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VOLUME VIII

WITH A DIGEST.

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Held : (i) That the statement made to the Police Headman was inadmissible in evidence by reason of Section 25 of the Evidence Ordinance.

(ii) That a Magistrate's powers under Section 429 of the Criminal Procedure Code cannot be made use of to elicit from any witness evidence that is inadmissible.

(iii) That it is contrary to Section 25 of the Evidence Ordinance to admit the evidence of a Police Officer (*a*) that the accused did not in the statement made to him set up the defence he set up before the Court or (*b*) that the accused made to him a statement not consistent with the position taken up in his defence in Court.

(iv) That the word " witness " in Section 122 (3) of the Criminal Procedure Code must be strictly construed as meaning a witness pure and simple and does not include an accused person who testifies on his own behalf.

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Held : (i) That the Order-in-Council of 27th October, 1896, can be legally brought into effect by Proclamation at a time when the national security is likely to be in danger by some widespread activity such as war or extensive civil disorder, and that when the national security is no longer imperilled by the state of affairs, then the Proclamation should be revoked.

(ii) That the powers of the Governor to issue an order under Article III 3. of the Order-in-Council of 27th October, 1896, as amended by the Order-in-Council of 21st March, 1916, is not absolute, and that it can be exercised only under conditions.

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Held : (i) That the words "all such corrections, additions, or alterations in his registers as may be necessary to keep up to date his register of Upasampada Bhikkhus and Samaneras of his Nikaya and the relevant details regarding them" in section 41 (5) of the Buddhist Temporalities Ordinance No. 19 of 1931 were intended to include the total removal of the names of Bhikkhus from the register.

(ii) That the words "modification" and "modify" in section 41 (5) of the Buddhist Temporalities Ordinance are wide enough to include the removal of a name from the register.

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Held : (i) That the petitioner had no right to intervene in the mortgage action as he is not a necessary party for the effectual and complete adjudication of the action between the mortgagor and the mortgagee.

(ii) That section 6 (1) of the Mortgage Ordinance No. 20 of 1927 does not give a person such as the petitioner-respondent a right to intervene in the mortgage action.

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Held : (i) That the action was statute-barred.

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Held : (i) That a person is entitled to halt his car on a road in any one of the following positions without being guilty of the offence of obstruction under Section 52 (1) of the Motor Car Ordinance No. 20 of 1927.

(*a*) As close to the side of the road as possible.

(*b*) In such position as may be indicated by a police-officer regulating traffic.

(*c*) In such position as indicated by a properly exhibited notice.

(ii) That it is no offence under Section 52 (1) of the Motor Car Ordinance to halt a car close to the left edge of a road, and that it makes no difference that the road is a busy one and narrow at the point at which the car is halted.

PERERA (POLICE SERGEANT) vs. FERNANDO 63

3. *Motor Cars—Regulation 4 of the regulation made under sections 6 and 58 of Ordinance No. 20 of 1927 and published in Gazette of 13th March, 1936—Endorsement by local authority on licence relaxing in certain circumstances the effect of regulation 4.*

Held : (i) That it is a breach of regulation 4 of the regulations made under sections 6 and 58 of the Motor Ordinance No. 20 of 1927 for an omnibus weighing more than 3 tons when fully loaded to proceed along a highway prohibited for omnibuses over 3 tons even though at the time it is proceeding its actual total weight is less than 3 tons.

(ii) That a local authority cannot by endorsement on a licence relax a prohibition made by regulation under sections 6 and 58 of the Motor Car Ordinance.

NAIR VS. ALEXANDER AND ANOTHER 93

4. *Motor Car Ordinance No. 20 of 1927—Omnibus contravening terms of licence—Authority to carry a certain number of passengers and a prescribed quantity of goods on the roof or in the alternative a prescribed quantity of goods and a fixed number of passengers—Regulation 6 (3).*

Held : (i) That once the six-passengers limit is exceeded, *ipso facto* the condition that the bus may carry goods to the extent of 336 pounds on the roof becomes operative and then if any goods are carried inside the bus it would amount to a contravention of the license no matter what their weight is.

(ii) Regulation 6 (3) of the regulation in the 4th schedule to the Motor Car Ordinance applies to a case of overloading and does not apply to a case where goods are carried in a part of an omnibus not authorised by the license.

MUNASINGHE (S. I. MOTOR PATROL) VS. ELIATHAMBY 96

5. *Motor Car Ordinance—Section 30 (2)—Written notice of non-user sent by post—Must the sender of such notice prove that the licensing authority to whom it was intended received it—With what amount of precision must the period of non-user be stated.*

Held : (i) That there was no obligation on the part of the accused to prove that the notice of non-user was in fact received by the local authority.

(ii) That the accused was only bound to prove that he posted the notice.

(iii) That the accused had in the circumstances of this case complied with the requirements of section 30 (2) of the Motor Car Ordinance.

JAFFNA U. D. C. VS. RAJERATNAM 116

Muslim Marriage and Divorce Ordinance.

Does an application to a Kathi for a dissolution of marriage oust the jurisdiction of the Police Court to make an order for maintenance under the Maintenance Ordinance.

See Maintenance .. ..

Notary.

Can evidence be led to contradict the statement made by a notary in his attestation clause to a deed attested by him.

See Evidence .. .. ..

Notice.

Notice of non-user—How may it be given.

See Motor Cars .. ..

Obstruction.

Halting motor car on highway—When is it an offence.

See Motor Cars .. ..

Order in Council.

Ceylon Defence Order in Council 1896*—*Article III.* 3.—*Deportation of British subject.*

See Habeas Corpus .. ..

Note. **This Order in Council has since been repealed.*

Ordinances.

Buddhist Temporalities Ordinance No. 19 *of* 1931.
Section 41 50

Civil Procedure Code.
Section 18 91
Section 247 119
Section 653 61
Section 756 26
Section 770 29

Criminal Procedure Code.
Section 81 107
Section 122 (3) 65
Section 172 6
Section 134 81
Section 188 20
Sections 325(1) and 338 75
Section 429 65

Evidence Ordinance.
Section 25 65
Section 26 81
Section 92 109
Section 57 21
Section 145 (1) 65

Estate Duty Ordinance No. 8 *of* 1919.
Section 16 (2) 77

Excise Ordinance No. 8 *of* 1912 83
Section 50 85

Frauds and Perjuries Ordinance No. 7 *of* 1840.
Section 2 99
Section 2 137

Income Tax Ordinance No. 2 *of* 1932.
Sections 65, 69, 75 57

Jaffna Matrimonial Rights and Inheritance Ordinance 1911 145

Maintenance Ordinance No. 19 *of* 1889.
Section 9 11
Section 10 1

Money Lending Ordinance No. 2 *of* 1918
Section 10 111

Mortgage Ordinance No. 21 *of* 1927.
Section 6 (1) 145
Section 16 91
.. .. 112

Motor Car Ordinance No. 20 *of* 1927.
Section 30 (2) 116
Sub-Sections (2) (3) of Section 57 49
Section 52 (1) 63
Section 58 and Section 6 93
Regulation 6 (3) 96

Muslim Marriage and Divorce Ordinance No. 27 *of* 1929. 149

Ordinance No. 31 *of* 1909 *Schedule* 1 47
Rule 2 137
do *No.* 21 *of* 1887 31
Order in Council Article III 3. *of* 26*th October* 1896

Partition Ordinance No. 10 *of* 1863.
Section 17 .. .. .. 70, 129

Penal Code.
Sections 183, 186 6
Section 211 127
Section 409 123

Poisons and Dangerous Drugs Ordinance.
No. 43 of 1935 150

Prescription Ordinance No. 22 *of* 1871 67
Do Section 6 112

Rubber Thefts Ordinance No. 21 *of* 1908.
Section 3 101

Stamp Ordinance No. 22 *of* 1909.
Sections 36 and 37 142

Youthful Offenders Ordinance No. 1 *of* 1886.
Section 32 144

Orphan.

Is a person in possession of an orphan's property legally liable to maintain him.

See Youthful Offenders Ordinance. .. .. ..

Partition.

1. *Partition—Transfer of interests pending final decree—Interests transferred described as "the shares to be awarded by the decision arranged in partition case* 5303 *now pending"—Is such transfer obnoxious to section* 17 *of the Partition Ordinance No.* 10 *of* 1863.

Held : That the transfer was valid and that it was not obnoxious to Section 17 of the Partition Ordinance No. 10 of 1863.

SALEE AND OTHERS VS. NATCHIA AND OTHERS 70

2. *Partition—Transfer executed after confirmation of scheme of partition, but before final decree was actually entered—Is the transfer valid—Section 17 of the Partition Ordinance.*

Held : (i) That the plaintiff's deeds of 25th July, 1935, and 1st August, 1935, were void by operation of section 17 of the Partition Ordinance.

(ii) That the District Judge had power to vacate the order of 24th July, 1935, in the circumstances of this case.

(iii) That for the application of the *exceptio rei venditae et traditae* there must be a deed good in law.

GUNAWARDENA VS. SENEVIRATNE 129

Penal Code.

1. *Penal Code section 409—Destruction of a wall erected across land over which the accused had a right of way—Ownership admitted—Bona fide act—Is it criminal.*

Held : That the act of the accused did not amount to an offence under section 409 of the Penal Code.

MOHIDEEN VS. SUPPRAMANIAM CHETTIAR AND OTHERS 123

2. *Penal Code section 211—Offering an illegal gratification.*

Where the Magistrate found that the accused offered a gratification of one rupee to a Police Constable "in order to get home to rest and to prevent himself being delayed or locked up in the Police Station."

Held : That an offence under section 211 of the Penal Code had not been committed.

BENEDICT VS. MARIKAR 127

Poisons and Dangerous Drugs.

Poisons and Dangerous Drugs Ordinance No. 43 of 1935—Unlawful Possession of dangerous drug—Sealing of production—Is it an essential requirement of law.

Held : That there is no requirement in law that the production, in any case in which a person is charged with being in unlawful possession of an excisable article or a dangerous drug, should be sealed at the spot or at any given time.

DE SILVA (EXCISE INSPECTOR) VS. SARPIN SINGHO 150

Prescription.

1. *Prescription—Mortgage bond executed on January 12, 1924—Promise to pay the mortgagee and after his life-time to his son—Death of mortgagee in September 1930 while his son was yet a minor—Action by son in February, 1934—Is action barred.*

Held : That the action was statute-barred.

TILLAINATHAN AND ANOTHER VS. NAGALINGAM 8

2. *Claim to incumbency of a Buddhist Temple—Within what time does a claim to an incumbency become statute-barred.*

See Buddhist Ecclesiastical Law. .. .. ..

3. *Action on mortgage bond—Action against administrator of deceased mortgagor—Deceased mortgagor subject to Thesawalamai—Widow of mortgagor not a party to the mortgage action—Separate action against widow after ten year's from date of bond—Prescription.*

See Mortgage .. ..

Principal and Surety.

Mortgage bond action against principal and surety—Judgment against surety by default—Should surety be a party to an appeal by the principal against an inter partes order against him.

See Appeal .. ..

Privy Council Appeals.

Privy Council Appeal—Application to the Supreme Court for leave to appeal—Should the day on which such leave would be applied for be intimated in the notice of the application given to the respondent—Ordinance No. 31 of 1909 Schedule I Rule 2—Computation of time within which notice to be given—Are Sundays and Public Holidays excluded.

Held : (i) That a notice of an intended application for leave to appeal to the Privy Council given under rule 2 of the rules in Schedule 1 of Appeals (Privy Council) Ordinance No. 31 of 1909, need not specify the day on which such leave would be applied for.

(ii) That in computing the period of thirty days prescribed in rule 2, no days included in a vacation of the Supreme Court shall be reckoned unless the Court otherwise directs.

PATHMANATHAN VS. THE IMPERIAL BANK OF INDIA 47

Production.

Sealing of production—Unlawful possession of dangerous drug—Is the sealing of the drugs seized in the possession of the accused an essential requirement of law.

See Poisons and Dangerous Drugs .. .. ..

Promissory Note.

Fictitious Promissory Note—Action on—Plea that note does not conform to the provisions of the Money Lending Ordinance—Circumstances in which relief under section 10 of the Ordinance may be given.

See Money Lending. .. .. ..

Res Judicata.

1. *Res judicata—Claim to land seized in execution—Section 247 of Civil Procedure Code—When does a claim under section 247 act as a bar to an action for a declaration of title to the same land.*

JULIUS PERERA VS. PEDRICK PERERA AND ANOTHER 119

2. *More than one action in respect of the same land on the same cause of action—Is it permissible in law.*

See Civil Procedure Code .. ..

Rubber Thefts Ordinance.

Forward contract to sell rubber by a person who is not a licensed rubber-dealer—Is such contract void.

See Contracts .. ..

Sealing.

Is sealing of a dangerous drug seized in the possession of an accused an essential requirement of law.

See Poisons and Dangerous Drugs .. .. ..

Sentence—Enhancement of.

When may the Supreme Court enhance the sentence passed by a lower court even in a case in which the accused had undergone the whole of the sentence imposed.

See Enhancement of Sentence .. ..

Sisiyanu Sisiya Paramparawa.

Succession to incumbency—In what circumstances can succession to an incumbency be determined by a rule other than that of Sisiyanu Sisiya Paramparawa.

See Buddhist Ecclesiastical Law .. ..

Stamp Ordinance.

Stamp Ordinance sections 36 and 37—Writing requiring a stamp of the value of one rupee stamped with a stamp of the value of fifty cents—Objection taken to the bond in the pleadings on the ground that it was under-stamped—Bond admitted by court—Can objection be taken in appeal to the bond.

Held : That the admission of a document in evidence cannot be questioned in appeal once it has been admitted in evidence by the trial judge.

FERNANDO VS. PERIS AND ANOTHER 142

Supreme Court—Power of to enhance sentence passed by a lower court even in a case in which the accused has undergone the whole of the sentence imposed.

See Enhancement of Sentence .. ..

Time—Computation of.

Privy Council appeal—Computation of time within which notice is to be given—Are Sundays and Public Holidays to be excluded.

See Privy Council Appeals .. ..

Thesawalamai.

Thesawalamai—Thediathetam property—Mortgage of—Jaffna Matrimonial Rights and Inheritance Ordinance 1911—*Mortgage Ordinance* 1927.

Held : That the decree was not binding on the children of the defendant, because they were not made parties to the mortgage action.

THAMBIAH VS. SANGARAJAH 145

Vendor and Purchaser.

1. *Vendor and Purchaser—Auction sale of land—Express undertaking to warrant and defend title—Vendor prepared to put purchaser in possession—Is purchaser entitled to withdraw from contract on the ground that there is a defect in the vendor's title.*

Held : (i) That where there is an express covenant to warrant and defend title no further or other covenant can be implied.

(ii) That where the vendor and purchaser at an auction sale of land have entered into a valid contract of sale with a condition to warrant and defend title the purchaser is not entitled to withdraw from the contract on the ground that the vendor's title is defective.

(iii) That the obligation of a vendor who has expressly agreed to warrant and defend title is to give vacant possession, and to warrant against eviction.

CHELLAPPAH VS. MC HEYZER AND ANOTHER 14

2. *Purchaser of land from devisee of deceased during administration of the deceased's estate—Sale not for purposes of administration—Seizure of land by a judgment-creditor of the deceased under a writ of execution against the deceased —Can purchaser resist the seizure on the ground that there was other property left by the deceased sufficient to cover the creditor's claim.*

See Debtor and Creditor .. ..

Youthful Offenders Ordinance.

Youthful Offenders Ordinance—Section 32—Person in possession of property devolving on an orphan—Is he a person "legally liable to maintain" such orphan.

Held : That a person in possession of property to which an orphan has a claim is not a person "legally liable to maintain" such orphan for the purposes of section 32 of the Youthful Offenders Ordinance.

CASSIPILLAI VS. RAJARETNAM 144

Words and Phrases.

"Modification" See Mandamus 50

"Modify" 50

Present: MOSELEY, J.

V. M. R. SITHAYAMMA vs. R. SINNIAH *alias* KANNIAH.

S. C. No. 802—*P. C. Teldeniya No.* 2584.

Argued on 4th February, 1937.

Decided on 24th March, 1937.

Insolvency—Arrears of maintenance ordered under the Maintenance Ordinance No. 19 *of* 1889—*Are such arrears a debt provable in Insolvency Proceedings.*

Held : That such arrears of maintenance ordered under the maintenance Ordinance No. 19 of 1889 as have accrued at the date of adjudication of an insolvent who has been condemned to pay maintenance can be proved in insolvency as a debt due from the insolvent.

PER MOSELEY, J.

"Now, it seems to me that a clear distinction can be drawn between arrears of alimony and arrears of maintenance in the light of a debt which can be proved in insolvency. The difficulty in the case of the former is that it is not possible to value them exactly. No such difficulty occurs in the case of arrears under a maintenance order inasmuch as the Court does not appear to have any power to discharge or modify such an order with retrospective effect but only to cancel or alter it, as provided by section 10 of the Ordinance, with effect from the date of such cancellation or alteration".

H. V. Perera with *G. E. Chitty* for defendant appellant.

No appearance for the applicant respondent.

MOSELEY, J.

This appeal raises an interesting point as to whether or not, and if so, to what extent, an insolvent is protected against an order committing him to prison for failure to comply with an order for maintenance, made under Section 3 of the Maintenance Ordinance No. 19 of 1889.

I quote the following extract from the order of the learned Magistrate :—" It has been held that a decree for alimony is not a debt provable " in bankruptcy proceedings (In the matter of the Insolvency of J. G. de " Silva, 2 N.L.R. 140). Much less could it be held that an order for main- " tenance is a debt provable in insolvency. In my opinion, therefore, the " arrears of maintenance do not fall within the scope of the debts provable " in insolvency proceedings. Consequently the protection in the insolvency " case is of no avail against an order for maintenance."

In the case cited by the learned Magistrate the following passage occurs in the judgment of Withers J: " It was irregular to arrest the " husband under a writ in execution of that part of the decree which required " him to secure alimony. He could not be adjudicated an insolvent on " that as a debt, for it is not a debt provable in insolvency."

Now, I think it is settled law that the liability of a defendant under an order for maintenance is purely a civil liability (*Subaliya v. Kannangara*, 4 N.L.R. 121), and that the relation subsisting between the parties is that

of creditor and debtor. Section 36 of the Insolvency Ordinance provides that except in certain cases an insolvent shall be free from arrest or imprisonment by any creditor in coming to surrender or during the protection which is granted to him until his certificate be allowed. In the case of *In re S.L.M. Ibrahim Saibo* (1 Lorenz 124) it was ordered that a prisoner should be discharged under the provision of section 36, it not appearing that the case came within any of the exceptions in that section. Now, a maintenance order is not expressly included in the exceptions referred to, nor do I think that it can be held to be so by implication.

In *Home v. De Kroos* (5 S. C. C. p. 11) the words "any creditor" were held to be limited, in this application, to any creditor who could have proved under the insolvency. It seems to me that that construction is somewhat narrow, but assuming it to be the correct one, I would be prepared to say that a sum due in respect of arrears under a maintenance order which have accrued prior to adjudication is a debt provable in the insolvency for reasons which I shall set out.

On this point, in the course of his argument, counsel for appellant referred me to Dixon's Divorce Law & Practice (1908 Ed.), where at page 289 it is laid down that "the amount due under an order for alimony is a debt provable in bankruptcy, like any other debt, and the discharge releases the bankrupt from all further claim in respect of all debts anterior to his bankruptcy." The learned author goes on to say that arrears of alimony accruing after adjudication are not provable in bankruptcy and quotes as his authority *Linton v. Linton* (52 L.T. 782). The *ratio decidendi* appears to have been that inasmuch as an order for alimony is liable to be rescinded or varied, it is not capable of valuation. Bowen, L. J., in the course of his judgment observed that "It seems to me to be a wild idea to suppose that the liability to pay alimony is a liability capable of being proved in bankruptcy. If it were so, it must be capable of being estimated in some way or other , which this liability is not."

In the latter case of *Kerr v. Kerr* (77 L.T. 29) the following appears in the judgment of Williams and Hawkins JJ.—"It follows that *Linton v.* "*Linton* is an authority for the proposition that, so far as regards permanent "alimony, there can be no proof for arrears arising before the receiving "order unless there is something in the nature of arrears.....which "make it possible in such a case to form that estimate which the Court "held in *Linton v. Linton* could not be formed in respect of the subsequent "arrears.....".

They went on to hold that the value of the liability, both as to the past and the future, was incapable of being fairly estimated. Wright J. in a dissenting judgment thought that they ought to hold that arrears due and payable before the receiving order are provable in bankruptcy, unless the Court has declared them incapable of valuation.

The reason for the decision in this case is, to use the words of Williams and Hawkins JJ., that "the uncertainty as to the continuance of the

" obligation to make the payment exists, not only as to future payments " but also as to arrears, for the Divorce Court will wholly or partially relieve " a husband from payment *of arrears*, if it is just to do so.....In " fact, the practice of the Divorce Court so much treats the sums periodically " payable under its order as a fund for maintenance and not as property " and so much keeps its hand on the obligation to make these periodical " payments for maintenance, that it is a standing rule that the Court will " not, in the absence of means, make an order enforcing more than one " year's arrears."

In the case of *In re Hawkins* (1894 1 Q.B.D. 25) it was held that arrears of alimony which become due after a receiving order cannot be proved for by the wife in the bankruptcy of the debtor. Vaughan Williams J. held that as to future instalments there could be no doubt that the decision in *Linton v. Linton* is conclusive. He referred also to " the broader ground that there can be no proof at all for arrears of alimony."

Now, it seems to me that a clear distinction can be drawn between arrears of alimony and arrears of maintenance in the light of a debt which can be proved in insolvency. The difficulty in the case of the former is that it is not possible to value them exactly. No such difficulty occurs in the case of arrears under a maintenance order inasmuch as the Court does not appear to have any power to discharge or modify such an order with retrospective effect but only to cancel or alter it, as provided by section 10 of the Ordinance, with effect from the date of such cancellation or alteration.

Since the argument, counsel for the appellant has drawn my attention to an Indian case reported in 5 Calcutta 538, which is an authority for the proposition that in India under similar legislation an insolvent who has obtained a protection order is not liable to arrest or imprisonment in respect of arrears of maintenance when such arrears are included in the Schedule filed by him. The judgment further supports the view that " maintenance is a purely civil liability....."

I am satisfied therefore that such arrears as had accrued at the date of the adjudication are, since they are capable of estimation, a debt provable in bankruptcy. I am unable to ascertain, on the material before me, the date of the adjudication order. It appears from the petition of appeal that at the time of the adjudication the appellant owed the sum of Rs. 230, which was shown as a liability in the insolvency case. The order of commitment is in respect of Rs. 138. It seems therefore, that the order must be in respect of arrears, the amount of which was ascertainable at the date of the adjudication.

I would allow the appeal and set aside the order for imprisonment without prejudice to any steps the applicant may care to take to enforce payment of moneys due under the order for maintenance which have accrued subsequently to the adjudication order.

Set aside.

Present : POYSER S.P.J. & SOERTSZ, J.

BEATRICE GNANAWATHIE ATTANAYAKE vs. LOKU BANDA ATTANAYAKA

S. C. No. 142—*D. C. (F.) Kurunegala No.* 242.

Argued on 15th March, 1937.

Decided on 23rd March, 1937.

Divorce—Malicious desertion—Circumstances in which a court may grant a divorce on the ground of malicious desertion.

The plaintiff and the defendant were married on 9th September, 1931. Till 26th June, 1935, they lived successively at Bogahamanne, Kandy and Nawalapitiya. On the latter date the plaintiff had to go to Kurunegala to give evidence in a testamentary case. The defendant took her there in a car and left her at her mother's house but did not return to fetch her, although it had been arranged that he was to do so. Two days later—28th June, 1935—the defendant wrote a letter, to the plaintiff's mother, in which he indicated that he did not intend to live with the plaintiff any more. The letter contained chiefly allegations of immoral conduct against the plaintiff. The following are some of the passages which indicated the mind of the defendant :

(*a*) " I came over there with Beatrice on the 26th instant but Edmund's mother said that you are away at Wariyapola. There are many reasons to bring and leave Beatrice there."

(*b*) " It is impossible for a person to live with this prostitute ".

(*c*) " Mother-in-law gave me lands to possess but they are taken again. Even if they are taken back if this woman is not apt to adultery I would not have brought her and left her. Your daughter is only good for the country where the woman brought to the son was taken by the father-in-law. I do not require your lands and I do not require your adulterous daughter too."

(*d*) " These things came out recently otherwise she would not have been able to live with me so long, now she is living as if she is a good woman."

No reply was sent to this letter and on 9th July, 1935, the plaintiff filed the action for divorce on the ground of malicious desertion. After summons was served the defendant offered to come back and be reconciled. The plaintiff did not agree to this in view of the serious nature of the allegations made against her in the letter. In his evidence, at the trial, the defendant said, " I am willing to take back the plaintiff and the children. I have been making several endeavours to take my wife back but she has stubbornly refused to go with me."

The trial judge held that the plaintiff failed to establish malicious desertion and refused a divorce.

Held : That there was proof of malicious desertion and that the plaintiff was entitled to a divorce.

Croos Da Brera with *C. T. Olagasegeram* for the plaintiff appellant.

H. V. Perera with *E. B. Wickremanaike* for the defendant respondent.

POYSER, S.P.J.

In this case the plaintiff prayed for a dissolution of her marriage to the defendant on the ground of malicious desertion.

The facts are as follows :—The parties were married by a Registrar in accordance with the provisions of the Marriage Ordinance, on the 9th

of September, 1931. For two years they appear to have lived happily together but quarrels subsequently arose owing to the plaintiff's objecting to the defendant's frequent visits to his parents.

Early in 1935 more serious quarrels arose on account of the issue of coupons for the plaintiff's father's tea estate. These coupons were originally issued in the name of the defendant, but the plaintiff's mother had them transferred to her name and when this had been done, the defendant neglected the plaintiff and threatened to take her back to her mother and leave her there.

On the 26th of June, 1935 the plaintiff had occasion to go to Kurunegale to give evidence in a testamentary case. The defendant took her there in a car and left her at her mother's house but did not return to fetch her, although it had been arranged that he was to do so.

Two days later, on the 28th of June, the defendant wrote the letter (P 2) to the plaintiff's mother. This letter contains a number of allegations against the plaintiff of committing adultery and also the following passage:—
" .....There are many reasons to bring and leave Beatrice there..... It is impossible for a person like me to live with this prostitute.....I do not require your lands and I do not require your adulterous daughter too."

No reply was sent to this letter and on the 9th of July, the plaintiff filed her action.

The District Judge has come to the conclusion that malicious desertion was not established. I do not agree. I think there was sufficient material before him to justify a finding that the defendant had maliciously deserted the plaintiff.

I quite appreciate the argument that in Roman Dutch Law no divorce should be granted on the ground of malicious desertion whilst there remains any hope of reconciliation, in support of which the case of *Ramalingam v. Ramalingam*, (35 N.L.R. p 174), was cited.

On the other hand a divorce has been granted where the wife had been absent for only six days before issue of summons, *Mostert v. Mostert* (2 Searle 128).

In this case the defendant appears to have acted with deliberation and determination of parting from his wife. His leaving his wife with her mother, having regard to the previous quarrels, does not appear to have been an act of angry impulse and the letter P 2 is conclusive evidence, in my opinion, that the defendant deliberately intended to repudiate the marriage.

The District Judge was of the opinion that " if there had been any desertion it had been by the plaintiff no by the defendant ". I do not think that is the case.

" In order to constitute desertion, there must be cessation of " cohabitation and an intention on the part of the accused party to desert " the other. It is not always, or necessarily, the guilty party who leaves

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"the matrimonial home ; the party who intends to bring the cohabitation "to an end, and whose conduct in reality causes its termination, commits "the act of desertion. There is no substantial difference between the case "of a husband who intends to put an end to a state of cohabitation and "does so by leaving his wife, and that of a husband, who with the like intent, "obliges his wife to separate from him."

Sickert v. Sickert. (Law Rep. Probate Div. 1899, page 278).

There is one other point in the case. After these proceedings were instituted, the defendant appears to have endeavoured to effect a reconciliation with the plaintiff. This is no ground for refusing the plaintiff a divorce, for the defendant's previous conduct could not be obliterated by subsequent offers, about the genuineness of which the plaintiff might reasonably entertain doubts. See *Thomas v. Thomas* (Law Rep. Probate Division, 1924, page 194).

I would allow the appeal and direct that a decree *nisi* be entered for the plaintiff as prayed and I would also direct that the District Judge should determine para 7 (2) and (3) of the plaint *i.e.* the question of maintenance and custody of the children. The plaintiff is entitled to the custody of her children but from her evidence she does not appear to desire such custody. The plaintiff is entitled to costs both here and in the Court below.

SOERTSZ, J.

I agree.

Appeal allowed.

Present : SOERTSZ, J.

D. J. A. ABEYSINGHE (REVENUE INSPECTOR, M.C. KANDY) vs. D. P. K. CHARLES APPUHAMY.

Revision Application No. 638—*P. C. Kandy No.* 52757.
Argued on 26th April, 1937.
Decided on 29th April, 1937.

Autrefois acquit—Criminal Procedure Code section 172,—*Discharge of the accused on the charges on which he was tried and a fresh charge framed simultaneously—Is such procedure tenable in law.*

The accused in this case was tried on charges under section 183 and 186 of the Penal Code. After hearing evidence the Magistrate made an order in which he stated *inter alia.*

"I therefore will proceed to *discharge accused* from proceedings under Section 183 and 186 and to frame a charge against him under Section 484."

It was argued that, as the Magistrate purported to discharge the accused under Sections 183 and 186 of the Penal Code he was not free to charge him simultaneously with an offence under Section 484,

Held : That the Magistrate was entitled in law to do what he did and that the plea of *autrefois acquit* could not prevail.

Ranawake with *Dodwell Gunawardena* for petitioner.

L. A. Rajapakse for respondent.

SOERTSZ, J.

This application must be refused for in my opinion, the plea of *autrefois acquit* is untenable on the facts of this case. Mr. Ranawake concedes that it was open to the Magistrate under section 172 of the Criminal Procedure Code to alter the charge before judgment is pronounced. He contends, however, that in this instance the charge was altered, or rather that a new charge was framed after judgment had been pronounced. He bases his contention on the following words in the order of the Magistrate, " I therefore will proceed to *discharge accused* from proceedings under section 183 and 186 and to frame a charge against him under section 484." The implication of this contention is that once the word " discharge " was uttered or written, there was judgment of acquittal because a discharge in a case which is being tried summarily, as this one was, is an acquittal. But Mr. Ranawake overlooks the fact that in the same breath, so to speak, the Magistrate said he was framing a charge under section 484.

The tenuous nature of the contentions put forward is apparent when counsel concedes that if the Magistrate had said " I do not think the charges under sections 183 and 186 lie on the facts of this case and I therefore frame a charge under section 484," the plea of *autrefois acquit* would not have been available.

I am supported in this view by the judgment of Sir Philip Macdonell C. J. in the case of *Julihamy v. J. L. Fernando & Others*, 745–747 P.C. Chilaw 37416 S.C.M. 29.11.32.* In this present case, " it is perfectly clear that the Magistrate did not intend to pronounce judgment on the case ; quite the contrary, he intended to proceed with the case, but on a substituted charge. There is a maxim *qui haeret in litera, haeret in cortice* and to hold this to be a judgment pronounced would offend against that maxim."

The case must go back to be proceeded with.

Sent back.

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* 2. C.L.W. p 95 (Edd.)

Present : POYSER, J. & SOERTSZ, J.

TILLAINATHAN & ANOTHER vs. NAGALINGAM

S. C. No. 68—D. C. Jaffna 5753.

Argued on 18th and 19th March, 1937.

Decided on 23rd March, 1937.

Prescription—Mortgage bond executed on January 12, 1924—*Promise to pay the mortgagee and after his life-time to his son—Death of mortgagee in September* 1930 *while his son was yet a minor—Action by son in February,* 1934—*Is action barred?*

The plaintiff's father Pootatamby took a mortgage bond in his favour dated January 12, 1924. The bond stipulated that the mortgagor would "pay the said Pootatamby and after his life-time to his son Tillainathan." Pootatamby died in September 1930 while Tillainathan was still a minor.

On February 26, 1934, Tillainathan, who was still a minor, brought this action. The plea was taken that the action was statute barred.

Held : That the action was statute barred.

H. V. Perera with *H. W. Thambiah* for plaintiff-appellant.

L. A Rajapakse with *Nadesan* for defendant-respondent.

SOERTSZ, J.

This appeal was pressed on two grounds, one of law and one of fact. The point of law taken was that the plaintiff is not barred by The Statute of Limitations 22 of 1871, from maintaining this action on the bond, even if the two payments of interest alleged to have been made on the bond in 1926 and 1929, are disregarded. The bond which is dated 12.1.24 contained a clause to the effect that the mortgagor would "pay the said Pootatamby (*i.e.* the mortgagee) and after his life-time to his son Tillainathan" (*i.e.* the plaintiff). Pootatamby died in September 1930. At the time Tillainathan was a minor. He was a minor at the time this case was instituted too, *i.e.* on 26th February 1934.

On these facts Mr. Perera contends that (*a*) that the cause of action *so far as the plaintiff is concerned,* arose only on failure of payments after Pootatamby's death in 1930 and that the plaintiff was well within time when he came into court in 1934, (*b*) alternatively, that even if, in view of the terms of Section 6 of the Prescription Ordinance the cause of action on this particular bond, must be considered to have arisen on the very day the bond was executed, then, prescription did not begin to run against the plaintiff in view of Section 15 of the Ordinance, because he was a minor at the time. Mr. Nadesan for the respondent contended that there was only one cause of action on the bond and that prescription having begun to run against the mortgagee Pootatamby was not interrupted by the minority of the plaintiff.

In my opinion the appellant's contentions are untenable. Section 6 of the Prescription Ordinance says that in the case of a hypothecation or mortgage payable at a definite time, an action to be maintainable should be commenced within ten years of the expiration of such time *and in all other cases within ten years of the date of such instrument of mortgage or hypothecation.* The mortgage bond in this case did not provide for payment within any definite time. Therefore, to use the common phrase, prescription began to run against Pootatamby from the date of the execution of the bond, and Section 15 of the Ordinance does not avail the present plaintiff for the reason that that Section is intended to serve a person who is under a disability *at the time the cause of action first arose.* In this case, when the cause of action or the right to sue first arose, the person entitled to sue upon it was Pootatamby and he was under no disability whatever. The words of Section 15 are quite clear 'Provided that if at the time when the right of action in respect of any of the causes referred to in Section 6, 7, 8, 9, 11 and 12.....shall accrue, *the person so entitled to sue* shall be subject to any of the said disabilities etc., then the several periods of limitation.....shall not commence to run until the removal of such disability ".

The Full Bench in the year 1878 considered a similar question in the case of *Sinnatamby vs. Viravy* (1. S. C. C. 14) and Clarence J. who delivered the judgment of the Court said " It would certainly be a matter for surprise to find the Legislature enacting that prescription after once commencing to run against a party could be afterwards interrupted by the disability of his successor. On considering the clause, it appears to us that we cannot interpret the words 'time of the right of such action or such claim accruing' (the words in the present Section 15 are the time when the right of action.... shall accrue) to mean the time when the actual plaintiff or defendant became personally entitled to sue. It appears to us that the time meant is the time when the cause of action first accrued. The effect of the clause then is, that if at the time the party now claiming was the party to sue or be sued, and was then under disability, prescription does not begin to run until his disability has been removed. This appears to us to be the most rational interpretation of the clause. We cannot read it so as to stop the running of prescription already started, by reason of the disability of a person succeeding to the right.....". See also *Sinnatamby vs. Meera Levvai* (6 N.L.R. 50.)

Mr. Perera's submission on the question of fact was that there was very strong evidence, namely documents P1 and P2, to prove that there had been two payments of interest due on the bond, in 1926 and in 1929 and that the trial Judge had misdirected himself when he refused to act on those documents because he said he found certain 'drawbacks'. These 'drawbacks' as the judgment shows were (1) that the next friend of the plaintiff who always interested himself in the investments of Pootatamby and collected moneys due on them gave different versions in regard to P1 and P2. On the first occasion on which he gave evidence, he stated that Rs. 180/– mentioned in P1 was handed to him by the defendant, and that he sent to the doctor, whereas on the next trial date, he said that that sum of Rs. 180/– had been handed by the defendant to the doctor himself at some railway station, (2) that these documents were not 'listed' by the plaintiff and were forthcoming only on a trial date, (3) that the explanation given by the next friend of the manner in which he obtained those documents

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from the defendant is unconvincing especially in view of the fact that that explanation has to depend for corroboration on the evidence of a Proctor's clerk.

In regard to this first objection, in my opinion, the discrepancy is most probably due to the fact that on the first occasion, the witness was testifying to his usual practice of collecting the moneys in Jaffna and remitting them by cheque or money order to Pootatamby. He apparently assumed that that was what happened in the case of P1 too. He says "the defendant handed a sum of Rs. 180/– to me first. That was in 1926. I sent that Rs. 180/– to the doctor. I *used* to send later by cheque and money order". The important point is that at the time he gave this evidence, the witness had P1 and P2 in his possession for he produced them a few moments later. P1 on the face of it shows that it was signed at Thunavil East in Jaffna. The witness had evidently not scrutinised the document and, therefore, assumed that it was given in accordance with the usual practice. In fact, in my opinion this discrepancy seems to tell against the defence that P1 is a fabricated document. If it was fabricated, this witness must have had a hand in its fabrication, and in that event, would know all about it. In regard to the second 'drawback', the evidence of Proctor Thambiah who was called by the Judge explains how P1 and P2 were obtained. His evidence shows that P1 and P2 must have been in his hand when the plaint was filed, because the dates of the payments of interest mentioned in the plaint are clearly taken from them. The Proctor had omitted to list them. The third 'drawback' referred to by the trial Judge is of a more substantial nature. It does seem surprising that the defendant should have given back these documents. He is said to be familiar with the Courts and well versed in litigation. He must have realised that in the absence of these documents, the plaintiff would have to rely on the word of the next friend to establish payments of interest and thus save the bond from being statute barred. He was surrendering his weapons to the enemy, and that after he had been sent a letter of demand calling upon him to pay the amount due in the bond. The explanation offered for the plaintiff is that the defendant was told that the documents were required in the Testamentary case. It is hardly likely that the defendant would have been persuaded so easily to part with the documents. It is possible, however that these documents were obtained in some other way which the parties feel too embarrassed to avow. On the face of the documents it is impossible to say that they are forgeries. The signatures have been spoken to by the plaintiff and the next friend and so far as one can judge by a cursory examination and comparison of signatures, they resemble the genuine signatures produced. In these circumstances I think these documents should be investigated further and I, therefore, set aside the judgment of the District Judge and send the case for trial before another Judge. The parties may if they choose, and if the trial Judge approves of that course, treat the evidence already led as part of the evidence to be considered in the new trial, and lead such other evidence as they may think necessary, particularly on the question of the genuineness of documents P1 and P2. In regard to costs, in the circumstances of this case I think the fairest order will be to direct that they abide the result.

POYSER, J.

I agree

Case sent back.

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

LEELAWATHIE E. WIJESURIYA vs W. M. JAMES DE SILVA.

S. C. No. 563/1936—*P. C. Tangalle No.* 27567.

Argued on 30th April, 1937.

Decided on 6th May, 1937.

Maintenance Ordinance No. 19 *of* 1889—*Arrears of Maintenance—Can more than one month's imprisonment be awarded under Section* 9 *of the Ordinance* ?

Held : That under Section 9 of the Maintenance Ordinance No. 19 of 1889, a month's imprisonment can be awarded for each month's allowance remaining unpaid after the execution of the warrant issued under that Section.

E. B. Wickremanaike for defendant-appellant.

S. W. Jayasooriya with *Ranatunga* for applicant-respondent.

ABRAHAMS, C. J.

The appellant in this case was ordered by the learned Police Magistrate, Tangalle, to pay a monthly sum in respect of the maintenance of his infant daughter by his wife, the respondent. He fell many months into arrears and eventually, at the instance of the respondent, a distress warrant was levied which proved ineffective, and, purporting to act under Section 9 of the Maintenance Ordinance, 1889, the Magistrate sentenced him to rigorous imprisonment for six months. Against this order for imprisonment he appealed, and Maartensz, J. before whom the appeal was listed referred the case to a bench of two Judges on the point as to whether the provision of law under which the order was made enables a sentence of more than one month's imprisonment to be passed. The point is one of considerable importance as it is a question which, as Maartensz, J. says, often comes before the Court. The section reads as follows :—

> " 9. If any person against whom an order is made under section 3 " neglects to comply with the order, the Magistrate may for every " breach of the order issue a warrant directing the amount due to be " levied in the manner by law provided for levying fines imposed by " Magistrates in the Police Courts, and may sentence such person " for the whole or any part of each month's allowance remaining " unpaid after the execution of the warrant, to simple or rigorous " imprisonment for a term which may extend to one month."

Strangely enough the interpretation of this section appears to have come before this Court on only one occasion when Macdonell C. J. was of the opinion in *Sivakaman vs. Velupillai*, (34 N.L.R. 80)*, that a sentence of six months' imprisonment following upon a single warrant issued in respect of eighteen months' maintenance was perfectly valid. The learned Chief Justice said :—

> " It was admitted in argument that if a warrant had been taken out " at the end of each one of those eighteen months and the respondent " had received a month's imprisonment under each one of those "warrants this would have been perfectly lawful under section 9. " I do not see that the mere fact that one warrant has been issued for " the whole amount at all invalidates what the Magistrate has done. " The Magistrate has not made order of imprisonment beyond the " six months which the law allows him in default of payment."

It would appear from this judgment that the point contested was whether a single warrant could be issued in respect of more than one breach of the Magistrate's order, and that it was not argued that imprisonment could not be cumulative but must be limited to one month no matter how many months the offender was in arrears.

The form of warrant of imprisonment given in the Schedule to the Ordinance, and which is directed by section 18 to be used in a case as so required, clearly implies that one warrant can do duty in respect of more breaches than one of the order. It was, however, pointed out by Maartensz, J. in his reference, and it has been also pointed out at this hearing, that there is a conflict of authority in the Indian Courts on the interpretation of section 488 of the Criminal Procedure Code which is for all intents and purposes identical with section 9 of the Maintenance Ordinance. In the *Queen-Empress vs. Narain*, (I.L.R. 9 All. 240), a bench of three, of which, those distinguished Judges, Edge C.J. and Straight J., formed part, were of the opinion that where a warrant was issued in respect of an accumulation of arrears of maintenance the term of imprisonment to be inflicted should not exceed one month. So far as I understand this judgment, it appears to lay down that if it is sought to recover an accumulation of arrears a separate warrant should issue for each separate breach, and if a single warrant is issued in respect of several breaches, a procedure which Straight J. regarded as an informality but which Oldfield J. appears to have regarded as a legitimate proceeding, the term of imprisonment should not exceed one month. In the case of *Allapichai Ravuthar vs. Mohidin Bibi*, (I.L.R. 20 Mad. 3), Subramania Aiyar J. and Davies J. disagreed with the Allahabad decision, pointing out that Section 488 of the Indian Criminal Procedure Code varied considerably from the terms of section 316 of the former Criminal Procedure Code of 1861 which contained the law relating to maintenance orders and which section 488 of the present code replaced,

*C. L. W. p. 97 (Edd.)

and they held in emphatic terms that the maximum term of imprisonment which could be imposed would be one month for each month's arrears. In *Bhiku Khan vs. Zahuran,* (I.L.R. 25 Cal. 291) Hill J. and Stevens J. were of the same opinion as the Madras Bench, and Addison J. in *Emperor vs. Sadar Muhammed,* (A.I.R. 1935 Lahore 758), and Broadway J. in *Emperor vs. Budhu Ram,* (A.I.R. 1919 Lahore 197), were of the opinion that the correct interpretation of section 488 was that which was laid down in the Madras and Calcutta cases above-mentioned. On the other hand, Hartnoll, Offg. C. J. and Ormond, J. in *Zaw Ta vs. Emperor,* (A.I.R. 1914 Lower Burma 163 (2), were of the opinion that one month's imprisonment only could be passed in respect of one month's arrears or an accumulation of several months' arrears, but with due respect to those learned Judges I find their reasoning somewhat involved and it does not commend itself to me, for it seems to me that the meaning to be preferred is that which, if I may so express it, leaps to the eye, and that is that for each month's breach (and the word 'each' in its simplest connotation has the meaning of separate identity) a month's imprisonment can be awarded. That interpretation also seems consonant with reason since otherwise a defaulter in respect of several months would be in no worse position than a defaulter in respect of one month only, since, as I have said above, the Ordinance clearly contemplates the issue of one warrant in respect of more than one breach of a Magistrate's order.

