The Ceylon Law Weekly

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

VOLUME XXIX

WITH A DIGEST

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INDEX OF NAMES

A. G. A., Haputale vs Carolis Appu 112
Al-Ayad vs Ayad 63
Andirishamy vs Deonishamy 111
Asiyath Umma vs Ratnayaki 11
Aslin Nona vs Perera & Another 79

Baronchi vs Ariyadasa 30
Bulathsinghala vs Matilda Perera 44

Caldera (S.I.P.) vs Thamby Lebbe 61

De Mel vs Kodagoda 105
Dhammananda vs Pemananda Thero 89

Ekanayake (S.I.P.) vs Wassira 76
Elaris vs Odiris Hamy 21
Ethal Alias Silva vs Velupillai 78

Fernando & Others vs Fernando & Others 19
Fernando vs Fernando & Others 58

Goonesinghe vs De Mel (Mayor, Colombo Municipal Council) .. 54
Goonesinghe vs Kretser 49
Goundan vs Emperor 33
Gunananda Thero vs Athukorale & Others 77

Hapumali vs Ukku 40
Hay vs Abdul Gany 84
Heneya vs Abdul Cader 22

In Re Wickremesinghe 87
Ismail vs Lye 66

Jirasinghe vs Setunga 96

La Brooy (S.I.P.) vs Amaradasa 107

Medhananda Therunnanse vs Dhammananda Therunnanse & Others .. 42
Mensaline Hamine vs Dias & Another 109
Molegoda vs Molegoda 8

Nalliah vs The Attorney-General 16
Navaratnam & Another vs Sithamparapillai 74

Pabilis Singho vs Gnanapiragasam (P.S.) 64
Parupathipillai vs Arumugam 17
Peris vs Virasinghe 43

Ragsoobhoy vs Namasivayam Chetty 32
Ramalingam vs Nair (S.I.P.) 25
Ravanna Mana Eyanna & Co. vs The Commissioner of Income Tax .. 70
Rex vs Balakira 50
Rex vs John Silva 51
Rex vs Lewishamy & Two Others 53
Rodrigo (Excise Inspector) vs Punchi Mahatmaya 56

Saram vs Thiruchelvam 81
Schokman vs Sirisena 37
Sellasamy vs Kaliamma & Others 65
Simon De Silva vs Hooper (I.P.) 10
Singho Appu vs The King 46
Sivasambu & Another vs Arumugam 29
Sivasampu (I.P.) vs Ratnayake & Two Others 59
Subasinghe vs Muttiah 95

Thambipillai vs Kandiah & Others 75
Thevar vs Fernando 91

Ummul Maroofa vs Leaff 1

Velmuladeniya vs Siyatu & Another 104

Weerasekera & Another vs The G. A., Uva Province 4
Wickramasinghe vs Crossette Thambyah 69
Wickremasuriya vs Davithappu & Others 86
Wijesuriya vs Samarasuriya 27
Wille vs The Commissioner of Stamps 13

Yuill vs Yuill 97

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Appeal

There is a right of appeal from a decision on any of the matters (a) to (d) in the proviso to section 8 of the Rent Restriction Ordinance.

See Rent Restriction Ordinance 1

Bail

Bail—Prisoner indicted with murder—Failure to be brought up for trial during 1st Criminal Sessions owing to postponements on application by defence counsel—Is it sufficient reason for allowing bail under section **31** *of the Courts Ordinance.*

A prisoner, who was indicted with another for murder, could not be brought to trial at the 1st Criminal Sessions after the date of his commitment owing to postponements allowed on three occasions on the application of one or other of the prisoners' counsel.

On an application for bail made under section **31** of the Courts Ordinance,

Held : That the prisoner was not entitled to bail.

NALLIAH vs THE ATTORNEY-GENERAL .. 16

Buddhist Priest

Where a Buddhist priest, the incumbent of a temple, died leaving an instrument in writing appointing a pupil priest as his executor and successor to the incumbency,

Held : That the instrument was a Last Will which affected property in Ceylon.

See Civil Procedure Code 89

Buddhist Temporalities Ordinance

Proclamation under section **3**—Court bound to take judicial notice.

See Evidence Ordinance 77

Certiorari

Certiorari, Writ of—Courts Ordinance section **42**—*Election Judge appointed under the Ceylon State Council (Elections) Order-in-Council* **1931**—*Can a Writ of Certiorari issue to such Election Judge.*

Held : That a Writ of Certiorari cannot be granted to bring up any order made by an Election Judge appointed under the Ceylon State Council (Elections) Order-in-Council **1931**.

Per LORD GODDARD : "It is well settled, and counsel did not seek to argue to the contrary, that a court having jurisdiction to issue a Writ of Certiorari will not and cannot issue it to bring up an order made by a judge of that court. Nor will a superior court issue the writ directed to another superior court—*Reg. vs Justices of the Central Criminal Court* (11 Q.B.D. 479)—and if the Election Judge is to be regarded as a special or independent tribunal his court would, in their Lordships' opinion, be a superior court. Considering that the court is held before a judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal and their Lordships will humbly advise His Majesty that it should be dismissed with costs."

GOONESINGHE vs KRETSER 49

Civil Procedure Code

Action for divorce—Order for payment of alimony pendente lite*—Non-compliance with order—Powers of court—Civil Procedure Code section* **839**.

Held : (i) That where a plaintiff fails to comply with an order for the payment of alimony *pendente lite*, the court has power, under section **839** of the Civil Procedure Code, to stay further proceedings until alimony is paid.

(ii) That such failure constitutes contempt of court.

ASLIN NONA vs PERERA & ANOTHER .. 79

Civil Procedure Code section **84**—*Application to have decree* nisi *set aside—Date of commencement of period of fourteen days prescribed by section* **84**—*Power of court to extend such period.*

Held : (i) That the period of fourteen days prescribed by section **84** of the Civil Procedure Code commences on the date on which the decree *nisi* is passed.

(ii) That a decree *nisi* under that section cannot be said to be passed until the form has been drawn up, approved and signed by the court.

(iii) That the court has no power to extend the period prescribed by that section.

Per KEUNEMAN, J.: (*a*) "It has been suggested that where the court signs a document containing the essential details contained in Form 21, it may be taken that it has passed the decree *nisi* although the document has not been formally drawn up in the office, and that an entry of such a kind made among the journal entries would be sufficient. I agree with the argument, but at the same time it is a question to be determined in each case as to whether the court was in fact passing the decree *nisi* or merely giving an instruction to the office to prepare a decree *nisi* to be passed thereafter.

(*b*) "I would urge upon the legislature the need of a speedy amendment of section 84 so that the unreasonable hardships imposed upon the plaintiff may be removed."

DE MEL vs KODAGODA 105

Civil Procedure Code section **518**—*Instrument in writing by Buddhist priest appointing pupil priest to be the executor and the incumbent of a temple—No specific disposition of property—Is such instrument a Last Will—If so, is the executor entitled to probate.*

Where a Buddhist priest, who was the incumbent of a temple, died leaving an instrument in writing whereby he appointed a pupil priest as his executor and as the successor to the incumbency but made no specific disposition of property,

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Held : That the instrument in question was a Last Will which affected property in Ceylon and that the executor was therefore entitled to probate.

DHAMMANANDA VS PEMANANDA THERO .. 89

Civil Procedure Code section **34**.

Held : (i) That a defendant who fails to abide by the previous decision of a court cannot plead section **34** of the Civil Procedure Code when an action is brought to enforce that decision.
(ii) The onus of showing that an action is barred by section **34** of the Civil Procedure Code is on the defendant.

Per DE KRETSER, J.: "Section **34** is based on the maxim that no one should be vexed twice regarding the same matter. It is a provision for the defendant's benefit and he cannot plead his own wrong and claim a benefit therefrom. He alone is to blame if he is being sued a second time. The provision is a salutary one but it must be so used and its scope so confined within certain recognized limits and principles, as not to take suitors unfairly by surprise and so as to do as little injustice as possible. The onus is on the defendant to show that the causes of action were identical and any doubt ought to go against him."

ELARIS VS ODIRIS HAMY 21

Civil Procedure Code section **347**—*Execution of decree—Application for execution made after lapse of more than one year from date of decree—Failure to give judgment-debtor notice of the application—Sale in execution—Validity of sale—Form of application.*

Where, after the lapse of more than one year from the date of a decree, an application for its execution was made in Form 42 in Schedule II to the Civil Procedure Code and the judgment-debtor's property was sold in execution without giving him notice of the application as required by section **347** of the Civil Procedure Code,

Held : (i) That the form of the application was defective.
(ii) That the sale in execution was void.

FERNANDO VS FERNANDO & OTHERS .. 58

Civil Procedure Code section **755**—*Petition of appeal not bearing the signature of proctor or advocate at the end of petition—Stamps cancelled by the signature of the proctor—Objection that appellant had not complied with section* **755** *upheld by District Court—Order abating appeal—Application in revision.*

Held : That the fact that the stamps on a petition of appeal were cancelled by the proctor for the appellant is sufficient compliance with the requirements of section **755** of the Civil Procedure Code.

MEDHANANDA THERUNNANSE VS DHAMMANANDA THERUNNANSE & OTHERS .. 42

Interrogatories—Delivery by plaintiff to defendant—Failure to answer—Defence struck off—Civil Procedure Code sections **94, 99, 100** *and* **109**—*Has the District Court any discretion to grant indulgence under section* **109**.

Held : (i) That where a defendant fails to answer interrogatories delivered to him, an order striking off his defence should not be made unless a clear and specific order had been made earlier under section **100** of the Civil Procedure Code.
(ii) The court has a discretion to grant indulgence to a party on an application for an order under section **109** of the Civil Procedure Code.

RAGSOOBHOY VS NAMASIVAYAM CHETTY .. 32

Growing crop of tobacco—Seizure by Fiscal—Is such crop to be regarded as movable or as immovable property—Validity of seizure effected under section **227** *of the Civil Procedure Code.*

Held : A growing crop of tobacco must be considered as *fructus industriales* and, therefore, as movable property, and a seizure of such crop under section **227** of the Civil Procedure Code is valid.

THAMBIPILLAI VS KANDIAH & OTHERS .. 75

Condonation—Civil Procedure Code section **602**.

See Divorce 109

Commissions of Inquiry Ordinance

Section 7—Powers of Commissioner to hear evidence in absence of parties implicated or concerned in the matter under inquiry.

See Mandamus 69

Condonation

Condonation by wife of husband's adultery—What amounts to.

See Divorce 109

Contract

Contract—Transfer of licences to import regulated textiles of Japanese origin—Agreement to refund value of licences unused "in the event of the permit system being abolished by the Government for reasons unforeseen or due to force majeure*"—Importation of Japanese textiles subsequently restricted by law, but not abolished—Effect on contract—Meaning of* force majeure*—The Defence (Trading with the Enemy) Regulations—The Defence (Control of Imports) Regulations.*

The defendant transferred to the plaintiff certain licences to import regulated textiles of Japanese origin and contracted that "in the event of the above permit system being abolished by the Government for reasons unforeseen, or due to *force majeure* if you are unable to use the above permits or any portion of same, we bind ourselves to refund (at the same rate paid to us) such value of the licences as may remain unused on the date of such abolition." On the entry of Japan into the war, the Defence (Trading with the Enemy) Regulations and the Defence (Control of Imports) Regulations affected the contract. These regulations authorized the importation of Japanese textiles without a licence

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from any part of the British Empire other than Canada or Newfoundland. The plaintiff claimed a refund under the contract on the ground that certain licences could not be used by him.

Held : That as the licences were available for use in a very restricted sense, namely, for the importation of Japanese textiles from Canada or Newfoundland, the plaintiff had failed to prove that the permit system had been abolished and was therefore not entitled to a refund under the contract.

Per KEUNEMAN, J.: " As regards the meaning of '*force majeure*' see the judgment of McCardie, J. in *Lebeaupin vs Crispin*—' The phrase "*force majeure*" was not interchangeable with "*vis major*" or "Act of God." It goes beyond the latter phrase. Any direct legislative or administrative interference would of course come within the term ; for example, an embargo.' "

ISMAIL VS LYE 66

Control of Prices Ordinance

Control of Prices—Order under Control of Prices Ordinance, No. **39** *of* **1939**, *fixing maximum price of one-pound and half-pound loaves of bread—Sale of quarter-pound loaves—Applicability of order.*

Held : That an order under the Control of Prices Ordinance fixing the maximum price of one-pound and half-pound loaves of bread has no application to the price at which quarter-pound loaves may be sold.

Per HOWARD, C.J. : " With regard to the weighing of the bread on the scales of the respondent, criminal cases of this nature must be established beyond all reasonable doubt. With no evidence as to the accuracy of the scales it cannot be said that this standard of proof has been reached."

EKANAYAKE (S.I.P.) VS WASSIRA 76

Corporal Punishment

A magistrate acting under section **152 (3)** of the Criminal Procedure Code cannot impose a sentence of whipping under section **7 (1)** of the Corporal Punishment Ordinance.

See Criminal Procedure Code 59

Counsel and Judge

Counsel and Judge—Questions asked in re-examination disallowed—Refusal by judge to record the questions he had disallowed—New trial—Justice should not only be done but be seen to be done.

Held : That the refusal by the judge to record, when requested by counsel, certain questions he had disallowed was sufficient for ordering a new trial.

SIVASAMBU & ANOTHER VS ARUMUGAM .. 29

Court of Criminal Appeal

Court of Criminal Appeal—Rape—Burden of proof.

Held : That in a charge of rape there is no burden on the accused to prove that the intercourse was with the consent of the prosecutrix. The prosecution must prove that the accused had intercourse with the prosecutrix without her consent.

REX VS BALAKIRA 50

Court of Criminal Appeal—Misdirection—Comment in the charge to the jury on the failure of the accused to give evidence—In what circumstances is judge entitled to comment on failure of accused to give evidence.

Held : That a statement to the effect that the failure of the accused to give evidence was an element the jury might take into consideration does not by itself amount to misdirection.

REX VS JOHN SILVA 51

Court of Criminal Appeal—Unlawful assembly and rioting—Penal Code sections **140, 141, 144, 146, 380, 283** *and* **419**—*Possession of property removed by members of the unlawful assembly—Is such possession, in the absence of other evidence, sufficient to establish that the possessors were members of the unlawful assembly.*

Held : That where property is robbed by the members of an unlawful assembly evidence of possession of such stolen property is not in itself sufficient to establish against the possessor the charge of being a member of the unlawful assembly.

REX VS LEWISHAMY & TWO OTHERS .. 53

Courts Ordinance

Section **31**
See Bail 16

Section **42**—Writ of Certiorari
See Certiorari 49

Section **42**—Writ of Mandamus
See Mandamus .. .. 69 & 54

Sections **16** and **18**
See Proctor 87

Criminal Procedure Code

Criminal Procedure Code section **289**—*Procedure to be followed when magistrate refuses to grant application for postponement of trial.*

Held : That when a magistrate refuses to grant an application for the postponement of a trial, he should record his reasons for the refusal and proceed with the trial.

ANDIRISHAMY VS DEONISHAMY 111

Joinder of charges—Criminal Procedure Code section **184**—*Two persons charged under the Excise Ordinance with jointly being in unlawful possession of arrack—Guilty knowledge established only against one person—Can both be acquitted on ground of misjoinder of charges.*

Two parcels, one containing four bottles of arrack and the other three bottles of arrack were found in a bus under the seats of the driver and

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the conductor who were its sole occupants. They were charged with jointly being in possession of seven bottles of arrack. The evidence established that only the conductor, who on the approach of a party of Excise Officers was seen trying to push something under his seat, knew that his parcel contained arrack. The magistrate acquitted both accused on the ground of misjoinder of charges.

Held : (i) That there was no misjoinder of charges.
(ii) That the conductor was in exclusive possession of the four bottles of arrack under his seat.

Per HOWARD, C.J.: " If he (the magistrate) had come to the conclusion that there was no evidence against the 1st accused, he should have discharged him and considered the case made against the respondent, the 2nd accused."

RODRIGO (EXCISE INSPECTOR) vs PUNCHI MAHATMAYA 56

Criminal Procedure Code section **152 (3)**—*Corporal Punishment Ordinance section* **7 (1)**—*Can a magistrate acting under section* **152 (3)** *of the Criminal Procedure Code exercise the power of imposing a sentence of whipping conferred on a District Judge by section* **7 (1)** *of the Corporal Punishment Ordinance.*

Held : That a magistrate acting under section **152 (3)** of the Criminal Procedure Code is not entitled to impose a sentence of whipping which a District Court may impose under section **7 (1)** of the Corporal Punishment Ordinance.

SIVASAMPU (I.P.) vs RATNAYAKE & TWO OTHERS 59

Criminal Procedure Code sections **50** and **89**
See Indian Penal Code 33

Decree Nisi

See Civil Procedure Code 105

Defence Regulations

The Defence (Purchase of Foodstuffs) Regulations, **1942**—*Accused charged with transporting kurakkan without a permit—Transport of kurakkan not an offence under the principal regulations but made an offence by an amending regulation—No reference made, in the charge, to the Gazette in which the amending regulation was published—Validity of conviction.*

Where the transport of kurakkan without a permit was made an offence by an amendment of the Defence (Purchase of Foodstuffs) Regulations, **1942** and no reference was made in the charge to the Gazette in which the amending regulation was published,

Held : That the failure to refer to such Gazette invalidates the conviction.

A. G. A., HAPUTALE vs CAROLIS APPU .. 112

Defence Regulations—Emergency Legislation—Defence (War Equipment) (Purchase by Civilians) Regulations **2** *and* **3**—*Burden of proof.*

Held : (i) That in a charge under Regulation 2 of the Defence (War Equipment) (Purchase by Civilians) Regulations, **1944**, the prosecution need not prove that the accused knew the article to be the property of His Majesty.
(ii) That the onus of proving any fact or circumstance which brings the accused within the defence in regulation **2 (2)** is on the accused.

CALDERA (S.I.P.) vs THAMBY LEBBE .. 61

Defence (Service Employees) Regulations **1942**—*Regulations* **2** *and* **3**—*Person employed by the Admiralty—Condition of leaving such employment—Agreement to terminate contract of employment by notice—Effect of notice—Meaning of term " employed by the military."*

Held : (i) That the effect of the Defence (Service Employees) Regulations **2** and **3** is to prevent any employee of the Admiralty, irrespective of the terms of his contract, from leaving his employment without prior written consent from the Captain Superintendent, Ceylon, or any other officer acting under his authority.
(ii) That a person is deemed to be employed by the Admiralty if the name of that person appears in any salary book, pay book or muster book kept for the purposes of any naval establishment in Ceylon.

LA BROOY (S.I.P.) vs AMARADASA 107

Divorce

Divorce—Condonation by wife of husband's adultery—What amounts to—Section **602** *of Civil Procedure Code.*

Held : That mere residence of husband and wife in the same house for a few months does not amount to " conjugal cohabitation" within the meaning of section **602** of the Civil Procedure Code. There should be in addition proof of forgiveness and reinstatement of the offending spouse.

Per KEUNEMAN, J.: " No doubt where the husband after knowledge of the wife's adultery shares her bed the law presumes condonation, but this is a special rule applicable to the husband, and not to the wife in similar circumstances."

MENSALINE HAMINE vs DIAS & ANOTHER .. 109

Withdrawal of allegations of malicious desertion —Does it amount to collusion.
See Husband and Wife 44

Malicious desertion—Refusal of wife to live with husband or go back to him.
See Husband and Wife 44

Limits of judicial intervention.
See Judge 97

Alimony *pendente lite*—Non-compliance with order for payment of
See Civil Procedure Code 79

Donation

Donation—Gift to P or his heirs, executors and administrators—Its validity—Fidei commissum.

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A deed of gift contained the following conditions: "(1) That owing to the affection we had towards our daughter, the deceased Dehiwalage Lucia Fernando.....the wife of Dombawalage Peduru Fernando.....we the aforesaid hereby gifted and set over.....unto Peduru the husband of the said Lucia Fernando or his heirs, executors, and administrators..... (2) To have and to hold the said portion of garden .....unto the donee or his heirs, executors and administrators for ever.....and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando and his descendants without selling, mortgaging or alienating the same or letting on lease for a period exceeding from generation to generation and when their generations cease to exist the same shall devolve on the Roman Catholic Church built by the Durawa people of Pitipane."

The main contentions in appeal were (*a*) that the deed did not constitute a valid gift inasmuch as there was an ambiguity as to the person or persons to whom the land was donated, (*b*) that the deed did not create a valid *fidei commissum*.

Held : (i) That the gift is a valid one as it is clear from the words used that the donors intended to gift the property to P and not to his heirs.
(ii) That the deed created a valid *fidei commissum*.

FERNANDO & OTHERS vs FERNANDO & OTHERS 19

Donation on the occasion of marriage
See 65

Donation with intention of securing succour and assistance during donor's life-time—Succour and assistance rendered—Revocability.

See Kandyan Law 40

Election Judge
See Certiorari 49

Estoppel
Estoppel—Land sold in execution—Purchase by defendants—Transfer of land to plaintiff by judgment-debtors prior to such sale—Presence of plaintiff at sale in execution—Absence of any protest—Is the plaintiff estopped from claiming title to the land.

Held : The mere presence of a person at a sale and his remaining silent is not sufficient in law to create an estoppel against him.

WIJESURIYA vs SAMARASURIYA 27

Evidence Ordinance
Evidence Ordinance section **57**—*Proclamation under section* **3** *of the Buddhist Temporalities Ordinance—Is a court bound to take judicial notice of such proclamation.*

Held : That a court is bound to take judicial notice of a proclamation under section **3** of the Buddhist Temporalities Ordinance.

GUNANANDA THERO vs ATHUKORALE & OTHERS 77

Evidence Ordinance section **92**—*Sale of land for a consideration expressed and acknowledged therein—Action for recovery of part of the consideration—Can opposing party say that the transaction was not a sale but a gift—Equitable rule applicable to a case where a party seeks to vary by extrinsic evidence the contents of a written document—Maxim that he who seeks equity must do it.*

Held : That where the court allows a party to lead oral evidence under section **92** of the Evidence Ordinance to vary the terms of a deed the opposing party is entitled to lead oral evidence to meet the claim put forward by the first party who has been allowed to vary the terms of the deed.

MOLEGODA vs MOLEGODA 8

Evidence Ordinance section **45**—*Footprint—When may a conviction be based on the evidence of a footprint expert.*

Held : (i) That the words "science" or "art" in section **45** of the Evidence Ordinance are wide enough to entitle a court to form an opinion as to the identity of a footprint on the testimony of a person who has studied footprints and is capable of distinguishing and identifying footprints.
(ii) That a conviction can rest on the evidence of the similarity of footprints alone.

