The

Ceylon Law Weekly

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

VOLUME VII.

WITH A DIGEST.

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Held : (i) That where a person obtains a declaration of title to land without an order for ejectment, he is not entitled to a writ for delivery of possession.

(ii) That a decree cannot be altered except in accordance with Section 189 of the Civil Procedure Code.

(iii) That where a person suing for declaration of title omits to ask for and obtain a decree for ejectment he cannot obtain a decree for ejectment by amendment of the original decree.

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Held : (i) That the 2nd and 3rd defendants should have been made respondents to the appeal.

(ii) That as the decree had been wrongly drawn up the case was one in which the discretionary powers given to the Court by Section 770 of the Civil Procedure Code should be exercised.

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Held : (i) That the rule that justice should manifestly be seen to be done had not been transgressed.

(ii) That the plaintiff's conduct in not raising any objection to the counsel appearing in the case after he had brought to the notice of the court the fact that he had made a Judicial order would cure the impropriety if any.

(iii) That a money-lender does not cease to be a money-lender merely because he is also a dairyman or the number of the loans granted by him are small or the borrowers belong to a restricted class.

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(ii) That even after the return is made the proceedings had by the fiscal up to that date will continue to be recognized as valid unless expressly nullified.

Siyaneris vs. *Peiris* **and another**—*S. C. No.* 46—*D. C. Colombo* 52738 47

Civil Procedure Code Section 422—*Commission to examine a witness in England—In what circumstances should a commission issue ?*

Held : (i) That the question whether or not a Commission shall issue is in the discretion of the trial Judge, in the sense that he is not bound to issue it because it is asked for.
(ii) That the exercise of this discretion by the trial Judge is open to review by the Supreme Court.
(iii) That merely because expenses will be involved in bringing a witness before the Court, particularly in a case where his evidence is of the utmost importance, a Commission will not be granted.

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K. Elonona vs. *W. William Fernando. Application for Workmen's Compensation by Commissioner under Section* 39 *of Ord. No.* 19 *of* 1934 102

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Criminal Procedure Code Section 440—Contempt of Court—Perjury—Contradictory Statement.

Held : (i) That Section 440 of the Criminal Procedure Code is intended for glaring cases of perjury.

(ii) That Section 440 of the Criminal Procedure Code should not be used to punish a person where he makes merely contradictory statements in the course of his evidence with no intention to commit perjury.

(iii) That this Section should be used very cautiously.

D. Appuhamy vs. *M. Habibu.—S. C.* 605—*P. C. Kandy* 51396A .. 42

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Held : That a confession recorded by a Police Magistrate under Section 134 of the Criminal Procedure Code does not become inadmissible in evidence under Section 25 of the Evidence Ordinance merely because the Magistrate, who recorded the confession from time to time, performed the duties of a police officer when, in fact, he was not in law entitled to do so.

King vs. *Sepala* **and others.** *Case stated under Section* 355 (1) *of the Criminal Procedure Code—S. C.* 62—*P. C. Panwila* 3659 .. 53

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Assignment of decree—Decree not entered at time of assignment—Does assignment pass title to the decree ?

Held : That upon the decree being entered rights thereunder passed to the assignee by virtue of the assignment.

Arunachalam Chettiar vs. *Seyed Mohammed—S. C. No.* 71—*D. C. Colombo* 42396 36

See under Action 134

Defamation.

1. *Defamation—Written communication regarding the conduct of a neighbour to the Superintendent of Police—No legal duty to communicate the information in question—Pleas of privilege, absence of malice, and truth.*

Held : (i) That under the Roman-Dutch Law it is not sufficient in answer to an action for defamation to prove that the defamatory words are true. It must also be proved that the publication was made for the public good.

(ii) That the true criterion as to whether an occasion is privileged both in English and the Roman-Dutch Law is to be found in the following dictum of Baron Parke in Toog (v. Spring (1 C.M. & R. 181 at p. 193).

" In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander) and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned..... If fairly warranted by any reasonable occasion or exigency, honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

(iii) That where it is found that the defendant has transgressed far beyond the proper limits of a privileged occasion it is not incumbent on the plaintiff to establish express malice. The necessary element of *animus injuriandi* can be inferred.

M. Chelliah vs. *C. Fernando—S. C. No.* 299—*D. C. (F) Colombo No.* 169 65

2. *Defamation—Petition to Government Agent regarding rival candidate for Chairmanship of Village Committee—Privileged communication—Privileged occasion—Matters requiring proof in an action for defamation.*

(1) **Held :** That under the Roman-Dutch Law

(*a*) the truth of a defamatory statement is no defence.

(*b*) a defamatory statement made on a privileged occasion is not actionable unless it is made with express malice.

(*c*) the fact that a defamatory statement is made raises a presumption that it was made maliciously.

(*d*) the presumption of malice can be rebutted by proof that the allegation was made on a privileged occasion.

(*e*) the defence of privilege cannot prevail if there is proof of express malice.

(*f*) a privileged occasion means an occasion when a right exists or a duty is imposed to give *bona fide* utterance or publication to what one believes to be the truth.

(*g*) a privileged communication means a communication made *bona fide* upon any subject matter in which the party making it has an interest or in reference to which he has a duty to a person having a corresponding interest or duty.

(*h*) Duty means not only duties legally enforceable but even moral and social duties of imperfect obligation.

(1) it is not necessary in the first instance to prove special damage. If the words uttered or published are clearly defamatory on the face of them, it will be presumed that damage has resulted from them as a natural consequence, and the courts will give judgment for general damages, not only as compensation for the damage which the law presumes to have resulted therefrom, but also for the insult (contumelia) suffered by the person defamed.

(2) That the defendant's petition to the Government Agent cannot in law be regarded as a privileged communication.

(3) That in the circumstances of this case there was proof of express malice on the part of the defendant.

S. Kanapathipillai vs. *K. Subramanium—S. C. No.* 270—*D. C. Jaffna* 3605 84

Elections.

Election Petition—Charges of bribery, treating and undue influence—Recognisance—What should be its form—Rules 12 (2) *and* 16 *of the Election Petition Rules—Petition and letter of appointment of agent—Should they be stamped?—Is notice given by an agent appointed by a writing not duly stamped a valid notice ?*

Held : (i) That when a charge of bribery is made against a candidate instances or cases of bribery by an agent can be proved,

(ii) That the law does not require an election petition to be stamped.
(iii) That the appointment of an agent by the petitioner to an election petition for the purpose of receiving notices must be by a formal writing.
(iv) That the formal writing appointing an agent must be stamped under item 35 of Part 1 of Schedule B to the Stamp Ordinance 1909.
(v) That it is sufficient compliance with rule 18, if the notice of the nature of the proposed security states whether security has been given by deposit or by a recognisance with sureties.

Vinayagamoorthy vs. *Ponnambalam. In the matter of the Election Petition against the return of Mr. G. G. Ponnambalam for the Point Pedro Electoral District.* 21

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Estate Duty—Application for refund of duty overpaid—Section 27 of the Estate Duty Ordinance No. 8 of 1919—Death of Member of Undivided Hindu Family—Claim that property on which duty was paid was Joint Property—Business carried on with ancestral funds—Burden of proof—What amount of duty is payable in such a case—Money paid under a mistake of law.

Held : (i) That the burden of proving that a business carried on by a member of an Undivided Hindu Family is a joint business is on the person who claims it to be joint-property.
(ii) That the joint-property of a Hindu Family is not property the managing member is " competent to dispose " within the meaning of the expression in the Estate Duty Ordinance.
(iii) That the subject has a right of action against the Crown for a refund of duty overpaid in any case in which the Commissioner refuses to refund such duty.

N. Ramasamy Chettiar vs. *The Attorney-General S. C. No. 297 —D. C. (F) Colombo No. 3130* 95

Evidence.

Dying declaration—Evidence Ordinance Section 32 (1)—Signs made by person unable to speak—Nod of injured woman fully conscious and able to understand what was said to her and to make signs and nod her head—Can a nod of a deceased person be admitted in evidence?

Held : That the nod of assent of the dying woman was a verbal statement and was admissible in evidence under Section 32 (1) of the Evidence Ordinance.

Alexander Perera Chandrasekera alias Alisandiri vs. *The King* .. 11

See under Excise 43

Excise.

Excise Ordinance No. 8 of 1912 Section 50—Criminal Procedure Code, Sections 190 and 429—Information Book—Extract from—how proved.

Held : (i) That where it is sought to prove, by the production of a certified copy, a statement recorded in the Information Book of a police station, that copy must be produced by the police officer who recorded the statement.
(ii) That the provision of Section 429 of the Criminal Procedure Code must be interpreted by the trial Judge with reasonableness and ought not to be used to remedy a dangerous defect or to fill a gap in the case for the prosecution.
(iii) That it is illegal for a Magistrate to recall a prosecution witness and hear other evidence in support of the prosecution case after he has reserved his order at the close of the case.

(iv) That the presumption created by Section 50 of the Excise Ordinance does not arise merely because a man behaves in a suspicious way in respect of any excisable article.

(v) That Section 50 of the Excise Ordinance comes into effect when from the suspicious behaviour of the person charged an element of an offence under Section 43 of the Ordinance can be proved.

Ponniah (Excise Inspector) vs. *Abdul Cader—S. C. No.* 543—*P. C. Jaffna* 10306 43

Forgery.

Forgery of a valuable security—Aiding and abetting the offence—No proof of intention with which forgery was committed—Such omission fatal to a conviction—Assumption of false name is by itself no offence.

Held : (i) That a charge which alleges forgery but does not allege the intention with which the forgery was committed is bad.

(ii) That a person who takes to himself a false name does not for that reason assume a false personality.

Toussaint (S. I. Police) vs. *Menika* **and others**—*S. C. No.* 409/11—*P. C. Gampola* 9186 38

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Housing and Town Improvement Ordinance No. 19 *of* 1915—*Construction and improvement of street under Section* 25—*Meaning of work of "Construction" in Section* 2 *of the Ordinance—Is a mansergh drainage scheme a work of "Construction" within the meaning of Section* 25 *? Under Section* 25 *is it ultra vires for the Municipality to include in a resolution a work of construction not included in Section* 2*?—Meaning of the words "such construction" in Section* 25 (1)—*How may the validity of a resolution under Section* 25 (1) *be tested?—Can the appeal tribunal in an appeal under Section* 92 (1) *go into the question of the validity of such a resolution ?*

Held : (i) That the expression "such work" in section 25 (1) of Ordinance 19 of 1915 means the work of construction resolved on by the Council.

(ii) That there is no appeal from a resolution of the Council under Section 25 (1).

(iii) That in an appeal under Section 25 (7) the tribunal of appeal is only empowered to go into the question of apportionment among the owners of the premises liable under the ordinance.

(iv) That the tribunal cannot inquire into the necessity or otherwise of the expenditure involved in a work of construction.

(v) That the Supreme Court has power under Section 46 of the Courts Ordinance to prevent any action by the Council *ultra vires* of its powers under Section 25 (1).

Colombo Municipal Council vs. *S. D. M. Ibrahim* **and others**—*S. C. No.* 103 *of* 1936—*D. C. Colombo (Special)* 2078 119

Income Tax.

Income Tax—Veterinary Surgeon, Trainer and dealer in horses carrying on horse-racing—Are the winnings from horse-racing taxable,

Held : That racing as carried on by the assessee and his wife formed no part of the business of trading in and training horses and that the winnings derived by them from horse-racing were not taxable.

G. N. G. Walles vs. *The Commissioner of Income Tax—S. C. No.* 155 (*Inty.*) 73

Jury.

Trial by Jury—Composition of Jury—Bias—Members of Jury alleged to be partial—Not challenged at the time the Jury was empanelled because material for making challenge not available then—Can objection be taken at a later stage or at the end of the trial?—In what circumstances the Privy Council will interfere where injustice is alleged on the ground that the jurors in a case tried by jury were open to objection.

2. **Held :—**
(i) That from these facts it would not be just or fair to presume partiality.
(ii) That the decision in the case *Ras Behari Lal vs. The King Emperor* (1933) 60 I.A. 354 does not warrant the proposition that in every case, in which there was material for a successful challenge by a juror, and it was not made for excusable reasons, an adverse verdict should be set aside.

Per LORD ROCHE :

" It was said that such partiality would under Section 225 of the Criminal Procedure Code of Ceylon be a ground upon which if objection had been made to the jurors in question it must have been allowed: that objection was not made because the appellant and his advisers were ignorant of the facts at the material time; but that nevertheless on the authority of the decision of this Board in *Ras Behari Lal vs. The King Emperor* (1933) 60 I.A. 354 if a conviction resulted to which a juror open to objection was a party the conviction would be quashed. In that case a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability is a good ground for objection under the law of India and was unknown to the accused until after the event. Their Lordships held that there was on those facts a grave injustice or in the words of an analogous case in the English Courts " a scandal and perversion of justice." Accordingly on principles frequently laid down by this Board the conviction was set aside and the Crown was left to take such course as to a new trial as the law of India would allow it to take. Their Lordships see nothing in that decision to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside. Their Lordships as at present advised are of opinion that such a proposition is ill-founded and is contrary to the well settled principles laid down by this Board with regard to its intervention in criminal matters."

Alexander Kennedy vs. *The King* 107

Lease.

Lease—Covenant against alienation without prior written consent of Lessor—Alienation in breach of such covenant—Legal effect of such alienation.

Held : (i) That a clause prohibiting alienation without the written consent of the lessor does not of itself affect the operation of a deed of gift of the leasehold property made in contravention of such prohibition.
(ii) That an alienation made in contravention of a covenant in a lease prohibiting such alienation without the written consent of the lessor would be effective until set aside by a court of law at the instance of the lessor.
(iii) That appropriate steps to have an alienation of a lease of land made contrary to the terms of the instrument of lease set aside can be taken only by one of the parties to the lease.

Jayawardene vs. *Jayawardene—S. C. No.* 268—*D. C. Kalutara No.* 19043 16

Maintenance.

Maintenance Ordinance No. 19 *of* 1889—*Default of payment of maintenance—Distress warrant—Application to pay arrears by instal-*

ments—Order committing accused to jail—Does an appeal lie from such order ?

Objection was taken that no appeal lay from such order.

The objection was upheld and the appeal dismissed.

Kathirasipillai vs. *Subramanium—S. C. No.* 782—*P. C. Jaffna No.* 27060 94

Marriage.

Marriage—Action for breach of promise—What should the writing relied on contain in order to succeed in an action ?

The plaintiff sued the defendant for breach of promise of marriage. He relied on a letter which *inter alia* contained the following passages :—

" If ever I marry anybody, I assure you that it will be none other than yourself. If by any mischance I fail to do so, I will remain single as I am. If I can join an order of nuns I will do so."

" Had my beloved father been alive I would certainly give a definite word at once without any fear or doubt.....I remind you that I who am in fear of knowing that it is very hard to escape from my mother, did not give a definite word. If God likes this matter between we two, I hope, that there will be a divine help to change the minds of the opponents. What our duty now is to pray only to God for the success of our matter."

Held : That the letter does not contain either a promise to marry or any admission of an earlier promise.

Phillip vs. *Regina Wettasinghe—S. C. No.* 316—*D. C. Avissawella No.* 1959 33

Minors.

Minor—Can a minor be arrested for debt?—Roman Dutch Law relating to immunity of minors from arrest—Civil Procedure Code, Section 298.

Held : That under the law of Ceylon a minor is not liable to be arrested for debt.

N. H. L. Girigoris vs. *R. P. de Zilva—S. C. No.* 217—*C. R. Galle No.* 14589 83

Moneylending Ordinance.

(1) *Moneylending—Ordinance, No.* 2 *of* 1918—*Sections* 2, 8, 10, 13 *and* 14—*Fictitious promissory notes taken as security for money lent—Can money lent on the security of unenforceable promissory notes be recovered ?—Can fictitious promissory notes be admitted in evidence to prove the loans?—Scope of Section* 2—*When may the Court re-open a moneylending transaction and take an account ?*

Held : (i) That the Court has power under Section 2 of Ordinance No. 2 of 1918 to reopen a money lending transaction and to take an account even though the promissory notes given as security for the loan are " fictitious " and therefore unenforceable.

(ii) That a loan is recoverable though the promissory notes taken as security in respect of it are " fictitious."

(iii) That promissory notes which are not enforceable by reason of Section 10 and by implication from Section 13 prohibited are not admissible in evidence to prove the loan.

M. A. L. M. S. Sockalingam Chettiar **and another** vs. *D. P. Ramanayake* **and another** 1

(2) *Money-lender—Business of money-lending—Sufficiency of evidence necessary to establish that a person is a money lender—Section 8 of No. 2 of* 1918.

Where a plaintiff admitted that during a period of 12 years he had lent money to ten or fifteen persons, to some of them on promissory notes, to others on mortgage bonds, and also that he supplemented his income with the interest gained thereby.

Held : That these facts alone were not sufficient to prove that the plaintiff was a money-lender.

T. B. Dissanayake vs. *Haramanis Appuhamy S. C. No.* 223 *C. R. Kandy* 20460 136

Mortgage.

Mortgage of a share of land which is the subject of a Partition action—Is the mortgage bond void?—Can the debt be recovered?—If so within what time?—Prescription.

The defendant mortgaged on February 21, 1929 a certain share of a land which was, at the time the mortgage bond was executed, the subject of a partition action. Action was filed on the bond on March 5, 1935. The action was resisted on the following grounds :

(*a*) That the hypothecation while partition proceedings were pending was void.
(*b*) That the action was prescribed by Section 7 of the Prescription Ordinance No. 22 of 1871.

Held : (i) That in the case of a mortgage of a share of land which is the subject of a partition action only the hypothecation is void and not the instrument containing it.
(ii) That although the hypothecation is void there still remains to the mortgagee an action on the promise to pay.
(iii) That the action on the promise to pay can be brought within the period prescribed in Section 6 of the Prescription Ordinance provided the instrument of mortgage is according to its substance and real characteristics " a bond conditioned for the payment of money."

John Appuhamy vs. *William Appuhamy—S. C. No.* 282—*D. C. Colombo No.* 2886 56

Municipal Council.

1. *Colombo Municipal Council Constitution Ordinance No.* 60 *of* 1935 —*Section* 23 (1) and (2)—*Objection to name of voter—Who may object?*

Held (i) That the person who can object that a voter is disqualified, is a voter in the same ward.
(ii) That the words ' in any such new or revised lists ' in Section 23 (2) should be read as meaning ' in any one of such new or revised lists. '

Naha-Kannu Meeranpillai vs. *Asby Lebbe Marikar. Appeal under Section* 24 *of Ordinance No.* 60 *of* 1935 71

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3. *Municipal Councils Ordinance No.* 6 *of* 1910 *Sections* 3, 10 (3), 31 *and* 32—*Annual value of house—Appeal from determination of Chairman under Section* 31—*Circumstances in which the Supreme Court will not interfere.*

Held (i) That the Supreme Court, sitting in appeal, should not draw any distinction between a finding of fact by the Chairman in an inquiry under Section 31 of Ordinance 6 of 1910 and a finding of fact by a judge in a civil action.

(ii) That although on the evidence placed before the Chairman another Chairman may have come to a different conclusion as there was evidence to support the Chairman's finding there was no reason for interference by the Supreme Court.

Dr. R. Sarawanamuttu vs. *Chairman M. C. Colombo—S. C. No.* 66 124

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Partition Action.

Partition action—Interlocutory decree—Appeal by 2nd to 7th defendants—8th to 11th defendants who were substituted in place of the 1st defendant, not made parties to the appeal—Section 770 of the Civil Procedure Code.

Held : That this was a case in which the appellants should as a matter of indulgence be given on opportunity to add the parties omitted from the appeal.

Francina Fernando vs *Kaiya Fernando* **and others** *S. C. No.* 63 *D.C. Kurunegala* 12880 133

Payment.

Payment of money into Court—Rules regulating payment—Effect of failure to comply with rules.

Held : That payment, of money into Court, not in accordance with the Rules regulating payment is not a valid payment.

Velu Kangany vs. *Kuppen Chetty—S. C. (Inty.)* 71—*D. C. Hatton No.* 2418 78

Penal Code.

(1) *Penal Code Section* 450—*Offence of being found upon a building for an unlawful purpose—What are the ingredients of such an offence?—Criminal Procedure Code Section* 178.

The accused was found standing on the window sill of a house looking into a room in the house. This room was occupied by an ayah employed there. The accused was charged with being found in a building for an unlawful purpose.

Held : (i) That where a person is charged with being found in a building for an unlawful purpose the prosecution must not only prove his presence there but also that he was there for some unlawful purpose.

(ii) That Section 450 of the Penal Code refers to two offences, one offence consisting in being found in or upon a building for an unlawful purpose, and the other offence consisting in being found in a building or enclosure and failing to give a satisfactory account.

(iii) That an accused cannot, upon a charge of being found in or upon a building for an unlawful purpose, be convicted of being found in a building and failing to give a satisfactory account with a separate charge in respect of the latter offence.

M. W. B. Thiedeman (S. I. Police) vs. *P. Charles—S. C. No.* 671—*P. C. Matara No.* 10981 40

(2) *Penal Code Sections* 409 *and* 410—*Mischief by cutting down trees growing on a land—Complainant not the owner of the land—Can the charge be maintained?*

Held : That there is no provision of law which requires that the complainant in a charge of mischief shall be the owner of the property in respect of which the

offence is alleged to have been committed, nor is it necessary that the complainant shall be aggrieved by the offence.

J. Jayasinghe vs. *Miguel Appu* **and another**—*S. C. No.* 1—*P. C. Dandegamuwa No.* 19825 63

(3) *Penal Code Sections* 427 *and* 428—*Criminal Trespass—Charge should specify intent.*

Held : (i) That in a charge of criminal trespass the intent with which the alleged trespass was committed should be specified.

(ii) That the fact, that the alleged trespasser is also charged with theft and mischief in the same transaction as the criminal trespass, is no legal justification for not specifying in the charge for trespass the intent with which the alleged trespass was committed.

E. P. T. Haniffa vs. *A. S. Hameedo Marikar*—*S. C. No.* 599—*P. C. Puttlam No.* 22293 81

Planting Agreement.

Planting agreement—Death of grantor of agreement—Sale of land by Fiscal in execution of a writ against the heirs of the grantor—Existence of agreement made known to those present at the sale. Are the purchasers bound by the agreement ?

Held : That the purchaser was bound by the agreement and was bound to pay compensation for the improvements effected by the plaintiffs.

Agostinu Appuhamy **and another** vs. *Caroline Hamine S. C. No.* 202 *C. R. Kurunegala No.* 9596 129

Principal and Agent.

Principal and Agent—Storekeeper and customer—Payment to salesman for goods purchased—Money misappropriated by salesman—In what circumstances would the payment operate as a discharge of the customer's obligation?

Held : That, in the circumstances of this case, the payment to the salesman would operate as a discharge of the customer's liability to the firm on the goods purchased.

K. T. E. De Silva vs. *H. Don Carolis & Sons, Ltd.*—*S. C. No.* 134—*C. R. Colombo No.* 18130 116

Public Officer.

Public Officer—Purchase of land by unregistered overseer in the name of his brothers and sisters—Contravention of General Orders—Force of General Orders—Is it against public policy to enforce anything done contrary to General Orders?

Held : (i) That an unregistered overseer is not a public officer for the purposes of the General Orders of Government.

(ii) That purchase of land by a public officer in contravention of General Orders does not render the transaction invalid.

(iii) That a Court will not refuse to enforce any contract agreement or undertaking merely on the ground that the person who seeks the assistance of Court is a

public officer, who in entering into the transaction in which he seeks the Courts' interference, did so contrary to General Orders.

Lucy Thirunayakar vs. *Leonard Thirunayakar S. C. No.* 237 *D. C. Kurunegala* 16891 127

Registration.

Registration of deeds—Competing deeds—One registered in old folio, the other in a new folio having a cross-reference to the old folio—Section 15 *of Ordinance No.* 23 *of* 1927.

Held : That a deed registered in a new folio containing a cross-reference to the folio in which instruments relating to the same land were previously registered can in law be regarded as duly registered.

Chelliah Pillai vs. *Devadasan* **and others**—*S. C. No.* 369—*D. C. Colombo No.* 2365 104

Privy Council Appeal No. 30 of 1934.

Appeal from the Supreme Court of Ceylon.

Present: LORD MAUGHAM, LORD SALVESEN, AND SIR LANCELOT SANDERSON.

M. A. L. M. S. SOCKALINGAM CHETTIAR and another (Appellants).

D. P. RAMANAYAKE and another .. .. (Respondents)

Argued on 19th — 22nd October, 1936.

Decided on 22nd October, 1936.

Judgment delivered on, 19th November, 1936,

Moneylending—Ordinance, No. 2 of 1918—Sections 2, 8, 10, 13 and 14 — Fictitious promissory notes taken as security for money lent—Can money lent on the security of unenforceable promissory notes be recovered—Can fictitious promissory notes be admitted in evidence to prove the loans—Scope of Section 2—When may the Court re-open a moneylending transaction and take an account.

By a mortgage bond dated the 28th of July, 1928 the first defendant (Ramanayake) covenanted with the first plaintiff (Sockalingam) and one Ramasamy to pay any sum of money which might thereafter be or become owing and payable to the first plaintiff or the said Ramasamy or either of them upon or in respect of any promissory notes or cheques made or endorsed by the first defendant or upon chits, tundus or other writings or in respect of any loans or advances or in respect of any accounts or transactions whatsoever with interest at the rate of 12 per centum per annum. The bond further secured all such sums by the mortgage of certain properties therein specified.

On the 1st of April, 1931, the said Ramasamy assigned all his rights under the said mortgage bond to the second plaintiff, and on the same day action was instituted for the recovery of a sum of Rs. 129,415/87 alleged to be due in respect of money lent on the security of the said bond and upon certain promissory notes : the plaintiffs prayed for the usual mortgage decree for sale of the property mortgaged in default of payment of the said sum. The second defendant was made a party to the action as a puisne encumbrancer of the mortgaged property. Several issues were raised at the trial. The argument before the Privy Council was confined to the following issues.

> (8) Are the promissory notes mentioned in paragraph (6) of the Plaint or any notes of which they are renewals not enforceable by reason of the failure to give details required by Section 10 of Ordinance No. 2 of 1918 ?
>
> (9) In view of the several allegations in the Plaint is the 2nd defendant entitled to ask that the transactions between the 1st defendant and the plaintiffs or either of them be re-opened and an account taken ?

The District Judge held that the promissory notes were themselves not enforceable but he held that they were admissible in evidence to prove the amount due on the mortgage bond. On the 9th issue he held that the 2nd defendant was entitled to ask that the transaction between the plaintiffs and the first defendant be reopened. From this decision the first and second defendants appealed. The Supreme Court held that the promissory notes were not enforceable and that the bond was also not enforceable. From this decision an appeal was taken to the Privy Council. It was admitted at the hearing that the notes were fictitious and therefore unenforceable.

Held : (i) That the Court has power under Section 2 of Ordinance No. 2 of 1918 to reopen a money lending transaction and to take an account even though the promissory notes given as security for the loan are " fictitious " and therefore unenforceable.

(ii) That a loan is recoverable though the promissory notes taken as security in respect of it are " fictitious."

(iii) That promissory notes which are not enforceable by reason of Section 10 and by implication from Section 13 prohibited are not admissible in evidence to prove the loan.

R. M. Montgomery, K.C. with H. I. P. Hallet K. C. and L. M. D. de Silva K.C. (Ceylon) for the appellants.

Mr. Chinna Durai and Lady Chatterjee for the respondents.

SIR LANCELOT SANDERSON.

This is an appeal by the plaintiffs against two decrees of the Supreme Court of the Island of Ceylon dated the 1st of August, 1933, whereby the Supreme Court set aside an order and a decree of the District Court of Colombo dated the 9th and the 21st of December, 1932, respectively and dismissed the action with costs. The respondents are the first and second defendants in the action.

The material facts are as follows :—

By a mortgage bond dated the 28th of July, 1928, the first defendant (Ramanayake) covenanted with the first plaintiff (Sockalingam) and one Ramasamy to pay any sum of money which might thereafter be or become owing and payable to the first plaintiff or the said Ramasamy or either of them upon or in respect of any promissory notes or cheques made or endorsed by the first defendant or upon chits, tundus or other writings or in respect of any loans or advances or in respect of any accounts or transactions whatsoever with interest at the rate of 12 per centum per annum. The bond further secured all such sums by the mortgage of certain properties therein specified.

On the 1st of April, 1931, the said Ramasamy assigned all his rights under the said mortgage bond to the second plaintiff, and the action in which this appeal arises was brought on the same day.

The plaintiffs thereby sought to recover the sum of Rs. 129,415/87 alleged to be due in respect of money lent on the security of the said bond and upon certain promissory notes : they prayed further for the usual mortgage decree for sale of the mortgaged property in default of payment of the said sum.

The second defendant was made a party to the action as a puisne encumbrancer of the mortgaged property.

Certain pleas were made and issues raised to which it is not now necessary to refer, and the questions which arise in this appeal relate to the issues numbered 8 and 9 in the judgment of the District Judge. They are as follows ;—

" (8) Are the promissory notes mentioned in paragraph (6) of the Plaint or any note of which they are renewals not enforceable by reason of the failure to give details required by Section 10 of Ordinance 2 of 1918 ?

(9) In view of the several allegations in the Plaint is the 2nd defendant entitled to ask that the transactions between the 1st defendant and the Plaintiffs or either of them be re-opened and an account taken ? "

The District Judge decided that the promissory notes in question were themselves not enforceable but at the same time he held that they were admissible in evidence to prove the amount due on the mortgage bond.

On the 9th issue he held that the second defendant was entitled to ask that the transactions between the plaintiffs and the first defendant should be re-opened.

Accordingly on the 9th of December, 1932, he directed the plaintiffs to file in Court a statement showing the moneys actually lent by the first plaintiff and Ramasamy to the first defendant from time to time on promissory notes, the amount of interest actually deducted in advance, the interest which they were entitled to deduct if calculated at 12 per cent. for the period when each note fell due and the amounts paid by the first defendant with the date of each payment.

Accounts were filed by the plaintiffs in accordance with the said order and on the 21st of December, 1932, the District Judge, after investigating the accounts and hearing evidence, held that a sum of Rs. 10,518/13 had been overcharged by the first plaintiff and that a sum of Rs. 7,378/96 had been overcharged by the second plaintiff. He therefore made a decree that the first defendant should pay to the plaintiffs jointly the sum of Rs. 11,518/78 with interest thereon at 12 per centum per annum from the 1st of April, 1931, to date of decree and thereafter on the aggregate amount of the decree at 9 per centum per annum till payment in full and costs of suit forthwith. He further made the usual mortgage decree in respect of the said sums.

The first and second defendants appealed to the Supreme Court by two petitions. The first was against the order of the District Judge of the 9th December, 1932, and the second against the decree of the said Judge dated the 21st of December, 1932. The Supreme Court held that as the plaintiffs were moneylenders the provisions of the ordinance relating to money lending—viz., No. 2 of 1918—applied to the transactions, that the promissory notes failed to comply with the provisions of section 10 of the ordinance because some of them did not show the amount of money deducted as interest paid in advance and because others which were renewal notes failed to show the capital sum actually borrowed ; and that under subsection 2 of the said section the promissory notes were not enforceable.

The Court held that though the bond was not in itself illegal, the promissory notes were illegal, and that the Court would refuse to enforce the security for those illegal transactions, the bond so far as it secured the illegal transactions being tainted with the same illegality.

Accordingly on the 1st of August, 1933, by the two decrees of that date the Supreme Court allowed both appeals, set aside the order and decree

of the District Judge dismissed the plaintiffs' action and directed that the plaintiffs should pay the taxed costs of the first and second defendants.

It is against the above mentioned decrees that the plaintiffs have appealed to His Majesty in Council.

The material sections of the ordinance are as follows :—

" 2.—(1) Where the proceedings are taken in any court for the recovery of any money lent after the commencement of this Ordinance, or the enforcement of any agreement or security made or taken after the commencement of this Ordinance in respect of money lent either before or after the commencement of this Ordinance, and there is evidence which satisfies the court —

(*a*) That the return to be received by the creditor over and above what was actually lent (whether the same is charged or sought to be recovered specifically by way of interest, or in respect of expenses, inquiries, fines, bonuses, premia, renewals, charges, or otherwise), having regard to any sums already paid on account, is excessive, and that the transaction was harsh and unconscionable, or, as between the parties thereto, substantially unfair ; or

(*b*) That the transaction was induced by undue influence, or is otherwise such that according to any recognized principle of law or equity the court would give relief ; or

(*c*) That the lender took as security for the loan a promissory note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious, or the amount due was left blank —

the court may re-open the transaction and take an account between the lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest, and charges as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable ; and if any such excess has been paid or allowed in account by the debtor, may order the creditor to refund it ; and may set aside, either wholly or in part, or revise, or alter any security given or agreement made in respect of money lent, and if the lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any court in which proceedings might be taken for the recovery of money lent shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under the last preceding sub-section, and the court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Ordinance by the borrower or surety or other person liable, notwithstanding that the time for repayment of the loan or any instalment thereof may not have arrived.

(3) In any insolvency proceedings on any application relating to the admission or amount of a proof in respect of any money lent, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money lending.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

8.—(1) A person who carries on the business of money lending, or who advertises or announces himself or holds himself out in any way as carrying on that business, shall keep or cause to be kept a regular account of each loan, clearly stating in plain words and numerals the items and transactions incidental to the account, and entered in a book paged and bound in such a manner as not to facilitate the elimination of pages or the interpolation or substitution of new pages.

(2) If any person, subject to the obligations of this section, fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which the default shall have been made.

Provided that in any case in which the court is satisfied —

(*a*) That the default was due to inadvertence and not to any intention to evade the provisions of this section ; and

(*b*) That the receipt of the loan, the amount thereof, the amount of the payments on account, and the other material transactions relating thereto satisfactorily appear by other evidence —

the court may give relief against any such default on such terms as it may deem just.

10.—(1) In every promissory note given as security for the loan of money after the commencement of this Ordinance, there shall be separately and distinctly set forth upon the document —

(*a*) The capital sum actually borrowed ;

(*b*) The amount of any sum deducted or paid at or about the time of the loan as interest, premium, or charges paid in advance ; and

(*c*) The rate of interest per centum per annum payable in respect of such loan.

(2) Any promissory note not complying with the provisions of this section shall not be enforceable.

Provided that in any case in which the court shall be satisfied that the default was due to inadvertence and not to any intention to evade the provisions of this section, it may give relief against the effort of this sub-section on such terms as it may deem just.

(3) The setting forth of the particulars required by sub-section (1) shall not affect the negotiability of any promissory note.

(4) Any promissory note setting forth the said particulars substantially in the form given in the schedule to this Ordinance shall be deemed to be in compliance with this section.

(5) The provisions of this section shall apply to renewals of any loan, and in all such cases the amount stated as the capital sum actually borrowed shall be the amount of the original loan.

13. Any person who shall take as security for any loan a promissory note or other obligation in which the amount stated as due is to the knowledge of the lender fictitious, or in which the amount due is left blank, shall be guilty of an

offence, and shall be liable on conviction to a fine not exceeding five hundred rupees, or in the event of a second or subsequent offence, either to a fine not exceeding one thousand rupees, or to simple imprisonment for a period not exceeding six months.

14. A promissory note given in respect of a loan with regard to which a deduction was made or a sum paid at or about the time of the loan in respect of interest, premium, or charges payable in advance, without such deduction or payment being set forth upon the document in accordance with section 10 (unless the circumstances are such as reasonably to entitle the lender to relief under that section), and any promissory note or other obligation in respect of a loan, with regard to which at or about the time of the loan any payment was made, or any collateral transaction entered into with a view to disguising the actual amount of the sum advanced, or the rate of interest payable in respect thereof, shall be deemed to be a promissory note or obligation in which the amount stated as due s, to the knowledge of the lender, fictitious within the meaning of sections 2 and 13 of this Ordinance."

SCHEDULE.

Promissory Note given in respect of a Loan.

Particulars required by "The Money Lending Ordinance, No. 2 of 1918."
1. Capital Sum borrowed, Rs.——
2. Interest, premium, or charges deducted or paid in advance, if any, Rs.———.
3. Rate of interest per centum per annum.———.

Stamp.

On demand (*or*————————months after date) I promise to pay to————————, or order, the sum of Rupees————————, with interest thereon at the rate of————————per centum per annum.

————————————————

(*Signature of Borrower.*)

At the hearing of the appeal before their Lordships it was admitted by learned counsel for the plaintiffs that the promissory notes did not comply with the provisions of section 10 inasmuch as they did not state the interest premium or charges deducted or paid in advance and consequently that the promissory notes were not enforceable. Further, it was admitted that the default was not due to inadvertence and that the promissory notes must be taken to be fictitious within the meaning of the ordinance to the knowledge of the lenders. It was however contended that the District Judge had jurisdiction to re-open the transactions under section 2 of the ordinance and to take an account between the lenders, viz., the plaintiffs and the person sued, viz., the first defendant and relieve the first defendant from payment of any sum in excess of the sum adjudged by the District Judge to be fairly due in respect of principal, interest and charges as the District Judge might adjudge to be reasonable.

On the other hand it was contended on behalf of the defendants that inasmuch as the promissory notes were taken as security for the loans and were not only unenforceable by reason of section 10 of the ordinance but

were, by necessary implication from section 13 prohibited, the plaintiffs were not entitled to recover the loans, or any part thereof.

In considering the above mentioned contentions the first thing to be observed is that in the ordinance the loan is treated as being something different from the promissory note, which is therein described as a security.

The provisions of section 10 make that clear. The section begins with the sentence, " In every promissory note given as security for the loan of money "

This must be remembered in construing the material words of section 10, subsection 2, viz.: " any promissory note not complying with the provisions of this section shall not be enfroceable," that is to say, the security, consisting of the promissory note, for the loan is not to be enforceable. The subsection does not provide that the loan shall be irrecoverable. If that had been intended it could easily have been so provided.

It is to be noted that the above mentioned provisions is very different from the words of section 8, subsection 2, which provides that :—

> " If any person subject to the obligations of this section fails to comply with any of the requirements thereof he shall not be entitled to enforce any claim in respect of such transaction in relation to which the default shall have been made."

The difference between the provisions of the two above mentioned sections is striking and it is abundantly clear that when it was intended to prevent any claim in respect of a transaction being enforced, it was stated in clear and unmistakeable language.

In their Lordships' opinion section two affords evidence that the provisions of section ten were not intended to make the loan therein referred to irrecoverable ; for that section provides that where proceedings are taken in any Court for the recovery of any money lent or the enforcement of any security made or taken after the commencement of the ordinance in respect of any money lent, the Court may re-open the transaction in certain events. One of the events is if the Court is satisfied that the lender took as security for the loan a promissory note in which the amount stated as due was to the knowledge of the lender fictitious or the amount due left blank.

To ascertain what is meant by the phrase in this section " a promissory note in which the amount stated as due was " to the knowledge of the lender fictitious " reference must be made to section 14 which provides that a promissory note given in respect of a loan with regard to which a deduction was made or a sum paid at the time of the loan in respect of interest premium or charges payable in advance without such deduction or payment being set forth upon the document in accordance with section 10 (subject to the proviso therein stated) is to be deemed to be a promissory note in which the amount stated as due is to the knowledge of the lender fictitious within the meaning of sections 2 and 13 of the ordinance.

It follows therefore that although the promissory notes in this case were notes in which the amounts stated as due were to the knowledge of the lender fictitious within the meaning of section 14 and could not be enforced by reason of the provisions of section 10, the Court had jurisdiction under section 2 of the ordinance to re-open the transaction and to take an account between the plaintiffs and the first defendant.

It was argued on behalf of the defendants that section 2 applied only to cases where action is taken by the borrower or by a third person to whom the security in question has passed by way of assignment and that otherwise section 2 would be inconsistent with the provisions of section 10.

Their Lordships are unable to accept that contention.

The provisions of the section are clear and unqualified and there is no jurisdiction for putting a construction upon the section which confines the jurisdiction of the Court to the cases suggested in the argument.

Further it appears to their Lordships that there is no inconsistency between section 2 and section 10.

Section 10 provides that if the Court is satisfied that the default was due to inadvertence and not to any intention to evade the provisions of the section the Court may give relief on such terms as it may deem just.

That provision is directed to a state of things quite different from that contemplated in section 2, which provides for a case where the lender has taken as security for the loan a promissory note in which the amount stated as due was *to the knowledge* of the lender fictitious.

In such a case jurisdiction is given to the Court to re-open the transaction and to take an account of what is actually due to the lender.

Stress was laid by learned counsel for the defendants upon the provisions of section 13, and it was argued that inasmuch as the ordinance provided a penalty for taking a " fictitious " promissory note as security for a loan, it must have been intended that the loan could not be recovered.

There is no doubt that this section and other sections of the ordinance were intended for the protection of members of the public who might be borrowers from moneylenders, and it is quite intelligible that it was considered of great importance that a promissory note taken by a moneylender as security for a loan should bear on the face of it the particulars specified in section 10, and that with a view to enforce such protection a penalty was imposed on the moneylender in the event of his non-compliance with the provisions thereof.

It does not necessarily follow that it was intended that the loan in respect of which such " fictitious " promissory notes were taken should be irrecoverable, and when the other sections of the ordinance are taken into consideration and in the absence of any specific provision such as is found in section 8 (subsection 2) to the effect that the moneylender should not be

entitled to enforce his claim their Lordships are of opinion that the provisions of section 13 do not prevent the Court from re-opening the transaction and taking the account under the provisions of section 2.

Their Lordships cannot refrain from saying that in their opinion the true construction of the provisions of the ordinance is by no means free from difficulty, and they appreciate the point of view adopted by the learned Judges of the Supreme Court, and the reason stated in support thereof, but after due consideration they have come to the conclusion that the District Judge was right in holding that he had jurisdiction to re-open the transaction and to take the account between the plaintiffs and the first defendant. That being so it was in his discretion to decide whether he should re-open the transaction and take the account, and their Lordships are not prepared to hold that he exercised that discretion wrongly.

Their Lordships, however, are of opinion that the promissory notes which were not enforceable by reason of section 10 and by implication from section 13 prohibited should not have been admitted in evidence to prove the loans. It is to be observed that the admission in evidence of the notes would make the sections practically valueless. Their Lordships' attention was drawn to certain English decisions, to which in their opinion it is not necessary to refer, inasmuch as their Lordships' decision is based upon the true construction of the provisions of the ordinance.

The learned counsel for the defendants desired to rely on the provisions of section 8 of the ordinance alleging that the books of the plaintiffs were not kept in accordance with the terms of that section. It appears, however, that the defendants wished to raise an issue upon this point at the trial, and upon objection by the plaintiffs the District Judge refused to allow that matter to be relied upon by the defendants as it had not been referred to in the pleadings, and he declined to state any issue in respect thereof.

Their Lordships are of opinion that the District Judge's decision was right in this respect since the proposed issue might well have involved the calling of evidence and they refused to allow learned counsel for the defendants to argue the point.

It must be clearly understood that on the further taking of accounts, to which reference will presently be made, the above mentioned defence will not be open to the defendants.

The District Judge apparently allowed a rate of interest higher than 12 per cent. per annum in respect of certain loans for short periods. In their Lordships' opinion this was not permissible, and that matter alone would necessitate a further taking of the account.

The more important matter, however, is the admission by the District Judge of the promissory notes, which were not enforceable, as evidence to prove the loans, which as already stated was not permissible.

In their Lordships' opinion the proper course is to remit the case to the Supreme Court in order that the Supreme Court may give such directions as are necessary for taking a further account between the parties to ascertain what amount is due by the first defendant to the plaintiffs in respect of money lent and interest at the rate of 12 per cent. per annum, on the footing that the promissory note given by the defendants are neither enforceable, nor admissible in evidence to prove the loans.

The plaintiffs will be entitled to the usual mortgage decree for such amount, if any, as may be found due to them on the taking of the further account.

It will be in the discretion of the Supreme Court to make such orders as are necessary for carrying out this direction, but their Lordships are of opinion that the further account should not be taken by the District Judge who took the account in the first instance. It is, of course, not intended to make any reflection upon the learned Judge, but he, having seen the promissory notes and admitted them in evidence, might be placed in a difficult position if he were asked to take the account again.

The result is that the appeal must be allowed and the two decrees of the Supreme Court and the order and decree of the District Judge must be set aside, and the matter remitted to the Supreme Court with the above mentioned direction.

The defendants must pay to the plaintiffs their costs of the appeals to the Supreme Court and two-thirds of their costs of the appeal to His Majesty in Council.

