The Ceylon Law Weekly

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

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WITH A DIGEST

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Held : That no such duty was imposed by law and that under section 755 of the Civil Procedure Code the Secretary or Chief Clerk of the Court was obliged only to set forth the material statements and grounds of appeal which the appellant wished to state in the form of a petition of appeal, and to have the petition attested by him after the appellant had signed it.

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Plaintiff obtained a money decree against the appellant on 16th December, 1937. The 1st application for writ was made on 8th July, 1948, and was allowed returnable on the 10th of February, 1949, and various sums of money representing the salary of the appellant for the months of March to December, 1948, were seized thereon and deposited in Court.

On 13th January, 1949, plaintiff's proctor moved that the writ issued be recalled, extended and re-issued, but the Court made order that the application should be made after the return of the writ.

On 23rd of March, 1949, plaintiff made application for further execution setting out the steps taken on 13-1-49 and praying that writ returned be re-issued. The Court allowed it holding that the application was virtually due for extension of time. The appellant contended that the writ was barred by Section 337 of the Civil Procedure Code.

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(2) That where the Court is of opinion that at the stage at which the application is made it is premature to state whether such a witness is necessary or not, the petitioner may be permitted to make a subsequent application.

Per BASNAYAKE, J.—"We wish to observe that in seeking the assistance of English decisions for determining the true scope of our enactment the language of the Code should not be overlooked, and it should be borne in mind that the English rule is not in exactly the same terms as our enactment. Another factor that should be taken into account in considering the older cases is the vast improvement in the speed of travel in modern times."

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The plaintiff was a member of a club called "Corsham Community Centre", who were licencees of a hall used for club activities. Under the rules of the Club a committee of management was elected by the members, and was authorized under the rules merely to manage the affairs of the Club and to provide, at their discretion, to what use the centre should be put.

The plaintiff while attending an entertainment without payment at the hall, which was one of the privileges of the membership, was injured by bricks from a damaged roof. She sued the committee of management on the ground that the contract between herself and the committee contained an implied warranty that the premises were and would be as safe for the purposes for which she was admitted as member as reasonable care and skill could make them.

Held : That the only contract the plaintiff made was when she paid her subscription to the Secretary of the Club as representing its members, and that was only a contract with the other members of the Club that she should be admitted to membership under its rules, and that the rules did not impose on the committee of management the liability which the plaintiff sought to put on them.

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The plaintiffs and defendant were co-owners of a land. The defendant built a house on the common land before the trial date against the express wishes of the plaintiffs. The plaintiffs obtained a mandatory injunction to demolish the house.

Held : (1) That the plaintiffs were not entitled to the mandatory injunction in the absence of proof that the erection of the building caused them any material damage or interfered with any of their proprietary rights or altered intrinsically the character of the common property.

(2) That every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportionate to his share, provided that he does not infringe the rights of other co-owners.

(3) That the question whether in any particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors and cannot be solved as an abstract question of law.

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Criminal Procedure—Dying deposition—How it should be recorded.

Held : (1) That where the prosecution relies upon a "dying deposition" to establish a charge of murder, it is imperative that the trial Judge should adequately caution the jury that, when considering the weight to be attached to such evidence, they should appreciate that the statements of the deponent had not been tested by cross-examination.

(2) That whenever in recording a dying deposition questions are put to the deponent for purposes of elucidation the form of the question as well as of the answer should be precisely recorded.

Per GRATIAEN, J.—"The method of recording evidence 'in the form of a narrative' though sanctioned in ordinary cases by section 298 (2) of the Code, seems to be inappropriate to the special case of a 'dying deposition'."

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Two accused were charged with acting together with a common purpose for or in committing breach of trust of money, the first accused alone with criminal breach of trust of money, and the second accused with abetting the first accused, offences punishable under sections 113*b*, 392 and 102, of the Penal Code.

On appeal it was contended on behalf of both the accused that the charge of "conspiracy" was bad in law in that it did not allege an "agreement" between them to "act together" in the manner and for the purpose specified.

Held : (1) That the indictment was bad in law in that it did not allege and was not intended to allege a prior "agreement" between the accused which is essential to the commission of any species of the offence of criminal conspiracy within the meaning of section 113*a* of the Penal Code.

(2) That where the indictment preferred a single conspiracy charge and there is evidence of a series of separate conspiracies, the Judge should specifically direct the Jury that there is only one single charge of conspiracy and that it was not competent for them to convict the accused unless they were satisfied upon the evidence that there was one single conspiracy which preceded and motivated the consequential acts which each accused was alleged to have committed.

(2) That in a charge of "abetment by conspiracy" under section 100 of the Penal Code, an agreement, which is an essential prerequisite of the offence, must be established.

(4) That in a charge of abetment by facilitation of criminal breach of trust, the liability of an alleged abettor under section 185 of the Criminal

Procedure Code to be jointly tried with the principal offender is subject to his right under section 179 to claim that not more than three charges of the same kind may be laid against him in the course of a single trial. This right is, as far as the abettor is concerned, not affected by the provisions of section 168 (ii).

Per GRATIAEN, J.—"It seems to us that the words "with or without previous concert or deliberation" were advisedly introduced into the language of section 113*a* of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of "agreement" which needs to be proved is an agreement with a "common design."

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The five appellants were convicted by a divided verdict of 5 to 2 on a charge of having conspired to murder two persons, in pursuance of which conspiracy both persons were in fact murdered. The circumstances in which Dias, one of the principal witnesses for the prosecution claimed to be able to testify to certain incidents alleged to have taken place during the crucial period were such as prominently to raise the question whether his evidence should be regarded as that of an accomplice. The jury were not invited by the trial judge to consider whether, apart from the evidence of Dias, the guilt of the accused was established by the evidence of the other witnesses called by the prosecution. Certain—passages in the charge to the jury were likely to have led them to think that they need not regard Dias as an accomplice, if in their view, he had been a guilty associate in the original plot but was not a guilty associate in the actual commission of the murders.

Held : (1) That a guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murder which had been planned.

(2) That the passages in question amounted to a misdirection which vitiated the conviction unless it could be held that no substantial miscarriage of justice had actually occurred.

(3) (By the majority of the Court) that it was not a case to which the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance should be applied.

Per GRATIAEN, J.—"In our opinion the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot properly be applied in the case of a divided verdict unless the evidence is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly reverse."

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Charge of unlawful assembly with house-trespass and attempted murder as common objects—Acquittal of accused on charges of house-trespass and attempted murder—Conviction for unlawful assembly and rioting—Inconsistency—Failure of Judge to put evidence of accused to jury.

Out of four accused charged with unlawful assembly, with house trespass and attempted murder as the common object one was completely acquitted, while the others were acquitted of house-trespass and attempted murder and convicted of unlawful assembly and rioting. The defence, supported by the accused's own evidence, was not put to the jury.

Held : (1) That the evidence on all the counts being the same, the alleged guilt of the accused on the counts of unlawful assembly and rioting was inconsistent with and was negatived by the verdict of acquittal on the connected offences.

(2) That the failure of the trial Judge to put to the jury the defence of the accused supported by his own evidence was itself a sufficient ground to quash the conviction.

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On 21-3-1950 the Police instituted non-summary proceedings in case No. 4124 M. C., Kanadulla, charging the accused with having on 12-12-49 used as genuine a forged or counterfeit five rupee note, knowing or having reason to believe the same to be forged or counterfeit, an offence punishable under section 478 (*b*) of the Penal Code.

On the same day in a separate case, the accused was charged with the commission of a similar offence on 9-12-49 and non-summary proceedings commenced thereon.

The accused was subsequently committed for trial in the Supreme Court on both charges.

The Attorney-General amalgamated both charges and presented a single indictment to the Supreme Court and at the trial Counsel for the defence took objection thereto.

At the argument it was conceded by the Crown that there was probably insufficient evidence in either case, when separately considered to justify the committal of the accused on either charge, and that it was felt that the pooling of the evidence led in the two separate non-summary proceedings would have furnished sufficient evidence for a conviction by a jury.

Held : (1) That although it is not illegal for the Crown to join in the same indictment under section 179 of the Criminal Procedure Code two charges which had formed the subject of separate proceedings terminating in separate committals, such a procedure is not proper and should not be permitted by the trial Judge where the avowed intention of the Crown is to supplement at the trial the insufficient evidence relied on in one preliminary magisterial investigation by the evidence recorded in a different investigation.

(2) That section 172 of the Criminal Procedure Code was never intended to authorise the Crown to supply vital gaps in the case against a person who had been improperly committed for trial on insufficient evidence.

(3) That on the facts of this case the accused should be separately tried as the accused was likely to be prejudiced in his defence.

Criminal Procedure Code

Sections 172 and 179. Village Communities Ordinance (Cap. 198) Charges under—Withdrawal and amendment of charges, when should be allowed.

Held : (1) That the power vested in a court under section 172 of the Criminal Procedure Code to alter a charge at any time before judgment is pronounced is a discretionary one and should be exercised judicially.

(2) That where a Magistrate failed to give reasons for the exercise of this discretion, the Supreme Court would consider the question anew.

(3) That section 172 of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more charges in a plaint.

(4) That an amendment of charges should not be refused by a court unless it is likely to do substantial injustice to an accused.

Per NAGALINGAM, J.—" Furthermore, when I consider that the charges relate to the commission of offence by a person holding a public office, I am the less reluctant to refuse the amendment."

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Plaintiff, having entered into a contract with one M in Basrah for the purchase of 52 tons of dates, requested the defendant Bank by letter to negotiate drafts drawn on him by M to the extent of Rs. 15,860, provided M surrendered to the defendant (*a*) an on board bill of lading, (*b*) an invoice, (*c*) a policy of insurance representing a shipment of about 1,000 bundles of dates weighing 52 tons C. I. F. Colombo and further promised to honour such draft in Colombo at maturity.

The defendant Bank agreed to do so and arranged with the Ottoman Bank, Basrah, to honour M's drafts. The Ottoman Bank paid Rs. 15,860 as against the invoice, the bill of lading and a policy of insurance. The bill of lading stated the " quantity or number of packages " to be 940 and weight as 47,000 *kilos* which according to the evidence was equal to 47 tons.

The invoice stated the number of packages to 940 and the weight of each bundle as 124 *kilos*—Total 1,040 cwts.

The plaintiff claimed from the defendant Bank the value of 5 tons of dates being the difference between the weights in plaintiff's letter to the defendant and the weight of the shipment as given in the bill of lading.

Held : (1) That there was negligence on the part of the defendant's agent in honouring M's draft which was not accompanied by a bill of lading showing that 52 tons of dates had been shipped.

(2) That as the plaintiff failed to prove satisfactorily the damages sustained by him, the Court would award only nominal damages.

(3) That under the Bills of Lading Act, the bill of lading is conclusive evidence only in favour of a consignee or endorsee for valuable consideration of the shipment of goods against the maker or the person signing the bill of lading. In other cases the statements in the bill of lading are *prima facie* evidence which the person disputing them must prove.

Deed

*Interpretation—Deed conveying portion of land—Correct description by boundaries—Extent inaccurately stated—Does it affect land conveyed—*Falsa demonstratio.

Held : That where in a deed the portion of land conveyed is clearly described and can be precisely ascertained a mere inconsistency as to the extent thereof should be treated as a mere *falsa demonstratio* not affecting that which is already sufficiently conveyed.

Defence Regulations

Privy Council—Certiorari—Jurisdiction of Supreme Court to issue—Courts Ordinance, Section 42—Interpretation of words " or other person or tribunal ".

Textile Controller—Defence (Control of Textiles) Regulations, Regulation 62—Revocation of licence granted to dealer in Textiles—Does certiorari lie against Controller.

Rule 62 of the Defence (Control of Textiles) Regulations, 1945, reads as follows :—

" Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licence issued to that dealer ".

Acting under this regulation, the respondent as the Controller of Textiles revoked the licence granted to the appellant to deal in textiles on the ground that he was a person unfit to hold a textile licence.

This decision to cancel the licence was preceded by certain exchanges between the parties, which arose out of the discovery of what appeared to be grave falsifications in the books of that branch of the respondent's office known as the Textile Coupon Bank. The final result of the falsifications was to credit the appellant with a much larger number of surrendered coupons than the records of the receiving clerks and their checkers appeared to justify.

The appellant obtained from the Supreme Court a rule *nisi* directed on the respondent to show cause why a writ of certiorari should not be issued to him for the purpose of quashing the order cancelling the licence.

The Supreme Court after hearing the parties held that the rule *nisi* must be discharged with costs on the ground that the respondent, though exercising a quasi-judicial function, had not departed from the rules of natural justice in arriving at his decision.

The question whether section 42 of the Courts Ordinance gave the Supreme Court power to direct the prerogative writs to a person such as the respondent or the question, whether the respondent, in acting under the powers of Regulation 62, is acting in a capacity that would make him amenable to certiorari even assuming that he is a person or tribunal within the meaning of section 42 of the Courts Ordinance, was not dealt with in these proceedings in view of a decision of a Bench of Five Judges in *Abdul Thassim vs. Edmund Rodrigo (Controller of Textiles)* 48 N.L.R. 121.

Held : (1) That the words " other person or tribunal " in section 42 of the Courts Ordinance are not to be interpreted as meaning persons who are *ejusdum generis* with District Judges, Magistrates or Commissioners. They include bodies or tribunals which while not existing primarily for the discharge of judicial functions, yet have to act analogously to a Judge in respect of certain of their duties.

(2) That the words " according to law " in section 42 means according to the relevant rules of English Common Law.

(3) That the respondent is not amenable to a mandate in the nature of a certiorari in respect of action under Regulation 62, as the requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially and as there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

(4) That the words " where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer " should be treated as imposing a condition that there must in fact exist such reasonable grounds known to the Controller before he can validly exercise his power of cancellation.

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Rule 33 of the Parliamentary Election Petition Rules, 1946, provides that the costs awarded to a successful party in an election petition shall be taxed by the Registrar.

Held : (1) That a Deputy Registrar has no power to tax the bill for costs awarded to a successful party at an inquiry into an election petition.

(2) That section 11 (*c*) of the Interpretation Ordinance enables a deputy or subordinate to perform the duties of his chief or superior when he is acting in place of his chief or superior and lawfully executing the duties that appertain to the office of his chief or superior.

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Burden of proof—Civil action—Defendant not calling any evidence in rebuttal when called upon—Assessment of oral evidence—Onus on the defendant to lead evidence in rebuttal.

The plaintiff sued the defendant for the recovery of Rs. 2,500 alleged to have been advanced on a paddy transaction which was illegal. The defence was a complete denial of the transaction. The plaintiff gave evidence and also called one S to support his case. The defendant's proctor when called upon for the defence stated that he was not calling any evidence. The learned District Judge disbelieved the plaintiff and his witness and accordingly dismissed his action.

Held : That where a defence was called upon and no evidence was at all forthcoming a verdict that the plaintiff's evidence is palpably false cannot be supported.

Per PULLE, J.—" With great respect, the learned Judge's approach to the question whether the three telegraphic money orders had been sent is open to the criticism that, before drawing an adverse inference from the fact that the money order receipts had not been produced, he should have considered whether the reason given by the plaintiff for his failure to produce them was itself false. The reason given by the plaintiff for the non-production of the corroborative documentary evidence was inexcusable but it cannot be a fair appraisement of the oral evidence of the advance of Rs. 1,700 to characterize it as false from the bare circumstance that the plaintiff failed to produce the receipts.

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Evidence Ordinance

Section 112—Presumption of legitimacy—Rebuttal—Onus.

Divorce action—Adultery—Damages against co-respondent—Why Privy Council should not interfere with award.

The plaintiff (1st respondent) sued her husband (the appellant) for a decree for judicial separation and for an order for payment to her of maintenance in respect of two children P and R born during the period of marriage. The appellant in his answer denied (*a*) her right to a judicial separation, (*b*) that the boy R was any son of his and asserted that she committed adultery with the 2nd respondent. Also he counter-claimed a decree for divorce and damages against the 2nd respondent.

The District Judge granted a divorce to the appellant on the ground that the 1st respondent committed adultery with the 2nd respondent and further held that the boy R could not be the son of the appellant. He also awarded damages in a sum of Rs. 15,000 against the 2nd respondent.

The respondents appealed and the Supreme Court upheld the findings as to adultery and decree for divorce but reduced the damages awarded to Rs. 10,000 and further declared that the appellant had failed to disprove the legitimacy of the boy R.

The appellant thereupon appealed to the Privy Council on the issues as to the paternity of the child and the quantum of damages.

There was evidence to establish (*a*) that the only date on which the appellant had access to his wife, during the material period was on the 9th of August, 1941 ; (*b*) that the child was born on the 26th March, 1942, the interval between the dates being 229 days inclusive of both dates ; (*c*) that the labour was a normal one and the child was a mature child of complete uterine development.

The expert evidence left no doubt (*a*) that a fully developed child normally appears after a uterine existence of 280 days from the commencement of the last menstrual flow (*b*) that an insemination-delivery period of 229 days could not—produce this fully developed child.

Held : (1) That in the circumstances the appellant had discharged the burden that lay on him to rebut the presumption created by section 112 of the Evidence Ordinance.

(2) That under section 112 of the Evidence Ordinance the ostensible father who denies paternity must prove that he had no access to the mother at a time when the child could have been begotten. In many cases this onus is a heavy one.

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Excise Ordinance, Sections 34, 35 and 36—Search without warrant—Admissibility of evidence so obtained.

An Excise party entered a house without a search warrant and arrested without a warrant the accused, who was alleged to have sold to a decoy the arrack, which the decoy was drinking at the time of entry. At the trial evidence was admitted of similar offences committed by the accused.

Held : (1) That the search without a warrant of the whole of a building, the verandah of which was used as a boutique and the rest as a human habitation, cannot be justified on the ground that such building was a place other than a dwelling-house.

(2) That the arrest of the accused without a warrant for the commission of the alleged offence and without compliance with the requirements of section 36 is unlawful.

(3) That the evidence obtained by such search is inadmissible.

(4) The admission of evidence of similar offences committed by the accused was prejudicial to the accused.

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Criminal Procedure—Police Officer, sole witness for prosecution, conducting prosecution—Undesirability.

Excise Ordinance—Search without warrant or complying with section 36—Evidence obtained by such search—Should a conviction be based on such evidence.

Held : (1) That a Police Officer, who is the sole witness for the prosecution, should not undertake the conduct of the prosecution in Court.

(2) That a conviction should not, save in exceptional circumstances, be based on evidence gathered in the course of an illegal entry on a person's house, although such evidence is not declared by the Evidence Ordinance to be inadmissible.

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Motor Car Ordinance, No. 45 of 1938, section 75 (2)—Certificate of Competence—Order for Suspension —Need to afford opportunity to place evidence of special circumstances before such order.

Held : That before an order suspending a certificate of competence under section 75 (2) of the Motor Car Ordinance is made, an accused person should be given an opportunity to place before the Court evidence of any special circumstances that govern his case.

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A Muslim female who had been brought up from her infancy as a Hanafi married according to Muslim rites when she was of fifteen years and two months, in age, which she alleged was past the age of 'bulugh' (discretion). For the purpose of the marriage she appointed by notice to the Registrar her uncle as wali, and the marriage was duly registered in accordance with the provisions of the Marriage and Divorce (Muslim) Ordinance (Cap. 99).

The father challenged the validity of the marriage incidentally, in an application by him to be appointed as curator and guardian of his daughter.

Held : (1) That the marriage was valid. A Muslim female in Ceylon following the Hanafi sect and had attained the age of bulugh (discretion) could marry without the assistance of a wali or marriage guardian.

(2) That for the purpose of marriage a Muslim attains "majority" on reaching the age of bulugh or puberty.

(3) That in a matter of marriage or divorce a Muslim is governed by the law of the Sect to which he or she belongs. "The words "Muslim Law" in that section (Section 50 of Cap. 99) cannot mean anything more or less than the Muslim Law governing the Sect to which the particular person belongs".

(4) That Section 8 (1) of Cap. 99 read in conjunction with Section 50 must be understood to mean that where Muslim Law requires a bride to be represented by the wali, he shall sign the marriage register on her behalf; where it does not, the signature of a wali to the marriage register is unnecessary. The section does not supersede the Muslim Law of Marriage and divorce.

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Omnibus Service Licensing Ordinance, No. 47 of 1942.

Case stated—Motor Car Ordinance No. 45 of 1938 and Omnibus Service Licensing Ordinance No. 47 of 1942—Proper mode of application by Commissioner of Motor Transport.

In stating a case for the opinion of the Supreme Court, the Commission should set forth the facts tabulated in paragraphs. Opinions or arguments should not be stated and there should be a definite finding of the facts, not a verbatim statement of the evidence, nor an approval of the contentions of either party. The questions submitted for the opinion of this (Supreme) Court should be clearly set out. Any material documents which were in evidence at the hearing before the Tribunal should be annexed as exhibits.

COMMISSIONER OF MOTOR TRANSPORT VS. THE SOUTH-WESTERN BUS CO., LTD. & OTHERS ... 106

Partition

Partition—Action for—Defendant's denial of plaintiff's title and claim that land forms part of Nindagame—Grant of whole village by Sannas—Failure of defendant to prove that land falls within village mentioned in grant.

Held : That where a person claims a land on a Sannas conveying a whole village, he must establish that the land he claims falls within the limits of the village at the time of the grant, for there is no presumption that the limits of a village do not undergo change in course of time.

MOLAGODA KUMARIHAMY VS. WIJETUNGA & OTHERS 40

Partition action—Interlocutory decree obtained without making heirs of certain deceased parties parties to the action—Decree affirmed in appeal—Power of Supreme Court to vary its decree.
See Restitutio-in-Integrum 86

Partition—Co-owner acquiring prescriptive title to divided block in lieu of undivided share in and—Heirs of such co-owner transferring their rights describing as undivided shares of whole land—Partition sought of divided block—Transferees not entitled to larger fractions of the corpus than set out in the deeds in respect of the larger corpus.

A co-owner acquired a prescriptive title to a divided block in lieu of his undivided 1/12 share of a land. His heirs transferred their rights in the divided portion describing as fractions of the larger land. In an action for partitioning the divided block.

Held : That the transferees are not entitled to get any larger fraction of the corpus to be partitioned than set out in the deeds in respect of the larger corpus.

APPUHAMY vs. ELISAHAMY 111

Paulian Action

Fraudulent Alienation—Paulian Action—Combined with action under Section 247 of the Civil Procedure Code—Onus of Proving Fraud—What should be proved.

Held : (1) That in an action to set aside a sale in fraud of creditors it must be proved that the alienee with full knowledge that the alienation was being made to defraud creditors has participated in the transaction.

(2) That the mere fact that the alienee simply knows that the debtor also had other creditors is no ground for holding that he is a participant in the fraud.

(3) That the burden of proving fraud rests upon the plaintiff when the alienation is for valuable consideration.

TOBIAS FERNANDO vs. DON ANDRIS APPUHAMY... 44

Penal Code

Obstruction—Fiscal Officer entrusted with writ for delivery of possession of property to person other than purchaser at sale in execution—Penal Code Section 183.

J became the purchaser of a property sold in execution of a mortgage decree against the appellant. He filed a motion stating that he purchased the property on behalf of his daughter M and her husband S and moved that conveyance be made out in their favour. The plaintiff having shown no cause and M and S having consented the Secretary executed a conveyance in their favour. Writ of delivery of possession under section 12 of the Mortgage Ordinance was issued and entrusted to the Fiscal's officer who was obstructed by the appellant.

The appellant was thereupon charged for obstruction and was convicted under section 183 of the Penal Code.

Held : That the writ was not invalid merely because it ordered delivery of possession to persons other than the purchaser at the sale.

DIAS vs. DE SILVA (FISCAL'S OFFICER) ... 24

Conspiracy—Abetment of conspiracy—Agreement an essential pre-requisite, Sections 100, 102, 113*b* and 392 of Penal Code.

See Court of Criminal Appeal 49

Sections 427 and 433—Criminal trespass—Appellant occupying rooms in estate acquired by Government—Notice to quit by Superintendent of estate after acquisition—No evidence of occupation by Superintendent or of annoyance to him by accused—Accused not the servant of Superintendent—Relevant intention must be proved and not assumed—What constitutes criminal trespass.

The appellant, who was in occupation of two rooms on an estate, wherein his family had lived for nearly seventy years, was noticed to quit by the Superintendent, R, who was under the direction of the Assistant Government Agent of Kegalla, H. on his refusal to leave, he was charged and convicted of the offence of criminal trespass by unlawfully remaining in the two rooms with intent to annoy R. The conviction was affirmed on appeal by the Supreme Court.

The Magistrate found that R was in occupation of the entire estate and the buildings thereon ; that the appellant had occupied the rooms not as a tenant but as a servant and that, when his employment was terminated by notice to quit, his continued occupation of the rooms was unlawful and warranted the conclusion that the intention of the appellant was to annoy R, since that would be the natural consequence of his action.

Evidence led in the case showed that the appellant's intention was not to annoy R but to remain on the estate where his family had lived for generations and not to find himself homeless. Further, there was no satisfactory evidence as to the character of the appellant's occupation, but the facts relating to R's employment and duties established that the appellant was a servant of H and not of R.

Held : (1) That in the circumstances the Crown had failed to prove that R was in occupation of the estate, including the two rooms.

(2) That on the evidence there was no intention on the part of the appellant to annoy R by remaining on the estate and the lower Courts were wrong in assuming an intention to annoy R merely because such annoyance would be the natural consequence of appellant's refusal to leave.

(2) That entry upon land, made under a *bona fide* claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant.

(4) That to establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim or right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent.

THE KING vs. SELVANAYAGAM 101

Prescription

Prescription Ordinance, Sections 6 and 7—Action for balance purchase money—Absence of any agreement or undertaking in the transfer deed to pay balance—Is the claim prescribed in 3 years or 6 years.

Where in a deed of transfer there is a declaration in the body of the deed that the vendor has received the consideration and a further statement to the effect that the vendor does admit and acknowledge the receipt of the consideration and contains no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered.

Held : That any claim for the balance purchase money is prescribed in three years.

PERERA vs. JOHN APPUHAMY 58

Prevention of Frauds Ordinance

Prevention of Frauds Ordinance, Section 2—Notarial agreement to purchase land—Provision that agreement be void after expiration of three months—

Can the period be extended by oral agreement—Earnest money—Default in completing transaction—Liability to refund.

Where a notarially attested agreement to purchase land, provided that the agreement should be null and void at the expiration of three months from the date of its execution.

Held : (1) That after the expiry of the said period such an agreement could in law be revived only by another writing attested by a notary as required by section 2 of the Prevention of Frauds Ordinance.

(2) That the earnest money paid under such an agreement must be refunded if the transaction could not be completed owing to the default of the party who received it.

SUPPIAH & ANOTHER vs. SITUNAYAKE ... 28

Privy Council

Privy Council—Appeal with special leave—Conviction of appellant and another for conspiracy to murder and the appellant for murder—Appeal to Court of Criminal Appeal—Convictions of appellant affirmed—Conviction of other conspiracy quashed and re-trial ordered—Acquittal of other in second trial—Can conviction of appellant on conspiracy stand.

Criminal Procedure Code, Sections 180 *and* 184—*Joint trial of accused—Prejudice to appellant—Miscarriage of justice—Test in determining—Principles on which Privy Council will interfere in criminal appeals.*

The appellant was convicted on two charges (1) conspiracy to commit murder, (2) murder. He was charged and tried together with one B, who, too, was convicted on the charge of conspiracy with the appellant to murder her husband.

The Court of Criminal Appeal quashed the conviction of B, holding that there were irregularities in the trial for conspiracy and granted her a new trial, but the appellant's appeal was dismissed on the ground that there was ample evidence to establish his guilt.

At the re-trial B was acquitted. On an application by the appellant, the Privy Council granted special leave to appeal.

At the hearing the main contentions for the appellant were (*a*) that he suffered a miscarriage of justice as the jury must have been unduly prejudiced against him by the questions put to the other accused at the joint trial ; (*b*) that if the jury had not been so prejudiced they might well have acquitted him.

Held : (1) That as B has been found not guilty of conspiracy, the proper course is to treat her acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge.

(2) That although there were irregularities in the trial on the conspiracy charge, the joint trial of the two accused could not be said to have seriously prejudiced the appellant in the eyes of the jury, as the summing-up on the murder charge was plainly separated from the joint charge and contained adequate directions to the jury.

(3) That in determining what amounts to a miscarriage of justice the test to be applied is whether a reasonable jury properly directed would on the evidence adduced have found the prisoner guilty.

(4) That in this case a reasonable jury properly directed would have found the appellant guilty of the charge of murder inasmuch as there was ample evidence to establish his guilt.

(5) That the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled so as to enable persons accused of different offences to be charged and tried together as provided by section 184 of the Criminal Procedure Code, is the time when the accusation is made and not when the trials concluded and the result known.

Per LORD PORTER.—" It may be useful to reiterate what was said as to the functions of the Board and the principles upon which their Lordship act, the language used in *Renouf vs. A. G. for Jersey* (1936) A.C. 445 at p. 475. The wording is :—

> " It may be useful to repeat that the Board has always treated applications for leave to appeal, and the hearing of criminal appeals so admitted, as being upon the same footing. As Lord Sumner, giving judgment of the Board in *Ibrahim vs. The King* in 1914 A.C. 599 remarked at page 614 : ' The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself ; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it '. He added, what is material in the present case : ' Misdirection, as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. ' "

DHARMASENA vs. THE KING 1

Privy Council—Divorce Action, Evidence Ordinance, Section 112
See 17

Privy Council—Certiorari—Jurisdiction of Supreme Court to issue.
See Defence Regulations 33

Privy Council—Criminal Trespass
See 101

Privy Council—Leave to appeal—Rule 1 (*a*) *of the Rules of Appeals (Privy Council) Ordinance (Cap.* 85) *—Meaning of " Final Judgment ".*

In an application by one Don Vincent Algama, the provisional trustee of the Rajamaha Vihare, under section 32 of the Buddhist Temporalities Ordinance for a writ requiring the applicant and another to deliver to him possession of the property of the Vihare, the Supreme Court set aside the order of the District Court and granted the application on the ground that section 32 of the Ordinance covered *de facto* viharadhipatis or those who claim to be viharadhipatis, and directed the District Court " to proceed with " the case.

The applicant sought leave to appeal to the Privy Council from the judgment of the Supreme Court but was opposed by the provisional trustee on the ground that the decision of the Supreme Court was not a " final judgment " within the meaning of that expression in Rule 1 (*a*) of the Privy Council Appeal Rules.

Held : That the judgment of the Supreme Court is a " final judgment " within the meaning of Rule 1 (*a*) ; for the judgment holds that the case is one in which the applicant's request for a writ should be granted. It finally disposed of the matters in

dispute between the parties, leaving only the act of issuing the writ to be done by the District Judge.

Per BASNAYAKE, J.—"It would be unwise to define the expression 'final judgment' in the abstract. Whether a judgment of this Court is final or not has to be determined by an examination of the facts and circumstances of each case."

BUDDHARAKKITA THERA vs. ALGAMA & SANGARAKKITA THERA 93

Rent Restriction Act, No. 291 of 948.

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (c)—Landlord requires premises for occupation of his sister—Meaning of "sister dependent on him"—must plaintiff need be immediate—Reasonableness.

A landlord for the purpose of renting his present residence and of moving into a smaller house sought to eject his tenant on the ground that the premises were required for his sister living with him. The sister herself owned a house and had an income of her own.

Held : (1) That the Court should consider all the factors relevant to the hardship caused to the parties, and decide in favour of the party whose need was greater. One of the factors is that the plaintiff's need of the premises should be "immediate" and not prospective.

(2) That a person owning property and having an income cannot be a "dependant" on the landlord, within the meaning of the Rent Restriction Act.

MENDIS vs. FERDINANDS 41

Rent Restriction Ordinance, Section 9—Tenant sub-letting the leased premises without prior consent of landlord in writing—Can landlord sue such tenant for ejectment without terminating tenancy by notice.

Held : That a landlord is entitled to institute an action in ejectment under section 9 of the Rent Restriction Ordinance No. 29 of 1948 without terminating the tenancy by notice.

WIMALASURIYA vs. PONNIAH 107

Rent Restriction Ordinance No. 60 of 1942—Sale of lease of boutique prior to area brought under operation of Ordinance—Purchaser entering into lease bond providing for advance deposit and payment of annual rent by monthly instalments—Failure to pay monthly instalments which exceed authorised rent—Action to recover rent and for ejectment—Rent Restriction Act of 1948 coming into operation pending action—Its applicability—Plaintiffs right to recover rent originally agreed upon.

The plaintiff sold by public auction the lease of a boutique for a period of four years from 1-7-1947 and the defendant became purchaser thereof at Rs. 2,150 a year. Accordingly a lease-bond dated 7-4-1947 was executed paying the plaintiff a sum of Rs. 1,433·33 as an advance and further providing that the annual rental should be paid in monthly instalments of Rs. 179·16, the 1st becoming payable on 30-6-1947 and the others on the last day of each month.

The defendant paid the 1st instalment and defaulted thereafter. On 2-6-1948 the plaintiff instituted this action for (i) the recovery of the rent due after giving credit for the advance, and (ii) for ejectment.

The defendant resisted the plaintiff's claim on the grounds :—

(*a*) that the plaintiff was not entitled to receive Rs. 179·16 per month in view of the provisions of the Rent Restriction Ordinance No. 60 of 1942.

(*b*) that under the Rent Restriction Act of 1948 (which came into operation on 1-1-1949) he was not entitled to retain in his hands more than 3 months' rent as advance.

It is common ground that the Rent Restriction Ordinance came into operation in the area on 10-7-1947 and that the authorised rent of the premises was Rs. 50 per month.

Held : (i) That the advance payment must be treated as a deposit made to secure the repayment of the rent.

(ii) That the provisions of the Rent Restriction Act of 1948 did not apply to this case as it came into operation after the institution of this case.

(iii) That the plaintiff was not entitled to recover any rent in excess of the authorised rent from 10-7-1947, the date in which the Ordinance came into operation in the area.

SANTHIA DIAS vs. LAWRENCE PEIRIS ... 56

Restitutio-in-Integrum

Restitutio in integrum—*Partition action—Heirs of party deceased substituted—Substituted heir dead—Interlocutory decree obtained without making heirs of substituted heir and other heirs parties—Decree affirmed in appeal—Power of Supreme Court to vary its decree not binding and can be set aside where principles of natural justice violated—Sections 36 and 37, Courts Ordinance, Section 776, Civil Procedure Code.*

In a partition action the District Court directed that the heirs of one Nangi, who was dead, should be substituted as parties for proceeding with the action. Saineris, one of the heirs of Nangi, was made a party, but after his death the respondents without substituting Saineris' widow and children as parties obtained an interlocutory decree, which was affirmed in appeal by the Supreme Court. The widow sought to set aside the decree by way of *restitutio in integrum* alleging in her petition that various parties had died and that no steps had been taken to substitute their heirs, including herself and her children, in the course of the action.

It was contended on behalf of the respondents that the order of the District Court did not purport to substitute the heirs of Nangi as defendants in the partition action and therefore the petitioners had no status to make this application, and further that the Supreme Court in granting the relief would in effect be varying its decree, which it had not the power to do.

Held : (1) That the order of the District Court was to substitute Saineris and his heirs as defendants to this action and therefore the petitioners had status to move for relief to the Supreme Court, and that there was no other remedy available to them.

(2) That the interlocutory decree was not binding on the petitioners as they were not substituted parties on Saineris' death.

(3) That the Supreme Court has power to grant relief in this case as the principles of natural justice have been violated.

WIJESINGHE vs. MIGEL & OTHERS 86

Sannas

Grant of whole village by Sannas—Claimant of land must prove that the land falls within the limits of the village at the time of the grant.
See Partition 40

Search

Search without warrant—Admissibility of evidence so obtained.
See Excise Ordinance 8

Sentence

Youthful offender—Sentence—Principles determining it—Section 21 of Children's and Young Person's Ordinance—Welfare of the young person should be the paramount consideration—Section 325 (2), Criminal Procedure Code.

A boy of ten years and six months was charged with murder. There was no evidence to establish the charge, but he pleaded guilty to the offence of wrongful confinement under section 333 of the Penal Code. The boy was found on medical and other evidence to be intelligent, co-operative and amenable to discipline and capable of being educated to be a good citizen.

The Court in the circumstances was of opinion that in the best interests of the accused and society, which is the underlying principle of section 21 of the unproclaimed Children's and Young Person's Ordinance, and because of the absence of adequate machinery to carry out the objects of the Ordinance, the accused should be discharged subject to conditions under section 325 (2) and 326 (2) (*c*) of the Criminal Procedure Code.

REX vs. W. A. JAYASENA *alias* JAYASINGHE ... 71

Sentence—Unsworn statement regarding accused—Magistrate influenced by.

Where in determining the sentence to be passed on an accused person the learned Magistrate appeared to have been influenced by the unsworn statement of a Police officer regarding the accused.

Held : That the sentence should be set aside.

Per BASNAYAKE, J.—The sentence of a Court is a part of its judgment and it cannot be based on any material which is not legal evidence.

MAILVAGANAM vs. SUB-INSPECTOR OF POLICE ... 108

Shops Ordinance, No. 66 of 1938.

Shops Ordinance 66 of 1938—Meaning of " Shop " —Portion of hotel building used for textile business—Permanent structure and regular business—Does it constitute a ' Shop.'

In a part of a building described as a hotel, the appellant transacted business as a retail dealer in textiles. The portion he occupied was separated by a partition and in front of it was a counter on which his goods were displayed. On either side of the counter were two doors of the entrance left permanently open. There was a canvas over the counter and the place was illuminated by electric lights from current taken from the main building. He was convicted for keeping the shop open in breach of the prescribed hours.

It was contended on his behalf that his place of business did not constitute a " shop " as defined in Ordinance No. 66 of 1938, as it was not a compact building with facilities for means and sanitation and capable of being closed or open by the occupant.

Held : That the appellant's place of business is a " shop " within the meaning of section 31 (1) of the Shops Ordinance No. 66 of 1938.

NADARAJAH, INSPECTOR OF LABOUR vs. PIYASENA 110

Statute

Construction of—Words reproduced from English statute.
See Money Lending Ordinance 11

Telecommunication Ordinance, No. 50 of 1944

Telecommunication Ordinance, No. 50 of 1944, Section 43—Construction of—Jurisdiction of Magistrate under Section 152 (3) of the Criminal Procedure Code to try offences indictable under the Ordinance.

Held : That on a proper construction of section 43 of the Telecommunication Ordinance the jurisdiction of Magistrates under section 152 (3) of the Criminal Procedure Code remains unaffected in every case where the Attorney-General has not sought to exercise the special power conferred on him by the proviso to section 43.

GUNAWARDENA, ASSISTANT ENGINEER, C. T. O. vs. VYTHILINGAM 75

Thesawalamai

Thesawalamai—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), Sections 19 and 20—Amending Ordinance No. 58 of 1947—Is it retrospective in effect—Interpretation Ordinance (Cap. 2), Section 5.

The defendant, a Jaffna Tamil, purchased a ½ share of a land during the subsistence of his marriage with the plaintiffs' sister who died in 1940. After the wife's death the plaintiffs claimed a half-share of the said interests on the ground that it formed *tediatetam* property under sections 19 and 20 of (Jaffna) Matrimonial Rights and Inheritance Ordinance (Chap. 48).

The defendant contended that the plaintiffs were not entitled to any rights in view of sections 19 and 20 of Ordinance No. 50 of 1947 which replaced the said two sections relied on by the plaintiffs.

Held : That as the amending Ordinance No. 58 of 1947 was retrospective in its operation the plaintiffs did not become entitled to the rights claimed.

Per NAGALINGAM, J.—Where a judgment of a lower Court is affirmed without reasons being given by this Court it is incorrect to treat the judgment of the lower Court either as a judgment of this Court or as a judgment which has any binding effect on this Court.

IN THE PRIVY COUNCIL

Present: LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, SIR JOHN BEAUMONT, SIR LIONEL LEACH.

KANNANGARA ARATCHIGE DHARMASENA vs. THE KING

FROM THE SUPREME COURT OF CEYLON.

Appeal No. 34 of 1949.
Reasons for Report of the Lords of the Judicial Committee of the Privy Council, Delivered on : 14th June, 1950.

Privy Council—Appeal with special leave—Conviction of appellant and another for conspiracy to murder and the appellant for murder—Appeal to Court of Criminal Appeal—Convictions of appellant affirmed—Conviction of other of conspiracy quashed and re-trial ordered—Acquittal of other in second trial—Can conviction of appellant on conspiracy stand.

Criminal Procedure Code, sections 180 *and* 184*—Joint trial of accused—Prejudice to appellant—Miscarriage of justice—Test in determining—Principles on which Privy Council will interfere in criminal appeals.*

The appellant was convicted on two charges (1) conspiracy to commit murder, (2) murder. He was charged and tried together with one B, who, too, was convicted on the charge of conspiracy with the appellant to murder her husband.

The Court of Criminal Appeal quashed the conviction of B, holding that there were irregularities in the trial for conspiracy and granted her a new trial, but the appellant's appeal was dismissed on the ground that there was ample evidence to establish his guilt.

At the re-trial B was acquitted. On an application by the appellant, the Privy Council granted special leave to appeal.

At the hearing the main contentions for the appellant were (*a*) that he suffered a miscarriage of justice as the jury must have been unduly prejudiced against him by the questions put to the other accused at the joint trial ; (*b*) that if the jury had not been so prejudiced they might well have acquitted him.

Held : (1) That as B has been found not guilty of conspiracy, the proper course is to treat her acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge.

(2) That although there were irregularities in the trial on the conspiracy charge, the joint trial of the two accused could not be said to have seriously prejudiced the appellant in the eyes of the jury, as the summing-up on the murder charge was plainly separated from the joint charge and contained adequate directions to the jury.

(3) That in determining what amounts to a miscarriage of justice the test to be applied is whether a reasonable jury properly directed would on the evidence adduced have found the prisoner guilty.

(4) That in this case a reasonable jury properly directed would have found the appellant guilty of the charge of murder inasmuch as there was ample evidence to establish his guilt.

(5) That the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled so as to enable persons accused of different offences to be charged and tried together as provided by section 184 of the Criminal Procedure Code, is the time when the accusation is made and not when the trial is concluded and the result known.

Per LORD PORTER.—" It may be useful to reiterate what was said as to the functions of the Board and the principles upon which their Lordships act, the language used in *Renouf v. A. G. for Jersey* (1936) A.C. 445 at p. 475. The wording is :—

" It may be useful to repeat that the Board has always treated applications for leave to appeal, and the hearing of criminal appeals so admitted, as being upon the same footing. As Lord Sumner, giving the judgment of the Board in *Ibrahim vs. The King* in 1914 A.C. 599 remarked at page 614 : ' The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself ; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it '. He added, what is material in the present case : ' Misdirection, as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.' "

Granville Sharp, K.C., with *Dingle Foot*, for the appellant.
Frank Gahan, for the respondent.

Delivered by LORD PORTER.

This is an appeal, by special leave,* from a judgment of the Court of Criminal Appeal of Ceylon, dated the 16th March, 1949, dismissing the appellant's appeal against this conviction on the 3rd February, 1949, at the Sessions of the Supreme Court of Ceylon sitting at Colombo, on two charges, viz.: conspiracy to commit murder and murder.

The appellant was charged and tried together with one Beatrice Maude de Silva Seneviratne upon an indictment dated the 18th June, 1949, containing three counts in the following terms :—

(1) That between the 1st and 8th day of November, 1947, at Nugegoda and Kotahena in the district of Colombo, you did agree to commit or act together with a common purpose for or in committing an offence to wit, the murder of one Govipolagodage Dionysius de Silva Seneviratne of No. 107, College Street, Kotahena, and that you have thereby committed the offence of conspiracy to commit murder in consequence of which conspiracy the said offence of murder was committed ; and that you have thereby committed an offence punishable under Section 113B read with Sections 296 and 102 of the Penal Code.

(2) That on or about 7th November, 1947, at Kotahena in the district of Colombo, and in the course of the same transaction as set out in count (1) above, you Kannangara Aratchige Dharmasena *alias* Baas did commit murder by causing the death of the said Govipolagodage Dionysius de Silva Seneviratne ; and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

(3) That between the dates mentioned in count (1) above, you Beatrice Maude de Silva Seneviratne did abet the said Kannangara Aratchige Dharmasena *alias* Baas, the first accused, in the commission of the offence set out in count (2) above which said offence was committed in consequence of such abetment and that you have thereby committed an offence punishable under Section 296 read with Section 102 of the Penal Code.

Govipolagodage Dionysius de Silva Seneviratne who undoubtedly was murdered by someone was the husband of the second accused.

Before the trial opened, counsel for each of the accused made an application that their respective clients should be tried separately, claiming that they would be seriously prejudiced if tried together. The application, however, was refused.

As a result of this refusal the two accused persons were tried together both upon the count for conspiracy and upon the two separate individual counts.

The justification for this action is to be found in Sections 180 and 184 of the Criminal Procedure Code of Ceylon. Their terms are as follows :—

"Section 180. (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the person accused of them may be charged with and tried at one trial for each of such offences, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts, and in trials before the Supreme Court or a District Court such charges may be included in one and the same indictment.

(4) Nothing contained in this section shall affect Section 67 of the Penal Code."

"Section 184. When more persons than one are accused of jointly committing the same offence or of different offences committed in the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit ; and the provisions contained in the former part of this Chapter shall apply to all such charges."

It was at one time contended on behalf of the appellant that the refusal by the learned Judge to separate the trials of the two accused was erroneous in law, gravely prejudicial to the appellant and amounted to a substantial miscarriage of justice. It was, however, afterwards

* See end of Judgment. Page 7.

conceded that this contention could not prevail in face of the decision in *Babulal Choukhani vs. The King-Emperor* (L.R. 65 I.A. 158) where their Lordships held that the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled so as to enable persons accused of different offences to be charged and tried together as provided by Section 239 of the Indian Code of Criminal Procedure (which is identical with Section 184 of the Ceylon Act) is the time when the accusation is made and not when the trial is concluded and the result known. The charges, it was held, have to be framed for better or worse at an early stage of the proceedings and it would be paradoxical if it could not be determined until the end of the trial whether it was legal or illegal. It was for the Judge bearing these considerations in mind to use his discretion.

In the light of this decision the appellant's advisers were plainly right in not persisting in the contention that the two accused were improperly tried together on the three charges framed.

It was however further urged that the indictment in fact charged only the crime of conspiracy and merely added murder as part of the conspiracy but not as a separate charge.

This result was said to follow from the insertion in count (2) of the words "in the course of the same transaction as set out in count (1)". Their Lordships do not find themselves able to accept this view. In their opinion the addition of these words does not limit the charge preferred to an allegation of conspiracy only; they are necessary in order to show that the three offences alleged were committed in the course of the same transaction. Nevertheless they still leave a separate and independent charge of murder by the appellant. This view is supported by a reference to Section 167 (4) of the Code which enacts that "The law and section of the law under which the offence said to have been committed is punishable shall be mentioned in the charge". If then count (2) charged or intended to charge conspiracy it must needs contain a reference to Section 113B of the Penal Code whereas Section 296 which prescribes the punishment for murder is alone referred to. So far, therefore, as this technical objection is concerned their Lordships reject the appellant's argument.

The trial took place before a Judge and jury. In his summing-up the learned Judge directed the jury upon the charges of conspiracy and of murder but told them that the accusation of abetment was so involved with that of conspiracy that unless they found the conspiracy proved they should acquit Mrs. Seneviratne of abetment also. The jury in their verdict found both the accused guilty of conspiracy to murder and the appellant guilty of murder but in accordance with the Judge's direction made no finding as to abetment and that charge may now be disregarded.

From this finding both appealed to the Court of Criminal Appeal and that Court quashed the conviction of Mrs. Seneviratne and granted a new trial in her case under the power contained in Section 5 (2) of the Criminal Appeal Ordinance of Ceylon No. 23 of 1938. The exact method to be adopted in exercising the power given in this section is not very clear but it seems that the correct procedure under the Ordinance is to quash the conviction. A quashed conviction however does not acquit the appellant of the crime charged. It merely makes the previous conviction abortive. If it is intended to direct a judgment of acquittal to be entered it must be done in terms. If this step is not taken, a new trial may be ordered though the conviction has been quashed, as has been done in this case.

Whilst the Court of Criminal Appeal so treated the case of Mrs. Seneviratne, they dismissed both appeals by the appellant saying that even without the evidence of one witness, viz., Alice Nona, whose testimony will be referred to later, there was ample evidence to establish the guilt of the appellant.

As a result of the order of the Court of Criminal Appeal Mrs. Seneviratne was re-tried and at the second trial Alice Nona, who was an important if not vital witness for the prosecution, proved so unreliable that the jury stopped the case on the invitation of the learned Judge who tried it and found the accused woman not guilty. After this verdict the position was that of two conspirators one had been found guilty by one jury and the other acquitted by another.

In their Lordships' opinion this is an impossible result where conspiracy is concerned. It is well-established law that if two persons are accused of conspiracy and one is acquitted the other must also escape condemnation. Two at least are required to commit the crime of conspiracy; one alone cannot do so. In the present case the only conspirators suggested were the two accused

persons and there were no others known or unknown who might have participated in the crime. It is true that one conspirator may be tried and convicted in the absence of his companions in crime *R. vs. Ahearne*, 6 Cox 6, but where two have been tried together so that the only possible verdict is either that both are or neither is guilty, an order for the retrial of one makes it imperative that the other should also be retried. In their Lordships' opinion therefore, if two persons are accused of a criminal conspiracy and convicted and on appeal one can be and is sent for retrial, the other should be sent at the same time for retrial also upon that charge so that both may be convicted or acquitted together. In the present case in as much as Mrs. Seneviratne has been found not guilty of conspiracy, their Lordships think the proper course is to treat her acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge. The appeal against conviction on that count should accordingly be allowed.

But though the appellant's conviction on the charge of conspiracy should in their Lordships' view have been quashed together with that of his alleged co-conspirator and though he, like her, should have been sent for retrial and must now be acquitted, yet there remains the question whether he should also have been acquitted of the charge of murder.

A number of grounds on which it is contended that the appellant suffered a miscarriage of justice have been put forward but in substance they may now be reduced to two; (1) that the jury must have been unduly prejudiced against him by the questions put to the other accused and (2) that if it had not been so prejudiced the jury might well have acquitted him. Undoubtedly there were irregularities in the trial for conspiracy which the Court of Criminal Appeal in Ceylon held to have been unduly prejudicial to the accused woman. In their judgment they say :—

> "It is, of course, always proper for a Judge—he has the power and it is his duty at times—to put such additional questions to the witnesses as seem to him desirable to elicit the truth. The part which a Judge ought to take while witnesses are giving their evidence must, of course, rest with his discretion. But with the utmost respect to the Judge, it was, I think, unfortunate that he took so large a part in examining the appellant. Though he was endeavouring to ascertain the truth, in the manner which at the moment seemed to him most convenient, there was a tendency to press the appellant on more than one occasion. The importance and power of his office, and the theory and rule requiring impartial conduct on his part, make his slightest action of great weight with the jury. If he takes upon himself the burden of the cross-examination of the accused, when the government is represented by competent counsel, and conducts the examination in a manner hostile to the accused and suggesting that he is satisfied of the guilt of the accused, as some of the questions do, the impression would probably be produced on the minds of the jury that the Judge was of the fixed opinion that the accused was guilty and should be convicted. This would not be fair to the accused, for she is entiled to the benefit of the presumption of innocence by both Judge and jury till her guilt is proved. If the jury is inadvertently led to believe that the Judge does not regard that presumption, they may also disregard it."

Strictly of course this criticism is concerned with the case against Mrs. Seneviratne alone, but a finding against her in a case of conspiracy is bound to influence to some extent the attitude of the jury towards the appellant.

Moreover the evidence of Alice Nona purported to implicate him as well as her in the alleged conspiracy. Bearing these circumstances in mind their Lordships have to decide whether the appellant's conviction for murder should or should not be affirmed and to determine the principles which should guide their decision. The principles upon which the Board must be guided in reaching a conclusion upon this matter are that they must keep in mind the provisions of Section 5 (1) of the Ordinance of 1938 which declares :—

> "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;
>
> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

and must bear in mind that they are not themselves a Court of Criminal Appeal.

In determining what amounts to a serious miscarriage of justice their Lordships have the guidance of English decisions upon wording which is the same as and is obviously copied from Section 4 (1) of the English Act of 1907.

For the present purpose it is enough to refer to *R. vs. Haddy* (1944 1 K.B. 442) which was approved in the House of Lords in *Stirland vs. Director of Public Prosecutions* (1944 A.C. 315). Viscount Simon's words in the latter case sum up the matter. He says :—

> Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to Section 4, Sub-section (1) of the Criminal Appeal Act, 1907, should be applied. The passage in *Woolmington vs. Director of Public Prosecutions* (1935) A.C. 462, 482, 483 where Viscount Sankey L.C. observed that in that case, if the jury had been properly directed it could not be affirmed that they would have 'inevitably' come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *R. vs. Haddy* (1944) K.B. 442 correctly interpreted section 4 sub-section (1) of the Criminal Appeal Act and the observation above quoted from *Woolmington's* case in exactly this sense."

What then their Lordships have to determine is whether a reasonable jury properly directed would on the evidence adduced have found the appellant guilty of murder.

That there is ample and more than ample evidence upon which a jury could do so is undoubted.

Some one murdered Govipolagodage Seneviratne in his own house between 9 o'clock and 9-30 on the 7th November, 1947. The post-mortem revealed that he had died as the result of a violent attack with a sharp instrument with which he had been struck with force a number of times and death was due to haemorrhage and shock from multiple incised wounds in the neck.

The evidence against the appellant on this part of the case is perhaps most conveniently set out in tabulated form.

(1) Three witnesses who had ample opportunities of observing him identified him as having been near the spot on the day in question at the time when the murder must have taken place and said that he had come from the back compound of the dead man's house.

(2) According to their evidence he had covered his head with a sarong belonging to the deceased's son and was carrying a hand-bag and knife. When challenged he threatened one of these witnesses with the knife.

(3) Another of these witnesses tried to stop him but he escaped, dropped the knife and hand-bag in a rampe bush and throwing off the sarong ran towards Alwis Street. The knife and hand-bag were afterwards found by the police in this spot.