SINGHO APPU vs THE KING 46

Evidence Ordinance sections **62, 64** *and* **65**

See Indian Penal Code 33

Evidence Ordinance section **108**—*Presumption—Person not heard of for seven years—Burden of proving that he is alive not discharged—Does his property devolve on heirs.*

Held : That where the burden of proving that a person, who has not been heard of for seven years, is alive, has not been discharged, such person's rights to property devolve on his heirs.

VELMULADENIYA vs SIYATU & ANOTHER .. 104

Excess Profits Ordinance
Held : Debts appearing in the books of an assessee and in respect of which no reduction has been allowed under section **9 (1) (d)** of the Income Tax Ordinance, though prescribed, are nevertheless "debts due to the business" for the purposes of section **10 (1) (b)** of the Excess Profits Ordinance No. **38** of **1941**.

Per JAYETILEKE, J.: "Section **10 (1) (b)** of the Excess Profits Duty Ordinance provides that the capital of a business shall be taken to be, so far as it consists of assets being debts due to the business, the nominal value of these debts less any reduction which has been allowed for bad and doubtful debts under section **9 (1) (d)** of the Income Tax Ordinance. It seems to me that on the true construction of section **10 (1) (b)** it is quite plain as a matter of language that the legislature regards both bad and doubtful debts for which a reduction has not been claimed or allowed under section **9 (1) (d)** of the Income Tax Ordinance as 'debts due.' In the present case no claim

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having been made or allowed at any time in respect of the debt in question under section 9 (1) (d) of the Income Tax Ordinance, the appeal must fail."

RAVANNA MANA EYANNA & CO. VS THE COMMISSIONER OF INCOME TAX .. 70

Excise Ordinance

Exclusive possession

See Criminal Procedure 56

Fidei Commissum

Fidei commissum—Deed of gift in favour of donee and her "descendants or her heirs, children, grandchildren.....for ever from generation to generation"—Do the words "or heirs" make the persons to be benefited uncertain.

A deed of gift executed in 1873 contained the following conditions: "After my death this property the aforesaid Menu Ridee and the said Menu Ridee's descendants or her heirs, children, grandchildren, etc. shall possess undisputedly for generations and for ever from generation to generation but (she or they) shall not alienate the same to an outsider to my family by way of transfer, mortgage or security."

It was argued that the use of the words "or her heirs" brought in a class of persons quite distinct from the descendants and uncertainty was created as to the persons to be benefited by the *fidei commissum*.

Held: (i) That the deed constituted a valid *fidei commissum* in favour of the descendants of the donee operative for four generations.

(ii) That the word "heirs" in this context should be interpreted as descending heirs from generation to generation.

HENEYA VS ABDUL CADER 22

See Donation 19

Footprint

When may conviction be based on evidence of footprint expert.

See Evidence Ordinance 46

Gaming Ordinance

Gaming Ordinance section 5—Written information on oath—Information orally given on oath and recorded by magistrate—Is it imperative that the information so recorded should be read over and explained to the accused.

Held: That where the information is orally communicated on oath to a magistrate who records it the requirements of section 5 of the Gaming Ordinance are satisfied though the recorded statement is not read over and explained to the accused.

SCHOKMAN VS SIRISENA 37

Husband and Wife

Husband and wife—Action for divorce on the grounds of adultery and malicious desertion — Withdrawal of allegations of adultery before filing of answer in view of settlement arrived at between the parties in a money case which was pending between them—Does such withdrawal amount to collusion—What evidence is sufficient to constitute malicious desertion.

Held: (i) That the withdrawal of allegations of adultery in a plaint, in view of a settlement arrived at in a money case pending between the parties, which allegations were denied in the answer, does not, where a feasible explanation is given of such withdrawal, amount to collusion.

(ii) That the refusal of a wife to live with her husband and to go back to him in spite of repeated requests amounts, in the absence of any evidence to the contrary, to malicious desertion.

BULATHSINGHALA VS MATILDA PERERA .. 44

Divorce action—Powers of court in case of non-compliance with order for payment of alimony *pendente lite*.

See Civil Procedure Code 79

Divorce—What amounts to condonation by wife of husband's adultery.

See Divorce 109

Maintenance

See 17

Indian Penal Code

Indian Penal Code section **216**—*Indian Criminal Procedure Code* **1898** *sections* **75** *and* **87**—*Indian Evidence Act sections* **62, 64** *and* **65.**

Held: (i) That in a prosecution under section **216** of the Indian Penal Code it is necessary for the prosecution to establish—

(*a*) that before the date of the harbourage there existed an order for the apprehension of the offender who was harboured,

(*b*) that the order was known to the accused person, and

(*c*) that acts amounting to harbourage were done by the accused with that knowledge.

(ii) That there can be no proof that the accused knew of the orders or warrants of arrest, unless or until the issue of the warrants has been proved.

(iii) That there is nothing in section **87** of the Indian Criminal Procedure Code which—

(*a*) makes the proclamation legal evidence of the issue of the warrant or order of arrest, or

(*b*) imputes to the accused notice of the proclamation or its terms.

(iv) That the word "knowing" in section **216** of the Indian Penal Code means something more than and different from the words "had reason (or sufficient cause) to believe."

(v) That sections **62, 64** and **65** of the Indian Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest and that is under section **62** of the Act by production of the original order, or, under the conditions specified in section **65**, of a certified copy.

Per LORD WRIGHT: "'Knowing,' however, implies a fact which can be known. It does not necessarily import actual evidence of the senses,

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but it does import knowledge of something actual by means of authentic or authoritative information.

A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasize this point. The objection taken on the appellant's part is not technical but substantial. Mr. Roberts, the above counsel for the Indian Government, did not in the end contest its validity. Indeed, he said the Indian Government would not countenance any relaxation of the stringency, in regard to warrants of arrest, of sections **62** and **65**."

(Section **213** of our Code corresponds to section **216** of the Indian Penal Code. Section **59** of our Criminal Procedure Code corresponds to section **87** of the Indian Criminal Procedure Code. Sections **62, 64** and **65** of the Indian Evidence Act correspond to sections **62, 64** and **65** of our Evidence Ordinance.

The provisions of our law which correspond to the provisions of the Indian law referred to in the judgment are as follows :—

Section **216** Indian Penal Code—Section **213** Penal Code.

Section **75** Indian Criminal Procedure—Section **50** Ceylon Criminal Procedure Code.

Section **87** Indian Criminal Procedure Code —Section **59** Ceylon Criminal Procedure Code.

Sections **62, 64** and **65** Indian Evidence Act —Sections **62, 64** and **65** of the Ceylon Evidence Ordinance.)

GOUNDAN VS EMPEROR 33

Insolvency Ordinance

Insolvency—Application by creditor to re-open proceedings after grant of certificate of conformity to insolvent—Matters to be taken into consideration in determining whether the application ought to be allowed—Insolvency Ordinance (Chapter **82**) *sections* **127, 129** *and* **133**.

Held : That an application by a creditor of an insolvent to re-open proceedings after the insolvent has been granted a certificate of conformity will not be allowed where the creditor has delayed to make the application and has refrained, for his own benefit, from disclosing to the court facts which were within his knowledge.

HAY VS ABDUL GANY 84

Interrogatories

Failure to answer—Defence struck off—Discretion of District Court to grant indulgence.

See Civil Procedure Code 32

Judicial Notice

Court bound to take judicial notice of Proclamation under Buddhist Temporalities Ordinance

See Evidence Ordinance 77

Judge

Divorce—Appeal—Trial Judge taking large part in examining witnesses—Whether ground for new trial—Discretion of judge—Limits of judicial intervention—Submission of no case at close of petitioner's evidence—Judge's ruling against such submission—Can respondent call evidence thereafter—Election.

Witnesses—Their demeanour—Judge's duty to test demeanour of witness in the light of whole evidence—Appellate court's power to review trial judge's view involving demeanour of witness.

The appellant (husband) sued the respondent (wife) for divorce on the ground of adultery. Prior to September, 1942, during several months the respondent had committed adultery with the co-respondent in the appellant's house during his absence. In September, 1942 these acts of adultery were condoned and the only act of adultery complained of in the petition was one committed on August 3, 1943. While evidence on this issue was being led the judge took a large part in the examination of witnesses. At the close of the appellant's case counsel for the respondent made a submission that no case had been made out by the appellant and that his petition be dismissed. The judge ruled against this submission and heard evidence of the respondent and the co-respondent without calling upon respondent's counsel previously to elect between calling evidence and relying on his submission. After trial the learned judge dismissed the petition holding that on the appellant's evidence he could not draw the inference that adultery took place on August 3, 1943 and that upon a "careful observation" of the demeanour of the respondent and of the co-respondent while giving evidence and the opinion he formed of their "type and characteristics" "he was not satisfied that they were deliberately dishonest in the box."

On appeal it was argued for the appellant:

(*a*) That as the submission of no case failed, the appellant was entitled to a decree or alternatively the appeal court in considering the appeal ought to disregard the evidence led for the respondents.

(*b*) That a new trial ought to be ordered inasmuch as the trial judge took a large part in the examination of witnesses.

(*c*) That on the evidence adduced in the case the appellant's case should have been accepted and the respondent's rejected. Counsel for respondent replied that the appellate court ought not to interfere with the view taken by a trial judge of witnesses whose demeanour he could observe.

Held : (i) That a submission by the respondent before calling his evidence that the petitioner has made out no case does not deprive him of his right to call evidence if such submission failed. He loses the right if he elects, expressly or impliedly, to call no evidence.

(ii) That the part which a judge ought to take while witnesses are giving their evidence must rest with his discretion.

(iii) That the mere fact that a judge takes a large part in the examination of witnesses during trial is not sufficient to justify an order for retrial.

(iv) That a judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence.

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(v) That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded.

YUILL VS YUILL 97

Kandyan Law

Kandyan Law—Donation with intention of receiving succour and assistance during life-time—Succour and assistance rendered—Can deed be revoked.

Where a Kandyan donated property with the intention of receiving assistance and necessary succour during the donor's lifetime and where the donee rendered such assistance and necessary succour,

Held : That the power to revoke the gift was not exercisable.

HAPUMALI VS UKKU 40

Landlord and Tenant

Landlord and tenant—Notice to quit—Action for ejectment and recovery of rent and damages—Subsequent acceptance by landlord of money as damages and not as rent—Does such acceptance amount to a waiver of the notice.

Where a landlord gave notice to a tenant to quit and instituted an action for ejectment and recovery of rent and damages but, after service of summons on the tenant, accepted money from him as damages and not as rent,

Held : That the notice cannot be taken to have been waived.

PERIS VS VIRASINGHE 43

Last Will

Instrument in writing by Buddhist priest appointing pupil priest to be executor and incumbent of a temple—Is instrument a Last Will.

See Civil Procedure Code 89

Maintenance

Maintenance—Agreement by wife to waive future maintenance on receipt of lump sum—Public policy—Does such agreement preclude her from claiming maintenance subsequently.

Held : (i) That an agreement by the wife in maintenance proceedings to waive all claims for future maintenance in consideration of the payment of a lump sum by her husband is invalid in law inasmuch as it is contrary to public policy.

(ii) That such an agreement does not bar her from a subsequent claim for maintenance.

PARUPATHIPILLAI VS ARUMUGAM 17

Mandamus

Mandamus—Courts Ordinance section **42**—*Municipal Councils Ordinance sections* **82** *and* **85**—*Where there is another remedy does Mandamus lie—Delay—Mandamus will not be granted.*

Held : (i) That a writ of mandamus will not be granted where there is another remedy available.

(ii) That a writ of mandamus will not be granted where the application is belated.

GOONESINGHE VS DE MEL (MAYOR, COLOMBO MUNICIPAL COUNCIL) 54

Mandamus—Village Committee Election—Village Communities Ordinance sections **14 (4), 16 (3)** *and* **24**—*Failure of presiding officer to arrive at the meeting within one hour after the time fixed for its commencement—Arrival of presiding officer more than an hour after time fixed for meeting—Electors present and desire election to be held—Election held with consent of all—Mandamus will not be granted to set aside such election.*

The meeting for the election of a candidate to represent the Horagune Ward of the village area of Kandapolla was fixed for 9-30 a.m. on 13th December, 1943. The presiding officer was held up by an earth slip on the road and was unable to arrive till 11-30 a.m. Immediately the presiding officer realized he would be delayed he sent a telegram to the Government Agent who in turn sent a telegram to the caretaker of the Village Tribunal building which was the venue of the meeting. This telegram was intended to convey the information to those assembled that the presiding officer would arrive late. It reached the addressee at about 11 a.m. As the telegram stated that the presiding officer would come though late the voters did not go away but remained and when the presiding officer arrived, desired that the election should be held.

The presiding officer thereupon informed the voters that he would hold the Horagune election and put off the Haldummulla election which had been fixed for 11 a.m. to 1 p.m. The petitioners took part in the election and voted. They raised no objection to the election being held. The defeated candidates themselves raised no objection at any time.

Held : (i) That the election was not illegal.

(ii) That the matter was not one in which a *Mandamus* should issue.

(iii) That a Writ of *Certiorari* does not lie.

(iv) That in proviso **(ii)** and **(iii)** of section **16** of the Village Communities Ordinance what is provided for is the manner of notice and not the period of notice prescribed in section **14**.

WEERASEKERA & ANOTHER VS THE G. A., UVA PROVINCE 4

Mandamus—Courts Ordinance section **42**—*Commissions of Inquiry Ordinance section* **7**—*Powers of Commissioner acting under the Commissions of Inquiry Ordinance—Under what circumstances may he hear evidence in the absence of parties who are implicated or concerned in the matter under inquiry.*

Held : That a Commissioner acting under the Commissions of Inquiry Ordinance is not entitled to use for the purpose of compiling his report facts elicited by him in the absence of parties concerned or implicated in the matter under inquiry without having such facts tested at a formal sitting.

Per ROSE, J.: "I am of opinion therefore that the only reasonable interpretation of the Ordinance as a whole is that if a Commissioner is to avail himself of the powers contained in sections **2, 3** and **4**, he must also be liable to the corresponding obligations contained in section **7**."

WICKRAMASINGHE VS CROSSETTE THAMBYAH .. 69

Marriage and Divorce (Muslim) Ordinance

Marriage and Divorce (Muslim) Ordinance (Chapter **99**)—*Claim under section* **21** *for payment of Mahr—Application of rule* **8** *of the Third Schedule and proceedings before the Kathi.*

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Held : In a claim for the payment of Mahr, where the facts are admitted by the parties, the Kathi is absolved from complying with the requirements of rule **8** of the Third Schedule relating to the recording of the sworn statements of at least two witnesses.

AL-AYAD VS AYAD 63

Matrimonial Rights and Inheritance Ordinance

Matrimonial Rights and Inheritance Ordinance section **35***—Meaning of the phrase "on the occasion of their marriage"—Evidence of circumstances not mentioned in deed—On whom lies burden of proving release from collation.*

Held : (i) That the phrase "on the occasion of their marriage" in section **35** of the Matrimonial Rights and Inheritance Ordinance does not mean on the happening of the marriage. If the marriage or, contemplated marriage, was a factor inducing the gift, then the gift is a gift made on the occasion of the marriage, and it is irrelevant whether the marriage takes place or not.

(ii) Once it is accepted that a gift was made on the occasion of the marriage the burden of proving that the property was released from collation is on the person who asserts it.

(iii) Although a deed of gift does not mention the fact that the gift is made in contemplation of the marriage of the donee, evidence can be led as to the circumstances in which the deed was executed and the state of the donor's knowledge at that date.

SELLASAMY VS KALIAMMA & OTHERS 65

Misdirection

Comment by judge in charge to jury on failure of accused to give evidence—Does it amount to misdirection.

See Court of Criminal Appeal 51

Misjoinder

See Criminal Procedure Code 56

Mortgage

See Usufructuary Mortgage 81

Mortgage Bond Action

Mortgage bond action—Prayer for hypothecary decree against transferee from mortgagor—Matters to be proved by plaintiff.

Held : That in an action on a mortgage bond in which a hypothecary decree is prayed for against a person who has acquired interests in the mortgaged property subsequent to the mortgage, plaintiff has to prove :

(1) that the land belonged to the mortgagor at the time of the mortgage,

(2) that it was duly mortgaged to him (plaintiff) for a sufficient consideration,

(3) that the mortgage debt had not been paid and that a definite sum of money was still due,

(4) that the plaintiff is entitled to levy this sum out of the mortgaged property.

BARONCHI VS ARIYADASA 30

Action on mortgage bond—Mortgaged property transferred by mortgagor before institution of action—Sale of mortgaged property in execution of decree—Surplus proceeds of sale after satisfying decree—Rights of transferee and holder of a money decree against the mortgagor to surplus—Mortgage Ordinance section **9**.

In an action on a mortgage bond, the property mortgaged was sold in execution and a sum in excess of the amount necessary to satisfy the decree was realized. Before the institution of the action, the mortgagor had transferred the mortgaged property to a third party, but the deed of transfer had not been registered. The transferee and the holder of a money decree against the mortgagor, both claimed the surplus proceeds of sale.

ETHAL ALIAS SILVA VS VELUPILLAI .. 78

Motor Car Ordinance

Motor Car Ordinance No. **45** *of* **1938** *section* **151** *—Conductor of omnibus convicted for overloading—Driver charged and convicted for aiding and abetting—Circumstances in which the latter may become liable.*

Held : That a conviction based on the mere fact that a driver of an omnibus was aware of the overload and that he failed to get the extra passengers set down is not justified.

SIMON DE SILVA VS HOOPER (I.P.) .. 10

Municipal Councils Ordinance

Sections **82** and **85**.

See Mandamus 54

Partition

Action for partition of land—Decree ordering sale of land in lots and declaring one party to be entitled to a house and the soil covered thereby—What share of the proceeds of sale is such party entitled to.

A decree entered in an action for the partition of a land ordered the sale of the land in lots and declared one of the parties to the action to be entitled to a house and the soil covered thereby.

Held : That such party is entitled to the entirety of the amount realized by the sale of the house and the soil on which it was standing.

WICKREMASURIYA VS DAVITHAPPU & OTHERS 86

Penal Code

Penal Code section **434***—Criminal trespass—Nature of intention necessary to support charge.*

Held : That a subsidiary intention to annoy or mere knowledge that annoyance might result is not sufficient to prove a charge of criminal trespass.

JIRASINGHE VS SETUNGA 96

Penal Code section **367***—Removal of cash in owner's presence on refusal to pay on illegal demand—Dishonest intention—Theft—Penal Code sections* **21** *and* **22**.

Accused and one Vinasitamby were residents of the same village and members of the same caste. A Maha Jana Sabha was formed in their village, one of the objects of which was to prevent the members of that caste from working for Vellalas. The accused was a member of the Sabha. Vinasitamby who was not a member of the Sabha worked for a Vellala. Shortly afterwards the accused and four others went to Vinasitamby's house and questioned him as to why he worked the field for a Vellala man and "dragged him" to go to the Sabha. Vinasitamby declined, where-

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upon the accused ordered Vinasitamby to pay a "fine" of Rs. 25/- to the Sabha. Vinasitamby refused and the accused took Rs. 25/- out of a box and went away remarking, "I am taking Rs. 25/- and you can do what you like."

Held : That in the circumstances the accused could be convicted of theft of the said Rs. 25/-

RAMALINGAM vs NAIR (S.I.P.) 25

Penal Code section **484**—*What are the ingredients of the offence under section* **484**.

Held : That to constitute an offence under section **484** of the Penal Code the following ingredients must exist :

(*a*) The insult must be intentional.
(*b*) The insult must be of a provocative character likely to produce a breach of the peace.
(*c*) The accused must have the knowledge that his words would produce that result.

SUBASINGHE vs MUTTIAH 95

Unlawful assembly and rioting—Penal Code sections **140, 141, 144, 146, 380, 283** and **419**—Possession of property removed by members of the unlawful assembly—Does it, of itself, establish guilt.

See Court of Criminal Appeal 53

Burden of proving rape.

See Court of Criminal Appeal 50

Penal Code section **213**

See Indian Penal Code section **216** 33

Police Ordinance

Police Ordinance section **64 (f)**—*Meaning of "passengers."*

Held : That the word "passengers" in section **64 (f)** of the Police Ordinance does not include "pedestrians."

PABILIS SINGHO vs GNANAPIRAGASAM .. 64

Postponement of Trial

Procedure to be followed by magistrate who refuses to allow postponement of trial.

See Criminal Procedure Code 111

Pre-emption

See Thesawalamai 74

Presumption

Person not heard of for seven years—Burden of proving that he is alive not discharged—Does his property devolve on heirs.

See Evidence Ordinance 104

Proctor

Proctor—Application for re-enrolment—Courts Ordinance sections **16** *and* **18**—*What formalities should a proctor seeking re-enrolment observe—Inherent jurisdiction of Supreme Court to readmit to the profession a proctor who has been disenrolled.*

Held : (i) The restoration of a proctor to the Roll, after his name has been removed, cannot be regarded as an admission and enrolment of the proctor under section **16** of the Courts Ordinance, and the Second Schedule to that Ordinance has no application to such restoration to the Roll.

(ii) Unless the court is satisfied that the effort of the applicant to live a decent and respectable life has been continued over a period sufficient for it to say with confidence that he can safely be entrusted with the affairs of clients, an application for re-enrolment will not be granted.

IN RE WICKREMESINGHE 87

Rape

Burden of proof.

See Court of Criminal Appeal 50

Rent Restriction Ordinance

Rent Restriction Ordinance No. **60** *of* **1942** *section* **8**—*Decision on matter relating to proviso* **(a)** *to* **(d)**—*Is there a right of appeal from such decision.*

Held : That an appeal lies from a decision on any of the matters **(a)** to **(d)** contained in the proviso to section **8** of the Rent Restriction Ordinance.

Per KEUNEMAN, J.: "On the footing of these cases it is argued that, even if a new jurisdiction was created by section **8** of the Rent Restriction Ordinance, that jurisdiction was conferred upon the ordinary courts, *viz.* the Courts of Requests and District Courts — and that the rights of appeal from judgments of those courts were not taken away. This is a forcible argument and, I think, it is correct."