Counsel for the appellant, however, contends that if a woman in whose favour the maintenance order has been made against her husband, permits him to fall into arrears and takes no proceedings until an accumulation of arrears, she ought, to use his own words, to suffer for her negligence. But it does not explain why the ordinance seems to contemplate proceedings on an accumulation of arrears. And why should it be presumed that an omission to proceed in respect of the first breach is due to negligence, when this may be due to forbearance out of sentiment or may be due to the persuasion by fair promises ultimately unfulfilled.

In my opinion this appeal should be dismissed.

MAARTENSZ, J.

I agree,

Appeal dismissed.

Present : POYSER, S. P. J. & SOERTSZ, J.

CHELLAPPAH vs McHEYZER & ANOTHER.

S. C. No. 274—*D. C. Colombo* 46747.

Argued on 24th March, 1937.

Decided on 19th April, 1937.

Vendor and Purchaser—Auction sale of land—Express undertaking to warrant and defend title—Vendor prepared to put purchaser in possession—Is purchaser entitled to withdraw from contract on the ground that there is a defect in the vendor's title ?

Held : (i) That where there is an express covenant to warrant and defend title no further or other covenant can be implied.

(ii) That where the vendor and purchaser at an auction sale of land have entered into a valid contract of sale with a condition to warrant and defend title the purchaser is not entitled to withdraw from the contract on the ground that the vendor's title is defective.

(iii) That the obligation of a vendor who has expressly agreed to warrant and defend title is to give vacant possession, and to warrant against eviction.

N. E. Weerasuriya with *Corea* for 2nd defendant-appellant.

H. V. Perera with *E. B. Wickremanayake* for plaintiff-respondent.

SOERTSZ, J.

The plaintiff brought this action against the defendant-appellant and another defendant, alleging that on certain notarially attested conditions of sale, the defendant appellant, through the other defendant who is a licensed auctioneer, put up for sale certain allotments of land, and that at that sale he, the plaintiff, was declared the purchaser of two of those allotments at the prices of Rs. 3,800/- and Rs. 3,700/-. He stated that in compliance with the conditions of sale which he signed, he paid to the auctioneer the sum of Rs. 582/- and Rs. 627/50, which represented one-tenth of the purchase price of the allotments he had bought, plus the expenses of the sale. He averred that the 1st defendant (that is the auctioneer) at the said sale declared that " a good, valid and marketable title would be made out for the said allotments and that they would be conveyed free of encumbrances, and that till the execution of valid conveyances in favour of the plaintiff, the 1st defendant would hold the purchase price in his hands." Alternatively, he pleaded " that the defendants *impliedly* agreed to make out and convey a good and valid and marketable title free of all encumbrances, and that there was an implied obligation on the part of the 1st defendant to refund the purchase price to the plaintiff, in the event of deeds of conveyance not being

executed in favour of the plaintiff". The plaintiff further averred that "the defendants were neither able to make out a good, valid and marketable title, nor to convey the said allotments free of encumbrances". He therefore prayed for judgment against the defendants jointly and severally or in the alternative for the said sum of Rs. 1,209/50.

The defendants filed separate answers. The 1st defendant pleaded that there was a misjoinder of parties and of causes of action and also stated that he was under no obligation to make out any title, or to convey the allotments to the plaintiff, but that the 2nd defendant was prepared to convey those allotments to the plaintiff and to place him in possession on payment of the balance purchase amount. He prayed that the plaintiff's action be dismissed.

The 2nd defendant, in his answer, denied that the 1st defendant made "any representation that a good, valid and marketable title would be made out for the said allotments and that they would be conveyed free of encumbrances." He stated further that the 1st defendant had not his authority to make such a representation. He pleaded that the plaintiff had made default in the payment of the balance purchase price and that under the terms of the conditions of sale, he forfeited the one-tenth of the purchase price he had paid, and also became liable to pay the difference between the price at which he had bought the two lots, and the price realised at the subsequent re-sale and he claimed this difference, a sum of Rs. 2,100/- in reconvention.

The case went to trial on a number of issues, but it must be particularly noticed that before the plaintiff's counsel began his case, the plaintiff consented to his action against the 1st defendant being dismissed with costs which were fixed at Rs. 475/-. The District Judge thereupon made the following note, "as a result of the settlement of the case with regard to the 1st defendant, the following issues go out — 1, 2, 3, 13 (a) and (b) " Issues 1, 2, 3, are these:—. 1. Did the 1st defendant at the auction sale of the lots referred to in the plaint represent that a good valid and marketable title would be given for the said allotments of land ? 2. Did the 1st defendant represent at the said sale that the said allotments of land would be conveyed free of all encumbrances ? 3. Did the 1st defendant represent that till the execution of a valid conveyance in favour of the plaintiff, he would hold the part of the purchase price in his hands ?

Once these issues were discarded the important issues left were — 4. Did the defendants *impliedly* agree to give and convey a good valid and marketable title free of all encumbrances ? 5. Was there an *implied* obligation on the part of the defendants to refund the purchase price to the plaintiff in the event of a good valid and marketable title not being given to the plaintiff ? 6. Were defendants unable to give a good, valid, and marketable title ? (This should have been amended to " Was 2nd defendant.....). 7. Was 2nd defendant unable to convey to plaintiff the said lots free of all encumbrances ? 12. Was the 2nd defendant under any obligation to make

out a good, valid and marketable title.....or to convey.....to plaintiff free of all encumbrances ? 15. Was the 2nd defendant ready and willing to convey the said lots to the plaintiff on payment of the balance purchase price and to place him in possession of the said lots ?

After trial, the learned District Judge answered these issues as follows — Issue 4. Yes, expressly. Issue 5. Yes. Issue 6. Yes. Issue 7. Yes. Issue 12. Whatever the obligation the defendant made an express warranty. Issue 15. In view of my finding on issue 10, this issue does not arise. Issue 10 was — Did the defendants waive their rights under clauses 5 and 6 of the conditions of Sale ? and the answer to it was " There was no valid agreement entered into". He entered judgment for the plaintiff for Rs. 750/– to which the plaintiff's claim had been reduced in consequence of his case against the 1st defendant being dismissed, and he rejected the 2nd defendant's claim in re-convention.

On appeal, counsel for the 2nd defendant did not press his client's claim in re-convention very properly, in my opinion, for the so called re-sale had been obviously staged for the purpose of enabling the 2nd defendant to make this claim. It ended in a Gilbertian note when the 2nd defendant himself became the purchaser of what was already his property.

The sole point then left for consideration on this appeal is whether, on the facts of this case, the plaintiff is entitled to recover the part of the purchase price he paid on the day of the sale. The trial Judge has answered that question in the affirmative basing his judgment on two grounds, namely: (1) that there was an *express warranty of title* given by or on behalf of the vendor, and the vendor was now found not to have a complete title (2) that there was a misrepresentation by the 2nd defendant's agent, the auctioneer, that a good, valid and marketable title would be made out for the said allotments and that they would be conveyed free of encumbrances'. In regard to (1) 'express warranty of title ' the facts found by the trial Judge are that although clause 10 in the conditions of sale originally stipulated that the vendor would not warrant and defend title that stipulation was waived before the sale and the vendor undertook to warrant and defend title. That appears to be a correct finding, but the difficulty arose when from it the Judge drew the inference that there was an express warranty of title. If I may say so, there appears to have been a certain confusion of ideas in the mind of the trial Judge in regard to the meaning of an express undertaking to warrant and defend title and a warranty of title. He appears to have thought that where there is a definite undertaking in a document that the vendor will warrant and defend title, there is an express warranty of title. But that, of course, is not so. An express warranty of title occurs when a vendor in so many words warrants that he has a good and lawful title. Whereas in every contract of sale, other than one in which the vendor definitely states that he will not warrant and defend title, there is implied, if it is not expressed, an undertaking to warrant and defend title if and when

it is challenged. In the present case, clearly there is no express warranty of title but only an explicit undertaking to warrant and defend it. In regard to the alternative averment in the plaint,—that there was an implied warranty of title, Burnside C. J. refused to countenance such a plea and expressed himself very strongly when it was advanced in the case of *Silva vs. Ossen Saibo* (2 C.L.R. 79). He said, " I do not hesitate to assert on the research which I have made, that this alleged doctrine of implied warranty in every sale, if enforced in its integrity, would involve results so grotesque and ridiculous as could not be accepted by anyone, who may even pretend to set it up, as touching the title to land among the peasantry of this Colony". But assuming, although not conceding, that there is such a warranty of title implied in certain cases, we are at once confronted in this case with the ruling of Hutchinson C. J. and Wendt J. in *VanderPoorten vs. Scott* (11 N.L.R. 147), that where there is an express covenant by which the vendor undertakes to warrant and defend title, *no further or other covenant can be implied. Expressum facit cessare tacitum.* The purchaser must be taken to have intended to rely on the express covenant only. See *also Misso vs. Hadjiar* (19 N.L.R. 277). In the present case, as I have already observed, clause 10 as amended at the sale contains an express covenant to warrant and defend title and consequently ' no further or other covenant can be implied.'

In this view of the matter, this case falls to be governed by the principle enunciated in *Jamis vs. Suffa Umma* (17 N.L.R. 33). In that case, two of the three Judges, Wood Renton A. C. J. and De Sampayo J., (Ennis J. dissenting) held that a purchaser of land at an auction sale, who has signed notarially attested conditions of sale agreeing to complete the purchase, is not entitled to withdraw from the sale on the ground of any defect of title of the vendor, and that in the absence of fraud on the part of the vendor, or of any express warranty of title he is entitled to get only vacant possession. " In the Roman Dutch Law there is no obligation on the part of the vendor to convey good title. His obligation is to give vacant possession, and to warrant against eviction." But, of course, if there has been fraud, the purchaser is always entitled to obtain a rescission of the sale, for fraud vitiates every contract. Or, if there has been an express warranty of title the purchaser is entitled to refuse to complete the sale if he is able to show that the vendor has not the good title he warranted.

In the present case, no fraud has been or can be alleged and there is no express warranty of title. The vendor is prepared to give vacant possession, but the purchaser would have none of it because, he says, the vendor's title ' does not total a unit,' and a certain Mrs. Gooneratne is claiming an interest in the land. Now although a vendor's paper title may not amount to all the shares that go to make a unit he may be able to make out a good prescriptive title. In this case, there is evidence to show that the vendor has been in possession of this land for long over the prescriptive period. Mrs. Gooneratne herself says ' I am the niece of the defendant. I know the lands which were sold. My uncle was in possession of those lands.....By

possession, I mean the lands belonged to him. I did not claim a share of the land." Later she adds in regard to one lot of land " Lot 61 E 2 A adjoins my block and forms part of my block. My uncle had to make arrangements with me with reference to that land..... He agreed to pay me Rs. 1,000/–" The 2nd defendant's evidence on this point is, " Mrs. Gooneratne had to join me in the conveyance. I would have had to pay her something. She stipulated for a payment of Rs. 1,000/–. If she pressed, I would have had to buy her off, but I do not think she would have done so." Now, in Roman-Dutch Law, there is nothing to prevent a vendor from selling the property of another provided, of course, he does not do so fraudulently, and is able to give the purchaser vacant possession, and to warrant him against eviction. So that even on this question of title it is not possible to hold that the 2nd defendant was not in a position to convey a good title if the law imposed that obligation on him. Much less is it possible to say that he was acting fraudulently and not *bona fide*, when he put up these lands for sale as lands in respect of which he could give vacant possession and warrant against eviction. The case of *Fernando vs. Perera* (17 N.L.R. 261) is easily distinguishable. There the vendor stipulated that he had a good title and undertook to execute " a good and valid conveyance of the said premises free from all encumbrances." The Judges who decided that case followed an English case *Lysaght vs. Edwards* (2 Ch.D. 507) and held that a stipulation to execute *a good and valid conveyance* meant a conveyance not only sufficient in form or substance, but also a conveyance effective in law to convey unfettered ownership. In regard to this it is not necessary, on this occasion to say anything more than that there is no such undertaking in the present case, but only an undertaking that " on payment of the balance, the *vendor shall execute a conveyance*". Similarly, the ruling in the case of *Baba Pulle vs. Umma* (4 C.W.R. 420) if it is sound is a ruling on an entirely different set of facts. That was a sale held on an order of Court, and that case was distinguished by the Judges who delivered that judgment from the case of *James vs. Suffa Umma* on the ground that in that case the sale was on an inter partes order and the purchaser, accordingly, had his remedy against the vendor on the covenant to warrant and defend title in the event of an ejectment, whereas in the case before them the purchaser would have no remedy if evicted. The case of *Marikar vs. Aron Perera* (2 C.W.R. 45) is in fact, a re-assertion by the two Judges who decided *Jamis vs. Umma* (17 N.L.R. 33) of their ruling in that case. Wood Renton C. J. said, in the course of that judgment, that "the clause in the conditions of sale which imposes on the 1st defendant an obligation to execute a conveyance does not involve any warranty of title."

If I may say with great respect, the cases of *Fernando vs. Perera* (17 N.L.R. 261) and *Baba Pulle vs. Umma* (4 C.W.R. 420) if they do not amount to attacks on the soundness of the decision in *James vs. Umma.* (17. N.L.R. 33) are at least intended to reduce as much as possible the scope of a decision which appears strange when viewed in the light of the principles of the law

of England. Indeed, in *Fernando vs. Perera* (17 N.L.R. 161) Pereira J. concludes his judgment with the observation that, " under the Laws of England it is, in general, sufficient if the vendor shows he has a good title by the time fixed for the completion of the contract of sale, but if it appears before that time that he has not a title and is not in a position to obtain one, the purchaser can repudiate the contract. ' I can see no objection to allow ourselves to be governed by this reasonable and equitable rule." But, surely, the objection to such a course is that we are under the Roman-Dutch Law on these questions " relating to the tenure, or conveyance or assurance of, or succession to any land or other immovable property, or any estate right or interest therein," and according to that Law, the correct view, with great deference, appears to be that taken by Wood Renton A.C.J. and De Sampayo J. in *James vs. Umma.* At any rate, that is a ruling by a Divisional Bench and we are bound by it in this case in which it is not possible to pretend that the facts can be properly distinguished.

In regard to the second ground upon which the trial Judge based his judgment — misrepresentation — he says " Plaintiff was induced to sign the conditions of sale by the misrepresentation (it matters not whether it was innocent or wilful) made by the agent of the 2nd defendant". But here, he has lost sight of the fact that the allegations of misrepresentation were abandoned before the trial commenced, when issues 1, 2, and 3 were dropped. Those issues must be taken to have been dropped because the plaintiff realised that he could not substantiate the matters involved in them.

The averments in paragraphs 3 and 4 of the plaint have the air of a text copied out of the report of the case of *Fernando vs. Perera.* At any rate, the plea in paragraph 3 was abandoned and I have already dealt with the plea in paragraph 4.

The judgment of the learned trial Judge cannot, therefore, be sustained on either of the grounds upon which it is based. Respondent's counsel did not seek to support it on any other ground nor do I see that it can be so supported. The result is that the plaintiff is unescapably enmeshed in his contract and by the operation of clause 6, he must forfeit the part purchase price he paid. I would therefore allow the appeal and dismiss the plaintiff's action.

In regard to costs, the 2nd defendant-appellant will receive the costs of appeal taxed in the class Rs. 200/– and under Rs. 750/–. He will also receive in that class costs incurred by him in filing answer. For the rest, each party will bear his own costs, for I find that a settlement of this case appears to have been prevented by the 2nd defendant-appellant insisting on his claim in reconvention and that claim has now been dismissed.

POYSER, J.

I agree.

Appeal allowed.

Present : SOERTSZ, J.

INSPECTOR SOURJAH vs W. A. HINNIHAMY.

S. C. No. 40—*P. C. Galle No.* 13630.

Argued & Decided on 28th April, 1937.

Criminal Procedure Code Section 188—*Misjoinder of charges.*

Held : (i) That the statement, " Guilty; I admit I took these articles from my son-in-law's house. They are mine". is not an unqualified admission within the scope of Section 188 of the Criminal Procedure Code.

(ii) That the joinder of charges of house-breaking and theft against one accused with a charge of retaining stolen property against another is a fatal irregularity.

Colvin R. de Silva for 2nd accused appellant.
Douglas Janze, C. C. for respondent.

SOERTSZ, J.

This case teems with irregularities and must be set aside. There are two fatal irregularities, first that the accused had not tendered an unqualified plea of guilt. If words mean anything the accused's plea amounted to an assertion of right to the articles in respect of which she was charged. Her words are, " Guilty; I admit I took these articles from my son-in-law's house. They are mine."

The learned Magistrate apparently is under the impression that if the word " guilty " is put within inverted commas there is no occasion to look beyond the words " guilty " to ascertain what the actual plea of the accused was.

The second fatal irregularity is that two charges, such as those with which we are concerned in this case, should not have been tried together. The 1st accused is charged with house-breaking and theft; and the 2nd accused is charged with retaining stolen property, knowing, or having reason to believe that property to have been stolen.

Although the accused in her petition of appeal has asked that the case be sent for trial before another Magistrate I think she is entitled to be acquitted. There is no reason for subjecting her to the expense of another trial on account of blunders for which she was in no way responsible.

I set aside the conviction and acquit the accused.

Conviction set aside.

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

P. SIVASAMPU (S. I. POLICE) vs JUAN APPU

S. C. No. 620—*P. C. Chilaw No.* 1368.
Argued on 4th May, 1937.
Decided on 17th May, 1937.

Evidence Ordinance section 57—Charge under a statutory rule published in the Gazette—Is production of Gazette in which the rule appears imperative ?

Held : That where a charge is laid under a statutory rule, regulation, or by-law, which is required by law to be published in the Gazette, the prosecution is under no obligation to produce the Gazette in which the rule, regulation or by-law appears in proof thereof in order to establish the charge.

J. W. R. Illangakoon K.C., Attorney-General with *Crossette-Thambyah, Crown Counsel* for complainant-appellant.

No Appearance for accused-respondent.

SOERTSZ, J.

The matter that arises for our decision on this reference * is whether in cases in which a charge is laid against an accused under a rule, or a regulation or a by-law which requires publication in the Government Gazette, the production of the relevant Gazette is imperative. This question has come up for authoritative decision in consequence of certain conflicting rulings by this Court.

In *Marambe vs. Kiri Appu,* 2 Ceylon Law Weekly p. 122, Macdonell C. J. said " the charge is defective in that there was a failure to specify the Gazette containing the rule or rules which the accused is said to have contravened *and of course the Gazette ought to have been produced.*" Koch, J. followed this ruling in *Inspector of Police vs. Punchirale,* 5 Ceylon Law Weekly p. 38 and relying on it and the other cases he cited in the course of his judgment, said " in a series of decisions it has been held that there rests on the prosecution the obligation to produce and prove the rule."

But in the case of *Peries vs. Teresa Nona,* 8 Ceylon Law Recorder p. 116 Lyall-Grant J. held that " the correct way to set out such a notification in the charge is by reference to the copy of the Ceylon Government Gazette in which it appears." In the case of *De Silva vs. Don Francis,* 2 Times of Ceylon Law Reports p 194, Bertram C. J. took the same view and dissenting from the ruling of Wood-Renton in *Lovell vs. Dondiya* 4, Leader Law Reports p 124, held that it was not necessary to produce the rule under which the charge was brought because the Court must take notice of all rules having the force of law,

After careful consideration, we find ourselves in agreement with the views of Bertram C. J. and Lyall-Grant J. Section 57 of the Evidence Ordinance enacts that " the Court shall take judicial notice of the following facts :—(1) *All laws or rules having the force of law*, now or hereafter in force or hereafter to be in force in any part of the Colony ".....
.....and that " in all these cases, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference. If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so ".

In England, the law in regard to this matter, appears to be that " Public General Statutes, like the rules of the Common Law or genera custom of the realm, *need not be either pleaded or proved*, because the courts are bound ex officio to take judicial notice of them. Production at the trial of a public general statute is not for the purpose of putting it in evidence, but merely in aid of the memory of the court and Jury" Archibold's Criminal Pleadings, Evidence and Practice, 1934 Edition, pp. 408-409. But in the case of statutory rules *i.e.* of subordinate legislation, the matter is governed by special acts such as the ' Documentary Evidence Act ' 1868 and the ' Rules Publication Act ' 1893.

In Ceylon, the effect of section 57 of the Evidence Ordinance is to put ' all laws *and rules having the force of law* ' on the same footing. But section 11 of the local ' Interpretation Ordinance' No. 21 of 1901 provides that " where any ordinance, whether passed before or after the commencement of this ordinance, confers power on any authority to make rules.....
.....all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in the Ordinance." So that inasmuch as the rules of subordinate legislation require publication in the Gazette for acquiring the force of law, there should be some material before the court to show that that condition precedent has been satisfied. In our view, there is sufficient compliance with that requirement if in the complaint or report to the court there is reference to the Gazette in which the rule invoked appears, for in that case, under section 114 of the Evidence Ordinance, the court may presume that the Official Acts ' of stating the rule and citing the Gazette " have been regularly performed " (*illustration e*). The production of the Gazette is not necessary unless it is called for in aid of the memory of the court, or under the last part of section 57. To take the present case, the rule or by-law involved in it is one made under section 18 of the Vehicles Ordinance No. 4 of 1916. In regard to by-laws made under that section, section 21 (1) of the Ordinance provides that all by-laws when made....." shall be published in the Government Gazette, and shall thereupon become as legal, valid and binding and effectual as if the same had been inserted in the Ordinance, and all courts, Judges and Magistrates shall take judicial notice thereof." In the report

made by the prosecuting inspector to court it is alleged that "the accused failed to affix a board bearing the name of the owner legibly painted in white on a black ground to the right side of the tent in breach of section 7 A of the by-laws framed under section 18 of the Ordinance No. 4 of 1916, and published in the Government Gazette on the 17th August, 1917, and thereby committed an offence punishable under Section 21 of Ordinance No. 4 of 1916." There is here sufficient material for the court to presume under section 114 of the Evidence Ordinance that the rule is correctly stated and that it has the force of law, and for it to act on that presumption. The production of the Gazette is, therefore, not necessary. Nor will the non-production of the Gazette embarrass the court at all, for every court is provided with copies of every Gazette and has, moreover, the right to call for a Gazette in aid of its memory or under section 57 of the Evidence Ordinance by way of proof of the by-law or rule. That is the position as far as the Court is concerned.

In regard to the accused, he is not entitled to claim that a charge laid against him under a rule, regulation or by-law should be supported by a copy of the Gazette containing it. Section 167 of the Criminal Procedure Code lays down rules for the framing of a charge. It says that a charge is sufficiently laid if it states the offence with which the accused is charged. "If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only ; if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as will give the accused notice of the matter with which he is charged ; and the law and section of the law under which the offence is punishable shall be stated in the charge."

It is obvious that the charge in this case has been framed in meticulous compliance with these requirements. I am, therefore, of opinion that the prosecution had discharged the burden that rested on it by placing before the court material to show the existence of a valid by-law, and facts to establish that the accused had offended against it. It was not open to the Magistrate to acquit the accused on the ground that 'the failure to produce the Gazette in which the rules appear is a vital irregularity.' When he issued process, it must be assumed in the circumstances of this case that he had taken judicial notice of the by-law and therefore, under section 56 of the Evidence Ordinance, the prosecution was exempted from the necessity of proving it for that section says "no fact of which the court will take judicial notice need be proved." It was, however, open to the court to act under the last part of section 57 and to call for the Gazette if it thought fit. I would, therefore, hold that the order of acquittal was wrong. It does not seem necessary to send the case back for further trial for, as far as the Magistrate is concerned, he appears to have acquitted the accused not because he had any doubts as to the existence and validity of the by-law, but because he thought on the authority of *Marambe vs. Kiri Appu* that the production

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of the Gazette was *sine qua non*. As far as the accused is concerned, there is no point in sending the case back because he has declared that he calls no defence. His proctor appears to have relied entirely on the authority of that case. There was no cross-examination of any of the witnesses.

I would set aside the order of acquittal and remit the case to the Magistrate for sentence to be passed under section 21 of Ordinance 4 of 1916.

ABRAHAMS, C. J.

I agree.

MAARTENSZ, J.

I agree.

Appeal allowed.

Present : MOSELEY, J.

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* *S. C. No.* 620 *of* 1936—*P. C. Chilaw No.* 1368

Argued on 13th November, 1936.

M. F. S. Pulle, C. C. for complainant-appellant.

MOSELEY, J.

This is an appeal with the sanction of the Solicitor-General against an acquittal. The accused was charged with having failed to affix a board, bearing the name of the owner legibly painted in white letters on a black ground, to the right side of the tent of his cart in breach of section 7 A of the by-laws framed under section 18 of the Vehicles Ordinance (Ordinance No. 4 of 1916) and published in the Government Gazette of the 17th of August, 1917, and with having thereby committed an offence punishable under section 21 of the said Ordinance.

At the close of the case for the prosecution, counsel for the accused submitted that the failure of the prosecution to produce the Gazette in which the by-laws were published was a vital irregularity, and in support of his submission cited the case of *Marambe vs. Kiriappu*, (I). The learned Magistrate agreed with the submission and acquitted the accused.

Section 20 (I) of the Vehicles' Ordinance provides that :—" the by-laws when " made. . . .shall be published in the Government Gazette, and shall thereupon become " as legal, valid, binding, and effectual as if the same had been inserted in this Ordinance " and all Courts, Judges, and Magistrates shall take judicial notice thereof."

Crown Counsel has contended that the prosecution was under no legal obligation to produce the by-laws, and if it were, an opportunity to do so should have been given.

With regard to the latter part of the contention, I fail to see why the prosecution after closing its case, should be given an opportunity to repair an omission, vital or otherwise.

The case cited by counsel for the accused to which reference has been made above, can, I think, be distinguished from the present case. In that case *Macdonell C. J.* said :— " The charge is defective in that there was a failure to specify the Gazette containing the rule or rules which the accused is said to have contravened and of course the Gazette ought to have been produced."

I am in some doubt as to what weight the learned Chief Justice intended to be given to the concluding words of the sentence. It seems to me that he intended to declare that the failure to specify the Gazette was a vital omission and that *ex abundanti cautela* perhaps, it would be well to produce the Gazette.

It will be observed that in the present case the Gazette was specified, and Crown Counsel has relied on the case of *de Silva vs. Don Francis*, (2), in which the accused was charged with an offence in breach of rules framed under the Forest Ordinance. This case was decided in 1924, eight years before the judgment of Macdonell C. J. referred to above.

In the earlier case *Bertram C. J.* said :—" The first (point) is that the prosecution " was defective, because the rule under which it was brought was not produced, and the " case of *Sam Lovell vs. P. Dondiya*, (3), was cited, which contains a dictum which seems " to suggest that the Court cannot take notice of statutory rules and regulations. This, " however, is clearly a misconception. Under section 57 of the Evidence Ordinance the " Court must take judicial notice of all rules having the force of law."

The most recent authority on this point is the case of *Inspector of Police vs. Punchirala*, (4), in which *Koch*, J. referred to the " necessity....of proving and producing the " particular rule the breach of which is complained of." In the course of his judgment he referred to the judgment of Macdonell C. J. and said :—" ....No language can be " more explicit and forcible. What His Lordship has expressed is nothing new. In a " series of decisions it has been pointed out over and over again that there rests on the " prosecution the obligation to produce and prove the rule. I refer to *Peachy vs. Mas-* " *tankamy*, (5), *Ekneligoda vs. Kiri Banda*, (6), *Sam Lovell vs. Dondiya* (3), and *Peries* " *vs. Theresa Nona*, (7)."

The learned Judge does not refer to *de Silva vs. Don Francis*, (supra), which seems to be the only authority in which section 57 of the Evidence Ordinance was considered.

In *Peachy vs. Mastankamy*, (supra), decided in 1892, it was held that in a prosecution for breach of any of the rules prescribed by the Government Agent under Chapter iv of Ordinance No. 10 of 1885 (now repealed) a copy of the rules must be put in evidence.

Presumably those rules were prescribed in the exercise of powers vested in the Government Agent, and it may be that they were such rules, not requiring the approval of the Governor with the advice of the Executive Council, as are referred to by *Burnside C. J.* in the extract from his judgment to which I shall next refer.

In *Ekneligoda vs. Kiri Banda* (supra), in which the accused was convicted of removing trees without a permit from the Government Agent, described by *Burnside C.J.* as " an offence against an unnumbered clause of an undefined Ordinance," in the course of his judgment His Lordship said :—" Then again, there is no evidence of what the parti- " cular rule is, and it is absolutely necessary that there should be evidence of such rule, " for this reason : the rules which the Government Agent may make under the 40th section " of Chapter iv in question do not require the approval of the Governor, with the advice " of the Executive Council, in the same way as rules made under the 41st section do, and, " not being made or approved by the Governor, with the advice of the Executive Council, " they do not have the force of law by being published in the Gazette as mentioned in " section 81."

I have already referred to the case of *Lovell vs. Dondiya* (supra), and the criticism by Bertram C. J. of the " dictum which seems to suggest that the Court cannot take notice of statutory rules and regulations." In the last case referred to by Koch, J. viz :— *Peries vs. Theresa Nona*, (supra), the charge was a breach of section 16 (3) of Ordinance No. 8 of 1912 and of Excise Notification No. 46 of the said Ordinance. The charge did not disclose where the notification was to be found, and it was held that in the absence of such disclosure in the charge, or of proof in Court, the Court is not bound to assume the existence of such a notification. *Lyall Grant J.* went on to say that :—" the correct

way to set out such a notification in the charge is by reference to the copy of the Ceylon Government Gazette in which it appears," but did not go so far as to say that the Gazette should be produced.

In view of the conflicting views to which I have referred and of the importance of this point of procedure, I am of the opinion that the proper course for me to adopt is to refer the case for argument before a Bench of three Judges.

(1.) 2 Cey. Law Weekly p. 122. (2.) 2 Times Cey. Law Rep. p. 194. (3.) 4 Leader Law Rep. p. 124. (4.) 5 Cey. Law Weekly p. 38. (5.) I. S. C. Rep. p. 247. (6.) 9 S. C. Circular p. 60. (7.) 8 Cey. Law Recorder p. 116.

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

ZAHIRA UMMA vs ENID V. A. ABEYSINGHE & OTHERS.

Application in Revision in D. C. Colombo No. 302 (S. *C. No.* 411).

Argued and Decided on 5th May, 1937.

Civil Procedure Code section 756—Failure to comply with terms of section—Abatement of appeal—What procedure should be observed in obtaining relief, under the section, from the Supreme Court ?

Held : That where an appeal has abated by operation of section 756 of the Civil Procedure Code the procedure to be followed in obtaining relief from the Supreme Court under that section is by way of a special application to the Supreme Court for relief and not by way of appeal against the order of abatement made by the District Judge.

Per SIR SYDNEY ABRAHAMS, C. J.

" It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when, though non-compliance with an essential term may be trivial, a material prejudice has been occasioned. This case seems to me to fall under the first of these categories."

C. T. Olagasegeram for the petitioner.

Chelvanayagam with *Wickremanaike* & *Muttucumaroe* for the respondents.

ABRAHAMS, C. J.

This case was referred to us by a bench of two Judges on the question as to whether an application for relief under section 756 of the Civil Procedure Code should be pursued by way of appeal and Mr. Justice Koch stated in his reference * that there can be little doubt that an appeal can be preferred to this Court from such an order, that is to say, that a petition of appeal was held by the District Judge to have abated. It would seem, however,

that on the facts of the case the learned District Judge had no option but to hold that the appeal had abated and the application of the petitioner for relief was framed as if it were an application in revision. In our opinion an order of abatement is not appealable where the District Judge had no option, because an appeal must protest against some error of law or fact made in the order in respect of which relief is sought. Probably Mr. Justice Koch thought that in view of the way in which the petition was drawn up the petitioner was in point of fact questioning the legality or propriety of the order which had been made. The petitioner has drawn up the petition in the form in which she did out of ignorance as to what the proper procedure really was. The provision appended by way of amendment to section 756 clearly indicates that where relief is sought against an order of abatement the proper procedure is by way of an ordinary application to the Supreme Court for relief. There is no doubt that the application does not indicate that the legality or propriety of the order of abatement is in any way questioned and it is therefore obviously incumbent upon us to regard it as if it had been properly preferred. That being so, the question is whether the circumstances attaching to this case justify our giving relief.

The petitioner says that the last day for entering the petition of appeal was the 3rd of July 1936, and the last day for tendering security was the 15th of July, 1936. Under section 756 it was her duty forthwith to give notice to the respondent that she would tender security at the proper time and the relevant form in which this notice is to be given contains a provision specifying in what manner the security is to be tendered. She did not give notice of security, but she produced a security by way of mortgage at the proper time, although there was no inquiry as to whether that security was satisfactory. She says she was unable at the time when she ought to have given notice of security to say what form the security was going to take, but she says that in view of the fact that she has produced an adequate security within the proper time and that no material prejudice has been caused to the respondent she ought to receive the relief which we are empowered to give in an appropriate case. I think, however, that if we gave relief in this case we should be completely ignoring that provision of section 756 which says that notice of security must be given, and the fact that no material prejudice has resulted, and I see no reason why in the circumstances we should inquire as to whether it has resulted, cannot be regarded as an excuse for non-compliance with an essential term of section 756. The petitioner says that she did everything she could, but she has not given any excuse for not doing what she should.

It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when, though non-compliance with an essential term may be trivial, a

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material prejudice has been occasioned. This case seems to me to fall under the first of these categories.

Two cases have been cited to us in aid of the petitioner. The first was *Jayawardene vs. Abdul Cader* (36 N.L.R. p. 326) and the other *Martin Singho vs. Paulis Singho* (13 Ceylon Law Recorder p. 238). It is sufficient to say that neither of these cases gives an assistance to the petitioner.

The application should, in my opinion, be dismissed with costs.

MAARTENSZ, J.

I agree.

SOERTSZ, J.

I agree.

Application dismissed with costs.

Present : KOCH & MOSELEY, JJ.

Application in Revision in D. C. Colombo, No. 302 (*S. C. No.* 411).

Argued on February, 19th 1937.

Decided on 1st March, 1937.

C. T. Olegasegram for petitioner.

Cheivanayagam with *E. B. Wickramanayaka* for respondent.

KOCH, J.

A preliminary objection having been taken by the respondents' counsel to our entertaining this application on the ground that the order of the District Judge in respect of which relief is prayed for by the applicant is an appealable order, we are called upon to decide an important matter of procedure.

The order in question was entered in the following terms. "The provisions of section 756 not having been complied with, the appeal must abate. "There can be little doubt that an appeal can be preferred to this Court from such an order. At the same time there are decisions of this Court giving relief to parties who have not appealed from such an order but have chosen the procedure of obtaining relief at the hands of this court by way of an application under section 756 of the Civil Procedure Code. One of such cases is that of *Jayawardene vs. Abdul Cader* 36 N.L.R. 326.

Akbar J. there says that the application before him for relief was under the proviso to section 756 of the Civil Procedure Code. Lower down he also says that the learned Commissioner was right in making the order that this appeal should abate, and finally, taking into consideration the circumstances advanced by the petitioner, he says that acting under the proviso to section 756 he would set aside the order of abatement referred to.

There is also another decision, namely, that in the case of *Martin Singho vs. Paulis Singho* 13 Ceylon Law Recorder 238. It will be seen that in neither of these two cases was objection raised by the respondent to the procedure adopted by the applicant, and as far as we can judge from the judgment in these two cases, the question of the appropriateness of the application has not been expressly considered. In this case too the application purports to be made, as will be seen from a reference to the caption in the petition to this court, under section 756 of the Civil Procedure Code but combining with it section 753 which is the revision section in the code.

It is very strongly pressed upon us that, although relief is sought by reason of the concessions set out in the proviso to section 756, application is really made under section 756 by way of revision, and it is also pointed out to us that in the papers submitted to us the subject of this application is described as one for revision,

As applications of this nature are likely frequently to come up before this Court and an objection to such procedure will be raised with equal frequency, we are of opinion that the matter is of sufficient importance to deserve an authoritative pronouncement by a Fuller Bench. The judgment in the second of the two cases to which we have referred is a Two Judge judgment and we are not likely, sitting as we are, to differ from it. We therefore make order that this question be referred for decision to a fuller Bench.

MOSELY, J.

I agree.

Present : POYSER, S. P. J. & SOERTSZ, J.

S. A. J. DE S. WICKRAMASOORIYA. vs M. RAJALIAS DE SILVA

S. C. No. 143 *of* 1936—*D. C. Galle No.* 33654.

Argued & Decided on 20th April, 1937.

Appeal—Non-joinder of necessary party—Section 770 Civil Procedure Code—Mortgage bond action against principal and surety—Judgment against surety by default—Should the surety be a party to an appeal by the principal against an inter partes order against him ?

The principal and surety in a mortgage bond were sued by the mortgagee on the bond. The principal was sued as 1st defendant and the surety as 2nd defendant. The 2nd defendant did not appear and defend. The principal contested the action and judgment was entered against him. From this order he appealed, but he failed to make the 2nd defendant a party to the appeal. At the hearing, objection was taken to the appeal on the ground that it was not properly constituted. The appellant claimed relief under Section 770 of the Civil Procedure Code.

Held : (i) That the 2nd defendant was a necessary party to the case.

(ii) That the case was not one in which relief under Section 770 of the Civil Procedure Code could be granted.

Weerasooriya with *Kurukulasooriya* and *Corea* for the 1st defendant-appellant.

H. V. Perera with *L. A. Rajapakse* for the plaintiff-respondent.

POYSER, S. P. J.

A preliminary point has been taken that the appeal is not properly constituted as the 2nd defendant has not been made a party.

The action was on a mortgage bond executed by the 1st defendant. The 2nd defendant also, as surety, executed this bond. Action was filed against both defendants but the 2nd defendant did not file answer or in any way contest the plaintiff's claim. The 1st defendant, however, did, but judgment was given against them for the amount claimed.

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Poyser, S. P. J

S. A. J. de S. Wickramasooriya *vs* M. Rajalias de Silva

It has been stated by Mr. Weerasooriya that the ground of his appeal is that the sum of money secured by the mortgage bond has been paid and the bond discharged. He, therefore, argues that if his appeal succeeds the 2nd defendant would get the benefit of the decree of the Supreme Court and the plaintiff's action would be dismissed against both parties as a necessary consequence of the appeal.

I cannot accede to this argument. The 2nd defendant is not a party before the Court and he has consented to judgment. Under those circumstances he would have no right of appeal and I do not see how we could, if the 1st defendant's appeal succeeds, set aside the decree of the lower court so far as the 2nd defendant is concerned.

It is not a case which comes under the provisions of section 760 of the Civil Procedure Code. It is a case in which if the 1st defendant were to succeed, the 2nd defendant would be prejudiced, for at present he and the 1st defendant are jointly and severally liable for the amount of the judgment. Further, such amount is to a certain extent secured by the lands of the 1st defendant which have been mortgaged. If the decree was set aside as against the 1st defendant, as I previously stated, it could not be set aside in regard to the 2nd defendant. The 2nd defendant would then be solely liable for the amount of the judgment.

We have been referred to a case, *Ramasamy Chettiar vs. Mohamadu Lebbe Marikar*, (1), which my brother and I decided on the 15th of February last, in which we held that two defendants in the lower court who had not been made parties to the appeal were necessary parties, but exercised the discretionary power given to the Court by section 770.

There was, however, in that case an excuse on behalf of the appellant for the non-joinder of these defendants, for the decree in the case only dismissed the plaintiff's action against the 1st defendant, it did not dismiss the plaintiff's action against the 2nd and 3rd defendants who were equally affected by the judgment.

In this case I do not think there is any good excuse for the 1st defendant for not joining the 2nd defendant. It has been held by a Full Bench in *Ibrahim vs. Beebee et al* (2), that the discretion given to the Court under section 770 should only be exercised if some good excuse was given for the non-joinder, or unless it was not really apparent that the parties not joined might be affected by the appeal.

That state of affairs does not exist in this case and the appeal must accordingly be dismissed with costs.

SOERTSZ, J.

I agree.

Appeal dismissed with costs.

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(1).....7 C. L. W. p. 64 (2).....19 N. L. R. p. 269

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

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS UPON THE DEPUTY-INSPECTOR-GENERAL OF POLICE, CRIMINAL INVESTIGATION DEPARTMENT, CEYLON, FOR THE PRODUCTION OF THE BODY OF MARK ANTHONY LYSTER BRACEGIRDLE.

Argued on 10th, 11th and 13th May, 1937.
Decided on 18th May, 1937.

Order of deportation of a British subject made under Article III. 3. of a prerogative Order-in-Council of 26th October, 1896—Validity of order of deportation questioned—Powers intended to be exercised on the arising of a state of emergency—Can such powers be exercised when there is no emergency—Action of Governor under powers granted by prerogative Order-in-Council—Can such action be canvassed in a Court ?

One Bracegirdle, a British subject, residing at the material time in Ceylon, was on 21st April, 1937, served with an order signed by the Governor requiring him to quit the Island on or before 6 p.m. on Saturday, 24th April. This order was made under Article III (3) of the Order-in-Council of 27th October, 1896, as amended by the Order-in-Council of 21st March, 1916. He omitted to comply with that order and on the evening of 7th May, 1937, he was arrested by an officer of Police purporting to act under the authority of the Governor. The actual order was issued by the Deputy-Inspector-General Criminal Investigation Department, which, in addition to authorising the arrest of Bracegirdle, directed the officer of Police executing the order to place Bracegirdle on board any ship proceeding from Ceylon to Australia, which country was Bracegirdle's last place of residence before he came to this Island.

In pursuance of this order of arrest Bracegirdle was arrested and an application was made on his behalf for a writ of *Habeas Corpus.* A writ was issued and the person, in whose custody Bracegirdle was, showed cause. The matter came up for hearing before a bench consisting of the Chief Justice Sir Sydney Abrahams and Justices Maartensz and Soertsz.

The applicant maintained that the Governor's powers under Article III. 3. of the Order-in-Council could be validly exercised only on the arising of an emergency and that no emergency had arisen. It was further contended that even if such an emergency had arisen no order could be made without prior proclamation of a state of emergency. A further point was taken that the arrest was illegal inasmuch as certain constitutional changes brought about by the State Council Order-in-Council 1931 precluded the Governor from employing the Police for the purposes of making the arrest except through the medium of the Minister for Home Affairs.

It was argued *contra* that the Article of the Order-in-Council under which the Order was made gave very wide powers which could be exercised at any time and that for the exercise of these powers it was not necessary that a state of emergency should arise. It was also urged that it was not open to the Court to inquire into this action of the Governor under the provision in question.

Held : (i) That the Order-in-Council of 27th October, 1896, can be legally brought into effect by Proclamation at a time when the national security is likely to be in danger by some widespread activity such as war or extensive civil disorder, and that when the national security is no longer imperilled by the state of affairs, then the Proclamation should be revoked.

(ii) That the powers of the Governor to issue an order under Article III. 3. of the Order-in-Council of 27th October, 1896, as amended by the Order-in-Council of 21st March, 1916, is not absolute and that it can be exercised only under conditions.

(iii) That the Supreme Court is entitled to inquire into the legality of an order made by the Governor under Article III. 3. of the Order-in-Council.

J. W. R. Ilangakoon, K. C., Attorney-General, with *E. A. L. Wijewardene, Solicitor-General,* and *M. F. S. Pulle, Crown Counsel,* for the Crown.

Francis de Zoysa, K. C., with *H. V. Perera K. C., M. T. de S. Amarasekera, B. H. Aluvihare, J. R. Jayewardena* and *N. de Silva* for Petitioner.

ABRAHAMS, C.J.

This is a case in which a *Rule Nisi* has been granted for a writ of *Habeas Corpus.* The subject of the writ, Mark Anthony Lyster Bracegirdle, is an English born British subject. We have heard this case with most anxious care, and I approach the question of our decision with equally anxious consideration as must always be done by His Majesty's Judges where the liberty of the subject is concerned. Mr. Bracegirdle asserts that the Police, through the Governor, have seriously restrained his liberty. On the other hand it is claimed on behalf of the Governor that the restraint of Mr. Bracegirdle's liberty has taken place legally and by reason of an absolute power vested in the Governor. Our duty as Judges in such matters is one which must be discharged with the greatest care. In *Rex v. Superintendent of Chiswick Police Station, Ex parte Sacksteder,* (1918, 1 K.B. 578), Scrutton L. J. said,

> " I approach the consideration of this case with the anxious " care which His Majesty's Judges have always given, and I hope " will always give, to questions where it is alleged that the liberty " of the subject according to the law of England has been interfered " with.....This jurisdiction of His Majesty's Judges " was of old the only refuge of the subject against the unlawful acts " of the Sovereign. It is now frequently the only refuge of the " subject against the unlawful acts of the Executive, the higher " officials, or more frequently the subordinate officials. I hope it " will always remain the duty of His Majesty's Judges to protect " those people."