There will be no order as to the costs of the suit except that the plaintiffs must pay to the defendants the costs incurred by them in respect of the taking of the account directed by the District Judge and in respect of the further hearing before the District Judge on the 21st of December, 1932.

The procedure to be adopted for the taking of the account hereby directed and the costs thereof will be a matter for the direction of the Supreme Court.

Their Lordships will humbly advise His Majesty accordingly.

Privy Council Appeal No. 30 *of* 1936.

Present : LORD ROCHE, SIR JOHN WALLIS AND SIR GEORGE RANKIN.

ALEXANDER PERERA CHANDRASEKERA
alias ALISANDIRI .. .. .. (Appellant).

THE KING .. .. (Respondent).

Argued 11th and 12th November, 1936.
Decided on 12th November, 1936.

Judgment delivered on 12th November, 1936.

Dying declaration—Evidence Ordinance section 32 (1)*—Signs made by person unable to speak—Nod of injured woman fully conscious and able to understand what was said to her and to make signs and nod her head—Can a nod of a deceased person be admitted in evidence.*

The accused one Alexander Perera Chandrasekera alias Alisandri was indicted in July, 1935, before the Supreme Court on the charge of murder of a woman named Salami Nadatchi in May 1934. The accused was found guilty and sentenced to death. Application to state a case for the consideration of the Supreme Court on a point of law arising in the case was made by the accused's Counsel (Mr. D. S. Senanayake Jnr.). Shortly, the point was whether the fact that the deceased woman, whose throat had been cut, had nodded her head, when asked whether the accused was the assailant was admissible in evidence. This application was refused, thereafter an application for special leave to appeal was made to the Privy Council. The application came up for hearing before Lord Blanesburgh, Lord Alness and Sir George Rankin. Mr. L. M. D. de Silva, K.C. (Ceylon) with Miss Mehta appeared in support of the application and Mr. Kenelm Preedy appeared for the Crown. After hearing counsel the Privy Council granted leave. Lord Blanesburgh observed " This is plainly a case, on the circumstances disclosed to us, which would make it difficult to say that there had been a completely satisfactory trial unless there had been from the learned Judge a most careful charge indicating the risk of accepting such evidence as was given as to the assent by the deceased. Our feeling at the moment, therefore, is that it would be well to treat this petition as quite exceptional—as one in which leave to appeal ought to be given."

The appeal was thereupon listed for argument before Lord Roche, Sir John Wallis and Sir George Rankin on 10th November, 1936. After an argument lasting two days the Privy Council dismissed the appeal for reasons given in the judgment. The sentence of death imposed by the Supreme Court was thereafter carried out.

Briefly the relevant facts are as follows :—

Salami Nadatchi was a widow living alone in a two-roomed one-storied house on a plot of land lying between the estates of one Stanley Jayawardene and one Collin Silva. On the date of her death she came to the bungalow of Mr. Collin Silva in a terribly wounded condition. The principal wound was one about 4 inches in length extending from the right side of her neck across the throat to about ½ an inch on the left side of the middle line. There were minor wounds on the face and head and her ears were severed

and torn. There she was bandaged and propped up against a wall with cushions. T throat wound rendered her unable to speak ; but she was fully conscious and able to und stand what was said to her and to make signs and to nod her head, though slightly. S was asked questions both by the police and by neighbours and in particular by one Mart Perera—a carter who had worked with the accused for Mr. Stanley Jayawardene and w also knew the deceased woman. Mr. Stanley Jayawardene was present at the mater time and there was no ground for suggesting that the evidence to which objection w taken was derived solely or mainly from police sources, or that Perera or Mr. Jayawarder who gave evidence of what took place, were witnesses with ill-will to the accused. T greater part of the interrogation was conducted by Martin Perera, who spoke to th wounded woman in Sinhalese. Asked who cut her neck, the deceased indicated by signs t height of the person and later pointed to Mr. Jayawardene and also made signs as of goa ing a bull. The accused had worked for Mr. Jayawardene as a carter. She also point to a constable and then patted or slapped her cheek two or three times. The accused h some time previously assaulted a constable by slapping his face and this was a matter common knowledge. Thereafter or sometime earlier, it is not certain, Martin Perera p the direct question : " Was it Alisandri ? "—the name by which the accused was ordinari known. The wounded woman nodded her head in answer to this question. There w no doubt in the minds of the witnesses that this was a nod of assent.

Held : That the nod of assent of the dying woman was a verbal statement a was admissible in evidence under Section 32 (1) of the Evidence Ordinance.

PER LORD ROCHE.

" It is unnecessary to decide whether the question put " Was it Alisandri ? " and the n of assent would have constituted an oral statement made by the deceased, but their Lor ships are clearly of opinion that it constituted a verbal statement made by her. The ca under consideration closely resembles the case of a person who is dumb and able to conver by means of a finger alphabet. Upon proper evidence proving the words used in a conve sation so held their Lordships think that a statement so made would be a verbal stateme within the meaning of the section. So here their Lordships think that there was prop and sufficient evidence of a verbal statement by the deceased to the effect that it was t accused who cut her neck."

L. M. D. de Silva K.C. (*Ceylon*) for the appellant.

Sir D. B. Somervell K.C. Attorney-General with *Kenelm Preedy* f the Crown.

LORD ROCHE.

This is an appeal by special leave against a judgment and sentenc of the Supreme Court of the Island of Ceylon dated 1st May, 1935, whereb after a trial before a Commissioner and a jury, the appellant was sentence to death for the murder of a woman named Salami Nadatchi on 15th Ma 1934. The jury had returned a verdict of guilty by a majority of six to on The main point raised in the appeal was whether information given by th deceased woman before her death was a statement within the meaning o Section 32 of the Ceylon Evidence Ordinance No. 14 of 1865, and as suc was admissible in evidence by virtue of that section. This information wa admitted in evidence and directly implicated the appellant. The materia part of the section is as follows ;—

"*Statements by persons who cannot be called as Witnesses.*

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.

"32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases :—

When it relates to cause of death

"(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The facts of the case as proved by evidence not the subject of objection were as follows :—

The deceased was a widow living alone in a two-roomed one-storied house on a plot of land lying between the estates of one Stanley Jayawardene and one Collin Silva. The deceased's house was about 150 yards from the estate bungalow of Collin Silva where a witness named Rengam Arumugam, watcher of the estate lived with his wife. The accused man had worked as a carter for Stanley Jayawardene's estate and lived in the neighbourhood, but recently and until shortly before 15th May, 1934, he had been in the employment of two brothers Mohamadu a few miles away. He had been discharged from this employment some days before 15th May and was then unemployed. On the day in question he had been to the place of business of the brothers Mohamadu, had borrowed a bicycle from one of them, and gone home on it to dinner at his house, which he left after dinner about 2 p.m. Between 2 and 3 p.m. he was seen near the house of the deceased woman in conversation with her. Between 3 and 4 p.m. he was seen riding the bicycle away from that locality and was described by a witness (Charles) as dismounting and as going into a thicket and lurking there and behaving in a suspicious and excited manner. He then, after bathing in a stream, went back on the bicycle to the place of business of the brothers Mohamadu where he was later arrested. Meanwhile at about 4 p.m. the deceased had come in a terribly wounded condition to the bungalow of Collin Silva occupied by Arumugam. The principal wound was one about 4 inches in length extending from the right side of her neck across the throat to about ½ an inch on the left side of the middle line. There were minor wounds on the face and head and her ears were severed and torn. She had evidently made her way unaided from her own house and was found on the verandah of Collin Silva's bungalow. There the interrogation took place from which the evidence in dispute was derived and in consequence the accused was arrested the same afternoon at the Mohamadus' place of business. The statement of the accused, made on 16th May, was of the nature of an alibi and in particular was to the effect that from 12.30 p.m. onwards he was at the boutique. This was proved at the trial to be untrue as appears from the evidence summarised above. At the trial the accused did not elect to give evidence nor was evidence called on his behalf. At the house of the deceased woman the main features of the attack upon her were plainly to be seen. There

was blood on a camp cot in the outerr oom upon which deceased must have been sitting or lying when attacked. The room was disturbed and jewellery which she possessed was missing. The door from this room to the outside was locked and the wounded woman, as was indicated by blood marks, made her way into the inner room and then out of a window and thence by a path to Collin Silva's bungalow. There she was bandaged and propped up against a wall with cushions. The throat wound rendered her unable to speak ; but she was fully conscious and able to understand what was said to her and to make signs and to nod her head, though slightly. She was asked questions both by the police and by neighbours and in particular by one Martin Perera — a carter who had worked with the accused for Mr. Stanley Jayawardene and who also knew the deceased woman. Mr. Stanley Jayawardene was present at the material time and there was no ground for suggesting that the evidence to which objection was taken was derived solely or mainly from police sources, or that Perera or Mr. Jayawardene, who gave evidence of what took place, were witnesses with ill-will to the appellant. The greater part of the interrogation was conducted by Martin Perera, who spoke to the wounded woman in Sinhalese. The course and result of it was as follows :—Asked who cut her neck, the deceased indicated by signs the height of the person and later pointed to Mr. Jayawardene and also made signs as of goading a bull. The accused had worked for Mr. Jayawardene as a carter. She also pointed to a constable and then patted or slapped her cheek two or three times. The accused had some time previously assaulted a constable by slapping his face and this was a matter of common knowledge. Probably at this stage — though the witnesses were not entirely in agreement as to the order of events — Martin Perera put the direct question : " Was it Alisandiri ? "— the name by which the accused was ordinarily known. The wounded woman nodded her head in answer to this question. As to this fact and that it was a nod of assent no witness seemed in any doubt. The wounded woman was removed to hospital and died there and, as has been already stated, the appellant was arrested and charged.

At the trial the admissibility of the evidence in question seems to have been raised by counsel for the defence as soon as the jury was empanelled and sworn. The jury was quite properly ordered to retire and the question of admissibility was argued and decided in their absence. An authority *Queen Empress* v. *Abdullah* I.L.R. 7 All. 385 which will be referred to later in this judgment was cited to the learned Commissioner, and in accordance with that authority he ruled that evidence as to signs made in answer to questions put to the deceased was admissible but that statements of witnesses as to what interpretation they put upon the signs were not admissible. It was said upon the argument of this appeal that the latter part of the ruling was not observed, and that evidence ruled inadmissible was in fact given. It is difficult to adhere to a clear line of division between the description of signs and the interpretation of signs, and it may be that in some respects witnesses trespassed beyond the line and so usurped what obviously

is the function of the jury ; but their Lordships observe that in some instances the matter complained of was elicited by cross-examination on behalf of the accused. Their Lordships are of opinion that no substantial grievance can be made out in this regard, still less any real or serious miscarriage of justice. The main question is whether any part of the evidence as to what passed between the deceased and Perera should have been admitted. In their Lordships' opinion the ruling of the learned Commissioner was correct. It is to be observed that in the section the word used is " verbal " and not " oral " which is used elsewhere in the Ordinance, as for example in section 3 and section 119 in reference to evidence given in Court. It is unnecessary to decide whether the question put " Was it Alisandiri ? " and the nod of assent would have constituted an oral statement made by the deceased, but their Lordships are clearly of opinion that it constituted a verbal statement made by her. The case under consideration closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Upon proper evidence proving the words used in a conversation so held, their Lordships think that a statement so made would be a verbal statement within the meaning of the section. So here their Lordships think that there was proper and sufficient evidence of a verbal statement by the deceased to the effect that it was the accused who cut her neck. As to the remainder of the evidence as to signs made by the deceased it was necessarily given in order that it might be understood in what circumstances and context the vital question came to be asked and to be answered. Mention has already been made of the decision in Allahabad upon which the learned Commissioner relied to support his ruling. This was a decision of the Full Court and was pronounced in the year 1885. Since that time it has been followed in Bengal in the case of *Emperor* v. *Sadhu Charan Das*, I.L.R. 49 Cal. 600 ; in Patna in *Chandrika Ram Kahar* v. *King-Emperor*, I.L.R. 1 Pat. 401 ; and in Lahore in *Mam Chand* v. *The Crown*, I.L.R. 5 Lah. 324. The material provisions of the Evidence Act in India are identical with the provisions of the Ceylon Ordinance. For the reasons aleady given their Lordships think that those decisions were correct and that the learned Commissioner was right in following them.

Observations were properly and forcibly made by counsel for the appellant as to the caution required in the reception of evidence of this character and in the use to be made of it. It is, of course, true that evidence of signs of an ambiguous or uncertain character ought not to be admitted at all and that in many cases the evidence though admissible might be of little weight. It is no doubt also true that answers to questions of a leading character may be of little weight, but in the circumstances of this case Martin Perera's question was in its context other than a mere leading question. At any rate all such matters are matters for the jury, going to the weight and not to the admissibility of the evidence, and there is nothing here to show that anything took place in this connection calling for or justifying the interference of this Board. Unfortunately neither the advisers of the appellant nor the Crown were able to trace or produce any note of

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the summing up. In the absence of any suggestion, based on any other materials, that the summing up was open to objection, their Lordships can only assume that the learned Commissioner who heard the argument on the admissibility of the evidence with regularity, and ruled upon it, as their Lordships have decided, correctly, also directed the jury adequately and properly as to the weight of the evidence. The result seems to their Lordships to be this : Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect, then a conviction was abundantly justified and indeed inevitable. For these reasons their Lordships have felt themselves impelled to advise His Majesty that this appeal should be dismissed.

Appeal Dismissed.

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

JAYAWARDENE vs JAYAWARDENE

S. C. No. 268—D. C. Kalutara 19043.

Argued on 24th and 25th November, 1936.

Decided on 4th December, 1936.

Lease—Covenant against alienation without prior written consent of Lessor—Alienation in breach of such covenant—Legal effect of such alienation.

The Crown leased an allotment of land to one Mudaliyar Jayawardene in perpetuity subject *inter alia* to a covenant to the effect that the lessee shall not sublet, sell, donate, mortgage or otherwise dispose or deal with his interest in the lease without the written consent of the lessor and that every such sublease, sale, donation etc., without such consent shall be absolutely void.

The lessee in contravention of this provision gifted the land leased to him to his four sons in equal shares and died leaving a last will in which he bequeathed all his property both movable and immovable to the plaintiff, one of his four sons without any express reference to the leased land.

The plaintiff who is the executor of the last will of the late Mudaliyar Jayawardene, and also a devisee under it sought to obtain possession of the leased land on the ground that the deeds of gift were void as they had been executed, in contravention of the terms of the instrument of lease without the written consent of the lessor.

Held : (i) That a clause prohibiting alienation without the written consent of the lessor does not of itself affect the operation of a deed of gift of the leasehold property made in contravention of such prohibition.

(ii) That an alienation made in contravention of a covenant in a lease prohibiting such alienation without the written consent of the lessor would be effective until set aside by a court of law at the instance of the lessor.

(iii) That appropriate steps to have an alienation of a lease of land made contrary to the terms of the instrument of lease set aside can be taken only by one of the parties to the lease.

(EDITORIAL NOTE. See the case of Wijemanne v Schockman, 13 N.L.R. p 301 wherein a discussion, on the effect of a clause prohibiting alienation on a forced sale, will be found. The effcet of such a clause on voluntary sales is examined in the course of their judgments by both Middleton J. and Wood Renton J.)

H. V. Perera with *Colvin R. De Silva* and *Chitty* for 1—3 defendants appellants.

Weerasuriya with Jayawardene for plaintiff respondent.

FERNANDO, A. P. J.

The plaintiff and 1—3 defendants are brothers, all four being sons of the late Mudaliyar J. V. G. Jayawardene. In 1919 lease P1 was entered into between the Crown and Mudaliyar Jayawardene, and by that lease the Crown leased the land referred to therein to the Mudaliyar in perpetuity, subject to various conditions among which was covenant No. 10 in P1 to the effect that the lessee shall not sublet, sell, donate, mortgage or otherwise dispose or deal with his interest in the lease without the written consent of the lessor and that every such sublease, sale, donation etc., without such consent shall be absolutely void.

On the 16th May 1927, the Mudaliyar by letter P3 applied for permission to gift his rights under the lease to his four sons, and certain correspondence followed between him and the Assistant Government Agent of Kalutara. On the 30th May 1927, the Mudaliyar executed four deeds of gift in terms similar to P4 in favour of his four sons giving each a one-fourth share of his interest in the leased premises, and on the 15th August 1927, by letter P6, the Mudaliyar sent to the Assistant Government Agent a copy of one of the deeds executed by him. On the 8th March 1928, the Assistant Government Agent wrote to the Mudaliyar letter P12 stating inter alia that the deeds of gift already executed are invalid by reason of the fact that consent of Government had not been given. Government however, was willing to consent to the donation on certain conditions, but the Mudaliyar did not comply with the requirements set out in the correspondence between him and the Assistant Government Agent. On the 28th October 1928, the Mudaliyar executed a last will P2 by which he devised and bequeathed all his property of whatever kind, movable and immovable nothing excepted to the plaintiff, but no express mention is made in that document of the lease in question, and the Mudaliyar died on the 19th January 1930 leaving this last will. The plaintiff now brings this action to have it declared that

he ,as executor of the will and as devisee under it, is entitled to the possessio of the land which is the subject of the lease, on the footing that the deed of gift in favour of himself and the three defendants were executed withou the written consent of the lessor, and are therefore void in view of the con dition which has been referred to above. He also asked that the defendant be ejected, and claimed certain damages.

The learned District Judge, held that the deeds of gift were absolutel null and void in view of the clause referred to, and that the plaintiff wa entitled to the premises as claimed by him, and he entered judgment in hi favour accordingly, with damages and costs. The main contention pu forward by counsel on behalf of the appellants was that the deeds of gif did not become absolutely void by the operation of covenant No. 10, an that it was necessary for the Crown to ask for a cancellation of those deed before the deeds could cease to be operative. In other words counsel argue that covenant No. 10 in effect merely provided that any donation withou the consent of the lessor would be voidable at the lessor's instance. H also argued that the plaintiff as executor represents the deceased Mudaliya and would be considered his heir under the Roman Dutch Law, and tha as such heir he is bound to abide by the donation and cannot himself impeac it. Counsel for the respondent, on the other hand argued that by the opera tion of covenant No. 10 the donation would be a nullity.

Wille in " Landlord and Tenant " 1st edition, Page 156 states tha where there has been an expressed agreement between the landlord and th tenant that the tenant may not sublet or assign without the consent of th landlord in writing, a sublease or assignment made by the tenant withou having first obtained the written consent of the landlord is of no effect a against the landlord who will be entitled to cancellation of the alleged sub lease or assignment. Such an agreement may however be waived by th landlord to the extent that his verbal consent will be sufficient to render a sublease or assignment effectual, and on page 155 he states that, " if th tenant purports to sublet or assign, such sub-lease or assignment is of no forc or effect whatever against the landlord, and the landlord is entitled to cance the sublease or assignment whether the lease contained a special agreemen to that effect or not." This being the law in South Africa, it would appea that it is left to the lessor to take appropriate action on a breach of the cove nant, and that it is open to him to consider the donation without his consen as of no effect, but the question that arises here is whether the donor himsel or his executor can claim that the donation made by the lessee is inoperative Sande in his Treatise on " Restraints on Alienation " at page 269 states tha the heir of a person who has alienated property which is by will prohibited from alienation is bound to abide by such alienation and cannot impeach it according to the rule, " the heir must take upon himself all acts of the person whom he succeeds for he receives his wealth from him," and that the hei is regarded as one and the same person with the deceased, and counsel argued that a gift would come under the same principles. Of course Sande is here

dealing with restraints upon alienation of immovable property created by a will, but there does not seem to be any reason why the same principles should not apply in the case of a donation contrary to the provisions of a lease for the reason, that the proposition of law stated by him is based on the rule, and the rule itself that the heir must take upon himself all acts of the person whom he succeeds is expressed in the widest possible meaning. Counsel also referred to a passage from Sampson, " Translation of Voet " Title 6, Chapter i, Section 17 and 18, to the effect that the seller cannot himself vindicate property belonging to another, but which had been sold by him on the ground that he is not the owner, even if the seller had subsequently become the owner, or is heir of the true owner, and here again the rule is that no one ought to gainsay his own act. It must also be noted that by clause 2 of the general provisions of the lease, it is provided that if any breach is committed by the lessee of any of the covenants on the lessee's part (and covenant 10 comes within the lessee's covenant) then this demise and the privileges thereby reserved shall forthwith cease and determine, and the lessor may thereupon enter into the said premises, and the said premises shall forthwith revert to the Crown, and this clause was relied on by counsel for the appellants as showing that it was for the Crown to claim that the donations were contrary to the covenant, and that therefore, the land had reverted to the Crown. The evidence in this case indicates that the Crown does not propose to claim a reversion as a result of the donations by the Mudaliyar, and counsel then argues that in the absence of any claim by the Crown, the donations must be regarded as good and operative between the parties. It may also be mentioned here that the Crown has accepted the rent due on the lease in some instances from the plaintiff, and in some instances from the defendants, being apparently content to leave the question to be decided as between the parties themselves.

In the case of *Perera v. Perera* 10 N.L.R. 230, this court dealing with a clause of forfeiture in a lease for non-payment of rent on the due date, stated that such a clause was only intended as security for the due payment of the rent, and that both under the English Law, and the Roman Dutch Law, a lessee was entitled to relief against such forfeiture, and reference is made to the earlier case of *Perera v. Thaliff* 8 N.L.R. 118. It was there held, that the Court would grant a lessee relief against a provision in the lease giving the lessor a right to claim cancellation in the event of a breach of a stipulation by the lessee, in a case where the breach thereof did not involve a notably grave and damnifying mis-use of the property leased and went on to state that the nature of the mis-use, and the question whether it should be punished by a cancellation or by condemnation in damages is entirely a matter that must be left to the discretion of the Court. It is not necessary to refer to all the cases, but I might refer to the case of *Banda v. Fernando* 6 C.W.R. 161 where it was held that the failure of a party to carry out an express stipulation in a lease which provided that such failure shall entitle the lessor to cancellation would ordinarily be looked upon by the Court

as the breach of an essential stipulation which would entitle the lessor to an order cancelling the lease, unless there are equitable grounds for allowing relief against such cancellation. There in fact, this Court in appeal gave relief to the defendant whose lease had become liable to be set aside subject, however, to certain terms which were laid down by the Court. Considering the principles laid down in these cases, and the authorities cited, I come to the conclusion that the effect of a clause in terms of covenant No. 10 is not of itself to affect the operation of a deed of gift like the one we are considering, but merely to provide that in appropriate circumstances, such a deed may be set aside by a court of law, and that appropriate steps to secure such an order from court must be taken by one of the parties to the lease. The lessor may bring an action to secure a cancellation of the lease if he so desires, but till the lease is cancelled, the deed of gift must remain operative as between the parties. I would also hold that under our law, a person in the position of the plaintiff who is the executor under the will of the Mudaliyar, and the devisee of his residuary estate is bound to abide by a donation made by the deceased and cannot vindicate the property from the donee.

With regard to the effect of the covenant in question, I might also refer to the judgment of De Sampayo J. in *Silva v. Mohamudu* 19 N.L.R. 426. He refers at length to the South African case of *Braytenback v. Frankil* 1913 S.A.L.R. App. Div. 390, and observes that even in the case of void contracts (as distinguished from those that are merely voidable) the universal practice in Holland was to apply for restitution and as Lord de Villiers observed in the course of the argument what was the universal practice in Holland must be taken to be law with us. Thus it appears that the Roman Dutch Law is quite in accordance with the general principles that a person cannot be judge in his own cause, and that where he wished to get rid of the effect of his own act, he must seek the assistance of the Court.

In view of the conclusion at which I have arrived, it is not necessary to discuss the other questions that were argued before us. The appeal of the 1st to 3rd defendants is allowed, the decree of the District Court is set aside, and plaintiff's action is dismissed with costs, here and in the court below.

Set aside.

MOSELEY, J.

I agree.

Present : MAARTENSZ J.

In the matter of the Election Petition against the return of Mr. G. G. Ponnambalam for the Point Pedro Electoral District.

VINAYAGAMOORTHY vs PONNAMBALAM

Argued on 2nd and 3rd November, 1936.

Decided on 25th November, 1936.

Election Petition—Charges of bribery, treating and undue influence—Recognisance—What should be its form—Rules 12 (2) *and* 16 *of the Election Petition Rules—Petition and letter of appointment of agent—Should they be stamped—Is notice given by an agent appointed by a writing not duly stamped a valid notice.*

An election petition to set aside the election of the successful candidate for the Point Pedro Electoral District Mr. G. G. Ponnambalam was filed on March 27, 1936. Charges of bribery, treating and undue influence were made in the petition. On the same day the petitioner filed a writing appointing Victor Austin Perera Nanayakkara, a Proctor of the Supreme Court as his agent for the purposes of the election petition. A Proxy form containing a good deal of matter inappropriate to a writing contemplated by rule 9 of the Election Petition rules had been adapted in part for the purpose. This writing as well as the petition bore no stamp.

A recognisance in the sum of Rs. 5,000/- executed by the petitioner and two sureties was filed on March, 31.

Notice of the filing of the petition and of the fact that the prescribed security had been given by a recognisance executed by the petitioner and two sureties was published in the Government Gazette. This notice was signed by the petitioner's proctor Mr. Nanayakkara as agent for the petitioner.

The respondent moved that the petition be dismissed on the following grounds.

1. That the recognisance is not in conformity with rules 12 (2) and 16 of the rules as the executants other than the petitioner have not made themselves primarily liable for the payment of all costs, charges and expenses.

2. That the recognisance given by the petitioner is limited to Rs. 5,000/- though the petitioner brings more than three charges.

3. That the sureties are insufficient.

4. That the notice published in the Government Gazette purporting to be signed by Mr. Nanayakkara is not a compliance with the provisions of rule 18, as the writing appointing him agent is not duly stamped and the notice does not set out the nature of the security in sufficient detail.

5. That the petition is not duly stamped.

The recognisance referred to in the first objection is set-out in the body of the judgment. The first and second objections were not upheld. The latter of these was taken on the footing that when a charge of bribery is made against a candidate evidence of bribery by an agent cannot be given.

Held : (i) That when a charge of bribery is made against a candidate instances or cases of bribery by an agent can be proved.

(ii) That the law does not require an election petition to be stamped.

(iii) That the appointment of an agent by the petitioner to an election petition for the purpose of receiving notices must be by a formal writing.

(iv) That the formal writing appointing an agent must be stamped under item 35 of Part 1 of Schedule B to the Stamp Ordinance 1909.

(v) That it is sufficient compliance with rule 18, if the notice of the nature of the proposed security states whether security has been given by deposit or by a recognisance with sureties.

De Zoysa K.C. with *Kumarasingham, Tiruchelvam* and *Curtis* for petitioner.

H. V. Perera with him *Nadarajah, E. B. Wickremanaike, D. W. Fernando, Soorasangaran* and *Thambhithurai* for respondent.

Wijewardena S.G. with *Thambiah C.C.* for Attorney-General.

MAARTENSZ, J.

This is an application by the respondent for the dismissal of the petition against his election on the grounds stated in his statements of objections dated the 7th of April and 25th of May 1936.

The petitioner in his petition filed on the 27th March 1936, avers that the election of the respondent is void by reason of corrupt practice in that " the said Ganapathypillai Gangesar Ponnambalam and his agents were guilty of :

(*a*) undue influence on the day of the election *viz*, 22nd of February, 1936 and before the said date,

(*b*) treating on the said date and before and after the said date.

The said Ganapathipillai Gangesar Ponnambalam was also guilty of bribery ".

Apparently on the same day the petitioner filed a writing appointing Mr. Victor Austin Perera Nanayakkara a Proctor of the Supreme Court his agent with reference to the election petition to be filed against the respondent. The writing is a proxy form only partly adapted for the purpose for which it was used. It still contains clauses quite inappropriate to a writing contemplated by rule 9 † of the rules in schedule 6 of the Ceylon (State Council Elections) Order in Council 1931 (hereafter referred to as the Order in Council).

An instrument purporting to be a recognisance in the sum of Rs. 5,000/– executed by the petitioner and two sureties was filed on the 31st of March.

Notice of the filing of the petition and that the required security had been given by a recognisance executed by the petitioner and two sure-

9. † With the petition the petitioner or petitioners shall leave at the office of the Registrar a writing, signed by him or them, giving the name of some person entitled to practise as a proctor of the Supreme Court whom he or they authorize to act as his or their agent or stating that he or they act for himself or themselves, as the case may be, and in either case giving an address within the city of Colombo at which notices may be left; and if no such writing be left or address given, then notice of objection to the recognizance in respect of security for costs as hereinafter provided and all other notices may be given by leaving the same at the office of the Registrar.

ties was published in the Government Gazette. The notice which was sent for publication was signed by Mr. Nanayakkara as Agent for the petitioner.

The grounds on which the respondent prays for a dismissal of the petition, shortly stated, are,

1. That the recognisance is not in conformity with rules 12 (2) † and 16 of the rules as the executants other than the petitioner have not made themselves primarily liable for the payment of all costs, charges and expenses."

2. That the recognisance given by the petitioner is limited to Rs. 5,000/– though the petitioner alleges more than 3 charges.

3. That the sureties are insufficient.

4. That the notice published in the Government Gazette purporting to be signed by Mr. Nanayakkara is not a compliance with the provisions of rule 18, ‡as the writing appointing him Agent is not duly stamped and the notice does not set out the nature of the security in sufficient detail.

5. That the petition is not duly stamped.

The recognisance which is the subject of the first objection is an adaptation of the model prescribed by rule 16 and is as follows :

" Be it remembered that on the 30th day of March in the Year of Our Lord One Thousand Nine Hundred and Thirty Six before Ramalingam Damodarampillai a Justice of the Peace We (1) Erampu Vinayagamoorthy of Point Pedro as principal and (2) Sinnathangam wife of V. Eliathamby Rajaratnam with the consent of her husband hereinbelow signified and (3) V. Eliathamby Vaithialingam both of Valvetty as sureties bind and acknowledge ourselves jointly and severally to Our Sovereign Lord the King in the sum of Rupees Five thousand (Rs. 5,000/–) to be levied of our property movable and immovable to the use of Our Lord the King His Heirs and successors, I the said Sinnathangam wife, of Rajaratnam hereby specially renouncing the Beneficium Senatus Consultum Velleianum and Beneficium Authentica Si Qua Mulier and we the said Sinnathangam wife of Rajaratnam and the said V. Eliathamby Vaithialingam hereby renouncing all rights and benefits whatsoever to which we as sureties are by law entitled.

The condition of this recognisance is that if the said Erampu Vinayagamoorthy and Sinnathangam wife of Rajaratnam and V. Eliathamby Vaithialingam or any of them shall well and truly pay all costs charges and

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(2) †The security shall be to an amount of not less than five thousand rupees If the number of charges in any petition shall exceed three, additional security to an amount of two thousand rupees shall be given in respect of each charge in excess of the first three and shall be given either by recognizance in the form in rule 16 set forth, with two sureties, or by a deposit of money, or partly in one way and partly in the other.

18. ‡ Notice of the presentation of a petition, and of the nature of the proposed security, accompanied by a copy of the petition, shall, within ten days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the agent of the respondent or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or, if no agent has been appointed, nor such address given, by a notice published in the *Government Gazette* stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.

expenses in respect of the Election Petition signed by the said Erampu Vinayagamoorthy relating to the Point Pedro Electoral District which shall become payable by the said Erampu Vinayagamoorthy under the Election (State Council) Petition Rules 1931 to any person or persons then this recognisance to be void otherwise to stand in full force.

I the said V. Eliathamby Rajaratnam of Valvetty do hereby consent to my wife the said Sinnathangam giving security as aforesaid.

sd. (In Tamil)
sd. (In Tamil)
sd. V. E. Vaithialingam
sd. V. E. Rajaratnam

Taken and acknowledged by the abovenamed (1) Erampu Vinayagamoorthy (2) Sinnathangam wife of V. Eliathamby Rajaratnam (3) V. Eliathamby Vaithialingam and (4) V. Eliathamby Rajaratnam on the 30th day of March, 1936 at Velvetty.

Before me
R. Damodarampillai
Justice of the Peace ".

Rule 16 enacts that the recognisance " may be " in the form set out in the rule and petitioner's Counsel contended that the recognisance need not be an exact copy of the model, and that all that is necessary is that it should have the same legal effect.

He argued that the persons described as sureties as well as the petitioner were in terms of the recognisance principal debtors and that the mere use of the term sureties did not change the character of the obligations—*Wijewardene v. Jayawardene* (1924) 26 N.L.R. 193. In support of this argument he pointed out that the petitioner and his sureties bound themselves jointly and severally and that the condition of the recognisance was that it should become void if the petitioner and the sureties or any of them paid all the costs, charges and expenses in respect of the election petition which shall become payable by the petitioner under the rules.

For the respondent it was submitted that the fact that the sureties have agreed to be bound jointly and severally did not render them principal debtors, and that even if their renunciation of the privileges of a surety were effective they would not be liable equally with the petitioner.

It was also contended that a recognisance is an acknowledgment of a debt due to the Sovereign and that the bond contains no such acknowledgment.

I am of opinion that both objections to the recognisance must fail.

The persons described as sureties in the document do not bind themselves as collateral security for the debt but bind themselves as debtors equally with the petitioner, and as was held in the case of *Wijewardene v. Jayawardene* (supra) the use of inappropriate words cannot alter the nature of the obligation,

The second objection is based on the fact that the words " to owe " are omitted after the word " severally " and before the words " to our Sovereign ". I was at first inclined to the opinion that this was a fatal defect ; but on reconsideration I am of opinion that the liability is implied by the fact that the executants bind themselves in the penal sum of Rs. 5,000/- which is to be recovered by a levy of their property and by the terms of the condition of the recognisance that the obligation is to be in force unless the costs and charges payable by the petitioner are paid.

The second objection depends on whether the petition sets out five charges or three. The contention for the respondent is that the allegations that the candidate and his agents were guilty of undue influence and treating form four charges. This contention necessitates an examination of articles 51 to 55 of the Order in Council relating to corrupt practices and articles 73 and 74 which specify the grounds on which an election of a candidate shall be void.

By the Order in Council, treating, bribery and undue influence are " corrupt practices ". Sections 52 and 53 of the Order say what acts amount to treating, bribery and undue influence and declare that any persons committing any of the acts described shall be guilty of the offence of treating or undue influence. In the case of *Silva v. Cooray* (1931) 33 N.L.R. 25, which was tried under the Order in Council of 1923 it was held that the accused, who was the candidate, could not be convicted of bribery unless he authorised or connived at the acts of the agent who committed acts of bribery. It was argued that the ratio decidendi of this case was applicable to the case of a person charged with treating or exercising undue influence, and that a charge of treating and undue influence against a candidate differed from a charge of treating and undue influence by an agent which under article 74 (*c*) are grounds for avoiding an election.

Article 74 enacts that the election of a candidate shall be declared to be void on an election petition on its being proved to the satisfaction of an election Judge inter alia that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by any agent of the candidate (Article 74 (*c*)).

It was contended and I think the contention is sound, that an election is liable to be declared void on proof that an agent of the candidate committed a corrupt or illegal practice in connection with the election, even if the agent acted without the knowledge or consent of the candidate.

It was accordingly argued that an allegation of corrupt practice by a candidate and an agent comprised two charges, that is to say a charge of corrupt practice by the candidate and a charge of corrupt practice by the agent. In support of this argument it was submitted that evidence of corrupt or illegal practice by an agent could not be led in support of such a charge against the candidate ; and vice versa that evidence of a corrupt or illegal practice by a candidate could not be led where a charge was made against the agent only.

I do not think this contention is sound. The charges made in an election petition need not be formulated with the precision and exactness of a charge in criminal proceedings. The petition must state the facts and grounds on which the petitioner relies to sustain the prayer of his petition – rule 4. Rule 5 provides that evidence need not be stated in the petition but the Judge may on application in writing by a respondent order such particulars as may be necessary to prevent surprise and unnecessary expenses and to ensure a fair and effectual trial.

In the case of *Tillekewardene v. Obeyesekere* (1931) 33 N.L.R. 65, the election petition alleged three offences, bribery, treating and paying or contracting for the payment of conveyance of voters and security was given in a sum of Rs. 5,000/–. In the particulars filed under rule 5 a number of cases under each charge were stated and the respondent contended that the security was inadequate. Drieberg J. in the course of his judgment said, " the word 'charges' in rule 12 (2) means the various forms of misconduct coming under the description of corrupt and illegal practices ; for example, whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery " and held that the security was not inadequate.

I am of opinion that this decision is an authority for the proposition that when a charge of bribery is made against a candidate instances or cases could be given of bribery by an agent.

For the purpose of article 74, the candidate is responsible for the act of his agent and the charge must be laid against the candidate. Therefore the allegations in the petition that the candidate and his agents were guilty of undue influence and treating amount to no more than charges against the candidate and in my opinion they constitute two charges and not four. I accordingly overrule the objection as to the adequacy of the security.

The 4th and 5th objections raise two questions (1) whether the petition and the writing appointing Mr. Nanayakkara the petitioner's agent are chargeable with stamp duty (2) whether the notice published in the Government Gazette gave the respondent notice of the nature of the security as required by rule 18.

The petition it was argued was chargeable with stamp duty payable on a deed or instrument not otherwise charged in part 1 of schedule B of the Stamp Ordinance No. 22 of 1909 (item 28). This contention is based on the definition of the term " instrument " in section 3 sub-section 14 of the Ordinance which enacts as follows :

" Instrument " includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded.

It was argued that the use of the word 'includes' instead of the word 'means' in the definition gave an extended meaning to the term instrument and that an instrument was not limited to a document by which a right

or liability is created, transferred, etc. The argument that the word 'includes' gives the term defined an extended meaning is right. But the question is whether the meaning of the term instrument is so extended as to make it applicable to the petition filed in these proceedings. I am of opinion that it does not. The word includes in a definition means that the term defined shall have the meaning given to it in the Ordinance in addition to its popular meaning. *Ludovici v. Nicholas Appu* (1900) 4 N.L.R. 12. I am not aware of any authority nor has any been cited to me where it was held that a petition of the nature filed in these proceedings was an instrument in the popular meaning of the word.

The Solicitor-General who appeared on behalf of the Attorney—General did not support the contention of the respondent that the petition was chargeable with stamp duty. I agree with him that the definition of instrument if given the extended meaning contended for by the petitioner would have the meaning given to it in section 4 of the Stamp Ordinance No. 3 of 1890 which provides that an "instrument" shall mean and include every written document. He argued that the alteration of the definition in Ordinance No. 22 of 1909 was introduced to give the term instrument a more limited meaning.

I entirely agree with this argument and unless the ordinance clearly provides that petitions of the nature of the petition filed in these proceedings are chargeable with stamp duty, which it does not, I am not prepared to hold that they are so chargeable by reason of an inference to be drawn from the terms of the definition of the term instrument.

For these reasons I overrule the objection to the petition on the ground that it has not been stamped.

The importance of the question whether the writing by which Mr. Nanayakkara was appointed the petitioner's agent is chargeable with stamp duty arises from the fact that the notice in the Government Gazette purports to be signed by him. It was argued that if Mr. Nanayakkara's appointment as agent is bad because it was not stamped the notice published by him is not a notice given by the petitioner as required by rule 18.

The respondent's contention is that the appointment is chargeable with duty either as a letter or power of attorney under part 1 of Schedule B to the Stamp Ordinance or as an appointment of an agent to accept process under part 2 of the Schedule.

The Second branch of the contention cannot succeed. The agent to receive process referred to in part 2 is an agent appointed in pursuance of the provision of section 30 of the Civil Procedure Code which enacts that "Besides the recognised agents described in section 25, any person residing within the jurisdiction of the Court may be appointed as agent to accept service of process". The process referred to is process issued under the provisions of the Civil Procedure Code.

The 1st contention must in my opinion, prevail. Part 1 of the Schedule item 34 imposes a duty of six cents on a letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and item 35 imposes a duty of five rupees on a letter or power of attorney, whether executed in Ceylon or elsewhere for any other purpose whatever.

The terms of item 35 are in my judgment wide enough to include an appointment of agent made under the provisions of rule 9.

The petitioner's counsel however argued that the writing by which the petitioner appointed Mr. Nanayakkara his agent was not chargeable with duty because such a writing was not necessary under the provisions of rule 9. It was argued that all the petitioner had to do under this rule was to leave at the office of the Registrar a writing signed by him, giving the name of some person entitled to practise as a proctor of the Supreme Court whom he authorises to act as his agent. In short that the writing was not chargeable with stamp duty because the law did not require it. But the petitioner has not left us a writing at the office of the Registrar and the petitioner must rely on the document he has filed. There might have been some force in the argument if the petitioner had left such a writing at the office of the Registrar in addition to the document by which he appointed Mr. Nanayakkara his agent. But that is not the case and the petitioner must rely on the document which is chargeable with duty in proof of that fact that Mr. Nanayakkara was his agent.

I cannot accede to the argument that a formal document is not necessary for the appointment of an agent.

Rule 9 is a verbatim copy of rule 9 of the Parliamentary Election Petition Rules made on 21st November 1868, pursuant to the Parliamentary Elections Act, 1868, printed as Appendix III in Volume 2 of Rogers on Elections. There is on page 524 of this volume a form of appointment. It is certainly not a statutory form, but there would have been no necessity for appending one if it was not the practice in England to appoint an agent by a formal document in writing and I doubt whether such a practice would have arisen if a formal appointment was not considered necessary under the provisions of rule 9.

The form is in these terms :—

Appointment of Agent.

In the High Court of Justice,
King's Bench Division.
The Parliamentary Elections Act, 1868,
and
The Corrupt and Illegal Practices Prevention Acts, 1883 & 1895. In the matter of the election petition for the country (or as the case may be) of .

Between A. B. . . Petitioner
and
C. D. . . Respondent

I, A.B. (or C.D.) the above named petitioner (or respondent do) hereby appoint and authorise X.Y. of , solicitor, to act as my agent herein.

And I hereby give notice that the address, at which notices addressed to me may be left, is aforesaid.

Dated this day of 19

(Signed) A.B. (or C.D.)

It will be observed that except for necessary variations no distinction is made between an authorisation under rule 9 and an appointment under rule 10.

Rule 10 provides that " Any person returned as a member may at any time after he is returned send or leave at the office of the Registrar a writing signed by him (or) on his behalf appointing a person entitled to practice as a proctor of the Supreme Court to act as his agent....."

There can be no question but that a formal appointment in writing is necessary under this rule, and I can see no reason why such a writing should be dispensed with in the case of an agent appointed by the petitioner.

Apart from these reasons there must in my judgment be an appointment of an agent for rule 43 requires an agent immediately on his appointment to leave written notice thereof at the office of the Registrar.

For these reasons I hold that the writing referred to in rule 9 is one by which a person is authorised by the petitioner to act as his agent, and not merely an intimation to the Registrar that so and so is authorised to act as agent.

I accordingly hold that a written appointment is necessary and that it must be stamped.

A subsidiary question with regard to the notice is whether the statement in the notice that " security for costs has been given by a recognisance executed by the petitioner and two sureties " is sufficient notice of the nature of the proposed security. It was submitted on behalf of the respondent that the notice should have also stated the names of the sureties and their addresses.

All that is required is that the notice should state whether the security has been given by deposit or by a recognisance with sureties, so that in the latter case the respondent might if so advised take steps as provided by rule 19. See the case of *William v. The Mayor of Tenby and Others* (1879–80) 5 Common Pleas Div. 135.

I overrule the objection that the notice does not sufficiently specify the nature of the proposed security.

The notice was given by an agent whose authority to do so was not duly stamped. The question arises whether the notice was for that reason not *de jure* given or whether the defect can be remedied by having the authority stamped under the provisions of section 36 of the Stamp Ordinance No. 22 of 1909. It is not chargeable with a duty of five cents

and is therefore not excluded by the terms of proviso A to that section. Against this procedure it was argued that rule 18 prescribes the time within which notice must be given and it was submitted that retrospective effect cannot be given to the letter of appointment.

I do not think the provisions of section 36 apply. In *Peiris v. Saravanamuttu*, 33 N.L.R. 229, where the question was whether a recognisance is liable to stamp duty and it was contended that the recognisance was not liable to stamp duty on the ground that an election petition was a quasi-criminal proceeding, Drieberg J. said "Nor, as I shall point out, is the question affected by the nature of the proceedings for the fact that they are criminal would only be relevant if it was sought to admit the recognisance in evidence, in which case it could be admitted though not duly stamped, under section 36 (*c*) of the Stamp Ordinance 1909. But it is not sought to have the recognisance admitted as evidence ". Similarly in these proceedings the petitioner does not seek to have the letter of authority admitted in evidence and neither section 36 (*a*) nor section 36 (*c*) applies.