UMMUL MAROOFA vs LEAFF 1

Res Judicata

See Civil Procedure Code 21

Sale

Sale of land—Five allotments conveyed by the same instrument—Possession of three out of the five allotments given immediately—The purchase price of the other two allotments retained in the hands of the vendee till vacant possession is given—Failure to give vacant possession—Action by vendor for balance purchase price retained by the vendee in respect of the two allotments—Can vendee claim rescission of sale of two only of the five lands.

The facts shortly are as follows :

The vendor (1st plaintiff) sold five allotments of land of a total extent of nearly 31 acres to the vendee (defendant) for a sum of Rs. 12,500/-. The vendee retained a sum of Rs. 4,200/- being the value of two of the allotments conveyed till vacant possession was given. The vendor failed to give vacant possession but sued the vendee for the balance purchase price. The vendee claimed a rescission of the contract in respect of the two allotments of which vacant possession was not given.

Held : That where a vendor sells several allotments of land by the same instrument of sale the vendee is entitled to claim a rescission of the sale in respect of some only of the allotments of land if it can be proved that the sale of some of the allotments was regarded as independent of the sale of the others.

ASIYATH UMMA vs RATNAYAKE 11

Stamp Ordinance

Stamp Ordinance Schedule **A** *Part I Items* **23 (1) (b), 23 (4)** *and* **23 (8)**—*Transfer of land to a company—Land purchased by trustee of partnership*

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—Partners incorporated as a company to purchase land from trustee—Conveyance by trustee to company upon incorporation—Members of the partnership allotted shares according to the value of their interest in the partnership.

Held : That the deed of conveyance by the trustee to the limited liability company attracted stamp duty under item **23 (8)** of Schedule A Part I of the Stamp Ordinance.

WILLE VS THE COMMISSIONER OF STAMPS .. 13

Thesawalamai

Thesawalamai—*Right of pre-emption—What is the proper price to be paid by person asserting the right.*

Held : That a person having the right of pre-emption of a land under the *Thesawalamai* is entitled to assert the right by offering to buy the land at the price actually paid for it by a purchaser.

Per DE KRETSER, J.: " When a co-owner wishes, to sell, the other co-owner is at liberty, to claim or demand the preference of being the proprietor. That must mean that the person owning a right is not deprived of his natural right to procure the best possible price for his share but that he cannot sell it to an outsider if a co-owner is willing to buy it at that price."

NAVARATNAM & ANOTHER VS SITHAMPARAPILLAI 74

Usufructuary Mortgage

Usufructuary mortgage—Property mortgaged first to one person and subsequently to another—Right of subsequent mortgagee to compel prior mortgagee to accept payment of the amount due to him and give a discharge of his bond.

A person granted to the defendant a usufructuary mortgage bond in 1940, and subsequently granted another usufructuary mortgage bond to the plaintiff in 1942. The plaintiff brought the amount of the earlier mortgage bond into court and asked for an order that the defendant should accept the said sum and give a discharge of the bond. The plaintiff maintained the action in his capacity as mortgagee and not as an agent of the mortgagor.

Held : That the plaintiff has no right, as mortgagee, to compel the defendant to accept payment of the amount due to him and give a discharge of his bond.

Per KEUNEMAN, J. : " In my opinion the various authorities establish the following propositions :

(1) It is open to any person who has an interest in the payment to offer to the prior mortgagee the amount of the debt without the consent and even in opposition to the orders of the debtor. The prior mortgagee can be compelled to accept the offer. In the case of a valid offer there will be an end of any action brought by the prior mortgagee, and the accumulation of interest will be stopped and the right of hypothecation extinguished. But for the offer to be valid it must be made in the name of the debtor, and the offer will not be regarded if there is no advantage to the debtor, for example if all that results is a change of creditor (*vide* Pothier 3.1.1 and Voet 20.4.34.)

(2) The person who makes the offer and compels its acceptance will not obtain the cession of action nor the right to any preference in the pledge, but any person may by agreement with the prior mortgagee obtain a transfer of the latter's rights, provided the transfer is made according to the form permitted by law (*vide* Voet 20.4.35.)

(3) Where the prior mortgagee has brought action, or has taken steps to enforce his rights, the position is different (*vide* Voet 20.4.5)."

SARAM VS THIRUCHELVAM 81

Vendor and Purchaser

See Sale 11

Village Communities Ordinance

Sections **14 (4), 16 (3)** and **24.**

See Mandamus. 4

Warrant of Arrest

See 33

Will

See Buddhist Priest 89

Witnesses

Demeanour—Judges duty to test.

See Judge 97

Trial judge taking large part in examination of witnesses.

See Judge 97

Words and Phrases

Meaning of " assets being debts due to the business " in section **10 (1) (b)** of the Excess Profits Ordinance.

See Excess Profits Ordinance 70

" Heirs "
See Fidei Commissum 22

" On the occasion of their marriage "
Matrimonial Rights and Inheritance Ordinance .. 65

" Passengers "
Police Ordinance 64

" Vis Major " " force majeure "
See Contract 66

" Employed by the military "
See 107

" Knowing " in section 212 of Penal Code
See 33

Workmen's Compensation Ordinance

Workmen's Compensation Ordinance (Chapter **117)** *section* **3***—Death of workman—Disobedience by workman of orders—Accidents arising out of and in the course of employment—Liability of employer.*

The deceased workman was employed as a labourer to load bags of tea leaves from lighters into ships in the Colombo Harbour. The bags were carried from the lighters to the ship by means of a sling worked by a crane. When all the bags had been loaded the workmen were required to go on board the ship to have their names registered by a clerk. The deceased workman, acting against orders, used the sling to go on board the ship, and fell, and was killed.

Held : That the accident arose out of his employment within the meaning of section **3** and that the employer was liable to pay compensation.

THEVAR VS FERNANDO 91

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Present: KEUNEMAN, J., CANNON, J. & JAYETILEKE, J. VOL. XXIX

UMMUL MAROOFA vs LEAFF

S. C. No. 171—*C. R. Colombo No.* 94683.
Argued on 24th November, 1944.
Decided on 5th December, 1944.

Rent Restriction Ordinance No. 60 *of* 1942 *section* 8—*Decision on matter relating to proviso* (*a*) *to* (*d*)—*Is there a right of appeal from such decision.*

Held : That an appeal lies from a decision on any of the matters (*a*) to (*d*) contained in the proviso to section 8 of the Rent Restriction Ordinance.

Per KEUNEMAN, J. : " On the footing of these cases it is argued that, even if a new jurisdiction was created by section 8 of the Rent Restriction Ordinance, that jurisdiction was conferred upon the ordinary courts, *viz.* the Courts of Requests and District Courts — and that the rights of appeal from judgments of those courts were not taken away. This is a forcible argument and, I think, it is correct."

Cases referred to : *Attorney-General vs Sillen* (11 E.R. 1200)
Kanagasunderan vs Podihamine (42 N.L.R. 97)
National Telephone Co., Ltd. vs Postmaster-General (1913 A.C. 546)
Secretary of State for India vs Cheltikani Rama Rao & Others (1916 A.I.R.— P.C. 22)
Maung Ba Thow vs Ma Pin (1934 A.I.R.— P.C. 61)
Hem Singh vs Mahant Basant Dai (1936 All England Law Reports I. 356)

Overruled : *Abeywardene vs Nicolle* (27 C.L.W. 101)
Gunapala vs Mohideen (45 N.L.R. 371)

Approved : *Weerasinghe vs Azeez* (45 N.L.R. 381)

H. W. Jayawardene, with *G. T. Samarawickreme*, for the plaintiff-appellant.
G. P. J. Kurukulasuriya with *Victor Joseph*, for the defendant-respondent.

KEUNEMAN, J.

The plaintiff brought this action alleging that the defendant took the premises No. 158, Temple Road on a monthly tenancy at a rental of Rs. 40/– a month, having deposited a sum of Rs. 40/– as one month's rent in advance. She further stated that the defendant had not paid the rent due for March, 1944, and that she had by notice of the 25th February, 1944, requested the defendant to quit the said premises. Plaintiff also averred that the said premises were reasonably required for occupation as her residence, and prayed for ejectment of the defendant.

The defendant pleaded that the notice served was contrary to the provisions of the Rent Restriction Ordinance of 1942, and denied that the premises were required for the occupation of the plaintiff. The defendant brought into court Rs. 80/– as rent for March and April, 1944.

After trial the Commissioner found that " the plaintiff's need for the premises in question cannot be said to be reasonable or genuine for certain," and dismissed the plaintiff's action with costs. Plaintiff appealed from that judgment, and at the hearing of the appeal a preliminary objection was taken on the part of the defendant that there was no right of appeal from this order. Wijeyewardene, J., acting under section 48 of the Courts Ordinance, reserved this question for the decision of three judges in view of the fact that there were three conflicting decisions of this court on the point.

In *Abeywardene vs Nicolle* (27 C.L.W. 101) Soertsz, J. said that there was no right of appeal from an order relating to section 8 proviso (*a*) to (*d*) of the Ordinance. The appeal had, however, been disposed of on other points.

A similar objection was taken in *Weerasinghe vs Azeez* (45 N.L.R. 381)* before de Kretser, J. who pointed out that the earlier decision was made *obiter*, and added : " When we turn to section 8, that section does not give the right to the landlord to sue the tenant for ejectment. That is a right he has independent of the Ordinance. What that section does is to curb his right and to limit it to certain circumstances. In my opinion, therefore, the right of appeal which existed previously is not affected by the Ordinance."

In *Gunapala vs Mohideen* (45 N.L.R. 371)† a similar matter came up before Soertsz, J. who pointed out that Ordinance 60 of 1942 introduced a material change in our law " by debarring landlords in certain areas from instituting such actions without the written authorization of an Assessment Board, and also by prohibiting

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* 28 C.L.W. 3 † 28 C.L.W. 1

courts of law in those areas from entertaining such actions, were they instituted, unless in the opinion of the court the rent was in arrear, or the tenant had given notice, or the landlord required the premises reasonably, or the premises were being used in an immoral, illegal, neglectful, or pestiferous manner." Soertsz, J. added : " The right of action and of appeal which existed previously is the right of the common law action and the common law appeal from a final judgment or order having the effect of a final judgment." But in the case where " the preliminary matters in section 8 (*a*) to (*d*) " have to be considered, " there is then an action for ejectment but only *in posse*. Till the court has held the preliminary inquiry in accordance with the fundamental rule of procedure that requires that the party to be affected shall be heard, there is in reality no action for ejectment over which the court has any power. If the court is of opinion that the landlord has not made out a case under section 8 (*a*) to (*d*) and makes order accordingly, that surely is not an order in an ejectment action. An ejectment action has not yet come into being for the purpose of trial."

A further point made by Soertsz, J. was that in an action for ejectment without authorization by a Board, "a new jurisdiction has been conferred on certain courts to consider some preliminary questions that do not arise as preliminary questions in the ordinary tenancy case." Soertsz, J. held that a jurisdiction conferred on a court is not subject to a right of appeal unless such a right has been given by clear words or inevitable implication. He followed the decision of Lord Westbury in *Attorney-General vs Sillen* (11 E.R. 1200) and a number of cases decided in England and in Ceylon which followed that decision. Soertsz, J. also made one reservation, *viz.* that what he had said applied to matters arising in the Courts of Requests, and pointed to the difference between section 73 and section 78 of the Courts Ordinance.

In view of these conflicting decisions we have given this matter our careful consideration. Section 8 of the Rent Restriction Ordinance No. 60 of 1942 runs as follows :

> " Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Ordinance applies shall be instituted in or entertained by any court, unless the Assessment Board, on the application of the landlord, has in writing authorized the institution of such action or proceedings :
>
> Provided, however, that the authorization of the Board shall not be necessary in any case where —
>
> (*a*) rent has been in arrear for one month after it has become due ; or
>
> (*b*) the tenant has given notice to quit ; or
>
> (*c*) the premises are, in the opinion of the court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord or for the purpose of his trade, business, profession, vocation or employment ; or
>
> (*d*) the tenant or any person residing or lodging with him or being his sub-tenant has, in the opinion of the court, been guilty of conduct which is a nuisance to adjoining occupiers, or has been convicted of using the premises for an immoral or illegal purpose, or the condition of the premises has, in the opinion of the court, deteriorated owing to acts committed by or to the neglect or default of the tenant or any such person.
>
> For the purpose of paragraph (*c*) of the foregoing proviso, ' member of the family ' of any person means the wife of that person, or any son or daughter of his over eighteen years of age, or any parent, brother or sister dependent on him."

The first part of this section is in imperative terms, and forbids the "institution" of proceedings for the ejectment of a tenant except on a written authorization of the Assessment Board, " notwithstanding anything in any other law." I do not think it is profitable to consider whether this part of the section creates a new jurisdiction or merely imposes a curb or fetter on an existing jurisdiction. In either case the plaintiff is effectively debarred from bringing the action without this authorization.

The real problem we have to solve is the effect of the proviso to the section. I think it is essential to consider the wording of the proviso. The language is that " the authorization of the Board shall not be necessary " in the cases given, *viz.* (*a*) to (*d*). If the authorization of the Board is not " *necessary* " in those cases, I find it difficult to resist the argument that in those cases the jurisdiction of the court in tenancy cases remains unaffected and in its pristine force. In this appeal counsel supporting the preliminary objection went so far as to suggest that before the plaint was filed the plaintiff was bound to satisfy the court that one of the grounds (*a*) to (*d*) had been established, and that in reality the plaintiff had to obtain the leave or sanction of the court to bring the action. I do not think the words of the section can be stretched to that length, and certainly this suggestion had not been made in any of the judgments referred to.

It is also interesting to consider the cases (*a*) to (*d*). It is worthy of note that cases (*a*) and (*b*) depend upon questions of fact and that the "opinion of the court" is not involved. Indeed grounds (*a*) and (*b*) would have been grounds for bringing an action for ejectment against a tenant before the Ordinance, and would have been material matters for determination in a tenancy case. In cases (*c*) and (*d*) " the opinion of the court " is involved. Case (*c*) brings in matters which before the Ordinance were irrelevant to the tenancy action, and possibly case (*d*) being the

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only cases contained in the proviso, these may have provided some support to counsel's argument. But in this case they do not stand alone but are conjoined with cases (*a*) and (*b*) and all these grounds (*a*) to (*d*) are grounds whereby under the proviso the authorization of the Board "shall not be necessary." In my opinion, therefore, where the conditions in cases (*a*), (*b*), (*c*) or (*d*) have been established the imperative words of the earlier part of section 8 have no application whatsoever.

I have considered the question whether section 8 requires a preliminary inquiry by the court as to whether grounds (*a*) to (*d*) or any of them exist. No doubt in view of this section it is now necessary for a plaintiff who has not obtained the authorization of the Board to allege that he comes in under one of these cases, and it is within the power of the court to try any of these matters as preliminary issues. I do not, however, find anything in the section that makes such a preliminary inquiry imperative, or prevents the court from allowing these matters to be proved at the trial itself.

I have, therefore, come to the conclusion that in the cases (*a*) to (*d*) the jurisdiction of the court to try the tenancy cases remains unaffected, and that the written authorization of the Board is not necessary. In all other cases the authorization of the Board is necessary before action brought.

It is interesting to note that under section 12 a procedure has been laid down for proceedings before the Board, although the grounds on which the Board may grant or refuse authorization have not been set out. No procedure, however, has been laid down for any application to the court for leave or sanction to bring the action or for the trial of any matters under section 8 (*a*) to (*d*) as preliminary questions for determination.

As regards the question of law raised by Soertsz, J., I think it will be sufficient to mention the Divisional Bench case of *Kanagasunderan vs Podihamine* (42 N.L.R. 97)* which followed earlier decisions in England and Ceylon. The effect of those decisions may be summed-up in the words of Lord Westbury in *Attorney-General vs Sillen* (11 E.R. 1200): "The creation of a new right of appeal is plainly an act which requires legislative authority. The court from which the appeal is given and the court to which it is given must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the legislature to have given to either tribunal the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal which is in effect a limitation of the jurisdiction of one court and an extension of the jurisdiction of another. A power to regulate the practice of a court does not involve or imply any power to alter the extent or nature of its jurisdiction."

This principle was accepted and applied in our Divisional Bench case.

The application of this principle to the present case is dependent upon the question whether in fact a new jurisdiction was conferred upon the court by section 8 of the Rent Restriction Ordinance and no right of appeal was expressly given. I have already discussed the question whether a new jurisdiction was conferred in respect of cases (*a*) to (*d*) contained in the proviso, and have come to the conclusion that in respect of those cases *no* new jurisdiction is conferred but the former jurisdiction is recognized. In my opinion the principle laid down in these cases is not applicable to the present case.

It has been contended for the appellant that another principle, adopted by the House of Lords and the Privy Council, is also applicable in the present case: see *National Telephone Company, Limited vs Postmaster-General* (1913 A.C. 546). Here the point taken was that no appeal lay from the determination of the Railway and Canal Commission under the Telegraph (Arbitration) Act 1909 because the reference contemplated is to the arbitration of a special tribunal and is not a reference to the Commission as a Court of Record. In respect of this argument Viscount Haldane, Lord Chancellor, said:

> "It is contended by the appellants that in a reference under this Act the commission is not in the same position as in a reference under the general Act establishing it, and that as no right of appeal is expressly given none can be presumed.
>
> My Lords, if the reference is one on the same footing as a reference under the general Act, that is, a reference to the commission as a Court of Record, with a right of appeal provided, this is decisive against the points raised in the argument for the appellants. And I find nothing in the Act of 1909 to cut down the effect of the words at the end of section 1, which appear to me to provide for a reference to the commission in its usual capacity. When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of the court are to attach, and also that any general right of appeal from the decision likewise attaches."

This case has been followed by the Privy Council in *Secretary of State for India vs Cheltikani Rama Rao & Others* (1916 A.I.R. — P.C. 22), in *Maung Ba Thow vs Ma Pin* (1934 A.I.R.— P.C. 61), and in *Hem Singh vs Mahant Basant Dat* (1936 All Eng. Law Rep. I. 356). In this last case it was held that jurisdiction conferred on the High Court was intended to include the new

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* 19 C.L.W. 53

subject-matter as part of the ordinary appellate jurisdiction of the High Court and that the case was within the principle laid down by Viscount Haldane (see above). The right of appeal to the Privy Council was upheld and the preliminary objection dismissed.

On the footing of these cases it is argued that, even if a new jurisdiction was created by section 8 of the Rent Restriction Ordinance, that jurisdiction was conferred upon the ordinary courts, *viz.* the Courts of Requests and District Courts—and that the rights of appeal from judgments of those courts were not taken away. This is a forcible argument and, I think, it is correct.

In the present case the Commissioner has decided that the plaintiff has not brought herself within any of the cases (*a*) to (*d*) and has dismissed her action. This is a final judgment or at any rate an order having the effect of a final judgment. This is a tenancy case, and does not come under section 833 A of the Civil Procedure Code. The appellant is, therefore, entitled to appeal on matters both of fact and of law under section 76 of the Courts Ordinance.

The preliminary objection is dismissed with costs. This is the only matter that has been referred to us. The appeal will be listed for argument in the ordinary course before a single judge.

CANNON, J.

I agree.

JAYETILEKE, J.

I agree. *Preliminary objection dismissed.*

Present: DE KRETSER, J.

No. 4 — WEERASEKERA & ANOTHER vs THE G. A., UVA PROVINCE
No. 15 — EKANAYAKE vs THE G A., UVA PROVINCE

S. C. Nos. 4 *and* 15.

In the matter of applications for Writs of Certiorari and Writs of Mandamus on the Government Agent, Uva Province, in regard to the Village Committee Election for 1944, *for Horagune Ward No.* 2 *in the village area of Kandapolla No.* 1 *in Wellawaya Division, and for Haldummulla Sanitary Board Town in the village area of Kandapolla No.* 1 *Wellawaya.*

Argued on 20th November, 1944.
Decided on 30th November, 1944.

Mandamus—Village Committee Election—Village Communities Ordinance sections 14 (4), 16 (3) *and* 24*—Failure of presiding officer to arrive at the meeting within one hour after the time fixed for its commencement—Arrival of presiding officer more than an hour after time fixed for meeting—Electors present and desire election to be held—Election held with consent of all—Mandamus will not be granted to set aside such election.*

The meeting for the election of a candidate to represent the Horagune Ward of the village area of Kandapolla was fixed for 9-30 a.m. on 13th December, 1943. The presiding officer was held up by an earth slip on the road and was unable to arrive till 11-30 a.m. Immediately the presiding officer realized he would be delayed he sent a telegram to the Government Agent who in turn sent a telegram to the caretaker of the Village Tribunal building which was the venue of the meeting. This telegram was intended to convey the information to those assembled that the presiding officer would arrive late. It reached the addressee at about 11 a.m. As the telegram stated that the presiding officer would come though late the voters did not go away but remained and when the presiding officer arrived, desired that the election should be held.

The presiding officer thereupon informed the voters that he would hold the Horagune election and put off the Haldummulla election which had been fixed for 11 a.m. to 1 p.m. The petitioners took part in the election and voted. They raised no objection to the election being held. The defeated candidates themselves raised no objection at any time.

Held : (i) That the election was not illegal.
(ii) That the matter was not one in which a *Mandamus* should issue.
(iii) That a Writ of *Certiorari* does not lie.
(iv) That in proviso (ii) and (iii) of section 16 of the Village Communities Ordinance what is provided for is the manner of notice and not the period of notice prescribed in section 14.

Cases referred to : *Wijesekera vs The A.G.A., Matara* (26 C.L.W. 52)
In application for writ of Mandamus on Govt. Agent, Northern Province (28 N.L.R. 323)
Ranesinghe vs The G. A., Sabaragamuwa (44 N.L.R. 572)
Karunaratne vs The G. A., Western Province (32 N.L.R. 169)

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K. S. Aiyar, for the petitioners.
H. H. Basnayake, Crown Counsel, for the respondent.

DE KRETSER, J.

These two applications for Writs of *Certiorari* and *Mandamus* arise out of the following facts :

Election for members of two wards of a village committee had been fixed for the 13th of December, 1943, at the Village Tribunal, for the Horagune Ward at 9-30 a.m. and for the Haldummulla Town at 11 a.m. The Presiding Officer nominated by the Government Agent found his way blocked by a landslide and delayed for about an hour to see if the obstruction could be cleared. He then sent two telegrams to the Government Agent and to the keeper of the Village Tribunal. A telegram was received by the keeper about 11 a.m. from the Government Agent informing him that the Presiding Officer would be late and requesting him to ask the headman to inform the voters. He did this. The information was publicly announced and the telegram passed from hand to hand.