I conceive that it is no less the duty of His Majesty's Judges in this Island to afford the same protection, but I think it is not out of place to bear in mind that we must proceed with the utmost impartiality and caution lest we unduly fetter the legitimate action of the Executive.

The facts, so far as they are material for our consideration of the case, are these : On the 21st of last month (April) an order signed by the Governor was served upon Mr. Bracegirdle requiring him to quit the Island on or before 6 p.m. four days later. He omitted to comply with that order

and on the evening of the 7th of this month he was arrested by an officer of Police purporting to act under the authority of the Governor. An actual order was issued by the Deputy-Inspector-General, Criminal Investigation Department, which, in addition to authorising the arrest of Mr. Bracegirdle, directed the officer of Police executing the order to place Mr. Bracegirdle on board any ship proceeding from Ceylon to Australia, which Dominion was, it would appear, Mr. Bracegirdle's last place of residence before he came to this Island. The reasons which prompted His Excellency to take this action have not been placed before us in detail, but it is not necessary, for the purposes of our decision, that they should have been. It is, however, notorious that Mr. Bracegirdle was alleged to have comparatively recently expressed his views on certain political and social aspects of life in Ceylon, and there is no harm in assuming that the Governor was of opinion that Mr. Bracegirdle's actions and utterances justified his removal from the Island. That is so far as I need refer to the antecedent facts of the matter. An application for a writ of *Habeas Corpus* was immediately made on Mr. Bracegirdle's account and it was submitted that the order of the Governor was *ultra vires*. This order was purported to have been made under Article III. 3. of the Order-in-Council of the 26th October, 1896, the exact words of which provision I shall presently set out. It was alleged in support of this submission—and the case has been mainly fought on the point—that an order under Article III. 3. of the said Order-in-Council could only be made on the arising of an emergency, and that no such emergency as was contemplated by the Order in Council had arisen, and that even if such an emergency had arisen no order could be made without prior proclamation of the emergency. It was also alleged that the arrest itself is illegal inasmuch as certain constitutional changes brought about by the State Council Order in Council 1931 precluded the Governor from employing the Police for the purposes of making the arrest. The Order-in-Council in question was enacted on the 26th day of October, 1896. I think that it is desirable to summarise its provisions, and when I reach Article III. 3., I shall give the whole of its text.

Article I is the enacting Article and it is stated that the Order shall have effect in the Colonies that are specified in the Order-in-Council—Ceylon, Hong Kong, Mauritius, Straits Settlements, St. Helena—and it was to have effect in any of these Colonies when proclaimed by the Governor of such Colony. It was to continue in operation until the Governor issued another proclamation declaring its operation to have ceased.

Article III. 1. places every person within the limits of the Colony under military law, but this provision is replaced by a provision in the amending Order in Council of 1916 to which I shall presently refer.

Article III. 3. which is the provision in dispute, reads as follows :—

> " The Governor may order any person to quit the Colony
> " or any part of or place in the Colony, to be specified in such order,
> " and if any person shall refuse to obey any such order the Governor

"may cause him to be arrested and removed from the Colony, or "from such part thereof, or place therein, and for that purpose to "be placed on board of any ship or boat."

Article III. 4. enables the Governor to make any regulations relating to ports and harbours and the movement of ships and boats, which regulations are declared to supersede for the time being any provision of any law in the Colony.

By Article III. 5. the Governor is empowered to require any person to do any work or render any personal service which the Governor may think necessary in connection with the defence of the Colony.

By Article III. 6. the Governor may requisition any animals, vehicles, ships, boats, or any personal property belonging to anybody if the property is required in connection with the defence of the Colony, and if compliance is not made with the requisition the property may be seized.

Article III. 7. enables the Governor to take over for public purposes the buildings or other property including gasworks, electric light works, and water supplies, and if he thinks it necessary for the defence of the Colony he may destroy any buildings or remove any property from one place to another.

Article III. 8. enables the Governor to exercise control over any railway if he thinks it is necessary in connection with the defence of the Colony.

Article III. 9. empowers the Governor to seize food supplies, fuel, and mineral oils, and to sell them and to pay the proceeds into the Treasury.

Article III. 10. enables the Governor to control food prices by proclamation.

Article III. 11. enables the Governor when he thinks it necessary for the defence of the Colony to control the trade in intoxicating liquors.

Article III. 12. is a compensation provision for property seized or destroyed.

Article III. 13. provides a Board to consider compensation or remuneration for work done or property seized.

Article III. 14. is ancillary to Article III. 13.

Article III. 15. enables any person authorised by the Governor in writing enter upon any land or house and examine and inspect it, and, if necessary, to to use force to effect such entry.

Article III. 16. provides for the conviction and punishment of persons who fail to comply with any order or requisition, or hinder the carrying out of any order or requisition.

Article III. 17. relieves any person from the consequences of any breach of contract which he may have committed in consequence of having obeyed any order or requisition.

Article III. 18. enables the Governor to issue a proclamation postponing the payment in respect of rent or other moneys due and payable, and the period of maturity of negotiable instruments, and enables him to

suspend for any period of time the execution of the judgments of Civil Courts and the enforcement of their processes, if he considers that "owing to "circumstances arising out of the state of war or the immediate apprehension "of war, the immediate execution of such judgments or enforcement of "such process would be inequitable or inexpedient."

This Order in Council was not brought into operation until a Proclamation of the 5th day of August, 1914, declared that it came into operation, and in the same Government Gazette in which this proclamation was published there was another proclamation declaring a state of war between Great Britain and the German Empire.

On the 21st of March, 1916, an Order in Council was passed amending the Order in Council of 1896 by substituting for Article III. 1., that is to say the provision declaring all persons in the Island subject to military law, an extensive provision to enable the Governor to make regulations for the public safety and the defence of the Colony, and providing for many matters in connection with these purposes, but it is not necessary to enumerate all these. The preamble to this Order in Council reads as follows:—

> "Whereas by an Order in Council dated the 26th day "of October, 1896, (hereinafter referred to as the principal Order) "Her Majesty Queen Victoria was pleased to make provision for the "security of the Colonies mentioned in the schedule to that Order "in times of emergency."

It was further declared that the amending Order was to be construed and read as one with the Order in Council of 1896.

Now in answer to an affidavit supporting the application for a writ of *Habeas Corpus* which repeated the objections to the validity of the Governor's order, which I have detailed above, an affidavit was put in on behalf of the Crown which was sworn by the Secretary to His Excellency and which alleged that the order of the Governor on which the arrest was effected was made in the public interest. The learned Attorney-General, in showing cause against the Rule, argued strenuously that Article III. 3. gave the Governor absolute power to make the order. That is to say, he contended that the Courts had no authority to inquire into the circumstances under which the order was issued. He emphasized what he described as the clear unambiguous words of Article III. 3., and in reply to the contention on behalf of Mr. Bracegirdle that the order of the Governor could be issued only in times of emergency, he argued that although this expression "times of emergency" occurred in the preamble to the amending Order in Council, 1916, and although the amending Order is to be read as one with the Principal Order, seeing that the words in Article III. 3. were clear and unambiguous they could not be controlled in any way by the words of the preamble. He pointed out that the Proclamation of August the 5th, 1914, had never been revoked and that in view of Article I (the enacting Article of the Order in Council of 1896) to the effect that the Order in Council was to remain in force until revoked by a subsequent Proclamation, which Proclamation

had not been issued, it was conclusive that, whatever circumstances might be existing, and however much the continuance in operation of the Order-in-Council might be criticised, the fact that the Order was in operation and that the words of Article III. 3. are clear and unambiguous gave the Governor the powers which he had exercised and which he claimed were beyond the scrutiny of the Court.

Now this power claimed by the learned Attorney-General is a very wide power, and if the legitimacy of the claim is admitted it means that from August the 5th, 1914, right down to the present day, then in the words of Mr. Perera, who appeared in support of the Rule, there has been in contemplation of law no personal liberty in Ceylon. It is said by the learned Attorney-General that executive officers who have extreme powers conferred upon them are assumed to exercise these powers prudently and justly. That is no doubt true but Mr. Perera, however, points out that it is not a question of what the Governor is likely to do, but it is a question of what he can do, and that in order to see whether it was intended that absolute powers in respect to this or any other provision of the Order-in-Council have been conferred upon the Governor the remaining provisions of the Order in Council should be looked at. There is strong authority to the effect that the Legislature does not intend to interfere with existing law and that it would require clear and unmistakable language to dislodge that presumption. In Chapter III, Maxwell on the 'Interpretation of Statutes', 4th Ed., the following passage occurs :—

> "It is in the last degree improbable that the Legislature would "overthrow fundamental principles, infringe rights, or depart from "the general system of law, without expressing its intention with "irresistible clearness ; and to give any such effect to general words, "simply because they have that meaning in their widest, or usual, "or natural sense, would be to give them a meaning in which they "were not really used. General words and phrases, therefore, how-"ever wide and comprehensive in their literal sense, must be con-"strued as strictly limited to the actual objects of the Act, and as not "altering the law beyond."

There can be no doubt that in British Territory there is the fundamental principle of law enshrined in *Magna Carta* that no person can be deprived of his liberty except by judicial process. The following passage from "The Governments of the British Empire" by Professor Berriedale Keith, is illuminating and instructive. In Chapter VII, of Part I, he discusses 'The Rule of Law and the Rights of the Subject'. He says :—

> "Throughout the Empire the system of Government "is distinguished by the predominance of the rule of law. The most "obvious side of this conception is afforded by the principles that no "man can be made to suffer in person or property save through the "action of the ordinary courts after a public trial by established "legal rules, and that there is a body of well-known legal principles,

"excluding arbitrary executive action. The value of the principles "was made obvious enough during the war when vast powers were "necessarily conferred on the executive by statute under which "rights of individual liberty were severely curtailed both in the "United Kingdom and in the oversea territories. Persons both "British and alien were deprived legally but more or less arbitrarily "of liberty on grounds of suspicion of enemy connections or inclina-"tions, and the movements of aliens were severely restricted and "supervised; the courts of the Empire recognised the validity "of such powers under war conditions, but it is clear that a complete "change would be effected in the security of personal rights "if executive officers in time of peace were *permitted* the discretion "they exercised during the war, and which in foreign countries they "often exercise even in time of peace."

It is therefore contended on behalf of the Crown in this case that that principle to which I have referred above can be definitely abrogated at the will of the Governor, or, by virtue of the power given to the Governor under Article 4 of the amending Order in Council of 1916, at the will of any Naval or Military authority to whom he delegated his powers. This is indeed a startling proposition. It implies that, to use the words of Lord Atkinson in *Rex v. Halliday* (1917) A.C. p. 260 (a case which the learned Attorney-General appeared to think supported him) "the personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive."

The learned Solicitor General, who replied on behalf of the Crown to Mr. Perera's submissions, argued that it was incumbent upon the Court to consider Article III. 3. by itself. He was entirely unable to justify his submission in view of the rule of construction that the whole of an enactment must be considered in the construction of any of its parts. It was said in the very ancient case of Lincoln College's Case (1595) reported in 76 E.R. 764, that "the office of a good compositor of an Act of Parliament "is to make construction on all the parts together and not of one part only "by itself", and Tanfield J. said in the almost equally venerable Chamberlain's Case (1610) reported in 145 E.R. 346, "As a will ought to receive "construction by due consideration of the intention of testator collected "out of all parts of the will, so the meaning of an Act of Parliament ought "to be expounded by an examination of the intention of the makers thereof "collected out of all the causes therein so that there be no repugnance but "a concordancy in all the parts thereof." An examination of the whole of the Order-in-Council of 1896 with its many references to things done through a state of war, or done in connection with or in aid of the defence of the Colony; with its requisitions of food and fuel; its references to the seizure, use of and destruction of public buildings; its control of railways, lighting stations and the water supply, make it overwhelmingly obvious that these extraordinary measures brushing aside the ordinary law of the land, suspending payment of debts and excusing persons affected by the

regulations from performing contracts must obviously be employed only in times when the national security must be provided for by such extreme measures, and it is equally obvious that this threat to national security must be by the very language of the Order real or apprehended state of war or widespread civil disorder.

No authority has been cited to me by the learned Law Officers to justify me in separating and interpreting one single provision of the Order in Council apart from its companions. It is inconceivable that the Sovereign in Council would have mixed up a number of subjects and conferred some powers upon the Governor which, as the Solicitor-General finally admitted, could only be used to meet war or a threat of war or be exercised in the interests of the defence of the Colony, while others like those in Article III. 3. enabling deportation, and those in Article III. 4. enabling the exercise of complete control over shipping to be exercised, and those in Article III. 15. enabling any house or building to be entered upon, were to be exercisable at will and at large. It is obvious to me that the Sovereign in Council intended one of two things, (and this seems to me to be necessarily implied by the words of the enacting Article in the Order-in-Council) namely, that either the Order in Council is to be brought into effect by Proclamation at a time when the national security is likely to be in danger by some widespread activity such as war or extensive civil disorder, and that when the national security is no longer imperilled by the state of affairs then the Proclamation should be revoked ; or that the Order in Council when once proclaimed should remain in force indefinitely but no powers should be exercised under it unless called for on account of an emergency of the kind indicated above. I incline to the former view because I think it is more consistent with the actual text of the enacting Clause, for otherwise there would have been no purpose in empowering the Governor to bring the Order in Council into effect by means of a Proclamation. This question was in point of fact considered by Barrett-Lennard J. in a case tried in Singapore in 1922, in which the scope of Article III. 3. came under consideration. A verbatim newspaper report of this case has been handed to us. Barrett-Lennard J. was of opinion that the Order in Council, affecting, as it did, places which were all of strategic importance, was intended to refer to war and to war only, and he said in very strong language that when the Great War which caused the Order-in-Council to be proclaimed in the Straits Settlements (as it was in Ceylon) had terminated, the Governor was not justified in keeping the Order in Council in operation, and he went so far as to say that the Order had expired not later than the time when the Central Powers resumed friendly relations with Great Britain in consequence of the various Peace Treaties. I confess that I am rather impressed by his reasoning, but it is not necessary for me to go so far as to say that I am in agreement with it since I am of the opinion, that no powers can be exercised under the Order-in-Council, unless an emergency of such a kind as is contemplated by the terms of the Order in Council be real or imminent.

A great deal of argument has been addressed to us on the subject of the powers of the Courts to scrutinize the powers of the Executive when conditions under which these powers are to be exercised have been attached to these powers by the various enactments conferring them, and a number of cases have been cited to us the great majority of which have dealt with applications for *Habeas Corpus* made by persons British or alien in respect of the exercise of powers conferred on the Home Secretary by war-time legislation. But the point in this case is whether the power of the Governor to issue an order under Article III. 3. of the 1896 Order-in-Council is absolute or not. It is contended that it is absolute—unconditioned by time, occasion or circumstance. I am of the opinion that it is not absolute and that the power may be exercised only under conditions. It was not stated in the affidavit of His Excellency's Secretary that the issue of the order was justified because a state of emergency existed and that the conduct of Mr. Bracegirdle justified the action which was taken in view of the emergency. Had that been advanced in argument I should have nevertheless held, that we are entitled, and indeed we have a duty to inquire as to whether the conditions, which must be satisfied before power granted to an Executive Officer can be exercised, have been fulfilled. What shall satisfy a Court in such behalf I am not prepared to say, but I do think it appropriate to state that the Courts have such powers of inquiry. This was said in unmistakable terms in the Privy Council case of *Eshugbayi Eleko v. The Officer Administering the Government of Nigeria*, (1931) A.C. 662. The Supreme Court of Nigeria had held that the Judges had no power to inquire into certain conditions that had to be fulfilled before the Governor of Nigeria could issue an order requiring a native to remove himself from one part of the Colony to another, and Lord Atkin, at page 670, said :—

> "Their Lordships are satisfied that the opinion which has "prevailed that the Courts cannot investigate the whole of the "necessary conditions is erroneous. The Governor acting under the "Ordinance acts solely under executive powers, and in no sense as "a Court. As the executive he can only act in pursuance of the "powers given to him by law. In accordance with British Juris-"prudence no member of the executive can interfere with the liberty "or property of a British subject except on the condition that he "can support the legality of his action before a Court of Justice."

But we are, however, absolved from considering any question as to whether the conditions attached to the exercise of the Governor's powers under the Order in Council have been fulfilled because, as I have said, it is not maintained that they have been so fulfilled. The Crown takes its stand upon what it submits are the unquestionable absolute powers of the Governor, and it is our duty to say that those powers are limited. The question whether it would be in the public interest that Mr. Bracegirdle should leave the Colony is not to the purpose. Were he an alien, that question might be

one for decision under Section 5 of The aliens Registration Ordinance, No. 30 of 1935, but he is not and we have to decide his rights as a British subject.

In my opinion then the Governor's order purporting to be made under Article III. 3. of the Order in Council of 1896, was made without authority. The arrest and detention are illegal and Mr. Bracegirdle must be released.

In view of my opinion that the order of the Governor is invalid, an opinion with which I understand my brother Judges will express concurrence, it is not necessary for us to give a decision upon the second ground on which it is contended that the arrest and custody by the police are illegal. But I think it fit to say that I am of opinion that had I held that the order of the Governor was valid, I should have rejected the submission that he is disqualified from employing the police to effect the arrest which he is authorised to cause. This I am able to say without going into the question as to whether the State Council Order-in-Council precludes the Governor from issuing orders to the police. Whether it does or does not is not to the purpose, since there is nothing to prevent the Governor from requesting the police to effect the arrest which he is authorised to cause.

MAARTENSZ, J.

On the 20th April, 1937, His Excellency the Governor purporting to act in pursuance of the power vested in him by clause three of Article III of an Order-in-Council dated the 26th day of October, 1896, ordered Mark Anthony Lyster Bracegirdle (hereafter referred to as Bracegirdle) to quit the Island of Ceylon on or before 6 p.m. on the 24th April, 1937.

Bracegirdle refused to obey the order and His Excellency in pursuance of the powers vested in him by the said clause directed the Deputy Inspector-General of Police, Criminal Investigation Department, or any Police Officer authorised by him in writing to arrest and remove Bracegirdle forthwith from the Island.

Bracegirdle was arrested on the 7th of May, 1937, by Inspector Kelaart who had been authorised to arrest him.

The petitioner makes this application as a friend of Bracegirdle.

The petitioner submits (*a*) that "an order under clause 3 of Article III of the Order-in-Council of the 26th October, 1896, can only be made on the arising of an emergency, that no such emergency as contemplated by the said Order-in-Council has arisen, that no such order can be made without prior proclamation of such emergency." (*b*) That "the said arrest was illegal and unwarranted inasmuch as His Excellency the Governor had not in law power to issue (to) the police the said order dated 20th April, 1937, or the said order of arrest dated 7th May, 1937, or to cause either of the said orders to be served or executed by or through the police."

The Attorney-General who ahowed caused against the application contended (*a*) that clause three of Article III gave the Governor unquestionable power to order a person to quit the Island and that the power could be exercised whether there was an emergency or not (*b*) that if the power could be exercised only in an emergency it was not open to the Court to inquire whether there was an emergency much less as to the nature of the emergency.

I do not think that the alternative contention is open to the Attorney-General because the affidavit filed by him sworn to by the Secretary to the Governor does not allege that there was an emergency which necessitated that making of the order. The petitioner's allegation " that no such emergency as is contemplated by the said Order in Council has arisen " stands uncontradicted.

It is in my opinion therefore unnecessary to examine in detail the numerous authorities cited to us regarding the power of the Court to inquire whether there had been an abuse or misuse of the power under which an order affecting the liberty of a person was made.

In the case of *The King v. Inspector of Leman Street Police Station, ex parte Venicoff*, 1920, 3 K.B. 72, The Secretary of State " In pursuance of the powers conferred by the Aliens Restriction Act, 1914, article 12, made order that Samuel Venicoff.....shall be deported from the United Kingdom.....and directed that from and after the service of this order upon the above-named alien he shall until he can be conveniently conveyed to and placed on board the ship on which he is to leave the United Kingdom, and whilst being conveyed to the ship and until the ship finally leaves the United Kingdom be in custody of the constable or other officer charged with the duty of enforcing this order."

In pursuance of that order Venicoff was detained in custody. Thereupon he applied for *Rules Nisi* for *habeas corpus* and *certiorari* directed respectively to the Inspector of Leman Street Police Station and to the Secretary of State for Home Affairs.

Article 12 reads as follows – " The Secretary of State may, if he deems it to be conducive to the public good, make an order (in this Order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United Kingdom.....".

On return to the Rules an affidavit by Sir John Pedder, an assistant secretary in the Home Office, was read which set out the grounds upon which it appeared to the Home Secretary that the applicant was a man against whom it was conducive to the public good that a deportation order should be made.

The Earl of Reading, C.J. said in the course of his judgment " Turning now to the statute, art. 12. and the deportation order made under it, I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these

orders and has imposed no conditions ". This dictum and the decisions in the cases of *Rex v. Brixton Prison (Governor) ex parte Sarno*, 1916, 2 K.B. 742, *Rex v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry*, 1917, 1 K.B. 922, *Rex v. Halliday*, 1917, A. C. 260 and *The King v Governor of Wormwood Scrubbs Prison*, 1920, 2 K.B. 305, would have had to be examined as well as the case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*, 1931, A. C. 662, if an emergency had been alleged in the affidavit filed by the Secretary to the Governor. As I have already said there is no such allegation and the only question which in my judgment arises for decision is whether the Governor's power to make an order under clause 3 is unfettered or whether he could only make the order on an emergency which effects the safety of the Island and which could be met by the deportation of Bracegirdle.

It is necessary for the determination of this question to consider the circumstances in which the Order in Council was made and proclaimed in the Island and to examine the various clauses of the Order.

The Order was made by Her Majesty Queen Victoria in Council on the 26th day of October, 1896. It enacts that the Order " Shall apply to and have effect in all or any of the Colonies specified in the schedule hereto in which it shall be proclaimed by the Governor of the Colony, and shall come into operation in each such Colony on being so proclaimed therein, and shall continue in operation therein until the Governor shall by proclamation declare that it has ceased to be in operation therein ".

The Colonies specified in the schedule are Malta, St. Lucia, Sierra Leone, Ceylon, Hong Kong, Mauritius, Straits Settlements and St. Helena.

The order was proclaimed in Ceylon on the 5th of August, 1914 that is on the outbreak of the Great War.

The Order-in-Council dated 26th October, 1896 (hereafter referred to as the principal order) was amended by Orders-in-Council dated the 28th of August, 1914 and the 21st of March, 1916. These were proclaimed in the Island on the 7th of October, 1914 and the 5th of June, 1916.

The Principal Order did not specify the purpose for which it was enacted. But the Amending Order dated the 21st March, 1916 sets out the purpose in a preamble in the following terms – " Whereas by an Order in Council dated the 26th day of October, 1896 (hereinafter referred to as the Principal Order) Her Majesty Queen Victoria was pleased to make provision for the security of the Colonies mentioned in the schedule to that Order in times of emergency ".

The petitioner contended that the preamble limited the powers conferred on the Governor by the Principal Order and the Amending Order to " times of emergency " ; and that the times of emergency contemplated by the Principal Order were such as would arise in times of war or possibly grave civil disturbances.

The reply to this contention was that where the terms of a section are plain and unambiguous it is a rule of construction that a Court is not

entitled to refer to the preamble, or the history of the legislation or surrounding circumstances in construing the section. In support of this argument we were referred to the cases of (1) *Willis v. Gipps* (1846) 5 Moo. P.C. 379, (13 English Reports 536). The Act in question was the Colonial Leave of Absence Act, 1782, (c. 75). The preamble of the Act recited the mischief of granting colonial offices to persons who remained in England and discharged the duties of their offices by deputy. It was held that the preamble did not exclude judicial offices from the general enacting part, which authorised the Governor to remove " any " office holder for misconduct, although the mention of delegation in the preamble showed that the judicial office was not there in contemplation. Full effect was given in the decision to the word 'any.' (2) *Rex v. Brodribb* (1816) 6 C. & P. 571, where it was decided that the preamble to the Oaths Act, 1797, (c. 123) which refers only to the mischiefs consequent on inciting men to sedition and mutiny, and on administering to them oaths with this object, did not restrict the enacting part of the statute, which made it felony to administer oaths with a view not only to mutinous or seditious purposes, but also to disturbing the peace ; or to be a member of any such association for any such purpose or not to reveal any unlawful combination or illegal act ; it being held that the latter words included offences foreign to politics and military discipline, such as the administration of oaths to poachers not to betray their companions.

The enacting part considered in these cases contained words which extended the provisions beyond the preamble. If clause 3 contained words of a similar character effect would have to be given to them however drastic that effect may be.

The clause reads as follows :—" The Governor may order any person to quit the Colony, or any part of or place in the Colony, to be specified in such order, and if any person shall refuse to obey any such order the Governor may cause him to be arrested and removed from the Colony, or from such part thereof, or place therein, and for that purpose to be placed on board of any ship or boat ".

In my judgment there are no words in the clause which indicate that an order can be made in pursuance of the powers conferred by it at any time and for any purpose.

It was also contended against the rule being made absolute that the preamble was not a part of the Principal Order. I do not think that a sound contention. Where the preamble of an amending enactment specifies the reason for the enactment of the principal act we are entitled to look at the preamble for the purpose of determining the scope of the principal act.

The petitioner next contended that the Order-in-Council must be read as a whole in order to ascertain the true meaning of its several clauses, and that if it were so read it would be manifest that the power conferred by clause 3 could only be exercised in time of war or grave civil disturbance.

Article III of the Principal Order in Council enacts that " So long as this Order shall be in operation in any Colony the following provisions

shall have effect ". The provisions are embodied in eighteen clauses. The first clause provided that every person within the limits of the Colony shall be subject to military law for the purposes of the Army Act. The Order-in-Council dated 21st March, 1916 substituted for claise 1 a clause empowering the Governor to make regulations for securing the public safety and the defence of the Colony. The second clause provided that any declaration made by the Governor under section 189 of the Army Act shall be deemed to apply to every military force raised in the Colony. The 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 18th clauses empower the Governor to order any person to leave the Colony, to make regulations or orders respecting any port or harbours in the Colony, to requisition the services of any person, to requisition any animals, vehicels, ships, boats etc. to take possession of buildings or other property (including gasworks and works for the supply of electricity), waterworks, wells, etc., to requisition the resources of any railway, to seize and take possession of articles of food and fuel, to prescribe the maximum price at which articles of food may be sold, to take steps to control the trade in beer, wine and spirits, to extend the time for the payment of rent or other money and the maturity of bills and to suspend the execution of judgments.

Clause 15 empowers any person authorised by the Governor to enter upon and examine any land or building.

Clauses 3, 4, 9, 10 and 15 do not state in express terms as the other clauses do that the powers are to be exercised in aid of or in connection with the defence of the Colony. But having regard to the nature of the powers they confer and the other clauses in which the exercise of the powers is limited to the defence of the Colony and the first clause which places every person under military law, I am of opinion that the powers conferred by clauses 3, 4, 9, 10 and 15 were only to be exercised when the defence or safety of the Colony required it.

In the cases which arose in England from orders made under the Defence of the Realm Act the Judges laid great stress on the fact that the orders were made in exercise of powers conferred on the executive in a time of great danger resulting from the war in which England was engaged.

The Order in Council was I have no doubt proclaimed on 5th August 1914 to meet exigencies arising from a state of war. The fact that it had not been repealed after the war terminated would not justify the exercise of powers which could properly be exercised only at a time of great public danger.

I am of opinion having given the matter my anxious consideration that clause 3 cannot be read as a separate clause conferring on the Governor the right, unfettered by any condition to order any person to quit the Colony at any time. It must be read with the other clauses of the Order-in-Council for the purpose of determining the extent of the powers conferred by it; read in that way it is to my mind manifest that the power to order a person

to quit the Colony could only be exercised in time of emergency. The nature of the emergency in view of the other provisions of the Order-in-Council could only be a state of war or grave civil disturbance.

It is not claimed that the order dated 20th April, 1937, was made in such an emergency.

I am of opinion, therefore, that the order was not authorised by clause 3 and that the arrest and detention of Bracegirdle are illegal. He must accordingly be released.

SOERTSZ, J.

I have had the pleasure and the advantage of reading the judgments of My Lord the Chief Justice and of my brother Maartensz, and I agree that the *Order Nisi* granted by this court must be made absolute and Mark Anthony Lyster Bracegirdle released. The facts of this case have been already fully stated and I abstain from repeating them. But in view of the importance of the questions of law involved in this application, I wish to make a few observations myself on them.

The Law Officers of the Crown sought to justify the orders made by His Excellency the Governor under clause 3 of Article III of the Order-in-Council dated the 26th of October, 1896 by virtue of which the Governor purported to act. I agree with them that this clause read by itself appears to give His Excellency an absolute and unlimited power to make the orders relied upon. But I am unable to agree with their contention that that clause should be separated from the other clauses of the Order-in-Council and considered by itself. Such a course is opposed to well-known and fundamental rules of legal interpretation which require Statutes that grant powers 'to be construed as strictly limited to the actual objects of the Statutes and as not altering the law beyond'; 'to make construction on all parts together and not of one part only by itself'. The trite legal maxim in regard to the interpretation of each clause in a Statute is '*noscitur a sociis*'. Moreover, in this particular instance, the Order in Council of 1896 provides for the whole of it applying and having effect on its being proclaimed by the Governor. There is no provision for its being called into operation piecemeal.

If then clause 3 of Article III is read with reference to the other clauses and Articles in the Order-in-Council, we are driven to the conclusion that this Order meant to invest the Governor with extraordinary powers for the defence of the realm and for the security of the Colony in times of emergency. In such times, it is possible to condone acts which in the words of Lord Reading 'would, in truth, shock the majority of persons in the country in time of peace'. That this was the intention of Her Majesty and that she 'never intended to construct an instrument of violent and arbitrary power' is elucidated by the preamble to the Order in Council of the 26th of March,

1916 by which the principal Order in Council of 1896, was amended. It expressly declared that 'whereas Her Majesty Queen Victoria was pleased to make provision *for the security of the Colonies* mentioned in the schedule to that Ordinance *in times of emergency* etc. it was further provided that this amending order 'should be construed and read as one with the principal order'. Moreover, the fact that these Orders in Council enacted temporary measures is borne out by the clause in the principal order which provided for their coming into operation on being proclaimed by the Governor of the Colonies concerned, and remaining in force until the Governors declared that they had ceased to be in operation.

At this state, I would address myself to the argument addressed to us by the Law Officers that inasmuch as these Orders-in-Council were brought into operation in 1914 and 1916 and have not been declared to have ceased to be in operation, they are effective and afford authority and justification for His Excellency's Orders. No doubt, these Orders-in-Council are in operation in the sense that they have not been revoked, but they cannot be applied or made effective in the absence of the conditions on which their valid functioning depends. Those conditions are twofold and concomitant – the security of the Colony and times of emergency. Now, in this case, the affidavit of the Secretary to His Excellency the Governor which was put before us states " I am informed by His Excellency that the said Orders were made because His Excellency was satisfied on the information available to him that circumstances had arisen rendering it necessary in the public interest to make the said Orders ". But that, if I may say so respectfully is insufficient, for even if we regard the phrase 'in the public interest' as an exact equivalent of the phrase in the Order in Council 'the security of the Colony', only one of the necessary conditions is satisfied by that declaration. As pointed out by my brother Maartensz the averment in the petitioner's affidavit 'that no such emergency as is contemplated by the Order in Council has arisen' has not been contradicted.

Therefore, the second condition for the lawful exercise of the powers given to His Excellency by clause 3 of Article III is wholly absent, and the Orders made by His Excellency in pursuance of those powers are, in my opinion, *ultra vires*.

Another point was taken on behalf of the petitioner, namely that His Excellency's Order issued to the Deputy-Inspector-General of Police directing the arrest of Bracegirdle was bad in law because it was issued without the concurrence of the Minister for Home Affairs.

We were earnestly pressed to consider this question and to give our ruling on it. But, I respectfully agree with the Chief Justice that the conclusion we have reached on the first matter absolves us from the necessity of considering an academic question.

Present : POYSER, S. P. J. & KOCH, J.

PATHMANATHAN vs THE IMPERIAL BANK OF INDIA.

S. C. No. 136—*D. C. Colombo No.* 46921.

Argued & Decided on 12th March, 1937.

Privy Council Appeal—Application to the Supreme Court for leave to appeal—Should the day on which such leave would be applied for be intimated in the notice of the application given to the respondent?—Ordinance No. 31 *of* 1909 *Schedule I Rule* 2—*Computation of time within which notice to be given—Are Sundays and Public Holidays excluded ?*

(ii) That in computing the period of thirty days prescribed in rule 2, no days included in a vacation of the Supreme Court shall be reckoned unless the Court otherwise directs.

Wijesekara vs. Corea 33 N.L.R. 349 dissented from.

Applicant (*K. Pathmanathan*) appears in person.
Weerasooriya for respondent.

POYSER, S. P. J.

Two points were taken by Mr. Weerasooriya on this application. The first point taken was that the notice * of this application which was given to the respondent, although admittedly given within a period of 14 days, did not intimate the day on which such leave would be applied for. The material rule is as follows :— (2) " 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 such judgment give the opposite party notice of such intended application." In support of that argument the case of *Wijesekere vs. Corea* (33 N.L.R. p. 349) † was cited. In that case the following occurs in the head-note : " Where a person applies for conditional leave to appeal to the Privy Council, the notice served on the respondent must contain an intimation of the day on which such leave will be applied for."

On looking at the judgment of Drieberg, J. it appears that he was doubtful if a notice at all was served. The petitioner apparently stated he had sent a telegram to the respondent and produced a receipt for a telegram

* To
The Imperial Bank of India, Colombo.
Take notice that I shall apply to the Supreme Court of The Island of Ceylon within thirty days of the date of the Judgment of The Supreme Court in the above Case for leave to appeal to the Privy Council from the said Judgment of the Supreme Court.
Colombo, 12th day of December, 1936.
Sgd : K. Pathmanathan
Plaintiff-Appellant.

† 1 C.L.W. p 159 (Edd.).

which contained no mention of the person to whom it was directed. The Judge does, however, in the course of his judgment state, " The form of notice adopted in practice include an intimation of the day on which the petitioner will move in the Supreme Court, and this is absolutely necessary in order that the respondent may be present or arrange for his representation on the day stated or any other day to which the hearing is adjourned. A mere notice by a petitioner that he is appealing against the order is, in my opinion, not sufficient."

With the greatest respect, I do not think the Rule in question requires that the notice must contain an intimation of the day on which the application will be made, and it should be added that this decision being the decision of one Judge is not binding on us.

In my opinion the applicant had substantially complied with the provisions of this Rule in his notice of the 12th of December, 1936, addressed to the respondent. Apart from the fact that the Rule does not specifically state that the day shall be named upon which the application will be made, in practice it would be impracticable to name any such day. The day on which the application will be heard would be decided by the Registrar in accordance with the usual practice. Further, in my experience, the practice in this Court has been for the applicant to apply in the first place " ex parte " for a notice of his application to be served on the respondent, and that would appear to be the most convenient practice.

For these reasons I do not think this application should be rejected on this ground.

A further point was taken on behalf of the respondent that the applicant did not make his petition to the Supreme Court within a period of thirty days from the date of the judgment. The judgment and decree was pronounced on the 30th day of November, 1936, and the petition to the Supreme Court was filed on the 13th of January, 1937.

There is no provision in the Rules set out in the Schedule to Ordinance No. 31 of 1909 in regard to whether Sundays, public holidays, or Court vacations are to be included in the periods of thirty or fourteen days set out in Rule 2 or the one month set out in Rule 3 (a), nor are the provisions of the Civil Procedure Code in regard to the exclusion of Sundays and public holidays in the computation of time applicable to appeals to the Privy Council.

There is, however, a section in the Supreme Court (Vacation) Ordinance (No. 1 of 1906), viz : section 8, which does deal with the question of vacations in regard to the computation of time. This section is as follows :— (8). " Where by any Ordinance, or rule regulating civil procedure, or by any special order of the court, any limited time not exceeding one month is appointed or allowed for the doing of any act or the taking of any proceedings in the Supreme Court, no days included in a vacation shall be reckoned in the computation of such time unless the court otherwise directs."

In my opinion, in the absence of any specific provision in the Rules regulating appeals to the Privy Council, this section can be invoked in regard to the question as to whether the applicant's petition to the Supreme Court was in time, and if that is so, this application was in time, for during the period 1st December, 1936, to 13th January, 1937, there is the Christmas Vacation of twenty one days.

For the above reasons leave to appeal to the Privy Council will be granted subject to the usual conditions.

KOCH, J.

I entirely agree.

Application allowed.

Present : SOERTSZ, J.

ANGAMMANA vs LEWIS De SILVA.

S. C. No. 43—*P. C. Kalutara No.* 25787.
Argued & Decided on 28th April, 1937.

Motor Car Ordinance No. 20 *of* 1927 *sub-sections* (2) *and* (3) *of section* 57 — *Same act constituting two different offences—Two separate charges—Is it proper to treat the charges as cumulative ?*

Held : That, where, for the same act two different charges under subsection (2) and (3) of Section 57 of the Motor Car Ordinance are made, they should be treated as alternative charges.

Gilbert Perera with *Macan Markar* for accused-appellant.
D. Janze, C. C. for respondent.

SOERTSZ, J.

In this case the accused was charged on the same facts (1) with having driven ' bus No. Z 428 in a dangerous manner at a dangerous speed and thereby committed an offence punishable under section 57 (2) of Ordinance No. 20 of 1927 and (2) at the same time and place with having driven the said bus negligently so as to cause damage to the house of Carolis Perera and thereby committed an offence under section 57 (3).

It is perfectly clear that these charges were intended to be considered by the Magistrate as alternative charges. The Magistrate, after hearing the evidence in the case, found the accused guilty and entered conviction against him on each of these counts.

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In the case of *Sub-Inspector of Police, Badulla, vs. Kamurdeen*, Vol. 31 New Law Reports, p. 359, Mr. Justice Lyall Grant pointed out that it was irregular for a Magistrate to convict an accused in circumstances such as these on both counts, and I am myself in complete agreement with that view.

Mr. Perera for the appellant also contends that upon the facts of the case the accused should have been convicted on the 2nd count of negligent driving of the ' bus and should not have been convicted on the 1st count in which he was charged with having driven the ' bus in a dangerous manner at a dangerous speed. I find myself quite unable to agree with this contention. The evidence disclosed a case of dangerous driving by the accused. I, therefore, set aside the conviction by the Magistrate on the 2nd count. I have no doubt that if the Magistrate realised that he should have convicted the accused on one count only he would have imposed a much heavier penalty on the count which he found the accused guilty than he has done. In the circumstances, I alter the sentence in respect of the 1st count in which I sustain the conviction of the accused, to a fine of Rs. 75/–, in default, one month's simple imprisonment.

Sentence varied.

Present : SOERTSZ J.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON THE REGISTRAR-GENERAL BY THE MAHANAYAKE THERO OF MALWATTA, KANDY.

Argued on 3rd May, 1937.

Decided on 27th May, 1937.

Mandamus—Circumstances in which a writ will be refused—Improper motive in seeking assistance of Court—Buddhist Temporalities Ordinance No. 19 *of* 1931, *section* 41*—Expulsion of a Bhikkhu from the Sangha—Is the Registrar-General bound to enter up in his register kept under the Ordinance the fact of such expulsion when it is communicated to him by the Nayaka of the expelled Bhikkhu's Nikaya ?*

On the 29th of May, 1935, the petitioner wrote the following letter to the Registrar- General.

> " I have the honour to inform you that Urapola Ratanajothi, registered as an Upasampada Bhikkhu under No. 5127 in the Register was declared by the Chapter of Buddhist Priests at Malwatte on the 6th of October, 1934, to be unfit any further to continue as a Bhikkhu, and his name was accordingly removed from my Register under the provision of Section 41, Sub-section 5 of the Ordinance No. 19 of 1931.

"I therefore trust that you will make the necessary correction in your Register."

To this the Registrar-General replied by the letter dated 6th June, 1935, stating that section 41 (5) does not contemplate cases of expulsion of Bhikkus from the Sangha.

Thereafter the petitioner made no communication to the Registrar-General till 12th October, 1936, when he wrote the following letter.

"I have the honour to inform you that the following Priests registered as Upasampada Bhikkhus under the numbers stated therein have had their names removed from my registers.

I was acting under the provisions of section 41 (5) of Ordinance No. 19 of 1931 in order that I may keep my registers up to date.

(1) Kandoluwawe Sumangala, No. 12, died on 6th February, 1934.
(2) Udugolmote Dannatissa, No. 1579, died on 23rd December, 1933.
(3) Watapota Seelawamsa, No. 1673, died on 18th November, 1932.
(4) Urapola Ratanajoti, No. 5127, expelled from the priesthood on 26th May, 1935.
(5) Dabarella Piyaratna, No. 2386, disrobed on 12th January, 1933."

To this letter the Registrar-General sent the following reply.

"With reference to your letter of the 12th instant, I have the honour to state that under section 41 (5) of the Buddhist Temporalities Ordinance No. 19 of 1931, the necessary amendments were made in the copies of the Upasampada declarations Nos. 12, 1579, 1673 and 2386 filed in this office. It is presumed that your copies of the declarations have been similarly amended.

As the Buddhist Temporalities Ordinance does not contemplate expulsions from the priesthood, no endorsement was made in the declaration of Urapola Ratanajoti Thero bearing registered No. 5127 filed in this office."

The petitioner thereupon made this application for a mandamus on the Registrar-General to compel the Registrar-General to make an entry of the fact that he had expelled the 2nd respondent Urapola Ratnajoti Thero from the Sangha in the register kept by him.

The 2nd respondent was not a party to the application but having heard of the application he appeared by Counsel and asked that he be heard as the decision of the Court in the matter concerned him. This permission was granted and his Counsel was heard.

The 2nd respondent tendered an affidavit in which he set out at length the facts of a dispute which he alleged existed between him and the applicant regarding the election of a Nayaka for Sripadasthana. It was alleged that the powers of the Supreme Court were being invoked in this instance with improper motives.

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Soertsz, J.

In re Application for writ of Mandamus

Held : (i) That the words "all such corrections, additions, or alterations in his registers as may be necessary to keep up to date his register of Upasampada Bhikkhus and Samaneras of his Nikaya and the relevant details regarding them" in section 41 (5) of the Buddhist Temporalities Ordinance No. 19 of 1931 were intended to include the total removal of the names of Bhikkhus from the register.

(ii) That the words "modification" and "modify" in section 41 (5) of the Buddhist Temporalities Ordinance are wide enough to include the removal of a name from the register.

(iii) That a mandamus will not be granted where the Court is not satisfied of the propriety of the motives of the applicant.

H. V. Perera with *J. R. Jayawardena, Muttukumaru* and *V. F. Gooneratne* for the petitioner.

Wijewardena, Solicitor-General with *Basnayake, Crown Counsel,* for the Registrar-General.

Rajapakse with *Canakeratne, Ranawake* and *Senaratne* for the intervenient.

SOERTSZ, J.

This is an application for a writ of mandamus on the Registrar-General. The petitioner is the Maha Nayaka Thero of the Malwatte Vihare in Kandy. He complains that although acting in pursuance of the power given to him by section 41 (5)* of the Buddhist Temporalities Ordinance No. 19 of 1931, he had removed the name Urapola Ratnajoti from his register on the ground that that priest 'has been declared by the Karaka Maha Sanga Sabha at Malwatta to be unfit any further to continue as a Bikkhu'. The Registrar-General to whom he duly conveyed that fact, refuses to fulfil his obligation under that section of the Ordinance 'similarly to modify the registers he is required to keep'.

The facts are as follows: On the 29th of May, 1935, the petitioner wrote letter R. 1 to the Registrar-General informing him that he had removed Ratnajoti Thero's name from his register and 'trusting that the Registrar-General would make the necessary correction in his.' The Registrar-General, however, replied by letter R. 2 of the 6th of June, 1935, stating that section 41 (5) 'does not contemplate cases of expulsion of Bikkhus from the Sangha'. Again on the 12th of October, 1936, the petitioner wrote letter C informing the Registrar-General that he had removed the names of five Bikkhus from his register. Ratnajoti Thero's name is among them. The Registrar-General by his letter D replied that he had modified his register in respect of four of the five names mentioned but that 'no endorsement was made in the declaration of Urapola Ratnajoti as the Buddhist Temporalities Ordinance does not contemplate expulsion from the priesthood'. The petitioner appears to have then addressed himself to various authorities and quarters to secure the Registrar-General's compliance with the law but without success.

He came into court with this application in January, 1937.