(4) A fourth witness who was repairing the roof of a house in Alwis Place saw the appellant run under the portico of the house where he was working and force his way through the zinc sheets of a boundary fence. He afterwards found a coat on the ground below the spot at which he was working. This witness like the others identified the appellant at an identification parade held before the learned Magistrate. It is true that one witness who said he saw some one running along Alwis Place failed to identify the appellant as the runner but that failure is of little importance in the face of the confident identification of the other four.

(5) The knife, bag, sarong and coat were all imbued with human blood and to the knife human hair of the colour and texture of the dead man was found adhering.

(6) About 3 to 3-30 on the afternoon of the 7th November the appellant came to the shop at Nugegoda which is occupied by a carpenter and by a smith. He brought with him a block of wood, a bolt of iron with a nut underneath and

a piece of iron which had been flattened for a knife. He also brought two washers and a nut. He first asked the carpenter to make him a herb-cutter which he required that day. The carpenter referred him to the blacksmith who rejected the knife as unsuitable because it was of iron whereas it should have been of steel, and the wood as having marks upon it made by the cutting knife. The blacksmith was unable to finish the work that day, but finished the cutter next morning after fitting to it a fresh knife and a fresh piece of wood. The appellant however had been arrested meanwhile and the knife and its accompaniments were handed over to the police.

The articles from the compound at the deceased's house and the other articles mentioned above were sent to the Government Analyst and these included the knife recovered from the rampe bush and the bolt which the appellant had brought to the blacksmith's shop. At the trial this witness was asked to reconstruct the herb-cutter with the knife which had been recovered instead of that made by the blacksmith. According to his evidence the bolt would leave two roughly circular marks on either side of any piece of metal attached to it and the recovered knife had in fact two circular marks, one on each side, which correspond in shape and area to the two marks that would be produced by the inner side of the bolt. From their appearance the inference therefore was justified that the recovered knife must have been attached to this bolt for some time. The appellant urges in answer that another knife had been found lying on the table on his premises to which the operating knife of a herb-cutter would be attached and his wife stated that the knife so found was the only one which they possessed and was that actually in use by the appellant and further that some difficulty was experienced in fixing the knife to the bolt.

The first of these points is disposed of by the evidence of the Government Analyst who says in terms that that knife could never have been fitted to the herb-cutter and the second is only true to the extent that there was a small projection half way down the thread of the bolt which necessitated the use of a little force if the screw was to go beyond it—an eventuality which was by no means certain. But in any case the witness had no doubt that the knife used to kill the deceased fitted into the bolt which the accused took to the blacksmith.

(7) The appellant was examined by a doctor on the day on which the murder was committed and was found to have an oblique incised wound over the inner prominence of his right ankle and an abrasion. These injuries could not have been caused by a dog bite as was suggested on behalf of the appellant or by a knife but were consistent with injuries caused by the appellant drawing his leg upward when passing through a fence constructed of galvanized iron or zinc sheets with sharp edges.

(8) On the morning of the murder the appellant borrowed an umbrella from a neighbour between the hours of 7-30 and 8 a.m. The umbrella was never returned but according to the police evidence an umbrella was found by 1-30 on the day of the murder leaning against the wall near a pool of blood and was identified as his by the neighbour. The only answer made on behalf of the accused was an assertion by his wife that the police had conspired to entrap her husband and in order to bring the conspiracy to a successful conclusion had removed the umbrella from his house when they came to arrest him. The lady's evidence however as to the knife and on other matters as appears below is inconsistent with the established evidence and could not be accepted.

(9) Finally, the accused man did not himself give evidence at the trial as to his movements on the day in question though his wife was called on his behalf and testified that with the exception of a brief and immaterial interval he was at home all day. This evidence is not only in conflict with that given by the four witnesses referred to above but also with that of the carpenter and blacksmith who spoke to his having visited them that afternoon.

On this evidence it is plain that there was ample material on which a jury could convict the appellant.

But it is said that as a result of the joint trial of the two accused he was seriously prejudiced in the eyes of the jury by the undue intervention of the learned Commissioner in the examination of Mrs. Seneviratne and his dramatic reconstruction of the steps taken which led up to the crime and which the evidence does not warrant. In particular it was pointed out that unless there was a conspiracy, no motive for the murder by the accused of a personal friend had been established; that in the summing-up the presence of the accused on the premises on the fatal day had been assumed; that the evidence of Alice Nona could not be, and at the second trial was not, accepted and that the suggestion that the coat and sandals found on the spot were those of the appellant was unwarranted.

Though, as the Court of Criminal Appeal have found and their Lordships have accepted, there were irregularities in the trial on the conspiracy charge, the summing-up against this prisoner is plainly separated from the joint charge. Moreover though short, it impresses upon the jury the necessity for the prosecution to prove their case. It puts fully and carefully before them the evidence for the appellant and calls their attention to and carefully reiterated his wife's evidence on his behalf.

He had already warned them that Alice Nona might be a conspirator and on this part of the case he places no reliance upon, and indeed does not base any argument upon, her evidence.

So too the coat and sandals are not suggested as incriminating the accused man. It is true that the jury were not warned in terms that without a finding of conspiracy no motive for the crime was proved, but motive is only an element and is not a vital element in the case where the evidence of the commission of the crime is clear. Moreover when dealing with the second count of the indictment, the learned Judge nowhere suggests that any motive had been shown to exist; the facts given in evidence alone are relied upon. Furthermore the appeal with which their Lordships are concerned is not brought from the trial by Judge and jury alone. Intervening is the judgment of the Court of Criminal Appeal who confirmed the verdict of the jury. "Even without the evidence of Alice Nona", they say "there was ample evidence in the case to establish the guilt of the first accused". With this observation their Lordships agree and notwithstanding such irregularities as occurred in the trial for conspiracy, they are not persuaded that any substantial miscarriage of justice has occurred. Rather they think that a reasonable jury properly directed would have found the appellant guilty of the crime of murder. It may be useful to reiterate what was said as to the functions of the Board and the principles upon which their Lordships act, the language used in *Renouf vs. A. G. for Jersey* (1936) A.C. 445 at p. 475. The wording is :—

> "It may be useful to repeat that the Board has always treated applications for leave to appeal, and the hearing of criminal appeals so admitted, as being upon the same footing. As Lord Sumner, giving the judgment of the Board in *Ibrahim vs. The King* in 1914 A.C. 599 remarked at page 614: 'The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it'. He added, what is material in the present case: 'Misdirection, as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.'"

Their Lordships may be permitted to say that the appellant's case was argued with great force and ability. Nevertheless they are not persuaded that any ground for interference with the conviction has been established and accordingly they have, as they indicated at the end of the hearing, humbly advised His Majesty that the appeal should be dismissed.

Dismissed.

AT THE COURT AT BUCKINGHAM PALACE

The 26th day of June, 1950.

Present :

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — MR. GAITSKELL
MR. SECRETARY GRIFFITHS — SIR RONALD IAN CAMPBELL

Application for Special Leave to Appeal.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 14th day of June, 1950, in the words following, viz.:—

> "Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October, 1909, there was referred unto this Committee the matter of an appeal from the Court of Criminal Appeal of Ceylon between Kannangara Aratchige Dharmasena *alias* Baas appellant and Your Majesty respondent (Privy Council Appeal No. 34 of 1949) and likewise the humble petition of the appellant setting forth: that on the 4th January, 1949, the appellant was arraigned with one Beatrice Maud de Silva Seneviratne (thereinafter called the second accused) at the Sessions of the Supreme Court of Ceylon sitting at Colombo on the Western Circuit on an indictment charging them jointly with conspiracy to commit murder in consequence of which murder was committed and charging the appellant with murder and charging the second accused with abetment of murder:

that the indictment contained three counts : that the appellant and the second accused were on the 3rd February, 1949, found guilty on count (1) and the appellant was found guilty on count (2) and both were condemned to death : that on the 26th March, 1949, the Court of Criminal Appeal of Ceylon dismissed the appellant's appeal and quashed the conviction of the second accused and ordered a new trial for her : that on the 20th April, 1949, the second accused was arraigned at the Sessions of the Supreme Court of Ceylon sitting at Colombo on the Western Circuit on an indictment charging her with conspiracy to commit murder and abetment of murder : that the indictment contained two counts : that the second accused was on the 20th April, 1949, found not guilty on both counts and was discharged : that on the 28th July, 1949, Your Majesty by Order in Council granted the appellant special leave to appeal to Your Majesty in Council *in forma pauperis :* And humbly praying Your Majesty in Council to take this appeal into consideration and that the judgment of the Court of Criminal Appeal of Ceylon dated 26th March, 1949, be reversed, altered or varied and for further or other relief :

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the appeal and humble petition into consideration and having heard Counsel on behalf of the parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this appeal ought to be dismissed and the judgment of the Court of Criminal Appeal of Ceylon dated the 26th day of March, 1949, affirmed."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed and carried into execution.

Whereof the Governor-General or Officer Administering the Government of Ceylon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

A. B. Perera, for the applicant.
J. Q. Le Quene, fsor the respondent.

Present : NAGALINGAM, J.

MURIN PERERA vs. WIJESINGHE (EXCISE INSPECTOR, KESBEWA)

S. C. 119—*M. C.—Panadura* 7797
Argued on : 22nd May, 1950.
Decided on : 1st June, 1950.

Excise Ordinance, Sections, 34, 35 and 36—Search without warrant—Admissibility of evidence so obtained.

An Excise party entered a house without a search warrant and arrested without a warrant, the accused who was alleged to have sold to a decoy, the arrack which the decoy was drinking at the time of entry. At the trial evidence was admitted of similar offences committed by the accused.

Held : (1) That the search without a warrant of the whole of a building, the verandah of which was used as a boutique and the rest as a human habitation, cannot be justified on the ground that such building was a place other than a dwelling-house.
(2) That the arrest of the accused without a warrant for the commission of the alleged offence and without compliance with the requirements of section 36 is unlawful.
(3) That the evidence obtained by such search is inadmissible.
(4) The admission of evidence of similar offences committed by the accused was prejudicial to the accused.

Cases referred to : *Bandarawela vs. Carolis Appu* (1926) 27 N. L. R. 401.
Silva vs. Menikrala (1928) 9 C. L. Rec. 78.
Almeida vs. Mudalihamy (1929) 7 Times 54.
Emperor vs. Ravala Kesigadu (I. L. R. 1902, 26 Mad. 124).

A. B. Perera with *R. S. Wanasundera*, for the accused-appellant.
S. S. Wijesinha, Crown Counsel, for the Attorney-General.

NAGALINGAM, J.

The appellant in this case was charged with and convicted of having sold arrack without a permit and sentenced to pay a fine of Rs. 750 in addition to imprisonment till the rising of Court.

The case for the prosecution may be said to be a simple and straightforward one. That case is that a decoy was after search sent by the Excise Inspector with a marked rupee note to make purchase of arrack at the premises of the accused and to continue to sip it till the Inspector's arrival. The decoy says that he carried out the instructions, that while yet he was sipping arrack the Inspector and his men went up in a car, got down, took charge of the glass from which he was imbibing the liquor and questioned him, when he admitted that he had been sold liquor by the accused.

There is a discrepancy in the prosecution evidence which has not been explained as to how the Inspector recovered the marked rupee note. According to the Inspector and the decoy, the accused it was who reluctantly gave the rupee note to the Inspector; but the Excise guard definitely states that when the accused was questioned the accused said that she did not have the money but dropped the money on the floor from where it was retrieved by the Excise Inspector. Now, it is impossible to disregard this discrepancy, especially where the defence denies that any money was taken from or dropped by the accused but states that it was the accused's sister, a young girl, who had received the money from the decoy in payment of the sale to him of biscuits and that as she had no change the rupee note was handed to a textile dealer, from whom the Execise Inspector obtained it. The accused and her sister both gave evidence and their story was supported by the textile dealer, who was called; the latter affirmatively testified to the decoy having been sold biscuits by the sister of the accused and that the decoy had made payment by tendering the rupee note and that it was the sister of the accused who gave him the rupee note for change, which he did, and that the Inspector subsequently obtained the note from him. The learned Magistrate dismissed the evidence of the textile dealer with the observation that such evidence is easily procurable. But this observation does not grapple with the difficulty presented by the conflict of testimony on the point given by the prosecution witnesses themselves. Nor has the learned Magistrate in his judgment discussed this contradiction and I am quite unable to say that the prosecution evidence should in these circumstances receive all the credit which it otherwise might have received.

There is another circumstance to which I must allude, and that is that the Inspector says that when he smelt the mouth of the decoy before he sent him out on his errand, the decoy was smelling slightly of liquor. He, no doubt, goes on to say that after he entered the premises of the accused he found the decoy smelling strongly of arrack. If a decoy is already smelling of liquor, belching may produce a far greater smell at a later stage, and this would by itself be no proof that he had consumed any further quantity of liquor.

There is a more fatal objection to the conviction in this case, and that is that inadmissible evidence prejudicial to the accused has been admitted by the learned Magistrate. The decoy in giving evidence testified to the fact that he had taken arrack that day at about 10 a.m., from the boutique which had been shown to him by Excise Guard Fernando, meaning thereby that it was the boutique of the accused, from where he had purchased, earlier that day arrack. He went on to say further that he had drunk arrack for fifty cents in the morning in the same premises. It is true that this evidence was given in cross-examination but nevertheless it is inadmissible evidence reflecting as it does bad character in so far as it shows that the accused had committed a similar offence earlier in the day. The Excise Guard however, when he gave evidence in chief, himself said that the Inspector asked the bogus customer to go to the place where he (the bogus customer) drank arrack earlier that day. This evidence, too was clearly inadmissible. There can be little doubt that this evidence too must have influenced the Magistrate to take a view adverse to the accused in this case.

The prosecution becomes far more intriguing when one addresses one's mind to a circumstance of no little import. There was sworn testimony that the husband of the accused has been charged with having assaulted an Excise guard called Cooray and there was also evidence given by the Excise Inspector himself that guard Cooray also accompanied him on this raid. The case against the husband of the accused was yet pending. Now, the suggestion on behalf of the defence was that while no special reason could be given by the accused, so far as she was concerned, for being made the target of a prosecution there was ample material suggesting that the prosecution against the wife was in retaliation for something done by the husband. In the light of this suggestion, the conduct of the Excise party undoubtedly lends itself to the very severe criticism it has been subjected to in Court, suggesting that the whole case is a fabrication to support which, breaches of the provisions of the Ordinance have been committed by the Excise party.

It is conceded on behalf of the prosecution that there was no warrant in the possession of the Excise Inspector before he raided the premises of the accused. He, however, sought to justify his action by a reference to section 34 of the Ordinance which empowers a place other than a dwelling-house to be searched without a warrant, and as the place he searched was a boutique, he was lawfully entitled to make a search without a warrant. In the first place,

the evidence shows that on the verandah of the building is a glass show-case in which biscuits and sweets were exposed for sale. This seems to be the only indicia for treating the verandah as a boutique and this may be sufficient, but there is other evidence in the case which shows that the rest of the building is used for human habitation and that in the strict sense of the term it is a dwelling-house. Had the Inspector made a search of the verandah alone, one might have agreed with him, but when he says he made a search of the room behind the verandah and found something under a bed one certainly fails to appreciate his explanation.

Apart from this attempted justification, there is a far more serious objection to the conduct of the Excise party in this case. Section 34 of the Ordinance does not enable an Excise officer to arrest without a warrant a person who had already committed an offence and of the commission of which offence information may have been received or believed in by the officer. The powers of arrest given to an officer under this section, that is to say, power to arrest without first being armed with a warrant as required by section 35 or without first recording the grounds of his belief in regard to the commission of an offence as required by section 36 are conferred on him only in the exceptional circumstance where he finds a person committing an offence, that is to say in his presence. To my mind, this section does not cover a case where a decoy is employed for the purpose of obtaining evidence of the commission of an offence but I do not think I need express any final view in regard to this question; it is sufficient to say that in this case the evidence discloses at best that the decoy was sipping arrack from a glass. The Inspector did not himself see the commission of the offence which is alleged to be the sale of arrack by the accused. Section 34 cannot therefore be availed of by the prosecution to justify the various acts committed or performed by the Excise party. It is not without interest to note that this section confers primarily a power of arrest of the person found committing the offence, and then it goes on to provide that the officer may search "any person upon whom and any vessel, vehicle, animal, package, receptacle or covering in or upon which he may have reasonable cause to suspect any such article (excisable article) to be." The omission of words such as "building" or "premises" is significant. It seems to me that the search of at any rate of the building which was used solely for purpose of habitation was not authorised by section 34 of the Ordinance.

The defence asserts that the Inspector did carry away a sealed bottle of Govt. arrack from a box where it had been kept and which had been brought to the house for the confinement of the accused. But it denies that any empty bottle or a bottle having liquor partially was removed from the premises. A difficult question arises as to what is the weight to be attached to the evidence given by the Inspector with regard to his search and discovery of the bottles in the house of the accused.

In considering the provisions of section 36 it has been held by this Court in the case of *Bandara wela vs. Carolis Appu* (1926) 27 N. L. R. 401 that though an Excise Inspector had not complied with the requirements of section 36, nevertheless the evidence obtained by him as a result of such unlawful entry would be legally admissible. This case has been followed in two later cases—*Silva vs. Menikrala* (1928) 9 C. L. Rec. 78 and *Almeida vs. Mudalihamy* (1929) 7 Times 54.

The first of these cases was decided by Jayawardene A.J. who was influenced in his view by the Indian case of *Emperor vs. Ravala Kesigadu* I. L. R. (1902), 26 Mad. 124. That was a case decided under section 34 of the Madras Akbari Act, No. 1 of 1886, which corresponds to section 34 of our Ordinance. The Indian provision, however, is that the officer "may arrest without warrant in any public thoroughfare or open place other than a dwelling-house any person found committing an offience" The facts were that an Assistant Inspector found the accused in the vicinity of a still—an offence in respect of which arrest without warrant was permitted by section 34 of the Indian Act. The objection there taken was that by a government notification the jurisdiction of the Assistant Inspector had been restricted to a certain area and that the arrest was affected by the officer outside the limits of his jurisdiction. The judgment of the Court consisting of Sir Arnold Wright C.J. and Benson J. shows clearly that they did not regard the arrest effected by the Assistant Inspector to have been beyond his powers, but what they did hold was, to use the language of the learned Judge. "The notification in question did not and could not operate so as to limit the power conferred upon officers by section 34 of the Act". Therefore, it will be apparent that what they did hold was that the officer acted within the scope of the powers conferred on him by section 34 and they had no occasion to consider the question whether if the officer had exceeded his powers and effected an arrest or made search evidence obtained in consequence thereof would have been admissible or not.

The local cases above cited are all based upon this Indian decision and the soundness of the views laid down in these cases may have to be re-considered in an appropriate case. In the case of *Bandarawela vs. Carolis Appu* (1926) 27 N. L. R. 401 I notice it was urged that the provisions of that section (36) would be reduced to a nullity, particularly in view of the fact that as a general rule the villager here does not dare to oppose a uniformed officer even when he attempts to enter a house for the purpose of search. But this contention was rejected by the learned Judge with the remark that he was not prepared to say that villagers, especially those engaged in committing an Excise offence, are "so docile as to allow their houses to be searched without protest". To say the least, this reasoning does not take into account at least that class of villagers against whom no presumption of being engaged in committing excise offences could be drawn. In my opinion, where an unlawful entry is made by an excise officer, it will be setting at nought the salutary provisions of the Excise Ordinance framed in that behalf to invest with legality that evidence.

Having regard to all these circumstances, I think the conviction cannot be sustained, which I therefore set aside and acquit the accused.

Accused acquitted.

IN THE PRIVY COUNCIL.

Present : LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, SIR JOHN BEAUMONT AND SIR LIONEL LEACH.

NADARAJAN CHETTIAR vs. TENNEKOON WALAUWA MAHATMEE AND ANOTHER

Appeal No. 33 of 1949.
S. C. No. 445 of 1946.
D. C. Colombo, 12109 M.
Delivered on 21st June, 1950.

Money Lending Ordinance, section 2 (1) *and* (2)—*Can a borrower re-open a transaction already closed—Statute—Words reproduced from English Statute—Construction—How far English decisions of Court of Appeal should be followed by our Courts.*

Held : (1) That a borrower has the right to re-open a transaction under section 2 sub-sections (1) and (2) of the Money Lending Ordinance although the transaction had already been closed and no money is due.

(2) That it is the duty of Courts in Ceylon to follow the decisions of the English Court of appeal on the construction of words identical with those used in a Ceylon Ordinance.

Per SIR JOHN BEAUMONT.—"Mr. Wilberforce was on safer ground when he contended that it was the duty of Courts in Ceylon to follow the decision of the English Court of Appeal on the construction of words indentical with those used in a Ceylon Ordinance. In the case of *Trimble vs. Hill* (L. R. S. A. C. 342) the Board expressed this opinion :—

"Their Lordships think the Court in the colony might well have taken this decision (*i.e.*, a decision of the English Court of Appeal) as an authoritative construction of the statute. Their Lordships think that in colonies where a like enactment has been passed by the Legislature the Colonial Courts should also govern themselves by it."

Frank Gahan, for the defendant-appellant.
R. O. Wilberforce, for the plaintiff-respondent.

SIR JOHN BEAUMONT.

This is an appeal from a judgment of the Supreme Court of Ceylon dismissing on the 18th February, 1948, an appeal from a judgment of the District Court of Colombo dated the 25th March, 1946.

The action was brought by the respondents who are husband and wife, as plaintiffs, against the appellant who is a money lender, as defendant, to have certain money lending transactions re-opened and for an account. The learned trial Judge decided that the transactions ought to be re-opened, that they were harsh and unconscionable and that they had been induced by undue influence. He directed an account to be taken between the respondents and the appellant, and on the account being taken found that the appellant ought to repay to the respondents the sum of Rs. 33,095·56 and entered judgment accordingly.

So far as is necessary for the determination of this appeal the history of the matter is as follows : In the year 1936 a loan was made by the appellant to the respondents upon security and on certain terms as to repayment. In the year 1938 there was a further money lending transaction between the parties, and it is conceded that the loans of 1936 and 1938 formed one money lending transaction.

On the 9th March, 1940 the respondents, after raising Rs. 60,000 elsewhere paid off the sum claimed by the appellant which then amounted to Rs. 28,202·35. It must be emphasised that this payment was made voluntarily at the instance of the borrowers, and the closing of the transaction was not brought about by the lender.

On the 1st July, 1940, the respondents filed the action out of which this appeal arises claiming relief under the Money Lending Ordinance 1918 of Ceylon (c. 67 of the Revised Statutes 1938). The substance of the claim in the plaint was that the money lending transactions of 1936 and 1938 should be re-opened, an account taken, and payment made to the plaintiffs of anything found to be due. The trial took place before R. F. Dias as District Judge of Colombo. A large number of issues were framed of which No. 19 was in the following terms :—

> " (19) Can plaintiffs maintain this action to re-open the transactions upon Bonds Nos. 1624 of 11-7-36 and 4664 of 19-2-38 as no sums are claimed to be due to the defendant thereon at the date of action ? "

By agreement between the parties this issue was decided as a preliminary point of law, the learned Judge assuming for the purpose of the argument that the facts stated in the plaint were correct. On the 4th August, 1941, in a considered judgment the learned Judge answered issue No. 19 in the affirmative holding that the action of the plaintiff lay although the account had been closed.

The appellant appealed against the judgment of the trial Judge and the appeal was heard by the Supreme Court on the 29th June, 1942, when such Court dismissed the appeal, the learned Judges, however, giving no reason for their decision.

The action thereupon proceeded upon the facts and was tried by the learned District Judge on the 9th March, 1945, and following days. On the 9th April, 1943, the learned Judge gave judgment in favour of the respondents and directed that an account be taken of the transactions between the appellant and the respondents on the basis of his judgment. The appellant appealed to the Supreme Court against the latter judgment of the learned District Judge and such appeal was dismissed by the Supreme Court on the 25th July, 1944, the learned Judges again giving no reasons for their decision.

The action then proceeded in the District Court on the account directed and in the result the learned Judge held the respondents (plaintiffs) to be entitled to the said sum of Rs. 33,095·56 and gave judgment for that amount accordingly.

The appellant appealed against the last mentioned judgment of the District Court and on the 18th February, 1948, the appeal was dismissed. the learned Judges once more giving no reasons for their decision. The present appeal is against that decision which was the final judgment in the action.

Before the Board the appellant has challenged not only the answer to issue No. 19 which raises a question of law based on the construction of the Money Lending Ordinance, but the findings of the Courts in Ceylon that the loans made to the respondents were harsh and unconscionable and induced by undue influence. In their Lordships' view there was ample evidence to support the finding of the trial Judge, confirmed in appeal, that the loans of 1936 and 1938 were harsh and unconscionable and their Lordships see no reason for departing from their normal practice of not interfering with concurrent findings of fact. In this view of the matter it is unnecessary to consider the arguments presented to the Board that there was no evidence to support the finding of undue influence. If the loans made by the appellant were in fact harsh and unconscionable, it matters not that the respon dents were free from the influence of the appellant.

The important question which falls for determination is whether a borrower is entitled to relief under the Money Lending Ordinance in respect of money lending transactions closed before the date of his application for relief. It is to be regretted that in considering this question which is one of some importance their Lordships have not the advantage of knowing the reasons upon which the Judges in the Supreme Court acted in dismissing the appeal against the judgment of the District Judge of the 4th of August, 1941.

The question at issue turns upon the construction of section 2 sub-sections (1) and (2) of the Money Lending Ordinance 1918 which are in the following terms :—

"2, (1). Where 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."

Section 2 reproduces section 1 of the English Money Lenders' Act 1900 (63 and 64 Vict. c. 51) section 2 (2) of the Ceylon Ordinance being expressed in language indentical with that of section 1 (2) of the English Act. The argument of the appellant is that relief under section 2 (1) can only be given in the course of a current transaction since the sub-section only comes into operation when proceedings are taken in any Court for the recovery of money lent. Sub-section (2) is merely a counterpart of sub-section (1) enabling the borrower to claim relief without waiting for the lender to sue for his money and even before the money is due but the relief can only be claimed in the course of a current transaction since the Court which can grant relief must be one in which proceedings might be taken for the recovery of money lent, and relief can only be granted at the instance of the borrower surety or other person liable. If the loan has been repaid and the transaction closed, there is so the argument runs, no money lent, no Court in which proceedings might be taken for the recovery of money lent and no borrower, surety or other person liable. Certainly there is force in this argument and it must be conceded that if the section applies in closed transactions some words must be read into it to cover a claim in which proceedings might have been taken for the recovery of money lent if the money had not been repaid at the instance of a former borrower, surety or other person liable. The contention of the respondents is that some such words ought to be read into the section in order to give effect to the intention of the legislature to be gathered from a consideration of the Ordinance as a whole. It is suggested that the legislature can hardly have intended that a borrower so long as a single instalment of his debts remains due is to have the right to claim relief and open settled accounts, while, when the last instalment has been repaid, he is to lose all his rights. Further that a literal construction of the sub-section would lead in many cases to very difficult questions as to whether a transaction was in fact closed or whether the closure was a mere device to enable the money lender to escape liability, money lenders being notoriously a class skilled in adapting legal forms to their own advantage.

The learned District Judge in his judgment stated that had the matter been at large he would have felt disposed to accept the argument advanced on behalf of the money lender and to hold that the action of the borrower did not lie, but in deference to the decision of the English Court of Appeal in *Saunders vs. Newbold* (1905 I Ch. 260) he held that the plaintiffs could re-open a closed account. *Saunders vs. Newbold* was a considered judgment of the English Court of Appeal in which the Court expressed the view that a borrower was entitled to open a closed transaction under section 1 (2) of the Money Lenders' Act. The Court did not in that case give relief in the closed transaction since the borrower had made no application to the Court so to do but the Court gave him liberty to make such an application if so advised. The decision of the Court of Appeal was affirmed in the House of Lords, but without any discussion on the construction of section 1 (2) of the Money Lenders' Act, though the liberty granted to the borrower by the Court of Appeal was expressly saved. The learned District Judge considered that the opinion of the Lords Justices on the effect of section 1 (2) was really obiter, but this is of little consequence since the right of a borrower to re-open a closed transaction under section 1 (2) of the Money Lenders' Act has been recognised in later cases in the English Court of Appeal (see Part V., Bond (XXII T.L.R. 253) and *Kerman vs. Wainewright* XXXII T.L.R. 295).

Mr. Wilberforce for the respondents in the first instance contended that the legislature in Ceylon by employing in section 2 (2) of the Money Lending Ordinance the exact words used in the English Money Lenders' Act, must be taken to have acepted the construction placed upon these words by Courts of competent jurisdiction in England. He relied on the rule stated by Sir W. James, L. J., in *Ex-parte Campbell* (L.R. 5, Ch. A. 703) that" Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them ". This rule has been acted upon frequently in the English Courts and was approved by the House of Lords in *Barras vs. Aberdeen Steam Trawling & Fishing Co., Ltd.* (1933 A. C. 402). Probably in suitable cases the rule would be applied in Ceylon as it has been in India (see *Strimathoo Moothoo Vijia and others vs. Dorasingha Tever* (2 IA. 169). It is however one thing to presume that a local legislature when re-enacting a former statute intends to accept the interpretation placed upon that statute by local Courts of competent jurisdiction with whose decision the legislature must be taken to be familiar : It is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed upon those terms by the Courts of the foreign country with which the local legislature may or may not be familiar. There is no presumption that the people of Ceylon know the law of England and in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew or must be taken to have known decisions of the English Courts under the Money Lenders' Acts. There is no basis for imputing to the legislature an intention to accept those decisions.

Mr. Wilberforce was on safer ground when he contended that it was the duty of Courts in Ceylon to follow the decision of the English Court of Appeal on the construction of words indentical with those used in a Ceylon Ordinance. In the case of *Trimble vs. Hill* (L. R. 5. A. C. 342) the Board expressed this opinion :—

> " Their Lordships think the Court in the colony might well have taken this decision (*i.e.*, a decision of the English Court of Appeal) as an authoritative construction of the statute. Their Lordships think that in colonies where a like enactment has been passed by the Legislature the Colonial Courts should also govern themselves by it."

This, in their Lordships' view, is a sound rule, though there may be in any particular case local conditions which make it inappropriate. It is not suggested that any such conditions exist in the present case, and the Courts in Ceylon acted correctly in following the decision of the English Court of Appeal.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Present : NAGALINGAM, J. & PULLE, J.

KANAGASABAI *vs.* BALASUBRAMANIAM

S. C. 424—*D. C. Point Pedro*, 10,271.

Argued on : 10th November, 1949.
Decided on : 30th November, 1949.

Civil Procedure Code, Section 337—Application after ten years for re-issue of writ returned unexecuted—Subsequent application—Court's power to grant.

Plaintiff obtained a money decree against the appellant on 16th December, 1937. The 1st application for writ was made on 8th July, 1948, and was allowed returnable on the 10th of February, 1949, and various sums of money representing the salary of the appellant for the months of March to December, 1948, were seized thereon and deposited in Court.

On 13th January, 1949, plaintiff's proctor moved that the writ issued be recalled, extended and re-issued, but the Court made order that the application should be made after the return of the writ.

On 23rd of March, 1949, plaintiff made application for further execution setting out the steps taken on 13-1-49 and praying that writ returned be re-issued. The Court allowed it holding that the application was virtually due for extension of time. The appellant contended that the writ was barred by Section 337 of the Civil Procedure Code.

Held : That in the circumstances the writ was barred by Section 337 of the Civil Procedure Code.

Per PULLE, J.—" The numerous authorities cited do not give any clear guidance on the question whether the power which a Court has of reissuing a writ which has been returned unexecuted can be exercised after the expiration of ten years from the date of decree. The proper approach to the problem is, in my opinion, to ascertain on the facts of each case whether the steps taken, after the return of a writ, to recover the whole or the balance of the judgment debt constitute a " subsequent application."

C. Chellappah with *A. Nagendra* for the defendant-appellant.

H. Wanigatunge with *S. Sharvananda* for the plaintiff-respondent.

PULLE J.

The first defendant-appellant in this case is the judgment-debtor against whom a decree was entered on December 16, 1937, for payment of a sum of Rs. 1,706, interest and costs of suit. The first application for writ was made on July 8, 1947, and on that application being allowed a writ was issued on February 10, 1948, made " returnable " on February 10, 1949. The question for determination in this appeal is whether an order made by the learned District Judge on April 6, 1949, for the re-issue of the writ, amounts to a grant of a subsequent application for execution after the expiration of ten years from the date of the decree and is, therefore, obnoxious to the provisions of section 337 of the Civil Procedure Code.

Before dealing with the submissions of law, it is necessary to state in greater detail the events that took place between the date of the writ, namely, February 10, 1948, and the date of the order from which this appeal is taken.

It would appear that on the authority of the writ various sums of monies representing the salary of the appellant for the months of March to December, 1948, were seized and deposited in Court. The writ was returned to Court by the Fiscal with the endorsements dated February 11, 1949, " The writ is returned by lapse of time ". In the meantime on January 13, 1949, the plaintiff's Proctor moved that the writ be recalled, extended and re-issued to enable the plaintiff to recover the balance amount due from the appellant. An order was made that the application should be made after the return of the writ. If the plaintiff thought that it was essential to his application that the returnable date of the writ should be extended before February 10, he ought not to have acquiesced in the order that his application should be made after the return of the writ.

After the writ was returned to Court, that is, on March 23, 1949, the plaintiff's Proctor filed an application for the further execution of the

decree on Form No. 42 in the First Schedule to the Civil Procedure Code. There are two matters to be noted in this application. First, it set out the steps taken by the Proctor on January 13, and the order made thereon. Secondly, it prayed "that the writ which has been returned to Court by the Fiscal partly executed owing to lapse of time be re-issued for further execution by seizure and, if necessary by the sale of the movable and immovable property of the 1st defendant". The application was supported by an affidavit from the plaintiff which stated among other things, that he had on the previous application exercised all possible and due diligence to realise the amount due on the decree. On March 24, the learned District Judge made order refusing the application on the ground that it was made ten years from the date of the decree. On April 5, the plaintiff's Proctor asked for an opportunity to support his application and asked that the matter be fixed for hearing on April 6, as that was the last date on which, he said, he should appeal from the order made on March 24. Plaintiff's Proctor was heard on April 6, and the Judge made the following order :—

> "An application was made for extension of time on 13-1-49. The present application is virtually an application for extension of time. In the circumstances I vacate my order of 24-3-49 and allow the application for re-issue of writ".

On April 21, the writ which had previously been returned was extended and re-issued, returnable on April 20, 1950. On May 5, 1949, appellant's Proctor submitted that the re-issue of writ was barred by section 337 and moved that it be recalled. Argument was heard on the 13th May and on the 8th June, 1949, the learned District Judge made order declining to interfere with his order of the 6th April allowing the application for re-issue of writ. The present appeal is from this order.

It is not disputed that it is competent for a Court to extend the time within which a writ is returnable. Hence it was within the discretion of the District Judge on plaintiff's application dated the 10th January to extend the returnable date. It is also not disputed, having regard especially to the Divisional Bench case of *Andris Appu vs. Kolande Asari*, (1916), 19 N. L. R. 225, that a writ of execution returned to Court may under certain circumstances be re-issued. Now the argument for the plaintiff is that the application for writ having been made on the 8th July, 1947, and allowed, the writ dated 10th February, 1948, and its extension and re-issue all draw their efficacy from the first application of the 8th July, 1947. In other words, the re-issue was not in pursuance of a subsequent application within the meaning of section 337 of the Code.

I do not think that the position taken up by the plaintiff is tenable. The numerous authorities cited do not give any clear guidance on the question whether the power which a Court has of re-issuing a writ which has been returned unexecuted can be exercised after the expiration of ten years from the date of decree. The proper approach to the problem is, in my opinion, to ascertain on the facts of each case whether the steps taken, after the return of a writ, to recover the whole or the balance of the judgment debt constitute a "subsequent application". There are two aspects of the application of the 24th March, 1949, which indicate that it is in every respect a subsequent application. The first is the form of the application which gives the various particulars required by section 224 and the second is the statement in the affidavit which accompanied the application that on the "previous" application due diligence was exercised to realise the amount decreed. Section 337 clearly shows that the exercise of due diligence is a condition precedent to the grant of a subsequent application. It is nowise associated with the first application, however late it may be made. To hold, as the learned Judge has done, that the application of the 24th March is only a continuation of the first application without possessing an identity of its own is to ignore both the substance and the form of the second application. In judging whether the second application is independent of the first, it is immaterial that the mode in which the Court's assistance was required was by re-issue of the writ which had been returned to Court. What has primarily to be considered is whether there has been a grant of the application. The re-issue of the writ is a result which flows from the grant of the application.

In my judgment plaintiff's application of the 24th March, 1949, is barred by section 337. I would, therefore, set aside the order appealed from but in all the circumstances of the case there will be no costs of appeal.

NAGALINGAM, J.

I agree.

Order set aside.

IN THE PRIVY COUNCIL

Present : LORD PORTER, LORD RADCLIFFE, SIR JOHN BEAUMONT

JOSEPH STANISLAUS ALLES vs. MERLE ALLES AND ANOTHER

Privy Council Appeal No. 56 of 1947
S. C. No. 118—119 *D. C. Colombo* 586
Decided on : 12th June, 1950

Evidence Ordinance, Section 112—*Presumption of legitimacy—Rebuttal—Onus.*
Divorce action—Adultery—Damages against co-respondent—Why Privy Council should not interfere with award.

The plaintiff (1st respondent) sued her husband (the appellant) for a decree for judicial separation and for an order for payment to her of maintenance in respect of two children P and R born during the period of marriage. The appellant in his answer denied (*a*) her right to a judicial separation, (*b*) that the boy R was any son of his and asserted that she committed adultery with the 2nd respondent. Also he counter-claimed a decree for divorce and damages against the 2nd respondent.

The District Judge granted a divorce to the appellant on the ground that the 1st respondent committed adultery with the 2nd respondent and further held that the boy R could not be the son of the appellant. He also awarded damages in a sum of Rs. 15,000 against the 2nd respondent.

The respondents appealed and the Supreme Court upheld the findings as to adultery and decree for divorce but reduced the damages awarded to Rs. 10,000 and further declared that the appellant had failed to disprove the legitimacy of the boy R.

The appellant thereupon appealed to the Privy Council on the issues as to the paternity of the child and the quantum of damages.

There was evidence to establish (*a*) that the only date on which the appellant had access to his wife, during the material period was on the 9th of August, 1941 ; (*b*) that the child was born on the 26th March, 1942, the interval between the dates being 229 days inclusive of both dates ; (*c*) that the labour was a normal one and the child was a mature child of complete uterine development.

The expert evidence left no doubt (*a*) that a fully developed child normally appears after a uterine existence of 280 days from the commencement of the last menstrual flow (*b*) that an insemination-delivery period of 229 days could not—produce this fully developed child.

Held : (1) That in the circumstances the appellant had discharged the burden that lay on him to rebut the presumption created by section 112 of the Evidence Ordinance.

(2) That under section 112 of the Evidence Ordinance the ostensible father who denies paternity must prove that he had no access to the mother at a time when the child could have been begotten. In many cases this onus is a heavy one.

Per LORD RADCLIFFE.—"The main ground that influenced the Supreme Court appears to have been their view that the appellant had shown carelessness and neglect as a husband in not determining the close association of his wife with the co-respondent. He had indeed committed the error of trusting two people too much : but as one of the two was his wife and the other was his own close friend it is perhaps hard that his error should be a matter of reproach to him. Nor do the references in the judgment of Wijeyewaradene, J. to the financial straits of the second respondent appear to have any admissible bearing on the quantum of damages. But, even when that much is said, their Lordships do not feel that they would be justified in interfering with the Supreme Court's Order in this matter. It is avowedly based partly on the scale of damages usually awarded in the Courts of Ceylon : moreover the assessment of the quantum of damages, as indeed the assessment of what is prudent and of what is careless in social relations, depends essentially upon a familiarity with local conditions which is possessed by the Supreme Court to a much greater extent than it can be by the members of this Board ".

D. N. Pritt K.C. with *Stephen Chapman* for the appellant.
A. Aiken Watson with *I. H. Jacob* for the respondent.

Delivered by LORD RADCLIFFE.

This is an appeal from a decree of the Supreme Court of Ceylon dated the 11th May, 1945. The proceedings in which this decree was made were matrimonial proceedings instituted by the first respondent against her husband, Mr. Joseph Stanislaus Alles, the present appellant, in which she sought to obtain a decree of judicial separation with consequential relief, including an order for the payment of permanent alimony to her in respect of two children born during the period of the marriage, a girl, Pauline Frances Hortense who was born in 1938, and a boy, Joseph Richard, who was born on 26th March, 1942. This claim was met by an answer on the part of the appellant in which he denied her right to a judicial separation, denied that the boy, Joseph Richard, was any son of his, asserted that the first respondent had committed adultery with the second respondent, Dr. T. S. M. Samahin, on several occasions

during the year 1941, and prayed for a divorce *a vinculo matrimonii* and an award of Rs. 25,000 by way of damages against the second respondent.

Thus among the matters that were in issue in the suit there arose, though indirectly, the issue of the boy's paternity. On the 11th December 1942, the trial Judge framed the issues and after some discussion he included an issue, numbered 7.

Is the child, Joseph Richard, not a son of the first defendant ? " It seems to have been agreed that a finding made on this issue in these proceedings would not be binding on the boy, but the learned Judge decided that he must deal with issue No. 7, since it had a bearing on the main question of matrimonial misconduct on the part of the wife and also because an answer to it would determine the question whether the appellant was liable to pay maintenance in respect of this boy.

The trial was a lengthy one, lasting from 11th December, 1942, until 15th February, 1943, and on 27th February, 1943, the District Judge of the District Court of Colombo, Dr. R. F. Dias, delivered judgment. For the purposes of this appeal it is sufficient to note that he held that the first respondent had committed adultery with the second respondent on various dates between the 15th February, 1941, and the 20th August, 1941, and that the appellant was entitled to a decree of divorce and to custody of the infant daughter of the marriage. He awarded the appellant a sum of Rs. 15,000 as damages against the second respondent. A detailed review of the evidence led him to conclude that the child, Joseph Richard could not be a son of the appellant and he decided accordingly that the first respondent was entitled to the custody of that child and that the appellant was not bound to maintain him.

Both respondents appealed to the Supreme Court, which on 11th May, 1945, made an order in part upholding and in part reversing the judgment of the District Court. The findings as to adultery and the divorce decree were upheld, but the appellant's damages as against the second respondent were reduced to Rs. 10,000, and a declaration was made that the appellant had failed to disprove the legitimacy of Joseph Richard. Since no appeal is before their Lordships on behalf of either of the respondents, the only matters that were in controversy before them were the issue as to the paternity of the child and the issue as to the quantum of damages. In both respects the appellant seeks to have the judgment of the Supreme Court reversed and the judgment of the District Court restored. It will be convenient to defer the comparatively minor point as to the quantum of damages until consideration has been given to the legitimacy issue, and it is to the latter, therefore, that their Lordships will first address their observations.

One thing at least is clear. In Ceylon the governing rule is contained in a statutory provision, section 112 of the Evidence Ordinance which reads as follows :—" The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried shall be conclusive proof that such person is the legitimate son of that man unless it can be shown that the man had no access to the mother at any time when such person could have been begotten or that he was impotent ". Under this system the Court does not find itself faced directly with the question whether the child whose status is in dispute is or is not the child of his ostensible father. That fact is conclusively proved by the mere circumstance of the birth occurring during the prescribed period, unless whoever denies the paternity can prove, not that the child was not conceived of any union with the ostensible father, but that that person had no access to the mother at a time when the child could have been begotten or was impotent. It is obvious that in many cases the onus of disproving any access at a time when the child could have been begotten must be a heavy one and it is not made the lighter by the uncertainty that still attends much scientific knowledge about the inception and progress of pregnancy. But, that being conceded, a Court that is furnished, as was the trial Court in this case, with an abundance of expert testimony bearing upon this very issue as to the dates within which Joseph Richard could have been begotten is faced with an issue of fact that is not incapable of being resolved ; and, though it must properly require to be well satisfied by the evidence if it is to conclude that such access as did take place did not take place at any time when conception was possible, it is not at liberty to reject an affirmative conclusion in difference to the general uncertainty that pervades the subject or to the existence of some merely theoretical doubt as to the unpredictable achievements of nature. The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived.

The peculiarity of the present case is that, owing to circumstances that are not material, the only date upon which the appellant had access to the first respondent during any mateiral period

was the 9th August, 1941. The child was born on 26th March, 1942. The question before their Lordships can therefore be stated in the simplest terms :—" Did the appellant prove at the trial that the child that was born on 26th March, 1942, could not have been begotten as a result of his intercourse with his wife on 9th August, 1941 ? " The interval between the two dates is 229 days if both dates are included in the computation.

Apart from these two fixed dates a few other matters of evidence may be treated as established. The most important was a detailed description of the child's appearance at birth. This was provided by the testimony of Dr. Wickremasooriya, who had attended the first respondent on her confinement and delivered the child. He described the labour as normal and the child as being " a mature child. By that I mean of complete uterine development. It looked an average full-term child ". His testimony included details as to the weight of the baby, the condition of its skin, the presence of sub-cutaneous fat, the development of hair, testicles and finger nails and its movements and crying on birth. The doctor said that by the time that delivery took place he was aware that some trouble was brewing between husband and wife and for that reason he " had a good look " at the child. Dr. Wickremasooriya had first been consulted by the wife on 23rd October, 1941. On that date he had made an examination which satisfied him that she was pregnant. He found her uterus enlarged to about four fingers breadth (3¾ inches in his case) above the junction of the pubic bone, and he considered that she was 14 to 16 weeks from the start of pregnancy, calculating that from the date of the last menstrual period. On 17th December another examination took place at which he heard the foetal heart sounds. Generally speaking, these are audible after the 20th week of gestation, calculated as before.

Now the expert evidence left no doubt that a fully developed child normally appears after a uterine existence of 280 days. This is equivalent to 10 lunar months, or, roughly speaking, 9 calendar months, although Taylor's Principles and Practice of Medical Jurisprudence, 10th Ed. Vol. II., page 33, in fact gives 274 days as the average of 9 calendar months. There was some dispute as to whether periods of uterine existence as given in medical text books or statistics are calculated from the date of fertilisation of the female ovum or from the date of the commencement of the last menstrual flow. Their Lordships are content to proceed on the latter assumption, not only because it seems almost inevitable that in most cases information as to the date of fertilisation or fruitful coitus would be unobtainable, but also because they construe the expert evidence as not raising any conflict on this point. To calculate in this way, failing more precise material as the basis of statistics, is not to accept or to import any theory that the uterine life of any particular child can in fact begin before fertilisation has taken place. But it does immediately raise the question, which has great importance in this case, whether there is any reliable evidence before the Court as to the date upon which the first respondent had her last menstrual flow.

At the trial she deposed that she had a period on 12th July. This is 257 days from 26th March and if her statement is to be treated as a statement of fact the child, even if conceived on 9th August could yet be spoken of as a 257 day child or as a child in the ninth (calendar) month for the purpose of any comparison of its characteristics with those normally attributed to the full-term child. On any view, there would be considerable difficulty in classifying it in this way, for to do so involves the assumption that a fertile coitus took place on the 28th day after the commencement of the last preceding menstrual flow. Medical experience appears to suggest that such an event would be a very exceptional occurrence and a good deal of the evidence at the trial was devoted to the question whether such a conception ought to be treated as a possibility. In their Lordships' view it would be wrong to treat the possibility as excluded even if the respondent was not, as she asserted that she was, accustomed to the onset of her menstrual periods at irregular intervals ; a circumstance which would make it even more difficult to maintain the positive proposition that a fertile coitus on 9th August could not have taken place. But it still remains to consider whether this child could properly be spoken of as a 257-day child on the ground that his mother had her last menstrual flow on 12th July.

The plaintiff's " whole case stands or falls with this date ", observed the trial Judge in his judgment. After hearing all the evidence he rejected her story and held it to be a false date. The Court of Appeal accepted her story on this point and it is not too much to say that the whole of their treatment of the medical evidence is based upon their assumption that this date is to be relied upon. Lastly, the only expert witness who was called on the plaintiff's behalf, Dr. Thiagarajah, conceded that, if menstruation on the 12th July was not to be accepted as a fact, he would agree that the conception of this child must have taken place some time earlier than 9th August.

On this issue their Lordships think that it would be wrong to interfere with the trial Judge's finding. It is, after all, a question of fact and he had ample grounds for refusing to believe the plaintiff about this matter. Firstly, he found her general evidence untrue, not merely on the question of adultery but also on unconnected matters. Indeed he had reason to regard her as a witness recklessly indifferent to the truth. Secondly, Dr. Wickremasooriya gave evidence that when she first consulted him on 23rd October, 1941, she was confused about the date of her last menstrual period and was not able to give it. She did supply him with the dates 11th to 14th July on a later visit on 17th December. It is very difficult to believe that a woman who professed herself unable to recall the dates on her first critical visit in October would have been able to recollect them two months later. Thirdly, the date she gave in her evidence at the trial was 12th July, not 11th to 14th. In view of the fact that Dr. Gunasekera had given evidence that on 11th July he examined the region of her abdomen and kidneys in connection with an attack of renal colic and neither observed the presence of any safety girdle nor was told anything of a menstrual flow, the change of date to the 12th July might well be regarded as somewhat significant. She said that she should fix the date definitely "because that was the day after Dr. Frank Gunasekera ceased to see me", but it did not appear why this mnemonic was not available to her on earlier occasions. Lastly, the plaintiff called her sister, Miss Merita de Costa, to support her story of menstruation on 12th July; but the account given by that witness was regarded by the trial Judge as being so inherently improbable that he not merely rejected it, just as he rejected her evidence on other matters, but he also treated it as throwing deeper suspicion on the plaintiff's date. To reverse this finding on appeal would be a strong step, only justified if the trial Judge had demonstrably misjudged the position. But the reasons for accepting the plaintiff's story which commended themselves to the learned Judges in the Supreme Court fall far short of establishing that. It is not that there was not some evidence that tended to confirm her date. She did tell her husband, as he agrees, that she had missed her period in September, the inference being that she had at any rate not missed her periods before then. If she could be treated as a witness of credit in matters where she is in conflict with other witnesses, there was her evidence that on 23rd October she did give Dr. Wickremasooriya the date of 11th August (on which date she had some bleeding) as the date of her last period. And it is fair to say that his examinations on the 23rd October and at later dates, though they could not be conclusive, led him to estimate a period of pregnancy that was consistent with her having had menstruation on 12th July. But all this is not of great weight, and their Lordships conclude that they ought not to maintain the Supreme Court's reversal of the District Judge's finding for two reasons. One is that Mr. Justice Wijeyewardene's summary of the considerations that led him and his judicial colleague to accept the plaintiff's story is an inadequate treatment of the relevant evidence. The other is that neither in that passage nor elsewhere in the judgments does any weight seem to be given to the consideration that the Court was reversing a finding of fact by a trial Judge who, having heard and tested the evidence of the plaintiff and her sister, had most explicitly disbelieved them.

The result is that the consideration of this case must proceed on the basis that there is no reliable information as to when the first respondent had her last menstrual period. That leaves the bare question whether the appellant has proved that Joseph Richard could not have been begotten on 9th August, no more facts being known than the dates of that coitus and of the child's delivery, the description of the child as he appeared at birth and such evidence as was afforded by Dr. Wickremasooriya's several examinations of the first respondent. Of the three doctors called by the appellant who might fairly be regarded as qualified to give expert testimony on this question two said with conviction that a child such as Dr. Wickremasooriya described the baby to be at birth could not possibly have been conceived as late as the 9th August. Such maturity of development as Dr. Wickremasooriya observed appeared to them to be impossible in a child whose period of gestation was 229 days from conception to delivery. These two doctors were Dr. Attygalle, visiting Gynaecologist to the General Hospital at Colombo and Lecturer in Gynaecology at the University of Ceylon, who included the F.R.C.O.G. (Great Britain) among his distinctions, and Dr. Navaratnam, also a F.R.C.O.G., Lecturer in Midwifery at the same University, and until recently Superintendent of the Lying-in Home, to which he had then become the Senior Visiting Obstetrician. Admittedly, their evidence commended itself to the trial Judge, who accepted their views. But it is obvious that he was not bound to accept these views if they appeared to him to be self-contradictory or unsupportable by by reason or if he had before him any genuine conflict of expert evidence on this issue which he found it impossible to resolve. It is this that their Lordships will now consider.

The foundation of the opinion which these doctors expressed lay in their assertion that medical science recognised that for a fully developed child to be born a period of some 265-270 or 270-275 days must elapse between insemination and delivery. There was no material difference in date between coitus and insemination; consequently 229 days might be taken as the insemination-delivery period of this child if he had been conceived as the result of coitus on 9th August. They did not maintain that the period of 265-270 or 270-275 days was absolute. Dr. Attygalle would allow about 14 days' variation on either side, taking the period as 270-275; Dr. Navaratnam put it at "about 265-270 days". But neither was prepared to accept the possibility of so large a variation from the normal as would be involved in 229 days. Now it is true to say that it is impossible to arrive at any certain conclusion, either from a perusal of the evidence or from a study of the various medical text books that were referred to, as to what is the exact relation between the insemination-delivery period as a scientific measure and the more usual calculation from the commencement of the last menstrual period to the date of delivery. Most observations about the development of children at birth must of necessity be based on no more precise knowledge than that of the mother's last menstrual date, and the 265/275 insemination-delivery period presents the appearance of being no more than a deduction from those observations, the foundation of which deduction is the belief that insemination normally occurs about a fortnight before the expected date of the next menstrual flow. And there is no agreement among the experts that insemination can only occur or does only occur towards the middle of the cycle. But, when all this is admitted, the fact remains that it appeared quite clearly from the evidence, not of these two doctors only, that medical science does recognise the validity of an insemination delivery period for the measurement of gestation and that it does use a period of about 265-270 days as the measurement of this. The plaintiff's expert, Dr. Thiagarajah, was not prepared to challenge that proposition. Having regard to this it seems impossible to say that the positive evidence of these two experts that an insemination delivery period of 229 days could not produce this fully developed child ought to be rejected as an unmaintainable assumption.

