts of the dowry deed are as follows, "We (the defendants) on account of the marriage that has taken place between (plaintiff) and (the wife) and for the sum of Rs. 750/- *kaikuly* or dowry money agreed to be given to (the plaintiff husband) and for dowry, do hereby give grant and set over to them both the property herein described as dowry." (The two lands were then described, and the deed proceeds) "Out of the property thus described the first property for the *kaikuli* money of the plaintiff husband and the second property for their dowry are given as dowry and so they shall this day take charge of them and they and their heirs, executors and administrators shall have the full right for ever freely to possess them." The Judgment of the Court was delivered by de Sampayo, J. who points out that the deed was drawn by a Tamil Notary and that he did not, for a Notary, quite appreciate the significance of the words he was using. He goes on to say, "The word *kaikuli* has a special meaning in Mohammedan law but neither the Notary nor the parties were aware of it, and it certainly seems to me that that the word has been used in a sense quite different from its ordinary signification. Now *kaikuli*, properly speaking, is a marriage gift made to the bride by her parents and is handed to and remain in the charge of the husband during the subsistence of the marriage and may be claimed from him by the wife or her heirs under the same circumstances as *maggar* which is contributed by the

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husband himself." He refers to the case in Vanderstraaten at page 162 and then proceeds, "Kaikuly undoubtedly is a gift to the husband and 'forms a settlement intended exclusively 'for her own personal benefit independent of her children and all others', (Vanderstraaten 162). The husband has only the control and management of the subject of the gift until it is demanded by the wife or her heirs." He then proceeds to say that the deed under discussion seems to show ignorance of the proper meaning of the terms used. He continues, "I think that the only reasonable conclusion to draw from the language used is that a gift to the husband himself had been promised at the marriage. This kind of marriage gift or 'dowry' to the husband on marriage is common in most communities in Ceylon. It is the price paid to the man for marrying the donor's daughter. That this is so in the present instance is made more clear by what follows in the deed itself, for it distinguishes the 'dowry' meant for both husband and wife from the *kaikuli* meant for the husband alone, inasmuch as it expressly states that the first land is 'for the kaikuli money of the husband' and the second land for the 'dowry' of both.....Moreover, as the learned District Judge observes, the reference to 'their heirs, executors and administrators' negatives the idea that the gift, so far as the husband was concerned, was an impersonal one, if the point raised by the defendants may be so put, or was only for a temporary purpose. I accordingly think that, though the word *kaikuli* was used in the deed, it is so used incorrectly, and that the plaintiff was in fact intended to be an actual beneficiary to the extent of half of the property gifted by the deceased." The learned Judge then goes on to discuss another point that had been raised, namely, could a gift of two persons be under any circumstances construed as a grant to one of them, and decides that the provisions of Ordinance 7 of 1840 were decisive that it could not. He then goes on to ask, must the husband be considered a trustee of the half interest in the land which he claimed in the case ? He proceeds again. "We are of course familiar with resulting trusts which arise from circumstances of fraud and which in a proper case will be recognised by the Court, but this is not a case of that kind. The rule of Mohammedan law stated in the text books and on the judicial decision, to the effect that *kaikuli* may be re-claimed from the husband is not of any assistance in the present case. Kaikuli, as we know, generally consists of money. The very definition of the term given in Vanderstraaten (at page 162) describes it as a sum of money and I believe that in the *kadutams* or marriage agreements in vogue among the local Mohammedans the amount is expressed in the denomination peculiar to them as so many 'kalanjees of gold.' When *kaikuli* is in the shape of money, the matter of reclaiming it from the husband involves no legal difficulty. But when it assumes the form of immovable property conveyed to the husband on a duly executed notarial instrument,

the law appears to me to step in and present a different aspect. He later refers to the case of Packeer Bava v. Hussen Lebbe 4 A. C. R. 61, which he says "is a still stronger case because there the lands were given 'in dower' on the occasion of the marriage itself. The Court said that the word 'dowry' was not conclusive as to the character of the gift, and Hutchinson C. J. observed 'it is styled' 'a dowry deed' but 'dowry' is not always among Mohammedans any more than among Christians, given either to the wife alone or to the husband alone or to them jointly. There was no law to prevent the donor from making provision in a dowry deed for the husband and children as well as for the wife.'" After this quotation from the case at 4 A. C. R. 61, Sampayo J. proceeds. "These remarks apply with great force to the present case, for notwithstanding the use of the words 'kaikuli' and 'dowry' in the deed under consideration it is very plain that donor intended to make and did in fact make provision for the husband as well as for the wife. The question will always be one of construction of a particular deed, and I should like to add that, in view of the Ordinance 7 of 1840, which would prevent a person from claiming the whole land where the deed in fact gives him only a share and from claiming anything where nothing is given to him, the rule of construction should be stringent and the supposed intention of the parties should not be made to over-ride the ordinary effect of the deed."

Two of the other cases cited to us may be mentioned, firstly, Pathumma v. Cassim, 21 N. L. R. 221. This was again the judgment of de Sampayo J., where the plaintiff wife sued the defendant husband for the sum of Rs. 150/- as *maggar* and for a sum of Rs. 150/- given by her parents to the defendant husband for *kaikuli*. The learned Judge says "Dowry or or Kaikuli is held in trust by the husband for the wife and cannot be withheld on the ground that it has been spent for the sustenance of the marriage." It may be that the phrase "dowry or kaikuli" is lacking in precision in that the two terms or not synonymous, kaikuli being rather a species of the genus dowry with legal incidents peculiar to itself, but the passage quoted, if applied to *kaikuli*, is in accordance with the earlier authorities. Another case cited was Pathumma v. Idroos, 31 N. L. R. 230, where my brother Dalton refers to the case in 21 N. L. R. 221 and to the possible confusion in the words used in that judgment, and then proceeds "it is clear that *maggar* is a payment by the husband to the wife on the marriage, which he calls dowry money and which remains in the husband's hands, while the *kaikuli*, which he calls dower, is a payment by the parents of the bride to the husband." This, he says is held in trust by the husband for the wife, both *maggar* and *kaikuli* being recoverable by the wife in the eventualities set out.

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The gist of these cases seems to be this. Kaikuli is a sum of money given by the parents of the bride to the husband or intended husband, which the husband possesses and owns but which he has to pay over to the wife, if she demands it, or to her heirs, if she is dead. He is, if he wish to put it so, a trustee of the *kaikuli* for his wife or for her heirs.

Now it is to be noticed that *kaikuli* seems to mean money and not anything else. The original way of expressing it seems to have been to give as and for kaikuli so many 'kalanjies of gold,' some obsolete currency but clearly a payment of money. I do not think any case was cited to us which showed that if land was given to the bridegroom as representing *kaikuli*, that land could be followed into the hands of the third party if the husband alienated it. But it will be objected, decided cases have established that the husband holding this *kaikuli* is trustee for his wife or her heirs, and that in the present case the mortgagee and any purchaser on a mortgage decree, had full knowledge of the fact that the property mortgaged or purchased was a *kaikuli* property and therefore subject to a trust. The mortgagee or purchaser would take then with full knowledge of the trust and could not in conscience be allowed to hold it as against the wife or her heirs *cestique trust.*

This then brings us to the question as to whether the deeds in these cases or either of them do constitute a trust. In case S. C. No. 320/33—S. C. Puttalam No. 4432, the deed P1 recites an intending marriage and the intention to give "the *kaikuli* prior to marriage, according to our Mohammedan religion, payable to the bridegroom agreed upon by me at Rs. 1000/-" ; the recital seems clear enough. The deed goes on "As and for a transfer of this sum of Rs. 1000/- I do hereby grant, sell, set over and deliver the property appearing below unto the said (bridegroom) and to his heirs, attorneys, and assigns", and the deed then describes the property referred to and adds "that the said property and all things belonging thereto together with my right, title and interest in respect of the same, the bridegroom and his heirs, attorneys and assigns shall from date hereof possess and enjoy for ever"; a species of repetition of the habendum in rather fuller language but agreeing entirely with the first and earlier habendum. This is the operative part and again it seems perfectly clear. It is a transfer complete and unqualified of the full dominium of the property described later in the deed. If the recitals show an intention to create a trust, (let that be conceded). and the operative part is a clear and unqualified transfer of the dominium, and it can hardly be disputed that it is, then it is necessary to apply the well understood rules on this point: per Lord Esher, M. R. in ex parte Dawes 17 Q. B. D at 286, "Now there are three rules applicable to the construction of such a question. If the recitals are clear and the operative part is ambiguous the recitals govern the construction. If the

recitals are ambiguous and the operative part is clear the operative part must prevail. If both the recitals and the operative part are clear but they are inconsistent with each other, the operative part is to be preferred." Now conceding that the recitals do clearly show the intention to create a trust, then since the operative part equally clearly confers an unqualified dominium they are in the words of the judgment just cited, inconsistent with each other and the operative part must prevail.

In the other case, S. C. No. 22/34—D. C. Puttalam No. 4468, the deed P1 therein contained recitals of an agreement to give a daughter in marriage and a further agreement "to pay as *kaikuli* to the bridegroom..... ..... By the said marriage, according to the rights of our Mohammedan religion, the sum of Rs. 2750",—again the recital is clear. Then follows the operative part, "For this sum of Rs, 2750/- we do hereby set over and assign as transfer the undermentioned property unto the said bridegroom his heirs, executors, administrators and assigns", and, as in the other deed, so this one proceeds, after describing the property to make a species of second habendum as follows "We do hereby make known that the said bridegroom his heirs, executors, administrators and assigns, from the time of the said marriage possess the aforesaid property and all things belonging, connected, used or enjoyed thereto, together with all our right, title and interest therein". The two habendums, if one can call them so, agree entirely, though, as in the former deed, perhaps the second habendum may be considered as emphasising the rights which the bridegroom took under the deed.

I doubt it can be said that in either of these deeds the operative part is in the least degree ambiguous, and if that is so, the operative part must prevail, since in each it is inconsistent with the recital. In each of the two cases, then, the bridegroom took an unqualified dominium in the inmovable property conveyed, and the persons who dealt with him for that property—mortgagee or purchaser under the mortgage decree—did so unaffected by any trust.

Suppose, however, it be argued that in each of these deeds the operative part is not unambiguous, since each deed after reciting the intention to give or pay a sum of money as *kaikuli*, goes on to say, that in S. C. No. 320/33, "as and after for a transfer of this sum of Rs. 1000/- I do hereby grant" and that in S. C. 22/34, for this sum of Rs. 2750/- "we do hereby set over and assign", and that each deed by the phrases "for a transfer of this sum", "for this sum", incorporates into its operative part the notion of *kaikuli*—stamping land granted the character of *kaikuli* if one may so put it. I would answer that I doubt you can read this into the words "for this sum" any such meaning so as to make the operative part ambiguous. Each deed promises the bridegroom a sum of money as *kaikuli*, which sum of money if given in money would (it may be conceded) be impressed with

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a trust, and then each deed goes on to give the bridegroom not a sum of money but a piece of land in the fullest possible *dominium*; the grant of full dominium in the operative part contradicts any notion of trust that there may be in the recital. In effect, each deed seems to say, we promise a sum of money under a trust (*kaikuli*). But we actually give a piece of land out and out unfettered by a trust. The words "As and for a transfer of this sum", "For this sum" are best interpreted as in the nature of a copula, connecting words linking grammatically the recital which has gone before to the operative part that follows; I cannot see that they qualify that operative part so as to make it ambiguous. If those words are simply as I read them to be, a grammatical connection, then they do not qualify or render ambiguous the operative part, which, in each deed says in as plain language as can be wished, that the donee is to have full dominium of the land, and as if that were not enough, proceed in each deed to repeat that grant in what I have called a species of second habendum.

For the appellants it was pressed upon us that 'where portions of the deed are inconsistent, we ought to give effect to that part which carries out the intention of the parties'—and argument which seems to beg the whole question. Certain cases were however cited to us. One of these was *Walker* v. *Giles* 6 C. B. 662; 136 E. R. 1407. The facts there were that certain share-holders in the Building Society had paid up a portion of the calls on their shares and as security for the balance conveyed certain lands of theirs to trustees, upon trust to permit the share holders so conveying to receive the rents until default in payment of their contributions, and with power to the trustees to appoint a collector of the rents if the shareholders did make default in their contributions, also a power of sale in that event. But the deed also went on to set out an agreement by which the share holder agreed to become tenants from the trustees of the lands conveyed under a named yearly rental. In effect, the deed contained two operative clauses at variance with each other, and the Court before which it came for interpretation, refused to give effect to the second operative part, the agreement to become tenants of the trustees, as inconsistent with the general scope of the deed—really, as being inconsistent with the earlier operative part. *Walker* v. *Giles* does not seem to me to support the argument put to us. Another case cited to us was *Vasonji Marobji* v. *Chanda Bibi* 37 Alahabad, 369, in which the Privy Council laid stress on the necessity of "putting a liberal construction upon deeds executed by natives of India." In that case, the recitals in the deed were as clear as possible to the effect that there were debts and that the only way to discharge them was for the widow to sell a portion of the property of her deceased husband. The operative part, it was argued, only conveyed the widow's life interest and not the dominium but the Privy Council held—see 379—that there were passages in the operative

part which could be construed as referring to a conveyance of the full dominium and not of the widow's life interest merely. As interpreted by the Privy Council the deed was one where the recitals prevailed because they were clear while the operative part was not clear. I do not think this case helps the appellants.

It will be remembered that in the second of the two cases S. C. No. 22/34—D. C. Puttalam No. 4468 expert evidence was taken to the effect that according to the local custom of Puttalam and apparently of the neighbourhood also *kaikuli* is looked upon as the natural property of the husband, and the wife has no claim thereto. Only one witness depose to this. It is perfectly true he was not cross-examined for the plaintiff but if a decision was to be based on his evidence it might have been as well that the Court asked him questions and also that the Court should have insisted on further evidence being called. It is not necessary, as it seems to me, for the purpose of the appeal in S. C. No. 22/34, to decide on the effect of this evidence. I think the appeal in which the evidence was given, as also the other one, can be determined on the other grounds, namely those given above. For these reasons I am of opinion that these appeals must be dismissed with costs.

DALTON, S. P. J.
I agree.

POYSER, J.
I agree.

KOCH, J.
I agree.

Present: ABRAHAMS, C. J. & FERNANDO, A. J.

RASALINGAM *vs.* BASTIAMPILLAI and ANOTHER.

Argued on 3rd & 4th September 1936.
Decided on 9th September 1936.

Promissory Note—Undertaking to marry—Illegal consideration.

The plaintiff-appellant sued the defendants on a promissory note made out in Tamil of which the following is a translation.

Rs. 1000/-
This 10th day of Sept: 1933.

I, the undersigned, R. M. Vasthiampillai have granted a promissory note and borrowed and received from Pethurupillai Thegopillai of Karampan, who was and is an officer in the G. P. O, Colombo and now at Karampan on leave, Rs. 1000/-. I do hereby promise to pay on demand to him or his order the said sum of Rupees one thousand together with interest thereon at the rate of 12 per cent. per annum. I have received the amount in full.

Sgd. R. M. VASTHIAMPILLAI.

Witnesses.
1. (Sgd.) B. Saverimuttu.
2. (Sgd.) Sana Vastiampillai.

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Rasalingam vs. Bastiampillai and another

This note was endorsed by the 2nd defendant respondent to the plaintiff in satisfaction of a debt of Rs. 1000/- due to the latter from the former. When he sued on it, objection was taken that as a matter of law the action was not maintainable, in view of the circumstances in which the note was made. Shortly they are as follows:—A proposal of marriage was made between the 1st defendant and one Saveriachchy daughter of the 2nd defendant. On the day before the day fixed for the exchange of rings it was agreed between the parties that the 1st defendant should make a promissory note in favour of the 2nd defendant and that the latter and his wife Anapillai should make a promissory note in favour of the 1st defendant The condition being that both promissory notes should be left in the hands of a common friend, one Vastiampillai, who, if any party backed out of the agreement of marriage, was to hand over to the other the note made by the defaulting party. An agreement regarding dowry was also drawn up and signed on the day the rings were formally exchanged. The 1st defendant backed out of the arrangement after the exchange of rings on the ground the girl was not what she was represented to be to him and thereupon the promissory note made by him was handed by Thambipillai to the 2nd defendant, who, as stated above, endorsed it to the plaintiff.

Held: That the note was for illegal consideration, and was not, therefore, enforceable.

PER ABRAHAMS, C. J.

".....if a note is given partly on good and partly on illegal consideration, the good consideration cannot prevail over the other....."

H. V. Perera with *Chitty* for 1st defendant-appellant.

Nadarajah for plaintiff respondent.

ABRAHAMS, C. J.

The appellant in this case agreed with the 2nd defendant-respondent that he would marry the latter's daughter. The 2nd defendant-respondant at the same time agreed that he would give his daughter in marriage to the appellant. For the purpose of securing the due fulfilment of this bargain, each party made out a promissory note agreeing to pay to the other a sum of Rs. 1000/- alleging that each had received this amount in full. Both these notes were deposited with a third party on the understanding that the note of the party breaking his undertaking would be handed over to the other party, who will receive back his own note. The appellant subsequently met the lady, and they exchanged rings presumably to symbolize their engagement. It is not denied by the appellant that he did promise the lady that he would marry her but shortly after their betrothal he refused to carry out his promise alleging that he did not find her sufficiently attractive.

The appellant's promissory note was then handed over to the 2nd defendant-respondent, who endorsed it without consideration to the plaintiff-respondent who sued the appellant.

It was argued at the trial that the action could not be maintained as the note was given in the first instance for an illegal consideration, namely the promise by the father of the girl to give his daughter in marriage to the maker of the note, and the case *de Silva* v. *Juan Appu*, 29 N. L. R. 418, was cited in support of this argument. The learned Judge, hower held that that case did not apply to the facts of this case which appeared to him to resemble closely the facts in *Fernando* v. *Fernando*, 4 N. L. R. 285, and he gave judgment for the plaintiff-respondent.

I have no hesitation in agreeing with the submission that this note was given for an illegal consideration. The law relating to Bills of Exchange in this country is identical with that which obtains in England and in English law this consideration will certainly be held to be illegal. Further the case falls within the reasons for the decision in *de Silva* v. *Juan Appu* and does not seem to us to have any resemblance to *Fernando* v. *Fernando*, beyond the fact that there was a marriage contract and that the father of the lady was a party to it. In that case the lady herself sued on the ground that the father had entered into the contract on her behalf and that she had adopted it. There is not a wisp of evidence in this case to show that the 2nd defendant-respondent was acting on behalf of his daughter or that the daughter in becoming engaged to the appellant was adopting what the father had arranged.

It is, however, argued for the plaintiff-respondent that even if an agreement on the part of the father to give his daughter in marriage is illegal (and Counsel did not appear to dispute that proposition), nevertheless, it does not follow that the note was given for an illegal consideration because at the time that it was actually made out it was inchoate, and did not in law become a promissory note until it was handed over to the person for whom it was intended. The consideration for that note, it is argued was a consideration that existed at the time that the note was handed over and this consideration was in point of fact damages due to the lady for breach of a promise to marry her. It seems to me that the facts do not support this hypothesis, since even assuming that the lady had a claim in damages, and I am certainly not going to give an opinion on that, the note was not given to discharge any claim for damages which she might have, because there was no agreement with her that if the appellant broke his promise to marry he would pay Rs. 1000/- or any sum at all by way of damages. It is then argued that in receiving the note as he did, the father was a trustee for his daughter and therefore had a right to do what he liked with the note in her interest. That argument adds nothing to the argument with which I have just dealt. There is not the slightest evidence that the lady knew anything whatever of the existence of this promissory note, and I would add that if the submission of the plaintiff respondent were accepted, it would mean one of two things, namely that the lady, whether she liked it or not, would have to be content with Rs. 1000/- damages, assuming that she desired to bring, and could legally bring, an action for breach of promise of marriage, or that the appellant having paid the amount of the promissory note would also be liable to pay damages to the lady.

Finally it is said that as the father promised to give a dowry of Rs. 5000/- with his daughter, that is a legal consideration to support the validity of the appellant's promissory note. There was an agreement to give a

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dowry appears to have been admitted at the trial by the appellant, but what were the exact conditions of that undertaking was not ascertained and we cannot go into it in default of any further evidence. But even if we were told that the promise to give a dowry was clearly and categorically proved, it would not act as a sort of antiseptic to what we have held to be an illegal consideration for if a note is given partly on good and partly on illegal consideration, the good consideration cannot prevail over the other, and it seems to me that in this case the foundation of the appellant's promise was the promise of the father to give his daughter in marriage and that the dowry that was promised was an additional inducement to the appellant to marry the lady.

I would allow this appeal with costs in both Courts.

FERNANDO, A. J.

I agree.

Present: DALTON, S. P. J.

JOHN *vs.* PIRA and others.

S. C. No. 344—P. C. Kandy No. 50495
Argued on 20th July 1936.
Decided on 30th July 1936.

Autre foit Acquit—Is acquittal on a charge under Section 5 of Ordinance No. 13 of 1907 for cruelty to an animal a bar to a prosecution on the same facts under Section 412 of the Penal Code for killing the same animal.

Where an accused was charged under Section 5 of Ordinance No. 13 of 1907 for cruelly stoning to death a bull and was later charged under Section 412 of the Penal Code for killing the same bull.

Held: That the previous acquittal was no bar to the second prosecution.

L. A. Rajapakse for complainant-appellant.

DALTON, S. P. J.

The three accused persons were charged by the Inspector of the S. P. C. A., Kandy on December 13th 1936, with cruelly stoning to death a black bull, in contravention or Section 5 of Ordinance No. 13 of 1907. On February 7th, 1936, they were acquitted by the Police Magistrate on the ground that the evidence disclosed that the death of the animal was not painful. He stated in his order that the owner of the bull, if he wished, could take further proceedings against the accused on a charge of mischief.

On the same date John, the owner, made a complaint against the accused of killing the bull, which was stated to be worth Rs. 60/- or Rs. 70/-, and he charged them with mischief. The matter came on a subsequent date before the Additional Police Magistrate, when objection was taken on behalf of the accused that the previous proceedings were a bar to this charge at the instance of John the owner, since they had been acquitted on the previous charge on February 7th. The Additional Magistrate after argument upheld this objection and acquitted them.

John now appeals against that acquittal, with the written sanction of the Attorney General.

The first case was launched by the Inspector of the S. P. C. A. for a contravention of a provision of the Prevention of Cruelty to Animals Ordinance, 1907, which is an Ordinance restricted to a particular class of offence. The Additional Magistrate has held that these former proceedings were also sufficient in point of law upon which to base a charge of mischief under Section 412 of the Ceylon Penal Code, applying the provisions of Sections 181 and 182 of the Criminal Procedure Code. Therefore, in view of the provisions of Section 330 (1) of the Criminal Procedure Code, the accused were not liable to be tried again on the same facts.

I regret I am unable to agree with the conclusion come to by the Additional Magistrate. He holds that the provisions of Section 181 of the Criminal Procedure Code apply and that the three accused could have been charged in the earlier proceedings for committing mischief on the evidence adduced in these proceedings. He points out that it would appear from the facts that the "act" complained of in the earlier proceedings was the killing of the bull which "act" was common to a charge both under Section 412 of the Penal Code and under Section 5 of the Prevention of Cruelty to Animals Ordinance. It is not, however, correct to say that the act complained of in the earlier proceeding was the killing of the bull. That fact was proved, but the accused were, nevertheless, acquitted. The act complained of there was the use of unnecessary cruelty. In that event I am unable to see how, in the words of Section 181, any doubt could arise as to whether the facts which could be proved constituted an offence against the provisions of Section 5 of the Prevention of Cruelty to Animals Ordinance or against those of Section 412 of the Penal Code.

It would further appear that if there had been any joinder of charges in the earlier proceedings in respect of these two offences, objection might have been taken to the joinder of these charges by the accused under the provisions of Section 178 of the Criminal Procedure Code. It was held in *Saineris* v. *Amadoris* (Ceylon Weekly Reporter 322) that the exceptions mentioned in the Criminal Procedure Code, (e. g. Section 181) did not apply, and that the joinder of the two charges there was improper.

The appeal must be allowed, and the order of the lower Court upholding objection must be set aside. The proceedings on the second charge will therefore be continued, and after hearing all the evidence put before him the Magistrate will proceed to adjudicate afresh.

Present : FERNANDO, A. J.

PARANGODUN *vs.* RAMAN AND ANOTHER.

S. C. No. 104—C. R. Colombo 17684.
Argued on 10th September, 1936.
Decided on 15th September, 1936.

'The Public Servants' (Liabilities) Ordinance 1899—Public Servants —What constitutes a person a "Public Servant"—Can a public servant plead the Ordinance, even after he has left the service to which he belonged, in answer to an action begun while he was in the service?

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Fernando, A. J.

Parangodun vs. Raman and another

Held: (i) That a person employed in the service of the Colombo Municipal Council on a daily rate of pay paid once a month, and who was entitled to a gratuity and certain privileges as regards sick leave, was a "public servant" within the meaning of the expression in Section 2 of Ordinance No. 2 of 1899.

(ii) That a public servant can, after he has left the service to which he belonged, plead the Ordinance in answer to an action begun, while he was in the service.

J. R. Jayawardene with *Mutukumaru* for plaintiff-appellant.

Mackenzie Pereira for defendant- respondent.

FERNANDO, A. J.

This was an action filed by the plaintiff against the two defendants on a promissory note, executed by them on the 10th March, 1932. In their answers the defendants pleaded that the note was given as security for some money due to a Cheetu Club, and that the amount had been duly paid.

Three issues were framed at the commencement of the trial, but after the first defendant had given evidence, Counsel for the defendants moved to raise the issue, whether the defendants were public servants, within the meaning of Ordinance 2 of 1899. The learned Commissioner of Requests dealt with all the issues, and held that the note was given for money lent to the defendants, that there was no evidence of payment, and that the full amount claimed was due. He then went on to hold that the defendants were public servants within the meaning of the Ordinance, and accordingly dismissed plaintiff's action. The plaintiff appeals from this order.

Counsel for the appellant cited a number of authorities of which I need only refer to *Perera* v. *Perera* 13 N. L. R. 257. The evidence there was, that the second defendant was paid Re. 1/37 per day, that if he was absent without leave he was fined, and that after a length of service he would be entitled to a gratuity. On this evidence, Wood Renton J. held that the second defendant was a public servant within the meaning of this Ordinance. The learned Commissioner in this case held on the evidence before him that the defendants were both in the regular service of the Municipal Council, that they were entitled to certain privileges as regards sick leave, and would receive a gratuity at the end of their period of service. It is also clear from the evidence that they receive their pay monthly, although the pay is calculated on a daily rate of pay. The case, therefore, falls clearly within the authority to which I have referred and the Commissioner's finding that the defendants are public servants, must be upheld.

A further question was raised in appeal which does not appear to have been taken in the court below, namely, whether the second defendant had ceased to be entitled to the protection of the Ordinance as his service terminated in February 1936. The plaint in this action, however, was filed on the 11th of December 1935, and it was held in *Samsadeen* v. *Goonawardene*, 14 Ceylon Law Recorder 1935, that an action against a public servant could not be maintained even in a case where the objection had been taken after judgment, and where the inquiry on the point was actually held after the defendant had ceased to a be public servant. Akbar J. held that the whole proceeding, including the promissory note annexed to the action when instituted, was in contravention of the Ordinance.

Counsel for the appellant attempted to question the finding of fact, but his appeal is only on a question of law, and he is precluded from challenging the findings on fact of the learned Commissioner of Requests. In these circumstances the appeal of the plaintiff must be dismissed with costs.

In the Privy Council.

Present: LORD CHANCELLOR, (VISCOUNT HAILSHAM,) LORD MAUGHAM, SIR SIDNEY ROWLATT.

THE KING *vs.* ATTYGALLE & ANOTHER.

Application for special leave to appeal.

Argued and decided on 26th March 1936.

Evidence Ordinance No. 14 of 1895 Section 106.

This was a case tried before Mr. Justice Akbar at the Midland Circuit and held at Kandy, in April 1935. The accused, three in number, were J. W. S. Attygalle, C. E. Fonseka and A. Perera. An indictment containing the following counts were presented against them.

1. That on or about the 22nd April, 1934 at Dodanwala, Haloluwa Road, Kandy, you did voluntarily cause one Charlotte Mary Maye, then with child, to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said C. M. Maye, and that you have thereby committed an offence punishable under Section 304 of the Ceylon Penal Code.

In the alternative to count (1)

2. That at the time and place aforesaid, you, 1. J.W. S. Attygalle, did voluntarily cause the said C. M. Maye, then with child, to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said C. M. Maye, and that you have thereby committed an offence punishable under Section 304 of the Ceylon Penal Code.

In the alternative to count (1)

3. That at the time and place aforesaid you, 2 C. E. Fonseka and 3. A. Perera, did abet the commission of the offence last aforesaid, which offence was committed in consequence of such abetment, and that you have thereby committed an offence punishable under Section 304 and 102 of the Ceylon Penal Code.

In the alternative to counts (1), (2) & (3).

4. That at the time and place aforesaid, you did voluntarily cause the said C. M. Maye, then with child, to miscarry, such miscarriage not being caused by you in good faith, for the purpose of saving the life of the said C. M. Maye, and that you have thereby committed an offence punishable under Section 303 of the Ceylon Penal Code.

In the alternative to count (4).

5. That at the time and place aforesaid, you, 1 J.W.S. Attygalle did voluntarily cause the said C. M. Maye, then with child, to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said C. M. Maye and that you have thereby committed an offence punishable under Section 303 of the Ceylon Penal Code.

In the alternative to count (4).

6. That at the time and place aforesaid, you, 2. C. E. Fonseka and 3. A. Perera did abet the commission of the offence last aforesaid, which offence was committed in consequence of such abetment; and that you have thereby committed an offence punishable under Sections 303 and 102 of the Ceylon Penal Code.

After trial the 1st accused was convicted on the fifth count and the second accused was convicted on the sixth count, while the 3rd accused was acquitted. The

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first accused was sentenced to simple imprisonment for 18 months and the 2nd to rigorous imprisonment for the same period.

The facts shortly are as follows:—

The 1st accused was a medical practitioner, and the 2nd accused, a person aged 29, an Engineer in the employment of the Public Works Department. About January, 1934, the 2nd accused made the acquaintance of Miss Maye, a nurse. Their friendship became so close that Miss Maye accompanied the 2nd accused on motor drives to rest-houses and it was admitted that the latter had sexual intercourse with the former on one or more of these trips. About February or March 1934, Miss Maye, having reason, to believe she was pregnant to the 2nd accused, informed him of her condition.

The 2nd accused then gave her certain drugs, which if taken internally were popularly believed to bring about a miscarriage. These drugs did not achieve the object in view. He, therefore, arranged with the 1st accused to perform an operation on her. This was done at a house in an unfrequented part of Kandy, where the 1st accused practised his profession. Miss Maye was taken to this house one evening at dusk by the 2nd accused who had arranged that she should come by train to Peradeniya from Colombo. That night, the 1st accused examined her with a view to find whether she was pregnant, and early next morning the 1st accused came with surgical instruments and performed an operation on her. She was carried to the operating table which was in a room of the house by the 2nd accused and put under chloroform by the 1st accused and operated on. A day after the operation she was sent back to Colombo where she became ill and had to enter the General Hospital for treatment. Here, what had happened came to light. At the trial the 1st accused gave evidence. He denied that he performed an operation on Miss Maye, but admitted having examined her under chloroform with a speculum, and that on discovering a three month old pregnancy, desisted from doing anything more.

An application was made to the trial Judge under Section 355(1) of the Criminal Procedure Code to state a case for the decision of the S. C. The grounds of this application were:—

(1) That the trial Judge was wrong in allowing Counsel for the prosecution to cross-examine the 1st accused when he gave evidence in the witness-box on the statement he had previously made to the Assistant Superintendent of Police of the Criminal Investigation Department.

(2) That the trial Judge was wrong in directing the jury under Section 106 of the Evidence Ordinance that the burden shifted on to the accused, without calling their attention to the fact that the prosecution must first prove its case.

This application was refused, and the accused petitioned the Privy Council for special leave to appeal.

At the argument before the Privy Council, Counsel for the appellant argued *inter alia*, that the trial judge completely misdirected the Jury as to the onus of proof by saying, "Now, there is a Section of the Evidence Ordinance which, I think, is really the basis of circumstantial evidence, so far as it occurs in Ceylon—that Section says, when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him." Miss Maye was unconscious and what took place in that room, that three-quarters of an hour that she was under chloroform, is a fact specially within the knowledge of these two accused, who were there. The burden of proving that fact, the law says, is upon him, namely, that no criminal operation took place but, what took place was this and this speculum examination....."During that three-quarters of an hour the only persons who had any special knowledge of what was taking place in the room were the first and second accused. Miss Maye herself was unconscious. Therefore, the burden of proof is upon them".

Held : (i) That it is not the law of Ceylon, that the burden is cast upon an accused person of proving that no crime has been committed,

(ii) That the mere fact, that there has been some mistake of law, does not afford sufficient ground of itself for granting special leave to appeal.

(iii) That even though the jury had been misdirected on the law, there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction.

It has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal; that the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. Lord Sumner in a well-known passage in the case of *Ibrahim v. The King* (1914) A. C. 599, pointed out that "misdirection as such, even irregularity as such, will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future".

"The latter danger, it is hoped, is sufficiently guarded against by the observations which their Lordships have thought it right to make. It has been suggested by Mr. de Silva, that the judgment in the recent case of *Lawrence v The King* (1933) A. C. 699, in some way modified or altered that statement of the law. *Lawrence v The King* is a case in which the actual decision was plainly within the authority of previous cases, because their Lordships held, that sentences had been pronounced which were outside the power of the tribunal which purported to pronounce them. It may be that the precise language of the judgment may have to be considered on a more suitable occasion. It is sufficient to say that the judgment then pronounced did not purport to depart in any way from the well settled principle which have been laid down in previous authorities and cannot be allowed to be construed so as to depart from those principles."