After Order Nisi had been issued on the Registrar-General, Urapola Ratnajoti submitted his petition and affidavit on the 23rd February, 1937, and prayed to be allowed to intervene, and to be heard before final order was made. As he was vitally concerned in the matter, he was given the opportunity he sought and his Counsel was heard. The Solicitor-General was heard on behalf of the Registrar-General.

I wish to say at once that the position taken up by the Registrar-General has no legal or logical justification. In response to the request addressed to him by the petitioner, he made the necessary modifications in the case of those Bikkhus who were reported to have died or disrobed, but he refused to modify the register in regard to the Bikkhu who was reported to have been expelled on the ground that the ordinance does not contemplate expulsion from the priesthood. This sounds to me, if I may describe it so, like an anticipatory echo of the argument of the learned Solicitor-General, that, in law, a Buddhist priest can never be expelled from the priesthood. To use his own words, 'once a priest, always a priest'. Whether that is a correct proposition in pure Buddhist Ecclesiastical Law is not as clear as the Solicitor-General sought to make out. Mr. Perera quoted passages from the Vinaya Pitaka which seemed to refute that proposition. Be that as it may. There can be no doubt that so far as the courts are concerned, expulsions from the priesthood have long been recognised. In *Attadasi Unnanse* v. *Rewata* 29 *N.L.R.* 361 it was held that *a Buddhist Priest who has been expelled* from the priesthood cannot claim to retain an incumbency on the ground of prescription. In *Therunnanse* v. *Abeynayaka* 2 *Matara cases* 21 it was held that *a priest* who has been *expelled from the priesthood* for the omission of any *parajika* offence must be considered to have suffered a '*degradation to the rank of a layman*'. Woodhouse in a footncte on page 18 of his *Sissiyanu Sissiya Paramparawa* quotes from F. Spiegel as follows:—Qui sacerdos cum femina coitum fecit *non amplius sacerdos erit*, non sakyaputrae asscela *sicut vir aliquis deciso capite amplius vivere non potest ita sacerdos postquam cum femina coitum habuit, non amplius sacerdos erit.* And *parajika* is only one of the grounds of expulsion. The Solicitor-General however relied on a passage from the judgment of the District Court of Kandy which was affirmed on appeal to the effect that even the Maha Sangha Sabha the highest ecclesiastical court of the Buddhist church " has no right of deprivation and its decrees can only be enforced in a negative way, namely by an interdict ordering all other priests to boycott the delinquent by ceasing to associate with him in any religious function until he is brought back to the paths of rectitude". *Sumangala Unnanse* v. *Dhammarakkita* 11 *N.L.R. at p.* 365. I do not find much support for the Solicitor-General's argument in this passage, for the fact remains that whatever the process, negative or positive, the result achieved is the same. The delinquent is for all practical purposes no longer a priest. Although he continues to perform the functions

of a priest, he has not the right to do so. He is a pretender 'until he is brought back to the paths of rectitude'. In my opinion, therefore, the refusal by the Registrar-General to modify his register for the reason urged by the Registrar-General is unwarranted. The reason put forward by the Registrar-General himself that *the Ordinance* does not contemplate expulsions is hardly intelligible. The Ordinance does not expressly refer to death or disrobing and yet the Registrar-General has taken notice of them. All the Ordinance does is to invest the Maha Nayake Thero and the Nayaka Thero of every Nikaya with the right and impose upon them the duty 'to make all such corrections additions or alterations as may be necessary to keep up to date their registers'. Death and disrobing are two events that necessarily affect the 'up to dateness' of the register, and no less must expulsion affect it, provided, of course, that expulsion is recognised in Buddhist Law. As I have already observed, our courts have always proceeded on the footing that Buddhist Law recognises expulsions.

With regard to the contention that this would amount to giving the two Theros referred to, arbitrary powers, it must be assumed that the Legislature was satisfied that ecclesiastical dignitaries of that eminence would act with a proper sense of responsibility. If, however, the Legislature did not intend to give the Mahanayake Thero and the Nayake Theros such power, the remedy is surely in the hands of the Legislature.

The next point taken by the Solicitor-General and by the Intervenient's Counsel was that the 'corrections, alterations and additions' referred to in section 41 (5) are corrections, alterations and additions in the details set forth in Form A of the Ordinance, and that those words and the words 'modify' and 'modification' in the later part of section 41 (5) show that the total removal of a name from the register was not in contemplation. I am quite unable to entertain this argument. The words "corrections, alterations and additions.....as may be necessary to keep up to date *his registers of Upasampada Bhikkhus .....and the relevant details* regarding them" suggest no doubt whatever to my mind that both total removal of the names of Bhikkhus and alterations, corrections and additions in and to the details were intended.

As for the bearing of the words 'modify' and 'modifications' on the meaning of section 41 (5), it was strongly urged that these words do not fit the case of a removal of a form, but only the case of some change effected in the form. But that it is to overlook the fact that the section refers not to 'modifying' or 'the modification of' *forms* but of *registers*. And to me it seems beyond question that one 'modifies' a register or there is a 'modification' of a register when one removes one or more forms from it. Moreover, in the case of death, disrobing or expulsion it is not necessarily by the removal of the relevant form that the modification of the registers is effected. It may be effected by an endorsement on the form, and letter D seems to indicate that that is the course the Registrar-General takes,

I am, therefore, of opinion that if the matter stood in this position, and no other considerations arose, a clear case has been made out for the issue of writ directing the Registrar-General to modify his registers. It is a duty the Statute casts upon him in imperative terms. It gives him no discretion and he is usurping functions he does not possess when he acts in the manner in which he acted in this case. But the rejoinder suggests itself at once that it would not have been possible for the court to exercise its discretion in the way in which it has decided to exercise it in this case if the Registrar-General had complied with the petitioner's request. The answer to that, as I conceive it, is that it is inevitable that sometimes curious results should flow from a strict adherence to the law. Nevertheless the law must take its course. But when an application like the present finds its way into court, albeit as a result of an obvious failure on the part of some authority to discharge a duty imposed on him by law, it is subject to certain well-known principles and rules by which courts guide themselves in these matters. Some of those rules and principles are set forth as follows in Halsbury's Laws of England :—

'The writ of mandamus is a high prerogative writ and the granting of it is a matter for the discretion of the court. It is not a writ of right and is not issued as a matter of course. Accordingly, the court may grant the writ even though the right in respect of which it is applied for appears to be doubtful, and on the other hand, the writ may be refused not only upon merits but also by reason of the special circumstances of the case. The court will take a liberal view in determining whether or not the writ will issue'. 10 Halsbury p. 78.

In view of this responsibility to which courts are called, I have considered most anxiously the facts that I have been put in possession by the affidavits of the different parties to this application and I have reached the conclusion that I should not use my discretionary power in favour of the petitioner in this instance because I am not convinced of the propriety of his motives.

The intervenient is a priest of long standing and high status. He was robed in the year 1884 and ordained in 1900. He is the Anunayake of the Sabaragamuwa District, and at a meeting held in Pelmadulla on the 14th of February 1934, he is said to have been elected unanimously by duly qualified voters to the office of Viharadhipati of Sripadasthana. It is this election that has brought him into sharp conflict with the petitioner.

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In re Application for writ of Mandamus

The Maha Nayake Thero questioned the validity of the intervenient's election and held in favour of a rival candidate Morontuduwe Dhammananda Thero. Regardless of this, the intervenient entered upon the office. The Maha Nayake Thero retaliated by summoning him to appear before him and the Karaka Maha Sangha Sabhawa, and on his failure to do so, expelled him from the priesthood.

It is not my purpose, and indeed it is hardly possible for me here, to enter into the merits of this matter. Suffice it to say that I am satisfied on the facts before me, that there is a substantial dispute between the intervenient on the one side and Morontuduwe Dhammananda Thero and the Maha Nayaka Thero on the other, for adjudication and determination by a proper tribunal in a regular action. In this state of things, were I to make the order for a writ of mandamus absolute, I feel I should be placing the intervenient in a position of great disadvantage, and even of great danger. The modification of the registers by the Registrar-General in obedience to the writ, will result by operation of section 41 (6)* in the register so modified being '*prima facie* evidence of the facts contained therein in all courts and for all purposes', and will render the intervenient guilty of an offence under section 24 of the Ordinance, and liable on summary conviction to a fine of fifty rupees.

Bearing this in mind, and on a careful consideration of the whole matter, I have come to the conclusion that by reason of the special circumstances of this case, I should exercise my discretion to refuse the application.

In regard to costs, I think the fairest order is that each party should bear his own costs.

Application refused.

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*41 (5) The Mahanayaka Thero of every nikaya shall from time to time make all such corrections, additions or alterations in his registers as may be necessary to keep up to date his registers of upasampada bhikkhus and samaneras of his nikaya and the relevant details regarding them; and whenever he makes any such modification in his registers he shall forthwith convey that fact to the Registrar-General who shall similarly modify the registers he is required to keep by this section.

41 (6) Such registers kept by the Registrar-General shall for the purposes of this Ordinance be *prima facie* evidence of the facts contained therein in all courts and for all purposes; and subject to the prescribed regulations, every such register may be searched and examined by any person claiming to be interested therein, and certified copies of or extracts from such registers may be obtained on payment of the prescribed fee.

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

THE COMMISSIONER OF INCOME TAX vs SAVERIMUTTU CHETTY.

S. C. No. 195.

In the matter of a Case stated by the Board of Review under the Provisions of the Income Tax Ordinance, 1932.

Argued on 30th April & 3rd May, 1937.
Decided on 14th May, 1937.

Income Tax—Ordinance No. 2 *of* 1932 *Sections* 65, 69 *and* 75—*Agreement with assessor re amount of assessable income—Does an appeal lie ?—Meaning of the words " additional amount " in Section* 65.

Held : (i) That, where an agreement as to the amount at which the appellant is liable to be assessed is reached between the assessor and assessee under Section 69 (2) of the Income Tax Ordinance, no appeal lies against the adjustment of the assessment made by the assessor in order to give effect to the agreement.

(ii) That an adjustment of the assessment made under Section 69 (2) is not a determination on appeal for the purposes of Section 75 of the Income Tax Ordinance.

(iii) That the words " determined on appeal " in Section 75 of the Income Tax Ordinance mean decided by an authority adjudicating in the matter.

(iv) That the words " additional amount " in Section 65 of the Income Tax Ordinance is wide enough to cover an amount previously reached by some miscalculation or by the subtraction of an allowance which ought not to have been made or which by the correction of the error is then augmented to a proper figure.

J. E. M. Obeyesekera, Crown Counsel, for Commissioner of Income Tax.

N. Nadarajah for Assessee-respondent.

ABRAHAMS, C. J.

This is a case stated by the Board of Review under Section 74 of the Income Tax Ordinance No. 2 of 1932. The facts, so far as they are material to the consideration of the point of law on which the case has been stated, are as follows : Mr. Saverimuttu Chetty, who may be called for convenience the assessee, was originally assessed for Income Tax for the year of assessment 1934-1935 on the basis that his assessable income was Rs. 9,413/– and his taxable income was Rs. 4,913/–. Upon his taxable income he was called upon to pay Rs. 245/65 as income tax. His taxable income was reached by deducting certain allowance amounting to Rs. 4,500/–. The assessee appealed against this assessment to the Commissioner of Income Tax under the provisions of Section 69 (1) of the Ordinance, which enables any person aggrieved by an assessment made under this Ordinance to appeal to the Commissioner within twenty one days from the date of the notice of such assessment. This must be done by what the Section calls a ' notice of objec-

tion.' The Commissioner acting under Section 69 (2) of the Ordinance, directed the Assessor to make further inquiry. By virtue of the provisions of this sub-section an agreement may be reached as to the amount at which the assessee is liable to be assessed, and this in fact happened, and, as a result the assessable income was assessed at Rs. 8,745/–, the taxable income at Rs. 2,496/– and the income tax payable was reduced to Rs. 124/80. This revision was effected by an allowance to the assessee of the sum of Rs. 1,749/– as earned income allowance under the provisions of Section 16 (1) (*b*) of the Ordinance.

On the 17th of March, 1936, the assessor made an additional assessment upon the assessee, in respect of the same year of assessment, assessing his assessable income at Rs. 8,866/– his taxable income at Rs. 4,366/– and the tax payable at Rs. 218/30. There was no dispute over the increase of the assessable income. The assessor contended that the allowance of Rs. 1,749/– which had been previously made to the assessee as "earned income" had been erroneously made. It is not our province to consider whether the error was in fact made or not, as we are limited in a reference under Section 74 of the Ordinance to points of law.

The assessee again appealed to the Commissioner of Income Tax against the additional assessment, on the ground that it was incorrect. The Commissioner dismissed the appeal and upheld the assessment. The assessee thereupon appealed to the Board of Review and contended before that authority that the additional assessment was invalid in law as the Assessor had no power to make the further assessment. He contended that the power given by Section 65, which I shall presently quote in detail, to make an additional assessment was subject to the provisions of Section 75, which I shall also quote in detail. The Board of Review upheld this contention, and at the request of the Commissioner stated a case for the decision of this Court.

Section 65, under which the Assessor purported to make the re-assessment (I avoid for the moment the expression of 'additional assessment' since its meaning is disputed by Counsel for the assessee) in March 1936, reads as follows —

> "65. Where it appears to an Assessor that for any year of assessment any "person chargeable with tax has not been assessed or has been assessed at less "than the proper amount, the Assessor may, within the year of assessment or "within three years after the expiration thereof, assess such person at the amount "or additional amount, at which, according to his judgment, such person ought to "have been assessed, and the provisions of this Ordinance as to notice of assess-"ment, appeal, and other proceedings shall apply to such assessment or addi-"tional assessment and to the tax charged thereunder ;
>
> "Provided that, where the non-assessment or under-assessment of any person "for any year of assessment is due to fraud or wilful evasion, such assessment "or additional assessment may be made at any time, within ten years after the "expiration of that year of assessment".

Section 75, which the Board of Review were of the opinion precluded the assessor from making this re-assessment, reads as follows :—

> " 75. Where no valid objection or appeal has been lodged within the time limited " by this chapter against an assessment as regards the amount of the assessable " income assessed thereby, or where the amount of the assessable income has " been agreed to under Section 69 (2), or where the amount, of such assessable " income has been determined on objection or appeal, the assessment as made " or agreed to or determined on appeal, as the case may be, shall be final and " conclusive for all purposes of this Ordinance as regards the amount of such " assessable income ;
>
> " Provided that nothing in this chapter shall prevent an Assessor from making " an assessment or additional assessment for any year of assessment which does " not involve re-opening any matter which has been determined on appeal for " the year."

Crown Counsel submits, first of all, that assuming this is an additional assessment (and he contends that it is, and indeed the Board of Review regarded it as such although Counsel for the assessee now disputes that it is) this is not a matter which had been determined on appeal in terms of the proviso to Section 75. He points out that in the body of the Section there is a reference, first of all, to an agreement as to the amount of the assessable income under Section 69 (2) and secondly, to the determination of the amount of such assessable income on objection or appeal, and therefore in view of the fact that there was an agreement reached between the assessee and the assessor in respect of the assessment of taxable income the matter was adjusted at the stage and certainly could not have been said to have been determined on appeal. There is not a shadow of doubt in my mind that that contention is right. Section 69 of the Ordinance contemplates the following procedure whereby an assessee who has been wrongly assessed in any respect can obtain a redress of his grievance. He can file an objection in writing to the assessment. This done, the Commissioner may direct an assessor to make further inquiry and the assessor and the assessee may between themselves settle the matter or, in the language of sub section (2) to Section 69, make the ' necessary adjustment ' as a result of their agreement. If no agreement is reached, the Commissioner hears the appeal and decides accordingly. There is, therefore, a contrast drawn in the body of Section 75 between an agreement as to the amount of the assessable income and determination of the assessable income on appeal.

Counsel for the assessee, however, argues that the words " determined on appeal " in the proviso, apply as much to the adjustment on agreement as they do to the decision of the Commissioner on appeal, because they are all parts of appeal proceedings under Section 69 and it is not possible to arrive at the agreement between the assessor and the assessee until appeal proceedings have been initiated. Apart from any ordinary grammatical interpretation of the words " determine on appeal " and in my opinion they obviously mean in their primary significance ' decided by an authority

adjudicating in the matter ', it would be an amazing thing if the legislature should intend to give one meaning to a phrase in the body of the section and another meaning to it in the proviso, so that the expression of the proviso included matters which were contrasted with it in the body of the Section.

Crown Counsel also submits that Section 75, on the face of it, refers to assessable income only, whereas the appeal in this case was lodged in respect of an assessment regarding taxable income. He says that if that is so, there is nothing to preclude the assessor from making an additional assessment under Section 65. Indubitably Section 75 refers to assessable income only, but it is possible that the proviso to the section extends beyond the mere exception to or qualification of the matters dealt with in the body of the Section, which is, of course, the primary function of the proviso, and may possibly refer also to other matters connected with assessment for instance matters in connection with the assessment of taxable income. So that I think this point had better be left intact in view of the successful result of Crown Counsel's preceding argument.

Mr. Nadarajah, for the assessee, raises a fresh point on the meaning of Section 65. He contends that a proper construction of the expression " additional amount " does not authorise the assessor in making this re-assessment. He submits that the words " additional amount " apply to an item of income which at the previous assessment escaped assessment by reason of omission from the assessee's return or because it had been overlooked by the assessor. I see no reason for interpreting the expression that way. It seems to me to be sufficiently wide in its ordinary meaning to cover an amount previously reached by some miscalculation or by the subtraction of an allowance which ought not to have been made and which by the correction of the error is then augmented to a proper figure. The use of the expression " under assessment " in the proviso to the section makes that construction perfectly clear. Incidentally there was no reference to us on this point by the Board of Review since that point was not put to the Board where they were called upon to adjudicate in appeal, but we are not, of course, precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision.

In my opinion on the point of law referred to us, the finding of the Board of Review was wrong and the matter should now go back for a decision upon the facts. I do not think this is a case where any order should be made as to costs.

MAARTENSZ, J.

I agree.

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

KOTALAWALA vs PERERA AND OTHERS.

S. C. No. 125—*D. C. Colombo No.* 5277.
Argued on 6th & 7th May, 1937.
Decided on 18th May, 1937.

Landlord's lien—Sale of tenant's property under decree of Court—Can the Court by mandate under Section 653 of the Civil Procedure Code prevent the sale of the property under the decree in order to protect the landlord's interests ?

The owner of certain premises filed action against the tenant for rent. At the same time a petition was filed by the owner asking the Court

(*a*) To issue a mandate to the Fiscal Western Province to sequester the goods of the tenant in the premises let to him, and to prevent their removal.

(*b*) To declare the petitioner entitled to exercise her right of lien over the said goods.

At the time these proceedings were taken the tenant's goods had been advertised for sale under a decree of Court.

The Court allowed the owner's application without any notice to the persons who were likely to be affected by his order. When the judgment creditor under whose decree the tenant's goods had been seized became aware of the order he moved the Court to set aside the order of sequestration made at the instance of the owner of the premises. This application was refused, and the judgment creditor appealed from this order.

Held : (i) That the Court had no power to stay the sale and sequester the goods as it had done.

(ii) That the case was not one in which a mandate under Section 653 of the Civil Procedure Code could properly issue.

H. V. Perera with *Chelvanayagam* for petitioner-appellant.
N. E. Weerasooriya for plaintiff-respondent.

MAARTENSZ, J.

This was an action for the recovery of rent due from the defendants to the plaintiff. The plaintiff with her plaint filed a petition and affidavit in which she averred that she as "landlord" has a lien over all the goods in the premises occupied by the defendants, that in execution of a decree entered in action 5084 of the District Court of Colombo against the same defendants the goods in the premises bearing assessment No. 215 Messenger Street, Colombo, have been advertised for sale, that a sale under the said decree and the removal of the goods by the purchaser will result in the petitioner's lien being lost.

The petitioner accordingly prayed the Court (1) to issue a mandate to the Fiscal, Western Province, to sequester the goods in the said premises and to prevent their removal (2) to declare the petitioner entitled to exercise her right of lien over the said goods.

The District Judge without notice to the judgment creditor in case 5084 and apparently without notice to the defendants allowed the application and issued a mandate in terms of the prayer of the petition to the Fiscal, who sequestered the goods.

The appellant who is the decree holder in case No. 5084 filed a petition on the 5th of June in which he prayed the court to release the goods from seizure.

The District Judge by his order dated the 17th of June not only disallowed the application of the appellant but went on to hold that the plaintiff as landlord had a right of lien preferent to the claims of the mortgage creditor, and directed that the sale under the mortgage decree should be subject to the preferent rights of the landlord and that the Commissioner appointed in case No. 5084 should bring the proceeds of sale into court to the credit of this action.

The District Judge referred to the case of *Perera vs Silva* (1935) 37 N.L.R. 157*, where it was held that a landlord's lien over movable property in the possession of his tenant may be enforced only through judicial process, and the Roman Dutch Law under which a landlord can obtain an attachment order, and held that he was entitled under section 839 of the Civil Procedure Code to invent a procedure in order that justice may be done.

This is a startling proposition with which with due deference I am unable to agree.

Justice must be done according to law. If hardship results from the law in force the remedy must be effected by legislation. There would be chaos if a Judge was entitled to create a procedure to meet the exigencies of every case in which he considers the law would work injustice.

The Section of the Civil Procedure Code under which a mandate to sequester property before judgment may issue is section 653. It provides that a mandate of sequestration may be issued if the plaintiff avers and satisfy the Judge that the defendant is fraudulently alienating his property with intent to avoid payment of the plaintiff's claim or with such intent is about to leave the Island leaving property belonging to him therein.

The plaintiff to this action has neither averred nor proved any of the facts required by this section. I am therefore of opinion that the District Judge had no jurisdiction to order a mandate to issue on the application of the plaintiff. The respondent contended however that the order could not be set aside at the instance of the appellant as he had no right to intervene in this action.

In support of this contention we were referred to the case of *Perera vs Lowe* (1930) 2 Ceylon Law Recorder 191.

That was an action on a promissory note. The petitioner sought to intervene on the ground that it was a collusive action to get execution levied against the defendant's property to which the intervenient had a claim.

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* 4 C. L. W. p. 33 (Edd.)

It was held that the intervenient had nothing to do with the questions involved in the action and that he could not intervene because he feared that some loss will be sustained by him in consequence of a judgment in which he had no personal interest.

This decision in my judgment has no application. Here the order made will cause loss to the intervenient for the order not only affected the defendants to the action but the appellant as well. The District Judge should before making the order have given the appellant notice of the application to sequester property which was already in the hands of the Commissioner for the purpose of being sold under the decree in case No. 4084. The appellant therefore had the right to intervene in this action for the purpose of conserving his rights.

It is not necessary and I do not in this appeal adjudicate on the respective rights of the parties to the proceeds realised by the sale of the goods. Subject to this observation I allow the appeal with costs and direct an order to be entered as prayed for in the prayer of the petition of appeal.

ABRAHAMS, C. J.

I agree.

Present : SOERTSZ, J.

PERERA (Police Sergeant) vs FERNANDO.

S. C. No. 95—*P. C. Negombo No.* 16402.

Argued on 3rd May, 1937.

Decided on 14th May, 1937.

Motor Car Ordinance No. 20 *of* 1927—*Obstruction by car when halted —Section* 52 (1).

This is an appeal from a conviction under Section 52 (1) of the Motor Car Ordinance No. 20 of 1927 for causing obstruction to traffic.

The appellant halted his car on the left edge of the road and went into his employer's shop, by the side of which the car had been halted, to fetch some parcels. A police sergeant finding the car halted went up to it and sounded its horn. Hearing the sound of his horn the accused came out of the shop. The sergeant thereupon took down his name and address and later instituted the present prosecution. There was no evidence that anyone was obstructed by the appellant's car but the sergeant stated in evidence that it was "likely to obstruct" because the road is a busy one and narrow at the point at which the car had been halted.

Held : (i) That a person is entitled to halt his car on a road in any one of the following positions without being guilty of the offence of obstruction under Section 52 (1) of the Motor Car Ordinance No. 20 of 1927.

(*a*) As close to the side of the road as possible.

(*b*) In such position as may be indicated by a police-officer regulating traffic.

(*c*) In such position as indicated by a properly exhibited notice.

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(ii) That it is no offence under Section 52 (1) of the Motor Car Ordinance to halt a car close to the left edge of a road, and that it makes no difference that the road is a busy one and narrow at the point at which the car is halted.

J. R. Jayawardena for accused-appellant.
Janze, C. C. for complainant-respondent.

SOERTSZ, J.

This appeal is concerned purely with a question of interpretation, and relates to Section 52 (1) of the Motor Cars Ordinance No. 20 of 1927. There is no controversy in regard to the relevant facts. It is admitted that the car was placed " on the left edge of the road " and that the accused who was the driver of the car had gone into his employer's shop by the side of which the car had been halted, to fetch some parcels.

The position taken up by the prosecuting sergeant is that on finding the car halted by " the edge of the road " he sounded the horn ; the accused then came out of the boutique. The sergeant took down his name and address and charged him with obstruction because the road is a busy one and is narrow at this point.

The sergeant adds, " I cannot say that anyone was actually obstructed by the accused's car, but it was likely to obstruct." The sergeant did not indicate to the accused that he should place the car in any particular position, nor was there any notice exhibited requiring him to do so.

Now Section 52 (1) is in these terms : " A motor car when not in motion shall be placed as close to the side of the road as possible, or in such position as may be indicated by any police officer or headman or by notice exhibited by the licensing authority and shall not be placed or allowed to remain in *such a position* as to obstruct or to be likely to obstruct traffic." My interpretation of this is that when a car is not in motion it must be placed in one of three ways either (*a*) as close to the side of the road as possible *or* (*b*) in such position as may be indicated by an officer *or* (*c*) in such position as indicated by a properly exhibited notice and that if a driver acts in any one of these ways he is within the law, unless in placing the car by the edge of the road or in position indicated, he places it *in such a position* as to obstruct or to be likely to obstruct traffic ; for instance, if he places his car so that it is the rear part of the car that is placed as close to the road as possible while the whole car presents itself, say in a right angular position, to the road, and thereby causes or is likely to cause obstruction to traffic. I am unable to accept the submission made by the Crown Counsel that the section is wide enough to render liable a person who places his car as close to the side of the road as possible and parallel to it but none the less obstruction is likely to be caused in consequence of the road being a narrow one. My reading of the section is that a person is exempt from the operation of the section if he places his car in any of the ways indicated and becomes liable only if in so placing it he takes up a position that obstructs or is likely

to obstruct. The other reading must inevitably lead to the result that on some roads, namely, those which an officer considers narrow and busy no cars can be placed alongside of them at all. If that was the intention of the legislature, it was easy to find words to express it clearly.

In my opinion the conviction of the accused is wrong. I set aside and acquit him.

Conviction set aside.

Present : SOERTSZ, J.

BABY NONA *alias* MARGARET COORAY vs JOHANA PERERA.

Application in Revision in P. C. Colombo No. 47690.
Argued on 7th May, 1937.
Decided on 14th May, 1937.

Criminal Procedure Code Sections 122 (3) *and* 429—*Evidence Ordinance Sections* 25 *and* 145 (1)—*Examination of Police Headman by Magistrate ex mero motu after the close of the case—Statement made by accused to Headman elicited by Magistrate—Statement not the same as that made by accused to Court in defence—Can it be proved by the evidence of a Police Officer that the position taken up by an accused person in defence in the Court was not disclosed to him at his investigation ?*

The accused, in this case, was charged with causing hurt to the complainant. Her defence was that the complainant was injured when she snatched away from her a bucket which she was holding at the time, and she gave evidence on her own behalf to this effect.

The Magistrate at the close of the case for the defence recalled the Police Headman to whom the accused admitted she had made a statement and elicted from him the statements he had made. The Headman said the accused had told him that "Johana struck her a blow on the right hand. She then raised the bucket. Johana snatched the bucket. Several people saw this."

The Magistrate treated this statement to the Headman as admissible evidence and regarded the statement as negativing the accused's evidence.

Held : (i) That the statement made to the Police Headman was inadmissible in evidence by reason of Section 25 of the Evidence Ordinance.

(ii) That a Magistrate's powers under Section 429 of the Criminal Procedure Code cannot be made use of to elicit from any witness evidence that is inadmissible.

(iii) That it is contrary to Section 25 of the Evidence Ordinance to admit the evidence of a Police Officer (*a*) that the accused did not in the statement made to him set up the defence he set up before the Court or (*b*) that the accused made to him a statement not consistent with the position taken up in his defence in Court.

(iv) That the word 'witness' in Section 122 (3) of the Criminal Procedure Code must be strictly construed as meaning a witness pure and simple and does not include an accused person who testifies on his own behalf.

No appearance in support.

SOERTSZ, J.

There was no appearance for the petitioner in this case. I have examined it myself. I accept without demur the Magistrate's statement in his judgment that his motive in recalling the Headman was not to supply a gap in the case for the prosecution, ' but to test the veracity of the accused's evidence by her previous statement to the headman.

There can be no doubt that the Magistrate has the right given him by Section 429 of the Cr. P. C. at any stage of an inquiry or trial ' to summon

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a witness or to examine a person in attendance or to recall and re-examine any person already examined if that course appears essential to the just decision of the case.' But that right is subordinate to the right of an accused to have his case tried and decided on admissible evidence. That is a paramount principle in criminal cases. Now, it is a rule that any statement of an accused that is a confession or amounts to one, made to a Police Officer is not admissible against him. In the case in hand, the accused woman's defence when she came into the witness box was that the complainant was injured when she snatched away from her a bucket which she was holding at the time. The Magistrate, at the close of the case for the defence, recalled the Police Headman to whom the accused admitted she had made a statement, and elicited from him the statement she had made. The headman said that the accused had told him that " Johana struck her a blow on the right hand. She then raised the bucket. Johana snatched the bucket. Several people saw this ".....

The learned Magistrate took the view that this statement negatived the accused's evidence. I am not at all certain that that is a correct view of the matter. It appears to me that when she told the headman ' Johana snatched the bucket ' she meant to imply that Johana received her injury when she snatched the bucket. But even if I accept the Magistrate's interpretation of this as contradictory of the accused's defence, I am still confronted with the difficulty that this was inadmissible evidence. The very question involved here, came up for decision by a Divisional Bench consisting of Lascelles, C. J., Pereira, J., and Ennis, J., in *King vs Kalu Banda*, 15 Vol. New Law Reports, page 422. In that case the accused's defence to a charge of grievous hurt was that he was acting in self-defence. The prosecution, therefore, led the evidence of a Police Officer to show that the accused had made a statement to him but had not stated that the injured man had attacked or threatened to attack him. Lascelles, C. J., in the course of his judgment observed, " but if Police Officers are allowed to go into the box and say ' the accused soon after the crime, made a statement to me but in that statement he said not one word of the defence he set up before the Magistrate,' the object of the legislature will be to some extent frustrated .....for so far as the probative effect of the evidence is concerned, there is little difference between a Police Officer giving the particulars of a statement which is inconsistent with the defence and his stating in general terms that the accused in his statement to him, did not mention the defence which he afterwards set up." Ennis, J., added that " to allow evidence by a Police Officer of the substance of a statement made to him by the accused from which incriminating circumstances may be inferred would, I consider, be contrary to the intention of Section 25." I have in this case considered the bearing of Section 122 (3) of the Cr. P. C. on this question, and I have come to the conclusion that the word ' witness ' in that section must be strictly construed as meaning witness pure and simple and does not include an accused person who testifies on his behalf. If that were not so Section 122 of the Cr. P. C. will have the effect of taking away a benefit or exemption given to an accused by Section 25 of the Evidence Ordinance. Moreover, in this instance, even if the effect of Section 122 (3) of the Cr. P. C. is to take away from the effect of Section 25 of the Evidence Act (and I do not concede that it does), there is another difficulty, namely, that Section 145 (1) of the Evidence Act has not been complied with.

It is obvious that the Magistrate was influenced in reaching his decision in this case by the evidence given by the Police Headman when he was recalled. I, therefore, set aside the conviction and acquit the accused.

Application allowed and accused acquitted.

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

SUMANATISSA vs GOONERATANE.

S. C. No. 158—*D. C. Matara No.* 8777.
Argued on 31st May, 1937.
Decided on 7th June, 1937.

Buddhist Ecclesiastical Law—Succession to the incumbency of a temple—In what circumstances can succession to an incumbency be determined by a rule other than that of Sisiyanu Sisiya Paramparawa—Limitation of action—Within what time does a claim for an incumbency become statute-barred?

Held : (i) That where a claim to the incumbency of a vihare dedicated to the Sangha is made on the footing of the existence of a rule of succession other than the rule known as *Sisiyanu Sisiya Paramparawa* it must be proved by evidence that such rule is contained in the instrument of dedication.

(ii) That a claim to an incumbency unless made within three years would be barred by the provisions of the Prescription Ordinance No. 22 of 1871.

H. V. Perera, K. C., with *N. E. Weerasuriya* for plaintiff-appellant.
Hayley, K. C., with *L. A. Rajapakse* for defendant-respondent.

FERNANDO, A. P. J.

The plaintiff-appellant filed this action for a declaration that he is the incumbent of the temple in question, named the Welihinda Temple, and he claimed to be so entitled through his tutor-priest, Sudassi who died in 1928. Sudassi had two pupils, Meerupe Gunananda, and the plaintiff. During his lifetime, Sudassi appointed Gunananda to be his successor by the document P2 of 1928. In 1930 Gunananda by document P3 appointed the plaintiff as incumbent in his place. Plaintiff, however, claims the incumbency not on the strength of the document P3, but as a pupil of Sudassi, and as entitled by the rule of succession known as *Sisiyanu Sisiya Paramparawa.*

The case for the defendant as placed before the District Court was that the succession to the incumbency of the temple was not governed by the rule of *Sisiyanu Sisiya Paramparawa*, but by a special set of rules agreed upon in 1872 and referred to as a *Katikawa.*

The learned District Judge held that according to the rule laid down in the *Katikawa* the incumbency should have gone after Sudassi's death to the defendant who was the senior resident pupil of Attanikata Sumangala, and that the rule of *Sisiyanu Sisiya Paramparawa* did not apply because of this special rule that appeared to have prevailed in this temple for over 50 years. He accordingly dismissed the plaintiff's action and declared that the defendant was the lawful incumbent.

The plaintiff appeals against this order, and it was argued for him that the general rule must apply. Counsel referred to the judgment of this Court in *Unnanse vs Unnanse*, 22 N.L.R. 323, where de Sampayo J. stated that, " there were only two rules of succession known to the Buddhist law, namely : *Sisiyanu Sisiya Paramparawa* or pupillary succession and *Siwuru Paramparawa* which is also a form of pupillary succession, but with the special characteristic that the pupil is a blood relation of the original priestly incumbent, and that in the absence of any evidence to the contrary, the presumption is that the incumbency is subject to the *Sisiyanu Sisiya* rule of succession." Reference was also made to the case of *Gooneratne vs Dharmananda*, 22 N.L.R. 276, where it was held that according to the *Sisiyanu Sisiya* rule, there was no failure in the succession so long as there remain direct pupillary successors to any previous incumbent.

Counsel for the respondent argued that it was open to a party claiming an incumbency to prove the existence of a rule of succession other than the *Sisiyanu Sisiya* or the *Siwuru Paramparawa*. He referred to the judgment of the full court in *Ratnapala Unnanse vs Kevitigala Unnanse* 2 S.C.C. 26 where Phear, C. J. laid down certain principles which he had gathered from the earlier cases. Those principles are as follows :—1. The general rule of succession has two branches, namely, *Sisiyanu Sisiya Paramparawa* and *Siwuru Paramparawa*, and it is the first branch of the rule which is to be presumed *in the absence of evidence that it is the other*. 2. There are exceptional cases in which the succession to the temple property is in the appointment of Government or of private individuals. 3. It is the terms of the original dedication that primarily imposed the rule of succession. 4. In the absence of direct evidence of these terms (of dedication) usage may be looked to and accepted as evidence *thereof*. If I may venture to formulate the position as governed by these principles as applying to the present case, the law is that the rule of succession is governed by the terms of the original dedication, or by one of the two rules of succession, and if the terms of the original dedication cannot be proved by direct evidence, the court may accept evidence of usage as proving the terms of the original dedication. If the terms of the original dedication cannot be proved either by direct evidence or by the evidence of usage then it must be presumed that the *Sisiyanu Sisiya Paramparawa* rule of succession applies unless it can be established that the succession is governed by the *Siwuru Paramparawa*.

Now the contention for the defendant is that the *Sisiyanu Sisiya Paramparawa* rule did not apply and that the rule of succession was governed by the *Katikawa* or the set of rules adopted in 1872, and there was no suggestion that those rules had any reference to, or derivation from, the terms of the original dedication. D3 purports to be a copy of this *Katikawa*, and an examination of it shows that there were 10 rules concerning the duties to be performed by the person accepting the chief incumbency. Rule 7 of these rules provides that in the event of the chief incumbent being unable

to perform his duties the next senior resident priest shall act on his behalf and perform the duties of the former. Rule 10 provides that if the chief incumbent does not do his duty and if information of his failure to act carefully is given to the *Sangha Sabawa*, the priests and laymen shall meet in the temple and investigate the complaint, and if the complaint is found true the chief incumbent may be removed and the next senior priest of the temple appointed chief incumbent, and the document ends by a statement of the signatory that he was asked to form a code of rules for the use of younger priests, that he had delayed in the compilation of those rules, and that the code of regulation contained in D3 is framed at the request of the younger priests. There was some question in the court below as to whether the document was admissible, inasmuch as there is nothing to show that it is a true and correct copy of the original and the original itself has not been produced. In these circumstances, I think, the document was inadmissible, but I propose to deal with the case on the footing that the document was properly before the court. If the document was properly before the court, the question arises as to whether it contains any evidence of the terms of the original dedication and it is obvious that the document does not contain any reference to the original dedication, and according to the principles laid down by the full court in *Ratnapala Unnanse vs Kevitigala Unnanse*, that document is of no assistance in determining the rule of succession that applies to this Vihare.

Counsel for the respondent also referred to the case of *Sangharatne vs Weerasekera*, 6 N.L.R. 313, where Layard, C. J. after stating that " the simple question to determine is whether any definite rule of succession other than the Sisya Paramparawa had been established in respect to the succession of the Vihare in question in that case, held that there was absolutely no evidence to establish the terms of the original dedication that primarily imposed the rule which is to govern the case. Having come to this conclusion, Layard C. J. proceeds, " of course in the absence of such direct evidence, we are at liberty to see if any usage has been established, and if such usage has been clearly proved, *it may be accepted as evidence of the terms of the original dedication.*" I do not think this judgment helps the respondent either. Layard C. J. thought that evidence of usage may be accepted but it was only to be used as evidence of the terms of the original dedication. In other words, if it had been proved in that case that a particular rule of succession had prevailed continuously in that particular temple, then he might have presumed that that rule which had applied continuously, was the rule laid down in the terms of the original dedication. In the case before me, however, the evidence is to the effect that in 1872 at a meeting held at the temple some new rule of succession was adopted, and that that new rule must govern the succession from that date, and as I have already said, there is no authority that lends support to this argument.

Counsel for the appellant also contended that the defendant in this action was barred from maintaining the action by Ordinance 22 of 1871,

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It has been held by this court that a claim to an incumbency is barred after the expiration of a period of three years. He further argued that if the defendant was entitled to the incumbency by the rule of *Sisiyanu Sisiya Paramparawa* then he was entitled to put forward that claim on the death of Attanikata Sumangala. Now it is clear from the evidence that Sudassi was incumbent of this temple for 35 years and Sudassi died in 1928, so that previous incumbent of this temple died about the year 1893. Assuming then that the defendant was entitled to succeed to his tutor Sumangala a cause of action accrued to him when Sudassi took possession of the Vihare in 1893. It is true that the right to an incumbency is not one that a person can acquire by prescriptive possession, but the claim of the defendant to succeed to his tutor Sumangala is now barred by the provisions of the Prescription Ordinance.

The appeal must, therefore, be allowed and decree will be entered in favour of the plaintiff with costs in this court and in the Court below.

MOSELEY, J.

I agree.

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

SALEE AND OTHERS vs NATCHIA AND OTHERS.

S. C. No. 175—*D. C. F. Kalutara No.* 14337.

Argued on 23rd October, 1936.

Decided on 9th November, 1936.

Partition—Transfer of interests pending final decree—Interests transferred described as " the shares to be awarded by the decision arranged in partition case 5303 *now pending "—Is such transfer obnoxious to section* 17 *of the Partition Ordinance No.* 10 *of* 1863 *?*

A transferred, by deed, his interests in a land in respect of which a partition action was pending, before final decree. The material clause of the deed was as follows :—

> " We.....do hereby sell and transfer all that right and title described in the schedule belonging to us, or the shares of the said property to be awarded by the decision arranged in partition case 5303 now pending or the shares of the amount that will be realised by the sale of the said property."

Held : That the transfer was valid and that it was not obnoxious to Section 17 of the Partition Ordinance No. 10 of 1863.

Weerasooriya with *T. S. Fernando* for 11th to 11D defendant-appellants.

Haniffa for 3rd and 13th defendant-respondents.

FERNANDO, A. P. J.

This is a partition action and the main question that arises on this appeal is whether the deed of transfer 11D 11 was inoperative in view of Section 17 of Ordinance 10 of 1863. It is common ground that D. C. 5303 was a partition action for a land of which the lot now in dispute formed a portion, and that the plaint in that action was filed on the 21st May, 1913, and final decree was entered on 2nd November, 1914. Deed 11D 11 is dated 4th June, 1914, and was therefore clearly executed before the final decree.

The learned District Judge states that deed 11D11 deals with undivided interest and for this reason he appears to have come to the conclusion that that deed was inoperative. The deed, however, is in these terms : " We.....do hereby sell and transfer all that right and title described in the schedule belonging to us, or the shares of the said property to be awarded by the decision arranged in partition case 5303 now pending or the shares of the amount that will be realised by the sale of the said property." Now the question whether a deed of this kind is valid in view of Section 17 and if valid what effect such deed has, have been considered in a series of judgments of this court. In *Abdul Ally vs Kelaart*, 1 Balasingham 40, Wendt J. held that a deed by which the vendor purported to sell and convey his undivided share of a property which was the subject of a partition action, where the deed further provided that if in the partition action the property shall be sold in its entirety and converted into money the vendor shall be entitled to take and receive to his own use so much of the proceeds realised by such sale as shall represent his undivided share sold was not obnoxious to Section 17 because at that date the vendor had not an undivided interest in the land, but an interest which had been transmuted by the decree into a right to receive a share of the proceeds of sale. Sampayo J. in the same case thought that the deed apart from its effect as a conveyance of the share also contained an assignment of the equivalent share of the proceeds of sale, and that the deed looked at in this way did not contravene the letter or the intention of Section 17. In the same year, 1904, the Supreme Court in *Louis Appuhamy vs Punchi Baba*, 10 N.L.R. 196, held that Section 17 was not intended to affect, or hinder, or prevent persons from alienating the right to which they might become entitled after a partition had been decreed. " Such a sale," said Layard C. J., " executed during the pendency of a partition suit in respect of a share or interest to which a person might become entitled after the partition suit has terminated, appears to me not affected by Section 17 ". In *Subaseris vs Porolis*, Wood Renton C. J., after referring to these two cases, observed that Section 17 " imposed a fetter on the free alienation of property and the courts ought to see that that fetter is not made more comprehensive than the language and the intention of the section required. The section itself prohibits only, in terms, the alienation of undivided shares or interests in property which is the subject

of partition proceedings while these proceedings are still pending, and the clear object of the enactment was to prevent trial of partition actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began. Such a transfer as we have to deal with in the present case, (by which a party had assigned to the plaintiff all the advantages or disadvantages such as costs and also the share which he would be entitled to either in common or partition by virtue of the decree in the partition action) is not touched either by the language or by the spirit of Section 17." In *Appuhamy vs Babun Appu*, however, 25 N.L.R. 370 Ennis A. C. J. appears to have taken a rather different view. He referred to the case of *Subaseris vs Porolis* 16 N.L.R. 394, and said that in that case " An attempt was made to grant some sort of equitable relief to a person who had purchased from a co-owner, during the pendency of a partition action, the share to which he would be entitled on partition. The decision in that case was influenced by the consideration that a party to a partition action should be able to deal by anticipation with whatever divided interests he may ultimately obtain. With that consideration I am in entire accord. It is possible that a co-owner in land subject to a partition suit may sell his interests in the land and agree to convey whatever he may receive under the final decree. It is possible that such an agreement would not be obnoxious to Section 17 of the Partition Ordinance. But it remains merely an agreement to convey, and would not operate as a conveyance or alienation." It was, therefore, held that the transfer in that case was void and Garvin J. agreed. No reference appears to have been made in that case to the earlier judgments in *Abdul Ally vs Kelaart* or *Louis Appuhamy vs Punchibaba* although those two cases were referred to in the judgment of Wood Renton A. C. J. in *Subaseris vs Porolis*. In *Khan Bhai vs Perera* 26 N.L.R. 204 a bench of five Judges of the Supreme Court considered the question of the period during which the prohibition contained in Section 17 would continue, and held that the prohibition contained until the issue of the certificate of sale under Section 8 of the Ordinance. Bertram C. J., however, held in his judgment that " Persons deciding to change or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interests to be ultimately allotted to them in the action," and it is clear that he himself was of the opinion that by acting in this manner a person could effectively charge or dispose of the interest to be ultimately to be allotted to him, and that a deed by which he purported to deal with the property in this way would not be necessarily regarded as a mere agreement to dispose of his interest.