The Presiding Officer arrived at 11-30 a.m. and was faced with two elections, for the first of which he was two hours late and for the second half an hour late. Section 16, proviso (iii) states that if the Presiding Officer is more than an hour late the meeting should be deemed to be adjourned for another date, of which notice must be given as provided by section 14. The Presiding Officer adjourned the meeting for Haldummulla Town till 1 p.m. and the meeting was then held and concluded at 2-30 p.m., after all present had voted. 319 voters were present and the successful candidate had a lead of 73 votes over his rival. The candidates expressed satisfaction with the way the election was conducted and no complaint has been made by the unsuccessful candidate.

A letter dated the 11th of December was sent to the Government Agent by a person identified as the President of the Committee intimating that the Presiding Officer had arrived 3 hours late and requesting him to be good enough to take early steps to cancel the election and reconvene the meeting in terms of section 16 (ii). He was apparently unaware of the addition of the third proviso brought in by the amending Ordinance No. 54 of 1942. The Government Agent replied by letter dated the 15th of December and informed him that the Presiding Officer had explained the cause of his delay and had held the election "with the full consent of the candidates," that no objection had been raised and the general desire was that the election should be held that day. He added that he had no power to declare the election void. Thereafter, a person who claimed to be qualified to be a voter made an application for the writs now under consideration alleging that he and a large number of voters had left after an hour and had been deprived of their right to vote, and had requested the President of the Committee to have the election invalidated.

With regard to the Horagune Ward the Presiding Officer swears that he intended to postpone the election but the candidates and their supporters pressed him to hold the elections at once. He called for objections and none was raised and he held the election. 323 voters were present, the winning candidate got 161 votes, the next 143, and the third only 15.

The same procedure was followed by the President of the Committee and the present application was made by two persons qualified to be voters, in almost the very same terms as the one relating to the Haldummulla Town ward.

Numerous counter-affidavits were filed contesting the allegations in the petitions. According to them the petitioners were present and took part in the elections, no one left, but, on the contrary, others came in, all were satisfied. Counsel for the petitioners stated he would not rely on the allegations made in the petitions and supporting affidavits but would take his facts from the counter-affidavits and base his whole case on the law. The counter-affidavits seem to be in every way more acceptable. As regards the Haldummulla Town ward counsel confessed he was on poor ground and he hardly referred to it. It seems to me that the application must fail. The irregularity has not been shown to have caused any harm, if it be an irregularity to adjourn for a short time on the very day and after notice to all assembled. But I am not satisfied it is an irregularity. The applications regarding the Haldummulla Town ward are dismissed.

No provision has been made in the Ordinance for adjournment in the course of the day but this does not mean that such an adjournment would be illegal. The numbers in a ward of a village area may be estimated by the fact that the Government Agent, who would have the necessary information, only allowed 1 hour for the Horegune ward. During such a short period adjournment would not ordinarily be needed but if the need did arise an adjournment could be made. Such an adjournment would need to be notified to the meeting. Such temporary adjournments

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are within the right of any meeting and no special provision is needed. But where a longer adjournment becomes necessary the Ordinance provided not only the power to adjourn but that notices would be necessary before the meeting is held. We have a curious situation disclosed in section 16, proviso (iii). It requires the notice prescribed by section 14 to be given and at the same time requires that the adjournment should not be for a date longer than 30 days from the date and time fixed. Only the Government Agent may give such notice and the Presiding Officer may not. Proviso (i) to section 16 empowers the Presiding Officer to exercise all the powers and perform all the duties that may be exercised or performed by the Government Agent at the meeting and no more. The Government Agent could not give " not less than one month's notice " and yet have the meeting " not more than thirty days after the date *and time* " fixed in the original notice convening the meeting. The proviso can only be interpreted practically as meaning that the manner of notice and not the period of notice was intended both in proviso (ii) and proviso (iii) when they invoke section 14. The Ordinance provides for the case of the Presiding Officer being present in time and adjourning a meeting. It provides for his arriving within an hour and holding the meeting, which is held in suspense till then. It does not provide for his arriving later than an hour finding all concerned still waiting, and with their consent holding a meeting, as happened in the case of the Horegune ward. It seems clear the Ordinance provided for an adjournment to some other date. Also that it was where no Presiding Officer was present to announce an adjournment, that the meeting would be deemed to be adjourned to an unspecified date, of which further notice would be needed. Candidates and voters would be entitled to disperse after waiting an hour. For what reason and in whose interests was the time of grace fixed at an hour ? Clearly in the interests of the electorate, for the protection of whose rights it is that all rules are made. The reason for fixing one hour must be a matter of conjecture. Probably is was felt that if the Presiding Officer did not come for one hour he was not coming at all. The time of grace was surely not allowed to encourage any habit of unpunctuality or to induce lack of care on the Presiding Officer's part or to punish misfortune on his part but to save expense and inconvenience to the electorate. The rule is one of procedure and rules of procedure can always be waived by those for whose benefit they are made. In the present case the evidence is that no voters left and the fact that the full time provided was occupied suggests that all or almost all the voters were present. The candidates were best qualified to look after their own interests and they were satisfied. Again an indication that no voters had left. Both they and the voters wished the meeting to be held. A situation arose not contemplated by the Ordinance and the Presiding Officer followed a course which quite satisfied the object of the Ordinance. The proviso does not say " arrive at a meeting after one hour has elapsed from the time fixed " but " does not arrive within one hour." It does not contemplate the case of the Presiding Officer arriving but that of his not arriving. The meeting is in being once the voters have assembled at the time fixed but it cannot proceed to business. The section does not say "shall stand adjourned " but " shall be deemed to be adjourned." " Deemed " by whom ? Obviously by those assembled *i.e.* the electorate. What if they did not in fact deem it to be adjourned ? Villagers notoriously have little idea of time and when they do make a guess they guide themselves by the sun. All temple life is regulated by solar time and the temple occupies a prominent place in village life. Lucky hours are fixed by astrologers according to solar time. The villager would in most cases take the time 9-30 as that time by the sun and 11-30 by advanced time would be 10-30 to him. That might in part explain why the voters waited. Many had assembled from early morning, probably making the day a non-working day. But this line of reasoning only fortifies the argument that those concerned might always waive a provision for their benefit. So does the argument that a meeting may always decide to resume after as adjournment. One must not forget this is a village election for a small electorate living in a small area ; that the barest elements necessary for an election are provided by the Ordinance which does not provide for an electoral roll or for electoral offences and other complexities familiar in bigger elections. It would be unfortunate to impose technicalities on such an electorate. I am not sure the writ applied for should be used in connection with these elections for section 24 of the Ordinance provides machinery for settling doubts as to the validity of an election. To sustain the contention that the election was void one would have to read into the proviso words to the effect that the meeting should not be resumed and any election held thereafter shall be invalid.

I feel it difficult to say that the meeting was irregularly, let alone illegally, held. It is cer-

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tainly a case in which in the exercise of my discretion, I should not allow the applications now made.

There remains one or two points to be considered. Crown Counsel contended that the writs would not lie as the Government Agent and the Presiding Officer only performed executive duties and section 42 of the Courts Ordinance only applied to persons discharging judicial functions. I have already expressed my opinion on section 42 in *Wijesekera vs The A.G.A., Matara* (26 C.L.W. 52). In my opinion the Presiding Officer performed only executive duties and the application to the Government Agent to hold another election was not one calling on him to perform a judicial duty but inviting his attention to the state of affairs and requesting him to act.

A Writ of *Certiorari* would lie only against a person performing a judicial duty. (Halsbury Vol. IX S, 1420; 1443). It does not lie where the proceedings were wholly void. (S. 1445; 1482 ;1449), nor will the court grant it where no benefit would arise from granting it (1482). The application must be made by an aggrieved party and not merely by one of the public and the conduct of the party applying must not have been such as to disentitle him to relief *e.g.* acquiescence in the irregularity complained of, failure to object to the constitution of the court (S. 1481).

It seems clear, therefore, that in both cases the Writs of *Certiorari* cannot be granted. But the Writ of *Mandamus* stands on a different footing. It will issue to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing such right (S. 1269). The grant of a writ is, as a general rule, a matter for the discretion of the court. It is not a writ of right and it is not issued as a matter of course. It may be refused not only upon the merits but also by reason of the special circumstances of the case (S. 1270). It will lie to enforce statutory rights and duties, to require public officials and bodies to carry out their duties (S. 1270; 1281). It will issue to Government officials exercising executive duties which affect the rights of private persons. When Government officials have been constituted agents for carrying out particular duties in relation to subjects so that they are under a legal obligation towards such subjects the writ will lie. (S. 1293). The rule that the court will not question by *Mandamus* the honest decision of tribunals applies to all tribunals and not only to those of a judicial character (S. 1500). It must be shown that the statute imposes a legal duty and the applicant must show that there resides in him a legal right to the performance of the duty. The legal right must be in the applicant himself (S. 1213). The mere fact that a person is interested in the performance of a duty as a member of a class of persons all of whom may be regarded as equally interested but himself having no particular ground for claiming such performance, or that he has an ulterior purpose but no immediate interest of his own or any other person's behalf, will not be sufficient (S. 1305). It must be shown there was a distinct demand of that which the party desires to enforce and that such demand was met by a refusal (S. 1307). It cannot apply where a person has by inadvertence omitted to do some act which he was under a duty to do and when the time within which he can do it has passed (S. 1307). Nor will it be granted when it seems that obedience to the writ would not be followed by any different result (S. 1308). A Writ of *Mandamus* would lie to command election to an office where though there has been election to the office, the election is void or merely colourable and there is in fact no election and the office is not full. It will not be granted where the office is in fact full. Proceedings must then be taken by way of *Quo Warranto* or election petition (S. 1274), or in this case by an application under section 24. In 28 N.L.R. 323 Dalton, J. used the writ to declare an election void where the venue had been changed without adequate notice. In the case reported at page 573 of 44 N.L.R. Hearne, J. went on the assumption that the writ lay but refused it on the ground that an adjournment (which had not been published, it was alleged) had not been shown to have affected the election. He followed the case reported in 32 N.L.R. 169.

Now, the petitioners did not apply to the respondent but a third party did, not stating he was acting on their behalf but ostensibly as a member of the public. He was not a candidate and, as far as one can see, not a voter. It is not shown he had a right to make the demand nor that the Government Agent was required by the Ordinance to decide on the validity of the election. The petitioners took part in the election and took no objection nor made a demand for adjournment. They have given no facts which indicate that a different result would have resulted had there been another meeting on another day. The election was held in good faith and cannot be said to be colourable. At most it was irregular. I see no reason, therefore, either on the law or on the facts to issue the Writ of *Mandamus*.

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The applications will, therefore, be dismissed. Counsel left it to the court to fix costs, if any, and suggested Rs. 105/-. In the circumstances of this case I award no costs. The question was one of some novelty and not without difficulty and I do not think costs should be awarded.

Applications dismissed.

Present: HOWARD, C.J. & WIJEYEWARDENE, J.

MOLEGODA vs MOLEGODA

S. C. No. 4—D. C. (F) Kandy No. 1129.
Argued on 12th September, 1944.
Decided on 28th September, 1944.

Evidence Ordinance section 92—Sale of land for a consideration expressed and acknowledged therein—Action for recovery of part of the consideration—Can opposing party say that the transaction was not a sale but a gift—Equitable rule applicable to a case where a party seeks to vary by extrinsic evidence the contents of a written document—Maxim that he who seeks equity must do it.

Held : That where the court allows a party to lead oral evidence under section 92 of the Evidence Ordinance to vary the terms of a deed the opposing party is entitled to lead oral evidence to meet the claim put forward by the first party who has been allowed to vary the terms of the deed.

Cases referred to : *Kiri Banda vs Marikar* (1917–20 New Law Reports 123)
Shah Mukhun Lall vs Baboo Sree Kishen Singh (1868–12 Moore's Indian Appeal Cases 157 at 185)
Nadaraja vs Ramalingam (1918–21 New Law Reports 38)
Hanif-un-Nissa & Another vs Faiz-un-Nissa & Another (1911–Indian Law Reports 33 Allahabad 341)
Velan Alvan vs Ponny (1939–41 New Law Reports 106)

N. E. Weerasooriya, K.C., with *S. R. Wijayatilake*, for the defendant-appellant.
Cyril E. S. Perera with *S. P. Wijeyewickreme*, for the plaintiff-respondent.

WIJEYEWARDENE, J.

This is an action by the plaintiff-respondent as administrator of the intestate estate of one Kambuwatawana to recover a sum of Rs. 1,600/- from the defendant-appellant.

By deed P 1 of August 9th, 1940, Kambuwatawana conveyed certain lands to the defendant for Rs. 2,000/-. He died shortly afterwards leaving as his heirs five children including the plaintiff and the defendant.

The plaintiff instituted this action alleging that the defendant failed to pay the sum of Rs. 2,000/- due as consideration on transfer P 1. The plaintiff claimed only a sum of Rs. 1,600/-, as he was prepared to give credit to the defendant for Rs. 400/- as the one-fifth share due to the defendant as an heir of the estate of Kambuwatawana.

The defendant filed answer pleading that no sum was due to the plaintiff as the deed P 1 was in reality a deed of gift executed by Kambuwatawana for "love and affection."

The District Judge held on the evidence that there was no money consideration for the deed P 1 but gave judgment for the plaintiff on the ground that the defendant was debarred by section 92 of the Evidence Ordinance from relying on oral evidence to prove that the deed of transfer P 1 was in fact a deed of gift.

The deed P 1 is in form a deed of sale by which the property was sold to the defendant for Rs. 2,000/-. In fact, the deed contains a warranty clause by which Kambuwatawana undertook to compensate the defendant, if he failed to settle any dispute in respect of the property sold under the deed. The deed, however, contains an express recital that Kambuwatawana has received "the purchase price of Rs. 2,000/- lawful money of Ceylon in full." The plaintiff, therefore, seeks in this action to deny the correctness of that recital. Could he then prevent the defendant from showing the real character of the consideration for the deed P 1 ?

In *Kiri Banda vs Marikar* (1917–20 New Law Reports 123) the plaintiff sold some lands to the

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defendant for Rs. 4,000/– the receipt of which the plaintiff acknowledged in the deed. The plaintiff sued to recover Rs. 2,500/– alleging that he received only Rs. 1,500/– out of the consideration. The defendant pleaded that the consideration for the conveyance was a sum to be determined by the number of acres sold at the rate of Rs. 150/– per acre and that a survey of the lands was made for that purpose. The defendant stated further that according to the survey only a sum of Rs. 1,269/50 was the entire consideration due to the plaintiff and that he has therefore overpaid Rs. 230/50 which he claimed in reconvention. This court held that the defendant was entitled to prove these facts and cited in support the following principle laid down by the Privy Council in *Shah Mukhun Lall vs Baboo Sree Kishen Singh* (1868–12 Moore's Indian Appeal Cases 157 at 185):

> "The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice is permitted to remove the blind which hides the real transaction, as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one in application also in the courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice."

The case of *Kiri Banda vs Marikar* (*supra*) was followed in *Nadaraja vs Ramalingam* (1918–21 New Law Reports 38). In that case the plaintiff had executed a deed of sale in favour of the defendant. The deed stated that the consideration was Rs. 4,000/– and that it had been received by the plaintiff. The plaintiff instituted the action for the recovery of Rs. 1,500/– alleging that only Rs. 2,500/– of the consideration was paid to him. It was held that the purchaser could prove by oral evidence that the consideration for the transfer was Rs. 2,500/– and not Rs. 4,000/–. After stating that the whole basis of the plaintiff's claim to relief under section 92 of the Evidence Ordinance is an equitable one, Bertram, C.J. said:

> "The principle of English equity was that he who sought equity must do it. In this case the plaintiff comes into court repudiating a statement with regard to the payment of the consideration, and if he is allowed to put that forward, he ought also to suffer the person whom he attacks to show the real nature of the transaction."

The District Judge thought that these decisions did not apply to the present case and said that "when they stated that the extrinsic evidence could be led to prove that the consideration was different, it applied only to the *quantum* of consideration and not to the nature of the consideration." In other words, the District Judge thought that the equitable principle referred to in those cases would permit the defendant to shew that the consideration was not Rs. 2,000/– as mentioned in the deed and only Rs. 10/– but not to shew that the consideration had no pecuniary value and was merely the "love and affection" of the transferor to the transferee which would constitute a valid cause under the Roman-Dutch law. I am unable to appreciate the distinction sought to be drawn by the learned District Judge, and I would not restrict the application of an equitable principle in such an artificial manner in the absence of any strong reason for it. The decision of the Privy Council in *Hanif-un-Nissa & Another vs Fai-un-Nissa & Another* (1911–Indian Law Reports 33 Allahabad 341) is clearly an authority against the view taken by the learned District Judge. The plaintiff in that case executed a deed transferring some property to the defendants, her daughter and grandchildren, for Rs. 60,000/–. It was on the face of it an ordinary deed of sale. It stated (i) that the consideration had been received by the vendor (ii) that the vendees had been put in possession of the property and (iii) that, if the vendees were deprived of possession of any part of the property sold, they could be entitled to receive from the vendor a proportionate part of the consideration. She instituted the action alleging that no consideration had ever passed between the parties and praying, *inter alia*, for the recovery of Rs. 60,000/–. The defendants pleaded that the alleged sale was not a sale at all and was only a gift. The High Court of Allahabad held that oral evidence was not admissible to prove that the deed which purported to be a deed of sale was a deed of gift and entered judgment in favour of the plaintiff (*vide* (1905) Indian Law Reports 27 Allahabad 612). The Privy Council set aside the judgment of the High Court and remitted the case to be dealt with on the evidence.

The counsel for the respondent relies strongly on *Velan Alvan vs Ponny* (1939–41 New Law Reports, 106), but I am unable to see how that decision is relevant to the question to be decided in this case. In that case the first defendant's husband had conveyed to the first defendant a land "in consideration of the sum of Rs. 1,000/– already received." As the deed

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purported to be for valuable consideration half of the property reverted to her husband under section 29 of Ordinance 1 of 1911 and on his death that half share devolved on the plaintiff, his brother, and some others. The plaintiff claiming thus to be a co-owner of the land instituted that action to assert the right of pre-emption under the *thesawalamai* in respect of a transfer by the first defendant to the second and third defendants. The defendants resisted the claim stating that the plaintiff was not a co-owner as the deed in favour of the first defendant was not for valuable consideration and no share therefore of the land reverted to the first defendant's husband or devolved through him on the plaintiff. The court had to consider in that case the scope of section 92 of the Evidence Ordinance and held that the defendants were precluded by that section from leading oral evidence to change the character of the transaction. It was clearly not a case where the court had to consider the application of the equitable principle referred to in the earlier decisions. The necessity for the application of that principle arises only where a court *allows* a party to lead oral evidence under section 92 to vary the terms of a written contract. In those circumstances, the equitable principle referred to comes into operation and enables the opposing party to lead oral evidence to meet the claim put forward by the first party who has been allowed under section 92 to vary a statement in the written contract.

For the reasons given by me I hold that oral evidence was admissible to prove that the deed P 1 was a deed of gift.

I set aside the judgment and direct decree to be entered dismissing the plaintiff's action with costs here and in the court below.

HOWARD, C.J.

I agree.

Judgment set aside.

Present: DE KRETSER, J.

SIMON DE SILVA vs HOOPER (Inspector of Police)

S. C. No. 1011—*M. C. Colombo No.* 48949.
Argued on 7th November, 1944.
Decided on 13th November, 1944.

Motor Car Ordinance No. 45 *of* 1938 *section* 151—*Conductor of omnibus convicted for overloading—Driver charged and convicted for aiding and abetting—Circumstances in which the latter may become liable.*

Held : That a conviction based on the mere fact that a driver of an omnibus was aware of the overload and that he failed to get the extra passengers set down is not justified.

Cases referred to : *S. Thangiah, S. I. Police vs Batch Appu* (5 C.L.J. 214).

Nihal Gunasekera, for the appellant.
H. A. Wijemanne, Crown Counsel, for the respondent.

DE KRETSER, J.

The appellant was the driver of an omnibus licensed to carry 27 passengers. On the day in question it carried 41. It appears an allowance is made of 5 passengers in view of prevailing conditions. The conductor of the omnibus has been duly prosecuted. Now, the driver of the omnibus is charged with aiding and abetting the conductor. He has been convicted, and appeals.

Under section 111 (2) of the Motor Car Ordinance No. 45 of 1938, the conductor is made liable in case too many passengers are carried.

Under section 151 anyone abetting any one of the many offences mentioned in the Ordinance may be charged and convicted.

No previous case has been cited to me and I was told that other cases await the decision in this appeal.

It seems to me that the legislature being aware of the fact that every omnibus has a driver did not make the driver liable for overloading. In section 111 (1) however, it makes the driver liable in respect of a motor cab. His business is to drive the omnibus. The conductor is the person who sees to the passengers and to the goods. He is, as his name indicates, the conductor of the omnibus. Under section 120 it is he who

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issues tickets to passengers. The driver is made liable for improper driving and the conductor does not come in then. The duties and liabilities of the two are kept distinct. The driver's position is much the same as the driver of a train and the difference that he is close up to the passengers should not make any difference in his position. It would be intolerable if the driver had to perform the duties of a conductor as well. In the present case the magistrate has convicted the driver, not on any special circumstances, but because the driver " must be held to be aware of the overload " and failed to get the extra passengers set down.

I do not think the conviction is justified. Considering that the omnibus was so full, there is no reason to hold that the accused had reason to believe that an already fully loaded omnibus was loaded to a particular extent and not to something less. But if he did know, that knowledge of his could not constitute abetment, both because it was not part of his duty to interfere with the conductor and also because abetment requires something more than abstention from interfering. The abettor must actively aid with the intention of aiding the offender or illegally omit to perform a duty with the intention of aiding the offender. There was no legal duty cast on him to see that the omnibus was not overloaded. The prosecution is seeking to implement the provisions of the Ordinance by bringing in a charge of abetment.

There may, of course, be special circumstances when a driver, like anyone else, may be guilty of abetment *e.g.* if he instigates the conductor, but no such special circumstances have been proved.

In *S. Thangiah, S. I. Police vs Batch Appu* (5 C.L.J. 214) Moseley, J. dealt with a very similar situation and refused to see abetment even though in that case the driver was out of his seat and might have seen the overloading of goods.

In my opinion section 151 indicates the position of the driver in regard to offences other than those specially provided for and then makes him liable only if it proved that the contravention was due to any act, omission, default or neglect on his part. If that is his position in the case of such offences, his position cannot be worse where special provision is made making only a particular person liable for the contravention.