How far then did Dr. Thiagarajah's evidence come into conflict with that of Dr. Attygalle and Dr. Navaratnam? It is part of the history of this case that the trial Judge refused to guide himself by Dr. Thiagarajah's evidence and passed some rather severe criticism on his impartiality, even accusing him of twisting scientific facts to suit his theories. Neither of the Judges in the Supreme Court thought this adverse criticism justified. Nor would their Lordships wish to repeat it in any sense that suggests that they do not regard Dr. Thiagarajah as a witness trying honestly to give his opinion on a difficult matter in which theory is bound to play an important part. But the trial Judge's impression that he was too zealous a partisan and that his zeal led him to advance his theories beyond the point to which they could reasonably go is not so easily got rid of. For instance, his use of Dr. Fernando's bare statement that, when called to the plaintiff at the beginning of her labour, he found that labour had advanced and the membranes were ruptured as indicating such a rupture of the membranes as would cause premature labour is really to build a theory without foundation upon an ambiguous phrase that Dr. Wickremasooriya had used in his evidence. The point is not without importance on the question whether Dr. Thiagarajah's evidence raised any material conflict with the other side, since he agreed that, if there was not in fact a premature rupture in the sense in which he understood the phrase, the child whose appearance was described by Dr. Wickremasooriya could not have been conceived on the 9th August. But, quite apart from this, the fact is that Dr. Thiagarajah's disagreement with the appellant's experts centred on the assumption that the plaintiff had had the menstrual flow to which she testified on or about the 12th July. In the course of his cross-examination he made it plain that if that date was "eliminated" he was not in disagreement with the other doctors and that he would himself accept that conception could not have taken place as late as the 9th August. Since, for the reasons already given, their Lordships are satisfied that the 12th July must be eliminated, to use Dr. Thiagarajah's phrase, it results that there is no conflict between him and the appellant's witnesses upon this, the crucial issue in the case.

There remains for consideration the evidence of Dr. Wickremasooriya. The first respondent relies upon certain answers given by him as showing that he at any rate did not think it impossible that the child delivered by him could have been conceived on 9th August. Now it does not necessarily follow that the trial Judge, having before him the evidence of Drs. Attygalle and Navaratnam and the virtual concession of Dr. Thiagarajah, would be precluded from finding against the legitimacy of this child by the fact that Dr. Wickremasooriya had declined to commit himself to the view that such a gestation period was impossible. To say that would be to

make Dr. Wickremasooriya's caution the determining point of the whole case. But, even if this is so, it is impossible to ignore the special significance of Dr. Wickremasooriya's evidence in this particular case. He was both the doctor who had examined the plaintiff from time to time during pregnancy and the only witness who, since he had delivered the child, could give an eye-witness's account of its appearance, and he was also a witness who, realising his peculiar position before the trial, had refused to give a proof of his evidence to either side and therefore appeared as an impartial expert, enjoying for that reason a status which was different from that of the other experts called. It is therefore necessary to examine his evidence with strict attention in order to see to what extent, if at all, it really supported the first respondent's contention.

In examining it one or two considerations must be borne in mind. He was a witness the full significance of whose answers cannot always be appreciated from the printed page. In more than one answer the intonation of voice may have made the whole difference. This is of some importance because it is apparent from the judgment of the District Court that the trial Judge himself did not regard Dr. Wickremasooriya's evidence as conflicting in any way with that given by Drs. Attygalle and Navaratnam. Indeed he closes his detailed treatment of the question of Joseph Richard's legitimacy with this sentence :—" In spite of severe cross-examination, Drs. Wickremasooriya, Attygalle, Navaratnam and Frank Gunasekera are all agreed that this child could not have been conceived by a coitus on the 9th August ". Another thing that tends to obscure the true effect of Dr. Wickremasooriya's evidence is that he gave it on the assumption that he must treat the plaintiff as having really had a menstrual flow from 11th—14th July and his calculations were made on that basis. Lastly, it is not unfair to remark that at the stage of the trial when he gave evidence neither the answers of the witness himself nor some of the questions put to him properly disentangled the issue whether the fully developed child delivered by him on 26th March could have been conceived by any coitus on the preceding 9th August from the quite separate issue whether there could have been a fruitful coitus on the 9th August if the plaintiff had had her monthly period about the 12th July.

If these considerations are borne in mind, their Lordships think that in the result, Dr. Wickremasooriya's evidence does, as the trial Judge thought that it did, support the same conclusion as that of the appellant's other witnesses. What it amounts to is this. His evidence in chief concluded with his reply to the question when " this child " was conceived, that the date was " somewhere round about the first two weeks in July ". During the course of his cross-examination he made two replies to questions from the Court, upon which Counsel for the first respondent has naturally placed much reliance. The first is recorded as follows :—

" (To Court :

" *Q.* Last menstrual period 12-7. Husband has connection on 9-8. That is the only connection. Child born 26-3. Is that possible ? *A.* It is possible. It is not impossible.

Q. In other words that is a time when Joseph Richard could have been begotten ? *A.* 32 weeks and six days.

" *Q.* Is that a period in which this child could have been begotten ? *A.* 32 weeks and six days suggests a premature child.) "

Their Lordships are satisfied both by the phrasing and by the context in which the questions appear that the witness, in his answers, was intending to convey that he did not deny the possibility of a fruitful coitus on the 9th August, even so long after what he believed to have been the last date of menstruation, but was not intending to convey that he accepted the possibility of the fully developed child that he saw on 26th March having been conceived on the 9th August. In substance the other passage comes to the same thing—

(To Court :

" *Q.* Could this child have been conceived on the 17th April ? *A.* No.

" *Q.* The question then arises, as a medical expert could you exclude the possibility of her conceiving owing to an intercourse on the 9th August ? *A.* The 9th August is the 30th day of her menstrual cycle. The probabilities are that even if she had a fertile coitus on that date it may not have resulted in a pregnancy, because if the period was just due most likely the fertilised ovum would be cast away with the menstrual discharge

" *Q.* Could you as an expert say that that is excluded ? If you can't do it the medical evidence fails and the child must be presumed to be legitimate ? *A.* I cannot make an absolutely certain statement. I can say the chances are against conception. That is that conception is rather remote.

"*Q.* But you can't definitely say it was not? *A.* I can't exclude the possibility.)"

Here again, however wide an ambit the Judge may have intended for his third question, it is reasonably plain that the witness himself as confining his attention to the single issue, could coitus on the 9th August have resulted in pregnancy at all? and it is that possibility alone that he decline to exclude. Indeed, in his re-examination Dr. Wickremasooriya made his view adequately plain, as the following passage shows :—

"*Q.* Suppose on the 9th August a fruitful coitus took place, when would that child be born if the child born was a mature child? Could the child be born on 26th March? *A.* It would not be a mature child.

"*Q.* A child conceived as a result of coitus on the 9th August? *A.* I think the child would be a premature child. It would be a premature child.

"*Q.* The child did not turn up to be a premature child? *A.* No."

In these three answers the witness has stated all the material terms of a syllogism of which the conclusion is that the child which did not bear in any way the appearance of a premature child could not have been conceived on the 9th August.

For these reasons their Lordships are satisfied that the appellant has sustained the onus, heavy as it is, of proving affirmatively that the only date when he had access to the first respondent was not a date when the child Joseph Richard could have been begotten. In this respect they are unable to agree with the judgment of the Supreme Court in Ceylon. The learned Judges who arrived at the contrary conclusion founded their whole consideration of this issue upon the basis that the first respondent did have a menstrual period on the 12th July. This, as has been pointed out, is an unacceptable basis of fact and its acceptance invalidates the reasoning that depends on it. In a case of this sort the final conclusion arises out of an appreciation of the evidence as a whole rather than out of a selection of isolated passages of it, and it indicates no lack of respect for the carefully reasoned judgments in the Supreme Court if their Lordships do not set out in detail the points at which their own consideration of the evidence has led them to differ from those judgments. But it may be helpful if they say that, in their view, too little weight has been attributed to the combined effect of the testimony of such experts as Dr. Wickremasooriya, Dr. Attygalle and Dr. Navaratnam; and too much weight to the evidence of Dr. Thiagarajah and to certain passages from medical text books which as sources of evidence, suffer from the disadvantage that they were not cited or referred to when the witnesses were giving their testimony at the trial.

There remains the question of the appellant's damages against the second respondent. These were reduced to Rs. 10,000 by the Supreme Court and the appellant has argued that they ought to be restored to the Rs. 15,000 awarded at the trial. The main ground that influenzed the Supreme Court appears to have been their view that the appellant had shown carelessness and neglect as a husband in not determining the close association of his wife with the co-respondent. He had indeed committed the error of trusting two people too much; but as one of the two was his wife and the other was his own close friend it is perhaps hard that his error should be a matter of reproach to him. Nor do the references in the judgment of Wijeyewardene, J., to the financial straits of the second respondent appear to have any admissible bearing on the quantum of damages. But, even when when that much is said, their Lordships do not feel that they would be justified in interfering with the Supreme Court's Order in this matter. It is avowedly based partly on the scale of damages usually awarded in the Courts of Ceylon; moreover the assessment of the quantum of damages, as indeed the assessment of what is prudent and of what is careless in social relations, depends essentially upon a familiarity with local conditions which is possessed by the Supreme Court to a much greater extent than it can be by the members of this Board.

In the result their Lordships will humbly advise His Majesty that the Decree of the Supreme Court dated the 11th May, 1945, should be set aside in so far as it directs that the Decree of the District Court of Colombo dated the 27th February, 1943, should be modified by declaring that the appellant has failed to disprove the legitimacy of Joseph Richard, and is so far as it directs that the District Judge do consider the questions of custody and alimony in respect of Joseph Richard, and in so far as it gives directions as to the costs of the first respondent's appeal; and that in lieu thereof there should be an order that the first respondent should pay the appellant's costs of her appeal; and that save as aforesaid, the Decree of the Supreme Court dated 11th May, 1945, should be affirmed. As the first respondent appeared *in forma pauperis* before this Board and the appeal failed on the issue of damages which alone concerned the second respondent, there will be no costs of the appeal before their Lordships.

Present : SWAN, J.

DIAS vs. DE SILVA (FISCAL'S OFFICER)

S. C. 296/1950—*M. C. Panadura* 9219
Argued on : 1st September, 1950
Decided on : 5th September, 1950

Obstruction—Fiscal Officer entrusted with writ for delivery of possession of property to person other than purchaser at sale in execution—Penal Code Section 183.

J. became the purchaser of a property sold in execution of a mortgage decree against the appellant. He filed a motion stating that he purchased the property on behalf of his daughter M and her husband S and moved that conveyance be made out in their favour. The plaintiff having shown no cause and M and S having consented the Secretary executed a conveyance in their favour. Writ of delivery of possession under section 12 of the mortgage Ordinance was issued and entrusted to the Fiscal's officer who was obstructed by the appellant.

The appellant was thereupon charged for obstruction and was convicted under section 183 of the Penal Code.

Held : That the writ was not invalid merely because it ordered delivery of possession to persons other than the purchaser at the sale.

Per SWAN, J.—"If the writ had been issued without jurisdiction or was otherwise illegal, invalid or irregular, or has been obtained by fraud or wilful suppression of material facts, resistance to its execution would not constitute an offence."

Cases referred to : *Sabapathipillai vs. Alagaratnam* (24 N. L. R. 56).

E. B. Wikramanayake, K.C., with *S. B. Lekamge*, for appellant.
H. V. Perera, K.C., with *A. M. Charavanamuttu* and *H. B. White*, for respondent.

SWAN, J.

The respondent is a Fiscal's Officer. The appellant was charged under section 344 of the Penal Code with having used criminal force on the respondent, alternatively under section 183 with having obstructed the respondent when he went to execute a writ of possession. After trial the learned Magistrate found the appellant guilty on the alternative count and fined him Rs. 100.

It is contended on behalf of the appellant that the writ was bad, and that the conviction should therefore be set aside. If the writ had been issued without jurisdiction or was otherwise illegal invalid or irregular, or has been obtained by fraud or wilful suppression of material facts, resistance to its execution would not constitute an offence. But in this case I can see no such infirmity in the writ.

Mr. Wikramanayake relies on the case of *Sabapathipillai vs. Alagaratnam* 24 N. L. R. 56. The facts of that case are clearly distinguishable from the facts we find here. There a property belonging to the accused had been sold by the Fiscal and purchased by the judgment-creditor, Chelliah who, in due course obtained a Fiscal's conveyance in his favour. Subsequently, Chelliah sold it to one Subramaniam. Subramaniam applied for a writ of possession. It was refused. Chelliah then applied for a writ and asked in his application that the Fiscal should give possession to Subramaniam as he, Chelliah, was not able to be present. The Court allowed the application. When the Fiscal went to put Subramaniam in possession the accused resisted execution of the writ. The accused was charged under sections 183 and 186 and convicted. In appeal the conviction was set aside. Sampayo, J., took the view that the application to put Subramaniam in possession on behalf of Chelliah was "*a mere subterfuge, the truth being that Subramaniam was intended to be put in possession on his own behalf as the owner of the land*". His Lordship further stated that Chelliah's application was "*an ingenious attempt at evasion of the previous ruling of the Court*", adding that the Court should "*not have allowed itself to be misled*" into acceding to it. In these circumstances and in view of the allegation of the accused that he had settled with Chelliah, one can readily understand why the conviction could not have been upheld.

In this case the facts are different. Under a mortgage decree entered against the accused in case No. 12135/M. B. D. C. Colombo, the property in question was sold and purchased by one E. M. W. Jayasuriya. His name appears in the conditions of sale as the highest bidder and the "purchaser" in that sense. The sale took place on 2-6-48. On 26-10-48 Jayasuriya filed a motion stating that he had purchased the premises on behalf of his daughter K. Mabel Dias and her husband B. Senarath Dias and moved that the conveyance be made out in their favour. The

plaintiff had no cause to show against the application but the Court wanted the consent of Senarath Dias. On 29-10-48 a minute of consent was filed from Mabel and Senarath Dias and the Secretary executed a conveyance in their favour on 23-11-48. On 25-1-49 the Court issued order for delivery of possession under section 12 of the Mortgage Ordinance. The writ was entrusted to the respondent for execution and when he went on 22-6-49 to execute it he was obstructed by the appellant.

Mr. Wikramanayake contends that the writ was invalid in that it ordered delivery of possession not to the purchaser but to somebody else. With that contention I do not agree. The purchaser at the sale, put in a motion to the effect that he had purchased the property on behalf of his daughter and son-in-law and asked for a conveyance in their favour. The Court was not satisfied and asked for the consent of the son-in-law. This precaution was necessary because the bond put in suit was a secondary mortgage. A consent motion was filed and the Court allowed the application. It must be presumed that when the Court allowed the application it satisfied itself that, although ostensible purchaser at the sale was E. M. W. Jayasuriya, the real purchasers were Mabel and Senarath Dias. There is nothing to suggest that the application of Jayasuriya was a subterfuge, or that Jayasuriya and his daughter with the connivance of Senarath Dias who, I am told, is the accused's own son, adopted a device or ruse to snatch an unfair advantage over the mortgage-debtor.

The writ on the face of it was regular and valid. There is nothing I can gather from the antecedent events to show that it was improperly obtained. The officer entrusted with its execution was a public servant acting in the discharge of his public functions within the meaning of section 188 of the Penal Code, and the appellant when he obstructed the respondent rendered himself liable to the punishment provided for in that section.

It is idle to contend that this is a trivial matter. It is not Writs of Court properly issued must be obeyed. Those who defy them render themselves liable to the penalties the law provides for such disobedience. In my opinion, the appellant was rightly convicted. The appeal fails and is dismissed.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : GRATIAEN, J. (President), GUNASEKARA, J. & SWAN, J.

REX *vs.* ASIRVADAN NADAR

Application 25 *of* 1950.
S. C. 22—*M C. Kanadulla,* 2,912.

Argued on : 3rd May, 1950
Decided on : 9th May, 1950

Court of Criminal Appeal—Dying deposition of deceased —Failure on the part of Trial Judge to give directions regarding degree of reliance to be placed on it—Misdirection—Evidence Ordinance, section 32 (1).

Criminal Procedure—Dying deposition—How it should be recorded.

Held : (1) That where the prosecution relies upon a " dying deposition " to establish a charge of murder, it is imperative that the trial Judge should adequately caution the jury that, when considering the weight to be attached to such evidence, they should appreciate that the statements of the deponent had not been tested by cross-examination.

(2) That whenever in recording a dying deposition questions are put to the deponent for purposes of elucidation the form of the question as well as of the answer should be precisely recorded.

Per GRATIAEN, J.—" The method of recording evidence ' in the form of a narrative ' though sanctioned in ordinary cases by section 298 (2) of the Code, seems to be inappropriate to the special case of a ' dying deposition '."

Cases referred to : *Waugh vs. The King* (The Weekly Notes 31-3-57 130, page).
Arumuga Tevan vs. Emperor (A. I. R. 1931, Mad. 180).
Bullu Singh vs. Emperor (A. I. R. 1929, Patna, 249).
Sashi Kanta De vs. King Emperor (1930), 32 Cr. L. J. of India 324.
Rex vs. Woodcock, 168 E. R. 352.
King Emperor vs. Premadanda Dutt (1925) 26 Cr. L. J., of India 1256.
Rex vs. Mitchell (1892) 17 Cox. 503.

M. M. Kumarakulasingham, for the accused-appellant.
A. C. Alles, Crown Counsel, for the Attorney-General.

GRATIAEN, J.—

This is an appeal against a conviction for the murder of a man named Thangasami Nadar, alleged to have been committed at Uduwela in the early hours of the morning of October 2, 1949.

The case for the Crown was that Thangasami Nadar had occasion on the previous day to find fault with the accused, who was his employee; and that at approximately 5 a.m. on October 2 the accused stabbed Thangasami Nadar while the latter was asleep in the "wadia" in which they, and certain other employees of Thangasami Nadar, resided. A blood-stained knife, alleged to belong to the accused, was shortly afterwards discovered under the deceased's bed. The man was taken to the Government Hospital at Kuliyapitiya for medical attention. As his condition was serious, the Magistrate was sent for and a "dying deposition" was recorded by him at 8-55 a.m. Thangasami Nadar died at 4-20 p.m. on the same day.

The prosecution called as witness at the trial the other inmates of the "wadia". None of them gave direct evidence of the stabbing, but there can be no question that their evidence, if true, did tend to implicate the accused. The learned Judge did not, however, invite the Jury to consider whether the cumulative effect of this circumstantial evidence was *by itself* sufficient to establish the guilt of the accused on the charge of murder. We cannot therefore with propriety accede to learned Crown Counsel's submission that the conviction should in any event be upheld on the weight of this evidence alone. As to the extent, if any, to which the Jury believed the witnesses concerned, it is impossible to speculate.

Apart from the evidence of these witnesses, the prosecution strongly relied on Thangasami Nadar's "dying deposition" which was recorded by the Magistrate at 8-55 a.m. on October 2, 1949. The entirety of this document—marked P9—was read in evidence at the trial without objection by the defence.

Such portions of the deposition P9 as are "statements made by (Thangasami Nadar) as to the cause of his death or as to any of the circumstances which resulted in his death" constitute admissible evidence on which the prosecution was entitled to rely under the provisions of section 32 (1) of the Evidence Ordinance Learned Crown Counsel concedes that at least some statements which appear in the deposition are not admissible under this section. We do not think it desirable that we should at this stage give a final ruling as to which portions of the deposition are, upon a proper application of this section, admissible and which portions should have been ruled out. That question must be decided, after due consideration, by the presiding Judge at the fresh trial which we propose to order in this case. For the purposes of the present appeal we shall assume—although we do not hold—that the entire document had been properly admitted in evidence.

The main ground on which the accused's conviction has been attacked is that, in leaving it to the Jury to consider whether they could accept as true the statements in the dying deposition P9 which incriminated the accused, the learned Judge omitted to give them adequate directions for their guidance in deciding what degree of reliance they could place upon those statements. It was submitted that in the circumstances of the present case this non-direction amounted to a misdirection which vitiates the conviction. In our opinion the objection is a substantial one.

As the evidence was presented to the Jury at the trial, the statements contained in the dying deposition P9 formed to a very large extent the foundation of the case against the accused, and it was in our opinion imperative that they should have been adequately cautioned that, when considering the weight to be attached to this evidence, they should appreciate that the statements of the deponent had not been tested by cross-examination. It has been pointed out in this connection in Taylor on Evidence (12th Ed. para. 722) that it should always be recollected that the power of cross-examination is "a power quite as essential to the eliciting of the truth as the obligation of an oath can be". In *Waugh vs. the King*, The Weekly Notes 31-3-50 page 173, the Privy Council quashed a conviction in a case where the presiding Judge had fallen into "the serious error of not pointing out to the Jury that a statement made in a dying deposition had not been liable to cross-examination".

Admittedly there is no rule of law under which evidence which is admissible under section 32 (1) may not be acted upon unless it is corroborated by independent testimony, but the Jury should always be cautioned as to the inherent weakness of this form of hearsay evidence. In *Arumuga Tevan vs. Emperor*, A. I. R. 1931 Mad. 180 Jackson J. held that "when a man who is dead has left a statement throwing light upon the

cause of his death, that statement is relevant evidence under section 32 (of the Indian Act) but it is not entitled to any peculiar credit..... It is incumbent upon the Court before it accepts the statement as true to see how far it is corroborated". A similar view was taken in *Bullu Singh vs. Emperor*, A. I. R. 1929 Patna. 249. Moreover the attention of the Jury ought specifically to be drawn to the question of "how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of the deposition". *Sashi Kanta De vs. King Emperor*, (1930), 32 Cr. L.J., of India 324. It is important to remember that in this country, unlike in England, statements, untested by cross-examination, which are made by a deceased person as to the cause of his death or as to the circumstances which resulted in it are admissible in evidence *whether or not they were made in expectation of death—i.e.*, at a time "when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth"—*Rex vs. Woodcock*, 168 E. R. 352. Under our Evidence Ordinance the sense of impending death which is believed to provide "a situation so solemn as to create a special guarantee of veracity" is not insisted upon; and yet another safeguard which generally assists jurors to assess in the light of cross-examination, the testimony of witnesses whom they have had the advantage of seeing and hearing for themselves, is also absent. It is therefore prudent and indeed essential, that these minimising factors should be prominently placed before the Jury by the presiding Judge (*vide* in this connection *King Emperor vs. Premadanda Dutt*, (1925), 26 Cr. L.J., of India 1256.) In the present case, this necessary caution was not administered. Moreover, we find from the record that when the Jury retired to consider their verdict, they returned to the Court *within three minutes* with a unanimous verdict against the accused on a capital charge. We cannot believe that in the present case this was a sufficient interval of time within which a Jury could have properly decided the difficult questions which they were either invited to consider or which, in our judgment, they should have been invited to consider. We therefore quash the conviction and order that the accused be tried on the indictment framed against him in fresh proceedings.

There is one further matter to which we wish to refer. In the course of his charge to the Jury the learned Judge suggested that some at least of the statements in the "dying deposition" had been made in answer to questions which had been put to Thangasami Nadar by the recording Magistrate. Upon an examination of the deposition P9, this seems to us to be not improbable although there is no specific evidence on the point. If this be correct, it is regrettable that there is no record of any precise questions in reply to which the deponent gave certain answers. Lord Cave (then Mr. Justice Cave) pointed out in *Rex vs. Mitchell*, (1892) 17 Cox. 503, that "a declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from those words, to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence which it is desirable should not be open in cases which the accused person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being fully comprehended. In such cases the *form of the declaration should be such that it would be possible to see what was the question and what was the answer, so as to discover how much was suggested by the examining Magistrate, and how much was the production of the person making the statement.*" For these reasons we think that whenever Magistrates are called upon to record "dying depositions" in accordance with the procedure laid down in Chapter 23 of the Criminal Procedure Code, they should record a deponent's statements in the words which he actually employs (or, when this is not practicable, in an accurate translation of those actual words). The method of recording evidence "in the form of a narrative", though sanctioned in ordinary cases by section 298 (2) of the Code, seems to be inappropriate to the special case of a "dying deposition". Whenever, as is sometimes necessary, questions are put to the deponent for purposes of elucidation, the form of the question as well as of the answer should be precisely recorded. Where this procedure has not been adopted in any particular case, the weight which a Jury would be entitled to attach to the statements made by a deceased person as to the circumstances of a transaction which resulted in his death must necessarily be greatly minimised.

Fresh trial ordered.

Present : BASNAYAKE, J. & PULLE, J.

SUPPIAH & ANOTHER vs. SITUNAYAKE

S. C. 165 (*M*)—*D. C. Kandy* 2413

Argued on : 21st and 22nd February, 1950

Decided on : 25th August, 1950

Prevention of Frauds Ordinance, section 2—Notarial agreement to purchase land—Provision that agreement be void after expiration of three months—Can the period be extended by oral agreement —Earnest money—Default in completing transaction—Liability to refund.

Where a notarially attested agreement to purchase land, provided that the agreement should be null and void at the expiration of three months from the date of its execution,

Held : (1) That after the expiry of the said period such an agreement could in law be revived only by another writing attested by a notary as required by section 2 of the Prevention of Frauds Ordinance.
(2) That the earnest money paid under such an agreement must be refunded if the transaction could not be completed owing to the default of the party who received it.

F. A. Hayley, K.C. with *S. J. V. Chelvanayakam, K.C., N. Kumarasingham* and *T. Arulanantham*, for the plaintiffs-appellants.

N. E. Weerasooria, K.C., with *E. B. Wikramanayake, K.C., and A. L. Jayasuriya*, for the defendant-respondent.

BASNAYAKE, J.

This is an appeal by the plaintiffs-appellants (hereinafter referred to as plaintiffs) from an order dismissing their action and condemning them to pay the defendant a sum of Rs. 30,000. The facts shortly are as follows :

The Crown having taken steps to acquire the estate known as Matale Estate belonging to the plaintiffs, they were anxious to purchase another. The defendant, who was negotiating with the Dangan Rubber Estates Limited of London (hereinafter referred to as the Dangan Company) through its Colombo agents, Lewis Brown & Company Limited, for the purchase of its estates in Matale, agreed with the plaintiffs to arrange for the sale to them of an estate called Hapugahalande in extent 749 acres for Rs. 450,000. On 14th July, 1945, they executed the agreement P1 whereby they agreed with the defendant to purchase Hapugahalande. The agreement provided that—

(*a*) on its execution the plaintiffs should pay to the defendant Rs. 15,000 as earnest money.

(*b*) that the earnest money was to be refunded in case the defendant failed to fulfil the terms of the agreement.

(*c*) that the earnest money was to be appropriated by the defendant in full satisfaction of his brokerage, commission, services, etc., under the agreement of its terms were fulfilled.

(*d*) that the plaintiffs should within 30 days of being called upon by the defendant to do so pay a further Rs. 35,000 by post-dated cheque in favour of Lewis Brown & Company Limited realisable on the date of execution of the deed of transfer.

(*e*) that the defendant should negotiate a loan of Rs. 400,000 on a mortgage of Matale Estate and Hapugahalande.

(*f*) that the defendant should negotiate a loan of Rs. 200,000 only on a mortgage of Hapugahalande in the event of the payment by the Crown of the compensation for the acquisition of Matale Estate within the time contemplated by the agreement.

(*g*) that the agreement should be null and void at the expiration of three months from the date of its execution.

(*h*) that the defendant should in addition to refunding the earnest money pay Rs. 45,000 as damages in case he sold Hapugahalande to any other person.

At the time the plaintiffs and the defendant executed the agreement for the purchase and sale of Hapugahalande the defendant had not executed his agreement with the Dangan Company. According to him that agreement was executed ten days later, on the 24th of July, 1945.

The defendant failed to carry out the terms of his agreement with the plaintiffs within the period of three months for which it was to endure. At the defendant's request the plaintiffs agreed to purchase the estate despite the expiry of the

agreement. The first plaintiff says :

"At the expiry of the three months defendant came to me and applied for an extension of time. I gave him one month's time. Defendant could not put through the transaction within that one month. Again he asked for time and I gave another one month. Within that time too the defendant could not complete the transaction. Again I gave him another half month's time. Finally I gave him time till December, 1945. Defendant was not able to complete the transaction and then I told him that I did not want that estate any more. Then I asked for the Rs. 15,000 and defendant said that he would return the money. Defendant did not pay me the money. Therefore I filed this action."

The defendant states that the plaintiffs orally extended till June, 1946, the period within which they were to purchase Hapugahalande and that before that period expired they purchased another estate by name Ankumbure and were unable to purchase Hapugahalande. He claims that in consequence of the inability of the plaintiffs to carry out their undertaking he was unable to keep his contract with the Dangan Company with consequent loss to himself. He claims in reconvention a sum of Rs. 250,000.

Learned Counsel for the plaintiffs submitted that the agreement P1 could in law not be extended without a writing notarially attested especially as it provided that it shall be null and void after the expiration of three months from the date of its execution. I am of opinion that that submission is sound and entitled to prevail having regard to the terms of the agreement P1. The "extensions" the first plaintiff says he gave were not in law extensions of the agreement but were mere indications that the plaintiffs were willing to purchase Hapugahalande if the defendant could bring about its transfer. Even after the expiry of the agreement, the plaintiffs were free, though not bound, to purchase Hapugahalande if the defendant offered it. Once the period of three months expired the agreement was null and void and ceased to exist except for the purpose of enforcement of the defaulter's liability thereunder. An agreement in writing such as P1 can in law be revived only by another writing attested by a notary as required by section 2 of the Prevention of Frauds Ordinance.

The oral evidence given by both sides regarding the so-called extensions has in my view been wrongly admitted for neither section 92 nor any other provision of the Evidence Ordinance permits the admission of oral evidence in the circumstances. In rejecting the contention of counsel on this point the learned District Judge does not appear to have scanned too closely proviso (4) to section 92. That priviso taken with the main section reads :

"92. When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms.

Proviso (4). The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property may be proved, *except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.*"

The contract in the instant case is required by law to be in writing and has been registered. No oral evidence can therefore be given of the existence of a subsequent agreement to modify the contract.

In that view of the matter it is unnecessary to decide whether the "extensions" given by the plaintiffs expired in December, 1945, or in June, 1946.

The defendant, having failed to carry out his contract within the duration of the agreement, is not entitled to retain the sum of Rs. 15,000 paid to him, and is liable to refund it.

I am afraid the plaintiffs cannot be made to pay the losses incurred by the defendant in his venture. The defendant has not produced his agreement with the Dangan Company and its terms cannot therefore be discussed.

The defendant is not entitled to claim his expenses from the plaintiff because he was not employed by the plaintiffs in any capacity which entitles him to remuneration for his services. The agreement having come to an end owing to his default, the defendant is not entitled to profit at the expense of the plaintiffs.

The order of the learned District Judge is therefore set aside and I direct that judgment be entered for the plaintiffs as prayed for with costs both here and below.

Set aside.

PULLE, J.

The agreement P1 dated 14th July, 1945, provided among other things, that the appellants should pay to the respondent a sum of Rs. 400,000 to complete the purchase of Hapugahalande Estate and that they should complete the purchase when called upon to do so by the respondent. The Dangan Company was not to undertake to warrant and defend the title to the Estate and that such warranty was to be expressly excluded by a clause in the proposed conveyance and that the sale was to be *ad corpus* and not *quantitatem*. There was also an agreement that in certain contingencies, the appellants should mortgage Matale and Hapugahalande Estates. The parties rightly took the view that the agreement was one that had to be entered into in conformity with the provisions of section 2 of the Prevention of Frauds Ordinance (Cap 57) and had it registered. I agree that it was not open to the respondent to prove a subsequent oral agreement to keep the written agreement alive beyond the stipulated period of three months.

It was implicit in P1 and the evidence is perfectly clear that the Dangan Company would not have been found to convey Hapugahalande Estate unless the respondent found purchasers for five other estates owned by the Company. Assuming for the purpose of argument than an oral agreement extending the time for the performance of the contract till the end of June, 1946, could have been proved, I am far from satisfied, in the absence of the agreement entered into by the respondent with the Dangan Company and of the agreements alleged to have been entered into between the respondent and the persons who were prepared to purchase parts or whole of each of the five estates referred to, that even if the appellants had been prepared by the end of June, 1946, to purchase Hapugahalande Estate, the Dangan Company would have been legally bound to convey it to them.

There is evidence of draft conveyances having been prepared and of notarial agreements entered into between the respondent and prospective purchasers. It was certainly not beyond the respondent's ability to have produced these documents to show that all was ready by the end of June, 1946, for the sale of the Company's estates, and that it was only the default of the appellants which wrecked the scheme.

I agree that the decree appealed from should be set aside and judgment entered for the plaintiff as prayed for with costs here and below.

Set aside.

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

H. P. M. ESSACK *vs.* NATIONAL BANK

S. C. 29—*D. C. (F) Colombo* 18398
Argued on : 29th June, 1950
Decided on : 4th August, 1950

Damages—Defendant Bank undertaking to negotiate drafts drawn on plaintiff by foreign merchant on surrender of shipping documents in respect of goods of specified weight and quantity—Payment by defendant's agent to foreign merchant of full sum on bill of lading showing less weight—Payment by plaintiff to defendant honouring draft—Action for damages to recover value of difference in weight—Bill of lading, when conclusive evidence.

Plaintiff, having entered into a contract with one M in Basrah for the purchase of 52 tons of dates, requested the defendant Bank by letter to negotiate drafts drawn on him by M to the extent of Rs. 15,860, provided M surrendered to the defendant (*a*) an on board bill of lading, (*b*) an invoice, (*c*) a policy of insurance representing a shipment of about 1,000 bundles of dates weighing 52 tons C. I. F. Colombo and further promised to honour such draft in Colombo at maturity.

The defendant Bank agreed to do so and arranged with the Ottoman Bank, Basrah, to honour M's drafts. The Ottoman Bank paid Rs. 15,860 as against the invoice, the bill of lading and a policy of insurance. The bill of lading stated the "quantity or number of packages" to be 940 and weight as 47,000 *kilos* which according to the evidence was equal to 47 tons.

The invoice stated the number of packages to 940 and the weight of each bundle as 124 *kilos*—Total 1,040 cwts.

The plaintiff claimed from the defendant Bank the value of 5 tons of dates being the difference between the weights in plaintiff's letter to the defendant and the weight of the shipment as given in the bill of lading.

Held : (1) That there was negligence in the part of the defendant's agent in honouring M's draft which was not accompanied by a bill of lading showing that 52 tons of dates had been shipped.

(2) That as the plaintiff failed to prove satisfactorily the damages sustained by him, the Court would award only nominal damages.

(3) That under the Bills of Lading Act, the bill of lading is conclusive evidence only in favour of a consignee or endorsee for valuable consideration of the shipment of goods against the maker or the person signing the bill of lading. In other cases the statements in the bill of lading are *prima facie* evidence which the person disputing them must prove.

H. W. Jayewardene, for the defendant-appellant.

J. R. V. Ferdinands with *G. F. Sethukavalar*, for the plaintiff-respondent.

JAYETILEKE, C.J.

The plaintiff sued the defendants in this action for the recovery of a sum of Rs. 1,525 as damages for negligence in taking up a bill of lading which did not comply with his instructions to them.

The plaintiff entered into a contract for the purchase of 52 tons of dates from one Mehta of Basrah. The contract was not proved at the trial but the letter of credit shows that it was a cost, insurance and freight contract. After entering into the contract the plaintiff by his letter P3 dated January 15, 1947, requested the defendants to negotiate drafts drawn on him by Mehta to the extent of Rs. 15,860 provided Mehta surrendered to them shipping documents consisting of an on board bill of lading, an invoice, and a policy of insurance representing a shipment of about 1,000 bundles of dates weighing 52 tons C.I.F. Colombo to be shipped per SS. Minot Victory, and promised to honour such drafts at maturity. The defendants agreed to do so and made the following endorsement on P3—

"This credit is confirmed by the National Bank of India, Ltd.

E. MACONOCHIE,
Manager.

Thereafter the defendants arranged with the Ottoman Bank of Basrah to honour Mehta's drafts. The Ottoman Bank honoured Mehta's draft P5 and paid him Rs. 15,860 as against the invoice P6, the bill of lading P7 and a policy of insurance which was not produced at the trial. P7 states as follows :—

"Quantity or number of pieces or packages 940.

Description of goods. Baskets dates. (Bundles) Kilos 47,000

Nine hundred and forty baskets only.

Freight Kilos 47,000 at 1D.4.125 per 1,000 Kilos.

Pounds 193,875 ".

According to the evidence 47,000 Kilos are equal to 47 tons.

P6 states as follows :—

"No. of packages : 940

Particulars : Dates each bundle to weigh about 124 Kilos. Total 1,040 cwts. at Rs. 15.4.0, CIF Rs. 15,860 ".

It must be noted that the invoice does not agree with the bill of lading and that there is a difference of five tons in the weights given in them. The goods are described in the plaintiff's instructions to the defendants in P3 by reference to weight and quantity. The weight is given as 52 tons and the quantity as about 1,000 bundles. The value of the goods is also given as Rs. 15·25 per cwt. When P3 is examined it seems to be clear that the weight of the goods was the essential thing from the plaintiff's point of view. The plaintiff complains that though he requested the defendants to honour drafts covering a shipment of 52 tons they have paid upon a bill of lading covering a shipment of 47 tons. He claims in this action from the defendants the value of the unshipped quantity of dates as damages for negligence. There can be no question that there has been negligence on the part of the agent of the defendants in honouring Mehta's draft which was not accompanied by a bill of lading showing that 52 tons of dates had been shipped. The point is covered by the decision in *London and Foreign Trading Corporation vs. British and Northern European Bank* (1921) Lloyd's Law Reports 116. In that case the plaintiffs had purchased 500 tons of meal from a Singapore firm, the contract requiring the buyers to open a credit in London. This they did with the defendant bank. The plaintiffs' instructions authorised the defendants to pay against a bill of lading to order and endorsed in blank, insurance policy, invoice for 500 tons maize meal CIF Liverpool, shipped per steamer from Singapore to Liverpool. The defendant bank paid against

a bill of lading covering 5,895 bags of maize meal with no reference to weight. The accompanying invoice stated that what was forwarded was 5,895 bags at 190 lbs. per bag equal to 500 tons. Although the stated number of bags was shipped they weighed only 448 tons. The plaintiffs sued the defendants for breach of duty in paying against those documents. The defendants contended that they were entitled to rely on the statement in the invoice but this contention was rejected and judgment was given for the plaintiffs for the value of goods short delivered. Rowlatt J. said :—

> "It is to be observed that the bill of lading that is required by the letter of credit says nothing about weight or quantity of goods, or what the goods were or where they were coming from or where they were going to. All it specifies is that it is to order, that it is to be endorsed in blank, and its date.
>
> Similarly the insurance policy merely names the risks covered. It is only when you get to the invoice you get the amount specified, the commodity itself specified, the price specified and the contract of sale specified. But to my mind it is quite obvious that when you read these you must read the requirements of the bill of lading and the insurance policy as the requirements of the bill of lading and insurance policy relevant to the invoice. It cannot mean that it is to be a blank form of bill of lading and insurance policy. They must be relevant to the invoice. Therefore I think nothing turns on the omission to state when the requisites of the bill of lading are being set out the quantity there, because I think that argument would carry one so far as to land one in an absurdity.
>
> Therefore it seems to me what the bank were authorised to do was to pay against a bill of lading which answered to the invoice, so that the buyer got the responsibility of the ship for the amount of goods which his seller was charging him for".

The only other question is what damages the plaintiff is entitled to. On this question the case I have referred to is not helpful because the damages seem to have been agreed upon by the parties. The facts of that case show that the plaintiffs had re-sold the meal to buyers in Liverpool, the latter had made a claim against the plaintiffs in respect of the deficiency, and plaintiffs had paid that claim. The action was brought for the recovery of the amount paid by the plaintiffs to the buyers in Liverpool.

At the trial of this case Counsel for the defendants suggested the following issue :—

> "What is the actual weight of the full consignment of dates received by the plaintiff in respect of this particular transaction ?"

Counsel for the plaintiff successfully objected to this issue on the ground that the statement in P7 that only 47,000 kilos were shipped was conclusive as between the plaintiff and the defendants and that the plaintiff was entitled to recover the value of the deficiency independently of the weight shipped. The identical argument was advanced at the hearing before us but no authority was cited in support of it. Chapter 66 introduced into Ceylon the Law of England in maritime matters. Under the *Bills of Lading Act* 1855 18 and 19 Victoria. C iii (1855) S. 3 the bill of lading is conclusive evidence in favour of a consignee or indorsee for valuable consideration of the shipment of the goods against the master or the person signing the bill of lading. But it is not conclusive as between the signer and the shipper, nor as between the owner and the shipper, nor as between the owner and the holder for value unless the owner signs it himself or by a servant. In all these cases the statements in the bill of lading are *prima facie* evidence which the person disputing them must disprove (Scrutton on Charter-Parties and Bills of Lading, page 78). Rule 4 of the rules framed under the Carriage of Goods by Sea Ordinance (Chapter 71) which provides that an outward bill of lading is *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (*a*), (*b*) and (*c*) of Rule 3 does not apply to goods shipped from Iraq nor does it apply to a homeward bill of lading. The present action is not one by or against the signer of the bill of lading or the owner of the ship. The bill of lading was given by the signer to Mehta and not to the defendants and I am unable to understand how the statement in it that 47,000 kilos were shipped can be regarded as evidence against them. So far as the defendants are concerned that statement appears to me to be hearsay. There is no evidence before us that the plaintiff received only 47 tons. Rajaratnam, a clerk employed in the Customs, said that for the purpose of ascertaining the duty payable on the dates consigned to the plaintiff he picked up four bundles at random and weighed them and found that two bundles weighed 2, cwts. 10 lbs. and the other two 2 cwts. 11 lbs. According to these test weights the weight of 960 bundles would be a little over 49 tons which is in excess of the quantity given in P7. Seyed Mohamed, the plaintiff's clerk, said that the exact weight of the 960 bundles received by the plaintiff appears in the plaintiff's books, but those books were not produced at the trial. The plaintiff has, in our opinion, failed to prove the damages sustained by him, and we have no alternative but to award him only nominal damages which we would fix at one rupee.

We would, accordingly, substitute for the sum of Rs. 1,525 in the decree that has been entered in the case the sum of one rupee. The appellant will be entitled to the costs of appeal. The parties will bear their own costs in the District Court.

GUNASEKERA, J.

I agree.

Decree varied.

PRIVY COUNCIL APPEAL No. 17 of 1949

Present : LORD PORTER, LORD OAKSEY, LORD RADCLIFFE, SIR JOHN BEAUMONT, SIR LIONEL LEACH

NAKKUDA ALI vs. M. F. DE S. JAYARATNE

FROM THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee. Delivered on 29th June, 1950

Privy Council—Certiorari—Jurisdiction of Supreme Court to issue—Courts Ordinance, Section 42—Interpretation of words " or other person or tribunal ".

Textile Controller—Defence (Control of Textiles) Regulations, Regulation 62—Revocation of licence granted to dealer in Textiles—Does certiorari lie against Controller.

Rule 62 of the Defence (Control of Textiles) Regulations 1945 reads as follows:—

" Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licence issued to that dealer ".

Acting under this regulation, the respondent as the Controller of Textiles revoked the licence granted to the appellant to deal in textiles on the ground that he was a person unfit to hold a textile licence.

This decision to cancel the licence was preceded by certain exchanges between the parties, which arose out of the discovery of what appeared to be grave falsifications in the books of that branch of the respondent's office known as the Textile Coupon Bank. The final result of the falsifications was to credit the appellant with a much larger number of surrendered coupons than the records of the receiving clerks and their checkers appeared to justify.

The appellant obtained from the Supreme Court a rule *nisi* directed on the respondent to show cause why a writ of certiorari should not be issued to him for the purpose of quashing the order cancelling the licence.

The Supreme Court after hearing the parties held that the rule *nisi* must be discharged with costs on the ground that the respondent, though exercising a quasi-judicial function, had not departed from the rules of natural justice in arriving at his decision.

The question whether section 42 of the Courts Ordinance gave the Supreme Court power to direct the prerogative writs to a person such as the respondent or the question, whether the respondent, in acting under the powers of Regulation 62, is acting in a capacity that would make him amenable to certiorari even assuming that he is a person or tribunal within the meaning of section 42 of the Courts Ordinance, was not dealt with in these proceedings in view of a decision of a Bench of Five Judges in *Abdul Thassim vs. Edmund Rodrigo (Controller of Textiles)* 48 N. L. R. 121.

Held : (1) That the words " other person or tribunal " in section 42 of the Courts Ordinance are not to be interpreted as meaning persons who are *ejusdum generis* with District Judges, Magistrates or Commissioners. They include bodies or tribunals which while not existing primarily for the discharge of judicial functions, yet have to act analogously to a Judge in respect of certain of their duties.

(2) That the words " according to law " in section 42 means according to the relevant rules of English Common Law.

(3) That the respondent is not amenable to a mandate in the nature of a certiorari in respect of action under Regulation 62, as the requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially and as there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

(4) That the words " where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer " should be treated as imposing a condition that there must in fact exist such reasonable grounds known to the Controller before he can validly exercise his power of cancellation.

Case Overruled : *Abdul Thassim vs. Edmund Rodrigo (Controller of Textiles)* 48 N. L. R. 121 (partly.)

Cases referred to : *Liversidge vs. Anderson* (1942) A. C. 206.
R. vs. Electricity Commissioners (1924) I. K. B. 171.
R. vs. Legislative Committee of the Church Assembly (1928) I. K. B. 411.
Board of Education vs. Rice (1911) A. C. 179.
Local Government Board vs. Arlidge (1915) A. C. 120.
Jayaratne vs. Bapu Miya Mohamed Miya

Stephen Chapman for the appellant
Sir David Maxwell Fife, R. C. G. Le Quesne for the respondent.

LORD RADCLIFFE

This is an appeal from an Order of the Supreme Court of Ceylon dated the 8th October, 1947. On the 21st March in the same year the appellant had obtained a rule *nisi* calling on the respondent to show cause why a mandate in the nature of a Writ of Certiorari (to use the language of section 42 of the Courts Ordinance) should not issue to him with a view to quashing an Order which he had made on the 10th March, 1947, cancelling the appellant's licence to act as a dealer in textiles. By the Order of the Supreme Court, which is the subject of this appeal, the rule *nisi* was discharged.

The material facts of the case, though few in number, are somewhat obscure, and it is difficult by a study of them to arrive at any certain conclusion as to what really happened. But, apart from the merits of the individual case, the respondent's Counsel raised several important questions during the argument of the appeal which relate to the jurisdiction conferred upon the Supreme Court by section 42 and to the power of that Court to issue any Writ of Certiorari to him in respect of his cancellation of a textile licence under the relevant section of the Defence (Control of Textiles) Regulations, 1945. It is desirable to deal with these questions, which are general, before coming to the individual merits of the present appellant's application for the Court's mandate : and in view of the opinion which their Lordships entertain as to the respondent's immunity it will not be necessary to consider at any great length the details of the incident that led to the cancellation. But a short statement of the facts will serve to explain the issue as to the Court's jurisdiction.

Since 1943 a scheme for the rationing of textiles had been in force in Ceylon. Introduced originally by Regulations made by the Governor under the appropriate Defence powers it was operated at the dates material to this appeal in accordance with the Defence (Control of Textiles) Regulations, 1945. One of the features of the scheme was that it restricted dealings in regulated textiles to such persons as held textile licences, the responsibility for granting which lay with an officer appointed by the Governor to be Controller of Textiles. In effect therefore a dealer who could not get or who lost a textile licence was out of the textile business so long as the scheme continued in operation. The appellant had secured a licence on his original application in July, 1943, the licence authorising him to carry on business in textiles at Nos. 109 and 111, Keyzer Street, Pettah, Colombo. From that time until the revocation of his licence in March, 1947, he had carried on business at that address in partnership with Shabandri Mohamed Hussain under the style "S. Mohamed Hussain & Co.".

On the 10th March, 1947, the respondent, the then Controller of Textiles, sent a letter to the appellant's firm which contained the words : "I find you are a person unfit to hold a textile licence. I therefore order the revocation of your licence under Regulation 62 with effect from 10th March, 1947." The Regulation thus invoked by the respondent is the last of a fascicule of regulations headed "Offences and Punishments" and runs as follows :—

> "62. Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to that dealer."

Upon this the appellant started the present proceedings. On the 21st March, 1947, he obtained from the Supreme Court a rule *nisi* directed to the respondent requiring him to show cause why a Writ of Certiorari should not be issued to him for the purpose of quashing his Order of cancellation. The Petition upon which the rule *nisi* was obtained showed that the respondent's decision to cancel the licence had been preceded by certain exchanges between the parties which arose out of the discovery of what appeared to be grave falsifications in the books of that branch of the respondent's office that was known as the Textile Coupon Bank.

The Textile Coupon Bank was an agency for collecting from dealers the coupons which they themselves had collected from their customers on the sale of textiles. Coupons paid into the bank by a dealer were credited to him in its books and, no doubt, the account so kept with him governed the volume of his future permitted textile imports. The system that was instituted for checking the record of coupons so paid in was an elaborate one. It is not necessary for the purpose of this appeal, nor their Lordships sufficiently informed as to the whole machinery of the scheme of control, to say how many persons might stand to gain by such a falsification of the books as would credit to a dealer a larger number of coupons than he had in fact paid in. It was a falsification of this kind that the respondent claimed to have discovered with regard to the appellant's account with the bank, and on the 22nd February, 1947, he sent to the appellant's

firm a letter which in effect amounted to a charge that on two separate occasions, the 30th November, 1946, and the 21st December, 1946, they had paid in 669 and 992 points respectively but had got their paying-in slips altered so as to show the larger amounts of 5,669 and 2,992 points respectively, with a view to obtaining in their ledger account at the bank credit for a larger amount than the coupons actually surrendered entitled them to. The letter invited the appellant to send any explanation that he might wish to offer in respect of these matters to the respondent in writing by the 25th of the same month and stated that any relevant documents might be seen at the Control of Textile Office. It is fairly plain that this letter was not the first intimation which the appellant had received to the effect that irregularities affecting his account were investigated in the respondent's office. On the 25th February, 1947, his proctors addressed to the respondent a letter of explanation, the substance of which was to maintain that on the two impugned occasions the appellant had in fact surrendered coupons covering the larger amounts of 5,669 and 2,992 points, and to assert that both the foil and counterfoil of his paying-in book, which showed these numbers in words and figures, though with obvious interpolations in respect of the thousand numeral, were documents substituted by some other person in the place of the firm's genuine foil and counterfoil. After considering this explanation in the light of the other information that was before him the respondent formed the view that he had reasonable grounds to believe that the appellant was unfit to be allowed to continue as a dealer in textiles and accordingly exercised his powers under Regulation 62 and cancelled the licence.

In due course the respondent appeared before the Supreme Court to show cause why the rule *nisi* for the Writ of Certiorari should not be made absolute, and on the 8th October, 1947, Mr. Justice Canekeratne delivered judgment to the effect that the rule *nisi* must be discharged with costs. The ground of his decision was that on the facts of the case as they appeared in the evidence before him the appellant had not shown himself entitled to the mandate that he sought, because the respondent, though exercising a quasi-judicial function in deciding to cancel a licence under Regulation 62, had not departed in any way from the rules of natural justice in the procedure by which he arrived at his decision. The learned Judge therefore applied to this case the principle of a familiar line of English authorities of which *Board of Education vs. Rice* (1911) A.C. 179 and *Local Government Board vs. Arlidge* (1915) A.C. 120 are the leading examples. Having regard to the decision of a Bench of five judges (Howard, C.J., Keuneman, Wijeyewardene, Canekeratne, J.J., and Nagalingam, A.J.) in *Abdul Thassim vs. Edmund Rodrigo* (*Controller of Textiles*) 48 N. L. R. 121, it was not open to the learned judge in the Supreme Court to consider either the question whether section 42 of the Courts Ordinance gave the Court power to direct the prerogative writs to a person such as the Controller of Textiles or the question whether a Controller of Textiles acting under the powers of Regulation 62 is acting in a capacity that would make him amenable to certiorari, even supposing that he is a person or tribunal within the meaning of section 42. Both these questions were, however, fully argued before their Lordships and they must therefore consider them. In effect this means that they must review the Supreme Court's decision in the *Abdul Thassim* case.

There is nothing in the Roman-Dutch law or the law of Ceylon that corresponds to the writs of mandamus, *quo warranto*, certiorari, *procedendo* and prohibition". It seems obvious, therefore, that the jurisdiction of the Supreme Court to grant and issue mandates in the nature of such writs is derived exclusively from section 42 and was conferred originally upon that Court by the legislative predecessor of that section. The range of the jurisdiction must be found within the words of the statutory grant. Those words describe the permissible subjects of the Court's mandates as being "any District Judge Commissioner, Magistrate, or other person or tribunal". The respondent contends that he is not an "other person or tribunal" within the meaning of those words, since their collocation with the words "District Judge, Commissioner, Magistrate" indicates that they extend only to tribunals (or persons acting as tribunals) which are in the ordinary sense established judicial bodies : and he reinforces his argument by pointing out that section 42 confers a number of powers in series, the power in question being preceded by a power to inspect and examine the records of any Courts and being succeeded by a power to transfer cases from one Court to another. Hence, he argues, the range of persons or tribunals that are subject to the Court's mandate under section 42 is more limited than that which is encompassed by the common law of England and is confined to persons who are *ejusdem generis* with District Courts, Magistrates or Commissioners.

Their Lordships agree with the decision of the Full Bench on this point. It is not necessary to add to their reasons. The reference to the writs of mandamus and *quo warranto* certainly makes it difficult to suppose that only Courts of Justice as ordinarily understood are to be subject to these mandates. Moreover there can be no alternative to the view that when section 42 gives power to issue these mandates "according to law" it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court may be moved for the issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon. But even in the cases of certiorari and prohibition the English law does not recognise any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions, yet have to act analogously to a judge in respect of certain of their duties. The writ of certiorari has been issued to the latter since such ancient times that the power to do so has long been an integral part of the Court's jurisdiction. In truth the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted. If these rules are borne in mind with respect to the phrase "according to law", the limited construction of section 42 for which the respondent contends is not only one which it is very difficult to express in precise words but one which is based on an altogether different conception from that which has guided the development of the English practice.