In the case of defective proxies filed by proctors an amendment of the proxy was allowed in the cases of (1) *Treaby v. Bawa* (1903) 7 N.L.R. 22, where the proctor's name had not been inserted in the proxy ; in this case the objection to the proxy was taken in the answer ; (2) *Tillekeratne v. Wijesinghe* (1908) 11 N.L.R. 270, where the plaintiff appellant had omitted to sign the proxy. Here objection was taken to the proxy in appeal. Hutchinson, C.J. held that the proxy could be rectified at this stage by the plaintiff signing it.

In the case of *Le Mesurier v. the Attorney-General* (1906) 10 N.L.R. 67, the proctor whose costs were taxed was not the proctor on the record and it was held that a party who has recognised the appearance of a proctor as representing another party to the suit cannot afterwards object to the taxation of costs due to such proctor on the ground that he had no authority to appear. In the case of *Fernando v. Perera* (1909) 1 Cur. Law Rep. 51, the petition of appeal was signed by a proctor who had acted as proctor for the appellant although he was not the proctor on the record and this Court allowed the proctor on the record to sign the petition of appeal *nunc pro tunc*.

In the case of *Velappa Chetty v. Meydin* (1895) 1 N.L.R. 333, the plaint was filed in the name of Kolentha Velan Chetty (one of the payees of the note sued on) by his Attorney Velappa on the 15th of August. The plaint was accepted. On the 14th of October the defendant moved that the plaint be taken off the file on the ground that the power of attorney executed in India was not duly stamped as required by the Stamp Ordinance then in force – Ordinance No. 3 of 1890. The motion apparently came on for discussion on the 17th October by which date the power of attorney had been duly stamped.

The District Judge made the following order "Had I known the imperfection of the power of attorney under which the plaint was presented and filed, I should have rejected it. I do now what I should have done then. I put matters in *statu quo*. I will now entertain it as the power of attorney is effectual for use in the Colony, but the action must be considered as instituted from this date, the 17th October ".

Withers, J. appears to have thought that, the plaint having been accepted the District Judge would not necessarily have rejected it, but might have declined to issue summons until the power had been duly stamped. It was conceded at the argument in appeal that had the Judge known the power of attorney to be ineffectual for local use for want of being stamped according to local law he would have rejected it.

Browne, J, observed that had the defendant called for inspection of the power of attorney at the outset he might very possibly have succeeded in having the plaint rejected, but as the result of his delaying to take such action the plaintiff was able to remedy this defect in the power by the 17th of October and the District Judge's order was therefore wrong.

In that case however the power of attorney was executed in India and under section 31 of Ordinance No. 3 of 1890 the Commissioner of Stamps could have affixed upon it a stamp of the proper amount of duty and in terms of the section the power of attorney had the like force and validity in law as if it had been properly stamped. Section 42 of the Stamp Ordinance contains similar provisions. Section 17 of the Ordinance requires a time limit of three months within which an instrument executed out of Ceylon may be stamped.

I do not think that section 34 of the Stamp Ordinance of 1890 referred to by Browne, J. is applicable as it refers to instruments specified in part 11 of Schedule B of the Ordinance.

The nearest case I can find to the question I have to decide is *Arumugam Chetty v. Silva* (1923) 25 N.L.R. 31. The plaintiffs in that case who were away in India sent a proxy from there to their proctor stamped with Ceylon Stamps. The proxy was not sent to the Commissioner of Stamps within three months for him to stamp it as required by the Stamp Ordinance (sections 17 and 42). Objection was taken to the proxy at the trial, and defendant moved that the action be dismissed. The Supreme Court allowed the plaintiffs to give a proper and sufficient proxy ratifying, if necessary, what the plaintiffs proctor had so far done in the action.

De Sampayo, A.C.J. who delivered the judgment said "It appears that the plaintiffs in India drew up a proxy in favour of Mr. Bartholomeusz, and stamped it with the Ceylon stamps of the value required for the purpose of this action. The objection is founded on the provisions of sections 17 and 42 of the Stamp Ordinance No. 22 of 1909, the effect of which is to require that an instrument such as this, when executed abroad, should, within three months of their arriving in Ceylon, be sent to the Commissioner

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of Stamps, and he should stamp the instrument with the stamps required. The objection, if it is to be dealt with, is a good one so far as it went. But the defendant wishes to have the whole action dismissed, with costs, because of the imperfection in the stamping of the proxy of the proctor. I think it was possible for the District Judge to have made a proper order to put matters straight. But the actual order he made was that a certain person, who appears to hold a power of attorney from the plaintiffs, should sign the proxy and put on a new set of stamps, and thus enable the proctor to continue the action. I think the proper course would have been to to allow the plaintiff, through their attorney, to give a proper and sufficient proxy to the proctor, ratifying, if necessary, what the plaintiffs' proctor had hitherto done in the action. I refer to this matter of ratification, because up to the date of trial when the objection was argued, the defendant's proctor did nothing to prevent the action going on. I think it is unjust now to put the plaintiffs to the expense of bringing a fresh action ".

It appears to me from the dicta of the Judges in the last two cases referred to that the plaintiffs in the two cases would have been compelled to bring fresh actions if the objection to the instruments referred to, on the ground of their not being stamped had been taken *in limine*.

I would emphasise the concluding words of the passage cited from the judgment of de Sampayo, A.C.J. beginning " I refer to this matter of ratification....."

In the first of the two cases there can be no doubt that the District Judge could have refused to accept the plaint on the ground that the power of attorney had not been stamped. The power having been executed out of Ceylon it was possible to supply the omission. But in this case the omission cannot be supplied as one month has elapsed from the date of its execution. Section 43 which provides that an instrument may be certified as duly stamped by the Commissioner of Stamps if it is brought to him within one year of its execution and the stamp duty leviable is duly paid to him and he is satisfied that the omission to stamp the instrument has been occasioned by accident, mistake or urgent necessity – cannot apply as there is no suggestion that the omission to stamp the letter of appointment was occasioned for the reasons stated in the section. Moreover no application has been made to the Commissioner of Stamps for such a certificate.

I am of opinion that the agent had no authority to give the notice published in the Government Gazette and I hold that the notice required by section 18 of the rules has not been served on the respondent.

I accordingly dismiss the petition with costs on the authority of the case of *Aron v. Senanayake*, 5 Ceylon Law Weekly, 51, decided by Akbar, J.

Present : SOERTSZ J. & FERNANDO A. J.

PHILLIP vs REGINA WETTASINGHE

S. C. No. 316—D. C. Avisawella 1959.

Argued on 19th January, 1937.

Decided on 25th January, 1937.

Marriage—Action for breach of promise—What should the writing relied on contain in order to succeed in an action.

The plaintiff sued the defendant for breach of promise of marriage. He relied on a letter which *inter alia* contained the following passages :—

" If ever I marry anybody, I assure you that it will be none other than yourself. If by any mischance I fail to do so, I will remain single as I am. If I can join an order of nuns I will do so."

" Had my beloved father been alive I would certainly give a definite word at once without any fear or doubt .....I remind you that I who am in fear of knowing that it is very hard to escape from my mother, did not give a definite word. If God likes this matter between we two, I hope, that there will be a divine help to change the minds of the opponents. What our duty now is to pray only to God for the success of our matter."

Held : That the letter does not contain either a promise to marry or any admission of an earlier promise.

A. L. Jayasuriya for defendant appellant.

Molligoda for plaintiff respondent.

FERNANDO A. J.

The main question that arises on this appeal is whether the defendant as set out in issue 1 made a valid promise to marry plaintiff and as the learned District Judge himself states in his judgment an action for recovery of damages for breach of promise of marriage can lie only if the promise shall have been made in writing.

The plaintiff relied on the letter P 1 written by the defendant the material portion of which has been translated apparently by the learned District Judge himself as follows—" if ever I marry anybody, I assure you that it will be none other than yourself. If by any mischance I fail to do so, I will remain single as I am. If I can join an order of nuns I will do so, " and the learned District Judge thought that this portion of P 1 came closer to a written promise to marry, than the words which occurred in the correspondence between the parties in *Beling v. Vethecan* (1 A.C.R. 1) and *Jayasinghe v. Perera* (9 N.L.R. 62).

In *Beling v. Vethecan* the material portion of the defendant's letter is quoted by Layard C.J. as follows " I won't tease you till we get married. Shall we fix the happy day for the 8th of April, the day after Easter ?" and the plaintiff in reply consented to marry the defendant on the 8th of April and the Court held that the letter written by the defendant contained an offer on the part of the defendant in writing to marry plaintiff, and that that offer was duly accepted by the plaintiff. The offer made by the defendant if accepted by the plaintiff would alone be sufficient to enable the plaintiff to sue for a breach of promise of marriage. In the same case Layard C.J. was inclined to think that the contention for the defendant, that the production of documentary evidence showing that the defendant admitted a verbal promise would not be sufficient to entitle the plaintiff to bring an action on the original verbal promise, as the Ordinance provides for the promise itself be in writing and not for the case in which a verbal promise is corroborated by some other material documentary evidence, was correct in law.

The case of *Jayasinghe v. Perera* (9 N.L.R. 62) came before Layard C.J. and Wendt J. a few months after *Beling vs. Vethecan*, and the facts in that case are set out by Wendt J. as follows—" the defendant who had courted the plaintiff asked her father's consent to the marriage, and the young couple promised to marry each other, and at the father's suggestion the defendant undertook to send him a formal written solicitation of the plaintiff's hand. This he did not send and in consequence the plaintiff at her father's request wrote defendant a letter asking him to put his promise in writing. In his answer the defendant wrote, " I am not agreeable to what Papa says for this reason ; that is, if I trust darling should not darling trust me ? If they have no faith in my word, I cannot help it. If they don't believe my word, I am not to blame. " This letter read in connection with the letter to which it was an answer, as Wendt J. said, " contains an unqualified admission under the hand of the defendant of the existence of his promise to marry the plaintiff, and in my opinion that is all the Ordinance requires." Layard C.J. agreed with the order of Wendt J. affirming the judgment of the District Court in favour of the plaintiff because he considered the construction placed on the defendant's letter a reasonable one, and because that letter read with the one to which it was an answer, sufficiently complied with the requirements of Section 21 of Ordinance 2 of 1895. It would appear therefore, that Layard C.J. agreed with Wendt J. in holding that an unqualified admission under the hand of the defendant of the existence of a promise by him to marry the plaintiff would be sufficient to enable the plaintiff to maintain an action for breach of promise of marriage.

Now the learned District Judge thought that the words used in P 1 came closer to a written promise to marry than the words used in either of the cases referred to above. I regret that I cannot agree. The words

used in *Beling v. Vethecan* clearly contains an offer by the defendant to marry the plaintiff on the date named, and if such an offer is accepted by the person to whom the letter is written that would be a clear promise to marry. It may be that the offer is not expressed in the words, " I shall marry you, " but the words themselves do contain a promise to marry because the words are, " shall we fix the happy day for the 8th of April ? " and it is clear from the letter that the happy day meant the day on which the parties were to get married. In *Jayasinghe v. Perera* the Court did not hold that there was an express promise in writing but only that there was a a writing in which an earlier verbal promise was admitted. The learned Judge here probably intended to emphasise that the words quoted by him, namely, " if ever I marry anybody I assure you that it will be none other than yourself. If by any mischance I fail to do so, I will remain single, " but these words clearly mean, " I will not marry any one except you, " and do not contain any express promise to marry the plaintiff, nor is it possible to find anywhere in the long letter P 1 any statement that either contains a promise to marry the plaintiff or admits an earlier verbal promise to marry the plaintiff.

On the other hand the defendant sets out reasons which prevented her from giving any promise to the plaintiff. " Had my beloved father been alive I would have certainly given a definite word at once without any fear or doubt " (the translation filed in Court appears to me to be incorrect when it reads, " would have given, " whereas the original should more correctly be translated as " would give ") " I remind you, " the letter goes on, " that I who am in fear of knowing that it is very hard to escape from my mother, *did not give a definite word.* If God likes this matter between we two, I hope, that there will be a Divine help to change the minds of the opponents. What our duty now is to pray only to God for the success of our matter. " It seems clear therefore that P 1 does not itself contain any promise by the defendant to marry the plaintiff nor it is possible to find in P 1 any discussion of any earlier promise by the defendant.

I would accordingly hold on the 1st issue against the plaintiff. His action must therefore fail, and I would set aside the order of the learned District Judge, and enter decree dismissing plaintiff's action with costs here and in Court below.

Appeal allowed.

SOERTSZ, J.

I agree,

Present : KOCH & MOSELEY JJ.

ARUNACHALAM CHETTIAR vs SEYED MOHAMED.

S. C. No. 71—D. C. Colombo 42396.

Argued on 13th, 15th, 18th, and 19th January, 1937.

Decided on 28th January, 1937.

Assignment of decree—Decree not entered at time of assignment—Does assignment pass title to the decree.

The facts shortly are as follows :—

In D. C. Colombo case No. 42396 the matter in dispute between the parties was amicably terminated by an agreement of settlement, the terms of which were set out in a minute of consent signed by the parties and dated March 7, 1935. The court passed decree in accordance therewith on March 14, 1935. Between these two dates, on March 11, 1935 the assignment in question was executed. The deed of assignment stated *inter alia* that the transferor had obtained a decree in his favour and purported to convey and assign for consideration all right, title interest, benefit and claim in the said decree which it was alleged had been entered.

Held : That upon the decree being entered rights thereunder passed to the assignee by virtue of the assignment.

(EDITORIAL NOTE. In the case of Silva v Suppramaniam Chettiar 3 C.L.W. p 99 (30th January, 1935) it was held that the assignment of a decree not yet in existence can be a perfectly good assignment enabling the assignee to get by suitable process all the benefits of that decree when it comes into existence ; but that the special procedural remedy given by section 339 of the Civil Procedure Code is not applicable to such a case. The remedy given by section 339 was held to be applicable only to a transfer by assignment of a decree already in existence at the time the assignment is made.)

H. V. Perera with *Subramaniam* for appellant.

N. E. Weerasooriya for respondent.

KOCH J.

This appeal raises the interesting point as to whether a deed that purports to assign a decree in an action passes title to that decree although the decree was in fact, not actually passed at the time of the assignment. It is admitted that the decree was duly entered a few days later.

The facts are that in action D. C. Colombo No. 42396, the dispute between the parties was terminated by a compromise the terms of which

were set out in a minute of consent signed by the parties and dated the 7th March 1935. The Court under Section 408 of the Civil Procedure Code passed a decree in accordance therewith on the 14th March 1935. In between, to wit, on the 11th March 1935 the assignment in question was executed. This deed of assignment after reciting that the transferor was the plaintiff in the above case, proceeded to state that the transferor *had* obtained a decree in his favour and went on to convey and assign for consideration all rights, title, interest benefit and claim to the said decree which it was alleged had been entered and further to all such rights powers and authority vested in the assignor as plaintiff in the case.

It is argued by the appellant that as there was no decree actually in existence at the date of the assignment, the benefits of the decree which was later entered did not and could not in law pass to the transferee under the assignment.

On the other hand the position is that there was a treaty before the assignment was executed and at the treaty it was agreed that the benefits accruing to the plaintiff under and according to the terms of the minute of consent were to be conveyed to the assignee and as at that treaty it was wrongly understood that decree had been actually entered the deed of assignment dealt only with the benefits of the decree and not with those which arose to the plaintiff under the minute of consent containing the compromise.

It must be noted that this minute of consent was also filed in Court before the day of execution of the assignment.

On these facts, it is contended by the respondent that the entering up of the decree was purely a formal and ministerial act which would necessarily follow under Section 408 of the Civil Procedure Code as there was nothing on the face of the terms of the minute of consent to indicate that any part of the compromise was *contra bonos mores* and that therefore the rights purporting to be conveyed under the assignment would receive confirmation and full vitality on the actual passing of the decree.

As an alternative argument Counsel argued that as it actually turned out that no formal decree had in fact been entered at the time of the assignment the description of the right conveyed was a *falsa demonstratio*, that had the parties been aware of the fact that the Court had not yet actually signed the decree the description of the rights would not have been " to the judgment and decree entered in case No. 42396, " but " to the judgment and decree to be entered in case No. 42396, " in which event, on the entering up of the decree full benefit to the decree would accrue to the assignee. The two decisions on this point are *Fernando vs. Fernando* (14 N.L.R. 412) and *Fernando vs. Christina* (15 N.L.R. 321).

Mr. Subramaniam for the appellant seeks to differentiate the law explaining the principle of *falsa demonstratio non nocet* as laid down in these cases by emphasising that it must be clear that the contracting parties had in their minds a definite conception as to what the *res* was to

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be, and admitted that if this was so the fact that it was wrongly described would not matter provided there was a sufficient indication in the deed to identify the matter dealt with under it with the *res* as previously contemplated.

I quite agree but this will not help the appellant as in my opinion the rights which flow from the compromise are precisely the rights which accrue under the decree. The rights are identically the same but in a different guise. It is this guise that has been somewhat wrongly described and that too only in regard to date.

My view therefore is that on the decree being passed by Court full rights under that decree passed to the assignee.

The appeal is therefore dismissed. The appellant will pay the respondent's costs.

Appeal dismissed.

MOSELEY, J.

I agree.

Present : ABRAHAMS C. J.

TOUSSAINT (S. I. Police) vs. MENIKA & OTHERS

S. C. No. 409/11—P. C. Gampola 9186

Argued and decided on 19th January, 1937.

Forgery of a valuable security—Aiding and abetting the offence—No proof of intention with which forgery was committed—Such omission fatal to a conviction—Assumption of false name is by itself no offence.

Held :—(i) That a charge which alleges forgery but does not allege the intention with which the forgery was committed is bad.

(ii) That a person who takes to himself a false name does not for that reason assume a false personality.

The King vs Canjemenaden 7 N. L. R. 52 followed.

H. V. Perera for 2nd, 3rd, and 4th accused–appellants.

N. Nadarajah C. C. for complainant respondent.

ABRAHAMS, C. J.

The appellants were charged with abetting the forgery of a valuable security, to wit a deed in respect of a piece of land. The person whom they were alleged to have abetted was one Menika and he purported to sell this plot of land as his own whereas it was in fact the property of another person. He executed the deed in the name of Ran Naide by placing his thumb-print upon it in the presence of the Notary who drew the deed. The purchaser

of the property was one Abdeen and he paid Rs. 100/- for the property. The second and 3rd accused who were relations of Abdeen were said to have negotiated the sale and they attested the document, as did the 4th accused who was brought in from outside when the document was ready for execution. All four accused were found guilty and sentenced to varying terms of imprisonment. The 1st accused has not appealed.

It is submitted for these appellants that the charge discloses a defect which is fatal to the conviction, namely that the intent with which the forgery was alleged to have committed has not been assigned. Counsel for the Crown with scrupulous fairness, calls my attention to the case of *The King vs. Canjemanaden* (7 N.L.R. p. 52), where a Divisional Bench of this Court consisting of the then Chief Justice and two Puisne Justices held that an indictment which alleged forgery but did not allege the intention with which the forgery was committed was bad. I am bound to follow this decision in any event, although I may respectfully say that I do not agree with it.

In addition to this fatal defect in the trial there are one or two features about it upon which I feel constrained to comment. It has been argued on behalf of the appellants that apart from the omission to assign the particular intent with which the forgery was committed the document itself cannot be regarded as a false document, because although it was signed in a name not the maker's own there was no evidence that the maker intended himself as a person other than what he was. On the facts I am inclined to agree with this submission. It is a matter which is quite easily overlooked by courts that a person who takes to himself a false name does not for that reason assume a false personality. A man may take any number of names and he may even take them for the purposes of cheating, but that is not the same thing as assuming another personality, whether that of a real person or a fictitious person.

It is also objected very strongly that there was no complainant in this case and the Police appear to have moved on certain information which they received from the administrative authorities. Now the vendee in the evidence which he first gave before the Court may have given the impression that he considered that he had been defrauded, but subsequently he receded from that position and said he had no complaint to make, in fact, that the money with which he purported to pay for the land belonged to the 2nd accused. The learned District Judge apparently refused to believe that story. He was, of course, at liberty to do so if he wished, but he was not justified in believing the earlier story. If a witness makes two contradictory statements the result is that neither can be believed. It follows then that there was really no evidence whatever of any intention to defraud, but at the most a suspicion that this transaction was entered into with some fraudulent intent.

I do not know the reason why the 4th accused was convicted. There was absolutely no evidence against him except that he possibly knew that

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a false name was being used. The learned Judge does not appear to have considered the case against him in any respect.

I quash the conviction and acquit all the appellants.

As I have found that no forgery was committed it follows that I have by implication found that the 1st accused, who did not appeal, ought not to have been convicted of the offence of forgery. I have the power to act in revision for his benefit and I think this is a proper case for exercising that power. I therefore quash the conviction in his case as well and acquit him and direct him to be released forthwith.

Accused acquitted.

Present : FERNANDO A. P. J.

M. W. B. THIEDEMAN (S. I. Police) vs P. CHARLES

S. C. No. 671—P. C. Matara 10981.

Argued 21st December, 1936.

Delivered on 13th January, 1937.

Penal Code section 450—*Offence of being found upon a building for an unlawful purpose—What are the ingredients of such an offence—Criminal Procedure Code section* 178.

The accused was found standing on the window sill of a house looking into a room in the house. This room was occupied by an ayah employed there. The accused was charged with being found in a building for an unlawful purpose.

Held : (i) That where a person is charged with being found in a building for an unlawful purpose the prosecution must not only prove his presence there but also that he was there for some unlawful purpose.

(ii) That section 450 of the Penal Code refers to two offences, one offence consisting in being found in or upon a building for an unlawful purpose, and the other offence consisting in being found in a building or enclosure, and failing to give a satisfactory account.

(iii) That an accused cannot, upon a charge of being found in or upon a building for an unlawful purpose, be convicted of being found in a building and failing to give a satisfactory account with a separate charge in respect of the latter offence.

Weerasooriya for accused appellant.

Nadarajah C. C. for respondent.

FERNANDO, A. P. J.

The accused in this case was charged with being found upon a building to wit, the house of Mr. Wijetunge, for an unlawful purpose, and failing to give a satisfactory account of himself, and he was charged with committing an offence punishable under section 450 of the Penal Code. Section 450 however, refers to two offences, one offence consisting in being found in or upon a building for an unlawful purpose, and the other offence

consisting in being found in a building or enclosure, and failing to give a satisfactory account. Section 178 of the Criminal Procedure Code, requires that for every distinct offence for which a person is accused, there shall be a separate charge. It seems to me from the proceedings in this case, that the Police Inspector who reported this case to the Court, and the Magistrate himself were both of the opinion that the offence consisted in being found in a building for an unlawful purpose, and failing to give a satisfactory account. If it was the intention to charge the accused for two separate offences, then two separate charges were necessary, and in the circumstances I propose to deal with the charge as being one of being found upon a building for an unlawful purpose.

The evidence in this case disclosed that the accused was seen standing on a window sill of the house occupied by Mr. Wijetunge, and if the charge was that the accused was there for an unlawful purpose it is clear that the prosecution had to prove not only that the accused was found on the window sill, but also that he was there for some unlawful purpose. The evidence also indicates that the accused was peeping or looking into a room in the house, and that, that room was occupied by the ayah employed in the house.

Crown Counsel referred me to the case of *de Vos v. Ernst* 15 N.L.R. 213, where de Sampayo J. dealt with a case in which a man was charged for criminal trespass, in that he entered into the sleeping apartment of a young lady by night for an immoral purpose. " It was denied," said de Sampayo J., " that the natural consequence of the accused's conduct was to intimidate, insult, and annoy the young lady, but it was urged that the accused's primary and ulterior intention which must alone be taken into account was none of those things, but to carry out some immoral purpose. In case of criminal trespass, as in other cases, we should apply the ordinary rule of law and of commonsense, that a man might fairly be held to have intended the natural consequences of his acts." I do not think, however, that this authority applies in the present case. Even if it can be suggested that standing on a window sill, and peeping into an apartment, might conceivably annoy the occupants of the room, it does not follow that a person standing there does so for an unlawful purpose. Section 450 is different from Section 427, in that it is necessary to prove that the accused was in or upon the building for an unlawful purpose, whereas Section 427 refers to a person who enters upon property either with intent to commit an offence or with intent to intimidate, insult or annoy the person in occupation. The word " unlawful " means exactly the same thing as, " illegal " and there must be proof that the accused was upon the building for an unlawful purpose. As the evidence does not establish that the accused was upon the window sill for an unlawful purpose the charge against him must fail. I would, therefore, set aside the conviction and acquit the accused.

Accused acquitted.

Present : FERNANDO, A. J.

D. APPUHAMY vs. M. HABIBU

S. C. No. 605 P. C. Kandy 51396 A.

Argued : 9th December, 1936.

Decided on : 17th December, 1936.

Criminal Procedure Code Section 440—Contempt of Court—Perjury—Contradictory Statement.

Held : (i) That Section 440 of the Criminal Procedure Code is intended for glaring cases of perjury.

(ii) That Section 440 of the Criminal Procedure Code should not be used to punish a person where he makes merely contradictory statements in the course of his evidence with no intention to commit perjury.

(iii) That this Section should be used very cautiously.

No appearance for appellant.

FERNANDO, A. J.

The complainant in this case D. Appuhamy was convicted by the learned Police Magistrate and fined Rs. 50/- or ten days rigorous imprisonment under Section 440 of the Criminal Procedure Code. The facts that led to the conviction were that, while giving evidence on affirmation, he stated. " I have never been charged in a court of law. I have been charged with assaulting one Malhamy, and got two months' rigorous imprisonment for it." These sentences follow each other in the appellant's cross-examination, and at the conclusion of the case the Magistrate appears to have called upon the appellant to show cause why he should not be convicted for perjury and for contempt of court.

There was no appearance for the appellant, but on a consideration of the section, and of the previous decisions on it, it seems to me that this conviction cannot stand. As long ago as 1913 Pereira J. in the case of *Haniffa v. Salwan*, 2 Balasingham Notes of Cases page 12, held that the section did not apply in the case of contradictory statements made by a person in the course of his evidence. I need not refer to all the authorities, but it is sufficient to refer to the case of *Ratnayake v. Karunaratne*, 3 Ceylon Law Weekly, page 135, where Poyser J. after considering all the authorities held that the section was intended for glaring cases of perjury, and that the section should be used very cautiously. Even if the first statement made by the appellant, was false, it does not appear to have been material for the purposes of his own case, and it would appear from the record that the appellant had made the first statement probably by mistake. At all events, I do not think this is a case in which the conviction can be upheld, and I would accordingly set aside the conviction, and allow the appeal.

Conviction set aside.

Present : ABRAHAMS, C. J.

PONNIAH (Excise Inspector) vs ABDUL CADER.

S. C. No. 543—P. C. Jaffna 10306

Argued on 20th and 21st January, 1937.

Decided on 4th February, 1937.

Excise Ordinance No. 8 *of* 1912 *Section* 50—*Criminal Procedure Code, Sections* 190 *and* 429—*Information Book—Extract from—how proved.*

Held : (i) That where it is sought to prove, by the production of a certified copy, a statement recorded in the Information Book of a police station, that copy must be produced by the police officer who recorded the statement.

(ii) That the provision of Section 429 of the Criminal Procedure Code must be interpreted by the trial Judge with reasonableness and ought not to be used to remedy a dangerous defect or to fill a gap in the case for the prosecution.

(iii) That it is illegal for a Magistrate to recall a prosecution witness and hear other evidence in support of the prosecution case after he has reserved his order at the close of the case.

(iv) That the presumption created by Section 50 of the Excise Ordinance does not arise merely because a man behaves in a suspicious way in respect of any excisable article.

(v) That Section 50 of the Excise Ordinance comes into effect when from the suspicious behaviour of the person charged an element of an offence under Section 43 of the Ordinance can be proved.

L. A. Rajapakse with *P. Tiyagarajah* for accused-appellant.
N. Nadarajah C. C. for Crown-respondent.

ABRAHAMS C. J.

The appellant was convicted of transporting nine slabs of Ganja without a permit and of possessing an excisable article, the possession of which is totally prohibited. He was sentenced to 6 months rigorous imprisonment and to a fine of Rs. 500/–.

The following facts were led in evidence by the prosecution. On the 2nd of December, 1934, a woman named Chellammah, residing in Anuradhapura received by post a parcel. This parcel was later returned unopened by her husband to the postmaster on the ground that the parcel was not meant for his wife but for some other woman of the same name. The parcel was addressed "Mrs. Sellammah, Malwatu Oya, Anuradhapura." The parcel was eventually opened by the postal authorities and was found to contain 9 slabs of Ganja packed in a towel bearing a laundry mark "N". Later, on the 2nd December the appellant complained to the Anuradhapura

Police that he had come to the town at 1 a.m. by the night mail from Jaffna and had stayed in the house of Chellamma where he was robbed of Rs. 244/–. On this complaint the house of Chellamma was searched by the Police and two letters were found purporting to be written by the appellant to Chellamma's husband where he refers to certain transactions between them expressing himself in mysterious language referring in Tamil to the word which translated was taken to mean "stuff" and which the prosecution allege means Ganja. It was also alleged that shortly after the parcel had been delivered to Chellamma the appellant displayed considerable anxiety about the parcel and reproached the postal peon for delivering it to Chellamma and asked him to get it back from her and to hand it over to him. He also complained to a neighbour of Chellamma's to the effect that the woman had wrongfully taken in a parcel that was intended for him.

The Jaffna Police searched a house in Jaffna which they believed, on certain information they said they had received, to belong to the appellant, and there they found a towel and a shirt with the laundry mark "N." The Magistrate seems to have concluded that the accused himself posted the parcel to Chellamma from Jaffna and had travelled down by the same train in order to obtain the parcel on its arrival in Chellamma's house, and that he had been carrying on an extensive trade in dope with the assistance of Chellamma's husband, that for some reason or other he had fallen out with his confederates and had brought a false charge against the latter.

Unfortunately for the prosecution, the learned Magistrate has accepted their theory on evidence improperly received and on inferences which have been drawn from objectionable evidence which in my opinion, he was not justified in doing. Undoubtedly it could have been proved from properly receivable evidence that the appellant had actually travelled down from Jaffna by the same train that carried the parcel, that it was his house that was searched in Jaffna and that therefore the towel found in that house belonged to him, and that the letters found in the house of Chellamma's husband did actually refer to dealings in Ganja. That would go a very long way to proving that the appellant had posted the parcel containing a contraband drug. However, it was sought to be proved that the appellant had travelled from Jaffna on the night of the 1st, by producing a copy of a complaint in the Police information book in Anuradhapura. An objection was taken before me as to the admissibility of this document on the ground that, assuming the information book was itself a document which need not be produced and could be represented by a certified copy of any entry in it, that copy was not produced by the Police Officer, who took down the alleged complaint of the appellant. I am of the opinion that this submission is sound. Next, as to the contents of the letters found in the house of Chellamma's husband, this man was called by the prosecution and admitted that the letters were in the writing of the appellant but he says that they referred to transactions dealing with dried fish. This witness

was a witness for the prosecution and he was not cross-examined by the prosecutiion as hostile, although it could hardly have been expected that he would admit that he had been engaged in any transaction in which he had broken the law. I cannot see therefore how the Magistrate was entitled to discredit him. The prosecution having called him they vouched for him as a witness of truth and had to take their chance that his evidence would not be completely satisfactory to their case.

Then as to the discovery of the towel, the Police officer who searched the house in Jaffna said that the house was pointed out to him as being that of the appellant by the son of the local Police Vidane. This youth was called by the prosecution and said that he did not point out that house as being that of the appellant but of some other person. The Magistrate believed that this witness was lying. He was of course entitled to come to that conclusion if he wished but that conclusion did not bring the prosecution any nearer to proving that the house pointed out to the Police was that of the appellant, since the statement that the information on which they acted was hearsay. Although he does not say so, the Magistrate himself seems to have come to the conclusion that the house had not been properly identified and he took this extraordinary course. After the conclusion of the defence which consisted only of an address by Counsel, the Magistrate recorded that he would make his order on the 16th of June (the hearing terminated on the 11th). Later (it does not appear on what date) the learned Magistrate recalled the Police Officer who searched the house. He said he could not find it but if he went inside it he would be able to identify it. The learned Magistrate directed the witness to draw a plan of the house which he searched and the witness sketched a rough plan. The Magistrate then adjourned the case to enable the Manigar to submit a plan of the appellant's house. On the 30th of June the Maniagar produced a sketch of three houses in which the appellant had admitted he had lived during the period of three years which included the date on which this offence was said to have been committed. The Magistrate was of the opinion, that the sketch made by the Police Officer was very similar to the plan of one of the houses made by the Maniagar. Apart from the admissibility of this belated evidence to which I shall presently refer, I do not think that any inference adverse to the appellant could have been drawn from the comparison of the rough sketch with the plan. There was nothing distinctive about the houses which the sketch and the plan disclosed and although the two were certainly similar in apperance neither was drawn to any sort of scale. I am also of the opinion that the action of the Magistrate in calling evidence to supplement the case for the prosecution after the close of the defence was unwarranted by law. Section 429 of the Criminal Procedure Code gives any Court very wide powers to take evidence *suo proprio motu* either by summoning any person as a witness or examining a person in attendance. Section 190 of the Code lays down the procedure that this is to be adopted by the

Magistrate after taking all the evidence, that is to say the evidence for the prosecution and the defence and any evidence that he himself may have called for. It runs as follows —

> " If the Magistrate after taking the evidence for the prosecution and defence and " such further evidence (if any) as he may of his own motion cause to be produced " finds the accused not guilty, he shall forthwith record a verdict of acquittal. " If he finds the accused guilty he shall forthwith record a verdict of guilty and " pass sentence upon him according to law, and shall record such sentence."

There is a number of decisions of this Court to the effect that section 190 requires a Magistrate to write his judgment immediately after he has taken all the evidence which means that he is not entitled to reserve his decision, and that if he does reserve his decision his action is so irregular as to vitiate any conviction which he may have recorded. There are other decisions to the effect that such an action would be an irregularity in the procedure but will only be fatal to the conviction if an injustice resulted from the delay. The case on both sides were considered by Koch J. in *Seneviratne vs. Bodia*, 35 N.L.R. 252. In the case bofore me the Magistrate had actually concluded the trial. He had reserved his decision, and the taking of further evidence *suo proprio motu* was an afterthought possibly excited by the appearance in his mind of certain doubts in considering what his decision should be. I do not, however, propose to consider whether it is a fatal or incurable irregularity for the Magistrate to reserve his judgment because I am prepared to go so far as to say that the provision of Section 429 must be interpreted by a Magistrate with reasonableness and ought not to be used to remedy a dangerous defect or to fill a gap in the case for the prosecution It has been held in England that it is illegal for a Judge to call a witness in favour of the prosecution's case after the close of the defence, and it is not very difficult to visualise the perpetration of a serious injustice if a Magistrate is given a free hand to assist the prosecution in this way. See *Rex vs. Dora Harris* (1927) 2 K.B. 587.

It appears to me that the very most that the prosecution has been able to prove in this case is a strong inference from the behaviour of the appellant that he anticipated the receipt of a parcel by Chellamma which parcel was intended for him and which contained to his knowledge contraband goods. This, however, does not make him guilty of any offence. It was nevertheless argued by Counsel for the Crown that Section 50 of the Excise Ordinance No. 8 of 1912 places upon the appellant in view of the circumstances prevailing in this case the burden of proving that he is not guilty of the offence of which he is charged. The substance of this Section is as follows.

> " In prosecutions under Section 34 it shall be presumed until the contrary is proved, that the accused person has committed an offence in respect of any exciseable article for the possession of which, or for his conduct in connection with which, he is unable to account satisfactorily. "

It is argued on the strength of that Section that the conduct of the appellant in respect of this parcel was such that an obligation was placed upon him to explain his conduct and that as he made no attempt to do so he was guilty of the offence of which he was charged. I cannot agree that the Section can be interpreted to admit of this contention. It cannot mean that because a man behaves in a suspicious way in respect of Ganja that he can be convicted of any offence under Section 43 unless he gives a satisfactory explanation of his conduct. I think Section 50 comes into effect when from the suspicious behaviour of the person charged an element of an offence under Section 43 can be proved. The prosecution has then done all that it can be called upon to do and it then remains for the accused to give a reasonable account of his behaviour. In this case the most that can be inferred from the appellant's behaviour is, as I have said that he expected the arrival of a parcel and that he knew that that parcel contained contraband goods. Supposing that to be his explanation it is not an unreasonable one and it does not amount to the admission of an offence.

I therefore quash the conviction and acquit the appellant.

Conviction set aside.

Present : KOCH & MOSELEY JJ.

SIYANERIS vs PEIRIS & ANOTHER.

S. C. No. 46—D. C. Colombo No. 52738.

Argued on 13th January, 1937.

Decided on 20th January, 1937.

Civil Procedure—Writ of execution—Are proceedings in execution held by the fiscal of no effect, if on or before the returnable day of the writ to Court the period appointed for execution in the writ is not extended.

Held : (i) That the failure to extend the period of execution of a writ on or before the returnable date does not render the seizure effected before that day invalid or ineffective.

(ii) That even after the return is made the proceedings had by the fiscal up to that date will continue to be recognized as valid unless expressly nullified.

N. E. Weerasuriya with *J. R. Jayawardene* for appellant.

L. A. Rajapakse with *Kurukulasuriya* for respondents.

KOCH J.

The point that arises in this appeal is interesting and of some importance. Are proceedings in execution held by the fiscal of no effect and un-

recognisable in law if, on or before the returnable day of the writ to Court, the period appointed for execution in that writ is not extended ?

It is argued that the failure of the judgment-creditor before or on the returnable day to move for and obtain, or of the Court to direct, a re-issue of the writ, is to render the writ dead and all acts done thereafter of no avail.

The relevant legal proceeding in this case is a seizure effected under a writ that was issued in D. C. Colombo Case No. 52738, for it is on the footing that the seizure was valid and existing that the learned District Judge of Colombo, acting under Section 351 of the Civil Procedure Code, has directed the fiscal to bring into the District Court of Colombo the proceeds realised by him at a sale held in execution of a decree entered in D. C. Ratnapura Case No. 5858 and pursuant to a subsequent seizure.

If the seizure in the Colombo case can be recognised in law, the order of the Judge is right.

Now, the writ under which the seizure was effected was returnable on the 27th July, 1934. On that day, it was duly returned but was not re-issued till the 23rd November, 1934.

The question has arisen whether the failure to extend the period of execution in the writ on or before the returnable day renders the seizure effected before that day abortive. This will materially depend on what the effect is of returning a writ to Court on the returnable day.

Applications for writs on pursuance of decrees are made under Section 224 of the Civil Procedure Code, but there is nothing in the Section or in any other section which provides for the fixing of a returnable date. There however appears a provision in Section 225 which authorises a Court to direct a writ to issue in Form No. 43 as appearing in the 2nd schedule to this Ordinance. On reference to that Form, it will be seen that the fiscal is directed to levy seizure and sell and have the money before the Court on an appointed day. Since the Code came into operation, this date has been called the returnable date.

The fiscal's return to the writ on that day will disclose either that monies have been realised by execution and sale, or that there has been no property of the judgment-debtor available for execution, or that only partial execution has taken place. In short, on that day the fiscal will inform the Court as to what steps if any, have been taken on the writ. During this period the fiscal may have from time to time, exercised his discretion in acting *e.g.*, in adjourning a sale (Vide Section 342 of the Civil Procedure Code), and in doing so he will have " to report to Court in his return to the writ or sooner the cause for which the adjournment is made." The Court, *mero motu*, will then have the power to re-issue the writ—*Attorney General vs. Ponniah* (11 N.L.R. 245)—so as to permit the fiscal to complete his work. But this order can also be, and is often made on the application of the judgment creditor or at the instance of the fiscal himself.

Again Section 319 requires the fiscal, if the latest day specified in the warrant has in its return been exceeded, to endorse upon the warrant the reason of the delay and to return the warrant with such endorsement.

These provisions would rather suggest, and there is nothing in the Code to the contrary that, even after such a return is made the proceedings had by the fiscal up to that date will continue to be recognised as valid unless expressly nullified. Property seized under such a writ would be "*in custodia legis*"—*Letchiman Chetty vs. Muttusamy Pillai* (3 A.C.R. 103), and this being so, there is no reason why the Court should be prevented from extending the period of execution *at its convenience* by ordering a re-issue of the writ, and especially so as the fiscal in exercising the discretion allowed him by law may delay to include the execution proceedings entrusted to him before the day fixed in his mandate—a contingency for which the judgment creditor cannot be held responsible.

Abuse by the judgment creditor of his privilege to apply for a re-issue of the writ after the returnable day can be prevented by the Court regarding an inordinate delay on his part to do so as an abandonment of his right to proceed under the writ—*Gurusamy Pillai vs. Meera Lebbe* (17 N.L.R. 467 at 471); *Yapahamine vs. Weerasuriya* (17 N.L.R. 183 at 188); *Andris Appu vs. Kolande Asari* (19 N.L.R. 225 at 232 and 233).

Mr. Weerasuriya has referred us to a number of decisions and has argued therefrom, to use the language of Ennis J. that where a writ is returned on the returnable day and no order for extension is made, the authority of the fiscal to hold has ceased and the seizure terminates" *Andris Appu vs. Kolande Asari* (supra). The cases he has cited are—(1) *Wijewardene vs. Schubert* (10 N.L.R. 90) (ii) *Attorney General vs. Ponniah* (supra) (iii) *Yapahamine vs. Weerasuriya* (supra) and (iv) *Gurusamy Pillai vs. Meera Lebbe* (supra).

It is true that *Wijewardene vs. Schubert* is a decision of a Divisional Bench, but in that case there was a recall of the writ, and I quite agree with the words of Middleton J. that "the effect of recalling a writ is to nullify the seizure that has been made under it." I should like however, to draw attention to the circumstances that Wendt. J. one of the three Judges, emphasised namely that "nothing was done by the Court or the fiscal which purported to revive that seizure."

The decisions no doubt do assist Mr. Weerasooriya in his contention and create difficulty and it was for that reason that Sampayo J. thought it as well that an analogus point should be referred to a Bench of Three Judges. It was in that case—*Andris Appu vs. Kolande Asari* (supra)—that Ennis J. expressed himself in the way in which he did, but the majority of the Bench, consisting of Wood Renton C. J. and Sampayo J. did not agree with him in that opinion. Wood Renton C. J. called attention to the fact that the ruling in *Peria Carpen Chetty vs. Sekappa Chetty* (2 Current Law Reports, 162) was not brought to the notice of the Judges who decided

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Patheruppillai vs. Kandappen (16 N.L.R. 298) and *Gurusamy Pillai vs. Meera Lebbe* (supra) and in doing so endorsed the opinion of Hutchinson C.J. in that case.

What Hutchinson C. J. held on the facts which were that the writ was returned to Court on the 25th July, 1907 and application for re-issue was allowed on the 27th August 1907 was that the writ was not recalled but allowed to re-issue and the seizure made under it in November 1905 still remained in force. Sampayo J. expressly disagreed with the contention that " the Court, though it may extend the currency of a writ, if application is made for that purpose before its returnable date, has no power to do so after the period originally fixed for its return has expired."

I am for the reasons I have previously given in entire agreement with the views expressed by the majority of the Court in *Andris Appu vs. Kolande Asari* (supra).

I therefore hold that the seizure effected in District Court Colombo Case No. 52738 was alive and valid at the date of the learned District Judge's order and that the learned District Judge is right in the order he made.

Dismissed.

MOSELEY J.

I agree.

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

HAYLEY & KENNY vs N. K. D. S. WICKREMASINGHE

S. C. No. 44 (Inty.) D. C. Colombo 3303.

Argued : 29th October, 1936.

Decided : 16th November, 1936.

Civil Procedure Code Section 422—Commission to examine a witness in England—In what circumstances should a commission issue.

Held : (i) That the question whether or not a Commission shall issue is in the discretion of the trial Judge, in the sense that he is not bound to issue it because it is asked for.

(ii) That the exercise of this discretion by the trial Judge is open to review by the Supreme Court.

(iii) That merely because expenses will be involved in bringing a witness before the Court, particularly in a case where his evidence is of the utmost importance, a Commission will not be granted.

Rajapakse with *Canjamanadan* & *Gunawardena* for defendant appellant.

Nadarajah with *Wickremanaike* for plaintiff respondents.

FERNANDO A. P. J.