The question as to the effect of Section 17 expressly came up before a bench of three Judges in *Hewawasan vs Gunasekera* 28 N.L.R. 33, and Garvin J. who had taken part in the judgment in *Appuhamy vs Babun Appu* held that a deed of transfer by a party to a partition action transferring certain lots which according to the survey would probably be allotted to the party, should be given effect to as between the two parties and was

not obnoxious to Section 17. He further states, " this is a sale by one and a purchase by the other of certain lots of land which had no existence as separate holdings, but which the parties believed would as a result of the final decree be allotted in severalty to the respondent, possession was to commence on the entering of the final decree, the respondent binding himself to do nothing to deprive the appellant of the benefit of the same and to execute all such further deeds as may be necessary to assure to the appellant a good title to the premises. Now, what is this transaction but a dealing by anticipation with the share which it was thought would be allotted to the respondent by the final decree ? What the respondent intended to sell and the appellant to buy was the share to be allotted to the respondent by the final decree.....It is said that the transaction embodied in these deeds is obnoxious to Section 17 of the Partition Ordinance. For the reasons already set out this transaction is not in my opinion such an alienation as is prohibited by that section." He then proceeded to consider the observations of Ennis A. C. J. in *Appuhamy vs Babun Appu* and he states that the deed in favour of the vendee Simon in that case was not before him " and it is impossible to say whether or not the language of the deed justified the observations made by Ennis A. C. J." He then went on to state that in the case before him there was no dispute as to title and that the action was only to compel the respondent to fulfil a part of the agreement by executing a transfer of the title declared by the final decree, the respondent having bound himself to execute all such further deeds as may be necessary, and he therefore held that there was nothing in the Partition Ordinance which would disentitle the appellant to the relief claimed by him. As far as I can follow this judgment, it seems to me that Garvin J. thought that the deed in *Appuhamy vs Babun Appu* probably was in effect an agreement to sell, and that that was the reason for the decision in that case, whereas in *Hewawasan vs Goonasekera* the deed was in effect an alienation and was held not to be found obnoxious to section 17. The plaintiff, however, in *Hewawasan vs Goonasekera* was only asking for a further transfer by his vendor and in the circumstances of the case the vendor having bound himself to give such a further conveyance it was not necessary to consider whether in fact such a conveyance was absolutely necessary and whether the title of the vendor to the portion allotted to him in the final decree had not already vested in the purchaser. Dalton J. concurred in the judgment of Garvin J. but Jayawardene A. J. who dissented from it, thought that the alienation sought to be effected by the deed in question offended against Section 17 and was therefore void. He then proceeds to consider the question whether the title subsequently acquired by the vendor under the final decree inured to the benefit of the purchaser, and came to the conclusion that that benefit could not inure to him because the deed was void under Section 17 and could not therefore become effective. He also proceeded to hold that it was not possible to construe the deed as an agreement to convey because a deed that is void under Section 17 is void

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to all intents and purposes, but he appears to have adopted the reasoning of Bertram C. J. in *Khan Bhai vs Perera* and he quotes in full the passage which I have already quoted with regard to the only manner in which persons desiring to dispose of their interests in a property subject to a partition suit can do so.

The question appears to have come up again in September 1926 in the case of *Fernando vs Atukorale* 28 N.L.R. 292 a few months after the case of *Hewawasan vs Goonasekera*. In that case Lyall Grant J. thought that the deed which was in the ordinary form a conveyance could not operate as a conveyance because the property dealt with did not at the time of the execution of the deed belong to the vendor. " If the deed is to have any effect, it must operate not as a conveyance but as an agreement to convey." Maartensz J., after referring to the earlier cases, observed that the statement of Sir Anton Bertram C. J. with regard to persons desiring to charge or dispose of their interests during the pendency of a partition suit was *obiter* to the question before the court in the case of *Khan Bhai vs Perera*. With regard to the deed in question, in *Fernando vs Atukorala*, Maartensz J. said that whether that deed " is looked upon as an out and out sale as in the case of *Subaseris vs Porolis* or as an agreement to sell which is the view taken by Ennis J. in *Appuhamy vs Babun Appu*, it is possible that it invests the transferee with rights which the transferor may not be entitled to deny, but other considerations arise where the contest is between a third party and the transferee." He then proceeded to discuss the effect of Section 9 of the Partition Ordinance, and came to the conclusion that the sale in question was extinguished by the partition decree." In the case where a vendor acquires a title other than under a partition decree he acquires a title good against the world, but the person to whom he has sold the property. In the case of title acquired under a partition decree the title is good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property, and he referred to the case of *Bernard vs Fernando* 16 N.L.R. 438. The case of *Hewawasan vs Goonasekera* does not appear to have been cited at all or considered by the Judges in the case of *Fernando vs Atukorala*.

The last case to which we have been referred is the case of *Rajapakse vs Dassanayake* 29 N.L.R. 509 and in that case Dalton J. and Jayawardena A. J. held that a deed pending a partition action conveying " all that undivided part of the land being all the interest which the vendors were declared entitled to in the preliminary decree, or whatever lot or interests the vendors will be allowed in the final decree " was not obnoxious to the provisions of Section 17 and Dalton J. in that case followed the case of *Hewawasan vs Goonasekera* which was binding on him as it is binding on us in this case. The deed in question in this case is clearly a transfer and not an agreement to sell, and I see no reason why I should not follow the decisions in which effect has been given to documents of this kind. The deed 11D 11 was by the 13th and 14th defendants in this action in favour of Thomas Fernando

and, as the learned Judge himself states in his judgment, the two vendors and the vendee were all parties to the partition action. I would, therefore, hold that deed 11D 11 is not obnoxious to Section 17 of the Partition Ordinance, and that the learned District Judge was wrong in holding to the contrary.

In view of his findings as to the effect of deed, the District Judge held that it was for the 11th defendant and her children to establish their title by prescription, but in view of the conclusion to which I have arrived as to the effect of that deed the burden of proving title by prescription would not be on these parties. On the evidence, however, I think the learned District Judge was wrong in coming to the conclusion that the 4th defendant had not acquired a title by prescription. The land is only 24 perches in extent, and Ahamadu Lebbe the 4th defendant put up buildings and recovered all the rents. The only other person who occupied that portion of the land was Samsi who according to the evidence paid rent to Ahmadu Lebbe. The 14th defendant appears to have been ejected from one of the boutiques of the land, and she appears to have been in possession under Cariem. Neither the 14th nor the 15th defendants have had any possession since 1927.

I would accordingly hold that all the interests of Samsi Lebbe under the final decree in 5303 have passed to the 11th defendant and defendants 11A to 11D, and that similarly the rights of the 13th and 14th defendants have passed to defendants 11A & 11B. The Interlocutory Decree will be amended accordingly, and the 3rd and 13th defendants will pay to defendants 11 to 11D their costs of this contest and of this appeal.

MOSELEY, J.

I agree.

Present : SOERTSZ, J.

RASAK vs CASSIM

S. C. No. 126—*P. C. Batticaloa No.* 44904

Argued on 20th May, 1937.

Decided on 27th May, 1937.

Appeal—Criminal Procedure Code Sections 325 (1) *and* 338—*Is an order made under Section* 325 (1) *an appealable order ?*

Held: That an order made under Section 325 (1) of the Criminal Procedure Code is not an order from which an appeal under Section 338 lies.

L. A. Rajapakse for accused-appellant.

C. T. Olegasegaram for complainant-respondent.

SOERTSZ, J.

Mr. Olegasegaram has taken the preliminary objection that there is no appeal from the order made in this case. The order was that the accused who was found guilty under Section 433 of the Penal Code is not convicted but is charged conditionally on his "entering into a recognizance in one hundred rupees with one surety to be of good behaviour and to appear for conviction during a period of one year." This order was made under Section 325 (1) of the Criminal Procedure Code. But for certain local decisions I should have reached without much difficulty the conclusion that there is no right of appeal from such an order. Section 338 (1) of the Criminal Procedure Code says " any person who shall be dissatisfied with any judgment or *final order* pronounced by any Police Court.....in a criminal case or matter to which he is a party may prefer an appeal to the Supreme Court against such judgment for any error in law or fact " subject to the

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Soertsz, J.

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provisions of Sections 335, 336 and 337. On the face of it the order discharging an offender conditionally on his entering into a recognizance to appear for sentence when called upon during a certain period, is not a final order. Such an order is not an unqualified discharge. It merely declares that in the opinion of the Court the charge against the accused has been proved, but without entering a conviction and awarding punishment, the court postpones those matters. In the event of the conditions imposed by the recognizance being observed by the accused for the period stated, his discharge becomes absolute and, I suppose, he is entitled thereafter to plead it as '*Autrefois acquit*' if he is confronted with the same charge. If, however, he violates any of the conditions of the recognizance, the occasion then arises for a conviction to be entered against him and for sentence to be passed on him. There is also the possibility that he may be discharged under Section 326 (1) at any time during the period of the recognizance. On the occurrence of any of those three contingencies, it may be that a right of appeal accrues to the aggrieved party. But till then it cannot, in my opinion, be said that there is a final order. My attention has, however, been called to some conflicting decisions on this point. In the case of *Anchapullai vs Bakerelal* 31 N.L.R. 149, Lyall Grant J. said "It has been more than once held by this court that there is a right of appeal from an order under Section 325 (1) on the ground that it was a final order.".....He to referred the case of *Inspector of Police, Avissawella, vs Fernando* 30 N.L.R. 482 in which Akbar J. following another judgment of Lyall Grant J. in *P. C. Dandagamuwa Revision No.* 670 *S. C. M.* 31-10-28* to the same effect, held that where an accused person is warned and discharged, the remedy open to the complainant is by way of an appeal. The case actually before Akbar J. was a different case from the present. He was dealing with an order warning and discharging the accused which may properly be considered a final order. Akbar J, in the course of his judgment, referred to the case of *Suppiah vs Lonu Banda* 3 C.W.R. 127 and *Schokman vs John* 4 C.W.R. 93, but in those cases too the ruling was that where a Police Magistrate refers the complainant to his civil remedy and discharges the accused, the complainant's remedy is to appeal under Section 338. So that there are really only two judgments among those cited to me that deal directly with the question whether there is an appeal from an order under Section 325 of the Criminal Procedure Code and both those are judgments of Lyall Grant J. On the other hand there are several cases in which it was held that an order made under this section is not an appealable order. In *Sanders vs Pary* 1 Bal. Reports 22 Moncrieff A. C. J. considered the question carefully and held that an appeal does not lie. Then in the case of *Culantaivalu vs Somasundram* 2 Bal. Reports 122, the full bench (Layard C. J. Moncrieff and Middleton J. J.) held that an order made under Section 88 of the Criminal Procedure Code requiring a person to execute a bond to be of good behaviour for a certain period is not a final order and no appeal lies from it. The reasoning in that case is applicable to this. A final order is an order which terminates the case. The order made in this case does not terminate it. Under Section 326 (c) of the Criminal Procedure Code the court may vary the condition of the recognizance, and may.....discharge the recognizance. Again, under Section 327 (4) the court on being satisfied that.....has failed to observe any condition of his recognizance may without any further proof of his guilt convict and sentence him for the original offence. So that the case is still pending, and that fact necessarily implies that there has been no final order. I would, therefore, sustain the preliminary objection and dismiss the appeal. I would add that if I had to consider the appeal on its merits, the result would not have been different.

Objection upheld and appeal dismissed.

Present : LYALL GRANT J.

* *In Revision—P. C. Dandagamuwa No.* 670.

Argued 23rd October, 1928.

F. C. Loos, Crown Counsel, for Solicitor-General.
Rajapakse for accused-respondent.

LYALL GRANT, J.

In this case the Crown has moved in revision. It is objected that the Crown had a right of appeal which it neglected to exercise and that it should not be allowed to move in revision when the time allowed for appeal has elapsed.

It was argued by Crown Counsel that the order made in this case was not a final order and that therefore there was no right of appeal. The order was one discharging the accused under section 325 of the Criminal Procedure Code. The question is whether such an order is a final order within the meaning of section 338. It is argued for the Crown that as it is an order of discharge it falls under section 157 and is therefore not appealable.

I think there is a radical distinction between a discharge under section 157 and one under section 325. The former does not allow a further prosecution and it is on that account it seems to me that it is not a final order. A discharge under section 325 disposes finally of the case and is a bar to further proceedings. It is to most intents a conviction, the only difference being that it is not recorded as such against the accused.

I am satisfied that the Crown had a right of appeal which it failed to exercise. In such cases the Court is slow to exercise its powers of revision.

See Goonawardena v. Orr, 2 A. C. R. p. 172.

In the present case the Magistrate has exercised a discretion which he undoubtedly possessed, in favour of the accused on, at any rate, plausible grounds.

In such circumstances and after a lapse of six months, I do not think it is desirable that this court should interfere by way of revision.

Present : MOSELEY J. & FERNANDO A.J.

MARTIN AND OTHERS vs. THE COMMISSIONER OF STAMPS

S. C. No. 23—*D. C. Colombo No.* 1201.

Argued on 3rd June, 1937.

Decided on 14th June, 1937.

Estate Duty—Ordinance No. 8 *of* 1919 *Section* 16—*Meaning of the expression "estate duty" in section* 16 (2).

The facts shortly are as follows :—

The appellants are the trustees appointed under the last will of Rear-Admiral Baker, who died in 1922. On his death estate duty was paid on the value of his assets

in Ceylon, which included a land known as Mahagastotte Estate. This estate was bequeathed to the trustees upon trust, as to half the annual income for the testator's two sons, and as to the other half of the income for his wife during her widowhood.

Upon her death or marriage the entire estate was to go to the two sons. The widow died in 1934 and the Commissioner of Stamps claimed estate duty on the footing that the cesser of her life-interest in one half of Mahagastotte Estate is liable to estate duty.

The appellants appealed to the District Court against the Commissioner's assessment. The District Judge upheld the Commissioner's claim and the appellants thereupon appealed to the Supreme Court.

The appellants contended that no estate duty was payable on the widow's death in view of section 16 (2).

Held : (1) That in this case no estate duty was payable on the widow's death.

(ii) That the expression "estate duty" does not anywhere in section 16 (2) of the Estate Duty Ordinance No. 8 of 1919 mean "settlement estate duty".

H. V. Perera K.C., with *Van Geyzel* for appellants.

Obeyesekere, Crown Counsel, for Commissioner of Stamps, respondent.

MOSELEY, J.

The appellants are the trustees appointed under the last will of Rear-Admiral Julian Alleyne Baker, deceased. On his death in 1922 estate duty was paid on the value of his assets in Ceylon, which included the Mahagastotte Estate. That estate was bequeathed to the trustee upon trust as to half the annual income for the testator's two sons and as to the remainder of such income for his wife during her widowhood. Upon her death or marriage the entire estate was bequeathed to the said two sons.

The widow died in 1934, and the Commissioner of Stamps has assessed estate duty on the footing that the cesser of her life interest in half the Mahagastotte Estate is liable to estate duty.

It may be convenient to set out here the relevant portion of the section of the Estate Duties Ordinance (No. 8 of 1919) which regulates the payment of estate duty on settled property. It is as follows :—

> "16 (1) Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by the deceased by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—
>
> (*a*) A further estate duty (called settlement estate duty) on the value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased ; but
>
> (*b*) During the continuance of the settlement, the settlement estate duty shall not be payable more than once.
>
> (2) If estate duty has already been paid in respect of any settled property under the last preceding sub-section since the date of the settlement, the estate duty shall not be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property".

The appellants appealed against the assessment on the ground that the widow had not at any time been competent to dispose of the property, that estate duty had already been paid in respect of it, and that consequently in view of the exemption contained in section 16 (2) no estate duty was payable on her death. The appeal was dismissed and the appellants have now appealed to this Court.

Now, sub-sections (1) and (2) of section 16 of the Ceylon Ordinance follow practically verbatim sub-sections (1) and (2) of section 5 of the Finance Act, 1894. There is one notable difference and that is the insertion in sub-section (2) of the local Ordinance after the words "settled property" of the words "under the last preceding sub-section".

The last preceding sub-section provides for the payment, in the case of property settled in specified manner, of a special estate duty, called "settlement estate duty". That duty has been fixed at one per cent of the value of the estate. The obvious purpose of such a duty is to relieve an estate which is comprised of property subject to a succession of life interests from paying the full duty on the cesser of each life interest. Settlement estate duty is paid in such cases, "except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased".

In the case now before us the only life interest was that of the wife of the deceased. Consequently settlement estate duty was not paid. This fact, coupled with the insertion in section 16 (2) of the words above mentioned, has led to the difference of opinion between the trustees and the Commissioner.

On behalf of the appellants it is contended that the words "under the last preceding sub-section" qualify the words "settled property" which immediately precede them, the intention being to make it quite clear that the exemption from payment of estate duty can only be claimed in respect of settled property within the meaning of sub-section (1), and not in respect of settled property generally. If that contention is accepted, it follows that, since estate duty was paid on the death of Admiral Baker on settled property coming within the meaning of sub-section (1), no further estate duty is payable until the death of some person competent to dispose of the property. Geraldine Baker, the widow, is no such person.

The argument put forward on behalf of the Commissioner is that the words "under the last preceding sub-section qualify the opening words of "sub-section (2) viz., If estate duty has already been paid", so that the estate duty referred to is the settlement estate duty. In support of this argument Counsel contended that the expression "settled property under the last preceding sub-section" is ungrammatical and that neither the legislature nor the draftsman would have been a party to a solecism of such a nature. While it must be conceded that the expression lacks elegance, it is not an unusual one, and, assuming that it bears the meaning attributed

to it by the appellants, is not, I venture to think, an example of bad grammar. On the other hand, to read the words as interpolated where the Commissioner would have us read them, one has to find that the draftsman avoided at least two more obvious and neater methods of giving expression to his intention. Firstly, he might have inserted the words in the place where we are invited to read them, and secondly, and still better, he might have used the phrase which he had just coined, if I may use the term, in sub-section (1) (*a*), viz., "settlement estate duty". In this connection it is noteworthy that the phrase is repeated in sub-section (1) (*b*). It is difficult, therefore, to believe that the draftsman, having used the expression twice, has immediately afterwards employed a paraphrase.

Moreover, counsel for the appellants has pointed out that to read the words in dispute as the Commissioner would have them read would lead to a manifest absurdity in that, in the case of the disposition of a life interest to a stranger with remainder to the testator's children, only "estate duty" and "settlement estate duty" would be paid, whereas, in the case of a disposition of a life interest to a testator's widow with remainder to the children, estate duty would be payable twice at the full rate. Such partiality can hardly have been the intention of the legislature which, while imposing the settlement estate duty, expressly exempts from liability thereto the case where the only life-interest in the property is that of a wife or a husband of the deceased. Again, if we are to hold that the words "estate duty" where they first occur in sub-section (2) mean "settlement estate duty" then surely the same meaning must be applied to the words where they recur in the same sub-section, a process which would lead to another absurdity.

Counsel for the Commissioner has invited us not to assume that the intention of the local legislature was to follow exactly English law, while counsel for the appellants urge that we should not assume an intention to depart from the model. I do not know that it is necessary in this case to estimate the intention of the legislature, except in so far as it can be gathered from giving to the words used their ordinary meaning. If I were in any doubt as to that meaning, I should feel inclined to hold that the insertion of the words which do not appear in the model was made with the intention of removing any doubt as to the class of settled property to which the sub-section applies. In spite of the inelegance of the expression, however, I have no doubt but that that is what the words mean.

Finally, it is fundamental that the intention to impose a charge on the subject must be shown by clear and unambiguous language, and that in cases of doubtful expression the party sought to be made liable must be deemed to be exempt.

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

FERNANDO, A.P.J.

I agree.

Appeal allowed.

Present : SOERTSZ, J.

POLICE SERGEANT HENDRICK vs. ARUMUGAM & ANOTHER

S. C. No. 325–326 — *P. C. Nuwara Eliya No.* 11885.
Argued on 6th May, 1937.
Decided on 14th May, 1937.

Criminal Procedure Code section 134—*Confession made to an Unofficial Police Magistrate—Is it admissible in evidence—Evidence Ordinance section* 26.

Held : (i) That a confession made to an Unofficial Police Magistrate appointed under section 84 A of the Courts Ordinance and recorded by him in the manner prescribed by section 134 of the Criminal Procedure Code is admissible in evidence in a case in which the offence with which the accused is charged is not an offence summarily triable.

(ii) That an Unofficial Police Magistrate acting under section 134 of the Criminal Procedure Code in a case in which he is entitled in law so to act should be regarded as a Magistrate for the purposes of section 26 of the Evidence Ordinance.

De Kretser for accused-appellants.

Douglas Jansze, Acting Crown Counsel, for complainant-respondent.

SOERTSZ, J.

The two accused-appellants were charged with offences punishable under section 440 and section 369 of the Penal Code. The value of the stolen property was three hundred and thirty three and consequently both offences fall beyond the jurisdiction of the Police Court. The Magistrate before whom the accused were charged being also District Judge assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and after trial convicted both the accused and sentenced each of them to a term of three months rigorous imprisonment. The Magistrate in his judgment points out that he considered the two cases separately, and that is as it should have been, for in the case of the 1st accused the prosecution relied on a confession said to have been made by him to an Unofficial Police Magistrate and that confession, if admissible, was admissible only against the 1st accused. This confession was made by appellant's Counsel the first ground of attack. He contended that the confession was inadmissible: (*a*) because the unofficial Police Magistrate derived his powers from section 84A of the Courts Ordinance No. 1 of 1889 and that section enacts that "he shall have all the powers and authority by the Criminal Procedure Code 1898 vested in the Police Courts *save and except the power and authority to take proceedings with regard to, or hear, try, or determine any offence which by that Code or by any law of this Colony is summarily triable before a Police Court*", and he

argued that because in this case the Police Magistrate who heard the case tried this case summarily, the power or authority of the unofficial Magistrate to take proceedings must be considered to have been ousted. In my opinion, there are two answers to this argument, first that at the time the proceeding of taking the accused's confession was carried out by the unofficial Police Magistrate, the case was non-summary case. Second, that the crucial fact which determines the power or authority of the unofficial Police Magistrate is not the fact that eventually the accused was tried summarily, but the fact that the offence or offences with which the accused were charged were offences which were not summarily triable by a Police Court. Section 84A says that the unofficial Police Magistrate has all the powers given to a Police Magistrate by the Criminal Procedure *save the power to take proceedings with regard to any offence summarily triable by a Police Court.* Neither of the offences charged in this case was triable summarily by a Police Court although the Magistrate tried them he tried them as District Judge. The next point taken was that the confession was bad inasmuch as it was taken while the 1st accused was in the custody of P. S. Nair. Section 26 provides that no confession shall be made if it is made whilst an accused is in the custody of a Police officer unless it is made in the immediate presence of a Police Magistrate. And it was urged that this statement or confession was made in the presence of an unofficial Police Magistrate and not of a Magistrate. The evidence Act does not define Magistrate but section 84A gives an unofficial Police Magistrate all the power and authority vested by the Criminal Procedure Code in Police Courts except the powers I have already indicated and, therefore, an unofficial Magistrate has the power and authority to take a confession save and except in a case in which the offence is summarily triable.

I, therefore, come to the conclusion that the statement made by the 1st accused to the unofficial Police Magistrate is admissible. There is evidence that it was a voluntary statement and not induced in any of the ways described in section 24 of the Evidence Ordinance. It was open to the Magistrate to convict the accused on that statement alone. It was an unequivocal confession. But, I have examined the other evidence in the case and in my opinion that evidence quite apart from the confession is sufficient to support the conviction of the 1st accused. That evidence and the confession taken together make his conviction inevitable.

In regard to the 2nd accused, the evidence is equally strong. He was a labourer on the estate. Soon after the theft he pawned a pair of 'koppu' belonging to the complainant with the pawn broker Selliah Pillai and had described himself as Muniandy although the name by which he was known was Muttiah. Muttiah was his name on the check-roll. About this time he gave Rs. 29/– to Peiris Appuhamy, a trader, for safe keeping and he gave a goldsmith certain stolen articles of jewellery of the kind lost by the complainant, and requested him to melt these and convert them into articles

of a different kind. His key fitted the padlock fixed to the complainant's door. One of the 'koppus' pawned by him has been clearly identified by the complainant.

All these facts establish the case against him beyond reasonable doubt. I dismiss the appeal.

Present : MOSELEY, J.

EXCISE INSPECTOR OF MATALE vs. HEEN MENIKA

S. C. No. 205—*P. C. Matale No.* 19029.

Argued on 28th May, 1937.

Decided on 8th June, 1937.

Excise Ordinance—Unauthorised possession of Excisable Article—Evidence of conduct—When may a conviction be sustained on such evidence.

The accused appellant was found in a garden about 75 yards distant from his house; with him were two Tamil labourers, one of whom was drinking toddy from a gotuwa. Near by were three pots. On the approach of the Excise party all three ran away and the appellant in his flight kicked the pot nearest to him and broke it. The spot where the pot was broken according to the evidence smelt of fermented toddy. The two remaining pots were found to contain 76 drams of fermented toddy. There was no evidence to prove that the broken pot had contained fermented toddy or any other excisable article. The accused did not give evidence.

Held : That the evidence was sufficient to justify the finding that the accused was in possession of the pots of fermented toddy.

C. E. S. Perera with *D. Gunawardena* for the accused-appellant.
D. Jansze, Crown Counsel, for Crown Respondent.

MOSELEY, J.

The appellant was convicted of being in possession of fermented toddy in excess of the prescribed quantity without a permit, in breach of section 16 of the Excise Ordinance No. 8 of 1912.

The evidence for the prosecution is that the appellant was found in a garden about 75 yards distant from his house. With him were two Tamil coolies, one of whom was drinking from a gotuwa. Near by were three pots. On the approach of the Excise party all three ran away, and the appellant in his flight kicked the pot which was nearest to him and broke

it. The spot where the pot was broken is said to have smelt of fermented toddy. The two remaining pots between them contained 76 drams of fermented toddy. The appellant did not give evidence.

The learned Magistrate held that in kicking one pot and smashing it the accused had identified himself with the toddy, and that from that act conscious possession could be presumed.

Counsel for the appellant relied upon the case of *de Silva v. Bolonga and another* (14 C.L.R. 165). This is an authority for the proposition that in a case of this kind the single fact that the accused ran away from the spot where the excisable article was found is not sufficient to raise the presumption of possession against the accused. The judgment followed that of Wood Renton C. J. in *Silva v. Hendrick Appu* (4 C.W.R. 232).

In *de Silva v. Bolonga and another* (*ubi supra*) Koch J. referred amongst others to the case S. C. Nos. 284-285 P. C. Kandy No. 40746* (S. C. Minutes, 29th May, 1933), in which an accused person who had been found with others in an empty shed ran away but before doing so broke a pot containing toddy. Koch J. distinguished such a case from the one under his consideration, saying that in the latter the accused were "not seen meddling with the article or stooping over it or coming in touch with it by breaking one or both of the pots containing the article."

I am entirely in accord with the view of Koch J. that the mere fact of the accused running away is not sufficient to raise the presumption of possession. The matter, however, appears to me in a different light when the escape is accompanied, as it is in this case, by the breaking by the accused of one of the three pots, the other two of which were found to contain the excisable article. It is true that there is no definite evidence that the broken pot had contained fermented toddy. The accused, however, unless his kicking of the pot was accidental, must have had an object in so doing. To put the case at its lowest, there was a strong *prima facie* case against him of possession. He made no attempt to disprove that case.

In my view the conviction was right and the appeal must be dismissed.

Appeal dismissed.

*Present : MACDONELL, C. J.

S. C. Nos. 284–85—*P. C. Kandy No.* 40746 & 40868
Argued & Decided on 29th May, 1933.

Deraniyagala, Crown Counsel, for Crown Appellant.

MACDONELL, C. J.

In these cases the learned Magistrate acquitted the two accused on the ground that there was no evidence " that the accused owned the shed on the land in which the shed was. The accused were not in the shed. There is nothing to show that the accused were the owners of the two pots of toddy found inside the shed ".

I do not think this is an exhaustive description of the evidence in this case. Apparently nobody else was present at the spot except the accused. Very possibly they had no legal occupation of the shed but a yard beyond where they were seated in an empty shed, there were found two bottles of fermented toddy in excess of the amount allowed by law. The accused at once ran away, one of them breaking the pot which had been on the ground before them and leaving behind a cup stated to have contained fermented toddy. This is evidence from which certainly it could be inferred that the accused had taken temporary occupation of the shed and that they were jointly in possession of the two pots of toddy found in that shed. If that is so the acquittal must be set aside and these cases sent back for trial before another Magistrate.

Present : SOERTSZ, J.

ALLEGACONE (Excise Inspr.) vs. MAILVAGANAM & ANOTHER

S. C. No. 306—*P. C. Chavakachcheri No.* 12231.
Argued on 14th June, 1937.
Decided on 17th June, 1937.

Excise Ordinance No. 8 *of* 1912 *section* 50 —*Criminal liability of a holder of a licence.*

The renter of a toddy tavern was along with his salesman charged for having kept the tavern open after hours. The Magistrate acquitted the salesman but convicted the renter applying the presumption created by section 50 of Ordinance No. 8 of 1912.

Held : That for the presumption created by section 50 of the Excise Ordinance No. 8 of 1912 to arise and for the burden of rebuttal to be cast on the licence-holder it must be established by the prosecution that an offence has been committed by a person in his employ.

H. W. Thambiah, for the accused-appellant.
Pulle, Crown Counsel, for complainant-respondent.

1937

Soertsz, J.

Allegacone (Excise Inspr.) *vs* Mailvaganam & Another

SOERTSZ, J.

The accused appellant who is the renter of toddy tavern No. 22 in Eluthumadduval South, was charged along with his salesman for having kept the tavern open after hours in contravention of general condition 6* of Excise notification No. 276 as amended by Excise notification No. 283, an offence punishable under section 45 (*c*) of Ordinance No. 8 of 1912.

The Magistrate acquitted the salesman, but convicted the appellant applying against him the presumption created by section 50 of Ordinance 8 of 1912. That section makes a holder of a licence or permit punishable together with the actual offender for an offence under section 43 committed by any person in his employ unless he shall establish that all due and reasonable precaution were exercised by him to prevent the commission of such offence ".

For this presumption to arise and for the burden of rebuttal to be cast on the licence or permit holder, it must be established by the prosecution that an offence has been committed by a person in his employ. In this case, it cannot be said that that fact has been established beyond reasonable doubt. The Inspector of Police and the Constable are unable to say anything more than that a man like the salesman ran out of the tavern. The Inspector stated in cross-examination that he could not identify the man who ran away.

It is probable that it was the salesman who ran away, but I cannot say that that fact has been proved beyond reasonable doubt.

I would, therefore, set aside the conviction and acquit the accused.

Accused acquitted

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* Opening and closing hours—(1) of Toddy Taverns.

Toddy Taverns shall remain open between the hours of 8 a.m. and 6-30 p.m., and shall be kept closed at all other hours.

Provided that the Government Agent may, after consulting the Excise Advisory Committee, in the case of any area generally or in the case of a particular tavern in any area—

(*a*) prescribe a later hour of opening ;

(*b*) prescribe an earlier hour of closing ;

(*c*) prescribe one or more periods, between the hours of opening and that of closing, during which the tavern shall be kept closed ;

(*d*) when local circumstances require it in a town or outside a town, and in the latter case for special reasons, prescribe an earlier hour of opening, which shall in no case be earlier than 7 a.m., or a later hour of closing, which shall in no case be later than the closing hours of arrack taverns in the same area ; and

(*e*) at the request of the licensee permit or, without such request, direct the tavern to be kept closed on Sundays or on other specified days of religious observance, either throughout the whole day or during one or more specified periods of hours.

The hours during which a toddy tavern may remain open shall be entered in the licence, and no sale shall take place except during those hours.

(2) Deals with Arrack Taverns.

(3) Deals with Foreign Liquor Premises.

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

S. MUDIYANSE & ANOTHER vs K. G. APPUHAMY

S. C. No. 194 *Inty.—D. C. Nuwara Eliya No.* 1888
Argued on 27th & 28th May, 1937.
Decided on 14th June, 1937.

Civil Procedure—More than one action in respect of the same land on the same cause of action—Is it permissible in law?

The plaintiffs brought this action against the defendant alleging that the latter was in forcible and illegal possession of a field known as Hemakachige Kumbura and asking that the defendant be ejected therefrom and the plaintiff placed in possession thereof. The defendant pleaded *inter alia* that the plaintiffs cannot maintain this action "the cause of action herein referred to being already the subject matter of two actions Nos. 11979 and 11980 of the Court of Requests of Nuwara Eliya".

In D. C. Nuwara Eliya Case No. 1514, Ramanathan Chettiar having obtained a decree against K. G. Appuhamy, the defendant in this action, seized in execution the land known as Hemakachige Kumbura, the subject-matter of this case.

S. Appuhamy (2nd plaintiff) and S. Mudiyanse (1st plaintiff) claimed equal shares in this land but their claim was disallowed as they admitted that K. G. Appuhamy was in possession. Thereafter on 8th November, 1935, they instituted the two above-mentioned cases, Court of Requests Nuwara Eliya 11979 and 11980 under section 247 of the Civil Procedure Code, against Ramanathan Chettiar and the defendant in this case.

Whilst these cases were pending in the Court of Requests, the said Appuhamy and the said Mudiyanse, on 8th February 1936, instituted the present action. On 13th May, 1936, Appuhamy and Mudiyanse moved to withdraw the Court of Requests cases against K. G. Appuhamy (the present defendant) with permission to institute a *rei vindicatio* action. This motion was allowed on 15th May, 1936.

Objection was taken to the present action inasmuch as it was brought while another action in respect of the same cause of action was pending.

Held : (i) That there can be no objection to this action existing side by side with the two Courts of Requests cases.

(ii) That under our law the fact that one action is pending in respect of a cause of action is no bar to the institution of another action in respect of that same cause of action.

(iii) So far as the general law of *res judicata* and kindred topics go, a party has the technical right to litigate before different tribunals at one and the same time subject to the control of the court to prevent the right being abused.

H. V. Perera, K. C., with *E. F. N. Gratiaen* for the defendant-appellant.
Molligoda with *Senaratna* for the plaintiff-respondents.

SOERTSZ, J.

In this action the plaintiffs sought to be declared the owners of the land referred to in the schedule to the plaint, and they alleged that the defendant is in forcible possession of it from July 1935. In his answer, before dealing with the merits, the defendant contended as a matter of law

that the plaintiffs could "not have and maintain this action, the cause of action referred to being already the subject matter of two actions Nos. 11979 and 11980 of the Court of Requests of Nuwara Eliya". In case No. 11979, the present 2nd plaintiff and in case No. 11980 the present 1st plaintiff sued under section 247 of the Civil Procedure Code, one Ramanathan Chetty who has seized this land on a writ against the present defendant, to have it declared that it was not liable to seizure under that writ, and they made the present defendant a party alleging that he was in wrongful possession of their shares of the land and praying that they be declared entitled to those shares, and that the present defendant be ejected therefrom.

This answer was filed on the 8th of May, 1936. On the 12th of May, 1936, the plaintiffs' proctor submitted motions in the two Courts of Requests cases, asking to be allowed to withdraw those cases as against the present defendant only, and to be given permission to institute a *rei vindicatio* action against him. These motions were allowed on the 15th of May, and the Commissioner made a journal entry that "Mr. Modder reserves any objection he may have *for the connected District Court case*".

The present case came up for trial on the 11th of September, 1936, and on that day seven issues of fact and four issues of law were framed and the case was adjourned for the 30th of September, 1936. On that day the issues of law were discussed, and on the 16th of October, 1936, the District Judge delivered his order in favour of the plaintiff. The present appeal is from that order.

The issues of law were these :—

1. Can plaintiff maintain this action the same having been instituted during the pendency of 11979 and 11980 ?
2. Plaintiffs' claims 81 and 88 having been dismissed, was their only remedy an action under section 247 of the Civil Procedure Code ? If so, is the present action maintainable ?
3. Was permission granted by the Court to withdraw C. R. 11979 and 11980 with permission to institute the present action ? Even if such permission was granted is that permission of any avail in law to the plaintiff ?
4. Plaintiff having withdrawn C. R. 11979 and 11980 against the defendant *is he* precluded thereafter from maintaining the present action against them?

I did not understand counsel for the appellant to press the point raised in issue No. 2. The question raised in that issue does not arise between the plaintiffs and this defendant. His contention was that once an action is instituted it must be proceeded with till a decision is obtained, unless it is allowed to be withdrawn under section 406 of the Civil Procedure Code with liberty to institute *a fresh action*; or unless it abates. In any of those events, there is a termination of the action. In this instance the plaintiffs were allowed to withdraw the two C. R. cases with liberty to institute a *rei vindicatio* action; that this must be understood to be the institution of a fresh action and not the bringing forward of an action that had been instituted there three months before permission to withdraw the two Court of Requests

cases as against the present defendant was granted. He also contended that the institution of the present case in February, 1936, was of no legal consequence because there were already pending two cases involving the subject matter of the present case. It had no significance except that it encumbered the roll.

So far as Courts in Ceylon are concerned there is the highest possible authority to support the view that the fact that one action is pending in respect of a cause of action is no bar to the institution of another action in respect of that same cause of action. That was exactly what happened in *S. P. A. Annamaly Chetty vs. Thornhill*, 33 *N.L.R.* 41., and Lord Thankerton in delivering the opinion of the Judicial Committee of the Privy Council, held that even a decree in one action from which *an appeal was pending* was no bar to a second action for " it is open to the court to see that the appellant does not get decree twice over for the same sum ". If, therefore, a decree in one case so long as it is under appeal, cannot support a plea of *res judicata* against a second action on the same cause of action, it necessarily follows that the fact that an action is pending already will not bar another action being instituted on the same cause of action. In regard to this question of *lis alibi pendens* I find Spencer Bower in his treatise on *res judicata* summarising the cases cited by him on the point as follows (see page 213):— " The practice of the Courts in dealing with a *lis alibi pendens* is governed by the same considerations of public policy as those which lie at the root of the doctrine of *res judicata*. In both cases alike, our Jurisprudence is actuated by the principle *nemo debet bis vexari pro una et eadem causa* though of course, the theory of merger—*transit in rem judicatam*—has no application to questions of *lis alibi pendens*. Pending litigation, *ex vi termini*, excludes the idea of its termination by judicial decision, but since concurrent proceedings on the same question, or with the same object, may occasion a *bis vexatio* hardly less oppressive than a proceeding which seeks to reagitate a question determined by a former judicial decision, the courts.....have always exercised their inherent discretionary jurisdiction to prevent abuses of *the technical right of a party to litigate before different tribunals at one and the same time* if that jurisdiction is invoked at a reasonably early stage, but not otherwise ". Mr. Perera, however, argued that the position in Ceylon is different in view of sections, 33, 34 and 406 of the Civil Procedure Code. In another stage of the case of *Annamaly Chetty vs. Thornhill* Justice Garvin summarises a similar argument by Mr. Perera in these terms (see 34 N.L.R. p. 385) " Counsel frankly admitted that if the question were to be determined by the general rules of the law of *res judicata* his objection would not be sustainable. But he contends that here in Ceylon we have a statutory rule in accordance with which upon the entry of a decree dismissing a plaintiff's action, no matter upon what ground—except for want of jurisdiction—every right claimed or claimable in respect of the cause of action for which the action was brought becomes a *res judicata* and, therefore, operates as a bar to a second action based on the same cause of action ".

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In this case, Mr. Perera contended that when the plaintiffs were allowed to withdraw the two Court of Requests cases, it must be assumed that the Commissioner of Requests dismissed those actions as against this defendant subject to the condition that a fresh action would be instituted, and that a strict compliance with that condition was necessary for the valid emergence of another action. In this case there was no such compliance inasmuch as the action now relied upon is not a *fresh action* but an action that was already pending. The answer to this argument as I conceive, is that the Privy Council has ruled in the case already referred to that the fact that one case is pending is no bar to the institution of a second action in respect of the same cause of action. But Mr. Perera suggested that the Privy Council was directing their attention to the particular facts of the case before them and the bearing of section 207 of the Civil Procedure Code on that case, and that they did not consider the effects of sections 33 and 34 of the Code. This is hardly probable. But apart from that sections 33 and 34 of the Civil Procedure Code are not, in my opinion, inconsistent with that proposition. Section 33 only says that 'Every regular action shall. . . . . .be so framed to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them'. Similarly section 34 lays down that the whole claim which a plaintiff is entitled to make in respect of the cause of action shall be included. These sections do not prohibit the bringing of more than one action, and as pointed out in the passage I have already cited from Spencer Bower, so far as the general law of *res judicata* and the kindred topics go, a party has the technical right to litigate before different tribunals at one and the same time. But, of course, the technical right is subject to the control of the court to prevent its being abused. In this instance, there is no possibility of that right being abused because in consequence of the withdrawal of the two Courts of Requests cases against the defendant he can hardly say that he is exposed to a *bis vexatio*.

In regard to Mr. Perera's contention that the plaintiffs were given permission to institute a fresh action and not to proceed on with the present action, that is literally correct. But from the context it seems clear that although the plaintiff's proctor in his motions asked that he be allowed to withdraw the Courts of Requests cases with liberty *to institute* an action *rei vindicatio*, he really had in view this action which was already pending at the time and was an action *rei vindicatio*. That, at any rate, is how the defendant's proctor appears to have understood it for he specially asked the court to note that '*he reserves any objection he may have for the connected D. C. case*'. 'The connected D.C. case' was manifestly the present action. Quite apart from that view of the matter, in my opinion, that fact that the plaintiffs had been given permission to file a fresh action did not preclude them from proceeding with the present action. If their proctor had explicitly stated that, as I have already observed, appears to be implied by his motions in the light of what transpired in Court, namely that he was withdrawing

these Courts of Requests actions against the present defendant in order to proceed with the present action against him, I feel confident that that application would have been allowed for it was the obvious and most convenient course. Mr. Perera concedes that the dismissal of the present action will not prevent the plaintiffs from bringing another action *rei vindicatio* in terms of the permission given them. This admission reveals the captious nature of the argument on behalf of the appellant.

As I have already held there was nothing to prevent this action existing side by side with the two Courts of Requests cases. Once the plaintiffs obtained permission to withdraw those cases with liberty to institute a *rei vindicatio* action, even if we assume that the plaintiffs and the defendant and the court contemplated *a fresh action*, it was open to the plaintiffs either to institute that fresh action, or to proceed with the action already pending. The plaintiffs have chosen the more convenient course of going on with a case already on the roll in which a final adjudication can be reached on all the matters in dispute between the parties. There is no likelihood at all that the plaintiffs will institute a fresh action on the permission granted by the Court. That would be a perfectly futile proceeding and if the plaintiffs indulge in it, the court can exercise its undoubted jurisdiction to prevent such an abuse.

I would, therefore, dismiss the appeal with costs and send the case back for trial on the issues of fact.

FERNANDO, A. P. J.

I agree.

Present: SOERTSZ & HEARNE, J. J.

THANGAMMAH vs. NAGALINGAM

S. C. No. 26—*D. C. Inty. Jaffna No.* 10289

Argued on—18th June, 1937.

Decided on—22nd June, 1937.

Joinder of Parties—Civil Procedure Code section 18—*Seizure of mortgaged premises in execution of a decree of court—Mortgage action in respect of the same premises—Can the execution creditor become a party to the mortgage action?—Mortgage Ordinance No.* 21 *of* 1927 *section* 6 (1).

The petitioner-respondent upon a writ he had obtained against the defendant in the present action seized in execution a certain land belonging to him. The plaintiff, the mortgagee of the land, thereupon put in suit a mortgage bond by which the land had been mortgaged to him by the defendant. Hearing of the mortgage action the respondent, at whose instance the land was seized, moved by way of petition and affidavit and asked that he be allowed to intervene in the case and file answer. He alleged that the action was brought by the plaintiff in collusion with the defendant. At the date of this

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application the defendant though served with summons had not appeared. The District Judge granted the application of the petitioner-respondent purporting to act under section 18 of the Civil Procedure Code.

Held : (i) That the petitioner had no right to intervene in the mortgage action as he is not a necessary party for the effectual and complete adjudication of the action between the mortgagor and the mortgagee.