If then the Controller of Textiles is not excluded from the ambit of section 42 upon the proper construction of the words "other person or tribunal", would it be "according to law" that he should be amenable to certiorari when he purports to act under Regulation 62; assuming, of course, for this purpose that in acting he has made a decision that is liable to be quashed on its merits? The Supreme Court held in the *Abdul Thassim* case that he was so amenable, and that decision has been given effect to in three other cases the facts of which bear a substantial similarity to the facts of that now under appeal. One of them, *Jayaratne vs. Bapu Miya Mohamed Miya*, is also the subject of appeal to this Board. The foundation of the Supreme Court's reasoning on this point is to be found in one sentence of the judgment of Howard, C.J., in the *Abdul Thassim* case: "The fact that he can only act when he has 'reasonable grounds' indicates that he is acting judicially and not exercising merely administrative functions".

It would be impossible to consider the significance of such words as "Where the Controller has reasonable grounds to believe....." without taking account of the decision of the House of Lords in *Liversidge vs. Anderson* (1942) A.C. 206. That decision related to a claim for damages for false imprisonment, the imprisonment having been brought about by an order made by the Home Secretary under the Defence (General) Regulations, 1939, Regulation 18B, of the United Kingdom. It was not a case that had any direct bearing upon the Court's power to issue a writ of certiorari to the Home Secretary in respect of action taken under that Regulation: but it did directly involve a question as to the meaning of the words "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations....." which appeared at the opening of the Regulation in question. And the decision of the majority of the House did lay down that those words in that context meant no more than that the Secretary of State had honestly to suppose that he had reasonable cause to believe the required thing. On that basis, granted good faith, the maker of the order appears to be the only possible judge of the conditions of his own jurisdiction.

Their Lordships do not adopt a similar construction of the words in Regulation 62 which are now before them. Indeed it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases when they appear in statutory enactments. It is an authority for the proposition that the words "if A.B. has reasonable cause to believe" are capable of meaning "if A.B. honestly thinks that he has reasonable cause to believe" and that in the context and surrounding circumstances of Defence Regulation 18B they did in fact mean just that. But the elaborate consideration which the majority of the House gave to the context and circumstances before adopting that construction itself shows that there is no general principle that such words are to be so understood; and the dissenting speech of Lord Atkin at least serves as a reminder of the many occasions when they have been treated as meaning "if there is in fact reasonable cause for A.B. so to believe". After all, words such as these are commonly found when a

legislature or law-making authority confers powers on a Minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith : but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships therefore treat the words in Regulation 62 " where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer " as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation.

But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this Regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.

Their Lordships have come to the conclusion that certiorari does not lie in this case. It would not be helpful to reconsider the immense range of reported cases in which certiorari has been granted by the English Courts : or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established Courts of Justice, and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably true to say that the Courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial even in respect of acts that approximate to what is purely administrative than to ministers or officials whose function is primarily administrative even in respect of acts that have some analogy to the judicial. But the basis of the jurisdiction of the Courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute. That principle is most precisely stated in the words of Lord Justice Atkin (as he then was) in *R. vs. Electricity Commissioners* (1924) 1 K.B. 171 at 204. ".....the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs ". As was said by Lord Hewart, C.J., in *R. vs. Legislative Committee of the Church Assembly* (1928) 1 K.B. 411 at 415, when quoting this passage. " In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects ; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."

It is that characteristic that the Controller lacks in acting under Regulation 62. In truth when he cancels a licence he is not determining a question : he is taking executive action to withdraw a privilege because he believes and has reasonable grounds to believe that the holder is unfit to retain it. But, that apart, no procedure is laid down by the Regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred upon the Controller by Regulation 62 stands by itself upon the bare words of the Regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

For these reasons their Lordships are of opinion that the case of *Abdul Thassim* was wrongly decided on this point, and that the respondent's argument that he is not amenable to a mandate in the nature of certiorari in respect of action under Regulation 62 must prevail. That in itself is sufficient to dispose of the appeal. But since the merits of the appellant's case have been fully argued before them and a question of costs might arise if the appeal were to be dismissed merely on this point of jurisdiction that could not have been argued in Ceylon, their Lordships will indicate the view that they would have taken had certiorari been an available remedy in this case.

They have no doubt that Mr. Justice Canekeratne was right in discharging the rule nisi. The situation that was revealed to the Court by the respondent's evidence was this. Dealers who wished to pay in textile coupons into the Coupon Bank were provided by the Bank with a paying-in book, the slips of which consisted of foil and counterfoil. The dealer entered on foil and counterfoil the number of coupons to be surrendered and took or sent the book and coupons to the Bank. They were there handed to a receiving clerk who counted the coupons, checked the number so counted against the numbers entered in the foil and counterfoil of the paying-in slip and recorded that number in a scroll-book which the dealer or his representative thereupon signed. That was the first check. The respondent produced affidavits from the two receiving clerks who had been on duty on the 30th November and 21st December, 1946, respectively, to the effect that they had entered in the scroll-book the numbers of 669 and 992 in respect of the coupons surrendered on behalf of the appellant on those days, and that the appellant's servant, M. O. Aliyar, had initialled the scroll-book bearing those numbers. They also identified their initials on the counterfoils of the paying-in slips. The second check was that the receiving clerk handed the dealer's paying-in book and the coupons to an assistant Shroff, who recounted the coupons, compared their number with the numbers entered in the foil and counterfoil and initialled both. The respondent produced an affidavit from the official stating that he had counted the coupons surrendered and identifying his initials on the foil and counterfoil of the paying-in slips. The assistant Shroff then passed the paying-in book to the Shroff. The Shroff compared the particulars on the foil with those on the counterfoil to see that they tallied and, if satisfied, entered the particulars in a register kept by him. He then affixed serial numbers to foil and counterfoil, initialled the counterfoil, signed the foil and passed on both these documents to the chief clerk. This was the third check. The respondent produced affidavits from the Shroff (for the 30th November, 1946), and the official who had acted as Shroff (for the 21st December, 1946), identifying their respective signatures and initials on the relevant foils and counterfoils and confirming that they had entered in the Shroff's register the respective numbers of 669 and 992 in respect of the coupons surrendered by the appellant. Up to this point therefore, there was a complete chain of evidence to the effect that the appellant had only surrendered these numbers of 669 and 992 coupons on those days. Now, as has been said, the next step in the Coupon Bank system was that the Shroff passed on the paying-in book to the chief clerk. His duty was to countersign foil and counterfoil and to record in a register kept by him, called the Credit Control Book, the number of coupons appearing in those documents. He then retained the foil of the paying-in slip but returned to the dealer the paying-in book with the counterfoil. The foil was in turn passed on to a ledger clerk who entered up the number of coupons shown on it to the credit of the dealer. No evidence was forthcoming on the part of any chief clerk or ledger clerk, but the respondent's own affidavit showed that, whereas the chief clerk's register recorded 669 and 992 coupons as surrendered by the appellant on the relevant dates, the ledger accounts credited him with the larger numbers of 5,669 and 2,992 respectively.

Plainly, therefore, the respondent had before him serious discrepancies in the books of his own office, the final result of which was to credit the appellant with a much larger number of surrendered coupons than the records of the receiving clerks and their checkers appeared to justify. Moreover the two foils in the possession of the Department showed, if they showed nothing more, that the words and figures denoting five thousand and two thousand respectively had been inserted at a different time from that at which the words and figures denoting the rest of the total had been written. It is not possible to tell exactly from the evidence before the Court what was the sequence of the respondent's actions. An inspector of his Department obtained the counterfoils from the appellant's possession : these showed the same interpolations as the foils had shown. The counterfoils were submitted to the Government analyst who reported that the slip dated the 30th November, 1946, bore signs of an erasure upon which the words " Five thousand " had been written and

that in the total the first figure "5" in fact overlay the figure "6" that followed. He found no definite indications on the other counterfoil. On the 22nd February the respondent wrote the appellant the letter already referred to in which he informed him precisely what were the discrepancies in his account that were being investigated, stated that the foils and counterfoils of the paying-in slips showed interpolations covering the bigger amounts, and told him that he (the respondent) had reason to believe that the appellant had got the interpolations made with a view to securing for himself a larger credit than he was properly entitled to. An explanation in writing was invited and the appellant was told that he could inspect any relevant documents.

On the 25th February the appellant's proctors sent a written explanation. The gist of it was that he had in fact surrendered the larger number of coupons on both the challenged dates. The paying-in slips had been entered up in the handwriting of the appellant and there were no interpolations on them when he sent them with the coupons to the Bank. They had been taken to the Bank by the servant, M. O. Aliyar, whose regular practice it was to put his own signature on paying-in slips. The letter then put forward the suggestion that the true paying-in slips had been destroyed by someone and that those now existing and bearing interpolations (the counterfoils of which had in fact been recovered from the appellant's possession) had been substituted in a handwriting which was not that of the appellant or any of his employees. No direct allusion was made to the fact that Aliyar's signature was, presumably, in the scroll-book acknowledging the lower amounts as paid in; but the letter stated that in the past Aliyar sometimes put his signature in the book without verifying the entry, and that on other occasions he put his signature to a blank space that was later filled in. Either of these things, it was suggested, might have happened on the two challenged occasions.

Apart from sending this letter the appellant seems to have procured an interview for his Counsel with the respondent, at which submissions were made. What they were the evidence did not reveal. Finally the respondent's affidavit speaks of an enquiry which he deputed an Assistant Controller to hold and of statements recorded at that enquiry or directly by himself on the part of the appellant, his partner S. Mohammed Hussain, and the employee Aliyar. Again the evidence fails to explain at what stage these statements were made or what their content was, and it is significant that the appellant's evidence makes no reference to them either by way of affirmation or denial. When all this procedure had been completed the respondent cancelled the appellant's licence.

It is impossible to see in this any departure from natural justice. The respondent had before him ample material that would warrant a belief that the appellant had been instrumental in getting the interpolations made and securing for himself a larger credit at the Bank than he was entitled to. Nor did the procedure adopted fail to give the appellant the essentials that justice would require, assuming the respondent to have been under a duty to act judicially. The appellant was informed in precise terms what it was that he was suspected of: and he was given a proper opportunity of dissipating the suspicion and having such representations as might aid him put forward by Counsel on his behalf. In fact, the explanation that he did offer was hardly calculated to allay the respondent's suspicions: probably it confirmed them. It left unanswered so many questions to which the appellant could have supplied some solution if he had really been innocent of any complicity in the falsifications. If he had surrendered the number of coupons credited to him in his ledger account, as he maintained, he must have had books or records of his own which verified his possession of those numbers on the relevant dates. He never produced such books or records. If he had somehow become possessed of substituted counterfoils, not, as they should have been, in his handwriting, he must have been able to offer some explanation as to how this came about and how the difference was not detected. He gave no explanation. If Aliyar's signature was in the scroll-book against the smaller numbers of coupons surrendered, it was no good suggesting that Aliyar might not have verified the numbers on those occasions or might have signed in blank. Either the appellant should have found out and explained what Aliyar's account of these matters was or else, if Aliyar was no longer in his employ and available to be questioned, he should have stated unequivocally that this was so. But, failing explanations from him on points such as

these, a heavy cloud of suspicion remained; and, if the respondent felt bound to act upon this suspicion, it was not because he had come to entertain it through any denial of natural justice or without reasonable cause but because the appellant himself either could not or would not produce the explanation that would have dissolved it.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

Present : BASNAYAKE, J. & PULLE, J.

MOLAGODA KUMARIHAMY vs. WIJETUNGA & OTHERS

S. C. 31 (*Inty.*)—*D. C. Kurunegala* 2003

Argued on : 1st and 2nd March, 1950

Decided on : 21st August, 1950

Partition—Action for—Defendant's denial of plaintiff's title and claim that land forms part of Nindagame—Grant of whole village by Sannas—Failure of defendant to prove that land falls within village mentioned in grant.

Held : That where a person claims a land on a Sannas conveying a whole village, he must establish that the land he claims falls within the limits of the village at the time of the grant, for there is no presumption that the limits of a village do not undergo change in course of time.

N. E. Weerasooria, K.C., with *H. W. Jayawardena* and *Wanasundera*, for added defendant-appellant.

H. V. Perera, K.C., with *G. P. J. Kurukulasuriya*, for respondent.

BASNAYAKE, J.

In this action the plaintiff one Warnakulasuriya Amaris Patabendige Silva Wijetunga seeks to obtain a decree for the partition of a land called Attikkagahamulagaala *alias* Halmillagahamulawattegala of six and half seers kurakkan sowing extent situated in the village of Gurussa in the Kurunegala District. The plaintiff claims 1/3 share of the land and states that the co-owners named in the libel, M. B. K. Molagoda of Gurussa and Wijesundera Mudiyanselage Ran Menika of Gokarella are each entitled to 1/3rd share. The latter show no cause why a partition should not be decreed as prayed. The former showed cause. He disputed the identity of the land described in the libel and the land depicted in the plan filed of record. He claimed that the land was a part of the Gurussa Nindagama which belonged to Dullewa Adigar and that his wife who is a descendant of Dullewa Adigar is now the sole owner having inherited a share in the land and purchased the remainder. Molagoda's wife was in consequence added as a party defendant. She filed a statement in which she traced her title to an undivided 13/36 share of Paranawatta and Bandarawatta (lot 48) and Attikkagahamulagaala (lots 52 and 53) in Final Village Plan No. 1773.

After hearing evidence for the plaintiff and the added defendant the learned District Judge held that the parties were entitled to the land in the shares stated in the libel. From that decision the added defendant has appealed.

The added defendant has not led evidence to prove the metes and bounds of the Nindagama. The Sannas 3D1, which is the foundation of her claim, makes a grant of certain villages including the village of Gurussa. The Sannas recites: " That all the villages including high and muddy lands houses and gardens and leaves forests, hills and streams appurtenant thereto have been granted in paraveni unto Wijesundera Wickremasinghe Chandrasekara Senevirathne Mudiyannenehe and to his children, grandchildrn and descendants as their paraveni property for ever and ever without any disturbance and free from poli marala modi hungam."

The added defendant's claim is founded on the fact that lots 48, 52 and 53 in Final Village Plan No. 1773 were excluded from the preliminary notice (P4) published under the Waste Lands Ordinance when claims to allotments of "waste land" in the Gurussa village were invited under that Ordinance. That circumstance does not prove that the lands surveyed by the Crown as situated in the village of Gurussa in 1919 A.D. were in the village of Gurussa contemplated in the Sannas of 1745 A.D. A person who claims that a Sannas applies to a particular allotment of land must prove his claim. Where the grant conveys a whole village the claimant must establish that the land in dispute falls within the limits of the village at the time of the grant, for there is no presumption that the limits of a village do not undergo change in course of time.

In the absence of evidence to prove that the subject matter of this action lies within the area to which the Sannas applies the learned District Judge proceeded on the evidence of the plaintiff's vendor Abeyratne Banda, that Kirimenika was the original owner and that she left four children, Dingiri Banda, Punchi Banda, Ran Menika the second defendant, and Bandi Menika. The first defendant has himself purchased a land known as Attikkagahamulagaala *alias* Halmillagahamula-wattegala of six seers kurakkan sowing extent from one Mutusamy Subramaniam whose vendor was one Wijesundera Mudiyanselage Dingiri Banda, a son of Kiri Menika, the original owner of the land.

The appellant has not satisfied us that the learned District Judge was wrong in accepting the evidence for the plaintiff.

The appeal is dismissed with costs.

Appeal dismissed.

PULLE, J.
I agree.

Present : DIAS, S.P.J.

MENDIS vs. FERDINANDS

S. C. 186—C. R. Colombo 17,865

Argued on : 19th June, 1950
Decided on 22nd June, 1950

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (c)—Landlord requires premises for occupation of his sister—Meaning of "sister dependent on him"—must Plaintiff need be immediate—Reasonableness.

A landlord for the purpose of renting his present residence and of moving into a smaller house sought to eject his tenant on the ground that the premises were required for his sister living with him. The sister herself owned a a house and had an income of her own.

Held : (1) That the Court should consider all the factors relevant to the hardship caused to the parties, and decide in favour of the party whose need was greater. One of the factors is that the plaintiff's need of the premises should be "immediate" and not prospective.

(2) That a person owning property and having an income cannot be a "dependent" on the landlord. within the meaning of the Rent Restrction Act.

Cases referred to ; *Raheem vs. Jayawardene* (1944) 45 N. L. R. 313.
Ramen vs. Perera (1944) 46 N. L. R. 133.
Mohamed vs. Salahudeen (1945) 46 N. L. R. 166.
Gunasena vs. Sanagaralingam Pillai (1948) 49 N. L. R. 473.
De Mel vs. Piyatissa (1948) 39 C. L. W. 63.
John Appuhamy vs. David (1945) 47 N. L. R. 36.
Egginona vs. David (1946) 22 C. L. Rec. 40.
Abeyasekere vs. Koch (1949) 41 C. L. W. 31.
Brito Mutunayagam vs. Hewavitane (1950) 51 N. L. R. 237.
Yoosuf vs. Suwaris (1950) 51 N. L. R. 381

A. H. C. de Silva, with *Mahesa Ratnam*, for the defendant appellant.
N. K. Choksy, K.C., with *M. P. Spencer*, for the plaintiff respondent.

DIAS, S.P.J.

In this case the plaintiff respondent sought to eject his tenant, the defendant appellant, from the premises known as No. 10 Dillenia Road, Borella. The appellant had been given due notice to quit, but his defence is that, although he had made every endeavour to obtain a house to live in, he had been unsuccessful in his quest.

The parties went to trial on the following issues :

1. Are the premises in question reasonably required by the plaintiff for the occupation as a residence for his sister—Miss Esther Ferdinands?

2. Is the said sister a person dependent on the plaintiff within the meaning of section 13 of the Rent Restriction Act ?

This action having been instituted on January 13, 1949, it is the Rent Restriction Act, No. 29 of 1948, which applies to this case. That Act came into force on January 1, 1949.

Section 13 (1) impose a fetter on a landlord from seeking to eject his tenant by process of law without authorization in writing by the Rent Control Board. One exception to this rule is where " the premises are, in the opinion of the Court reasonably required for occupation as a residence for the landlord or any member of the family of the landlord....." The expression " member of the family " is defined to mean " the wife of that person, or any son or daughter of his over eighteen years of age or any parent, brother or sister dependent on him ". It is the duty of the landlord to prove facts which bring his case within the exception. If he fails the bar in section 13 (1) will apply and in the absence of a written authorization from the Board, his action must be dismissed. The burden of proof on both the issues, therefore, lay on the plaintiff —see *Raheem vs. Jayawardene* (1944) 45 N. L. R. 313.

It is, I think settled law, that in cases of this kind it is the duty of the Judge in forming an opinion whether or not the premises are " reasonably " required for occupation as a residence by the landlord or a member of his family not only to ascertain whether the desire of the landlord is a reasonable one, but also to be satisfied on various other matters like (*a*) what alternative occupation is available to the tenant, and (*b*) the position of the tenant *Raheem vs. Jayawardene* (supra) *Ramen vs. Perera* (1944) 46 N. L. R. 133 and (*c*) the relative positions of the plaintiff and the defendant *Mohamed vs. Salahudeen* (1945) 46 N. L. R. 166. The question is now settled by the two-Judge decision in *Gunasena vs. Sanagaralingam Pillai* (1948) 49 N. L. R. 473. It is the duty of the Court not only to take into consideration the situation of the landlord, but also that of the tenant, together with any other factors which may be directly relevant to the acquisition of the premises by the landlord.

If the case law on this subject is classified it will be found that they fall into three classes (1) cases where the hardship of the landlord and the tenant are equally balanced. In such a situation the landlord's claim must prevail *De Mel vs. Piyatissa* (1948) 39 C. L. W. 63 *Ramen vs. Perera* (supra) ; (2) Cases where the hardship to the landlord outweighs the hardship to the tenant. In such cases the landlord's claim obviously must prevail *John Appuhamy vs. David* (1945) 47 N. L. R. 36 *Egginona vs. David* (1946) 22 C. L. Rec. 40 and (3) Cases where the hardship to the tenant outweights the hardship to the landlord. In such cases, the landlord's action must be dismissed. Examples of this principle are furnished by *Abeyasekere vs. Koch* (1949) 41 C. L. W. 31 *Brito Mutunayagam vs. Hewavitane* (1950) 51 N. L. R. 237. The question in each case depends on which of these three classes that case falls into.

The Commissioner of Requests found that the plaintiff is at present living in a large bungalow in Gower Street and of which he is the owner. As the plaintiff proposes to rent his house, and move into a smaller house belonging to him; but as that house only has two rooms he will not be able to have his sister to stay with him, as she is doing at present. The Commissioner says that the reason for the plaintiff closing down his house in Gower Street is due to financial reasons, and that it would not be possible for him to run that big house and also to emit to his

wife and child in England approximately Rs. 1,450 a month. The Commissioner however, either has failed to refer or has overlooked the fact that the sister of the plaintiff is not a destitute person who is dependent on others. No doubt she is the only daughter in a family of nine or ten children, but on her mother's death she inherited 1/10th of the estate. There is evidence that the estate duty on the mother's estate came to Rs. 4,000 or Rs. 5,000 and for purposes of administration some Colombo house property had to be sold for Rs. 20,000. Furthermore, the Commissioner has failed to take into account the fact that the plaintiff's sister is the owner of a house in Colombo called "Broodside" which she inherited from her father and which she has rented out for Rs. 118 per mensem. If this lady requires a place to reside in, all she has to do is to terminate that tenancy and go into residence there. Her reason for not doing this is that that rent is her only source of income. It seems hard that the defendant, whom the Commissioner holds has unsuccessfully done everything in his power to obtain a house to live in, should be thrown on the streets in order to release the premises in question to the plaintiff's sister who while owning a house of her own does not choose to occupy it. Furthermore, the sister is living with the plaintiff in his large Gower Street house and is keeping house for her brother. As pointed out by my brother Basnayake in the unreported case S. C. 103 C. R. Kandy 3342 (S. C. M. May 3, 1950) (1950) 51 N. L. R. 381, the plaintiff's need of the premises should be "immediate" that is to say at the date the action in ejectment was "immediate" that is to say, at the date the action in ejectment was filed. In the present case, as found by the Commissioner "the plaintiff proposes to rent his Gower Street house and go to reside in a smaller house". The rights of the parties must be determined as at the date the action was filed. At that date the plaintiff's intention to rent his Gower Street house was prospective and might never materialise. Until then there is no need for the sister to require a house of her own.

There is no question but that both the plaintiff and the defendant are stating what is true. In such circumstances, an appellate tribunal is placed in no less advantageous a position than the Court below to arrive at a correct conclusion *Abeyasekere vs. Koch* (supra).

The Commissioner of Requests says "I have no doubt that the defendant has made efforts to secure a bungalow. The need of the defendant appears to me to be as great as that of the plaintiff—but the plaintiff being the owner, his need must prevail over that of the defendant". For that reason he has answered both issues in the affirmative and entered judgment for the plaintiff. With great respect, I am unable to agree. This is not a case where the hardship caused to the defendant by having to leave the premises can be said to be equally balanced by the hardship caused to the plaintiff or his sister by their not being able to get possession of the house. If the facts are considered without prejudice, the defendant's need far exceeds that of the plaintiff or his sister. Their need for this house is not immediate. The lady is living with the plaintiff and she has several other brothers who can give her a habitation. She owns her own house, but has taken no steps to eject her tenant so that she may occupy it herself. She cannot by any stretch of the imagination be described as being a dependant of the plaintiff. She is quite an independent person with property of her own and an income of her own. The fact that the Commissioner without any agreement between the parties thought fit to direct that the writ of ejectment should not issue for two months shows that subsconsciously, perhaps, he felt that he was doing an injustice to the defendant.

I set aside the judgment and decree appealed against, and dismiss the plaintiff's action with costs both here and below.

Appeal dismissed.

Present : BASNAYAKE J. AND PULLE, J.

TOBIUS FERNANDO vs. DON ANDRIS APPUHAMY

S. C. 540 (M)—*D. C. Panadura* 1125

Argued on : 8th February, 1950.

Decided on : 21st August, 1950.

Fraudulent Alienation—Paulian Action—Combined with action under Section 247 of the Civil Procedure Code—Onus of Proving Fraud—What should be proved.

Held : (1) That in an action to set aside a sale in fraud of creditors it must be proved that the alienee with full knowledge that the alienation was being made to defraud creditors has participated in the transaction.

(2) That the mere fact that the alienee simply knows that the debtor also had other creditors is no ground for holding that he is a participant in the fraud.

(3) That the burden of proving fraud rests upon the plaintiff when the alienation is for valuable consideration.

G. P. J. Kurukulasuriya, for the 1st defendant-appellant.

Kingsley Herat, for the plaintiff-respondent.

BASNAYAKE, J.

This is an action instituted by one Andris Appuhamy against two persons named K. Tobius Fernando and S. Manuel Fernando. For a sum of Rs. 12,000 Tobius Fernando purchased from Manuel Fernando on deed No. 893 of 19th July, 1947, twenty-three items of machinery and tools lying on four contiguous lands called Pokunewatta *alias* Delgahawatta, Delgahawatta, Meegahawatta, and Delgahawatta, depicted in Plan No. 1974/80 situated at Horetuduwa in Panadura. The sale was preceded by a notarially attested agreement to sell executed on 26th June, 1947. Tobius Fernando had no ready cash and had therefore to raise a loan to pay Manuel Fernando. One Akbar Ally Tayab Ally lent him Rs. 3,500 and guaranteed an overdraft for Rs. 8,500 at the Bank of Ceylon. Manuel Fernando was paid about Rs. 10,000 by Tobius Fernando. Of this a sum of Rs. 4,000 was paid in the form of a promissory note.

In execution of a decree in favour of Andris Appuhamy entered against Manuel Fernando for a sum of Rs. 8,800·78 on 11th July, 1947, in action No. 16025 (M) of the District Court of Colombo in respect of a contract of partnership dated 5th February, 1941, the plaintiff on 19th March, 1948, seized the following property—

1. One Boiler (old)—Maker: Gainsborough, Marshal & Sons, England.

2. One Engine bearing No. 11413—Maker: Ransoms, Sims & Jefferies Ltd.

3. Three Circular Saws.

4. Three Sawing Benches with Belting.

5. One Wooden Machine with Emery Stones.

6. One Shed made with old Corrugated Iron Sheets and Cadjans.

Tobius Fernando successfully claimed this property on the ground that they were his by virtue of deed No. 893 (P3). Thereupon on 31st March, 1948, the plaintiff Andris Fernando instituted the present action claiming that deed No. 893 is a fraudulent conveyance executed in collusion between Tobius Fernando and Manuel Fernando in order to deprive the plaintiff of the rights under the decree in case No. 16025.

In an action to revoke a sale in fraud of creditors it must be proved that the alienee with full knowledge that the alienation was being made to defraud creditors has participated

in that which was being done in fraud of creditors (Voet XLII, Tit. VIII, sec. 2). The person who asserts that the sale is fraudulent must prove fraud on the part of the debtor and the alienee (*ibid* sec. 14). For the action to lie the alienee must be a participant in the fraud (*ibid* sec. 4). The fact that the alienee simply knows that the debtor also had other creditors is no ground for holding that he is a participant in the fraud by reason of that circumstance alone. But if after receiving clear notice from the creditors, at the time when the debtor was selling, not to purchase, he purchases then he is regarded as a participant in the fraud since they who persevere after having received clear notice, are not lacking in fraud.

Fraud on the part of a debtor is said to be present when two things concur, namely, that he had the intention to defraud, well knowing himself to be insolvent and nevertheless diminishing his assets, although he did not perhaps, in committing the fraud, specifically contemplate the latter (diminishing of assets) or the former (insolvency) fact. The event must correspond to the intention, so that the creditors cannot in fact recover what is due to them (*ibid* sec. 14).

In the instant case the plaintiff has failed to prove that the alienation was to defraud creditors or that the alienee participated in the sale in order that Manuel Fernando might defraud his creditors. The plaintiff did not before proceeding to execution apply to the Court under section 219 of the Civil Procedure Code for an order that the debtor be orally examined before the Court as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the decree. He explains his omission to take the course provided by law by saying that he was perfectly sure that the debtor had nothing else by way of assets. The plaintiff was aware of the sale of the assets he is now pursuing, for in the proceedings against Manuel Fernando (D. C. Colombo Case No. 16025) there occurs the following journal entry on 16th December, 1947 :

> "The defendant undertakes not to encumber or to accept any further consideration from the purchaser of the mill which was the subject matter of this action pending this inquiry."

This entry completely negatives the plaintiff's assertion that till he was notified of Tobius Fernando's claim he was not aware that the property he was after had been sold by Manuel Fernando. Tobius Fernando himself has been unfortunate in that the mill has been seized and sold by Akbar Ally in execution of judgment in his favour in the suit in which he sought to recover the money he loaned to Tobius Fernando for the purchase of the machinery and tools.

In an action to set aside an alienation the onus of proof of fraud on the part of the grantor and that the grantee was privy to the fraud rests upon the plaintiff where the alienation is for valuable consideration.

The plaintiff has failed to establish fraud on the part of the defendants and his action cannot succeed.

The appeal is allowed with costs here and below.

PULLE, J.

I agree that the plaintiff has failed to establish fraud. In my opinion the agreement to sell dated 26th June, 1927, under which the 1st defendant paid to the 2nd defendant a sum of Rs. 1,500 by way of part payment of the purchase price, the payment of Rs. 3,300 on the execution of deed No. 893 and the evidence of Akbar Ally raise, at the least, a substantial doubt as to whether deed No. 893 was executed collusively and in fraud of the 2nd defendant's creditors.

The action fails and should be dismissed with costs here and below.

Appeal allowed.

Present : BASNAYAKE, J.

MARIYAI vs. SENANAYAKE (HEAD QUARTER INSPECTOR, CHILAW)

S. C. 54—M. C. Chilaw 42764

Argued and decided on : 14th March, 1950.

Criminal Procedure—Police Officer, sole witness for prosecution, conducting prosecution—Undesirability.

Excise Ordinance—Search without warrant or complying with section 36—Evidence obtained by such search—Should a conviction be based on such evidence.

Held : (1) That a Police Officer, who is the sole witness for the prosecution, should not undertake the conduct of the prosecution in Court.

(2) That a conviction should not, save in exceptional circumstances, be based on evidence gathered in the course of an illegal entry on a person's house, although such evidence is not declared by the Evidence Ordinance to be inadmissible.

S. J. Kadirgamar, with *G. L. L. de Silva*, for the appellant.

Arthur Keuneman, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

In this case the accused one Mariyai has been charged with the contravention of section 43 (b) and (f) and section 44 of the Excise Ordinance.

After hearing the evidence for the prosecution and the defence the learned Magistrate found the accused guilty and sentenced her to pay a fine of Rs. 50 on the first charge, Rs. 75 on the second charge, and Rs. 125 on the third charge.

The case for the prosecution is that Police Sergeant Navaratnam went to the village called Udappuwa to inquire into a charge of kidnapping made by one Muthuraman. When he was inquiring into that charge he received information that illicit manufacture of arrack was going on in the house of the accused's father. He went there on that information and he says : " I found the accused seated down in front of a still in operation. The accused was placing the bottle P1 to the bamboo pipe P2. I saw the arrack dripping from the pipe P2. The base pot P3 was on the fire. Over P3 was the perforated pot P4 and over P4 was the brass condnser P5. I took the accused into custody and dismantled the still. I sealed the productions and took the left thumb impression of the accused on the seal."

The prosecution rests solely on the testimony of Police Sergeant Navaratnam. Although Police Constable Moorthi accompanied him and his name is on the list of witnesses in the report filed under section 148 (1) (b) of the Criminal Procedure Code he has not been called and no explanation has been given as to why that witness has not been called. It is submitted for the defence that the prosecution is false, and that the articles produced in the case were planted by the prosecution in the house of the accused. Three witnesses besides the accused have given evidence for the defence. All of them say that the sergeant introduced the incriminating articles into the house of the accused. The learned Magistrate has rejected the defence and accepted the evidence of the Police Sergeant. I find myself unable to agree with his view that the evidence for the defence, especially having regard to the conduct of Police Sergeant Navaratnam, does not throw a reasonable doubt as to the truth of the prosecution case. This Court has more than once stated that a witness who is the life and soul of the prosecution case should not undertake the conduct of the prosecution in Court. It has quashed more than one conviction on that ground. In this case the Police Sergeant is the sole witness for the prosecution and is not only the person who detected the offence but is also the person who

inquired into it. It is not as if no other officer was available to conduct the case for the prosecution for I observe that the report to the Court has been made by Head Quarters Inspector Senanayake. I am of opinion that in this case that ground alone is sufficient to vitiate the conviction. I wish to add that the conduct of Police Sergeant Navaratnam in entering and searching the house of the accused without a warrant is illegal and constitutes a grave intrusion on civil liberty. Section 36 of the Excise Ordinance defines the circumstances in which a search may be effected without a warrant, in the following terms :

"Whenever a Government Agent or any excise officer not below such rank as the Governor may prescribe has reason to believe that an offence under section 43 or section 44 has been, is being, or is likely to be, committed, and that a search warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence, he may, after recording the grounds of his belief, at any time by day or night, enter and search any place and may seize anything found therein which he has reason to believe to be liable to confiscation under this Ordinance ; and may detain and search and, if he thinks proper, arrest any person found in such place whom he has reason to believe to be guilty of such offence as aforesaid."

In this country a person has no right to enter the home of another without his leave and licence except where he is authorised by law to do so. Police Sergeant Navaratnam had no such authority.

Although evidence gained in the course of an illegal entry on a person's house is not declared by the Evidence Ordinance to be inadmissible, I do not think that a conviction should, save in exceptional circumstances, be based on evidence so gathered. Police Officers or any other officers of Government should not be encouraged to flout the law openly.

I set aside the conviction of the accused and allow the appeal.

Appeal allowed.

Present : BASNAYAKE, J.

BELIGAMMANA vs. RATWATTE

Application for the Execution of the Decree in Election Petition No. 16 of 1947 (Mawanella)

Argued on : 21st November, 1949.
Decided on : 21st November, 1949.

Election Petition—Costs awarded—Bill taxed by Deputy Registrar and not by Registrar as required by Rule 33 of Parliamentary Election Petition Rules 1946—Is such taxation valid—Interpretation Ordinance, Section 11 (c)—Its applicability.

Rule 33 of the Parliamentary Election Petition Rules 1946 provides that the costs awarded to a successful party in an election petition shall be taxed by the Registrar.

Held : (1) That a Deputy Registrar has no power to tax the bill for costs awarded to a successful party at an inquiry into an election petition.

(2) That section 11 (c) of the Interpretation Ordinance enables a deputy or subordinate to perform the duties of his chief or superior when he is acting in place of his chief or superior and lawfully executing the duties that appertain to the office of his chief or superior.

G. T. Samarawickrema, in support.

BASNAYAKE, J.

The successful respondent to the election petition presented by C. R. Beligammana makes this application for the issue of writ against the petitioner's property for the recovery of the balance sum due to him as costs, namely, Rs. 2,775·05. The application avers that the bill of costs has been taxed by the Deputy Registrar of this Court.

Rule 33 of the Parliamentary Election Petition Rules, 1946, provides that the costs shall be taxed by the Registrar. Neither the Ceylon (Parliamentary Elections) Order in Council, 1946, nor the Parliamentary Election Petition

Rules, 1946, defines the expression "Registrar" so as to include his deputy. Learned Counsel for the applicant has invited my attention to section 3 (3) of the Ceylon (Parliamentary Elections) Order in Council, 1946, which subject to certain exceptions makes the Interpretation Ordinance applicable to the interpretation of the Order-in-Council. On the authority of that provision he argues that under section 11 (*c*) of the Interpretation Ordinance his deputy may properly perform the functions that devolve on the Registrar of this Court under the Parliamentary Election Petition Rules, 1946. The provision of the Interpretation Ordinance on which learned Counsel relies reads :

"(c) for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinate lawfully executing the duties of such office in place of such chief or superior, it shall be deemed to have been and to be sufficient to prescribe the duty of such chief or superior."

I am unable to agree with the learned Counsel that that rule enables an officer charged by statute with certain functions to delegate his functions to any subordinate. That provision to my mind, enables a deputy or subordinate to perform the duties of his chief or superior when he is acting in place of his chief or superior and lawfully executing the duties that appertain to the office of his chief or superior.

I accordingly direct the applicant to have the bill of costs taxed by the Registrar and thereafter if he wishes to do so to make his application for a writ for any sum due to him over and above that deposited as security for costs.

Present : BASNAYAKE, J.

HARAMANIS SILVA vs. POLICE SERGEANT WIJESINGHE, (NANU OYA)

Application. No. 616—*M. C. Nuwara Eliya* 4810
Argued and decided on : 15th February, 1950.

Motor Car Ordinance, No. 45 *of* 1938, *section* 75 (2)—*Certificate of Competence—Order for Suspension—Need to afford opportunity to place evidence of special circumstances before such order.*

Held : That before an order suspending a certificate of competence under section 75 (2) of the Motor Car Ordinance is made, an accused person should be given an opportunity to place before the Court evidence of any special circumstances that govern his case.

Eardley Perera, for the petitioner.

BASNAYAKE, J.

The petitioner was charged on the following counts, viz., that he did

"(*a*) being the driver of lorry No. CY. 4520 drive the same on a public road to wit Nuwara Eliya—Nanu Oya road, and fail to carry therein a Record Sheet relating to the journey and fail to produce the same for inspection when required to do so by a police officer, in breach of section 115 of Ordinance No. 45 of 1938 ;

"(*b*) at the same time and place aforesaid drive the said lorry on a highway without a policy of insurance in force in relation to the use of the said lorry in breach of section 127 (1) of Ordinance No. 45 of 1938 ;

"(*c*) at the same time and place aforesaid drive the said lorry and fail to carry a certificate of competence and fail to produce same on demand by a police officer in breach of section 74 (1) of Ordinance No. 45 of 1938."

To these charges the petitioner pleaded guilty and was convicted on his own plea, and on each of the counts 1 and 2 he was fined Rs. 25 and on count 3 he was warned and discharged, and thereafter his certificate of competence was suspended for 12 months under section 75 (2) of the Motor Car Ordinance. Under that section a Court is empowered to suspend a certificate of competence of a person for a period not exceeding 2 years in addition to other punishment which may lawfully be imposed. In the instant case it is submitted that the petitioner was not afforded an opportunity of placing before the Court evidence of special circumstances contemplated in section 75 (2) (*c*) of the Motor Car Ordinance No. 45 of 1938. I think the petitioner is entitled to that opportunity. I set aside the order of suspension and send the case back so that the learned Magistrate may afford the petitioner an opportunity of placing before the Court evidence of any special circumstances which govern his case.

I leave it open to the learned Magistrate after hearing the evidence placed before him to make any order he may deem just.

Set aside.

Present : NAGALINGAM, J. (President), GRATIAEN, J. AND GUNASEKERA, J.

REX vs. COORAY

S. C. 4—M. C. Colombo 43770.

Argued on : 4th, 5th, 8th, 9th, 10th, 11th and 12th May, 1950.
Decided on : 25th May, 1950.

Court of Criminal Appeal—Conspiracy—Prior agreement to commit intended criminal act essential —Abetment by conspiracy—Agreement an essential prerequisite—Where offence consists of series of conspiracies insufficient for indictment to allege a conspiracy—Abetment by facilitation of criminal breach of trust—Joinder of charges—Sections 168 (2), 179, 184 *Criminal Procedure Code—Sections* 100, 113*a* *Penal Code.*

Two accused were charged with acting together with a common purpose for or in committing breach of trust of money, the first accused alone with criminal breach of trust of money, and the second accused with abetting the first accused, offences punishable under Sections 113*b*, 392 and 102, of the Penal Code.

On appeal it was contended on behalf of both the accused that the charge of " conspiracy " was bad in law in that it did not allege an " agreement "between them to " act together " in the manner and for the purpose specified.

Held : (1) That the indictment was bad in law in that it did not allege and was not intended to allege a prior " agreement " between the accused which is essential to the commission of any species of the offe of criminal conspiracy within the meaning of Section 113*a* of the Penal Code. Law

(2) That where the indictment preferred a single conspiracy charge and there is evidence of a separate conspiracies, the Judge should specifically direct the Jury that there is only one si of conspiracy and that it was not competent for them to convict the accused unless they in law it is upon the evidence that there was one single conspiracy which preceded and motivated the the next tial acts which each accused was alleged to have committed. of full age

(3) That in a charge of " abetment by conspiracy " under section 100 of the Penal Code, an agr Hanafi which is an essential prerequisite of the offence, must be established. chooses

(4) That in a charge of abetment by facilitation of criminal breach of trust, the liability of an alle 350) abettor under Section 185 of the Criminal Procedure Code to be jointly tried with the principal offender is subject to his right under Section 179 to claim that not more than three charges of the same kind may be laid against him in the course of a single trial. This right is, as far as the abettor is concerned, not affected by the provisions of section 168 (ii).

Per GRATIAEN, J.—" It seems to us that the words " with or without previous concert or deliberation " were advisedly introduced into the language of Section 113*a* of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of " agreement " which needs to be proved is an agreement with a " common design."

Cases referred to : *King vs. Silva*, (1923) 24 N. L. R. 493.
The King vs. Hibbert, 13 Cox. C.C. 82 at p. 86.
The King vs. Andree, (1941) 42 N. L. R. 495.
Quinn vs. Leatham, (1901) A. C. 495.
Mahub Shah vs. Emperor, A. I. R. (1945) P. C. 118.
Regina vs. Roulton, 12 Cox. C. C. 87 at p. 95.
Rex vs. Mulcahy, L. R. 3 H. L. 306.
The Queen vs. Parnell, 14 Cox. C. C. at p. 515.
Rex vs. Meyrick, 21 Cr. A. R. 94.
Rex vs. West, (1948) 1 K. B. 709.
Rex vs. Kohn, 176 E. R. 470.
Rex vs. Luberg, 19 Cr. A. R. 133.

H. V. Perera. K.C., with *Colvin R. de Silva*, *M. M. Kumarakulasingham*, and *G. Rajapakse*, for the first accused-appellant.

M. M. Kumarakulasingham, with *H. W. Jayawardene* and *K. C. de Silva* for the second accused-appellant.

R. R. Crosette-Thambiah, K.C., Solicitor-General, with *R. A. Kannangara, Crown Counsel*, and *S. S. Wijesinghe, Crown Counsel*, for the Crown.

GRATIAEN, J.

There are two accused in this case. They have appealed against convictions on charges of having committed serious offences in their respective capacities as officers holding key positions in the organisations of the Co-operative Movement in this country.

It is convenient at the outset to describe the procedure relating to the financing of the business of one particular Co-operative Society—namely the Salpiti Korale Stores Societies Union Ltd., in so far as is necessary for the purposes of the present appeal. This Union carried on its activities through the agency of three wholesale depots, including the Moratuwa Depot (of which D.S. Ranatunge was manager during the relevant period) and the Piliyandala Depot (of which the first accused's brother, Leo Cooray, was manager) The first accused was the President of the Working Committees of both these depots. He was also President of the Salpiti Korale Union which the central organisation.

Salpiti Korale Union (to which I shall refer as "the Union") required funds purposes of purchasing rice, currystuffs her commodities for sale and distribution s members through the depots. These funds e obtained from the Co-operative Central Bank (of which the second accused was the manager) a loan to the Union from this Bank (up to a sanctioned maximum of Rs. 75,000 at any point of time) on what is described as a "cash credit basis" having been arranged with the Directors of the Bank. The first accused was, at all relevant times, in addition to his other functions previously described, Vice-President of the Board of Directors of the Bank.

In order to meet the requirements of theUnion and of similar institutions, the Bank operated on a special account, with overdraft facilities, in the Bank of Ceylon. Sums required by each Union from time to time would be advanced up to a sanctioned amount; the Union would utilise these advances to purchase stocks for its various Depots; these stocks would be sold to members at the Depots; and in due course the proceeds of sale would be paid in to the credit of the Union's "loan account" with the Co-operative Central Bank. The agreement was that such payments should be made as far as possible in the form of cheques and money orders; cash deposits in excess of a total of Rs. 100 per day were apparently refused or, at any rate, discouraged owing to the inadequate facilities in the Bank for handling cash.

In or about April 1948, it was discovered that thirty-five cheques which had been deposited with the Bank to the credit of the Union by or on behalf of the Moratuwa and the Piliyandala Depots on various dates between 23rd September, 1947, and 28th February, 1948, had either never been presented for payment at the Bank of Ceylon or (having been dishonoured on one or two occasions shortly after they had been deposited) not been represented for payment. Thirty-two cheques all of them belonging to the former category, were "cash" cheques, drawn on the Pettah Branch of the Bank of Ceylon by the first accused. The three remaining cheques, belonging to the second category, had been drawn by a man named E. J. Cooray who, like the Manager of the Piliyandala Depot, was a brother of the first accused. The aggregate sum represented by these thirty-five cheques amounted to Rs. 161,576·93. After the discovery of the alleged fraud, all thirty-five cheques were presented for payment at the Bank of Ceylon but were dishonoured. In the meantime it was discovered that the books of the Co-operative Central Bank had been balanced on the assumption that the "value" of each of these allegedly worthless cheques had been properly credited in liquidation of the Union's indebtedness to the Bank.

The case for the Crown was that the transactions which I have described were all part of a scheme whereby the first accused, in his capacity as the President of the Union and of the two Depots which belonged to its organisation, had dishonestly converted to his own use cash collected from time to time by their respective Managers and intended to be credited to the Union's account with the Central Bank; that he had dishonestly substituted in the place of those sums of money a number of worthless cheques; and that he had procured the dishonest connivance of the second accused, as Manager of the Bank, to facilitate the commission of his fraud by "holding-up" these cheques instead of presenting them for payment in the ordinary way.

On the basis of these allegations both accused were jointly indicted before the Supreme Court and a special jury on the following counts:—

"1. That between the 1st May, 1947, and 30th April, 1948, at Colombo, both accused did act together with a common purpose for or in committing an offence, to wit, criminal breach of trust in respect of Rs. 161,576·93 belonging to the Salpiti Korale Stores Societies Union Ltd., which was entrusted to the first

accused by D. S. Ranatunge and M. S. Leo Cooray, Managers of the Moratuwa and Piliyandala Wholesale Depots, respectively of the said Union, in the way of his business as Agents, to be deposited to the credit of the said Union at the Colombo Co-operative Central Bank, and thereby committed the offence of conspiracy in consequence of which conspiracy the said offence of criminal breach of trust was committed; and that both accused had thereby committed an offence punishable under section 113B read with sections 392 and 102 of the Penal Code.

"2. That at the time and place aforesaid and in the course of the same transaction, the first accused being entrusted with the said sum of Rs. 161,576·93 by D. S. Ranatunga and M. S. Leo Cooray, Managers of the Moratuwa and Piliyandala Co-operative Wholesale Depots of the said Union, in the way of his business as an Agent, to be deposited to the credit of the said Union at the Colombo Co-operative Central Bank, did commit criminal breach of trust in respect of the said sum of Rs. 161,576·93 and that he had thereby committed an offence punishable under section 392 of the Penal Code.

"3. That at the time and place aforesaid and in the course of the same transaction the second accused did abet the first accused in the commission of the offence of criminal breach of trust in respect of Rs. 161,576·93 as set out in count 2 above, which said offence was committed in consequence of such abetment; and that he had thereby committed an offence punishable under section 392 of the Penal Code read with section 102 of the said Code".

After a trial which continued for several days the Jury found both accused guilty on the first count; they also found the first accused guilty on the second count, and the second accused guilty on the third count. The learned Judge sentences of six years rigorous imprisonment, to run concurrently, on the first accused; and sentences of two years' rigorous imprisonment to run concurrently, on the second accused. The present appeals are from these convictions.

Substantially, the defence raised on behalf of each accused at the trial was that he should be acquitted because he had not acted "dishonestly" in the transactions to which the various counts in the indictment relate. On this aspect of the case the direction of the learned Judge to the Jury were, in our opinion, adequate. In appeal, however, the convictions were attacked upon other legal grounds which had apparently been lost sight of in the course of the trial. We regret that on these questions of law we have failed to reach unanimity, and the conclusions which I now proceed to record represent in each case the view of the majority of the members of the Court.

It was argued on behalf of both accused, as a first ground of appeal, that the first count in the indictment, charging them with the offence on "conspiracy", was bad in law, in that it did not allege an "agreement" between them to "act together" in the manner and for the purpose specified. The case for the Crown, on the other hand, is that although an agreement is the gist of the offence of conspiracy in cases falling under section 113A of the Penal Code *where an agreement "to commit or abet" an offence is alleged*, no such agreement need be proved, even inferentially, when two or more persons are alleged to have "*acted together with a common purpose for or in committing or abetting an offence.*" It was on this view of the law that the indictment was advisedly framed against the appellants; and it was on this basis that the case was presented to the Jury by the prosecution and in due course by the learned presiding Judge. The question which arises for our decision is therefore a fundamental one depending upon the proper interpretation of the language of section 113A.

It is pertinent to recall the circumstances under which section 113A was enacted. Until 1924, "criminal conspiracy" was not penalised in this country except, to a limited extent, as a species of the offence of abetment under section 100 of the Code. This defect in the law received some prominence by reason of the acquittal of one of the accused persons in the *King vs. Silva* (1923) 24 N. L. R. 493. Accordingly Ordinance No. 5 of 1924 was passed to amend the Penal Code by introducing section 113A and 113B which read as follows:—

"113A (1) If two or more persons agree to commit or abet or act together with a common purpose for or on in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.

(2) A person within Ceylon can be guilty of conspiracy by agreeing with another person who is beyond Ceylon for the commission or abetment of any offence to be committed by them or either of them, or by any other person, either within or beyond Ceylon; and for the purposes of this sub-section as to an offence to be committed beyond Ceylon, "offence" means any act which if done within Ceylon would be an offence under this Code or any other law.

Exception.—This section shall not extend to the case in which the conspiracy is between a husband and his wife.

"113B. If two or more persons are guilty of the offence of conspiracy for the commission or abetment of any offence, each of them shall be punished in the same manner as if he had abetted such offence".

Mr. H. V. Perera's contention is that section 113A must be interpreted so as to establish the commission of the offence of "conspiracy" in one or the other of the following circumstances :—

(1) if two or more persons *agree*, with or without previous concert or deliberation, *to commit* an offence or to abet an offence, or ;

(2) if two or more persons *agree*, with or without any previous concert or deliberation, to *act together with a common purpose for or in committing or abetting* an offence.

If this interpretation be correct, conspiracy consists in either set of circumstances, "in the agreement or confederacy to do some act, whether it is done or not" *The King vs. Hibbert* 13 Cox C.C. 82 at p. 86.

The learned Solicitor-General argued, on the other hand, that the offence of "conspiracy" is established within the meaning of the section either (1) if two or more persons *agree* to commit or to abet an offence ; or (2) if two or more persons *act together*, with or without any previous concert or deliberation, with a common purpose for or in committing or abetting an offence.

This latter interpretation was favoured by Scertsz J. in *The King vs. Andree* (1941) 42 N. L. R. 495. The question did not directly arise, however, for consideration in that case, the indictment for conspiracy having expressly alleged and the prosecution having led satisfactory evidence to prove "*an agreement to act together*" on the basis that Mr. H. V. Perera's present submission is correct. Nevertheless, the obiter dictum of this very distinguished Judge is entitled to considerable respect.

We have had benefit of a full argument on the question which has arisen, and the view which we have formed is that the interpretation of section 113A contended for by Mr. H. V. Perera is correct. Apart from other considerations, this conclusion is to be preferred upon an analysis of the grammatical elements of the sentence under consideration. Moreover, under the common law of England, "conspiracy" is regarded as differing from other offences in that it penalises an agreement or confederacy, *simpliciter*, to do some act—and not the act itself (which may or may not have been performed in pursuance of such agreement). The position is the same under chapter 5A of the Indian Penal Code ino s far as the offence of conspiring to commit criminal acts is concerned. Indeed, evidence of earlier recognition in Ceylon of this fundamental idea is to be found in the language of section 100 of the Penal Code. One should therefore hesitate, in the absence of compelling words which would justify such an assumption, to hold that the Legislature could have intended in 1924 not only to make "conspiracy" in the sense in which the term had previously been understood, a criminal offence, but also to penalise *under the same name* conduct which introduces an entirely different concept.

If the offence of "criminal conspiracy" as defined by section 113A of the Penal Code be compared with the corresponding offence which has been either defined by statute in India or judicially interpreted as a common law offence in England, it emerges that the vital respect in which the Ceylon Legislature had departed from the existing models was by restricting the offence in this country to agreements designed to further the commission or the abetment of *criminal acts*—and that agreements to commit unlawful acts which are not offences, or to perform by illegal means acts which are themselves lawful, were not caught up in the new section. Subject to this, as Howard C.J. seems to suggest in the *King vs. Andree* (1941) 42 N. L. R. 495 the elements of the English law of criminal "conspiracy" have been substantially introduced into the Penal Code, and, if this be so, it is agreements *per se* in respect of criminal offences which, from the moment of their formation, are intended to be penalised. Lord Brampton has pointed out in *Quinn vs. Leatham* (1901) A. C. 495 that "the overt acts which follow a conspiracy form of themselves no part of the conspiracy". Similarly, we would hold that "to act.....for or in committing or abetting an offence" (though punishable if such acts should offend against other provisions of the criminal law) cannot by itself constitute the offence of criminal conspiracy under section 113A in the absence of proof (by direct evidence or inferentially) of a prior agreement to act in furtherance of that end. Indeed, even if the interpretation sought by the Crown for section 113A be correct, it is strongly arguable that persons cannot be held to "*act together with a common purpose*" unless there is evidence from which a Court may legitimately infer a prearranged plan for such concerted action—*vide Mahbub Shah vs. Emperor* A. I. R. (1945) P. C. 118 regarding the prerequisite of acting "*with a common intention*". It is "*the concurrence of minds*" which constitutes the offence (per Cockburn J. in *Regina vs. Roulton* 12 Cox C.C. 87 at p. 95). Nor is it necessary in order to complete the offence of "conspiracy" that anything should

be done beyond the agreement. "The conspirators may repent and stop; or they may have no opportunity, or may be prevented, or may fail; nevertheless, the crime is complete and was completed *when they agreed*" *The Queen vs. Aspinall* (1872) 2 Q. B. D. 48. In other words, if acts are committed in pursuance of the agreement which preceded them, proof of such acts is, on a charge of conspiracy, relevant only in so far as they furnish evidence from which the prior agreement, which is the essential ingredient of the offence concerned, may legitimately be inferred *Rex vs. Mulcahy* L. R. 3 H. L. 306.