L. M. D. De Silva K. C. with *Stephen Chapman* for appellants.

Kenelin Preedy for the Crown.

This is a case which has given their Lordships, considerable trouble The prosecution was against the first accused for performing an illegal operation, and against the second accused for abetting him in that crime.

At the trial the learned Judge gave a direction to the jury, to which exception has been taken by Mr. de Silva in a very clear and helpful argument, and in which the learned Judge explained to the jury his view as to the burden of proof based upon his construction of Section 106 of Ordinance No. 14 of 1895 in the Ceylon Code. That section enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. With reference to that section the learned Judge told the jury that :—

> "There is a section which is really the basis of circumstantial evidence so far as it occurs in Ceylon; that section says when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. "Miss Maye —that is the person upon whom the operation was alleged to have been performed—was unconscious and what took place in that room, that

three-quarters of an hour that she was under chloroform, is a fact specially within the knowledge of these two accused, who were there. The burden of proving that fact, the law says, is upon him, namely, that no criminal operation took place but what took place was this and this speculum examination."

Their Lordships are of opinion that that direction does not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed. The jury might well have thought from the passage just quoted that that was in fact a burden which the accused person had to discharge.

The summing up goes on to explain the presumption of innocence in favour of accused persons, but it again reiterates that the burden of proving that no criminal operation took place is on the two accused who were there.

If their Lordships thought that the refusal of leave to appeal in this case could be construed as an acceptance of that doctrine they wonld be very slow to reject the petition which has been brought before them, But, in fact the circumstances of the case have been explained to their Lordships, and they are satisfiod that on the facts that were explained here, there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction.

It has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal; that the mere fact that there has been some mistake of law does not afford sufficient ground of itself for granting special leave to appeal. Lord Sumner in a well known passage in the case of *Ibrahim* v. *The King* (1914) A. C. 599, pointed out that "misdirection as such, even irregularity as such, will not suffice. There must be something, which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which in general tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future."

The latter danger, it is hoped, is sufficiently guarded against by the observations which their Lordships have thought it right to make. It has been suggested by Mr. de Silva that the judgment in the recent case of *Lawrence* v. *The King* (1933) A. C. 699, in some way modified or altered that statement of the law. *Lawrence* v. *The King* is a case in which the actual decision was plainly within the authority of previous cases, because their Lordships held that sentences had been pronounced which were outside the power of the tribunal which purported to pronounce them. It may be that the precise language of the judgment may have to be considered on a more suitable occasion. It is sufficient to say that the judgment then pronounced did not purport to depart in any way from the well settled principles which have been laid down in previous authorities and cannot be allowed to be construed so as to depart from those principles.

In all the circumstances of this case their Lordships do not feel justified in humbly advising His Majesty to grant special leave to appeal because they are satisfied that there has been no such substantial injustice, no such deprivation of the substance of fair trial as the cases show to be necessary in order to justify the granting of such leave. At the same time their Lordships want to make it clear that that refusal does not imply an endorsement of some of the language of the summing-up, language which perhaps would not seem quite so unfavourable to the accused if it is taken as a whole and not divorced from the context in which it appears. But as stated in the passage to which attention has been called the statement of the law is incorrect and nothing that has happened on this petition must be understood as affording any approval of its language.

Their Lordships will accordingly humbly advise His Majesty that the petition be refused.

Present : ABRAHAMS C. J. & FERNANDO, A. J.

SAMYNATHAN *vs.* DORAISAMY & ANOTHER.

S. C. No. 74 (1). D. C. Colombo 1951.
Argued on 2nd September, 1936.
Decided on 7th September, 1936.

Bill of Costs — Taxation — Under what class should a Bill of Costs in a proceeding under Section 22 of Ordinance No. 1 of 1895 be taxed.

Held : That a Bill of Costs in a proceeding under Section 22 of Ordinance No. 1 of 1895 should be taxed under the lowest class.

H. V. Perera and *Amerasekere* for substituted petitioner-appellant.

Nadarajah with *Jayawardene* and *A. P. Fernando* for Intervenients-respondents.

FERNANDO, A. J.

These proceedings began in the District Court by an application in the name of the deceased petitioner to add his name to an entry made in the Register of Births concerning the birth of a child. Before the application could be inquired into, the petitioner died, and the appellant applied to have himself substituted in the place of the deceased, and the application was allowed. After a protracted inquiry, the learned District Judge held that the original application was not in fact made by the deceased, and that the proxy purporting to be signed by him, and the affidavit filed with the application were both not signed by the petitioner. He also found that the deceased was in fact the father of the child whose birth had been registered, but as a result of the former finding he dismissed the application and

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ordered the appellant to pay the respondents their costs. The appellant appealed against the order, but his appeal was dismissed with costs because the petition of appeal had not been duly stamped. The appellant then applied to this Court to revise the order made by the District Court that the appellant should pay the cost of the respondents. That question was referred to a Bench of Three Judges, and the application in revision was refused with costs, the court holding that the District Court had power to make such an order for costs in a proceeding under Section 22 of Ordinance 1 of 1895.

After the order in revision, the question of the amount of costs was again argued in the District Court, and the learned District Judge was asked to review the taxation of costs. The taxing officer had taxed the Bill of Costs at Rs. 3874/08, and the District Judge after considering the items taxed the bill at Rs. 3042/08. The present appeal is from this order of the District Judge.

In making the order as to costs at the conclusion of the inquiry the learned District Judge merely ordered the appellant to pay the costs of the respondents, but did not specify how those costs were to be taxed, and on the 25th of September, 1925, the respondents' Proctor moved that the secretary be directed to tax the bill according to Class V, the highest class in schedule III. On this *ex parte* application, the District Judge's order was in these terms. "The taxation will be as in a civil proceeding in Class III", no reasons were given for fixing Class III as the appropriate class, and when the bill came up for revision, the District Judge merely states "I do not think the taxing officer has erred in taxing the bill as in a civil proceeding in Class III which is the intermediate among various actions in the District Court". Here again there is no clear reason why the bill has been taxed in this class, or why the District Judge thought the class was appropriate.

In the course of his order, the learned District Judge states that the inquiry was very complicated, and occupied a great deal of time involving the necessity of calling expert evidence with regard to the genuineness of certain documents, but it is also clear from those proceedings that the enquiry was one of very little value to either of the parties concerned. It is difficult to see the purpose for which the deceased himself might have initiated that inquiry, but as far as the substituted petitioner is concerned the enquiry seems to be one of no value whatsoever. It is equally clear that the respondents who opposed the application had no interest in the matter either. It was stated in the course of the argument that the deceased was entitled to some property under a will subject to the condition, that the property on his death would pass to his child or children. It may be that the appellant thought it possible for him to argue that the child, the entry of whose birth was in question, might be able to claim a right to succeed although he was illegitimate, and presumably the respondents would be able to contend that being illegitimate, the child was not entitled to succeed. The entry itself

would only be '*Prima facie*' evidence of the birth of the child, but not of any other entry in the register, and it would be open to the parties to prove either that he was in fact the child of the deceased petitioner, or that he was not, nor is it clear that the appellant or the respondents had any interests in the matter of this entry. In these circumstances there can be little doubt that the parties launched on this protracted inquiry without considering how such an inquiry would cause any benefit or detriment to either party.

Now the District Judge allowed the bill to be taxed in class III. which refers to actions where the value of the subject matter is between Rs. 750/- and Rs. 3000/-. On the facts of this case the value of the subject matter would appear to be absolutely nil, and I think this circumstance as well as the useless nature of the inquiry ought also have been considered in fixing the amount of the costs that should be paid by one party to the other. Schedule III of the Civil Procedure Code was probably not intended to, and in fact does not enable the party to whom costs have been awarded to recover all the expenses which he has in fact incurred, and it is difficult to see how the expenses incurred in an unnecessary inquiry like this can be said to be necessarily incurred by the party. The learned District Judge however, thought the fairest order was that the bill of costs should be taxed as in an action, and his order that it should be taxed in class III was clearly an arbitrary order. I would, therefore, order the bill of costs to be taxed as in a case falling under class I on the basis that the value of the subject matter was practically nil, and therefore clearly under Rs. 200/-.

Counsel for the appellant however, argued that no costs were payable at all, and as he has failed in this contention, I would order that there be no costs of this appeal.

ABRAHAMS. C. J.

I agree.

Present: FERNANDO, A. J.

ALICE NONA AND ANOTHER *vs.* WICKREMESINGHE.

S. C. No. 425.

Argued : 8th September, 1936.

Decided : 18th September, 1936.

In the matter of an appeal under Section 48 of the Workmen's Compensation Ordinance 19 of 1934.

Workmen's Compensation Ordinance No. 19 of 1934—Accident arising out of and in the course of employment—Computation of wages—Can "batta" paid at intervals be included.

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Fernando, A. J.

Alice Nona and another *vs.* Wickramasinghe

The workman in question was employed to drive an omnibus belonging to his employer. He was paid a monthly salary and -/50 cts. "batta" every third day in the month for work done at night. In the performance of his duties as driver of the omnibus entrusted to him, he took it to a Petrol Service Station for the purpose of obtaining petrol. He assisted in filling the tank by holding the hose that conveyed the petrol from the pump to the petrol tank of the omnibus. Owing to the negligence of a passenger in the bus who lighted a match while the petrol was being pumped, contrary to the directions prescribed by the Petrol Service Station owners, there was an explosion in which the workman was fatally injured. The negligent passenger was prosecuted for criminal negligence, but was acquitted.

Held: (i) That the injuries sustained by the workman were caused by "accident arising out of and in the course of his employment."

(ii) That the "batta" paid to the workman, being part of the wages and not a travelling allowance, can be taken into account in the computation of his wages for the purpose of calculating the compensation payable by the employer.

Gratiaen for the appellant.

A. L. Jayasuriya with *Senaratne* for respondents.

FERNANDO, A. J.

The Commissioner appointed under the Ordinance ordered the appellant to pay to the respondents a sum of Rs. 1350/- as compensation due to them on the ground that the death of one Jagodege William, had been caused by an accident arising out of and in the course of his employment.

Counsel for the appellant argued first that the accident did not arise out of his employment but the authorities cited by him show that before he can succeed on this point, it must be proved that William, the employee in question, was acting in breach of a statutory regulation and thus was himself responsible for the accident. Counsel has referred me to condition 8 of the conditions as to structure and equipment of minor Petroleum installations which requires that the licensee shall take all due precautions for preventing unauthorised persons from having access to any dangerous petroleum, or to any receptacle which contains or has recently contained dangerous petroleum. This condition has to be performed by the licensee, the seller of the petroleum, but casts no duty on the purchser, and I am not satisfied that the hose with which petroleum is pumped into a car is a receptacle within the meaning of this condition. It is a matter of common knowledge that the hose is in fact handled by almost every purchaser of petroleum, and it is difficult to believe that if such handling is a breach of the condition, it would be so openly allowed. In these circumstances I must hold that the finding of the Commissioner that the accident arose out of and in the course of his employment was correct.

Counsel also argued that the amount of compensation awarded was excessive, in as much as the Commissioner wrongly included in the wages earned by the deceased an allowance which had been paid to him as "batta." The evidence, however, does not show that this was a travelling allowance. The appellant in the course of his evidence stated, " when a driver works at night I pay him batta -/50 cents. This is a ' Santhosam ' not an agreed allowance." He also produced his book of daily expenditure showing amounts of 'batta' paid to the deceased. In computing the wages earned by the deceased, the Commissioner added to his monthly salary, " the batta earned by him which is at the rate of -/50 cents for every third day in the month." The books are not before me, but I understand the Commissioner to mean that he was satisfied on the evidence and from the books, that a sum of -/50 cents had been paid to the deceased every third day during the months that he was employed. There is no appeal to this Court from the finding of the Commissioner except on a question of law, (see section 48) (3). On the material before me, I am not prepared to say that the Commissioner was wrong when he found that in fact the deceased had been paid -/50 cents every third day during the months he was employed. If he had been paid this sum regularly there is nothing to show that, that sum was intended to cover travelling that is to say, the cost of travelling. On the other hand the nature of the employment, driving a 'bus—shows that the deceased when he travelled did so on his employer's Omnibus, and could not have incurred any expenditure in so travelling. Nor is there any evidence to show that the allowance was intended to cover the cost of any meals which the deceased had to find during such travelling. I would, therefore, hold that the allowance in question was part of the wages received by the deceased as over-time, that is to say because on every third day he worked more than the ordinary number of hours.

I hold against the appellant on both these questions and accordingly dismiss the appeal with costs.

Present : V. M. FERNANDO A. J.

INSPECTOR OF POLICE (Gampaha) *vs.* EDMUND

S. C. No. 526.—P. C. Gampaha No. 3982.
Argued on: 22nd September, 1936.
Decided on: 22 September, 1936.

Criminal Procedure Code Sections 182 and 183—Can a person charged with an offence under Section 57 (2) of the Motor Car Ordinance No. 20 of 1927 be convicted of an offence under Section 57 (3).

Held: That a person charged with an offence under Section 57 (2) of the Motor Car Ordinance No. 20 of 1927 can, where the facts justify such a finding, be convicted of an offence under Section 57 (3).

De Jong for the accused-appellant.

FERNANDO, A. J.

The facts in this case present no difficulty. I see no reason to disagree with the finding of the learned Police Magistrate who accepted the evidence of Mr. Kalpage and his driver. Their evidence establishes the fact that the accused reversed his bus in a crowded road without giving any signal or warning beforehand.

Counsel for the appellant argued that the learned Magistrate was wrong in amending the charge against the accused from one under section 57 (2) of the Ordinance to a charge under section 57 (3). Section 57 (2) refers to a person driving a motor car recklessly or in a dangerous manner or at a dangerous speed, and section 57 (3) refers to a person driving a motor car negligently. The accused was charged under section 57 (2), but in his judgment the learned Magistrate convicted him of an offence under section 57 (3).

Section 182 of the Criminal Procedure Code enables a person to be convicted in a case where he is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of section 181. Section 183 provides that where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it.

It seems to me that in this case the accused was charged with reckless or dangerous driving which is a major offence within the meaning of section 183, inasmuch as other particulars would be necessary to constitute that offence beyond mere negligence, whereas, negligence alone would be sufficient to constitute an offence under section 57 (3). On the evidence recorded by the Magistrate it is clear to my mind, that the accused did commit an offence under section 57 (3) of the Ordinance. I, therefore, affirm the conviction and sentence, and dismiss the appeal.

Privy Council Appeal No. 55 of 1935.

Present: LORD MAUGHAM, LORD ROCHE AND SIR GEORGE RANKIN.

STEPHEN SENEVIRATNE *vs.* THE KING.

JUDGMENT DELIVERED ON 29TH JULY, 1936.

Conviction for murder — Misdirection — Non-direction—Evidence Ordinance, Section 106—Hearsay evidence—Duty of Prosecution—Criminal Procedure Code Section 238—Inspection of scene of crime by Court—Undue pressure on jury.

The accused was tried before Mr. Justice Akbar and an English-speaking jury. The trial began on 14th May 1934 and lasted 21 days. He was found guilty of the offence of murder by a verdict of 5 to 2 (one of the five in the majority recommending him to mercy) and sentenced to death. The sentence was commuted by the Governor to one of imprisonment for life.

M. W. H. de Silva Acting Deputy Solicitor-General with him H. L. Wendt, Crown Counsel prosecuted.

R. L. Pereira, K. C., with him Stanley Obeysekera, K. C. defended.

Held: (i) That there were no grounds on the evidence taken as a whole upon which any tribunal could, properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty, and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not in law or justice, permissible grounds on which to base a verdict.

(ii) That Section 157 of the Evidence Ordinance does not permit of the admission in evidence of statements made by a witness without previous cross-examination of the person as to such statements.

(iii) That hearsay evidence is not admissible as corroboration under Section 157 of the Evidence Ordinance.

(iv) That Section 106 of the Evidence Ordinance does not impose a general onus on an accused person to explain everything that might be within his knowledge.

PER LORD ROCHE,

(*a*) "As to the matter of hearsay evidence: it has been already observed that witnesses who gave evidence favourable to the appellant were extensively cross-examined as to other and previous oral statements. Such procedure is with the leave of the judge permissible under section 154 and 155 of the Ordinance (Law of Evidence) 14 of 1895 and it is to be presumed that such leave was obtained. In other cases, as for example in the case of the maid Alpina, whose good faith does not seem to have been questioned by the Crown, evidence of what she had said was given apparently without previous cross-examination of the witness as to such statements. This is both undesirable and not permitted by the above sections and it could not be and was not suggested that section 157 of the same Ordinance applied to make the further hearsay evidence admissible as corroboration."

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(*b*) "Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. Thus, in the present case, the maid Alpina and Dr. S. C. Paul were indispensable Crown witnesses. As to some of the other witnesses, there might have been both less confusion and a fairer trial if, though their names were on the indictment, they had been put into the box to be questioned as to other than formal matters by the defending counsel."

H. I. P. Hallet, K. C. for petitioner.

D. B. Somerville, K.C. Attorney General with *L. M. D. de Silva, K.C.* for the respondent.

LORD ROCHE.

This is an appeal by special leave from a verdict and sentence given and passed in the Supreme Court of the Island of Ceylon on 14th June, 1934. The appellant was charged with having murdered his wife on the 15th October, 1933, and after a trial lasting 21 days he was found guilty by a majority of five to two of the jury, one of the five in the majority recommending him to mercy. Sentence of death was passed but this sentence was commuted to one of rigorous imprisonment for life.

The main ground of the appeal is that on the evidence a verdict of guilty could not properly or safely be found and that the jury ought to have been so directed and that in these circumstances such grave injustice had been done as to require the interference of His Majesty. The appellant also complained of certain specific matters in the conduct of the trial as causing or contributing to the miscarriage of justice. Such matters were: that a very large amount of hearsay evidence was admitted and was used as evidence of fact: that the learned Judge misconstrued section 106 of the Ceylon Ordinance No. 14 of 1895 relating to the law of evidence and in consequence gave an erroneous direction to the jury as to the onus of proof: that the learned Judge used language to the jury in his charge which was calculated to put undue pressure upon them and to prejudice the accused. Complaint was also made, though this was not one of the specific reasons assigned for the allowance of the appeal, that after the evidence was concluded the hearing was reopened and further heard at the appellant's house, where the death of his wife occurred, in a manner that was entirely irregular and was not permitted by law.

There is no uncertainty as to the principle upon which this Board acts in the matter of the review of a criminal case. The statement of the principle most useful for the purpose of this case appears in the judgment delivered by Lord Sumner in the case of *Ibrahim* v. *The King-Emperor* (1914) A. C. 599—at p. 614, and is as follows :—

> "Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists : *Riel* v. *Reg.* (*1885*, *10 App. Cas. 675*); nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done' : *Dillet's Case* (*1887*, *12 App. Cas. 459*). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing : *Riel's Case* , *Ex parte Deeming* ([*1892*] *A. C. 422*). The Board cannot give special leave to appeal where the grounds suggested could not sustain the appeal itself ; and, consequently, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* ([*1893*] *A. C. 346*). There must be something which, in the particular case, deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg.* v. *Bertrand* (*1867 L. R.* 1 *P. C. 520*)."

Whether mischiefs within the scope of the above description have occurred in the present case is a question which depends for its solution upon an examination of the facts and evidence in the case and upon the course of the trial. The facts and their Lordships' observations thereon are as follows :—

The appellant is a Cambridge graduate who was called to the bar in 1919. His wife in 1933 was about 38 years old. She was a cousin of the appellant and they had been married in 1923. They had one child, a boy aged 9, called Terence, another child having died soon after birth. The deceased, though short in stature (5 feet 3 inches) is described as huge. For some years husband and wife had not got on well together, constant quarrels arising out of various questions, including questions as to property, whether they should live in a rented house, and minor matters. A number of letters found after the death of the deceased amongst her belongings and purporting to be written to the appellant in 1932 show that the deceased was making accusations against the appellant in respect of a discharged servant girl, and of marital neglect and indicate that the deceased had become somewhat abnormally unhappy and was putting into writing expressions of unhappiness and of hope that she would not live long, with more than one threat of ending her own life. When she was angry with her husband she was in the habit of shutting herself up in her room and at times of taking no food. On the other hand it was in evidence that the appellant, though not infrequently quarrelling with his wife and not attentive to her wishes, had never been seen by anyone to threaten his wife with any form of physical

violence. Further, there was a substantial body of oral evidence to the effect that the deceased had been threatening suicide, and it is stated by two witnesses that some six weeks before her death she had discussed suicide by chloroform with a relation, Mr. Charles Seneviratne.

On the day before her death a Mr. and Mrs. de Saram had come to dinner, and the deceased was said to have become angry when she was told that the appellant had taken the boy Terence with him to the house of a Mrs. Francis Seneviratne. According to the statement of the appellant before the police magistrate, he had a conversation with his wife after the visitors had left in the course of which she said that he would repent his action.

The arrangements at Duff House, the appellant's residence, relevant to the night of the 14th-15th October, 1933, are not in dispute. The house was one storied and in it the deceased slept in a room together with her personal servant maid Alpina, and in a room, which opened off this room, Terence slept and his nurse Mabel Joseph. A bath-room and lavatory opened off each of these two rooms. Both in front and behind and also on the east side of the bungalow were verandahs and a number of poultry runs surrounded the house on all sides. The deceased's bed lay lengthwise along a wall and in her room were a couple of teapoys, an almirah, an iron safe and a wash stand. The evidence is that these rooms made a self-contained suite and that at night the doors giving access to these two rooms from other parts of the house were locked so that no one could have access thereto. The appellant had his bedroom apart in a suite of rooms at the back of the bungalow on the other side, and he would proceed most directly by the back verandah if he was minded to go from his own rooms to those of his wife. There was the evidence of a male servant called Banda to the effect that when on Sunday the 15th October he got up at 6.0 a. m. he found the doors closed as he had left them on the previous night. The evidence of Alpina as to what happened during the night was that the deceased wakened her twice, once to close the shutters because it was raining and another time when the deceased was seen to be drinking some water.

As to Sunday, the 15th October, Alpina's evidence was that she woke at 6.0 a. m., saw the deceased sleeping, went to the bathroom, and when she came back, found that the lady had turned over on her side, with her head on one pillow and another pillow at her side near to the wall ; that the lady was awake but neither of them spoke ; that Alpina, leaving the door ajar and having dressed, went to do some cooking in a kitchen at the back of the house towards the western side ; that 15 or 20 minutes from the time when she had got up, Seelas, a servant boy of 15, came to her and told her that her mistress wanted her. The chauffeur Perera came

into the kitchen at the same time and said the same. Alpina said she then washed her hands and went without hurry to her mistress's room, followed by Seelas, who was going to his pantry ; that she then saw her lady lying across the bed, that is to say not in a recumbent or sleeping position but out of bed in the sense that she was lying across it with her head towards the wall and legs and feet hanging over the outer edge of the bed ; that as she entered the room, she saw the appellant coming in from the child's nursery ; that she noticed a smell which she describes as poisonous and oily ; that the accused went to the bed, commenced fanning his wife with a book and sent her (Alpina) for brandy and afterwards on repeated errands for hot bottles, which he applied to his wife ; also that he attempted artificial respiration. She also said that there was a handkerchief on the bed, about a foot square in size, near to the lady's right hand. This handkerchief she said she put with some soiled linen on to the dressing-table after the doctor had come and she new her mistress was dead. It appears to have gone to the laundry and nothing further is known about it. A small green smelling salts bottle, marked P. 4, was on the teapoy upon which the deceased had kept her books. The stopper was out and it was empty. Alpina first saw it on the 16th October, when she had to clear the teapoy for some purpose, and put the books aside. She does not remember seeing such a bottle on the dressing-table. On the 16th she took the bottle and put it on a chair, on which she put the books. This is the bottle which, it was suggested, might have been filled the chloroform from some other container, and which the deceased might have used if she administered chloroform to herself.

The evidence of the nurse, Mabel Joseph, aged 21, was that she got up at 6.0 and left for church about 6.30, having seen the lady lying in her bed with her hand to her head.

Seelas, the boy of 15 who spoke to Alpina about her mistress wanting her, said that he got up at 6.0 and that he saw the appellant and the servant Martin feeding the fowls on the back verandah and heard them talking about the fowls. When in the pantry he says he heard some noise, not very loud, other noises from the fowls occurring at the same time, which seemed to him to come from the direction of the deceased's room. He says he went to Alpina and told her of this in the kitchen, and that the chauffeur Perera was there at the time, that he went back with Alpina to go to his pantry, and that later he assisted Alpina to bring hot water bottles to the lady. He says it was not possible for the appellant to go to the lady's room without his being seen by the witness. Banda, aged 18, who is Alpina's brother, says he was sweeping the outer verandah when the appellant came out and told him to take two Sunday papers that morning, that the appellant went to the front verandah and came through the hall to

the back verandah to feed the fowls. Banda was occupied with sweeping the verandahs until the car went off to fetch Mrs. Bandaranayake and if his evidence is true he must have seen the appellant if the appellant went to his wife's room at the material time.

Perera, aged 38, the driver, says he got up about 6-30 and was washing himself in his room when he heard a noise and that he went to tell Alpina and then went back to his room. Afterwards Simon the cook told him to fetch Mrs. Bandaranayake, that he went with Simon in the car to bring this lady, that Simon did not tell him to fetch Dr. Paul also until they were on the return journey. He went back with the lady to fetch Dr. Paul and brought him about 7-30.

Simon, the cook, aged 26, says that he was in the kitchen, and that he had washed when he heard a noise and saw Alpina going to the lady's room, that he followed and saw the appellant fanning his wife and was told first to go on a cycle and then afterwards with the motor car to fetch Mrs. Bandaranayake and the doctor.

Martin, aged 14, was giving food to the fowls. He says the appellant came from his room along the back verandah, that the witness went to the kitchen and went back and the appellant had reached the back verandah. The appellant was finding fault with the witness for giving rice and water to the chickens, as distinct from the ducklings, and was engaged in picking out certain of the chickens. Martin speaks to seeing the appellant on the back verandah just before Alpina and Seelas went to the lady's room.

It is plain that this evidence, if believed, makes it impossible to suppose that the appellant was with the deceased in the room at the time she uttered the cry, and the learned judge treated it as obvious that if the evidence of these witnesses were believed, the appellant must be acquitted as having established an alibi.

The story of the appellant himself in a statement made at an early stage of the proceedings was that he was on the verandah where the chickens were when he heard a groan, that he thought the noise was made by Terence so went to the child's room first. The explanation which he is said to have given at the time for going to the child's room first is that he thought Terence might have got his head stuck fast between the rails of his cot, and he thought the noise which he heard might have been due to this.

The case for the prosecution thus depended upon the Crown being able to displace the evidence of the servants. To this end in addition to the suggestion that the servants would be easily induced to try to exonerate the appellant there was adduced the evidence of relatives who had gone to the house on the day of the death and afterwards, and had had conversations with the servants about the occurrences of the morning of the 15th. By Ceylon Ordinance No. 14 of 1895, section 145 (2), proof of previous statements to

contradict witnesses is provided for. A very considerable body of evidence of this kind was given that is to say of oral statements said to have been made by servants in contradiction of evidence given by them in so far as it assisted the appellant. Much of this evidence of previous statements was uncertain and varying and in no case does any servant seem to have made admissions so as to bring the evidence given in court into accord with their supposed statements. Therefore at most the evidence of alibi would be weakened or destroyed. There would still remain proved by the evidence circumstances of improbability, tending to cast doubt on the suggestion that with the child sleeping in the next room, a number of servants going about their ordinary work in adjacent rooms and verandahs, the appellant, almost immediately after the nurse had left for church, had gone into his wife's room and proceeded to administer chloroform in such a manner as to permit of her so completely altering her position in bed and of uttering a cry and dying immediately afterwards. If he did this and at the same time managed to leave the room and to come back again before Alpina reached the lady's room, his movements were extraordinary.

Dr. S. C. Paul's evidence was that he arrived at 7-30 and that when he arrived, the appellant left the room. Dr. Paul found that the woman was dead and had probably been dead since about 6-30. He appears thereafter to have examined the room and finding a bottle of aspirin tablets, asked the accused about them. In addition to telling the doctor how he had heard the noise from his wife's room and how he thought that the boy had put his head between the rails of his cot, the appellant, in answer to the doctor's question, said that his wife had the night before complained of headache, and he had given her the bottle of aspirin nearly full. It appears that the bottle if full, would have contained 25 aspirins, and in the bottle there actually were nine remaining. Accordingly Dr. Paul thought that death was probably due to an overdose of aspirin, and that the marks which he had noticed on the face of the deceased were caused by rubbing of brandy and application of hot water bottles to the face. Dr. Paul was not content to certify death in the ordinary course but telephoned to the coroner and gave information to the police and to Mr. Leo de Alwis, the brother of the deceased. On learning from the police and coroner that they did not suspect foul play or propose to take any proceedings, he gave a certificate that afternoon according to which death was due to syncope or heart failure.

Comment was made by the Crown upon the suspicious conduct of the appellant in that though there must have been some smell of chloroform if he entered the room immediately after the cry, and although it would appear that his wife had died very soon afterwards, the appellant at no time mentioned the smell of chloroform to Dr. S. C. Paul on his arrival.

Dr. Paul's son, Dr. Milroy Paul, in the afternoon injected formalin

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into the body by way of embalming or preserving it, and on the 16th the funeral took place. On the evening, however, of the 15th, while Dr. Milroy Paul was talking to his father, the question of the marks on the face of the deceased was discussed by them. Dr. Milroy Paul stated his opinion that the marks must be due to chloroform. The deceased's brother, Mr. de Alwis, not being satisfied that his sister had died from natural causes and apparently at first adopting the view that she had been driven to suicide took steps after a day or two to instigate the authorities to action, with the result that the body was exhumed and a post-mortem was held upon it on the 7th November. The salient features of the post-mortem findings were much discussed in the medical evidence. It may be taken to be common ground that aspirin was not found in the body, that the face marks were most probably attributable to chloroform and that except on the face there were no marks whatever on the body of any significance. A slight bruising on the insides of the arms might have been caused in the course of the movements made to attempt artificial respiration.

It is now necessary to examine the medical evidence. It should be observed that the doctors could not properly state their opinions as to whether the death was due to murder, suicide or accident; that was a question for the jury. Apart from evidence as to what they saw on an examination of the body, the function of the doctors was confined to giving expert opinions as to the effects of chloroform on a human body, including the marks of burning which chloroform may occasion, and as to the immediate cause of death and other matters of that nature. Dr. S. C. Paul was in a special position for he was the family doctor and had attended the deceased on two confinements, and he as already stated saw the deceased at 7-30 a. m. at Duff House and interviewed the appellant. The main points on which expert evidence was given were, first, whether the death was due to aspirin poisoning or to chloroform, secondly, whether it was due to asphyxia or syncope, thirdly, whether the marks on the face were such as would be caused by burns from chloroform, fourthly, whether pressure on the face would be necessary to cause such burns, fifthly, as to the behaviour of persons during the administration of chloroform, *e. g.*, as regards struggling, shouts or other cries and so forth. It may be mentioned here that evidence of a very inconclusive character was given on this last point, inconclusive because not one of these witnesses had heard any of the sounds coming from the room of the deceased, and all they had to guide them were the very different descriptions of these sounds given by the Cingalese witnesses who heard them. In these circumstances their Lordships do not think it necessary to summarise the expert evidence as to these sounds ; but they must observe that any theory as to the cause of death must take into account the fact that cries or sounds apparently coming from the deceased were heard an extremely short

time before Alpina entered her room and found her lying insensible. The conclusion that the death was due to homicide must therefore involve the idea that the murderer had discontinued the means which he must obviously have employed to prevent calls for assistance and had done this just before causing insensibility: and the cries or sounds must have emanated (on the footing of homicide) from a partially suffocated woman.

The expert evidence was taken as conclusively establishing that the death was not due to aspirin. Further it is reasonably clear that the direct cause of death might be the same if due to the administration of chloroform vapour either by the deceased or by another person, and the contest of conflicting opinions as to whether the signs observable on the post-mortem examination pointed to asphyxia or to cardiac syncope or to asphyxia with secondary syncope was not of first importance. It was apparently supposed that asphyxia would take longer to produce, and be more likely to require an agent external to the deceased to bring it about ; but the supposition itself was not at all clearly established. It must also be remembered that none of the doctors had any experience of the changes which might take place in a formalin injected body buried underground for twenty-four days in the climate of Ceylon.

It seems desirable to summarise the material expert evidence. The evidence of Dr. W. C. Hill was to the effect that death was due to asphyxia which he explained as meaning respiration being prevented and sufficient oxygen not coming in. There might also, he said, have been secondary syncope. The marks on the face were consistent with burns from chloroform. Dr. G. Cooke stated that chloroform in a bottle or an ampoule which had been opened five years before would be useless. He had attended the deceased about eight years before in her confinement as an anaesthetist and she was "susceptible to chloroform". Dr. S. C. Paul who was F. R. C. S. and Doctor of Medicine (Madras) and who as stated had been the medical attendant of the deceased for many years, testified that she had some symptoms of diabetes and also had a skin disease called Tina Nigrantes, a sort of fungus on the face, neck and body. When he saw the body at 7-30 a. m. on the 15th October there was a slight discoloration of the face on the right side including the lips and just below them, tip of the nose and the eyelids but not on the chin. The face was placid and calm. The eyes were not protruding, there were no injuries to the tongue, no paleness, no lividity of nails, finger tips or lips. He thought she might have taken some thing, but the suggestion of chloroform did not then occur to him. At that time he thought that brandy and hot water bottles (which the appellant said he had used) might have produced the burns. He was present at the post mortem. The marks were then more visible on both sides of the face. He then did not doubt that the death was due to chloro-

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form. In his experience chloroform burns might be caused without pressure. He had on an average 2,000 cases a year of the administration of chloroform at his hospital and there were five or six cases of burns every year. If it was a case of suicide whether a handkerchief saturated with chloroform remained on her face or not death would have occurred within two or three minutes. In ten minutes or so the smell would have gone. (That is of course in the atmosphere of Ceylon.) He agreed with several statements in the textbooks as to the great difficulty of causing death by the administration of chloroform by force (he cited the works of Taylor and Webster). He agreed with a statement in Webster (p. 706): "It is probable however that no authentic case is on record in which chloroform has been successfully used on a sleeping person for criminal purposes. Cases of suicide by inhalation are rare though some are reported." He testified that the deceased was a robust woman. One of his remarks was that if a third person was applying a handkerchief or some like object soaked in chloroform to cause death the natural impulse would be to close the mouth to prevent screaming and the burns would then be more on the lips and in the region of the mouth than elsewhere. He thought the deceased died of syncope and not of asphyxia.