In my opinion the conviction is not justified. It will accordingly be set aside and the accused will be acquitted.

Appeal allowed.

Present: HOWARD, C.J. & WIJEYEWARDENE, J.

ASIYATH UMMA vs RATNAYAKE

S. C. Nos. 77-78—D. C. (F) Matara No. 15167.
Argued on 26th September, 1944.
Decided on 9th October, 1944.

Sale of land—Five allotments conveyed by the same instrument—Possession of three out of the five allotments given immediately—The purchase price of the other two allotments retained in the hands of the vendee till vacant possession is given—Failure to give vacant possession—Action by vendor for balance purchase price retained by the vendee in respect of the two allotments—Can vendee claim rescission of sale of two only of the five lands.

The facts shortly are as follows :

The vendor (1st plaintiff) sold five allotments of land of a total extent of nearly 31 acres to the vendee (defendant) for a sum of Rs. 12,500/–. The vendee retained a sum of Rs. 4,200/– being the value of two of the allotments conveyed till vacant possession was given. The vendor failed to give vacant possession but sued the vendee for the balance purchase price. The vendee claimed a rescission of the contract in respect of the two allotments of which vacant possession was not given.

Held : That where a vendor sells several allotments of land by the same instrument of sale the vendee is entitled to claim a rescission of the sale in respect of some only of the allotments of land if it can be proved that the sale of some of the allotments was regarded as independent of the sale of the others.

N. E. Weerasooriya, K.C., with *C. J. Ranatunga*, for the defendant-appellant in No. 77 and the defendant-respondent in No. 78.

H. V. Perera, K.C., with *W. W. Mutturajah*, for the plaintiffs-respondents in No. 77 and the plaintiffs-appellants in No. 78.

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WIJEYEWARDENE, J.

The first plaintiff (wife of the second plaintiff) sold five allotments of land for Rs. 12,500/- to the defendant by deed D 3 of 1942 wherein she acknowledged receipt of the entire consideration.

The plaintiffs instituted this action stating that the first plaintiff was paid only Rs. 8,300/- and that a sum of Rs. 4,200/- was due to her.

The defendant pleaded that Rs. 8,300/- paid by him to the first plaintiff represented the purchase price of the first, fourth and fifth allotments and that it was agreed that the balance Rs. 4,200/- was to be paid to the first plaintiff on the defendant being given vacant possession of the second and third allotments mentioned in the deed. The defendant pleaded further that the first plaintiff had failed to give him vacant possession of these two lots.

I see no reason to disturb the finding of the District Judge that the first plaintiff has not given vacant possession of the second and third lands.

The questions that arise for determination are :

1. Whether the defendant could claim a rescission of the sale only in respect of the second and third lands or he should claim rescission of all the lots as argued by the plaintiffs ?

2. What sum could be claimed by the defendant in respect of the rescission of sale ?

The facts of the case relevant to these questions are briefly as follows : The five allotments of land were under mortgage to a third party at the time of the sale. The mortgage debt amounted to about Rs. 9,000/-. The defendant was willing to give only Rs. 8,200/- out of the consideration and wanted to retain in his hands the balance Rs. 4,200/- until he was given vacant possession of the second and third lands. Though the first plaintiff wanted Rs. 9,000/- to pay off the mortgage, the defendant was not prepared to advance to him an additional Rs. 700/- out of the sum of Rs. 4,200/- which he was going to keep in his hands on account of the second and third lands. He, however, accommodated the defendant by lending Rs. 700/- on a promissory note carrying interest. The notary who attested the deed D 3 stated in the attestation clause " at the instance of both parties " that " the balance amount (Rs. 4,200/-) was retained by the vendee for payment when the title to the second and third named lands is closed and peaceful possession delivered over." The total extent of all the allotments is about thirty one acres and the consideration Rs. 12,500/- was reached on an average assessment of Rs. 400/- an acre. On that basis of assessment, the purchase price of the second and third lands would amount to Rs. 4,200/- approximately. These facts coupled with the evidence led by the defence show that the sale of the first, fourth and fifth lands was not dependant on the sale of the second and third lands though all the lands were dealt with in one instrument. It is, therefore, open to the defendant to claim a rescission of the sale of the second and third lands alone on the ground that he had not been given vacant possession. I think, however, that we should adopt in this case the principle underlying the opinion expressed by Voet that " if a number of things have been sold together for one (lump) price, the obligation for eviction is multiplied according to the number of the things, and as many actions are given as there are things evicted which were included in the single sale....." (Voet 21.2.35 Berwick's Translations.)

As regards the second question I am of opinion that the defendant is entitled to retain in his hands the sum of Rs. 4,200/-. The evidence referred to by me leads me to the conclusion that this amount was fixed as the price for the two lands in question. Different opinions have been expressed by the Roman-Dutch law authorities on the question whether a purchaser who is judicially evicted from a land is entitled to recover only the value of the land at the time of the eviction if such value is less than the purchase price. (See (1939) Norman on Purchase and Sale in South Africa (second edition) page 314). The view favourable to the first plaintiff is that " the compensation payable diminishes if the *res vendita* has fallen in value in the purchaser's hands." The plaintiff, however, led no evidence on that point.

I would allow appeal No. 77 and enter decree —

(*a*) Directing the defendant to execute a conveyance reconveying to the first plaintiff the right, title and interest in the second and third lands conveyed to him by the first plaintiff by deed D 3.

(*b*) Granting the defendant costs in the District Court and in appeal No. 77 as against the plaintiffs.

I dismiss the appeal No. 78 but I make no order as to costs of that appeal.

HOWARD, C.J.

I agree.

Appeal dismissed.

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Present: KEUNEMAN, J. & CANNON, J.

WILLE vs THE COMMISSIONER OF STAMPS

S. C. No. 57—Case stated by the Commissioner of Stamps.
Argued & Decided on 6th November, 1944.

Stamp Ordinance Schedule A Part I Items 23 (1) (*b*), 23 (4) *and* 23 (8)—*Transfer of land to a company—Land purchased by trustee of partnership—Partners incorporated as a company to purchase land from trustee—Conveyance by trustee to company upon incorporation—Members of the partnership allotted shares according to the value of their interest in the partnership.*

Held : That the deed of conveyance by the trustee to the limited liability company attracted stamp duty under item 23 (8) of Schedule A Part I of the Stamp Ordinance.

H. V. Perera, K.C., with *N. M. de Silva*, for the appellant.
H. H. Basnayake, Crown Counsel, for the Commissioner of Stamps.

KEUNEMAN, J.

This is an appeal on a case stated by the Commissioner of Stamps, who has decided that the deed in question falls under item 23 (1) (*b*) of the schedule to the Stamp Ordinance or in the alternative under item 23 (8). Speaking for myself, I am not satisfied that item 23 (1) (*b*) applies, namely that this deed is a conveyance or transfer of any immovable property for any consideration. I think there is great force in the argument of Mr. H. V. Perera that in this case there is no consideration moving from the company, who is the grantee, to the seller. However, I do not think it is necessary to decide this point and I have not called upon Crown Counsel to support it.

As regards the contention of the appellant that the deed comes under item 23 (4), namely a conveyance or transfer of property without consideration to the person beneficially entitled to such property by the trustee, I think on the documents and affidavits it is not possible to hold that the grantor was in fact a trustee. The Commissioner has looked at the facts fully and I agree with him on that point, that no trust in favour of the company has been established. The only other item which can apply is item 23 (8) which is of a general character. The Commissioner has rightly held that item 23 (8) is applicable in which case *ad valorem* duty must be paid.

In all the circumstances I think the order of the Commissioner must be upheld and the appeal dismissed with costs.

CANNON, J.

I agree.

Appeal dismissed.

CASE STATED

Facts :— On an application made to me by Mr. H. Wille, Notary Public, for my opinion under section 29 of the Stamp Ordinance as to the duty with which deed No. 219 dated 9th September 1943 attested by him is chargeable I informed him by my letter dated 10th December 1943 that the deed was liable to a stamp duty of Rs. 5,280/– under item 23 (1) (*b*) or item 23 (8) of part I Schedule A of the Stamp Ordinance. The duplicate of the said deed which is hereto annexed (marked A) bears a stamp of Rs. 11/–.

2. The value of the property dealt with in the deed is not stated in the deed. The property was valued officially at my instance at Rs. 330,000/– and the duty was computed under item 23 (1) (*b*) or 23 (8) on that value.

3. By his letter dated 17th December 1943 Mr. H. Wille gave notice of objection against my opinion, on the grounds (1) that the instrument in question is a Conveyance by a Trustee without consideration to a beneficiary, chargeable under item 23 (4) of the Schedule to the Stamp Ordinance, and (2) that the value of the property as assessed by me is excessive. By a subsequent letter dated 20th May 1944 Mr. Wille informed me that his clients do not propose to contest the matter on the 2nd ground of objection. In other words, the objection to the valuation of the property at Rs. 330,000/– is withdrawn.

4. In making his application for my opinion Mr. H. Wille forwarded to me certified copies of deed No. 4504 dated 15th May, 1943 attested by G. A. Wille, Notary Public, (hereto attached marked B) and of deed No. 212 dated 25th June, 1943 attested by H. Wille, Notary Public (hereto attached marked C) and an affidavit (marked D) dated 18th November, 1943 by M. T. Veerappa Pillai the executant of deed No. 219 on which my opinion was sought. On a request made by

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me by virtue of section 31 (3) of the Stamp Ordinance Mr. H. Wille forwarded to me an affidavit (marked E) giving information called for by me, certified copies of deed No. 143 dated 23rd July, 1941 attested by H. Wille, Notary Public (marked F) and deed No. 867 dated 23rd July, 1941 attested by J. F. Martyn, Notary Public (marked G) and of the Memorandum and Articles of Association of Kelaneiya and Braemar Estates, Ltd., (marked H). Further, on enquiry made by me under section 31 (3) Mr. H. Wille stated that the amount due as principal and accrued interest on mortgage bond No. 867 attested by J. F. Martyn, Notary Public as at the date of execution of deed No. 219 attested by him viz. as at 9th September, 1943 was, principal Rs. 65,000/- and accrued interest Rs. 622/91.

Adjudication :— I hold that deed No. 219 marked A is liable to *ad valorem* stamp duty on the value of the property conveyed therein i.e. to a stamp duty of Rs. 5,280/- under item 23 (1) (*b*) or item 23 (8) of part I Schedule A of the Stamp Ordinance.

Reasons :— (1) Deed No. 219 on which the above adjudication is given is a conveyance by M. T. Veerappa Pillai of two estates "Kelaneiya" and "Braemar" situated at Maskeliya to the "Kelaneiya and Braemar Estates Limited" a Company incorporated under the Companies Ordinance in August 1943 for the purpose of acquiring the said estates — *vide* document H. It is recited in the deed that the two estates were purchased by M. T. Veerappa Pillai on deed No. 143 dated 23rd July 1941 (document F) and that by deed No. 4504 executed about two years later the said Veerappa Pillai agreed to convey the estates without consideration, save in the sense of deed No. 212, to a Limited Liability Company thereafter to be formed, the said Veerappa Pillai having held the estates in trust for himself and 14 other co-owners who were to form and become shareholders in the said Company, shares therein being allotted to them in proportion to their respective contributions to the purchase price.

(2) Deed No. 143 (document F) by which Veerappa Pillai purchased the two estates in 1941 is a plain outright conveyance on sale of the two estates for £ 20,000 or Rs. 266,666/66 and no conditions whatsoever are recited therein. Deed No. 4504 (document B) of 15th May, 1943 recites that Veerappa Pillai had provided only 1/15th of the purchase price on deed No. 143, and that 14 others had contributed 1/15th share each, and that the estates were worked in partnership on the footing of the said co-ownership, the said Veerappa Pillai having held the estates in trust for all the said co-owners. The deed goes on to say that the said co-owners "deem it expedient to form a Limited Liability Company for the purpose (*inter alia*) of holding the said Estate Kelaneiya and Braemar in the name of the said Company." In pursuance of this object it is agreed that on formation of the Company Veerappa Pillai shall convey the Estate "without any consideration being paid to him therefor" to the proposed company.

(3) To put it in plain language, what had happened was that in 1941 15 persons had paid the purchase money in equal shares and purchased the property in question in the name of one of them who thus held the property in trust for himself and the other co-owners. They worked the estates in partnership for two years, and then in 1943 they decided to form a Limited Company and by deed No. 4504 they got the party in whose name the property was purchased to agree that he would convey the property to the Company when formed without claiming any consideration for such conveyance. A further step in this direction was taken by the execution of deed No. 212 (document C) shortly afterwards wherein it was agreed that the conveyance to the Company should be made in consideration of the allotment of 17,850 shares of the nominal value of Rs. 10/- each to the 15 persons who had contributed to the original purchase.

(4) In the simple case of a person conveying property to a newly formed company in consideration of the allotment to him of shares in such company there is no question that the conveyance is liable to *ad valorem* stamp duty. The position is not in any way altered if such person holds the property not in its entirety for himself but as trustee for himself and others. It is a conveyance for consideration, the consideration being the valuable benefit received by him and the others of share holdings in such company. On the evidence of the deeds executed by the parties, therefore, there can be no doubt or dispute that deed No. 219 is a conveyance for valuable consideration under item 23 (1) (*b*) or item 23 (8) of the Schedule to the Stamp Ordinance.

(5) The contention of the Notary that this is a deed of conveyance by a trustee to a "beneficiary" and therefore liable to a nominal duty of Rs. 10/- under item 23 (4) is based on the evidence of an affidavit sworn by Veerappa Pillai for the purpose of this application for an adjudication, and forwarded to me by the Notary (document D). This affidavit was forwarded on the Notary's own initiative and not in compliance with any request by me under section 29 (2) or 31 (2). It does not appear to be in order, for me to take such evidence into consideration. Even if it is in order, no weight whatever can be given to the contents of an affidavit which is inconsistent with the terms of deed No. 4504. In this affidavit Veerappa Pillai says that the contributories to the purchase price "intended at that time (i.e., at the time of the purchase) to form a limited liability company." On the contrary, deed No. 4504 executed on 15th May, 1943 recites that the co-owners who had worked the estates in partnership "deem it expedient to form a Limited Liability Company." If the position was that there had been such an intention from the time of the purchase it would have been so stated. It is obvious that the decision to form a Company was taken two years later at the time deed No. 4504 was executed. I reject the evidence of the affidavit (document D) as an afterthought intended to set up the position that there was a trust in favour of a future beneficiary, which was in fact non-existent at the time of the original purchase. If this evidence is accepted it would mean that in every case where, for example, a father gifts to his son property which he had purchased, the payment of *ad valorem* duty on the gift could be avoided by his swearing an affidavit that when he purchased the property he intended to gift it to his son at some future date.

(6) There is a further fatal defect in Mr. Wille's contention that the deed comes within item 23 (4) of the Schedule to the Stamp Ordinance. This item gives the benefit of a nominal stamp duty to a conveyance by a trustee to the person beneficially entitled to the property conveyed only if the conveyance is "without consideration." Here there is valuable consideration passing from the grantee (the Company) to the grantor and other co-owners of the property in the form of shares in the Company. The recital in deed No. 219 to the effect that the conveyance is made "without any consideration being paid to him" is to ensure that Veerappa Pillai will not claim any additional consideration for the transfer by him to the company by virtue of the fact that he was the person who had paper title to the interests conveyed. But so far as the grantors and grantee on deed No. 219 are concerned there is consideration passing from the grantee to the grantors. This consideration is not pecuniary as it is not in the form of money but of shares. Hence item

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23 (1) (*b*) applies as on a conveyance for a consideration "other than pecuniary" and duty is chargeable on the value of the property in the alternative, item 23 (8) which deals with a conveyance of any kind whatsoever not charged in the Schedule or expressly exempted applies, and the same duty is chargeable.

(7) The decision in the case of *John Foster & Sons Ltd. vs Commissioners* (1894 – 1 Q.B. 516) is authority for the adjudication given by me.

(*Sgd.*) T. D. PERERA,
Commissioner of Stamps.

Colombo, August 15, 1944.

COPY—" A "

Prior Registration : Kandy L 48/152, 153

No. 219

To all to whom these presents shall come Mawadykoil Thottiapoosariar Veerappa Pillai of Maskeliya in the Island of Ceylon

Sends Greeting

Whereas by Deed No. 143 dated 23rd July 1941 and attested by Herbert Wille of Colombo Notary Public all that and those the Estates plantations and premises called and known as " Kelaneiya " and " Braemar " situated in Maskeliya and in the Schedule hereto fully described were purchased as on and from 1st April 1941 for £ 20,000 equivalent to Rs. 266,666/66 in the name of the said Mawadykoil Thottiapoosariar Veerappa Pillai.

And Whereas by deed No. 4504 dated 15th May 1943 and attested by Geo. A. Wille of Colombo Notary Public the said Mawadykoil Thottiapoosariar Veerappa Pillai agreed to convey and transfer the said " Kelaneiya " and " Braemar " Estates as described in the said Deed No. 143 without any consideration being paid to him therefor (save in the sense of deed No. 212 next hereinafter in part set out) to a Limited Liability Company thereafter to be formed (now duly incorporated under the Companies Ordinance No. 51 of 1938 as " Kelaneiya & Braemar Estates Limited " and having its registered office in the District of Colombo) as the beneficial owner thereof the said Mawadykoil Thottiapoosariar Veerappa Pillai having held the said Estates in trust as set out in the said deed No. 4504 for himself and fourteen other co-owners who were to form and become shareholders in the said Company shares therein being allotted to them in proportion to their respective contributions to the said purchase price.

And Whereas Deed No. 212 dated 25th June 1943 and attested by the said Herbert Wille Notary Public was executed by the parties to the said deed No. 4504 as supplementary to the said Deed No. 4504 in order to record the names of the beneficial co-owners of the said Estates and their title to the shares to be allotted to them on the footing of their said co-ownership based on their said contributions.

Now Know Ye and these presents witness that the said " Kelaneiya & Braemar Estates Limited " having now been duly incorporated as aforesaid the said Mawadykoil Thottiapoosariar Veerappa Pillai doth hereby in pursuance of the premises and of the said Deeds Nos. 4504 and 212 assign convey transfer set over and assure all that and those the said Estates plantations and premises called and known as " Kelaneiya " and " Braemar " situated at Maskeliya as aforesaid and in the said Schedule hereto fully described to the said " Kelaneiya and Braemar Estates Limited " without any consideration therefor being paid to him or to the other co-owners thereof (save as aforesaid) together with all the buildings cooly lines erections factories plant machinery fixtures tools equipment implements waggons cattle carts and other the live and dead stock thereon or thereto belonging and all growing crops and other property on the said Estates and premises and all rights privileges easements servitudes and appurtenances whatsoever to the said Estates and premises belonging or in anywise appertaining thereto or held or used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate right title interest property claim and demand whatsoever of the said Mawadykoil Thottiapoosariar Veerappa Pillai in to upon or out of the same.

To have and to hold the said Estates and premises hereby conveyed with all the appurtenances thereof unto the said " Kelaneiya and Braemar Estates Ltd." and its assigns for ever subject however to the existing mortgage thereon created by Bond No. 867 dated 23rd July 1941 and attested by J. F. Martyn of Colombo Notary Public in favour of Bosanquet & Skrine, Ltd.

And the said Mawadykoil Thottiapoosariar Veerappa Pillai doth hereby covenant with the said " Kelaneiya & Braemar Estates Limited " and its assigns that save as to the said mortgage he the said Mawadykoil Thottiapoosariar Veerappa Pillai has not at any time heretofore made done or committed or knowingly suffered or been party or privy to any act deed matter or thing whatsoever whereby or by means whereof the said Estates and premises hereby transferred and conveyed or expressed or intended so to be or any part thereof are is can shall or may be impeached or encumbered or prejudicially affected in title charge estate or otherwise howsoever.

In Witness Whereof the said Mawadykoil Thottiapoosariar Veerappa Pillai doth set his hand to these presents and to two others of the same tenor and date at Colombo on this ninth day of September One thousand nine hundred and forty three.

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Present: DE KRETSER, J.

NALLIAH vs THE ATTORNEY-GENERAL

Application for bail in M. C. Jaffna No. 3674—No. 524.
Argued & Decided on 6th November, 1944.

Bail—Prisoner indicted with murder—Failure to be brought up for trial during 1st Criminal Sessions owing to postponements on application by defence counsel—Is it sufficient reason for allowing bail under section 31 of the Courts Ordinance.

A prisoner, who was indicted with another for murder, could not be brought to trial at the 1st Criminal Sessions after the date of his commitment owing to postponements allowed on three occasions, on the application of one or other of the prisoners' counsel.

On an application for bail made under section 31 of the Courts Ordinance,

Held : That the prisoner was not entitled to bail.

S. Nadesan, in support.
T. S. Fernando, Crown Counsel, for the Attorney-General.

DE KRETSER, J.

The applicant is charged with the offence of murder and a prisoner in such circumstances is not ordinarily admitted to bail.

The first sessions at which the prisoner might have been tried opened in July, 1944, and this case was set down for trial on the 18th July. On that date the trial had to be postponed as another trial which had begun earlier was still proceeding. The case, was therefore, postponed for the 4th September. That date did not suit counsel for the applicant who, at some unspecified date, intimated this fact to Crown Counsel, who, thereupon, obliged counsel for the defence by fixing it for the 21st September. It is not disclosed why the 4th September, a date fixed on the 18th July, was found to be inconvenient to counsel for the defence. It is well known that Crown Counsel go to extraordinary lengths in obliging brother counsel, sometimes to lengths to which they should not go. The case was postponed on the 4th September to the 21st September and that did not suit counsel for the applicant again. It was then postponed for the 9th October on which date counsel for the second accused sent a medical certificate stating that he was unable to appear. The result was that the sessions closed on the 14th October and this case had to stand over for the next sessions.

The present application is made under section 31 of the Courts Ordinance which requires that the prisoner shall be brought to trial at the first criminal sessions after the date of his commitment at which such prisoner might properly be tried. It is not suggested that the prisoners might not properly have been tried on the various dates given. Crown Counsel argues that " properly be tried " means that provided no other work is interfering. It is not necessary to decide this point, but I would not give the words " properly be tried " such a narrow significance. However, the section goes on to say that the prisoner should be admitted to bail, unless good cause be shown to the contrary, or unless the trial shall have been postponed on the application of such prisoner. The circumstances which I have detailed furnish sufficient good cause to the contrary, and the alternative also applies as the trial was postponed on three occasions on the application of one or other of the prisoners' counsel, who obviously were making those applications in the interests of the prisoners.