It is necessary to consider an argument which was strongly urged before us by the learned Solicitor-General. While conceding that *prima facie* the words "with or without previous concert or deliberation" seems to relate to all the words "agree to act or abet or act together....." which have gone before, he suggested that logically, and in order to avoid an interpretation which would lead to absurdity, they should be regarded as qualifying only in the later words "act together....."

An "agreement" he argued, necessarily presupposes some degree of "previous concert and deliberation; and it is therefore nonesensical" (to use his own words) to suggest that two or more persons can "agree" to do something "without previous concert and deliberation" With respect, we cannot agree. The common law offence of "conspiracy" in England has from time to time been developed and clarified by high judicial authority, and it is now well established that the kind of "agreement" which is regarded in England as forming the gist of this offence does not necessarily mean that the alleged conspirators "actually met and laid their heads together, and then and there actually agreed to carry out the common purpose" *The Queen vs. Parnell* 14 Cox C. C. at p. 515. In that judgment Fitzgerald J. made reference by way of illustration to an unusual case of two guilty "conspirators" who never saw each other until they stood face to face in the dock; "It may be" said the learned Judge "that the alleged conspirators have never seen each other and have never corresponded. One may have never heard the name of the other, *and yet by the law they may be parties to the same common criminal agreement*".

Similarly, in *Rex vs. Meyrick* 21 Cr. A. R. 94 Lord Howart said, "In order that persons may conspire together it is not necessary to prove that there should be direct communication between each and all.....It is necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other or directly consulting together, *but that they entered into an agreement with a common design*. Such agreements might be made in various ways. There may be one person..... round whom the rest revolve. The metaphor is the metaphor of the centre of the circle and the circumference. There may be a conspiracy of another kind, when the metaphor would rather be that of a chain. A communicates with B.B. with C.C. with D. and D. and so on, to the end of the list of conspirators."

It seems to us that the words "with or without previous concert or deliberation" were advisedly introduced into the language of section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of "agreement" which needs to be proved is an "agreement with a common design" as explained in the judgment to which I have referred.

Another argument which was addressed to us was that, if "agreement" be the vital ingredient of every form of conspiracy contemplated by section 113A, the words "agree to.....act together with a common purpose for or in committing or abetting an offence" would be redundant because they are in effect synonymous with the earlier words "agree to commit or abet an offence". We are not convinced that the meaning of these phrases is necessarily identical. One can conceive, for instance, of an agreement between A and B to commit acts (of preparation) which, though designed to further the commission of an offence by C, might possibly fall short of the actual abetment of a criminal act. In any event, the mere circumstance that redundant words have been introduced into a statute out of an abundance of caution would not justify an attempt to attribute to the sentence in which those words appear some meaning which, though eliminating redundancy, was not intended by the draftsman.

In the result, the majority of the Court hold that the first count in the indictment is bad in law because it did not allege and was not intended to allege a prior "agreement" between the accused which is essential to the commission of any species of the offence of criminal conspiracy within the meaning of section 113A of the Penal Code. The learned Solicitor-General very properly stated that, having regard to the manner in which the case for the prosecution was presented to the Jury at the trial, he would not invite us to hold, under the proviso to section 5

(1) of the Court of Criminal Appeal Ordinance, that no substantial miscarriage of justice had actually occurred. The Jury was at no time invited, as they should have been, to consider whether upon the evidence, they were satisfied that the accused had entered into a conspiracy in consequence of which they are alleged to have acted in furtherance of a plan to procure the commission by the first accused of the offence of criminal breach of trust. A single count in an indictment on a "conspiracy" charge can properly allege only one conspiracy and not a series of separate conspiracies. It was therefore essential to ensure that the Jury, adequately and specifically directed on the point, should have realised that it was not competent for them to return a verdict against the accused unless they were satisfied upon the evidence that there was one single conspiracy which preceded and motivated the consequential acts which each accused was alleged to have committed. *Vide* the observations of Humphreys J. in *Rex vs. West* (1948) 1 K. B. 709. For the reasons which have been given we quash the convictions of both accused on the charge of conspiracy.

It is convenient at this stage to record the conclusions arrived at by the majority of the members of the Court in regard to the charge of "abetment" framed against the second accused in the third count of the indictment. The allegation is that between 1st May, 1947, and 30th April, 1948, he did abet the first accused in the commission of the offence of criminal breach of trust of Rs. 161,576·93 (*i.e.*, the sum represented by the thirty-five cheques to which I have referred).

It is not alleged by the Crown that the second accused "instigated" the first accused to commit criminal breach of trust. The Jury could not properly convict him, therefore, unless, after adequate direction, they took the view that he had *either* "engaged in a conspiracy" for the commission of the offence or "intentionally aided".....its commission (*vide* section 100 of the Penal Code) I shall deal with each of these alternative positions in turn.

Even if two views were possible as to the proper interpretation of section 113A of the Code, there can be no question that, in order to establish the offence of "abetment by conspiracy" under section 100, an agreement is an essential prerequisite. Indeed, the second explanation to section 100 makes it clear that "a conspiracy for the doing of a thing is when two or more persons agree to do that thing or to cause or procure that thing to be done." It follows that, in having failed to distinguish between the interpretation which was wrongly placed upon section 113A and the interpretation which admittedly must be placed on that part of section 100 dealing with abetment by conspiracy, the learned Judge had misdirected the Jury. All the infirmities in the direction on the first count in the indictment necessarily attach therefore to the direction on the third count. For instance, the learned Judge told the Jury, "if you find that there was a conspiracy on the first count you may very well find that the conspiracy constituted a form of abetment under the third count." We have already taken the view that there was misdirection on the first count in not pointing out that an agreement was the gist of the offence. *A fortiori*, failure to make this clear on the third count was a misdirection. In another portion of this charge on the issue of conspiracy the learned Judge said, "conspiracy means to act together with a common purpose, the direct act (of the second accused) being to hold up the cheques. The act on the part of the second accused is admitted. It is guilty knowledge which is denied". We think that this was an inadequate direction because even though the acts alleged against the second accused were not in dispute, the vital question for the Jury to decide was "*whether there was a previous conspiracy*" in pursuance of which the acts complained of were committed *Rex vs. Kohn* 176 E. R. 470.

Admittedly the Jury were also invited to consider whether the second accused was, in the alternative, guilty of abetment by "intentionally aiding" that is, by facilitating the commission of the offence of criminal breach of trust by the first accused. As we read the learned Judge's charge, however, the Jury might well have thought that this question need not be considered by them unless they returned a verdict of acquittal on the charge of conspiracy. It is therefore not possible to hold that, in view of the Jury's finding on the first count, the verdict against the second accused on the third count was arrived at by finding that there had been abetment by facilitation. The majority of the Court accordingly hold that the conviction of the second accused on the charge of abetment must be quashed. After hearing the evidence of the witnesses for the prosecution, the learned Judge had expressed the view that the case against the second accused was "what could be called a thin one". In that stage of things we are not disposed to say that it would be appropriate to order a re-trial of the second accused on the third count in the indictment. We accordingly make order acquitting the second accused on the

third count. Whether or not the evidence against him, if true, established the commission of some other offence than that with which he was charged, does not arise for our consideration.

Before we proceed to deal with the outstanding charge against the first accused, namely, on the charge of criminal breach of trust, I consider it desirable that I should record the conclusions arrived at by the majority of the Court on a further point which was raised in connection with the charge of abetment. In so far as the third count in the indictment can be understood to allege abetment by conspiracy, we think that it can properly be interpreted to involve a charge of having engaged in a single conspiracy which preceded the alleged commission of criminal breach of trust by the first accused. If, on the other hand, abetment by facilitation be regarded as forming the gist of the offence, it seems to us that, upon an analysis of the evidence for the prosecution in the present case, a number of separate abetments was in effect involved. Section 168 (2) of the Criminal Procedure Code, read with section 179, admittedly permits an accused person to be charged and tried at one trial for the commission of any number of offences of criminal breach of trust (if alleged to have been committed in the course of a period not exceeding one year). We can find nothing in the Criminal Procedure Code, however which sanctions the trial of an accused person on more than three charges of *abetment* in the same proceedings. The liability of an alleged abettor, under section 184, to be jointly tried with the principal offender is, in our opinion, subject to his right, under section 179 to claim that not more than three charges of the same kind may be laid against him in the course of a single trial. That right is, as far as the abettor is concerned, not affected by the provisions of section 168 (2).

It now remains to consider the charge against the first accused on the second count in the indictment. Having in the first instance been charged jointly with the second accused on the "conspiracy" count he was on this count charged with having by himself committed criminal breach of trust of Rs. 161,576·93 during the relevant period. It is clear enough that, according to the case for the prosecution against the first accused, the proof relied on to establish his guilt on the charge of conspiracy amounted also to proof of the actual commission of the offence specified in the second count. The charge of conspiracy has in our opinion failed; in the meantime a great deal of evidence had been led at the trial on that count which might or might not have been admissible against the first accused if he had been separately tried on the second count. In such circumstances, as Sankey J. points out in *Rex vs. Luberg* 19 Cr. A.R. 133 great care is called for in the Judge who sums up the case to the Jury *to keep the separate issues on the two charges perfectly clear.* We are satisfied that insufficient care was exercised at the trial in this respect.

The trial and conviction of the first accused on the second count was unsatisfactory for another reason which is in our opinion substantial. Whether or not criminal breach of trust of some amounting to Rs. 161,576·93 was alleged to have been committed *in pursuance of a single design* (as the prosecution suggests) the fact remains that the charge against the accused, according to evidence, involves the alleged commission not of one offence of criminal breach of trust but of *a number of such offences during the period covered by the indictment.* To include all these offences in a single count was, of course, permissible under section 168 (2) of the Criminal Procedure Code. It was essential however that the Jury's attention should have been directed to the specific evidence on which the Crown alleged that each separate offence had been committed. This was not adequately done in the present case. No doubt the error into which the learned Judge has fallen was due to the circumstance that, at the trial, the defence concentrated its attention more particularly on the issue of "dishonesty". Nevertheless, it was necessary that the Jury should have received adequate directions so as to enable them to decide whether, in regard to each alleged offence of criminal breach of trust, all the ingredients of that offence were established to their satisfaction. We set aside the conviction of the first accused on the second count in the indictment, and order that he be re-tried on this count in fresh proceedings.

Conviction of 1st accused on count 1 set aside and re-trial ordered on count 2.

Appeal of 2nd accused allowed.

Present : JAYETILEKE, C.J., AND SWAN, J.

SANTHIA DIAS vs. LAWRENCE PEIRIS

S. C. 537—D. C. (F) Mannar 10457.

Argued on : 22nd June, 1950.
Decided on : 4th August, 1950.

Rent Restriction Ordinance No. 60 of 1942—Sale of lease of boutique prior to area brought under operation of Ordinance—Purchaser entering into lease bond providing for advance deposit and payment of annual rent by monthly instalments—Failure to pay monthly instalments which exceed authorised rent—Action to recover rent and for ejectment—Rent Restriction Act of 1948 coming into operation pending action—Its applicability—Plaintiffs right to recover rent originally agreed upon.

The plaintiff sold by public auction the lease of a boutique for a period of four years from 1-7-1947 and the defendant became purchaser thereof at Rs. 2150 a year. Accordingly a lease-bond dated 7-4-1947 was executed paying the plaintiff a sum of Rs. 1433·33 as an advance and further providing that the annual rental should be paid in monthly instalments of Rs. 179·16, the 1st becoming payable on 30-6-1947 and the others on the last day of each month.

The defendant paid the 1st instalment and defaulted thereafter. On 2-6-1948 the plaintiff instituted this action for (i) the recovery of the rent due after giving credit for the advances, and (ii) for ejectment.

The defendant resisted the plaintiff's claim on the grounds :—

(*a*) that the plaintiff was not entitled to receive Rs. 179·16 per month in view of the provisions of the Rent Restriction Ordinance No. 60 of 1942.

(*b*) that under the Rent Restriction Act of 1948 (which came into operation on 1-1-1949) he was not entitled to retain in his hands more than 3 months' rent as advance.

It is common ground that the Rent Restriction Ordinance came into operation in the area on 10-7-1947 and that the authorised rent of the premises was Rs. 50 per month.

Held : (i) That the advance payment must be treated as a deposit made to secure the repayment of the rent.

(ii) That the provisions of the Rent Restriciton Act of 1948 did not apply to this case as it came into operation after the institution of this case.

(iii) That the plaintiff was not entitled to recover any rent in excess of the authorised rent from 10-7-1947, the date in which the Ordinance came into operation in the area.

H. V. Perera, K.C., with *J. M. Jayamanne*, for the plaintiff-appellant.
E. B. Wikramanayake, K.C., with *V. K. Kandaswamy*, for the defendant-respondent.

JAYETILEKE, C.J.

On March 30, 1947, the plaintiff sold by public auction the lease of a tiled boutique for a period of four years commencing from July 1, 1947, and the defendant purchased it at Rs. 2150 a year. Thereafter the plaintiff and the defendant entered into an indenture of lease bearing No. 360 dated April 7, 1947 (P 1). At the execution of P 1 the defendant paid to the plaintiff a sum of Rs. 1433·33 in advance. P 1 provides that the yearly rental of Rs. 2150 should be paid in monthly instalments of Rs. 179·16 and that the 1st instalment should be paid on or before June 30, 1947, and the other instalments on or before the last day of each month. In view of this provision in the lease the advance must be treated as a deposit made to secure the payment of the rent. The defendant paid the instalment that fell due on June 30, 1947, but failed to pay the instalments that fell due thereafter. On June 2, 1948, the plaintiff instituted this action for the recovery of a sum of Rs. 370·76 as balance rent after giving the defendant credit for the deposit, for ejectment and damages.

The defendant resisted the plaintiff's claim for ejectment on the ground (i) that under the Rent Restriction Ordinance No. 60 of 1942 he was not entitled to recover Rs. 179·16 as rent and (ii) that under the Rent Restriction Act No. 29 of 1948 he was not entitled to retain in his hands more than three months rent as an advance.

The Rent Restriction Ordinance came into operation in the District of Mannar on July 10, 1947. It is admitted that the authorised rent of the premises is Rs. 50 a month. The learned District Judge held that the plaintiff could not recover more than the authorised rent from July 10, 1947. He held further that under Section 8 of the Rent Restriction Act No. 29 of 1948 the plaintiff could not retain in his hands as an advance of rent any amount exceeding the authorised rent for a period of three months, and that the defendant was entitled to set off the balance sum of Rs. 1220 against the rent that accrued between July 30, 1947, and the date of the institution of the action. Giving the plaintiff credit for Rs. 660 being the rent he was entitled to recover from July 1, 1947, up to the

date of action he held that there was an excess amount in the plaintiff's hands. He dismissed the plaintiffs' action and entered judgment for the defendant in reconvention for a sum of Rs. 788·33. At the argument before us two points were raised by Counsel for the appellant.

(1) That the Rent Restriction Act No. 29 of 1948 came into operation after the institution of this action and therefore it did not apply to this case.

(2) Section 8 of the Rent Restriction Ordinance does not apply to a period which has already commenced to run.

Section 1 of the Rent Restriction Act provides that it will come into operation on such date as may be appointed by the Minister by order published in the Gazette. The appointed date is January 1, 1949, and it appears in Gazette No. 9932 dated December 23, 1948. Section 8 reads :—

"No person shall, as a condition of the grant, renewal or continuance of the tenancy of any premises to which this Act applies, demand or receive or pay or offer to pay

(*a*) as an advance of rent any amount exceeding the authorised rent for a period of three months or"

There is no Section in the Rent Restriction Ordinance which corresponds with S. 8. The words "no person shall.....demand or receive" contemplate an act done when the Act is in operation. Mr. Wickremanayake stated frankly that he could not rely on that part of the judgment.

The second point taken by Mr. Perera turns on the interpretation of Section 3 of the Rent Restriction Ordinance. It reads :—

"(1) It shall not be lawful for the landlord of any premises to which this Ordinance applies—

(*a*) to demand, receive or recover as the rent of such premises, in respect of any period commencing on or after the appointed date, any amount in excess of the authorised rent of such premises as defined for the purposes of this Ordinance in section 4; or ;

(*b*) to increase the rent of such premises in respect of any such period to an amount in excess of such authorised rent".

Mr. Perera argued that according to P 1 the unit period of occupation is a year and that as such period had commenced to run when the Ordinance came into operation Section 3. does not apply.

Some light is thrown upon the construction of Section 3 by the preamble. It is as follows :—

"An Ordinance to restrict the increase of rent and to provide for matters incidental to such restriction"

The scheme of the Ordinance is as the name suggests to benefit a tenant by tying a landlord's hands in cases to which the Ordinance applies by forbidding him to demand, receive or recover as rent any amount in excess of the authorised rent where under the common law he had the opportunity of doing so. The legislature has undoubtedly been economical of words but the words used must be read according to the subject to which they refer. The contention put forward by Mr. Perera does not seem to be in accordance with the ordinary meaning of the language used. The ordinary meaning of the words "any period" would be "any portion of time". According to Mr. Perera's argument if before the Rent Restriction Ordinance came into operation A had leased to B a house for a period of 99 years for Rs. 100,000 and the indenture provided that the rent for the whole period should be paid in 1288 equal monthly instalments section 3 would not apply. I can find nothing either in the language or in the policy of the legislation that it was so intended. This view is supported by the proviso to section 5 (i) which is the only exception to the standard arbitrarily laid down in the Ordinance. It provides that in the case of any premises let at a progressive rent payable under the terms of a lease executed prior to the 1st day of November, 1941, the standard rent of the premises in respect of any period shall be the rent payable in respect of that period under the terms of the lease.

We are of opinion that the plaintiff is not entitled to recover any rent in excess of the authorised rent from July 10, 1947. We would send the case back for inquiry as to the exact amount due to the plaintiff as rent up to the date of decree, after giving the defendant credit for the deposit and the rent paid by him on June 30, 1947. After such inquiry the District Judge will enter judgment in favour of the plaintiff for such amount, for ejectment and for damages which we fix at Rs. 100 a month. The plaintiff will be entitled to costs here and in the Courts below.

SWAN, J.

I agree.

Set aside and sent back

Present : NAGALINGAM, J.

PERERA vs. JOHN APPUHAMY

S. C. 147—C. R. Gampaha 4249.

Argued on: 16th January, 1950
Decided on : 18th January, 1950.

Prescription Ordinance, Sections 6 and 7—Action for balance purchase money—Absence of any agreement or undertaking in the transfer deed to pay balance—Is the claim prescribed in 3 years or 6 years.

Where in a deed of transfer there is a declaration in the body of the deed that the vendor has received the consideration and a further statement to the effect that the vendor does admit and acknowledge the receipt of the consideration and contains no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered.

Held : That any claim for the balance purchase money is prescribed in three years.

Distinguished :—*Lamatena vs. Rahaman Doole*, 26 N. L. R. 406.
Ausadahamy vs. Kiribanda, (1936) 15 C. L. Rec. 153.

Followed :—*Thommassi vs. Kanapathipillai*, (1883) 5 S. C. C. 174.

Referred to :—*Thamotherampillai vs. Kanapathipillai*, 41 N. L. R. 265.

Frederick W. Obeysekere, for the defendant-appellant.
S. W. Jayasuriya, for the plaintiff-respondent.

NAGALINGAM, J.

A point under the law of prescription arises for decision on this appeal. The plaintiff sued the defendant for the recovery of a sum of Rs. 100 and interest being the balance purchase price in respect of a sale of land by him to the defendant. The sale, according to the deed of conveyance, was for the price of Rs. 300.

The plaintiff's case is that a sum of Rs. 200 out of the consideration was paid leaving a balance sum of Rs. 100 yet due to him. He also claimed interest on the unpaid sum. The defendant, on the other hand, took up the position that the consideration for the deed was in reality a sum of Rs. 200 and that the full amount had been paid to the plaintiff and nothing more was due to him.

The defendant also raised a plea of prescription. The deed of conveyance was executed on 20th March, 1945, and the action was commenced by the plaintiff on the 2nd November, 1948, that is to say, after the expiry of more than three years from the date of the execution of the deed. The contention of the defendant is that the plaintiff's action became prescribed in three years in terms of the present section 7 of the Prescription Ordinance (Cap. 55) while the plaintiff contends that the section of the Prescription Ordinance which governs the case is the present section 6.

Before it could be said that the action falls under section 6 of the Ordinance, it must be shown that the action is based upon a written promise or contract. The plaintiff relies upon the cases of *Lamatena vs. Rahaman Doole* (1924) 26 N. L. R. 406 and *Ausadahamy vs. Kiribanda* (1936) 15 C. L. Rec. 153. In the former case the facts were very similar to those in the case before me, subject, however, to one important variation. It does not appear that in the deed of conveyance executed in that case there was any recital or averment that the full consideration for the deed had been paid to or received by the vendor. The deed, however, did contain in the attestation clause a statement by the notary that out of the sum of Rs. 200, which was the consideration for the deed, a sum of Rs. 100 was paid in his presence. Jayawardene A.J. held that " by a deed of sale the vendor transfers the land, and the vendee agrees to pay the price. The action to recover the unpaid balance of the price grows directly out of the deed of sale, it is dependent on it and derives its vital force from it " That this statement of the learned Judge must be confined to those cases where the deed does not recite that the full consideration has been paid by the vendee or received by the vendor is apparent from the fact that the learned Judge himself does not recite that the full consideration has been paid by the vendee or received by the vendor is apparent from the fact that the learned Judge himself does not doubt the correctness of the principle laid down in the earlier case of *Thomassie vs. Kanapathipillai* (1883) 5 S. C. C. 174 where it was held that where the deed recited that the full consideration had been received by the vendee an action by him to recover an alleged balance of the consideration

was prescribed in three years as the cause of action did not arise upon a written contract but upon a simple money debt. In the later case of *Ausadahamy vs. Kiribanda* (supra) though in the body of the deed the receipt of the consideration by the vendee was specifically stated, the attestation of the notary, however, contradicted it, for in the attestation it was explicitly stated that the vendor had retained part of the purchase price to discharge certain mortgage encumbrances subsisting on the land conveyed. On the plaintiff instituting the action for recovery of the balance retained by the vendor to pay off the mortgage on the basis that the latter had failed to implement his undertaking to pay the mortgage debt, it was held that that the attestation clause of the notary operated as a written undertaking given by the vendor by his agent, the notary, and that the action was therefore not prescribed in three years but would only be prescribed in terms of section 6 after the expiry of a period of six years.

In the present case, there is a declaration in the body of the deed that the vendor has received the consideration, for the deed not merely sets out that the vendor transferred the land "in consideration of the sum of Rs. 300 of the lawful money of Ceylon well and truly paid to me" by the vendee, but expressly goes on to say that the vendor does admit and acknowledge the receipt of the consideration. The attestation clause in the deed which is relied upon by the respondent does not assist him, for unlike in the case of *Ausadahamy vs. Kiribanda* (supra) there is no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered. The attestation merely states that out of the consideration only a sum of Rs. 200 was paid in the presence of the notary. Counsel for respondent attempted to lay emphasis on the word "only" and contended that therefore the balance was not paid, and he went on to seek to read into the document a promise on the part of the vendor to pay that balance. I do not agree that these words in the attestation are capable of that interpretation. While the attestation does not show that the balance had previously been paid to or acknowledged to have been received by the vendee, it gives no indication that the balance was yet outstanding or that the vendor made a promise to pay the balance in the future. In other words, while it is not possible to say that the balance had previously been received, it is equally not possible to say that the balance was agreed to be paid thereafter. There is therefore in this case no conflict between the attestation and the statement in the body of the deed that the full consideration had been paid, for the attestation is consistent with the view that the balance had previously been paid or settled in some way acceptable to the vendee. It is therefore difficult to say that the attestation clause contains an agreement or undertaking to pay the balance. The present case, therefore, falls within the principle laid down in *Thomassie vs. Kanapathipillai* (supra) which was followed in the later case, of *Thamotherampillai vs. Kanapathipillai* (1940) 41 N. L. R. 265.

I hold, therefore, that the plaintiff's action having been instituted after the lapse of three years of the accrual of the cause of action is prescribed. Plaintiff's action fails and is dismissed with costs both of this Court and of the lower Court.

Appeal allowed.

Present : BASNAYAKE, J.

EXCISE INSPECTOR OF WELIGAMA vs. JAMIS SILVA

S. C. 996—*M. C. Matara* 19144.

Argued & decided on : 16th October, 1950.

Evidence—Excise notification—Should it be proved—Excise Ordinance Section 58.

Held : That there is no obligation for the prosecution to prove by evidence a notification made under the Excise Ordinance.

A. Mahendrarajah, Crown Counsel, for the complainant-appellant.

A. L. Jayasuriya, with *T. B. Dissanayake,* for the accused-respondent.

BASNAYAKE, J.

The learned Magistrate having held that the prosecution had proved that the accused was in possession of a quantity of fermented toddy in excess of the prescribed quantity of one-third of an imperial gallon in breach of section 16 of the Excise Ordinance acquitted him on the ground that the prosecution had failed to produce in evidence Excise Notification No. 264 published in the Ceylon Government Gazette No. 8060 of 22nd June, 1934, which contains the notification which prescribes the limit of sale by retail of fermented toddy. Section 16 prohibits the possession without a permit in that behalf of any quantity of an excisable article in excess of the quantity prescribed in that notification. There is no obligation on the prosecution to prove by evidence a notification made under the Excise Ordinance. Section 58 of that Ordinance provides :—

"58. (1) Every excise notification shall be published in the Government Gazette.

(2) A Court shall take judicial notice of every excise notification.

(3) Where an excise notification is printed—

(*a*) in any Excise Manual or other book or document purporting to be printed by authority or on the orders of Government or by the Government Printer or at the Ceylon Government Press ; or

(*b*) in any document purporting to be an extract from any issue of the Government Gazette,

it shall be presumed, until the contrary is proved, that an excise notification in identical terms was published in the Government Gazette.

(4) In this section—

"excise notification" means a notification made or issued under this Ordinance or for the purposes thereof ;

"Court" has the same meaning as in the Evidence Ordinance."

The learned Magistrate is clearly wrong in requiring proof of the notification in question.

I therefore set aside the order of acquittal and convict the accused of the charge read over to him and sentence him to pay a fine of Rs. 150 ; in default of payment of fine he will undergo six weeks' rigorous imprisonment.

Acquittal set aside and convicted.

Present : JAYETILEKE, C.J., AND SWAN, J.

A. H. M. ABDUL CADER vs. A. R. A. RAZIK *et. al.*

S. C. No. 27—D. C. Colombo No. 4518/G.

Argued on : 19th, 20th and 21st September, 1950.
Decided on : 28th September, 1950.

Muslim Law—Marriage of a female under twenty-one years following Hanafi Sect—Wali not necessary if female had attained "bulugh" or puberty—Effect of Civil Procedure Code, Section 502 and Majority Ordinance No. 7 of 1865, (Cap. 53)—A Muslim in Ceylon attains "majority" on reaching bulugh or puberty—Mohamedan Code of 1806, repealed by the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) and Muslim Marriage and Divorce Registration Ordinance (Cap. 99)—Meaning of "Muslim Law" in Section 50 of Cap. 99—A Muslim in Ceylon is to be governed by the law of the Sect to which he belongs—Section 8 (1) of Cap. 99 does not supersede Muslim Law of Marriage and Divorce.

A Muslim female who had been brought up from her infancy as a Hanafi married according to Muslim rites when she was of fifteen years and two months in age, which she alleged was past the age of 'bulugh' (discretion). For the purpose of the marriage she appointed by notice to the Registrar her uncle as wali, and the marriage was duly registered in accordance with the provisions of the Marriage and Divorce (Muslim) Ordinance (Cap. 99).

The father challenged the validity of the marriage incidentally, in an application by him to be appointed as curator and guardian of his daughter.

Held : (1) That the marriage was valid. A Muslim female in Ceylon following the Hanafi sect and had attained the age of bulugh (discretion) could marry without the assistance of a wali or marriage guardian.

(2) That for the purpose of marriage a Muslim attains "majority" on reaching the age of bulugh or puberty.

(3) That in a matter of marriage or divorce a Muslim is governed by the law of the Sect to which he or she belongs. "The words "Muslim Law" in that section (Section 50 of Cap. 99) cannot mean anything more or less than the Muslim Law governing the Sect to which the particular person belongs".

(4) That Section 8 (1) of Cap. 99 read in conjunction with Section 50 must be understood to mean that where Muslim Law requires a bride to be represented by the wali, he shall sign the marriage register on her behalf; where it does not, the signature of a wali to the marriage register is unnecessary. The section does not supersede the Muslim Law of marriage and divorce.

Cases referred to :—*Narayanen vs. Saree Umma*, 21 N. L. R. 439.
Kalendralevvai vs. Avasumma, 48 N. L. R. 508.
Marikar vs. Marikar, 18 N. L. R. 481.
Assanar vs. Hamid, 50 N. L. R. 102.

C. Thiagalingam, with *N. M. de Silva*, *P. Navaratnarajah*, and *V. Arulambalam*, for appellant.
M. I. M. Haniffa, with *M. H. A. Azeez*, and *M. Markhani*, for 1st and 2nd respondents.
H. V. Perera, K.C., with *U. A. Jayasundera, K.C.*, and *M. Markhani*, and *M. S. Abdulla* for 4th respondent.

SWAN, J.

We are concerned in this appeal with the validity of an alleged marriage between the 4th respondent and one Rasheed Bin Hassen. The matter came up indirectly before the District Court in the following circumstances. The appellant, who is the father of the 4th respondent—a Muslim young lady below the age of 21—applied to the District Court of Colombo to have himself appointed curator of the property of the 4th respondent and the 3rd respondent, who is the married sister of the 4th respondent appointed guardian over the person of the minor. Later he moved that a guardian *ad litem* be appointed over the minor for the purpose of substantial application he had made for the appointment of a curator and guardian. Chapter 35 of the Civil Procedure Code deals with actions by or against minors and persons under other disqualification. Section 502, which is the last section in that Chapter, states that " for the purposes of this Chapter a minor shall be deemed to have attained majority or full age on his attaining the age of 21 years or on marrying, or obtaining letters of *venia aetatis*." The application by the appellant for the appointment of a curator and guardian was an " action " within the meaning of section 6 of the Civil Procedure Code which declares that " every application to a Court for relief or remedy through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action." The second application of the appellant for the appointment of a guardian *ad litem* was therefore, as a matter of procedure, entirely correct. When, however, the question of the appointment of a guardian *ad litem* came up the minor herself appeared and said that she had married Rasheed Bin Hassen in the interval between the appellant's application and her appearance. The appointment of a guardian *ad-litem* was, therefore, unnecessary if section 502 governed the matter as undoubtedly it did. The appellant, however, challenged the validity of the marriage and the Court was, therefore, required in an incidental proceeding to decide this issue. After a lengthy inquiry the learned District Judge held that there had been a valid marriage. One would, in the circumstances, have expected a wise and tolerant father to have accepted the decision as final and conclusive. But he has pursued the matter further and had now asked this Court to reverse the finding of the lower Court and declare that marriage invalid.

It has been held by our Courts that marriage does not confer majority upon a Muslim below the age of twenty-one (see *Narayanen vs. Saree Umma et al* 21 N. L. R. 439 and *Kalendralevvai vs. Avasumma* 48 N. L. R. 508. Therefore it was competent for the learned District Judge to have taken the view that whether or not the alleged marriage was valid, he could still proceed to appoint a guardian over the person of the 4th respondent and a curator of her property. It is only in respect of actions by or against minors that the procedural requirements of Chapter 35 of the Civil Procedure Code are applicable. In point of fact what happened after the learned Judge's finding regarding the validity of the alleged marriage shows that the parties accepted this as the correct legal position, for on 27-1-49 of consent Rasheed Bin Hassen was appointed curator " without prejudice to the rights of either party with regard to the validity of the marriage which question is now under appeal."

As regards the question at issue on this appeal the following facts should be noted. The 4th respondent was at the date of the impugned marriage, 15 years and 2 months old. By letter X2 addressed to Katheeb A. J. M. Warid, Muslim Registrar of Marriages, she requested him to marry her to Mr. Rasheed Bin Hassen according to the Hanafi Law. In the same letter she informed the Registrar that she had appointed her uncle. Mr. Marikar Mohideen, as her wali. X3 is the act of appointment. X4 is an affidavit in which the 4th respondent gives the date of

her birth, declares that she has passed the age of bulugh discretion and states that she belongs to the Hanafi sect and follows her religion accordingly. The marriage was solemnized according to Muslim rites by Katheeb Warid on 11-12-47 as appears from the certificate of marriage issued by him marked X1.

The first point to consider is whether the 4th respondent was or was not a Hanafi at the time of the alleged marriage. The learned District Judge has held that she was a Hanafi and with that finding we agree I would say that, on the evidence, a contrary view would have been unreasonable, especially if one bears in mind the fact that the 4th respondent was brought up from her infancy by her maternal grandmother, the 2nd respondent who is a Hanafi.

The next point is whether, being a Hanafi, the 4th respondent could contract herself in marriage. Mr. Thiagalingam admits that under what he calls " pure " Muslim Law a Hanafi girl who has reached the age of bulugh can marry without the assistance of a wali or marriage guardian. He contends, however, that, that law is not applicable to Muslims in Ceylon.

Mr. Thiagalingam firstly relies upon the Age of Majority Ordinance No. 7 of 1865 (Cap. 53 of the New Legislative Enactments). The Ordinance makes twenty-one years the legal age of majority for all persons for all purposes. Mr. Thiagalingam points to section 2 of the Indian Majority Act 9 of 1875 which provides " that nothing herein contained shall affect (*a*) the capacity of any person to act in the following matters, namely marriage, dower, divorce and adoption " and argues that, in the absence of a similar reservation in our Age of Majority Ordinance, twenty-one years is the age of majority for Muslims in all matters including marriage. But our Courts have considered the effect of the Age of Majority Ordinance on the rights of Muslims in the matter of marriage and taken the view that " majority " for the purpose of a marriage contract in the case of Muslims is not affected by that Ordinance. In *Marikar vs. Marikar* 18 N. L. R. 481 Sampayo, J., having discussed the age of capacity for Muslims, made the following observations :—

> " According to Muhammadan Law, therefore, not only has Cader Saibo Marikar attained the age of " majority " and become capable of contracting himself in marriage but the authority of the plaintiff as guardian if any, has ceased. But some difficulty arises out of the provisions of Ordinance 7 of 1865 which fixes the legal age of majority at twenty-one years. In my opinion the Ordinance has regard to the attainment of legal majority for general purposes, or the majority which under the Muhammadan law is conferred by " discretion " and does not affect the age capacity for purposes of marriage." In *Narayen vs Saree Umma* 21 N. L. R. 439 Sampayo J. referred to the earlier case mentioned above and said " as was pointed out in *Marikar vs Marikar* there are two kinds of majority under Muhammadan law namely one as regards capacity to marry without the intervention of a guardian and the other as regards a general capacity to do other acts as a major ". With regard to those other acts it was held that the Age of Majority Ordinance was applicable to Muslims as well. But this decision has been dissented from in *Assanar vs. Hamid* 50 N. L. R. 102 where it was held in effect, that for all purposes a Muslim minor attained majority on reaching the age of puberty. We are content, in this case to say that for the purpose of marriage a Muslim attains " majority " on reaching the age of bulugh or puberty."

The last point for determination is whether a Muslim girl can enter into a contract of marriage in Ceylon without a wali or marriage guardian. For a virgin of the Shafi sect, whatever her age may be, a wali is necessary. For a Hanafi girl who has attained the age of " bulugh " a wali is not required. Mr. Thiagalingam, however, contends that the latter principle has never been adopted in Ceylon and in support of his contention points to section 64 and 65 of the Mohamedan Code of 1806. But that Code has been repealed and in place of those sections which dealt with intestate succession we have the Muslim Intestate Succession and Wakfs Ordinance 10 of 1931 (Cap. 50), and in place of those sections which dealt with marriage and divorce we have Ordinance 27 of 1929 as amended by Ordinance 9 of 1934 (Cap. 99). Section 50 of Cap. 99 reads as follows :—

> " The repeal of section 64 to 102 (first paragraph) of the Mohamedan Code of 1806 which is effected by this Ordinance shall not affect the Muslim law of marriage and divorce and the rights of Muslims thereunder.

Mr. Thiagalingam says that although section 64 to 102 have been repealed we must still look

to those sections for the relevant Muslim law. With that contention we do not agree. We know that the Code of 1806 was complied at a time when it was believed that all Mohamedans in Ceylon were of the Shafi sect. In fact, when that Code was submitted to the Governor it was stated to be " the Code of the laws observed by the Moors in the province of Colombo and acknowledged by the head Moormen of the district to be adapted to the present usages of the caste ". It was soon realised that the Code was not exhaustive, and our Courts have held that where it is silent recourse should be had to text books for the relevant Muslim Law. It was also found, in course of time, that there were other sects than Shafis in Ceylon. The right of every Muslim to deal and be dealt with according to the law of the particular sect to which he belongs is expressly stated in the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50). That Ordinance was proclaimed on 17-6-1931. In it we find a declaration that the law applicable to the intestacy of any deceased Muslim domiciled in Ceylon shall be the Muslim law governing the sect to which he belonged : and as regards donations not involving *fidei commissa, usufructs* and trusts a declaration to the like effect. The Marriage and Divorce (Muslim) Ordinance No. 27 of 1929 as amended by Ordinance 9 of 1934 was proclaimed on 1-1-37. By that time the Legislature had openly recognised the rights of Muslims in certain matters to deal and be dealt with according to the law governing the sect to which they belonged. It was, therefore in our opinion, unnecessary to say so in so many words in section 50 of Cap. 99. The words " Muslim Law " in that section cannot mean anything more or less than the Muslim law governing the sect to which the particular person belongs. We would, therefore hold that in a matter of marriage or divorce a Muslim is governed by the law of the sect to which he or she belongs.

Even then, contends Mr. Thiagalingam, under Cap. 99 a wali is necessary for a Muslim woman whatever her sect may be. Undoubtedly section 8 (1) provides that the marriage register shall be signed by the wali of the bride except where the Kathi has expressly authorised such marriage under section 21 (2) which enables a Kathi to sanction a marriage even against the express wishes of the wali. The proviso to that subsection also empowers the Kathi to authorise the registration of a marriage where a woman has no wali. We do not think it therefore follows that even where the Muslim law does not require the intervention of a wali in a particular case section 8 (1) supersedes that law. The reasonable interpretation of that section read in conjunction with section 50 appears to be that where the Muslim law requires a bride to be represented by the wali he shall sign the marriage register on her behalf; where it does not, the signature of a wali to the marriage register is unnecessary.

In this case, however, the bride appointed her uncle as her wali and the Kathi approved of the appointment and permitted the wali so appointed to sign the marriage register.

Fitzgerald in his book on Muhammadan Law at p. 56 says :—

> " Even where a guardian is superfluous in law it is considered respectable to have one ". At the next page the writer goes on to say—" A woman of full age who can dispose freely of her own hand as in Hanafi and Shafi law can obviously ask any one she chooses to give her away ", Ameer Ali (4th Ed. Vol. 2, p. 350) sets out the law in these words—" The Hanafis hold that an adult woman is always entitled to give her consent without the intervention of a wali. When a wali is employed and found acting on her behalf he is presumed to derive his power solely from her."

It seems to be clear that under Muslim Law a Hanafi maiden can act without the intervention of a wali or marriage guardian, or appoint a wali herself for the purpose of her marriage. We would therefore, hold that a valid contract of marriage according to Muslim law was entered into between the 4th respondent and Rasheed Bin Hassen on 11-12-47 and that the marriage was duly registered in accordance with the provisions of the Marriage and Divorce (Muslim) Ordinance—Cap. 99.

The appeal fails and is dismissed with costs.

Dismissed with costs.

JAYATILEKE, C.J.,

I agree.

Present : BASNAYAKE, J.

APPUHAMY vs. PUNCHIRALA

Application : In Revision C. R. Kurunegala 15329 S. C. No. 353 of 1950

Argued & decided on : 16th October, 1950.

Affidavit—Statements unsworn annexed to in support—Weight to be attached in legal proceedings —Need to be on oath.

In support of his averments in an affidavit to the effect that he could not file an appeal before the lapse of the prescribed period owing to illness, the petitioner annexed two unsworn statements from an ayurvedic physician and the village headman.

Held : That such statements should have been on oath.

H. W. Jayawardena, for the defendant-petitioner.

K. Sivasubramaniam, for the plaintiff-respondent.

BASNAYAKE, J.

This is an application under section 765 of the Civil Procedure Code (hereinafter referred to as the Code). That section declares that it shall be competent to this Court to admit and entertain a petition of appeal from a decree of any original Court, although the provisions of sections 754 and 756 have not been observed, provided :

(*a*) that it is satisfied that the petitioner was prevented by causes not within his control from complying with those provisions ;

(*b*) that it appears to this Court that the petitioner has a good ground of appeal ; and

(*c*) that nothing has occurred since the date when the decree or order which is appealed from was passed to render it inequitable to the judgment-creditor that the decree or order appealed from should be disturbed.

In the instant case it is submitted on behalf of the petitioner that he was prevented by illness from being present when the trial Judge delivered judgment on 29th June, 1950, and that he was thereby prevented from filing a petition of appeal within the required time. Two unsworn statements, one purporting to be from an ayurvedic physician and the other from a village headman, are annexed to the affidavit of the petitioner. Such statements should be on oath if cognizance is to be taken of them for the purpose of any proceeding in a Court of law.

But even the petitioner's statements in his affidavit do not satisfy me that he was prevented from complying with the provisions of sections 754 and 756 of the Code by causes not within his control. The steps prescribed by those two sections are steps which the petitioner's proctor was competent to take under the authority of his proxy. No explanation as to why the proctor did not take the necessary steps is offered. The petitioner's illness lasted only till the 29th of June, 1950. That is the day on which the judgment was delivered. It is not stated that the petitioner was incapacitated by illness till the appealable time expired. That being the case it cannot be said that the petitioner was prevented from preferring an appeal by causes not within his control. The proxy granted to a proctor cannot be regarded as an idle document. The authority is granted in wide terms so that he may have the fullest liberty of protecting his client's interests.

The application is refused with costs.

Application refused.

Present : NAGALINGAM J.

KATHIRITHAMBY vs. SUBRAMANIAM

S. C. No. 153—*C. R. Point Pedro* 449.

Argued on : 20th & 22nd March, 1950.
Decided on : 23rd May, 1950.

Thesawalamai—Jaffna Matrimonial Rights and Inheritance Ordinance (*Cap.* 48), *Sections* 19 *and* 20—*Amending Ordinance No.* 58 *of* 1947—*Is it retrospective in effect—Interpretation Ordinance* (*Cap.* 2) *Section* 5

The defendant, a Jaffna Tamil, purchased a ¼ share of a land during the subsistence of his marriage with the plaintiffs' sister who died in 1940. After the wife's death the plaintiffs claimed a half-share of the said interests on the ground that it formed *tediatetam* property under sections 19 and 20 of (Jaffna) Matrimonial Rights and Inheritance Ordinance (Chap. 48).

The defendant contended that the plaintiffs were not entitled to any rights in view of sections 19 and 20 of Ordinance No. 50 of 1947 which replaced the said two sections relied on by the plaintiffs.

Held : That as the amending Ordinance No. 58 of 1947 was retrospective in its operation the plaintiffs did not become entitled to the rights claimed.

Per NAGALINGAM, J.—Where a judgment of a lower Court is affirmed without reasons being given by this Court it is incorrect to treat the judgment of the lower Court either as a judgment of this Court or as a judgment which has any binding effect on this Court.

Only when this Court expressly adopts a judgment of the lower Court as its own can the judgment of the lower Court be treated as being invested with that character whereby it is enabled to be regarded as a pronouncement having a binding effect on this Court.

The amending ordinance has the effect of declaring what was always the law and its operation therefore cannot be confined to any period subsequent to when it became law.

Cases referred to :—*Satchithananda vs. Sivaguru*, 50 N. L. R. 293.
Sothinagaratnam vs. Akilandanayaki et. al. S. C. No. 55/D. C. Jaffna No. 3092 S. C. Min. 3-11-1948.
Attorney General vs. Pougett, (1816) 2 Price 381.
Craies : Treatise on Statute Law, 1907 Ed. p. 332.
Nalliah vs. Ponniah, 22 N. L. R. 198.
Avitchi Chettiar vs. Rasamma, 35 N. L. R. 313.
Attorney General vs. Theobold, (1897) 2 Q. B. D. 527.

H. W. Tambiah, with *S. Sharvananda*, for the plaintiffs-appellants.
Subramaniam, with *P. Navaratnarajah*, for the defendant-respondent.

NAGALINGAM, J.

The construction of certain provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance, Cap. 48 as amended by the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance No. 58 of 1947 is involved on this appeal. The facts which give rise to the dispute briefly are that the defendant, a Jaffna Tamil, purchased a ¼ share of the land the subject matter of this action by a deed of 1934 (P1). He was married to a sister of the plaintiffs in the year 1931 or 1932 and the wife died in 1940.

The case for the plaintiffs is that the property having been acquired during the subsistence of the defendant's marriage it fell under the category of property known as *tediatetam* and that on the death of their sister the defendant's wife, they inherited a half of the acquired land ; and as the defendant has prevented them from possessing their share they bring this action for the recovery of consequential damages.

The case of the plaintiffs is rested upon a reading of sections 19 and 20 as first enacted in the main ordinance. It cannot be gainsaid that if those provisions applied, the property in question having been acquired for valuable consideration during the subsistence of the marriage, the property fell under the category of *tediatetam* as defined in section 19 and that on the death of the wife, by virtue of section 20, a half share thereof vested on the plaintiffs as heirs of the deceased spouse.

The defendant, however, contends that as these provisions so much relied upon by the plaintiffs have been abrogated by the amending

ordinance and that the new sections 19 and 20, substituted by it for the old provisions, should alone be looked at for the purpose of deciding the rights of parties. In regard to this contention, the plaintiffs join issue with the defendant and assert that the amending ordinance, which found a place in the Statute book only in 1947, that is to say about seven years after the death, which gives rise to this piece of litigation, has no application, as their rights has become crystallised before the passing of the amending ordinance and that any attempt at determining their rights by reference to the amending ordinance would militate against the well-accepted principle that the legislature cannot be deemed to have intended to impair or interfere with rights already accrued and vested.

The contest may therefore be stated in the form of a question, viz., whether the amending ordinance is prospective or retrospective in its operation.

This question, I may say at once is concluded by authority. In the case of *Satchithananda vs. Sivaguru* 50 N. L. R. 293 I, had occasion to consider this point and I reached the view that the amending ordinance was retrospective in its operation. My brother Windham agreed with me. That being a two Judge case, even if I were disposed to differ from the view then taken, it is not open to me to do so as that case is binding on me sitting alone. Mr. Thambiah, however, invites me at least to reserve the point for consideration by a fuller bench on the ground that another judgment of this Court is in conflict with the case of *Satchithananda vs. Sivaguru* 50 N. L. R. 293. He refers to the case of *Sothinagaratnam vs. Akilandanayaki et al* S. C. No. 55 D. C. Jaffna No. 3052, S. C. Min. 3-11-48. The appeal in that case was dismissed without a judgment. Where a judgment of a lower Court is affirmed without reasons being given by this Court it is incorrect to treat the judgment of the lower Court either as a judgment of this Court or as a judgment which has any binding effect on this Court. The further circumstance referred to by Mr. Thambiah that the point of law had been argued at great length in this Court is again no argument to treat a judgment of a lower Court as having any greater weight than that it is in fact a judgment of an inferior Court. Various reasons may have actuated this Court in affirming the judgment of the lower Court but not necessarily those given in the lower Court. Only when this Court expressly adopts a judgment of the lower Court as its own can the judgment of the lower Court be treated as being invested with that character whereby it is enabled to be regarded as a pronouncement having a binding effect on this Court. I do not therefore think that there is any conflict of authority on this point so far as this Court is concerned, for there is only the judgment of this Court on the point.

In reality the further argument of this question has revealed the existence of another approach to the solution of this problem and which to my mind is even far more conclusive than the arguments upon which the decision in the case of *Sachithananda vs. Sivaguru* 50, N. L. R. 293 was based. It was not sufficiently realised in the course of the argument in that case that the amending ordinance No. 58 of 1947 in section 2 thereof expressly refers to the Jaffna Matrimonial Rights and inheritance Ordinance as "the principal ordinance" and in every one of the subsequent sections by which amendments are introduced the term "principal ordinance" continues to be used. Now the term "principal ordinance" is not used in the amending ordinance as words of ordinary connotation but as a term of art. The words "principal ordinance" have been impressed with a special meaning by the Interpretation Ordinance Cap. 2, section 5 whereof runs as follows :—

> "Where any Ordinance is declared to be passed to amend any other Ordinance, the expression "the principal Ordinance" shall mean the Ordinance to be amended and the amending Ordinance shall be read as one with the principal Ordinance".

The words underlined are of special significance in this context. The mind of the Legislature is clearly disclosed in regard to the effective date of the operation of this amending ordinance by its use of the term "principal ordinance" in the Amending Ordinance. To constrast this amending ordinance with another Ordinance, viz. Ordinance No. 60 of 1947, which is in itself an Ordinance amending an earlier Statute, viz., the Prevention of Frauds Ordinance, Cap. 57, the Legislature did not in that amending ordinance refer to the earlier Statute which it sought to amend as the "principal ordinance." The reason for this distinction is not unimportant and in fact very substantial. What, then, is the meaning to be given to the words that the "amending ordinance shall be read as one with the principal ordinance ?" The plain meaning of these words is that the amendments should be incorporated into the main Ordinance and read as if it had been enacted at the time that the main Ordinance itself was framed before an

attempt is made to construe or give effect to them; it certainly would be doing violence to these words if the amending ordinance were to be treated as a separate piece of legislation to be construed without reference to the main Ordinance. I have not come across any case either local or of the English or Indian Courts where these identical words have received judicial interpretation. There is, however, an old English case which comes very close to the subject matter in hand. That is the case of *Attorney-General vs. Pougett* (1816) 2 Price 381 where the facts were that by a Statute of George III an export duty was imposed upon hides of *9s. 4d.* but the Statute omitted to mention whether the duty so imposed was in respect of any specified weight. To remedy this omission an amending ordinance was was passed in the same reign by which the words "per cwt." were added after *9s./4d.* The question that rose was whether the duty at 9*s* 4*d.* per cwt. was to be levied in regard to hides that had been exported before the enactment of the amending ordinance, whether the duty was merely a sum of 9*s.* 4*d.* on the full quantity of hides exported on one occasion by an exporter without reference to the weight. Chief Baron Thomson in giving judgment said :—

> "The duty in this instance was in fact imposed by the first Act, but the gross mistake of omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed and they must be taken together as if they were one and the same Act."

I think the words "the amending ordinance shall be read as one with the principal ordinance" which in themselves are plain have the same meaning that Chief Baron Thomson intended to convey by the words, "they (the main and amending ordinances) must be taken together as if they were one and the same Act."

If, therefore, the proper method of construing the amendments introduced by the amending ordinance is to construe them after incorporating them into the main Ordinance and then reading both Ordinances as if they were one, the reason for the enactment of section 7 which was left in some obscurity in *Satchithananda vs Sivaguru* 50 N. L. R. 293 becomes obvious. Section 19 is in Part 3 of the main Ordinance which part deals with inheritance; section 14, which is the very first section of this part, expressly declares that the subsequent sections, of which section 19 and 20, it will be observed, are two, should apply to the estates of persons who die after the commencement of the Ordinance, provided they fall under one or other of the following two classes: (1) unmarried persons (2) married persons who were married subsequent to the Ordinance. If the new sections 19 and 20 are therefore substituted in the principal Ordinance and read in the light of the provisions of section 14, nothing can be clearer than that the operation of the new sections 19 and 20 extends to the two categories of persons set out above, that is to say, these sections would have operation in respect of estates of the aforesaid classes of persons dying after 17th July, 1911, the date of the commencement of the main Ordinance. In this view of the date for commencement of operation of the new amending sections 19 and 20, the reason for the enactment of section 7 in the amending ordinance by which the amendments were excluded from having effect on certain decided cases is plainly understandable. But for this saving clause, even the decided cases would have come within the ambit of the amendment. The policy of the Legislature not to interfere with decided cases even where it sets out to declare the law as distinct from enacting new law is well established and is an old one. Commenting on retrospective Statutes, Craies observes in his Treatise on Statute Law 1907 ed. p. 332 that "Acts of this kind like judgments decide like cases pending when the judgments are given but do not reopen decided cases".

Furthermore, the amending Ordinance cannot but be regarded as a piece of legislation declaratory in its nature. After the main Ordinance had become law in 1911, the construction of section 19 as it then stood came up for consideration in the case of *Nalliah vs. Ponniah* 22 N. L. R. 198. Notwithstanding the wording of that section 19, both the lower Court and this Court gave effect to the well known principle of Thesawalamai that where property is acquired by either spouse during the subsistence of marriage with his or her separate property, the property so acquired continued to have its separate character and did not fall under the category of *tediatetam* property. This judgment, however, came up for review in the Divisional Bench case of *Avitchi Chettiar vs. Rasamma* 35 N. L. R. 313 and the Divisional Bench took a contrary view and held that provided the property was acquired during the subsistence of marriage by either spouse, such property became *tediatetam* irrespective of that fact that the consideration paid for such purchase may have been the separate property of one of the spouses. The Divisional Bench case introduced for the first time a new notion foreign to Thesawalamai in regard to what is known as *tediatetam* and caused and

continued to cause no little discontent among the people of Jaffna. It was to remove this discontent that the amending ordinance was passed. Looked at from the historical point of view, too, it is easy to see why the operation of the amending ordinance should be co-eval with the main Ordinance. If the new section 19 of the amending ordinance was enacted to resort to the old conception of *tediatetam*, which it undoubtedly does, can one think of any sound reason for the legislature deciding to perpetuate the erroneous notion of Thesawalamai embodied in the earlier section 19 even in regard to persons who may have died between 1911 and 1947, the dates of the passing of the main and the amending ordinances respectively. I can think of none. The amending ordinance has the effect of declaring what was always the law and its operation therefore cannot be confined to any period subsequent to when it became law. The case of *Attorney-General vs. Theobold* (1897) 24 Q. B. D. 527 is an authority for the proposition that where a Statute is in its nature declaratory the presumption against construing it retrospectively is inapplicable.