Dr. T. S. Nair, and L. R. C. P. and S. (Edinburgh) and Faculty of Physicians (Glasgow) was present at the post-mortem. He held a strong opinion that death was caused by asphyxia. The marks could have been caused by pressure with some fluid irritant. He alone of all the doctors said that the signs he saw at the post-mortem pointed to smothering, but he added that he could only say that the marks were consistent with smothering. He added that he had seen no evidence of chloroform. He looked for bruises or marks of violence on the body but could not find them. He thought the marks on the face indicated that pressure had been used. He agreed that round the mouth, chin and lower lips there was no blister or burn.

Dr. Milroy Paul, the son of Dr. S. C. Paul, was an F. R. C. S. (England), M. R. C. P. (London) and M. D. (London), and he embalmed the body on the 15th October by an injection of formalin into the veins. He noticed the marks on the face. He thought on reflection that they were due to chloroform and so informed his father. He was present at the post-mortem. Death in his opinion was not due to syncope pure and simple. It was at least partly due to asphyxia. He was clear that it was not a case of asphyxia caused by simple smothering, for the signs in such a case were quite different. He gave elaborate evidence as to the marks and stated that they could be caused by chloroform without pressure and gave an instance of a very recent case under his own observation. He found no burns on the lips except a drip on the left side and no burns on the bridge of the nose. This, in his opinion, indicated absence of pressure on these parts. He also agreed

that it was very difficult to administer chloroform when a person was asleep. He would expect such a person to awake and shout out. "Even under operation a patient struggles and two or three persons are kept to hold him down." There were no bruises and no scratches.

Dr. J. S. de Silva, and M.B. and Master of Surgery (Aberdeen) was the senior anaesthetist at the Generel Hospital (Colombo). He had an unrivalled experience in the giving of anaesthetics, for he had administered them in 25,000 cases, originally he used chloroform alone and more recently chloroform followed by ether. He had had only one death and that was of a patient in a moribund condition, and he had had no cases of burns from chloroform a very remarkable testimony to his skill. He was present at the post-mortem. He said the death was not caused by asphyxia basing his opinion upon the absence of the external and internal signs of it, and he cited various text-books. He thought the death was due to syncope caused by the inhalation of chloroform. He did not see how chloroform could be used on another person to cause death without touching the ridge of the nose, and the sides of the nostrils. A homicide, he said, would naturally soak the centre of the lint, or pad or handkerchief. He had made experiments as to burning with chloroform and said you could get burning with and without pressure. He said it was next to impossible to anaethetise a person single-handed and on an unwilling person he would not attempt it. He insisted on the absence of signs of violence or of any resistance offered by the deceased. There could be no doubt that the view of this witness was very definitely that the indications were either inconsistent with homicide or at any rate were strongly against it.

Dr. R. L. Spittel, F. R. C. S. (England), was not present at the post-mortem, but had read the report issued by Dr. Nair. He thought, judging from the report, that the cause of death was secondary syncope preceded by asphyxia and due to the administration of chloroform. He agreed that some skins were more susceptible than others. He held the view that it required superhuman determination for a person to saturate a handkerchief with chloroform and press it down on his or her face until death ensued. There were recorded instances of such suicides; they were "baffling." He would expect a person to whom chloroform was going to be administered to struggle violently. He had made some experiments with chloroform burns and found he got burns if there was pressure on the handkerchief and none if there was not; but the value of these experiments would depend very greatly on the degree of concentration of the chloroform used, and in re-examination he said that in one experiment he used a two p.c. concentration and there was no evidence as to the concentration in other cases.

Dr. Karunaratne, an M. D. of London was in government service as a pathologist. He had had a brilliant career as a student in London. He had

personally done between 2,000 and 3,000 post-mortems in Ceylon, and he was present at the post-mortem on the deceased. There were signs that asphyxia went on for some time before the heart failed and assuming that chloroform was used he would attribute death to chloroform, i. e., to respiratory failure associated with secondary syncope. As regards the question of suicide or murder he said that the deceased being a well-built lady would have struggled if chloroform was being administered against her will and one would expect to find bruises and scratches in such a case ; on the other hand it emerges from his evidence as a whole that he thought homicide was a more probable cause of death than suicide because of the great difficulty of a would-be suicide keeping the chloroform in contact with the face, since by unconscious action the person would take it off.

Such being the nature and effect of the evidence the further course of the trial may be shortly stated. All the witnesses were called by the prosecution. Fifty-four witnesses having been mentioned on the back of the indictment, 52 witnesses were called and two tendered but not examined. The statement of the appellant in the police court on the 10th February, 1934, was put in in accordance with the law but the appellant did not elect to give evidence in his own defence. Evidence having been taken from the 14th May to 8th June, the judge and jury with the accused and counsel on both sides went on the latter date to the scene of the occurrence, namely, Duff House. The servant witnesses were there and were questioned further and at length presumably by the Judge and by nobody else. A certain Dr. Peiris was also present and took some part in the proceedings. He does not seem to have been at any time called as a witness or sworn. Experiments were conducted by pouring chloroform on a handkerchief to see how long the smell would remain, and by making noises at one place to discover how loud they would sound at another place.

The learned judge summed up, on the 13th and 14th June, in a very long and careful charge, and the jury were absent for five hours. They brought in a verdict by the minimum majority of five to two, one of the five recommending the appellant to mercy.

The learned judge, in the course of his summing up when dealing with the question whether the death was due to homicide or suicide, told the jury that they should view the evidence under the four heads of: motive, opportunity, means and conduct. He laid before them the fact that the letters show a motive for suicide or a motive for taking an overdose of chloroform to frighten the appellant. He also said that the case would be the first of its kind, apparently, in the British Empire, where murder had been attempted by chloroform, and that the appellant would have taken a great risk of the victim screaming.

As regards opportunity, he told them that if they believed Martin,

Banda and Seelas, opportunity was absent. On the other hand the accused had opportunity in the sense that he was up and that he was in the same house. As regards means, the only evidence in the case was supplied by the appellant himself who had stated that some 2½ months before he had bought an ampoule of chloroform in connection with an operation on the leg of a buffalo at his estate in Chilaw : that it had not been used for this purpose and had been brought home and had been handed to his wife.

Under the head of conduct, the learned judge invited the jury to consider the conduct of the appellant during "the faint," and after "the faint," when Dr Paul came, and later, including such matters as whether the accused did not guess that his wife had died, whether he did not think it necessary to make a fuss about it or whether he really was attempting to revive his wife, and whether his leaving the room could be reasonably explained. He put to them also whether the conduct of the accused in telling the doctor about the aspirin was not suspicious in view of the fact that the medical evidence had disclosed that the lady could not have taken any aspirin, the view of the learned judge on this point being that unless the deceased had thrown away a number of tablets it cannot have been true that the bottle was full as the appellant had said it was.

As regards the medical evidence, he told the jury that all the doctors were agreed that chloroform was the cause of death, but that the doctors were divided into two proups, those who thought that the death was caused by syncope and those who thought that it was caused by asphyxia and syncope, or simply by somothering as Dr. Nair had suggested. He told them that except for Dr. S. C. Paul and Dr. de Silva, the other doctors were of the opinion that death was due to secondary syncope with which there were concurrent asphyxial signs and he put it to them whether or not they would accept the proposition that there were asphyxial signs which must have taken some minutes to produce. He put the evidence about the burns on the face to the jury and the controversy between the doctors as to whether they must have been caused by pressure. After discussing the medical evidence he said :—

> "These problems are set by doctors. If you cannot make up your own mind from the doctors' evidence, it is still your duty to come to a conclusion on your own observations in this case. Could the burns of that kind be caused by a mere handkerchief by putting it in that position, or must pressure have been used ? If pressure was used, could not the lady herself have used pressure when she wanted to go off. Accused says in his statement that she was in the habit of inducing sleep by chloroform . . . Make up your mind one way or the other and see whether it corroborates the prosecution story or the case for the defence, whether it was suicide or death by misadventure."

Upon a review of the charge of the learned Judge as a whole, their Lordships do not find that it was calculated to bring before the minds of the jury the essentials of the case in respect of these circumstances : (1) that

the only evidence as to where the accused was at or before the time of the death was in his favour or if the evidence were disbelieved and disregarded there was no evidence of his presence in his wife's room at the material time ; (2) that there was particularly strong evidence pointing to a tendency or inclination on the part of the lady to commit suicide. This point was mentioned more than once, but as no more than balancing the motive for murder. This is unsatisfactory because assuming that there was such a balance as regards motives for suicide and murder yet more than motive was disclosed by the evidence. There was disclosed, as has been said above, a tendency towards suicide in the deceased. No tendency towards violence or murder in the accused was even suggested. (3) That the medical evidence was completely ambiguous in its effect, and did not show any preponderance of opinion among the doctors that the physical conditions apparent at the post-mortem were such as to be consistent only with the hypothesis of homicide or to point clearly in that direction. In considering the weight which a jury could properly attach to this medical evidence it is important to observe that the question was not whether they were justified in preferring the opinions of those doctors who thought that the appearance of the body pointed to the application of external force rather than to the application by a suicide of a handkerchief soaked with chloroform, but rather whether the evidence of the medical experts as a whole pointed so clearly in the direction of homicide that the evidence of the three servants that the appellant was elsewhere than in the room of the deceased, must be rejected as untrue. Expert evidence to have that effect must be clear and decisive. Their Lordships are unable to take the view that the jury was properly directed on this important aspect of the case : they were left to infer that they were at liberty to accept either of the views put forward by the medical witnesses conflicting as they were, and even to put aside all the medical evidence and to form their own opinion from the facts as to whether they pointed to homicide rather than to suicide. In the opinion of their Lordships the expert evidence was so conflicting, where it was not hesitating and doubtful, that the learned Judge should not have invited the jury on matters involving medical knowledge and skill to come to a conclusion for themselves to which the medical men could not point the way either with certainty or with even an approach to agreement amongst themselves.

It is apparent that this general tendency of the summing up was to lead the jury to think that in effect they might convict the accused mainly if not entirely on the view they formed of his conduct. Many of the matters discussed under this head seem to their Lordships to be most uncertain in their effect and unreliable as a guide to a conclusion. There were points against the appellant. There were others in his favour. The greater number were merely ambiguous. It has always to be remembered that as the evi-

dence showed the appellant was in danger, even if suicide were found to be the cause of death, of incurring at least moral blame, and it was quite consistent with innocence of murder that he should prefer misadventure to be deemed to be the cause of death. Still if there had been other evidence of weight their Lordships do not doubt that a jury might properly have taken into account these matters of conduct. But in this case at the end of the evidence the result was that there was no direct evidence justifying a conviction and for reasons already given there was no medical or other circumstantial evidence justifying a conviction; and to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused was, their Lordships think, to act upon the merest scintilla of evidence and to be impermissible.

On these facts the advice proper to be tendered to His Majesty seems to their Lordships to be no doubtful matter. The submission of the Attorney General was well founded, that it is not for this Board to interfere because its conclusion as to guilt or innocence might differ from that of the jury. But in the view of their Lordships, there are here no grounds on the evidence taken as a whole, upon which any tribunal could properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not, in law or justice, permissible grounds on which to base a verdict. The only proper direction to the jury in these circumstances was that they must return a verdict of not guilty or that they could not safely or properly find any other verdict. The direction was, as has been seen, quite other than this, and the verdict, in the opinion of their Lordships cannot stand.

Having regard to this conclusion on the main issue in the appeal, it is strictly unnecessary to consider the other points raised, but in the circumstances of the case, and having regard to the general importance of some of the matters debated at the Bar, their Lordships propose to deal shortly with these points also.

As to the matter of hearsay evidence: it has been already observed that witnesses who gave evidence favourable to the appellant were extensively cross-examined as to other and previous oral statements. Such procedure is with the leave of the judge permissible under section 154 and 155 of the Ordinance (Law of Evidence) 14 of 1895 and it is to be presumed that such leave was obtained. In other cases, as for example in the case of the maid Alpina whose good faith does not seem to have been questioned by the Crown, evidence of what she had said was given apparently without previous cross-examination of the witness as to such statements. This is both undesirable and not permitted by the above sections and it could not be and was not suggested that section 157 of the same Ordinance

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applied to make the further hearsay evidence admissible as corroboration. It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Raj* v. *The King-Emperor* (I. L. R. 42 Col. 422) to the effect that all available eye witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witness irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. Thus, in the present case, the maid Alpina and Dr. S. C. Paul were indispensable Crown witnesses. As to some of the other witnesses there might have been both less confusion and a fairer trial if, though their names were on the indictment, they had been put into the box to be questioned as to other than formal matters by the defending counsel. As the trial was conducted the result was unhappy. The jury was warned more than once in the judge's charge that evidence of previous statements of a witness not admitted by the witness to have been made and not adopted by him in his evidence in court was not evidence of fact. But how ineffective is such a warning when there is present a very extensive mass of hearsay evidence, is shown by what happened here. Not only did medical and other witnesses assume to be facts matters of which there was merely such hearsay evidence and then proceed to found conclusions upon them, but the learned judge himself in his charge, through forgetfulness, more than once fell into the same error. In these circumstances the appellant's complaint under this head, seems to their Lordships to be established in fact.

As to section 106 of the Evidence Ordinance (No. 14 of 1895): that section provides as follows :—"When any fact is especially within the knowledge of any person the burden of proving that fact is upon him." The learned Judge, who tried the present case, held a view as to that section which led him to give directions to juries one of which is in question here, and another of which has been already considered and disapproved by this

Board in a reported judgment (see *Attygalle* v. *The King*, ([1936] A.C. 338) * That judgment had not, of course, been delivered when the charge was given to the jury in the present case, and the material passages of the charges in *Attygalle's* case and this case, though not in identical language, are substantially of the same tenour. Accordingly the direction given in this case is open to the objection which their Lordships explained in the judgment in *Attygalle's* case. That explanation need not be repeated. It is quite right to say that the learned Judge in the present case in the course of his very able charge to the jury explained generally that the onus was on the Crown to establish guilt. But the passage in the charge under examination seems nevertheless to be open to very serious objection. It is not primarily or at all a general comment, which would be and was quite admissible, on the fact that the appellant was not called to give evidence. Nor was it a direction that any specific named fact was one which fell within the section with the result that the onus of proving that fact was upon the appellant. It was a direction as to facts generally, and therefore it was particularly unfortunate that the relevant passage in the charge should have been expressed thus: "He has got to explain..... In the absence of explanation, the only inference is that he is guilty". Its tendency would be to lead the jury to suppose that if anything was unexplained which they thought the appellant could explain, they not only might but must find him guilty. In a very difficult and quite exceptionally mysterious case such as this, the area of the unexplained was extensive, and how much the appellant himself could explain depended on where he was at material times, and indeed, on the very matter at issue in the trial, namely his guilt or innocence. One thing is quite clear, that this case and *Attygalle's* case are wide apart in one respect. In *Attygalle's* case this Board did not interfere because, owing to clear evidence of guilt free from all connection with the irregularity complained of, the irregularity caused no injustice. Here the case even as left to the jury admittedly hung suspended in a wavering balance, and no one can say what tipped the scale against the appellant.

The matter of undue pressure on the jury can be shortly dealt with. In the course of his charge the learned Judge is reported to have said this: " . . . the verdict, whether it is a conviction or an acquittal, I hope it will be unanimous, owing to the serious and grave nature of the case, but if you cannot agree please remember that I have got the full power to ask you to reconsider your verdict, but four to three means an unacceptable verdict. That means you have to go through the trial again. I hope you will not have this misfortune." It was said that this meant and the jury would understand, that if they did not agree, they would have to try the case afresh. Their Lordships are satisfied that the

* 6 C. L. W. 41 (Eds.)

learned Judge can have had no intention of threatening the jury with such a fate and must, as the Attorney-General said, have been referring to a possible necessity for a further direction from him and for a new and prolonged deliberation. Their Lordships also recognise that in this case, as often, the shorthand note is not in all respects either complete or accurate; but the form the note takes in this passage seems to indicate that the shorthand writer understood the language in the sense complained of and the jury may unfortunately have done the same.

There remains the matter of the proceedings at Duff House on 8th June, 1934. Section 238 of the Criminal Procedure Code (No. 15 of 1898) 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 on 8th June, 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. Pieris, who does not appear to have been sworn as a witness, the judge and foreman of the jury being present with Dr. Pieris 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 sounds or smells; but they feel bound to record their view that there were features in the proceedings of 8th June which were irregular in themselves and unnecessary for the administration of justice. Their Lordships do not find it necessary to consider whether any injustice resulted in this particular case, but they regard proceedings so conducted as tending, in the words used in *Ibrahim's* case "to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future."

In these circumstances even had their Lordships taken a different view on the main point in the case, and had thought that there was evidence which justified the learned judge in leaving the whole case to the jury as one where they might, if they thought fit, properly find a verdict of guilty, their Lordships would feel impelled to say that, particularly in respect of the mistaken use made of the hearsay evidence, and in respect of the error arising upon section 106 of the Evidence Ordinance, such mischiefs attended this hearing as to bring the case into the category where the interference of His Majesty on the advice of this Board is necessary.

For these reasons their Lordships have humbly advised His Majesty that the appeal should be allowed and the conviction and sentence quashed.

Privy Council Appeal No. 70 of 1934.

Present : LORD BLANESBURG, LORD MAUGHAM, LORD ROCHE.

ABEYESUNDERA *vs.* THE CEYLON EXPORTS, LTD., and another.

S. C. No. 174 (F) D. C. Kurunegala 11914.
Delivered on 9th July, 1936.

Section 17 of the Registration Ordinance No. 14 of 1891—Prior Registration—Fraud and collusion—Guardian and Ward—Advantage obtained by guardian of minor without disclosing his fiduciary relation ship—To whose benefit does it enure—Trust—Extent to which the English-Law of Trusts apply—Section 118 of Ordinance No. 9 of 1917.

Raymond Evershed, K. C., with *L. M. D. de Sivla, K. C.* and *Harold L. Murphy, K. C.* for appellant.

Hugh I. P. Hallett K. C., with *De Gruyther, K. C.* for respondent.

The material facts are fully set out in the judgment. Shortly they are as follows:—

Benjamin Rajapakse was a landed proprietor and planter who at different times encountered much financial trouble. In 1901 he was insolvent with liabilities of Rs. 250,000 and he then settled with his creditors with the help of his father. In 1908 he again got into financial difficulty and his father then agreed to pay or settle his debts if he transferred the properties he then possessed to the children by his second marriage. Benjamin Rajapakse assented to this proposal and accordingly in 1908 executed a deed of gift donating an estate called Raigam Estate to his minor son, John Rajapakse, the original plaintiff in this case, who was then five years old and was living with and under the care of his father. The deed of gift contains a declaration that the grant or gift to the son was received and accepted by his mother, the wife of Benjamin Rajapakse. This deed was not registered until the 17th December 1915. Benjamin Rajapakse also conveyed by deed of gift another estate called Rawita to his minor daughters and this deed also remained unregistered. After the execution of the deeds of gift the minor children, including the original plaintiff John Rajapakse, continued to live with their parents up to the year 1918. Benjamin Rajapakse remained in possession of the land and he proceeded to borrow money on the security of Raigam Estate and of Rawita Estate. As the title deed of Raigam Estate contained, endorsed on the margin a reference to the deed of gift a piece of paper was pasted over the endorsement to conceal the existence of the unregistered deed of gift, by whom it did not appear from the evidence. In 1915 Benjamin Rajapakse unsuccesfully attempted to sell Raigam Estate to a Mudaliyar Wijewardene. It was then discovered that there was an unregistered deed of gift which the proctor who examined the title pointed out to Benjamin Rajapakse and informed him it was his duty to register. Thereafter the defendant came forward as a possible purchaser and took a deed of transfer in September 1915.

As the land comprising Raigam Estate fell within the description of land in Section 9 of Ordinance 12 of 1840, steps were taken by Benjamin Rajapakse to have the land declared free of Crown rights. These steps terminated in a Final Order under the Waste Lands Ordinance in the years 1919-1922. During the published proceedings under the Waste Lands Ordinance the deed of gift in favour of the minor John Rajapakse was not disclosed.

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The Ceylon Exports Ltd. purchased the rights of John Rajapakse and were held entitled thereto both by the Supreme Court and the Privy Council subject to the rights of the transferee of Benjamin Rajapakse to compensation for improvements effected by him and Benjamin Rajapakse after the date of the deed of gift and to expenses incurred by him in perfecting the title, and freeing the land of encumbrances.

Held: (i) That mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person registering of the priority conferred by law.

(ii) That the words "fraud or collusion" in section 17 of Ordinance No. 14 of 1891 import serious moral blame and that mere constructive fraud resulting from notice would not justify a finding of "fraud or collusion."

(iii) That a person who conceals the fact that a minor is the beneficial owner of any right and obains an advantage for himself must be deemed to be constructive trustee for the minor.

(iv) That it is the duty of a person in a fiduciary position to protect the interests of the beneficiary and take such steps as are necessary to prevent the destruction of the interests of the beneficiary.

PER LORD MAUGHAM.

(a) "Their Lordships see no reason for doubting the proposition that in Ceylon mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a persen registering of the priority conferred by law. That has been the law in Ceylon since the year 1877 and a number of authorities are cited in the judgments of the Supreme Court which illustrate the proposition. Nor do their Lordships think that anything would be gained by attempting to define the words "fraud or collusion." Though it is probably a good working rule to hold that the words import serious moral blame, and that mere constructive fraud resulting from notice would not justify a finding of fraud or collusion. It may not be improper to add that a question of honesty is not a matter of law, and such a question should present no difficulty to persons capable of appreciating the relevant facts although they may not have had the advantage of legal training."

(b) "There is no doubt that according to the law of Ceylon, as according to the law of England, a guardian stands in a fiduciary relation to his ward, and their Lordships can see no reason for doubting tnat Benjamin Rajapakse stood in such a fiduciary relation to his son John Rajapakse. It was his duty, if not at once to register the deed of gift, at least to prevent the registration of any instrument by which a third party could destroy the inferest of the son. The relevant facts were known to the appellant; and in the circumstances the appellant became a constructive trustee of the estate including in the Crown grants since that estate was obtained by him on the strength of the transfer of 1915 from a person in a fiduciary position and by concealment of the fact that the beneficial owner of the village title was the minor John Rajapakse."

LORD MAUGHAM,

This is an appeal from the decree of the Supreme Court of the Island of Ceylon dated the 22rd October 1933, setting aside a decree of the District Judge of Kurunegala dated the 29th April, 1932. The latter decree dismissed the action wherein the original plaintiff was one John de Silva Rajapakse and the original defendant was the present appellant.

The origi plaintiff instituted the action as long ago as the 30th November, 1926, for a declaration that he was entitled under a deed of gift No. 1294 of the 21st September, 1908, executed in his favour when a minor aged five years by his father W. Benjamin Rajapakse (who was added as defendant in the course of the proceedings but has not appeared before the Board), to a property called Raigamwatta consisting of six specified lots of land of the aggregate extent of about 250 acres. The problems that arise for decision in the proceedings are due to the circumstance that the added defendant whom it will be convenient to call Benjamin Rajapakse, notwithstanding the deed of gift executed by him in 1908, purported by a deed of transfer No. 5487, dated the 28th September, 1915, to convey the same estate to the appellant who thereupon entered into possession of the estate and was still there when the proceedings were commenced.

The claim of the appellant so far as it is based on the deed of transfer from Benjamin Rajapakse depends upon the provisions of a Registration Ordinance No. 14 of 1891. It has been replaced by an Ordinance No. 23 of 1927 in practically identical terms but it is the Ordinance of 1891 which was in force at the relevant period. Section 71 of Ordinance No. 14 of 1891 was in the following terms :—

> "Every deed, judgment order or other instrument as aforesaid unless so registered. shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order, or other instrument which shall have been duly registered as aforesaid. Provided however, *that fraud or collusion in obtaining such last mentioned deed, judgment, order or other instrument, or in securing such prior registration, shall defeat that priority* of the person claiming thereunder; and that nothing herein contained shall be deemed to give any greater effect or different construction to any deed, judgment, order or other instrument registered in pursuance hereof save the priority hereby conferred on it."

It was contended that since the deed of gift of 1908 had not been registered at the time when the deed of transfer of 1915 was registered, namely, on the 1st October 1915, the former was void as against the appellant. This conclusion would, no doubt, follow subject to the effect, if any, of the proviso that fraud or collusion in obtaining the transfer would defeat the priority of the person claiming under that document. The question *whether such fraud or collusion had been established was the main question in debate in Ceylon.* Another question of some importance was also raised which will have be to the subject of separate consideration, but it seems best to dispose of the question of fraud or collusion before embarking on the other question. It should be mentioned here that the District Judge arrived at a conclusion on the question of fact favourable to the appellant but that view was not taken in the Supreme Court.

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Benjamin Rajapakse was a landed proprietor and planter who at different times encountered much financial trouble. He was helped by his brother in 1898. In 1901 he was insolvent with liabilities of Rs. 250,000 and he then settled with his creditors with the help of his father. In 1908 he again got into financial difficulty and it is admitted that his father then agreed to pay or settle his debts if he transferred the properties he then possessed to the children by his second marriage. Benjamin Rajapakse assented to this proposal, and as a result the deed of gift already referred to was duly executed in favour of Benjamin's son, John Rajapakse, the original plaintiff, then a child aged about five years and nine months, who was living with and under the care of his father. The deed of gift contains a declaration that the grant or gift to her son was received and accepted by his mother the wife of Benjamin Rajapakse. Having regard to this acceptance no question could be raised as to the validity of the deed, though it required registration under the ordinance above referred to if it was to avoid the danger of a subsequent deed, judgment, order or other instrument being registered purporting to confer an adverse interest on some other party. In fact the deed of gift was not registered until the 17th December, 1915. John Rajapakse also conveyed by deed of gift another estate called Rawita to his two minor daughters and this deed also remained unregistered. After the execution of the deeds of gift the minor children including the original plaintiff John Rajapakse continued to live with their parents up to the year 1918. Benjamin Rajapakse remained in possession of the land and he proceeded to borrow money on the security of the Raigam estate and of the Rawita estate. As regards the Raigam estate there was this difficulty, that the deed of gift or a reference thereto was endorsed in the margin of the title deed relating to the Raigam estate; but this difficulty did not deter Benjamin Rajapakse from his transactions with money lenders. The device used was of the simplest character; a piece of paper was pasted over the endorsement so as to conceal it and thus to conceal the existence of the unregistered deed of gift, but the evidence does not establish by whom, and at what date this was done. It should here be mentioned that at one time it was alleged by Benjamin Rajapakse that the agreement in 1908 by his father that he would pay or settle the debts of his insolvent son, in return for which he was to assign his properties to his minor children, was never carried out by the father, and that accordingly Benjamin Rajapakse was justified in regarding himself as being still the owner of the properties. This view found favour with the learned Trial Judge, but not with the judges of the Supreme Court. The matter depended upon inference, and no reliance was or could have been rested on the demeanour of Benjamin Rajapakse who, when called as a witness at the trial, gave three or four different accounts of the matter, accounts which it was

impossible to reconcile one with the other. Dalton J. Acting Chief Justice in his careful judgment elaborately considers the evidence in relation to this matter and in the opinion of their Lordships nothing would be gained by repeating at length the reasons which he stated for coming to the conclusion that there is no ground for holding that the promise made by the father of Benjamin Rajapakse was not carried out. Their Lordships will only add that in addition to the positive evidence of the Notary who actually attested the deed of gift in 1908, and saw some of the debts paid, strong ground for trusting his recollection in this matter is to be found in the circumstance that when Benjamin Rajapakse was proposing to apply to the Court, with the object of having the deed of gift declared invalid and the property mentioned in it revested in him, he never suggested that the promise of the father had not been fulfilled and that the deed of gift had thus been obtained by a consideration which had failed. The suggested ground was of a completely different character and one which clearly had nothing to recommend it. Their Lordships see no reason to doubt that the Supreme Court rightly came to the conclusion that there was no substance in the suggestion that the promise of the father was not duly carried out.

Benjamin Rajapakse seems to have made no attempt to sell Raigam till the year 1915, but in that year his liabilities were such that he found it necessary to endeavour to obtain a purchaser. As a result one Mudaliyar Wijewardene entered into negotiations with him for its purchase. Benjamin Rajapakse's title deeds were left with Mr. A. Alvis, the proctor for the proposed purchaser, and it was then discovered that the strip of paper pasted on the deed conveying the property to Benjamin Rajapakse covered the endorsement in relation to the deed of gift in favour of John Rajapakse. According to the evidence Mr. Alwis then pointed out to Benjamin Rajapakse his duty to his son to have the deed of gift registered. It seems clear that it was at this time that Benjamin Rajapakse suggested that he might obtain the leave of the Court for a re-transfer of the property. Counsel's opinion was taken on a statement of facts submitted by Mr. Alwis. The opinion was in the following terms :—

> "In my opinion the donor W. B. Rajapakse is neither entitled to the property nor to have it retransferred to him. The Court will not sanction such a retransfer. The payment of the mortgage gives him no rights whatever. The deed of gift being unregistered a subsequent purchaser from the donor for value would get title if he registers his deed but that does not mean that the donor has title, that is a result which follows from the special provisions of the registration ordinance."

It will be noted that the final sentence in this brief opinion was inaccurate in that it made no reference to the proviso in Section 17 of Ordinance

14 of 1891 and did not qualify the statement that a subsequent purchaser from the vendor for value would get title if he registered his deed by remarking that fraud or collusion in obtaining such deed would not defeat the priority under the deed of gift. Mr. Al is pointed out to Wijewardene the difficulties of the position and the prospect of litigation, and the latter declined to proceed with the matter unless Benjamin Rajapakse could get the property re-vested in him.

The next step in the history is that the defendant (the present appellant) came forward as a possible purchaser, and took a deed of transfer of the estate from Benjamin Rajapakse, dated the 28th September, 1915. in consideration of the sum of Rs. 42,500. It is a singular feature of the case that the appellant was not called as a witness although there was a charge of fraud and collusion against him, and although he was present and his counsel called evidence in answer to the plaintiff's claim. Benjamin Rajapakse, who did give evidence, was, as their Lordships have already indicated a witness whose statements called for very careful scrutiny before they could be accepted; but this fact seems to be no sufficient ground for the absence of the appellant from the witness box. It was not denied on behalf of the appellant before this Board, that Benjamin Rajapakse had committed a fraud on his son by conveying the property to the appellant after having executed the deed of gift to the former in 1908. The contention on his behalf was that he had in 1915 no knowledge of this fraud and owed no duty to John Rajapakse and was not in a fiduciary position as regards him. The Acting Chief Justice however summarises in very clear terms the state of knowledge of the appellant when he obtained the conveyance in 1915.

> "He knew of the earlier conveyance, and it seems to me that on the facts he was aware of a great deal more than the mere existence of a prior and unregistered conveyance. He knew the earlier conveyance was to the minor son of his grantee, he knew an attempt had been made to conceal it and must have suspected that Rajapakse was the author of that attempt, he knew that conveyance was unregistered, he knew it was the duty of Rajapakse as father and guardian of his son to have the earlier deed registered, he knew Counsel had advised that Rajapakse had no title to the property, and was not entitled to have it reconveyed to him, he knew Rajapakse was in the hands of money lenders who were pressing him, he knew Rajapakse was trying to sell this property to others to raise money, he was told that if he took a conveyance litigation might result in view of the earlier deed, and it was a dangerous thing to do, and he knew if Rajapakse registered the deed to his son as he was told he should do, he (defendant) could not even plead the benefit of the Registration Ordinance. Knowing all this, although it probably

did not require any persuasion he got Rajapakse during the course of the transactions to undertake not to register the deed to the minor ; he pushed through the conveyance to himself with great celerity, he showed no desire to want the advice of Mr. Alvis who nevertheless cautioned him as to the risk he was taking, he dispensed with searches, lent Rajapakse Rs. 40000/- on mortgage which in the circumstances put the latter in his power, and could only result in the conveyance which to judge from his actions he seemed bent on obtaining."

Counsel for the appellant was unable to challenge this statement, but he placed great reliance on the opinion which has been set out and suggested that the appellant acted upon the faith of it. It seems, however, to their Lordships in the admitted circumstances of the case that if the appellant desired to show that he had really been misled by the inaccuracy in the opinion above set forth he should certainly have given evidence to that effect. In the view of their Lordships Section 17 of Ordinance No. 14 of 1891, does not present any difficult question of construction, though no doubt there may be difficulties of fact in determining in a particular case whether fraud or collusion has been established. Section 16 of the Ordinance contains an elaborate statement of the deeds and other instruments which require registration and it should be observed that these include contracts or agreements for the future sale or purchase or transfer of land and all kinds of accounts of mortgages or encumbrances affecting land, as well as of judgments or orders of Court affecting land. Their Lordships see no reason for doubting the proposition that in Ceylon mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person registering of the priority conferred by law. That has been the law in Ceylon since the year 1877 and a number of authorities are cited in the judgments of the Supreme Court which illustrate the proposition. Nor do their Lordships think that anything would be gained by attempting to define the words " fraud or collusion." Though it is probably a good working rule to hold that the words import serious moral blame, and that mere constructive fraud resulting from notice would not justify a finding of fraud or collusion. It may not be improper to add that a question of honesty is not a matter of law, and such a question should present no difficulty to persons capable of appreciating the relevant facts although they may not have had the advantages of a legal training. In the present case Benjamin Rajapakse was endeavouring for his own benefit to deprive his son of the property which he had transferred to him by the deed of gift in 1908 ; the appellant was fully aware of what he was doing and for his own purposes joined with him in the transaction. There could scarcely be a plainer case of collusion, which must mean in this connection collusion to deprive the person entitled to the land under the prior instrument of his

lawful rights. The various authorities in Ceylon cited in the judgments of the Supreme Court contain some strong examples justifying this conclusion. In these circumstances their Lordships must agree with the finding of the Supreme Court upon the subject of fraud or collusion with the result that in the circumstances the transfer of 1915 obtained no priority or benefit by reason of its prior registration.