Applicant's counsel stresses the singular " such prisoner," but in view of the Interpretation Ordinance it must be taken to mean " such prisoners," and since the trial could not proceed with each accused independently. any application made on behalf of one prisoner led necessarily to a postponement of the whole trial. I think the alternative also, therefore, applies.

The application is, therefore, refused.

Application refused.

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Present: JAYETILEKE, J.

PARUPATHIPILLAI vs ARUMUGAM

S. C. No. 534—*M. C. Jaffna No.* 4174.
Argued on 13th December, 1944.
Decided on 21st December, 1944.

Maintenance—Agreement by wife to waive future maintenance on receipt of lump sum—Public policy—Does such agreement preclude her from claiming maintenance subsequently.

Held : (i) That an agreement by the wife in maintenance proceedings to waive all claims for future maintenance in consideration of the payment of a lump sum by her husband is invalid in law inasmuch as it is contrary to public policy.

(ii) That such an agreement does not bar her from a subsequent claim for maintenance.

Cases referred to : *Madduma Hamy vs Kalu Appu* (3 S.C.C. 132)
Nakamuttu vs Kantan (1 S.C.D. 48)
Hinnihamy vs Gunawardene (3 C.L.Rec. 161)
Subaliya vs Kannangara (4 A.C.R. 121)
Hyman vs Hyman (1929 A.C. 601).

N. Kumarasingham, for the applicant-appellant.
H. W. Thambiah, for the defendant-respondent.

JAYETILEKE, J.

The appellant is the wife of the respondent. She married the respondent in 1932 and lived with him till the beginning of 1937. On October, 1st 1937, she made an application in case No. 7369, M.C. Kayts, for an order against the respondent under section 3 of Ordinance No. 9 of 1889 for her maintenance. In the application she said that the respondent was a police constable and was drawing Rs. 45/– a month. On November 18th 1937, the magistrate made an order by consent that the respondent should pay to the appellant for her maintenance 1/4 of his nett salary every month. In pursuance of that order the respondent appears to have paid the appellant Rs. 6/– a month. On December 14th 1939, the appellant stated that she was entitled to receive more than Rs. 6/– a month and moved for an inquiry. On March 29th 1940, the matter was settled and the respondent agreed to pay Rs. 8/– a month. On April 15th 1943, the appellant obtained a distress warrant for the recovery of five months' arrears of maintenance. On May 14th 1943, the parties appear to have arranged a compromise. The journal entry reads :

> "Distress warrant twice returned by Fiscal unexecuted as respondent is not possessed of any movable property. Demand made of him was not complied with. The respondent pays Rs. 200/– in court. The applicant receives same waiving all future claims for maintenance against the respondent. The applicant signs the record."

At this date the arrears of maintenance amounted to Rs. 56/–. The appellant has presumably agreed to accept Rs. 144/– in lieu of future maintenance. There can be no doubt that this is a hard bargain.

On March 4th 1944, the appellant made an application in this case alleging that the respondent failed to maintain her for five months. She has not explained in her application what she did with the money that was paid to her. She was paid sufficient money for her maintenance for 18 months. The magistrate held that the compromise made by the appellant was binding on her and dismissed the application. The appeal is against that order. The question whether a compromise of this nature is valid in law has been considered in three reported cases.

In *Madduma Hamy vs Kalu Appu* (3 S.C.C. 132) the applicant and the respondent had entered into an agreement in writing by which the applicant agreed to relieve the respondent of the burden of maintaining her and their children. Clarence, J. said :

> "Such an agreement as this between husband and wife is invalid."

In *Nakamuttu vs Kantan* (1 S.C.D. 48) the applicant received from her husband a sum of Rs. 50/– for the maintenance of herself and their children during their lifetime. Grenier, J. said :

> "The obligation on the part of the husband to maintain his wife and children is a continuing one and he cannot relieve himself of the liability by

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entering into an unconscionable bargain as in this case, with the mother. The case no doubt, would be different if the husband invested some money for his wife and allowed her to take the interest for her maintenance."

These cases were cited with approval in *Hinnihamy vs Gunawardene* (3 C.L.R. 163). In that case the mother of five children applied for an order of maintenance against their father and the magistrate made an order requiring the latter to pay a certain sum monthly. Subsequently the respondent applied to the magistrate and obtained an order sanctioning the payment of a lump sum of Rs. 250/– in respect of the claim for maintenance of the children in full discharge of the maintenance payable by him. Some time later the applicant applied again for an order for maintenance. The magistrate considered that the compromise did not discharge the respondent and ordered that the maintenance should continue. In affirming the order made by the magistrate de Sampayo, J. said :

"The Ordinance does not contemplate the settlement of a lump sum. It only provides for making a 'monthly allowance.' The payment of a lump sum may, of course, negative the basis of the application, namely, that the father neglects or refuses to maintain his children. But in such a case the money should be so settled as to ensure the continued maintenance of the children. But in this case the income to be derived from Rs. 250/– is by no means sufficient to maintain five children. It was never invested or secured. The mother appears to have exhausted it and the children are presumably left once more without maintenance.....The appellant relies on the circumstance that the court had sanctioned the compromise in this, but I do not think it makes any material difference."

Both under the Roman-Dutch law and the English law the husband is bound to maintain his wife in a manner suitable to her rank and position. The wife can compel her husband to perform this duty by a civil action. The Maintenance Ordinance was enacted to provide a simpler, more speedy and less costly remedy (see *Subaliya vs Kannangara* 4 A.C.R. 121).

In *Hyman vs Hyman* (1929 A.C. 601) the question arose whether a wife who covenanted by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by the deed and thereafter obtains a decree for dissolution of the marriage on the ground of her husband's adultery is not precluded by her covenant from petitioning the court for permanent maintenance. In the course of his judgment Lord Atkin, said :

"While the marriage tie exists the husband is under a legal obligation to maintain his wife..... But the duty of the husband is also a public obligation, and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts. When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the court to which I have referred were granted partly in the public interest to provide a substitute for the husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true the powers of the court in this respect cannot be restricted by the private arrangement of the parties. 'Quilibet potest renunciare juri *pro se introductu.*' "I beg attention to the words '*pro se*'," says Lord Westbury in *Hunt vs Hunt*, "because they have been introduced into the maxim to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation." To apply another maxim, 'Privatorum *conventio juri publico non derogat.*' In my view no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall seem fit to order the husband to make some reasonable payment to the wife 'having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties.' The wife's right to future maintenance is a matter of public concern which she cannot barter away."

These observations seem to me to indicate that a compromise of the nature entered into by the appellant in this case ought to be set aside on grounds of public policy. I would accordingly set aside the order appealed from and send the case back so that the magistrate may make an appropriate order under section 2. He will ascertain what sum was due to the appellant as arrears of maintenance on May, 14th 1943, and for what period the balance, if any, out of the money paid to her was sufficient for her maintenance. The appellant is entitled to the costs of the appeal.

Order set aside.

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Present: DE KRETSER, J. & JAYETILEKE, J.

FERNANDO & OTHERS vs FERNANDO & OTHERS

S. C. No. 212—*D. C. Negombo No.* 12202.
Argued on 14th December, 1944.
Decided on 21st December, 1944.

Donation—Gift to P or his heirs, executors and administrators—Its validity—Fidei commissum.

A deed of gift contained the following conditions : " (1) That owing to the affection we had towards our daughter, the deceased Dehiwalage Lucia Fernando.....the wife of Dombawalage Peduru Fernando.....we the aforesaid hereby gifted and set over.....unto Peduru the husband of the said Lucia Fernando or his heirs, executors, and administrators.....(2) To have and to hold the said portion of garden.....unto the donee or his heirs, executors and administrators for ever.....and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando and his descendants without selling, mortgaging or alienating the same or letting on lease for a period exceeding from generation to generation and when their generations cease to exist the same shall devolve on the Roman Catholic Church built by the Durawa people of Pitipane."

The main contentions in appeal were (*a*) that the deed did not constitute a valid gift inasmuch as there was an ambiguity as to the person or persons to whom the land was donated, (*b*) that the deed did not create a valid *fidei commissum.*

Held : (i) That the gift is a valid one as it is clear from the words used that the donors intended to gift the property to P and not to his heirs.

(ii) That the deed created a valid *fidei commissum.*

Cases referred to : *Hendrick vs Sudritaratne* (3 C.A.C. 80)
Wickremasinghe vs Wijetunga (18 N.L.R. 413)
D. C. Negombo 16035 (S.C.M. 28-7-1915)

N. E. Weerasooriya, K.C., with *N. Nadarajah, K.C.*, and *S. R. Wijayatilake*, for the plaintiff-appellant.

H. V. Perera, K.C., with *L. A. Rajapakse, K.C.*, and *J. A. L. Cooray*, for the 4th to 9th defendants-respondents.

JAYETILEKE, J.

This is an action for a partition of the land depicted in plan 2. The plaintiff alleged that the original owners of the land were Rapiel and his wife Maria, and that they gifted it to their son-in-law, Peduru, by deed No. 8731, dated November 21st 1862, (P1), subject to a *fidei commissum* which extended to the fourth degree of succession. The 4th to the 9th defendants alleged in their answer that the original owner was Peduru and that his heirs conveyed the entire land by 4D2 and 4D3 to their predecessor in title, Franciscu Fernando. At the trial they did not seriously contest that the original owners of the land were Rapiel and Maria. The material portions of P1 are in these terms :

"(1) That owing to the affection we had towards our daughter, the deceased Dehiwalage Lucia Fernando.....the wife of Dombawalage Peduru Fernando.....we the aforesaid hereby gifted and set over.....unto Peduru the husband of the said Lucia Fernando or his heirs, executors, and administrators.....

(2) To have and to hold the said portion of garden.....unto the donee or his heirs, executors and administrators for ever.....and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando and his descendants without selling, mortgaging or alienating the same or letting on lease for a period exceeding from generation to generation and when their generations cease to exist the same shall devolve on the Roman Catholic Church built by the Durawa people of Pitipane.

(3) And I the said Peduru Fernando thankfully accept the foregoing gift subject to the conditions mentioned herein."

The learned District Judge dismissed the plaintiff's action holding that P1 had not been accepted and that it did not create a valid *fidei commissum.*

It is well settled law that no donation is complete and valid unless it is accepted by the donee. No particular form of acceptance is necessary and the acceptance may be by letter or messenger. In *Hendrick vs Sudritaratne* (3 C.A.C. 80) Lascelles, C.J. said :

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> "There is, I think, a natural presumption in all these cases that the deed is accepted. Every instinct of human nature is in favour of that presumption, and I think that when a valuable gift has been offered and it is alleged it has not been accepted, some reason should be shown for the alleged non-acceptance of the deed."

In the present case there is the statement in the deed that Peduru accepted the gift. There is also evidence that four years later Peduru dealt with the land on the footing that he was the sole owner.

In *Wickremasinghe vs Wijetunga* (18 N.L.R. 413) it was held that acceptance can be presumed from the sale of the land donated by the donee.

In the absence of any evidence to the contrary it seems to me that the inference is irresistible that Peduru accepted the gift. Mr. H. V. Perera sought to support the judgment on the ground that there was an ambiguity in P1 as to the person or persons to whom the land was donated. He contended that a gift to A or his heirs is invalid.

In interpreting a deed the rule is that effect should be given, if possible, to every word contained therein but too much regard must not be had to the natural and proper significance of words to prevent the simple intention of the parties from taking effect. (Beal's Rules of Legal Interpretation, 3rd Edition, page 60, 165). There are certain words in P1 which seem to me to indicate that the donors intended to gift the property to Peduru and not to the heirs. The words I refer to are :

(*a*) "Donee or his heirs"

(*b*) "I the said Peduru Fernando thankfully accept the foregoing gift."

(*c*) "After our death the aforesaid portions shall be possessed by Peduru Fernando or his heirs and his descendants."

If the intention of the donor was to gift the property to Peduru or his heirs the *habendum* clause should read "and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando or his heirs and his or their descendants." The words "or his heirs, executors and administrators" can in my opinion be explained away without doing violence to the language used in a manner that gives effect to the obvious intention of the donors. They are words which are frequently used by Sinhalese notaries to donate a gift of *plena proprietas*. The prohibition against alienation indicates that the donors did not intend to invest Peduru with *plena proprietas*. Having regard to the context in which the words "or their heirs, executors and administrators" appear it seems to me that they can be rejected. (See Norton on Deeds, 2nd Edition, page 330). Even if these words cannot be treated as superfluous I fail to see why the gift should be held to be invalid. The words "or his heirs" are in their plain primary meaning substitutionary and may have been inserted with a view to guard against the failure of the deed by lapse.

The only other question is whether the deed creates a valid *fidei commissum* extending to four generations. The restraint against alienation coupled with the provision that the property shall be possessed by Peduru and his descendants "from generation to generation," and the provision that in the event of the failure of descendants the property shall devolve on the Church, leave no doubt in my mind that the donors intended to create a perpetual *fidei commissum*. In D.C. Negombo 16035 (S.C.M. 28-7-1915) another deed of gift executed by Rapiel and Maria on November 21st 1862, came up for consideration. The language in that deed is similar to that of P1 except that in the translation that was furnished to the court the word "and" was erroneously substituted for the word "or." In the course of the judgment delivered by de Sampayo, J. he said :

> "The deed of gift is one of the class of deeds which has been recently considered by the court, namely, where the transfer is in favour of the grantee, his heirs, executors, administrators and assigns but a condition against alienation is imposed with a designation of the persons who are to take after the grantees it is unnecessary to repeat our reasons for holding in 217 D. C. Colombo 38578, Supreme Court Minutes 16th July, 1915, after an examination of all the authorities that a transfer in the above form does not invalidate a *fidei commissum* which is otherwise well created. There is not the slightest doubt that, apart from the form of the grant, the present deed creates a good *fidei commissum* in favour of the descendants of Maria Salome Fernando and ultimately in favour of a certain Church at Pitipane."

For the reasons given above I would set aside the judgment of the learned District Judge and send the case back for a decree to be entered in terms of these findings. The District Judge will inquire into any claims for improvements and any other matter that may arise incidentally before entering the decree. The appellant is entitled to the costs of the appeal and the costs of contest.

DE KRETSER, J.

I agree.

Judgment set aside.

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Present : DE KRETSER, J.

ELARIS vs ODIRIS HAMY

S. C. No. 220/1943—*C. R. Gampaha No.* 1872.
Argued on 12th December, 1944.
Decided on 18th December, 1944.

Civil Procedure Code section 34.

Held : (i) That a defendant who fails to abide by the previous decision of a court cannot plead section 34 of the Civil Procedure Code when an action is brought to enforce that decision.
(ii) The onus of showing that an action is barred by section 34 of the Civil Procedure Code is on the defendant.

Per DE KRETSER, J. : " Section 34 is based on the maxim that no one should be vexed twice regarding the same matter. It is a provision for the defendant's benefit and he cannot plead his own wrong and claim a benefit therefrom. He alone is to blame if he is being sued a second time. The provision is a salutary one but it must be so used and its scope so confined within certain recognized limits and principles, as not to take suitors unfairly by surprise and so as to do as little injustice as possible. The onus is on the defendant to show that the causes of action were identical and any doubt ought to go against him."

Cases referred to : *Wimalasekere vs Dingirimahatmaya* (39 N.L.R. 25).

H. V. Perera, K.C., with *R. C. Fonseka*, for the defendant-appellant.
L. A. Rajapakse, K.C., with *S. R. Wijayatilake*, for the plaintiff-respondent.

DE KRETSER, J.

The only question debated at the hearing of this appeal was whether the plaintiff was barred by section 34 of the Civil Procedure Code from making his present claim by reason of the claim he successfully made in C.R. Gampaha Case No. 1684.

In that case the plaintiff set out in his plaint the manner in which he became entitled on a lease to possess certain rubber trees during his lease and, complaining of an ouster by the defendant a few days after the plaintiff had entered into possession, he asked for damages already sustained and continuing damages until the date of judgment. He did not ask for a declaration of his right to possess on his lease and consequently not for damages until he was placed in possession.

The defendant filed answer admitting the title of the lessors and the lease to plaintiff but pleaded that the lease was void as it was executed during the pendency of a partition action. He also denied that the plaintiff entered into possession or that he had suffered any damages or had a cause of action or that he (the defendant) was in unlawful possession.

At the trial issues were raised on these lines and immediately afterwards the record reads, "Case settled at this stage. Of consent judgment for plaintiff as prayed for fixing damages at Rs. 19/25 per mensem as a matter of settlement. Plaintiff to have costs of this class. Enter decree accordingly."

The plaintiff believing that his right was admitted went to take possession on the very next day when the defendant refused to give possession. The plaintiff then brought the present action setting out title and the decision in the previous case and claimed damages and that he be placed and quieted in possession and that the defendant be ejected. The defendant filed an answer making the same pleas as in the previous case and in addition pleaded the earlier action as a bar and also that the court had no jurisdiction as the subject-matter of the action was worth Rs. 1,500/–. The same issues as before were raised and in addition the following :

1. Is the plaintiff's action barred by the decree in C. R. Gampaha No. 1684 ?
2. If so, can he claim (*a*) ejectment ? (*b*) damages ?
3. Under any circumstances is the plaintiff estopped by the decree in C. R. Gampaha No. 1684 from claiming damages, if any, in excess of Rs. 19/25 per mensem ?

The learned Commissioner held in the plaintiff's favour but reduced the damages claimed. The defendant appeals.

It is clear that the defendant is taking advantage of a legal defence and would have no defence on the merits, and none was attempted. No case exactly in point was cited to me. The learned Commissioner decided the case on the footing that a new cause of action had accrued to the plaintiff after the decision of the earlier case. It was conceded that if this view be correct the judgment was unimpeachable. The argument for the defendant was based on the assumption that the position between the parties was the

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same as it had been before the previous action *viz.* the defendant was in possession during the plaintiff's right to possession and, therefore, there was no new cause of action. I do not think this view is correct or possible, for clearly the position was not the same.

In the earlier case the plaintiff alleged an ouster and the defendant denied the plaintiff's right on the lease which he alleged was void but at the trial he conceded the plaintiff's claim and consented to pay him damages. The cause of action in the earlier case had not been merely the refusal to give possession but a refusal on a certain footing. There was no express decree declaring the plaintiff entitled to possess on his lease or placing him in possession but his claim to damages could only have been admitted and costs fixed on the implied admission that the plaintiff was entitled to possess on the lease. The plaintiff was entitled to assume that the defendant would thereafter yield him possession and when he refused to yield a fresh cause of action arose. The position is only slightly different from the case of *Wimalasekere vs Dingirimahatmaya* (39 N.L.R. 25). There the plaintiff was declared entitled to a land after a contest but no decree of ejectment had been prayed for or granted. The plaintiff brought a fresh action and the previous case was held not to be a bar under section 34. So, in this case the plaintiff on the date of the trial of the first case had his claim conceded. He is entitled to possession whether the decree says so or not, and he was entitled to take possession on the admission impliedly made. Both parties claim from the same source and both were aware that the plaintiff's rights on his lease could not be contested. The defendant was probably trying to wear the plaintiff down into surrendering his lease. Section 34 is based on the maxim that no one should be vexed twice regarding the same matter. It is a provision for the defendant's benefit and he cannot plead his own wrong and claim a benefit therefrom. He alone is to blame if he is being sued a second time. The provision is a salutary one, but it must be so used and its scope so confined within certain recognized limits and principles, as not to take suitors unfairly by surprise and so as to do as little injustice as possible. The onus is on the defendant to show that the causes of action were identical and any doubt ought to go against him. In my opinion the present action is not barred. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Present: KEUNEMAN, J. & CANNON, J.

HENEYA vs ABDUL CADER

S. C. No. 210—D. C. (F) Kandy No. 753 L.
Argued on 9th & 10th November, 1944.
Decided on 22nd November, 1944.

Fidei commissum—Deed of gift in favour of donee and her "descendants or her heirs, children, grandchildren.....for ever from generation to generation"—Do the words "or heirs" make the persons to be benefited uncertain.

A deed of gift executed in 1873 contained the following conditions : " After my death this property the aforesaid Menu Ridee and the said Menu Ridee's descendants or her heirs, children, grandchildren, etc. shall possess undisputedly for generations and for ever from generation to generation but (she or they) shall not alienate the same to an outsider to my family by way of transfer, mortgage or security."

It was argued that the use of the words " or her heirs " brought in a class of persons quite distinct from the descendants and uncertainty was created as to the persons to be benefited by the *fidei commissum.*

Held : (i) That the deed constituted a valid *fidei commissum* in favour of the descendants of the donee operative for four generations.

(ii) That the word " heirs " in this context should be interpreted as descending heirs from generation to generation.

Cases referred to : *Amaratunga vs Alwis* (40 N.L.R. 363)
Ex parte Van Eden & Others (1905 Trans. Rep. 151)
De Saram et al vs Kadijar et al (45 N.L.R. 265)
Ibanu vs Abeysekera (6 N.L.R. 344)
Noordeen vs Badurdeen (45 N.L.R. 203)
Umiatty vs Ramiah (2 C.W.R. 26).

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H. V. Perera, K.C., with *H. W. Thambiah*, for the defendant-appellant.
N. Nadarajah, K.C., with *N. E. Weerasooriya, K.C.*, and *C. E. S. Perera*, for the plaintiffs-respondents.

KEUNEMAN, J.

The plaintiffs brought this action to be declared entitled to the field Naran Kumbura. They alleged that the field belonged originally to Pusumba Vidane Heneya who by deed No. 931 of the 29th March, 1873 (P1) gifted the same to Menu Ridee subject to a *fidei commissum* for generations. Menu Ridee died leaving her son Kuda Heneya, who himself died leaving as his heirs the plaintiffs.

The defendant *inter alia* denied that P1 created a *fidei commissum*, and alleged that Kuda Heneya had by deed 16085 of the 8th August 1921 (D1) transferred the field in question to Kiri Ukku Ridee, who by deed 1258 of the 4th April, 1923 (D2) transferred to the defendant.

As the argument turns mainly on the terms of the deed P1, I set out the relevant terms which are as follows: Pusumba Vidane Heneya granted this land among others "by way of gift to my grand-daughter Menu Ridee." Among the conditions imposed was this: "After my death this property the aforesaid Menu Ridee and the said Menu Ridee's descendants or her heirs, children, grandchildren, etc. shall possess undisputedly for generations and for ever from generation to generation but (she or they) shall not alienate the same to an outsider to my family by way of transfer, mortgage or security." The grantor added that "no one of my descendants" shall be entitled to raise any disputes whatsoever.