This is an appeal by the defendant appellant against an order allowing the plaintiff's application for a commission to examine a witness, Mr. Sinclair, in England. In support of the application the 4th plaintiff filed an affidavit setting out inter alia the nature of the evidence that Mr. Sinclair would give, and in para 5 of that affidavit it is stated that Mr. Sinclair is a material witness to prove the liability of the defendant in respect of certain goods ordered from the Erasmic Company, Mr. Sinclair having been at that time the Ceylon representative of that Company, and that Mr. Sinclair could repudiate the averment in the defendant's answer that the cheques sued upon were drawn by the defendant's attorney fraudulently. The affidavit then goes on to state that Mr. Sinclair has since severed his connection with the Erasmic Company and that it is impossible to secure his attendance at the trial as a witness. It also states that Mr. Sinclair is now employed in London and it is not possible for him to leave England for the period necessary to attend at the trial and that even otherwise to secure his attendance would involve an expenditure which is excessive and unreasonable in the circumstances of this case.

In the course of his order the learned District Judge states that while the defendant acted with the utmost promptness in filing his answer, the plaintiffs had delayed to file their replication which was only filed on the 21st September, 1935. The application for a commission was made on 12th February, 1936, and by that time the trial was fixed for the 26th February, 1936, and by reason of these facts he came to the conclusion that the plaintiffs had not exercised due diligence in preparing for trial, and that no material had been placed before him to show that it was impossible for the plaintiffs to have made application earlier, and he quoted at length a passage from the judgment of Fry J. in *Steuart vs. Gladstone* (1877, 7 Chancery Division 394), where in somewhat similar circumstances an application for a Commission was refused.

The District Judge appears therefore to come to the conclusion that the plaintiffs had not exercised due diligence in preparing for trial, and he delayed too long in making the application for a Commission, and one would have expected that he would have refused the application. He proceeded however to consider an application by Counsel for the plaintiffs that the trial be postponed for six weeks, and that within those six weeks it will be possible for plaintiffs to get the Commission executed, which application was objected to by Counsel for the defendant. He then observed that in the circumstances the plaintiff's motion should be allowed as an indulgence, and that he would allow the application for a Commission on certain conditions. For these reasons he postponed the trial for the 18th of May and ordered a Commission to issue on condition that it was returned duly executed before the date of trial.

The application was apparently made under Section 422 of the Civil Procedure Code, and it is clear law that in proceedings under this section

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the Court will act on the same principles as the Courts in England (see *Ahamadu Mahodeen vs. Habeebu Mohamed* 1 Brown 234). After considering all the authorities Bertram C. J. in *Marsden vs. Habibhoy* 22 N.L.R., came to the conclusion that the question as to whether or not a Commission shall issue is in the discretion of the Judge, in the sense that the Judge is not bound to issue it merely because it is asked for. It is also in the discretion of the Court to issue it in another sense, that is to say, that the Judge has to weigh the circumstances and decide according to his judgment of these circumstances. It is also in the power of the Supreme Court to review that discretion, and the question in each case is a question of fact on which the Court must form its own determination. In the case of *Steuart vs. Gladstone* the application was refused because the plaintiff had been unreasonably dilatory in making the application, and in the circumstances of this case the District Judge would have been perfectly justified if he refused the application made by the plaintiff. It is equally clear from the decision in *Lawson vs. Vacuum Brake Co.* (54 Law Journal 16) that a heavy burden lies on the party who wishes to examine a witness abroad to show clearly that the witness cannot be reasonably expected to come to the court of trial, and this principle will apply more particularly in a case where owing to the nature of his evidence it is important that the witness should be examined by the Court which would try the case. In *Marimuttu Pillai vs. Ramasamy*, 2 Balasingham's Notes of Cases page 3, the application appears to have been refused for the reason that the decision of the whole case appeared to hang on the evidence of the witness, and it was therefore thought that the witness should be before the court which would adjudicate upon the issue between the parties. Nor has it been definitely alleged that it is impossible to secure the witness's attendance here. The affidavit filed at the plaintiffs states that it will not be possible for the witness to leave England so as to be present at the trial which was fixed for the 24th February, and it goes on to state that even otherwise considerable expenditure would be involved in securing his attendance. I do not think a Commission should issue merely because expenses will be involved in bringing the witness before the Court, particularly in a case where the evidence would, as in this case, be of the utmost importance.

For these reasons it seems clear to my mind that the learned District Judge should have refused the application, and that he was wrong in allowing a Commission to issue merely as an indulgence to plaintiff.

I would accordingly set aside the order of the learned District Judge and remit the case to the District Court for trial in the ordinary course. The order as to costs made by the District Judge will stand, and the plaintiffs will pay to the appellant his costs of this appeal.

MOSELEY, J. *Appeal allowed.*

I agree.

Present : ABRAHAMS, C. J., POYSER & KOCH, JJ.

KING vs SEPALA AND OTHERS.

Case stated under section 355 (1) *of the Criminal Procedure Code.*

S. C. No. 62—P. C. Panwila No. 3659.

Argued on 8th February, 1937.

Decided on 11th February, 1937.

Case stated—Criminal Procedure Code Section 355—*Evidence Ordinance Section* 25—*Police Magistrate who from time to time performs the duties of a police officer though in fact not a police officer—Confession of an accused recorded by such Magistrate under Section* 134 *of the Criminal Procedure Code—Is such confession inadmissible in evidence.*

Held : That a confession recorded by a Police Magistrate under Section 134 of the Criminal Procedure Code does not become inadmissible in evidence under Section 25 of the Evidence Ordinance merely because the Magistrate, who recorded the confession from time to time, performed the duties of a police officer when, in fact, he was not in law entitled to do so.

PER ABRAHAMS, C. J.

"The fact that a person *bona fide* believes himself to possess the authority to perform certain official acts does not create that authority, not even if others believe that he has that authority."

A. S. Ponnambalam for Accused-appellant.

N. Nadarajah, C. C. for the Attorney-General.

ABRAHAMS, C. J.

This is a reference by Maartensz J. * on a point of law argued before him at the Kandy Assizes.

The two accused in the case were tried with four others on an indictment charging them with house-breaking, robbery and voluntarily causing hurt to two persons during the course of the burglary. These accused were convicted, mainly, in the opinion of the learned Judge, on two confessional statements made by them to Mr. Fernando, Acting Police Magistrate at Matale. These statements purported to have been made voluntarily, but it was elicited from Mr. Fernando that he had been exercising police powers and actually regarded himself as an Additional Superintendent of Police though it transpired on a detailed investigation of his functions that he had not been officially appointed to that or any other office in the Police Force, nor did his post of Office Assistant to the Assistant Government Agent carry with it an appointment to any office in the Police Force or lawfully import the exercise of police powers. It was contended, however, for the accused,

that Mr. Fernando was a Police Officer within the meaning of Section 25 of the Evidence Ordinance since he continuously exercised the powers of a Police Officer, signed documents as Additional Superintendent of Police, *bona fide* believed himself to hold the office and was believed by others, official and unofficial, to be a Police Officer. It was accordingly submitted that by the operation of Section 25 aforesaid these statements were inadmissible. Maartensz J. held that the statements were admissible as Mr. Fernando was not a Police Officer within the meaning of the above section. As the point was a novel one he agreed to refer it and made the following order of reference in respect of which we are now called upon to adjudicate.

> " I accordingly under the provisions of Section 355 of the Criminal Pro-
> " cedure Code reserve and refer for the decision of a Court of three Judges the
> " question of law which arose at the trial. The question is as follows. I quote
> from my order :
>
> " The question I have to decide is whether a confession made to a person
> " who is not a police officer is inadmissible against the person making it because
> " the person to whom it was made performs from time to time the duties of a
> police officer."

Counsel for the accused has cited to us the case of the *King vs. Hurribole Chunder* (1 Calc. Law Rep. 215) in which Garth C. J. held that the term " Police Officer " used in Section 25 of the Indian Evidence Act, to which Section 25 of the Ceylon Evidence Ordinance corresponds verbatim, was not to be interpreted in the technical sense, but in a popular and comprehensive sense. "Technical sense" presumably would confine the term to a member of the regularly constituted Police Force. Subsequent decisions of the Indian Courts explain what popular and comprehensive sense means by extending the scope of the section to cover persons who though not members of the Police Force are authorised by law to exercise certain powers vested in members of the Police Force. These is no definition of 'Police Officer' in the Evidence Ordinance itself and on the strength of the Indian decisions (no Ceylon cases on the interpretation of section 25 were cited to us) the term can be fairly held to include persons who fall into the two categories abovementioned.

It is now sought to include within the term a person who has purported to perform the duties of a member of the Ceylon Police Force without any legal authority. I can see no warrant whatever for placing such a construction upon the term. Counsel for the accused has urged that Mr. Fernando was to all intents and purposes a Police Officer, that he only lacked the actual appointment, and was *de facto* if not *de jure* a Police Officer. These are mere words and carry the matter no further. The fact that a person *bona fide* believes himself to possess the authority to perform certain official acts does not create that authority, not even if others believe that he has that authority.

In my opinion Maartensz J. was right Mr. Fernando was not a Police Officer within the meaning of Section 25 of the Evidence Ordinance. I would therefore dismiss the appeal.

POYSER, S. P. J.

I agree.

KOCH, J.

I agree.

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* MAARTENSZ, J.

Mr. S. C. Fernando as Acting Police Magistrate of Matale recorded statements in the nature of confessions made by the 5th and 4th prisoners in this case on the 31st of December, 1935, and 2nd January, 1936, respectively under the provisions of Section 134 of the Criminal Procedure Code. The statements were made and recorded in Mr. Fernando's house.

Mr. Fernando in the course of his examination in this Court as to the circumstances in which he recorded the statements stated on the 11th of January, 1937, that he was at the time in question an Additional Assistant Superintendent of Police. It was accordingly contended that the statements were inadmissible under the provisions of Section 25 of the Evidence Ordinance, 1895, which enacts that no confession made to a Police Officer shall be proved as against a person accused of any offence.

Mr. Fernando's statements that he was an Additional Assistant Superintendent of Police took Crown Counsel by surprise and I adjourned the determination of the question of the inadmissibility of the statements to the 13th of January.

On the 13th of January Crown Counsel led evidence which established that Mr. Fernando had not been appointed an Additional Assistant Superintendent of Police or an officer of the Police of any other rank.

The terms of Mr. Fernando's appointment in the Government Gazette dated 24th March 1933 are as follows :—

> " Mr. S. C. Fernando to be Office Assistant to the Assistant Government Agent, " Matale, and Additional Commissioner of Requests and Police Magistrate, Matale " and Dumbara, from March 15th 1933, until further orders."

The Assistant Government Agent of Matale is an Additional Superintendent of Police. The terms of his appointment in the Government Gazette dated 9th November, 1934 are as follows :—

> " Mr. R. Y. Daniel to the Office of Assistant of Matale to the Governemnt Agent, " Central Province ; Deputy Fiscal for the District of Matale ; Additional Commi- " ssioner of Requests and Additional Police Magistrate Matale, Additional Superin- " tendent of Police Matale ; and Local Authority under the Petroleum Ordinance " for the District of Matale, from October 31, 1934, until further orders."

It appears from the evidence given by Mr. Fernando on the 13th of January, 1937, that he regarded himself an Additional Assistant Superintendent of Police and in that capacity made orders on Crime files submitted to the Assistant Government Agent for orders, when the cases were simple and held inquiries into complaints against the Police.

Mr. Daniel the Assistant Gevernment Agent gave evidence to the same effect and added that a report made by Mr. Fernando was published in the Police Gazette and that Mr. Fernando was styled Additional Assistant Superintendent of Police in that Gazette,

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Mr. Fernando although not appointed clearly performed the duties of a Police Officer and Counsel for the defence contended that the statements made to him were therefore not admissible in evidence.

The question I have to decide is whether a confession made to a person who is not a Police Officer is inadmissible against the person making it because the person to whom it was made performs from time to time the duties of a Police Officer.

The question so far as I am aware is a novel one and not covered by authority nor being on circuit have I had the opportunity of searching the analogous cases.

The object of Section 25 is to prevent confessions obtained from accused persons through any undue influence being received as against them. If a confession be made to a Police Officer the law says that such a confession shall be absolutely excluded from evidence because the person to whom it was made is not to be relied on for proving such a confession and he is moreover suspected of employing coercion to obtain such confession.—Woodroffe & Ameer Ali page 25.

It has been held in India that the term " Police Officer " should be read not in any strict technical sense but according to its more comprehensive and popular meaning. A confession therefore made to the Deputy Commissioner of Police Calcutta was held to be inadmissible although the confession was made to the Deputy Commissioner not in his capacity as a Police Officer but as an acting Magistrate and Justice of the Peace — R. v. Hurribole Chunder 1., 207.

If Mr. Fernando has been appointed a Police Officer this decision would have been ample authority for excluding the confessions.

Now Section 25 excludes a confession made to a Police Officer whatever his rank and however unlikely the danger of the confession being false or extorted may be. It is therefore essential that the person to whom the confession is made should be a Police Officer if it is to be excluded under the provisions of this section. Mr. Fernando although he performed Police duties from time to time was not in fact a Police Officer.

I am accordingly of opinion that the confessions are not excluded by the provisions of Section 25 of the Evidence Ordinance 1895.

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

JOHN APPUHAMY vs WILLIAM APPUHAMY.

S. C. No. 282—D. C. Colombo 2886.

Argued on 25th January, 1937.

Decided on 10th February, 1937.

Mortgage of a share of land which is the subject of a Partition action—Is the mortgage bond void—Can the debt be recovered—If so within what time—Prescription.

The defendant mortgaged on February 21, 1929 a certain share of a land which was, at the time the mortgage bond was executed, the subject of a partition action. Action was filed on the bond on March 5, 1935. The action was resisted on the following grounds :

(*a*) That the hypothecation while partition proceedings were pending was void.

(*b*) That the action was prescribed by Section 7 of the Prescription Ordinance No, 22 of 1871,

Held : (i) That in the case of a mortgage of a share of land which is the subject of a partition action only the hypothecation is void and not the instrument containing it.

(ii) That although the hypothecation is void there still remains to the mortgagee an action on the promise to pay.

(iii) That the action on the promise to pay can be brought within the period prescribed in Section 6 of the Prescription Ordinance provided the instrument of mortgage is according to its substance and real characteristics " a bond conditioned for the payment of money."

L. A. Rajapakse for plaintiff-appellant.
M. C. Abeyawardene for defendant-respondent.

MOSELEY, J.

By a mortgage Bond dated 21st February, 1929, the defendant mortgaged a certain share of land which was at the time the subject of a partition action. Action was filled on the bond on 5th March, 1935. The defence was that by virtue of Section 17 of the Partition Ordinance (No. 10 of 1863) the hypothecation while partition proceedings were pending was void. It was further contended that in the event of the plaintiff being regarded as an unsecured creditor, action was prescribed by Section 7 of the Prescription Ordinance (No. 22 of 1871).

The learned District Judge found that the hypothecation was void, that no money could be due on that mortgage bond, and that the question of prescription did not therefore arise.

From that judgment the plaintiff appeals. His first point being that, even if the hypothecation of the land is bad, the personal covenant to pay the debt remains. On this point we were referred to the case of *Sidambaram Chetty vs. Jayawardene* (1), which case had been considered by the District Judge and held not applicable. This case seems to provide ample authority for the proposition that only the hypothecation is void and not the instrument containing it.

Counsel for the respondent sought to distinguish the circumstances of the present case and submitted that in the case before us there is no distinct claim on the personal covenant, where as in *Sidambaram Chetty vs. Jayawardene* (supra) the plaintiff avoided recourse to the hypothecary action, and sued only on the personal covenant. But in the plaint there is a perfectly clear claim for payment on the personal covenant, and I have no hesitation in following the authority and finding that, although the hypothecation is void, there still remains to the plaintiff an action on the promise to pay.

This brings us to the second point, namely, whether or not the action on the promise is prescribed. The defendant's contention is that being a mere promise to pay it falls under Section 7 of the Prescription Ordinance and that the action, not having been brought within six years, cannot be maintained.

(1) 4 Thambyah p. 85

Counsel for the plaintiff argues that the document is a Bond conditioned for the payment of money within the meaning of Section 6 of the Ordinance, in which case the action has been commenced well within the statutory period of ten years.

We are thus faced with the vexed question as to what is a bond conditioned for the payment of money.

We were referred to the case of *Tissera vs. Tissera* (2), in which case the document under consideration contained a promise to pay a sum of money with interest on demand and the person executing it bound himself, his heirs and executors and all his properties. It was held by Bonser C. J. that the document was a "general conventional mortgage" and he had no doubt that it fell under Section 6. He was also of opinion that it was a bond " conditioned for the payment of money " the meaning of which he went on to say " is that the bond is to be given for securing the payment of money, and it seems to me that what is technically a single bond, *i.e.*, a bond without any defeasance or condition annexed, is as much within Section 6 as a double or conditional bond."

This view was considered in *Seman vs. Silva* (3) by Ennis J. who said "I am unable to agree that this case is an authority for the proposition that a document notarially executed, containing merely a promise to pay money is a bond conditioned for the payment of money. In my opinion the expression refers only to documents in which there is a condition that money is to be paid by way of security."

The document then under consideration was a lease which De Sampayo J. was quite sure " is not a bond. Its main purpose is not to secure the payment of money, but to vest the right of possession of a land for a certain period in the lessee."

It can hardly be controverted that the main object of the document in the case before us is to secure the payment of money.

Counsel for the respondent referred us to the case of *Sinnamy Aiyer vs. Balampikai Amma* (4) in which all the previous authorities were reviewed at length. The document in that case was an agreement to convey land and provided, in default, for the payment of a sum of money as the value of the land and a further sum by way of liquidated damages. This document was held not to be a " bond conditioned for the payment of money."

In *Seman vs. Silva* (supra) De Sampayo J. observed that " an instrument should be construed as a bond or the contrary according to its substance and real characteristics." That is a proposition which commends itself to me and I feel constrained to follow the view expressed by Bonser C.J. which I have quoted above.

In my opinion the mortgage Bond in this case must be regarded as a " bond conditioned for the payment of money " and as such falls within Section 6 of the Prescription Ordinance. The action therefore is

(2) 2 N. L. R. p. 238 (3) 18 N. L. R. p. 397 (4) 31 N. L. R. p. 47

not prescribed and the plaintiff in the absence of any defence on the merits, should succeed.

The appeal is allowed with costs. The judgdment of the District Court is set aside and judgment will be entered for the amount claimed with costs.

Appeal allowed.

FERNANDO, A. J.

I agree.

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

RUTHIRA REDDIAR vs SUBBA REDDIAR & ANOTHER.

S. C. No. 263—D. C. Colombo 258.

Argued on 25th January, 1937.

Decided 1st February, 1937.

Bias—Interlocutory order made by Judge—Acting as counsel later in ignorance of the fact that he had made an order as judge—Counsel requested by court to proceed with the conduct of the case after he had brought to its notice the fact that he had made a judical order in the case—Waiver—What are the characteristics of a moneylender.

The Counsel for the defendants had previously while acting as District Judge and in his capacity as such made an interlocutory order, in an action on a promissory note, giving the defendants leave to defend the action. He had at the time he made the order. no interest in the action. After the hearing of the action had been in progress for some time he appeared for the defendants in the absence of another advocate. He was not aware at the time that he had made a judicial order in the same action. Later he realised this and brought it to the notice of the court. The trial Judge requested him to proceed, and the plaintiff raised no objection.

Held : (i) That the rule that justice should manifestly be seen to be done had not been transgressed.

(ii) That the plaintiffs' conduct in not raising any objection to the counsel appearing in the case after he had bought to the notice of the court the fact that he had made a Judicial order would cure the impropriety if any.

(iii) That a money-lender does not cease to be a money-lender merely because he is also a dairyman or the number of the loans granted by him are small or the borrowers belong to a restricted class.

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Moseley J.

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and another

Rajapakse with *Jayawardene* for plaintiff-appellant.
Nagalingam for defendants-respondents.

MOSELEY, J.

This is a suit by the plaintiff on a promissory note given him by the two defendants. The defendants raised a number of defences impugning the validity of the note. On most of the issues raised at the trial the learned Judge found in favour of the plaintiff but he held on issues 10 and 11 that the plaintiff was a money lender and had not kept books as required by the Money Lenders Ordinance and therefore dismissed his action.

Two grounds of appeal have been urged before us. The first is that the adovcate for the defence Mr. S. C. Swan, had previously acted as District Judge and in his capacity as such had made an interlocutory order in this very action giving the defendants leave to defend.

It is not suggested that at the time of making the order Mr. Swan had any interest in the action and it was only after the hearing had been in progress for some time that he appeared in the absence of another advocate, and it was he who, realising at a later stage that he had made the order referred to, informed the Court accordingly.

The learned Judge requested Mr. Swan to proceed and any opposition there may have been on the part of the plaintiff was withdrawn.

The point, I think it may safely be said, was waived and that may account for the reluctance felt by Counsel for the appellant in bringing the matter to our notice.

Mr. Rajapakse relied upon an unreported judgment of Dalton J. *S. C. No.* 63, *C. R. Colombo No.* 40396 (1),* the facts of which in all material points are on all fours with those now before us. Dalton J. viewed the matter as a very grave irregularity which must vitiate the proceedings. He referred to what he described as a similar kind of case which came before a Divisional Court in England, viz ; *The King vs. Sussex Justices* (2). In that case the the Justices while considering their decision were attended by the Justices' clerk who happened to be a member of a firm of solicitors who were acting against the accused in a civil action for damages arising out of the same circumstances. It was asserted that the Justices, in convicting the accused arrived at their decision without consulting the clerk who in fact scrupulously refrained from referring to the case. Hewart L. C. J. in the course of his judgment said :—

> "The question therefore is not whether in this case the deputy clerk "made any observation or offered any criticism which he might not properly "have made or offered ; the question is whether he was so related to the case in "its civil aspect, as to be unfit to act as clerk to the Justices in the criminal matter. "The answer to that question depends not upon what actually was done but "upon what might appear to be done. Nothing is to be done which creates even "a suspicion that there has been an improper interference with the course of "justice."

The conviction was quashed. It will be observed that in that case the clerk at that time when he was in a position to influence the justices, was

(1) S. C. Minutes 17th February, 1930, (2) L. R. 1924 1 K. B. p 256.

already an interested party. In the case before us the position is entirely different. At the time when Mr. Swan sat as District Judge he had no interest whatever in either of the parties to the suit, and it is difficult to conceive that it could occur to any one that an impropriety had or might have been committed.

The crux of the matter is surely the possibility of bias on the part of the Judge when the case came before him. Here that possibility did not exist.

We have also been referred to the case of *Dyson vs. Kanagammah* (3). In that case Jayawardene A. J. cited with apparent approval the Judgment of Dalton J. but the learned acting Judge was evident under some misconception as to the facts as he described the case as one "where an Advocate who appeared for one of the parties sat as Judge *later* and made certain orders." Had that been the case there could hardly be a graver irregularity.

As, however, the facts are on an entirely different footing I do not think there has been a transgression of the rule, if I may so term it, that justice should manifestly be seen to be done.

In my view therefore there is no substance in that ground of appeal.

I would add that in the case of *The King vs. Sussex Justices* (Supra), Hewart L. C. J. indicated that, had there been a waiver he would have affirmed the conviction. So that in this case even if I had not come to the conclusion which I have, it would appear that any impropriety has been cured by waiver.

The second ground of appeal is that the learned Judge was wrong in holding that the plaintiff was a money lender. Counsel for the appellant contended that the number of loans granted was small and that the borrowers belonged to a restricted class. It does not seem to me that either of these circumstances is necessarily relevant, nor does the fact that the appellant was a dairyman negative the posibility of his also being a money lender.

In my opinion there is evidence upon which the learned Judge could find that the appellant was in fact a money lender. I would therefore dismiss the appeal with costs.

Appeal dismissed.

FERNANDO, A. J.

I agree.

Present : DALTON, J.*

A. VAIRAMUTTU CHETTY vs K. DON FRANCIS.

S. C. No. 63—C. R. Colombo 40396.

Argued on 7th & 17th February, 1930.

Decided on 17th February, 1930.

Garvin for plaintiff appellant.
Rajapakse for Defendant Respondent.

(3) 31 N.L.R. 473.

1930

Dalton J.

A. Vairamuttu Chetty
vs
K. Don. Francis

DALTON, J.

This is an appeal by the plaintiff in the Court of Requests. He sought to recover from the defendant certain sums of money alleged to be advanced to the defendant. The learned Commissioner found for the defendant and dismissed the plaintiff's action with costs.

It came to my notice when this matter came before me first on the 7th February that there was on the face of the proceedings an irregularity of which I must take notice. The case was called in the Court of Requests on the 7th May, 1928, advocates appeared for the plaintiff and defendant, and the case then came before Mr. S. C. Swan as Commissoner. There was an argument on that date as to the plaint, and the Commissioner held that from the statements of Counsel before him it was obvious that the proceedings were insufficient. He therefore directed that an amended plaint be filed on the 20th of May. He also made reference to the defendant's answer and pointed out that the defendant's answer was as vague as the plaint. Thereafter presumably as a consequence of what happened on the 7th of May, an amended answer was also filed by the defendant. On the 28th of August the matter came on for trial. The advocate who appeared for the defendant on that date was the Commissioner who sat to try the matter on the 7th of May. I adjourned this matter on the last date when it came before me in order that the fact might be verified. I am now told by counsel that it is correct, that is that the the advocate who appeared on the 28th of August for the defendant was the commissioner who sat on the 7th of May and who made certain orders in the matter and certain remarks as to the defendant's answer as a result of which he filed an amended answer. It seems to me that that is a very grave irregularity which must vitiate the proceedings. I wish to say as little as possible about the matter in view of the further action which I think I must take.

During the course of the argument here I made reference to a similar kind of case which came before the Divisional Court in England. (*The King vs. Sussex Justices, ex parte McCarthy* 1924 1 *K.B.* 256). It was stated in that case that it is not merely of some importance but of fundamental importance that justice should be done as to be manifestly and undoubtedly seen to be done. The rule is that nothing is to be done which raises a suspicion that there has been an improper inference with the course of justice.

Counsel who appeared on the 28th of August for the defendant seems to me to have placed himself in an impossible position by his conduct. It is not a case of any injustice having possibly been caused to the plaintiff in this action. It may be that injustice has been caused to him or it may be that no injustice has been caused to him, but that is not the point.

It seems to me, having regard to what happened when a person being counsel and judge in the same case although it is true on different dates, and having regard to the facts before me, I must set aside all the proceedings in the lower court with the right to proceed de novo if plaintiff is so advised. I quite appreciate the difficulty of Counsel for the defendant in this case who has sought to avoid any hardship being done to his client who has a judgment in his favour.

I deem it a case which I should refer to the Chief Justice and other Judges of the Supreme Court for such action as they may think fit to take in the matter. The Registrar will therefore forward the record as I have denoted with this judgment. It is possible that thereafter some order may be made whereby the defendant or the plaintiff may be recouped in the costs they have incurred in this abortive trial. I make no order as regards the costs in this Court.

Present : MOSELEY, J.

J. JAYASINGHE vs MIGUEL APPU & ANOTHER.

S. C. No. 1—P. C. Dandagamuwa No. 19825.
Argued on 8th February, 1937.
Decided on 15th February, 1937.

Penal Code Sections 409 *and* 410—*Mischief by cutting down trees growing on a land—Complainant not the owner of the land—Can the charge be maintained.*

Held : (i) That there is no provision of law which requires that the complainant in a charge of mischief shall be the owner of the property in respect of which the offence is alleged to have been committed, nor is it necessary that the complainant shall be aggrieved by the offence.

J. R. Jayawardena with *A. E. R. Corea* for complainant-appellant.

No appearance for respondent.

MOSELEY, J.

This is an appeal, with the sanction of the Attorney-General, against an order of the Police Magistrate discharging the accused on a charge of mischief, punishable under Sections 409 and 410 of the Penal Code. The appellant sued the respondents in the District Court, Kurunegala, and obtained judgment against them. Execution was issued and a certain piece of land belonging to the respondents was sold and purchased by the appellant. Before the sale was confirmed by the Court, the appellant complained that the respondents cut down certain trees growing on the land and instituted proceedings on the above-mentioned charge.

The accused contended that the complainant was not yet the owner of the land and was therefore not entitled to maintain the charge. The learned Magistrate upheld the accused's contention and, as stated above, discharged the accused.

Now, there is no provision of law which requires that the complainant in a charge of mischief shall be the owner of the property in respect of which the offence is alleged to have been committed. It is not even necessary that the complainant shall be aggrieved by the offence.

In my view, therefore, the complainant was clearly entitled to maintain the charge.

The learned Magistrate in giving the reasons for his order went on to indicate the civil remedy which is open to a purchaser in case of waste being committed by a judgment-debtor or other person in possession of property sold pending confirmation of the sale. It is true that such a remedy is provided, but that does not protect a person who commits mischief in those circumstances from his criminal liability.

The appeal is allowed. The case will go back to the Magistrate to be tried on its merits.

Appeal allowed.

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

RAMASAMY CHETTIAR vs MOHAMADU LEBBE MARIKAR

S. C. No. 271—D. C. (Final) Kandy No. 45995

Argued & Decided on 15th February, 1937.

Appeal—All parties to the action not made respondents—Can persons who neither appear nor file answer at the trial be dropped—Section 770 of the Civil Procedure Code—Mistake in decree.

The plaintiff brought a hypothecary action against the 1st defendant. He joined the lessees of the land as the 2nd and 3rd defendants. They neither appeared at the trial nor did they file answer. The plaintiff's action was dismissed as against all the defendants but the decree was entered up in the following terms " It is ordered and decreed that the plaintiff's action against the 1st defendant be and the same is hereby dismissed with costs." The plaintiff appealed but he failed to make the 2nd and 3rd defendants respondents to the appeal. There was no indication that the 2nd and 3rd defendants had no desire to support the finding of the District Judge. At the hearing of the appeal a preliminary objection was taken on the ground that the appeal was not properly constituted as all the parties to the action were not made respondents.

Held : (i) That the 2nd and 3rd defendants should have been made respondents to the appeal.

(ii) That as the decree had been wrongly drawn up the case was one in which the discretionary powers given to the Court by Section 770 of the Civil Procedure Code should be exercised.

H. V. Perera with *Chelvanayagam* for the plaintiff-appellant.
Weerasooriya with *A. L. Jayasuriya* for the 1st defendant-respondent.

POYSER, S. P. J.

In this appeal a preliminary point was taken that the appeal was not properly constituted as all the parties to the action were not made respondents to the appeal. From the facts that have been stated to us there appears to be no doubt that the 2nd and 3rd defendants were necessary parties, for they are interested in the subject-matter of the appeal. It is true that the 2nd and 3rd defendants, at the hearing in the District Court, did not appear, nor did they file answer. They were only made parties because they are the lessees of the property in respect of which the plaintiff brought this hypothecary action. Although they may have had no desire to appear in the lower court, it is not by any means certain, nor is it clear that they have no desire to support the judgment of the District Judge, and they should in my view have been made parties.

However, I think this is a case where the Court should exercise the discretionary powers given to it under Section 770 of the Civil Procedure Code. Although the judgment purports to dismiss the plaintiff's action against all the defendants, the decree is in the following form :—" It is

ordered and decreed that the plaintiff's action against the 1st defendant be and the same is hereby dismissed with costs." It is quite clear, having regard to the terms of the judgment, that this decree was wrongly drawn out ; it should have dismissed the plaintiff's action as against all the defendants. In view of the error in the decree, I think there is some excuse on behalf of the appellant for the non-joinder of the 2nd and 3rd defendants, and applying the principles which are referred to in the judgment of Dalton J. in the case of *P. S. S. M. K. I. Kadirasan Chetty and another v. R. A. Perera and others* (1), leave will be given to the appellant to join the 2nd and 3rd defendants as respondents to the appeal. But this leave will be on terms and is granted subject to his payment of 5 guineas costs to the 1st defendant-respondent.

SOERTSZ, J.

I agree.

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

M. CHELLIAH vs C. FERNANDO

S. C. No. 299—D. C. (Final) Colombo No. 169.
Argued on 18th & 19th January, 1937.
Decided on 11th February, 1937.

Defamation—Written communication regarding the conduct of a neighbour to the Superintendent of Police—No legal duty to communicate the information in question—Pleas of privilege, absence of malice, and truth.

The plaintiff and the defendant were neighbours. The former is a married woman and by profession a certified maternity nurse. In the course of a written communication made by the defendant to the Superintendent of Police, Colombo North, he stated " She (meaning the plaintiff) had been kept as a mistress by more than one person "—" She is apparently a woman of doubtful character "—She uses her certificate in midwifery as a cloak to hide her shameless conduct "—" She is often not at home and when she is, there is a constant stream of callers at any time of the day or night."

The defendant while admitting the statements pleaded

(*a*) That they were true.

(*b*) That there was absence of malice.

(*c*) That they were made on a privileged occasion.

The learned Judge held in favour of the defendant. This judgment was reversed in appeal.

Held : (i) That under the Roman-Dutch Law it is not sufficient in answer to an action for defamation to prove that the defamatory words are true. It must also be proved that the publication was made for the public good.

(ii) That the true criterion as to whether an occasion is privileged both in English and the Roman-Dutch Law is to be found in the following dictum of Baron Parke in Toogood v Sprying (1 C.M. & R. 181 at p 193).

" In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander) and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.....If fairly warranted by any reasonable occasion or exigency, honestly

(1) 5 Times of Ceylon Law Reports p. 9.

made, such communications are protected for the common convenience and welfare of society ; and the law has not restricted the right to make them within any narrow limits ".

(iii) That where it is found that the defendant has transgressed far beyond the proper limits of a privileged occasion it is not incumbent on the plaintiff to establish express malice. The necessary element of *animus injuriandi* can be inferred.

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

SOERTSZ, J.

The plaintiff, a married woman and certified maternity nurse by profession, sued the defendant to recover a sum of one thousand rupees as damages she claimed to be entitled to, in consequence of the defendant having defamed her by alleging, in the course of a written communication made by him to the Superintendent of Police, Colombo North, that 'she had been kept as a mistress by more than one person '—'she is apparently a woman of doubtful character'—'she uses her certificate in midwifery as a cloak to hide her shameless conduct'—'she is often not at home and when she is, there is a constant stream of callers at any time of the day or night.'

That these statements were made, is beyond question. The letter was produced and was received in evidence, and the defendant admitted he wrote it. It was not, and indeed it cannot be denied, that these statements are defamatory. The learned trial Judge found that 'the allegations made in the petition are true', and he went on to say 'therefore plaintiff's case for damages fails.' Roman-Dutch Law requires not only 'that the words were true in substance and in fact, but that it was for the public benefit that they should be published.' *Botha v. Brink*, 8 *Buch.* 123. Adultery is not an offence under our law, and I fail to see how the private morals of a woman can be of public interest, or how it can benefit the public to be informed of them. It is not necessary, however, to consider that question further, for after a careful examination of the evidence I am unable to agree with the District Judge that the statements published of the plaintiff have been proved to be true. The learned trial Judge appears to have reached his conclusion by a curious course of reasoning. The plaintiff in her evidence stated that 'it is not true that my husband is really separated from me. My husband has been in Jaffna for the last two years. During that time he came to Colombo. Before those two years he was in Colombo for some time. He is a canvasser and has to be on the move always. He goes all over the Island. Now he is permanently fixed at Jaffna, canvassing orders in Jaffna.....My husband is a canvasser for Baur & Co.'

A witness, Ponniah, deposed to having seen the plaintiff's husband at a Hindu temple at Kochchikade about the year 1933, dressed, in a hermit's saffron robes, and Jamion, an Invoice clerk at Baur's, said that he had been working nearly two years at Baur's but that he knew of no employee of Baur's by the name of Chelliah. This witness admitted in cross-examination 'that appointments and general supervision of business are in the hands of the Manager.'

In this state of the evidence on that point, the trial Judge says at the very outset of his judgment " She says her husband was a canvasser at Baur's getting a salary of Rs. 150/– a month and a commission, and during the period relevant to the case, employed as such canvasser at Jaffna. There is evidence, for instance, the evidence of Ponniah that the plaintiff's husband on the contrary has been seen by him going about in a yellow garb otherwise engaged, and Jamion, an Invoice clerk at Baur's, says that that company did not employ canvassers and that there is certainly no employee of the firm called Chelliah. In his petition.....the defendant referred to the plaintiff as being separated from her husband. That is probably true, because the plaintiff does not give a true statement with regard to her husband which would indicate that she no longer has any interest in her husband or his doings. I am unable to accept the plaintiff's evidence on that point. Therefore the plaintiff for some purpose of her own has attempted to deceive the Court as to her husband's relationship with her." It is obvious that a judgment which begins with so strong a bias against the plaintiff, must end disastrously for her. I have quoted the whole of this part of the judgment to draw attention to the fallacious reasoning that underlies it. I do not see how the evidence of Ponniah and Jamion, assuming it to be true, necessarily results in the plaintiff's evidence being false. Ponniah saw the plaintiff's husband once in 1933 in a Hindu Temple, clad in hermit's robes. Surely, this does not mean that he could not have been a canvasser for two years–at the time the plaintiff was giving evidence – in Jaffna. Even a busy and wordly canvasser may find the time and feel the desire to go on a pilgrimage to a temple. Many things may worry even a canvasser's conscience and suggest to him the desirability of purification by pilgrimage in the full attire of a hermit. Chaucer speaks of one such among his pilgrimage 'with his bargeines and his chevisance'. With regard to Jamion, admittedly, he is scarcely the man to know who all the employees of Baur & Co. are. In a word, the evidence of Ponniah and Jamion was not sufficient for holding that the plaintiff was untruthful when she said that her husband was not really separated from her, but was residing in Jaffna as his business required him to do so. The premise of the learned Judge, resting as it does on insufficient data, the conclusion he draws from it 'that therefore the plaintiff for some purpose of her own has attempted to deceive the Court' is not justified.

The next point made by the trial Judge is that plaintiff and Corea denied that there were any improper relations between them and they also denied that Corea used to visit the plaintiff. The learned Judge says with regard to this " Neither party called Corea, but I considered that this case required proper investigation as it involved on the one hand, the character of the plaintiff, and on the other hand the *bona fides* of the defendant. I myself called Corea as a Court witness. My object was to see if he could give any explanation as to his presence there, *for I had made up my mind that he did go there.* He, however, denied having gone there and

denied even knowing the plaintiff. That evidence in my opinion is totally false." Now, it is clear that if one has made up one's mind that a certain person goes frequently to a certain house and then asks him why he does so, and that person denies his visits, the natural reaction is to disbelieve the denial. But the question is whether there was sufficient justification for the trial Judge to have made up his mind that Corea did visit the plaintiff. In the communication addressed by the defendant to the Police, all he says is "To the best of my belief this ex-married woman has been kept as a mistress by *more than one person* whose names I am in a position to divulge to you personally ". When the plaintiff was in the witness box, defendant's Counsel subjected her to an exhaustive cross-examination, but he did not put one single question to her to suggest that she had been Corea's mistress. She was questioned only with regard to a cousin of her's named Saverimuttu who was living in the same house as the plaintiff. If the defendant had 'Corea' in mind as one of the several persons referred to in the letter sent to the Police, and who had the plaintiff for mistress, it is hardly possible to account for the omission to put one question to her on that point. After the cross-examination of the plaintiff, the trial Judge put some questions to her and then for the first time, the plaintiff was asked whether she knew Corea and whether she and Mrs. Corea did not have a quarrel. It is not at all clear to me how the learned Judge knew to put these questions, for there is nothing on record up to that stage to show that Corea or Mrs. Corea had been mentioned at all. However, the point I make is that defendant does not appear to have instructed his Counsel to make any suggestion as to improper relations between her and Corea and a quarrel between her and Mrs. Corea in consequence. Then again when the defendant gave evidence, all he said was that the plaintiff was kept by Mr. X, and curiously enough, this too was said in answer to a question by the Court. Not one statement to that effect had, up to that stage, been made by the defendant in answer to questions by his Counsel. The defendant's wife gave evidence and spoke in detail to certain incidents from which she inferred intimate relations between the plaintiff and Saverimuttu, but did not so much as mention the names of Corea and Mrs. Corea. The Judge put no questions to her. The witnesses Ponniah and S. A. Fernando speak to Corea's relations with the plaintiff, but my own impression is that they are unreliable witnesses and their evidence would hardly have been accepted by the Judge were it not for the fact that by the time they came to give evidence, he had 'made up his mind' without any evidence to justify his so doing, that Corea did go to the plaintiff's house. The Judge having thus reached the conclusion that Corea did visit the plaintiff, goes on to draw from Corea's plaintiff's and Mrs. Corea's denial of those visits, the inference that Corea's visits could not have been innocent. To use his own words "Therefore, I think his (Corea's) denials indicate that his visits could not have been innocent. Again, the plaintiff herself denies the visits. If they were innocent and explicable she would have admitted them. The fact that

she falsely denies these visits indicates to my mind that these visits were not innocent. Of course, Mrs. Corea says she knows nothing of these visits. Therefore the plaintiff was receiving into the house rented by her the visits of Corea *unknown to his wife*, which she falsely denies." I say with regret that this is impossible reasoning. It also overlooks the facts, at least the very important fact according to the defendant's case that Mrs. Corea came to the plaintiff's house and quarrelled with the plaintiff over her relations with her husband.

The final stage in the reasoning of the trial Judge is concerned with a statement made by the defendant in the course of his evidence, again in answer to a question by the Judge, that one day after this case had been instituted, he peeped through a crack in the door and saw the plaintiff and Saverimuttu engaged in sexual relations. The defendant admitted that he had not mentioned a word about this to his lawyers, and the defendant's wife knew nothing about it. She says 'I have never seen my husband peeping through that hole.' But so far as the trial Judge was concerned, the weakness of this evidence appears to be its strength.

I have examined the evidence with great care and I find it impossible to hold on the evidence that the defendant has substantiated the allegations he made in his letter. As I observed earlier in my judgment, the Roman Dutch Law requires a defendant in a case like this to prove not only that the defamatory statements are true, but that it was for the public benefit that they should be made. In my view, it was not possible for the defendant to contend that it was for the public good for him to make those statements. His defence failed for that reason, apart from the other defence of a privileged occasion and absence of malice, but I have none-the-less examined the evidence on this question of the truth of the statements as found by the Judge, because I think in a case of this nature, a person in the position of the plaintiff is entitled to the benefit of the view of this Court if it is not in agreement with the view taken by the trial Judge.

The only other question for consideration is whether the plea of a privileged occasion and of absence of malice protects the defendant. Baron Parke's dictum states the true criterion as to whether an occasion is privileged both in the English and the Roman-Dutch Law. He said in *Toogood* v. *Spyring* 1 C.M. & R. 181 at page 193 that a statement is to be considered as made on a privileged occasion when it is " fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned,.....if fairly warranted by any reasonable occasion or exigency, honestly made, such communications are protected for the common convenience and welfare of society ; and the law has not restricted the right to make them within any narrow limits ". Testing the present case by that criterion, a privileged occasion arose for the defendant to make a complaint to the Police with regard to the alleged assault on his servant, the abuse to which his wife and the other inmates of his house were being subjected,

and the fact that the previous warning said to have been given by the Police on an earlier complaint of his not having had an effect. These are matters in which the intervention and assistance of the Police may properly be sought. With regard to these matters the defendant had a right, if not a duty, to place them before the Police and the Police had a corresponding duty or interest to be informed. But the Police could do nothing in the matter of a woman's morals, unless of course an offence resulted. The fact that a woman was guilty of adulterous intercourse with one or more men is deplorable, but is not an offence and does not call for Police interference. Therefore, the allegations complained of are not protected. In the words of Earl *Loreburn* in *Adam, Ward*, 1917, Appeal Cases at pages 320-321 "anything that is not relevant and pertinent to the discharge of the duty and the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the Judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was genuine and reasonably appropriate to the occasion.....For a man ought not to be protected if he publishes what is in fact untrue of someone else or *when there is no occasion for his publishing it to the person to whom he, in fact, publishes it.*" I am not overlooking the earlier dictum I have quoted that communication made by a person in the discharge of some duty, or in the exercise of a right, or in matters where his interests are concerned have not been restricted by the law within 'any narrow limits', but I insist that to say that these allegations complained of in this case were not relevant and pertinent to the defendant's duty, right or interest, is not to attempt to restrict the communication within narrow limits. The defendant himself in calmer moments appears to have realized this. He says in the course of his evidence 'I was not particular that her character should be investigated.....,I was not concerned at all with her character."

In my opinion, a privileged occasion had arisen, but the defendant transgressed far beyond the proper limits of that occasion. I, therefore, hold that it is not incumbent on the plaintiff to establish express malice. The necessary element of a *animus injuriandi* can be inferred from the publication of the defamatory words.