The second question which was discussed on the present appeal depends upon the special facts in relation to the Raigam estate. The land appears to have been, as regards far the greater portion of it, forest, waste or chena land situate in a district formerly comprised in the Kandyan provinces. Section 6 of Ordinance No. 12 of 1840 enacts in reference to such lands as follows :

> "All forest, waste, unoccupied, or uncultivated lands shall be presumed to be the property of the Crown until the contrary thereof be proved, and all chenas and other lands which can be only cultivated after intervals of several years shall, if the same be situate within the districts formerly comprised in the Kandyan Provinces (wherein no thombo registers have been heretofore established) be deemed to belong to the Crown and not to be the property of any private person claiming the same against the Crown except upon proof only by such persons of a sannas for grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues or services having been rendered within twenty years for the same as have been rendered within such period for similar lands being the property of private proprietors in the same districts ; and in all other districts in this Colony such chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause."

The appellant has contended that the land must be presumed to be Crown land within the meaning of section 6 and accordingly that having obtained, as he did, by purchase or grant from the Crown the land in question there is no room for the application of any trust binding such land and that the action therefore failed. In order to appreciate this point it is necessary to consider the circumstances under which the appellant obtained his grant from the Crown.

Benjamin Rajapakse began taking steps for the purpose of obtaining a grant from the Crown in relation to the Raigamwatta estate as early as the year 1913. He got Mr. Murray, a surveyor, who was called as a witness, to make what is called a C. Q. P. (certificate of quiet possession) plan of the estate and apparently of some other property. On the 24th April 1917, the plan and a tenement sheet made by Mr. Murray were sent to an official called the Settlement Officer at Colombo with

a request that the certificate of quiet possession should be issued to the defendant. The Settlement Officer requested the solicitors for the defendant to set out the defendant's title ; and the title deeds which purported to show the title of Benjamin Rajapakse and the transfer from him to the defendant were sent to the officer. It should here be stated that, notwithstanding the terms of Ordinance No. 12 of 1840 and of certain subsequent ordinance, a practice has grown up in the Island and still continues under which persons who are in possession of forest, waste, unoccupied, or uncultivated lands deal with the same by deeds and other instruments as though they had a title of some kind to the lands, the title being well-known in Ceylon as "a village title ". By letter dated the 1st June 1917, the Settlement Officer informed the solicitors for the defendant that he would not be entitled to a C. Q. P. for the land except a few acres of old garden, but that if he were seeking a settlement of his dispute as to title with the Crown, the matter would come up in the ordinary course of business within the next two years and the claim would then be enquired into. Such an enquiry took place in due course, both Benjamin Rajapakse and the appellant being present. Benjamin Rajapakse gave evidence and was questioned by the Settlement Officer, and it is clear that the latter came to a decision on the footing that Benjamin Rajapakse had transferred his village title to the appellant by the transfer of 1915, and it is equally clear that the existence of the previous deed of gift in favour of Benjamin Rajapakse's son was not mentioned to the Settlement Officer. Crown grants, the dates of which are mentioned in the answer of the defendant, were issued to him in the years 1919—1922, and a final order under the Waste Lands Ordinance was published in the Ceylon Government Gazette. The Acting Chief Justice states the position as regards the settlement enquiry and the way in which the Crown Grants were obtained by the appellant in the following terms :—

> " It is clear, however, from the evidence that the purpose of the settlement inquiry is to settle the land, subject to what the witnesses say as to the age of the plantations, upon the persons entitled thereto under the village title. In other words the Settlement Officer for the purpose of deciding who is entitled to the grant recognises the equitable interests of the claimants as disclosed by their village titles, in practice applying the provisions of Section 8 of the Ordinance as regards possession and payment. This, I think, I might well say is common knowledge and was of course known to Benjamin Rajapakse, and there is not the least reason to doubt it was known to the defendant. It is the recognised policy of the department in settlement matters. The fact of the earlier conveyance was not disclosed to the Settlement Officer, for it is clear that had it been produced, any grant obtained by Rajapakse must have been obtained on behalf of and for the benefit of his son who had village title in his own name and possession through his father."

In these circumstances is it possible for the appellant to claim to hold the estate free from any claim by the respondents, the Ceylon Exports Limited who, it should be explained, were purchasers from the original plaintiff and were substituted as plaintiffs in the course of the trial ?

Section 118 of the Trust Ordinance, No. 9 of 1917 enacts as follows:—

> All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

Their Lordships are clearly of opinion that this section makes the English law applicable to trusts or obligations in the nature of trust arising or resulting by the implication or construction of law which has not been provided for by the ordinance. There is no doubt that according to the law of Ceylon, as according to the law of England, a guardian stands in a fiduciary relation to his ward, and their Lordships can see no reason for doubting that Benjamin Rajapakse stood in such a fiduciary relation to his son John Rajapakse. It was his duty, if not at once to register the deed of gift, at least to prevent the registration of any instrument by which a third party could destroy the interest of the son. The relevant facts were known to the appellant ; and in the circumstances the appellant became a constructive trustee of the estate included in the Crown grants since that estate was obtained by him on the strength of the transfer of 1915 from a person in a fiduciary position and by concealment of the fact that the beneficial owner of the village title was the minor John Rajapakse.

The attention of their Lordships has been called to the facts that the decree of the Supreme Court directs that the question of compensation for improvements alleged to be due to the defendant and the question of damages to the plaintiffs be dealt with in the District Court to whom the matter was referred for further inquiry. This order and direction requires some amendment since the appellant may be entitled to compensation for improvements effected by him or by Benjamin Rajapakse after the date on the deed of gift, and to costs and expenses properly incurred by the appellant in obtaining or perfecting a title from the Crown to the lands included in the deed of gift, and also to monies paid by the appellant in discharge of a mortgage bond No. 170, and questions may also arise as to the interest if any, to be allowed to either party as well as the question of damages, if any sustained by the substituted plaintiffs. The decree under appeal should be amended in those respects. Subject to these amendments their Lordships are of opinion that the judgments of Dalton A. C. J. and Maartensz J. are correct for the reasons therein contained ; and they will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Present: LYALL GRANT J.

DOOLE (S. I. Police). *vs.* CHARLES

S. C. No. 681—P. C. Galle No. 30831.
Argued on 16th January, 1928.
Decided on 26th January, 1928.

Footprint—Is the opinion of a Fingerprint expert as to the identity of footprints relevant under Section 45 of the Evidence Ordinance.

Held: That Section 45 of the Evidence Ordinance does not entitle a Court to convict a person of theft merely on the opinion of a fingerprint expert, that a footprint found at the place where an offence has been committed is that of the accused.

T. Weeraratne for accused-appellant.

Mervyn Fonseka Crown Counsel for respondent.

LYALL GRANT J.

The accused in this case was convicted of the theft of cloth hung round a motor car. The only evidence of any importance against him is that of a fingerprint expert who has given his opinion that a footprint found on the mudguard of the car is that of the accused. There is nothing that can purely be called corroboration.

The Magistrate does not say in his judgment that he is satisfied from a personal comparison of the footprints that the one on the car is that of the accused. He relies entirely on the opinion given by the expert.

Section 45 of the Evidence Ordinance admits the opinion of a fingerprint expert as a relevant fact, but this section has not yet been extended to cover opinions given by persons skilled in questions relating to the identity of footprints.

I do not think that section 45 of the Evidence Ordinance entitles a Magistrate to convict a person of theft merely on the opinion of a finger expert that a footprint found at the place where an offence has been committed is that of the accused.

The appeal is allowed and the conviction quashed.

Present: ABRAHAMS, C. J.

THE SOLICITOR-GENERAL *vs.* MANIKKAM and another.

Application in Revision in P. C. Kandy 46504.
Argued & decided on 25th September 1936.

Opium Ordinance No. 5 of 1910. Can an order be made under Section 27 directing the payment of a portion of a fine recovered under the Ordinance to the Police Reward Fund?

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Held. (i) That an order under Section 27 directing the payment of a part of a fine recovered under Ordinance No. 5 of 1910 should be made at the time of the conviction and as a part of the judgment.

(ii) That the Police Reward Fund is not an "informant" within the meaning of Section 27 of Ordinance No. 5 of 1910 and that an order directing the payment of a part of a fine to the Fund cannot be made under the section.

Nihal Gunasekere, Crown Counsel in support.

ABRAHAMS, C. J.

Several months after a conviction for an offence against the Opium Ordinance an application was made to the Magistrate asking that half the fine of Rs. 2000/- should be awarded to the Principal Collector of Customs, who was the principal informant in the case. The Magistrate made the following order—"If the fine be paid let Rs. 500/- be credited to the Police Reward Fund."

Under Section 27 of the Opium Ordinance any Court before which a person is convicted of any offence under the Opium Ordinance can direct that a portion of the fine actually recovered and realised, not exceeding one half, shall be paid to the informant. Apart from the question as to whether the Magistrate after he had signed his judgment was empowered to make any order under Section 27 of the Opium Ordinance and there is a decision to the contrary *P. C. Mannar No. 7437* (S. C. M. of 8th March 1917),* the Police Reward Fund cannot be described as the informant. I, therefore, set the aside the order of the Magistrate.

* *Present* : DE SAMPAYO, J.

MAC GUIRE (E. P. S.) *vs.* PERIATHAMBYCHETTY.

In Revision P. C. Mannar No. 7437
Argued and decided on 8th March 1917.

Grenier, Crown Counsel for the Crown.

DE SAMPAYO, J.

The accused was convicted on his own plea of having imported opium without authority on the 16th of December 1916, and was fined Rs. 100/-. It appears that on the 17th of January an application was made for refund of half the fine to the Customs Officers who detected the opium. I cannot quite make out who made the application, the Magistrate's order says that the application was made by the Customs authorities —nor do I quite understand to whom the money was intended to be paid. The formal complaint to Court was made by a police constable and nothing has transpired in the proceedings to indicate who the actual informant was. Section 27 of the Opium Ordinance under which the prosecution was brought authorises the Court to direct a portion of the fine actually recovered and realised, not exceeding one half, to be paid to the informant. Apart from the difficulties I have just mentioned, it seems to me that any order under that section should be made at the time of the conviction and as a part of the judgment. Section 306 (4) indicates that a judgment once signed cannot be altered by the Court except in the case of a clerical error or any other error which may be rectified before the Court rises. I think it is too late now to make the order the Magistrate has entered in this case.

In revision the order is set aside.

Present : MOSELEY, J. & FERNANDO, A.J.

KOTALAWALA *vs.* PERERA.

S. C. No. 146—D. C. Colombo 1965.
Argued on 24th September, 1936.
Decided on 30th September, 1936.

Malicious Prosecution—When may an action be brought for ?

Held : That an action for malicious prosecution will not lie unless it can be proved that the defendant, in addition to giving the information which resulted in the prosecution, requested or directed the prosecution of the particular person bringing the action.

H. V. Perera with *D. Goonewardene* for defendant-appellant.

Weerasooriya, with *Nadarajah*, and *E. G. Wickramanayake* for plaintiff respondent.

FERNANDO, A. J.

The plaintiff alleged in his plaint that the defendant caused a charge to be preferred against the plaintiff in P. C. Gampaha 29580, the charge being that the plaintiff aided and abetted one Nadorisa to commit forgery of a cattle voucher in favour of the plaintiff.

The first issue framed at the trial was, "did the defendant cause the plaintiff to be charged in P. C. Gampaha 29580 ?" and with regard to this issue, the District Judge stated that in his evidence in the Police Court, there can be no question that the defendant alleged that the voucher was a forgery and when the defendant made that charge of forgery, he did so as an eye-witness." Apparently for these reasons the learned District Judge thought there could be no doubt that the defendant did cause the plaintiff to be charged with aiding and abetting the forgery. As a matter of fact however, it would appear from the judgment, that the learned District Judge was more concerned with the question whether the defendant acted maliciously and without reasonable or probable cause, rather than with the question whether it was the defendant himself who caused the plaintiff to be charged. In the case of *Uduma Lebbe Marikar vs. Sarango*, 5 S. C. C. 230, it was held that assuming that the defendant, falsely, and maliciously and without any reasonable or probable cause, caused an Inspector of Police to charge the plaintiff with theft, the plaintiff would have no cause of action inasmuch as the Inspector himself who preferred the charge might have had good grounds for making that charge. As Clarence J. said—"All that plaintiff has proved is that defendant gave certain information to the Police, in consequence of which and of other information obtained by his own inquiries, the Inspector prosecuted the plaintiff. It does not appear that defendant solicited the Inspector to prosecute. The Inspector on receiving

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defendants' complaint, seems to have taken the matter into his own hands, and to have instituted the criminal prosecution against the plaintiff. Under these circumstances defendant clearly is not civilly responsible to plaintiff for the prosecution instituted, by the Inspector."

In *Wijagoonatilleke vs. Jonisappu*, 22 N. L. R. 231, the cause of action as set out in the plaint was that the defendant had, falsely and maliciously and without any reasonable cause, given information to the Police, and caused plaintiff to be charged with riot and robbery, and that the defendant had also given false evidence at the trial, and had, procured other false witnesses. Schneider J. took the view that the cause of action as set out in the plaint indicated that the action was within the scope of the '*Actio Injuriarum*' of the Roman Dutch law, which is wider than the action for malicious prosecution known to the English law" "If the present action", he said "be regarded as identical with the English Law Action of that name, it is bound to fail, for in the circumstances the defendant cannot be said to have prosecuted the plaintiff." The defendant did no more than give information to the Police, and the Police after investigation prosecuted. In support of this position he referred to the case of *Uduma Lebbe Marikar* vs. *Sarango* (supra) and an Indian Case. He then proceeded to discuss the other allegations made by the plaintiff in the, case, and held that a statement made by a witness is absolutely and unconditionally privileged, so that no action can be brought against him in respect of any evidence given in Court. There is no evidence, he said, whatever that the defendant procured false witnesses. The only other question was, "whether in respect of the statement made by the defendant before the Sergeant of Police, he can claim the same privilege as that which the law affords to the statements he made when giving evidence before the Police Court" and he held that the defendant could claim the same privilege. Following the judgment in *Sir Patrick Watson* v. *Jones*, 1905, A, C. 480 he held that the privilege which protects a witness in respect of his evidence in the box, also protects him against the consequence of statements made to the client and the Solicitor in preferring the proof for trial. The position of the defendant in that action, he thought, was much stronger than the positon of the defendant in *Watson* v. *Jones* because the defendant made his statement in the course of an inquiry under chapter 12 of the Criminal Procedure Code.

Nathan 3 Common Law, South Africa, page 1682 (Chapter 5) states that where a person maliciously and without reasonable cause prosecutes another on a criminal charge, the latter on acquittal has an action for damages, and that the remedy is provided for by the '*Actio Injuriarum.*' The '*Actio Injuriarum*' was allowed in every case in which injury resulting in damage was maliciously done, or caused to be done, even though

it was done during the course of a proceeding which was itself perfectly lawful. "The requisites to found an action for malicious prosecution, had been settled in a series of South African cases, the effect of which is that in order to maintain such an action, the plaintiff must prove :—

1. The existence of the prosecution.
2. That there was malice in instituting the criminal proceeding.
3. That there was an absence of reasonable and probable cause.
4. The termination of the criminal proceeding in favour of the plaintiff".

If it be clearly shown that a private person procured a prosecution at the public instance, maliciously and without reasonable cause, an action may lie against him. It is in any case clear, that where a private individual merely lays information concerning the commission of an alleged criminal offence without requesting or directing the prosecution of any particular person, and the public prosecutor is left to exercise his own judgment, as to whether a prosecution shall be instituted, or not such prosecution is not traceable to the action of the person who gave the information and he cannot be held responsible for it. The defendant must have set the criminal law in motion, that is, he must have voluntarily instituted criminal proceedings, (paragraphs 1641—1643.) It is clear then that in South Africa, an action of this kind will not lie in a case where the prosecution had been instituted by a public officer unless it is shown that the defendant in addition to giving information either requested or directed the prosecution of any particular person.

The evidence in the case proves that the witness Abraham complained to the defendant that he had lost a cow, and the defendant conveyed that information to the Muhandiram. The Muhandiram held an inquiry himself, and this was followed by another inquiry by the Mudaliyar. The Sub-Inspector of Police who actually filed the charge in the Police Court stated, that he did so on certain information obtained from a petition that was sent to him by the Muhandiram, that the petition was sent by a man called Rupasinghe, and that the Inspector held an inquiry and after the inquiry decided to take action. The plaintiff himself when questioned whether the defendant had anything to do with the charge against him said that he did not know that the defendant had anything to do with that charge.

On this evidence it seems clear that this action cannot be maintained because there is no proof that the defendant did in fact prosecute the plaintiff aud even assuming that an action on the basis of the '*Actio Injuriarum*' can be brought in circumstances like these, it seems clear from the evidence that the defendant merely gave some information when

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questioned by the Muhandiram, and by the Inspector of Police, and that he did not either direct or request the prosecution of the plaintiff or of any one else. It would therefore follow, that the defendant did not cause the plaintiff to be prosecuted.

As the action must fail on this ground it is not necessary to discuss the other questions raised in the other issues framed at the trial. I would set aside the decree of the District Court and dismiss plaintiff's action with costs here and in the court below.

MOSELEY, J.....I agree.

Present : DALTON, A. C. J. & KOCH, J.

FERNANDO & others *vs.* AMARASURIYA.

S C. No. 103 (Inty) D. C. Kalutara 13185
Argued : 18th October, 1933.
Decided : 25th October, 1933.

Partition Action—Purchaser of interest of a defendant—Extent of liability to pay pro rata costs.

A person purchased the interest of the first defendant to a partition action at a judicial sale and came into the proceedings after the interlocutory decree. By final decree he was declared entitled to and allotted the interests which, under the interlocutory decree, fell to the first defendant. The final decree went on to decree that the costs of partition be borne *pro rata*. When the 2nd and 3rd defendants took out writ against the added defendant, he disclaimed liability to pay costs incurred prior to the date on which he came into the action.

Held: That the purchaser of the 1st defendant's interest was liable to pay the *pro rata* costs incurred prior to the date on which he came into the action.

Kurukulasuriya with *T. S. Fernando* for 2nd and 3rd defendants-appellants.

E. B. Wickremenagake for 10th defendant-respondent.

DALTON, A. C. J.

This appeal arises in a partition action instituted on March 24 1926, the appellants being the 2nd and 3rd defendants in the action and the respondent the 10th defendant. The 10th defendant came in to the proceedings after the interlocutory decree, which was dated November 27th 1930, having acquired the interests of the 1st defendant at a judicial sale. By the final decree dated July 16th 1931, the 10th defendant was declared entitled to and allotted the interests which under the interlocutory decree fell to the 1st defendant. The final decree went on to decree that the costs of partition be borne *pro rata*.

The 2nd and 3rd defendants thereafter took out writ against the 10th ant to recover from her the proportionate part of their costs of parti- the basis of the shares allotted and it was then urged on her motion ch 3rd 1933, that she was not liable to pay *pro rata* costs incurred March 7th 1931, the date when she came into the action. An order ereupon made on March 31st 1933 in the lower Court upholding the efendant's contention, the Judge holding that it is unjust that she be made to pay *pro rata* costs anterior to the date she was made a o the case. From that order the appeal is taken.

It seems to me that all that was required to be done on the motion of 3rd was to construe and apply the order in the decree, to which I lready referred. It was ordered there that the costs of partition be *pro rata*. There seems to be no doubt as to what is meant by "the f partition" (see Jayawardene, *The Law of Partition*, pp. 333—349 ses there cited). A practice seems to have grown up whereby the f partition are ordered to be paid *pro rata* according to the shares l to the different parties, irrespective even of the fact that some may ve desired the partition. As de Sampayo J. however points out in *Appu vs. Pelo Appu* (19 N. L. R. at p. 274) it is not obligatory on the to make such an order in every case. If the circumstances are such is equitable to make any other order, for example such a qualified as to the payment of *pro rata* costs as the 10th defendant now asks is within the powers of the trial Judge to do so. The Court did not ny other than the usual order here, nor was it apparently asked to do ne knows how excessive the costs in partition actions are sometimes and it is the duty of the trial Courts to see that no injustice is done to in this respect.

It was suggested that inasmuch as the interlocutory decree contained ar order, namely that the costs of partition be paid *pro rata*, the 10th lant should not at any rate have to pay any costs up to the date of that According to the order in the final decree however she has to pay *ta* costs on the basis of what is allotted to her, and it would seem that e final decree which awards the shares in severalty (per Bonser C. J. *vs. Perera*, I. N. L. R. at p. 336). In that case therefore, one has to t that decree alone to construe the order made.

The Judge in the order appealed from in allowing the motion has a variation in the final decree in respect of the order as to costs which not in his power to do, the appeal must therefore be allowed with

Present : ABRAHAMS C. J. & FERNANDO, A. J.

SATHASIVAM *vs.* ATHAHARIYA and another.

S. C. No. 87.—D. C. Colombo. 48002.
Argued on 25th and 26h August, 1936
Decided on 4th September, 1936.

Agreement—Express provision that the decision of one party on certain matters provided for in the agreement shall be binding on the other—Is such a provision valid ?

Held: (i) That an agreement to the effect that in case of a dispute between the parties to a contract the decision of one of them shall be accepted by the other is good and valid.

(ii) That the doctrine that a person ought not to be a Judge in his own cause does not apply to agreements to the effect that disputes arising out of a contract shall be submitted to the decision of one of the parties thereto.

Chelvanayagam with *Muttucumaru* for defendants-appellants.

N. Nadarajah with *J. R. Jayawardene* for plaintiff-respondent.

ABRAHAMS, C. J.

The facts which led to this appeal are as follows. One O. L. M. Majeed, a hardware merchant was indebted to various creditors, and a settlement was arrived at by which it was agreed that his stock-in-trade should be handed over to the plaintiff-respondent who should receive it, sell it, and realise the procee ds for the benefit of the creditors. The 1st defendant-appellant gave a mortgage bond to the plaintiff respondent to cover any benefit between the sum realised and Majeed's specified debts, but her liability was limited to Rs. 15,000/-. The plaintiff-respondent was the obligee of this mortgage bond. It is material to this appeal that the final clause of the bond ran as follows :—

> "And I hereby expressly agree that I do hereby expressly waive all privileges and exceptions to which sureties are by law entitled and that the statement rendered to me by the said obligee as receiver as aforesaid of the amounts realised by the calling and conversion of the said assets and book-debts of the said Oduma Lebbe Marikar Abdul Majeed shall be final, binding and conclusive on me and shall not be open to question by me on any ground whatsoever."

Subsequently, the proctors for the plaintiff-respondent wrote to the 1st defendant-appellant to the effect that the total gross receipts realised by the sale of the aforesaid assets, and from recoveries made, totalled Rs. 134,972/89. The letter added that, in addition to this sum, the Receiver

"has one lot of Steam Flanges of the value of Rs. 2000/- which are practically unsaleable." A demand for Rs. 15,000/- due on the bond was made in the letter, to which apparently no reply was received. Judgment was given against the 1st defendant-appellant for the amount claimed.

It is argued in this appeal that the final clause of the mortgage bond is not binding on the 1st defendant-appellant. Counsel, so far as I can understand his submissions, contended that the obligor of the bond had to all intents and purposes agreed to consent to judgment on what might be mere assertions of the obligee, and that she thereby bound herself not to raise any defence that might be open to her. Counsel was unable to give any authority for the proposition that such a clause in an agreement does not bind. He appeared to think that it ought not to be binding, and therefore was not binding. Counsel for the plaintiff-respondent, on other hand, submitted that this clause was tantamount to a submission to the arbitration of one party to an agreement by the other party, and he cited a passage from Hudson on Building Contracts, 6th Ed. at page 238, and Russel on Arbitration, 1906 Ed., page 95, both of which on the authority of the ancient case of *Matthew* v. *Ollerton*, 4 Mod. page 226, state that if there is an agreement to that effect, the submission to the decision of one party to a contract of any dispute arising out of that contract is an exception to the doctrine that a party ought not to be a judge in his own cause. There is also direct authority for the proposition that an agreement, to the effect that in case of a dispute between the parties to a contract the decision of one of them shall be accepted by the other, was good. In *Ranger* vs. *The Great Western Railway Co.*, 5 H. L. C. page 71, 10 E. R. page 824, a contract between a railway company and building contractor stipulated that payments should from time to time during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by the Principal Engineer of the Company or his Assistant Resident Engineer. In case of a dispute between the contractor and the Assistant Resident Engineer the decision of the Principal Engineer of the Company was to be final. After differences had so arisen between the contractor and the company, it was discovered by the former that the Principal Engineer was a shareholder in the company. In giving judgment, the Lord Chancellor said, "A Judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent. But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent between the parties.

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"When it is stipulated that certain questions shall be decided by the engineer appointed by the Company, this is, in fact a stipulation that they shall be decided by the Company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The Company reserved the decision to itself, acting however, as from the nature of things it must act, by an agent, and that agent was, for this purpose, the engineer. His decisions were, in fact, those of the Company".

It might, I think, be argued that the respondent in this appeal was merely a nominal party to the agreement between himself and the 1st appellant, and therefore could have had no interest in the agreement itself. However, in view of the case just cited, it is not necessary to try to make stronger what is already strong enough.

It has also been argued for the 1st appellant that the respondent ought to have proved that he had failed to find a market for the Steam Flanges referred to in his letter of demand, and that even if the 1st appellant was bound to accept the statement as to the amounts realised by the sale, her obligation to do this did not extend to accepting the statement on his part that it was not possible to dispose of certain other items of stock, I think this is interpreting the obligation too narrowly, and that obligation extended as much to his declarations regarding impracticability of sale as to declarations regarding the amounts realised by the sale of his stock, since if that were not so, the 1st appellant would have been bound to accept the statement that he was only able to obtain a most trivial price for the whole of the stock but would have been entitled to dispute the fact that he found it impossible to sell a few articles. Moreover, the 1st appellant has not disputed at any time, and in fact does not dispute now, that these Steam Flanges were unsaleable. She merely says that she is agnostic about the matter, so that even if the agreement permitted her to dispute any declaration as to the impracticability of sale, she has not availed herself of that right.

I would dismiss the appeal, with costs in both courts.

FERNANDO, A. J.

I agree.

Present: ABRAHAMS, C. J.

VEERO (S. I. Police.) *vs.* MARSHALL

S. C. No. 529.—P. C. Kurunegala, 48718.

Argued on 7th October, 1936.

Decided on 9th October, 1936.

Penal Code Section 315—Hurt caused with the handle of a closed clasp knife. Is the handle of a closed clasp knife an instrument for cutting within the meaning of the section ?

Held: That the handle of a closed clasp knife is not an instrument for cutting within the meaning of Section 315 of the Penal Code.

J. R. Jayawardene for accused-appellant.

ABRAHAMS, C. J.

The appellant was convicted of the offence of voluntarily causing hurt with a sharp cutting instrument to wit the handle of a clasp knife, under Section 315 of the Penal Code and was sentenced to pay a fine of Rs. 50/-or in default to suffer 2 months rigorous imprisonment. He appeals on the ground that an injury caused by the handle of a closed clasp knife is not punishable under Section 315 but under Section 314 and he also complains that the sentence is excessive in the circumstances. The assault appears to have been entirely unprovoked, and the injuries four, inflicted on the head are not in themselves serious. Nevertheless they were inflicted on a part of the human person where a comparatively slight blow may result in a serious injury, and were therefore some indication of a malicious intent. I think, then, that the sentence is not excessive.

As regards the section under which the offence falls the Magistrate followed S. C. No. 102—P. C. Colombo (Itinerating) No. 47571,* which he treated as conclusive on the point. That case undoubtedly cannot be distinguished from this, and there Dalton, J. said "After hearing part of the evidence the Magistrate came to the conclusion that the injury was caused probably by a knife which was closed at the time of the offence. He then goes on to hold that a closed knife cannot be said to be an instrument for cutting. I am quite unable to agree with him. Whether a clasp knife is closed or opened it is still a knife and one of the primary uses of the knife is for the purpose of cutting."

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With all due respect, I regret I am unable to agree with the learned Judge and I have not the slightest doubt that it would be a serious misconstruction of section 315 to hold that the handle of a closed knife was an instrument for cutting. To follow such a construction to its logical outcome would be to convict of causing hurt by means of an instrument for shooting a person who struck another on the head with the butt end of a revolver. In my opinion the section means to penalize those persons who employ instruments intended or adapted for shooting, stabbing or cutting in the way in which they were intended or adapted for use. It would appear as if unconsciously the prosecution in this case followed this view by the manner in which the charge was actually drafted the error in the charge being that the wrong section was quoted.

Another, and a closer way of looking at the true construction of this section, is by analysis of the word 'instrument.' The actual instrument for cutting is that part of the knife which actually inflicts the cut, namely the blade.

My attention has been directed by Counsel for the appellant to Section 61 of the Village Communities Ordinance No. 9 of 1924. The offence of voluntarily causing hurt is in fact triable by a Village Tribunal, and as the offence was committed within the jurisdiction of a Village Tribunal it should have been tried by that Tribunal. But under the provision to that section, jurisdiction was given to the Police Magistrate by the action of the Police Officer who prosecuted this offence in his Court, Counsel submits that the Police Officer did so because he was of the opinion that the case fell under Section 315, and was therefore cognizable by the Police Court to the exclusion of a Village Tribunal. It may be so, but the fact remains that jurisdiction was given to the Police Court, and was lawfully given. If any injustice had been done in the sentence I would have rectified it myself, and therefore, no useful purpose would be served by remitting the case for trial to the Village Tribunal. In fact as I do not consider the sentence excessive it might very well be that the Village Tribunal would inflict a sentence which, in my opinion would be inadequate. It is desirable however, that the appellant should have recorded against him a conviction for the offence which, in my opinion he committed, and not that which, in my opinion he did not commit. I therefore allow the appeal by altering the conviction to one of voluntarily causing hurt under Section 314. I dismiss the appeal against the sentence.

* *Present:* DALTON, J.

CHARLES NAIDE *vs.* SADIRIS NAIDE.

S. C. 802.—P. C. Colombo 47571. (*Itinerating*)
Argued & decided on 3rd February 1927.

J. S. Jayawardene for complainant-appellant.

Sri Nissanka for accused-respondent.

DALTON, J.

The accused in this case, respondent in the appeal, was charged with voluntarily causing hurt to the complainant who is the appellant by means of an instrument for cutting to wit a knife and thereby committed and offence under Section 315 of the Ceylon Penal Code. After hearing part of the evidence the Magistrate came to the conclusion that the injury was caused probably by a knife which was closed at the time of the offence. He then goes on the hold that a closed clasped knife cannot be said to be an instrument for cutting. I am quite unable to agree with him. Whether a clasped knife is closed or opened it is still a knife, and one of the primary uses of the knife is for the purpose of cutting. Because he held that it was not an instrument for cutting he came to the conclusion that the offence disclosed one under Section 314 and one under which the Village Tribunal had exclusive jurisdiction. He therefore discharged the accused and referred the complainant to the Village Tribunal.

His judgment must be set aside, the appeal being allowed and the case sent back for the rest of the evidence to be heard and the Magistrate then to come to the conclusion as to the guilt or otherwise of the accused.

Present : ABRAHAMS, C. J.

PERERA (S. I. Police) *vs.* AGALAWATTE & ANOTHER.

S. C. No. 467-468—D. C. Kalutara 17022.
Argued on 30th September and 1st October 1936.
Decided on 6th October, 1936.

Penal Code—Sections 285 and 286—Obscene publication—Test of Obscenity—

The 2nd appellant, an Ayurvedic Physician, who is the owner of various kinds of drugs published a book for the purpose of advertising his drugs. The book was printed at the press of the 1st appellant. The author claimed that his drugs possessed remedial qualities for a very extensive number of complaints. The reader of the book was exhorted to pass it on to a friend. There were passages in the book which went beyond recommending remedies to the diseased. They suggested artificial stimuli for the increase of sexual energy and the enhancement of sexual satisfaction. The book not only prescribed a remedy for the diseased but also an aphrodisiac for the sound.

Held: That such a book has a tendency to deprave and corrupt those whose minds are open to such influence.

PER ABRAHAMS C. J.

(a) "The test to be applied in considering what is an obscene publication is that which is contained in the judgment of Cockburn, L.C.J. in *Reg:* vs. *Hicklin*, (1868) 3 Q. B.

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Abrahams, C. J.

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Cases 360: "The test of obscenity is this, whether the tendency of the matter charged... is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall".

(b) The definition between a remedy and an aphrodisiac was, if I may respectfully say so, admirably put in the case of *Emperor* v. *Thakan Datt and another*. A. I. R. 1917 Lah 288, where Johnstone C. J. said, "We would like to see a distinction drawn between (i) description of disease, with remedies and treatment therefore, and (ii) description of defective sexual enjoyment, with advice for heightening and prolonging such enjoyment in the case of normal persons. Disease is a thing to be combated; and descriptions of it with cures suggested printed in a paper intended to reach sufferers and doctors and not likely to come into the hands of others; are not criminal; but advice of the kind mentioned in (ii) above is on a different footing and would be kept out of public prints, as it amounts to an incentive to sensuality."