The principal argument addressed to us by counsel for the appellant was that the use of the words "or her heirs" brought in a class of persons quite distinct from the descendants, and that there was uncertainty as to the persons to be benefited by the *fidei commissum*. The *fidei commissum*, it was argued, accordingly failed.

Counsel for the appellant relied on the case of *Amaratunga vs Alwis* (40 N.L.R. 363). In this case, in one *fidei commissum* alleged to have been created the beneficiaries were to be "the children and heirs descending from her and authorized persons such as executors, administrators and assigns." In the other alleged *fidei commissum* the beneficiaries were to be "her heirs and authorized persons such as executors, administrators and assigns." Soertsz, J. drew attention to the use of the word "assigns" and refused to treat that phrase as surplusage or a notarial flourish and to strike out or ignore it. Soertsz, J. adopted the language of Innes, C.J. in *Ex parte Van Eden & Others* (1905 Transvaal Reports 151) that intention must be arrived at "not by considering what we think it would have been a good thing if they did mean, or what they ought to have meant, but by ascertaining the plain meaning of the words used. If these words are capable of more than one construction, then of course the court would lean towards the one most in favour of freedom of alienation." Soertsz, J. held that no *fidei commissum* was created.

We have also been referred to the Full Bench case of *De Saram et al vs Kadijar et al* (45 N.L.R. 265). This related to a complex and badly drafted will, and it is not possible in a short space to set out the full terms. It is sufficient for the purposes of this case to say that *inter alia* it was a devise to certain named "heirs and heiresses" with a prohibition against alienation imposed upon their "issue or heirs" — or as an alternative reading, "heir or heirs." Howard, C.J. comments on this phrase as well as other matters and comes to the conclusion that "there was no certainty with regard to the beneficiaries. The class is too wide for ascertainment and too vaguely described." Soertsz, J. commented on the words "heir or heirs" which included a much wider class than "children" who were also referred to, and added that if the actual words were "issues or heirs" confusion is worse confounded, and that there was a bewildering uncertainty from the choice that appears to have been given, and that even if the word "or" was given the force of "and" there emerged an indeterminate and almost unlimited group. Hearne, J. commented on the phrase "heir or heirs" more particularly with regard to the question of the time of vesting of the *fidei commissum* and drew attention to the absence of such words as "from generation to generation." He also pointed out that on the language of the will including this phrase it could not be confidently pointed out what persons were intended.

I have only dealt with a particular phrase which had to be interpreted in the Full Bench case, and have not referred to the other difficulties in the case. For instance, one of the many questions raised there was whether the testator intended to create a *fidei commissum* or a trust. I have not referred to all these matters because they are not immediately relevant to the point to be decided in this case, and I have also referred

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only to the opinions of the majority judges. I wish with respect to adopt the language of Wendt, J. in *Ibanu vs Abeysekera* (6 N.L.R. 344) which Howard, C.J. thought of particular interest, *viz*: "When the intention to substitute another (or *fidei commissary*) for the first taker (or *fiduciary*) is expressed or is to be gathered by necessary implication from the language of the will, a *fidei commissum* is constituted. Where these requisites appear, it matters not that the language employed is open to criticism, and therefore too much weight ought not to be attached to decided cases in which the courts, seeking to ascertain the testator's intention from variously worded wills and varying circumstances, have pronounced for or against the *fidei commissum*." Wendt, J. added that "where there is doubt, the inclination of the court is against putting a burden upon the inheritance." I wish also to draw attention to the language of Lord Porter in the Privy Council decision of *Noordeen vs Badurdeen* (45 N.L.R. 203)*: "Difficulty of construction alone would not prevent the creation of a *fidei commissum*. To bring about that result doubt is required, either as to whether such a condition has been created or who are the recipients of the bounty." Lord Porter had also previously stated—"There is no doubt that under that system (the Roman-Dutch law) the creation of a *fidei commissum* will not lightly be implied and requires both exact language and certainty as to the intention of the testator and as to the persons to be benefited in order to effect its creation."

I now turn to the language of the present deed. I think counsel for the appellant has properly drawn attention to the use of the word "heirs." He argued that this word may be regarded as bringing into the class of beneficiaries persons who are distinct from "descendants" or "children, grandchildren, etc." The word may include, for instance, the spouse, and in certain circumstances either ascendants or collaterals. I do not think it is open to us to treat the word as mere surplusage or as a notarial flourish, and in my opinion we are not entitled to disregard the word or strike it out. There can be no question that the use of the word creates a difficulty, and we have to consider whether it raises a doubt as to the persons to be benefited.

In this connection I may point out that the word "heirs" would certainly include "children"—although it may also include a wider class. It is true, however, that in this deed both the words "heirs and children" occur, and it may be argued that distinction was contemplated. In my opinion that word must be regarded in its context. Here I cannot lose sight of the fact that the word "heirs" is flanked on one side by the word "descendants" and on the other by the words "children, grandchildren, etc." Nor is this all. We have the further phrase "for generations" and "from generation to generation." Clearly these phrases are applicable as much to the word "heirs" as to the words "children, grandchildren, etc." and I think it follows that the word "heirs" will be read, not in its ordinary significance but as heirs "for generations" and "from generation to generation." If the matter is regarded from this point of view, I think the construction of the word "heirs" as including the spouse or ascendants or collaterals becomes artificial and unreal. The phrases I have mentioned are of great significance, and in my opinion the word "heirs" should be interpreted as descending heirs from generation to generation.

In this connection I may refer to the case of *Umiatty vs Ramiah* (2 C.W.R. 26). In this case the beneficiaries were to be "our lawful heirs" and there was a prohibition against alienation by "our said heirs or issues" and a provision that the properties should be held and possessed for ten generations under the restrictions imposed and in the form of *fidei commissum*. In this connection de Sampayo, J. said: "Now, the word 'generation' itself is indicative of the fact that he (the testator) contemplated only the descendants of the devisees as the beneficiaries after them. It is argued, however, that it only points out the period of time to which the *fidei commissum* is to extend and is not significant of the class of persons who are to take. But I think that the expression is used in this will in the natural sense and signifies degrees of kindred proceeding from the devisees in the descending line, though at the same time, being a measure of succession, it also indicates the duration of the *fidei commissum*."

In the deed we have to construe, I think, this applies with particular force, for the words "for generations" do not stand alone but are accompanied by the words "from generation to generation," and the argument that these words are used only to indicate the period of time for the continuance of the *fidei commissum* is not applicable. The words are, I think, meant to explain and define the preceding words to which I have referred.

In my opinion the deed in question constituted a valid *fidei commissum* in favour of the descendants of Menu Ridee for generations and from generation to generation. As the deed was executed before the Entail and Settlement

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* 27 C.L.W. 49

Ordinance of 1876, the *fidei commissum* will be operative for four generations.

A further point was urged by counsel for the appellant, namely, that the prohibition against alienation only extended to alienation to an "outsider to my family," that is, to the grantor's family. He contended that by implication an alienation to a member of the grantor's family was permitted, and that Kiri Ukku Ridee, the grantee under the deed D1, was a member of the family of Pusumba Vidane Heneya, the grantor on P1. The basis of fact upon which this argument is grounded is not supported by the evidence. Kiri Ukku Ridee was a witness, and in examination-in-chief she stated that her father Rana Heneya was a brother of Menu Ridee, and it will be remembered that in the deed P1 Menu Ridee is described as the grand-daughter of Pusumba Vidane Heneya. But in cross-examination she stated, "My father is related to Pusumba Vidane Heneya. They are the children of cousins." There was no re-examination. It is not possible to hold that Kiri Ukku Ridee was a member of the family of Pusumba Vidane Heneya. It is unnecessary, therefore, to consider the matter of law raised by counsel for the appellant.

In the circumstances the appeal is dismissed with costs.

CANNON, J.

I agree.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

RAMALINGAM vs NAIR (Sub-Inspector of Police)

S. C. No. 862—*M. C. Point Pedro No.* 3748.
Argued on 12th October, 1944.
Decided on 25th October, 1944.

Penal Code section 367—*Removal of cash in owner's presence on refusal to pay on illegal demand—Dishonest intention—Theft—Penal Code sections* 21 *and* 22.

Accused and one Vinasitamby were residents of the same village and members of the same caste. A Maha Jana Sabha was formed in their village, one of the objects of which was to prevent the members of that caste from working for Vellalas. The accused was a member of the Sabha. Vinasitamby who was not a member of the Sabha worked for a Vellala. Shortly afterwards the accused and four others went to Vinasitamby's house and questioned him as to why he worked the field for a Vellala man and "dragged him" to go to the Sabha. Vinasitamby declined, whereupon the accused ordered Vinasitamby to pay a "fine" of Rs. 25/– to the Sabha. Vinasitamby refused and the accused took Rs. 25/– out of a box and went away remarking "I am taking Rs. 25/– and you can do what you like."

Held : That in the circumstances the accused could be convicted of theft of the said Rs. 25/–.

Cases referred to : *Ponnu vs Sinnatambi et al* (1922 – 24 N.L.R. 248)
Gunasekere vs Solomon et al (1924 – 25 N.L.R. 474)
Haniffa vs Salim (1938 – 39 N.L.R. 348)
Prosonno Kumar Patra vs Udoy Sant (1895 – I.L.Reps. 22 Cal. 669)
Queen-Empress vs Sri Churn Chungo (1895 – I.L.Reps. 22 Cal. 1017)
King-Emperor vs Bakhtawar (1923 – 25 C.L.J. 650)
King-Emperor vs Ganpat Krishnaji (1930 – 31 C.L.J. 975).

N. Nadarajah, K.C., with *H. Wanigatunga*, for the accused-appellant.
G. P. A. Silva, Crown Counsel, for the crown-respondent.

WIJEYEWARDENE, J.

The accused was convicted on a charge of theft of Rs. 25/– and sentenced to undergo one month's simple imprisonment and pay a fine of Rs. 75/–.

The accused is married to a daughter of a step-brother of Vinasitamby from whose possession the money was taken. The accused and Vinasitamby live at Uduthurai village. A Maha Jana Sabha was formed composed of members of their caste. One of the objects of the Sabha was to prevent members of that caste from cultivating the fields of the Vellalas. The accused was a member of the Sabha, but not Vinasitamby. In March last Vinasitamby worked the field of a Vellala man. Shortly afterwards, the accused went to the house of Vinasitamby with four others one of whom questioned Vinasitamby why he worked for a Vellala man.

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Vinasitamby replied that he did not want the permission of anyone to do such work, when those who accompanied the accused "dragged (Vinasitamby) to go to the Committee of the Maha Jana Sabha." Vinasitamby refused to go and "lay on the ground." The accused, thereupon ordered Vinasitamby to pay a "fine" of Rs. 25/- to the Sabha. When Vinasitamby refused to make the payment, accused entered the house of Vinasitamby and took Rs. 25/- out of a box and went away saying, "I am taking Rs. 25/- and you can do what you like."

The magistrate has found the facts, as stated above, proved by the evidence of Vinasitamby and his witnesses. That evidence stands uncontradicted as no evidence was called by the defence. I see no reason to interfere with the magistrate's finding on the facts.

The counsel for the accused argued in appeal that a charge of theft was not maintainable on those facts and relied on *Ponnu vs Sinnatambi et al* (1922 - 24 N.L.R. 248) and *Gunasekere vs Solomon et al* (1924 - 25 N.L.R. 474). The Crown Counsel submitted that, in any event, the accused could have been convicted of criminal misappropriation and invited my attention to *Haniffa vs Salim* (1938 - 39 N L.R. 348).

I would approach the consideration of this question of law by examining the relevant provisions of the Penal Code without the aid of the decisions cited by counsel. Section 366 enacts :

> "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

According to that definition there are five elements which are necessary and sufficient to constitute the offence of theft. They are :

1. Dishonest intention to take property ;
2. The property being movable property ;
3. The taking out of the possession of another person ;
4. The taking being without the consent of the person in possession ;
5. The removal of the property in order to accomplish the taking of it.

It is not disputed that the last four elements mentioned above are present in this case. The only question is whether the accused had a dishonest intention. The answer to this question involves a consideration of sections 21 and 22 of the Code.

Section 22 defines "dishonestly" in terms of "wrongful gain" and "wrongful loss" while sub-sections 1 and 2 of section 21 define "wrongful" and sub-sections 3 and 4 define "gain" and "loss" occurring in "wrongful gain" and "wrongful loss."

Section 22 reads :

> "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly."

Section 21 reads :

1. "Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled."
2. "Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled."
3. "A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully."
4. "A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property."

It follows from sections 21 and 22 that a person acts dishonestly if he takes property by unlawful means with the intention of *retaining* it or with the intention of *keeping* the person entitled to it *out of its possession*. It is not necessary that such person should have an intention of *acquiring* the property or of *depriving* the other person of it.

Now, in this case Vinasitamby was not a member of the Maha Jana Sabha and was not, therefore, bound by the rules of that Sabha. The Sabha had no right—and much less the accused as an individual member — to call upon the complainant to defend himself before a meeting of the Sabha or to impose a fine on him. It does not matter even if the intention of the accused was not to derive some personal benefit from his act. The "fine" was clearly illegal and the accused could have had no doubt about it. The cases cited by the counsel for the accused may be distinguished from the present case on that ground. In *Ponnu vs Sinnatambi et al (supra)* the accused removed some animals from the possession of the complainant in order to compel the payment of a sum that was justly due. In *Gunasekere vs Solomon et al (supra)* it was found that the accused acted only "with the object of causing annoyance" to the complainant and not with the object of causing "an injury in the nature of wrongful loss." Even if it be assumed, as contended for by accused's counsel — though the evidence does not warrant such an assumption — that the accused did not intend to appropriate the money but only to retain it in order to compel Vinasitamby to stand his trial before the Maha Jana Sabha, the accused had a dishonest intention in taking the money, according to the interpretation I place on sections 21 and 22 of the Penal Code.

That interpretation is in accordance with the view taken by the High Courts of Allahabad, Bombay and Madras with regard to the corresponding sections of the Indian Penal Code.

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The interpretation suggested by accused's counsel was adopted by the High Court of Calcutta in *Prosonno Kumar Patra vs Udoy Sant* (1895–I.L.R. 22 Cal. 669) which was, however, overruled by a Bench of five judges in *Queen-Empress vs Sri Churn Chungo* (1895 – I.L.R. 22 Cal. 1017). In that case, A, the husband of B, owed some money to C. On A's death, B went to her brother D taking with her two head of cattle that belonged to A. D was using the animals in ploughing a field when E, the servant of C, came and took away the animals forcibly to C. C detained one of the animals and said he would release it when his debt was paid. E was charged with theft and the High Court convicted him on that charge In the course of his judgment Petheram, C.J. said :

> "It is evident that it was the intention of the legislature that it should be theft under the Code, to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt ; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code."

Pigot, J., who delivered a separate judgment, said :

> "We think that an intention on the part of the accused to use the possession of the property when taken for the purpose of obtaining satisfaction of a debt due to him, and only for that purpose, has no bearing on the question of dishonest intention under the Penal Code. To hold that such a purpose could render innocent what would be otherwise a wrongful gain within the meaning of section 23 would amount to the recognition of a right on the part of every individual to recover an alleged debt by the seizure of property of his alleged debtor, and would tend to a state of things in which every man might, if strong enough, take the law into his own hands."

The judgment in *Queen-Empress vs Sri Churn Chungo* (*supra*) was followed by the Lahore High Court in *King-Emperor vs Bakhtawar* (1923 – 25 C.L.J. 650) and by the Bombay High Court in *King-Emperor vs Ganpat Krishnaji* (1930 – 31 C.L.J. 975).

I uphold the conviction but alter the sentence passed by the magistrate. I order the accused to pay a fine of Rs. 100/– and to be detained in custody till 4 p.m. on the day the sentence is pronounced in the Magistrate's Court. The accused will serve a term of one month's rigorous imprisonment, if he fails to pay the fine.

Conviction upheld.

Present: HOWARD, C.J. & DE KRETSER, J.

WIJESURIYA vs SAMARASURIYA

S. C. No. 250—D. C. (F) Tangalla No. 4783.
Argued on 19th October, 1944.
Decided on 25th October, 1944.

Estoppel—Land sold in execution—Purchase by defendants—Transfer of land to plaintiff by judgment-debtors prior to such sale—Presence of plaintiff at sale in execution—Absence of any protest—Is the plaintiff estopped from claiming title to the land.

Held : That mere presence of a person at a sale and his remaining silent is not sufficient in law to create an estoppel against him.

Cases referred to : *Carr vs The London & North Western Railway Company* (1875 – C.P. Cases, at pp. 316–317)
Rodrigo vs Karunaratne (21 N.L.R. 360)
Ukku Banda vs Karupai (25 N.L.R. 204)
Tissahamy vs Perera (43 N.L.R. 405)
S. C. No. 303–D. C. (F) Matara No. 14491

N. E. Weerasooriya, K.C., with *E. B. Wickramanayake*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *S. W. Jayasuriya*, for the defendant-respondent.

HOWARD, C.J.

The defendant in this case claims the property in dispute by virtue of a Fiscal's transfer No. 6115 of the 19th June, 1941. The defendant became the purchaser of the said property at a sale held in execution against two persons, Andirishamy and Ensohamy, on the 27th February, 1941, for the recovery of costs in a partition case. On the 26th February,

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1941, by deed No. 1454, Ensohamy and Andirishamy sold the said property to the plaintiff. On the same day the transfer of the property was registered in the Land Registry. The defendant is in forcible possession of the property and the plaintiff has brought this action praying that he be declared entitled to the said land, that the defendant be ejected therefrom and that he be placed in possession thereof. The plaintiff also claims damages at Rs. 120/- and a further Rs. 15/- per month from the date of action until placed in possession. The defendant pleaded that the plaintiff's deed executed a day before the sale in execution by the Fiscal was a fraudulent deed. Further that the plaintiff was present at the sale in execution and allowed the interests of the grantors to be sold without any protest, and thus as a matter of law was estopped from denying the validity of the defendant's purchase. The learned judge has accepted the evidence of certain witnesses, who gave evidence on behalf of the defendant, that the plaintiff was present at the Fiscal's sale and got a certain person called Abeywickreme, also a witness, to bid for him. He has also held that, although the plaintiff gave consideration for the land, he had concealed his title in circumstances amounting to fraud. He was, therefore, estopped from setting up title to the said property and his deed was null and void.

In coming to the conclusions he did, the learned judge seems to have been very much influenced by the fact that two of the witnesses who testified on behalf of the defendant were proctors. Mr. Jayawickreme was the proctor for the plaintiff in the partition proceedings and had seized the property in execution for costs due to him and the defendant's proctor in such action. In giving evidence he stated that the plaintiff came to him a few days after the sale and told him he had bid at the sale but his (Mr. Jayawickreme's) clients would not allow him to buy. The Fiscal's officer also gave evidence on behalf of the defendant and stated he was present at the sale and the bids were recorded. This witness also stated that the plaintiff put in bids. In cross-examination this witness admitted that he did not write plaintiff's name among the bidders, but the latter had asked Abeywickreme to bid. The plaintiff denied that he bid at the sale or was present or that he instructed Abeywickreme to bid on his behalf. Abeywickreme also gave evidence and stated he was present at the sale and purchased another lot in his own behalf. This witness denied that he bid or was instructed to do so on the plaintiff's behalf. In view of the fact that the plaintiff's name does not appear in the list of bidders, it is not proved that he bid at the sale. Mr. Jayawickreme stated that he did bid, whilst the Fiscal's officer on the other hand stated that Abeywickreme bid on his behalf. In view of this conflict of evidence, I think that the learned judge was wrong in holding that a bid was made on his behalf by Abeywickreme. Mere presence at a sale and remaining silent is not sufficient in law to create an estoppel. The principles relating to estoppel were formulated by Brett, J. in *Carr vs The London & North Western Railway Company* (1875–C.P. Cases, at pp. 316-317) in the following passage :

> "One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.
>
> The present case cannot be brought within that proposition, because it is not pretended that there was any statement or conduct false to the knowledge of the defendants or any of their servants.
>
> Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.
>
> And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

In *Rodrigo vs Karunaratne* (21 N.L.R. 360) it was held that to establish an estoppel, it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to be estopped. The representation producing the impression must be, in effect, an invitation to the person affected by it to do a particular act. *Rodrigo vs Karunaratne* was followed in *Ukku Banda vs Karupai* (25 N.L.R. 204) when it was held that to establish an estoppel by conduct by silence, the person who is sought to be estopped by reason of his silence must be proved to have intended to create a false impression on the person who sets up the estoppel, and that he caused him thereby to do a particular act. This principle was also cited with approval in my judgments in *Tissahamy vs Perera* (43 N.L.R. 405) and in a recent case, S.C. No. 303 — D.C. (F) Matara No. 14491, decided on 10th May, 1944.

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In the present case the defendant did not go into the witness-box and give evidence. There is, therefore, an entire absence of evidence as to whether the plaintiff's presence at the sale, and silence, induced him to buy. Neither the conduct of the plaintiff nor the general situation leads to any such inference. In my opinion the judgment of the District Judge is erroneous. I allow the appeal and order that judgment be entered for the plaintiff as claimed with costs in both courts.

DE KRETSER, J.

I agree.

Appeal allowed.

Present: HOWARD, C.J. & DE KRETSER, J.

SIVASAMBU & ANOTHER vs ARUMUGAM

S. C. No. 299—*D. C. Jaffna No.* 16007.
Argued and Decided on 23rd October, 1944.

Counsel and Judge—Questions asked in re-examination disallowed—Refusal by judge to record the questions he had disallowed—New trial—Justice should not only be done but be seen to be done.

Held : That the refusal by the judge to record, when requested by counsel, certain questions he had disallowed was sufficient for ordering a new trial.

N. Nadarajah, K.C., with *H. W. Thambiah*, for the defendant-appellant.
L. A. Rajapakse, K.C., with *C. Renganathan*, for the plaintiffs-respondents.

HOWARD, C.J.