(ii) That section 6 (1) of the Mortgage Ordinance No. 20 of 1927 does not give a person such as the petitioner-respondent a right to intervene in the mortgage action.

(iii) That a seizure of a land in execution of a decree of court does not create an interest in the land seized within the meaning of section 6 (1) of Ordinance No. 21 of 1927.

Nadarajah with *Mahadeva* for plaintiff–appellant.

Nadesan for petitioner-respondent.

SOERTSZ, J.

This was an action on a mortgage bond. The plaintiff sued the defendant to recover a sum of Rs. 1,500 with interest and prayed that in default of payment, decree be entered for the sale of the mortgaged premises. Before summons could have been served on the defendant, the petitioner-respondent filed petition and affidavit and prayed that " he be allowed to intervene in this case and file answer ". He alleged that this action was a collusive one between the plaintiff and the defendant for the purpose of frustrating a seizure he had effected in respect of this land on a writ he had obtained against the plaintiff.

The inquiry into this application took place on the 11th of November, 1936. By that date, the defendant had been served with the summons but had not appeared to defend the action. The District Judge made order on the 23rd of November, 1936, directing that the petitioner be added a party. He purported to act under section 18 of the Civil Procedure Code. Now, as pointed out in the case of *Perera v. Lowe* 2 *Ceylon Law Recorder* 191 in which the facts are exactly the same as the facts in this case except that there the action was based on a promissory note and not on a mortgage bond, a person in the position of the petitioner in the present case cannot intervene as he is not a necessary party for the effectual and complete adjudication of the questions involved in the case. He has nothing to do with the questions involved in the action between the plaintiff and the defendant. It is not necessary to pursue this question any further. Respondent's counsel frankly admitted he could not support the trial Judge's order under section 18 of the Code, but he maintained that the petitioner was rightly made a party because he was a necessary party in terms of section 6 (1) of the Mortgages Ordinance 21 of 1927.

The petitioner, he argued, had an interest in the land to 'which the mortgage in suit had priority ! But this point too is covered by authority. In *Ibrahim v. Hong Kong and Shanghai Bank* 37 *N.L.R.* 51,* Garvin and Akbar J.J. held after careful consideration that a seizure does not create an interest in the land seized within the meaning of section 6 (1) of the

* 2 C. L. W. 531 (Edd)

Ordinance No. 21 of 1927. The same view appears to have been taken by Dalton J. in *Chettiar v. Coonghe* 35 *N.L.R.* 89 at 91. I would follow these rulings and hold that the petitioner's application cannot be supported under section 6 (1) of the Mortgages Ordinance.

It therefore fails and the appeal must be allowed with costs of appeal and of the inquiry to be paid to the appellant by the petitioner-respondent.

HEARNE, J. J.
I agree.

Appeal allowed.

Present : SOERTSZ, J.

NAIR vs. ALEXANDER & ANOTHER

S. C. No. 773—*P. C. Matale No.* 17582
Argued on 2nd June, 1937.
Decided on 14th June, 1937.

Motor Cars—Regulation 4 *of the regulation made under section* 6 *and* 58 *of Ordinance No.* 20 *of* 1927 *and published in Gazette of* 13*th March,* 1936—*Endorsement by local authority on licence relaxing in certain circumstances the effect of regulation* 4.

Held : (i) That it is a breach of regulation 4 of the regulations made under sections 6 and 58 of the Motor Ordinance No. 20 of 1927 for an omnibus weighing more than 3 tons when fully loaded to proceed along a highway prohibited for omnibuses over 3 tons even though at the time it is so proceeding its actual total weight is less than 3 tons.

(ii) That a local authority cannot by endorsement on a licence relax a prohibition made by regulation under sections 6 and 58 of the Motor Car Ordinance.

Pulle, Crown Counsel, for the complainant-appellant.
C. E. S. Perera for the accused-respondent.

SOERTSZ, J.

The first accused is the driver and the second accused is the owner of an omnibus bearing No. E. 724. They were charged with a breach of regulation 4 of the regulations made under sections 6 & 58 of Ordinance No. 20 of 1927, and published in the Government Gazette of the 13th of March 1936. That regulation is in these terms : 'The highways outside Colombo specified in Schedule B hereto are hereby declared to be suitable for all motor cars other than lorries, trailers and six-wheeled motor cars, subject to the condition of restrictions contained in the first column of the said schedule and hereby imposed in respect of the use of any particular highway thereof provided that ;—

(1) The tare of the motor car together with the weight of the maximum number of passengers and the maximum load, if any, which it is licensed to carry, shall not in any case exceed the weight specified in the corresponding entry in the second column of the said schedule ; and (2) the maximum axle load does not exceed three tons.

The highway in question in this case is that section of the Kandy, Matale, Dambulla road that lies beyond the 31st mile post and the Nalanda-Oya bridge. The weight given for this section in the corresponding entry in column two is three tons. In terms of the concluding part of the regulation, that weight of three tons is the weight of the tare of the omnibus plus the weight of the maximum number of passengers and the maximum load if any, which it is licensed to carry.

The facts of this case are that this omnibus was, on the occasion with which we are concerned, on the Dambulla side of the 31st mile post. In it there were 20 persons including the driver and the conductor. The tare of the omnibus is 1 ton, 17 cwts. 1 qr. It is licensed to carry 19 passengers and the driver and conductor and goods up to 480 pounds and two gallons of petrol on the hood or alternatively, to carry up to 3142 lbs and 6 passengers and the driver and the conductor. So that when this omnibus is being used for the conveyance of more than 6 passengers it is capable of carrying 21 persons plus 480 lbs plus two gallons of petrol. Section 63 (1) of the Ordinance 20 of 1927 says that each person shall, in the case of hiring cars, be deemed to weigh 120 lbs. Therefore, the maximum weight is $21 \times 120 +$ 480 lbs + the weight of 2 gallons of petrol, *i.e.* $2520 + 480 = 3000$ + the weight of the petrol. Add the tare and the result is 3 tons, 4 cwts. 4 lbs + 2 gallons of petrol. In the alternative case, the maximum weight of the omnibus is $8 \times 120 + 3142$ lbs + the weight of 2 gallons of petrol *i.e.* 4102 lbs + 2 gallons of petrol or 1 ton, 15 cwts. 2 qrs. 14 lbs. Add the tare and the result is 3 tons, 13 cwts. 3 qrs. 14 lbs. plus the weight of the petrol. In both cases, therefore, the maximum weight is well over the prescribed 3 tons. But it is contended that inasmuch as this omnibus was carrying *on this occasion* less than 3 tons, there was no breach of the regulation. A similar contention was put forward in the case *Brantha v. Pereira* 29 *N.L.R.* 38, but Dalton J. rejected it observing that if the actual weight was intended, it would have been very easy to say so. I am in respectful agreement with this view. This case was relied upon by the prosecution in the court below and in regard to it, the Magistrate said 'on the authority of the case reported in 29 N. L. R. 38, the accused will be guilty of an offence but the accused pleaded that the licence issued was subject to special conditions inscribed on the reverse side of the licence D 1 " *load to be reduced on restricted roads*" ' and he upheld the contention. In my opinion, this is an impossible view as the law stands at present. It amounts to holding that it is possible for licensed persons to break the law. Not even a licensing authority has the power to do that. The law is clear that the test is not the actual weight

of the omnibus at any particular time, but its maximum weight calculated in the manner indicated. The words of the regulation are unequivocal 'the tare of the motor car together with the *maximum* number of passengers and the maximum load if any'. The purpose of the words 'if any' is not quite clear unless those words have been inserted to meet a possible case of a hiring car being licensed for carrying passengers only. But it is quite clear that so far as passengers and the lorry come into question, it is the maximum number and the maximum load and not the actual number and the actual load that the legislature contemplated. I was strongly addressed in regard to the hardship that this interpretation entails so far as owners of omnibuses are concerned. Perhaps, it is a hardship that they should have to maintain relays of omnibuses to suit the exigencies of the route on which they plied their omnibuses but that is a matter for the legislature. It is beyond my control. I am concerned with the interpreting the law as it is. I would, however, add if it will avail the accused at all, that the licensing authority appears to have interpreted this regulation in the way in which they ask it to be interpreted, for there is the endorsement on the licence 'load to be reduced on restricted roads', implying thereby that an omnibus of which the maximum attainable load is over 3 tons can keep within the law by discarding goods or passengers to the requisite extent when the 3 ton limit of road is reached. But, as I have already held, however reasonable this view may be, it is inconsistent with the law as it is. While I am on this point, the words of Dalton J. in the case I have referred to, occur to me " if effect can be given to the argument advanced....., the provision would be unworkable without a large body of traffic inspectors along the road continually checking the number of passengers entering and leaving the vehicles ". I notice that in regard to this particular route Kandy, Matale, Nalanda, Dambulla up to the 31st mile post, the allowed weight is 5 tons 'with the exception of the Katugastota bridge on which the maximum weight allowed is 3 tons'. This, at first sight, may appear to support the case for the accused,but as a matter of fact, it refutes that case by providing a very limited exception. And in the case of such exception, the inconvenience emphasised in the passage I have just cited from the judgment of Dalton J. will hardly apply for an inspector stationed at that particular point will suffice for the enforcement of that exception.

I am, therefore, of opinion that the accused are guilty and that the order of the Magistrate is wrong. I set aside the order and convict the accused on the charges laid against them. In regard to sentence, in my opinion, this is a case for nominal sentence. The licensing authority has misled the accused into the commission of this offence by making the endorsement he made on the licence. Moreover, the accused have plied this omnibus on this route for a long time without this question being raised. I would, therefore, order each accused to pay a fine of one rupee, in default one day's simple imprisonment.

Present: SOERTSZ, J.

MUNASINGHE (S. I. Motor Patrol) vs. ELIYATHAMBY.

S. C. No. 687—*P. C. Matale No.* 18151
Argued on 4th June, 1937.
Decided on 11th June, 1937.

Motor Car Ordinance No. 20 *of* 1927—*Omnibus contravening terms of licence—Authority to carry a certain number of passengers and a prescribed quantity of goods on the roof or in the alternative a prescribed quantity of goods and a fixed number of passengers—Regulation* 6 (3).

The accused was the driver of a licensed omnibus. The license authorised him to carry 17 passengers and 336 pounds of goods on the roof or in the alternative to carry 2484 lbs of goods and 6 passengers. On the day in question he was found carrying 14 passengers, 2 bags vegetables, 1 bag rice, 1 bag sundries and two bundles of vegetables inside the omnibus. He was thereupon charged with contravening the terms of his license.

It was *inter alia* urged on behalf of the accused that it was not proved that the weight of the passengers in excess of six passengers plus the weight of the goods inside the bus exceeded the weight allowed viz. 2484 pounds. It was also contended that the conductor and not the driver was liable.

Held : (i) That once the six-passengers limit is exceeded, *ipso facto* the condition that the bus may carry goods to the extent of 336 pounds on the roof becomes operative and then if any goods are carried inside the bus it would amount to a contravention of the license no matter what their weight is.

(ii) Regulation 6 (3) of the regulation in the 4th schedule to the Motor Car Ordinance applies to a case of overloading and does not apply to a case where goods are carried in a part of an omnibus not authorised by the license.

C. E. S. Perera for accused–appellant.
M. F. S. Pulle, Crown Counsel, for the complainant–respondent.

SOERTSZ, J.

The accused in this case was charged in that he "being the driver of motor bus No. X 4256 used the said bus in contravention of its licence by carrying 14 passengers, 2 bags vegetables, 1 bag rice, 1 bag sundries and two bundles of vegetables *inside* the said bus when it was licensed for 17 passengers and 336 pounds of goods on the roof or in the alternative to carry 2484 lbs of goods and 6 passengers, in breach of section 31 of Ordinance 20 of 1927 and thereby committed an offence punishable under section

84 of Ordinance 20 of 1927'. He was convicted and sentenced to pay a fine of Rs. 15 ".

The appeal is on two questions of law. It is contended (*a*) that there was no offence because the goods found inside the bus were not weighed and that therefore there is no evidence that the of the passengers in excess of six passengers plus the weight of the goods inside the bus exceeded the weight allowed viz. 2484 pounds (*b*) if an offence was committed, then the *conductor* and *not* the *driver* is liable.

The relevant facts are that on this occasion this omnibus was found to be carrying 14 passengers and the goods described in the charge, inside the omnibus and that the accused was the driver of the omnibus. It is admitted that the conditions endorsed on the licence issued in respect of this omnibus are that it may carry 17 passengers and goods up to a weight of 336 pounds on the roof *or* 2484 pounds of goods and six passengers. In the alternative case there is no restriction as to where the goods are to be carried. It seems clear that the parties interested in the omnibus are given the choice whether to use it on a particular occasion mainly for the conveyance of passengers or mainly for the carriage of goods.

Once the six-passengers limit is exceeded, *ipso facto* the condition that the bus may carry goods to the extent of 336 pounds on the roof becomes operative. But, in this instance, there were goods, no matter what their weight, inside the bus and thus there occurred a contravention of that condition. The contention put forward that inasmuch as 14 passengers and the driver and the conductor weigh 16 × 120 *i.e.* 1920 pounds and the weight of the goods has not been ascertained, the omnibus was within the alternative limit of a load of 1484 pounds is, in my opinion, utterly untenable. That alternative limit is irrelevant except when there are not more than six passengers in the omnibus.

The next question is whether the driver could have been charged and convicted. Mr. Perera for the appellant submitted that in terms of regulation 6 (3) in the 4th schedule of the Motor Cars Ordinance the conductor and not the Driver was liable. Regulation 6 (3) is in these terms: " If there are found in an omnibus goods *exceeding the weight* which, having regard to the number of passengers in the omnibus, the omnibus is licensed to carry, the *conductor* of the omnibus shall be guilty of an offence ".

But the prosecution in the present case is not based on an allegation that the allowed weight was exceeded, but on the allegation that there were

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goods inside the omnibus when under the conditions obtaining at the time, goods should have been *on the roof* and *not inside* the omnibus. So that regulation 6 (3) does not apply. That being so, the driver is liable under section 80 (3) of the Ordinance unless the contravention was not due to any act, omission, neglect or default on his part. The driver has not sought to exculpate himself on any of those grounds.

With regard to the case of *Doole v. Zubair*, 37 N.L.R. 242, the headnote does not state the actual point decided in that case, namely that for ascertaining the denomination of a vehicle, whether it is a lorry or an omnibus one must look to the licence and that an omnibus does not become a lorry because goods are carried inside it and not on the roof as the condition endorsed on the licence required. The driver was sought to be made liable on the ground that he was there in the position of a lorry driver. Moreover, in that case the accused was charged with carrying goods *in excess of the prescribed quantity and not with carrying them in a prohibited part of the omnibus.*

For these reasons, the appeal fails and is dismissed.

Appeal dismissed.

Present : SOERTSZ, J. & HEARNE, J.

THAMBY LEBBE & ANOTHER vs JAMALDEEN

S. C. No. 196 (*Final*)—*D. C. Kandy No.* 47009
Argued on 22nd June, 1937.
Decided on 1st July, 1937.

Agreement to make a gift of land by way of dowry—Lands not specified by reference to a corpus—Agreement not notarially attested—Section 2 of Ordinance No. 7 of 1840—*Is such agreement enforceable ?*

Held : (i) That an agreement made upon consideration of marriage to settle upon the plaintiffs landed property is not "a bargain, promise or agreement for 'effecting' " a sale, purchase, transfer, assignment or mortgage of land or other immovable property within the meaning of section 2 of Ordinance No. 7 of 1840.

(ii) That a promise given in writing by the defendant undertaking to give "Cash Rs. 1,000/– and house and paddy field and estate worth Rs. 20,000/– at Nawalapitiya and Rambukpitiya" in consideration of the marriage of plaintiff with his daughter was enforceable, although it was not notarially attested.

Hayley, K.C., with *C. V. Ranawaka* for plaintiffs-appellants.

H. V. Perera, K.C., with *L. A. Rajapakse* and *Molligoda* for defendant-respondent.

HEARNE, J.

In this case the trial Judge found that the defendant-respondent had promised the plaintiffs-appellants a dowry gift of Rs. 20,000/– in consideration of their marriage which took place on 20th December, 1930, and that he failed to give them immovable property to the value of Rs. 20,000/– or the equivalent in cash as stated in the marriage certificate. In the marriage certificate it is stated that the "*Stridanam*" was to be "Cash Rs. 1,000/– and house and paddy field and estate worth Rs. 20,000/– at Nawalapitiya and Rambukpitiya." The next paragraph is to the effect that " the *Stridanam* amount (had been) received, the balance to be given whenever the bride and bridegroom asked for them." It is agreed for the purposes of this appeal that " *Stridanam* " should read " part of the *Stridanam* " and that the sum of money that actually changed hands was Rs. 1,000/– only. On the issue of prescription the Judge found in favour of the plaintiffs, now appellants, but dismissed their claim on the ground that the defendant-respondent, not having agreed to give Rs. 20,000/– in cash, the plaintiffs were not entitled " to claim immovable property in the absence of notarial writing."

Whether or not notarial writing is necessary depends upon the interpretation that is placed on section 2 of Ordinance No. 7 of 1840. That section provides that (*a*) no sale, purchase, transfer, assignment or mortgage of

land or other immovable property, (*b*) no promise, bargain, contract or agreement for effecting any such object.....and (*c*) no contract or agreement for the future sale or purchase of any land or immovable property, shall be of force or avail in law unless.....The facts of this case cannot be said to fall within (*c*), for there was no agreement of *sale* or *purchase* nor, in so far as (*a*) is concerned, was there any sale, purchase, transfer, assignment or mortgage. The question for which there is, as I understand, no authority in this Court is whether an agreement made upon consideration of marriage to settle upon the plaintiffs landed property is a bargain, promise or agreement for "effecting" one of the "objects" referred to in (*a*). I do not think that (*b*) is susceptible of or intended to have that meaning. I regard the words "promise, bargain, contract or agreement for effecting any such object" as referring to a means of and a stage in the formal effectuation of a sale, purchase, transfer, assignment or mortgage. The draftsman no doubt had before him the Statute of Frauds and it would appear that the clause in section 4 of the Statute relating to agreements made upon consideration of marriage was omitted designedly. A clause of that nature would not have been left to the Courts to infer from the text but would have been stated expressly. It is possible, if not probable, that the conditions in Ceylon would have made impracticable an insistence upon notarial attestation in every case and that this was the reason for the omission.

Apart from this view which I take of section 2 of Ordinance No. 7 of 1840 I doubt very much whether the Ordinance has any application at all where the land, as in the present case, is unidentifiable land. The defendant-respondent's promise had reference to property which was limited as to value and as to situation but apart from these limitations was a promise of land at large. Section 8 (a) of the Registration of Documents Ordinance No. 23 of 1927 refers to the same instruments affecting land as does section 2 of Ordinance No. 7 of 1840 and it would appear that the instruments in question as mentioned in both are those which relate to or affect specific properties.

In my opinion the view taken by the learned District Judge was wrong.

On the question of prescription Counsel for the respondent has argued that as the plaintiffs relied upon a verbal promise for payment of the dower gift on demand the cause of action arose in October 1930 and that in consequence the plaintiffs' claim was barred by section 6 of Ordinance No. 22 of 1871. Now apart from the fact that the plaintiffs alleged that the defendant had confirmed his promise at the marriage in writing, it is quite clear from the evidence of the plaintiffs (the defendant did not give any evidence at all) that the defendant verbally renewed his promise from time to time till October 1935 when he definitely refused to fulfil it. This refusal gave rise to the cause of action. The District Judge was in my opinion right in finding that the cause of action accrued to the plaintiffs in 1935.

The appeal is allowed with costs. No issue was framed in the lower Court on the question of damages. The case should be remitted to the Judge to decide the amount of damages suffered by the plaintiffs consequent upon the defendant's refusal to settle property on the plaintiffs and to enter judgment in their favour in accordance with his finding.

SOERTSZ, J.

I agree.

Appeal allowed.

Present : POYSER, S. P. J. & FERNANDO, A. J.

HULL BLYTH & CO., LTD. vs VALIAPPA CHETTIAR

S. C. No. 180—*D. C. Colombo No.* 2839.
Argued on 15th June, 1937.
Decided on 29th June, 1937.

Forward contract for the sale of rubber—Delivery of a specified quantity to be made monthly over a period of six months—Acceptance of three of the deliveries—Refusal to accept the subsequent deliveries—Breach of contract—Purchaser not a licensed rubber-dealer—Is the contract for this reason void and unenforceable?—Section 3 *of the Rubber Thefts Ordinance No.* 21 *of* 1908.

Shortly the relevant facts are as follows :—

The plaintiff company and the defendant entered into a contract on 23rd May, 1934, in which the plaintiff company agreed to sell to the defendant 150 tons of rubber, delivery to be in quantities of 25 tons per month beginning from August, 1934 to January, 1935. It was agreed that payment was to be made against tender in accordance with the Chamber of Commerce bye-laws and conditions of sale of rubber.

The defendant accepted the deliveries made in August, September and October, 1934, and paid for them as agreed, but refused to accept or pay for any rubber tendered during the months of November and December, 1934, and January, 1935.

The plaintiff thereupon claimed a sum of Rs. 15,960/– being damages for breach of contract. The defendant denied liability on the following among other grounds.

(1) That the contract in question was an agreement to gamble in differences and therefore unenforceable.

(2) That the defendant had not, at the date of the contract, or at any date, a license to deal in rubber, the contract therefore was void and unenforceable and no action could be maintained for the recovery of damages for the non-fulfilment thereof.

(3) That the plaintiff company did not duly tender to the defendant, in accordance with the terms of the contract, the rubber deliverable in November and December, 1934 and January, 1935.

The learned trial judge held in favour of the plaintiff on all the issues except the second issue set out above, On this issue he held that as the defendant was not a licensed

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rubber dealer under the provisions of the Rubber Thefts Ordinance the contract was unenforceable.

From this finding the plaintiff appealed.

Held : (i) That the provisions of the Rubber Thefts Ordinance No. 21 of 1908 do not apply to forward contracts for the sale or purchase of rubber.

(ii) That this contract was not void and that the plaintiff was entitled to damages.

(iii) That a licence under the Rubber Thefts Ordinance is not necessary until delivery of rubber is taken by way of completion of a contract.

(iv) That the object of the Rubber Thefts Ordinance, is clearly, to prevent the purchase of stolen rubber, and not to control all dealings in rubber.

PER POYSER, S. P. J.

" Having considered this Ordinance as a whole I am of opinion that its provisions do not apply to forward contracts and that a license under this Ordinance is not necessary until delivery of rubber is taken by way of completion of a contract.

The object of this Ordinance, is clearly, to prevent the purchase of stolen rubber, not to control all dealings in rubber, and to carry out these objects provisions are made that persons who purchase rubber and such rubber is delivered to them have to comply with certain regulations and to furnish information as to the origin of every lot of rubber they purchase. All these requirements are obviously to prevent the purchase of or to trace stolen property.

The Ordinance does not and was never intended, in my opinion, to prohibit, *e.g.* a forward contract entered into between two brokers after sunset, and if the respondent's contention is correct, such a contract would be unlawful."

Hayley, K.C., with *Weerasooriya* and *D. W. Fernando* for appellant.

H. V. Perera, K.C., with *Gratiaen* and *J. A. T. Perera* for respondent.

POYSER, S. P. J.

The plaintiff company and the defendant entered into a contract on the 23rd of May 1934 (P1) under the terms of which, the plaintiff company agreed to sell to the defendant 150 tons of rubber, delivery to be in equal quantities of 25 tons monthly from August 1934 to January 1935, payment to be against tender in accordance with the Chamber of Commerce bye-laws and conditions of sale of rubber.

The defendant accepted and paid for all claims in respect of the month of August, September and October, 1934, but refused to accept or pay for any rubber tendered during the months of November and December 1934 and January, 1935.

The plaintiff company claimed Rs. 15,960/- for breach of the said contract and it was agreed in the lower court that they should be given judgment for this sum "in the event of their being found entitled to damages."

The principal grounds on which the defendant denied liability were:—

(1) That the contract in question was an agreement to gamble in differences and therefore unenforceable.

(2) That the defendant had not, at the date of the contract, or at any date, a license to deal with rubber, the contract therefore was void and unenforceable and no action could be maintained for the recovery of damages for the non-fulfilment thereof,

(3) That the plaintiff company did not duly tender to the defendant, in accordance with the terms of the contract, the rubber deliverable in November and December 1934 and January 1935.

The learned Judge, in a careful and exhaustive judgment found in favour of the plaintiff company on all the issues framed with the exception of the issues in regard to the defendant not having a license to deal in rubber, and on these issues he held that as the defendant was not a licensed dealer under the provisions of the Rubber Thefts Ordinance, 1908, the contract was therefore prohibited by law and unenforceable. He consequently dismissed the plaintiff's action.

On behalf of the appellant it was argued, firstly, that the provisions of the Rubber Thefts Ordinance were not applicable to forward contracts but only to purchases for immediate delivery, and that the object of the Ordinance was to prevent rubber dealers from receiving stolen property, secondly, that even if the Ordinance did apply to forward contracts, the contract in this case was not an unlawful or prohibited one as the Ordinance did not require sellers to have a license.

Mr. H. V. Perera, for the respondent, relied on section 3 of the Ordinance and argued that the Ordinance was applicable to all purchases of rubber whether for immediate or future delivery, and that if the purchaser was unlicensed, the contract was unlawful and unenforceable.

To decide these questions, it is first necessary to carefully examine the precise terms of the Rubber Thefts Ordinance.

As Atkin L. J. said in the case of *In re Mahmoud and Ispahani*, (1921 2 K.B. p. 731) :—

> "When the Court has to deal with the question whether a particular contract "or class of contract is prohibited by statute, it may find an express prohibition "in the statute, or it may have to infer the prohibition from the fact that the "statute imposes a penalty upon the person entering into that class of contract. "In the latter case, one has to examine very carefully the precise terms of the "statute imposing the penalty upon the individual. One may find that the "statute imposes a penalty upon an individual, and yet does not prohibit the "contract if it is made with a party who is innocent of the offence which is created "by the statute."

The preamble of this Ordinance commences thus :—" Whereas it is expedient to make special provision to prevent thefts of rubber."

I have set this out with a view to appreciating the real scope of the Ordinance. " The preamble of a statute may be legitimately consulted to find out its meaning and keep its effect within its real scope." (*Maxwell on Interpretation of Statutes, 7th Edition p. 37 and cases cited therein*).

The sections of the Ordinance to which reference is necessary are as follows. Section 3 upon which the respondent relied, is as follows :—

> " From and after the commencement of this Ordinance it shall be unlawful "for any person to purchase rubber or to take delivery of rubber for sale "or shipment, unless he has been licensed under this Ordinance to deal in rubber, "or has received from the Government Agent a permit authorising him to do so,

"Any person who purchases rubber or takes delivery of rubber for sale or ship-
"ment without being so licensed, or without such permit, shall be guilty of an
"offence against this Ordinance."

In connection with this section it is to be noted that it is only unlawful for an unlicensed person to purchase rubber or to take delivery of rubber for sale or shipment. The sale of rubber by an unlicensed person is not prohibited.

Sections 4 and 5 deal with the issue of licenses, section 4 (2) requiring the premises to be stated at which the business of a dealer in rubber is to be carried on and section 4 (4) permits the issue of licenses to superintendents and assistant superintendents of estates to purchase rubber.

Section 6 requires a licensed dealer to have the words "Licensed dealer in Rubber" painted in conspicuous letters upon his licensed premises.

Section 7 makes provision with regard to partners and it will be seen that only one license is required in respect of the same premises.

Section 8 (1) (*a*) makes it an offence for any person to sell or to deliver rubber or for a licensed dealer to purchase or take delivery of rubber except between sunrise and sunset.

Section 8 (1) (*b*) makes it an offence for any licensed dealer to purchase or take delivery of rubber from any person not personally known to him, under twelve years of age, or from any estate labourer.

Section 8 A (*b*) requires, inter alia, the seller of rubber to fill up a declaration specifying the lands from which the rubber was produced.

Section 9 requires a book to be kept by licensed dealers in which certain particulars are to be entered. These particulars all deal with the purchase and delivery of rubber, amount bought, from whom, day of delivery, price, and similar matters. A seller, unless a licensed dealer, is not required to keep books.

Section 10 provides for the inspection of licensed premises and books.

Section 13 imposes a duty on licensed dealers to keep scales on the licensed premises.

From the above it will be seen that the object of the Ordinance, as it states, is to prevent thefts of rubber and to carry out this object not only are dealers licensed but the places where they are authorised to deal and receive the rubber they purchase are controlled open to inspection. The Ordinance also appears to have been framed in regard to the purchase of rubber with immediate delivery and not in regard to forward contracts.

In regard to the latter class of contract many of its provisions are inapplicable and some could not be carried out.

Section 8 A (*b*) *e.g.* could not be complied with in the case of a forward contract by a firm of brokers for they would in all probability be unable to specify the lands of which the rubber to be delivered was the produce.

Section 9 also indicates that the expression "purchase" does not refer to forward contracts as the various entries in the books are required to be made only when the rubber is delivered,

Having considered this Ordinance as a whole I am of opinion that its provisions do not apply to forward contracts and that a license under this Ordinance is not necessary until delivery of rubber is taken by way of completion of a contract.

The object of this Ordinance, is clearly, to prevent the purchase of stolen rubber, not to control all dealings in rubber, and to carry out these objects provisions are made that persons who purchase rubber and such rubber is delivered to them have to comply with certain regulations and to furnish information as to the origin of every lot of rubber they purchase. All these requirements are obviously to prevent the purchase of, or to trace, stolen property.

The Ordinance does not and was never intended, in my opinion, to prohibit, *e.g.* a forward contract entered into between two brokers after sunset, and if the respondent's contention is correct, such a contract would be unlawful.

The Supreme Court of the Straits Settlement have come to a similar conclusion. The case of *Syn Thong and Co., vs Tong Joo (Hoo) and Co.* (St Sett. Law Rep. 1929. Part I p.39) depended on the interpretation of section 3 of the Rubber Dealers Ordinance (Laws of the Strait Settlements. Vol. V Cap. 212) which is as follows :—

> "No person shall purchase, treat, or store rubber unless he shall have "been duly licensed in that behalf by the licensing officer."

The Court held "that the fact that plaintiffs were not the holders of a license to purchase rubber under section 3 of the Rubber Dealers Ordinance, did not render the contracts illegal as the words "purchase rubber" in section 3 do not refer to a forward contract. A license under the section does not become necessary until delivery is taken. Where a contract is executory, the circumstance that one party is bound to fulfil a certain condition before he can legally perform the contract, and has not yet done so, does not render the contract itself illegal."

I also agree with Mr. Hayley's argument that even if the Ordinance did apply to forward contracts, the plaintiff company are still entitled to succeed.

The Judge has held that the contract was a prohibited one and applying the principles set out in *In re Mohmoud and Ispahani*, (supra), held that it was unenforceable. That case depended on the true construction of an order of statutory effect made under the Defence of the Realm Regulations. This order prohibited any person from buying, selling or otherwise dealing in certain articles whether situated within or without the United Kingdom, except under and in accordance with the terms of a license issued by the Food Controller. The seller had a license, the purchaser had not. The Court held that as the contract was prohibited, they would not enforce it even on behalf of an innocent party.

"The sole question is whether the statute means to prohibit the contract. If the contract is prohibited by statute, the Court is bound not

to render assistance in enforcing an illegal contract." (Scrutton L. J. p. 729).

In this case the contract was not prohibited — the wording of section 3 of the Ordinance is very different to the wording of the Order above referred to.

It was argued that the following words in this section — " it shall be unlawful for any person to purchase rubber or to take delivery of rubber for sale or shipment unless he has been licensed " — had the effect of making the contract between the parties a prohibited one if the purchaser was unlicensed.

I do not agree that if the purchaser commits an unlawful act the seller also "*ipso facto*" does. One cannot read into a penal statute, as into a contract, words necessary to give it what has been called business efficacy.

This case, in my opinion, falls within the class of case referred to by Bankes L. J. in his judgment in *In re Mohmoud and Ispahani* (supra) viz : " the class of cases which say that when a contract may be performed either in a lawful way or in an unlawful way and if a party in the performance of his part of the contract, without the knowledge of the other party, elects to perform it in an unlawful way, he cannot be heard to allege his own wrong."

Of this class of case *Bloxsome vs Williams*, (3 B and C 232) is an example. This case was not overruled by *In re Mahmoud and Ispahani* (supra) although in the latter case the Court did disapprove of a dictum of McCardie J. (*Brightman vs Tate*, 1919 I K.B. 463) to the effect that there is some qualification admissible to the established rule of law that the Court will never lend its aid in the enforcement of a contract which is *ab initio* illegal.

There is not the slightest doubt in this case that the plaintiff was an innocent party and not a " *particeps criminis.*"

The evidence of Mr. Shand on this point, and the Judge accepts his evidence "on this and every other point," is: "I did not know that the defendant was not qualified to buy rubber because he had no license. I regarded him as a gentleman of standing who would observe all provisions of the law. He never told me nor did I have any information that he had no license to deal in rubber. I did not enquire if he had a license or not."

On the other hand the defendant made no effort to obtain a license, and if this appeal could not be decided on other grounds it might be decided against the respondent on the ground that there was an implied obligation on his part to use his best endeavours to obtain a license and he made no such endeavours. (See *In re Anglo Russian Merchant Traders and John Batt and Co., London* 1917 2 K.B. p. 685).

For these reasons I do not consider it is competent for the defendant to rely on his own breach of the law, assuming there was such a breach, and I think the Judge was wrong in holding that the principles enunciated in *In re Mohmoud and Ispahani* (supra) are applicable to this case.

There is only one other point to which I need briefly refer, viz : that the plaintiff company did not duly tender to the defendant the rubber deliverable from November 1934 to December 1935.

In connection with this argument reference was made to the Sale of Goods Act but as the Judge points out, tender, according to the contract, was to be made in accordance with the Chamber of Commerce bye-laws and this the plaintiff company duly did.

Further the Judge finds, and the evidence amply supports his finding, that the defendant never intended to take delivery of the rubber tendered during these months.

I would allow the appeal and direct that decree be entered for plaintiff company as prayed with costs both here and below.

FERNANDO, A. J.

I agree.

Appeal allowed.

Present : SOERTSZ, J.

SALGADO (Police Sergeant) vs JOHN SINGHO.

S. C. No. 308—*P. C. Dandagamuwa No.* 41

Argued & Decided on 14th June, 1937.

Criminal Procedure Code section 81—*Application to have a person bound over to keep the peace—Should such person be afforded an opportunity of showing cause against the order?*

Held : That before an order under section 81 of the Criminal Procedure Code is made the person in respect of whom the Order is to be made should be given an opportunity of showing cause against the order.

PER SOERTSZ, J.

"Section 81 is obviously intended to anticipate cases of breaches of the peace which the complainant apprehends. In this case the information alleged against the appellant was that he had already committed a breach of the peace on 3rd November, 1936. Before the Magistrate was called upon to consider the propriety of directing this accused to furnish bail in terms of Chapter 7. of the Criminal Procedure Code the Police should have prosecuted the accused for the offence he is alleged to have committed on 3rd November, 1936. But, of course, in that case it would not have been section 81 that would have been applicable but section 80 (1) in the event of the accused being convicted of the offence with which he was charged.

H. W. Tambiyah for petitioner-appellant.

M. F. S. Pulle, C.C., for Crown respondent.

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Soertsz, J.

Salgado (Police Sergeant) *vs* John Singho

SOERTSZ, J.

It is impossible to sustain the order made by the Police Magistrate on 11th February, 1937, directing the appellant to furnish bail in Rs. 100/– with one surety to be of good behaviour and keep the peace for a period of six months.

To begin with, the plaint filed by the Police on 3rd December 1936 was against this accused and three others and was to the effect that they had at Narammala on 30th November 1936 committed a breach of the peace by fighting on the public road.

The Police Sergeant who made this complaint to Court stated that he apprehended further trouble. He, therefore, begged that the respondent might be called upon to show cause as to why they should not be bound over to keep the peace in terms of section 81 of the Cr. P. C.

Then on the 10th December 1936 the Police appear to have dropped the other three respondents and to have concentrated their attack upon this appellant, because on that day the Police Sergeant reports to Court that he has received credible information that the appellant had on 30th November 1936 at Narammala committed a breach of the peace by fighting on the public road, that he apprehended further trouble and therefore he begged that this respondent be called upon to show cause why he should not be bound over to keep the peace in terms of section 81 of the Cr. P. C.

Section 81 is obviously intended to anticipate cases of breaches of the peace which the complainant apprehends. In this case the information alleged against the appellant was that he had already committed a breach of the peace on 3rd November 1936. Before the Magistrate was called upon to consider the propriety of directing this accused to furnish bail in terms of Chapter 7. of the Cr. P. C. the Police should have prosecuted the accused for the offence he is alleged to have committed on 3rd November, 1936. But, of course, in that case it would not have been section 81 that would have been applicable but section 80 (1) in the event of the accused being convicted of the offence with which he was charged. But even if I overlook this defect, the order cannot be supported at all in view of the fact that the appellant was not given an opportunity to show cause against the application made to have him bound over. There was not even a word of evidence tendered against him.

I gather from the connected case which has been sent up, that on this very day, 11th February, 1937, certain accused in that case were acquitted of charges preferred against them by the complainant. The present appellant appears to have been a witness for the prosecution in that matter. The Police Magistrate acquitted the accused in that case and probably importing the knowledge he had acquired in the course of that case thought he should forthwith order the appellant to furnish bail in this case.

As I have already pointed out the order is bad in that the appellant was not given an opportunity to show cause. I, therefore, set aside.

Present : POYSER, S. P. J. & FERNANDO, A. P. J.

PERERA vs ALICE

S. C. No. 15—*D. C.* (*Inty.*) *Galle No.* 34072
Argued & Decided on 24th June, 1937.

Evidence Ordinance section 92—*Statement in attestation clause of a bond that consideration passed in the notary's presence—Is evidence to contradict such statement inadmissible.*

In the attestation clause to a mortgage bond it was stated that consideration passed in the presence of the notary. When action was filed on the bond, the defence was taken that there was no consideration for the bond. The plaintiff objected to this defence on the ground that evidence in support of the allegation that no consideration passed was inadmissible under section 92 of the Evidence Ordinance. The District Judge upheld this objection and the defendant appealed from this finding.

Held : That the evidence that no consideration passed on the mortgage bond was not inadmissible, although the attestation clause stated that consideration passed in the notary's presence.

M. I. M. Haniffa for the substituted defendant-appellant.

E. B. Wickremanaike for plaintiff-respondent.

POYSER, S. P. J.

In this case the plaintiff sued the defendant on mortgage bond P 1, the consideration being a sum of Rs. 300/- which in the attestation clause was stated to have been paid by the plaintiff to the mortgagor in the presence of the notary. The added defendant, who is the widow of the mortgagor, in her answer set out that no consideration was paid by the plaintiff to the mortgagor and that the mortgage was executed in the circumstances set out in the answer. The actual execution of the mortgage bond was admitted. At the trial, after issues had been framed, the added-defendant gave evidence and in such evidence stated " Defendant gave P 1 because of the joint purchase of the car as security for the purchase and for no consideration." This evidence was objected to on behalf of the plaintiff on the ground that it was oral evidence seeking to vary the terms of the bond and was, therefore, contrary to the provisions of section 92 of the Evidence Ordinance. Counsel for the added-defendant argued that the evidence in question did not seek to vary the terms of the bond but only went to prove that no consideration passed, even though such evidence contradicted the attestation clause. The District Judge held that such evidence was inadmissible as the attestation clause stated that the full consideration had been paid. The trial was then adjourned as the added-defendant wished to appeal against that order.

In my opinion the District Judge was wrong in holding that evidence to prove that no consideration passed on the mortgage bond P 1 was inadmissible. This point has already been decided by authority— vide *Kiri Banda vs Marikar* (20 N.L.R. p.123). In that case de Sampayo J. held that it is competent for a party to a contract to prove the want or failure

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of consideration or to prove that the consideration was different from that recited in the contract. This decision is in accordance with proviso 1 of section 92 of the Evidence Ordinance. Section 92 sets out that no oral evidence shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the terms of any contract, but the proviso lays down that any fact may be proved which would invalidate any document, including want or failure of consideration. It is also conceded by Mr. Wickremanaike that the judge was wrong in holding that evidence was inadmissible to show that no consideration passed although the attestation clause stated that it did.

The order of the District Judge is, consequently, set aside and the trial will proceed, the added defendant being allowed to adduce evidence to prove that the consideration stated on P 1 to have been paid was in fact not paid. It will not be available tc the added-defendant to adduce evidence attempting to vary or contradicting other terms of the document P 1.

The appellant is entitled to the costs of this appeal. Other costs will follow the final result.

FERNANDO, A. P. J.

I agree.

Present : MOSELEY, J.

COREA (S. I. Police) vs TIKIRI BANDA

S. C. No. 235—*P. C. Ratnapura No.* 14190
Argued & Decided on 7th June, 1937.

Criminal Procedure—Evidence recorded in one case—Accused convicted in another case on the evidence so recorded the facts being the same—Is this procedure legal.

Held : (i) That even though the facts be identical an accused cannot be convicted on the evidence recorded in another case.

(ii) That before a conviction can be had evidence must be called to support it.

S. W. Jayasuriya for the accused-appellant.

M. F. S. Pulle, C.C., for the complainant-respondent.

MOSELEY, J.

No evidence was recorded in this case, but the Magistrate made the following order :—" On the facts and evidence recorded in the counter case which are identical with the facts in this case as well, I hold the accused guilty of the offence with which he is charged." The accused was, thereupon, sentenced to imprisonment till the rising of the court and ordered to enter into a bond to keep the peace and to be of good behaviour for six months. The procedure is, of course, quite irregular and before a conviction can be had evidence must be called to support it. For that reason I allow the appeal and set aside the conviction and the sentence.

Appeal allowed.

Present : SOERTSZ, J. & HEARNE, J.

NALLIAH vs FERNANDO & ANOTHER

S. C. No. 299(F)—*D. C. Negombo No.* 9394

Argued on 22nd & 24th June, 1937.

Decided on 1st July, 1937.

Money Lending Ordinance—Fictitious promissory note—Circumstances in which relief under section 10 *may be given.*

A promissory note was given for a sum of Rs. 225/–. This sum was made up as follows :—

Rs.	76.48	Amount due by defendants for rice.
,,	17.10	Interest payable at the time the promissory note was signed on the balance of a previous bond of Rs. 60/–.
,,	35.00	Amount of a loan previously given.
,,	9.01	Interest which had accrued on the above loan of Rs. 35/–.
,,	9.00	Interest, for four months in advance, on the promissory note.
,,	2.40	Interest taken in advance on the balance of the bond of Rs. 60/–.
,,	76.01	Paid to the defendant in cash at the time of execution of the promissory note.
Rs.	225.00	

The sum of Rs. 9/– was set out in the marginal column of the note as interest in advance. When action was filed for the recovery of the sum of Rs. 225/– shown in the note, objection was taken *inter alia* that the note was fictitious within the meaning of section 14 of the Money Lending Ordinance. There was no evidence, however, to show that the sum of Rs. 2.40 being interest taken in advance on the balance of the bond of Rs. 60/– was omitted with intent to evade the provisions of the Money Lending Ordinance.

Held : That the note was fictitious only in respect of the sum of Rs. 2/40 and that the plaintiff was entitled to relief under section 10 as there was no evidence of intention to evade the provisions of the Money Lending Ordinance.

N. Nadarajah with *L. A. Rajapakse* for the plaintiff-appellant.

Croos Da Brera for the defendants-respondents.

HEARNE, J.

To the plaintiff's suit which was founded upon a promissory note for Rs. 225/– two defences were raised: firstly, that various payments had been made which reduced the plaintiff's claim to one of Rs. 55/38 only; and, secondly, as a matter of law, that the plaintiff could not maintain the action for the reason that the note sued upon was fictitious within the meaning of section 14 of Ordinance No. 2 of 1918. On the defence of fact the Judge found in favour of the plaintiff and I see no reason to doubt the propriety of that finding, but he dismissed the action holding that the statement as to consideration was fictitious.

The sum of Rs. 225/- consisted of Rs. 76/48 being the amount due by the defendants for rice, Rs. 17/10 being the interest payable at the time the promissory note was signed on the balance of a previous bond of Rs. 60/-, Rs. 35/- being a loan, Rs. 9/01 being the interest which had accrued on this loan, Rs. 9/- being interest for four months in advance on the promissory note, Rs. 2/40 being the interest taken in advance on the balance of the bond of Rs. 60/-; a total of Rs. 148/99 plus Rs. 76/01 taken by the defendants in cash.