L. A. Rajapakse with *P. Senaratne* for defendant-appellant.

M. M. I. Kariapper Actg. Crown Counsel for Crown respondent,

ABRAHAMS, C. J.

The 1st appellant was convicted under Section 285 of the Penal Code for printing a number of copies of a book containing obscene passages. The 2nd appellant was convicted for aiding and abetting the 1st appellant in the commission of the above offence, and also with possession of a number of copies of the same book which amounts to an offence punishable under Section 286 of the Penal Code. They were each fined Rs. 50/- or in default one month's rigorous imprisonment.

The appeal is on the ground that there was a misjoinder of charges and also on the ground that the passages in the book, which are the subject matter of the charge, are not actually obscene. The first point, that of misjoinder, was not seriously pressed, and I have no hesitation in saying that there is no substance in it. The second point, however, raises a question of considerable difficulty as this sort of case frequently does.

The book in question was written by the 2nd appellant who is an Ayurvedic Physician, and who is the owner and probably the purveyor of various kinds of drugs which he claims in his book to possess remedial qualities for a very extensive number of complaints, whether the book contains obscene passages or not, I am of the opinion that it was written merely to puff the drugs and for no other purpose. In a prosecution of this kind, however, the intention of the accused is not actually relevant, the question being, is the book likely to get into the hands of people who may be corrupted by it ?

There has been considerable argument as to the meaning of the passages in the book which form the subject matter of the charge. It was contended by Counsel for the appellants that the passages merely prescribe a remedy for those persons who are impotent or suffer from a lack of sexual energy. It was contended on the other hand by Counsel for the Crown that the appeal is wider than that and suggests the lascivious, and incites peopel to immorality by putting into their minds lascivious ideas.

A number of cases have been cited on both sides, but, of course, in the consideration of charges such as these, each case depends on its own facts. The test to be applied in considering what is an obscene publication is that which is contained in the judgment of Cockburn, L. C. J. in *Reg. Hicklin*, (1868) 3 Q. B. Cas. 360, "The test of obscenity is this, whether the tendency of the matter charged.....is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall".

It is argued for the appellants that the appeal of the book is to the diseased only, and that the book is hardly likely to fall into the hands of anybody else, and if it does, it could not be said to be any more harmful than a number of medical treatises relating to sexual deficiencies which can be purchased by all and sundry without any difficulty. The book apparently is only obtainable on application to the writer or the publisher who, I am informed, advertised the existence of the work in the Ceylon Press. The reader of the books is exhorted after reading it, to pass it on to a friend. Therefore I do not think it can be doubted that the book is quite likely to be passed on to people who are perfectly sound, and who do not require medicine to restore or to improve their sexual powers.

Then as to the material itself, I am of the opinion that there are parts of the passages which are objected to in P 9 and P 10 which go beyond recommending remedies to the diseased and undoubtedly do suggest to the sound artificial stimuli for the increase of sexual energy and the enhancement of sexual satisfaction. In other words there is not only prescribed a remedy for the diseased but an aphrodisiac for the sound, and that, in my opinion has a tendency to deprave and corrupt those whose minds are open to such influence. The definition between a remedy and an aphrodisiac was, if I may respectfully say so, admirably put in the case of *Emperor v. Thakan Datt and another*. A. I. R. 1917 Lah. 288, where Johnstone C. J. said, "We would like to see a distinction drawn between (i) description of disease, with remedies and treatment therefore, and (ii) description of defective sexual enjoyment, with advice for heightening and prolonging such enjoyment in the case of normal persons. Disease is a thing to be combated ; and descriptions of it with cures suggested printed in a paper intended to reach sufferers and doctors and not likely to come into the hands of others, are not criminal ; but advice of the kind mentioned in (ii) above is on a different footing and would be kept out of public prints, as it amounts to an incentive to sensuality."

If the writer of the book wished to continue to reach sufferers only, he can express himself in a way which will not appeal to persons who do not require his remedies.

I, therefore, have no reason to interfere with the Magistrate's finding and I dismiss both appeals.

Present : MOSELEY, J. & FERNANDO, A. J.

MADAWELA and another *vs.* MADAWELA and another.

S. C. No. 178 of 1935.—D. C. Kurunegala. 15888.
Argued on 6th October, 1936
Decided on 12th October, 1936.

Public servants' (liabilities) Ordinance, No. 2 of 1899—Section 4—Action against public servant—Death before trial—Legal representative and another substituted—Can they for the first time plead the benefit of the Ordinance.

A public servant was sued on an alleged guarantee in respect of a promissory note. He did not claim the benefit of the Public Servant's (Liabilities) Ordinance and died while the action was pending. The administratrix and another were substituted as defendants. The substituted defendants for the first time claimed the benefit of the Public Servants' (Liabilities) Ordinance. The District Judge held that it was not open to the substituted defendants to take the plea inasmuch as the deceased public servant had not taken it.

Held : That the legal representatives of a deceased public servant can plead the Public Servants' (Liabilities) Ordinance in an action pending at the date of his death even though the public servant had not in his lifetime taken the plea.

H. V. Perera with *E. B. Wickremenayake* for substituted defendant

N. E. Weerasuriya with *J. R. Jayawardene* for plaintiff-respondent,

MOSELEY J.

This is an appeal from a judgment of the District Court of Kurunegala in an action on an alleged guarantee in respect of a promissory note. The action was begun in July 1931, but before trial the original defendant died and the administratrix of his estate and another person were substituted as defendants.

In an amended answer filed in January 1935, the substituted defendants raised for the first time the point that the action could not be maintained as it was brought in contravention of the provisions of Ordinance No. 2 of 1899, inasmuch as the defendant was a public servant when he gave the alleged guarantee and at the date of the institution of the action.

The learned District Judge, however, while holding that the defendant was a public servant at the time of the making of the promise, was of the opinion that, inasmuch as the plea that the action was in contravention of the Ordinance could not be taken by the legal representative of the defendant, who did not himself take that plea during his lifetime, the action could be maintained against those representatives. For these and other reasons he gave judgment for the plaintiff.

It has been argued in this Court on behalf of the plaintiff that there is no evidence that the defendant was a public servant, and that the provi-

sions of the Ordinance only apply if the defendant is a public servant at the time at which the plea is taken and that in this case, as must be conceded, the defendant was no longer a public servant, when the plea was taken.

On the first point I think there is ample evidence that the defendant was a public servant at the time of the making of the alleged promise and at the date on which the action was instituted, and it seems to me that that is all that matters.

Several authorities have been brought to our notice, but, in my view, the judgment in *Samsudeen Bhai vs. Gunawardene* (1), removes all doubt on this point. In that case it was held that the "whole proceedings appear to be void under Section 4, because the action at the time it was instituted was in contravention of the provisions of the Ordinance."

In the light of that judgment the crucial time appears to be the time at which the action was instituted. There can be no doubt that, at the time at which this action was instituted, the defendant was a public servant and was protected by the Ordinance. This being my view, it is unnecessary to consider the other grounds of appeal.

The appeal is allowed with costs. The judgment of the lower Court is set aside and judgment will be entered dismissing the action with costs.

(1). 37 N. L. R. p. 367.

FERNANDO, A. J.

I agree.

Present: ABRAHAMS, C. J, & MAARTENSZ, J.

THE KING *vs.* PONNADURAI AIYAR & OTHERS

S. C. No. 54/55—D. C. (Crm.) Mullaitivu 69.

Argued and decided on 21st October, 1936.

Criminal Procedure Code—Joinder of charges—Section 179.

The accused were indicted on the following charges.

1. That on or about 6th September, 1935, at Mullaitivu, you did commit house-breaking by night by entering the house of one Sivaguru Mailvaganam in order to commit theft; and that you have thereby committed an offence punishable under Section 443 of the Ceylon Penal Code.

2. That at the time and place aforesaid, you did, in a building used as a human dwelling, to wit, the aforesaid house, commit theft of cash about Rs. 39-50, a torch, 3 shirts, 12 sarees and other articles, property in the possession of the said Sivaguru Mailvaganam; and that you have thereby committed an offence punishable under Section 369 of the Ceylon Penal Code.

3. That at the time and place aforesaid and in the course of the same transaction as set out in counts 1 and 2, you did commit house-breaking by night by entering

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the house of one Gabriel Bastianpillai in order to commit theft; and that you have thereby committed an offence punishable under Section 443 of the Ceylon Penal Code.

4. That at the time and place aforesaid, and in the course of the same transaction as set out in counts 1 and 2, you did in a building used as a human building, to wit, the house last aforesaid, commit theft of a torch, two fountain pens, 2 sarees and other articles, property in the possession of the said Gabriel Bastianpillai; and that you have thereby committed an offence punishable under Section 369 of the Ceylon Penal Code.

Objection was taken to the indictment in appeal on the ground that there was a misjoinder of charges.

Held: That two persons can be jointly charged and tried in respect of two distinct transactions when the offences which are included in these transactions are identical.

2. C. L. R. 189 (King vs. Arlis Appu) overruled.

L. A. Rajapakse with *Soorasangaram* for the accused-appellants.

J. W. R. Illangakoon, A. G. with *Pulle, C. C.* for the Crown.

ABRAHAMS, C. J.

I see no reason to recede from or vary in any way the opinion which I formed when I referred this matter that two persons could be jointly charged and tried in respect of two distinct transactions when the offences which were included in those transactions were identical. My brother Maartensz agrees with this view.

It has, however, been urged upon us by Mr. Rajapakse that the appellants were not actually charged with having been concerned in two different transactions but that the offences were specifically stated to have omitted in one transaction. This procedure was obviously adopted in order to avoid the consequences of the decision of *The King v. Arlisappu* (2 C. L. R. p. 189) from which we now differ. It has been represented to us that the charge was in point of fact accurate. But the question as to whether a particular series of events does or does not form one transaction is a very complicated matter depending entirely on the individual circumstances of a case and as our finding one way or the other, whichever it may be, may be taken as a precedent for future cases we think it better not to give a decision on this point. Asssuming that there were two transactions and not one, the form of the charge, containing words of surplusage, was a mere irregularity curable under the provisions of section 425 of the Criminal Procedure Code. The appellants suffered no prejudice by the form of the charge as the offence was very clearly made out.

We, therefore, dismiss the appeal.

MAARTENSZ, J.

I agree.

Present: MOSELEY, J. & FERNANDO, A. P. J.

PAIVA *vs.* MARIKKAR AND ANOTHER

S. C. No. 177.—D. C. Kalutara, 18566.

Argued on 29th and 30th September and 2nd October, 1936.
Decided on 15th October, 1936.

Breach of Agreement to transfer property—Trusts Ordinance—Section 93.—When may specific performance of a contract be enforced?

M agreed to transfer a property to P and a part payment was made in advance. The agreement provided:

(a) that M would on or before 30th June, 1931 discharge the present existing mortgage and convey the premises to P free from all encumbrances.

(b) that if M fails to get the transfer executed M should pay Rs. 250 as damages.

(c) that if the said amount is not paid by M, P can recover it according to law.

On 4th September, 1933 M transferred the property to A. P sued M and A. The District Court held that inasmuch as registration was sufficient notice to A within the meaning of Section 93 of the Trusts Ordinance, the transfer to A was subject to the agreement in favour of P and decreed A to transfer the property to P.

Held: That on failure to perform the agreement, no specific performance can be enforced in view of the provision for payment of damages.

PER FERNANDO, A. J.

"The Court there appears to have adopted the rules applicable in England, which are set out in Fry, on Specific Performance, 5th edition, page 68 in which contracts of this kind are divided into 3 classes.

(1) Where the sum mentioned is strictly a penalty, a sum named by way of securing the performance of the contract, as the penalty in a bond.

(2) Where the sum named is to be paid as liquidated damages for a breach of the contract,

(3) Where a sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done, and it is stated that where the stipulated payment comes under either of the two first mentioned heads, the Court will enforce the contract, if in other respects it can, and ought to be enforced. On the other hand, where the contract comes under the 3rd head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract. The question to which of the three foregoing classes of contracts any particular one belongs is a question of construction. In considering it, the Courts must in all cases look for their guide to the primary intention of the parties as may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation."

H. V. Perera with *Chitty* for 2nd defendant-appellant.

N. E. Weerasooriya with *T. S. Fernando* for plaintiff-respondent.

FERNANDO, A. P. J.

By deed of agreement P 1 of the 22nd April 1931, the first defendant agreed to transfer the premises specified therein. The purchase price was fixed at Rs. 325/- and Rs. 125/- was paid on the date the agreement was signed, and it was provided in P 1 that the first defendant would on or before the 30th of June 1931, discharge the present existing mortgage and convey the premises to the plaintiff free of all encumbrances. The agreement was also subject to the condition that in case the first defendant fails to get the transfer executed, the first defendant should pay to the plaintiff the total sum of Rs. 250/- consisting of the Rs. 125/- paid in advance by the plaintiff

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and another Rs. 125/- as damages sustained by the plaintiff, and the bond recites, "if the said amount is not paid, the second party can recover the same according to law."

On the 4th of September 1933, the first defendant executed deed No. 1061 marked 2 D 1 conveying the premises to the 2nd defendant.

The learned District Judge held that as the agreement had been duly registered that registration was sufficient notice within the meaning of Section 93 of the Trusts Ordinance, and that the transfer in favour of the second defendant was therefore subject to the agreement in favour of the plaintiff. He therefore, entered judgment ordering the second defendent to transfer the property to the plaintiff, and both defendants to pay the plaintiff his costs of this action.

Two questions were argued in appeal namely, first. Is the agreement P1 of such a kind as would entitle the plaintiff to ask for specific performance of it? and second, whether the agreement can be regarded as an existing contract within the terms of Section 93 of the Trusts Ordinance ?

With regard to the first point, we were referred to the case of *Mathas* v. *Raymond* 2 N. L. R. 270 where Bonser C. J. said that the stipulation for damages in the agreement before him was intended to be a substitute for specific performance. Withers J. in the same case said, that the intention of the parties was the material question, and that if the penal stipulation is intended to be merely accessory to the principal obligation, then it is open to the seller to exact specific performance, but if, on the other hand, the penal stipulation is an alternative obligation, specific performance cannot be enforced. "If it is intended", he says, "that the party making the penal stipulation may break the principal obligation, but shall pay the consequent damages, then the party is restricted to his right of action to recover those damages," and Laurie J. who joined in the judgment agreed that in that case "the only remedy competent to the plaintiff was to exact payment of the damages". The Court there appears to have adopted the rules applicable in England, which are set out in Fry, on specific performance, 5th edition, page 68 in which contracts of this kind are divided into 3 classes.

(1) Where the sum mentioned is strictly a penalty, a sum named by way of securing the performance of the contract as the penalty in a bond.

(2) Where the sum named is to be paid as liquidated damages for a breach of the contract.

(3) Where a sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done, and it is stated that where the stipulated payment comes under either of the two first mentioned heads, the Court will enforce the contract, if in other respects it can, and ought to be enforced. On the other hand, where the contract comes under the 3rd

head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract. The question to which of the three foregoing classes of contracts any particular one belongs is a question of construction. In considering it, the Courts must in all cases look for their guide to the primary intention of the parties as may be gathered from the instrument upon the effect of which they are to decide, and for that purpose to ascertain the precise nature and object of the obligation.

We were also referred to the case of *Appuhamy* v. *Silva* 17 N. L. R. 238 where Lascelles C. J. said "was it intended that the plaintiffs should be entitled to a re-conveyance on payment of the agreed sum, a penalty being annexed to secure performance? If this is the true construction, the fact of a penalty being annexed will not prevent the Court enforcing performance of what is the real object of the contract. Or does the contract mean that one of two things has to be done, namely, the reconveyance of the property or the payment of the penal sum at the election of the defendant? If this is the case, the contract is satisfied by payment of the penalty, and there is no ground for claiming performance of the other alternative." From the manner in which this statement of the law is set out it seems clear that Lascelles, C. J. was impressed, if I may respectively say, correctly impressed by the fact elicited in that case that the plaintiff's were asking for a reconveyance of their own land which they had transferred to the defendant on payment of a certain sum of money.

Applying that test to the facts of the present case, it seems to me clear that the condition set out in P1 constitutes an alternative obligation. The conveyance by the first defendant was to be preceded by a discharge of the present existing mortgage, and it is clear that the mortgage which the parties then contemplated was for a sum of Rs. 2000/- and effected a number of other lands belonging to persons other than the first defendant. It is true that the first defendant agreed to discharge that mortgage, and to transfer the land to plaintiff, but if the mortgage bond had to be paid by other persons and involved such a large sum as Rs. 2,000/- is it likely that the parties intended to compel the plaintiff to secure a discharge of that mortgage? It is also to be noted that at the concluding part of that condition the expression that is used is that "if the said amount is not paid, the second party the plaintiff, can recover the same according to law." I think these words can only mean that the parties set out the only remedy that would be available to the plaintiff in such an event. The first defendant was apparently anxious to receive a sum of Rs. 125/- on the day the agreement was signed, and although he was willing to transfer his land at that time in order to secure the money he was not in a position to transfer

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owing to the existing mortgage. It was probably expected that that mortgage might be discharged within the short period of two months that was to elapse between the deed of agreement and 30th of June, 1931, which was the date contemplated for the transfer, and if within the 2 months, the first defendant succeeded in getting the mortgage discharged, it was agreed that he should transfer the land to the plaintiff on the plaintiff tendering him the money, but if that mortgage could not be discharged then the first defendant was to pay back to the plaintiff Rs. 125/- which he received along with a further sum of Rs. 125/- as damages. In those circumstances, I would hold that the intention of the parties was that in case of failure on the part of the first defendant to fulfil his contract, he had the option of paying the sum of Rs. 250/- which was an alternative obligation, and in view particularly of the discharge of the mortgage bond that was contemplated, the agreement contained in P1 was not one of which specific performance could be demanded.

The plaintiff must also fail on the 2nd question, namely, with regard to the effect of Section 93 of the Trusts Ordinance. It is true that in the case of *Silva* v. *Salo Nona* 32 N. L. R. 81, this Court held that the mere registration of an agreement to sell land is of itself notice within the meaning of Section 93 to a person who acquires the land subsequent to such agreement but the section refers to an existing contract of which specific performance will be allowed and the date of the purchase by the 2nd defendant was the 4th September 1933, whereas the 30th June 1931 was the date contemplated for the transfer to the plaintiff. In my opinion as I have already stated, the contract was not one of which specific performance would be ordered and in view of the time that had expired, I do not think it can be stated that in fact this was an existing contract in September 1933. The mere registration of the agreement would not be sufficient to show whether the contract had been waived or any action brought upon it, or the matter settled by payment or otherwise. For these reasons I would hold that the title acquired by the second defendant on his purchase is not affected by the agreement P1, and the plaintiff must fail on the third issue framed at the trial. I would accordingly allow the appeal, set aside the decree of the District Court and enter an order dismissing plaintiff's action as against the second defendant with costs in appeal and in the Court below.

MOSELEY, J.

I agree.

Present : KOCH J.

SOMASUNDRAM *vs.* KOTALAWALA

In the matter of the election for the Badulla Electoral District holden on the 27th February, 1936.

Argued on 14th, 15th, 21st, 22nd September, 1936.
Decided on 30th September, 1936.

Ceylon (State Council) Order in Council 1931—Article 9 (d)—Lease of house to head of Government Department as agent of the Crown.

Held : That a lease of a house to the head of a Government Department acting as the agent of the Crown, for the use of such department is a contract falling within the ambit of Article 9 (d) of the Ceylon (State Council) Order in Council 1931.

R. L. Pereira K. C. with *H. V. Perera* for the petitioner.

N. E. Weerasooria with *C. W. Perera* and *T. S. Fernando* for the respondent.

M. W. H. de Silva, Deputy Solicitor General with *S. J. C. Schokman, Crown Counsel* as *amicus curiae.*

KOCH, J.

The petitioner and the respondent were candidates for election at the State Council election held on the 27th February 1936 for the Badulla Electoral District. The respondent was declared by the Returning Officer duly elected on the 28th February, 1936. He had polled 15,795 votes as against the petitioner who only polled seven thousand odd. The nomination day was fixed for the 15th January, 1936 when the petitioner and the respondent stood nominated for the electoral district and the election was adjourned in order to enable a poll to be taken on the 27th February, 1936. The result of the polling was duly announced in the Government Gazette on the 10th March, 1936. Within 21 days of this announcement the petitioner on the 27th March, 1936 filed his election petition and complied with the necessary formalities and requirements prescribed by the Ceylon (State Council Election) Order in Council of 1931.

In this petition the petitioner states that the election was void under article 74 (e) of the aforesaid Order in Council as the respondent was at the time of his election a person disqualified for election as a member. This disqualification the petitioner avers was due to the fact that the respondent was at the time of his election holding a contract or agreement made and entered into with the Director of Medical and Sanitary Services or the Medical Officer of Health in Uva Province for or on account of the public service, and that the contract or agreement referred to was a contract of tenancy by which the said respondent let for hire the premises called "Bridge View" situate in Badulla town for the purpose of providing office accommodation for the Medical Officer of Health Uva and his staff. He further avers that this tenancy began in January 1930 and without interruption continued up to the date of his petition and was still continuing.

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I am satisfied that on the evidence led by the petitioner the premises "Bridge View" in Badulla town was engaged by the Director of Medical and Sanitary Services as an office for the Medical Officer of Health, Badulla, on a monthly tenancy renewable from month to month as from 1st January, 1930 at a rental of Rs. 55 per month. I am also satisfied that this tenancy continued uninterrupted up to the 31st of March, 1936, subject to the qualification that owing to the depression the monthly rental was reduced in 1931 to Rs. 45/-. I am further satisfied that this reduced monthly rental was paid to and accepted by the respondent up to the end of February, 1936.

The evidence clearly shows that the monthly rental was payable at the end of each month and that the procedure adopted (which is the usual procedure) was for the respondent to receive these rents at the end of each month as they fell due by signing a voucher that was prepared and perfected for the purpose at the office of the Medical Officer of Health, Badulla. This practice was regularly followed up to the end of February, 1936 but on the 29th, March 1936 the respondent gave notice to the Director of Medical and Sanitary Services terminating the tenancy on the 30th of April, 1936 with the request that he would feel obliged if the tenancy could be terminated earlier as he had been declared elected member of the State Council of Badulla on the 28th of March, 1936. The Director in pursuance of this request made immediate arrangements for the shifting of the office of the Medical Officer of Health from "Bridge View" to another bungalow and "Bridge View" was vacated at the end of March. The March rent for "Bridge View" was sent from the head office at Colombo of the Director of Medical and Sanitary Services in March to the Medical Officer of Badulla for payment to the respondent, but the respondent had failed to attend and sign this voucher and to receive this rent. This rent was returned by the Medical Officer of Health to the head office. The reason why the respondent was not specially called upon by the Medical Officer of Health (Dr. Ferdinands) to sign the voucher and receive payment was due, he says, to the fact that he learnt that the respondent having been declared elected on 28th February, 1936 was averse to receiving the rent for the month of March. This sum of Rs. 45/- though returned by the Medical Officer of Health to the head office has been and is still available to the respondent who undoubtedly is entitled to this sum, and can at any time hereafter legally claim the same so long as it is not prescribed. The fact that the rent for March 1936 had not been received by the respondent into his hands cannot obviously affect the continuance of the contract of tenancy up to 31st March, 1936, as a contract of tenancy can only be legally terminated by the giving of due notice or by mutual consent. On the facts established I have no hesitation in holding that the respondent in the capacity of landlord was a party to a

contract of tenancy in respect of premises "Bridge View" Badulla and that this contract of tenancy commenced on 1st January, 1930 and continued up to 31st March, 1936.

Now who is the other party to this contract? The respondent's counsel first contended that this other party was no other than the Medical Officer who was the actual tenant, as he himself was in occupation and as the various vouchers signed by the respondent were typed in the office of the Medical Officer of Health by an officer of his and signed by the Medical Officer of Health himself. I am not in the slightest degree impressed by this argument as the test to be applied as to who the other party to the contract was—is not dependent on circumstances such as those relied on by the respondent but on the identity of the actual party with whom the contract of tenancy was actually entered into. There can be no doubt whatsoever on the evidence of Dr. S. T. Gunasekera, Acting Director of Medical and Sanitary Services, and the evidence of Doctors Dissanayake and Ferdinands, supported as it is by the documents P1 to P15, that this contract of tenancy was entered into by the respondent with the Director of Medical and Sanitary Services for the purpose of providing office accommodation for the Medical Officer of Health, Badulla. It is true that the evidence discloses that "Bridge View" was selected by the then Medical Officer of Health, Badulla, Dr. Dissanayake, but that was on instructions from the Director because the Medical Officer of Health happened to be on the spot and perhaps was best judge as to whether the building would suit him as an office. The fact that the selection of the premises was left to the agent of a principal is no reason for inferring that the contract of the landlord was with that agent. I am clear in my mind that on the evidence there can be no question that this contract of tenancy was between the respondent and the Director of the Medical and Sanitary Department. In fact the respondent's counsel Mr. Weerasooria later in his argument felt constrained to admit that this was so.

The ground, as I have stated before, on which the petitioner relies is that this contract which was entered into with the Director of Medical and Sanitary Services was for or on account of the public service, a requirement that is set out in Article 9 (d) of the Ceylon (State Council) Order in Council of 1931. On this point I am satisfied that the Department of Medical and Sanitary Services is one of the Departments of the Public Service and therefore a part of that service, and that this contract was entered into by the Director not for his own private purposes, but for and on account of the public service. There is the evidence of the Acting Director on this point and there is also his evidence that the rents were paid from public funds. This evidence is supported by the evidence of Mr. J. P. de Vos, Assistant Accountant of the Department of Medical and Sanitary Services and Mr. D. A. Fernando, Audit

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Examiner, as well as the documents produced relevant to that point. Even assuming that this contract was entered into with the Medical Officer of Health, Badulla, and not with the Director of Medical and Sanitary Services, I cannot see how this will make any difference as I am firmly of opinion that the Medical Officer of Health in thus contracting was acting not in his personal capacity or for his personal benefit but for and on account of the Department of Medical and Sanitary Services of which he was a member and therefore for and on account of the public service. No authority has been cited by respondent's counsel to satisfy me that a contract made by a person with the public service should be entered into by that person with some particular specified officer of the public service, and so far as I am aware there is no such provisions in any of our Ordinances unlike the special provision in Section 456 of the Civil Procedure Code which says that all actions by or against the Crown shall be instituted by or against the Attorney General.

The evidence called by the petitioner and the documents relied on by him clearly proved that the intention of the respondent in entering into the eontract of tenancy was to do so with the public service, through its representative, the Director of Medical and Sanitary Services. In fact the respondent in his letters P1, P6 and P13 refer to his bungalow being required and used for the purpose of the Anti Malarial Campaign. In *Royse* vs. *Birley* (1869) 20 Law Times Reports 786 at page 792 Brett J, referring to the corresponding section in the English Statute 22 George III C 45, says "I think that to render its provisions applicable a contract must be entered into with the knowledge that it was with the agent of the Government." I have no hesitation in saying that the Director of Medical and Sanitary Services was acting in respect of this contract as the agent of the Government and that the respondent was well aware that the Director was acting as such agent.

Counsel for the respondent stoutly maintains that, granted the respondent entered into a contract of tenancy and granted that that contract was with the Director of Medical and Sanitary Services and granted that the premises leased were put to public use, nevertheless, the position falls short of such a contract having been entered into with a person for on account of the public service. He contends that contracts "for or on account of the public servico" are contracts which contemplate that something should be done under the contract by the other party (in this case the respondent) for the benefit or the use of the public service, and that the acts contemplated do not therefore include the mere letting out of the premises on a contract of tenancy no matter whether such premises were intended to be used for the public service. He says that the other parties contemplated are persons such as Government contractors and public contractors. He sites Rogers on

Elections Volume 2, 20th edition, pages 21 to 25, and 21 Halsbury old edition, page 658 Section 1177. I do not find here anything that definitely defines the particular nature of the act that the other party should do for the use and benefit of the public service so as to bring that act within the meaning of the words "for and on account of the public service". I find that the passage and the cases therein referred to deal only with contracts under which goods, wares merchandise, and commodities are supplied without any pointed reference to the fact that it is such type of contract and such type only that can be said to be "for or on account of the public service." There is however sufficient material there to show that contracts made with the Commissioners of the Treasury or the Navy or the Victualling officers or generally on account of the public services disqualify the other party from being elected or sitting which would rather indicate that contracts made with the head of a Government Department for the benefit of the public service are rightly made with the recognised authority.

Assuming that Mr. Weerasooria is right in maintaining that the contract contemplated necessarily involve the doing of an act for the use and benefit of the public service I am of opinion that the letting of a house to the head of a department of the public service and maintaining it in a habitable condition during the period of occupation amounts to the doing of an act for the use and benefit of the public service. This idea is sustained by my brother Akbar J. in his judgment in *Cooray vs. De Soysa* 5 C. L. W. 111 at page 118. He there says, "Any contract for or on account of the public service would include any contract which will help or further the object for which this public service was established." Surely the letting out of the premises in question in order that it might be used as an office for the Medical Officer of Health, Badulla, is a contract which will help and further the object for which the public service was established. Moreover, my brother in differentiating between contracts that could not be said to be "for or on account of the public service" (such as a contract of conveyance entered into by a passenger by buying a railway ticket or a contract for the establishment of a telephone in a person's house) and contracts which can be rightly said to be "for or on account of the public service" instances the following as coming under the latter head viz., a contract by which on payment of a rent a person allows the telephone authorities to fix an erection in his premises for the convenience of the telephone authorities. If my brother is right in the instance he has given (and my opinion is that he is right) is there any difference between that instance and the case under review? In this case instanced by my brother the premises were let under contract to the telephone authorities to fix an erection for the convenience of the telephone authorities. In the case under review the premises were let under contract to the Medical authorities to fix an office for the con-

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venience of the Medical authorities. I am, therefore, of opinion that the contract in question was entered into by the respondent "for or on account of the public service."

The next point raised by counsel for the respondent is that under the Article setting forth the disqualification viz 9 (d) of the Ceylon (State Council) Order in Council 1931, a contract of tenancy cannot be included under the words "any contract or agreement or commission." His argument is that the word "commission" controls the words "contract or agreement" and that the words contract and agreement must be read merely as explanatory of the words "commission." He continues the argument by insisting that the one word to be considered in 9 (d) is the word "commission," and that before the petitioner can succeed, he must bring this contract of tenancy within the word "commission." He contends that the petitioner has failed to do so because the word "commission in this context means a trust or authority and as tenancy is not a trust or authority it cannot be brought within the legal meaning of the word "commission." I may be disposed to agree that the word "commission" implies what Mr. Weerasooria says it does, but find the greatest difficulty in subscribing to his argument that the word "commission" is the only word to be considered in 9 (d) and that the words "contract or agreement" have been inserted as purely explanatory of the word "commission.' In the first place the words "contract or agreement precede the words or commission" and to my mind this order of arrangement would rather suggest that if the question of one word controlling another can be introduced at all the earlier word would control the later and not the later word the earlier. The words as they appear are "any contract or agreement or commission made or entered into," It will be seen that there is the disjunctive "or" between each of these words contract, agreement or commission which, to my mind in connection with the rest of the context, has been advisedly inserted by the draftsmen with the object of setting out these words as definite and separate words each to be taken and read by itself and legal effect given to each on that footing. I have given full consideration to the very ingenious argument of Mr. Weerasooria and the cases he has cited on this point. But I regret that I am firmly convinced that his argument cannot prevail. To uphold it will be to drive a coach and four through the express words "contract or agreement." For, I cannot bring my mind to agree that these words were inserted purely for the purpose of explaining the word "commission" which has a definite legal meaning and does not require any assistance from words such as contract or agreement to make one aware of what that meaning is. On the contrary my opinion is that if the words contract or agreement are to be considered as being merely explanatory I fear that far from the meaning of the word "commission"

being thereby clarified, the effect would be to mystify it. Nothing could have been easier for the draftsman if he intended to limit the holding or the enjoying in whole or in part to "commission" only to use the word "commission" only without any reference to contract or agreement and to explicitly define that word in Article 4 where a number of terms and words are defined.

It is hardly likely that the proviso "nothing herein contained shall extend to any pension," would have been inserted in this connection were it not for the fact that otherwise it might be reasonably construed that a person enjoying a pension does so as the result of a contract express or implied. This proviso would not have been necessitated if the identity of the word "contract" was lost in the word "commission."

The next argument of respondent's counsel was that assuming that contract, agreement and commission were each differently and separately contemplated under Article 9 (d) it was not intended that the words "contract" or "agreement" should include a contract of tenancy. His point was that the words contract or agreement referred to in this Article only contemplated contracts to supply. He says that the words in our enactment have been chipped off from Section 1 of 22 George 111 C 45, and that being so, the implications of that section only should be adopted in our section The section in the English Statute runs as follows—"Any person..... who shall undertake, exercise, hold or enjoy in the whole or in part any contract, agreement or commission made or entered into with under or from the Commissioners of His Majesty's Treasury or of the Navy or of the Victualling Officer or with the Master General or the Board of Ordnance or with any one or more of such persons whatsoever for or on account of the public service." Mr. Weerasooria contends that the words "or with any other person or persons whatsoever" must be read *eiusdem generis* with the persons specified previously in that act and as the contract contemplated with such persons were limited by decisions of court to supplies only, the same limitations should apply to our Article. In this connection I am not prepared to say that it is clear the words "with any person or persons whatsoever" are *eiusdem generis* of the persons previously mentioned. I say so because the Statute 21 George V C13 which became law on the 27th March, 1931 was passed to remove any such doubt.

I do not see that the cases cited by him on this point actually limit such contracts to those for supplied only, although it is true that every one of the cases he refers to deal with contracts for supplies. The principle of *ejusdem generis*, which it is argued does apply to the English Statute, cannot apply to our statute because there are no such "preceding" persons specified, and there is, therefore, no

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room for the introduction of this principle into our statute. I have only to ascertain therefore whether the word contract appearing in our Article read in connection with the context is wide enough to include a contract of tenancy. The words are "any contract" which must mean any contract whatsoever in the absence of any words limiting the range of such contracts, and there does not appear any such limiting word in our Article.