The object of the Legislature in enacting that the amending ordinance should be read as one with the principal Ordinance would have been better achieved had it not used the word "repealed in enacting the new sections 19 and 20 but used some such word as "abrogated" instead for then the apparent conflict that arises by using the word "repealed" which word has a special significance as set out in section 6 of the Interpretation Ordinance and referred to in *Satchithananda vs. Sivaguru* 50 N. L. R. 293 would not arise.

There is another difficulty that may be said to arise by reason of the language used in section 7 of the Amending Ordinance. That section uses the phrase "prior to the date on which the Ordinance comes into operation". If the Amending Ordinance is to have effect from the date when the principal Ordinance came into operation, then the phrase can make no sense. On the other hand, if the phrase is to be deemed to refer to the date when the Amending Ordinance was passed as the effective date of operation of the amendments, then all the calculated pains taken by the Legislature to refer to the main Ordinance as the principal Ordinance would have been an irksome toil it had set itself all to no purpose, and it would follow that the studied use of the words "principal Ordinance" would be equally meaningless. This conflict and these absurdities would be avoided if the phrase is read to mean "prior to the date on which this Ordinance becomes law." This construction would also carry into effect the intention of the Legislature in passing the Amending Ordinance.

Having regard to these considerations, I am confirmed in the view that I expressed in the case of *Satchithananda vs. Sivaguru* 50 N. L. R. 293 that the Amending Ordinance has retrospective effect and has effect from the date of the passing of the main Ordinance in 1911.

If the main Ordinance as amended applied then by virtue of section 19 (new) the property purchased by the defendant becomes his *tedatetem*, for there is no evidence that the consideration paid for the purchase came from his separate estate. In passing I might observe that the position would be the same even if the old section 19 applied. The real obstacle to the plaintiffs' success in this case is section 20 (new). Both the new sections 19 and 20 speak of "*tediatetam* of a spouse". Under the Thesawalamai, *tediatetam* was property belonging in common to the two spouses though it may have been acquired by one of the spouses and the meaning of the term under Thesawalamai is correctly set out in the old section 20 (1). Now for the first time under the new sections 19 and 20 *tediatetam* is regarded as a species of property which though not forming part of the separate estate of the spouse in whose name such property may stand, yet loses the character of its being common to both spouses, which was of the essence of the nature of *tediatetam* property under the Thesawalamai. By reason of the loss of the common or joint character of the *tediatetam* property consequences of a far reaching character bringing about a revolutionary change in the law of inheritance result. The change itself is expressly embodied in the new section 20, which runs as follows :—

> "On the death of either spouse one half of the *tediatetam* which belonged to the deceased spouse, and has not been disposed off by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouser."

It will be noticed that it is *tediatetam* property which belonged to the deceased spouse that would devolve in respect of a half share thereof on the surviving spouse and the other half share on the heirs of the deceased spouse. The new section 19 having already used the phraseolgoy "thediatheddam of a spouse" the idea underlying that term is carried forward in section 20

when it concerns itself only with the devolution of *tediatetam* property belonging to the deceased spouse. If, therefore the surviving spouse has *tediatetam* property belonging to him or her that *tediatetam* property unlike under the old Thesawalamai, does not become subject to devolution at the dissolution of marriage and in effect becomes, as a result of the dissolution of marriage, the separate property of the surviving spouse to which the heirs of the deceased spouse can lay no claim. The property in this case is not property that belonged to the deceased spouse—the deed of conveyance is in favour of the defendant. The property, therefore, is at best *tediatetam* of the defendant—and this *tediatetam* property did not fall into the category of property that was subject to devolution at the date of the death of the defendant's wife, but continued to be vested in regard to the entirety thereof in himself. In view of the foregoing, it cannot be said that any share of the property claimed by the plaintiffs devolved on them by reason of the death of their sister.

For these reasons the plaintiffs' appeal fails and is dismissed with costs.

Appeal dismissed.

Present : NAGALINGAM, J.

JOHN PERERA vs. JOSEPH PERERA WEERASINGHE

S. C. No. 930—*M. C. Gampaha No.* 51038.

Argued on : 4th October, 1950.
Decided on : 16th October, 1950.

Criminal Procedure Code (*Cap.* 16), *Sections* 179, 172. *Village Communities Ordinance* (*Cap.* 198) *Charges under—Withdrawal and amendment of charges, when should be allowed.*

Held : (1) That the power vested in a court under section 172 of the Criminal Procedure Code to alter a charge at any time before judgment is pronounced is a discretionary one and should be exercised judicially.

(2) That where a Magistrate failed to give reasons for the exercise of this discretion, the Supreme Court, would consider the question anew.

(3) That section 172 of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more charges in a plaint.

(4) That an amendment of charges should not be refused by a court unless it is likely to do substantial injustice to an accused.

Per NAGALINGAM, J.—" Furthermore, when I consider that the charges relate to the commission of offence by a person holding a public office, I am the less reluctant to refuse the amendment."

Cases referred to :—*The Queen vs. Sinno Appu*, 7 S. C. C. 51.
King vs. Emanis, 41 N. L. R. 529.

R. S. Wanasundera, for the complainant-appellant.
L. F. Ekanayake, for the accused-respondent.

NAGALINGAM, J.

This is an appeal from an order of the learned Magistrate of Gampaha refusing an application of the complainant to amend the charges against the accused person by withdrawing one of three charges framed against him and by interpolating certain words in the other charges in order to bring them in conformity with the provisions of the law.

The prosecution against the accused person was founded under the Village Communities Ordinance, Cap. 198 L. E., and consisted in the allegation that the accused who was chairman of a village committee had failed in his duty to report the absence of certain members from village committee meetings and thereby had incurred liability to punishment.

When the case came up for trial on the first occasion, objection was taken to the prosecution on the ground that the provision of the law under which the accused person was sought to be punished had been abrogated. The learned Magistrate upheld this contention and discharged the accused. The complainant appealed from the order and this Court set aside the learned Magistrate's order and directed the case to be tried on its merits. When the case went back

to the Magistrate's Court, the prosecutor discovered that there was firstly a misjoinder of charges and secondly that the charges as framed did not disclose adequately the offence with the commission of which the accused was charged.

Of the three offences with which the accused was charged, the first was said to have been committed between 23rd July, 1948, and 15th February, 1949. While the other two offences were said to have been committed between 6th September, 1946, and 23rd December, 1946. It would thus be seen that these charges could not have been joined as there was a violation of the provisions of section 179 of the Criminal Procedure Code in that all these offences had not been committed within a space of twelve months from the first to the last of such offences. The prosecutor, therefore, moved that he be permitted to withdraw the first charge. The learned Magistrate does not specifically deal with this in his order.

The prosecutor having also discovered that the other two charges as framed alleged that the respondent had wilfully neglected to report to the Government Agent that members had absented themselves "on three consecutive meetings of the village committee" while the offence created by the enactment consisted not neglecting to report the absence of a member from three consecutive meetings but in neglecting to report the absence of a member without leave of the committee from more than three consecutive meetings, application was also made to amend the other two charges by the addition of the necessary words in order to specify the charges accurately.

The written application that was made for amendment also suffered from infirmities and application was made *ore tenus* to make further amendments.

That the prosecutor has been careless and negligent in the extreme, there can be little doubt. The question, however, is whether the learned Magistrate was right in refusing to accede to the application to amend the charges. No reasons have been given, except that the defence strongly objects to the amendment. Under section 172 of the Criminal Procedure Code, power is vested in a Court to alter a charge at any time before judgment is pronounced. There can be little doubt that this is a discretionary power that is vested in the Court but such a discretion must be exercised judicially. Had the learned Magistrate given any reasons save that "the defence strongly objects", it would have been possible to test whether the discretion has in fact been properly exercised. In the present state of the record it is not possible to do so and I have to consider the question anew.

The principal underlying the grant or refusal of an application to amend was laid down in a very early judgment of this Court in the case of *The Queen vs. Sinno Appu* 7 S. C. C. 51 in which Fleming, A. C. J., laid down the proposition that an amendment should not be refused by the Judge unless it is likely to do substantial injustice to an accused. In the same case Lawrie J. expressed the view that the "Judge should be ready to listen to and willing to adopt any amendment which will have the effect of convicting the guilty or of acquitting the innocent". I have had no arguments addressed to me on behalf of the respondent to indicate that any substantial injustice or prejudice other than legitimate is likely to be caused to him by reason of the amendment being allowed. Furthermore, when I consider that the charges relate to the commission of offences by a person holding a public office, I am the less reluctant to refuse the amendment.

The case of *King vs. Emanis* 41 N. L. R. 529 is an authority for the proposition that section 172 of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more counts or charges in an indictment or complaint. I think this is a fit case where the learned Magistrate should have exercised his discretion in favour of the complainant and allowed the amendments.

I therefore set aside the order of the learned Magistrate and allow the complainant to withdraw the first charge in the complaint and to set out the complaint in respect of the other charges in manner following :—

1. The complainant abovenamed complains to this Court that the accused abovenamed being the Chairman of the Village Committee of Egodapatha village area did between the 6th September, 1946, and 23rd December, 1946, wilfully neglect to send within seven days of the absence without leave of the said Committee of D. P. Ranatunga, member for Dematadenikanda of the said Village Committee, from more than three consecutive meetings of the said Committee written information to the Government Agent Western Province, that the said D. P. Ranatunga had absented himself without leave of the said Committee from more than three consecutive meetings of the said Committee and thereby committed an offence punishable under section 19 (5) of the Village Communities Ordinance Cap. 198 as amended by the Village Communities Amendment) Ordinance No. 54 of 1942.

2. At the same place aforesaid and within the said dates the said accused did wilfully neglect to send within seven days of the absence without leave of the said Committee of R. T. Don Rajapaksa, member for Udammita of the said Village Committee, from more than three consecutive meetings of the said Committee, written information to the Government Agent Western Province, that the said R. T. Don Rajapaksa had absented himself without leave of the said Committee from more than three consecutive meetings of the said Committee and thereby committed an offence punishable under section 19 (5) of the Village Communities Ordinance Cap. 198 as amended by the Village Communities (Amendment) Ordinance No. 54 of 1942, and direct the trial of the accused on these charges.

Present : GRATIAEN, J.

REX vs. W. A. JAYASENA *alias* JAYASINGHE.

4th Western Circuit holden at Colombo.
S. C. No. 22—M. C. Avissawella, 48531.
Decided on : 24th November, 1950.

Youthful offender—Sentence—Principles determining it—Section 21 of Children's and Young Persons' Ordinance—Welfare of the young person should be the paramount consideration—Section 325 (2) Criminal Procedure Code.

A boy of ten years and six months was charged with murder. There was no evidence to establish the charge, but he pleaded guilty to the offence of wrongful confinement under section 333 of the Penal Code. The boy was found on medical and other evidence to be intelligent, co-operative and amenable to discipline and capable of being educated to be a good citizen.

The Court in the circumstances was of opinion that in the best interests of the accused and society, which is the underlying principle of section 21 of the unproclaimed Children's and Young Person's Ordinance, and because of the absence of adequate machinery to carry out the objects of the Ordinance, the accused should be discharged subject to conditions under section 325 (2) and 326 (2) (c) of the Criminal Procedure Code.

GRATIAEN, J.

The accused in this case is 10 years and 6 months old. He was charged before me and an English speaking Jury with having murdered a child aged 8 on 3rd February, 1950. Pending his trial, the learned Magistrate remanded the accused to the Jayasekera Home in Colombo which he regarded as less unsatisfactory for the purpose than any other available institution. I am glad to learn from the Probation Officer that those in charge of the Jayasekera Home have done their best to protect the accused from undesirable association with older delinquents during the period of over 9 months which has unfortunately lapsed before the accused was brought to trial in this Court. Nevertheless, the absence in Ceylon of a single Remand Home reserved exclusively for the detention of young persons awaiting trial is greatly to be deplored.

At the trial, the charge of murder failed ; nor did the evidence disclose that the lesser offence of culpable homicide not amounting to murder had been committed. Indeed, if the testimony of Dr. Abeywardena and Dr. Tisseveerasinghe's had been led with greater precision in the non-summary proceedings on the vital issues relating to the charge of homicide, I am satisfied that commitment to this Court on this grave charge would have been found unnecessary. The case against the accused might well have been disposed of summarily on charges within the jurisdiction of the Magistrate. Dr. Tisseveerasinghe's evidence in this Court proved conclusively that the unfortunate boy alleged to have been murdered by the accused had; in fact died by misadventure, and Dr. Abeywardene's evidence proves that the accused, in any event, did not possess sufficient maturity of understanding to realise that his conduct, wicked and reprehensible though it undoubtedly was, was likely to cause his victim's death. It is right that these facts should be placed on record in view of the publicity which this case has received, particularly in the neighbourhood in which the accused and his parents reside. The Jury was satisfied, the Crown has now conceded, and I am convinced that no criminal responsibility attaches to the accused for the tragic death of young Rupasinghe.

The accused tendered a plea of guilt on the charge of wrongful confinment punishable under section 333 of the Penal Code. This plea was very properly accepted by the Crown and by the Jury. The accused is a lad of tender years and the question of sentence has caused me grave anxiety. After the trial, I adjourned proceedings until today in order that I might

have the assistance of some official evidence in order to determine the punishment most appropriate to the case.

The evidence led before me today brings home once more the inadequacy of Institutions established for the treatment of young delinquents in this country. The accused was barely 10 year sold when he committed this crime in circumstances which show that he is possessed of much wickedness and considerable cunning. On the other hand, he is bright and intelligent and, in the opinion of Dr. Abeywardena and of the Probation Officer, he is co-operative and amenable to discipline. Under proper guidance of competent persons, there would be good reason to hope that he can be diverted from his present evil propensities and that he may in due course become a decent citizen. If, however, he is left in an environment in which unjustifiable reproaches of his fellow villagers and his school friends that he is a murderer will take sometime to die down. I fear that he is almost certain to develop into a danger to society. It is desirable that he should be given the opportunity of starting a new life in new surroundings where the stigma attached to the crime is less likely to be felt. He is too young to qualify for admission in a Borstal Institute.

The Children and Young Persons Act which was enthusiastically enacted by the Legislature 12 years ago was specially designed to deal with cases of this sort, but administrative difficulties, which I trust will one day be overcome, have so far prevented the Ordinance being brought into operation, the ideal solution of sending the accused to an "Approved School" is therefore not available. Similarly, it is admitted that no Government Reformatory School exists to which this lad of tender years can be sent under the provisions of the Youthful Offenders' Ordinance. The Probation Officer is of opinion that it is undesirable to send the accused to the only Certified Industrial School in Ceylon which is functioning at Maggona. I am therefore left to devise some other means of dealing with the present case.

Section 21 of the Children's and Young Persons' Ordinance declares that "Every Court in dealing with a child or young person who is brought before it, either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings and for securing that proper provision is made for his education and training." Although the Ordinance is not yet in operation, the underlying principle adopted by the Legislature in passing section 21 must and should always guide Courts in dealing with cases of juvenile deliquency. The sad inadequacy of the machinery of the unproclaimed Ordinance prevents me today from making an entirely appropriate order in this case. In the circumstances in which I am placed, I think the best I can do in the interests of the accused and the society is to make an order under section 325 (2) of the Criminal Procedure Code in the following terms :—

"I discharge the accused conditionally on his entering into a recognizance with his father as surety in the sum of Rs. 25 to be of good behaviour and to appear in this Court when called upon at any time within three years from today".

For the purpose of securing that the accused shall be assisted to lead an honest and industrious life, I further make order under section 326 (2) (c) of the Criminal Procedure Code that the recognizance entered into by the accused shall contain the following conditions :—

(*a*) that the accused shall throughout the prescribed period of 3 years be placed under the Supervision of the Probation Officer for the time being in charge of the Colombo Probation Unit ;

(*b*) that he shall as soon as arrangements be made for the purpose reside and receive his education and treatment at the Child Protection Society Home in Maharagama, or should this arrangement prove impracticable at any future date at such other similar Institution as the Probation Officer in charge of the accused shall select with approval of the Court;

(*c*) that he shall attend The Government Child Guidance Clinic in Colombo for such treatment as the Officer in Charge of the Clinic shall notify the Probation Officer to be necessary and desirable;;

(*d*) that he shall obey all such orders or directions as may be issued to him by the Probation Officer for the purpose of securing his good conduct and welfare".

I further direct that should the Probation Officer at any time consider that, in the interests of the accused and of society, the present order should be varied or modified in any way he should refer the matter to this Court for further directions.

It was brought to my notice that there are technical difficulties which prevent me from making the appropriate order under the Probation Offenders' Ordinance No. 42 of 1944, the

chief difficulty being that, when the present offence was committed, Avissawella had not been proclaimed a "Judicial Division" for the purposes of that Ordinance. Nevertheless, I express the hope that, for all financial purposes, the order which I make today shall be regarded as a probation order so as to permit the expenses involved in maintaining the accused at Maharagama or in any other Institution will be met from public funds.

Present : BASNAYAKE J. & GUNASEKERA, J.

NATIONAL BANK OF INDIA LTD. vs. KALIAPPAPILLAI & OTHERS.

S. C. 89—D. C. Colombo (Inty.) 18570/M.
Argued on : 25th October, 1950.
Decided on : 2nd November, 1950.

Civil Procedure Code, section 423—Evidence on commission—What the Court must be satisfied with before granting application for—If application premature can a second application be made—Factors that should be taken into consideration.

Held : (1) That in an application for the issue of a commission under section 423 of the Civil Procedure Code for the examination of a witness at any place not residing within the Island, the petitioner must satisfy the Court that the evidence of that witness is necessary.

(2) That where the Court is of opinion that at the stage at which the application is made it is premature to state whether such a witness is necessary or not, the petitioner may be permitted to make a subsequent application.

Per BASNAYAKE, J.—"We wish to observe that in seeking the assistance of English decisions for determining the true scope of our enactment the language of the Code should not be overlooked, and it should be borne in mind that the English rule is not in exactly the same terms as our enactment. Another factor that should be taken into account in considering the older cases is the vast improvement in the speed of travel in modern times."

N. K. Choksy, K.C., with *Vernon Wijetunge*, for the defendant-appellant.
H. V. Perera, K.C., with *R. Manikkavasagar*, for the plaintiff-respondent.

BASNAYAKE, J.

The plaintiffs in this action are three persons carrying on business in partnership under the name style and firm of K. M. Kaliappapillia and Company in Colombo, and the defendant is the National Bank of India, Limited.

The plaintiffs seek to recover a sum of Rs. 65,285·32 from the defendant Bank being damages sustained by the plaintiffs in consequence of the defendant Bank acting contrary to the terms of the letter of credit granted by them.

The letter of credit is in the following terms :—

CONFIRMED IRREVOCABLE AND WITHOUT CREDIT

Bank No. 84/2190 Amount £16,800 Stg.

To the Manager,
National Bank of India, Ltd., 5th December, 1946.
Colombo.

Dear Sir,

I/We shall feel obliged by your giving authority to your Agents in Lourenco Marques by cable to negotiate the drafts of Messrs. Dayal Khatau & Sons, Lourenco Marques on me/us to the extent of Pounds Sixteen Thousand Eight Hundred Sterling drawn at Sight against Shipping documents (consisting of on Board Bill of Lading, Invoice and Policy and/or Certificate of Insurance covering Marine and War Risk) representing Shipment or Shipments of Two Hundred Tons White Juwari and Two Hundred Tons Bajree. Import Licence EFS/EA/46/230. Part shipment allowed. All prices per ton of 2,240 lbs. C. I. F. Colombo.

It is understood that the Bank is not to be responsible for the genuineness or the accuracy of such shipping documents if apparently in order.

In consideration of such drafts or documents being purchased or negotiated by your Agents in Lourenco Marques I/we hereby agree duly to accept and pay the same at maturity, provided they shall not exceed in the whole the sum of Pounds Sixteen Thousand Eight Hundred Sterling as aforesaid and provided such draft or drafts be so negotiated 15-1-47. E2 Cr. 3729 of 4-12-46.

Yours faithfully,
K. M. KALIAPPA PILLAI & Co.
Sgd.....
Manager.

This credit is confirmed by
the National Bank of India, Ltd.

Sgd. E. MACONOCHIE
p. Manager.

The plaintiffs contend that the defendant Bank contrary to the terms of the letter of credit paid money on three drafts which represented a shipment of 200 tons of millet.

The defendant denies that it acted outside its authority and asserts that the drafts were negotiated in conformity with the plaintiffs' authority.

Before the trial and the settlement of the issues the Proctors for the defendant Bank filed an application under section 423 of the Civil Procedure Code praying that a Commission be issued to Capitao Antonio Dos Santos Figueiredo, the President of the Government Exchange Council and Director of Statistics of Lourenco Marques, to record the evidence of the following witnesses :—

1. Prahbudas Bhimjee, Managing Partner of Messrs. Popatlal & Companhia of Lourenco Marques,
2. Ramji Meghji, Manager of Messrs. Damodar Mangalji & Co., of Lourenco Marques,
3. Damodar Bonavidas, President of the Indian Chamber of Commerce of Lourenco Marques.

The petition alleged that the witnesses are not in the employ of the petitioner and that the witnesses are unable to come to Colombo to give evidence and that it is necessary in the interests of justice that the evidence of the witnesses be recorded on commission. It is also alleged in the petition that the evidence of these witnesses is necessary in order to ascertain whether the term "Millet" and "Bajree" are recognised as applicable to the same commodity in Lourenco Marques, South Africa. It is contended for the petitioner that this investigation is necessary because the goods were described in the relative Bill of Lading as "Millet Seed" and in the invoice as "Millet (Bajree)".

Questions of law which effect the main issues which are likely to arise in the case were argued before us, but we wish to refrain from expressing any opinion on those questions as the trial of the case is yet to take place.

In regard to the question that arises for decision on this appeal, it is sufficient to say that a person making an application for the issue of a commission for the examination of a person residing at any place not within the Island must satisfy the Court that his evidence is necessary. In the instant case the proceedings have not reached the stage when it is possible for a Judge to state whether the evidence of the persons mentioned in the petition of the petitioner is necessary or not. We have construed the Judge's order as amounting to a finding that the evidence of those witnesses is not necessary, but it does not appear from the proceedings that the learned District Judge focussed his attention on the provisions of section 423 of the Civil Procedure Code. That sections reads :—

"When any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within the Island is satisfied that his evidence is necessary, the Court may issue such commission.

We wish to observe that in seeking the assistance of English decisions for determining the true scope of our enactment the language of the Code should not be overlooked, and it should be borne in mind that the English rule is not in exactly the same terms as our enactment. Another factor that should be taken into account in considering the older cases is the vast improvement in the speed of travel in modern times.

On the material before us we are of opinion that it is premature to state whether the evidence of the witnesses named by the petitioner is necessary or not. After the issues have been settled or even at a later stage it may appear that the evidence of any particular person or persons residing at any place outside the Island is necessary. Then it is open to the party relying on the evidence of such witnesses to make an application for the issue of a commission.

As we are not satisfied on the material before us at this stage that the evidence of the witnesses cited by the petitioner is necessary, we would dismiss the appeal with costs.

In order to remove doubts as to the right of the petitioner to make a fresh application under section 423 of the Civil Procedure Code should it become necessary to do so in the course of the trial, we wish to record that the dismissal of this appeal will be no bar to such an application.

Appeal dismissed.

GUNASEKERA, J.
I agree.

Present : PULLE, J.

GUNAWARDENA, ASSISTANT ENGINEER, C. T. O. *vs.* VYTHILINGAM

Application No. 398 *of* 1950. M. C. Jaffna 18769
Argued on : 12*th September*, 1950.
Decided on : 2nd October, 1950.

Telecommunication Ordinance, No. 50 *of* 1944, *section* 43—*Construction of—Jurisdiction of Magistrate under section* 152 (3) *of the Criminal Procedure Code to try offences indictable under the Ordinance.*

Held : That on a proper construction of section 43 of the Telecommunication Ordinance the jurisdiction of Magistrates under section 152 (3) of the Criminal Procedure Code remains unaffected in every case where the Attorney-General has not sought to exercise the special power conferred on him by the proviso to section 43.

A. Mahendrarajah Crown Council in Support.

PULLE, J.

This is an application by the Attorney-General to revise the proceedings in a prosecution under the Telecommunications Ordinance No. 50 of 1944, on the ground that the learned Magistrate had no jurisdiction to try the offences with which the accused person was charged. There were three charges laid for breaches of section 26 (1) (d) of the Ordinance. These breaches constituted offences punishable with a fine not exceeding Rs. 1,000 and with a further fine not exceeding Rs. 500 for every week the offence continued and, in default of payment of such fine, with imprisonment of either description for a term not exceeding six months. The trial of these offences being beyond the ordinary jurisdiction of a Magistrate's Court the learned Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Court and disposed of the case. It is now submitted that he was wrong in trying the case summarily in his capacity as District Judge and that he should have taken non-summary proceedings.

It is argued by learned Crown Counsel that the power of a Magistrate to try an offence indictable in the District Court has, so far as such offences under the Telecommunications Ordinance, No. 50 of 1944, are concerned has been taken away by the terms of section 43 of the Ordinance. The question which I have to decide is whether this submission is correct. Section 43 reads :—

> "Offences under this Ordinance which by reason of the amount of the penalties with which they are punishable are not within the summary jurisdiction of a Magistrate's Court, may be tried by a District Judge on committal from a Magistrate's Court, and such District Court, in cases where the punishment assigned to such offences exceeds the ordinary jurisdiction of a District Court, may award so much of the punishment assigned thereto as District Courts are by law empowered to award
>
> Provided that if the Attorney-General certifies that any such offence may be tried by a Magistrate's Court, it shall be competent for such Court to take cognizance of the offence, and to award in respect thereof so much of the punishment assigned thereto as Magistrate's Courts are empowered by law to award ".

Now there are offences under the Ordinance which are punishable summarily by a Magistrate in the exercise of his ordinary jurisdiction. Vide, for example, sections 28, 29, 30 and 34. Certain other sections provide punishment for offences indictable in the District Court, as for example, sections, 26 and 38. Offences such as those punishable under sections 31, 32 and 33 would be triable exclusively by the Supreme Court, but for the provisions in section 43.

The first paragraph of section 43 deals with all offences which under the Ordinance are indictable and it empowers a District Judge to try on indictment even offences otherwise triable in the Supreme Court subject to the restrictions mentioned in that paragraph. I am unable to read into the section an imperative provision that in all cases where an offence is indictable in the District Court a Magistrate has no option but to take non-summary proceedings. There is nothing in the proviso which in my opinion provides an argument in support of learned Crown Counsel's contention. So far as offences which, by reason of the punitive limits, are triable only in the Supreme Court are concerned the proviso to section 43 makes them summarily triable. In regard to other indictable offences, namely, those triable in the District Court also, the proviso deprives Magistrates of the discretionary power either to take non-summary proceedings or to assume jurisdiction under section 152 (3) of the Criminal Procedure Code. On a proper construction of section 43 the jurisdiction of Magistrates under section 152 (3) remains unaffected in every case where the Attorney-General has not sought to exercise the special power conferred on him by the proviso to section 43.

The application is refused.

Application refused.

IN THE COURT OF APPEAL

Present : TUCKER, SINGLETON & JENKINS, L.JJ

SHORE *vs.* MINISTRY OF WORKS AND OTHERS

Delivered : 24th May, 1950

Contract—Member of Club managed by elected Committee—Club not proprietary—Injured on the premises by reason of defective building—Action based on implied warranty by Committee of reasonable safety of premises—No privity of contract between plaintiff and the Committee.

The plaintiff was a member of a club called "Corsham Community Centre", who were licencees of a hall used for club activities. Under the rules of the Club a committee of management was elected by the members, and was authorized under the rules merely to manage the affairs of the Club and to provide, at their discretion, to what use the centre should be put.

The plaintiff while attending an entertainment without payment at the hall, which was one of the privileges of the membership, was injured by bricks from a damaged roof. She sued the committee of management on the ground that the contract between herself and the committee contained an implied warranty that the premises were and would be as safe for the purposes for which she was admitted as member as reasonable care and skill could make them.

Held : That the only contract the plaintiff made was when she paid her subscription to the Secretary of the Club as representing its members, and that was only a contract with the other members of the Club that she should be admitted to membership under its rules, and that the rules did not impose on the committee of management the liability which the plaintiff sought to put on them.

Per JENKINS L. J.—"If this had been a proprietary club and the proprietors had admitted the plaintiff to membership for reward it may well be that the principle stated in MacLenan vs. Segar (Supra) would have applied and the plaintiff would have been entitled to succeed."

Cases referred to : *MacLenan vs. Segar* (1917) 2 K. B. 332.
Francis vs. Cockrell 23 L. T. 466
Hall vs. Brooklands Auto Racing Club 1933, 1 K. B. 205.
Prole vs. Allen 1950 1 All E. R. 476

TUCKER, L.J.

This is an appeal from a decision of Lynskey, J. given at Bristol Assizes in an action brought by the plaintiff, Mrs. Shore, originally against the Ministry of Works and the members of the committee of management of the Corsham Community Centre. At the trial the case against the Ministry of Works was abandoned and the case proceeded only against the members of the committee, and Lynskey, J. decided in favour of the defendants.

The Ministry of Aircraft Production had during the war, occupied a large area in or about Corsham in Wiltshire and there grew up there a number of prefabricated buildings and a village for the workers known as the Married Quarters Estates, Corsham. In 1943 some of the residents were minded to form what is called a community centre, and for that purpose to form a club. In due course a club was formed and its constitution and rules appear in a document called "Constitution" and dated October, 1944, as follows :—

"(1) The name of the centre shall be the "Corsham Community Centre" (2) Its aims and objects shall be : (*a*) to promote the well-being of the community resident in the Married Quarters Estates, Corsham. (3) Membership : Membership of the centre shall be open to adult members of Corsham Married Quarters Estates and to Corsham and District residents and to such other persons as the management committee shall approve. (4) Fees of membership shall be as follows : *5s. 0d.* per person per annum. (5) Application for membership shall be made on official application forms obtainable from the Secretary and the members of the management committee" Rule (6) deals with the election of the management committee, and there are provisions for the retirement of members of the committee annually. Rule (7) provides for the appointment of officers, namely a Chairman, Vice-chairman, honorary Treasurer, and three trustees in whom the property of the centre shall be vested. Rule (8) provides the procedure for nominations to the management committee. Rule (9) provides for meeting and for the summoning of general meetings. Rule (10) makes provisions for banking and for auditing of accounts and for the signing of cheques, and so forth. By Rule (11) "the use of the centre shall be at the discretion of the management committee," and Rule (12) provides the procedure for altering the constitution, which can only be done by a two-thirds majority at the annual general meeting. Throughout this document and throughout the case the

word "centre' is used in two senses. The club itself is called the Corsham Community Centre and it carried on its activities in a hall, referred to as a community centre. At the material time the hall was the property of the Ministry of Aircraft Production, although at the time of this action it was owned by the Ministry of Works, and the Ministry of Aircraft Production had, in a letter of December, 30th 1943, granted a licence to the club to use the premises in accordance with that letter. I think it is clear that the club were licensees and nothing more, and, furthermore, that it was the club as a whole who were the licensees as distinct from the committee. The committee merely had authority, under the rules, from the members to manage the affairs of the club and to provide, at their discretion, to what use the centre should be put.

In March, 1947, the plaintiff was a member of this club having paid her subscription in October, 1946. In March, 1947, she attended some entertainment in this hall as one of her privileges of membership. The entertainment was given for club members only and they attended without payment beyond that which they had already made for membership of the club. On the night in question there was an exceptional gale which caused damage owing to the insecure construction of the roof, some bricks became dislodged, and the plaintiff was struck by a brick and suffered injuries as a result. The Judge has not found it necessary to assess the damages which he would have awarded her if he had found the defendants to be responsible, but he has found that the premises were not as safe as reasonable care and skill on the part of anyone, could make them.

The present case, however, was not framed in negligence. The plaintiff put her whole case on contract and pleaded that the contract between herself and the committee of management contained an implied warranty that the premises were as safe for the purpose for which she was admitted as a member as reasonable care and skill could make them. Counsel for the plaintiff founds his argument on the decision of McCardie J. in *MacLenan vs. Segar* (1917) 2 K. B. 332. That case dealt with the relationship of an innkeeper and his guest, and in his judgment McCardie J. said:

"So too as to premises generally the rule, I think, is the same, and upon the decisions as they stand may be stated as follows, namely: where the occupier of premises agree for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises; and the headnote to *Francis vs. Cockrell* 23 L.T. 466 must to this extent be corrected. But subject to this limitation it matters not whether the lack of care or skill be that of the defendant or his servants, that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises".

That statement of law was approved by this Court in 1933 in *Hall vs. Brooklands Auto Racing Club* 1933 1 K.B. 205 a case dealing with a visitor who was admitted for reward to witness motor racing at Brooklands.

Counsel for the plaintiff submits that, on its facts, the present case comes within the principles laid down in *MacLenan vs. Segar* (*Supra*) He says that when the plaintiff joined this club she made a contract with the committee and that there is to be implied into that contract a warranty in the terms stated by McCardie J. In my opinion, however, the present case is altogether different from *MacLenan vs. Segar* (*Supra*) and *Hall vs. Brooklands Auto-Racing Club* (*Supra*). The only contract that the plaintiff made was when she paid her subscription to the secretary of the club as representing its members, and that in my view, was only a contract with the other members of the club that she should be admitted to membership. She was admitted to membership on the terms of the rules governing the Club, contained in the document called the "Constitution" which I have read. In that document are to be found all the matters which govern her relationship with the other members of the club, and the duties of the management committee and any authority which they derive from the body of members. There is nothing in the constitution which could impose on the committee the liablity which the plaintiff seeks to put on them. After she had become a member of the club, whenever she attended this hall in the circumstances in which she was there on this occasion, she was merely one member of the club making use of premises of which the club as a whole were

licensees, and I do not think that she has any remedy against the committee based on this contract. What the position might be had negligence been alleged does not arise.

We have been referred to *Prole vs. Allen* 1950 1 All E.R. 476 a case recently decided by Pritchard, J. at the Somerset Winter Assizes in which he had to deal with an action brought by a member of an unincorporated members' club against some members of the committee and a steward of the club. In that case the action was founded solely in tort, the learned Judge held that the members of the committee owed no duty to the plaintiff, and accordingly as against them, the action failed That case does not assist in the present appeal, the case on behalf of the plaintiff here not having been founded on tort.

In dealing with the present matter, Lynskey J. having referred to *MacLenan vs. Segar* (*Supra*) and *Hall vs. Brooklands Auto-Club* (*Supra*) said :

"But it seems to me here that the real contract made by Mrs. Shore in joining this club and in paying her subscription was not made with the committee. It was a contract made with all the other members of the club, and entitled her, together with all the other members of the club, to enjoy the amenities of the club and become a part-owner of the property of the club, and also to have a rightful share in this licence which the club had from the Minister. In my view, the management committee of the club were doing no more than acting as agents for all the members. They were elected by the members and they were exercising the powers of all the members as agents for those members. They were not a body which was contracting as a separate body with individual members, nor had they any separate entity for the purpose of contracting with outside who came with members of the club. It was shown in the course of the club's defence that the members of the club might be vicariously liable for particular negligence of the members of the committee, but I cannot read into this contract, entered into when the plaintiff joined the club, a warranty by the committee that, in fact, the club premises which they only had a licence to use, would be as safe as reasonable care and skill could make them. If they had made any such contract on behalf of the club and for the club, they would have been undertaking to do something which they had no legal right to do, and they could not implement their contract. I cannot for one moment read into this contract such a warranty." That last paragraph has been criticised by Counsel for the plaintiff who has said that, for instance, *vis-a-vis* a member of the public who might be attending an entertainment at this club, it would be a curious result if the club or its committee could escape liability, based on the doctrine of *MacLenan vs. Segar* (*Supra*) by reason of the fact, unknown to the visiting guests, they were only the licensees of the premises with the limited rights and powers attached to licensees. It is not necessary to press a concluded view with regard to this because it was not the basis of the judgment of Lynskey, J. but as at present advised, I am inclined to feel that there is some substance in Counsel's submission on that part of the case. For the reason I have stated, I do not think the plaintiff has any remedy based on contract which entitled her to recover judgment against the committee of the club, whom she is now suing. The appeal must fail.

SINGLETON, L.J., : I am of the same opinion. The plaintiff's action against the committee of management was based entirely on contract. It was alleged in the statement of claim that the contract relied on, which was a contract of membership, included an implied warranty that the club premises would be as safe as reasonable care and skill could make them. I am not prepared to hold that any such term was to be implied into this contract. I agree with the submission made by Counsel for the defendants that one must look at the circumstances and see who the parties are in considering whether or not a term such as this can be implied into a contract between the plaintiff and the person with whom she contracted or those on whose behalf he contracted with her.

In the judgment of McCardie, J. in *MacLenan vs. Segar* (*Supra*) to which my Lord referred, and which was approved in this Court in *Hall vs. Brooklands Auto Racing Club* (*Supra*) the learned Judge said :

"Where the occupier of premises agree for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them".

I draw attention to the words "agrees for reward," I do not think this is such a case. When the plaintiff became a member of the community centre soon after its formation, she became a member on the same terms as the other members and entitled to the same rights as they had. At some time thereafter, it may be, she took part in electing a committee of management, but she was not one with whom the occupier (even if the club could not be regarded as the

occupier) agreed for reward that she should have the right "to enter and use" the premises—to use the words of McCardie, J. I find it unnecessary to read a term of this kind into the contract, and I think it would be wrong to do so. For that reason I agree that the appeal must be dismissed.

JENKINS, L.J. : I agree. I confess to feeling considerable sympathy with the plaintiff who met with this accident, the liability for which, it seems she can bring home to nobody. On the other hand, it would, to my mind be very serious if the elected members of the committee of management of a club of this kind found themselves saddled, by virtue of their office, with a warranty as to the safety of the club premises. That result would be surprising indeed.

If this had been a proprietary club and the proprietors had admitted the plaintiff to membership for reward, it may well be that the principle stated in *MacLenan vs. Segar* (*Supra*) would have applied and that the plaintiff would have been entitled to succeed. Once it appears, however, that this was a members' club and not a proprietary club, then it seems to me there is an end of the case, for the contract which the plaintiff made in October, 1946, was an ordinary contract of membership of a members' club, and the rights she acquired under it were simply those which she was entitled to enjoy in common with the other members, including the right from time to time to use the club premises in accordance with the rules, with all their defects or imperfections. There was nothing in the nature of a special contract between the plaintiff and the committee of management. Her relationship to the committee of management was that of any other member. The persons from time to time elected to the committee of management were members elected by their fellows to manage the affairs of the club on behalf of the general body of members, and clearly they could not, by virtue of that relationship, be held to have given a warranty to the other members of the club as to the state or condition of the building. The considerations thus briefly summarised and more fully dealt with in what my Lords have already said lead me also to the conclusion to which they have come, that notwithstanding to bring home any legal liability against any of the defendants, and the appeal should, therefore, be dismissed.

Appeal dismissed with costs.

Present : NAGALINGAM, J. & PULLE, J.

KANDAPPA vs. SIVAGNANAM

S. C. 16 (M)—D. C. Point Pedro No. 3296.
Argued on : 24th October, 1950.
Decided on : 8th November, 1950.

Burden of proof—Civil action—Defendant not calling any evidence in rebuttal when called upon—Assessment of oral evidence—Onus on the defendant to lead evidence in rebuttal.

The plaintiff sued the defendant for the recovery of Rs. 2,500 alleged to have been advanced on a paddy transaction which was illegal. The defence was a complete denial of the transaction. The plaintiff gave evidence and also called one S to support his case. The defendant's proctor when called upon for the defence stated that he was not calling any evidence. The learned District Judge disbelieved the plaintiff and his witness and accordingly dismissed his action.

Held : That where a defence was called upon and no evidence was at all forthcoming a verdict that the plaintiff's evidence is palpably false cannot be supported.

Per Pulle, J.—"With great respect, the learned Judge's approach to the question whether the three telegraphic money orders had been sent is open to the criticism that, before drawing an adverse inference from the fact that the money order receipts had not been produced, he should have considered whether the reason given by the plaintiff for his failure to produce them was itself false. The reason given by the plaintiff for the non-production of the corroborative documentary evidence was inexcusable but it cannot be a fair appraisement of the oral evidence of the advance of Rs. 1,700 to characterize it as false from the bare circumstance that the plaintiff failed to produce the receipts.

C. Thiagalingam with *K. Rajaratnam*, for the plaintiff-appellant.

Wesley D. Thamotheram, for the defendant-respondent.

PULLE, J.

This is an appeal by the plaintiff from the judgment of the learned District Judge of Point Pedro dismissing an action instituted by him against the defendant-respondent for the recovery of a sum of Rs. 2,500 alleged to have been advanced to him in June, 1947, for the supply of paddy. The defence was a complete denial of the transaction. At the trial the plaintiff gave evidence and called as a witness one Subramaniam Aiyadurai who was alleged to have witnessed at Karaveddy the payment of Rs. 1,700. No evidence was given in support of the defence. The finding of the learned Judge was expressed in the following words :—

"The impression left on my mind by both the plaintiff and Aiyadurai is that they were relating a story which is palpably false. I do not believe that any money was paid by the plaintiff into the hands of the defendant".

Among the issues raised were whether the transaction on which the plaintiff based his claim was illegal and, if so, whether the action was maintainable. Naturally, these issues did not require to be answered in view of the finding that the transaction spoken to by the plaintiff never took place.

The argument urged on behalf of the plaintiff is that, especially in view of the fact that no evidence was adduced to contradict the evidence on which the claim was based, the plaintiff had discharged the burden resting on him in a civil suit and that there was nothing in the evidence so intrinsically improbable as to justify the finding that the claim was palpably false.

Before discussing the evidence for the limited purpose of testing the reasons given for rejecting it *in limine* it is important to bear in mind the circumstances under which both parties were, so to speak, compelled to go to trial. On the 23rd September, 1949, the date for which the trial was fixed, the plaintiff was present and the defendant was absent. The plaintiff was represented by Proctor and Counsel and the defendant by his Proctor. The latter moved for a postponement on payment of costs on the ground that his client who was the Chairman of a Village Committee in the Eastern Province was held up in another case and he produced a telegram to that effect. The plaintiff's Counsel consented to a postponement probably for the reason that the plaintiff himself was not sufficiently ready for trial. The postponement was refused and it is not made a ground of complaint, and certainly it is not open to the plaintiff to make a complaint, that the learned Judge acted otherwise than in properly exercising his discretion in the matter.

Briefly stated the plaintiff's evidence was that he paid Rs. 1,700 to the defendant at Karaveddy in June, 1947, and sent Rs. 1,200 about a week after from Trincomalee on three telegraphic money orders. In cross-examination he admitted it was an offence to transport paddy from the Eastern Province without a permit and that he had no permit. In reply to the Court he said, "This was an illegal transaction".

In regard to the telegraphic money orders the plaintiff said he did not have the receipts and that he had sent a person named Sebastian to Colombo to bring them. In his answer the defendant alleged that the action had been instituted maliciously because he was suspected by the plaintiff of giving information leading to the seizure of paddy which the plaintiff attempted illicitly to transport. This alleged motive for instituting a false suit was put to the plaintiff and denied by him.

At the close of the plaintiff's case the record reads that the Proctor for the defendant informed the Court that he was not calling any evidence. The construction which I place on this part of the record is that it was when the learned Judge called upon for the defence that the Proctor intimated to him that he was not calling any evidence. Vide section 163 of the Civil Procedure Code.

Without any way suggesting how the case might have ended had both parties been in a position to lead all the material evidence, the judgment calls for comment in two or three material respects. It cannot be controverted that a party to a civil suit adducing evidence in discharging the burden on a question of fact is definitely at an advantage where no evidence, oral or documentary, is led in rebuttal by the opposite party. Where, as in this case, the defence was called upon and no evidence was at all forthcoming for the defendant a verdict that the plaintiff's evidence is palpably false cannot, in my opinion, be supported.

With great respect, the learned Judge's approach to the question whether the three telegraphic money orders had been sent is open to the criticism that, before drawing an adverse inference from the fact that the money order receipts had not been produced, he should have considered whether the reason given by the plaintiff for his failure to produce them was itself false. The reasons given by the plaintiff for the non-production of the corroborative documentary evidence was inexcusable but it cannot be a fair appraisement of the oral evidence of the advance of Rs. 1,700 to characterize it as false from the bare circumstance that the plaintiff failed to produce the receipts. A correct direction on this point might have influenced the learned Judge's mind differently in assessing the evidence relating to the Karaveddy transaction.

All things considered it seems to me that there ought to be a re-trial before another Judge. I would set aside the decree *pro forma* and remit the case for the purpose indicated. The appellant will have the costs of appeal and all other costs incurred up to now will be costs in the cause.

NAGALINGAM, J. *Set aside and sent back.*

I agree.

Present : GRATIAEN, J.

S. KARALINA vs. EXCISE INSPECTOR, MATARA

S. C. No. 995—*M. C. Matara, No.* 19479

Argued on : 29th November, 1950
Decided on : 4th December, 1950

Excise Ordinance—Illegal search—Evidence discovered on—Is such evidence admissible—Weight to be attached to such evidence.

Held : (1) That evidence discovered on an occasion when the accused's premises had been illegally raided without the authority of a search warrant and in contravention of the provisions of section 36 of the Excise Ordinance is admissible to establish a charge under the Excise Ordinance, but the weight to be attached to such evidence depends on the facts of each case.

(2) That where such evidence has not been challenged as untrue or unreliable, the allegedly illegal entry and search have no bearing on the case.

Cases referred to : *Bandarawella vs. Carolis Appu* (1926) 27 N. L. R. 401.
S. I. Mirigama vs. John Singho (1926) 4 Times 71.
Silva vs. Menikrala (1928) 9 Law Recorder 78.
Almeida vs. Mudalihamy (1929) 7 Times 54.
Attorney-General vs. Barthewyex (1932) 1 C. L. W. 280.
Peter Singho vs. Inspector of Police, Veyangoda (1949) 42 C. L. W. 15.
Murin Perera vs. Wijesinghe (1950) 51 N. L. R. 577.
Lawrie vs. Muir, 53 Journal of Criminal Law 81.
McGovern vs. King's Advocate, 55 Journal of Criminal Law 303.
People vs. Before, 242 New York Reports 13.

Vernon Wijetunge, for accused-appellant.
E. H. C. Jayetileke, Crown Counsel, for Attorney-General.

GRATIAEN, J.

This is an appeal against a conviction under the Excise Ordinance. According to the evidence of Inspector Weerasinghe, whose veracity was not challenged by the defence, the accused's house was raided in her presence by a party of excise officers. In the kitchen they found a quantity of toddy which admittedly was far in excess of the amount permitted by law, and in the absence of some satisfactory explanation from the accused who was the chief occupant of the premises, the commission by her of an offence punishable under section 43 (*a*) of the Ordinance was clearly established.

The conviction has been however on the ground that the Inspector's evidence is legally inadmissible because the facts to which he testifies were discovered on an occasion when the accused's premises had been illegally raided without the authority of a search warrant and in contravention of the provisions of section 36 of the Excise Ordinance. I shall assume—although I do not hold—that the raid was not authorised by law, but I really do not see how, in the present case, this circumstance can vitiate the conviction.

There is no provision in the Evidence Ordinance which renders a relevant fact (such as the detection of an offence) inadmissible merely because the fact has been discovered in the course of an illegal search, and as far as offences punishable under the Excise Ordinance are concerned, there is no other express statutory prohibition against the admission of such evidence. An abuse of official power may, of course, expose the offender to a claim for damages, to certain penal consequences, and, I trust, to stern disciplinary action; moreover in an appropriate case it would doubtless justify a Court of Law in viewing the evidence tendered with suspicion. But I do not see how, in the present state of the law, relevant evidence can be ruled out *ab initio* on the ground that it was obtained by improper means. This has been laid down in a long line of decisions of this Court. In *Bandarawella vs. Carolis Appu*, (1926) 27 N. L. R. 401, Jayewardene, A.J., held that there was no rule of law requiring the rejection of such evidence. In *S. I. Mirigama vs. John Singho*, (1926) 4 Times 71 and in *Silva vs. Menikrala*, (1928) 9 Law Recorder 78, Garvin, J., held that "evidence which is legally admissible does not cease to be admissible merely because that evidence was discovered by

an Excise Officer who did not comply with the requirements of section 38 of the Ordinance when searching premises without a warrant". In *Almeida vs. Mudalihamy* (1929) 7 Times 54, Lyall-Grant, J., took the same view, and so did Drieberg, J., in *Attorney-General vs. Barthewyek* (1932) 1 C. L. W. 280. These decisions were recently followed by Basnayake, J., in *Peter Singho vs. Inspector of Police, Veyangoda*, (1949) 42 C. L. W. 15.

The fallacy in the appellant's submission seems to lie in some confusion between the *admissibility* of the evidence tendered and the *weight* which should be attached to such evidence when its accuracy is disputed. Mr. Wijetunge claims that the decision in *Murin Perera vs. Wijesinghe*, (1950) 51 N. L. R. 377, supports his contention. I do not agree. As I understand the judgment in that case, the conviction was quashed by my brother Nagalingam on a question of fact, and in *assessing the evidence for the prosecution*, the learned Judge very properly, if I may say so, took into consideration, apart from other circumstances, the fact that in his opinion the raid conducted by certain Excise officers was in contravention of section 36. It is correct that Nagalingam, J. considered that the soundness of the view laid down in three of the cases which I have cited "may have to be reconsidered in an appropriate case". I do not understand his judgment to suggest, however, that the earlier rulings of this Court should not be regarded as binding authority unless they are over-ruled or set at nought by legislation.

I have not been able to discover any decisions of the English Courts expressly touching this question, but I find that in Scotland the Court of Sessions (Vide *Lawrie vs. Muir* 53 Journal of Criminal Law 81) adopted the view that "all irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible". Lord Cooper said "the law must strive to reconcile two highly important interests which are liable to come into conflict—(*a*) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (*b*) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any formal or technical ground". The full text of the judgment is not available to me, but the Scottish Courts now seem to favour the *admission* of evidence, however improperly obtained, in cases of serious crime, and its *rejection* in cases of minor statutory offences. (Vide also *McGovern vs. King's Advocate*, 55 Journal of Criminal Law 303). However that may be, it is important to remember that in this country questions affecting the admisibility of evidence are regulated by statute, and that it is for the legislature alone to decide whether in the interests of the community the admissibility of evidence improperly obtained should be curtailed. How the problem should be solved, it is not for me to determine. "On the one side", said Mr. Justice Cardozo of America, "is the social need that crime should be suppressed. On the other, the social need that law shall not be flouted by the insolence of office. *There are dangers in any choice*". (*People vs. Before*, 242 New York Reports 13).

In regard to the present appeal the evidence of the prosecuting officer is clearly admissible, and as it has not been challenged as untrue or unreliable the allegedly illegal entry and search have no bearing on the case. I dismiss the appeal.

Appeal dismissed.

Present : BASNAYAKE & GRATIAEN, JJ.

GABRIEL PERERA vs. AGNES PERERA & OTHERS

S. C. 189—D. C. Colombo 3205

Argued on : 2nd November, 1950
Decided on : 14th December, 1950

Interpretation—Deed conveying portion of land—Correct description by boundaries—Extent inaccurately stated—Does it affect land conveyed—Falsa demonstratio.

Held : That where in a deed the portion of land conveyed is clearly described and can be precisely ascertained a mere inconsistency as to the extent thereof should be treated as a mere *falsa demonstratio* not affecting that which is already sufficiently conveyed.

S. W. Jayasuriya, for 4th defendant-appellant.
C. Jansz, for plaintiff-respondent.

BASNAYAKE, J.

This is a partition action wherein the plaintiff one Biyanwilage Agnes Perera seeks to compel the partition of a land called Delgahawatte. She and eight others are the co-owners of the land.

The defendants filed statements of claim alleging that they were entitled to divided extents of the land. After the evidence of the plaintiff it was agreed between the parties that Lots B, D and E should be excluded and that the action be confined to Lots A and C in Plan No. 3650. The only dispute that remained thereafter was the contest between the plaintiff and the 4th defendant in respect of Lots A and C.

The question argued in appeal is whether deed No. 19041 of 28th May, 1924, (hereinafter referred to as P2) gives the 4th defendant who claims under that deed the entire extent of Lot A, which is 1 rood 22 perches, or only 1 rood and 5 perches out of it. To determine that question it is necessary to examine deed P2. The relevant portion of that deed reads as follows :—

"All that the western half from the divided northern half part of the land called Delgahawatta situated at Meeliya in Weligampitiya in the District of Colombo Western Province and which said western half part is bounded on the north by the ditch of the land which now belongs to.....and others, east by the cart road which separates the half part of this land belonging to Jayasinghe Aratchige Martin Silva, south by the live fence which separates other half part of this land West by the ditch which separates the land belonging to the heirs of Biyanwilage Gordianu Perera containing in extent about one rood and five perches together with the trees plantations and everything thereon, the entire land being bounded on the north by the live fence which separates a portion of this land of Iddagodage Marthinu Perera and others East by the ditch which separates the field belonging to Gorakanage Elias Silva and Tammitage Peduru Perera, South by the limit of a portion of this land of Vedamestrige Peduru Silva, West by the live fence of the land of Biyanwilage Gordianu Perera containing in extent about two acres and one rood....."

It is not denied that P2 describes the boundaries of the land correctly, nor is it denied that the corpus of Lot A is identical with the corpus which falls within the boundaries described therein. Lot A happens to be in fact 1 rood and 22 perches, and not 1 rood and 5 perches as described in the deed.