The plaintiff has, then, made out a case for damages. The sole question left is the amount of damages. In this connection, I think I am entitled to take into consideration the fact which emerges clearly from the evidence, that the plaintiff and the other inmates of her house acted in a very unneighbourly and provocative manner towards the defendant and his family. The plaintiff has claimed one thousand rupees as damages. I think it will be sufficient if I award her three hundred rupees and costs in that class both here and below.

FERNANDO, A. P. J. (I agree.)

Appeal allowed.

Present : ABRAHAMS, C. J.

NAHA-KANNU MEERANPILLAI vs ASBY LEBBE MARIKAR

S. C. No. 703—Appeal under Section 24 of Ordinance No. 60 of 1935.
Argued on 19th November, 1936
Decided on 24th November, 1936.

Colombo Municipal Council Constitution Ordinance No. 60 of 1935—Section 23 (1) and (2)—Objection to name of voter—Who may object.

Held : (i) That the person who can object that a voter is disqualified, is a voter in the same ward.

(ii) That the words " in any such new or revised lists' in Section 23 (2) should be read as meaning ' in any one of such new or revised lists. '

C. Nagalingam with *J. E. A. Alles* for petitioner-appellant.
L. A. Rajapakse with *S. A. Marikar* for objector-respondent.

ABRAHAMS, C. J.

This is an appeal against the decision of the Municipal Commissioner, Colombo, who expunged the appellant's name from the Municipal list of New Bazaar West Ward on the objection of a voter whose name was on the list for New Bazaar East Ward. The ground for the objection was that under Section 14 (2) (g) of the Colombo Municipal Council (Constitution) Ordinance, No. 60 of 1935, the appellant did not have the necessary property qualification. The appellant submitted that under the terms of Section 23 (2) of the abovenamed Ordinance the objector had no status to lodge his objection. This was overruled by the Commissioner, hence this appeal.

Section 23, sub-sections (1) and (2) are the relevant sections in the Ordinance, and they read as follows :—

" 23 (1) Every person duly qualified in any year to vote, who has made-
" due application under Section 21 to have his name placed in the lists for the
" year, or transferred from one list to another, or marked with the double quali-
" fication mark, or whose name was inserted in the lists for the previous year,
" and who finds at the time when the new or revised lists are open to inspection
" under Section 22 that his name is omitted from such lists, or is not so transferred,
" or is not marked with the double qualification mark, and who claims to have
" his name inserted or transferred or so marked (such person being hereinafter
" referred to as 'the claimant') may apply to the Commissioner to have his name
" inserted or transferred or so marked.

" (2) Every person whose name appears in any such new or revised lists
" at the time when they are open to inspection, and who objects to the name of
" any other person appearing therein or being marked with the double qualifi-
" cation mark (such first-mentioned person being hereinafter referred to as 'the
" objector') may apply to the Commissioner to have the name or the double
" qualification mark of such other person erased therefrom."

It is pointed out on behalf of the appellant that under Section 14 (8) of the Ordinance no person is entitled to vote in more than one ward nor is any person entitled to have his name entered into the new or revised list of more than one ward, and he submits that it was therefore not open to a person whose name is in one of the revised lists to object to a person whose name is in one of the other revised lists.

The Municipal Commissioner gave his decision in these terms :—

" Reading Section 23 (1) I see that that sub-section speaks for the lists
" for the year ; obviously meaning the list for the whole Municipality. The

"next sub-section goes on to speak of such new or revised lists. I can find no "reason for restricting these to the list or lists for any particular ward. If I "did so it would be interpolating into the Ordinance words that do not exist "there."

I am of the opinion that this decision was wrong and that the Commissioner has been led into error by a too narrow construction of the expression 'lists,' since this word although used in the plural must clearly be paraphrased as 'one of the 'lists.' The proper rendering of that part of sub-section (2) down to the word 'therein' is as follows, "Every person whose "name appears in any one of such new or revised lists at the time when those "lists are open to inspection and who objects to the name of any other person "appearing therein." Now the ordinary grammatical meaning of the word 'therein' is 'in that place' that is to say, in the place which has been previously mentioned in the sentence in which the word appears. What is that place ? Clearly as indicated one of such new or revised lists. If the respondent's contention is to prevail, then the words above referred to would have to read as follows : "Every person whose name appears in any one of such "new or revised lists at the time when the lists are open to inspection "and who objects to the name of any other person appearing in that list "or in any other of the revised lists." That is obviously giving to the word 'therein' a meaning which it does not in ordinary grammar bear.

It has been urged very strenuously for the respondent that in the construction of sub-section (2) the intention of the Legislature should be considered. That is of course so, but the intention of the Legislature by the ordinary rules of interpretation is to be gathered first and foremost by the grammatical meaning of the words which it thought fit to employ. But even if one considered, without resorting to interpretation, what was the probable intention of the Legislature, I am of opinion that it was manifestly such as is borne out by the construction which, in my opinion, sub-section (2) obviously bears. The person who can object that the voter is disqualified, if such objector is to be a voter at all, should obviously be a voter in the same ward because his vote may be in danger of being cancelled by that of an unqualified voter, whereas no such danger exists, so far as he is concerned, if that unqualified voter is in another ward. Counsel for the respondent admits, if I understood him aright, that that was the intention of the Legislature, but he says that that is not the only intention because every voter in Colombo, no matter for what ward he is qualified to vote, has an interest in a proper Municipal Government of this city and ought to be allowed to object to any voter in any ward who is disqualified, for instance if he is serving a term of imprisonment (see disqualification (c) of Section 14 (2). I suppose by this is meant that if there were a majority of disreputable voters it might have the effect of bringing into power a disreputable candidate. I think this is too far fetched for serious consideration, and in addition I might point out that out of the seven grounds for disqualifying a voter only two relate to his character, one relates to his sanity, one to his nationality, one to his minority, one to residence and one to property. So that in the majority of cases, it may be observed, even the abovementioned argument can have no application.

I allow the appeal and I direct that the appellant's name shall be inserted as a duly qualified voter on the list of voters for the New Bazaar West Ward, Colombo, with costs to the appellant here and at the inquiry before the Commissioner.

Appeal allowed.

Present : MOSELEY J & FERNANDO A. J.

G. N. G. WALLES vs THE COMMISSIONER OF INCOME TAX.

No. 2 of 1932 (*S. C. No.* 155 *Inty* :)
Argued on 27th and 28th January, 1937.
Decided on 17th February, 1937.

Income Tax—Veterinary Surgeon, Trainer and dealer in horses carrying on horse-racing—Are the winnings from horse-racing taxable.

The appellant was a Veterinary Surgeon and a trainer of horses. He was also a dealer in horse food and horses. In addition he had a large string of horses which he raced. In some cases for a fixed monthly pay of Rs. 175/– per mensem he looked after the horses he trained. He derived income during the tax year under review from

(a) his business as a horse-trainer
(b) his profession of Veterinary Surgeon
(c) his business as a dealer in horse food and horses and looking after horses and
(d) from horse–racing.

The assessee's wife also owned a small string of horses which she raced. He kept regular books in regard to his horse-racing A separate folio was opened for each horse. On one side was entered expenses incurred such as food, entry fees, jockey's fees, etc. On the other the winnings of that horse. The horses he imported for sale he generally trained and raced them before selling.

The Board of Review on the evidence before it expressed the following decision.

" Upon the evidence and the facts stated in the course of the argument we are of opinion that the racing of horses by Mr. and Mrs. Walles is an activity which forms part of the business carried on by Mr. Walles, the profits from which formed part of the profits from an enterprise which is conducted on commercial lines and therefore fall within " profits and income " as defined in Section 6 (1) (a) of the Ordinance. "

Before the Board and the Supreme Court it was contended that the winnings from racing were not taxable as racing was carried on by the assessee appellant not as a business but for the love of sport.

Held : That racing as carried on by the assessee and his wife formed no part of the business of trading in and training horses and that the winnings derived by them from horse–racing were not taxable.

H. V. Perera with *E. G. P. Jayatilleke* and *N. M. de Silva* for assessee-appellant.

N. Nadarajah C. C. with *Crossette Thambiah C. C.* for Commissioner of Income Tax-respondent.

MOSELEY, J.

This is a case stated for the opinion of this Court under the provisions of Section 74 of the Income Tax Ordinance, No. 2 of 1932, by the Board of Review constituted under that Ordinance.

The assessee, Mr. G. N. G. Walles, is a veterinary surgeon, a dealer in horse fodder and saddling and a trainer of race horses. He also imports and sells horses. According to his own account, since 1920 he has indulged in horse-racing purely from the love of sport and his racing string now numbers twenty two. His wife has taken up racing on similar lines and now owns nine horses.

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For the year of assessment 1933–1934 the assessee was assessed as having an income of Rs. 35,170/00. He was dissatisfied with that assessment on two grounds, viz :—

(1) that the stakes won by horses belonging to himself and his wife are not assessable, and

(2) that no allowance had been made for an alleged bad debt of Rs. 6,535/–, which debt, he contended, became bad within the year preceding the year of assessment and which, he claimed, should be deducted from the assessment of his income.

The assessee appealed to the Commissioner of Income Tax on these grounds.

In regard to the first ground the Commissioner held that the racing of horses by the appellant formed part of the business carried on by him and that the profits thereof were taxable. He held that the profits resulting from the racing of horses belonging to the appellant's wife were profits resulting from an enterprise conducted on commercial lines and fell within the meaning of "profits and income" as defined in Section 6 (I) of the Ordinance.

In regard to the second point the Commissioner held that the debt of Rs. 6,535 became bad not later than December 1931, at which date the appellant bought in the property of the debtor. He, therefore, disallowed the deduction, and the appeal on both grounds was dismissed.

The appellant thereupon appealed to the Board of Review who decided as follows :—

> "Upon the evidence and the facts stated in the course of the "argument we are of opinion that the racing of horses by Mr. and "Mrs. Walles is an activity which forms part of the business carried "on by Mr. Walles, the profits from which formed part of the profits "of an enterprise which is conducted on commercial lines, and there-"fore fall within "profits and income" as defined in Section 6 "(I) (*a*) of the Ordinance.
>
> "On the question of the "bad debt" we are of opinion "that it was incurred during the period of which the profits have "to be ascertained for the purpose of this assessment. It is accord-"ingly disallowed. The appeal is dismissed and the assessment is "confirmed".

The appellant is still dissatisfied and has requested the Board to state a case.

Now the decision of the Board on a question of fact is final unless, I suppose, this Court be of opinion that there is no evidence to support such finding. It becomes necessary therefore to examine the finding of the Board with a view to ascertaining the dividing line between the finding of fact and the Board's view of the law which should be applied.

It is somewhat difficult to dissect the finding of the Board on the above lines, but if I may be permitted to paraphrase the finding, it seems to me that the question this Court is invited to decide is whether or not the

"activity" of racing horses as carried on by Mr. and Mrs. Walles does, for the purposes of Section 6 (I) (*a*) of the Ordinance, form part of the business carried on by Mr. Walles.

I think we may take it as common ground that stakes won by an owner who races purely for sport are not liable to taxation under the above mentioned sub-section or any other provision of the Ordinance.

It was urged before us by counsel for the Commissioner that the racing of horses was an inseparable part of the appellant's business as a trader in horses, and he relied upon the appellant's evidence to the effect that "he imported race horses, trained them, ran them in races and sold them; sometimes at a profit and at others at a loss". It was pointed out, no doubt with truth, that the winning of a race enhances the value of a horse and that therefore the running of a horse with a view to winning races was part and parcel of the business of trading in horses.

Does, however, the business of trading in horses negative the possibility of the same person engaging in racing from the love of sport?

A number of authorities were cited by counsel for the appellant. I shall refer to a few.

In the case of *Earl of Derby v. Bassom* (42 Times Law Reports p. 380) it was held that where a person kept a racing and breeding establishment as a hobby and also let out to others the services of his stallions, he was liable to pay income tax on the fees received for such services. The facts are on a converse footing to those existing in the case before us, but the case is authority for the proposition that where a commercial proposition is carried on in conjunction with a hobby the profits from the former are taxable.

In Commissioners of Inland Revenue v. William Ransom & Son, Limited (1918 2 K. B. p. 709) it was held that where two businesses carried on by the same person were taxable on different bases, and it was possible for the Commissioners to separate one from the other, there was nothing in law to prevent them from doing so. *Sankey J.* in the course of his judgment said:—

"I can conceive of cases where the two branches of the business of "a person or a company are so interlaced that it is impossible to separate "them, and, although I express no definite opinion upon the point, it may "be that in those circumstances, if the main branch of the business is subject "to excess profits duty, the whole business is subject to the duty on the "ground of impossibility of separating the main branch from the rest of the "business. There, again, the decision would depend very much on the "facts of the case. The case where an individual carries on two separate "businesses of which one is liable to the duty and the other is not, is a "simple one, but it might be more difficult to arrive at a decision where "the one business is ancillary and incidental to the other in such a way as "to make them nearly inseparable....."

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The principle of severance of businesses was approved in *Commissioners of Inland Revenue v. Maxes* (1919 I K.B. p. 647).

If I am right in my comprehension of the question which we are asked to decide, I am unable to arrive at any conclusion other than that the pursuit of horse racing as carried on by Mr. Walles, and *a fortiori* as carried on by Mrs. Walles, forms no part of the business of trading in and training horses. In my view therefore the stakes won by horses belonging to Mr. and Mrs. Walles are not assessable.

We now come to the matter of the alleged bad debt. This was in respect of an account for horse fodder supplied to Mr. Coomber which amounted to Rs. 11,172/89. To secure this sum Mr. Coomber executed a mortgage bond which Mr. Walles put in suit on the 23rd March, 1931. Decree was entered on the 8th May, 1931, and on the 22nd December of the same year Mr. Walles bought in the property for Rs. 7,100,00 (appraised value) subject to three mortgages. On the 23rd May, 1932, Mr. Walles sold the property for Rs. 45,000/–. After paying off the three mortgages he had a balance left of Rs. 4,497/58 in his hands. He is therefore still Rs. 6,675/31 out of pocket in respect of Mr. Coomber's debt.

Mr. Walles claims that this amount became a bad debt at the date of the realisation of the mortgaged property, *i.e.*, within the year preceding the year of assessment, and should, therefore, be deducted from the assessment of his income.

The Commissioner, on the contrary, held that it became bad not later than December 1931, when the appellant bought in the property. The Board of Review contented themselves with expressing the opinion that it was not incurred during the period of which the profits had to be ascertained for the purposes of this assessment.

Now, it does not appear that any steps have been taken to recover the balance due from Mr. Coomber since December 1931, and unless and until such steps are taken, I do not know how it can be said that the debt is bad. That the date of realisation bears no relation to the date at which the debt becomes bad is evident when it is appreciated that Mr. Coomber's debt would have remained even though the property had realised, for the sake of argument, Rs. 100,000/–. It seems to me therefore that the claim for deduction is premature and on this point the appeal must fail.

It is, however, apparent that in connection with the realisation of the debt the appellant has suffered a pecuniary loss. He bought the property in for Rs. 7,100/–, and after paying off the money due under the three mortgages the balance remaining in his hands was Rs. 4,497/58. There was therefore a loss on the transaction of Rs. 2,602/42. This loss became apparent on the 23rd May, 1932, and it may be that the appellant is entitled to a deduction in respect of this amount under Section 13 of the Ordinance.

In view of these findings the appeal is allowed, the assessment made by the Board is annulled, and the case is remitted to the Board for revision of the assessment as set out above. The appellant, having succeeded on

the main issue, will be entitled to a refund of the sum of Rs. 50/- deposited by him under Section 74 (1) and will also be entitled to his costs of this appeal.

FERNANDO, A.P.J.

I agree, but would like to add the following :—

It was argued before us that in this case, the Board had found against the appellant on the facts, and that the question, whether the racing of horses was a part of the business of the appellant was itself a finding of fact. In view of the provisions of Section 74 of the Ordinance, it is, in my opinion, the duty of the Board to set out separately their decisions of the facts, and the questions of law, if any, that arise. The decision in this case as set out by the Board is that, " the racing of horses by Mr. and Mrs. Walles is an activity which forms part of the business carried on by Mr. Walles." The contention for the appellant before the Board as well as before us, was that the racing of horses by him and his wife was done purely for sport, and it was contended that the profits of such racing were not liable to be taxed as in England, and as admitted by both parties in the case of the *Earl of Derby v. Bassom.* Now it was open to the Board to find that in fact, the racing of horses by Mr. and Mrs. Walles was not done by them for sport, but was a commercial enterprise ; that the racing of horses was part of the business of importing and selling horses as contended by Counsel for the Commissioner, and that the horses that they raced were not, as contended by the appellant, the exclusive property of Mr. and Mrs. Walles kept by them for the purpose of racing, but only some of the horses which had been imported by them for the purpose of sale. Such a finding would be a finding of fact, and it may be that in view of sub-section 5 of Section 74, this court would not interfere with any such finding of fact. On the other hand, it was open to the Board, to find that the racing was done for sport, that the horses kept for racing were other than the horses that were imported and sold, but that nevertheless, the racing done by Mr. and Mrs. Walles was an activity forming part of a business carried on by Mr. Walles, in which event their finding would no longer be of finding of fact but a finding of law, and it would be open to this court to consider whether such a finding would be correct in law.

Counsel for the Commissioner stated that even on a finding of fact, it was open to this Court to interfere if in fact such finding was not supported by the evidence before the Board. It is clear from the order made by the Board that certain evidence was recorded when the inquiry took place before the Board. The record of that evidence has not been placed before us as such, but in the case stated, there are certain extracts from the evidence of Mr. Walles. If we are to assume that these extracts were the only evidence before the Board, then the question would arise whether the Board was justified in holding that the evidence of Mr. Walles that he raced horses for sport was not true, if in fact they did arrive at such a finding.

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The appellant spoke of a number of horses which were owned by him, and which were kept by him for the purpose of racing. He also stated that there was another string of horses belonging to his wife also kept for racing. If these horses were kept for racing, and if the appellant's evidence that he engaged in racing for sport is to be accepted, then it is difficult to see how the stakes won by those horses could form part of the business carried on by Mr. Walles. It is admitted that Mr. Walles trained horses which belonged to others than himself, and I do not think it is suggested that the stakes won by such horses would also be a part of the profit of Mr. Walles' business. I cannot see any reason why Mr. Walles' horses would be in a different position to those owned by other owners who engaged the services of Mr. Walles as trainer. For these reasons I agree with my brother whose judgment I have had the advantage of reading, that the stakes won by horses belonging to Mr. and Mrs. Walles are not assessable.

It is also argued for the appellant that he should be allowed a deduction in respect of a bad debt of Rs. 6,535/–. That sum was apparently claimed as a deduction under Section 9 D of the Ordinance, as a bad debt incurred in the business. I agree that the debt due to the appellant from Mr. Coomber cannot be regarded as a bad debt incurred within the period of which the profits were being ascertained, but I agree that the sum of Rs. 2,602/42 was clearly a loss incurred by the appellant on the 23rd May 1932, and would be a deduction allowable under Section 13 B or C of the Ordinance. I do not think it necessary to say anything more on this point, and the Board of Review will no doubt have this matter in mind when they fix the final assessment on the appellant.

Present : AKBAR AND POYSER, J. J.

VELU KANGANY vs KUPPEN CHETTY

S. C. (Inty.) 71—*D. C. Hatton* 2418

Argued and decided on 15th January 1936.

Payment of money into Court—Rules regulating payment—Effect of failure to comply with rules.

The plaintiff sued the defendant for the recovery of a sum of Rs. 564/– The defendant filed answer admitting that a sum of Rs. 439/90 was due and he paid this sum by a cheque drawn in favour of the Government Agent, Central Province. This cheque was handed by the defendant to his proctor Mr. Aiyadurai to be deposited in Court. The cheque was handed to the Secretary to be placed to the credit of the action. The Journal indicated that the defendant had deposited the sum of Rs. 439/90 admitted in his answer but the amount stated in the cheque was not credited to the case in respect of which it was paid. The cheque reached the hands of the Government Agent but the sum of Rs. 439/90 was deposited to the credit of some other case. While certain irregularities committed by the Secretary in respect of moneys paid in by suitors was under investigation

the D. J. noticed that the sum of Rs. 439/90 though shown in the Journal entry as having been paid had not actually been credited to the case. He also found that the rules regarding payment of money into Court had not been observed. He, therefore, ordered notice to issue on the defendant to produce the Kachcheri receipt and in default to show cause why he should not be ordered to bring the sum of Rs. 439/90 into Court inasmuch as he had failed to observe the rules of Court.

The defendant showed cause and led evidence to show that he had paid the amount by cheque drawn in favour of the Government Agent.

The District Judge made the following order.

Vide my order dated 25-4-35* as regards the payment "into court" of the Rs. 75/- by the plaintiff.

With regard to the alleged payment "into court" of the Rs. 439.90 by the defendant's attorney, this is a hard case. The rules of the Supreme court governing payments "into court" are to be found published in Gazette No. 7407 dated 25-7-1924.† Ignorance of that regulation on the part of suitors, their legal advisers, and the Bench is no excuse. Clearly and admittedly the defendant has not paid this sum of money "into court" in accordance with the prescribed regulations. Therefore, that payment in law is not a payment. Unlike the payment of Rs. 75/- by the plaintiff who acted strictly in accordance with the regulations, the defendant has failed to observe the correct procedure. Therefore, it is the defendant who is liable to make good this money and not the Crown. As I said before this is a hard case, but it is hard cases which make bad law. In this case as in others which have come before me the party paying says "I paid the money in open Court while the Judge was sitting on the bench" but I fear that that is no excuse.

L.A. Rajapakse with *D. J. R. Gunawardene* appeared for the appellant.

Basnayake C.C. appeared as *amicus curiae* with *Ismail C.C.*

The defendant appealed from the order.

After hearing Counsel for the appellant, the Supreme Court affirmed the order of the District Judge.

* D. C. Hatton No. 2418 (Special).

On this evidence there is not the slightest doubt that the plaintiff has paid this sum of Rs. 75/- in accordance with the law contained in the rules of the Supreme Court appearing in Gazette 7407 of 25-7-24.

The position therefore is that through no fault of the parties to this case this sum of Rs. 75/- has been misappropriated by Wijetunge, late C. C. of this court and unless the Crown seeks to avoid liability on the ground that it is not liable for the torts of its servants it is morally bound to make good this money.

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† *ORDER FOR REGULATING THE PROCEDURE FOR THE PAYMENT OF MONEY INTO COURT.*

We, the Honourable Sir Anton Bertram, Knight, K.C., Chief Justice of the Island of Ceylon, and the Honourable George Francis MacDaniel Ennis, Senior Puisne Justice of the Supreme Court of the Island of Ceylon, and the Honourable Thomas Edward de Sampayo, K.C., Puisne Justice of the said Court, and the Honourable William Thomas Porter, Puisne Justice of the said Court, and the Honourable Gualterus Stewart Schneider,

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"The Peyment into Court order 1924."

K.C., Puisne Justice of the said Court, do hereby, in pursuance and execution of the powers given by section 53 of the "The Courts Ordinances, 1889 and 1901," and all other powers and authorities enabling us in this behalf, order and direct in manner following :—

1. Where in any law or regulation for the time being in force in the Courts of this Island provision is made for the payment of money into Court, such payment shall be made in the manner following :—

(*a*) Whenever any person has occasion to pay money into Court he shall signify the same to the Secretary or Chief Clerk of the Court, who shall give him a deposit note in the form prescribed in the Financial Orders, to be delivered together with the money to the Kachcheri or Treasury of the District.

(*b*) The receipt shall then be acknowledged by the signature of the Government Agent or Assistant Government Agent or person duly authorized on his behalf on that part of the note reserved for the purpose, which shall be cut off and delivered to the person who shall have made the payment, the remaining part being reserved as the authority for receiving the money.

(*c*) The date of the Kachcheri receipt shall be deemed to be the date of payment into Court.

(*d*) Where there is no Kachcheri or Treasury in the Town in which the Court is situated, the Secretary or Chief Clerk shall issue to the person requiring to pay money into Court, in addition to the deposit note referred to in rule 1 (*a*) above, an application addressed to the nearest Post Office for an official money order in favour of the Government Agent or Assistant Government Agent of the District, to be delivered by him to the Postmaster. The receipt shall then be acknowledged by the signature of the Postmaster on that part of the note reserved for the purpose which shall be cut off and delivered to the person who shall have made the payment. The remaining part together with the money order shall be sent by the Postmaster to the Court which shall forward them to the Kachcheri. The date of issue of such money order shall be deemed to be the date of payment into Court.

2. This order may be cited as "The payment into Court Order, 1924".

Dated at Colombo, this 28th day of March, 1924.

ANTON BERTRAM, Chief Justice.
G. F. M. ENNIS, Senior Puisne Justice.
THOMAS E. DE SAMPAYO, Puisne Justice.
W. T. PORTER, Puisne Justice.
G. S. SCHNEIDER, Puisne Justice.

I certify that this is a true copy of the rules made by the Judges of the Supreme Court under the provisions of section 53 of "The Courts Ordinances, 1889 and 1901".

ANTON BERTRON.

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

MEYAPPA CHETTY vs A CHELLIAH

S. C. No. 132—*D. C.* (*F*) *Jaffna* 6510.

Argued & Decided on 23rd February, 1937.

Civil Procedure Code Section 775—Petition of appeal by the appellant and signed before the Secretary of the Court—Can such petition be entertained.

Held : That a petition of appeal tendered by the appellant and signed by him before the Secretary of the District Court cannot be entertained.

Defendant Appellant (*A. Chelliah*) appears in person.

S. J. V. Chelvanayagam for the plaintiff-respondent.

POYSER, S.P.J.

In this case counsel for the respondent has taken the objection that the petition of appeal has not been drawn or signed by an Advocate or Proctor, nor has it been taken down in writing by the Secretary of the District Court as required by Section 755 of the Civil Procedure Code. As appears from the petition itself, this petition was tendered by the defendant appellant and signed by him in the presence of the Secretary of the District Court. It has been held in two recent cases, both of which are binding on us, that a petition of appeal in that form must be rejected. The cases I refer to are *Emmanuel v. Ratnasingham* (34 N.L.R. p. 126) and *S. C. No.* 172 (*Final*) *D. C. Kandy No.* 45714 (*S. C. Mts. of* 22*nd October* 1936*.) The latter case was decided as recently as last October. I would, however, as in *Emmanuel v. Ratnasingham* (*Supra*), reserve the right to the appellant to move in revision if he so desires.

The appeal is rejected with costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

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

F. T. NELSON vs KAMMAL

S. C. No. 172—*D. C. Kandy* 45714

Argued & Decided on 22nd October, 1936.

S. J. V. Chelvanayagam for plaintiff-appellant.

E. F. N. Gratiaen for defendant-respondent.

FERNANDO, A.J.

Counsel for the respondent has taken the objection that the petition of appeal in this case has not been drawn or signed by an Advocate or Proctor nor has it been taken down in writing by the Secretary of the District Court as required by section 755 of the Civil Procedure Code. It appears to be a petition drafted by the appellant himself and signed in the presence of the Secretary. In *Emmanuel v. Ratnasingham*, 34, N.L.R. p. 126, a petition of appeal was rejected on this ground in view of the " trend of recent decisions " of this Court, and we see no reason why we should not follow these decisions. The petition of appeal is accordingly rejected and the appeal is dismissed with costs.

MOSELEY, J.

I agree.

Present : SOERTSZ, J.

E. P. T. HANIFFA vs A. S. HAMEEDO MARIKAR.

S. C. No. 599 *of* 1936.—*P. C. Puttalam No.* 22293.

Argued : 28th January, 1937.

Decided on : 1st February, 1937.

Penal Code Sections 427 *and* 428—*Criminal Trespass—Charge should specify intent.*

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—
Soertsz J.
—
Haniffa
vs
Hameedo Marikar

Held : (i) That in a charge of criminal trespass the intent with which the alleged trespass was committed should be specified.

(ii) That the fact, that the alleged trespasser is also charged with theft and mischief in the same transaction as the criminal trespass, is no legal justification for not specifying in the charge for trespass the intent with which the alleged trespass was committed.

N. E. Weerasuriya with *Chitty* for accused appellant.

H. V. Perera with *E. B. Wickremanayake* for complainant respondent.

SOERTSZ, J.

The accused appellant appeals from a conviction entered against him on a charge of criminal trespass. There were two other charges against him, namely of theft and mischief. The Magistrate acquitted him of these charges. The point taken on appeal is that the charge of criminal trespass was defective in that it did not specify the intent with which the alleged trespass was committed.

In my opinion, this point is entitled to succeed in this case. There are numerous cases in which this Court has held that a charge of criminal trespass which fails to specify with what intent the entry was made is defective. It will suffice to cite *Henaya vs. Bandiya,* (1) *Obeysekera Hamine vs Goonesekera,* (2) *and Fonseka vs. Sardial,* (3).

It might have been argued that inasmuch as the accused was charged with theft and mischief in the same transaction in which the criminal trespass was alleged to have occurred, there was implied the intention to commit theft and mischief, but the Magistrate has acquitted the accused of those two charges and it is a question whether in those circumstances an intention to commit theft and mischief can be read into the charge of criminal trespass.

But the cases I have referred to, go the length of holding that the "intention" should be *specified.* In that view of the matter this charge was bad.

The only other question is whether the conviction should be set aside and the accused acquitted or the case sent back for a fresh trial.

In my opinion, this is not a case in which there is any justification for subjecting the accused to another trial, for the Magistrate himself began his judgment by observing that "this case became dangerously akin to a civil action at various stages," but he went on to give reasons which made him rescue it from that perilous position. I have examined those reasons and have come to the conclusion that on the facts too this appeal must succeed. There appears to be a substantial dispute between the parties for decision in a civil Court.

I set aside the conviction and acquit the accused.

Conviction set aside.

(1) 30 N. L. R. p. 353 (2) 3 C. W. R. p. 42 (3) 3 C. W. R. p. 292

Present : SOERTSZ, J.

N. H. L. GIRIGORIS vs R. P. DE ZILVA

S. C. No. 217—*C. R. Galle No.* 14589.

Argued on 3rd February, 1937.

Decided on 8th March, 1937.

Minor—Can a minor be arrested for debt—Roman Dutch Law relating to immunity of minors from arrest—Civil Procedure Code, Section 298.

Held : That under the law of Ceyon a minor is not liable to be arrested for debt.

A. L. Jayasuriya for defendant-appellant.

N. E. Weerasooriya with *Wijemanne* for plaintiff respondent.

SOERTSZ, J.

The defendant who is a minor was sued through a guardian-ad-litem on a contract of tenancy, and decree was entered in favour of the plaintiff respondent for a sum of Rs. 200/- and costs.

The plaintiff after having resorted in vain to every other method of recovering his dues, applied to the Commissioner of Requests under Section 298 of the Civil Procedure Code, for a warrant of arrest of the defendant. Objection was taken to the issue of a warrant on the ground that a minor could not be arrested for the debt. The learned Commissioner overruled the objection and directed that a warrant should issue.

This appeal is from that order. There is a dearth of authority on this point. The Commissioner based his order on section 298 of the Civil Procedure Code and held that whatever the Roman-Dutch Law might be, " we are governed by the Civil Procedure Code with respect to procedure. Imprisonment in execution of a decree is a step in the procedure.....

Section 298 provides that if the Fiscal return to the writ that he is unable to find any property of the judgment debtor, and in certain other cases, the Court may issue a warrant for the arrest of the judgment debtor. But in no case, shall the Court issue a warrant for the arrest or imprisonment of a woman in execution of a decree for money.".

Two observations fall to be made on these findings of the Commissioner. Firstly, that the Civil Procedure Code cannot be regarded as having *abrogated* the Common Law *by implication.* It is true that arrest and imprisonment are " steps in procedure," but they are steps available against those only who under the Common Law are liable to be proceeded against by means of such steps.

Secondly, in regard to the suggestion that when the Civil Procedure Code in section 298 exempted women from arrest, it must be assumed that all others including minors, were brought under the operation of that section, I am quite unable to agree with it. From section 298 it is clear that the

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Legislature intended to exempt all women from arrest and imprisonment, and proceeded to do so in express terms. *Were it not for this provision unmarried women above* 21 *years of age*, and married women too, perhaps, in certain circumstances, would have been liable to arrest under the Common Law. But, for the purpose of securing similar immunity to minors, *it was not necessary to exempt them if they stood already exempted* by the Common Law. What then is the Common Law on the point ? As I have observed there is, by no means, an abundance of authority on the point, but there is high authority for the proposition that minors are not liable to arrest, the authority of Voet who in Book II, Tit. 4 Section 36 says :—" Sunt autem, *qui nullo modo*, possunt arrestari, *qui certis in locis, aut certarum personarum intuitu*, ab arresti metu immunes sunt. Nullo modo mulieres viro nuptae, minores, furiosi, prodigi, alique curatorum potestate subjecti, ob id non habentes personam standi in judicio."

In the next section Voet goes on to say that tutors, curators and attorneys, testamentary executors, and generally administrators of the things of others cannot be arrested for the debts of those whose affairs they look after, for " neque sane tantus videri debet commerciorum favor, nec usque adeo merae agentium utilitati prospiciendum, *ut non debitores dura et inhumana ob debiti alieni exactionem paterentur*. The underlying principle of the exemptions of these two groups appears to be, that so far as minors are concerned, they are exempted because they have no locus standi in judicio ; so far as the executors guardians and others are concerned, they are exempted because their intervention was sought and obtained to bind the estates of the minors they represent.

I would, therefore, allow the appeal and refuse the application for warrant. I make no order as to costs.

Appeal allowed.

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

S. KANAPATHIPILLAI vs K. SUBRAMANIAM.

S. C. No. 270—*D. C. Jaffna No.* 3605.

Argued on 2nd & 3rd February, 1937.

Decided on 12th February, 1937.

Defamation—Petition to Government Agent regarding rival candidate for Chairmanship of Village Committee—Privileged communication—Privileged occasion—Matters requiring proof in an action for defamation—

The plaintiff and the defendant were rival candidates for the office of Chairman of the Village Committee of Karainagar. At the election which was held on July, 8th 1932 the plaintiff was elected Chairman. The defendant on July, 6th 1932 sent a petition in the following terms to the Government Agent at Jaffna.

" The humble petition of Kanthapper Subramaniam of Karainagar East

" Respectfully sheweth,

" The petitioner begs to submit that he is one of the members of the Village " Committee of Karainagar and one Sangarapillai Kanapathipillai of Karainagar " East is also a member of the said Committee and he is now seeking for the " presidentship of the said Village Committee. According to sub-section (e) " of section 18 of the Village Committees Ordinance No. 9 of 1924, he is not eligible " to be elected as a president or a member.

" 2. In case No. 18417 of the District Court of Jaffna the said Kana- " pathipillai had submitted that he was in jail for three months hard labour (R.I.) " in Keddah having misappropriated the Government money.

" 3. In case No. 16593 of the District Court of Jaffna in the judgment " it is stated that this Kanapathipillai is a man who bears an unsavoury character " and who has been in jail in the Federated Malay States, is the man who is engineer- " ing in this case.

" 4. In case No. 12196 of the Police Court of Jaffna he was convicted " under section 287 of the Ceylon Penal Code and was fined Rs. 7/50. " The petitioner brings these facts to your honour in the hope that you will be " pleased to view the case in its true light and have him disqualified from the " membership for which act of benign goodness the petitioner shall ever pray."

At the election he reminded the Government Agent of his petition and asked him to inquire into it. The Goverment agent ruled that the plaintiff was entitled to stand for election. In the election which followed, the plaintiff was successful. Thereafter the defendant sought to test the validity of the plaintiff's election by a writ of quo warranto.

In this too he was not successful. The plaintiff then brought this action claiming damages in Rs. 10,000/- for defamation. He founded his action on the three allegations in the petition, which he said were all untrue. In answer to this the defendant contended :

(*a*) That the first allegation was made in perfectly good faith and was founded on an admission of the appellant in the case in question that he had been convicted of embezzlement.

(*b*) That in regard to the second allegation there was no difference in substance between the allegation as he made it and the actual statement in the judgment.

(*c*) That as regards the third allegation he made a mistake but that it was a *bona fide* mistake and was not without due inquiry.

(*d*) That the publication of the petition was made on a privileged occasion in pursuance of a duty which lay on him to point out to the Government Agent that the appellant was disqualified from election as Chairman of the Village Committee.

The learned trial judge upheld the defendant's contentions dismissed the plaintiff's action. In appeal, the Supreme Court set aside the finding of the District Judge and awarded the plaintiff Rs. 1,000/- as damages and costs in that class in both Courts. The facts are fully set out in the judgment.

(1) **Held :** That under the Roman-Dutch Law

(*a*) the truth of a defamatory statement is no defence.

(*b*) a defamatory statement made on a privileged occasion is not actionable unless it is made with express malice.

(*c*) the fact that a defamatory statement is made raises a presumption that it was made maliciously.

(*d*) the presumption of malice can be rebutted by proof that the allegation was made on a privileged occasion.

(*e*) the defence of privilege cannot prevail if there is proof of express malice.

(*f*) a privileged occasion means an occasion when a right exists or a duty is imposed to give *bona fide* utterance or publication to what one believes to be the truth.

(*g*) a privileged communication means a communication made *bona fide* upon any subject matter in which the party making it has an interest, or in

reference to which he has a duty, to a person having a corresponding interest or duty.

(*h*) Duty means not only duties legally enforceable but even moral and social duties of imperfect obligation.

(1) it is not necessary in the first instance to prove special damage. If the words uttered or published are clearly defamatory on the face of them, it will be prsumed that damage has resulted from them as a natural consequence, and the courts will give judgment for general damages, not only as compensation for the damage which the law presumes to have resulted therefrom, but also for the insult (contumelia) suffered by the person defamed.

(2) That the defendant's petition to the Government Agent cannot in law be regarded as a privileged communication.

(3) That in the circumstances of this case there was proof of express malice on the part of the defendant

H. V. Perera with *S. J. V. Chelvanayagam* and *C. Seneviratne* for plaintiff-appellant

N. E. Weerasuriya with *Rajapakse* and *Tillainathan* for defendant-respondent.

ABRAHAMS, C. J.

This is an appeal against the judgment of the District Judge, Jaffna, dismissing a claim for Rs. 10,000/- damages said to have been suffered by the appellant through the publication by the respondent of defamatory statements.

The appellant, at the time that he suffered the wrong of which he complained, was president in the Village Karainagar. He was manager of the school and proprietor of the Temple and was worth over a lakh of rupees. The respondent was also resident in the same village. He was a relation of the appellant's and they were apparently on amiable terms until certain events took place. On the 30th of May, 1932, there was a Village Committee election held under the Village Communities Ordinance, No. 9 of 1924. Both the appellant and the respondent stood as candidates and they were both elected. The successful candidates are elected by a show of hands, and the appellant alleged at the trial of the action and called certain witnesses to support him that the respondent held up his hand in his favour. This the respondent denied and brought evidence in support of his denial. The learned District Judge did not mention the matter in his judgment because he formed an unfavourable view of the appellant and said that he preferred the respondent's evidence. It is more than probable that he refused to believe the appellant on this point and moreover it is hardly likely that in the forest of hands that were raised any particular person would have been noticed.

About the end of June the Government Agent of the Northern Province, in pursuance of his duties under the Village Communities Ordinance, gave notice that there would be an election for the Chairmanship of the Village Committee of Karainagar on the 8th of July, 1932. Under the Ordinance, members of the Committee have the right to elect their Chairman. The Government Agent is required to be present and to decide matters of

procedure, but he has no vote. On July, the 6th, the respondent sent a petition to the Government Agent addressed to him at Jaffna. That petition read as follows :—

" The humble petition of Kanthapper Subramaniam of Karainagar East.

" Respectfully shewth.

" The petitioner begs to submit that he is one of the members of the " Village Committee of Karainagar and one Sangarapillai Kanapathipillai " of Karainagar East is also a member of the said Committee and he is now " seeking for the presidentship of the said Village Committee. According " to sub-section (e) of section 18 of the Village Committees Ordinance No. 9 of 1924, he is not eligible to be elected as a president or a member.

" 2. In case No. 18417 of the District Court of Jaffna the said " Kanapathipillai had submitted that he was in jail for three months hard " labour (R.I.) in Keddah having misappropriated the Government money.

" 3. In case No. 16593 of the District Court of Jaffna in the judg- " ment it is stated that this Kanapathipillai is a man who bears an unsavoury " character and who has been in jail in the Federated Malay States, is the " man who is engineering in this case.

" 4. In case No. 12196 of the Police Court of Jaffna he was convicted " under section 287 of the Ceylon Penal Code and he was fined Rs. 7/50.

" The petitioner brings these facts to your honour in the hope that you will be pleased to view the case in its true light and have him disqualified " from the membership.

" For which act of benign goodness the petitioner shall ever pray."

It is upon the allegation in the petition that the appellant founded his action. He said that the first allegation is untrue because although he was imprisoned in Keddah, in the Federated Malay States for 3 months, it was for the offence of attempting to cheat and not for having misappropriated Government money, and this is actually the fact. He said that the second allegation is untrue in that what was actually said in the judgment referred to was the following " It is suggested that one Sangarapillai Kana- " pathipillai is a man who bears an unsavoury character and a man who has been in jail in the Federated Malay States is the man who is engineering this case," and he contended that the two statements were widely different. He finally said that the third allegation was totally untrue since the man who was convicted in the case mentioned is another person with a somewhat similar name. The respondent submitted at the trial that the first allegation was made in perfectly good faith and was founded on an admission of the appellant in the case in question that he had been convicted of embezzlement. A reference to the case in question discloses that it was recorded that the appellant had made such an admission. Embezzlement is a term unknown to the penal law of Ceylon and the penal law of Malaya, both of which are founded on the Indian Penal Code which does not include the term Embezzlement'. It is a little difficult to understand how that term

got upon the record, but it did get on the record and the appellant was said to have used it, and I think that the respondent was entitled to rely upon its use for what it was worth to him. As regards the second allegation, the respondent contended that there was no difference in substance between the allegation as he made it and the actual statement in the judgment. The learned District Judge accepted that view, and I propose to comment on this finding later. As regards the third allegation, the respondent says that he made a mistake, but that it was a *bona fide* mistake and was not made without due inquiry. The learned Judge accepted his submission. It was also contended by the respondent that the publication of the petition was made on a privileged occasion in pursuance of a duty which, the respondent submitted, lay on him to point out to the Government Agent that the appellant was disqualified from election as Chairman of the Village Committee. It is desirable that I should go into the facts relating to the publication of the consequent happenings.

It was alleged by the appellant at the trial, and was not contradicted, that when the Committee met on the 8th of July to elect a Chairman his name was proposed and seconded, so was the respondent's and two other names. The respondent said " I sent a petition to you, Sir, which must be inquired into." The Government Agent said nothing and then the respondent handed over a copy of the petition and also of the " Ceylon Daily News " of June the 5th, 1920, containing an appeal against the order of the Police Magistrate, Colombo, directing the surrender of the appellant to the Keddah authorities. It should be mentioned here that the appellant had appealed in Keddah against his conviction. He had been released on bail pending the appeal, but before the hearing of the appeal he had absconded to Ceylon, whence his surrender was demanded. The Supreme Court of Ceylon, dismissed the appeal against the order for surrender and the appellant was taken back to Keddah where he eventually served the sentence of imprisonment which had been passed on him. The appellant then went on to say that the Government Agent asked him whether the contents (presumably of the petition and the newspaper report) which were read over were true. The appellant admitted that he had been sentenced to three months imprisonment, and the Government Agent said that in the absence of a certified copy of that record he would permit him to stand for election. These proceedings were briefly recorded in the Minute made by the Government Agent. It must be observed in view of the fact that the petition referred to the ineligibility of the appellant to be elected as a " President or a Member " by virtue of sub-section (e) section 18 of the Village Communities Ordinance, that under that provision of the law a person shall be disqualified to be elected or to be a member of any committee if he has been convicted of theft, fraud, forgery, perjury, or of any infamous crime. The appellant was duly elected Chairman and the respondent subsequently moved for a Writ of Quo Warranto against the appellant in the Supreme Court on the ground that a conviction for attempt-

ing to cheat brought him within the scope of a disqualification under the provision abovenamed. But the Supreme Court dismissed the application on the ground that an attempt to cheat did not fall within the category of the criminal offences mentioned in that provision.