The sum of Rs. 9/-; was duly set out in the marginal column of the note as interest in advance, the sums of Rs. 76/48 and Rs. 35/- represented the novations of debts due by the defendants at the time the promissory note was executed—as to this there is considerable authority *e.g. Ramalingam Pillai vs Wimalaratna* (1933) 35 N.L.R. 379—while the items of Rs. 17/10 and Rs. 9/01 were capital advances in that they were payments notionally made by the plaintiff lending money to the defendants to pay interest due and the defendants notionally handing back the money to the plaintiff in discharge of their indebtedness in respect of interest. To my mind the note was not fictitious except to the extent of Rs. 2/40. The defendants were not given Rs. 2/40 in cash and their liability to pay that sum had not arisen. It was a deduction made in respect of interest payable and paid in advance and should have been shown marginally in the promissory note.

As the sum of Rs. 9/- as interest was shown in the margin of the promissory note it would appear that the smaller sum of Rs. 2/40 was omitted through inadvertence and that it was not intended to evade the provisions of the Ordinance. In the circumstances I am of the opinion that the plaintiff is entitled to relief under section 10 of the Ordinance.

The appeal is allowed with costs and judgment should be entered for the plaintiff in the lower court as prayed.

SOERTSZ, J.

I agree.

Appeal allowed.

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

SAVARIMUTTU vs ANNAMMAH

S. C. No. 128—*D. C. Colombo No.* 4138.

Argued on 17th & 19th May, 1937.

Decided on 27th May, 1937.

Mortgage—Action on a Mortgage Bond—Mortgagee subject to Thesawalamai—Action against administrator of deceased mortgagee—Widow not made a party to the action—Separate action brought against the widow after ten years from the date of the bond—Prescription—Section 6 *of Ordinance No.* 22 *of* 1871—*Section* 16 *of the Mortgage Ordinance No.* 21 *of* 1927.

Shortly the facts are as follows :—

One Bastiampillai, a Jaffna Tamil subject to Thesawalamai, had mortgaged for a sum of Rs. 5,000/- a property acquired by him during the subsistence of his marriage. Bastiampillai died on 2nd March, 1933. Two years later action was filed on the bond against the administrator of Bastiampillai's estate and decree was entered. Bastiampillai's widow was no party to this action. An application to execute the decree against the entire premises was refused. This action was thereupon brought against Bastiampillai's widow praying "that the court be pleased to declare that the said undivided one-half (*i.e.* widow's share) be held and bound executable for the payment of the said debt of Rs. 10,000/- and legal interest."

The District Judge entered decree for the plaintiff. The defendant appealed from this decision. For the appellant it was contended (i) that the earlier case instituted by the plaintiff against Bastiampillai's Administrator was a bar to this case; (ii) that the action was barred by the Prescription Ordinance.

Held : (i) That the action was statute-barred.

(ii) That all the actions possible under the provisions of section 16 (1) of the Mortgage Ordinance must be commenced, against the different parties sought to be bound, within the period mentioned in section 6 of the Prescription Ordinance No. 22 of 1871.

Nagalingam for defendant-appellant.

H. V. Perera, K.C., with *Nadarajah* for plaintiff-respondent.

SOERTSZ, J.

The original plaintiff in this case had lent one Bastiampillai a sum of Rs. 5,000/- and had taken from him mortgage bond No. 38 dated 3rd October 1935 to secure the payment of that sum and interest. By that bond a house and land in Colpetty were hypothecated. Bastiampillai was a Jaffna Tamil subject to the Thesawalamai, and, it is admitted, he and his wife were governed by Ordinance No. 1 of 1911. He had acquired the property hypothecated during the subsistence of his marriage with the defendant in this action, and therefore this property was *Thediatetam* and by the law governing the parties, vested on acquisition, equally in him and his wife. Bastiampillai died on the 2nd of March, 1933. Some two years later the original plaintiff sued the administrator of his estate on the bond and obtained a decree which declared the entirety of the mortgaged property bound and executable. If that decree had been entered against Bastiampillai himself, the plaintiff would have had a clear course in view of the Divisional Bench ruling in the case of *Sangarapillai vs Deveraja Mudaliyar*, 38 N.L.R. 1, that the husband as the manager of the *thediatetam* property could mortgage it and that it would suffice to sue him in order to render the whole property executable. But a difficulty arose in consequence of the decree being one against the administrator of Bastiampillai's estate. His wife was no party to that action and, therefore, on the ruling in *Ambalavanar vs Karunathan* 37 N.L.R. 286 she was not bound by the mortgage decree. The plaintiff appears to have made an application to the testamentary court in Jaffna to be allowed to sell the entire premises,

but this application was refused and he was informed that he could sell only Bastiampillai's half share, which was the only share inventoried in the Testamentary case. He therefore launched this action against the defendant, Bastiampillai's widow, and prayed "that the court be pleased to declare that the said undivided one-half (*i.e.* the widow's share).....be held and bound executable for the payment of the said debt of Rs. 10,000/- and legal interest etc." The learned District Judge entered decree in terms of plaintiff's prayer.

The appeal is from that order. For the appellant, it was contended 1. that the earlier case instituted by the plaintiff against Bastiampillai's Administrator was a bar to this case; 2. that this action is barred by the Statute of Limitations.

Mr. Nagalingam for the appellant frankly admitted that the ruling in *Kadappa Chettiar vs Ramanayake*, 38 N.L.R. 33 was against him on the first point, but he pressed the second point and he relied on section 6 of Ordinance 22 of 1871. It is admitted that the present action was instituted after ten years had elapsed from the date of the bond. But Mr. Nadarajah maintained that section 6 of Ordinance 22 of 1871 does not apply because, he said the present action is not one for the recovery of money, and that its purport is only to render Bastiampillai's widow's half share executable for a debt due on a decree he had already obtained. At this point, I think it best to consider section 6 of the Prescription Ordinance. It enacts "No action shall be maintainable for the recovery of any sum due upon any hypothecation or mortgage.....unless the same shall be commenced in the case of an instrument payable at or providing for the performance of its conditions within a definite time within ten years from the expiration of such time, and in all other cases within ten years from the date of such instrument of mortgage or hypothecation, or last payment of interest".....

The question is whether the present action is one for the recovery of any sum due upon any hypothecation or mortgage of any property. On the face of it, it certainly is such an action. Paragraph 7 of the plaint runs as follows : "There is now justly due and owing to the plaintiff on the said bond the total sum of Rs. 10,009/61, which sum, although often demanded, the defendant, the said administrator in the said testamentary case....., has failed to pay. The plaintiff restricts his claim to Rs. 10,000/-. Paragraph 8 continues "A cause of action has thereby accrued to the plaintiff to have the said undivided half of the said land declared held and bound for the payment of the said sum of Rs. 10,000/- and liable to be sold for the payment of the same *unless the defendant* or the administrator *pays the said debt.* Clause 2 of the prayer is in these terms : "that in *default of payment* of the said debt by the said administrator.....*or the said defendant* the said undivided half.....be sold etc. Mr. Nadarajah, however, sought to argue that although ostensibly this was an action to recover Rs. 10,000/- from the defendant, in reality the plaintiff's object was to have the defendant's half share sold for a judgment which the plaintiff had already

obtained. But the answer to that, in my opinion, is that although the plaintiff had obtained a judgment against the administrator he found himself unable to recover all his money in that quarter, and was now seeking to recover it from the defendant as well, by making her pay the amount or suffer her land to be sold. I do not deny that the plaintiff has made a gallant attempt to frame this plaint so as to enable such an agreement as that put forward to be advanced, but he could not escape the necessity of an averment that the land be declared executable if the amount due is not paid. However much one tries to change the appearance of the action, it still remains an action for the recovery of a sum due upon a hypothecation or mortgage. It was also contended that a mortgage creates a *jus in rem* and that the right subsisted so long as the debt was due. There is no doubt about its creating a real right. But the enforcement of the right however real is subject to legal bars, such as, for instance, those created by the Statute of Limitations. Section 16 (1) of the Mortgage Ordinance does not affect this question. That section makes it possible for more than one action to be brought in respect of the same remedy notwithstanding section 34 of the Civil Procedure Code, but all the possible actions must be commenced against the different parties sought to be bound within the period mentioned in section 6 of Ordinance 22 of 1871.

I have examined the case cited to us from the S. C. Minutes of the 19th of February, 1905, but the ruling in that case has no bearing on the facts of the present case. In the present case, the position would have been different and Mr. Nadarajah's argument sound, if on the decree obtained in the earlier case, the plaintiff was seeking to levy on the widow's share. Whether he could do so despite the fact that the widow was not a party to the earlier action was a question that arose incidentally in *Sangarapillai's case* 38 N.L.R. 1 and Dalton J. observed "having regard to the powers of the husband in respect of the common property of the spouses to mortgage the whole of the property, the wife is not a necessary party to the action to make her interest in it bound by the decree of the court in a suit on the mortgage bond..... *It is possible that other considerations might arise in cases where the community had come to an end before the action was brought or in the course of the action*, but whether they would or not it is not necessary here to decide.

But in the latter case of *Ambalavanar vs Karunathan* to which I have already referred, Poyser & Koch J.J. held that in the contingency contemplated by Dalton J. the wife would have to be added as a party. Once the plaintiff yielded to the authority of *Ambalavanar vs Karunathan* and acknowledged that a separate action was necessary to bind the widow's share he had to be clear of the bar created by section 6 of Ordinance 22 of 1871.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

FERNANDO, A. P. J.

I agree.

Appeal allowed.

Present : FERNANDO, A. J.

JAFFNA U. D. C. vs RAJARATNAM

S. C. No. 371—*P. C. Jaffna* 11504
Argued on 28th June, 1937.
Decided on 6th July, 1937.

Motor Car Ordinance—Section 30 (2)—*Written notice of non-user sent by post—Must the sender of such notice prove that the licensing authority to whom it was intended received it.—With what amount of precision must the period of non-user be stated.*

The accused-appellant was at all material times the owner of Motor Omnibus No. H 828. In December 1932 he sent it to the garage of one Mather for repairs. Prior to this on 7th November, 1932, the accused had written to the licensing authority, the Urban District Council of Jaffna, that his omnibus was laid by for repairs as from 1st of January, 1933, and that he would obtain a licence as soon as the repairs were over. On 5th December 1932, the Chairman of the U. D. C. requested the accused to state the period during which he proposed not to use the vehicle. On 28th December, 1932, Mather informed the Chairman of the Urban District Council that the vehicle in question was being kept for sale and would not be put on the road during 1933. On 12th April, 1933, the accused wrote again informing the local authority that the vehicle was still undergoing repairs and would not be ready for another two or three months. On 23rd June, 1933, the local authority asked the accused to remit the licence fee due on the motor omnibus. The accused in his reply dated 11th July, 1933, informed the local authority that the vehicle was still under repair and asked that time be given till the end of the year to take out the licence.

The accused was thereupon prosecuted for using the omnibus in question without a licence. There was no evidence of actual user but the Police Magistrate convicted the accused on the ground that he failed to prove that the notice of non-user was received by the local authority.

Held : (i) That there was no obligation on the part of the accused to prove that the notice of non-user was in fact received by the local authority.

(ii) That the accused was only bound to prove that he posted the notice.

(iii) That the accused had in the circumstances of this case complied with the requirements of section 30 (2) of the Motor Car Ordinance.

No appearance for appellant.

S. Nadesan and *Thambyah* for respondent.

FERNANDO, A. J.

It is admitted that the accused appellant is the owner of Motor Omnibus No. H 828. He sent it to Mather's garage for repairs in December 1932. Mather himself gave evidence, and stated that he sent to the Chairman of the Urban District Council, a letter dated the 28th December 1932 informing him that the vehicle in question was being kept for sale and would not be put on the road next year, meaning 1933. On the 7th of November 1932, the accused himself wrote the letter P2 stating that the 'bus in question

was laid by for repairs as from the 1st of January 1933 and that he would obtain a licence as soon as the repairs were over.

On the 5th of December, 1932, the Chairman requested the accused to state the period during which he proposed not to use the vehicle, and the letter written by Mather (D5, in Police Court Jaffna 11506) appears to have been written in reply to this request. Then, on the 12th of April, 1933, the accused wrote again to the Chairman letter P 4, which is filed in this record, informing the chairman that the ' bus was still undergoing repairs, and will not be ready for another two or three months. The Chairman replied by letter P 5 of the 23rd June, asking the accused to remit the licence fee due on that vehicle. The accused replied by letter P 6 of the 11th July stating that the ' bus was still under repairs, and requested that the accused be given time till the end of the year 1933 to take out the licence.

The accused is now charged with using the motor bus in question for which a licence had not been issued on the 4th of January, 1933. There is no evidence whatever to prove that the vehicle was in fact used by the accused on that date, but the learned Magistrate convicted the accused on this charge holding that for the year 1933 the accused was acting himself. With regard to the letter (P 5 in P. C. 11506) the Magistrate held that the letter had not reached the Urban District Council, that there was no acknowledgment of that letter, and that it was for the person giving notice to see that the letter has been received.

Mather's evidence was to the effect that the ' bus was given to them for repairs in December, 1932, and that he wrote the letter D 5 on the 28th December. "The letter," he adds, "was posted but we received no acknowledgment." In cross-examination, he stated that the letter was not sent by registered post, and that he had no post book, and that there was no record in his office to show that the letter had been posted.

When a question arises whether notice was given by or on behalf of the accused to the Chairman, I do not think it necessary for the accused to prove that his letter was in fact acknowledged, or that there is a burden on him to show that the letter was in fact received by the Urban District Council. Where a letter is in fact posted, and is not returned by the postal authorities, there is a presumption that the letter has been delivered, and it is not suggested that a letter posted in Jaffna addressed to the Chairman of the Urban District Council, is likely to go astray. The acknowledgment, if at all, would be addressed to the writer, Mather, and although Mather says that the letter was not acknowledged, I do not think the accused on whose behalf that letter was written can be held liable for that omission. The Magistrate has not in fact disbelieved the evidence of Mr. Mather that he did write the letter, and in these circumstances, I think the learned Magistrate was wrong in holding that the accused had to prove more than

that the letter was posted. Quite apart, however, from P 5, there is the letter P 2 of the 7th November 1932 which was admittedly received at the office of the Urban District Council, and the position taken up for the complainant is that the accused did not reply to his letter of the 5th December by which he demanded the accused to state the period during which he proposed not to use the vehicle. It is true that section 30 (2) requires the owner to state the period during which he does not intend to use the vehicle, but that requirement cannot apply to a case where the accused is uncertain with regard to the period. It is a matter of common knowledge that when a vehicle is entrusted to a garage for repairs no definite date when the repairs will be completed can be fixed by the owner. The work of repairs is of a technical nature, and very often a car is not returned to the owner on the date fixed, for circumstances entirely beyond the control of the owner. The accused, in this instance, stated in P 2 that he would obtain the licence as soon as the repairs are over, and in a case of this kind, I do not think the accused can be expected to give any more definite information. If letter P 5 was received by the Chairman, then, that letter clearly states the period during which the vehicle will not be used, inasmuch as it sets out that the car will not be used next year, meaning the whole of next year.

Although he did not reply to P 3, the accused wrote P 4 on the 12th of April, and the Magistrate holds that this notice is bad because no definite period is mentioned. Here, too, the accused stated that the bus would not be ready for another two or three months, and I do not think that in the circumstances accused was bound to give any information that was more precise. On the 11th of July, by P 6, the accused asked for time till the end of the year, and with regard to this the Magistrate found that the notice was good.

In these circumstances, it seems to me that this conviction cannot stand. It is true that the accused was the registered owner, and that he is presumed to be in possession. It seems to me that he has complied with section 32 as far as it was within his power, and that in November 1933, or in April, 1933, the accused was not in a position to state a definite period when the vehicle would be ready for use. I would, therefore, hold that the conviction was wrong and that the accused was not liable either to be fined, or to be ordered to pay any tax for the year 1933. The appeal is accordingly allowed.

Appeal allowed.

Present : SOERTSZ, J. & HEARNE, J.

JULIUS PERERA vs PEDRICK PERERA & ANOTHER

S. C. No. 257—D. C. Kalutara No. 19081
Argued on 8th & 9th July, 1937.
Decided on 13th July, 1937.

Res judicata—Claim to land seized in execution—Section 247 Civil Procedure Code—When does a claim under section 247 act as a bar to an action for a declaration of title to the same land.

The 2nd defendant conveyed to the plaintiff, her 2/3 share in certain lands on 11th May, 1933. The 1st defendant seized and sold the entire premises in execution against the 2nd defendant and became the purchaser upon a Fiscal's conveyance dated 10th November, 1933. Seizure of the premises had been effected in June, 1933, and in July the plaintiff claimed the land which had been seized. The date fixed for the inquiry into the plaintiff's claim was later, in point of time, than the date on which the sale had taken place and on the former date the plaintiff's proctor appeared and the following note was made by the Judge.

"30.8.33. Mr. Kuruppu for claimant present. Inquiry, Mr. L. S. Fernando for plaintiff. Claim not pressed. Rs. 5/- costs to be paid by claimant."

The plaintiff brought this action asking for a declaration that he was entitled to a 2/3 share of the land which he alleged had been conveyed to him on 11th May, 1933. The District Judge dismissed the plaintiff's action and this appeal is from that decision. The main question argued on appeal was whether the minute of 30.8.33 in the Court of Requests, Panadure, was a bar to the plaintiff's action.

Held : That it was not.

PER HEARNE, J.

"But where, as in the present case, the claim inquiry would lead to nothing as the property seized had already been sold, and in the then existing circumstances the claimant stated that his claim was not pressed, it cannot be said that the claim was ever in issue or had in any sense been adjudicated upon. I adopt the reasoning of Jayawardena A.J. in *Ridi v. Lapaya* 9 Times Law Reports 140."

H. V. Perera, K.C., with *Dodwell Gunawardena* for plaintiff-appellant.
Rajapakse with *J. R. Jayawardena* for defendants-respondents.

HEARNE, J.

The point in this appeal arises out of facts which are shortly these. The 2nd defendant in the court below conveyed to the plaintiff, as the plaintiff alleges, her 2/3rd share in certain landed property by deed dated 11th May, 1933. The 1st defendant seized and sold the entire premises in execution against the 2nd defendant and became the purchaser upon a Fiscal's conveyance dated 10th November, 1933. This was in the Court of

Requests, Panadura. Seizure of the premises had been effected in June, 1933, and in July the plaintiff claimed the land which had been seized. The date fixed for the inquiry into the plaintiff's claim was later, in point of time, than the date on which the sale had taken place and on the former date the plaintiff's proctor appeared and the following note was made by the Judge of the Court :—

> "30.8.33. Mr. Kuruppu for claimant present. Inquiry Mr. L. S. Fernando for plaintiff. Claim not pressed. Rs. 5/- costs to be paid by claimant."

The plaintiff asked for a declaration in the case from which this appeal has been taken. (D. C. Kalutara 19081) that he was entitled to a 2/3rd share of the land which he alleged had been conveyed to him on the 11th May, 1933, and it was held that "the entry dated 30.8.33 contained by implication an order dismissing" such claim, and that as the claimant did not follow up the proceedings with an action under section 247 of the Civil Procedure Code "the order was conclusive and his action failed." The plaintiff has appealed and the question is whether the view taken by the Judge was right.

To my mind, on a review of the authorities, the test that should be applied is this. If the question of a claim under section 241 of the Civil Procedure Code had been put in issue and was then "withdrawn" or "abandoned" the dismissal or rejection of such claim would be a disallowance under section 245 of the Code, and would create an estoppel by *res judicata*, but otherwise not.

In *Perera v. Perera* (1931) 32 N.L.R. 197, the claimant after several adjournments "withdrew his claim" and, if I may say so with respect, the view taken that he had in so many words intimated to the Court his inability to succeed on the matter pleaded by him in support of his claim was the only possible one. The same view, in my opinion, would properly be taken, as indeed it has been taken by this court, in a case where the claimant on the day fixed for the inquiry of which he had notice absents himself. *Isohamine v. Munasinghe* (1928) 29 N.L.R. 277.

But where, as in the present case, the claim inquiry would lead to nothing as the property seized had already been sold, and in the then existing circumstances the claimant stated that his claim was not pressed, it cannot be said that the claim was ever in issue or had in any sense been adjudicated upon. I adopt the reasoning of Jayawardena A.J. in *Ridi v. Lapaya* 9 Times Law Reports 140.

The appeal is allowed with costs and the case remitted for trial of the appellant's claim to the property in question as well as the relief he asks including damages, with the direction that the proceedings on 30.8.33 in the Court of Requests, Panadura, do not constitute a bar to the appellant's action in D. C. Kalutara No. 19081.

SOERTSZ, J.

I agree.

Appeal allowed.

Present : SOERTSZ, J. & HEARNE, J.

SAVARASIPILLAI vs ANTHONIPILLAI

S. C. No. 240—*D. C. F. Jaffna No.* 8290
Argued on 7th & 8th July, 1937.
Decided on 13th July, 1937.

Donation—Ingratitude—In what circumstances may a deed of gift be set aside on the ground of ingratitude.

The plaintiff is the wife of the defendant, and in this action she sought to have a deed of gift made by her to her husband set aside on account of her husband's cruelty and desertion. It was not alleged that the defendant's conduct amounted to ingratitude in law. The evidence disclosed that the husband disapproved of his wife's conduct in going from house to house. This in the words of a witness led to a 'cat and dog life' between husband and wife. On one occasion the husband drove the wife out of the house and she sought the aid of the maintenance court. There she waived her right to maintenance on her husband agreeing to give her a field to enable her to support herself.

Held : That the evidence did not disclose " gross ingratitude " in law on the part of the donee.

PER SOERTSZ, J.

"If one bases oneself on the authority of Voet one finds that there are five instances of ingratitude expressly mentioned by him as affording justification for the revocation of gifts, namely, 1. the laying of impious hands of the donee on the donor; 2. the donee outrageously defaming the donor; 3. the donee causing the donor enormous loss; 4. the donee plotting against the donor's life; 5. the donee failing to fulfil the conditions annexed to the gift. Voet, however, goes on to add that " it does not seem to admit of doubt that for *other similar and graver* causes donations may be revoked. " (Voet 39. 5. 22). We have been referred to a passage of Perezius on donations in which that Commentator challenges Voet's extension of the instances of ingratitude to 'other similar and graver causes' as opposed to authority. In these modern times, the natural tendency will be to take the view of Perezius and strictly limit the instances of ingratitude, which justify the revocation of a donation, to those expressly mentioned, for it will be highly inconvenient and even dangerous to make 'ingratitude' at large a ground for revocation, as respondent's counsel contended, was the law. For one thing, ingratitude and gratitude are such elastic terms."

H. V. Perera, K.C., with *J. A. T. Perera* for the defendant-appellant.
Subramaniam with *Chitty* for the plaintiff-respondent.

SOERTSZ, J.

This is an action instituted by a married woman against her husband to have a deed of gift executed by her in his favour set aside on the ground that he has driven her and her children out of the house and that " on account of this cruelty and desertion a cause of action had accrued to the plaintiff to have the said deed of donation revoked and set aside. " It

will be noticed that the plaintiff herself did not expressly aver that this conduct of the defendant amounted to gross ingratitude. Nor was there an issue framed on that basis. The issues were :

1. Did the defendant drive the plaintiff and her children out of the houses where they were living and leave them in a helpless state ?

2. If so, is the plaintiff entitled to have the deed of donation set aside ? and two other issues which do bear directly on the point involved in this appeal. The trial Judge, however, entered judgment for the plaintiff on the ground that " defendant's conduct appears....to amount to gross ingratitude. " Overlooking for the moment the omission I have indicated on the part of the plaintiff to allege expressly that she was seeking to revoke the gift on the ground of gross ingratitude, I will examine her case on that footing, and begin by asking myself the question with which Wood-Renton C.J. began his consideration of a similar point in *Hamine v. Goonewardena* 17 *N.L.R.* 507—does such conduct on the part of the defendant as is disclosed in the circumstances stated in the pleadings and the plaintiff's evidence amount to ingratitude within the meaning of the Roman Dutch Law ? If one bases oneself on the authority of Voet one finds that there are five instances of ingratitude expressly mentioned by him as affording justification for the revocation of gifts, namely, 1. the laying of impious hands of the donee on the donor; 2. the donee outrageously defaming the donor; 3. the donee causing the donor enormous loss; 4. the donee plotting against the donor's life; 5. the donee failing to fulfil the conditions annexed to the gift. Voet, however, goes on to add that " it does not seem to admit of doubt that for *other similar and graver* causes donations may be revoked. " (Voet 39.5.22). We have been referred to a passage of Perezius on donations in which that Commentator challenges Voet's extension of the instances of ingratitude to 'other similar and graver causes' as opposed to authority. In these modern times, the natural tendency will be to take the view of Perezius and strictly limit the instances of ingratitude which justify the revocation of a donation to those expressly mentioned, for it will be highly inconvenient and even dangerous to make 'ingratitude' at large a ground for revocation, as respondent's counsel contended, was the law. For one thing, ingratitude and gratitude are such elastic terms. Their name is legion. I find considerable difficulty when I attempt to define these words. I recall the definition of gratitude by some cynic who said that it was a lively sentiment of thankfulness towards those from whom favours are expected, implying thereby that it does not exist so far as past benefactors are concerned. But that, I concede, is going too far. As for ingratitude, I know that it has been said to be 'base' and 'sharper than a serpent's tooth'. But that, I fear, is not very illuminating. The conclusion I reach, in this state of things, is that this matter of ingratitude as a ground for setting aside donations is not as fluid as respondent's counsel sought to make out. If it is, then in the words of Voet '*fora omnia atque tribunalia non suffectura actionibus contra ingratos movendis*',

But even acting upon the authority of Voet that donations may be revoked for any of the five instances of ingratitude, mentioned by him as well as for 'other similar and graver causes', I do not find it possible to grant the plaintiff the relief she claims. Her case certainly does not fall within the five enumerated instances. Does it amount to a similar and graver type of ingratitude ? In my opinion, clearly not. The case reveals a difference of views between husband and wife and it is impossible to say that the resulting relationship involves ingratitude on one side or the other. The husband thinks that the wife's inclinations are too nomadic. She goes about from house to house and he disapproves of this. This, to use the words of a witness, has led to a 'cat and dog life' between them. A point was reached when the husband drove the wife out. His view apparently is that if she will not acknowledge his marital control, she must live apart. She took the matter to the maintenance Court and although she waived maintenance for herself, he agreed to give her a field to enable her to support herself. This can hardly be described as ingratitude of 'a similar and graver kind'. The case of *Sansoni v. Foenander, Vanderstraaten* p. 144 and 1872-76 *Ramanathan* p. 32 does not help the plaintiff. The two grounds on which the revocation of the gift was allowed in that case were (*a*) failure to observe the conditions imposed (*b*) continual slander and insult by the donee of the donor—both grounds are among the enumerated instances.

It is also worthy of note that the deed of gift in question in this case is one that was executed as far back as 1926. I would set aside the judgment of the trial Judge and dismiss the plaintiff's action, but will not make an order for costs.

HEARNE, J.

I agree.

Appeal dismissed.

Present : FERNANDO, A. J.

MOHIDEEN vs. SUPPRAMANIAM CHETTIAR & OTHERS

S. C. No. 391–393—*P. C. Kandy No.* 54823

Argued 30th June, 1937.

Decided on 5th July, 1937.

Penal Code section 409—*Destruction of a wall erected across land over which the accused had a right of way—Ownership admitted—Bona fide act—Is it criminal.*

1937

Fernando, A. J.

Mohideen *vs* Suppramaniam Chettiar & Others

Shortly the facts are as follows :—

The complainant is the lessee of premises No. 386. The 1st accused is the owner of premises No. 385 which adjoins it. At the back of Nos. 385 and 386 are the latrines of the respective premises. On 1st January, 1937, the 1st accused constructed a wall so as to block the passage from No. 385 to its latrine at the back. Thereafter the tenants of No. 385 used the passage used by the tenants of No. 386 to get to their latrine. Thereupon the complainant built a wall blocking up the passage of the tenants of No. 386. The accused, who are owner and tenants of No. 385, pulled down this wall. They claimed that the passage was one to the use of which they were entitled and that half the land on which the wall stood was theirs.

Held : That the act of the accused did not amount to an offence under section 409 of the Penal Code.

Gratiaen for accused-appellants.
N. Nadarajah for respondent.

FERNANDO, A. J.

The complainant in this case charged the three accused-appellants with committing mischief by breaking down a wall standing on premises No. 386 Trincomalee Street, and he also charged the third accused with criminal trespass on premises No. 386. After trial, the Police Magistrate acquitted the third accused on the charge of criminal trespass holding that it had not been proved that the intention of the 3rd accused was to commit any offence or to intimidate, insult or annoy any person.

With regard to the charge for mischief, the Police Magistrate held that the act of the accused was an assertion of their rights, or at least of what they honestly believed to be their rights. It would appear that the complainant is the lessee of premises No. 386, and that 1st accused is the owner of No. 385 which adjoins No. 386, and that at the back of the premises, there are two latrines which belong to the respective owners. According to the complainant, the 1st accused in January, 1937, constructed a wall so as to block the passage from No. 385 to the latrine at the back, and thereafter the tenants of No. 385 used the passage on 386 to get to their latrine, that passage being also used by the tenants of No. 386 to get to the latrine attached to those premises. The passage on premises No. 386 was so used from January, 1937, till the complainant built the wall in question. His case is that on the night of the 14th of March the three accused pulled down the wall that he had constructed that day. The position of the accused is that the passage across which this wall was constructed was a common passage, and they maintain that it has been used as a common passage for a long period. They also stated that half of this passage across which the wall was constructed falls within their premises.

Before a person can be convicted under section 409 of the Penal Code, the prosecution must prove that the accused caused the destruction of the wall with intent to cause wrongful loss or damage to the complainant or with the knowledge that it is likely to cause such wrongful loss or damage.

In *Fernando v. Fonseka*, 23 N.L.R. 7, Bertram C.J. held that a person who demolishes a latrine on his own land which he claims to be a nuisance cannot be convicted of mischief merely because it had been erected by a person who wrongly claims an interest in the land. He cited the case of *Porolis v. Romanis* C.A.C. 163, where Pereira J. held that a person can be convicted of mischief only where he acts spitefully, maliciously, or wantonly, and another case in which Hutchinson C.J. used the following words. "Supposing it should turn out afterwards and be decided by a civil Court that the complainant had no right to put up the fence, that it was a wrongful encroachment on the appellant's land, it would be absurd that the appellant should be convicted for the criminal offence of committing mischief by taking away an encroachment that he had a right to take away." It seems to me that the words of Hutchinson C.J. apply directly to the case before me. The learned Magistrate held that the accused honestly believed that the passage across which the wall had been constructed was, with regard to half of it, their property, and there can be no doubt that if they can establish that position in a civil Court, the wall which has been constructed by the complainant would be an encroachment of their rights.

Mr. Nadarajah for the complainant referred to the case of *Hapuwa v. Peiya* 1 Ceylon Law Weekly, page 212, but the facts there were that the accused had destroyed a fence which had existed for about 15 years, and they also wantonly destroyed fruit trees planted by the complainant. It seems to me that in view of the Magistrate's own finding that the accused were acting in the *bona fide* assertion of their rights, this conviction cannot stand.

Counsel for the respondent attempted to support the statement of the learned Magistrate that the accused could have resorted to their legal remedy instead of demolishing the wall. Bertram C.J., however, in *Fernando v. Fonseka* referring to the argument that the appellant is not entitled to take the law into his own hands where the respondent was also asserting a *bona fide* claim, stated that the contention was not tenable in law. In view of these authorities, I think the conviction cannot stand and I would set aside the conviction and acquit all the three accused.

Conviction set aside.

Present : SOERTSZ, J. & HEARNE, J.

COOMARASAMY vs FERNANDO

S. C. No. 196 (*Inty.*)—*D. C. Kalutara No.* 17049
Argued on 18th June, 1937.
Decided on 29th June, 1937.

Mortgage of immovables—Purchase of lands by mortgagee at execution sale for appraised value—Interest—Is mortgagee entitled to interest for the period between the sale and the confirmation of the sale.

1937
—
Hearne, J.
—
Coomarasamy
vs
Fernando

The plaintiff is the mortgagee of certain premises mortgaged to him by the defendant by bond No. 691 dated 8th April, 1930, attested by L. S. Fernando, Notary Public, for a sum of Rs. 30,000/- with interest at 12 per cent per annum subject, however, to a reduction of 2% if it is paid quarterly. On 7th August, 1931, the plaintiff put the bond in suit and on 18th February, 1932, decree in favour of the plaintiff was entered in the following terms :—

It is ordered and decreed that the 1st defendant do pay to the plaintiff and 2nd and 3rd defendants the sum of Rs. 34,352/98 being the aggregate amount of the principal, interest and costs due in respect of Mortgage Bond No. 691 dated the 8th day of April, 1930 and attested by L. S. Fernando, Notary Public, together with interest on Rs. 30,000/- at 12 per cent per annum from 29th July till the — hereof and thereafter on the aggregate amount interest at the rate of nine per cent per annum from this date till payment in full, and the costs of this action as taxed by the officer of the court, on or before the 18th day of May, 1932.

If the said 1st defendant pays the said plaintiff all accrued interest on the primary mortgage bond within this period of three months, she be given a further extension of three months.

And it is further ordered and decreed that in default of payment of the said amount, interest, and costs within such time, the premises mortgaged by the said bond as primary mortgage in favour of the said plaintiff, and as secondary mortgage in favour of the said 2nd and 3rd defendants and more fully described in the schedule hereto attached, the right title interest and claim whatsoever of the said 1st defendant in to upon or out of the said several premises mortgaged by the 1st defendant, be sold by Mr. H. Thomas Fernando, Licensed Auctioneer, Panadure, and the proceeds applied in and towards the payment of the said amount, interest, and costs and if such proceeds shall not be sufficient for the payment in full of such amount, that the said 1st defendant do pay to the plaintiff and 2nd and 3rd defendants the amount of the deficiency with interest thereon at the aforementioned rate until realisation. Out of the proceeds of sale the claim of the said plaintiff be first settled and the 2nd and 3rd defendants do only be declared entitled to share in any surplus left over after the judgment in plaintiff's favour is settled.

THE SCHEDULE ABOVE REFERRED TO.

All that and these the estate and premises called and known as St. Valerian's Estate situated in the Kalutara District of the Western Province and comprising the several allotments of land following together with the plantations and buildings fixtures tools implements furniture live and dead stock thereon.

1. The allotment of land called Baragewattepitakattiya situated at Badureliya Village &c. and 41 other lands.

The conditions of sale fixed by court permitted the plaintiff to purchase 40 of the mortgaged lands at the appraised value of Rs. 39,145.62 but the auctioneer sold them to him at Rs. 36,149/12. At an inquiry into the petition filed by the defendant-appellant to set aside the sale, a settlement was reached by the parties whereby the sale was confirmed and the plaintiff-respondent became the purchaser of the 40 lands at the appraised value. Thereafter, the plaintiff-respondent made an application to court to draw a sum of Rs. 1,200/- lying in deposit in the case, as the balance still due to him, in satisfaction of his claim according to the decree. The appellant objected to the application being granted contending that a sum of Rs. 4/38 only was due, and moved that the balance be paid to her. The sum of Rs. 1,200/- represented interest charged. At the inquiry

it was urged on behalf of the plaintiff-respondent that he was entitled to charge interest from the date of sale till confirmation of the same and the sum he claimed is correct on that basis. The appellant contended that the claim of the plaintiff was satisfied in full when the properties were purchased by him at the sale. The District Judge held that the plaintiff-respondent was entitled to recover interest on the aggregate amount of the decree for the period between the date of sale and its confirmation. From this decision the defendant appealed.

Held : That the plaintiff was entitled to interest up to date of confirmation of the sale.

N. E. Weerasuriya with *Kurukulasuriya* for 1st defendant-appellant.
E. B. Wickremanaike for plaintiff-respondent.

HEARNE, J.

The point in this appeal which involves a sum of approximately Rs. 1,200/–is whether the plaintiff in the lower court, here the respondent, who become the purchaser of the defendants property against whom he had issued an order of sale in order to recover the amount due to him on a decree of court, is entitled to recover interest on the full amount of the said decree for the period between the sale and its confirmation. To my mind, he is entitled to interest up to the confirmation of sale as the decree is not satisfied till the sale has been confirmed. This was the *ratio decidendi*, with which I respectfully agree, in the case of *Ganesh v. Purshottam* (1908) I.L.R. 33 Bom. 311 (316) which was followed in *Khalil-Ur-Rahman v. Gokul Prasad* reported in (1919) I.L.R. 41 All. 526.

The appeal is dismissed with costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

Present : SOERTSZ, J.

BENEDICT vs MARIKAR.

S. C. No. 292—*P. C. Colombo No.* 4493
Argued & Decided on 14th June, 1937.

Penal Code section 211—*Offering an illegal gratification.*

Where the Magistrate found that the accused offered a gratification of one rupee to a Police Constable "in order to get home to rest and to prevent himself being delayed or locked up in the Police Station."

Held : That an offence under section 211 of the Penal Code had not been committed.

K. W. E. Perera for accused-appellant.
M. F. S. Pulle, Crown Counsel, for crown respondent.

1937

Soertsz, J.

Benedict
vs
Marikar

SOERTSZ, J.

The accused appeals from a conviction under Section 211 of the Penal Code, offering an illegal gratification, to wit, Rs. 1/- to P. C. 433 Layeris, with the intention that the said Police Officer would screen him from legal punishment for an offence of " criminal force " or with the intention that the said Police Constable would not proceed against him and bring him to legal punishment.

The learned Magistrate has recorded his finding in these terms :— " Taking the evidence as a whole I think it is true that accused offered the rupee *in order to get home to rest and to prevent himself being delayed or locked up in the Police Station.* "

On this finding the accused is clearly entitled to an acquittal because the effect of the finding is that the intention of the accused was not to offer Rs. 1/- to the Police Constable as an inducement to the Police Constable to screen him, the offender, from legal punishment or to prevent his being brought to legal punishment, but that the Police Constable might give the accused an opportunity to go home and rest and might not be delayed or locked up in the Police Station.

That was a very natural desire and I do not see that the accused by entertaining it rendered himself guilty of the offence with which he has been charged.

I, therefore, set aside the conviction and acquit the accused.

Conviction set aside

Present : SOERTSZ & HEARNE, JJ.

GUNAWARDENA vs. SENEVIRATNE

S. C. No. 229 (*F*)—*D. C. Colombo No.* 503

Argued on 4th & 5th July, 1937.

Decided on 15th July, 1937.

Partition—Transfer executed after confirmation of scheme of partition, but before final decree was actually entered—Is the transfer valid—Section 17 of the Partition Ordinance.

On the 24th of July, 1935, the District Judge made the following order in a Partition action "Scheme confirmed. Final decree 11th September." At the time of making this order the Judge had overlooked the fact that the 3rd defendant had been reported dead on 5th June, 1935. On 26th August, 1935, the plaintiff's proctor moved that the order of 24th July, be vacated as he had omitted by an oversight to issue notice to confirm the scheme of partition on the 35th—37th defendants. The District Judge allowed this motion. On 19th September, 1935, notice was reported served on these parties and the Judge made order "Scheme confirmed. Final decree on the 30th October." Underneath this order, a note was entered against the same date "Final decree entered." As a matter of fact the decree was tendered for signature to the District Judge on 24th September 1935.

On 25th July, 1935, and 1st August, 1935, the 2nd defendant, M. Podisingho, and the 1st defendant, M. Daniel, sold to the plaintiff in the present action two lots E, and G in the land sought to be partitioned. The plaintiff in the present action was the 6th defendant in the partition action, and the present defendant, the 8th defendant in that action. The defendant to this action claimed title to lots E and G on two deeds dated 25th September, 1935, and 30th September, 1935, executed by M. Podisingho and M. Daniel. Objection was taken to the plaintiff's deeds on the ground that they were void by operation of section 17 of the Partition Ordinance. It was also contended that the District Judge had no power to vacate the order of 24th July, 1935.

Held : (i) That the plaintiff's deeds of 25th July, 1935, and 1st August, 1935, were void by operation of section 17 of the Partition Ordinance.

(ii) That the District Judge had power to vacate the order of 24th July, 1935, in the circumstances of this case.

(iii) That for the application of the *exceptio rei venditae et traditae* there must be a deed good in law.

H. V. Perera, K. C., with *Jayawardena* for defendant-appellant.

N. E. Weerasuriya with *Corea* for the plaintiff-respondent.

SOERTSZ, J.

The plaintiff sued the defendant for a declaration of title to lot E and to the north-western undivided half of lot G of the land Miriswatta fully described in the schedule to the plaint.

He based his title to lot E on a deed of sale dated the 25th of July, 1935, and to a share of lot G on a deed of sale of the 1st of August, 1935. The vendors on the two deeds were M. Podisingho the 2nd defendant and the 1st defendant M. Daniel in partition case No. 33625. The present plaintiff was the 6th defendant and the present defendant the 8th defendant in that case. The defendant denied the plaintiff's title and claimed that he was entitled to lot E on a deed dated 25th September, 1935, from M. Podisingho and to a half share of lot G on a deed dated 30th September, 1935, from M. Daniel. In regard to lot G except for a possible conflict in the event of both the plaintiff and the defendant claiming the north-western half, both conveyances by Daniel can be satisfied, for each is in respect of a half share. But the defendant's case is that the deeds in favour of the plaintiff although earlier in date than his deeds, conveyed no title inasmuch as they were executed while legal proceedings for the partition of the land Miriswatta were pending. They were void by operation of section 17 of the Partition Ordinance. The question, then, is whether it is correct to say that partition proceedings were pending on the 25th of July, and/or on the 1st of August, 1935. An examination of the journal entries in the case shows that on the 5th of June, 1935, the case was called and notice to confirm the scheme of partition was reported served on the 1st, 4th, 5th, 6th and 8th defendants. The 1st and 4th defendants were present and they and Mr. Abeywardena who appeared on behalf of the 5th, 5thA and 8th defendants agreed to the scheme. The 6th defendant was absent and the 3rd defendant was reported dead. On the 7th of July, notice was re-issued on the 2nd defendant who had not been served. On the 24th of July, 1935, a minute of consent by the 2nd defendant was filed and the District Judge made order—" *Scheme confirmed. Final decree 11th September* ". It will be noticed that at this stage the fact that the 3rd defendant had been reported dead on the 5th of June was overlooked. A clerk, however, appears to have noticed this fact and he made a note—it is not clear when—beneath the Judge's order just referred to, that " Notice to confirm scheme has not been served on the 35th, 36th, 37th, 38th, 39th defendants heirs of the 3rd defendant deceased. *Decree not to be entered* ". Apparently, in view of this note, the plaintiff's proctor on the 26th of August, 1935, appeared in Court and stated that notice to confirm the scheme had not been issued on the 35th—39th defendants through an oversight on his part, and moved that the order of the 24th of July be vacated and he be allowed to issue notice on the said parties for the 18th of September, 1935. The District Judge granted this application. Then on the 19th of September, 1935, notice was reported served on these parties and the Judge made order " *Scheme confirmed. Final decree on the 30th of October.*" Underneath this order, there is a note as against the same date "*Final decree entered*". I sent for the record in the Partition case and also obtained the "outstanding decrees" register' of the District Court and I find that, as a matter of fact, the decree was tendered for signature to the District Judge on the 24th of September, 1935. On

these facts, plaintiff-respondent's counsel maintains that the partition case ceased to be pending on the 24th of July because when on that date the District Judge made order "Scheme confirmed. Final decree 11th September", in effect final judgment was given. All that remained to be done was the ministerial act of drawing up the decree, and for that purpose the Judge gave the plaintiff's proctor time till the 11th September. He contends that the Judge acted without jurisdiction when he vacated the order of the 24th of July and that, in consequence, the order of the 24th of July stood despite the order purporting to vacate it. The final decree as it appears now, is signed by the Judge as of the date 19th September, 1935, but to carry respondent's Counsel's contention to its logical conclusion, it must be assumed, that is to say, if decrees in partition cases too should be entered in compliance with the requirement of section 188 of the Civil Procedure Code, the decree in this case should be treated as dated not 19.9.35 but 24.7.35. The appellant's Counsel, on the other hand, maintains that the partition proceedings were, in this instance, pending till the District Judge actually signed the partition decree. That is to say, till the 19th of September, if the date the decree bears is the crucial date, or till the 24th of September which the Register shows is the date on which the decree was actually tendered to him for signature, if section 188 of the Civil Procedure Code has no application to partition cases. The order made on the 24th of July, 1935, is in two parts : (*a*) "scheme confirmed", (*b*) "Final decree 11th September."