I am indebted to Mr. Schokman, Crown Counsel, who appeared as *amicus curiae* for a very helpful authority. He drew my attention to Courts (Emergency Powers) Act 1917 C 25 Section 9 (1) (7 and 8 George V). This statute was expressly passed during the War to prevent any prejudice being created against a sitting member of the House of Commons who by reason of the emergencies of the Great War may have been required to supply property or permit the use thereof by a Government Department for purposes connected with the War. This statute in Section 9 (1) expressly set forth that none of the provisions of the House of Commons Disqualification Act of 1782 (which has been previously referred to in this judgment as 22 George 111) shall be construed so as to extend to a contract or agreement, entered into during the Great War to the price of compensation to be paid for any property so requisitioned or taken. To my mind it is perfectly clear that the relevant provision in that statute refers to any property of whatsoever description movable or immovable. If 22 George 111 C 45 Section 1 was confined only to commodities or supplies, there would have been no necessity for that provision to have been couched in such general terms as to include immovable property. After careful consideration, therefore, I am of opinion that the words "any contract" are wide enough to include a contract of tenancy.

Mr. Weerasooria next very strongly pressed his contention that the tenancy of "Bridge View" for and during the month of March 1936 was from a contractual point of view and so far as his client the respondent was concerned, an executed contract. That what only remained for his client to do was to receive the rent which fell due at the end of that month and that this amounted only to a right to payment and did not involve any obligation whatsoever on his part towards his tenant. In short that the respondent was purely a creditor and nothing more. Proceeding on this footing Mr. Weerasooria cited in support the Manchester Election Petition case of *Royse* v. *Birely* (1869) already referred to. He relied on the decision there that words holding or enjoying a contract made for or on account of the public service within the meaning of 22 George 111 C 45 Section 1 (previously referred to) required that such contract must at the time of the election be an executory one; that therefore under a contract for the supply of goods where the goods had been delivered to and accepted by the Government before the election and at the time of the election nothing remained to be done under the

contract except for the Government to pay the price which previously had become ascertained and was payable, the contractor in that case was held not to be disqualified inasmuch as at the time of the election the contract was executed. He also cited the case of Tranton and Aster (1917) 33 Times Law Reports 383. This case concerned the insertion of an advertisement in the newspaper called the Observer the proprietor of which was Major Astor. This was done as the result of an alleged order given by a Government Department for the insertion of a Government advertisement. Major Astor was at the time sitting and voting in the Common House of Parliament and it was sought by Tranton to recover a large sum by way of penalty against the defendant for having so sat and voted when he was disqualified from doing so. Justice Low who decided that case was of opinion that the advertisement was inserted as the result only of a Government order and that there was no evidence that the order was ever accepted except by reason of the insertion. He was therefore of opinion that the moment advertisement was inserted the contract was executed and that all that remained to be done was for the defendant to receive payment. In these circumstances he was of opinion that the sitting or voting which was proved to have taken place between the insertion and the actual payment was not penalised under the act. In the course of his judgment he dealt with the case of *Royse vs. Birley* (supra and expressed his approval of the decision in that case. Low Justice was further of opinion that the Act was not intended to include casual or transient transactions although they may be the subject of contracts, and that the kind of contract intended was of a continuing and lasting character and would not include for instance ordinary sales or purchases across the counter.

Another case cited by Mr. Weerasooria was *Thompson vs. Pearce* (1819) Broderip and Bingham's Reports Vol. 1 page 25 where it was held that every dealer who had a realation to the public service however remote is not disqualified from sitting in the Parliament. In this case the dealer had supplied articles of clothing specified in an order issued to him by a Colonel for the use of his regiment and the facts showed that the order had been executed and that the Colonel was indebted in the defendant's books to the amount of order, all that remained under the contract to be done was payment. There can be very little doubt that where a contract has been wholly performed by the parties to it and all that remains is a matter of payment the contract can rightly be said not to be executory but actually executed and would not be such as is contemplated by the statute. The same principle, I admit would apply to our Article 9 (d). The difficulty however in the way of Mr. Weerasooria is that the contract of tenancy in the present case had at no period of time prior to the 31st of March, 1936

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been executed. For a tenancy contract, unlike a contract for the sale of goods, is a contract of a continuing nature until the final day of its determination and during the period of its continuance involves several mutual rights and obligations of a landlord towards his tenant and of a tenant towards his landlord. These mutual right and obligations were well known. The landlord has to protect the tenant in his occupation of the building and to see that he has peaceable possession of it as long as the tenancy continues. He has further to keep the premises in a habitable state of repair so that the tenant may have the use of them for the purposes for which they were let to him. He would also be responsible to pay compensation to the tenant for any loss caused to the tenant through defects in the property leased and also an obligation on the termination of the tenancy to permit the tenant to remove movable property brought in by him and also in certain cases to pay compensation for improvements effected by the tenant.

On the other hand the tenant is under obligation to use the premises only in the way that it was intended he should use it when the contract was entered into. He should also while occupying cause no damage to the premises. He should further effect such minor repairs as would be necessary from time to time as were not intended that the landlord should effect and should further pay the rent agreed upon as it fell due. These mutual rights and obligations undoubtedly existed through the month of March and up to the end of the last day of that month. I therefore cannot see how it can be seriously argued that all that remained to be done during the month of March was, so far as the landlord was concerned, to receive the rent and thus bring this contract within the principle of the judgments just dealt with.

I may further say that the respondent's counsel argued that under Article 74 (e) of the Ceylon (State Council Elections) Order in Council of 1931, the time of his election meant the time when the Returning officer under Article 47 caused the name of the member elected to be published in the Government Gazette and not the time when he was either nominated or declared duly elected by the Returning officer. I regret I cannot agree with this contention. Firstly, because this very Article state that "the Returning officer shall without delay report the result of the election to the Legal Secretary. "The result of the election" can only be reported when the election is over. Secondly, because the date of publication of the result of an act cannot reasonably be considered to be the date of the act unless there is special provision to that effect and there is no such provision here. Thirdly in Article 31 it is stated that if only one candidate stands nominated on nomination day the Returning officer shall declare that candidate elected and report the result to the Legal Secretary. This would show that the election was over in those circumstances on nomination day. Finally,

in Article 32 (1) there is provision that if more than one candidate stands nominated on that day the Returning officer "shall forthwith adjourn the election" to enable a poll to be taken. This provision can only reasonably mean that the election which commenced on nomination day will be concluded when the poll has been taken. I am therefore of opinion that the time of his election may be either nomination day or election day or any time between these two days but not by any means the day of publication in the Government Gazette of the result of the election.

Moreover, even if the date of publication in the Government Gazette namely, 10th March, 1936 is regarded as the time of the respondent's election, I fail to see how this can help the respondent as the contract of tenancy in question was existing at this date and continued to exist for 3 weeks later.

Mr. Weerasooria relying on Warrington's case (1869) 1. O'M and H 42 and *Anson* vs. *Dyott* (1869) and the judgment of Drieberg J in *Peiris* vs. *Saravanamuttu* 33 N. L. R. 229 pressed upon me that I should view this trial not as a civil proceeding but rather in the character of a criminal or quasi-criminal proceeding and that therefore before upsetting this election I ought to be satisfied beyond all reasonable doubt that the election is void, I think Mr. Weerasooria was right and I have, therefore, adopted the principle set out in these judgments in coming to a decison as to whether the election is void or not.

I have no doubt whatsoever that for the reasons I have given the election of the respondent is void on the ground that he was disqualified at the time of his election under Article 9 (d) of Ceylon (State Council) Order in Council 1931 and that the prayer of the petitioner should succeed. The petitioner will be entitled to the costs of this trial.

Present : SOERTSZ, A. J.

KULATUNGE *vs.* SIMON

S. C. No. 136—M. C. Colombo 14100.

Argued on 12th May, 1936.

Decided on 15th May, 1936.

Motor Car Ordinance No. 20 of 1927—Regulation 4 of Schedule 4 of the Ordinance—Setting down a passenger at a place other than a public stand or stopping place.

Held : That, if the driver of an omnibus slows down his vehicle when taking a bend and a passenger taking advantage of the slowing down of the vehicle chooses to alight from it, the driver of the omnibus cannot be said to have set-down such passenger in breach of regulation 4 of the regulations in the Fourth Schedule to Ordinance No. 20 of 1927.

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C. T. Olegasegram with *Shelton de Silva* for appellant

SOERTSZ, A. J.

This is another case from the Municipal Court of Colombo in which the charge made against the accused is bad. The accused was charged from the summons which stated that he "being the driver of bus J. 23 set down a passenger out of a 'halting' place and thereby committed an offence punishable under Section 84 of Ordinance No. 20 of 1927." Now Section 84 is the general Penal Section. There is no reference in the summons to the provision of Law which makes it an offence to set down a passenger at a place other than an authorised stopping place. I find from the report made to the Court by the prosecuting officer that it is alleged that the accused was acting "In breach of Section 4 schedule 4 of Ordinance No. 20 of 1927 and published in Government Gazette No. 7902 of January." * That Section is as follows:— "Where in an urban area any notice is exhibited by a licensing authority indicating a stopping place or public stand for omnibuses, which has been provided or allotted for stopping or standing of omnibuses, no passenger may be taken up or set down from an omnibus in the urban area except at such stopping place or public stand." If I consider this case on the supposition that there was a reference to this section in the charge, I am still unable to sustain the conviction as there is evidence to show that the accused 'set down' a passenger in an unauthorised manner. Police Sergeant Kulatunga says "I saw bus J23 coming.....It slowed opposite the former Eastern Garage and a passenger got down from the front seat.....Passenger got down as bus was turning round the bend." P. C. Baboordeen says "I saw bus J23 coming..... The driver jammed his brakes, we looked to see and saw a gentleman getting off the front seat....."

The evidence is consistent with the driver having slowed down when taking the bend and the passenger making use of the opportunity to alight. It is insufficient for establishing a voluntary setting down by the driver.

For these reasons, I set aside the conviction and acquit the accused.

Appeal allowed.

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* Where in an urban area notices are exhibited by a licensing authority indicating stopping places for omnibuses, an omnibus shall not be stopped for the purpose of taking up or setting down passengers except at a place so indicated.

Present : ABRAHAMS, C. J., MAARTENSZ J. and MOSELEY J.

N. K. de S. WICKREMASINGHE *vs.* D. R. SENEVIRATNE,

S. C. Nos. 104—105 D. C. Galle No. 31142.
Argued on 26th, October, 1936.
Decided on 12th November, 1936.

Civil Procedure Code—Schedule III—Scale of Costs and charges to be paid to proctor in the District Courts—Making and serving copy of plaint—Meaning of the words "making a copy" as used in the Schedule.

Held : (i) That the words "making a copy" as used in Schedule III to the Civil Procedure Code mean making a copy by other than mechanical means.

(ii) That a charge for serving printed copies of a plaint in a partition action does not fall within any of the items in the Schedule.

PER MOSELEY J.

(a) "A taxing officer has a discretion to allow charges or fees not specially provided for in the schedule, but where a definite fee is fixed in respect of an item, it appears clear that a taxing officer has not, nor is it desirable that he should have, a discretion to depart therefrom."

(b) "In order to avoid such an injustice, I feel that there is ample justification for construing" making a copy" as I think the legislature intended them to be understood, that is to say, as making a copy by other than mechanical means."

No 104 : *H. V. Perera* with *L. A. Rajapakse* for 2nd plaintiff-appellant.
N. E. Weerasuriya with *T. S. Fernando* for respondent.

No 105 : *N. E. Weerasuriya* with *T. S. Fernando* for appellant.
H. V. Perera with *L. A. Rajapakse* for plaintiffs-respondents.

MOSELEY, J.

The appellant in case No. 104 was one of the plaintiffs in a partition action and the respondent was his proctor. In case No. 105 the petitions are reversed, but, as the two cases are being considered together, I shall, for the sake of convenience, refer throughout to the client as the appellant and to the proctor as the respondent.

The latter included in his bill of costs the following item:—"Making 261 copies of plaints (110 folios in each) @ -/50 cents per folio, Rs. 14355/00.

It is conceded that this number of copies was necessary and it is contended on behalf of the respondent that the charge is according to the scale in the 3rd schedule to the Civil Procedure Code. According to the scale a charge of 50 cents per folio is allowed for making and serving a copy of the plaint, or translation thereof, for service.

It is not disputed that, normally, such a charge represents a fair remuneration for the work performed.

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In this case, however, owing to the large number required, it was considered convenient to have the copies printed, in respect of which the actual cost was Rs. 35/-. The taxing officer reduced the item of Rs. 14,355/- to Rs. 5208-50 following a scale which differs from that laid down by the Civil Procedure Code.

Both the appellant and the respondent raised objections to the revised figure, and the bill of costs was referred to the District Judge. The appellant contended that the charge was excessive ; the respondent that the taxing officer had no discretion to allow anything less than the amount fixed by the Code. The acting Additional District Judge thought that the taxing officer was entitled to allow any sum up to what he referred to as "*the maxima*," and further thought that Rs. 20/- for each copy of the plaint was a fair and reasonable charge, and found that the item should be Rs. 5220/-.

Against this finding both parties have appealed on the grounds indicated above.

Counsel for the appellant has urged that the amount charged in the bill of costs, and indeed the reduced amount fixed by the District Judge, bears no relation to the value of the work done. He further contended that the charges fixed by the schedule are "*maxima*," and that in a case of this nature the taxing officer has a discretion to allow such sum within the specified limit as he considers a fair and proper remuneration for the work done.

In the case of *Alles* v. *Buultjens*, (1), in which the facts closely resemble those in the case before us, the Court, while allowing in full an item for printing copies of a plaint which was charged according to scale, was of the opinion that "the object of the schedule is to fix a maximum up to which "the taxing officer is entitled to tax when he is satisfied "that some item of work in the case has been done."

No reasons were advanced by the learned Judges in support of this view with which I regret that I am unable to agree.

A taxing officer has a discretion to allow charges or fees not specially provided for in the schedule, but where a definite fee is fixed in respect of an item, it appears clear that a taxing officer has not, nor is it desirable that he should have, a discretion to depart therefrom.

In my view, therefore, the charge for printing copies of a plaint, assuming that such printing can be said to come within the meaning of the words "making a copy," would be —/50 a folio, that is to say, the Proctor's charge in this case would be a proper one.

In the case of *Alles* v. *Buultjens*, (supra), the view was taken that "as the schedule now stands no distinction is made as to the process by which copies are made."

It was admitted there, as I think it must be in this case, that, if the copies had been made by the proctor's clerk in his own handwriting, the charge would be in order. The amount involved in that case was small, viz:—Rs. 588/00, and the extravagance of such a charge was not so apparent as in the present case.

That a proctor should be able, by the mere act of handing certain script to a printer and paying the latter Rs. 35/00 for work done, to recover on that account from his client a sum of Rs. 14,355/00 can only be described as fantastic.

There can be no doubt that such a circumstance could not have been envisaged when the Civil Procedure Code became law, and handwriting was the universal means of making a copy.

Counsel for the respondent has contended that the language used in this particular item of the schedule is clear, and it is not for the Court to attempt to give effect to the intention of the Legislature, and that it is for the Legislature to remedy the evil, if such it be.

It is a fundamental principle of interpretation that in order to avoid a hardship or an injustice the ordinary meaning of a word may so far be modified. There are numerous authorities for the proposition. It will suffice to quote one. The County Courts' Act (13,14 Vict. c 61) by Section 12 provided that a plaintiff in trespass who recovered a sum not exceeding £5 should not get costs, but that, if he recovered less than £5 and the Judge certifies, the plaintiff should recover his costs. In *Garby* v. *Harris*, (2), the plaintiff recovered £5 exactly. He was not *ipso facto* entitled to costs; and as the amount recovered was not less than £5, it was contended that the certificate given by the Judge was improperly given and should be rescinded. It was held that as there was no doubt about the intention of the Legislature, the words "less than £5" should be read as "not exceeding £5."

It seems to me that in the present case we are faced with no less an injustice.

There is, I take it, no limit to the number of persons whom it may be necessary to cite in a partition action, so it may be that with the present case the limit of injustice has not been reached. In order to avoid such an injustice, I feel that there is ample justification for construing the words "making a copy" as I think the Legislature intended them to be understood, that is to say, as making a copy by other than mechanical means.

That being so, it follows that the item charged in the bills does not, in my opinion, fall within the meaning of item in the schedule.

The appeal in case No. 104 is, therefore, allowed with costs. The item is one in respect of which the taxing officer had power to allow a reasonable

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fee. In all the circumstances I think a charge of Rs. 200/- including Rs. 35/- actually paid to the printer, would be reasonable and should be allowed.

The appeal in case No. 105 is dismissed with costs.

(1) 6 C. W. R. p. 197.
(2) 21 Law Jour. Ex. p. 160 (1852.)

S. S. ABRAHAMS, C. J.

I agree.

MAARTENSZ, J.

I agree.

Present: ABRAHAMS, C. J, MAARTENSZ, J. and MOSELEY, J.

KING *vs.* SOLOMON & OTHERS

In the matter of a case stated by the Attorney General under Section 355 (3) of the Criminal Procedure Code in respect of the Supreme Court Case No. 45 P C Gampaha 35066 of the 2nd Western Circuit 1936.

Argued on 30th October, 1936.

Decided on 4th November, 1936.

Case stated under Section 355 (3) of the Criminal Procedure Code—Charge of culpable homicide—Penal Code Section 293—Misdirection of the Jury.

2. "The abovenamed prisoners were charged with committing culpable homicide not amounting to murder by causing the death of one Liyana Pathirennehelage Podisingho on or about the 10th May, 1935 at Wadirawa in the division of Gampaha of the District of Negombo. They were tried before the Hon'ble Mr. V. M. Fernando, the Commissioner of Assize, and an English-speaking Jury on the 28th May, 1936, and convicted of the offence with which they were charged by a unanimous verdict. Each of the prisoners was thereupon sentenced to undergo 5 years' rigorous imprisonment.

3. The deceased Podisingho had a daughter named Sopinona. She was the mistress of the first prisoner, Solomon. On the 8th May, 1935 Sopinona left the house of the first prisoner at Wadirawa and proceeded to Polgahawala. The first prisoner sent Sopinona's brother, Piyasena, to Polgahawela to fetch her back. On the 10th May, 1935, about 8 a. m. Sopinona returned to Wadirewa to the house of the deceased. About an hour or an hour and a half later, the first prisoner entered the house of the deceased accompanied by the other prisoners. The first prisoner struck Sopinona with a stick. The deceased asked the first prisoner not to strike his daughter. Then the first prisoner struck the deceased on his shoulder and on the chest. The third prisoner seized the deceased and pushed him against a wall and the second prisoner and the third prisoner also joined in the assault on the deceased. All the four prisoners struck the deceased with their closed fists, chiefly on the abdomen.

The medical evidence showed that the deceased was about 55 years of age and that externally there was a contusion over the left side of the front aspect of the chest. On internal examination there were the following injuries: –

(1) A rupture of the anterior margin of the spleen 2" long.

(2) A rupture over the internal surface of the spleen 2" long.

There were also ten ruptures of the liver, one over the anterior border of the liver, and the other over the external surface of the liver.

In the opinion of the Medical Officer who gave evidence death was due to haemorrhage and shock resulting from the ruptures of the spleen and of the liver. The spleen was enlarged as a result of disease to twice its normal size and a comparatively light blow would have been sufficient to cause its rupture. The liver was of normal size and in the opinion of the Medical Officer considerable force must have been used to cause a rupture of the liver. The injuries of the liver were not necessarily fatal in the sense that 50% of persons who had received such injuries might, with proper treatment be expected to recover. Death might not have resulted in this case if the spleen had not been ruptured. In other words, if there was no injury to the spleen Podisingho (the deceased) may possibly have recovered from his other injuries. Cross-examined with regard to the absence of marks on the body, Dr. Suppramaniam, the Medical Officer, stated that he would have expected more external injuries unless all the blows had been struck on a flexible part of the body like the abdomen. The learned Commissioner in his charge to the jury directed " that it was not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking a man with the fist, and that knowledge of the consequences likely to follow from the assault made on Podisingho must be inferred from the actual consequences of that attack."

Held : That the Commissioner's direction was wrong in law.

J. W. R. Illangakoon K. C., Attorney General with *M. F. S. Pulle Crown Counsel* for Crown.

H. V. Perera with *S. Nicholas* for the accused.

ABRAHAMS, C. J.

This is a case which was submitted for our determination by the Attorney General under Section 355 (3) of the Criminal Procedure Code.

The convicted persons were four in number, and they were tried before the Honourable Mr. V. M. Fernando, then Commissioner of Assize, and a Jury and were convicted of culpable homicide not amounting to murder, the offence with which they were charged. They were sentenced each to undergo five years' rigorous imprisonment. The evidence for the Crown was that these four men invaded the premises of the deceased apparently in pursuit of the mistress of the 1st prisoner who was also the daughter of the deceased. Some altercations broke out and the four prisoners pushed the deceased against a wall and struck him with their closed fists, chiefly on the abdomen. The deceased who was about 55 years of age was found on an autopsy to have sustained two ruptures of the spleen and two ruptures of the liver. The Medical Officer who conducted the post mortem said that

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death was due to haemorrhage, and shock resulting from the ruptures of those two organs. The spleen was enlarged as a result of disease to twice its normal size and a comparatively light blow would have been sufficient to cause its rupture. The liver was of normal size and in the opinion of the Medical Officer considerable force must have been used to cause a rupture of it. The injuries on the liver were not necessarily fatal in the sense that 50 per cent of persons who had received such injuries might with proper treatment be expected to recover. Death might not have resulted in this case if the spleen had not been ruptured.

The learned Commissioner in his charge to the Jury directed them "that it was not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking a man with the fist, and that knowledge of the consequence likely to follow from the assault made on Podisingho must be inferred from the actual consequences of that attack." An application was made to him, on behalf of the prisoner to state a case under Section 355 (1) of the Criminal Procedure Code. This he refused to do.* The Attorney General has therefore submitted for our determination the question whether the Commissioner's direction to the Jury above referred to was a proper direction in law. Section 223 of the Penal Code which defined culpable homicide reads as follows :—

> "Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death commits the offence of culpabale homicide."

and it was evidently sought to charge the accused with the knowledge that they were likely by the assault on the deceased to cause his death.

I am of the opinion that this direction was wrong. There is no authority in law or in logic for so interpreting the words of Section 293. Analysed the direction amounts to this; that the accused persons must be taken to have known what the probable consequences of their act of assaulting the deceased would be because those consequences in fact followed from the act. It is manifest that the Jury must have come to the conclusion that they had no option but to convict. I cannot help feeling that the learned Commissioner did not really mean precisely what he said because in his order refusing the application to state a case the following passage occurs,..... "with regard to knowledge I directed them that such knowledge could be inferred *a posteriori*." 'A person may truthfully declare,' says Gour, Fifth Edition page 967. 'that he did not know that his act was likely to cause death and yet he may be rightfully found to have had that knowledge. The standard which the Court fixes before itself is that of a reasonable man, and

* S. C. 45—P. C. Gampaha 35066 S. C, Minutes of 13th Aug. 1936 (Eds.)

the question it ultimately asks itself is not whether the accused had the knowledge. And for this purpose the act itself is the real test'. Knowledge of the probable consequences of an act may be presumed from the nature of the act itself and the nature of the act should obviously form the basis of an inquiry into whether or not the doer of that act must be held to have had knowledge of its probable consequences, but that form *a posteriori* reasoning is very different from imputing knowledge of the consequences of an act merely because those consequences happened.

Although we are compelled to hold that this direction was wrong, it is nevertheless our duty to consider whether if the direction had been correct the Jury would in all reasonable probability have returned the same verdict. In view of the medical evidence I am unable to see how they would have been justified in so doing. From that evidence it would appear that but for the rupture of the diseased spleen the deceased man had an even chance of recovering and I am unable to see on what process of reasoning in the absence of any evidence to that effect that knowledge of this condition could be fairly imputed to the accused.

Then, can the accused be convicted of any, and if so, of what offence? They obviously committed the offence of hurt punishable under Section 314 of the Penal Code, and since death actually resulted from the assault that they committed it must be inferred that they commited grievous hurt. The only kind of grievious hurt that they could possibly be held to have committed appears to be that figuring in the eighth category in Section 311 of the Penal Code, that is to say, any hurt which endangers life. It is beyond argument that apart from the injury to the spleen the injury to the liver endangered the sufferer's life. Now, in order to convict of the offence of voluntarily causing grievous hurt, it must be proved that they act which caused grievious hurt was alone with the intention of causing grievous hurt or with the knowledge that grievous hurt was likely to be caused and proceeding on that definition did the four accused when they assaulted the deceased intend to injure him in such a way that his life would be endangered, or short of that intention did they have the knowledge that they were likely to inflict upon him injury likely to put his life in danger ? The Jury undoubtedly could have come to that conclusion but can we hold that they in all probability would have come to that conclusion had they been specifically and properly directed on the point ? It must be remembered that the accused assaulted the deceased with their fists, though they undoubtedly did strike him in a dangerous part of the body. I am unable to say that if I myself had been trying a case, sitting without a Jury I should not have had some doubts as to the accused's guilt, and in view of that opinion I am by no means satisfied that the Jury would not have had some doubts.

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It would appear then that the conviction should be altered to one of voluntarily causing hurt punishable under Section 314 of the Penal Code. The assault undoubtedly was a cowardly one and was entirely unprovoked and I do not think any injustice would be done to the accused if they suffered the maximum sentence that is to say, 1 year's rigorous imprisonment, and I think that the sentence of 5 years' rigorous imprisonment should be reduced to that figure.

I agree
MAARTENSZ, J.

I agree
MOSELEY, J.

Present : ABRAHAMS, C. J.

COMMISSIONER OF STAMPS *vs.* V. SUBRAMANIAM.

S. C. No. 404—P. C. Badulla No. 21391.

Argued & Decided on 2nd October, 1936.

Stamp Ordinance No. 22 of 1909—Section 50 - Recovery of duty or penalty imposed under the Ordinance.

Held: That it is wrong to impose a term of imprisonment in default of payment of any duty or penalty to be recovered under Section 50 of the Stamp Ordinance No. 22 of 1909.

N. Nadarajah with *E. B. Wickremanayake* for accused-appellant.

Kariapper Crown Counsel for Crown Respondent.

ABRAHAMS, C. J.

The Magistrate in this case has misconstrued the terms of Section 50 of the Stamp Ordinance No. 22 of 1909. Under that section any duty, penalty or other sums imposed or required to be paid under that Ordinance may be recovered from the person required to pay as if it were a fine imposed by any Police Magistrate. The Magistrate evidently regarded the penalty as if it were actually a fine and has imposed a sentence of imprisonment in default of payment under Section 312 of the Criminal Procedure Code. But the penalty is only a fine for the purposes of recovery and not for the purposes of enforcement of payment thereof. I, therefore, quash the order imposing imprisonment in default of payment.

Present: MOSELEY, J. & SOERTSZ, A. J.

WIJESEKERE *vs.* NORWICH LIFE ASSURANCE COMPANY.

Application for conditional leave to appeal to the Privy Council in S. C. No. 123 D. C. Colombo No. 51137 (463.)

Argued : 13th October, 1936.

Decided : 20th October, 1936.

Conditional Leave to appeal to Privy Council Rules 2, 5 and 5A framed under Ordinance No. 13 of 1909.— Validity of notice served.

Where a notice of an application for conditional leave to appeal to the Privy Council was served, without the intervention of Court, on an attorney who was specially authorised by the party to be noticed to accept legal processes and notices.

Held: (i) That the notice had not been properly served.

(ii) That the appellant should have applied to Court for leave to serve notice on the attorney.

Applicant in person in support.

E. F. N. Gratiaen for the party noticed.

SOERTSZ, A. J.

This is an application for conditional leave to appeal to the Privy Council from a judgment of this Court. Mr. Gratiaen for the party noticed takes the objection that the application is not in conformity with the rules framed under Ordinance No. 31 of 1909 which regulates the procedure on appeals from this Court to His Majesty in Council and that, therefore, it should not be entertained.

Rule 2 enacts that "Application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall within fourteen days from the date of the judgment give the opposite party notice of such intended application."

Rule 5 of the Orders regulating the procedure under "The Appeals (Privy Council) Ordinance, 1909" provides that this notice 'may be served either on the party or on his proctor.'

Rule 5A provides "If after reasonable exertion it is found that service of any notice cannot be duly effected upon a party personally or upon his proctor empowered to accept service thereof, it shall be competent for the Court, which may consist of a single Judge, on being satisfied by evidence adduced before it that reasonable exertion to effect service has been made and that service cannot be effected, to prescribe any other mode of service. "The service substituted by order of the Court shall be as effectual as if it had been made on the party personally or on his proctor. Whenever service is substituted by order of the Court, the Court shall fix such time for the appearance of the party as the case may require."

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In this case the judgment of the Court was delivered on the 7th of August 1936. On the 20th of August the applicant gave notice to Messrs. Leechman & Co. who are said to hold a Power of Attorney from the defendant company of his intention to apply for conditional leave to appeal. Again on the 7th of September the applicant gave Messrs. Leechman & Co. notice of his intention to apply for conditional leave on that very day the 7th of September.

Mr. Gratiaen contends firstly that both the notices are of no avail to the applicant in that they have not been served on the proper party, and secondly that the notice of the 20th August is bad because it does not specify the date on which the applicant intended to make his application. and, thirdly that the notice of the 7th of September which seeks to supply that deficiency is bad because it is not within the fourteen days.

In support of the first objection the case of *Fradd v. Fernando*, 36 N. L. R. 132 was relied upon and in support of the second point the case of *Wijeyesekera* v. *Corea*, 33 N. L. R. 349. In the first case it was held that service of notice should be effected on the party or his proctor and that service on the attorney of the party is not sufficient. If it is not possible to serve notice on the party or his proctor, the applicant should apply to this Court to be allowed to effect substituted service under Rule 5A referred to. The applicant submits that he served the notice on Messrs Leechman & Co. not because they held a power of attorney from the defendant company, but, because they have been—so he says—specially authorised by the defendant company to accept legal processes and notices in their name. Assuming that the applicant's statement is correct that Leechman & Co. have been so authorised, nevertheless he should have applied to this Court to be allowed to serve notice on them on the ground that he is not able to serve the party or his proctor, and that, therefore, he should be allowed to serve the defendant company's specially authorised representative. The intervention of this Court was necessary to enable him to obtain a relaxation of the rule and to serve his notice in that manner. If he chose to act without the intervention of this Court, he had to observe the rule which requires him to serve the notice on the party or his proctor. We would follow the ruling in *Fradd v. Fernando* (supra) and hold that the notice in this case has not been properly served.

It is not necessary to consider the second objection taken on the strength of the ruling in *Wijeyesekera v, Corea* (supra) that the notice of the 20th of August which is the only notice given within 14 days was insufficient because it did not specify the date on which the applicant intended to make his application.

The notice of the 7th of September is clearly out of time.

The application is refused with costs.

MOSELEY J.

I agree.

Present: ABRAHAMS, C. J., MAARTENSZ, J. & MOSELEY, J.

In the matter of the application of Charles Christopher Jacolyn Seneviratne to be admitted and enrolled as an Advocate of the Supreme Court.

Heard and decided on : 26th October, 1936.

Advocate—Application for Readmission.

The applicant who was an Advocate of the Supreme Court was convicted in 1920 of the offence of cheating and was sentenced to undergo rigorous imprisonment for 3 years. Thereafter his name was struck off the roll of Advocates. In 1926 the applicant applied to be re-admitted on the ground that since his release from prison "he had led an honest life and had endeavoured to conduct himself in all his undertakings, commercial and social, in a manner which he submitted fitted him for reinstatement in his profession."

This application was refused as the Court thought that it was too prematurely made. The applicant renewed his application ten years later.

Held. On the material before the Court the applicant had redeemed the past and that it would be unjust to prevent him from admission.

PER ABRAHAMS, C. J.

"We should of course, be very careful in admitting to the profession, members of which should observe the highest standard of honour and trustworthiness, a man who has been guilty of a crime of dishonesty. But that is not to say that character once lost cannot be redeemed. It, therefore, follows that if we are of the opinion that the applicant has redeemed, the past it would be unjust to prevent him from once more earning his living in the profession for which he is qualified."

C. Brooke Elliott, K. C. with *Francis de Zoysa, K. C. and J. R. Jayawardena* in support.

E. A. L. Wijeyewardene Solicitor-General with *M. F. S. Pulle* Crown Counsel as amicus curiae.

ABRAHAMS, C. J.

The applicant, who was an Advocate of the Supreme Court, was convicted in April, 1920, with another Advocate, of the offence of cheating. He was sentenced to undergo rigorous imprisonment for 3 years, but in July, 1921, he and his confederate were released from imprisonment by an order of His Excellency the Governor of the day. In 1926 he applied for reinstatement and produced evidence that since his release from prison he had led an honest life and had endeavoured to conduct himself in all his undertakings, commercial and social, in a manner which he submitted fitted him for reinstatement in his profession. The decision of the Court was postponed until December, 1928, pending inquiries from the Inns of Court in England as to the practice of the Inns in reinstating Barristers who had

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been disbarred. The hearing is reported in 30 N. L. R. page 299. Schneider, A. C. J. in giving the decision of the Court and holding that the Supreme Court had power to allow an application for reinstatement said "I regarded the application premature as I considered that although his conviction might have had the salutary effect of awakening in the applicant a higher sense of honour and duty, the period during which his conduct is testified to by the certificates as having been irreproachable was not long enough to be deemed to be a guarantee sufficient for him to be safely entrusted once again with the affairs of clients and admitted to an honourable profession without that profession suffering degradation." The other members of the Court concurred. It would appear now that the reason why the application was not then and there granted was because the learned Judges of the Court composing the Bench on that occasion, were of the opinion that the probationary period had not been sufficiently long for the Court to hold that the applicant had rehabilitated his character. Since then nearly 8 years have elapsed and the applicant is once more before us and has produced additional evidence of his conduct during that period.