The Roman Dutch Law on defamation differs from the English Law in one important respect, viz: that the truth of a defamatory statement is no defence. It is identical with the English Law in another important respect, that a defamatory statement made on a privileged occasion is not actionable unless it is made with express malice, that is to say with actual ill-feeling or malice in the popular or general sense.

To explain the law in another way, the fact that a defamatory statement is made raises a presumption that it was made maliciously. This presumption can be rebutted by proof that the allegation was made on a privileged occasion, but this privilege can be destroyed by proof that the allegation was made with express malice. A privileged occasion is defined to mean an occasion when a right exists or a duty is imposed to give *bona fide* utterance or publication to what one believes to be the truth, (De Villiers ' The Roman and Dutch Law of Injuries,' 1899, Ed. p. 208), and privileged communication is defined to mean a communication made *bona fide* upon any subject matter, in which the party making the same has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty ; and by the term 'duty' is here meant not only duties legally enforceable but even moral and social duties of imperfect obligation. (Maasdrop Vol. IV, 1909 Ed. p. 100). It would appear that a communication made on a privileged occasion can only be a privileged communication when utterance or publication is so given to what one honestly believes to be the truth, and there seems to be a presumption in favour of a communication made on a privileged occasion being a privileged communication ; at all events, he who asserts that it is not is required to prove his assertion.

Now it was contended at the trial, and it was accepted apparently by the learned Judge, that there were two occasions on which publication of defamatory statement was made. The first of these was supposed to be on July the 6th when the petition was transmitted to the Government Agent, and the second was on July the 8th when the meeting to elect the Chairman of the Village Committee was held and when the respondent made reference to the allegation in the petition and required the Government Agent to deal with them. It is convenient to take the second of these occasions first and to consider whether it can be regarded as a privileged occasion. The learned District Judge clearly thought that it could. It is convenient here to quote his exact words, " With regard to the petition " sent to the Government Agent two days prior to the meeting, it " was urged for plaintiff that the occasion was not privileged. It was more " or less conceded on both sides that the Government Agent had no power " to disqualify from being elected to the Chair, any person who has already

" been elected to the Committee. Such being the case he was under no duty " to receive the communication, and I do not quite agree with this " argument. It would appear that the Government Agent had in fact on " a previous occasion exercised powers of disqualifying a member from voting " at election of Chairman—Vide D13. The Government Agent is the person who presides at the meeting when a Chairman is elected. He is bound as " such to receive objections to the candidature and make his ruling thereon. " I therefore think that there is a duty cast on him to receive objections and " give his ruling. The objections may be of such a nature that even if " established, though sufficient to disqualify a man from being elected a " member, would not justify or empower the Government Agent from " disqualifying a member from being elected Chairman. Members may " call on him to exercise powers which in fact he does not possess under " the Ordinance. But his duty is clear. In conducting the meeting he msut " listen to the objections and make his ruling thereon. In that sense there " is a duty cast on him to receive a communication like the one complained "of and a duty or a right of every member to make it. A communication " therefore made to him at the meeting seems to me to be one made on a " privileged occasion." If I understand this reasoning aright, the learned Judge appears to think that all that was necessary for the respondent to show was that there was a duty imposed upon the Government Agent to receive and to examine any objections that might be advanced against the election of a particular person as Chairman. Assuming that there is such a duty cast upon the Government Agent, how can it be said that there is a duty imposed upon every or any member of the committee to make to the Government Agent allegations which, even if they were true, would not justify the Government Agent in entertaining them ? If the only ground for disqualifying a person from being elected to a particular office were a conviction for felony, how can it be the duty of anybody to make an objection to his election on the ground that he was convicted of being drunk and disorderly ? To quote Tindal C. J., in *Coxhead vs. Richards* (135 E. R. 1069, at page 1080) ; " If the defendant took a course which was not justifiable " in point of law, although it proceeded from an error in judgment only, " not of intention, still it is undoubtedly he, and not the plaintiff, who must " suffer for such error." It is not the person who publishes defamatory matter who creates the privilege which he claims for the publication.

I am therefore unable to agree with the learned District Judge that, at any rate, so far as the second and third allegations in the petition are concerned, they are protected. As regards the first allegation, it has been argued here, as it was argued in the lower Court, that even assuming the facts of the conviction to be as they were said to be true, the Government Agent had no power to declare any person who was a duly elected member of the Committee to be disqualified under the Ordinance from membership and therefore from election as the Chairman, and that despite the fact that the Government Agent had taken the required action at a previous election

elsewhere. I do not, however, think it necessary to canvass the powers of the Government Agent in this matter.

As regards the first publication, namely that of transmission of the petition to the Government Agent on the 6th of July, the learned Judge is of the opinion that that also could have been considered as having been made on a privileged occasion. He founds his decision very largely on the case of *Andrews vs. Nott Bower* (1895, 1 Q. B. 888). A copy of the report of the case was not available to the learned Judge, and the condensed information or digest of the case which he apparently consulted misled him, which illustrates the danger of founding conclusions upon cases, the full facts of which have not been consulted. In *Andrews vs. Nott Bower* the Magistrate for the borough, for the purpose of facilitating the business of the general annual licensing meeting, ordered the defendant, who was head constable of the borough, to issue to persons having business before the meeting copies of a report made by him to the Magistrates stating the grounds of objections taken to the renewal of licenses. The plaintiffs in the action proceeded against the head constable, but it was held by the Court of Appeal, who found the case to represent certain difficulties, that the publication was made upon a privileged occasion since it was made on the authority of the Magistrate and by their direction, and undeniably the publication of the report was convenient and desirable for the purpose of the popular and effective discharge of the business of the Sessions. I do not see how it can be argued for a moment that this particular case bears any analogy to the case before us. The Government Agent did not call for any objections, and I fail to see how it would be necessary or even useful for the purposes of any duties that he had to perform at the election meeting for him to have any beforehand. Assuming any duty upon his part to entertain objections at the meeting he would have to perform a quasi judicial duty in respect thereto, and it seems to me that the action of the respondent in forwarding the petition was very similar to that of the defendant in a civil case who, prior to the trial, forwards to the Judge who is to try the case a letter calling upon the Judge to non-suit the plaintiff in view of his bad character and of a conviction for a criminal offence. These allegations would no doubt be privileged in Court but obviously would not be privileged when published to the Judge prior to the hearing of the case.

Mr. Weerasooriya, on behalf of the respondent, made a somewhat shy endeavour to persuade us to hold that there was a moral duty imposed upon the Government Agent to see that an undersirable candidate should not be elected to the Chairmanship of the Committee, and that there was therefore a corresponding moral duty imposed upon any member of the Committee to bring to his notice the moral defects of any candidate for that office. I should think that it would be thoroughly undesirable for the Government Agent to do anything persuasive or dissuasive in connection with the free choice of the Village Committee. It is not of very much use to establish by law any elective system if any outside interference is

justified. If I may say so, the Government Agent had a very proper conception of his position in respect to the election when he completely ignored the 2nd and 3rd allegations in the petition and applied himself only to the consideration of the proof of the 1st allegation.

I am further of the opinion that even if these communications were made on priviliged occasions, express malice was proved against the respondent. There is a number of facts, the cumulative effect of which convinces that his object in publishing the allegations in the petition was not the discharge of a public duty but the indirect motive of getting rid of a rival candidate. In his evidence at the trial he says that the appellant was a troublesome and quarrelsome man and was not fit to be elected as a member of a Village Committee. At the time of the election he knew that he was not fit to be elected but did not object to his name being submitted for election because he had no materials in hand to prove his conviction and did not know that his name was being submitted till the last moment. He did not tell the fact of the conviction to the presiding officer because he thought that he would be asked to produce a certified copy of the case. At that time he says he had the public interest at his heart (sic.) Now according to the respondent he knew all about this conviction at the time of the election of the Village Committee, and assuming that he was taken by surprise, if he really regarded the appellant as being unfit to remain a member of the Committee, it seems remarkable that he should wait until he discovered that the appellant was a rival candidate for the Chairmanship. The wording of his petition indicates that he had examined or in some other way become acquainted with the disqualificatory provisions of the Village Communities Ordinance. He had ample time to send to Keddah for a copy of the record of the conviction or he could have applied in Colombo for a copy of the extradition proceedings in the Magistrate's Court. A man who could go to the trouble of hunting among the Court files in Jaffna for material to use against the appellant, and a man who being baulked in his effort to move the Government Agent then endeavoured to move the Supreme Court for the issue of a Writ of Quo Warranto, is certainly sufficiently intelligent and resolute to perform a public duty which he claimed to have at heart. It would be too cynical to suggest that the appellant was morally fitted to be a member of the Committee when morally disqualified from election to the office of Chairman, and the respondent does not make any such suggestion.

We then have the terms of the petition itself. It will be observed that the respondent makes a distinct reference to the disqualificatory provisions. He must be taken to have appreciated that the second and third allegations provided no ground for legal disqualification. The proper person to whom these two allegations should have been submitted were his fellow members on the Village Committee. Why then did he place them before the Government Agent who had no power to disqualify on these grounds? It appears to me that he hoped that in some way the Government Agent

might intimate to the Committee that the appellant was unworthy to be their Chairman. This underhand method, to my mind, ousts the protestations of a public duty.

There is also the particular wording of the 2nd allegation to which I made previous reference. This is a blunt and categorical statement that the District Judge stated that the respondent bore an unsavoury character and was engineering that particular law suit. The learned Judge in this case was of the opinion that the clause " a man who bears an unsavoury character and has been in jail in the Federated Malay States " was the opinion of the Judge and not repetition of the suggestion, on the ground that if it was not the opinion of the Judge the sentence would have been worded differently. Unfortunately judgments are not always written meticulously, and in my opinion it is by no means certain which construction is the correct one, but certainly the omission of the phrase ' It is suggested ' leaves the allegation free from ambiguity. When one sees that the words of the judgment have been so distorted as to give the clear impression that the judge in that case accused the appellant of engineering litigation, which of course the Judge did not do, it seems clear that this was done deliberately by the respondent who wanted to blacken the appellant's character. Finally if the respondent is so zealous in the public interests why was he at such pains to collect prejudical material against the appellant and then not bring it before those people who had an interest in the appointment of a suitable chairman, namely his fellow members in the Village Committee. It seems to me that by the underhand method of addressing himself to the Government Agent he had hoped to obtain that officer's influence because he felt that his fellow members, if they were approached directly, would not respond satisfactorily to his approaches, and this seems confirmed by the fact that the appellant was elected in spite of everything that the respondent did. I think therefore that it has been established that the respondent acted with express malice and that the appellant is entitled to succeed in his appeal on this ground also.

There is then the question of damages. It is said in Maarsdorp, p. 89, that it is not necessary in the first instance to prove special damage. If the words uttered or published are clearly defamatory on the face of them, the law will presume that damage has resulted from them as a natural consequence, and the Courts will give judgment for general damages, not only as compensation for the damage which the law presumes to have resulted, therefrom, but also for the insult (*contumelia*) suffered by the person defamed. The learned Judge however held that even granting that the communication was defamatory and the occasion not privileged, the plaintiff was not entitled to recover any damages for the publication of allegation three, as he was of opinion that the appellant had no reputation to lose. He also says that it was more or less public property that the plaintiff was convicted of an offence involving dishonesty and therefore the first allegation could have caused him no damage. This view appears to me

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to stultify the principle of the law as expressed in the passages from Maarsdorp above quoted, and Counsel for the respondent makes no effort to sustain the learned Judge's view but merely pleads that a due sense of proportion would be observed when damages are to be awarded, which plea I unhesitatingly accept. I think the best proof of the reputation which the appellant enjoyed in the neighbourhood is the fact that he succeeded in the candidature as Chairman and that at the next election for membership of the Village Committee he was again returned. His neighbours were evidently of the opinion that notwithstanding his past, of which they were admittedly aware, he was at least as good as any of them.

The appellant's original claim for Rs. 10,000/- damages was ludicrous. There is, however, nothing to be said in favour of the respondent. He acted maliciously and displayed great energy in collecting mud to fling at the appellant. I would award appellant Rs. 1,000/- damages, costs of this appeal and costs in that class in the Court below.

Appeal allowed.

Koch, J.

I agree.

Present : MOSELEY, J.

KATHIRASIPILLAI vs SUBRAMANIAM

S. C. No. 782—*P. C. No.* 27060 *Jaffna.*
Argued and Decided on 4th. February, 1937.

Maintenance Ordinance No. 19 *of* 1889—*Default of payment of maintenance—Distress warrant—Application to pay arrears by instalments—Order committing accused to jail—Does an appeal lie from such order.*

This is an appeal by the respondent to an action for maintenance from an order committing him to jail for failure to pay maintenance for eight months.

At the argument a preliminary objection was taken to the appeal on the ground that no appeal lay from an order made under Section 9 of the maintenance Ordinance committing a person to jail for neglect to comply with an order for maintenance. Counsel cited the following cases in support of his contention 11 N.L.R. 289, 12 N.L.R. 263, 14 N.L.R. 244 at 246.

A. W. Nadarajah with *M. Tiruchelvam* for respondent-appellant.
H. W. Thambiah for applicant-respondent.

The objection was upheld and the appeal was dismissed.

Appeal dismissed.

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

N. RAMASAMY CHETTIAR vs. THE ATTORNEY GENERAL

S. C. No. 297 (*Final*)—*D. C. Colombo No.* 3130.
Argued on 24th February, 1937.
Decided on 5th March, 1937.

Estate Duty—Application for refund of duty overpaid—Section 27 *of the Estate Duty Ordinance No.* 8 *of* 1919—*Death of Member of Undivided Hindu Family—Claim that property on which duty was paid was Joint Property —Business carried on with ancestral funds—Burden of proof—What amount of duty is payable in such a case—Money paid under a mistake of law.*

This action was brought by the plaintiff for the recovery of a sum of Rs. 23,954/82 from the Crown. This sum, he alleged, was estate duty overpaid by the Administrator of the Estate of Ramasamy Chettiar who died in India leaving property in Ceylon.

It was claimed on behalf of the plaintiff that Ramasamy was a member of a Hindu Undivided Family consisting of three persons in all and having joint property. On his death duty became payable only on one-third of the family property in Ceylon.

The claim was contested by the Crown both on grounds of fact and law. The District Judge held against the Crown. An appeal was taken from this decision.

The chief points taken at the argument were :—

(*a*) That there was no proof that the property, set-out in the Declaration and Statement of Property furnished under the Estate Duty Ordinance, was joint-property.

(*b*) That Section 27 of the Estate Duty Ordinance did not apply to a case where the property on which duty had been paid was not found to be over-valued by the Commissioner.

(*c*) That the Commissioner alone had the right to decide whether a refund should be made under Section 27.

(*d*) That Section 27 created no right of action against the Crown for the recovery of duty overpaid.

(*e*) That the duty had been overpaid through a mistake of law and was therefore not recoverable.

Held : (*i*) That the burden of proving that a business carried on by a member of an Undivided Hindu Family is a joint business is on the person who claims it to be joint-property.

(*ii*) That the joint-property of a Hindu Family is not property the managing member is " competent to dispose " within the meaning of the expression in the Estate Duty Ordinance.

(*iii*) That the subject has a right of action against the Crown for a refund of duty overpaid in any case in which the Commissioner refuses to refund such duty.

E. A. L. Wijewardene Solicitor General with *R. R. Crossette-Thambyah Crown Council* for defendant-appellant.

H. V. Perera with *Tissaverasinghe and Chelvanayagam* for plaintiff-respondent.

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SOERTSZ, J.

Ramasamy Chettiar died leaving an estate in Ceylon that fell to be administered. Arunachalam who had held his Power of Attorney and had been the Manager of his business here, applied for, and obtained Letters of administration. In this case, we are concerned with the question of what the true value of his property that was subject to Estate Duty was. In the declaration made by the administrator in compliance with Section 21 of the Estate Duties Ordinance, he treated all the movables Ramasamy died possessed of in Ceylon as the property of Ramasamy alone, and the Commissioner of Stamps valued them for the purpose of Estate Duty at Rs. 389,085/– and claimed a sum of Rs. 23,954/82 with interest at 4 per cent from the 6th of September 1933 as the duty payable. When the administrator had paid a sum of Rs. 20,610/53 on account of the duty due, he and the others concerned in the administration of Ramasamy's estate appear to have realised that only a third of the movables declared and assessed for the purpose of estate duty, belonged to Ramasamy, and that estate duty had been overpaid. Arunachalam evidently felt too embarassed to take action in the matter himself and renounced his administratorship. The present plaintiff took his place and launched this case to obtain a refund of the amount alleged to have been overpaid. He maintained that under Hindu Law, Ramasamy was entitled only to one-third of the movables in Ceylon and that the other two-thirds belonged to his two sons. The trial Judge found in favour of the plaintiff and entered decree for him for a sum of Rs. 12,190 less $2\frac{1}{2}$ per cent discount, with interest at 9 per cent from the date of the decree, and costs. He held that Ramaswamy was a member of a joint Hindu family, and that the business he carried on in Ceylon was carried on with ancestral funds and that, therefore, the movables found at the time of his death belonged to him and his two sons jointly. The appeal is against these findings. The Solicitor-General who appeared in support of the appeal, pressed it on the following grounds: firstly, that there was not satisfactory evidence for holding that Ramaswamy was a member of a joint Hindu family; secondly, that there was not satisfactory evidence for establishing the allegation that the funds with which Ramaswamy did business in Ceylon were coparcenary funds; thirdly, that, assuming that Ramasamy was a member of a joint family, and that the funds he used were coparcenary, the whole estate must be deemed to have passed for the purpose of estate duty under Section 8 (1) a and/or 8 (1) d; fourthly, that the questions whether there had been overpayment and whether there should be a refund were entirely for the decision of the Commissioner of Stamps, and that Courts of Law had no jurisdiction in the matter; fifthly, that if the Courts had jurisdiction, the plaintiff had misconceived his remedy when he proceeded by way of a regular action instead of by way of Mandamus or Petition of Right. The first two submissions involve questions of fact. In regard to these, it is important to bear in mind that Ramaswamy was a native of Sembanur in Southern India,

and was a Hindu, and that 'the joint and undivided family is the normal condition of Hindu Society' (Mulla). Speaking of the members of this community doing business in Ceylon, Drieberg J. observed in *Adiacappa Chetty v. Thomas Cook & Son*, 31 N.L.R. at p. 405 "they are Hindus from South India among whom the joined family system prevails." With these facts in mind, it is easy to understand the trial Judge's acceptance of Swaminathan's evidence when he says "From my knowledge, this system of living in joint family ownership has been the law and custom of my family and of my father and his father as long as I can remember," as sufficient proof of the fact that Ramaswamy was a member of a joint Hindu family. Once a joint Hindu family has been established, it follows, almost as a corollary in the case of families, that in addition to 'jointness' of food and worship, own property, that within that family there is a narrower body called the 'coparcenary' composed of those members who acquire by birth an interest in that property. This coparcenary usually consists of sons, grandsons and great grandsons, and the property that falls to them is ancestral property as distinct from self-acquired property. The question, then, is whether the property with which we are concerned in this case was coparcenary or self-acquired. On this question, Mulla says on page 256 of the 1936 Edition of his "Principles of Hindu Law:" there is no presumption that a family, because it is joint, possesses joint property or any property .....to render property joint, the plaintiff must prove that it was purchased with joint family funds, or that it was produced out of the joint family property, or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a Court in the same way as any other fact, namely by evidence." This was the view adopted *in Periyacaruppen Chettiar v. The Commissioner of Stamps*, 6 Ceylon Law Weekly 133. The burden was, therefore, on the plaintiff to prove that Ramasamy's business here was carried on with ancestral funds. For this too, he relies entirely on the evidence of Swaminathan.

Swaminathan testifies as follows: "during his lifetime, Ramasamy lived in Sembanur with his family, and he had his business in Colombo. My father had lived in Sembanur before him. I and my other brothers and my father had our property in common. I am familiar with the system in India of owning property as a joint Hindu family. That is the nature of my property.....during my father's lifetime, the properties were divided. That was in 1910. It was divided among the five of us .....After that division, I am aware that my brother Ramaswamy with the share that he got, did business in Colombo. He joined the three brothers including myself and carried on business in partnership.....he was trading there with the moneys that he got as his share out of the joint property.....that business was wound up.....at that winding-up, each got his share. Ramaswamy carried on business under the Vilasam of K.M.N.R.M. That was his own business. That was from 1915. That was the same business he

was carrying on up to his death." This evidence if accepted, affords ample proof that the joint family to which Ramaswamy belonged owned a joint estate, and that the funds with which he conducted his Ceylon business came to him out of ancestral funds as a result of the 1910 partition. This evidence is very much stronger than the evidence upon which the unsuccessful plaintiff in *Periyacaruppen Chetty v. The Commissioner of Stamps* 6 C.L.W. 133, relied. The learned Solicitor-General, however, urges that the evidence of Swaminathan on these points, should not have been accepted by the trial Judge for two reasons, namely, that it is the evidence of an interested party, and that it is inconsistent, with documents D1, D2, D3. It is no doubt a fact that Swaminathan is interested, but on the other hand, it is a near kinsman who would be able to speak with authority on matters of this nature.

In regard to the documents refered to, D1 is the declaration made by the first administrator Arunachalam under Section 21, including all the movables as the property of the deceased. This is prima facie, a point against the plaintiff, but it is, by no means, conclusive. It is easy to understand Arunasalam taking the view that although Ramasamy belonged to a joint family, and carried on his business with coparcenary funds, the whole estate was, none the less, liable for estate duty. That, I believe, was the assumption on which all Chettiar Estates in Ceylon were administered till the question arose in a recent case and served to instant local Chettiars as to the correct position in the matter. D2 is an extract from the Register of Business Names. It shows that the business Ramasamy carried on here was registered by him as his individual business. In my opinion, this can hardly be said to be a point against the plaintiff's case. The father as the manager or 'Karta' of the joint family is entitled to carry on a business with coparcenary funds, and when he does so, either by himself or in partnership with a stranger or strangers, the other members of the joint family do not become partners in that business. The manager is, however, accountable to the family in regard to that business. Mulla, on the authority of a number of cases cited by him on page 261 of his 1936 edition, says "it is competent to the manager of the joint family business, acting on behalf of the family, to enter into partnership with a stranger. But not all the members of the joint family, but only such of its members as have in fact, entered into partnership with the stranger, become partners. The Manager is, no doubt, accountable to the family, but the partnership is one exclusively between the contracting members and the stranger." That is the view adopted locally in *Adaicappa Chettiar v. Thomas Cook & Son.* Ramasamy, therefore, correctly described himself as the individual who was carrying on the business. D3 serves but to confirm this view. It is a notice given by Ramasamy's elder son to the Registrar of the fact that his father died on the 5th of September 1932 and that the business he had been carrying on, had come to an end. To say the least, I do not think these documents are inconsistent with the plaintiff's present case. The trial

Judge himself considered these documents when he was examining Swaminathan's evidence, and he came to the conclusion that that evidence was true, and that the claim made in this case was made *bona fide*.

I see no reason for disturbing these findings of fact. On these findings, only a one-third share of the movables was the property of the deceased, and only that share would, ordinarily, be liable for estate duty. But, the Solicitor-General contends that by operation of sections 8 (1) a and 8 (1) d, the entire movables must be deemed to have passed, bacause they were (*a*) " property of which the deceased was at the time of his death competent to dispose," and/or, because they were (*b*) " property which the deceased, having been absolutely entitled thereto has caused to be transferred to or vested in himself and any other person jointly either by disposition or otherwise."

In my opinion, upon a proper interpretation of both these sub-sections of section 8, these contentions fail. The words " competent to dispose of " are explained in section 2 (2) as follows : " A person shall be deemed competent to dispose of property, if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property ; and the expression ' general power ' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit." Now, under the Hindu Law governing joint families, the manager or ' karta ' has large, indeed very large powers. He may enter into contracts, he may borrow money, give valid discharges, alienate property for ' legal necessity ' and may even make gifts of a proper kind and within reasonable limits. But, he is always accountable to the family for his acts, and his coparceners are entitled to pursue their shares improperly alienated, and in certain circumstances, to recover them. See the rulings of the Privy Council in *Deen Dayal v. Jugdeep Narain* 1877, 3 *Cal.* 198 ; *Suraj Bansi Koer v. Sheo Persad* 1880—5 *Cal.* 148 *Hardi Narain v. Ruder Perkash* 1883—10 *Cal.* 626. It is obvious that a person who can only alienate for 'legal necessity' can only gift within certain limits, and is accountable to others for the ancestral property in his hands, cannot be appropriately described as one who is free to dispose of that property 'if he were *Sui Juris*', or 'as he thinks fit.' In regard to the submission that the entire property passed under section 8 (1) d, the argument, as I understand it, was that it passed because the deceased had caused what had become his absolute property in consequence of the partition of 1910, to be vested in himself and his sons jointly, when he married and begot them. It is contended that in that emergency, the entire property was caught up by virtue of the word ' otherwise ' in the phrase " caused to be transferred to or vested.....by disposition or otherwise." I find myself quite unable to subscribe to that proposition and I fully appreciate the tentative manner in which the learned Solicitor-General submitted it for our consideration. For one thing, it is hardly correct to say that Ramasamy became absolutely entitled to the property in question on the partition of 1910,

for although on that date, it became in a sense his absolute property, it remained subject to the incidence of the law governing the community to which he belonged. Morever, it seems clear that 'otherwise' in the context means by disposition or other juristic acts, and does not include ' by operation, of law.' The vesting of ancestral property in sons takes place in the joint family by operation of law, on their birth. Mulla says on page 230 " a coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof." It can scarcely be said that the birth of the male of the species lies so much at the bidding or under the control of the father as to justify its being spoken of in anything but a loose sense, as ' caused ' by him. ' *Cui tanta deo permissa potestas* ' ?

The next point taken by the Solicitor-General is that the Commissioner of Stamps is the sole judge of the question whether there has been overpayment and whether there should be a refund. The Courts, he says, have no jurisdiction in the matter. In this connection we were referred to the case *in Re Nathan, Law Reports* 12 *Queens Bench p.* 461. That case arose on an application made under section 23 of 5 & 6 Victoria, Chapter 79, which is the counterpart of section 28 of our Estate Duties Ordinance. These sections provide that " when it is proved by affidavit or declaration on oath or affirmation and proper vouchers *to the satisfaction* of the Commissioners.....

Brett M. R. commenting on a similar argument addressed to the Court, said that it was not necessary to decide the point, but that he would " be very loth to hold that that is so, and to think that there is no remedy open to persons in the position of the prosecutor.....and that the officials in a department of the Government have been constituted the sole and exclusive judge whether they ought to be satisfied or not." In this case too, it is not necessary to decide that point, for the plaintiff's claim is not made under section 28, but under section 27 of the Ordinance. In section 27, the words ' to the satisfaction of the Commissioner' do not occur. The simple words are 'if at any time within three years..... the value of the *property on which estate duty has been paid is found* to exceed *the true value of the property subject to estate duty*.....it shall be lawful for the Commissioner of Stamps, and he is hereby required to return the amount of duty which had been overpaid." In the interpretation of this section, I have derived much assistance from the judgment of Brett M. R. in the case of in *Re Nathan.* The learned Master of the Rolls points out that the section he was considering was an enabling section which gives power to servants of the Crown to whom money has been paid to get back without a direct order from the Crown in each particular case, from some other department of the executive but which is, after all, from the Crown and out of the general fund into which it has been paid, the money which is to be repaid. But, if the servants in question do not act in pursuance of their power and the requirement imposed by the statute, the prosecutor's

or plaintiff's right, if any, is against the Crown, for although the statute imposes a duty on the Commissioner, it is not a duty which raises any relation between him and the plaintiff, and, therefore, the duty he owes is not to the plaintiff, but to the Crown. It was money paid into his hands for the use of the Crown, and he has no right to hold it against the directions given to him by the Crown. Here the Crown has given express directions by enacting that '*he is hereby required to return*'.....

The clear implication of these observations of the Master of the Rolls is that if the Commissioner neglects or refuses to perform the duty cast upon him by the statute, an action lies. But that action lies against the Crown, provided, of course, the Crown is liable to be sued. The point is that the subject is not left without means of relief if the official concerned refuess or fails to perform his duty. If it was the intention of the legislature to establish so surprising a state of things, very clear words were required for the purpose. An action or some proceedings for the obtaining of redress must be held to lie. In England, *no action* lies against the Crown. The subject must seek redress for his grievance by way of a *petition of right.* The position is, however, different in Ceylon. It was ruled by the Collective Court many years ago in *D. M. Jayawardene v. Juanis Fernando and the Hon. the Queen Advocate* 4 *S.C.C.* 77 that "the practice adopted here of suing the Crown in the name of the Queen's Advocate both in real actions for the recovery of specific property, and in actions for the recovery of money due ex contractu has prevailed here for a long series of years, and has been recognised by this Court in hundreds of decisions—indeed has not, so far as we can ascertain, been called in question until now .....under these circumstances we think it too late, at this day, to contest in this Court the validity of this practice." An action therefore, lies against the Crown and after the Civil Procedure Code was enacted, the Attorney-General is the proper party to be sued. It has not been contended that in this particular case an action does not lie against the Crown on any other ground. If therefore, an action lies, the Solicitor-General's contention that the plaintiff should apply for a Mandamus fails, for a Mandamus is a last resort and lies only when there is no other remedy. Likewise, his contention that the plaintiff's remedy was by petition of right, fails, for as pointed out in the Collective Court case, such a proceeding is not known locally.

In reply to respondent's counsel, the Solicitor-General contended further that the plaintiff must base his action either on an allegation of a mistake of fact or mistake of law. He said that there is no evidence that there was any mistake of fact — Arunachalam who could have spoken on the point had not given evidence. There could be no action founded on a mistake of law, because the correct view in Roman Dutch Law was that taken by Kotze J. in *Rooth v. State*, that ignorance of law or mistake of law excuses no one. See Nathan Vol II. 1913 edition pp.617, 618. But, the simple answer to this argument is that the present action is founded on

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the statute which gives a person, who is found to have overpaid estate duty, the right to a return of the amount overpaid during a certain period, regardless of the case of the overpayment. In my opinion, the appeal fails and must be dismissed with costs.

Appeal dismissed.

POYSER, J.

I agree.

Present : SOERTSZ, J.

K. ELONONA vs W. WILLIAM FERNANDO.

Application for Workmen's Compensation by Commissioner under Section 39 *of Ordinance No.* 19 *of* 1934.

Argued on 1st March, 1937.
Decided on 10th March, 1937.

Workmen's Compensation Ordinance No. 19 *of* 1934—*Person injured while loading into a cart machinery which had been installed in an old building in the demolition of which he had been engaged the day previous to the accident—Is the injured person entitled to compensation under the Ordinance.*

Held: That a labourer, who is injured when engaged in loading into a cart machinery from an old building in the demolition of which he had been engaged the previous day, does not fall within the definition of "workman" in Ordinance No. 19 of 1934, and is therefore not entitled to compensation.

J. E. M. Obeysekera, C. C., (Amicus Curiae)

SOERTSZ, J.

This is a matter submitted for the decision of this Court by the Commissioner for Workmen's Compensation under Section 39 of Ordinance No. 19 of 1934.

The question is whether the deceased who was injured while he was engaged in loading some dismantled machinery into a cart on the 8th of April 1936, and who died in consequence of that injury on the 21st of April 1936, can be said to have been employed " in the demolition of a building " when the accident took place, having regard to the facts (1) that the machinery he was loading into the cart was machinery which had been installed in an old building and was being removed to be set up in another building in Bingiriya, (2) that the deceased had been employed before the day of the accident in demolishing the walls of that old building in which the machinery that was being removed stood,

This question arises because only " workmen " who conform to the definition of " workmen " in the Ordinance and their dependants are entitled to compensation. The definition of " workman " in the Ordinance appears to have been evolved by (*a*) a general stipulation that his wages shall not exceed Rs. 300/– per mensem (*b*) by an enumeration of certain categories of employment (*c*) by an express exclusion of three classes of workmen.

It is, therefore, essential that a workman who claims or on whose behalf a claim is made for compensation should bring himself within one of the categories of employment enumerated in the schedule.

I have no doubt it must have been the intention of the Legislature to provide for a case like that of the workman with whom we are concerned in this case, for I can conceive no equitable ground on which he could have been deliberately excluded, but unfortunately the enumeration in the schedule is not exhaustive, and the plight in which this workman's dependants find themselves is due to the fact that this is a *casus omissus* from the enumeration.

The only possible category, upon the evidence, that can be said to be at all relevant to this is the one referred to by the Commissioner. It is No. 7 (a) in the schedule. It reads as follows :—"Any person who is..... employed in the construction, repair or demolition of any building which is designed to be or is or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof ....."

Now the evidence in this case is that the workman *had been engaged* in the demolition of a building *before* the day of the accident. He does not, therefore, appear to come within the ambit of Section 3 of the Ordinance which provides " if personal injury is caused to a workman by accident arising out of, *and in the course of his employment*, his employer shall be liable to pay compensation *et cetera*. The words " in the course of his employment " clearly mean in the context " in the course of his employment in one of the classes of work enumerated in the schedule."

This view is supported by the fact that in the case of workmen employed on buildings, repairing or demolishing, it is insisted that the buildings should be of a certain type or certain dimensions, most probably because of the risk that attends upon workmen engaged on such buildings. It would have been of no consequence to insist upon the type of dimensions of a building, if it was intended to provide compensation for workmen who *had been* engaged upon a building, but who were not so engaged, but were engaged in some other kind of work, at the time the accident occurred.

In my opinion, it is, therefore, clear that in order to make an employer liable for compensation, the accident should have happened while the workman was in the course of working in one of the enumerated classes of work.

The workman, in this case, was injured, not while he was engaged in demolishing the building, but while he was loading machinery into a cart. The answer to the question is in the negative.

Appeal dismissed

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

CHELLIAH PILLAI vs DEVADASAN & OTHERS.

S. C. No. 369—*D. C. Colombo No.* 2365.
Argued on 10th & 11th February, 1937.
Decided on 19th February, 1937.

Registration of deeds—Competing deeds—One registered in old folio, the other in a new folio having a cross-reference to the old folio—Section 15 *of Ordinance No.* 23 *of* 1927.

Held : That a deed registered in a new folio containing a cross-reference to the folio in which instruments relating to the same land were previously registered can in law be regarded as duly registered.

Weerasuriya with *E. B. Wickremanaike* for 1st added defendant-appellant.
H. V. Perera with *J. R. Jayawardena* for plaintiff-respondent.
D. S. L. P. Abeysekera with *C. T. Olegasagaram* for the 2nd defendantrespondent

POYSER, S. P. J.

The only question that arises on this appeal is whether the plaintiff's deed, Fiscal's Transfer No. 16839 of the 8th November 1934 take priority over the 1st added defendant's deed No. 2254 of the 1st December, 1924 by reason of due registration.

The material facts, which were admitted, are as follows :—The plaintiff's deed is registered (B 301/115) in a continuation of the folio in which the first deed relating to the land in question was registered and therefore is correctly registered. (See Jayawardene on Registration of Deeds, page 141 and the cases there cited).

The 1st added defendant's deed is registered in another folio, (B 170/238), which was commenced on the 3rd of September, 1919. These two folios however are connected by cross-references. In the top left hand corner of the folio where the plaintiff's deed is registered there appears the following :—" See B 170/238 ". Similarly in the top right hand corner of B 170/238 there appears " See B 243/254." (B 301/115) is a continuation of B 243/254).

In regard to the cross-references, there was no evidence or information as to when they were entered, and, Mr. Perera argued that as the first entry in B 170/238 was 3rd September 1919, and the first entry in 243/254 was

27th September, 1927, that such cross-references could not have been entered before 1927. This is a logical argument, but as Mr. Perera conceded that the cross-references in 243/254 must have been entered before his deed was registered in 1934, I propose to deal with this appeal on the footing that the cross-references were not entered before 1927. The question therefore is whether the 1st added defendant's deed was duly registered in 1927, for if it was, it takes priority over the plaintiff's deed.

The learned District Judge has held that as there was no doubt as to the identity of the land, a new folio should not have been opened and the cross-references are consequently of no avail, and in support of this finding he refers to Regulation 13 (3) of the regulations made under the Registration of Documents Ordinance, No. 23 of 1927, dated the 6th of January, 1928. This regulation lays down that the Registrar shall only register an instrument in the new folio if he is doubtful as to the identity of the land and shall connect the two folios by cross-references.

This regulation, however, was not in force when the 1st added defendant's deed was registered, consequently even if the District Judge's interpretation of the regulations were correct, which I am not prepared to admit, this case cannot be decided on such interpretation.

In my view the added first defendant's deed was duly registered so far as the plaintiff is concerned and this view is amply supported by authority. The case of *Mudalihamy v. Punchibanda*, (1) was very similar to this. The head note is as follows :—" The defendant's deed was registered "in the wrong folio but there was a side entry containing a reference to the "right folio. The plaintiff's deed was registered in the right folio which " also contained a reference to the folio in which the defendant's deed was " registered." Held that the defendant's deed was duly registered. *Schneider, J.* in the course of his judgment states :—" These references, " in my opinion, establish a connection between the volumes and folios " in which the two competing deeds are registered sufficient to facilitate " reference to all existing alienations or encumbrances affecting the land in " claim within the meaning of Section 15 and 16 of ' The Land Registration " Ordinance 1891.' I am unable to understand why the Registrar had not " registered the defendant's deed in the same volume and folio in which he "had registered the plaintiff's deed. The name of the land, the boundaries " and other particulars are identical."

In this case also I am unable to understand why the Registrar did not register the first added defendant's deed in the same volume and folio in which he had registered the plaintiff's deed, but whatever its reason may have been, the fact that the right and wrong folios were eventually connected by cross-references enables the first added defendant's deed to be treated as duly registered so far, at any rate, as the plaintiff is concerned.

Further, Section 15 of Ordinance No. 23 of 1927, which applies (sub-section 2) to instruments whether registered before or after the commence-

(1) 5 Cey Law Recorder p. 73

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ment of the Ordinance, contains a proviso which appears to meet this case. The material part of the section is as follows :—

> " Every instrument presented for registration shall be registered " in the book allotted to the division in which the land affected by the " instrument is situated and in, or in continuation of the folio in which " the first registered instrument affecting the same land is registered.
>
> " Provided that —
>
> " An instrument may, if the Registrar thinks fit, be entered in a new " folio, cross-references being entered in the prescribed manner so as to " connect the registration with any previous registration affecting " the same land or any part thereof."

This proviso would appear to give legislative effect to the decision in *Mudalihamy v. Punchi Banda*, (supra), and other reported cases on this point.

I would also refer to a later case, *Ramasamy Chettiar v. Palaniappa Chettiar*, (2) in which it was held, following *Silva v. Appu* (3), in connection with the question of the right or wrong folio for registration, that the right folio for registration of a deed was the one in which the first deed relating to a particular land had been registered. In this case there were no cross-references, and as appears from the judgment of Dalton, J. at p. 98, if there had been cross-references, this case would probably have been differently decided.

In view of the authorities cited, I would allow this appeal with costs both here and in the court below and direct that a hypothecary decree be entered for the first added defendant as prayed.

SOERTSZ, J.

I agree. At one stage, I was impressed by Mr. Perera's argument that a new folio opened by the Registrar without cross-references to the old folios was a wrong folio, and continued to be wrong folio even though the requisite cross-references were made upon it later. But on further consideration, I am of opinion that the words of proviso (*a*) of Section 15 of Ordinance 23 of 1927 are wide enough to support the interpretation that a new folio must be regarded as a right folio from the time the cross-references were entered. As pointed out by my brother, it was conceded in this case that when the plaintiff's deed came to be registered, there were cross-references on the new folio sufficient to facilitate reference to existing alienations and encumbrances. Therefore, I agree that the first added defendant's deed must be " treated as duly registered as far, at any rate, as the plaintiff is concerned."

I subscribe to the order made by my brother.

Appeal Allowed.

(2) 13 Cey Law Recorder p. 98
(3) 1914 4 Bal. N. C. p. 28

Present : LORD ROCHE, SIR JOHN WALLIS, SIR GEORGE RANKIN.

ALEXANDER KENNEDY vs THE KING

Privy Council Appeal No. 69 *of* 1935.
Argued on 1937.
Decided on 9th February, 1937.

Trial by Jury—Composition of Jury—Bias—Members of Jury alleged to be partial—Not challenged at the time the jury was empanelled because material for making challenge not available then—Can objection be taken at a later stage or at the end of the trial—In what circumstances the Privy Council will interfere where injustice is alleged on the ground that the jurors in a case tried by a jury were open to objection.

Briefly the facts are as follows :—

The accused appellant, a native of the United Kingdom, had lived in Colombo since 1909 trading in boots and shoes. Since 1920 he had conducted the business, which he was carrying on in 1933 — a retail business under the style of "Kennedy" selling, mainly ready made boots and shoes. He was the sole proprietor of that business. In connection with it, he also traded in skins suitable for the manufacture of shoes. These skins he bought or acquired in Ceylon or elsewhere in the East, stored on premises of his own and sent for sale in London. In the normal manner of traders, he financed his purchases of boots and shoes made through agents in London and the consignment of skins to London by over-draft with his bankers, the National Bank of India. On 29th September, 1933, he was and had been for some year or two conducting his business in a building known as the "Times Building" a structure of reinforced concrete. The shop was on the ground-floor and the appellant also occupied the basement. The appellant was, in September 1933, engaged in equipping a new shop and was about to remove from the "Times Building" to his new shop in a building known as the "Colombo Stores". Shortly after 11 p.m. on 29th September, 1933, at a time appellant was alone on the premises in the 'Times Building,' an explosion took place followed by a fire which did great damage to the building and virtually caused a complete destruction of all the stock on the premises. It was common ground that the explosion occured in the basement and that the fire originated there. The circumstances under which the fire occurred being suspicious, investigations as to the origin of the fire were made and these resulted in the prosecution of the accused. He was indicted on two counts — the first under section 419 of the Penal Code for that on 29th September, 1933, he caused damage by fire in respect of a building which contained his shop and the second under section 418 of the code for the like offence in respect of the property in the shop. The appellant pleaded not guilty to these charges and was tried before the Supreme Court and found guilty by a unanimous verdict on both counts and was sentenced to a term of six years' imprisonment. Special leave to appeal against this conviction was granted by the Privy Council on 20th October, 1934. Among the points taken at the hearing of the appeal before the Privy Council was a point arising out of the composition of the jury which it was urged was such as to require that the conviction should be quashed. The point was that there was presumed or actual partiality to be found in the foreman and three other members of the jury by which the accused was tried. It was said that the members of the jury complained of were employed by firms or companies who were agents or sub-agents for insurance companies and that in some cases the insurers for whom such agency subsisted were at risk on policies effected by the appellant. The allegations are true in this sense only, that the employers and the jurors in question—three limited companies and one partnership firm—were agents for insurance companies in the sense that they were agents receiving commission or discount on insurances

placed by them with insurance companies for themselves or their business connections. Any of the jurors in question did not personally conduct agency business even of this kind. They were in departments of their respective businesses quite other than, and distinct from, any insurance agency, and had no knowledge of or, concern with, any matter of insurance.

2. **Held :—**

(i) that from these facts it would not be just or fair to presume partiality ;

(ii) that the decision in the case Ras *Behari Lal vs. The King Emperor* (1933) 60 I.A. 354 does not warrant the proposition that in every case, in which there was material for a successful challenge by a juror, and it was not made for excusable reasons, an adverse verdict should be set aside.

Per LORD ROCHE:

"It was said that such partiality would under section 225 of the Criminal Procedure Code of Ceylon be a ground upon which if objection had been made to the jurors in question it must have been allowed: that objection was not made because the appellant and his advisers were ignorant of the facts at the material time; but that nevertheless on the authority of the decision of this Board in *Ras Behari Lal vs. The King Emperor* (1933) 60 I.A. 354 if a conviction resulted to which a juror open to objection was a party the conviction would be quashed. In that case a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability is a good ground for objection under the law of India and was unknown to the accused until after the event. Their Lordships held that there was on those facts a grave injustice or in the words of an analogous case in the English Courts " a scandal and perversion of justice." Accordingly on principles frequently laid down by this Board the conviction was set aside and the Crown was left to take such course as to a new trial as the law of India would allow it to take. Their Lordships see nothing in that decision to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside. Their Lordships as at present advised are of opinion that such a proposition is ill-founded and is contrary to the well settled principles laid down by this Board with regard to its intervention in criminal matters."

Walter Monckton K.C. with him C. John Colombos and B. J. M. Mackenna for the appellant.

Sir Terence O'Connor K. C. (Solicitor-General) with him Kenelm Preedy and L. M. D. de Silva K. C. (Ceylon) for the Crown.

LORD ROCHE.