It is settled rule of interpretation of deeds that, where the portion conveyed is perfectly described, and can be precisely ascertained, and no difficulty arises except from a subsequent inconsistent statement as to its extent, the inconsistency as to extent should be treated as a mere *falsa demonstratio* not affecting that which is already sufficiently conveyed. *Llewellyn vs. Earl of Jersey* (1843) 11 M. and W. 183, 12 L. J. Ex 243.

The 4th defendant is therefore entitled to the whole of Lot A and the plaintiff to Lot C. As in the result there will be no land to be partitioned the partition action will stand dismissed with costs.

The appeal is therefore allowed with costs.

Appeal allowed with costs.

GRATIAEN, J.
I agree

Present : BASNAYAKE, J.

AMUGODAGE JAMIS vs. BALASINGHAM & OTHERS

In the Matter of an Application for a Writ of Mandamus under Section 42 of the Courts Ordinance on C. Batasingham, Elections Officer, Kalutara District

Application No. 573 *of* 1950

Argued on : 27th and 28th November, 1950
Decided on : 29th November, 1950

Mandamus—Election of members to Town Council—Failure of Election Officer to exhibit and publish notice in accordance with sections 17 and 83 (a) of the Local Authorities Elections Ordinance No. 53 of 1946—Validity of election.

In the course of preparing and holding the elections for the newly constituted "Alutgamawidiya Town Council" the Election Officer after preparing the electoral list for Ward No. 7 did not exhibit a notice at the office of the Village Committee stating that the list was open for inspection at the office of the Village Committee, but instead exhibited a notice to that effect at the office of the Muslim Educational Welfare Society. The notice was also not published in Tamil, which was the language of the majority of the inhabitants of the electoral area.

Held : (1) That the publication of notice under section 17 of the Local Authorities Elections Ordinance is vital to the holding of an election and the failure to comply with the requirements of the section avoided the election.

(2) That, as the majority of the inhabitants in the area were Muslims, speaking the Tamil language, the notice should be published in the Tamil language too to satisfy the requirements of section 83 (*a*) of the Ordinance.

Per BASNAYAKE, J.—"Where a statute enjoins a duty in imperative language, it must be performed in the way the law requires it to be done, and it is not open to anyone to substitute any other method of performance even though such method may serve the purpose the legislature had in view."

"It is settled law that where the time prescribed by statute for the performance of a duty which it is alleged has not been performed has passed, the Court when granting a mandamus has power to appoint a date for its performance.",

H. V. Perera, K.C., and *E. B. Wikramanayaka, K.C.*, with *H. W. Jayawardena, G. T. Samarawickrema* and *Abdullah*, for petitioner.

Walter Jayawardena and *Jayaratne, Crown Counsel*, for 1st and 2nd respondents.

D. S. Jayawickrema, for 3rd respondent.

G. E. Chitty and *Tissa Gooneratne*, for 4th respondent.

BASNAYAKE, J.

This is an application for a mandate in the nature of a writ of mandamus on the Elections Officer of the Kalutara District (hereinafter referred to as the 1st respondent) and the Returning Officer (hereinafter referred to as the 2nd respondent) for Ward No. 7 of the newly constituted Town Council of Alutgamwidiya (hereinafter referred to as the Town Council). The 3rd and 4th respondents to this application are persons who have been nominated as candidates for election to that ward. The 1st and 2nd respondents are officers appointed to their respective offices under sections 4 and 28 of the Local Authorities Elections Ordinance, No. 53 of 1948 (hereinafter referred to as the Ordinance).

The petitioner alleges that the 1st respondent has failed to comply with the requirements of the Ordinance and prays that a mandate in the nature of a writ of mandamus be issued on him ordering him—

(*a*) to prepare electorial lists in conformity with law after giving due notice for Ward No. 7, and

(*b*) to take all necessary steps for the purpose of holding a due and proper election of a member to represent Ward No. 7.

Shortly the material facts are as follows :—

By order published under the Town Councils Ordinance No. 3 of 1946 Gazette No. 10,085 of 17-3-50 a new Town Council under the name of "Alutgamwidiya Town Council" was constituted. Its term of office was to commence on the 1st of January, 1951. The entire territorial area of the Town Council was carved out of the village area of the Beruwal-Alutgam and Malewan Baddas. By order under the Village Committees Ordinance the limits of the village area were accordingly altered with effect from the 1st of January, 1951 Gazette No. 10,138 of 18-8-50.

In order that elections might be held for the Town Council steps were taken for the preparation of electorial lists and their certification. Thereafter nominations for the seven wards into which the Town Council was divided were received on 3rd November, 1950 and the 3rd and 4th respondents were nominated for Ward No. 7. On 11th November, 1950, the petitioner filed the present application.

Learned Counsel for the Crown raised the following preliminary objections to the hearing of this application :—

(1) that there was unreasonable delay in making the application,

(2) that there was no demand for the performance of the duty which the petitioner alleges was not performed, and

(3) that even if there had been non-compliance with the requirements of the statute, no mandamus should issue as the steps taken were in keeping with the spirit of the Ordinance.

It is settled law that the Court will refuse a mandamus where there has been unreasonable delay in applying for it, but in this instance the petitioner has in my view asked for relief within a reasonable time, for the last of the impugned steps was taken on 7th October, 1950. I am therefore not prepared to hold that there has been delay.

The rule that before the Court will grant a mandamus it must be convinced that there has been a demand made by a party having a right to make it for the performance of the duty sought to be enforced and a refusal to perform it by the party against whom the application is made, is in my opinion not one that applies to all cases (Halsbury's Laws of England, Vol. 9, p. 771, sec. 1307.) In my view that rule can only apply to duties of a private nature and not to those which effect the public at large. In the former class of cases a demand and a refusal must precede an application for relief by mandamus. In the latter a literal demand and refusal are unnecessary (Short on Mandamus, p. 249.) The instant case falls into the latter class of cases. It is clear from the affidavits of the 1st and 2nd respondents that such a demand even if it had been made would have been futile.

In regard to the third objection I find myself unable to accede to learned Crown Counsel's submission that what he calls a substantial compliance of section 17 is sufficient. Where a statute enjoins a duty in imperative language, it must be performed in the way the law requires it to be done, and it is not open to anyone to substitute any other method of performance even though such method may serve the purpose the legislature had in view.

In the instant case the Elections Officer was under a duty to exhibit the notice required by section 17 of the Ordinance at the office of the local authority of the area (section 85 (*b*) of Ordinance.) The local authority of the area which is to come under the aegis of the Town Council on 1st January, 1951, was at the relevant date the Village Committee of the Beruwal-Alutgam and Malewan Baddas. The notice should therefore have been exhibited at the office of that Village Committee and nowhere else. It is admitted that the notice was not exhibited at the office of the Village Committee. The statute has therefore not been obeyed by the Elections Officer. The publication of the notice prescribed by section 17 is a vital step in the preparation for an election and omission to publish it in the prescribed manner is fatal. It was also submitted that even the notice exhibited at the office of the Muslim Educational Welfare Society, which was a place selected for exhibiting the notice required by section 17, was not published in the Tamil language. It appears from the affidavits :—

(1) that the majority of the inhabitants of the area within the Town Council are Muslims,

(2) that the language of the Muslim inhabitants is Tamil,

(3) that many of them know Sinhalese, and

(4) that in no school in the area is Sinhalese taught.

In this state of the facts I am of opinion that the notice required to be published under the Ordinance should be published in English, Sinhalese, and Tamil, as section 83 (*a*) requires that it should be published in English and, in accordance with the requirements of the area to which it relates, in Sinhalese or in Tamil or both in Sinhalese and in Tamil. It is clear from the facts of this case that the requirements of the area in question are that the notices should be published both in Sinhalese and in Tamil.

It is settled law that where the time prescribed by statute for the performance of a duty which it is alleged has not been performed has passed, the Court when granting a mandamus has power to appoint a date for its performance. (Halsbury's Laws of England, Vol. 9, pp. 752,753—sec. 1281. Ibid. p. 748—sec. 1273.) In the instant case section 13 requires that the preparation of the electoral lists shall commence on the 1st of May of the year preceding the year in which the term of office of the members to be elected at the general election is due to commence. As far as the electoral lists are concerned there is no complaint against their preparation except that electoral lists in Tamil have not been prepared.

I therefore allow the application for a mandamus and order that the steps prescribed in Part III of the Ordinance be taken as follows :—

On 7th December 1950—the step prescribed by section 17.

" 20th January 1951—the step prescribed by section 23 (4.)

" 24th January 1951—the step prescribed by section 27 (1) (a).

" 10th February 1951—the step prescribed by section 29,

" 3rd March 1951—the step prescribed by section 39.

I also order the Elections Officer to do all other things that may be necessary for the purpose of holding the first election of members of the Alutgamwidiya Town Council.

The date fixed in Gazette No. 10,085 of 17-3-50 as the date on which the term of office of the Alutgamwidiya Town Council shall commence and the date fixed in Gazette No. 10,138 of 18-8-50 as the date on which the limits of the Beruwal-Alutgam and Malewan Baddas. village area should be re-defined need alteration. I have no doubt that the executive will take necessary action to alter those dates.

The 1st and 2nd respondents will pay the petitioner's costs of this application, which I fix at four hundred guineas.

Application allowed.

Present : DIAS, S.P.J., AND GUNASEKARA, J.

WIJESINGHE vs. MIGEL AND OTHERS

Application for Revision or in the Alternative for Restitutio in Integrum in S. C. 127-29—D. C. Tangalle 4445 (101).

Argued on : 22nd and 23rd November, 1950.
Delivered on : 13th December, 1950.

Restitutio in integrum—*Partition action—Heirs of party deceased substituted—Substituted heir dead—Interlocutory decree obtained without making heirs of substituted heir and other heirs parties—Decree affirmed in appeal—Power of Supreme Court to vary its decree—Interlocutory decree not binding and can be set aside where principles of natural justice violated—Sections* 36, 37, *Courts Ordinance, section* 776, *Civil Procedure Code.*

In a partition action the District Court directed that the heirs of one Nangi, who was dead, should be substituted as parties for proceeding with the action. Saineris, one of the heirs of Nangi, was made a party, but after his death the respondents without substituting Saineris' widow and children as parties obtained an interlocutory decree, which was affirmed in appeal by the Supreme Court. The widow sought to set aside the decree by way of *restitutio in integrum* alleging in her petition that various parties had died and that no steps had been taken to substitute their heirs, including herself and her children, in the course of the action.

It was contended on behalf of the respondents that the order of the District Court did not purport to substitute the heirs of Nangi as defendants in the partition action and therefore the petitioners had no status to make this application, and further that the Supreme Court in granting the relief would in effect be varying its decree, which it had not the power to do.

Held : (1) That the order of the District Court was to substitute Saineris and his heirs as defendants to this action and therefore the petitioners had status to move for relief to the Supreme Court, and that there was no other remedy available to them.

(2) That the interlocutory decree was not binding on the petitioners as they were not substituted parties on Saineris' death.

(3) That the Supreme Court has power to grant relief in this case as the principles of natural justice have been violated.

Cases referred to : *Loos vs. Scharenguivel*, (1891) 9 S. S. C. 143.
Banda vs. Dharmaratne, (1922) 24 N. L. R. at p. 211.
In re Warnasuriya, (1896) 2 N. L. R. at p. 146.
Perera vs. Wijewickrema, (1912) 15 N. L. R. at p. 413.
Perera vs. Simeon Appuhamy, (1923) 2 T. L. R. at p. 119.
Babun Appu vs. Simeon Appu, (1907) 11 N. L. R. at p. 45.
Caldera vs. Santiagopillai, (1920) 22 N. L. R. 135.
Juan Perera vs. Stephen Fernando, (1902) 3 Br. p. 5.
Thambiraja vs. Sinnamma, (1935) 36 N. L. R. 442.
Pablis vs. Eugene Hamy, (1948) 50 N. L. R. 346.

H. V. Perera, K.C., with *G. T. Samarawickrema*, and *W. D. Gunasekara*, for the petitioner.
S. J. V. Chelvanayagam, K.C., with *A. L. Jayasuriya*, for 1-4th respondents (parties substituted in place of the plaintiffs.)
E. B. Wikremanayake, K.C., with *Christie Seneviratne*, for 4th defendant-respondent.
H. W. Thambiah, with *S. Sharvananda*, for the 146th defendant-respondent.
Christie Seneviratne, for the 3rd defendant-respondent.
M. H. A. Aziz, with *A. M. Ameen*, for the 27th and 77th defendants-respondents.

DIAS, S.P.J.,

This is an application by way of *restitutio in integrum* or in the alternative an application to revise the proceedings in D. C. Tangalle Partition Case No. 4445.

In this case the plaintiff through his proctor, Mr. D. A. Jayawickreme, who is also the 4th defendant to this action, sought to partition a land called Lot C of Punchihenayagama in extent 586½ acres.

It is clear from the proceedings that the person who carried this action through the Court was the 4th defendant. Six years after the action was filed the impropriety of a litigant being also the proctor for the plaintiff appears to have struck Mr. D. A. Jayawickreme who on February 28, 1945, revoked his proxy, and Proctor Mr. F. Dissanayake filed the plaintiff's proxy. Nevertheless it is clear from the subsequent proceedings that although Mr. Dissanayake was the plaintiff's proctor, it was the 4th defendant who was really acting for the plaintiff. For example, on May 1, 1945, Mr. Jayawickreme for the plaintiff moved that the unserved notice lying in the case be re-issued for service. Again on July 26, 1945, Mr. Jayawickreme for the plaintiff had no objection to a party being added. On November 13, 1945, Mr. Jayewickreme for the plaintiff received certain notices on behalf of the plaintiff, and on January 15, 1946, he again took notices on behalf of the plaintiff on an intervention. There are other journal entries showing that although Mr. Dissanayake was the proctor for the plaintiff, it was the 4th defendant who was really acting as the plaintiff's proctor. To make confusion worse confounded, on February 2, 1946, Mr. Jayawickreme, the 4th defendant filed the proxy of the 133rd to the 136th defendants, &c. I, therefore, agree with Mr. H. V. Perera not only that all this is extremely improper but that it also shows that an important person in this case was the 4th defendant in his dual role of party-litigant and proctor.

The plaintiff having filed this action on June 16, 1939, the case was called on September 5, 1945, "to see whether the case was ready for trial". The learned District Judge having been told that the case was ready for trial, it was fixed for two days in December, 1945. The trial took place on those dates and further hearing was adjourned for two dates in February, 1946. Judgment was delivered on September 6, 1946, and the interlocutory decree, 1 R 8, was entered on that date.

Thereafter three appeals were filed against this decree by the 20th, 22nd, 23rd, 24th, 26th and 29th defendants. The appeals were argued on February 16, 1949, before my brother Canekeratne and myself when this Court dismissed the appeals with a small modification. The present petitioner filed her present application on March 23, 1949.

The caption of this action shows that in March 1949 there were 146 defendants to the action which commenced with 18 defendants. The petitioner in her petition discloses in paragraphs 7 and 8 that various parties have died without steps having been taken to have their heirs substituted. Therefore, even after the present dispute has terminated it may well be that finality will not even then be reached.

This case, therefore, is a melancholy example of the workings of our antiquated and cumbersome Partition Ordinance. This case forcibly reminds one of the famous though mythical case of *Jarndyce vs. Jarndyce* immortalized by Charles Dickens in "Black House" of which it was said—"And thus, through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ends". And now, at the end of 1950, if the contention of the petitioner is right, the work of twelve long years will be of no effect because the dispute which was settled by the interlocutory decree of the District Judge and the judgment in appeal of the Supreme Court will have to be ignored, and the matter dealt with anew.

The following facts will serve as an introduction to the dispute which has now arisen in this case :

4-3-41...Proctor Attapattu filed proxy of one T. Wattuhamy, an intervenient who disclosed other persons, including a lady named Nangi. As a matter of fact Nangi had died on 5-11-38—see Death Certificate 1 R 1. This fact was not known at the time.

18-3-41...Mr. D. A. Jayawickreme, proctor for the plaintiff, (*i.e.*, 4th defendant), moved that Mr. Attapattu be ordered to issue notices on the parties disclosed by Wattuhamy. Mr. Attapattu however refused to do stating that "notices are not necessary if the intervenient does not want them".

I believe it is the practice in most Courts that while it is the duty of the plaintiff in a partition case to see that all the parties necessary for the adjudication of the case are before the Court, in the case of an intervenient who comes in contesting the claims made by the plaintiff and the defendants, it is for the intervenient to bring before the Court all the parties disclosed by the intervenient. Mr. Attapattu does not appear to have contested this point. His view was that if the intervenient did not want Nangi or her heirs added, there was no duty cast on the intervenient to notice her or them. If that was Mr. Attapattu's view, I must dissent from it. He, however, eventually issued notices.

21-5-41...The exhibit 1 R 2 shows that notice of Wattuhamy's intervention was issued on 19 persons. No. 5 is Nangi whose death was then probably still not known. 1 R 2

required Nangi to appear before the District Court on 16-6-41 and file her statement of claim by becoming an added party to the case "if so advised".

11-6-41...By his return 1 R 3 the Fiscal reported that Nangi was said to be reported dead.

Pausing at that point, it is clear that a necessary party, Nangi, was dead. Therefore, the next step which had to be taken was to notice Nangi's heirs to be added in her place.

21-11-41...Mr. Attapattu by his motion 1 R 4 naming Saineris (the son of Nangi) and four other children of Nangi and other persons as respondents, moved the Court in the following terms: "It is necessary to get the aforesaid heirs substituted in the room of the deceased 5th (Nangi), 6th and 10th co-owners in order to enable his client to issue notices on them". Mr. Attapattu therefore moved that an order nisi be entered "directing the 1st to the 5th named respondents be substituted in the room of the deceased Nangi".

25-11-41...The order nisi which issued is the exhibit 1 R 6 and is the important document in this case. The operative part of the order nisi reads as follows: "It is ordered that the said substitutions be made unless sufficient cause be shown to the contrary on the 10th day of December 1941". 1 R 6 is the order of the Court whatever Mr. Attapattu's intention may have been. The plain meaning of the words used in the order nisi indicates that unless the respondents show cause to the contrary on 10-12-41 they would be substituted as parties-defendants.

21-1-42...The relevant journal entry reads: "Order Nisi reported served on 1st to 11th respondents, *i.e.*, including Saineris and the other children of Nangi. 12th defendant and 17th defendant are absent. They are added as parties. 6th respondents is present and has no cause to show. Others absent (*i.e.*, Saineris and his group of respondents). Enter order absolute (*i.e.*, order nisi 1 R 6 was made absolute)".

The procedure which the learned District Judge adopted in this case is sanctioned by the decisions in *Loos vs. Scharenguivel*, (1891) 9 S. C. C. 143, and *Banda vs. Dharmaratne*, (1922) 24 N. L. R. at p. 211.

Two main questions arise for decision in this case: (*a*) Was Saineris (the son of Nangi) added or substituted as the 50th defendant in this case? (*b*) If so, are the widow and children of Saineris entitled to make the present application? A third and vitally important question in this case is as to what the order nisi 1 R 6 and the order absolute precisely meant and affected.

According to the respondents the effect of the order absolute was to substitute Saineris and the other children of Nangi in order that notices may issue on them to show cause why they should not be added. It is argued for the respondents that 1 R 6 when it was made absolute did not substitute the children of Nangi as defendants to this action. It is contended that the only effect of the order absolute was that the persons were substituted in place of a party not on the record (*i.e.*, Nangi). Therefore it is argued that 1 R 6 and the order absolute amount to a nullity.

Counsel for the petitioner, on the other hand, has argued strenuously that the order nisi 1 R 6 is clear and specific in its terms and that when the order nisi was served and the respondents having shown no cause, the order absolute substituted Saineris and his group as defendants to this action.

To my mind the position is clear. The order nisi 1 R 6 declared in unequivocal terms that the respondents would be substituted in the room of the deceased Nangi unless sufficient cause was shown to the contrary on the returnable date. The order nisi having been duly served and no cause having been shown, the effect of making the order nisi absolute was to substitute Saineris and his group as substituted or added defendants (it matters not what they are called) to this action.

That everybody including the plaintiff and the 4th defendant believed that Saineris was added as the 50th defendant to this action cannot be disputed. Mr. H. V. Perera for the petitioner was at pains to show from various subsequent journal entries in the case that the respondents to the present application held that view. I do not think Mr. Perera need have taken so much trouble because in the statement of objections to the present application, dated August 21, 1950, it is clearly admitted that Saineris was added as the 50th defendant. I draw attention to paragraph 3 of the statement of objections where it is clearly stated: "Thus the 50th defendant (the said Saineris) was brought into the case". Again in paragraph 4 of the statement of the statement of objections it is stated: "No statement of claim was filed by the said Nangi (35th defendant) or by her heir the said 50th defendant under whom the petitioner now claims as his widow". In the light of these admissions, I think it is futile to argue, as the respondents tried to do, that the effect of the order absolute in 1 R 6 was not to add Saineris

as a party-defendant to these proceedings. The case of *In re Warnasuriya*, (1896) 2 N. L. R. at p. 146, shows that parties who knowing that an irregularity has been committed (if it is so in fact) and thereafter co-operate by inviting the Court to decide the case despite such irregularity, they will not be allowed to question the irregularity. In my opinion there was no irregularity up to the time the order nisi was passed.

The irregularity arose when Saineris, the 50th defendant, died on February 19, 1943, (vide death certificate marked A), *i.e.*, three years before the interlocutory decree had been entered. It is therefore beyond all questions and dispute that an interlocutory decree has been entered in a partition action in a contest which arose between the intervenients (including Saineris) and the rest of the parties to the action, in which one of the contesting intervenients was dead, and without steps having been taken to add his heirs, namely, the present petitioners. Final decree has not been entered and cannot be entered if what the petitioner states in her petition is true, namely that various other parties have also died and their heirs have not been substituted yet.

The remedy by way of *restitutio in integrum* is an extraordinary remdey and is given only under very exceptional circumstances. The respondents have submitted that if Saineris had not in fact been added as the 50th defendant to this action, the remedy of his widow, the petitioner would be not to move the Supreme Court for *restitutio in integrum* or in revision, but to intervene in the District Court. The respondents however concede that if Saineris was in fact added as the 50th defendant, then the petitioner would have status to move this court for relief. I have already given my reason fully for holding that Saineris was added. Therefore, on the argument as presented by the respondents, the petitioner has status to move this Court for relief. This answers the first question which we have to decide.

The only outstanding question therefore is whether we should grant relief to the petitioner?

It is only a party to a contract or to legal proceedings who can ask for relief by way of *restitutio in integrum*—see *Perera vs. Wijewickreme* (1912) 15 N. L. R. at p. 413 and *Perera vs. Simeon Appuhamy*, (1923) 2 T. L. R. at p. 119. I have already held that the present petitioner has status to make this application.

It has also been laid down that relief by way of *restitutio in integrum* should be sought for with the utmost promptitude—see *Babun Appu vs. Simeon Appu*, (1907) 11 N. L. R. at p. 45. It has been argued that an examination of the relevant dates will show not only that the petitioner has been guilty of unreasonable delay in seeking her remedy but that the facts seem to indicate that she is acting in collusion with the appellants whose appeal against the interlocutory decree was dismissed by this Court. It is pointed out that the judgment in appeal was delivered on February 16, 1949; that thereafter there was some abortive attempt to appeal to the Privy Council; and when that failed this petitioner on March 10, 1949, moved this Court and is in effect seeking to over-rule the interlocutory decree and the judgment of the Supreme Court in appeal. The explanation given by the petitioner in her affidavit is that she sought her relief as soon as she heard what had happened and she submits that the course this trial took has gravely prejudiced her and she is asking for relief. I am unable on the materials before me to hold that her statements are false. After all she is a village woman living in a remote part of this Island and it may well be that she was in total ignorance of what was happening. Furthermore, there is no evidence which would justify me in holding that she is acting in collusion with the defeated appellants.

Restitutio in integrum is not available if the petitioner has another remedy open to her. It was conceded at the Bar that if Saineris had in fact been added as the 50th defendant, the petitioner's remedy would be to seek relief in the Supreme Court and that she could not intervene. I hold that Saineris having been added as the 50th defendant, there is no other remedy open to the petitioner except to move this Court for relief.

We now come to the substantial point which has been urged in this case, namely, that not only are there no merits in the present application of the petitioner, but also that if we grant her the relief she seeks we will in effect be sitting in judgment on a two-Judge decision of this Court in the earlier appeal and which is now embodied in a decree of the Supreme Court which has passed the seal of the Court. It was argued that the Supreme Court by means of *restitutio in integrum* cannot vary its own decree especially after they have passed the Seal of the Supreme Court. It is pointed out that the powers of this Court are not unlimited. It is urged that S. 36 of the Courts Ordinance (*Chapter VI*) defines the jurisdiction of this Court while S. 37 only permits this Court to interfere with the judgments of an original Court and it cannot interfere with the orders of the Supreme Court. It is pointed out that S. 776 of the Civil Procedure Code deals with the sealing of decree of the Supreme Court and

that once a decree has been sealed, such decree, if it is a judgment of two Judges of this Court, cannot be varied by another bench of two Judges.

The question, however, is whether such arguments can prevail in a case of this kind. Let me take one example. P files a partition action against A, B and C. A and B appear and file answer. C does not. There is a contest and a trial. The District Judge enters an interlocutory decree. There is an appeal to the Supreme Court which affirms the judgment and decree of the District Court. The Supreme Court judgment is sealed. Thereafter, before final decree is entered, C comes forward and satisfies the Court by proof that there was in fact no service of summons on him. It is everyday practice in a case like that for this Court to hold that all the earlier proceedings are abortive and of no effect. If authority is needed this is supplied by the following cases: *Caldera vs. Santiagopillai*, (1920) 22 N. L. R. 155; *Juan Perera vs. Stephen Fernando*, (1902) 3 Br. p. 5; and *Thambiraja vs. Sinnamma*, (1935) 36 N. L. R. 442. The last case on this point is that of *Pablis vs. Eugena Hamy*, (1948) 50 N. L. R. 346. which laid down that where a summons in a partition action is not properly served on a party such party is not bound by the final decree in the case and it can be vacated even where the irregularity has been discovered after final decree was entered. It is to be noted that in the present case final decree has not yet been entered.

The situation which emerges in the present case is that Saineris was a party. He died before the trial without steps having been taken to substitute his heirs who were therefore not bound by all the subsequent proceedings. In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. We are merely declaring that so far as the petitioner is concerned there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. In my opinion, therefore, the order of this Court should be that the petitioner and the other heirs of Saineris should be forthwith added as parties to this action, and that after she has filed her statement of claim the District Judge should proceed to adjudicate on the merits of her application. It will also be the duty of the plaintiff to see that all the necessary parties are before the Court before any further adjudication is made. I would go further and say that in view of the irregularity in not joining Saineris' heirs, in my opinion both the interlocutory decree in this action and the subsequent judgment of this Court in appeal are of no effect because by reason of the non-observance of the steps in procedure no proper interlocutory decree was in fact entered in this case.

The contesting respondents will pay to the petitioner the costs of these proceedings.

GUNASEKARA, J.

I agree.

Application allowed.

Present : GRATIAEN, J. AND GUNASEKARA, J.

W. M. ELPI NONA vs. M. A. PUNCHI SINGHO *et al*

S. C. No. 205.—*D. C. Avissawella* No. 5272.

Argued on : 31st October, 1950.
Decided on : 21st November, 1950.

Co-owners—Rights and obligations of—Building on common land against the wishes of other co-owners—Mandatory injunction to demolish the building—When may it be granted ?—Roman Dutch Law.

The plaintiffs and defendant were co-owners of a land. The defendant built a house on the common land before the trial date against the express wishes of the plaintiffs. The plaintiffs obtained a mandatory injunction to demolish the house.

Held : (1) That the plaintiffs were not entitled to the mandatory injunction in the absence of proof that the erection of the building caused them any material damage or interfered with any of their proprietary rights or altered intrinsically the character of the common property.

(2) That every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportionate to his share, provided that he does not infringe the rights of other co-owners.

(3) That the question whether in any particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors and cannot be solved as an abstract question of law.

N. E. Weerasooria, K. C. with *F. W. Obeyesekera* and *B. Ratwatte* for the defendant-appellant.

No appearance for the plaintiffs-respondents.

GRATIAEN, J.

The plaintiffs are jointly entitled to an undivided 11/24 share of the land described in the schedule annexed to the plaint. The defendant owns an undivided 1/4th share, while the remaining interests belong to a man named William Singho who is not a party to these proceedings.

The plaintiffs sued the defendant for a declaration that they were jointly entitled to an undivided 13/24 of the land, but in the course of the trial their claim was restricted to the admittedly correct share which is 11/24. The outstanding dispute relates to a building which the defendant had in February, 1948, commenced to erect on the common land for the exclusive use of herself and her family. It was completed before the trial commenced. The plaintiffs claimed a mandatory injunction for the demolition of this building. After trial the learned District Judge entered decree against the defendant ordering that the building should be demolished, and the present appeal is from the order for demolition. I am far from satisfied that such a decree could in any event be properly entered in proceedings to which one of the interested co-owners had not been joined as a party, but the appeal can be decided without expressing a definite opinion on this point.

Mr. Weerasooria was content to argue the defendant's appeal on the basis that the relevant facts are correctly set out in the evidence led by the plaintiffs at the trial. His submission is that in law these facts do not justify the mandatory injunction ordered by the learned Judge. The plaintiffs were unfortunately not represented at the hearing of the appeal.

There can be no doubt that the defendant erected the builidng in question contrary to the express wisnes of the plaintiffs, and that she had been forewarned of the plaintiffs' intention to seek the intervention of the Court should she persist in ignoring their protests. The building is described in the 1st plaintiffs' evidence as "a big wattle and daub house with a cadjan roof... worth about Rs. 300." There is no evidence as to the ground space covered by this building or as to its situation in relation to the plantations on the land. The plaint had alleged that it had been erected on that portion of the land "where the plaintiffs' plantations stand.....causing irreparable damage to them," but no attempt was made at the trial to substantiate this allegation. The case for the plaintiffs, as I understand it, was presented at the trial on the assumption that under the Roman Dutch Law a co-owner is *under no circumstances whatever* entitled to put up a building on the common land without the consent of all his co-owners; and that in the absence of such consent any co-owner is entitled as of right to demand its demolition. No material was placed before the Court for the purpose of establishing that the erection of the building had caused any material damage to the plaintiffs, or that it interferred with such co-proprietory rights as the plaintiffs had hitherto exercised on the land. In this state of things it is necessary to consider whether the Roman-Dutch Law does go so far as to vest a co-owner with an absolute right to prevent either co-owners from building on the common land.

The rights and obligations of co-owners in relation to the common land have been considered in many earlier decisions of this Court, but it is perhaps convenient in the first instance to examine the views of the jurists on which these decisions are based. According to Grotius (3-28 4; *Vide* Lee's Translation, Vol. 4, 437): "So long as the community (of ownership) continues an obligation exists to use the thing fairly for the common advantage". Wille *(Principles of South African Law, page 159)* states with reference to this principle that each co-owner is "entitled to make a reasonable use of the common property, *proportionate to his interest, in accordance with the object for which such land is destined*". The limitations on the right of a co-owner to enjoy the common land are prescribed by Voet who declares (10-3-7) that "no innovation can be made with regard to the common property by one owner if the other objects, and the position at law of the person forbidding is the better of the two; so that if anything new (*quid novi*) is done or ordered to be done to it by one of the owners against the other's wish, he can be compelled to restore the property to its original condition". It is on the application of this principle that co-owners have been held by the South African Courts to be precluded from converting pasture into arable land or from building upon such pasture land unless the other co-owners consent. ***Botha, Smith et al vs. Kinnear—Kotze, 215.***

It seems to me that in accordance with what has been laid down by the jurists every co-owner has the right to enjoy his share in the common land *reasonably and to an extent which is proportionate to his share*, provided that he does not infringe the corresponding rights of his co-owners; moreover, neither he nor they can except by mutual consent, apply the common land to new purposes *in such a manner as to alter the intrinsic* character of the property. Should the erection of a building, for instance, (or, for

that matter, any assertion of a co-proprietory right) be proved to constitute an interference with the legitimate use of the property by an objecting co-owner, a cause of action accrues to compel the wrongdoer to restore the *status quo*. The question whether in any particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors, and cannot, in my judgment, be solved as an abstract question of law.

If the plaintiffs had proved their allegation that the building had, despite their protests, been erected on their plantations in the common land, I do not doubt that they would have been entitled to the relief they have claimed in these proceedings. In the absence, however, of proof that their rights as co-proprietors have been infringed in this or in any other way, I am unable to discover a legal basis on which they can be declared entitled in law to a mandatory order for the demolition of the building concerned. The cause of action in proceedings of this kind is based on the infringement of the rights of the objecting co-owners and not on a right *simpliciter* to withhold consent to something which has not been proved to be *quid novi* in the sense in which, I think, the term is used by Voet—that is *either* an alteration or conversion of the intrinsic character of the common property *or* an attempted user of the property which is disproportionate to the defendant's interest therein.

I now proceed to examine some of the earlier decisions of this Court affecting the question. In *Siyadoris vs. Hendrick*, (1896), 6 N. L. R. 275, Bonser C.J., took the view that the law does not prevent one co-owner from the use or enjoyment of the common property in such a manner as is natural and necessary under the circumstances. *Silva vs. Silva*, (1903) 6 N. L. R. 225, is not in conflict with this view, although a mandatory injunction to demolish a building constructed against the wishes of the co-owners was ordered in the circumstances of that particular case. "I would not say that in no case can a co-owner build without expressed consent", said Moncrieff J., "Building might be a natural and necessary act.....I conceive that consent of the co-owners would not be required for an act sanctioned by the practice of the co-owners, or which is a natural or necessary element of their co-ownership". Similarly, Layard, C.J., took the view that the building objected to in that case was "an act prejudicial to the community of the land because it converted part of the land to another use from that to which it was previously devoted". In the present case there is no evidence of such conversion and one cannot lose sight of the fact that in many small holdings held in common by villagers in this country, it is customary for some at least of the co-owners to reside on the common land in buildings constructed for the purpose by themselves or their predecessors. These buildings no doubt remain joint property so long as the bond of common ownership exists but it is well settled law that during the co-parcenary each such building may be enjoyed exclusively by those for whose benefit they had been constructed.

In *Kathonis vs. Silva*, (1919), 21 N. L. R. 452; Ennis, A.C.J., (De Sampayo, J. concurring)—expressly held that "a co-owner has the right to build and live on the common land, *though presumably this right is limited to the accommodation which his share would provide when convenience of possession is considered*" (Vide also "*Girihagama vs. Appuhamy*, 14 C. L. W. 11). In *Goonewardene vs. Goonewardene*, (1913) 17 N. L. R. 143, Wood Renton, J. stated that the decisions in *Siyadoris vs. Hendrick*, (*ibid*) and *Silva vs. Silva*, (*ibid*) had "constantly been followed in later cases", and agreed that "the law does not prohibit one co-owner from the use and enjoyment of the property in such a manner as is natural and necessary in the circumstances". A mandatory injunction was granted by Hearne, J., and Fernando, A.J., in *Mutaliph vs. Mansoor, et al* (1937) 39 N. L. R. 316, in respect of a building erected on the common land by one co-owner without the consent of the others, but an examination of the facts set out in Fernando, A.J.'s judgment shows that the building concerned had been erected so as to obstruct a passage which had for many years been reserved to provide access to other buildings on the land. Similarly, in *Perera vs. Podisingho*, (1946) 47 N. L. R. 347, certain objecting co-owners successfully obtained an order of court for the demolition of a building which was found to enjoy a road frontage disproportionate to the share to which the defendant was entitled. In each of these cases, therefore, one finds that a clear infringement has been established by the evidence. With great respect, I think, that the contrary view expressed by Pereira, J., in *Goonewardene vs. Silva*, (1914) 17 N. L. R. 287, to the effect that "a co-owner has no right whatever to build on the common property without the consent of his co-owners" is unacceptable if it purports to lay down a general proposition of law.

The plaintiffs in the present action have failed to establish that by erecting a building on the common land, the defendant has infringed their rights as co-proprietors. In my opinion, the

onus of proving such an infringement fell on the plaintiffs. Under the Roman-Dutch Law a party applying for an interdict is required to establish *inter alia* "that the interference or injury complained must clearly be of such a nature as to prejudice the applicant in his rights." (Nathan on Interdicts, page 30). If the English law were to apply, the position would be precisely similar.

I must set aside the judgment of the learned District Judge and amend the decree appealed from by deleting that portion of it which orders the demolition of the building erected by the defendant on the common land. The plaintiffs should pay to the defendant her costs in this Court and in the Court below.

GUNASEKARA, J.

I agree.

Appeal allowed.

IN THE MATTER OF AN APPLICATION FOR CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL IN S.C. NO. 5 OF 1949

BASNAYAKE, J. AND PULLE, J.

BUDDHARAKKITA THERA vs. ALGAMA & SANGARAKKITA THERA

Application No. 360 of 1950. D. C. Colombo 59 Trust.

Argued and decided on : 6th October, 1950.
Reasons delivered on : 28th November, 1950.

Privy Council—Leave to appeal—Rule 1 (a) of the Rules of Appeals (Privy Council) Ordinance (Ch. 85)—Meaning of "Final Judgment".

In an application by one Don Vincent Algama, the provisional trustee of the Rajamaha Vihare, under section 32 of the Buddhist Temporalities Ordinance for a writ requiring the applicant and another to deliver to him possession of the property of the Vihare, the Supreme Court set aside the order of the District Court and granted the application on the ground that section 32 of the Ordinance covered *de facto* viharadhipatis or those who claim to be viharadhipatis, and directed the District Court "to proceed with" the case.

The applicant sought leave to appeal to the Privy Council from the judgment of the Supreme Court but was opposed by the provisional trustee on the ground that the decision of the Supreme Court was not a "final judgment" within the meaning of that expression in Rule 1 (*a*) of the Privy Council Appeal Rules.

Held : That the judgment of the Supreme Court is a "final judgment" within the meaning of Rule 1 (*a*); for the judgment holds that the case is one in which the applicant's request for a writ should be granted. It finally disposed of the matters in dispute between the parties, leaving only the act of issuing the writ to be done by the District Judge.

Per BASNAYAKE, J.—"It would be unwise to define the expression 'final judgment' in the abstract. Whether a judgment of this Court is final or not has to be determined by an examination of the facts and circumstances of each case."

H. V. Perera, K.C., with *Samerawickrame*, for applicant.
N. K. Choksy, K.C., with *Ismail*, for respondent.

BASNAYAKE, J.

This is an application by one Mapitigama Buddharakkita Thera of Rajamaha Vihare, Kelaniya, (hereinafter referred to as the applicant), for leave to appeal to the Privy Council under Rule 2 of the Rules in the Schedule of the Appeals (Privy Council) Ordinance (hereinafter referred to as the Privy Council Appeal Rules) from a judgment of this Court in appeal from the District Court of Colombo wherein proceedings were instituted under Section 32 of the Buddhist Temporalities Ordinance by one Don Vincent Algama, the provisional trustee of the Rajamaha Vihare, Kelaniya, hereinafter referred to as the respondent) against the applicant and another, one Sangarakkita Thera.

Section 32 of the Buddhist Temporalities Ordinance reads :—

"32. (1) Whenever the trustees of any temple who has vacated his office as trustee for any cause whatsoever under the provisions of this Ordinance or of any Ordinance hereby repealed, or any viharadhipati, shall hold or occupy, either directly or through any other person on his behalf, any movable or immovable property belonging to any temple, and shall refuse or neglect to deliver possession of such property to the trustee for the time being of the said temple, or to any person authorised in that behalf by the Public Trustee, it shall be competent for such trustee, or for the Public Trustee,

or the person authorised as aforesaid, as the case may be, to apply by way of summary procedure to the court for a writ requiring such first-named trustee or viharadhipati to deliver possession of the property to such other trustee or person aforesaid.

(2) On the hearing of such application it shall be competent to such court to issue its writs to the Fiscal or Deputy Fiscal and give possession accordingly as if it were a writ issued in execution of its own decree.

(3) A certificate under the hand of the Public Trustee to the effect that the person mentioned therein has vacated his office of trustee as aforesaid shall be conclusive evidence of the fact stated therein."

An application under section 32 of the Buddhist Temporalities Ordinance is a statutory proceeding provided for the purpose of enabling the trustee of a temple to obtain possession of the movable and immovable property belonging to the temple held by a trustee who has vacated office or a viharadhipati who refuses or neglects to deliver possession of such property to the lawful trustee for the time being.

The learned District Judge dismissed the application of the provisional trustee for a writ requiring the applicant to deliver to him possession of property belonging to the Rajamaha Vihare, Kelaniya. In appeal the judgment of the District Judge was set aside and the case was sent back "to be proceeded with". In the course of his judgment my brother Dias disposes of the question arising for decision in the following way :—

"Admittedly, the learned Judge has erred in certain of his conclusions. He erred in construing s. 32 by reference to the section of a repealed Ordinance. This led him to hold that s. 32 only applies to a viharadhipati who has been suspended or removed from office. There is no warrant for such a construction of s. 32. The learned Judge further held that because the petitioner did not plead in his petition that the respondents are "viharadhipatis", but that they only claim to be such, therefore the petitioner's application must be dismissed. In my opinion s. 32 is wide enough to include persons who are either functioning as *de facto* viharadhipatis or who claim to be viharadhipatis. I cannot agree with the learned Judge that it is the duty of the petitioner to allege in his application that the 1st respondent is in possession of the property, or to detail the property he desires to be restored to him. To require a man like the petitioner to specify the property is asking him to do what is impossible. The petitioner as provisional trustee is in the dark and is endeavouring to obtain possession of the property. If the 1st respondent is not in possession of the temporalities the petitioner will fail if he cannot establish that fact."

Objection is taken to the application by the respondent on the ground that the decision of this Court is not a "final judgment" within the meaning of that expression in Rule 1 (*a*) of the Privy Council Appeal Rules.

The question that arises for decision here is whether that judgment is a "final judgment." Learned counsel for the respondent to this application argues that there are certain steps which the District Court still has to take before giving effect to the order of this Court and that there is no finality in that order. The judgment of this Court holds that the case is one in which the applicant's request for a writ should be granted. It finally disposed of the matters in dispute between the parties, leaving only the act of issuing the writ to be done by the District Judge. In view of that decision we are unable to agree with learned counsel that the judgment is not final in the sense in which the expression "final judgment" is used in Rule 1(*a*). Rule 1(*b*) gives a right of appeal "from any other judgment of the Court, whether final or interlocutory." These words indicate that the expression "final judgment" which occurs in paragraph (*a*) is used in contradistinction to an interlocutory judgment.

It would be unwise to define the expression "final judgment" in the abstract. Whether a judgment of this Court is final or not has to be determined by an examination of the facts and circumstances of each case.

The leading cases on the meaning of the expression "final Judgment" are cited in the case of *Vander Poorten vs. Settlement Officer*. 24 C. L. W. 14.

Mr. Perera sought to bring himself also within Rule 1(*b*) on the ground that the question involved in the appeal was one which by reason of its great general or public importance or otherwise ought to be submitted to His Majesty in Council for decision. We are not convinced that the questions involved in the appeal are questions which by reason of their "great general or public importance" ought to be submitted to His Majesty in Council. In view of the conclusions that we have reached, it is not necessary to discuss further the submissions made in support of that contention.

At the conclusion of the argument we gave our decision in favour of the applicant and granted leave to appeal under Rules 2 and 3 and indicated to counsel that our written reasons would be delivered later.

We have accordingly formulated our reasons.

The applicant is entitled to the costs of this application.

PULLE, J.

I agree.

Leave to appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : NAGALINGAM, J. (President), GRATIAEN, J. AND PULLE, J.

REX vs. P. A. GUNAWARDENA, P. A. CHANDANAHAMY, P. A. APPUHAMY, A. WIJEDASA, P. A. KOVIS SINGHO

Appeals Nos. 39-40, 42-44 *of* 1950 *with Applications Nos.* 80-81, 83, 85-86 *of* 1950.

S. C. No. 24—*M. C. Ratnapura No.* 16250.

Argued on : 6th November, 1950.
Decided on : 13th November, 1950.

Court of Criminal Appeal—Conspiracy to commit murder—Passages in judge's charge to jury likely to have confused them on the matters to be taken into account in deciding whether one of the principal prosecution witnesses was an accomplice—Misdirection—Proviso to section 5 (1) of the Court of Criminal Appeal Ordinance.

The five appellants were convicted by a divided verdict of 5 to 2 on a charge of having conspired to murder two persons, in pursuance of which conspiracy both persons were in fact murdered. The circumstances in which Dias, one of the principal witnesses for the prosecution claimed to be able to testify to certain incidents alleged to have taken place during the crucial period were such as prominently to raise the question whether his evidence should be regarded as that of an accomplice. The jury were not invited by the trial judge to consider whether, apart from the evidence of Dias, he guilt of the accused was established by the evidence of the other witnesses called by the prosecution. Certain—passages in the charge to the jury were likely to have led them to think that they need not regard Dias as an accomplice, if in their view, he had been a guilty associate in the original plot but was not a guilty associate in the actual commission of the murders.

Held : (1) That a guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murder which had been planned.

(2) That the passages in question amounted to a misdirection which vitiated the conviction unless it could be held that no substantial miscarriage of justice had actually occurred.

(3) (By the majority of the Court) that it was not a case to which the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance should be applied.

Per GRATIAEN, J.—" In our opinion the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot properly be applied in the case of a divided verdict unless the evidence is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly perverse."

M. M. Kumarakulasingham, with *C. M. Dharmakirti-Pieris* for 1st and 2nd appellants.
M. M. Kumarakulasingham, with *A. B. Perera* and *P. B. Dissanayake*, for 3rd appellant.
M. M. Kumarakulasingham with *R. D. Dissanayake* for 4th appellant.
M. M. Kumarakulasingham, with *Austin Jayasuriya*, for 5th appellant.
H. A. Wijemanne, Crown Counsel, with *A. C. M. Ameer, Crown Counsel*, for Attorney-General.

GRATIAEN, J.

There were six accused in this case. They were charged (1) with the offence of conspiracy to cause the death of two persons named Don Chandradasa Samarasinghe Appuhamy and Pitigala Arachchilage Simon Singho in pursuance of which conspiracy both persons were in fact murdered ; (2) with the murder of the said Don Chandradasa Samarasinghe Appuhamy ; (3) with the murder of the said Pitigala Arachchilage Simon Singho ; (4) alternatively to the second count, with abetment of the murder of Don Chandradasa Samarasinghe Appuhamy ; (5) alternatively to the third count, with abetment of the murder of Pitigala Arachchilage Simon Singho. The alternative charge of abetment were withdrawn in the course of the trial. On the outstanding charges the 6th accused was unanimously acquitted by the jury of the charge of conspiracy, and the other five accused (who are the appellants) were found guilty of conspiracy by a divided verdict of 5 to 2. No verdict on either of the charges of murder has been recorded, but it is not necessary for the purposes of the present appeals, which relate solely to the convictions on the charge of conspiracy, to decide what consequences result from the omission on the part of the jury to comply with the imperative requirements of section 248 (1) of the Criminal Procedure Code.

One of the principal witnesses called for the prosecution was the witness Maddunage Dias, and there is no doubt that his evidence, if acted upon by a jury properly directed, points strongly to the guilt of the appellants. Certain other

witnesses were called to support Dias' version of the events which took place during the crucial period preceding 23rd September, 1949, on which date Don Chandradasa Samarasinghe Appuhamy and Pitigala Arachchilage Simon Singho were killed. The jury were not, however, invited by the learned Judge to consider whether, apart from the evidence of Dias, the guilt of the accused was established by the evidence of those other witnesses alone.

It is necessary to refer only to the main ground of appeal which was urged before us. Admittedly the circumstances in which Dias claimed to be able to testify to certain incidents alleged to have taken place during the crucial period 19th to 23rd September, 1949, were such as prominently to raise the question whether his evidence should be regarded as that of an accomplice. The learned Judge very properly directed the jury that they should give their careful consideration to the question whether Dias was in fact an accomplice, and the jury were cautioned as to the manner in which the evidence of an accomplice should be assessed. Counsel for the appellants contends, however, that the following passages in the learned Judge's charge were likely to have confused the jury on the matters to be taken into account by them in deciding whether Dias should be regarded as an accomplice :—

1. " You will have to ask yourselves, gentlemen of the jury, whether in the circumstances of this case Dias is an accomplice or not. You would look at it this way ; to what extent did Dias identify himself with the conspiracy on that count ? How far did he go ? What was his participation ? Did he go so far as to make him a guilty associate ? He tells you that on that last fateful day he turned back. If he was the only person who said that you might have been very doubtful. But Gunasekara also says that he turned back. In those circumstances would you say that he was a guilty associate in either of the murders ?

2. " About the meeting of Gunasekara and Piyadasa on the 23rd he (*i.e.*, Dias) said that when he met them he took advantage of the fact of meeting Gunasekara to stay behind. Gunasekara says he actually stayed behind. If that is so, you will ask yourselves, ' did Dias' part in the conspiracy stop at that point ? If so, is he an accomplice ? "

After very careful consideration we have come to the conclusion that this complaint is justified it seems to us that these passages (*and particularly the second of them*) might well have misled the jury into thinking that they need not regard Dias as an accomplice if, in their view, he had been a guilty associate in the original plot to cause the death of Appuhamy and Simon Singho but was not a guilty associate in the actual commission of the murders. The correct position of course, is that the jury should have approached the evidence of Dias with caution even if they believed him to be an accomplice in respect of the offence of conspiracy alone. A guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murder which had been planned.

In our opinion the passages which I have quoted from the learned Judge's charge amount to a misdirection which vitiates the conviction unless, in accordance with the proviso to section (5) (1) of the Court of Criminal Appeal Ordinance we can hold that no substantial miscarriage of justice has actually occurred. The majority of the Court have come to the conclusion that this is not a case to which the proviso should be applied. As an appellate tribunal, we lack the advantage of having seen and heard the witnesses for ourselves, and we are not convinced that the evidence in the case was so " convincing cogent and irresistible " (*Rex vs. Lewis*, 26 Cr. A. R. at page 113) that " no reasonable jury would or could have come to any other conclusion " than that all five accused are guilty. (*Rex vs. Haddy*, (1944) 1 A. E. R. 319 ; *Stirland vs. Public Prosecutor*, (1944) 2 A. E. R. 13 ; and appeals Nos. 12-15 of 1950 with Applications 30-33 of 1950—S. C. Minutes 26-7-50). It is important to remember that at the trial two of the jurors did not return a verdict against the appellants, and were presumably not prepared to act on the evidence for the prosecution. In our opinion the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot properly be applied in the case of a divided verdict unless the evidence against the accused is of such a character as to justify the reproach that the judgment of the dissenting jurors was manifestly perverse.

We are all agreed that the evidence in the case if accepted by a jury upon proper directions, was evidence upon which the accused might reasonably have been convicted. We accordingly order that the conviction on the charge of criminal conspiracy be quashed and that the appellants be re-tried on this count. We express no opinion as to whether it is open to the Crown to claim that the appellants should also be tried afresh on the 2nd and 3rd counts on which no verdict was returned by the jury at the conclusion of the original trial.

Conviction quashed.

Present : GRATIAEN, J.

THE KING vs. NISSANKA MICHAEL FERNANDO

S. C. No. 43—M. C. Kanadulla No. 4124/4125
3rd Midland Circuit, 1950, (holden at Kandy.)

Argued on : 16th January, 1951.
Decided on : 25th January, 1951.

Criminal Procedure—Two similar offences alleged within twelve months—Institution of separate non-summary proceedings in respect of each offence—Committal of accused in each case—Amalgamation of charges in one indictment by Attorney-General—Objection by defence—Is it justifiable—Prejudice to accused—Criminal Procedure Code, Sections 172, 179.

On 21-3-1950 the Police instituted non-summary proceedings in case No. 4124 M. C., Kanadulla, charging the accused with having on 12-12-49 used as genuine a forged or counterfeit five rupee note, knowing or having reason to believe the same to be forged or counterfeit, an offence punishable under section 478 (*b*) of the Penal Code.

On the same day in a separate case, the accused was charged with the commission of a similar offence on 9-12-49 and non-summary proceedings commenced thereon.

The accused was subsequently committed for trial in the Supreme Court on both charges.

The Attorney-General amalgamated both charges and presented a single indictment to the Supreme Court and at the trial Counsel for the defence took objection thereto.

At the argument it was conceded by the Crown that there was probably insufficient evidence in either case, when separately considered to justify the committal of the accused on either charge, and that it was felt that the pooling of the evidence led in the two separate non-summary proceedings would have furnished sufficient evidence for a conviction by a jury.

Held : (1) That although it is not illegal for the Crown to join in the same indictment under section 179 of the Criminal Procedure Code two charges which had formed the subject of separate proceedings terminating in separate committals, such a procedure is not proper and should not be permitted by the trial Judge where the avowed intention of the Crown is to supplement at the trial the insufficient evidence relied on in one preliminary magisterial investigation by the evidence recorded in a different investigation.

(2) That section 172 of the Criminal Procedure Code was never intended to authorise the Crown to supply vital gaps in the case against a person who had been improperly committed for trial on insufficient evidence.

(3) That on the facts of this case the accused should be separately tried as the accused was likely to be prejudiced in his defence.

Per GRATIAEN, J.—(*a*) " The purpose of conducting non-summary proceedings for the investigation of charges relating to indictable offences is to provide the accused person with certain fundamental safeguards before he can properly be committed for trial. No person can or should be indicted for an offence unless the prosecution has placed before the committing Magistrate sufficient *prima facie* evidence in support of that charge."

(*b*) " It follows from my order in the present case that, *for the purposes of each separate trial, the indictment must be regarded as containing a list of only those witnesses who were examined and those productions which were relied on by the prosecution in the particular non-summary proceedings in which the accused was charged and committed for trial.* In the present state of the law in this country, the Crown is not entitled *as of right* to rely on any other evidence than what was tendered against the accused in the lower Court in support of each charge.