The trial Judge in this case does not regard the second part of the order as constituting the final judgment of section 6. His view is that "the order 'scheme confirmed' is the final decree". He says that according to the practice of the Court, whenever the decree was signed, it would have borne the date 24th July, 1935. This view of the trial Judge that 'partition confirmed' is the final decree is opposed to the view by this Court in *Appuhamy v. Tikiri Naide* 30 *N.L.R.* 289. In that case, the Court confirmed the scheme of partition on the 6th of March, 1903, and on an issue as to whether the partition action was pending thereafter, Drieberg, J. commented on a contention similar to Mr. Weerasooriya's contention here, as follows :—"In this case, the court did no more than approve the scheme of partition submitted by the Commissioner. To extend to this order the effect of a judgment *in rem* assigning divided lots to the parties, with all the important results which flow from such a judgment, will be to relax to a degree, dangerous and confusing, the provisions of the Ordinance." This view of Drieberg, J. is the logical outcome of the Roman Law view that persons who got allotments under a judicial partition *derived their title from the decree of the court* and of the Roman Dutch Law theory that partition is a species of alienation. As such it requires a formal and unequivocal act like the entering of a decree to attest it. Section 9 is explicit that *the decree* is 'the good and sufficient' evidence of the new title,

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Soertsz, J.
—
Gunawardena
vs
Seneviratne

Mr. Weerasuriya, however, submitted that this ruling is inconsistent with the ruling in the case of *Abdul Azeez v. Thamby Appu* 30 *N.L.R.* 314. I am unable to agree with that submission. The two decisions are not in my view, inconsistent. In the latter case, the court not only approved the scheme of partition proposed, but also made order allotting the shares on the 14th of March, 1914, except in regard to a one-twelfth share which was reserved on the 14th defendant in the event of his proving title thereto. This the 14th defendant did on the 1st of May, 1914, and the Judge made order "Amend decree by allotting that share (lot B) to (illegible) defendant." A formal decree for partition was entered on the 3rd of May, 1916. In that state of things, two deeds came into competition , one dated 24th July, 1914, the other the 1st of August, 1919. The purchaser on the latter deed contended that the earlier title conveyed on the 24th of July, 1914, was blotted out by the decree entered 3rd May, 1916. Garvin J. observed "it is urged that the formal decree of May 3rd 1916 must be regarded as a final judgment and that the rights of the parties to the shares in severalty must be deemed to have been ascertained and declared as at that date. *But what is conclusive is the final judgment, and not the mere formal decree.* It is urged by the appellants that the order of March 14th and May 1st 1914 constitute the form of the final decree. Now it seems to me that that contention is entitled to prevail. On the first of these two dates an entry on the record shows that the learned Judge approved the scheme. . . . *He went further and allotted shares in severalty in accordance with the scheme to those who were entitled.* The words I have underlined afford the basis for differentiation between the two cases. In the case first referred to, there was only the approval of the scheme. There was no order allotting shares. In the present case too, there is only an order confirming the scheme. There is no order allotting shares. That matter was deferred in the first instance for a date between the 24th of July and the 11th of September and in the second instance, for a date between the 19th September and the 30th of October. The allotment actually took place when the Judge considered the decree tendered to him and signed it probably on the 24th of September. The point is that there must be something done by way of entering final judgment as required by section 6 of the Partition Ordinance. The mere confirmation of the scheme is not sufficient. See Jayawardene on Partition pp. 151–153 and the cases cited there. I therefore find great difficulty in reading the order made in this case on the 24th of July, 1935, as amounting to the entering of a final judgment. The words used imply that it was the intention of the Judge to defer the entering of final judgment till the ministers of his court and the proctors for the parties had an opportunity to examine the record and submit a decree for his consideration. This view is supported by the fact that immediately beneath the order made by the Judge, there is the note by an officer of the Court drawing attention to the fact that the heirs of the 3rd defendant had not been served with notice and that decree should not be entered, as well as by the fact that when

the plaintiff's proctor moved on the 26th of August, 1935, that the order confirming sale be vacated because he had failed to issue notice on those parties, the Judge readily allowed the application. That brings me to the question whether the Judge was entitled to vacate his order. Respondent's Counsel relies on section 189 of the Civil Procedure Code and contends that he was not. In the case of *Dissanayake v. Don Dias* 6 *C.W.R.* 137, de Sampayo, J. and Loss A.J. held that a Judge has an inherent power to set aside a decree entered in circumstances similar to these. They took the same view in *Podi Singho v. Coyanis Appu* 6 *C.W.R.* 118. I see no reason for not following that view. I am not aware of any cases to the contrary on similar facts. There are cases in which it has been held that a court had no jurisdiction to vacate or alter an order made by it except as provided by section 189 of the code, but those are cases in which the attempts to vacate or modify were made on the ground of mistake in fact or law, and not because a condition precedent for the validity of an order was overlooked. Those cases appear to have been cited to de Sampayo J. in *Podi Singho v. Coyanis Appu* for he says " In a partition case whether the defendants filed answer or not, they are bound to get notice of the trial so that they may be present at the investigation into title. If this does not happen I do not think that the parties who are actually absent at the so-called *ex parte* trial, can be said to be parties to the decree that follows. For this reason, I think *notwithstanding the decisions on the general subject of the amendment of a decree. " It was within the power of the District Court to amend the decree entered in circumstances such as these.* " From another point of view, even if respondent's counsel's argument that the order of the 24th of July, 1935, amounted to the entering of a final judgment as required by section 6 of the Partition Ordinance is accepted, that final judgment was not effective, because it was not a 'decree for partition.....given as hereinbefore required', to quote from section 9. The partition proceedings were, therefore, pending and the parties had not by virtue of the decree that was entered, acquired shares or interests in severalty. In my view, therefore, the partition suit was pending both on the 25th of July and on the 1st of August, 1935.

Mr. Weerasuriya's next submission was that, none the less, his deeds were good because they purported to convey not undivided shares, but definite lots, and that even if those lots were, strictly speaking, not lots allotted in severalty by the 25th of July and the 1st of August, the title to them as lots in severalty accrued to the plaintiff on final decree being entered. In regard to the first part of this submission, there are cases in which sections 9 and 17 of the Partition Ordinance have been subjected to a greater strain than they can legitimately be required to bear, but I know of no cases which go the length to which respondent's counsel invited us to go in order to hold that the conveyances to the plaintiff were good as conveyances for separate lots. It is true that the plaintiff's deeds purported to deal with lots E and C, but on the dates on which those deeds were executed, there were not, in law any such lots in existence. I would

follow the judgment of Ennis A.C.J. in *Appuhamy v. Babun Appu* 25 *N.L.R.* 370 which is exactly in point. In regard to a similar argument in that case Ennis A.C.J. said " It was suggested that what A sold to S was not an undivided share of the land but a divided whole and that such a conveyance would not fall within section 17. In my opinion, this argument is unsound, because until May 23rd 1916 when final decree in the partition case was entered, A was not owner of lot A but only of undivided shares of the land—shares the alienation of which is prohibited and declared void by section 17. " I do not think that the case of *Hewawasan v. Goonasekere* 28 *N.L.R.* 33 helps the respondent. The facts of that case were different and Garvin J. who agreed with Ennis A.C.J. in *Appuhamy v. Babun Appu* differentiated the two cases. He pointed out that in that case he was considering " the respondent has undertaken that he will at all times do and execute all such acts and deeds as may be necessary to assure the premises to the appellant. " The appellant was suing him to compel him to do so and Garvin and Dalton JJ. held that the respondent 'is in a position to do so and must do so unless he can justify his refusal on some legal ground '.

In the present case, the plaintiff's position is that the deeds themselves read with the decree conveyed good title and that there is nothing further required to perfect it. In regard to the other contention of respondent's counsel that even if the two deeds did not convey title to the plaintiff in respect of these two lots on the dates the deeds were executed, title accrued to him directly the final decree was entered allotting these lots to his vendors, I find it impossible to accede to that view. On that point, if I may respectfully say so, the correct view appears to be that taken by Jayawardena A.J. in *Hewawasan v. Goonesekera*, namely that for the application of the *exceptio rei venditae et traditae* there must be a deed good in law. A deed pending partition is expressly declared to be void and not merely voidable or defective as the trial Judge held. Dalton J. took a different view from that of Jayawardena J. by assuming that on the deed executed pending partition a defective title passed. Garvin J. expressed no opinion on this point in that case, but in a later case *Mudalihamy v. Dingiri Menika* 28 *N.L.R.* 412, he rejected a similar plea. In my opinion, therefore, the plaintiff's deeds conveyed no title to him on their execution and secured no title for him at a later date.

I would, if I could, give the plaintiff some relief for his, after all, are the earlier deeds. But the law does not permit me to do so.

I, therefore, allow the appeal and dismiss the plaintiff's action with costs here and below.

HEARNE, J.

I agree.

Appeal allowed.

Present : FERNANDO, A.J.

GNANAPRAKASAM & ANOTHER vs MARIAIPILLAI

S. C. No. 42—C. R. Jaffna No. 4091
Argued 28th June, 1937.
Decided on 1st July, 1937.

Encroachment of building on another's land—Bona fide act—What are the rights of the person whose land is encroached on.

Where the defendant erected on his land, *bona fide*, a building which was afterwards found to encroach on the plaintiff's land.

Held : That the plaintiff can only claim compensation and that he is not entitled to ask that the building be pulled down.

H. V. Perera, K.C., with *T. Nadarajah* for plaintiffs-appellants.
L. A. Rajapakse with *N. Nadarajah* & *Haniffa* for defendant-respondent.

FERNANDO, A. J.

On the evidence before him, the Commissioner of Requests held that there was an encroachment by the defendant on the land belonging to the plaintiffs, and that encroachment is shown in Mr. Weerasingham's plan as being ·25 kulies in extent. The Commissioner of Requests also found that the defendant did not act maliciously, but in the mistaken belief that the encroachment was her own property, and that such mistake on her part was perfectly *bona fide*.

It would appear from the evidence of the Surveyor, Manuel, that he was taken by the plaintiff to the spot to test the correctness of the then existing boundary, namely, the fence that stood between the two lands. He found that there was an encroachment by the defendant of about 2 or 2½ inches on the eastern corner of the plaintiffs' land, and as the encroachment was very small, the surveyor thought it could be passed, and his evidence is to the effect that on that occasion both the plaintiff and the defendant accepted the limit fence which existed as the boundary. After the fixing of the boundary, the defendant began the construction of her building, and it would appear that the first protest by the plaintiff was in April, 1936 by which time the foundation had been laid and the wall on the plaintiffs' side had come up about 5 feet. It is possible that the plaintiff began to dispute the boundary only after he realised that there would be a window opening on to his land. This window was apparently removed in view of the objection but the plaintiff persisted in claiming the land, and has brought this action.

Counsel for the appellant contended that in a case where a building is erected partly on one's own ground and encroaches partially on the ground of another, the owner of the ground encroached on, may demand that the encroachment be removed, or that the party making the encroachment shall make a transfer of the piece of ground actually occupied by the encroachment, and so much of the rest of the ground as is rendered useless to him thereby, and pay to him the value of the ground transferred together with the costs of transfer and a reasonable sum as damages for the trespass and as a solatium for the compulsory expropriation of his property. (See Institutes of Cape Law, Volume 2, 1903 edition, page 47–48.) The passage continues in these words, "Where, however, there has been delay in applying for the former remedy, a Court will restrict the party injured to the latter." On the strength of this passage, Counsel argues that the owner has the option of asking for one or other of these two remedies, and that the court is bound to give him the first remedy if he has not been guilty of any delay. It seems to me, however, that the passage cited may be read as meaning for one or other of them, and that the Court will grant him such remedy as is reasonable in the circumstances, but where there has been delay on the part of the plaintiff, he will not be allowed the first remedy in any event.

Whatever the interpretation of that passage may be the law as applied in Ceylon is not exactly in the terms of that passage. De Sampayo J. in *Bisohamy v. Joseph*, 23 N.L.R. 350, said that "In a case of encroachment like this, it does not necessarily follow that plaintiff should get judgment for the actual portion encroached on with the result that any building should be broken down." He referred to the case of *Migal Appuhamy v. Thamel*, 2 Current Law Reports 209, as an authority for the proposition that in certain circumstances, the Court instead of ordering the removal of the encroachment may either order compensation to be paid by the defendant or compel the defendant to buy the land encroached upon. In *Bisohamy v. Joseph*, the evidence indicated that the plaintiff was aware of the building, and did not object to it until the defendant after completing the building of the wall, sent him a letter of demand claiming half the expenses. The wall in that case was only a boundary wall, but in spite of that circumstance, the case was sent back to the Court of Requests in order that the Commissioner might award to the plaintiff reasonable compensation for the encroachment. In *Saga Madam v. Makeen*, 27 N.L.R. 227, de Sampayo and Porter JJ. set aside the judgment of the District Court by which an injunction had been allowed compelling the defendant to remove a building put up by him encroaching on the plaintiff's land. "It has been pointed out," said de Sampayo J. in the course of the argument, "that the principle both of English equity, and the Roman Dutch Law is that an injunction of this sort should not be granted if the plaintiff can be compensated in damages. The principle is apparently applicable whether there has been delay on the part of the plaintiff or not. The order of the

District Court was set aside, and the case was sent back so that the District Judge might consider the question of compensation to be paid, and assess the proper amount of damages that were due to the plaintiff. In the circumstances of this case, I see no reason why that principle should not be applied.

The encroachment is very small in extent, and there is nothing to indicate that the plaintiff has suffered damages in any way except with regard to the value of the portion of land which has been encroached upon. The learned Judge appears to have accepted the evidence of the Surveyor Manuel to the effect that the portion of land encroached upon is worth about Rs. 40/– and he ordered Rs. 50/– to be paid to the plaintiff as compensation. I see no reason to interfere with this order, and I would affirm the judgment of the Commissioner of Requests. The plaintiffs-appellants will pay to the defendant-respondent her costs of this appeal.

Judgment affirmed.

Present : SOERTSZ, J.

SUBRAMANIAM vs. VISWANATHAN

S. C. No. 145—*C. R. Trincomalee No.* 4275.
Argued on 25th June, 1937.
Decided on 30th June, 1937.

Agreement of lease of paddy field—Land situated in Eastern Province—Agreement not notarially attested—Is such agreement enforceable—Ordinances No. 7 *of* 1840 *and No.* 21 *of* 1887.

The plaintiff and the defendant entered into a written agreement to the following effect.

"I.....having taken on lease the field.....at Kandalkadu.....for this year's cultivation, the quantity of paddy agreed to be given for it is ninety bushels, which unless the whole plain of Kandalkadu fails for want of rain or by flood, I promise to deliver in good paddy.....Should I fail.....I consent and agree that he may add to the said ninety bushels profit at the rate of quarter bushel for each bushel outstanding.... "

This agreement was not notarially attested. The defendant failed to carry out this agreement and the plaintiff filed action to recover a sum of Rs. 285/– the value of 112½ bushels of paddy, which he alleged was due to him by virtue of this agreement.

The defendant took the objection that the agreement was unenforceable as it had not been notarially attested. The plaintiff relied on Ordinance No. 21 of 1887.

Held : (i) That the provisions of Ordinance No. 7 of 1840 were applicable to this agreement and that was unenforceable as it was not notarially attested.

(ii) That Ordinance No. 21 of 1887 did not apply to this agreement.

N. E. Weerasuriya with *Wijemanne* for the plaintiff-appellant.
Chelvanayagam with *Muttucumaroe* for the defendant-respondent.

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Subramaniam *vs* Viswanathan

SOERTSZ, J.

The plaintiff sued the defendant to recover a sum of Rs. 280/–, the value of 112½ bushels of paddy which he alleged was due to him on a written agreement entered into between him and the defendant on the 20th of May 1934.

The agreement in question is the document P1. Among the issues framed was the issue "Can plaintiff maintain this action on the writing P1 inasmuch as the said writing was not notarially executed." The parties agreed that this issue should be first taken up. After discussion, the learned Commissioner answered that issue in the negative and dismissed the plaintiff's action with costs. The first question that arises for consideration is whether document P1 created an interest in land. It says "I.....having taken on lease the field.....at Kandalkadu.....for this year's cultivation, the quantity of paddy agreed to be given for it is ninety bushels, which unless the whole plain of Kandalkadu fails for want of rain or by flood, I promise to deliver in good paddy.....Should I fail.....I consent and agree that he may add to the said ninety bushels profit at the rate of quarter bushel for each bushel outstanding."

In my opinion this agreement had to be notarially attested in order that it might be of force or avail in law. The Ordinance No. 21 of 1887 which was introduced in consequence of the Full Court ruling in *Saytoo v. Kalingawa* 8 S.C.C. 67 enacted that "the provisions of section 2 of the Ordinance No. 7 of 1840 shall not be taken to apply to any contract or agreement for the cultivation of paddy land.....for any period not exceeding twelve months, if the consideration for such contract or agreement shall be that the cultivator shall give to the owner.....any share or shares of the crop or produce thereof." By implication, therefore, the provisions of section 2 of 7 of 1840 apply to all other contracts or agreements for the cultivation of paddy fields. In the present case the plaintiff, even if Ordinance No. 21 of 1887 was available to him cannot claim exemption for the reason that he was to receive on this agreement not a share of the crop or crops good bad or indifferent, but a *fixed* ninety bushel quantum of 'good paddy free of chaff wet or damage'. This agreement is similar in this respect to the agreement that was interpreted by De Sampayo J. in *De Silva v. Thelenis* 3 C.W.R. 130 and the principle laid down there applies and debars the plaintiff from maintaining this action. But the Ordinance No. 21 of 1887 was not proclaimed for the Eastern Province and, therefore, in no circumstances is the exemption created by it available to him.

In my opinion, therefore, the learned Commissioner's judgment is right and the appeal fails.

I dismiss it with costs.

Appeal dismissed with costs.

Present : SOERTSZ, J.

INSPECTOR PEIRIS vs PUNCHI BANDA & OTHERS

S. C. Nos. 5 & 6—*P. C. Colombo No.* 45880

Argued on 16th July, 1937.

Decided on 2nd August, 1937.

Enhancement of sentence—Power of Supreme Court in appeal to enhance punishment imposed by the trial court.

Of five persons convicted of offences under sections 334 and 314 of the Penal Code and sentenced to a term of six weeks' rigorous imprisonment, two appealed against the finding of the trial Judge. In appeal the Supreme Court enhanced the sentence of the lower court, holding that the sentence imposed by it was insufficient. The accused who did not appeal were also noticed to show cause why their sentences should not be enhanced.

Held : That the Supreme Court has power to enhance a sentence passed by a lower court, even where, at the time of the hearing of the case in appeal or revision, the accused has undergone the whole of the sentence imposed by the lower court.

De Jong for 1st and 5th accused-appellants.

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

SOERTSZ, J.

This is a bad case with an ugly resemblance to gangster methods. The complainant is a young man, 22 years of age. He has been employed from time to time as a decoy by the Excise Department. He appears to have been suspected of giving authorities information in regard to a charge of being in possession of ganja in which the 1st and 2nd accused in this case were involved. The other accused appear to be members of the 1st and 2nd accused's party. They live in the Pettah near the Khan Clock Tower, a notorious dope centre. On the day in question, the complainant appears to have come to the bus stand near this clock Tower to take bus. The 4th accused seized him and dragged him away and took him into a house. There all the accused set upon him and assaulted him and locked him up in a room. He was held prisoner for three days. On the 3rd day the Police received information that the complainant had been locked up by the 1st accused. Inspector Christoffelsz went to the spot about 11-45 a.m. He was unable to obtain any information about the complainant from the 2nd and 3rd accused and was about to leave the place when he heard someone call out " Sir, Sir." It was the complainant who had espied the Inspector. The door of the room had been padlocked. The 2nd accused opened the padlock and the Inspector says, " The complainant was inside. He was hardly able to speak. His face and neck were badly swollen. He seemed to have been badly assaulted." The accused on these facts, were charged under section 334 and 314 of the Penal Code.

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The charge under section 334 is one triable by a District Court, but the Magistrate elected to assume jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code. There is no objection that can be taken to this course, but when the Magistrate in his capacity of District Judge found the accused guilty on the charges framed against them and sentenced them to a term of six weeks' rigorous imprisonment, I think that was something after the manner of an anticlimax. It was like patting the accused on the back.

This case is a clear instance of an open defiance of the law in a locality where there are likely to be many willing imitators. The complainant was treated in this way because he was known to be an Excise decoy and was suspected of having had a hand in the charge preferred against the 1st and 2nd accused. Once the accused were convicted, deterrent punishment should have followed. The appellants were probably so agreeably surprised when they were sentenced to 6 weeks' rigorous imprisonment that they thought they might try their luck once more.

Mr. de Jong for them has argued their appeal very strenuously and, if I may say so, with great ability, but I see no reason for differing from the verdict of the learned Magistrate. I affirm the convictions, but vary the sentences by directing that the accused do undergo eight months' rigorous imprisonment instead of six weeks. Some of the accused have not appealed, but by virtue of the powers of revision of this Court, I have directed notice to be issued on them to show cause why their sentences should not be revised. Those accused have probably served their six weeks' term already and as a rule, this Court does not interfere to enhance punishment in such cases. In this connection, I would quote from a judgment of the Chief Justice in *The Solicitor-General vs Fernando* P. C. Colombo 49479 S. C. Minutes 9th October, 1936.* " I think I must say that there are occasions when the Court would be perfectly justified in sending back to prison an offender on whom so grossly inadequate a sentence has been passed, that a very serious miscarriage of justice would be caused unless such action were taken. My attention has been directed to certain decisions of other Judges of this Court, in some of which an application for enhancement has been refused on account of the fact that the term of imprisonment has already been served, but I do not see any statement in any of these judgments that under no circumstances should enhancement of sentence be passed when the accused has been discharged from prison. *It follows then that in a proper case I shall be perfectly prepared to enhance a sentence even when the accused has been discharged from prison.*"

In my opinion this is a proper case for such treatment and it is for that reason I have directed notices to issue.

Conviction affirmed and sentence enhanced.

Present : ABRAHAMS, C. J.

THE SOLICITOR-GENERAL vs H. FERNANDO alias BITA

**Application in revision in P. C. Colombo No.* 49479

Argued & Decided on 9th October, 1937.

M. F. S. Pulle, C.C., in support.

ABRAHAMS, C. J.

This is an application for enhancement of a sentence of 2 weeks' rigorous imprisonment passed on the 7th of September last, for the offence of being in possession of about 14 drams of fermented toddy. There were four previous convictions against the accused, at intervals, roughly speaking, of a little over twelve months, the last of which took place on 13th of April, 1935, when the accused was sentenced to three months' rigorous imprisonment and fined Rs. 100/– or six weeks' rigorous imprisonment in default, for illicit possession and transport of toddy. The Ordinance under which the accused was convicted provides for severer punishment in the case of a second or subsequent offence.

It does not follow, of course, that because an accused has been previously convicted that he must perforce receive a severer sentence than that which he last served or even as severe a sentence. The Court of Criminal Appeal in England has said again and again that the first consideration is the intrinsic nature of the offence and that to punish a man more severely, merely because he has been convicted before, would be to punish him twice for the same offence. At the same time circumstances sometimes do justify a more severe punishment upon an old offender and in this case I think that had I been trying the case myself I should have passed a more severe sentence than two weeks' imprisonment, although I do not think, in view of the fact that the quantity of toddy possessed was not very large and that the last offence was committed 16 months earlier, I should have awarded more than a month. But it has to be remembered that the accused has already served his sentence and to imprison him again would savour very much of cat-and-mouse treatment, which, generally speaking, is unfair.

At the same time, I think, I must say that there are occasions when the court would be perfectly justified in sending back to prison an offender on whom so grossly inadequate a sentence has been passed that a very serious miscarriage of justice would be caused unless such action were taken. My attention has been directed to certain decisions of other Judges of this Court, in some of which an application for enhancement has been refused on account of the fact that the term of imprisonment has already been served, but I do not see any statement in any of these judgments that under no circumstances should enhancement of sentences be passed when the accused has been discharged from prison. It follows then that in a proper case I shall be perfectly prepared to enhance a sentence even when the accused has been discharged from prison. What should be a proper case is, of course, a matter which depends entirely upon particular circumstances. This case before me is somewhat doubtful. It may be that the accused will be lucky but the court should lean in his direction rather than against him. I dismiss the application.

Present : FERNANDO, A. J.

FERNANDO vs PEIRIS & ANOTHER

S. C. No. 207—*C. R. Panadura No.* 5491.
Argued on 1st & 2nd July, 1937.
Decided on 7th July, 1937.

Stamp Ordinance sections 36 *and* 37—*Writing requiring a stamp of the value of one rupee stamped with a stamp of the value of fifty cents—Objection taken to the bond in the pleadings on the ground that it was under-stamped—Bond admitted by court—Can objection be taken in appeal to the bond.*

On 26th January, 1935, the plaintiff and the defendants entered into the bond set out below. The bond was stamped with an adhesive stamp of the value of fifty cents. The defendants failed to observe the terms of the bond and on 6th June, 1936 the plaintiff brought this action to enforce the bond. At the date of action the 1st defendant had paid a sum of Rs. 70/– and the plaintiff, therefore, claimed the balance, Rs. 60/–. In answer the defendants took the objection *inter alia* that the agreement was invalid in law and unenforceable. At the trial the following issue was raised : Is the writing sufficiently stamped ? The learned Judge made order admitting the document in evidence, and entered judgment for the plaintiff. The defendants appealed. In appeal objection was taken to the admission in evidence of the writing sued on. It was contended that the action was not maintainable as the writing in question was a bond which was insufficiently stamped, in that it bore a stamp of the value of –/50 cts. whereas the proper duty was one rupee. For the respondent it was contended that the objection to admission, in evidence, of the document could not be taken in appeal, once the document was admitted by the trial Judge even though the trial Judge is found to have admitted the document in error. Counsel for the respondent cited Donough's Indian Stamp Act, 8th edition pp.405, 406, 407, 408 and 414, and 17 N. L. R. 230: 20 N. L. R. 183.

Held : That the admission of a document in evidence cannot be questioned in appeal once it has been admitted in evidence by the trial judge.

L. A. Rajapakse with *Surasangaram* for defendant-appellant.
G. P. J. Kurukulasooriya for plaintiff-respondent.

FERNANDO, A. J.

The main point that was argued by Counsel for the appellant was that the document P1 * on which the plaintiff brought this action was a bond and as such has not been properly stamped in terms of item 15 B of the schedule to the Stamp Ordinance. That schedule requires the bond to be stamped with a stamp of Re. 1/– whereas the stamp affixed to the document was only –/50 cts.

**Know all men by these presents that:*

We, Malalage Hendrick Peiris of Malamulla in Panadura, as principal and Pelpolage Waiman Perera of Wewita in Bandaragama, as surety hereinafter sometimes called the obligors, are held and firmly bound jointly and severally unto H. Thomas Fernando of Panadura

Counsel for the respondent argues that in view of the provisions of section 37 of the Stamp Ordinance it is no longer open to this court to question the admission of the document. The effect of that section is in my opinion that once a document has been admitted in the court of first instance, the admission of such document cannot be questioned in the court of appeal, but if the court of appeal is satisfied that the document is not sufficiently stamped, then action may be taken in terms of section 37 (2), which enables to send the document to the Commissioner of Stamps for necessary action. The reason appears to be that where a document has not been sufficiently stamped, the loss to the revenue can be recovered by appropriate action, but as between the parties, the validity of the document cannot be questioned. Section 36 provides that the court of first instance, may, if satisfied that the stamp is insufficient, allow the document to be admitted in evidence on payment of the deficiency of stamp duty and a penalty, and as long as the party producing the document is prepared to pay the deficiency and the penalty, the document must be admitted, and the rights of the parties determined on such document. The position of the parties in the appeal court is exactly the same, and although the appeal court may order the necessary steps to be taken for the recovery of the deficiency, the action cannot be dismissed because of such deficiency. The principle of law is clear, and I do not think it necessary to discuss the authorities which were cited before me.

The document has been drawn up in the form of a bond, but it has not been notarially attested as is usual with bonds conditioned for the payment of money. The amount of the deficiency according to the counsel for the appellant is only –/50 cents and I do not think this is an appropriate case for action under section 37 (2). I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

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carrying on business under the name style and firm of " The Panadure Financiers " Panadure, at their registered place of business No. 154, Gravets Road, Panadure, in the sum of rupees one hundred and thirty (Rs. 130/–) for the due and faithful payment of which, we, the said Malalage Hendrick Peiris and Pelpolage Weiman Perera bind ourselves jointly and severally and our respective heirs executors, and administrators firmly by these presents renouncing the beneficium ordinis seu excusionis, beneficium divisionis, beneficium non numeratae and all other benefits to which by law sureties are entitled.

Now the condition of this obligation is such that if the above bounden obligors or their respective heirs executors or administrators shall duly pay the said sum of rupees 130/– by monthly instalments of rupees ten each, the first of such payment being due on the twentieth day of February, 1935, the day of these presents and thereafter on or before the twentieth day of each and every succeeding month, then this obligation shall be null and void and of none effect, otherwise shall remain in full force and virtue.

In witness whereof etc. etc. ..... *on this 26th day of January, 1935.*

Signed and witnessed,

Present : FERNANDO, A. J.

CASIPILLAI vs RAJARETNAM

S. C. No. 245—*P. C. Mallakam No.* 16307

Argued & Decided on 6th July, 1937.

Youthful Offenders Ordinance—Section 32—*Person in possession of property devolving on an orphan—Is he a person " legally liable to maintain " such orphan.*

Held : That a person in possession of property to which an orphan has a claim is not a person " legally liable to maintain " such orphan for the purposes of section 32 of the Youthful Offenders' Ordinance.

H. W. Thambiah for petitioner-appellant.
M. F. S. Pulle, Crown Counsel, for respondent.

FERNANDO, A. J.

The Police Magistrate in this case convicted a boy and ordered him *inter alia* to be sent to the Maggona Reformatory for three years. He then called upon the appellant, Casipillai, to show cause why he should not pay for the maintenance of the boy at the Reformatory. He purported to act under section 34 of Ordinance No. 1 of 1886. Section 32 of the Ordinance provides that the parent of the offender, or if he an orphan, the guardian, or other person legally liable to maintain him shall be bound to pay the whole or part of the cost of maintaining such an offender.

It was argued for the appellant that the boy was not an orphan, but I do not think that contention can prevail inasmuch as the evidence shows that the boy was brought to the house of the appellant when he was 12 days old, by the appellant's daughter and son-in-law. Both the appellant's daughter and son-in-law are now dead, and there is nothing to indicate that the parents of the child are alive or that there is any other person liable to maintain him.

The question arises, however, whether this appellant is legally liable to maintain the child, and I think the learned Magistrate was wrong when he came to the conclusion that the appellant was legally liable. It is said that the appellant is in possession of some property which belonged to his daughter and son-in-law. Even if this is true, there does not, in my opinion, arise from that position a liability on the appellant to maintain the child. It may be possible for the child, or any friend of his, to institute an action to recover any property which is claimed to belong to the child as inherited from his adoptive parents, but there is nothing to indicate that the appellant is legally liable to maintain the child.

I would therefore set aside the order made by the learned Magistrate ordering the appellant to pay for the maintenance of the child.

Set aside.

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

THAMBIAH vs. SANGARAJAH

S. C. No. 70 (Final) D. C. Jaffna No. 6290.
Argued on 7th and 8th June, 1937.
Decided on 24th June, 1937.

Thesawalamai—Thediathetem property—Mortgage of—Jaffna Matrimonial Rights and Inheritance Ordinance 1911—*Mortgage Ordinance* 1927.

The plaintiff is the mortgagee of a land, the mortgagor being one Sinnadurai, the father of the defendant. During the lifetime of his wife Nannipillai, Sinnadurai mortgaged the land. About two and half years later, action was filed on the bond against Sinnadurai alone. While the case was pending Nannipillai died. The plaintiff continued the action against Sinnadurai and obtained a decree against him. At the sale in execution the plaintiff purchased the land. The defendant claims half share of the land on the footing that the decree is not binding on him and his minor sister. It was admitted that the defendant was a Jaffna Tamil subject to the Thesawalamai.

Held : That the decree was not binding on the children of the defendant, because they were not made parties to the mortgage action.

H. V. Perera, K. C., with *T. Nadarajah* for defendant-appellant.
N. E. Weerasooriya with *F. A. Tissaverasinghe* and *N. Nadarajah* and *Corea* for plaintiff-respondent.

SOERTSZ, J.

The plaintiff brought this action to be declared the owner and proprietor of the land 18 lachams, 15½ kulies in extent described in paragraph 1 of the plaint. He alleged that the defendant had objected to and prevented the Fiscal from putting him in possession thereof in execution of a hypothecary decree he had obtained against the defendant's father in respect of this land.

The defendant's answer disclosed that he claimed certain interests in the Western portion of this land, namely, that portion that is made up of the two lots of 10 lachams and 15 kulies and of 3 lachams and ½ kuly. He claimed nothing of the Eastern lot 5 lachams in extent. The defendant's case is that the eastern portion of their land was the thediatetam property of his parents Sinadurai and Nannipillai. He admits that during his mother's lifetime, his father mortgaged this land on the 21st of February, 1929 to the plaintiff who put the bond in suit in case No. 1631 D. C. Jaffna on the 26th of November, 1931, making only his father Sinadurai the defendant. While that case was pending Nannipillai his mother died on the 14th of December, 1931. The plaintiff continued the action, even thereafter, only

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against Sinadurai the mortgagor, and obtained decree on the 2nd of February, 1932, and at the sale in execution purchased this land himself on deed P3 of the 1st February, 1934. The defendant contends that he is not bound by the decree and that he and his minor sister are entitled to a half share of the land. That is the principal question for decision.

A Divisional Bench of this Court has held and that ruling binds us—that under the *Thesawalamai* the husband has the same right to mortgage property which forms part of the *thediatetam* property, after the passing of Ordinance No. 1 of 1911 as he had before this Ordinance was enacted, and that the wife is not a necessary party to a hypothecary action against the husband on mortgage effected by him in respect of *thediatetam* property in order to make her interest in the property bound by the decree. *Sangarapillai v. Devaraja Mudaliyar* 38 *N.L.R.* 1. . In that case, however, the wife was alive at the time of the decree and thereafter. In fact, it was she who took the point that she was not bound by the decree entered against her husband. In an earlier case *Ambalavanai v. Kurunathen* 37 *N.L.R.* 286, Poyser and Koch J.J. held that where after the Jaffna Matrimonial rights and inheritance Ordinance of 1911, a husband mortgaged *thediatetam* property, and the mortgagee *after the death of the wife*, put the bond in suit, without making the minor heirs of the wife who were in possession, parties to the action, the heirs were not bound by the hypothecary decree.

Counsel for the respondent question the soundness of this decision and also maintained that if we accepted that decision, the present case is distinguishable by reason of the fact that in that case the wife was dead at the time the action was brought, whereas in this case the wife was alive and died only two months before decree was entered.

I am unable to appreciate this distinction. I can see no good logical reason for requiring heirs to be substituted in cases where the wife dies before the institution of the action and not requiring them to be substituted in cases where she dies pending the action, if it is sought to bind them by decree. In a case in which the wife is alive at the time of the decree, as in the Divisional Bench Case I have already referred to, there is manifestly good logical foundation for holding that it will be sufficient to sue the husband in order to bind the wife too. Chief Justice MacDonell based his finding to that effect on the theory that the husband is the sole and irremovable attorney of his wife with regard to *alienations* of the *thediatetam* property by sale or *mortgage* and that for the purpose of such alienation, the wife's person is 'merged in that of the husband and there can be no requirement that she should be joined as a party to any mortgage action, because she cannot on any correct analysis be described as a party separate from her husband.' Dalton J. said, 'Having regard to the powers of the husband in respect of the common property of the spouses to mortgage the whole of the property, the wife is not a necessary party to the action to make her interest in it bound by the decree.....This seems to me a necessary inference or deduction from his power to mortgage the whole property.'

I prefer myself to state the principle in the way in which Dalton J. stated it, for I find some difficulty in proceeding on the principle of the husband 'the sole and irremovable attorney of his wife.' But, it must be remembered that this power of the husband presupposes the existence of a community of property between himself and his wife, and that community of property presupposes in turn the existence of the husband and wife. The death of either husband or wife puts an end to that community for purposes such as those with which we are concerned in this case. In regard to the children, the position of the husband or father is quite different. The moment the wife dies, there is no community of any kind between him and his children. They derive their title from their mother, and their father as father has no control over their shares of the property either to deal with or to subject it to the process of a Court. As husband, the position he occupied in regard to his wife was quite different. In a case like the present, it is true that the children's share is liable for the debts but for that liability to be made effective the children must be sued or made parties to a pending action. I, therefore, see no reason for dissenting from the view taken in *Ambalavana v. Karunathan*, and as I have already observed, I do not think that the fact that in this case the wife was alive at the date of the institution of the action makes any difference. Counsel for the respondent alternatively asked for relief under section 11 of the Mortgage Ordinance, and I would have acceded to this request but I find that there is not sufficient material on the record on which to estimate and assess that relief.

Mr. Perera for the appellant contended that the plaintiff has not asked for relief under that section and that he could not ask for it in view of the terms of section 35 of the Civil Procedure Code. It is correct that in the plaint no claim was made under section 11 of the Mortgage Ordinance, but the question was raised in issue 5.

In regard to the contention that such a claim is obnoxious to section 35 of the Code, if the leave of the Court was necessary for such a claim to be put forward, the fact that the Court adopted and framed issue 5 implies that it gave the requisite leave.

I would, therefore, set aside the decree of the District Judge and remit the case to him for the investigation of the question of the relief to which the plaintiff is entitled under section 11 of Ordinance No. 1 of 1927. The defendant-appellant has succeeded on the question argued namely whether he and his sister were bound by the decree or not and he is, therefore, entitled to the costs of appeal. I leave the question of the costs in the trial court to the District Judge when he is making his order on the investigation he is directed to make. I would add that the defendant's minor sister should be duly added a party defendant before the case goes further.

FERNANDO, A.J.

I agree.

Set aside and sent back.

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

TILLAKARATNE vs KURUPPU WIJEWARDENA

S. C. No. 213—*D. C. Colombo No.* 420

Argued on 16th July, 1937.

Decided on 21st July, 1937.

Debtor and creditor—Death of creditor—Several lands belonging to the debtor devolving on sole heir—Sale of one of the lands by the devisee—Sale during administration of the deceased debtor's estate—Sale not for purposes of administration—Seizure of property sold by creditor of deceased under a writ of execution on a mortgage decree against the deceased—Can purchaser resist the seizure on the ground that there was other property left by the deceased sufficient to cover the creditor's claim.

The plaintiff in this case had purchased a land from the sole heir and devisee of one William Peris. The sale had taken place while the administration proceedings were pending, but it was not effected for the purposes of administration. The defendant a judgment-creditor of the deceased under a mortgage decree seized the land purchased by the plaintiff in execution of his decree. The plaintiff opposed the seizure on the ground that the defendant could have followed other lands of William Pieris' estate which would have carried his claim and that as he did not do so he was not entited to seize the plaintiff's land.

Held : That the plaintiff was not entitled to resist the seizure on the ground that there were other lands of William Pieris' estate of sufficient value to cover his claim which the defendant could have seized in execution.

H. V. Perera, K.C., with *A.W.H. Abeysundera* for the defendant-appellant.

C. Nagalingam with *S. W. Jayasuriya* for the plaintiff-respondent.

HEARNE, J.

After the disallowance of his claim under section 241 of the Civil Procedure Code, the plaintiff brought an action under section 247 and succeeded. The defendant now appeals.

The defendant had issued a writ against certain properties of the deceased William Pieris in order to recover the balance due to him on a mortgage decree and the plaintiff claimed that the properties in question were not liable to be seized by reason of the fact that the properties had been transferred to him by the widow of William Pieris as the sole devisee under his will. The transfer took place during the pendency of the administration and it was not claimed nor was the trial Judge satisfied that the consideration was spent for the purposes of administration.

The sole ground on which the Judge decided in favour of the plaintiff was that the defendant could have followed other land of William Pieris' estate which would have covered his claim and that, as he did not do so, the plaintiff was entitled to succeed. For this proposition I know of no authority. If the plaintiff acquires a title which is defeasible at the instance

of a creditor of the estate, he cannot say to a creditor who seizes the land that the property is immune from seizure so long as there is other property which may be seized.

I would allow the appeal with costs and dismiss the plaintiff's suit in the trial court with costs.

FERNANDO, A. J.

I agree.

Appeal allowed.

Present : FERNANDO, A.J.

SOORIYAUMMA vs. SATHUKEEN

S. C. No. 416—*P. C. Trincomalie No.* 1652.
Argued & Decided on 30th June, 1937.

Maintenance Ordinance—Muslim Marriage and Divorce Ordinance—Does an application to a kathi for a dissolution of marriage oust the jurisdiction of the Police Court to make an order for maintenance under the Maintenance Ordinance.

Held : That the jurisdiction of a Police Court to entertain an application for maintenance under the Maintenance Ordinance is not ousted by an application to a *Kathi* for dissolution of marriage under the Muslim Marriage and Divorce Ordinance No. 27 of 1929.

Maharoof for defendant-appellant.

FERNANDO, A.J.

This is an appeal against an order by the Police Magistrate ordering the appellant to pay Rs. 7/– a month for the maintenance of his two children. On service of summons the appellant was present in court and admitted that the applicant was his lawful wife and that the children were his. The case was then fixed for trial on the 3rd April, and on that day counsel appearing for him stated that the appellant had made an application to the Kathi for dissolution of his marriage and the custody of his children, and moved that the case be referred to the Kathi for inquiry and decision.

This application was opposed by the respondent. There was then an application for a date to settle and the case was called on 17th April. On that day the Magistrate proceeded to make an order after considering the amount which the appellant would be able to pay in view of his earnings.

Counsel for the appellant now contends that the jurisdiction of the Kathi to inquire into claims of maintenance conferred on him by section 21 of Ordinance No. 27 of 1929 is exclusive, and that the Police Magistrate had no jurisdiction to make an order.

On reading, however, of Section 21 of the Ordinance I am not satisfied that the Ordinance does confer exclusive jurisdiction to the *Kathi* in respect of claims for maintenance. Section 13 of the Ordinance provides that if a husband desires to divorce his wife the procedure laid down in the rules in the Second Schedule shall be adopted. There is no such provision with regard to a person who wishes to claim maintenance for her child or herself.

It seems to me that section 21 merely provides that in a case where the *Kathi* is inquiring into an application for divorce he may also inquire into a claim for maintenance. There is nothing in the ordinance ousting the

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jurisdiction of the Police Court to inquire into claims for maintenance pure and simple. Further it seems to me that the objection with regard to the jurisdiction of the Police Court was taken only in appeal. There was no such objection raised when the matter came up before the Magistrate. I would accordingly affirm the judgment and dismiss the appeal.

Appeal dismissed.

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Present : SOERTSZ, J.

DE SILVA (Excise Inspector) vs. SARPIN SINGHO

S. C. No. 302—*P. C. Gampaha No.* 41717

Argued on 14th June, 1937.

Decided on 17th June, 1937.

Poisons and Dangerous Drugs Ordinance No. 43 *of* 1935—*Unlawful possession of dangerous drug—Sealing of production—Is it an essential requirement of law.*

Held : That there is no requirement in law that the production, in any case in which a person is charged with being in unlawful possession of an excisable article or a dangerous drug, should be sealed at the spot or at any given time.

PER SOERTSZ, J.

"The delay in the sealing of the productions is a matter to be considered when the Magistrate is examining the possibility or probability of an introduction of an excisable article with a view to implicating an accused in a false charge."

Pulle, Crown Counsel, for complainant-appellant.

No appearance for accused-respondent.

SOERTSZ, J.

This is an appeal with the sanction of the Attorney-General, from an order of the Police Magistrate of Gampaha acquitting the accused who was charged with having been in possession of a preparation of ganga in violation of section 7 (1) of Ordinance No. 43 of 1935. The Magistrate acquitted the accused on the ground that "it is absolutely necessary that productions in Excise cases should be sealed at the spot unless that is impossible." In this case it was admitted that the ganga was sealed in the presence of the accused in the house of the Police Vidane which is said to be 200 fathoms distant from the spot at which the accused was arrested. I should have thought that a sufficient compliance with a requirement, if there were such a requirement, *i.e.* that productions should be sealed at the spot. But, in my opinion, even if the production had not been sealed in the neighbourhood of the scene of arrest but sometime later, at the Police or Excise station for instance, that does not mean that the prosecution must necessarily fail. The delay in the sealing of the productions is a matter to be considered when the Magistrate is examining the possibility or probability of an introduction of an excisable article with a view to implicating an accused in a false charge. It has no other bearing on the case. The Magistrate's view that sealing of the productions on the spot is an essential part of some prescribed ritual is erroneous.

I, therefore, set aside the order of acquittal and send the case back for trial in due course.

Set aside and sent back.