This is an appeal by special leave against the conviction of the appellant on 20th October, 1934, by the Supreme Court of Ceylon (Assize Court of Colombo) sitting with an English speaking jury of seven jurors. The indictment upon which the appellant was convicted contained two counts—the first under section 419 of the Penal Code for that on 29th September, 1933, he caused mischief by fire in respect of a building which contained his shop and the second under section 418 of the Code for the like offence in respect of the property in his shop. The appellant pleaded not guilty and the trial lasted from 3rd September to 20th October, 1934, when the appellant was found guilty by a unanimous verdict on both counts and was sentenced to a term of six years' imprisonment on each count, the sentences to run concurrently.

The circumstances out of which the proceedings arose were in outline as follows : The appellant, a native of the United Kingdom, had lived in

Colombo since 1909 trading in boots and shoes. Since 1920 he had conducted the business which he was carrying on in 1933—a retail business under the style of Kennedy selling mainly ready made boots and shoes. He was the sole proprietor of that business. In connection with it he also traded in skins suitable for the manufacture of shoes. These skins he bought or acquired in Ceylon or elsewhere in the East, stored on premises of his own and consigned for sale in London. In the normal manner of traders he financed his purchases of boots and shoes made through agents in London and his consignments of skins to London by overdrafts with his bankers, the National Bank of India. On 29th September, 1933, he was and had been for some year or two conducting his business in a building known as the " Times Building " a structure of reinforced concrete. The shop was on the ground floor and the appellant also occupied the basement. The appellant was in September, 1933, engaged in equipping a new shop and was about to remove from the Times Building to such new shop in a building known as the " Colombo Stores." Shortly after 11 p.m. on 29th September, 1933, at a time when the appellant was alone on the premises in the Times Building, an explosion took place followed by a fire which did great damage to the building and virtually caused a complete destruction of all the stock on the premises. It was common ground that the explosion occurred in the basement and that the fire originated there. The appellant escaped with some injuries. His wife who was talking to the night watchman outside the premises was uninjured. Fire assessors were called in and various investigations were made by them and by the police. In April, 1934, the proceedings now in question began in the Police Court of Colombo.

The main point raised for the appellant at the hearing of this appeal was that the learned Judge—Mr. Justice Drieberg—misdirected the jury in that he directed them that there was evidence upon which they might convict the appellant whereas he ought to have directed them that there was no evidence entitling them to take that course and that on the evidence as it stood they ought to acquit the appellant. Counsel for the appellant relied upon the decision of this Board in the case of *Seneviratne vs. The King* (All England Law Reports, 1936, Vol. 3, p. 36) where their Lordships after an examination of the evidence held that it was such that a verdict of guilty could be no more than a guess and could not be justified by any principles of legal inference. There were also misdirections in the charge to the jury. The conviction was therefore set aside. The present case it was said fell into the same category and it was urged that the same result should follow. In particular it was said that the case for the prosecution rested upon the use of petrol by the appellant and that upon the expert evidence for the Crown it was not shown that any quantity of petrol available to the appellant could have caused the damage to the building which in fact resulted and that on the contrary the evidence as a whole and especially the expert evidence for the defence showed conclusively that it could not have caused such damage. In the most able and

thorough arguments of leading and junior counsel for the appellant their Lordships' attention was directed to all the material features in the very voluminous evidence in this case and their Lordships have also had the assistance of the Solicitor-General for the Crown. In the result their Lordships are satisfied that the complaint made is not well founded and that the jury not only ought not to have been directed in the manner suggested but that had they been so directed the direction would have been wrong. Having arrived at this conclusion their Lordships conceive that it would be as improper as it is unnecessary to review and discuss the evidence and its weight in detail so as to pass or to appear to pass a judgment of their own upon it. They propose to indicate in a form as compendious as possible why they have arrived at a clear conclusion that the directions of the learned Judge were proper and sufficient and that there was proper, nay ample, material upon which the jury could arrive at the verdict they did.

The charge was most careful and studiously fair to the accused. It was also entirely free from any error of law as to the onus of proof or otherwise. The first topic dealt with was motive—the case for the prosecution being that the appellant was financially embarrassed if not insolvent. The learned judge dealt with the facts as to financial pressure upon the appellant and gave due weight to the appellant's good character in this connection and generally and to the fact that certain financial pressure was common to all traders at the material time which was one of acute and world-wide depression. The jury was expressly directed that motive was of secondary importance and was for reasons which were correctly explained to the jury not to be used to supplement deficiency of evidence direct or circumstantial warranting a conclusion adverse to an accused.

The charge next proceeded to deal with the actual evidence adduced as to acts of the appellant tending to show that he prepared for and did the thing he was charged with doing. The sequence of events proximate to the material date was as follows : In July and August, 1933, there was undoubtedly pressure on the appellant by the Bank to reduce his overdrafts, and a certain anxiety expressed in letters by his London agents, who ultimately by letter dated London, 5th September, 1933, declined to indent further. The Bank had during this period by interview and letter asked for lists of stocks and copies of the appellant's balance sheet which had not at that time been made up for the preceding year ending 31st December, 1932. It was not until 28th September—the day before the fire—that the balance sheet was completed. Stocks of skins in Colombo at the date of 31st December, 1932, appeared in the balance sheet at rather more than 12,000 rupees in value, whilst boots and shoes and outfitting stock appeared at nearly 4½ lacs of rupees. Such stock was adequately covered by existing insurances. But on 18th July, 1933, the appellant caused himself to be insured in a further 125,000 rupees "on stock of reptile skins whilst stored in the basement of the Times Buildings." After the fire the appellant put

forward to Mr. Ross the fire assessor a claim for a total loss of skins to the full amount of the policy and loose stock sheets (exhibit P39) were produced to vouch the claim. These sheets must be further referred to later. Mr. Ross was satisfied as to the boot and shoe stock. No question or criticism seems ever to have been raised as to the quantity of this part of the stock. What was said about it was that owing to the depression sales had been slow and the stock was overburdened with goods not in fashion. The appellant said this was not so and that in any case he proposed after removal to his new shop to have a removal sale there. As to the skins the position was very different. Mr. Ross was satisfied that the stock of skins in the basement as appeared from the debris was a small one and in no way approaching the amount shown in the stock sheets. The appellant as he said in his evidence to facilitate the passing of his larger claim for boot and shoe stock gave way and put in a formal claim for skins at some 14,000 rupees—based on the 1932 balance sheet figure and certain subsequent purchases. But at the hearing the evidence for the appellant was that the larger stock of skins to a value of over 125,000 rupees was in fact in the basement having been moved there for storage from his bungalow in the month of July, 1933. This stock he alleged had been gradually accumulated in his bungalow during a period of years and was his own though it had never appeared in any balance sheet of the business of which he was sole proprietor and had never been insured prior to 18th July, 1933, and had never been mentioned in connection with any valuations or with any requests for security prior to 5th September, 1933. At that date a stock of 98,000 rupees worth of skins was mentioned in a letter to the Chartered Bank with whom he was then arranging for some accommodation in addition to that previously granted by his bankers—the National Bank. The evidence as to the financial resources from which this large hidden asset in stocks of skins was built up was such as may not have satisfied the jury. Moreover there was also discovered during the investigations a document (exhibit P32) also having its origin in the middle of July, 1933, containing a list of skins largely but not altogether the same in its contents as the stock sheets (P39) but describing the skins as the property of the Wewelduwa Tanneries consigned to Kennedy & Co. for sale. Wewelduwa Tanneries were owned by one S. A. Perera. The document was in his handwriting and the ascription of any such property to him was admittedly untrue. The explanations of the form and purpose of this document, which was naturally not put forward to Mr. Ross in support of the claim, given by the appellant and Mr. Perera, were divergent and it was open to the jury to reject them and to feel assisted to a conclusion that the evidence as to the existence of such a stock was no more to be relied upon than the evidence as to the property in it. In the month of August the National Bank (Colombo) under date of the 18th wrote to the appellant asking " where the skins relating to No. 2 Account are and their approximate value." The appellant replied by letter of the 19th that the bulk of the stocks referred to were in the tannery.

He did not then mention the larger stocks said to have been at this time in the basement. On 23rd August the appellant purchased two tins of petrol each containing two gallons. His evidence was that he intended to clean skins with this petrol but being advised against this course by Mr. Perera (the tanner who wrote out the list (exhibit P32) he gave the tins unopened as a present to Mr. Perera. Apparently purchases of petrol in tins in Colombo are extremely uncommon—cars taking their petrol from pumps. Mr. Perera put the gift of petrol to him in July about a fortnight after he had written out exhibit P.32. In any case, as the vendors' books fix the date of purchase beyond dispute as 23rd August, the date at least was wrong. To complete the story as to petrol tins the evidence showed that after the fire two petrol tins, of precisely the same type as those purchased which, of course, was not an uncommon type, were found in the appellant's shop, that is to say, on the ground floor. They were empty save that one contained a small quantity of petrol and the other some other liquid and solid material which was not analysed but was not petrol. Near them was a suit case which was not identified as a suit case belonging to or used by the appellant. There was evidence relied upon for the defence that in July a customer had asked permission to leave a suit case at the shop and that it had been left and put in a cupboard but it was not known what it contained or how long it had remained there or on the premises. The whole of the evidence and particularly the evidence of the appellant and Perera as to the tins of petrol purchased by the appellant and said to have been given to Perera was left with extreme accuracy and fairness to the jury for them to decide what credence they gave to it.

To return to the night of the fire, as has been stated the appellant was alone inside the premises when the explosion occurred. It was said that he generally was the last to leave and to shut up. The time he was alone there, shortly before 11 p.m. on 29th September, was estimated at about 10 minutes. An employe, Hossan, had been absent to get some soda water for the appellant and on his return left for home. Mrs. Kennedy and the watchman were together outside. The appellant's account was that as he was operating a switch to turn out the electric lights, which switch was on the ground floor, there was a flash and an explosion. The theory advanced to explain it was that there was a short circuit and a sparking when the switch was operated which caused an explosion of gas, presumably coal gas, and that this was the cause of the fire. Marsh gas was mentioned in evidence as a possibility but no real point was made of this. As to coal gas, some evidence was given of smells in the past which might have been gas but on the night in question the meter readings showed no leakage. A leakage to cause such an explosion must have been considerable and the gas pipes even after the explosion and fire were found to be absolutely tight and unleaking. It was truly said by counsel for the appellant that it was not for the defence to prove that there was some cause for the explosion other than petrol and their Lordships entirely agree with this proposition. But

they are also satisfied that there was evidence before the jury which entitled them to come to the conclusion that the explosion could not be and was not due either to gas or some high explosive which was the other theory advanced. This evidence did not come from the prosecution alone. One leading expert for the defence gave reasons for suggesting coal gas as a cause but another leading expert for the defence rejected any such theory with some emphasis. He preferred the theory of a high explosive which does not seem to have been favoured by anyone else and there were reasons against this theory which the jury were entitled to regard as conclusive. In this state of the evidence if they arrived at a conclusion that petrol was the only possible cause of the mischief then having regard to the evidence as to its method of evaporation they were, in their Lordships' opinion, also entitled to conclude that it could have been applied and used by no one but the appellant. It should be added in this connection that there was also before jury very definite evidence from a skilled electrician of position, who examined the material switch boards after the explosion, to the effect that no short circuit had occurred there and that the seat and origin of the explosion was not in the vicinity of the switches.

There remains to consider in somewhat more detail the point made for the appellant that the extent of the damage was such that it could not have been caused by two gallons or even four gallons of petrol. The evidence on this point stood thus: According to the evidence for the Crown the nature of the explosive mixture of petrol and air in operation would depend so largely on an unknown factor as to be uncertain. The unknown factor was how much of the basement area, which was of course known, was available for and was filled by petrol gas. A large quantity of the stock of boots and shoes was said to have been stored there so as to almost fill the basement. According to the expert evidence for the Crown in such a part or pocket of the basement as was left an explosion could result even from the use of two gallons of petrol capable of causing the immediate damage in the vicinity where it plainly occurred and certain other damage which was spoken of as admitting of calculation in respect of the force required to cause it. Other damage, according to these witnesses, was not similarly calculable for reasons which they gave. In particular it was said that the steel girders of the structure having sagged and bent under the influence of the fire which followed upon the explosion, it was impossible to say how much of such other damage was due to the original explosion and how much to the shifting of weight in the whole building caused by the fire and consequent girder damage. No doubt evidence was given ably and forcibly by witnesses for the defence that it could be calculated that the explosion was of such force that it could not have originated from two or four gallons of petrol but required a much larger quantity. But it is to be observed that the results arrived at by these witnesses to a large extent depended upon factors which were unknown or in dispute—such as the fire effects which have been alreadyreferred to and such as the question whether

the stresses in operation should be calculated on the basis that the damage showed the effect of actual sheering and not merely rupture by tension for which a much less force would be required. These matters were debated fully and amply at the hearing and the jury viewed the premises twice at different stages of the hearing. Although the jury was not made up of experts their Lordships do not doubt that they were capable of deciding and entitled to decide on the materials afforded by the evidence and the views on such questions as the question whether the damage showed sheering as opposed to rupture upon tension and such as the question whether this or that part of the damage resulted from the explosion or from the consequential fire.

As the case thus stood and as it was thus presented to the jury by the learned Judge in his charge their Lordships are clearly of opinion that it was properly left to the jury to decide the case upon the whole evidence and that a direction in the sense contended for on behalf of the appellant was neither imperative nor proper. Upon the argument of the appeal another point was made with regard to the summing up, namely, that altogether undue stress was laid by the learned Judge in his summing up on a conflict of evidence as to how and where the appellant emerged from the building after the explosion. It is true that stress was laid on such conflict between the appellant's evidence and that of a witness for the Crown and apparently in this respect the learned Judge was following and dealing with strenuous arguments on the point by counsel on both sides. The matter was, of course, a test of credibility but at the trial one point of emergence was supposed to show and the other to negative presence in the basement at the time of the explosion. At the hearing of the appeal it was common ground that whether the appellant came from the basement or not was largely irrelevant since plainly having regard to apertures in the ground floor (such as a staircase and a chute) a fire in the basement could quite well have been ignited by someone present at the moment of such ignition on the ground floor. But their Lordships are unable to find that the learned Judge was at fault when he dealt with an issue fought strenuously before him in the manner in which he did deal with it—particularly as the topic was relevant on the question of credibility. Still less are their Lordships able to find in this or in any part of a summing up, which, read as a whole was unexceptional, any ground for exercising the well understood jurisdiction of their Lordships in criminal matters.

It follows that after a charge which their Lordships have held to be proper and upon evidence which in their Lordships' opinion was clearly sufficient the jury arrived at conclusions upon the evidence and the guilt of the appellant which are not subject to any review before this Board.

There remains for consideration an independent point arising out of the composition of the jury which it was urged was such as to require that the conviction should be quashed leaving it to the Crown if the law in Ceylon permitted to embark on another trial. The complaint was that there was

presumed or actual partiality to be found in the foreman and three other members of the jury. It was said that such partiality would under section 225 of the Criminal Procedure Code of Ceylon be a ground upon which if objection had been made to the jurors in question it must have been allowed: that objection was not made because the appellant and his advisers were ignorant of the facts at the material time; but that nevertheless on the authority of the decision of this Board in *Ras Behari Lal vs. The King Emperor* (1933) 60 I.A. 354 if a conviction resulted to which a juror open to objection was a party the conviction would be quashed. In that case a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability is a good ground for objection under the law of India and was unknown to the accused until after the event. Their Lordships held that there was on those facts a grave injustice or in the words of an analogous case in the English Courts " a scandal and perversion of justice." Accordingly on principles frequently laid down by this Board the conviction was set aside and the Crown was left to take such course as to a new trial as the law of India would allow it to take. Their Lordships see nothing in that decision to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside. Their Lordships as at present advised are of opinion that such a proposition is ill-founded and is contrary to the well settled principles laid down by this Board with regard to its intervention in criminal matters.

But on the facts of this case their Lordships are of opinion that no such question arises at all. In their view there was no partiality presumed or actual shown in regard to any of the jurors and therefore no ground upon which a challenge as of right and for cause could have been sustained. The facts as disclosed in the affidavits and documents were as follows : The appellant had in accordance with his rights under the Code elected to be tried by jurors on the list or panel which contained only English-speaking persons. It appears that a very large number probably most of the important British mercantile houses in Colombo, of whose members or employes such a list would inevitably be largely composed, were agents or sub-agents for insurance companies. It was said that the members of the jury complained of were employed by firms or companies who were such agents and that in some cases the insurers for whom such agency subsisted were at risk on policies effected by the appellant. The allegations are true in this sense only that employers of the jurors in question—three limited companies and one partnership firm—were agents for insurance companies in the sense that many persons are agents in this country, that is to say, not general agents doing or conversant with the insurance business but receiving commission or discount on insurances placed by them with insurance companies for themselves or their business connections. Agency business even of this description was not conducted by any of the jurors in question. They

were in departments of their respective business quite other than and distinct from any insurance agency and had no knowledge of or concern with any matter of insurance. To presume partiality from such facts would in the opinion of their Lordships be both fanciful and unjust.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

Present : SOERTSZ, J.

K. T. E. DE SILVA vs H. DON CAROLIS & SONS, LTD.

S. C. No. 134—*C. R. Colombo No.* 18130
Argued on 8th March, 1937.
Decided on 12th March, 1937.

Principal and Agent—Shopkeeper and customer—Payment to salesman for goods purchased—Money misappropriated by salesman—In what circumstances would the payment operate as a discharge of the customer's obligation.

The plaintiff went to the defendants' shop and bought an article of furniture the value of which he handed to the defendant's salesman. The latter, instead of handing over the money to the cashier of the shop, appropriated it to his own use. The defendants refused to deliver the goods which had been paid for and the plaintiff brought this action.

The defendants relied mainly on a notice that had been exhibited in the show-room in a prominent place to the following effect—" All payments should be made to Cashier and Firm's receipts obtained for same "

The plaintiff relied on the evidence that the offending salesman had authority to, and did ordinarily receive money from customers in order to hand it himself to the Cashier.

Held : That, in the circumstances of this case, the payment to the salesman would operate as a discharge of the customer's liability to the firm on the goods purchased.

Weerasooriya with *E. B. Wickremanaike* for defendant-appellants.
Croos Dabrera with *Neville Perera* for plaintiff-respondent.

SOERTSZ, J.

The question involved in this appeal is which of the two innocent parties, the plaintiff or the defendants, should suffer for the fraud of a third party, namely the defendants' salesman.

The question must be examined and answered on the basis that the plaintiff did pay the sum of Rs. 128/25 into the hands of the salesman. The Commissioner has so found, and evidence is overwhelmingly in support of that finding.

The defendant's case is that payment to the salesman was not payment to them because the salesman had no authority to receive payment, and the defendants had taken the precaution of exhibiting in a prominent place in their shop a notice (D4) to the effect :—" All payments should be

made to Cashier and Firm's receipts obtained for same." In regard to the first matter, the trend of recent decisions has been to reduce to certain limits the general proposition which appears to have been laid down in some earlier cases, that 'he who has power to sell has power to receive the money.' In *Butwick v. Grant*, Law Reports 1924 — 2 K.B. 483, Horridge and Sankey J.J. followed the ruling in *Drakeford v. Piercey* 7 B & S 515 and held that the proposition that 'an agent authorised to sell has, as a necessary legal consequence, authority to receive payment is utterly untenable and contrary to authority.'

Sankey J. said, 'In an action by the seller of goods against the buyer for the price it would be open to the buyer who had paid the seller to show, and in the absence of any reason to the contrary, he would be entitled to succeed on showing, either that the agent had *actual authority* to receive payment, or that he had *ostensible authority* to receive payment or that he had *customary authority* by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question.' Applying this test to the facts of this case, there is evidence to show that William Perera had authority to, and did receive money from customers in order to hand it himself to the Cashier. A. E. H. Mendis, the Accountant of the defendant's firm said "The salesman took the money from the customer to the Cashier," and Jayasinghe, the Cashier, corroborated Mendis when he stated "customers' money is always brought to me by the salesmen." According to this evidence, the first two conditions laid down by Sankey J. are satisfied, namely, that the buyer should show that the salesman had (*a*) real, (*b*) ostensible authority to receive money. In my opinion, in this case, the third condition is also satisfied that the buyer should show that the salesman had customary authority to receive money. It is notorious that it is the salesmen in shops who receive payments from customers for goods purchased by them. They, of course, usually take it to the Cashier. But the point is that they have authority real or ostensible to receive money, and, therefore, when they receive it, they receive it as agents of their employers. I do not think it makes any difference, on this question of the responsibility of the principals for the money so received by salesmen, whether the salesman directly he received the money ran out at the door, to use the words of Mr. Croos-Dabrera's submission, and the money was lost to the parties in that way, or whether the money was lost to them, because the salesman gave a sufficiently probable explanation for his not giving the customer the Cashier's receipt, as the salesman in this case did, to satisfy the customer that everything was right and in order. The salesman when he took the money and offered the explanation he did, was acting within the apparent scope of his employment. It would be very irksome indeed to customers if they were required or expected to act on the assumption that salesmen employed in firms like these were more probably thieves than honest men, and to keep them in constant, view, and follow them about to

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make sure that they actually took the money to the Cashier, or to verify that the Cashier is actually not in his seat, when the salesman says he is not, as the salesman in this case did. It will be, least of all, in the interests of shopkeepers if that degree of meticulous observation and inquiry is demanded of their customers. But, it is urged in this case that the shopkeeper had taken the precaution of displaying a notice to inform customers that they should make payments to the Cashier and obtain the firm's receipts. The evidence of Mendis and Jayasinghe shows that this is a requirement that is honoured in the breach, not in the observance. But, quite apart from that, there is no evidence to show that the plaintiff in this case was aware of this notice, or that he could not but be aware. The evidence is that "the defendant firm has a very extensive business place. In each floor there are six or seven halls. The Cashier is in one of the halls." And all we are told of this notice is that it 'is displayed in the show room in a prominent place.' It appears to be a matter of pure luck whether a particular customer sees this notice or not. It depends on whether or not he enters the show-room. There is nothing on record to show that the plaintiff entered the show-room. *In Mandy vs. Galle Face Hotels Co.* 4 *N.L.R.* 191., an attempt on the part of the hotel to avoid liability for the bicycle of a guest which was lost from the premises, on the ground that a notice was displayed that 'no responsibility shall attach to the hotel for any property lost, unless previously placed in the manager's charge for safe-custody, was respected. Lawrie J. contented himself with saying 'It was not proved that the plaintiff saw or read this notice.' In my opinion, the defence based on this notice fails. The locus classicus on this question of the incidence of the loss between innocent parties is, I believe, *Lickbarrow v. Mason*, 2 *T.R.* 63 where Ashurst J. held "that wherever one of two innocent parties must suffer by the acts of a third, he who has enabled such third party to occasion the loss must sustain it." In this case, the defendants enabled the salesman to occasion the loss by permitting him to receive money. I am not suggesting that they should not have permitted him to receive money. Business of this kind can hardly be carried on conveniently and expeditiously without investing salesmen with such authority. But employers must take the risks involved.

In my opinion, the appeal fails and must be dismissed with costs.

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

COLOMBO MUNICIPAL COUNCIL vs S. D. M. IBRAHIM & OTHERS

S. C. No. 103 *of* 1936—*D. C. Colombo (Special) No.* 2078.

Argued on 5th & 9th March, 1937.

Decided on 16th March, 1937.

Housing and Town Improvement Ordinance No. 19 *of* 1915—*Construction and improvement of street under Section* 25—*Meaning of work of "Construction" in Section* 2 *of the Ordinance—Is a mansergh drainage Scheme a work of "construction" within the meaning of Section* 2—*Under Section is it ultra vires for the Municipality to include in a resolution a work of construction not included in Section* 2—*Meaning of the words "such construction" in Section* 25 (1)—*How may the validity of a resolution under Section* 25 (1) *be tested—Can the appeal tribunal in an appeal under Section* 92 (1) *go into the question of the validity of such a resolution.*

The Municipality by virtue of a resolution under Section 25 (1) of the Housing and Town Improvement Ordinance carried out certain improvements to a street known as the 42nd Land in Wellewatte. The Improvements included a scheme of lighting, sewering, draining, metalling, and bitumen painting at an approximate cost of Rs. 40,687/–. Notices were served on the persons effected by the improvements. They objected but their objections were of no effect. Certain of the objectors then appealed under Section 25 (7). The principal grounds of appeal were:—

(*a*) that the cost of a drainage sewer cannot in law be apportioned to the persons effected,

(*b*) that a rubble and metalled and surface painted highway was unnecessary.

The District Judge held that a sewer could not in law be constructed and that a rubble and metalled and surface painted highway was unnecessary ; but acting under the provisions of Section 92 (1) of the Ordinance he stated the following case.

(1) "As to whether, under section 25 (7) of the Housing and Town Improvement Ordinance, No. 19 of 1915, this Court as a tribunal of appeal is only empowered to consider under section 25 of the said Ordinance the question of apportionment amongst the owners of the premises liable under the Ordinance to pay for works of construction."

(2) "As to whether the question of alleged extravagance and lack of necessity in this case with regard to a rubble, metalled and surface painted road is a question which could be enquired into by this Court as a tribunal of appeal in considering the apportionment of costs as being a matter coming within the scope and meaning of "Cost" under the provisions of the Ordinance relating to the apportionment of costs."

(3) As to whether the decision of a local authority with regard to works of construction as to the necessity for works of construction can be made the subject of an appeal to this Court as a tribunal of appeal."

(4) As to whether the provision of soil sewerage was rightly held by this Court not to be included or to fall within the definition of "construction" contained in the said Ordinance."

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Held : (i) That the expression "such work" in section 25 (1) of Ordinance 19 of 1915 means the work of construction resolved on by the Council.

(ii) That there is no appeal from a resolution of the Council under section 25 (1).

(iii) That in an appeal under section 25 (7) the tribunal of appeal is only empowered to go into the question of apportionment among the owners of the premises liable under the ordinance.

(iv) That the tribunal cannot inquire into the necessity or otherwise of the expenditure involved in a work of construction.

(v) That the Supreme Court has power under section 46 of the Courts Ordinance to prevent any action by the Council *ultra vires* of its powers under section 25 (1).

H. V. Perera with *J. L. M. Fernando* for appellant.

J. R. V. Ferdinands with *D. Jansze* for respondents.

POYSER, S. P. J.

The District Court Colombo is, under the provisions of sections 83 and 84 of the Housing and Town Improvement Ordinance, (No. 19 of 1915), the special tribunal of appeal for the administrative limits of the Municipal Council of Colombo and this is a " case stated " by the District Judge under section 92 (1) of the Ordinance.

The material facts are as follows :—The Municipal Council, acting under section 25 of the Ordinance, resolved, on the 2nd of October, 1929, to carry out a scheme of lighting, sewering, draining, metalling, and bitumen painting in 42nd Lane, Wellawatte at an approximate cost of Rs. 40,687/–.

Notices were served on the owners of all premises affected, (section 25 (2), objections to the Scheme were heard and finally on the 21st of January, 1931, the Council, having considered further objections, approved the Scheme and the apportionment of the cost made by the Chairman and published in the Government Gazette of October 25, 1929.

The work was commenced in accordance with the latter resolution and completed in June 1932 at a total cost of Rs. 36,869/16. In September, 1933, certain of the owners of the premises affected, appealed, in accordance with section 25 (7) of the Ordinance, against their apportionments and after a considerable delay the matter duly came up for enquiry in the District Court.

The principal grounds for the appeal, as set out in the amended petition of appeal, dated the 1st of August, 1935, were that " (*a*) the cost of a nine inch soil sewer cannot in law be apportioned amongst the appellants and the appellants are not liable for the cost of the said sewer." " (*b*) the provision of a rubble and metalled and surface painted carriageway was a highly extravagant and unnecessary work of construction, having regard, *inter alia*, to the location and importance of the said lane, the nature and volume of traffic using the said lane and other relevant factors and considerations, it was quite sufficient to construct a gravelled roadway and the dffer-

ence between the estimated cost of such a roadway and the actual cost of the said rubble and metalled and surface painted carriageway, to wit, a sum of Rs. 13,469/16, cannot and should not be apportioned amongst the appellants."

The District Judge, after holding that the right of appeal was not restricted to the question of apportionment only, viz : the proper division of the sum of Rs. 36,869/16 among the owners of the premises affected, considered he could determine whether the provision of a soil sewer came within the definition of " construction " in the Ordinance and also whether the provision of a metalled macadamized road was necessary.

These matters were exhaustively dealt with by the District Judge and he finally held that the soil sewer was not a work of " construction,' and that the provision of a metalled and macadamized road was unnecessary and he accordingly made a substantial reduction for the sum to be apportioned, but, acting under the provisions of section 92 (1) of the Ordinance,- stated the following case :—

(1) " As to whether, under section 25 (7) of the Housing and " Town Improvement Ordinance, No. 19 of 1915, this Court as a " tribunal of appeal is only empowered to consider under section " 25 of the said Ordinance the question of apportionment amongst " the owners of the premises liable under the Ordinance to pay for " works of construction."

(2) " As to whether the question of alleged extravagance and " lack of necessity in this case with regard to a rubble, metalled and " surface painted road is a question which could be enquired into " by this Court as a tribunal of appeal in considering the apportion- " ment of costs as being a matter coming within the scope and meaning " of " Cost " under the provisions of the Ordinance relating to the " apportionment of costs."

(3) " As to whether the decision of a local authority with regard " to works of construction as to the necessity for works of construc- " tion can be made the subject of an appeal to this Court as a tribunal " of appeal."

(4) " As to whether the provision of soil sewerage was rightly " held by this Court not to be included or to fall within the definition of "construction" contained in the said Ordinance."

The first point that was argued in appeal on behalf of the Council was that the tribunal of appeal could not enquire into whether the resolution of the Council was *ultra vires*, the only matter they could deal with was the Chairman's apportionment of the cost of the work carried out *i.e.* whether a proper proportion of the expenses had been apportioned among the frontagers in accordance with section 25 (4), whether other premises, not fronting 42nd Lane would be benefitted, (section 25 (5)), and other matters in regard to apportionment.

Mr. Ferdinands argues that the expression " such work " in section 25 means " such work of construction." Consequently the Chairman had only power to apportion the expenses of work which could properly be included in the definition of construction, and, if he included the expenses of any work which did not come under that definition, the tribunal of appeal could properly delete such expenses from the apportionment.

This point involves the true construction of section 25 (1) of the Ordinance and the definition of " construction " which are as follows :—

> 25 (1) " If any street, not being a public street, or any part " thereof, be not constructed or maintained to the satisfaction of " the local authority, the local authority may from time to time " resolve with reference to such street or part thereof to do any one " or more of the works comprised in the definition of " construction " ' in section 2 of this Ordinance ; and the expenses incurred by the " local authority in executing any such work shall be apportioned " by the Chairman among the premises fronting, adjoining, or abutting " upon such street or part thereof, and shall be recoverable from the " owners of all such of the aforesaid premises as are liable to be assessed " for local rates in the same manner and by the same process as a " rate." . . . . . .
>
> (2) "*Construction*" in the case of any street or thoroughfare " includes provision for the lighting of the street or thoroughfare " and the supply of water to its inhabitants, and its sewering, draining, " levelling, paving kerbing, metalling, channelling, and every method " of making a carriageway or footway, and the provision of access " to the street or thoroughfare."

I think the contention of the Council is correct and I consider Mr. Ferdinands' construction is too narrow. The words "such work", in my opinion, mean the work of construction resolved on by the Council. It will be seen that in this Chapter of the Act the Council have various powers, and the Chairman, who is the executive officer of the Council, has various powers and duties.

There is not only an appeal against the Chairman's apportionment of the expenses of " work of construction " but there is also, section 26, an appeal against any order of the Chairman under this chapter in respect of which an appeal is not otherwise provided.

I can see nothing in this Chapter or in the Act as a whole to indicate that a resolution of the Council could be made the subject of an appeal and this in effect what the petitioners have sought to do.

Further, if the Chairman had refused to include in his apportionment the cost of the soil sewer, he would, in effect, be amending a motion of the Council and that he obviously has no power to do.

There are no authorities directly in point. A number of English cases were referred to but such cases related to the true construction of section 150, The Public Health Act, 1875. The material part of this section is as follows :—

> " Where any street within any urban district (not being a " highway repairable by the inhabitants at large) or the carriageway " footway or any other part of such street is not sewered levelled " paved metalled flagged channelled and made good or is not lighted " to the satisfaction of the urban authority such authority may, by " notice addressed to the respective owners or occupiers of the pre- " mises fronting adjoining or abutting on such parts thereof as may " require to be sewered levelled paved metalled flagged or channelled, " or to be lighted, require them to sewer, level, pave, metal, flag, " channel or make good or to provide proper means for lighting the " same within a time to be specified in such notice." . . . . . .
>
> " If such notice is not complied with, the urban authority may, " if they think fit, execute the works mentioned or referred to therein; " and may recover in a summary manner the expenses incurred by " them in so doing from the owners in default, according to the front- " age of their respective premises, and in such proportion as is settled " by the surveyor of the urban authority, or (in case of dispute) " by arbitration in manner provided by this Act ; or the urban autho- " rity may by order declare the expenses so incurred to be private " improvement expenses."

It will consequently be seen that the provisions of this section vary considerably from those of section 25 of the local Act, but it is of interest to note that in the case of *Re an Arbitration between Stoker and Mayor etc. of Morpeth* (112 Law Times Rep. p.753) *Shearman J.* (page 758), after consideration of earlier authorities held " (1) that the arbitrator has only " power to decide the question of apportionment, and the meaning of that " must be to decide, where there is a disputant, what is the proper proportion " of the whole sum to be paid by the disputant ; and (2) that the arbitrator " has no power to enquire into the reasonableness of the whole amount he " has to apportion between the frontagers."

A further point taken on behalf of the appellants was that if the Council had wrongly included the cost of a soil sewer in " work of construction " and such work could not be enquired into by the tribunal of appeal, the petitioners had no remedy even if the Council had acted *ultra vires*, and such a state of affairs could never have been intended by the Legislature.

I cannot agree ; if the Council were to act *ultra vires*, the Supreme Court would have power, under section 46 of the Courts Ordinance, to issue a writ of prohibition or other suitable mandate. See *The King vs. Electricity Commissioners* (1924 I.K.B. p. 171).

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For the reasons above stated, I would answer the first paragraph of the case stated in the affirmative. It consequently follows that paragraphs 2 and 3 must be answered in the negative. In regard to paragraph 4 there was a long and interesting argument and we were invited to express an opinion thereon even if such opinion were to be '*obiter*'. In view, however, of the answer to paragraph 1, I do not think it necessary or desirable that we should express opinions that are not material to the decision of this appeal.

I would allow the appeal and direct that the Chairman's final apportionment shall be treated as the correct apportionment.

The Council will have the costs of this appeal and the proceedings in the District Court.

KOCH. J.

I agree.

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

DR. R. SARAWANAMUTHU vs CHAIRMAN, M. C. COLOMBO.

In the matter of an appeal under Section 31 *of Ordinance No.* 6 *of* 1910, *from an Order made under the same Section.* (*S. C. No.* 66.)

Argued on 2nd & 3rd March, 1937.

Decided on 15th March, 1937.

Municipal Councils Ordinance No. 6 *of* 1910 *Sections* 3, 10 (3), 31 *and* 32—*Annual value of house—Appeal from determination of Chairman under Section* 31—*Circumstances in which the Supreme Court will not interefere.*

This is an appeal from a decision made by the Chairman of the Municipal Council under section 31 of Ordinance No. 6 of 1910.

The question in dispute was what was the true annual value of certain premises. Expert evidence was called by the appellant. The Municipal Assessor was also examined. The Chairman accepted the Municipal assessor's evidence in preference to the evidence of the appellant. In appeal it was urged that the appeal should be looked at as if it were an appeal in a criminal case.

Held : (i) That the Supreme Court, sitting in appeal, should not draw any distinction between a finding of fact by the Chairman in an inquiry under section 31 of Ordinance 6 of 1910 and a finding of fact by a judge in a civil action.

(ii) That although on the evidence placed before the Chairman another Chairman may have come to a different conclusion as there was evidence to support the Chairman's finding there was no reason for interference by the Supreme Court.

H. V. Perera with *Chelvanayagam* for appellant.

N. E. Weerasooriya with *Van Geyzel* for respondent.

This is an appeal from an order of the Chairman of the Colombo Municipal Council erasing the name of the appellant from the list of persons entitled to be elected as Councillors for the Municipality.

Section 10 (3) of the Municipal Councils Ordinance, 1910, sets out the qualifications which a person must possess before he shall be entitled to have his name placed on that list. Paragraph (j) of the sub-section is that which is pertinent to this matter and the relevant portion is as follows:—

> (j) " Is on the first of July in such year, and has been during the whole of the then last preceding six months, in occupation of any house, warehouse, counting house, shop, or other building (in this section referred to as qualifying property) of the annual value of not less than five hundred rupees, within the division for which he desires to be elected....."

The appellant was on the 7th November, 1936, elected a Councillor for St. Paul's Ward of the Colombo Municipal Council. At that date his name appeared in the list of those qualified to be so elected. The period for which he was elected began to run from the 1st January, 1936, but two days later he was notified by letter by the respondent that he proposed to erase the appellant's name from the list on the ground that the annual value of the premises occupied by him was only Rs. 400/–. This proposal without enquiry was carried into effect on the 6th January, whereupon the appellant appealed to this Court which set aside the order and returned the matter for enquiry. An enquiry was duly held as a result of which the respondent again ordered the appellant's name to be erased. From that order the appellant now appeals.

It may be convenient here to set out the definition of " annual value " as it appears in Section 3 of the Ordinance. It is as follows :—

> " Annual value ' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for any house, building, land, or tenement if the tenant undertook to pay all public rates and taxes, and if the landlord undertook to bear the cost of repairs, maintenance, and upkeep, if any, necessary to maintain the house, building, land, or tenement in a state to command that rent. Provided that in the computation and assessment of annual value no allowance or reduction shall be made for any period of non-tenancy whatsoever."

For the purpose of assessing rates and taxes an " Assessment Book " is kept by the Chairman, and in this book the annual value of each house, building, land, or tenement is entered yearly, and in this book from 1933

the property in respect of which the appellant claims qualification was assessed at Rs. 400/– until the 9th December, 1935, when a request was made that the assessment should be increased. That request was made by Mr. Wanigaratne, who was the tenant under the Parish Priest of Grandpass and sublet the premises, or the greater part of them, to the appellant.

It could not be seriously argued, in fact, there is direct authority to the contrary, that the assessment referred to is conclusive except for the purpose of rating. Were it conclusive, little could be said on behalf of the appellant. It followed, therefore, that a mass of evidence was adduced before the Chairman. The principal witness in support of the respondent was Mr. Orr, assessor for the Municipality since 1924, while for the appellant the like position was filled by Mr. Eastman, who had been Government Assessor for about four years, and before that, Municipal Assessor for nearly three years. Evidence, of course, was given of the actual rental paid in respect of the premises concerned, but since such rental is not conclusive of the annual value, which depends upon a hypothetical rental, the Chairman, in my view quite properly, attached considerable importance to the evidence of these two gentlemen whom he characterised as "expert witnesses." He preferred the opinion of Mr. Orr, who considered the annual value of the part of the premises occupied by the appellant to be Rs. 400/–.

The Section of the Ordinance under which the Chairman acted in ordering the erasure of the appellant's name is Section 31, which enables him so to act if at any time it is "proved to his satisfaction" that any Councillor is not possessed of all the necessary qualifications. He has expressed himself as satisfied that the appellant had not this necessary qualification It may be that a different Chairman may have arrived, on the same evidence, at a different conclusion, but I am satisfied that there is ample evidence upon which the Chairman in this case could find as he did.

Mr. Perera has argued that, inasmuch as an order such as has been made in this case may, as provided by Section 32 of the Ordinance, have penal consequences, we should regard this appeal in the same light as if it were against a conviction. A prosecution does not by any means necessarily follow the making of such an order, and I do not think this Court, sitting in appeal, should draw any distinction between a finding of fact by the Chairman in such an enquiry as this, and a finding of fact by a Judge in a civil action.

That being my view, I do not see any reason for interference with the finding of fact in this case, a finding which, as I have already said, is at least adequately supported by the evidence. I would therefore dismiss the appeal with costs.

FERNANDO, J.

I agree.

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

LUCY THIRUNAYAKAR vs LEONARD THIRUNAYAKAR

S. C. No. 237—D. C. Kurunegala No. 16891.

Argued on 18th March, 1937.

Decided on 24th March, 1937.

Public Officer—Purchase of land by unregistered overseer in the name of his brothers and sisters—Contravention of General Orders—Force of General Orders—Is it against public policy to enforce anything done contrary to General Orders.

Held : (i) That an unregistered overseer is not a public officer for the purposes of the General Orders of Government.

(ii) That purchase of land by a public officer in contravention of General Orders does not render the transaction invalid.

(iii) That a court will not refuse to enforce any contract, agreement or undertaking merely on the ground that the person who seeks the assistance of court is a public officer who, in entering into the transaction in which he seeks the Court's interference, did so contrary to General Orders.

H. V. Perera with *N. E. Weerasooriya* for defendant appellant.

Croos De Brera with *C. T. Olegasegeram* for plaintiff respondent.

POYSER, S. P. J.

The facts of this case are briefly as follows :—In 1922 the plaintiff, by deed P 4, purchased a certain land with his own money but had the deed of transfer executed in the name of two of his sisters and two of his brothers of whom the defendant is one. The defendant only is sued as the sisters have already transferred their shares to the plaintiff and the other brother is now in a lunatic asylum.

Similarly in 1928, by deed P8, the plaintiff purchased another property the transfer of which was executed in favour of the defendant.

At the time the plaintiff obtained these transfers he was an unregistered overseer in the Public Works Department, it was for that reason he did not have the transfers executed in his own name, not wishing, to use his own words " the government to know that I had bought property in my name."

The District Judge has accepted the plaintiff's evidence and entirely disbelieved the defendant. He consequently declared the plaintiff entitled to the lands claimed, and ordered the defendant to transfer his rights on P 4 and P 8 to the plaintiff.

In the lower court the point was taken that the plaintiff by acquiring property without the sanction of the Government did an act which was

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contrary to public policy and, therefore, could not ask a Court of Equity to rescue him from the consequence of such an act.

The Judge's finding on this point was that "the plaintiff did obtain the transfer in question in order to circumvent General Orders appertaining to Public Officers and concealed the fact that he was acquiring property," but he also found that the plaintiff was not a public officer and consequently did not reject his claim on this ground.

On appeal, the only point taken was that the plaintiff had acted fraudulently and deceitfully, and, therefore, it would be against public policy to grant him any relief against his brother.

The basis of that argument is that the plaintiff was a public officer. The material orders are as follows :—

General Orders. Sixth Edition. 152.

"No Public Officer is allowed to "acquire or be a part owner of any land in the Colony other than a garden or "ground attached to his dwelling house, and not cultivated with a view to the "sale of produce. He may not acquire or be a part owner in any concession in "the Colony, not within the same territory be the owner of house property other "than a house for his own occupation."

153. "General Order 152 is not binding on officers who are natives of Ceylon "(including Burghers), but such officers must obtain the sanction of Government "before they purchase land."

The trial Judge was of the opinion, having regard to the definition of 'Public Officer,' in Order 322, that General Orders did not apply to the plaintiff.

General Order 322 occurs in Chapter vii which deals with the Widows' and Orphans' Pension Fund, and is as follows :—

322. "'Public Officer' shall mean and include——(1). Any person who "holds any permanent office in the service of this Colony which is——(*a*) Separate-"ly provided for in the Estimates, and (*b*) Has been declared pensionable "by notification published in the Government Gazette, and (*c*) Who draws "a salary from the Colonial Treasurer of Rs. 250/– per annum or upwards, either "in respect of one or of two or more such offices held permanently and conjointly."

I do not think this definition can be taken into account as regards Chapter iv which deals with discipline. That Chapter, however, does appear to indicate that the orders there set out only apply to salaried officers and the plaintiff is not a salaried officer but is paid a daily wage.

An unregistered overseer, as the plaintiff is, has been held to be a public servant entitled to the protection of the Public Servants' Liabilities Ordinance. See *Weerasinghe vs. Wanigasinghe*, (34 N.L.R. p. 185), but I do not think he is a public officer and therefore Rule 153 would not be applicable to him.

Assuming, however, that the plaintiff was a public officer, I would still hold, for the following reasons, that the judgment appealed from should

be affirmed. There is no evidence that the plaintiff defrauded or deceived the Government or anyone else; his evidence is, and it is the only evidence on this point, that he was making a reasonable profit on his Government contracts and he did not want the Government to know that.