The Solicitor General has quite properly put before us the facts of the case which led to the conviction of the applicant. Undoubtedly the offence was bad as is evidenced by the term of imprisonment to which he was sentenced and the term which he actually served. But I do not think that we can now say that the case was so bad that under no circumstances could we admit the applicant to the ranks of the profession. Nor do I think it would be fair to extend the probationary period further. It would be far better that we should do one thing or the other now. We should, of course, be very careful in admitting to the profession, members of which should observe the highest standard of honour and trustworthiness, a man who has been guilty of a crime of dishonesty. But that is not to say that character once lost cannot be redeemed. It therefore follows that if we are of the opinion that the applicant has redeemed the past it would be unjust to prevent him from once more earning his living in the profession for which he is qualified.

I am of the opinion that this application should be granted and that the applicant should be re-admitted to the profession of an Advocate of the Supreme Court.

MAARTENSZ, J.

I agree.

MOSELEY, J.

I agree.

* *In the matter of the application of James Peter Salgado to be re-admitted and re-enrolled as a Proctor of the Supreme Court.*

Drieberg, K. C. with him *F. de Zoysa* and *Mervyn Fonseka* in support.

Akbar, S. G. with him *M. W. H. de Silva, Crown Counsel* appear on notice.

BERTRAM, C. J.

This is an application by a former proctor of this Court, who some fourteen years' ago was convicted of criminal breach of trust, and who was in consequence struck off the roll of proctors, to be restored to the roll. There is no question that this Court has an inherent jurisdiction in the exercise of its discretion, where it is of opinion that an offender has sufficiently expiated his offence, to restore him to the roll of practising members of the profession. It is not necessary to say that we all feel that this jurisdiction must be exercised with the greatest caution. If a member of the profession is guilty of a lapse, the after consideration of the facts is restored to the roll, a very important step has been taken. In the case of *In Re Poole* (*1*) it was said that, with reference to such officers of the Court "that their presence on the roll is an indication *prima facie* at least that they are worthy to stand in the ranks of an honourable profession, to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs, and in whom they are in the habit of reposing unbounded confidence! and in looking to the fact that in restoring this person to the roll we should be sanctioning the conclusion that he is in our judgment a fit and proper person to be so trusted, I think we ought not to do so, except upon some solid and substantial grounds."

In the cases brought to our notice, the grounds for such a proceeding have been recognised as being, in the first place, a palpable and definite repentance, and a manifestation of an honest career during a considerable period of time: and in the second place, adequate reparation, or at any rate, on offer of all possible reparation in the man's power. Now in the present case it has been proved to us that the proctor in question for a period of fourteen years has led a blameless life, in the course of which he has been entrusted with responsibilities of a semi-public nature, and he appears to have earned the respect of those who are qualified to express an opinion. Evidence has been given that he has pursued the honourable avocation of a teacher with industry and efficiency, and he is highly spoken of in that capacity. It also appears that at the time of the original trial he was anxious and ready to make every possible reparation, and that the person who was injured by his lapse was also most anxious to compound the offence. But it was thought necessary in the interests of justice, and in the interests of the legal profession, that the law should take its course. It is impossible for us to lay down any general rule. In the previous case—In *Re Moonesinghe* (*2*), the period that elasped was twenty years. In the present case the period is fourteen years All we can say in the present case, looking at all the facts of the case we are prepared to exercise the jurisdiction of the Court in favour of the applicant, because we are satisfied that in so doing we are not in any danger of re-admitting to the roll a person who is not entitled to be treated with professional confi

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* Referred to in the course of the argument in the matter of the application by C. C. J. Se tne for re-admission and re-enrolment. [Ed.]

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dence. In taking this step we do not of course in any way wish to be thought to deal lightly with the offence of criminal breach of trust when committed by a member of the legal profession. The proctor in question found himself in this position, because when he was entrusted with funds in a fiduciary capacity, he did not keep those funds separate from his own money, but used them for his own purposes, with the result that when they were required they were not available. There is no principle which it is more important to press upon persons entering the legal profession than a strict regard to the principles of trust accounts. These principles are now part of the legal training for soicitors in England, and it is the intention of the Council of Legal Education to take steps to bring about a regular training in trust accounts among students desiring to enter the proctor's branch of the legal profession in Ceylon. I trust, therefore, that it will be realised that this is a point which this Court regards as being of very great importance, and it is, after very careful consideration that we have determined in the present case to exercise our discretion in favour of the present applicant. We should be sorry to create a precedent which would make it an easy matter for a man to be once more restored to the legal profession. We are entitled to act the present instance, because on the facts of the case the present applicant has made out a right to petition the Court for such restoration. The application is therefore allowed.

(1) (1869) L. R. C. P. 350.
(2) (1917) 4 C. W. R. 370.

ENNIS, J.
I agree.

SCHNEIDER, J.
I agree.

GARVIN, J.
I agree.

Present : FERNANDO, A. J.

SILVA *vs.* MURPHY

M. C. Colombo 724.
Argued on 27 & 28th October, 1936.
Decided on 30th October, 1936.

(*Appeal under Section 24 of Ordinance No. 60 of 1935.*)

Colombo Municipal Council (Constitution) Ordinance No. 60 of 1935 Section 21, 23 (4) and 23 (6)—Application to have name placed in the lists.

The appellant, on a notice from the Commissioner acting under Section 21 of Ordinance No. 60 of 1935 in the preparation and revision of lists of persons qualified to vote and to be elected, applied to have his name placed in both lists. The Commissioner omitted his name on the ground that the application was improperly filled in inasmuch as the number of the appellant's residing house was not correctly given. On inquiry, presumably at the instance of the Commissioner, his rates clerk had ascertained the correct number which was 66/10 and annual rate Rs. 40/- whereas the application form gave 10/66 and annual rate as Rs. 80/-.

Held: (i). That a mistake such as the one made by the applicant in his application form does not entitle the Commissioner to reject it under Section 21 (1) (h) on the ground that it is improperly filled in.

(ii) That the error was not of such a character as to deprive the appellant of his right to vote inasmuch as he had the requisite qualifications.

J. R. Jayawardena for Claimant-appellant.

L. A Rajapakse for Commissioner-respondent.

FERNANDO, A. J.

This is an appeal from the order of the Chairman of the Municipal Council, acting presumably under Section 103 of Ordinance No. 60 of 1935 and performing the duties of Commissioner under Section 21 of that Ordinance. It would appear that the Chairman as such Commissioner gave due notice of the preparation of the lists of persons qualified to vote and to be elected, and called upon all qualified persons to apply to him before the 31st of May 1936. The appellant applied to have his name inserted in both lists, and his application form appears to have been received in the Office of the Chairman on the 30th of May, 1936. The Chairman however omitted his name from the list and the appellant then claimed under Section 23 to have his name placed in the list for the year, and to have his name marked with the double qualification mark. In a letter addressed to the Registrar of this Court the Chairman states that the claim was not entertained as provided in Section 21 (i) h, because he thought the appellant had not made due application under Section 21, and that therefore the appellant's application was omitted from the list prepared by him under Section 23 (4) he also states that there was no adjudication under Section 23 (6).

I am assuming for the purpose of this order that an application was necessary in response to the notice under Section 21 (I) f. The question that then arises is whether that application was improperly or incompletely filled in, in terms of Sub-section (g). I see no reason for suggesting that the application was incomplete. In the Chairman's letter of the 9th of October 1936 he states that the application form gave an incorrect number as the number of the house in which the appellant resided. He also states that no house of that number was traceable or existed, in the locality and he therefore treated the application as improperly filled in. The word "improper" is not defined in the Ordinance, and Stroud in his Judicial Dictionary states that "improper" is the same as "wrongful". The application form itself has been sent up, and at the foot of it there is a rubber stamp for certain details to be filled in apparently by the rates clerk of the Municipal Council and on this rubber stamp there is an entry to the effect that the assessment number of the applicant was 66/10 and the annual rate was Rs. 40/-. These entries are initialled presumably by the rates clerk, but it would appear that these entries have been struck out, and another entry appears to have been made on the side of the form, to the effect that No. 10/66 Temple Road is untraceable. Now Sub-section 2 of Section 21 empowers the Commissioner in preparing such lists, either by himself or by any officer appointed by him for the purpose to make such enquiries as he shall deem necessary, and presumably these entries

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were made by the rates clerk on requisition by the Commissioner that he should inquire. Quite apart from the enquiry made by the rate Clerk the Chairman might himself have made such inquiry, and if he did so there is little doubt that the facts which have been struck out of the form could have been ascertained by him.

Counsel for the appellant cited an authority from the English reports which is not of much assistance in as much as the statute under which that case was decided gave express power to the revising Barrister to amend the list in certain cases, apparently on information supplied to him in the course of his inquiries. There is no such section in this Ordinance, so that that authority does not apply, but the question for me to decide is whether the Chairman was right in holding that this application form had been "improperly filled in". In deciding this question I have to bear in mind that the right of a person to exercise his vote had been treated as a matter of great importance, see the well known case of *Asbhy* vs. *White.*, and that an interpretation of the section in the manner suggested by the Chairman would deprive the appellant of his right to vote. In view, therefore, of the absence of a definition of the word "improper" and in view of the fact that rates clerk did ascertain the correct number I hold that the application form was not impropely filled in. The Application form gave the number 10/66 whereas the proper number was 66/10 and I am not prepared to hold that this obvious mistake is of such a character as to deprive the appellant of his right to vote.

In the application form itself the appellant states that the annual rate which was paid in respect of the property of which he was a tenant was Rs. 80/-. If the entry made by the Rate clerk is correct then the rate would appear to be Rs. 40/-. In either case the appellant was qualified to have his name in the list of voters under section 14, and under section 15, it would appear that he his also entitled to have the double qualification mark referred to in section 21 (1) d. Counsel for the Chairman did not suggest that in fact these qualifications did not exist. I would accordingly order the appellant's name to be inserted in the list of voters and I would further order his name to be marked with the double qualification —mark referred to in section 21 (1) d. In the circumstances of this case I make order that each party should bear his own costs of this appeal.

Present : MOSELEY, J. & FERNANDO, A. P. J.

SEETHANGAINAMMAL *vs.* V. ELIYAPERUMAL.

185—D. C. Jaffna 6739.
Argued : 22nd October, 1936.
Decided : 26th October, 1936.

Thesawalamai Ordinance 1 of 1911—Section 21—Does Thediathetam include a gratuity in money paid to a person on his retirement from Government Service.

Held. That a gratuity in money paid to a person on his retirement from Government Service is not Thediathetam within the meaning of Section 21 of Ordinance 1 of 1911.

Nadarajah with *Kumarasingham* for plaintiff-appellant.

Weerasuriya with *T. S. Fernando* for defendant-respondent.

FERNANDO, A. P. J.

The plaintiff appellant sued the defendant respondent for a divorce, and a decree nisi was entered in her favour in D. C. Jaffna 1416 on the 13th February 1934. The decree also provided for alimony to be paid by the respondent, and presumably the order for alimony was based on the salary that was then drawn by the defendant who was in the service of the District Road Committee of Mullaitivu. On the 1st April 1934, the defendant retired from Government service, and on the 16th February 1934, he drew a sum of Rs. 1060/- which admittedly was paid to him as a gratuity on his retirement. On the 3rd September, 1934, the plaintiff filed this action claiming half the gratuity as her share of the defendant's acquired property, and in the plaint she stated that in the Divorce action, a division of the acquired property was ordered as between the plaintiff and the defendant whose rights with regard to property are governed by the Thesawalamai.

When the case came up for trial in the District Court, no evidence was led, but certain admissions were made, and on these admissions the learned District Judge dismissed the plaintiff's action with costs, and he made that order on the footing that the plaintiff admittedly could not claim a half share of the salary earned by the defendant between the date of action and the date of decree, and that for the same reason, the plaintiff was not entitled to claim a half share of the gratuity which was given in lieu of the salary which the defendant might have earned if he had continued in service.

The learned District Judge appears to have thought that in the case of *Thamotheram* v. *Nagalingam* 31 N. L. R. 257 Drieberg J. held that the salary of the husband was acquired property within the meaning of Section 21 of Ordinance 1 of 1911. An examination of that judgment, however, will show that although Drieberg, J. was of opinion that money which a man had saved from professional earnings, which he had set aside or invested, and which is not needed for his ordinary expenditure, could be regarded as acquisitions or as acquired property, he proceeded to say that he did not think that these expressions were applicable to the salary of the appellant in that case. I do not think that this judgment in any way disturbs the principles definitely laid down by a Bench of three Judges of whom Drieberg, J. was one. In the case of *Avechchi Chettiar* vs. *Rasamma* 35 N. L. R. 313, Garvin, A. C. J., who delivered the judgment in that case in which both the other Judges concurred

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said, "The question before us must be settled by interpretation of the language of the legislature," and he referred to that portion of Section 21 which is the provision under which the appellant claims a half share of the gratuity. The words of that Section are as follows :—"property acquired for valuable consideration by a husband or wife during the subsistence of the marriage." If regard be paid to the scheme and purposes of the Ordinance it seems to me that it has provided a definition of "Thediathetam" in Section 21, and it has done so not only for the purpose of inheriance, but generally for the purpose of the Ordinance. He held that in the case before him, the premises were acquired for valuable consideration during the subsistence of the marriage and therefore fell within the definition of "thediathetam."

The property in question in this case is admittedly a gratuity in money paid to the defendant on his retirement from service, and it is impossible to hold that this gratuity is property acquired for valuable consideration. As Counsel for the respondent submitted the words "for valuable consideration" must be interpreted as that would be under the English Law, and even if it can be argued that this gratuity is something paid to the defendant for his past services, then they would not be paid to him for valuable consideration. But it is impossible in my opinion to bring salary as such within the definition contained in Section 21, and all that the Supreme Court held in *Thamotheram* vs. *Nagalingam* was that an investment of money saved from professional earnings might be regarded as acquired property. I would therefore, hold that the gratuity in question is not thediathetam within the meaning of Section 21 of Ordinance 1 of 1911.

In view of this position, it is not necessary to discuss the other question, namely, whether plaintiff can still claim this property in view of the order made in the Divorce action. The order made in that case is not in fact before us, although the proceedings of the 3rd April 1935 appear to indicate that the plaint and decree in that action were in fact produced, but they are not in the record in this case.

The appeal therefore, fails and must be dismissed with costs.

MOSELEY, J.

I agree.

Present : ABRAHAMS, C. J., KOCH, and MOSELEY J. J.

In the matter of a contempt of Court punishable under Section 51 of the Courts Ordinance No. 1 of 1889 in regard to the non-summary proceedings in the Police Court of Avissawella in Case No. 12421.

S. M. ABDUL WAHAB *vs.* A. J. PERERA and OTHERS.

Heard and Decided on 12th October, 1936.

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Abrahams, C.J.

S. M. Abdul Wahab *vs.* A. J. Perera and others.

Contempt of Court—Courts Ordinance No. 1 of 1889—Section 51—non-summary proceedings pending—Notice of meeting having reference to a pending non-summary case—Meeting held in pursuance of such notice—Discussion of the case in public calculated to prejudice the fair hearing of the said case.

The petitioner Wahab and seven others were charged with having been members of an unlawful assembly and with abduction and rape. While the non-summary proceedings were pending before the Police Court, a notice convening a meeting and having reference to the non-summary proceedings was published, the translation of which is to the following effect.

NOTICE.

A serious and frightful crime which has been committed on a young respectable Sinhalese lady who is a stranger, by a rich landed proprietor of Kanontota called Wahab Mudalali with his henchmen is now being enquired into at the Police Court of Avissawella.

As this is an unheard of and frightful crime which has never taken place in these parts before, a public meeting will be held on the 9th instant at 4 p.m. at the Avissawella Public Market under the Chairmanship of Proctor Mohandas de Mel Laxapathy, and all are requested to be present without fail.

We the sympathisers.

A. J. Perera

R. A. Charles

N. D. S. Abeykone

D. P. Amandakone.

In pursuance of this notice a public meeting was held at Avissawella public market where the contents of the said notice were read out and the charges against the petitioner were publicly discussed.

On the application of the petitioner a rule was issued by the Supreme Court on the signatories to the said notice to show cause why they should not be punished under Section 51 of the Courts Ordinance 1 of 1889 for contempt of the authority of the Supreme Court on the grounds that the publication of the said notice and the public discussion of the case were calculated to prejudice the fair hearing of the said case before the Supreme Court.

The respondent appeared before the Supreme Court and submitted that they were not actuated by any malice against the petitioner or other accused and that they has no intention in any way prejudicially to affect the proceedings in the said case or to commit any contempt of court and as they had been advised that the terms of the said leaflet are inconsistent with their intention they humbly apologised to their Lordships for having published and read the said leaflet at the said meeting.

Held. That the publication of the leaflet and the discussion of the case at a public meeting while it was still pending constituted a contempt of court.

H. V. Perera with *E. A. P. Wijeratne* and *R. G. C. Pereira* for the petitioner.

M. T. de S. Amarasekera with *T. S. Fernando* for the respondents.

J. W. R. Ilangakoon, Attorney-General with *S. J. C. Schokman* Crown Counsel for the Crown.

ABRAHAMS, C. J.

There is no doubt that this is a bad contempt of Court. The language used in the leaflet, which was apparently widely distributed, can only be

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interpreted in one way and that is that the person named therein is guilty of the offence with which he was charged. Further, the language used is most inflammatory. It is calculated to excite racial feeling and also social indignation, a Sinhalese lady being said to have been outraged by a rich man belonging to some Mohammedan sect.

It is hardly necessary for us to enlarge on the mischievousness of such a pamphlet. In a country where trial by jury for serious offences is the rule jurymen may be deterred from doing their strict duty by a knowledge that in the minds of the people of the district in which the crime has been committed the accused person was regarded as guilty long before he was brought to trial and in a more subtle way possibly witnesses for the prosecution and the defence may be in the one case influenced to exaggerate their evidence and in the other actually deterred from giving it. As to whether the respondents actually intened to prejudice a fair trial or not, we are of the opinion that they never stopped to think about it. As is unfortunately not seldom the ways of men in such matters they assumed the guilt of the accused and could not contemplate any other conclusion to the trial than his conviction. But they had acted with deliberate malice against the accused is a matter which we do not hold to be proved.

This, we understand, is the first case of its kind that has occurred in the Island. We hope that it will be a very long time before there is another. The people of this country have travelled far along the road which leads to the management of their own affairs. They have also travelled very fast along that road and must realise that these people who have the privilege of making the laws which govern them have also the stern obligation of obeying those laws.

We have hesitated whether it is not our duty to mark our disapproval of the action of the respondents by sending them to prison. But as this is the first case of its kind, as we have already said, and the respondents have not disputed the facts and not raised any technical points but have submitted themselves fully and humbly to the judgment of the Court, we have no desire in this case to be harsh. We fine them each Rs. 200/-, or in default sentence them to undergo 3 months simple imprisonment. On the application of Mr. Amarasekera the respondents are granted 10 days in which to pay the fine.

F. H. B. KOCH.

I agree.

F. A. MOSELEY.

I agree.

Present : MOSELEY J. and FERNANDO, A. J.

PERIYACARUPPAN CHETTIAR *vs.* THE COMMISSIONER OF STAMPS.

S. C. No. 8. D. C. Colombo 6447.
Argued on 8th October, 1936.
Decided on 23rd October, 1936.

Estate Duty Ordinance No. 8 of 1919—Estate duty payable on death of a person domiciled in India and subject to Hindu Law—Hindu undivided family—Joint property.

Held : (i) That even where it is admitted that a Hindu merchant of Indian domicil trading in Ceylon is a member of a Joint Hindu family the burden of proving that the assets of such person is Joint property is on the person who alleges that it is Joint property.

(ii) That in order to establish that the property of a Hindu member of a Joint family is Joint property it must be proved either that the property was purchased with Joint family funds, or that it was produced out of Joint family property.

(iii) That money received from an ancestor by way of a gift or a loan is not ancestral property within the meaning of the expression in Hindu Law.

(iv) That the conduct of the deceased member of a Joint Hindu family and his surviving heirs can be taken into account in considering a claim that the property standing in the name of the deceased is Joint property.

Nadaraja with *Wickremanayake* for Administrator-appellant.

Basnayake, Crown Counsel for the Commissioner of Stamps.

FERNANDO, A. J.

This is an appeal against the assessment of estate duty made by the Commissioner of Stamps, on the estate of M. R. P. L. P. R. Muttu Karuppan Chettiar who died in India on the 9th February, 1933. He left an estate consisting of movable and immovable property and his heirs are said to be his own sons, Periyacaruppan Chettiar the administrator, and Kumarappan Chettiar. The deceased carried on business in Ceylon and it was stated by the appellant that he was entitled to a one-third share of the business carried on in Colombo under the vilasam M. R. P. L. P. R. and to one-sixth of the business carried on in Kandy under the vilasam M. R. P. L. M. T.T., and the case for the appellant was that the deceased was a member of a Hindu undivided joint family, whereas the Commissioner of Stamps appears to have made his assessment on the footing that the deceased was the sole proprietor of the business in Colombo and had a half share in the business carried on in Kandy.

The two firms M. R. P. L. P. R. and M. R. P. L. M. T. T. owned property in Ceylon both movable and immovable and with regard to the

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interpreted in one way and that is that the person named therein is guilty of the offence with which he was charged. Further, the language used is most inflammatory. It is calculated to excite racial feeling and also social indignation, a Sinhalese lady being said to have been outraged by a rich man belonging to some Mohammedan sect.

It is hardly necessary for us to enlarge on the mischievousness of such a pamphlet. In a country where trial by jury for serious offences is the rule jurymen may be deterred from doing their strict duty by a knowledge that in the minds of the people of the district in which the crime has been committed the accused person was regarded as guilty long before he was brought to trial and in a more subtle way possibly witnesses for the prosecution and the defence may be in the one case influenced to exaggerate their evidence and in the other actually deterred from giving it. As to whether the respondents actually intened to prejudice a fair trial or not, we are of the opinion that they never stopped to think about it. As is unfortunately not seldom the ways of men in such matters they assumed the guilt of the accused and could not contemplate any other conclusion to the trial than his conviction. But they had acted with deliberate malice against the accused is a matter which we do not hold to be proved.

This, we understand, is the first case of its kind that has occurred in the Island. We hope that it will be a very long time before there is another. The people of this country have travelled far along the road which leads to the management of their own affairs. They have also travelled very fast along that road and must realise that these people who have the privilege of making the laws which govern them have also the stern obligation of obeying those laws.

We have hesitated whether it is not our duty to mark our disapproval of the action of the respondents by sending them to prison. But as this is the first case of its kind, as we have already said, and the respondents have not disputed the facts and not raised any technical points but have submitted themselves fully and humbly to the judgment of the Court, we have no desire in this case to be harsh. We fine them each Rs. 200/-, or in default sentence them to undergo 3 months simple imprisonment. On the application of Mr. Amarasekera the respondents are granted 10 days in which to pay the fine.

F. H. B. KOCH.

I agree.

F. A. MOSELEY.

I agree.

Present : MOSELEY J. and FERNANDO, A. J.

PERIYACARUPPAN CHETTIAR *vs.* THE COMMISSIONER OF STAMPS.

S. C. No. 8. D. C. Colombo 6447.
Argued on 8th October, 1936.
Decided on 23rd October, 1936.

Estate Duty Ordinance No. 8 of 1919—Estate duty payable on death of a person domiciled in India and subject to Hindu Law—Hindu undivided family—Joint property.

Held : (i) That even where it is admitted that a Hindu merchant of Indian domicil trading in Ceylon is a member of a Joint Hindu family the burden of proving that the assets of such person is Joint property is on the person who alleges that it is Joint property.

(ii) That in order to establish that the property of a Hindu member of a Joint family is Joint property it must be proved either that the property was purchased with Joint family funds, or that it was produced out of Joint family property.

(iii) That money received from an ancestor by way of a gift or a loan is not ancestral property within the meaning of the expression in Hindu Law.

(iv) That the conduct of the deceased member of a Joint Hindu family and his surviving heirs can be taken into account in considering a claim that the property standing in the name of the deceased is Joint property.

Nadaraja with *Wickremanayake* for Administrator-appellant.

Basnayake, Crown Counsel for the Commissioner of Stamps.

FERNANDO, A. J.

This is an appeal against the assessment of estate duty made by the Commissioner of Stamps, on the estate of M. R. P. L. P. R. Muttu Karuppan Chettiar who died in India on the 9th February, 1933. He left an estate consisting of movable and immovable property and his heirs are said to be his own sons, Periyacaruppan Chettiar the administrator, and Kumarappan Chettiar. The deceased carried on business in Ceylon and it was stated by the appellant that he was entitled to a one-third share of the business carried on in Colombo under the vilasam M. R. P. L. P. R. and to one-sixth of the business carried on in Kandy under the vilasam M. R. P. L. M. T.T., and the case for the appellant was that the deceased was a member of a Hindu undivided joint family, whereas the Commissioner of Stamps appears to have made his assessment on the footing that the deceased was the sole proprietor of the business in Colombo and had a half share in the business carried on in Kandy.

The two firms M. R. P. L. P. R. and M. R. P. L. M. T. T. owned property in Ceylon both movable and immovable and with regard to the

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immovable property it was admitted in appeal that that property would devolve on the heirs of the deceased according to the law of Ceylon and the claims that the deceased was a member of a Hindu joint family was pressed only with regard to the movable property of the deceased which it was submitted would be governed by the Hindu law.

At the inquiry in the District Court, it was proved that there was a business in Ceylon carried on by the deceased's father under the vilasam M. R. P. L. and that that business was wound up in 1918. The proprietors of that business according to the appellant were Periannan, the father of the deceased, and three uncles of the deceased, named, Muttu Raman, Murugappa, and Muttu Karuppan and the appellant's case is that in 1918 the business of M. R. P. L. was wound up and the four brothers started four separate firms one of which M. R. P. L. P. R. was started by Periannan, the father of the deceased. The appellant then submits that the firm of M. R. P. L. P. R. started business with capital derived from the firm of M. R. P. L. and the assets taken from the firm of M. R. P. L. were ancestral property in the hands of the deceased with the result that the business of M. R. P. L. P. R. must itself be regarded as ancestral property. He then submitted that Muttu Karuppan was the manager of a Hindu joint family and that his two sons the administrator and Kumarappan became entitled to shares in the joint family business not by succession to Muttu Karuppan, but immediately on the dates of their respective births, that is to say, long before the death of Muttu Karuppan. At the time Muttu Karuppan died there were not only the two sons, the administrator and Kumarappan but three grandsons of the deceased namely, the sons of the administrator and Kumarappan who on this footing would all be entitled to shares in the business from the time of their respective births.

Even if we were to assume that Muttu Karuppan was a member of a Hindu joint family it does not follow that all his property must necessarily be the property of that family for it is admitted that a member of a Hindu joint family can carry on business by himself in such a way as to make that business or the profits of it his own property as distinct from the property of the family and it was for this purpose that the appellant contended that the assets with which the deceased started business in Ceylon as M. R. P. L. P. R. and M. R. P. L. M. T. T. were assets derived by him from his father and therefore ancestral property. It was contended on the other hand for the Commissioner of Stamps that the appellant himself in his original application to this Court for the grant of sole testamentary jurisdiction did not suggest that the deceased was a member of an undivided joint Hindu family, and that the deceased himself had transferred the business in Kandy apparently on the footing that it was his sole property. It was also proved

t in D. C. 49541 the appellant himself had given evid c on the footing that the business of M. R. P. L. P. R. was the sole business of his father and it w contended for the Commissioner of Stamps that the conduct of t appellant and of his father indicated that the business in Ceylon as the sole property of the deceased. As far as the appellant was concerned, his Counsel relied on certain returns made by the deceased to the Income Tax Department in India during the years 1927 to 1934. After considering all the evidence placed before him the learned District Judge held that the deceased was the owner and proprietor of the business carried on in Colombo under the vilasam M. R. P. L. P. R. and of a half share of the business carried on in Kandy under the name M. R. P. L. M. T. T. He then proceeded to hold that the immovable property in Ceylon passed to the heirs of the deceased on his death in accordance with the law of Ceylon and that the estate was liable to pay estate duty on the full value of the immovable property owned by the deceased. With regard to the movable property, he held that estate duty was payable in respect of the entire interest which stood in the name of the deceased at the time of his death in the two firms M. R. P. L. P. R. and M. R. P. L. M. T. T.

With reard to the Law that governs an undivided Hindu joint family submissions were made by Counsel for the appellant in the District Court based on Gour's commentary on the Hindu Code, and Counsel for the Commissioner of Stamps appears to have relied on certain passages in Mulla's Hindu Law. At the same time an objection appears to have been taken under sections 38 and 45 of the Evidence Ordinance. Section 38 provides that when the Court has to form an opinion as to the law of any country any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, as well as any report of a ruling of the Courts of the such country contained in a book purporting to be a report of such rulings is relevant, and section 45 provides that with regard to foreign law, the opinions on that point of persons specially skilled in such foreign law are relevant facts. Counsel for the appellant referred to the cases of *Anamali Chetty* v. *Thornhill*, 29 N. L. R. 225 and *Adaicappa Chetty* v. *Cook and Sons* 31 N. L. R. 385. In *Anamali Chetty* v. *Thornhill*, Schneider J. deals with some aspects of a Hindu joint family and at page 229 he says that a Nattu Kottai Chetty is born into business and for business alone. At birth he acquires rights in his father's business as a member of a joint Hindu family. At an early age he takes an active part in the old business, and often also when quite young starts a business of his own. In *Adaicappa Chetty* v. *Cook & Sons*, Drieberg J. also appears to have recognised the existence of the joint Hindu family system among the Chettiars. "They are Hindus from South

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India," he says, "among whom joint family system prevails. It is clear that the respondent and his father do not constitute a firm as it is defined in the Ordinance that is to say, two or more individuals who have entered into partnership with one another with a view to carrying on business for profit. Such interest in the business as the respondent has was acquired at birth. It cannot be said that he and his father entered into partnership." In view of the provisions of the Evidence Ordinance and of these decisions and having regard to the fact that the learned District Judge appears to have examined the authorities that were cited before him, we indicated to Counsel during the argument that we would allow the passages in Gour and Mulla, which had been referred to in the District Court and the reports of any cases in the Indian Courts on the joint Hindu family system to be cited before us for the purposes of this case, because it appeared to us necessary that we should consider the Hindu Law on this point in order to see whether the appellant is entitled to succeed in his contention that the movable property in Ceylon of the deceased was not his sole property but the property of the joint Hindu family of which he is said to have been a member.

Now the contention for the appellant is that the deceased was a member of a joint undivided Hindu family. The learned District Judge whilst holding that the burden of proving that he was a member of a joint family was on the appellant, appears to have held or perhaps assumed that the deceased was a member of a joint Hindu family. The next question that arises is whether the property in question in this case, that is to say, the movable property of the firm of M R P L P R and a half share of the property of the firm M R P L M T T was the property of that joint Hindu family and on this it is clear from the authorities that there is no presumption. "Assuming" says Gour "that a family is normal, and that as such it is presumbly joint it does not thence follow that it has joint property since there is no presumption that every joint family necessarily possesses joint property. Consequently unless the nucleus of family property is admitted or proved, the burden of proving the existence of joint property lies on the claimant. If in any case, the plaintiff alleges that any property is joint, it is for him to prove it, which he may do either by direct evidence proving that fact, or by the indirect evidence of establishing a nucleus and by the application of the rule of the Hindu law that whatever has been acquired with the help of the nucleus becomes impressed with its own character." (Page 685, para 1375.) Mulla adopts the same view at page 256. "There is no presumption that a family because it is joint possesses joint property or any property. The burden of proving that any particular property is joint family property rests on the party asserting it. To render the property joint the plaintiff must prove that it was purchased with

joint family funds, or that it was produced out of the joint family property or by joint labour. None of these alternatives is a matter of legal presumption." He also states at page 257 that "a member of a joint family who engages in trade can make separate acquisitions of property for his own benefit; and unless it can be shown that the business grew from a nucleus of joint family property or that the earnings were blended with joint family estate, they remain his self-acquired property."

Assuming then that the deceased was a member of a joint Hindu Family, the burden is on the appellant to show that the property in question was joint property and for this purpose he must prove, either that it was purchased with joint family funds, or that it was produced out of the joint family property. Counsel for the appellant contended that there was proof in this case that the business of M. R. P. L. P. R. was started with funds that the deceased obtained from his father and that the nucleus of the business was therefore ancestral property. The evidence seems to show that there were four brothers, Periannan, Muttu Raman, Murugappa and Muttu Karuppan who at one time carried on business together in Ceylon under the vilasam M. R. P. L. Of these four, Periannan was the father of the deceased Muttu Karuppan and the evidence indicates that the joint business of the four brothers was wound up in 1918. Muttu Karuppan then started the business of M. R. P. L. P. R. by himself and Counsel also referred to the fact that in the account books of the firm, there is an entry dated 1st February 1919, showing a sum of Rs. 31,091/45 as "credit from M. R. P. L." He argued from this that M R P L was a business of four brothers who were all sons of Palaniappa Chettiar and that the property with which Muttu Karuppan started business was his ancestral property; but the appellant himself in his evidence stated that his grandfather died 10 or 12 years ago either in 1923 or in 1924, and left no property in Ceylon, so then when Muttu Karuppan started the business of M. R. P. L. P. R. in 1918 his father Periannan was alive, and even assuming that Periannan allowed some of the money belonging to him as a member of M. R. P. L. to be used for this business that money must have been given to Muttu Karuppan by Periannan as a gift or possibly as a loan. In either event it is clear, that it was not ancestral property as that term is understood in the Hindu law. after considering the authorities, Gour at page 610 submits that an acquisition by gift from the father can no more be reasonably regarded as ancestral property than an acquisition from a stranger, and such an acquisition should then be presumed to be the son's self-acquired property unless the gift is merely a mode of partition of the patrimony. According to Mulla, it may be said that the only property that can be called ancestral is property inherited by a person from his father; father's father; or father's father's father excluding the doubtful case of property inherited from a maternal grandfather. I would therefore hold that the appellant has failed

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to prove that the money with which the business of M R P L P R was started was ancestral property within the meaning of the Hindu Law.