Cases referred to : *R. vs. Johnson*, 3 Cr. A. R. 168.
R. vs. Bond (1906) 2 K. B. 389.
R. vs. Boyle and Merchant (1914) 3 K. B. 339 ; (*vide* also Archbold, 32nd Ed., page 356).
Archbold, 32nd Ed., page 54 ; *R. vs. Latham*, 5 B. and S. 635 and *R. vs. Bailey* (1924) 2 K. B. 300.
King vs. Manuel Cooray, 33 C. L. W. 104 and *King vs. Aron Appuhamy*, 51 N. L. R. 538.

V. Jonklass, with *G. B. Ellapola* for the accused.

T. S. Fernando, Crown Counsel, with *S. Wijesinghe, Crown Counsel* for the Attorney-General.

GRATIAEN, J.

On 21st March, 1950, the Kuliyapitiya Police instituted non-summary proceedings against the accused in the Magistrate's Court of Kanadulla (Case No. 4124) on a charge of having on 12th December of the previous year used as genuine a forged or counterfeit five-rupee note, knowing or having reason to believe the same to be a forged or counterfeit, an offence punishable under section 478 (*b*) of the Penal Code.

On the same day, namely, 21st March, 1950, the Kuliyapitiya Police instituted separate non-summary proceedings in the same Court (case No. 4125) charging the accused with the commission of a similar offence on 9th December, 1949. Had it occurred to the prosecuting authorities to apply the provisions of Section 179 of the Criminal Procedure Code which enables a joinder of these two charges in a single proceeding in the Court below, all the difficulties which have caused could have been avoided. Instead, the procedure,

thoughtlessly selected, was to conduct a separate and distinct Magisterial inquiry into the alleged commission of each offence.

On 20th April, 1950, the proceedings in case No. 4124 were terminated before the learned Magistrate, Mr. G. Thomas, who committed the accused for trial in the Supreme Court on the first charge to which I have referred. In the other proceedings a different Magistrate, Mr. W. A. Walton, who had in the meantime succeeded Mr. Thomas, committed the accused for trial in this Court on the second charge, on 31st May, 1950. In due course a copy of the proceedings in each case was forwarded to the Attorney-General for necessary action as required by section 165 (*e*) of the Criminal Procedure Code. The delay in the preparation and forwarding of the typewritten briefs to the Attorney-General was, as usual, not inconsiderable.

On 4th November, 1950, a single indictment was presented to this Court in the name of the Attorney-General charging the accused on two separate counts with the commission of the respective offences which had been the subject of the Magisterial inquiries separately conducted under the provisions of Chapter 16 of the Criminal Procedure Code.

The preliminary questions arising for my determination are (1) whether in these circumstances the joinder of the two charges in a single indictment is permissible in law ; (2) what would be the effect of such joinder if permissible ; and (3) whether I should, in the exercise of my discretion as presiding Judge, permit the trial of the accused on both counts to proceed before the same jury in a single proceeding.

On the first question I have formed the view that the provisions of Section 179 are sufficiently wide to sanction within certain circumscribed limits the action taken by the Crown. The charges framed against the accused are of the same kind, and both offences are alleged to have been committed within the requisite period of twelve months. Undoubtedly both charges could have been framed and investigated in the same non-summary proceedings ; and, although this was not done, the language of the section does not appear to preclude such charges, after the accused had been committed for trial on separate occasions, being "included in one and the same indictment" for the purpose of a single trial before a higher Court. Learned Counsel have not been able to discover any precedent either in Ceylon or in England for such an amalgamation of charges *after* an accused person has been committed for trial at the conclusion of separate and distinct proceedings in the Court below. Nevertheless, I do not see how I would be justified in quashing the indictment which is on the face of it regular and authorised by the provisions of the Code. I accordingly over-rule the first objection raised by the defence. I hold that the joinder of the charges at this stage is not precluded by law, subject of course to the over-riding discretion vested in the presiding Judge to direct a separate trial on each count in the indictment if in his opinion the accused may be prejudiced or embarrassed in his defence by reason of being charged with both offences in the same indictment. Mr. Fernando indicated that should I so direct in the present case, the Crown desired the trial to proceed in the first instance with the count in which the commission of an offence on the later date, namely, 12th December, 1949, is alleged.

Before I proceed to consider the other questions of law which were discussed, it is convenient to examine the underlying reason for the anxiety of the Crown to include both charges in a single indictment.

The commission of an offence punishable under Section 478 (*b*) of the Penal Code cannot be established unless the prosecution proves that the accused "*knew or had reason to believe*" that the forged or counterfeit currency note uttered by him on the date specified was *in fact* a forged or counterfeit note. For the purpose of establishing the guilty mind which is an essential ingredient of this offence, evidence that the accused person had on other occasions reasonably proximate in time uttered similar counterfeit notes is admissible and relevant (though not, of course, conclusive) under section 14 of the Evidence Ordinance. *R. vs. Johnson*, 3 Cr. A. R. 168 ; *R. vs. Bond* (1906) 2 K. B. 389 ; *R. vs. Boyle and Merchant* (1914) 3 K. B. 339 ; (vide also *Archbold*, 32nd Ed. page 356).

I have closely examined the evidence led against the accused in each of the separate non-summary proceedings on the respective charges which are now included in the single indictment under consideration. In regard to neither charge was any evidence justifying the inference of guilty knowledge, admissible under section 14 of the Evidence Ordinance or any other provision of law, placed before the Magistrate *in the proceedings in which that particular charge was under investigation*. The evidence led in the course of the proceedings in case No. 4124 on the charge of uttering a counterfeit note was quite inadequate to justify the commitment of the accused by the Magistrate ; similarly there was no evidence to justify commitment on the

other charge which was investigated by the magistrate in case No. 4125.

Learned Crown Counsel very frankly conceded during the argument that when the records of each of the two proceedings were received and examined in the Attorney-General's Office, it was realised that there was probably insufficient evidence in either case, separately considered to justify the commitment of the accused on either charge; it was felt, however, that *if* the evidence of the alleged commission of one offence had been led as proof of the commission of the other, committal on both charges would have been justified. In other words, the pooling of the evidence led in the separate and distinct non-summary proceedings in the lower Court would have furnished sufficient evidence to place before a jury for the purpose of securing a conviction on both charges. Otherwise, the trial of the accused upon indictment, with the evidence on each respective count restricted to what had been placed before the committing Magistrate, would almost inevitably have resulted in an acquittal.

Learned Crown Counsel admits that the normal procedure available to the Attorney-General in the circumstances which I have set out was to return both proceedings to the Magistrate with directions under section 389 that the evidence led in case No. 4125 should be led as additional evidence in support of the charged framed in case No. 4124, and *vice versa*. If that were done, a fresh committal on each charge would have been based on sufficient evidence to justify a trial upon indictment in the higher Court, and in that event the joinder of both charges in a single indictment would have been entirely unobjectionable. The Crown decided, however, to attempt the speedier, though admittedly novel, procedure of including these charges in one indictment without recourse to the preliminary steps which I have indicated and thereby condoning, in a sense, the irregular orders of commitments made by the Magistrates concerned. In other words, the Crown's intention is not merely to join the charges in one indictment but to amalgamate at this late stage the evidence in both proceedings for the purpose of proving the commission of both offences in the course of a single trial. This, to my mind, seems objectionable in principle and I do not find myself disposed to sanction it unless the law of criminal procedure compels me to do so.

Learned Crown Counsel has argued that the objection is merely technical because, in his submission, the accused can suffer no prejudice by the procedure which the Crown proposes to adopt. I cannot agree that this is so. No doubt the accused was aware in the lower Court of each item of the evidence which the Crown now desires to amalgamate at the trial, but this does not conclude the matter, as the extent to which this fresh evidence is relied on has now been substantially altered. The purpose of conducting non-summary proceedings for the investigation of charges relating to indictable offences is to provide the accused person with certain fundamental safeguards before he can properly be committed for trial. No person can or should be indicted for an offence unless the prosecution has placed before the committing Magistrate sufficient *prima facie* evidence in support of that charge. Here, the accused had no notice before commitment that the prosecution relied on the alleged commission of one offence as proof of the alleged commission of the other offence. Had he received notice of such intention, it would have been open to him, by the cross-examination of witnesses or by leading evidence in the lower Court, to attempt to satisfy the Magistrate that he should not be committed for trial on either count. The novel procedure adopted by the Crown in the present cases has deprived him of this fundamental right, and, assuming as I must do at this stage that he is innocent of both charges, I feel bound to hold that prejudice might well have been caused to him. It is therefore too late now to supplement the evidence which in its original content was insufficient to justify his commitment in either case. Had there been *some* evidence led before each committing Magistrate to prove the charge under investigation, the present procedure might have been less indefensible. In the present state of things, however, I regard the objection raised by the defence as one of substance and not merely of form.

The view I have taken is that while it is not illegal for the Crown to join in the same indictment under section 179 charges which had formed the subject of separate proceedings terminating in separate committals, such a procedure is not proper and should not be permitted by the trial Judge where the avowed intention of the Crown is to supplement at the trial the insufficient evidence relied on in one preliminary Magisterial investigation by the evidence recorded in a different investigation. This procedure would have the result not only of joining the charges in one indictment but also of pooling and amalgamating the evidence of separate non-summary proceedings. It must be remembered that "each count in an indictment is *for the purposes of evidence and judgment* a separate indictment. *Archbold*, 32nd Ed. page 54; *R. vs.*

Latham, 5 B. and S. 635 and *R. vs. Bailey* (1924) 8 K. B. 300. I accordingly direct that, in the facts of the present case, the accused should be separately tried on each count in the indictment. The principle which I propose to follow in exercising my discretion in the matter is that laid down in section 5 (3) of the indictments Act, 1915, of England which provides that " where.....the Court is of opinion that a person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment ". It follows from my order in the present case that, *for the purposes of each separate trial, the indictment must be regarded as containing a list of only those witnesses who were examined and those productions which were relied on by the prosecution in the particular non-summary proceedings in which the accused was charged and committed for trial.* In the present state of the law in this country, the Crown is not entitled *as of right* to rely on any other evidence than what was tendered against the accused in the lower Court in support of each charge.

I agree with learned Crown Counsel that, on the authority of *King vs. Manuel Cooray*, 33 C. L. W. 104 and *King vs. Aron Appuhamy*, 51 N. L. R. 538, (followed recently by Gunasekara, J. in an unreported case) the provisions of section 172 of the Criminal Procedure Code may be regarded as empowering this Court, *in the exercise of its discretion*, to allow an indictment to be amended by adding to the list of witnesses and documents called or produced in the lower Court. This discretion may properly be exercised, for instance, where fresh evidence has been discovered by the prosecution after the accused had been committed for trial, or where admissible evidence was led in the lower Court, but in an incomplete form. I have not been referred, however, to any authority here or in England where fresh evidence has been permitted to be led after indictment *to supplement evidence which was in the first instance inadequate to justify his commitment* and upon which the accused should not have been put upon his trial. Section 172 was never intended, in my opinion, to authorise the Crown to supply vital gaps in the case against a person who had been improperly committed for trial on insufficient evidence. Section 165 (*f*) of the Court empowers the Attorney-General to present an indictment against an accused " if, after the receipt by him of the certified copy of the record of the inquiry (under Chapter 16) he is of opinion that *the case is one which should be tried upon* indictment....." This can only mean that the Attorney-General must be satisfied that the evidence led *at the preliminary inquiry* was sufficient to warrant trial upon indictment. The existence of other evidence which was not led at the inquiry to support the charge cannot be taken into account for the purpose of his decision. A proper commitment justified by the evidence placed before the committing Magistrate, is a condition precedent to the operation of section 172 of the Criminal Procedure Code.

I appreciate that the desire of the Crown in this case was to avoid the delay which would have been occasioned by ordering the proceedings in cases No. 4124 and 4125 to be re-opened for the purpose of leading in each case the minimum evidence which would have justified commitment on each charge. Had there already been on record sufficient evidence to put the accused on trial on each of the charges, the proposed " short-cut " (if I may use that term) would perhaps have been open to less objection. In the present case, for the reasons which I have given, the " short-cut " leads nowhere.

It now remains for the Crown to decide whether any useful purpose would be served by proceeding against the accused *in accordance with and subject to the restrictions imposed by my directions in this order.* Let the case be called on February, 1st for this purpose. The accused must be produced in Court on that date, and the cases fixed for trial if the Crown so desires.

I had given careful consideration to the question whether I should reserve these question for the consideration of a fuller Bench in terms of Section 48 of the Courts Ordinance. In my opinion such a step would not be justified. My ruling does not seem to me to be in conflict with any earlier decisions of this Court, and I can hardly think that many occasions would arise in the future for the Crown to be confronted with a situation where fresh evidence to support a charge on which an accused has been committed for trial on insufficient material. Should such occasions arise, justice demands that the normal procedure available to the Attorney-General should not be side-tracked. Besides, in the present cases the accused has already, through inability to furnish bail, been on remand for over 10 months awaiting his trial and it is not right that a final decision should be further delayed pending the determination of academic questions of law. If the accused is in fact

guilty of the serious offences alleged against him, the case affords yet another illustration of the necessity for the prosecuting authorities to obtain the advice of the law officers of the Crown *at the proper time*—that is, at a stage when the case against the accused is still under preparation for the purposes of the non-summary proceedings in the Court below. Had this been done, the trial of the accused would long since have been concluded.

Objection upheld.

IN THE PRIVY COUNCIL

Present : LORD NORMAND, LORD OAKSEY, LORD REID, SIR JOHN BEAUMONT AND THE CHIEF JUSTICE OF CANADA (THE RIGHT HON. T. RINFRET)

THE KING vs. SELVANAYAGAM

Privy Council Appeal No. 38 *of* 1947.
S. C. 941—*M. C. Kegalla,* 12,301.

Decided on : 26th July, 1950.

Criminal trespass—Appellant occupying rooms in estate acquired by Government—Notice to quit by Superintendent of estate after acquisition—No evidence of occupation by Superintendent or of annoyance to him by accused—Accused not the servant of Superintendent—Relevant intention must be proved and not assumed—What constitutes criminal trespass—Sections 427, 433, *Penal Code.*

The appellant, who was in occupation of two rooms on an estate, wherein his family had lived for nearly seventy years, was noticed to quit by the Superintendent, R, who was under the direction of the Assistant Government Agent of Kegalla, H. On his refusal to leave, he was charged and convicted of the offence of criminal trespass by unlawfully remaining in the two rooms with intent to annoy R. The conviction was affirmed on appeal by the Supreme Court.

The Magistrate found that R was in occupation of the entire estate and the buildings thereon ; that the appellant had occupied the rooms not as a tenant but as a servant and that, when his employment was terminated by notice to quit, his continued occupation of the rooms was unlawful and warranted the conclusion that the intention of the appellant was to annoy R, since that would be the natural consequence of his action.

Evidence led in the case showed that the appellant's intention was not to annoy R but to remain on the estate where his family had lived for generations and not to find himself homeless. Further, there was no satisfactory evidence as to the character of the appellant's occupation, but the facts relating to R's employment and duties established that the appellant was a servant of H and not of R.

Held : (1) That in the circumstances the Crown had failed to prove that R was in occupation of the estate, including the two rooms.

(2) That on the evidence there was no intention on the part of the appellant to annoy R by remaining on the estate and the lower Courts were wrong in assuming an intention to annoy R merely because such annoyance would be the natural consequence of appellant's refusal to leave.

(3) That entry upon land, made under a *bona fide* claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant.

(4) That to establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent.

Cases referred to : *Suppiya vs. Ponniah* (1909) 14 N. L. R. 475.
Wijemanne vs. Kandiah (1933) 35 N. L. R. 244.
Forbes vs. Rengasamy (1940) 41 N. L. R. 294.

J. D. Casswell, K.C., with *Ralph Millner* and *Rex Hermon*, for the accused-appellant.
Sir David Maxwell Fyfe, K.C., with *J. G. Le Quesne*, for the Crown.
In the Application for Special Leave to Appeal.
D. N. Pritt, K.C., with *R. K. Handoo*, and *C. E. L. Wickremesinghe*, for the petitioner.
Frank Gahan, for the Crown.

Delivered by SIR JOHN BEAUMONT—

This is an appeal by special leave from a judgment of the Supreme Court of Ceylon dated the 30th August, 1946, which dismissed the appellant's appeal against his conviction in the Magistrate's Court of Kegalla on a charge of criminal trespass punishable under section 433 of the Penal Code.

The facts on which the charge was based can be stated shortly. On the 23rd April, 1945, the Government of Ceylon duly gave notice of its intention to take possession of certain private lands, including the Knavesmire estate, for village expansion pursuant to the Land Acquisition Ordinance (Legislative Enactments of Ceylon, 1936, Chapter 203). On the 26th November, 1945, the executive committee of the local administration directed the land officer of Knavesmire to take possession of the estate for and on behalf of His Majesty pursuant to section 12 of the Ordinance, and on the 6th December, 1945, the land officer certified that he had that day taken possession of the said estate on behalf of His Majesty. It is not disputed that thereupon the estate vested absolutely in His Majesty free from all encumbrances.

The Government continued for the time being to employ the labour force then on the estate, the appellant being a member of such force. On the 30th January, 1946, D. R. M. Rajapakse was appointed by the Governor to the post of superintendent of the Knavesmire estate, the terms of appointment being stated in a letter dated the 26th June, 1946, addressed to him by the Chief Secretary (Exhibit P. 9). According to the evidence of Mr. Henderson, assistant government agent of Kegalla, given at the hearing of this matter, the appointment was made on his recommendation.

The object of the Government in acquiring the Knavesmire estate was to place in possession of it selected landless residents from certain villages who would work the estate on co-operative lines. According to the evidence of Mr. Henderson he selected 243 such tenants, and with a view to providing them with work on the estate he instructed Mr. Rajapakse, the superintendent, to give notice to all the labourers on the estate as from the end of May, 1946. In accordance with these instructions Mr. Rajapakse on the 29th April, 1946, gave notice to the appellant (Exhibit D. 1), terminating his employment as from 31st May, 1946, and directing him to hand over to Rajapakse the house which he occupied and to leave the estate on or before the 31st May, 1946. On that date the appellant accepted his wages, but refused to accept a discharge ticket tendered to him, and declined to leave the premises in his occupation.

According to the evidence of the appellant given at the hearing, when the estate was taken over by the Crown he and his wife and mother occupied two rooms in the lines on the estate. His father and grandfather had occupied the rooms before him. His father had planted trees in the garden plots in front and in rear of the rooms and the appellant and his parents had enjoyed the produce of the trees. The appellant claimed that he and his ancestors had been in occupation of the rooms for 70 years and for that reason he declined to quit, since he had no other house to live in. He claimed the right to stay on the estate since for generations he and his family had lived there.

On the 5th June, Mr. Henderson, the assistant government agent, made a report to the Magistrate's court of Kegalla that the appellant had committed criminal trespass by unlawfully continuing to remain on the Knavesmire estate property of the Crown in the occupation of D.R.M. Rajapakse, Superintendent of the said estate, with intent thereby to annoy the said Rajapakse, and thereby committed an offence punishable under section 433 of the Penal Code, and on the same day a summons was issued to the appellant to answer to the said complaint.

The offence of criminal trespass is defined by section 427 of the Penal Code in the following terms :—

> "Whoever enters into or upon property in the occupation of another with intent to commit an offence, or to intimidate, insult or annoy any person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'."

At the trial the learned magistrate found that Rajapakse was at the material time in actual and physical occupation of the whole of the Knavesmire estate and all the buildings thereon ; that the appellants had occupied two line rooms not as a tenant but as a servant and that when his employment ended by notice to quit duly served on him his subsequent remaining on the estate was unlawful ; and that the facts proved warranted the conclusion that the intention of the accused by remaining on the estate was to cause annoyance to Rajapakse since that would be the natural consequence of his action. The accused was accordingly, on the 28th of June, 1946, convicted and sentenced to two months' rigorous imprisonment.

An appeal against the conviction was lodged in the Supreme Court and was heard on the 30th August, 1946, by Mr. Justice Jayetileke, who agreed with the conclusions of the learned magistrate and dismissed the appeal.

In order to establish the criminal trespass charge the Crown must show :—

(1) that the occupation by the appellant of his two rooms after the expiration on the 31st May, 1946, of the notice to quit was unlawful ;

(2) that Rajapakse was at the date of the expiration of the notice to quit in occupation of the Knavesmire estate including the rooms in which the appellant and his family lived ; and

(3) that the intention of the appellant in refusing to surrender his two rooms was to annoy Rajapakse, there being no suggestion of an intention to commit an offence or to intimidate or insult.

The evidence on record does not establish clearly the nature of the appellant's occupation of his two rooms, since there is no evidence as to the origin of such occupations, but their Lordships are in agreement with the view expressed by Mr. Justice Jayetileke in the Supreme Court that the effect of acquisition by the Crown of the Knavesmire estate under the Land Acquisition Ordinance, assuming the proceedings under the Ordinance to have been in order, was to wipe out any interest which the appellant may have had in any part of the estate. Their Lordships will therefore assume that the occupation of the appellant was unlawful after the 31st May, 1946, and they will determine on that basis the two remaining questions whether Rajapakse was in occupation of the rooms in which the appellants lived, and, if so, whether the refusal of the appellant to give up such rooms was with intent to annoy Rajapakse.

Section 427 does not make every trespass a criminal offence. It is confined to cases in which the trespass is committed with a particular intention and the intention specified indicates that the class of trespass to be brought within the criminal law is one calculated to cause a breach of the peace. Their Lordships are satisfied that the section was not intended to provide a cheap and expeditious method for enforcing a civil right. It is to be noted that the section deals with occupation, which is a matter of fact, and not with possession which may be actual or constructive and may involve matters of law. The first paragraph of the section comes into operation when a trespasser enters land in the occupation of another with the intent specified, and the second paragraph applies when the entry is lawful but becomes unlawful, *e.g.*, when the entry is made on the invitation of the occupier and there is a refusal to leave when the invitation is withdrawn. But in either case there must be an occupier whose occupation is interfered with, and whom it is intended to insult, intimidate or annoy (unless the intent is to commit an offence). The section has no application where the fact of occupation is constant, the only change being in its character, as where a tenant holds over after the expiration of his tenancy.

In the present case according to the uncontradicted evidence the only person in physical occupation of the two rooms at the material dates was the appellant, who cannot have intended to annoy himself. This difficulty the respondent sought to overcome by alleging that the occupation by the appellant of his two rooms was that of a servant and was in law, therefore, the occupation of the master, that after the acquisition of the Knavesmire estate by the Crown and the re-employment of the appellant on the estate, the occupation of the appellant became that of the Crown, and that Rajapakse represented the Crown. Their Lordships have already indicated that in their view there is no satisfactory evidence as to the character of the appellant's occupation but assuming it to have been that of a servant, their Lordships think it clear that Rajapakse was not the master. The terms of his appointment in Exhibit P. 9 do not define his duties, but as already pointed out it was Mr. Henderson who secured his appointment ; it was Mr. Henderson who directed Rajapakse to serve the notices to quit ; and it was Mr. Henderson who selected the new tenants for the land. There is no evidence that Rajapakse had any power to dismiss the appellant, or that he was under any obligation to pay the appellant's wages, or was in any sense his master, and in their Lordships' opinion the Crown failed to prove that Rajapakse was the man in occupation of the estate, including the two rooms, at the material time. If this be so an intention to annoy Rajapakse would be irrelevant but in their Lordships' view the Crown also failed to prove the existence of such an intention. It was suggested in argument that there were concurrent findings of fact as to the appellant's intention, but intention, which is a state of mind, can never be proved as a fact ; it can only be inferred from facts which are proved. It may well be that in doing a particular act a man may have more intentions than one, and Sir David Maxwell Fyfe for the respondent did not dispute that to bring a case within section 427 the intention specified in the section must be the dominant intention. The appellant when in the witness box was not asked whether he intended to annoy

Rajapakse, nor were any questions put to him to suggest that he was on bad terms with Rajapakse, who was merely carrying out the orders of his superiors. The courts in Ceylon thought that an intention to annoy Rajapakse must be inferred because such annoyance would be the natural consequences of the appellant's refusal to quit, and that the appellant must have appreciated this. Their Lordships are not prepared to hold that the appellant, in refusing to give up his two rooms, thereby no doubt increasing the difficulties of the superintendent intended to induce, or contemplated that he would induce, in the mind of the superintendent an emotion so inappropriate to a Government officer and so unprofitable as annoyance; but even if the appellant did anticipate that Rajapakse would be annoyed it is perfectly clear from his evidence that his dominant intention was to remain on the estate where he and his family had lived for generations and not find himself homeless. Entry upon land, made under a *bona fide* claim of right, however ill-founded in law the claim may be, does not become criminal merely because a forseen consequence of the entry is annoyance to the occupant. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent. Their Lordships are not in agreement with the contrary view which Mr. Justice Wood Renton seems to have entertained in *Suppiya vs. Ponniah.* (1909) 14 N. L. R. 475. They prefer the view of Dalton, A.C.J., in *Wijemanne vs. Kandiah.* (1933) 35 N. L. R. 244. The case of *Forbes vs. Rengasamy*, (1940) 41 N. L. R. 294 on which the courts in Ceylon relied is distinguishable because in that case the accused did not give evidence as to his real intention and the court thought that his conduct had been defiant.

The appellant asked for costs against the Crown on the ground that recourse to the criminal law was entirely unwarranted. It is very rare for their Lordships to allow costs in a criminal matter and although they think that in this case recourse to a criminal court was not justified, the application found some support in previous decisions of the Supreme Court and was successful in two courts. In the circumstances their Lordships will adhere to their usual practice and make no order as to costs.

For the above reasons their Lordships will humbly advise His Majesty that this appeal be allowed and the conviction and sentence upon the accused passed by the magistrate of Kegalla on the 28th of June, 1946, be set aside.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : DIAS, S.P.J. (President), GRATIAEN, J. AND GUNASEKARA, J.

REX vs. ABEYRATNE

Appeal No. 53 *of* 1950 *with Application No.* 105 *of* 1950.

S. C. No. 7—*M. C. Anuradhapura No.* 2093.

Argued and decided on : 28th November, 1950.
Reasons delivered on : 6th December, 1950.

Charge of unlawful assembly with house-trespass and attempted murder as common objects—Acquittal of accused on charges of house-trespass and attempted murder—Conviction for unlawful assembly and rioting—Inconsistency—Failure of Judge to put evidence of accused to jury.

Out of four accused charged with unlawful assembly, with house trespass and attempted murder as the common object one was completely acquitted, while the others were acquitted of house trespass and attempted murder and convicted of unlawful assembly and rioting. The defence, supported by the accused's own evidence, was not put to the jury.

Held : (1) That the evidence on all the counts being the same, the alleged guilt of the accused on the counts of unlawful assembly and rioting was inconsistent with and was negatived by the verdict of acquittal on the connected offences.

(2) That the failure of the trial Judge to put to the jury the defence of the accused supported by his own evidence was itself a sufficient ground to quash the conviction.

Cases referred to : *R. vs. Cooper*, (1947) 63 T. L. R. 561.
The King vs. Namasivayam, (1948) 49 N. L. R. 289.
R. vs. Mills, (1935) 25 C. A. R. 128.
R. vs. Raney, (1942) 29 C. A. R. 14.

Nihal Gunasekara, with *E. A. G. de Silva*, for the accused-appellant.

GRATIAEN, J.

The appellant was the 3rd accused in this case. He and three others were charged with the commission of the following offences :—

(1) that they, with others unknown, were on the 12th October 1949, members of an unlawful assembly the common object of which was to commit house trespass by entering the house of U. K. P. A. Ambatenne ;

(2) that being members of the said unlawful assembly, they were guilty of the offence of " rioting " ;

(3) that, being members of the said unlawful assembly they were guilty of the offence of house trespass ;

(4) that, being members of the said unlawful assembly, they were guilty of the attempted murder of U. K. P. A. Ambatenne.

The jury unanimously acquitted the 2nd accused of all the charges, and acquitted the other accused, including the appellant, of the charges of trespass and attempted murder. They however returned unanimous verdicts finding the 1st, 3rd and 4th accused guilty of the offence of unlawful assembly and rioting. Only the 3rd accused has appealed against his conviction and sentence.

It is common ground that on the night of 12th October, 1949, an incident had taken place outside the Parakarama Cinema in Hingurakgoda owned by P. R. Perera who was called as a witness for the defence. A man named Sirisena was involved in that incident, in consequence of which there was, to use the words of the presiding Judge " a clash between the labourers (who were Sirisena's friends) and the cinema people and their sympathisers ". The case for the prosecution is that the four accused, and a number of others who could not be identified, broke into Alahakoon's house and there severely attacked the witness Ambatenne. Apart from the question of the identity of the persons involved in the incident, it is not disputed that, at some stage of the transaction, a number of persons did form themselves into an unlawful assembly and caused grave injury to Ambatenne in or in the vicinity of Alahakoon's house.

The case against the accused persons rested entirely on the evidence of Sirisena, Ambatenne and a witness named Kalu Banda. Alahakoon had, fortunately for himself, escaped the attentions of his pursuers and was unable to identity any of his would-be assailants. No witness purported to testify to the participation of any of the accused in the acts attributed to the unlawful assembly except in regard to events which took place after the mob had entered Alahakoon's house.

The grounds of appeal relied on by the 3rd accused are as follows :—

(*a*) that the verdict of the jury convicting him of unlawful assembly and rioting was unreasonable and could not be supported having regard to the evidence ;

(*b*) that as the jury had acquitted him on the counts of house-trespass and attempted murder, the verdict convicting him on the counts of unlawful assembly and rioting was " perverse " ;

(*c*) that the presiding Judge's charge to the jury had omitted to put the appellant's defence to the jury.

At the conclusion of the argument the Court was unanimously of the opinion that the appeal should succeed, and order was accordingly made quashing the convictions and sentences passed on the 3rd accused. I now proceed to pronounce the reasons for this order.

It is convenient in the first instance to consider the case for the prosecution on the charges of house trespass and attempted murder. Sirisena implicated all four accused, and no other witness purported to identify the 2nd accused as having taken any part in the alleged commission of the offences with which he was charged. The learned presiding Judge pointed out to the jury that if they were not prepared to act on Sirisena's evidence, they must acquit the 2nd accused of all the charges. Sirisena's evidence was clearly unsatisfactory ; he had on an earlier occasion admitted his inability to identify any member of the unlawful assembly ; and the verdict of the jury acquiting the 2nd accused justifies us in assuming that they considered it unsafe to accept Sirisena's evidence.

With regard to the case against the 1st, 3rd and 4th accused, the presiding Judge pointed out to the jury that only Sirisena, Ambatenne and Kalu Banda had given evidence implicating

them in the incident which took place in Alahakoon's house. Having very carefully analysed the evidence of these witnesses the learned Judge said to the jury " if you are satisfied that the 1st, 3rd and 4th accused belonged to the group of people who entered the house, *then they are guilty of all the charges* laid against them in the indictment. But if you are satisfied that they did not or if you have any reasonable doubts as to their presence, *then you must acquit all three accused on all the charges* ". We think that this was a proper direction. If, in the opinion of the jury, the accused persons, with a number of confederates, had broken into Alahakoon's house and attacked Ambatenne with dangerous weapons, it would have followed as a matter of irresistible inference that the persons concerned had at some earlier point of time joined an unlawful assembly for the purpose of achieving the common objects specified in the indictment. If on the other hand, the jury were not satisfied that any accused person had broken into Alahakoon's house and was concerned with the offences of house breaking and attempted murder, it necessarily followed that there was no evidence incriminating those persons on the charges of unlawful assembly and rioting. (Vide *R. vs. Cooper*, (1947) 63 T. L. R. 561). In the opinion of the Court, the verdict of the jury acquitting the appellant of house breaking and attempted murder necessarily involves their rejection of the evidence implicating him in the incidents which took place in Alahakoon's house, and the verdict convicting the appellants on the counts of unlawful assembly and rioting was not supported by any other evidence. We think that *in the circumstances of the present case* the alleged guilt of the appellant on the counts of unlawful assembly and rioting is inconsistent with and was negatived by the verdict of the jury acquitting him of the connected offences. We accordingly make order quashing the convictions and sentences imposed on the appellant.

As the 1st and 4th accused have not appealed against their convictions, we are precluded from making any order affecting them. Should they now desire to apply for an extension of time within which to appeal to this Court, we think that their applications would be entitled to favourable consideration. (Vide—*The King vs. Namasivayam*, (1948) 49 N. L. R. 289).

With regard to the third ground of appeal relied on by the 3rd accused, we are of the opinion that although the learned Judge's charge gave adequate directions on other matters, he omitted entirely to put the appellant's defence to the jury. The appellant gave evidence at the trial, and called a witness for the purpose of proving that he was about 200 yards away from Alahakoon's house at the time when he was alleged by the prosecution to have broken into it and assaulted Ambatenne. This vital evidence was not put to the jury for their consideration in the learned Judge's summing-up, and we consider that even if this ground of appeal had stood alone it would have been necessary to quash the conviction. (Vide—*R. vs. Mills*, (1935) 25 C. A. R. 128 ; *R. vs. Raney*, (1942) 29 C. A. R 14).

Conviction Quashed.

Present : BASNAYAKE, J.

COMMISSIONER OF MOTOR TRANSPORT vs. THE SOUTH-WESTERN BUS CO., LTD., & OTHERS.

In the matter of an application by the Commissioner of Motor Transport for the amendment of the Case stated for the opinion of the Supreme Court under Section 13 (8) *of the Omnibus Service Licensing Ordinance No.* 47 *of* 1942.

Application No. 49 *of* 1950.
Argued and decided on : 31st October, 1950.

Case stated—Motor Car Ordinance 45 *of* 1938 *and Omnibus Service Licensing Ordinance* 47 *of* 1942—*Proper mode of application by Commissioner of Motor Transport.*

In stating a case for the opinion of the Supreme Court, the Commission should set forth the facts tabulated in paragraphs. Opinions or arguments should not be stated and there should be a definite finding of the facts, not a verbatim statement of the evidence, nor an approval of the contentions of either party. The questions submitted for the opinion of this (Supreme) Court should be clearly set out. Any material documents which were in evidence at the hearing before the Tribunal should be annexed as exhibits.

Walter Jayewardena, Crown Counsel, for the appellant-petitioner.
H. V. Perera, K.C., with *H. W. Jayewardena*, for the South-Western Bus Co., respondent.

BASNAYAKE, J.

This is an application by the Commissioner of Motor Transport who has under section 4 (6) of the Motor Car Ordinance No. 45 of 1938 asked that a case be stated under that provision read with section 13 of the Omnibus Service Licensing

Ordinance No. 47 of 1942. He prays that the case stated be sent back to the Tribunal for amendment under paragraph (*d*) of section 4 (6) because the stated case does not set out the questions for the determination of which he applied for a case to be stated. That provision reads :

> "Any Judge of the Supreme Court may cause a stated case to be sent back for amendment by the Tribunal and thereupon the case shall be amended accordingly."

The stated case, which is by no means carefully drafted, does not contain the questions of fact and law on which the Commissioner has in his written application asked that a case be stated. But the application of the Commissioner is annexed to the case stated and marked "A". The Matters on which the opinion of this Court is prayed for are stated in that document.

The only question that arises for decision on the present application is whether annex "A" to the case stated can be treated as a part of it, and the questions set out therein regarded as questions on which the opinion of this Court is asked.

The procedure adopted by the Tribunal is extremely unsatisfactory. The case stated should set forth the facts tabulated in paragraphs. Opinions or arguments should not be stated and there should be a definite finding of the facts, not a verbatim statement of the evidence, nor an approval of the contentions of either party. The questions submitted for the opinion of this Court should be clearly set out. Any material documents which were in evidence at the hearing before the Tribunal should be annexed as exhibits. This is not the only case within my knowledge in which the Tribunal has adopted the course of annexing a number of documents to the case stated and leaving it to this Court to ascertain from them the findings of the Tribunal and the questions submitted for the opinion of this Court. Such an unsatisfactory practice is not in the interests of those for whose benefit an appeal by way of case stated to this Court is granted and Must not be allowed to grow.

I am not convinced that the instant case is one which may properly be remitted for amendment. In the special circumstances of this case I am prepared to regard the questions set out in annex "A" as questions submitted for the opinion of this Court.

I refuse the application and direct that the case stated be listed for hearing.

There will be no costs.

Application refused.

Present : BASNAYAKE, J.

WIMALASURIYA vs. PONNIAH

S. C. 167—*C. R. Gampola* 8471.

Argued on : 24th November, 1950
Decided on : 24th January, 1951.

Rent Restriction Ordinance, section 9—Tenant sub-letting the leased premises without prior consent of landlord in writing—Can landlord sue such tenant for ejectment without terminating tenancy by notice.

Held: That a landlord is entitled to institute an action in ejectment under section 9 of the Rent Restriction Ordinance No. 29 of 1948 without terminating the tenancy by notice.

H. W. Jayawardena, with *D. R. P. Goonetilleke*, for the plaintiff-appellant.
Vernon Wijetunge, for the defendant-respondent.

BASNAYAKE, J.

This is an appeal by the plaintiff in an action for ejectment of the defendant from premises No. 69 Malabar Street, Gampola. The plaintiff alleges that the defendant in contravention of section 9 of the Rent Restriction Act, No. 29 of 1948, sublet the premises, and he claims the right to eject the defendant by virtue of section 9 (2) of that Act.

The action was fought on the ground that the plaintiff has not terminated the contract of tenancy by giving the requisite notice and that he is not entitled to institute proceedings in ejectment under section 9 without first terminating the contract.

The learned Commissioner has upheld the objection of the defendant and dismissed the plaintiff's action.

The question that arises for consideration is whether a landlord before instituting, under the right given to him by section 9 of the Rent Restriction Act No. 29 of 1948, an action for the ejectment of a tenant who without his prior consent in writing has sublet the leased premises or any part of it, is bound to terminate the tenancy by giving him reasonable notice according to the terms of the contract of tenancy. Learned counsel for the appellant contends that section 9 creates a new right not known to the common law and that a landlord is entitled to institute an action in ejectment under that section without terminating the tenancy by notice. The relevant portion of section 9 of the Rent Restriction Act No. 29 of 1948 reads :

> "(1) Notwithstanding anything in any other law, but subject to any provision to the contrary in any written contract or agreement, the tenant of any premises to which this Act applies shall not, without the prior consent in writing of the landlord, sub-let the premises or any part thereof to any other person.
>
> "(2) Where any premises or any part thereof is sub-let in contravention of the provisions of sub-section (1), the landlord shall, notwithstanding the provisions of section 13, be entitled in an action instituted in a Court of competent jurisdiction to a decree for the ejectment from the premises of his tenant and of the person or each of the persons to whom the premises or any part thereof has been so sub-let."

Under the common law the landlord is entitled to institute proceedings in ejectment against a tenant who remains in the leased property after the termination of the lease. A lease terminates either by effluxion of time or by notice of termination where a lease is terminable on notice. Where there is no express agreement to the contrary a tenant may under our law sub-let an urban tenement. The act of subletting by a tenant of an urban tenement does not give the landlord the right to cancel the lease and ask for possession of the premises. It cannot therefore be said that the landlord is obliged by the common law to give notice before exercising his statutory right under section 9 of the Act. Nor does the statute impose any obligation on him to give notice before proceeding thereunder. A notice of cancellation of the contract of tenancy need not under our law precede every action in ejectment. A cancellation need be made only in a case where without such cancellation the landlord is not under the terms of the lease entitled to demand the surrender of the premises.

The legislature is presumed to know the law and it can safely be assumed that if it intended that notice should be given before the institution of legal proceedings under section 9 it would have provided for it by express enactment, especially as it was conferring by statute a right which the landlord does not have under the common law.

I am therefore of opinion that the present action is maintainable. The appeal is allowed with costs here and in the Court below.

Appeal allowed.

Present : BASNAYAKE, J.

MAILVAGANAM vs. SUB-INSPECTOR OF POLICE

Application No. 102—*S. C.* 139 *with M. C. Trincomalie* 6543.
Argued and Decided on : 6th November, 1950.

Sentence—Unsworn statement regarding accused—Magistrate influenced by.

Where in determining the sentence to be passed on an accused person the learned Magistrate appeared to have been influenced by the unsworn statement of a Police officer regarding the accused.

Held : That the sentence should be set aside.

Per BASNAYAKE, J.—The sentence of a Court is a part of its judgment and it cannot be based on any material which is not legal evidence.

R. L. Pereira, K.C., with *C. F. Sethukavalar*, for the accused-appellant and petitioner in revision.
A. Mahendrarajah, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

This is an appeal by one P. V. Mailvaganam who has been sentenced to undergo a term of three months' rigorous imprisonment on his own plea of guilty to a charge of having been in possession of half pound and three ounces of ganja without a licence from the Minister in breach of section 28 of the Poison, Opium and Dangerous Drugs Ordinance. The appellant has no right of appeal and his appeal is therefore rejected.

There is also an application to revise the sentence passed on him in the exercise of the powers of this Court under section 358 of the Criminal Procedure Code. It is submitted by

learned Counsel for the petitioner that the learned Magistrate has imposed a term of imprisonment on the petitioner, who is a first offender, because he has been influenced by the following statement made by Sub-Inspector Simon Perera: "The accused is a habitual dealer in opium and ganja. He runs a cafe in which this ganja was found."

It does not appear from the record of the proceedings that the statement was on oath or that the petitioner has been afforded an opportunity of contradicting it or of cross-examining the person making it. The sentence of a Court is a part of its judgment and it cannot be based on any material which is not legal evidence. The unsworn statement of the Sub-Inspector is not legal evidence.

I am unable to escape the conclusion that in determining the sentence the learned Magistrate was influenced by the statement of the Sub-Inspector. I therefore set aside the sentence of three months' rigorous imprisonment imposed on the petitioner and order him to pay a fine of Rs. 500. In default he will undergo three months' rigorous imprisonment.

Sentence altered.

Present : DIAS, J. & GUNASEKERA, J.

ABRAHAM vs. FERDINANDO

S. C. 516—D. C. (Final) Panadura T. K. 866/25551.
Argued and Decided on : 18th January, 1950.

Appeal—Failure to conform to Civil Appellate Rules 1938, *section* 4 (*b*)—*Abatement—Section* 755 *Civil Procedure Code—Petition of appeal by appellant in person—Duty imposed on Secretary or Chief Clerk.*

Where a person in an appeal failed to conform to section 4 (*b*) of the Civil Appellate Rules 1938 and to section 755 of the Civil Procedure Code but pleaded that as he personally conducted the case in the original Court it was the duty of the Secretary of the Court to advise him on the law and procedure relating to appeal.

Held : That no such duty was imposed by law and that under section 755 of the Civil Procedure Code the Secretary or Chief Clerk of the Court was obliged only to set forth the material statements and grounds of appeal which the appellant wished to state in the form of a petition of appeal, and which is to have the petition attested by him after the appellant had signed it.

Case referred to : *Emmanuel vs. Ratnasingham* (1932, 34 N. L. R., p. 126).

Defendant-petitioner in person.
M. L. S. Jayasekera, for the plaintiff-respondent.

DIAS, J.

This application fails for two reasons. In the first place, the appeal must be deemed to have abated within the meaning of the Civil Appellate Rules, 1938 (Subsidiary Legislations of Ceylon, Volume 4, June, 30th 1938, to 1st January, 1941), section 4 (b). This sub-section declares that where the appellant fails to pay the additional fees due under rule 2 sub-rule (4) within the time specified or before the expiry of the time allowed by rule 2 sub-rule 7, whichever is later, the appeal shall be deemed to have abated. The petitioner's contention is that he having conducted the case in person it was the duty of the Secretary to have advised him on the law. We do not think that any such duty is cast upon the Secretary of a Court to advise litigants as to what the law or the procedure is. This is a danger which a suitor in person always has to face when he thinks he can conduct litigation in person.

In the second place the application fails because under section 755 of the Civil Procedure Code it is provided that all petitions of appeal shall be drawn and signed by some advocate or proctor or else the same shall not be received. There is a proviso to the effect that any party desirous to appeal may within the time limited for presenting a petition of appeal and upon his producing the proper stamp required for a petition of appeal be allowed to state *viva voce* his wish to appeal together with the particular grounds of such appeal and the same shall (so far as they are material) be concisely taken down in writing from the mouth of the party by the Secretary or chief clerk in the form of a petition of appeal. This admittedly has not been done. In the case of *Emmanuel vs. Ratnasingham* (1932, 34 N. L. R. p. 126) this Court held that where a petition of appeal was signed by the appellant but was not taken down in writing by the Secretary of the Court in terms of section 755 the petition of appeal was irregular.

The application must therefore be dismissed with costs.

Dismissed.

GUNASEKERA, J.

I agree.

Present : PULLE, J.

NADARAJAH, INSPECTOR OF LABOUR vs. PIYASENA

S. C. No. 1268—*M. C. Colombo South No.* 21815.

Argued on : 10th July, 1950.
Decided on : 29th November, 1950.

Shops Ordinance 66 of 1938—Meaning of "Shop"—Portion of hotel building used for textile business—Permanent structure and regular business—Does it constitute a 'Shop.'

In a part of a building described as a hotel, the appellant transacted business as a retail dealer in textiles. The portion he occupied was separated by a partition and in front of it was a counter on which his goods were displayed. On either side of the counter were two doors of the entrance left permanently open. There was a canvas over the counter and the place was illuminated by electric lights from current taken from the main building. He was convicted for keeping the shop open in breach of the prescribed hours.

It was contended on his behalf that his place of business did not constitute a "shop" as defined in Ordinance No. 66 of 1938, as it was not a compact building with facilities for meals and sanitation and capable of being closed or open by the occupant.

Held : That the appellant's place of business is a "shop" within the meaning of section 31 (1) of the Shops Ordinance No. 66 of 1938.

Cases referred to : *Metropolitan Water Board vs. Paine* (1907) 96 L. T. R., p. 63.
Illford Corporation vs. Mallinson (1923) 147 L. T. R., p. 37.
Summers vs. Roberts (1944) 1 K. B., p. 106.

H. W. Jayawardene, for the accused-appellant.
Sam Wijesinghe, Crown Counsel, for the Attorney-General.

PULLE, J.

The appeal in this case arises from a prosecution under the Shops Ordinance, No. 66 of 1938, and the point to be determined is whether the place where admittedly the appellant was carrying on a retail business fell within the meaning of the word "shop" as defined in section 31 (1) of the Ordinance. The definition reads, leaving out what is immaterial.

> "'Shop' means any premises in which any retail or wholesale trade or business is carried on and includes any premises in which the business of a barber or hairdresser or the sale of articles of food or drink is carried on".

There is a building which is described as a hotel and bearing Municipal assessment No. 191, Galle Road, Wellawatte. A portion of the entrance to this building is blocked by a partition and in front of it, on the floor of the entrance, is a counter which is flanked by the two doors of the entrance which are left permanently open. The appellant who carried on a business in textiles transacted his business from the area between the counter and the partition. There was a canvas awning over the counter and the goods were displayed on the counter and the space between it and the awning. Directly above the awning were the concrete canvas of the hotel. At night the place was illuminated by electric lights from current taken from premises No. 191.

Having regard to the place where the appellant was carrying on business it is obvious that he was an occupant of a part of building No. 191. Learned Counsel argues that that is not sufficient to constitute the place a shop as defined in the Ordinance. He argues that to constitute a shop there must be a compact building capable of providing the salesmen with facilities for taking meals and with sanitary conveniences and also capable of being closed and open in order to conform to closing orders made under section 15 (1). I do not think that the argument based on the absence of facilities in any way assists the appellant. In regard to compulsory providing of facilities, sections like 10, 11 and 14 cannot be interpreted to mean that if these facilities do not exist a retail or wholesale place of business cannot be a shop. On the contrary they envisage a place of business which is a shop within the meaning of the Ordinance, but which may not have those facilities and thus rendering the occupier guilty of offences punishable under section 28 (1). As I read section 15 and 18 a physical closing of the place of business is not essential to compliance therewith. What is prohibited is the keeping of a shop open in breach of the prescribed hours "*for the serving of customers*".

On behalf of the appellant reliance was placed on the cases of *Metropolitan Water Board vs. Paine* (1907) 96 L. T R. p. 63 and *Illford Corporation vs. Mallinson* (1923) 147 L. T. R. p. 37,

In the former case the word "premises" had to be interpreted in the context of section 79 of the East London Waterworks Act, 1853. The question for decision in the first case was whether a bare land on which the owner intended to erect buildings came within the description of the word "premises" so as to entitle the owner to a water supply for building operations at certain advantageous rates. It was held that the word "premises" meant a house and did not include bare land. In the second case the word "premises" had to be interpreted as used in Section 1 in the Poor Rate Exemption Act, 1833. In this as well it was held that the word referred to buildings only and not a piece of vacant land. In view of the evidence in this case that the place where the appellant carried on his business is a part of a building, the applicability of these decisions does not arise. I would observe that in the earlier case the word "premises" was not defined in the Act and the Judges expressed the opinion that the interpretation of the term gave rise to great difficulties. In both cases the scope of the relevant acts was considered and it was decided that the term could not have been intended by the legislature to mean a piece of bare land. It may be that a person who sets up a movable structure on a piece of bare land for the purpose of selling his wares is not reached by the provisions of the Shops Ordinance, No. 66 of 1938, but that is not the question which falls to be determined in the present case.

In *Summers vs. Roberts* (1944) 1 K. B. p. 106 the appellant sold by retail liniment in bottles in the uncovered portion of a market at a stall consisting of a board resting on but not fixed to two trestles. It had to be determined whether the place was a shop which according to Shops Act of 1912 *included* any "premises" where retail trade was carried on. It was ruled that the word "shop" should be interpreted from the setting and context in the Act of 1912 and that the word "premises" connoted a permanent place, defined by precise limits on which, or on part of which, there was some sort of structure where a regular retail business could be carried on. In the present case the elements of permanence and the regularity of the business are both present.

I hold that the case against the appellant has been proved and the appeal is, therefore, dismissed.

Appeal dismissed.

Present : NAGALINGAM, J. AND PULLE, J.

APPUHAMY vs. ELISAHAMY

S. C. No. 98—D. C. (Inty.) Panadura 511.

Argued on : 23rd October, 1950.
Decided on : 7th December, 1950.

Partition—Co-owner acquiring prescriptive title to divided block in lieu of undivided share in land—Heirs of such co-owner transferring their rights describing as undivided shares of whole land—Partition sought of divided block—Transferees not entitled to larger fractions of the corpus than set out in the deeds in respect of the larger corpus.

A co-owner acquired a prescriptive title to a divided block in lieu of his undivided 1/12 share of a land. His heirs transferred their rights in the divided portion describing as fractions of the larger land. In an action for partitioning the divided block.

Held : That the transferees are not entitled to get any larger fraction of the corpus to be partitioned than set out in the deeds in respect of the larger corpus.

Cases referred to : *Fernando vs. Podi Singho* , 6 Ceylon Law Recorder, p. 73.

Vernon Wijetunge, for the 1st, 3rd and 4th defendants-appellants.
H. A. Koathegodde, for the plaintiff-respondent.

PULLE, J.

The appellants are the 1st, 3rd and 4th out of seven defendants in an action instituted for the partition of a land called Kongahalanda *alias* Kongaha Kannatta in extent 1 A. 3 R. 08 P. It is not disputed that this land formed part of a larger land of the same name in extent 24 acres.

The portion sought to be partitioned is therefore very nearly 1/12th of the larger land.

The appellants contended that the action could not be maintained as the land was not a distinct corpus but part of an undivided land. The learned trial Judge found against the appellants and held that the plaintiff's predecessor in title one Tantriwattage Lokuhamy who was entitled to an undivided 1/12th share of the larger land possessed the land sought to be partitioned as a divided block and that she and her successors had acquired title thereto by prescriptive possession. The learned Judge has set out convincing reasons for holding that the land had become a distinct corpus by separation and that therefore the action was maintainable. In my opinion the appellants have failed to show that the finding is wrong and the appeal, therefore, fails on that point.

The second point raised by the appellants is that the shares allotted to the parties are not in accordance with the shares dealt with in the deeds produced in the case. It would appear that Tantriwattage Lokuhamy referred to above had four children, viz., (*a*) Hendrick, (*b*) Punchihamy, (*c*) Appolonia and (*d*) Bastiana. By two deeds P2 of 1942 and P1 of 1945 the plaintiff purchased the interests of six out of the seven children of Hendrick and the interests of Appolonia. The 1st defendant-appellant by deed 107 of 1933 purchased the interests of the remaining child of Hendrick and the interest of Bastiana. The 1st defendant and her children also succeeded to certain shares by intestate succession upon the death of the husband of the 1st defendant. A feature common to all the deeds is that the shares conveyed are described as fractions of shares not of the land sought to be partitioned but of the larger land of 24 acres. For example, by deed P1 of 1945 the plaintiff purchased the interests of one of the seven children of Hendrick who himself one of the four children of Tantriwattage Lokuhamy. The share conveyed is not 1/7th of 1/4th of the 2 acre block which Lokuhamy acquired by prescriptive possession but 1/7 of 1/4 of 1/12 of the larger land of 24 acres. The question for decision is what rights in the land passed on P1 and on the other deeds in which the shares are calculated in the same manner. The plaintiff's contention is that P1 conveyed to him title to 1/7 of 1/4 of the corpus in the suit. much as one would wish to give to the plaintiff shares according to his mode of calculation the authorities are against him. In the case of *Fernando vs. Podi Singho* 6 Ceylon Law Recorder p. 73. Bertram, C.J., laid down the following proposition :—

> "If persons who are entitled by prescriptions of a land persist after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part ; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves have acquired a title by prescription must be bound by the terms of their deeds."

Applying the principle laid down in this case the plaintiff and the defendants whose title is based on each of the deeds referred to will get no larger fraction of the corpus sought to be partitioned than that set out in the deeds in respect of the larger corpus.

I am not unmindful of the fact that certain inconvenient results will flow from the interpretation which I have placed on the deeds as, for example, the unallotted shares might give rise to further disputes and fresh litigation. The parties and their predecessors are entirely to blame for this situation and I do not think it would be proper to help them out of it by construing their instruments of title in a sense contrary to that laid down by this Court.

I would vary the decree appealed from to the extent that the parties will be entitled to shares calculated in the manner set out in the judgment and that it will be open to the learned District Judge to enter a decree for sale, if partition is impracticable.

I see no reason to disturb the order made by the learned District Judge as to the costs of contest.

There will be no costs of appeal.

NAGALINGAM, J.

I agree

Decree varied.

END OF VOLUME XLIII.