There is no evidence that he improperly made a profit from his Government contracts, and consequently all that plaintiff has done is to disregard a general disciplinary order which has not the force of law.

The general principles in regard to the maxim "*In pari delicto potior est condicio defendentis*", which was invoked on behalf of the defendant, are conveniently set out in Pollock Principles of Contract, 7th Edition, page 379, and may be summarised for the purposes of this case, as follows:—

"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

As previously pointed out, the plaintiff's cause of action was not founded on an immoral or illegal act and he is entitled to succeed in his claim.

Appeal dismissed with costs.

SOERTSZ, J.

I agree.

Present : FERNANDO, A. P. J.

AGOSTINU APPUHAMY & ANOTHER vs CAROLINE HAMINE.

S. C. No. 202—*C. R. Kurunegala* No. 9596.

Argued on 8th & 9th March, 1937.

Decided on 17th March, 1937.

Planting agreement—Death of grantor of agreement—Sale of land by Fiscal in execution of a writ against the heirs of the grantor—Existence of agreement made known to those present at the sale—Are the purchasers bound by the agreement.

D, who was the owner of a land, entered into a planting agreement by which he gave over the land to the plaintiffs to be planted with coconuts within a period of seven years. It was agreed that the plaintiffs should be paid at the rate of Rs. 1/50 per tree after the plantation reaches a stage at which the trees would have grown above the reach of cattle. D died before the expiry of the term of the agreement. After his death, D's heirs were sued for a money debt of D and the land in question was sold by the Fiscal in execution. The defendants purchased it for a sum of Rs. 175/- At the sale the Fiscal informed those present of the existence of the planting agreement. The defendant pur-

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chaser denied liability on the planting agreement and the plaintiffs, thereupon, brought this action.

Held : That the purchaser was bound by the agreement and was bound to pay compensation for the improvements effected by the plaintiffs.

Navaratnam with *Olegesegaram* for defendant appellant.
Rajapakse for plaintiff respondents.

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Darlis Wijesinghe, who admittedly was the owner of the land in question, entered into a planting agreement P 1 in November 1926, by which he gave over the land to the plaintiffs to be planted with coconuts within a period of 7 years, and it was agreed that the plaintiffs were to be paid compensation at the rate of Rs. 1/50 per tree which had grown above the reach of cattle.

Darlis Wijesinghe, died before the term expired and his heirs were sued in D. C. Kurunegala 17965 for a money debt due from Darlis Wijesinghe, and under writ issued in the case, the land in question was seized and sold by the Fiscal, and was purchased by the defendant.

The plaintiffs claim to be entitled to a sum of Rs. 311/25 as compensation for the trees planted by them, and they plead that the defendant, at the time of his purchase, was fully aware of the plaintiffs' claim for compensation, and that they are entitled to recover the claim which they restricted to Rs. 300/- from the defendant.

The defendant in his answer pleaded that the Fiscal's transfer in his favour prevailed over the planting agreement by prior registration. He then went on to deny that the plaintiffs planted the land according to the agreement, or that they were entitled to compensation.

At the trial the following issues were framed :—(1) Did the plaintiffs plant the land in question according to the terms of the agreement, (2) How many trees are on the land above the reach of cattle, (3) What amount, if any, are plaintiffs entitled to as compensation, (4) Have plaintiffs any cause of action against the defendants. On these issues the Commssioner of Requests held that the plaintiff did plant the land according to the terms of the agreement, that there were about 209 trees above the reach of cattle, and that the plaintiffs were entitled to Rs. 182/40 as compensation. He also held on the 4th issue that the plaintiffs had a cause of action against the defendant.

The main contention of Counsel for the appellant was that there was no cause of action available to the plaintiffs against the defendants. He argued that there was no privity of contract between the defendant, who purchased the land at the sale in execution, and the plaintiffs, who had planted the land on a contract with Darlis Wijesinghe. The learned Commis-

sioner followed the ruling of this Court in *Mudiansay vs. Seelandyar* 10 N.L.R. 209. Grenier J. in that case followed the ruling in *Appuhamy vs. Silva* 1 S.C.R. 71 and held that " the right to claim compensation for improvements may be asserted by the party who has effected improvements, not only against the owner under whom he entered as a tenant, but also as against those claiming title to the land by conveyance from such owner." Walter Pereira in his " Laws of Ceylon " 2nd edition, page 376, refers to the case of *Mudiyanse vs. Seelandiar* and states tha this Court " went perilously near declaring, if it is to be deemed not to have actually declared, that as regards the right to compensation for improvements, a lessee was, and is to be supposed to be, entitled to the right of, not only a possessor, but a *bona fide* possessor of the land leased." It would appear, however, from the facts of that case as set out in the judgment of Grenier J., that the respondents who claimed compensation entered under a planting agreement with some of the owners for a term of years, and that the respondents were in *bona fide* possession of the land.

With regard to the meaning of the expression, " a bona fide possessor," Walter Pereira states on page 373 that, " a lessee does not hold the property leased in the belief that it belongs to him, and cannot, therefore, be said to be a *bona fide* possessor in the legal sense of the term." He cites the case of *De Beer's Consolidated Mines vs. London & South African Exploration Co.*, 10 S.C. 359, where Maasdorp C. J. said, " a lessee is not a possessor in the strict Roman Law sense of the term, and stands on a different footing with regard to improvements from the ordinary possessor," and he held that a lessee has no right of retaining the land leased after the expiration of the lease, but if the improvements had been made with the consent of the owners, he will be entitled to a tacit hypothecation for the value of the materials even after giving up possession. His right to compensation will depend upon whether the improvements were made with or without the consent of the owner.

It will be noted that Maasdorp C. J. does not use the expression " *bona fide* or *mala fide* possessor", and Walter Pereira on page 355 defines a *bona fide* possessor as, " one who is under the *bona fide* impression that the land possessed by him belongs to him, or that he is entitled to be in possession of the same ; while a *mala fide* possessor is one who knows, and obviously has reason to believe, that the land is not his property, and that this possession of it is unlawful." If this definition is correct, the question will arise whether a lessee who has taken a lease for a period of years, and who, therefore, is entitled during that period to be in possession of the land, is not a *bona fide* possessor. He does appear to come within the 2nd part of the definition of a *bona fide* possessor. It cannot be said that his possession as lessee is unlawful, so that he would not be a *mala fide* possessor within this definition, but that question does not arise in

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this case. We are only concerned with a planter who has planted the land under an agreement with the owner, and he clearly would be entitled to claim compensation against that owner for improvements effected by him. I see no reason for holding that a person who is entitled to claim compensation against the owner cannot assert the same claim against persons claiming title to the land on a conveyance from or against such owner, and this position was clearly held in *Mudiyanse vs. Seelandyar* In his summary of the law at page 377, Walter Pereira states that " a *bona fide* possessor who has effected useful improvements has the right to have the improvements taken over by the owner of the land, and compensation paid to him, while a *mala fide* possessor has a similar right as regards useful improvements when the owner of the land has stood by and allowed the improvements to be effected without protest." Whether the plaintiffs are to be treated as *mala fide* or *bona fide* possessors, there can be no question that the improvements in this case were useful improvements, and the plaintiffs would be entitled to claim compensation for those improvements from the owner as such, quite apart from the question whether the owner had entered into a contract to pay for those improvements or not, and on the ground merely that the owner had allowed the improvements to be effected without protest. The only question in this case, therefore, is whether the claim that the plaintiffs could have maintained against the owners could be maintained against the defendant who at the Fiscal's sale purchased merely the right, title and interest of the owners.

The position is made even more favourable for the plaintiffs by the fact that at the sale in execution against Darlis Wijesinghe, the Korale who conducted the Fiscal's sale states in evidence that he read out the planting agreement on the orders of the Fiscal in order to make would be purchasers understand that they would have to pay compensation to the planters in terms of the agreement. It is clear, therefore, that the defendant was aware that she was purchasing the rights of the owner to the land subject to the claim made by the planters for improvements. It would appear from the Korale's evidence that the plantation was worth Rs. 212/40 in his opinion, while the land with the plantation was worth Rs. 500/- and the defendant purchased the land with the plantation for Rs. 175/-. In these circumstances, I see no reason to interfere with the finding of the learned Commissioner of Requests that the defendant is liable to pay compensation to the plaintiffs in the sum of Rs. 182/40. The appeal is accordingly dismissed with costs.

Dismissed with Costs.

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

FRANCINA FERNANDO vs KAIYA FERNANDO AND OTHERS.

S. C. No. 63—D. C. Kurunegala 12880.
Argued on 2nd March, 1937.
Decided on 8th March, 1937.

Partition Action—Interlocutory decree—Appeal by 2nd to 7th defendants—8th to 11th defendants who were substituted in place of the 1st defendant, not made parties to the appeal—Application to make 8th to 11th defendants parties to the appeal—Section 770 of the Civil Procedure Code.

In an appeal by the 2nd—7th defendants, who had been allotted one-third share from an interlocutory decree in a partition action the 8th — 11th defendants who had been substituted in place of the 1st defendant and who had filed no answer, were not made parties to the appeal. The appellants contended that they were entitled to a half-share and the 8th — 11th defendants to the other half. If the appeal succeeded, the plaintiff was to get nothing and the 8th — 11th defendants would benefit although not made parties to the appeal.

Held : That this was a case in which the appellants should as a matter of indulgence be given an opportunity to add the parties omitted from the appeal.

Croos Dabrera for 2nd to 7th defendants appellants.

Weerasuriya with *J. R. Jayawardena* for plaintiffs respondents.

FERNANDO, A. P. J.

This is an appeal by the 2nd to the 7th defendants against an Interlocutory decree entered for the partition of the land, which was the subject matter of the action, and allotting to the appellants one-third share, while the remaining two-thirds was allotted to the plaintiff, and to the persons substituted in place of the 1st defendant. Objection is taken to the appeal on the ground that the 8th to the 11th defendants, who were substituted in place of the 1st defendant have not been made respondents to this appeal, although they are interested in the subject matter of the appeal. The appellants' case is that they are entitled to a specific half share of the land, and not to a one-third share only, and if their appeal succeeds, then the land will have to be divided between them on the one hand, and the 8th to 11th defendants on the other and the plaintiff himself will get no share at all.

When objection was taken to the appeal on this ground, Counsel for the appellants suggested that this was a matter in which relief should be given to his clients under section 770 of the Civil Procedure Code, and that they should be allowed to issue notice on the 8th to 11th defendants at this stage. Counsel for the respondents, on the other hand, referred to paragraph 12 of the petition of appeal, in which it is stated that the defendants who have not been made parties filed no answer, and were taking no steps in the case, so that the proctor for the appellants appears to have considered

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the question whether the 8th to 11th defendants should be made respondents, and elected to proceed without making them parties to the appeal.

The principal reason why the law requires that parties in the position of the 8th to the 11th defendants should be made respondents to an appeal of this kind is that their interests are likely to be prejudically affected if the appeal is decided in favour of the appellants. In this instance, however, if the appellants succeed in their contention, the result will be to increase the share of the 8th to 11th defendants, and not to decrease it, so that in fact, they will not be prejudicially affected by the appeal. At the same time, they are parties to the action, and have been allotted certain shares, and are equally interested with the plaintiff in the decision of the appeal, so that they appear to be necessary parties to that appeal.

In view of these circumstances, I think the appellants should be given an opportunity to add the 8th to 11th defendants as respondents to this appeal; but this is allowed only as an indulgence, and the appellants must pay to the plaintiff-respondent Rs. 52/50 as costs of this argument.

MOSELEY, J.

I agree.

Present : SOERTSZ, J.

WANIGASEKERA AND OTHERS vs KIRIHAMY AND ANOTHER.

S. C. No. 197—*C. R. Matara No.* 20188.

Argued on 3rd March, 1937.

Decided on 10th March, 1937.

Action for declaration of title—Prayer for damages, costs and such other and further relief as to the court may seem meet—No prayer for ejectment—Decree entered in terms of prayer—Application made later for notice on defendants to show cause why they should not be ejected and why the decree should not be amended by entering an order for ejectment—Civil Procedure Code, Section 189.

The plaintiffs appellants sued the defendants for declaration of title, damages, costs " and for such other and further relief as to the court may seem meet", The plaintiff succeeded and decree was entered as prayed for. About three months later the, plaintiffs' proctor moved for a notice on the defendants " to show cause why they should not be ejected from the land and why the decree should not be amended by entering an order for ejectment." The trial judge refused to allow this motion. He held that he had no power to amend the decree except in conformity with section 189 of the Civil Procedure Code.

Held : (i) That where a person obtains a declaration of title to land without an order for ejectment he is not entitled to a writ for delivery of possession.

(ii) That a decree cannot be altered except in accordance with section 189 of the Civil Procedure Code.

(iii) That where a person suing for declaration of title omits to ask for and obtain a decree for ejectment he cannot obtain a decree for ejectment by amendment of the original decree.

N. E. Weerasooriya with *Wijemanne* for the plaintiffs appellants.

SOERTSZ, J.

The appellants sued the respondents for declaration of title, damages, costs and such other and further relief as to the Court may seem meet. After an *exparte* trial, the Commissioner entered decree declaring the plaintiffs entitled to the piece of land in question and to damages at the rate of Rs. 10/– per year and costs.

The appellants had not expressly asked for ejectment decree under the general prayer ' for such other and further relief as to the Court may seem meet.' About three months later, the appellants' proctor moved for a notice on the defendants " to show cause why they should not be ejected from the land and why the decree should not be amended by entering an order for ejectment." This motion was fixed for inquiry and an inquiry was held. On behalf of the 2nd defendant it was objected that the Court had no power to amend the decree except in conformity with section 189 of the Civil Procedure Code. The Commissioner upheld the objection and disallowed the application with costs.

The appeal is from that order. In my opinion, the Commissioner was right. Section 189 of the Civil Procedure Code as amended by Ordinance 26 of 1930 provides that " the Court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order, or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment." In this instance, there is no clerical or arithmetical error and the decree is in conformity with the order. Nor can it be said that an order for ejectment was not made ' from any accidental slip or omission ' on the part of the Commissioner. Such an order was obviously not made for the simple reason that it was not asked for. The Commissioner could well have taken the view that no order for ejectment was asked for, for good reasons.

The fact that the present application indicates that the failure to ask for ejectment was an accidental slip or omission cannot be allowed to affect the case as it stood at the date decree was entered.

The appeal, therefore, fails and must be dismissed. It is, perhaps, open to the plaintiff to take other steps to obtain relief.

P. S.

After this judgment had been typed, Mr. Wijemanne kindly brought to my notice the case of *Vangadasalam vs. Chettiar* 29 N.L.R. 446 in which it was held that where a person obtained a declaration of title to land without an order for ejectment, he is not entitled to a writ of delivery of possession. I was glad to find that I had reached the same conclusion.

Present : FERNANDO, A. P. J.

T. B. DISSANAYAKE vs HARAMANIS APPUHAMY.

S. C. No. 223—*C. R. Kandy No.* 20460.
Argued on 9th March, 1937.
Decided on 11th March, 1937.

Money lender—Business of money lending—Sufficiency of evidence necessary to establish that a person is a money lender—Section 8 *of No.* 2 *of* 1918.

Where the plaintiff admitted that during a period of 12 years, he had lent money to ten or fifteen persons, to some of them on promissory notes, to others on mortgage bonds, and also that he supplemented his income with the interest gained thereby.

Held: That these facts alone were not sufficient to prove that the plaintiff carried on the business of moneylending within the meaning of the Ordinance.

Weerasooriya with *Wijemanne* for plaintiff appellant.

Cyril Perera with *Dodwell Goonawardena* for defendant respondent.

FERNANDO, A. P. J.

The only question that arises on this appeal is whether the plaintiff carried on the business of money lending within the meaning of section 8 of the Moneylending Ordinance. The plaintiff admitted that he had lent money to the defendant on promissory notes on four occasions, and the learned Commissioner of Requests found that he had lent money from 1920 up to about 1932. The evidence on this point, however is limited to the admissions made by the plaintiff under cross-examination, when he said that he had lent money to 10 or 15 persons ; to some of them on promissory notes, to others on mortgage bonds. He was further questioned and gave the names of 9 persons to whom he had lent money on various times, some apparently on mortgage bonds and others on promissory notes. If the period 1920—1932 mentioned by the Commissioner of Requests is right then he had lent money to about ten persons within a period of 12 years. In re-examination the plaintiff summarised the position by stating that within the last 15 years he had lent money to different people most of whom were his friends. I do not think the facts were sufficient to enable the Commissioner of Requests to draw the inference that the plaintiff lent money systematically or continuously so as to bring this case within the principle laid down in the case of *Dewasurendra vs. de Silva*, 34 N.L.R. 313. No doubt it was admitted by the plaintiff that he supplemented his income with the interest he gained by lending money, but this alone is not sufficient to prove that the plaintiff carried on the business of money lending within the meaning of the Ordinance.

The learned Commissioner of Requests found in favour of the plaintiff on issues 1 to 6, and refused to enter judgment in his favour merely because of his finding on issues 7, 8, and 9. I would hold on issue 7 that it has not been established that the plaintiff was a money lender within the meaning of the Ordinance and accordingly enter judgment for the plaintiff for the sum of Rs. 292/– which the learned Commissioner found was due to the plaintiff on issue 2. Defendant will also pay to the plaintiff the costs of this action in appeal and in the Court below.

Appeal allowed.

In His Majesty's Privy Council.

Present : Lords Sankey, Blanesburgh, Merrivale, Atkin and MacMillan.

Application for leave to appeal from a conviction for contempt of Court by the Supreme Court of Ceylon.

H. I. P. Hallet, K.C., with *L. M. D. de Silva, K.C.*, (*Ceylon*) for the applicant.

Sir Donald Somervell, K.C., Attorney-General with *Kenelm Preedy K.C.*, for the Crown.

Mr. Hallet submitted that the decision of the Supreme Court of Ceylon threatened an infringement of the liberty of the Press, which the Judicial Committee has been at great pains recently to re-affirm and define. He urged that the newspaper article in question, read as a whole, was not a criticism of the Judges at all, but was a criticism of the tradition concerning Court vacations incorporated in Ordinances and Regulations. There was no evidence that the writer was doing otherwise than genuinely exercising the right, enjoyed by every member of the public and greatly valued by the Press of Ceylon, to criticise temperately and fairly but freely any episode in the administration of justice.

Counsel argued that the meanings attributed by the Ceylon Court to the passages complained of were not the natural or ordinary meaning of those words when read as part of the whole article. He submitted that the Supreme Court had misconceived the doctrine of Contempt of Court as applied to public criticism and had applied their jurisdiction to punish for such contempt in a case where it was not properly applicable.

In further argument Mr. Hallett said that it had been laid down that an offence to the dignity of a Court was not in itself a subject calling for punishment.

Counsel for the Crown was not called upon. The application was dismissed.

In the Supreme Court of Ceylon.

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

In the matter of a rule under Section 51 of the Courts Ordinance on Herbert Alexander Jayatilleke Hulugalle, Editor of the 'Ceylon Daily News".

Argued on 7th and 8th September, 1936.

Delivered on 21st. September, 1936.

Contempt of Court—Courts Ordinance Section 51—Newspaper Editorial holding up to public odium and ridicule the judges of the Supreme Court.

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The facts shortly are as follows :—

An editorial article entitled "Justice on Holiday", was printed and published in the "Ceylon Daily News" on the 6th of August, 1936. As the article contained matter scandalous and holding up to public odium and ridicule of Judges of the Supreme Court, a rule *nisi* under section 51 of the Courts Ordinance, 1889, as issued by the Supreme Court on the 25th of August, 1936, calling upon the respondent, the Editor of the 'Ceylon Daily News', to appear in person before the Supreme Court on 7th September 1936, and show cause by affidavit why he should not be punished for Contempt of Court. On 7th September 1936, the respondent appeared and showed cause by affidavit in which he stated *inter alia* :—

(*a*) that he was not the writer of the article in question ;
(*b*) that the article was not capable of the meaning imputed to it in the rule *nisi* ;
(*c*) that he would not have allowed the article to be published if he thought the article was capable of the meaning imputed to it in the rule.

It was argued for the respondent that the article did not constitute a contempt of Court. That it was a criticism of a system and not of the judges themselves. That it was a criticism of measures, 'not of men'.

The Solicitor-General argued that the article constituted a criticism of the judges and as such constituted a contempt of Court.

Held : That the article constituted a contempt of Court.

The respondent was convicted and sentenced to be imprisoned till the rising of Court and to pay a fine of Rs. 1,000/- or in default thereof to suffer simple imprisonment for three months.

R. L. Pereira, K. C., with him *Messrs. H. V. Perera, Canakeratne* and *J. R. Jayawardene* for the respondent.

Mr. J. W. R. Ilangakoon, K. C., (Solicitor-General) with him *Messrs. Basnayake* and *Pulle*, Crown Counsel for the Crown.

ABRAHAMS, C.J.

The defendant, who is the Editor of the Ceylon Daily News, appeared in answer to a Rule issued at the instance of this Court itself to show cause why he should not be committed for contempt of Court in respect of certain passages recorded in a leading article published in his newspaper on August the 6th last, and entitled "Justice on Holiday". For better understanding the reflections on the Judges alleged in the Rule to be contained in this article, it is desirable that the article itself should be set out at length :—

JUSTICE ON HOLIDAY

With all this talk of the law's delays it seems an ironical jest that the Supreme Court and the District Courts of Colombo should close for two weeks from Friday, presumably for the Race Meet in Colombo. This fortnight's relaxation appears

to be the special privilege of these Courts, for the other Courts in Colombo and the outstations, as well as the Legal Department, are expected to perform their duties during that period. His Majesty's Judges in England are not off duty for the Derby or for the fashionable Ascot meet. They do not obviously mix up sport with their judicial functions. Here in Ceylon Public Servants have a surfeit of holidays to make less fortunate members of the public grow green with envy. But when in addition to Christmas holidays, the long Easter vacation and the other leave privileges, the Supreme Court and the District Courts of Colombo close shop during the August race meet, the public has a right to question the propriety of this tradition. It is indeed a tradition of what old bureaucrats would call the halcyon days of the Public Services when Government officials did just as they liked. Now times have changed and especially in the case of the judiciary there is the greater necessity to speed up the administration of justice if the public grievance about the law's delays is to be redressed. But instead of removing the obvious causes which lead to arrears of work the tendency is to talk glibly about the lack of staff and the need for more officers to man the judiciary. The taxpayer is always there to give his money to pay for more Judges, more Commissioners of Assize and other officers. Even in his budget speech Sir Baron Jayatilleke dwelt at length on the law's delays and prefaced his remarks on that point by announcing the increase in the financial provision made for the Supreme Court. Neither more funds nor more personned for the judiciary will help in preventing delays in the administration of justice as long as the tradition symbolized in the August race meet holidays continues. After all, what is this great sport for which justice is held up for a fortnight ? It may have been sport in the past but today it seems to have descended into an orgy of gambling shared by the high and low of the land. It does seem incongruous that two weeks' intensive operations in spotting the Double and the Treble should coincide with special leave for Courts of Law. The sooner the judicial officers and members of the legal profession co-operate to stop this exclusive August holiday the nearer will be the day when there will be no complaint about the law's delays.

The objectionable passages and the innuendoes said to be intended, were set out in the Rule and are as follows :—

(1) " With all this talk of the law's delays it seems an ironical jest that " the Supreme Court and the District Courts of Colombo should close for " two weeks from Friday, presumably for the Race Meet in Colombo..... " His Majesty's Judges in England are not off duty for the Derby or for the " fashionable Ascot Meet. They do not obviously mix up sport with their " judicial functions. Here in Ceylon Public Servants have a surfeit of " holidays to make less fortunate members of the public grow green with envy. " But when in addition to Christmas holidays, the long Easter vacation " and the other leave privileges the Supreme Court and the District Courts " of Colombo close shop during the August race meet, the public has a right " to question the propriety of this tradition. It is indeed a tradition of " what old bureaucrats would call the halcyon days of the Public Services " when Government Officials did just as they liked,

' meaning thereby that in spite of the fact that the Judges of the ' Supreme Court are amply provided with holidays, they habitually ' take in August a further holiday of two weeks to which they are ' not justly entitled for the mere purpose of indulging a passion ' for race-going and that their behaviour in so doing is in contrast

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and

" with that of His Majesty's Judges in England who keep their " judicial functions separate from sport ".

(2) " Neither more funds nor more personnel for the judiciary will " help in preventing delays in the administration of justice as long as the " tradition symbolized in the August race meet holidays continues. After " all what is this great sport for which justice is held up for a fortnight ?"

' meaning thereby that the delays in the administration of justice ' are due to the unwarranted closing of the Supreme Court by the ' Judges owing to the August Race Meet and that the Judges know ' or ought to be aware of this fact instead of which they prefer to ' attribute it to inadequacy of staff and insufficiency of funds ".

The defendant, in his affidavit, stated that he was the Editor of the newspaper but was not the writer of the leader. He denied that the passages complained of contained the meanings attributed to them in the Rule. He protested his respect for the Judges and said that if he had thought that the passages bore the meanings attributed to them, whether the same amounted to a contempt or not, he would not have permitted publication.

I think it also desirable, in order to ascertain whether the alleged meanings can be reasonably attributed to the article, that it should be carefully examined and that certain facts should be set out. These are as follows :—During the month of August in Colombo, it is, and has been the case for a number of years, that what may not inaptly be called a Carnival of Sport and social functions takes place ; these functions include the Kennel Club Show, Football Matches under both Codes, Hockey and Cricket Matches, Boxing Championships, and the most important meeting during the year of the Ceylon Turf Club. The Supreme Court goes into vacation for ten working days which overlap this carnival period, and this year during that vacation there occurred two Race days, one only of which was on a week-day afternoon, the other taking place on a Saturday afternoon. Incidentally the Supreme Court does not sit on a Saturday in Term time. The Assize Courts during this August vacation invariably continue to function, and there is also a Vacation Judge who sits on one day during the vacation.

The vacations of the Supreme Court are prescribed by Statute, namely, " An Ordinance for the establishment and regulation of Vacations " in the Supreme Court, No. 1 of 1906 ", as amended by Ordinance No. 2 of 1928. The necessary provision runs as follows :—

" Section 4 of the principal Ordinance is hereby amended so as to read as " follows:—

(1) " The Christmas vacation shall commence on the twenty-second " day of December and terminate on the twelfth day of the next following " January.

" Provided that if the thirteenth is a Thursday and the day following " is a public holiday, or if the thirteenth is a Friday, then the Christmas " vacation shall terminate on the Saturday next following.

(2) "The Easter vacation shall commence on Maunday Thursday "and shall continue for twenty three days.

(3) "The August vacation shall commence on such day in August "as the Chief Justice shall appoint in each year for the purpose and shall "continue for twleve days.

(4) "The days of the commencement and termination of each vaca- "tion shall be included in such vacation."

So far as the August vacation is concerned, the amendment added two days. The District Courts are under the direction of the Attorney General and are independent administratively of the Supreme Court. By Financial Regulations of the Government (see F.R. 1100) vacations of the District Court depend upon the state of the roll of cases. I might mention here, though it is not necessary to do so, that action has been taken in respect of the Supreme Court only as it appeared from the reference to His Majesty's Judges in England and the later reference to the financial provision made for the Supreme Court that the Supreme Court was specially aimed at. For some years now, delays in the disposal of cases both civil and criminal in the Supreme Court have been the occasion of much concern to the Government and to the Judges of the Court, and undoubtedly have been the occasion of public interest and, it may be, of discussion. Last year the Judicial Commission, presided over by the late Chief Justice, was appointed to investigate the state of civil business in the Courts in general. The report was published in March this year. Various reasons were given for the delays but it was not suggested, nor did it appear in evidence, that the statutory vacations should be abolished or curtailed, but it was certainly recommended that there should be an increase of the Supreme Court Bench. At the present moment the number of cases in arrears on the appellate side of the Supreme Court is well over 700, and it is manifest that no appreciable reduction can be made in these arrears without an increase in the Judiciary. In fact it is not beyond the bounds of possibility that without this increase the Courts may be able to hold their own in the flow of business. In addition to the Supreme Court Judges, Commissioners of Assize are appointed from time to time to cope with the excessive criminal work. This year the Supreme Court Judiciary has been increased by one.

The species of contempt alleged against the defendant is that which was described by Lord Hardwicke L.C. as 'scandalising a Court or a Judge', (*In re Read and Huggonson*, (1742) 2 Atk. 469). This was defined by Lord Russell of Killowen C.J. in *Reg. v. Gray*, (1900) 2 Q.B. 36, as "any act done "or writing published calculated to bring a Court or a Judge of the Court "into contempt, or to lower his authority". It was suggested by Counsel for the defendant, at any early stage of these proceedings, that if committals for this type of contempt are not actually out of date in Ceylon that we should be very slow indeed to take action in this manner, and that moreover it would be more desirable that proceedings should be taken as for defamation since in proceedings for contempt the Court itself is both prosecutor and judge. There was cited to us in support of the first suggestion

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the case of *Mc Leod v. St. Aubyn*, (1899) A.C. 549, in which Lord Morris delivering judgment in the Judicial Committee of the Privy Council said that committals for contempt of Court by scandalizing the Court itself had become obsolete in England. This observation was disproved next year by the incidence of the case of *Reg. v. Gray*, and as the Privy Council applied the law laid down in respect of this kind of contempt in that case as a test in the recently decided case of *Ambard v. Attorney General for Trinidad*, (1936) A.C. 322, I think that it is not open to argument that what has been done in England ought not to be done in Ceylon in the proper circumstances. Further, committals for this kind of contempt are not unknown in Ceylon, since, *In the matter of Armand de Souza*, Editor of the Ceylon Morning Leader, 18 N.L.R. 33, a Full Bench of this Court declared that committals for contempt by scandalizing the Court were punishable in Ceylon. As to the second suggestion, I would quote the words of Woodroffe J. commenting on a similar suggestion made *In the case of Moti Lal Ghose*, 45 Cal. at page 199, where he said, " That observation applies to all cases of contempt, " and if it were given effect to, the Court would be deprived of its jurisdic- " tion in every case ". I might also say at this juncture that it has been urged upon us by Mr. H. V. Perera, who argued the law in a most able and interesting manner, that there has been no reported case of the kind similar to this where the contempt alleged was said to consist of charges against Judges for something not actually done while adjudicating, and that we should be careful not to extend the principles that have been laid down in cases of committal to other cases they were not intended to cover. That has been conceded by the Solicitor-General who appeared in support of this Rule. He has been unable to find a case where the facts were parallel. But though I agree that the Court should not be precipitate to adopt summary procedure, I think that if the case falls within what we regard as well defined principles we not only can but we should exercise our powers in the public interest. In *Helmore v. Smith*, (1886) 35 Ch. D. 449, the Court of Appeal said that though the case before them was a novel case, it did amount to contempt of Court and was quite properly treated as such.

It is now for us to decide whether the Editorial in question does bear the meaning which it is alleged to bear in the Rule issued. In deciding this we have to put ourselves in the place of the readers of the paper and decide to the best of our ability, subjecting the language to the test of our own intelligence, what impression it created on the minds of those who read it. In this connection I would refer to the words of Wood Renton C.J. in the case of *Armand de Sousa*, referred to above. The learned Chief Justice said, " The Court has itself to interpret the meaning of the language " used, and in doing so to consider how it will be understood by the majority " of those whom it reached. It was published in a daily newspaper. It " is clear that the readers of such an article as this would not stop to subject " it to the minute analysis which it has received at the Bar, or to consider " how far the character of the warp of one line of criticism was modified

" by woof of a different texture. They would read the article as such " articles are read every day by ordinary people, who have no time, even " where they have the capacity, to carry out such a process of balancing, " and who would be guided in the long run by the general impression which " the article left on their minds. If we apply that test, it seems to me that " the innuendo which the rule has annexed to the first of the passages in " question is justified by its language ". The learned Solicitor General has analysed before us the article, and has commented on it in detail, and has contended that the readers of the newspaper would undoubtedly place upon it a construction which has been placed upon it in the Rule. This appears to be the substance of his submission. It is alleged, he says, against the Supreme Court that it enjoys a privilege denied to other Courts in Colombo, (with the exception of the District Court, Colombo) and the outstations and to the Legal department, of relaxing from its duties for a fortnight for the purpose of enabling the Judges to attend the Race Meeting in Colombo. That the Judges exercise this privilege for the purposes of amusing themselves in that way is implied in the contrast between their conduct and that of His Majesty's Judges in England who were said obviously not to mix up sport with their judicial functions, the inference clearly being that His Majesty's Judges in Ceylon do mix up sport with their judicial functions, that is to say, they interrupt their labours to resort to race-going. The further inference is that the Judges have not that proper conception of their duties which is held by the Judges in England, who are admittedly the model which His Majesty's Judges overseas should copy. Then it went on to point out that not being satisfied with the Christmas holidays, the Easter vacation and other leave privileges, the Supreme Court adjourns its sittings during the August Race Meet, and that this practice of adjournment is a continuance of a tradition dating back to the times when public servants did just as they liked. The statement that the public has a right to question the propriety of this tradition is clearly an indication in the mind of the writer that the practice was not justified, and, taken with the foregoing reference to mixing up sport with their judicial functions, the impression created in the mind of the reader would obviously be that the Judges maintain a practice of taking a holiday, not because they need it as a rest from their labours, but because they want to go racing, which is conduct unworthy of the example set by His Majesty's Judges in England. The writer then goes on to say that times have changed, which is an indication that it is time that the Judges changed with these times. The reader is then told that instead of removing the obvious causes which lead to arrears of work, the tendency is to talk glibly of the lack of staff and the need for more officers to man the judiciary, and that the tax-payer is always there to give his money to pay for an increase of staff, but that it is useless to provide more money and more judicial staff as long as this tradition of closing the Courts for the August race holidays continues, which interval for sport holds up justice for a fortnight. By 'the obvious causes which

lead to arrears of work' the writer clearly intends to refer to this fortnight's holiday in August. He charges the persons who can remove these obvious causes with preferring to talk instead about lack of staff, and he implies by the concluding words of that passage that it is no use providing more money and more men as long as this August holiday, which is treated in the article as the sole cause for delays in the administration of justice, is allowed to continue. Having, then, blamed the Judges for their addiction to amusement instead of conscientious attention to their judicial duties, and having held them responsible for the arrears of work, to clear away which they ask for more staff, and having said that more staff will be useless as long as justice continues to be held up for a fortnight in this way, he then proceeds to aggravate the indignity offered to the Judges by referring to the sport, judicial patronage of which holds up justice for a fortnight, as an orgy of gambling which brings both the high and the low into contact.

It appears to me that this article is not only disrespectful to the Judges in its mode of expression but must undoubtedly have a tendency to lower the Supreme Court as a body in the eyes of the public, imputing to the Judges a serious breach of duty by taking an unauthorised holiday for the mere purpose of going to race meetings, adding to this imputation a further imputation of dishonesty in attributing the present regrettable arrears of work in the Courts to lack of staff, when the Judges themselves are the cause of that state of things. It is obvious that the public would think very meanly of the Supreme Court if it treated these charges as true.

It has, however, been argued with much force and eloquence by Mr. R. L. Pereira, that it is the holidays and not the Judges that are being attacked. It is, he says, 'an onslaught on measures, not on men'. It is not said, he says that the Judges are not justly entitled to this holiday. What is suggested is that it is not desirable that it should now be taken. He further says that there is nothing to show that this article does not attack the Ordinance which now embodies the tradition in the August holiday, or the tradition itself. From start to finish of this article there was not one word about the Ordinance or any other legal measure establishing the Court vacation. Surely any man of intelligence who had not wilfully overlooked the existence of the Ordinance would have indicated in the article that the Judges had no option but to adjourn in August, and the appeal would have been to the State Council to amend the law, and possibly there would have been an appeal to the Judges to forego in the public interest that holiday which the defendant says he does not contend that they were not justly entitled to. It cannot for a moment be denied that the article is addressed to the Judges not in terms of persuasion but in terms of expostulation. If that is not so, what is the meaning of the reference to mixing up sport with judicial functions. There has been no attempt to explain that most stinging phrase. Further, how can it have been intended to attack a tradi-

tional practice of closing the Courts and not attack those persons who maintain the practice, when it is denounced as an improper practice – a practice which is a relict of the days when Government Officials did just as they liked. Practices do not create themselves nor do they maintain themselves, they are the creation of men and are maintained by men.

It is then argued from the legal aspect that even assuming that the Judges are attacked, they are not attacked qua judges but qua men, and that there can be no contempt here because their judicial functions are nowhere referred to. Now the test applied in the case of *Ambard v. The Attorney General for Trinidad*, above referred to, in the class of contempt known as scandalizing a Court or a Judge, was the definition in *Reg. v. Gray*, which runs as follows :—" Any act done or writing published calculated " to bring a Court or a Judge of the Court into contempt, or to lower " his authority, is a contempt of Court ", and it was further said in that case that this definition was to be taken subject to one and an important qualification, that Judges and Courts were alike open to criticism and that if reasonable argument or expostulation was offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. It is, of course, clear from that definition that to bring a Court or a Judge into contempt, something must be said of a Judge in relation to himself as a Judge, that is to say, in relation to the performance of his judicial duties. So far as I can understand an argument which appears to me to be refined to a degree, to constitute a contempt of Court of this description something derogatory must be said of a Judge while he is actually administering justice. I am entirely unable to see how a Judge cannot be disparaged as a Judge if it is said of him that he is guilty of a breach of any of the duties which he owes to the public as a Judge. If I understand Counsel aright, if it is falsely said of a Judge that when he is sitting on the Bench instead of listening to the argument of Counsel he gambles with dice with the Registrar, that would amount to a contempt of Court. But if it was falsely said of him that he adjourned his Court during sitting hours because he wanted to dice in his private room with the Registrar, that would not be a contempt of Court. I am afraid that to the average person who read of the doings of this Judge he would be regarded as unworthy to sit in the seat of judgment. Nor can I see the difference between the illustrations I have given and the statement about a Judge that instead of coming to his Court as usual on an ordinary working day, he remained in his house to hold a gambling party. It seems to me that it is as much a part of the duty that he owes to the public to attend the Court for the trial of cases, as it is to give due attention to his work when he is in Court and to continue to sit for the despatch of business, unless he has good reason to adjourn. Surely what is implied concerning the Supreme Court and the Judges of the Supreme Court in this case is that they have enough rest from their labours in the form of the holidays at Christmas

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and Easter, and that therefore every one of them ought to go on *de die in diem* from Easter to Christmas unless there is reasonable cause to adjourn, instead of which as a body they take unto themselves the privilege of closing the Courts for a fortnight for an unworthy reason. How can it be said that this is not alleged against them as Judges but only as men ?

Our attention has been directed to the case of *In the matter of a Special Reference from the Bahama Islands*, 1893, A.C. 138. It was argued for the defendant that there is a close similarity between that case and this, in that the Chief Justice of the Bahama Islands was charged in a letter to a newspaper with taking an unauthorised holiday, and that the Judicial Committee of the Privy Council said that that letter might have been a libel but that it was not a contempt of Court. It is very difficult to infer anything from that case because Their Lordships gave categorical answers to certain questions put to them by the Secretary of State for the Colonies and gave no reasons for their answers. I do not think that we are in a position to supply the reasons for those answers. I would say, however, that the facts are altogether different, as in that case the Judge brought the attack upon himself by descending into the arena of newspaper controversy. Further, if I may say so with respect, there does not appear to be anything to show that the allegation in that case was not true. It is also argued that the innuendoes cannot amount to a contempt because, to use the exact words of Mr. H. V. Perera, they do not tend to affect the confidence of the public in the judicial acts and determinations of the Judges when performing their judicial functions. That seems to me to assume that it is necessary to prove that the confidence of the public must be affected in that respect. If the test to apply is that which was applied by the Privy Council in the case of *Ambard v. The Attorney General for Trinidad*, namely, that any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority is a contempt, it seems to follow as a matter of course that the administration of justice is endangered by being brought into disrepute.

It is implied, so far as I can follow the elaborate argument, that it is only when the confidence of the public that the Judges will adjudicate justly is undermined, that a contempt is committed. Reference was made to the citation in the *King v. Davies*, (1906) 1 K.B. 32, of the observations of Wilmot C.J. in the *King v. Almon* (1765) where that learned Judge said that " Attacks upon the Judges excite in the minds of the people a general " dissatisfaction with all judicial determinations ". I think a reply to the argument of Mr. Perera is that assuming such dissatisfaction is not presumed inevitably to flow from contempt of the authority of the Judges, I can hardly believe that members of the public, if they once conclude that the Judges of the Supreme Court are guilty of a serious breach of their judicial duties in one respect, will not think it highly probable that they will be guilty of a breach of duty in every other respect. Besides, if I may say

so with respect, I do not see why the expression 'dissatisfaction with judicial determinations' should only mean dissatisfaction with the correctness and impartiality of decisions. A decision may be thoroughly unsatisfactory on account of a serious delay in rendering it, and through lapse of time it may be perfectly useless to the party claiming its benefit. I am of the opinion that it is as much the duty of a Judge to do justice with as little delay as is reasonably possible, as it is to do justice correctly and impartially. There is an old saying that justice is ever sweetest when it is freshest. Clause 40 of Magna Charta says, " To none will we sell, to no one will we deny or delay " rights or justice ", which clearly means that the Judges are bound to the public not only to do justice incorruptly or impartially but to do it swiftly. It seems that if I acceded to the argument of Counsel in this respect I should concede that it is the business of the Judges only to keep the stream of justice pure and not to prevent it from being dammed to a trickle by a congestion of cases. Surely it is only commonsense to conclude that public confidence in a speedy disposal of cases by the Judges to the best of their ability in view of prevailing circumstances, is likely to be undermined.

In my opinion the article bears the construction placed upon it, and the defendant has failed to show cause why he should not be committed for contempt of Court.

This is a serious contempt. The language employed is extremely offensive. Moreover, at a time like this the article is most mischievous. Reforms in the Courts are, as I have said, much to the fore at the moment, and the public is of course interested to know what will be done and how much it may cost. The plight of the taxpayer is graphically depicted in the article and he is given little comfort when he is told that it will be useless to pay for an increased judiciary when the delays which an increased Bench will be appointed to cope with are caused by the judges themselves and by conduct unworthy of their office. It is obvious that the confidence which the public is presumed to have, as Wilmot C.J. puts it, in the *King v. Almon*, in the wisdom and integrity of the judges that the power they have is applied to the purpose for which it was deposited in their hands, is seriously jeopardised by allegations of the kind which the offending article contains, and that power would ultimately be fretted away if such allegations were allowed to pass unremarked.

It would be thoroughly undesirable that the press should be inhibited from criticising honestly and in good faith the administration of justice as freely as any other institution. But it is equally undesirable that such criticism should be unbounded. The rights of such criticism and the limitations imposed upon these rights are, if I may respectfully say so, well defined in the concise and most trenchant words of Lord Atkin in *Ambard v. Attorney General of Trinidad:—*

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"But whether the authority and position of an individual judge, or the "due administration of justice, is concerned, no wrong is committed by any member "of the public who exercises the ordinary right of criticising, in good faith, in "private or public, the public act done in the seat of justice. The path of criticism "is a public way; the wrong headed are permitted to err therein; provided that "members of the public abstain from imputing improper motives to those taking "part in the administration of justice, and are genuinely exercising a right of "criticism, and not acting in malice or attempting to impair the administration "of justice, they are immune. Justice is not a cloistered virtue: she must be "allowed to suffer the scrutiny and respectful, even though outspoken, comments "of ordinary men."

It was open to the defendant, as to anyone else, to hold and express the opinion that there are too many Court vacations or that they are too long or are fixed at inconvenient times, or that portions of them should at this juncture be sacrificed to the public interest, and had that been all no objection could have been taken in this Court.

The defendant states he was not the writer of the offending article and I see no reason to disbelieve him. But he does not deny that he passed the matter for publication and his responsibility is therefore hardly less than if he had written it. No apology has been tendered. At the same time it must be observed with no little satisfaction that proceedings in contempt have been infrequent in Ceylon, in fact there has been no committal since the case of Armand de Souza in 1914, when an order for one month's imprisonment was made. While taking this into consideration, I think at the same time the Court should, in the interests of the public, mark its reprobation of the indignity offered to itself.

Herbert Alexander Jayatileka Hulugalle, the order of the Court is that you be imprisoned until the rising of the Court and that you do pay a fine of Rs. 1,000/- or suffer simple imprisonment for three months in default of payment.

AKBAR, S.P.J.

I agree

KOCH, P.J.

I agree