It seems also clear that both the appellant and his father dealt with the business in Kandy as the sole and exclusive property of Muttu Karuppan. The appellant is 33 years old and has been in Ceylon since 1918 except for several short periods in which he went back to India, but he says, that he came to know that he and his father were members of an undivided joint family only recently within the last year. It is true that on being pressed on this point he said "all along in India I knew that my father and grandfather were members of an undivided joint family", but it is significant that in the application for letters of administration he set out the details of the property of his father on the footing that property was his sole property. Questioned with regard to his application and affidavit in connection with the testamentary case, he said "I did not disclose that my father was a member of a joint Hindu family. I was not aware of it at that time." It is also admitted that the deceased Muttu Karuppan shortly before his death transferred his shares of the business in Kandy to his two sons, a transaction which is inexplicable if Muttu Karuppan himself believe that that was the property of this joint family. As I have already stated there was nothing to prevent Muttu Karuppan carrying on business by himself, and if he did so that business would be his sole property. It is impossible to believe that his son who was his attorney in Ceylon for a number of years was not aware that the business was a joint family business if in fact that was its character. Nor is it possible to understand how Muttu Karuppan could have dealt with his share of the Kandy business before his death unless it is that he realised that the business was his sole business and could be dealt with by him at his will.

The documents A 5 to A 12 are copies issued by an officer of the Income Tax Department in India over certain assessment orders made in India with regard to the deceased Muttu Kuruppan. In each of these copies there is statement with regard to the status of Muttu Karuppan and the status is given as a Hindu undivided family. The documents have been tendered in the District Court on the footing that they were statements made by Muttu Karuppan himself, but an examination of the documents show conclusively that those were not statements of Muttu Karuppan. Counsel in appeal suggested that they were admissible as statements made by the deceased against his own interest and therefore admissible under Section 32 of the Evidence Ordinance but I cannot see how these documents can be proved under Section 32. It was then suggested that they were copies of a public record, and that the statement with regard to the Hindu undivided family must have been taken from a statement made by Muttu Karuppan but there is the difficulty that assuming the statements to have been made by Muttu

Karuppan there is no proof that the statement was against his interest at the time he made it. We are not in a position to say whether in fact such a statement if made by Muttu Karuppan would or would not result in the tax payable by him in India being reduced because the property assessed was the property of a Hindu undivided family and if the position is that by such a statement Muttu Karuppan tried to secure a lower rate of tax than otherwise then the statement if made by him would be in his own interest and not against it. It is extremely doubtful whether the documents are admissible at all but even if they are admissible they only prove that the immovable property in India in respect of which certain figures are entered as income for a year was the property of a Hindu undivided family, and that certain remittances made from Ceylon to India have also been accounted for as part of the income of that family. They do not in themselves enable us to decide whether in fact the business in Ceylon with which alone we are concerned was itself the property of a joint Hindu family or not.

Considering all the evidence in the case and the authorities I come to the conclusion that the conduct of Muttu Karuppan and of the appellant himself proves conclusively that the business of M. R. P. L. P. R. and a half share of the business of M. R. P. L. M. T. T. was not a joint family business of Muttu Karuppan but his sole business. I would accordingly dismiss this appeal with costs.

MOSELEY, J.

I agree.

Present : MAARTENSZ, J.

PIYADASA *vs.* HEWAVITARNE.

In the matter of the Election Petition against the return of Mr. R. Hewavitarne as being duly elected for the Matara Electoral District.

Argued on 16th and 17th November, 1936.

Decided on 20th November, 1936.

Ceylon (State Council Elections) Order in Council 1931—Rules 18 and 19 of the Election (State Council) Petition Rules 1931—Effect of non-compliance with requirements of the rules.

Held. (i) That notice of presentation of an election petition published in the following form in the Gazette within ten days of the presentation of the petition did not constitute sufficient notice of the proposed security as required by rule 18 of the Election (State Council) Petition Rules, 1931.

"Notice is hereby given under Section 18 of the rules made under Article, 83 of the Ceylon (State Council Elections) Order in Council, 1934 and 1935 and that an Election) Petition has been presented by Hewa Lunuwillage Piyadasa of Meddawatta in Matara, against the election of Raja Hewavitarne as member of the State Council for the Electoral District of Matara at the election held on March 5, 1936. A copy of the said petition together with connected papers may be obtained by the said Raja Hewavitarne, the respondent to the said petition, on application to the Office of the Registrar of the Supreme Court."

H. L. PIYADASA,
Petitioner.

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(ii) That a letter to the Registrar of the Supreme Court in the following form by the Respondent to an Election Petition does not amount to an appointment of the person named therein as agent of the Respondent.

The Registrar,
The Supreme Court,
Colombo.

SIR,

I have the honour to request you to hand over to my Agent Mr. Fred G. de Silva, Proctor S. C. a copy of the charges framed against me in the election petition filed by one Piyadasa of Matara.

I beg to remain,
Your obedient Servant,
RAJA HEWAVITARNE.

(iii) That the service of a notice, required to be served on the Respondent to an Election Petition, on his agent's clerk is not sufficient service of such notice.

(iv) That the fact that the Respondent to an Election Petition has entered an appearance cannot cure any defect in the service of the prescribed notice.

(v) That an Election Petition is liable to be dismissed where notice of the proposed security is not given as required by rule 18 of the Election (State Council) Petition Rules 1931.

The decision in 3 C. L. W. 51 [In the matter of the Election Petition filed in respect of the Dedigama Electoral District] followed.

Francis de Zoysa, K. C. with *Canakaratne*, *E. A. P. Wijeratne* and *A. L. Jayasuriya* for petitioner.

R. L. Pereira K. C. with *H. V. Perera*, *M. C. Abeywardena* and *A. E. R. Corea* for respondent.

E. A. L. Wijeyewardene, Solicitor-General with *Crossette-Thambyah*, Crown Counsel for Attorney-General.

MAARTENSZ, J.

The question for decision in these proceedings is whether the petitioner has given the respondent notice of the nature of the proposed security.

Notice of the presentation of the petition was served by a notice published in the Government Gazette of the 3rd April 1936, within ten days of the presentation of the petition.

The notice is dated the 31st of March and is as follows :

"NOTICE is hereby given under section 18 of the rules made under Article 83 of the Ceylon (State Council Elections) Order in Council, 1934 and 1935 and that an Election Petition has been presented by Hewa Lunuwillage Piyadasa of Meddawatta in Matara against the election of Raja Hewavitarne as member of the State Council for the Electoral District of Matara at the election held on March 5, 1936. A copy of the said petition together with connected papers may be obtained by the said Raja Hewavitarne, the respondent to the said petition, on application to the Office of the Registrar of the Supreme Court."

H. L. PIYADASA,
Petitioner.

Colombo, March 31st, 1936.

The notice makes no reference to the proposed security. The security was given on the 1st of April by a recognisance signed by the petitioner and two sureties.

The petitioner contends that where service of the notice prescribed by rule 18 is effected by a notice in the Government Gazette the notice need only state that a petition has been presented and that a copy of the same may be obtained by the respondent on application at the office of the Registrar, and that the respondent by inquiry at the office of the Registrar should ascertain for himself the nature of the proposed security.

Rule 18 enacts that "notice of the presentation of a petition, and of the nature of the proposed security, accompanied by a copy of the petition, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent". It then goes on to prescribe the mode of service thus : "Such service may be effected either by delivering the notice and copy aforesaid to the agent of the respondent or by posting the same in registered letter to the address given under rule 10 ....., or, if no agent has been appointed, nor such address given, by a notice published in the Government Gazette, *stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar*,

I am unable to accept this contention that the words underlined dispense with notice of the proposed security where service is effected by a notice in the Government Gazette.

Rule 18 enacts in unmistakable terms that notice of the presentation of the petition and of the proposed security must be given to the respondent and I cannot agree that that direction is superseded by a provision regarding the mode of serving the notice. The object of the words underlined is to give the respondent notice that a copy of the petition may be obtained at the office of the Registrar so that the notice in the Government Gazette might not be encumbered by the petitioner having to annex to it a copy of his petition, which must accompany the notice when service is effected in one of the other ways prescribed by the rule. That service of the notice of the nature of the security is necessary is shown by rule 19 which enables a respondent where security is given wholly or partially by recognisance within five days of the service of the notice of the petition and the nature of the security to object in writing to the recognisance on the grounds set out in the rule. It will be difficult to determine the day from which the five days is to be calculated if a notice as to the nature of the security left at the office of the Registrar is to be deemed service of the notice. Under Rule 12 (1) security must be given within three days of the presentation of the petition, but notice of the nature of the security may be given within ten days of the presentation of the petition. Thus if a notice of the presentation of the petition is published in the Government Gazette three days after presentation, as was done in this case, the respondent will have to visit the office of the Registrar daily to see whether notice of the nature of the proposed security has been given.

As a matter of fact a notice of the nature of the proposed security was not left at the office of the Registrar. The petitioner only sent to the Registrar through his agent *inter alia* a copy of the recognisance to be handed

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to the respondent on application. Technically therefore there was no service of the notice of the proposed security on the respondent. But it is not necessary for me to determine whether a formal notice should have been left at the office of the Registrar in view of the opinion I have come to that notice of the proposed security should have been set out in the notice published in the Government Gazette, or by another notice published in the Government Gazette within the time prescribed by rule 18.

I accordingly hold the objection that notice of the proposed security was not served on the respondent by the notice published in the Government Gazette of the 3rd of April.

The petitioner appeared to have been of the same opinion for Mr. J. G. de S. Wijeratne purporting to be his agent served on Mr. F. G. de Silva's clerk on the 3rd of April copies of the petition and recognisance. The service on Mr. de Silva's clerk is not a compliance with the terms of rule 18 for two reasons. First, Mr. de Silva was not duly appointed agent of the respondent. The letter relied on by the petitioner as constituting Mr. de Silva the respondent's agent runs as follows :—

Colombo, 31st March 1936.

The Registrar,
The Supreme Court, Colombo.

SIR,

I have the honour to request you to hand over to my Agent Mr. Fred G. de Silva, Proctor S. C. a copy of the charges framed against me in the election petition filed by one Piyadasa of Matara.

I beg to remain,
Your obedient Servant,
RAJA HEWAVITARNE.

The respondent in this letter refers to Mr. de Silva as his agent but the letter certainly does not amount to an appointment of Mr. de Silva as agent of the respondent. In the second place service on Mr. de Silva's clerk is not service upon him. If the respondent had not taken objection to the sufficiency of the security within five days of the service of the notice on Mr. de Silva's clerk and latter contended that he had not been duly served with service of the proposed security, I should have been bound to uphold his contention on the ground that notice had not been served upon him or his agent as required by Section 18. The fact that he has entered an appearance cannot cure the defect in the service of the notice.

I need not in these proceedings determine whether the document appointing Mr. Wijeratne the petitioner's agent is chargeable with stamp duty.

I hold that notice of the nature of the proposed security was not served on the respondent. There remains the question whether the petition should be dismissed. On this question I have the advantage of authority. *In the matter of the Election Petition filed in respect of the Dedigama Electoral District*, 3 Ceylon Law Weekly, 51, it was held by Akbar, J. (I quote the head note) "That failure to give notice of the presentation of the petition and of the nature of the security in the manner required by rule 18 of the Election Petition Rules 1931 is a fatal defect for which the petition is liable to be dismissed."

I respectfully agree with the opinion of Akbar J. and with his reasons for coming to that opinion.

I accordingly dismiss this petition with costs.

Present : ABRAHAMS, C. J. & SOERTSZ, A. J,

ABEYDEERA *vs.* RAMANATHANCHETTIAR.

S. C. No. 139 (F)—D. C. Galle No. 33428.

Argued on 22nd September, 1936.

Decided on 30 October, 1936

Money lending transaction—Promissory note given in satisfaction of money borrowed and money due on goods purchased—Is note fictitious—Compound interest—When may it be charged.

The defendant gave the plaintiff a promissory note for Rs. 20000/-. The sum included the capital sum previously lent plus interest thereon and moneys due on rice purchased by the defendant. To cover the previous loans the defendants had given two cheques, which were returned on the execution of the promissory note for Rs. 20000/-.

At the trial the defendant took the following objections.

(a) That the note was not enforceable as the capital sum actually borrowed did not appear on the face of the note as required by the provisions of Section 10 of the Money Lending Ordinance No. 2 of 1918.

(b) That the note was void as the capital sum of Rs. 20000/- appearing on the note included compound interest.

(c) That the note came within the ambit of Section 13 of the Money Lending Ordinance as it was a fictitious note within the meaning of the expression in Section 14. At the trial it was admitted that the sum of Rs. 20000/- included interest on the money lent previously. The trial Judge did not uphold the defendants objections but held that the plaintiff was not entitled to recover the full amount claimed on the note as compound interest was not in law recoverable. The defendant appealed.

Held: (i) That compound interest may be lawfully charged in Ceylon where there is a definite contract to pay such interest.

(ii) That a transaction, in which the promissor, in lieu of cheques already issued by him to the promisee, gives a promissory note for moneys already borrowed plus interest accumulated thereon, and for moneys due on account of goods sold and expenses incurred in connection with the transactions between the promissor and the promisee, does not cease to be a money lending transaction merely because the promisee does not at the time of execution of the note physically lend the money to the promissor.

(iii) That a promissory note given in consideration of

(a) money lent to the promissor previously together with interest thereon

(b) goods sold to the promissor

(c) travelling expenses incurred in connection with the transactions between the promissor and the promisee is not a "fictitious note" within the meaning of the expression in Section 14 of the Money Lending Ordinance.

[Editorial Note. In the case of *Obeyesekera* vs. *Fonseka*, 2 C. L. W. 349, a different view appears to have been taken on the question of compound interest.]

N. E. Weerasooriya with *J. R. Jayawardene* for defendant-appellant.

H. V. Perera with *E. B. Wickremanaike* for plaintiff-respondent.

ABRAHAMS, C. J.

This is an action for the recovery of a sum of Rs. 22,099/97 alleged to be due on a promissory note dated the 19th of July 1932, made out for Rs. 20,000/- with interest thereon at the rate of 14% per annum. The plaint

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states that this sum was "the amount found to be due from defendant to plaintiff upon an account stated between them on the said date in respect of their prior dealings." The plaintiff is a money lender and he also appears to be a dealer in rice. On the 15th of May 1931, the defendant gave the plaintiff a cheque for Rs. 4000/- in payment for rice purchased from him, with interest on the amount owed. There had also been money lending transactions between the parties, and on the 6th of February, 1932 the defendant gave the plaintiff two cheques for Rs. 14,000/- and Rs. 1000/- respectively to cover certain advances made and interest charged on the amounts due. On the 19th of July, 1932, the promissory note, which is the subject matter of the action, was given by the defendant to the plaintiff, and the three cheques previously mentioned were returned.

It was objected at the trial, on behalf of the defendant, that the capital sum actually borrowed does not appear on the face of the note as required by the provisions of Section 10 of the Money Lending Ordinance No. 2 of 1918 and therefore the note was not enforceable. It was further objected by him that the capital sum of Rs. 20,000/- appearing on the note included compound interest, and that, therefore the note was void, and also that it was a fictitious note within the meaning of Section 14 of the Money Lending Ordinance and that it came under the provisions of Sections 13 of the Ordinance. At the trial it was admitted by Counsel for the plaintiff that in arriving at the sum of Rs. 20,000/- compound interest was charged.

The following were the issues at the trial :—

1. Does the capital sum of twenty thousand rupees, appearing on the note include interest on interest on previous transactions ?

2. If so is the note void ?

3. Does the capital sum appearing on the note represent the actual sum due to plaintiff at the date of the note ?

4. If not, is the note enforceable ?

5. What amount if any is due on the note ?

6. Was the default if any, incorrectly setting out the capital sum borrowed due to inadvertence and not due to an intention to evade the provisions of the Money Lending Ordinance ?

In view of what I am about to find in this appeal, there will be no reason to discuss the learned Judge's finding on the 6th issue. He answered the other five as follows.—The 1st in the affirmative, the 3rd in the negative, the 2nd and 4th in favour of the plaintiff and on the 5th he held that the plaintiff was not entitled to recover the full amount claimed on the note, as compound interest was not permissible, and that the claim must be deleted. The decree was formulated accordingly.

I am of the opinion that the 1st issue was properly answered in the affirmative on the admission of the plaintiff's counsel, that in the note is included the interest on a sum of Rs. 284/- which was itself interest. Then comes the question as to whether the note was void on that account as issue 2 suggests it might be. The learned District Judge so far as I can gather from the judgment has held that compound interest is not legally chargeable, but he appears to consider that the note is not voided thereby because it was not given on a purely money lending transaction amounting as it did to an account stated which incorporated loans of money, sales of rice, and a few rupees representing plaintiff's travelling expenses. I propose to say something presently on what I take to be true nature of the transaction for which the promissory note was given but for the moment, dealing with the question of compound interest I am of the opinion that compound interest, may be lawfully charged. The Money Lending Ordinance does not say that compound interest may not be charged. The only section in that Ordinance which has any reference to interest is Section 4 which provides that rates above the rates mentioned in it are matters to be considered when a transaction is under review for the purpose of ascertaining whether it is harsh and unconscionable. Under the Roman Dutch law although it is not legal to charge compound interest when there has been undertaking to pay such interest or where there is a recognised custom to charge compound interest or where the contract between the parties sanctions it, unless the amount charged can be said to be usurious. (See Manfred Nathan, Common Law of South Africa, Volume II, pp. 667-670. In *Ramasamy Pulle* vs. *Tamby Candoe* (Ram, 1872-1875. p. 189) it was held that the Dutch usury laws were purely local enactments and were not introduced into Ceylon. Section 3 of Ordinance 5 of 1852 as amended by Section 97 of the Bills of Exchange Ordinance No. 25 of 1927 enacts "that no person shall by prevented from recovering on any contract or engagement any amount of interest expressly reserved thereby, or from recovering interest at the rate of nine per cent per annum on any contract or engagement in any case in which interest is payable by law and no different rate of interest has been specially agreed upon between the parties," but the amount recoverable on account of interest or arrears of interest was allowed by reason of the custom of the Banks and the acquiescenes of the defendant. In the present case there is no doubt that the defendant did agree to pay interest upon interest. He says in his answer that he was compelled to grant the note because he was hard pressed and was afraid that the plaintiff would put him in Court.

It follows then from the foregoing view that the 3rd issue ought to have been answered in favour of the plaintiff and that the appeal ought to be dismissed at this stage although as the plaintiff has not appealed against the finding that he is not entitled to recover the full amount, claimed on the

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note he cannot of course claim any further benefit from this finding than the mere dismissal of the appeal.

As I said earlier in the judgment I purpose to say something about the true nature of the transaction for which the note was given, because both at the trial and at the appeal it was contended by the defendant that as the actual amount due did not appear on the note the note did not comply with the provisions of Section 10 of the Money Lending Ordinance and was not enforceable and that for the same reason the note was a fictitious note within the meaning of Section 14 of the Money Lending Ordinance and was not enforceable. The plaintiff on the other hand contended that the Money Lending Ordinance did not apply as the transaction was not a purely money lending transaction, involving as it did a multiplicity of dealings between the parties only some of which were concerned with the lending of money. The learned District Judge said "the Note was not given on a purely money lending transaction. It includes a large sum on account of the sale of rice. Also a few rupees representing plaintiff's travelling expenses, in connection with the transactions. The accounts were looked into between the parties and it was agreed that the sum of Rs. 20,000/- was due. There was in fact no loan of money in the note. It created a novation of a pre-existing debt".

I am of the opinion that the note was given for a purely money lending transaction although no money actually passed between the parties at the time the note was given. The plaintiff's Manager, giving evidence said that no money was lent on the note itself. The learned Judge accepting this which meaning as it did that no money actually passed between the parties physically, came to the conclusion that no money was actually lent and thereby overlooked the implications which arose from the return of the three cheques and the consequential giving of the promissory note. The obligation to pay the sums represented by the cheques were extinguished when the promissory note was given for value received. What is the actual analysis of that transaction ? The cheques, by being returned, were deemed to have been paid. The defendant had no money to pay them, and the payment was, therefore, made by the plaintiff notionally lending the defendant the money to pay the sums due and the defendant notionally handing back the money to the plaintiff and securing the repayment, of the loan by the promissory note the value received being the money which was notionally received by the defendant and notionally returned to the plaintiff. The fact that the plaintiff did not physically lend the Rs. 20,000/- to the defendant and the defendant hand it back to him does not make any difference to the substance of the transaction. The facts of *Lyle* v. *Chappell* (48 T. L. R. 119) bear a substantial resemblance to the facts in this case. In that case a loan secured by a promissory note was extinguished and a fresh promissory note given for a larger

amount the lender handing to the borrower a cheque for the amount due which the borrower endorsed and handed back to the lender who treated it as settling the first transaction. Greer L. J. said "In my view, the documents signed by the defendant.....is an agreement by him to discharge whatever was due on the promissory note of April 25 by borrowing from the plaintiffs a sum of £ 200 and authorizing them instead of physically handing over the money to the defendant to pay themselevs the £ 200. The money lenders seem to have thought it necessary or desirable that they should physically hand over a cheque for £200 to the defendant and get it back again, but there is nothing in the agreement to the effect that this should be done and in my judgment it was not essential that the agreement should be carried out in that way. If the money to be borrowed was intended to be used, for the extinction of the debt agreed by the parties at £ 200 it seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards".

With regard to the alleged fictitiousness of the note that contention also fails Section 14 of the Money Lending Ordinance defines fictitious promissory notes as one "given in respect of a loan in regard to which a deduction was made or a sum paid at or about the time of the loan in respect of interest, premium or charges payable in advance, without such deduction or payment being set forth upon the document in accordance with Section 10 .....and any promissory note in respect of a loan with regard to which at or about the time of the loan any payment was made or any collateral transaction entered into with a view to disguising the actual amount". In this case it was stated that a sum of Rs. 237/37 was paid in advance as one month's interest on the sum of Rs. 20,000/-. That sum was set forth upon the document in accordance with Section 10, therefore the note is not fictitious within the meaning given in the first part of Section 14 of the word "fictitious" nor is it fictitious within the meaning of that word in the second part of Section 14, because neither party has submitted that any payment was made or any collateral transaction entered into to disguise the actual amount advanced.

In my opinion this appeal fails, and should be dismissed with costs.

Soertsz, A. J.

I agree.

Present: ABRAHAMS, C. J., MAARTENSZ, J. & MOSELEY, J.

THE ATTORNEY GENERAL *vs.* M. DE MEL LAXAPATHY

In the matter of a contempt of the authority of the Supreme Court committed in respect of P. C Avissawella Case 12421.

Argued & decided on 26th October, 1936.

Contempt of Court—Section 51 of the Courts Ordinance No. 1 of 1889—Publication of notice convening a meeting for discussing a pending case—Meeting held in pursuance of such notice.

The respondent, a proctor of the Supreme Court practising at Avissawella, was by a rule *nisi* called upon to show cause why he should not be punished for contempt of the authority of the Supreme Court.

(a) In that he did on or about the 9th July, 1936, at Avissawella, cause to be printed and published a notice to the following effect:—

A serious and frightful crime, which has been committed on a young respectable Sinhalese lady who is a stranger, by a rich landed proprietor of Kanantota called Wahab, Mudalali with his henchman, is now being inquired into at the Police Court at Avissawella.

"As this is an unheard of and frightful crime which has never taken place in those parts before, a public meeting will be held on the 9th instant at 4 p. m. at the Avissawella Public Market under the Chairmanship of Proctor Mohandas de Mel Laxapathy and all are requested to be present without fail."

Which said notice had reference to the non-summary proceedings there pending before the Police Court of Avissawella in case No. 12421 wherein one Seleka Marikkar Abdul Wahab alias Wahab Mudalali of Pelangoda Estate, Hanwella, with seven others was charged with having on or about the 19th June, 1936, committed the offence of being members of an unlawful assembly with intent to cause hurt, robbery, and rape on a woman named Mentho Nona, which said publication was calculated to prejudice the the fair hearing of the said case before the Supreme Court.

(b) In that he did on or about the 9th July, 1936, preside at a public meeting held near the Public Market at Avissawella in pursuance of the said notice whereat he caused the said notice to be read out to the public assembly at the said meeting, which said act was calculated to prejudice the fair hearing of the said case before the Supreme Court.

The notice was published in Sinhalese and the proceedings at the meeting was conducted in the same language.

At the hearing the respondent showed no cause, but explained his position by an affidavit in which he pointed out that he was taken by surprise and that he did not know Sinhalese quite as well as he might, and that he would not have approved the notice if he had appreciated its force, and that he had no intention of prejudicing the fair trial of the case.

Held: That the conduct of the respondent constituted a contempt of Court.

C. Brooke Elliott, K. C. with *J. R. Jayawardena* instructed by *C. E. Jayawardena* for the Respondent

J. W. R. Ilangakoon Attorney-General with *E. A. L. Wijeyewardena* Solicitor-General and *M. F. S. Pulle* Crown Counsel in support.

ABRAHAMS, C. J.

As we said in the previous proceedings where the conveners of this meeting and the authors of the handbill were concerned,* this is a bad contempt of Court because it tends to interfere with the due administration of justice. The respondent in this case has explained his position. He says that he was taken by surprise, that he does not know Singhalese quite as well as perhaps he might, and he submits that the vernacular words are somewhat ambiguous and that they indicate not that a crime has been committed by a particular person but that it is alleged to have been committed. He also says that he had no ill-feeling against the accused persons and that it did not occur to him in all the circumstances that it was likely to be thought that the accused were regarded as guilty by the persons whose names appeared in the handbill as the conveners of the meeting, or by himself, or by anybody else.

We are prepared to believe that he did act without due care and attention, although we do not think that he was quite in such a hurry as he would have us believe as he was careful to strike out certain compromising words from the handbill—the reference to the race of the accused person, and he also struck out his name as one of the conveners of the meeting. We are prepared to believe, however, that he had no intention of prejudicing the fair trial of this case, but we are bound to point out to him and to anybody else that when offences are alleged to have been committed a little more discretion and a little less zeal on the part of people who want to see the law upheld is the right cause to pursue. There is no doubt that his name appearing in this handbill a name which is honoured in this district, and for a very good reason—and his professional designation, are some guarantee of the truth of the fact that the handbill appears to indicate, and that the ignorant people who convened that meeting were encouraged by the attitude that he took up to go on with what they were doing.

We have no desire to be unduly, severe, but we can hardly treat him on the same footing as we treated the conveners of the meeting whom we fined Rs. 200/-. We must mark our disapproval of his conduct by imposing a fine of Rs. 500/-, or in default 3 months' simple imprisonment.

(Sgd.) L. M. MAARTENSZ,
Puisne Justice.

(Sgd.) F. A. MOSELEY,
Puisne Justice.

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* See 6. C. L. W. p. 130 (Edd.)

Present : ABRAHAMS, C. J.

J. C. A. DUNUWILA, (Excise Inspector,) *vs.* M. UKKUWA,

S. C. 809, P. C. Gampaha, No. 10363.
Argued and Decided on : 16th November, 1936.

Judicial Notice—Evidence Ordinance Section 57—Is a notification published under Section 16 of the Excise Ordinance No. 8 of 1912 a publication of which a Court shall take judicial notice.

Held, (i). That a notification under Section 16 of the Excise Ordinance No. 8 of 1912 is not a form of legislation of which the Courts must take judicial notice.

(ii). That such a notification must be proved by the production of the Gazette containing the Notification.

C. E. S. Perera, for accused-appellant.

ABRAHAMS, C. J.

In this case the accused appellant was convicted of possessing 7 drams of toddy in excess of the quantity permitted by law. The charge states that he committed the offence in breach of Sec. 16 of the Excise Ordinance No. 8 of 1912, read with Excise Notification No. 264 published in the Government Gazette of 22nd June 1934. He was also charged with transporting 7 drams of toddy in excess of the quantity allowed without a license in breach of Section 12 of the same Ordinance read with the same Notification.

It is objected that the conviction ought not to be allowed to stand because there was no proof of publication of the Notification. I think that this submission must prevail. A Notification is not a form of legislation of which Courts must take judicial notice, and as a consequence it is a part of the case against the appellant which ought to have been proved by the production of the Gazette containing the Notification. The impropriety of such an omission has been pointed out more than once in this Court, and in particular by Macdonell C. J. in *Marambe* v. *Kiriappu*, Vol. 2. Ceylon Law Weekly, p. 122.

It has also been submitted by Counsel for the appellant that apart from the omission to prove the Notification, the evidence against the appellant is so unsatisfactory as to justify an interference with the conviction. The principal witness against the appellant is stated to have been corroborated by Mr. Yates, who has been given certain information relative to the offence, through an interpreter. It is obvious that the interpreter ought to have been called, because Mr. Yates was not in a position to say any more than what the interpreter had told him, which was of course inadmissible.

There was further some question of the possibility of the excessive quantity of toddy having been foisted upon the accused by some outside person. It is very difficult for me to gather from the record what actually had happened, but it seems to me that that was a possibility that was not properly explored by the Court, and I certainly am unable to say that if Mr. Yates' evidence had not been accepted and the question of the introduction of the excessive quantity of toddy had been considered, the Magistrate would

have convicted. In any event, however, the failure to prove the notification must vitiate the proceedings. I can order the retrial of the case, but I do not propose to do so. It has not been the practice in this Court to direct a new trial unless the circumstances are most exceptional, and I set the conviction aside and acquit the accused. I understand the accused was unable to pay the fine of Rs. 50/- inflicted on him and is already serving his sentence of 6 weeks. He will therefore be released immediately.

Present : MOSELEY J. & FERNANDO A. P. J.

ARUNACHALAM CHETTIAR *vs.* A. D. PAULIS APPUHAMY.

S. C. 142, D. C. Colombo, No. 51848.
Argued : 3rd November, 1936.
Delivered :10th November, 1936.

Mortgage Decree—Can court stay execution of decree—Civil Procedure Code, Section 343.

In a mortgage action, of consent a decree was entered directing that order to sell the mortgaged property was not to issue either until the defendant made default in the payment of certain sums which he agreed to pay on certain dates, or till a period of two years from the date of the decree had expired. The consent motion provided that in the event of the full claim not being paid within the period of two years, commission to sell was to issue forthwith without notice to the defendant, but this condition was not included in the decree. After the expiry of that period the plaintiff applied for an order to sell, and the defendant applied for a further period within which he might pay the money. The trial judge held that it was not open to him to enlarge the time fixed in the decree. The defendant appealed from this decision.

Held. That in a mortgage action the Court has power under 343 of the Civil Procedure Code to stay execution of the decree for good reason.

Decision in Ramanathan v. Ibrahim 4 C. L. W. p. 14 considered.

H. V. Perera with *Wickremanaike* for defendant-appellant.

Nadarajah for plaintiff-respondent.

FERNANDO, A. P. J.

In this case a decree was entered on 28th March, 1934 directing that order to sell the mortgaged property was not to issue either until the defendant makes default in the payment of certain sums which he agreed to pay on certain dates, or till a period of two years from the date of the decree has expired. That period having expired in March, 1936, the plaintiff applied for an order to sell, and defendant applied for a further period within which he might pay the money. The learned District Judge held it was not open to him to enlarge the time fixed in the decree itself. It is true that the decree was entered of consent, but although the consent motion provided that in the event of the full claim not being paid within the period of two years, commission to sell was to issue forthwith without notice to the defendant, that provision was not entered in the decree, and I take it that this was omitted advisedly.

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Fernando, A. P. J.
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Arunachalam Chettiar
vs.
Paulis Appuhamy

The District Judge relies on the judgment of this Court in Ramanathan v. Ibrahim 36 N. L. R. 445* where Akbar J. setaside the order of the District Court allowing the judgment creditor 9 months' time to pay, because as he said "the proper course would have been to fix the conditions under which the section was to be carried out, and in those conditions to fix the period within which the balance due to the judgment creditor was to be paid." The case was therefore, sent back in order that the District Judge might fix a period after which the sale is to be carried out.

The direction thus given appears to my mind to be inconsistent with the earlier portion of his judgment in which he states that the conditions of sale must be with reference to the original decree, and must not have the effect of altering or contradicting or varying the period fixed by the Court in the original decree. Nor is this case any authority for the proposition that in the case of a mortgage decree the provisions of section 343 of the C. P. C, do not enable the court for good reason to stay execution of the decree. That section was held in 26 N. L. R. 449 to apply to sales under mortgage decrees entered under Sec. 201 of the C. P. C., and I see no reason for doubting that the section applies in all cases of execution of decrees entered by Court. It is true that in the ordinary course, execution of a decree will be allowed by Court unless due cause is shown why execution should in any particular case be delayed, and in this case the evidence led for the defendant does indicate that the plaintiff placed certain objections in the way of the defendant raising a loan on the mortgaged properties, and the learned District Judge found that the plaintiff was probably irritated by the fact that the defendant had filed an action against him. In the circumstances of this case we ordered that an order to sell should not issue for a further period of six months from the date of the receipt of the record in the District Court and that the title deeds and plans of the mortgaged lands should be deposited by the plaintiff within a week of the record reaching that Court with the Secretary, in order that the defendant's proctor might have access to them in order to apply for a loan, or to forward them to the State Mortgage Bank or to any other likely creditor. It will be clearly understood that the defendant's proctor, if he takes the deeds from the Secretary will be personally responsible to see that the same are returned to the Secretary within a reasonable time, and in any event before the expiration of the period of six months already referred to. As execution has been stayed as an indulgence to the defendant, he will not be entitled to the costs of this appeal or of the application to the District Court, and each party will bear his own costs of these proceedings.

Moseley J.

I agree

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* 4 C. L. W. 14.