One of the cardinal principles of our law is that justice should not only be done but be seen to be done and in this case there is no doubt that the defendant considered that he had not been given a fair trial. It would appear that at one stage of the proceedings the defendant's counsel wanted to put certain questions to a witness. These questions were disallowed. After that there appears to have been a somewhat unseemly wrangle between defendant's counsel and the judge. Later on the defendant's counsel, according to a passage in the record, said that he did not want to appear in the case as some of his questions in re-examination which the judge considered irrelevant and not arising out of the cross-examination were not recorded by the judge. The judge then said that he informs Mr. Ragupathy (that is to say the defendant's counsel) that he is at liberty to retire from the case. Mr. Ragupathy then said that he did not want to make any statement as to whether he wants the permission of court to retire from the case. Mr. Ragupathy then proceeded to retire from the case. The defendant then informed the court that he did not want to proceed with the case that day in view of the position that was taken up by his counsel. His proctor was absent. The application for an adjournment was then allowed. The case was resumed on the 5th July, that is to say it was resumed two days later when the defendant was present in person and applied that his case should be heard by another judge. He then gave evidence and said that his reason for requiring the case to be heard by another judge was that some of his evidence had not been recorded and also because the court disallowed certain questions regarding the account books. The District Judge then proceeded with the hearing of the case. The defendant apparently took no part in the hearing and did not address the court nor tender any documents in evidence. Subsequently judgment was given in favour of the plaintiffs.

We think it is obvious from the record of the evidence of the trial that the learned District Judge was asked to record the questions which he had disallowed. The learned District Judge has furnished us with an explanation of various allegations made in the petition of appeal and in that statement he does not deny the allegation the he was asked to record these questions and refused to do so. For this reason alone we think that a new trial should be ordered. It is obvious that if there is no record of the questions which counsel wished to put to the witness in re-examination, this court is unable to say on appeal whether or not those questions were relevant.

We, therefore, set aside the judgment in favour of the plaintiffs and order a new trial by another judge. The costs of the abortive trial and of this appeal will abide the result of the new trial.

DE KRETSER, J.

I agree.

Set aside and new trial ordered.

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Present: HOWARD, C.J. & KEUNEMAN, J.

BARONCHI vs ARIYADASA

S. C. Nos. 32-33—*D. C. Matara No.* 13679
Argued on 13th & 14th July, 1944.
Decided on 21st July, 1944.

Mortgage bond action—Prayer for hypothecary decree against transferee from mortgagor—Matters to be proved by plaintiff.

Held : That in an action on a mortgage bond in which a hypothecary decree is prayed for against a person who has acquired interests in the mortgaged property subsequent to the mortgage, plaintiff has to prove :

(1) that the land belonged to the mortgagor at the time of the mortgage,
(2) that it was duly mortgaged to him (plaintiff) for a sufficient consideration,
(3) that the mortgage debt had not been paid and that a definite sum of money was still due,
(4) that the plaintiff is entitled to levy this sum out of the mortgaged property.

Cases referred to : *Abdul Lebbe vs Abideen* (31 N.L.R. 129)
Wijeyesinghe vs Don Davith (1903 – 2 Matara Cases 36)
Ahamado Lebbe Markar vs Luis (2 S.C. Cir. 80 & 3 S.C. Cir. 99)
Alexander vs Hedges (4 S. C. Cir. 85)
Prasad Rai vs Bishan Dayal (I.L.R. 27, All. 71).

N. E. Weerasooriya, K.C., with *N. Nadarajah, K.C.*, and *Ivor Misso*, for the 2nd defendant-appellant in No. 32 and the 2nd defendant-respondent in No. 33.

F. C. W. Van Geyzel, for the 3rd defendant-appellant in No. 33 and the 3rd defendant-respondent in No. 32.

H. V. Perera, K.C, with *L. A. Rajapakse, K.C.*, and *D. Abeywickrema*, for the plaintiff-respondent in both appeals.

HOWARD, C.J.

This case relates to two appeals, one by the 2nd defendant in D. C. Matara No. 91/13679 and the other by the 3rd defendant in D. C. Matara 92/13679. In both these cases judgment was entered for the plaintiff with costs to be paid by the 1st, 2nd and 3rd defendants. The plaintiff's claim was in respect of a sum of Rs. 3,750/– with interest alleged to be due on a mortgage bond dated the 18th December, 1930, marked P1, and made by the 1st defendant in favour of one Daniel Abeysuriya. The plaintiff also claimed a hypothecary decree in respect of the premises referred to in the plaint. Various assignments were made of the said bond which by virtue of P2 dated the 6th July, 1933, was assigned back to Abeysuriya. In case No. 16622 of the Court of Requests, Matara, the interests of Abeysuriya in the said bond were sold in execution of a money decree against the said Abeysuriya. The plaintiff purchased those interests and obtained Fiscal's conveyance dated the 4th November, 1938, marked P7. The 2nd and 3rd defendants were made parties on the basis that they had acquired certain rights in the mortgaged premises. The rights of the 2nd defendant arose from the fact that the 1st defendant by deed of the 21st March, 1928, 2D5, mortgaged the half share of the premises to certain parties who put the bond in suit. The interests mortgaged were purchased at the sale in execution by one Baronchi who obtained on the 3rd February, 1931, auctioneer's conveyance marked 2D7. The said Baronchi also purchased from the 1st defendant by deed of the 3rd February, 1931, the entirety of the land described in the schedule to the plaint. The 2nd defendant is the administratrix of the estate of the said Baronchi. The 3rd defendant is a mortgagee of the interests of the 2nd defendant in the land described in the schedule to the plaint.

Counsel for the 2nd and 3rd defendants have contended on two grounds of law that the judgment of the District Judge is wrong. The first of these grounds is that the execution proceedings in case No. 16622 of the Court of Requests of Matara are void and the sale bad and gave the plaintiff no title. We think there is no substance in this contention. The second ground put forward by the appellants is that the plaintiff has failed to prove that any money was due on the original bond or, that any consideration was paid in respect of such bond. With regard to this aspect of the case, the learned District Judge states as follows :

> "As regards (*a*) the plaintiff has produced the certified copy of the bond marked P1 and the original marked P8 both of which prove that the sum claimed by the plaintiff is due on the said bond. The 1st defendant who is the mortgagor has not contradicted this claim by evidence and I am therefore free to hold that the sum claimed is due on the bond."

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In support of this contention counsel for the appellants has referred us to the case of *Abdul Lebbe vs Abideen* (31 N.L.R. 129) the head-note of which is as follows :

> " Where a creditor on a mortgage bond asks for a hypothecary decree against the property, title to which has passed to a third party by a subsequent transfer by the debtor, the burden is upon the plaintiff to prove the execution of the mortgage, and the sum of money due upon it.
>
> An admission by the debtor of the amount due does not discharge the onus which is on the creditor of proving, as against the subsequent transferee, what sum, if any, is due on the bond."

In his judgment in this case Drieberg, J. referred to a passage from the judgment of Sir Charles Layard, C.J. in *Wijeyesinghe vs Don Davith* (1903 – 2 Matara Cases 36). This passage is as follows :

> " It has been repeatedly held by this court that the burden of establishing the existence of the debt due on a mortgage, where a mortgagee seeks to follow the property in the hands of a third party other than the mortgagor, is on the mortgagee."

The same principle is also formulated in *Ahamado Lebbe Markar vs Luis* (2 S.C. Cir. 80 and 3 S.C. Cir. 99). The plaintiff in this case had obtained a decree for money against his mortgagor on a mortgage bond by which the land was specially mortgaged to him. The defendant was in possession of this land by virtue of a conveyance from the plaintiff's mortgagor. The plaintiff then brought an action against the defendant to have it declared that the land was liable to be seized and sold in execution of the plaintiff's mortgage decree. In his judgment at page 81 of 2 Supreme Court Circular, Phear, C.J. stated as follows :

> " As has already been said, the plaintiff in this suit must prove against the defendant all the facts, which are essential to his alleged right under the mortgage to sell, *de novo*, and quite independently of anything which occurred on that other suit. It seems therefore incumbent upon him at least to establish that the land in question belonged to his mortgagor at the date of his mortgage, that it was then mortgaged by that owner to him, in order to secure the repayment to him to a specific sum of money actually then due as a debt to him from the mortgagor upon some sufficient consideration. That this debt has not been paid, but that a definite sum of money, being the whole or part thereof, is still due to him, secured by this mortgage, and that he is entitled to issue or to have issued writs of seizure and sale for the purpose of levying this definite sum of money out of the mortgaged premises."

This case was next considered by the Full Court at page 99 of 3 Supreme Court Circular. In the course of his judgment Cayley, C.J. stated as follows :

> " It accordingly appears to me to be clear that if the plaintiff has proved (as he appears to have substantially done) his mortgage, his mortgagor's title at the time of the mortgage, and that the mortgage debt is still unpaid, he is entitled to a decree in his favour declaring the property liable to be sold to satisfy that debt."

The following passage from the judgment of Dias, J. is also of interest :

> " In its judgment of the 2nd May, 1879, this court seems to have assumed that the plaintiff's judgment against his debtor had the effect of a mortgage-decree rendering the mortgaged property liable as against the mortgagor to be sold to satisfy plaintiff's debt. As the present defendant is a third party in possession of the mortgaged property, this court held that the plaintiff was bound to prove, as against the present defendant, the whole of his right to have the mortgaged property sold in satisfaction of his claim. This the plaintiff had failed to do at the first trial, but this court having given him another opportunity, he has, I think, made out a case to entitle him to a decree as against the present defendant."

Mr. Perera, on behalf of the plaintiff, has contended that the burden of proving that the bond was discharged lies on the defendants. In support of this contention he has referred us to Austin's reports, 26341, pp. 184–185, *Alexander vs Hedges* (4 S. C. Cir. 85) and *Prasad Rai vs Bishan Dayal* (I.L.R. 27, All. 71). In all these cases, however, the defendants were the original mortgagors and not as in this case persons in possession of the mortgaged premises by virtue of assignment.

Applying the principles formulated in the cases I have cited to the facts of the present case it is, I think, clear that before the plaintiff could succeed against the 2nd or 3rd defendant he would have to show (1) that the land belonged to the mortgagor at the time of the mortgage, (2) that it was duly mortgaged to him for a sufficient consideration, (3) that the mortgage debt had not been paid and that a definite sum of money was still due, (4) that the plaintiff is entitled to levy this sum out of the mortgaged property. It may be conceded that (1) and (2) are established by production of the mortgage bond. (3) and (4) have not, however, been established and I am of opinion that the learned District Judge was in error when he held that the copy of the bond P1 and the original P8 both prove that the sum claimed by the plaintiff is due on the said bond.

The appeal is, therefore, allowed and the judgment set aside. The case is remitted for the plaintiff to adduce evidence to prove that a definite sum of money is due on the mortgage bond. The respondent will pay the 2nd and 3rd defendants the costs of this appeal. The costs so far incurred in the District Court will abide the result of the action.

KEUNEMAN, J.

I agree.

Appeal allowed.

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Present: KEUNEMAN, J. & CANNON, J.

RAGSOOBHOY vs NAMASIVAYAM CHETTY

S. C. No. 62 (*Inty.*)—*D. C. Colombo No.* 14638.
Argued & Decided on 16th November, 1944.

Interrogatories—Delivery by plaintiff to defendant—Failure to answer—Defence struck off—Civil Procedure Code sections 94, 99, 100 *and* 109—*Has the District Court any discretion to grant indulgence under section* 109.

Held : (i) That where a defendant fails to answer interrogatories delivered to him, an order striking off his defence should not be made unless a clear and specific order had been made earlier under section 100 of the Civil Procedure Code.

(ii) The court has a discretion to grant indulgence to a party on an application for an order under section 109 of the Civil Procedure Code.

N. Nadarajah, K.C., with *V. A. Kandiah* and *S. Handy Periambanayagam*, for the defendant-appellant

H. V. Perera, K.C., with *N. K. Choksy* and *P. Navaratnarajah*, for the plaintiff-respondent.

KEUNEMAN, J.

This appeal is taken by the defendant-appellant against an order of the District Judge that his answer should be struck off and that he should be treated as in default under section 109 of the Civil Procedure Code for failure to answer interrogatories. It is clear that the plaintiff-respondent obtained the leave of the court to deliver interrogatories and actually did deliver interrogatories. But failure to answer interrogatories served under section 94 does not make a person liable to have his defence struck off. In order that he should become liable to this penalty it is necessary that an order should have been made under section 100 requiring him to answer or to answer further either by affidavit or by *viva voce* examination. Mr. Nadarajah for the appellant contends that in this case there is no order made under section 100 of the Civil Procedure Code. Mr. H. V. Perera for the respondent contended that an order under section 100 had been made on the 21st of January, 1944. On that date which, was the date originally fixed for the answering of the interrogatories, the defendant himself moved the court for an extension of time for answering the interrogatories. It is clear, as the District Judge himself says, that his application amounted to an application for an extension of time. In the journal entry of that date there appear the words " Answers to interrogatories 17.3." Now, Mr. Perera contends that this was an order made on the footing that the defendant had omitted or refused to answer the interrogatories. There is no evidence in the record that any application was made by the plaintiff on that date for an order under section 100 and in my opinion, the language used by the District Judge " Answers to interrogatories 17.3 " may very well be regarded as a mere extension of time for the answering of the interrogatories. I think it is clear that under section 99 of the Civil Procedure Code the District Judge had power to extend the time for the answering of the interrogatories. It is very difficult from the words used by the District Judge to say that this was a peremptory order made under section 100. Where a peremptory order of that kind is made I think it should be made clearly and specifically and be obvious to everybody that it is an order under section 100. In this case the fact that the District Judge may have made an order extending the time has no bearing upon the present appeal. I do not think there was any order made under section 100. Section 109 can only come into operation where an order has been made under section 100, and in view of my holding that there has been no order under section 100 at all, I think the defendant did not become liable to have his defence struck off. On that ground alone the judgment of the District Judge must be set aside. I may add that the District Judge appears to have been under the impression that he had no discretion to grant any indulgence in a case under section 109 when objection was taken to such indulgence by the other side. This is certainly not the law. I would direct the attention of the judge to the cases reported in 2 Ceylon Law Recorder page 173 and 5 Appeal Court Reports p. 135.

In all the circumstances I set aside the order of the 17th March, 1944, and send the case back to the District Court for any further proceedings that may be necessary in the case. The appellant is entitled to the costs of appeal.

CANNON, J.

I agree.

Order set aside.

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IN THE PRIVY COUNCIL

LORD MACMILLAN, LORD WRIGHT & SIR GEORGE RANKIN

GOUNDAN vs EMPEROR

Privy Council Appeal No. 1 *of* 1943.
Decided on 23rd February, 1944.

Indian Penal Code section 216—*Indian Criminal Procedure Code* 1898 *sections* 75 *and* 87—*Indian Evidence Act sections* 62, 64 *and* 65.

Held : (i) That in a prosecution under section 216 of the Indian Penal Code it is necessary for the prosecution to establish —

(*a*) that before the date of the harbourage there existed an order for the apprehension of the offender who was harboured,

(*b*) that the order was known to the accused person, and

(*c*) that acts amounting to harbourage were done by the accused with that knowledge.

(ii) That there can be no proof that the accused knew of the orders or warrants of arrest, unless or until the issue of the warrants has been proved.

(iii) That there is nothing in section 87 of the Indian Criminal Procedure Code which —

(*a*) makes the proclamation legal evidence of the issue of the warrant or order of arrest, or

(*b*) imputes to the accused notice of the proclamation or its terms.

(iv) That the word " knowing " in section 216 of the Indian Penal Code means something more than and different from the words " had reason (or sufficient cause) to believe."

(v) That sections 62, 64 and 65 of the Indian Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest and that is under section 62 of the Act by production of the original order, or, under the conditions specified in section 65, of a certified copy.

Per LORD WRIGHT : " ' Knowing,' however, implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information.

A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasize this point. The objection taken on the appellant's part is not technical but substantial. Mr. Roberts, the above counsel for the Indian Government, did not in the end contest its validity. Indeed, he said the Indian Government would not countenance any relaxation of the stringency, in regard to warrants of arrest, of sections 62 and 65."

(Section 213 of our Code corresponds to section 216 of the Indian Penal Code. Section 59 of our Criminal Procedure Code corresponds to section 87 of the Indian Criminal Procedure Code. Sections 62, 64 and 65 of the Indian Evidence Act correspond to sections 62, 64 and 65 of our Evidence Ordinance.

The provisions of our law which correspond to the provisions of the Indian law referred to in the judgment are as follows :—

Section 216 Indian Penal Code — Section 213 Penal Code.
Section 75 Indian Criminal Procedure — Section 50 Ceylon Criminal Procedure Code.
Section 87 Indian Criminal Procedure Code — Section 59 Ceylon Criminal Procedure Code.
Sections 62, 64 and 65 Indian Evidence Act — Sections 62, 64 and 65 of the Ceylon Evidence Ordinance.)

D. N. Pritt, K.C., with *R. K. Handoo*, for the appellant.
G. D. Roberts, with *S. B. Khambatta*, for the respondents.

LORD WRIGHT,

The appellant, a wealthy landowner, merchant and banker with large interests in Tiruppur, where he resided, and other places in the Province of Madras, was charged along with ten other persons under section 216, Penal Code, with the offence of " harbouring " two persons who were suspected of having committed a murder on or about 8th March, 1940. The murdered man was Muthu Goundan, of Othuvillaipudur. The police formed the opinion that the murder was committed by four persons, all of them Valayans, a low tribe among the depressed and criminal classes of Madras, aided and abetted by one R. V. I. Goundan, the father-in-law of the appellant. Two of these four Valayans are the persons whom the accused was said to have " harboured." These men, along with R. V. I. Goundan, being subsequently tried for the murder

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or abetment, were acquitted. Of the eleven men later charged with "harbouring," ten including the appellant were convicted by the Sub-Divisional Magistrate who tried the case, the appellant being sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000/- with a further three months' rigorous imprisonment in default of paying the fine. On appeal, the Sessions Judge set aside all the convictions and sentences. On a further appeal by the prosecution from the orders of acquittal, Horwill, J., who heard the appeal in the High Court of Madras, confirmed all the acquittals except that of the appellant; as to him, the judge restored the conviction and sentence passed by the Sub-Divisional Magistrate. Special leave to appeal was granted to the appellant by His Majesty in Council. In the result, as will appear later, their Lordships arrived at the opinion, on the conclusion of the arguments, that the appeal should be allowed on the ground that there was no evidence admissible in law to prove the essential foundation of the case for the prosecution, namely, that any order had ever been made for the arrest of the two men said to have been "harboured." In view of the decisive character of this objection to the conviction, it will be enough here to summarize as shortly as possible the material facts and to outline the course which the proceedings below took. First, however, the terms of section 216 must be set out. That section is in the following terms:

> "Section 216,— .....whenever a public servant, in the exercise of the lawful powers of such public servant orders a certain person to be apprehended for an offence, whoever, knowing of such.....order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person.....is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine....."

That section requires, if the offence is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly knowledge by the accused party of the order, thirdly the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended. The character of a warrant of arrest is defined in section 75, Criminal Procedure Code 1898, as follows:

> "Section 75,— (1) Every warrant of arrest issued by a court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of magistrates, by a member of such Bench: and shall bear the seal of the court.
>
> (2) Every such warrant shall remain in force until it is cancelled by the court which issued it, or until it is executed."

The form prescribed for such a warrant is set out in schedule 5 of the Code:

> "Schedule V. Form II.— Warrant of Arrest.
> (See section 75)
>
> To (name and designation of the person or persons who is or are to execute the warrant) whereas of stands charged with the offence of (state the offence), you are hereby directed to arrest the said and to produce him before me. Herein fail not.
>
> Dated this day of 19 .
> (Seal)"

A warrant or order of this character is a public document, and the conditions necessary to prove it are prescribed in sections 63, 64 and 65, Evidence Act, which are in the following terms:

> "62. Primary evidence means the document itself produced for the inspection of the court.
>
> 64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.
>
> 65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—
>
> (*a*) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court or, of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
>
> (*b*) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (*c*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
>
> (*d*) When the original is of such a nature as not to be easily movable;
>
> (*e*) When the original is a public document within the meaning of section 74;
>
> (*f*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence.
>
> (*g*) When the originals consist of numerous accounts of other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.
>
> In cases (*a*), (*c*) and (*d*) any secondary evidence of the contents of the document is admissible.
>
> In case (*b*), the written admission is admissible.
>
> In case (*e*) or (*f*) a certified copy of the document, but no other kind of secondary evidence, is admissible.
>
> In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

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The ten persons charged together with the appellant were (1) the *pattagar* or proprietor of an estate at Palayakottai, in the grounds of which the two suspected Valayans were eventually arrested, and eight other persons who were servants of the *pattagar*, the appellant and another person said to have assisted the appellant. The appellant was arrested on 29th September, 1940, the *pattagar* and the others arrested with him having been arrested on 23rd August, 1940. The charge against the appellant was in due course framed by the Sub-Divisional First Class Magistrate of Coimbatore. It was dated 18th January, 1941, and was in the following terms:

"That on or about the 13th day of July, 1940, Soratta Valayar, son of Vettai Valayar, and Kooravalayar, son of Alaga Valayar, were ordered to be apprehended for an offence under section 302, by the Sub-Magistrate, Udumalpet, a public servant in the exercise of his lawful powers as such public servant, and that you knowing of the said order for apprehension on or about the 22nd day of August, 1940, at Palayakottai harboured the said Soratta Valayar and Kooravalayar with the intention of preventing them from being apprehended and thereby committed an offence punishable under section 216, Penal Code, and within my cognizance."

The charge referred to an order, though without giving any precise date for it. It specified the place and date of the offence and alleged that the accused knew of the alleged order before the date of the alleged offence, which was said to have been committed on or about 22nd August, 1940. It is clear that it was necessary for the prosecution to establish that before that date the order existed and was known to the appellant, and that the acts amounting to harbourage were done by the appellant with that knowledge. The prosecution sought to prove both that the warrant of arrest had been issued and that the appellant knew of its issue by means of two proclamations, one in respect of each of the two suspected Valayans. These were, except for the name of the particular suspect, in identical terms. It will be enough to quote one of them:

"In the Court of the Sub-Magistrate, Udumalpet
R. C. XI of 1940 Calendar Case.

Whereas complaint has been made before me that Soratta Valayan, son of Sellappan *alias* Vettai Valayan, Nallur, Oalladam Taluk, has committed (or is suspected to have committed) the offence of murder punishable under S.302, Penal Code, and the warrant of arrest issued was returned with the endorsement that the said Soratta Valayan could not be found and whereas it has been shown to my satisfaction that the said Soratta Valayan has absconded (or is concealing himself to avoid the execution of the said warrant);

Proclamation is hereby made that the said Soratta Valayan is required to appear at Udumalpet Camp before this court, to answer the said complaint on 18th August, 1940, at 10 a.m.

Dated this 5th day of July, 1940.

(Signed) JOHN A. SAMUEL,
Sub-Magistrate."

There was no evidence at all in this case to show that the proclamations or either of them came to the knowledge of the appellant, or that he had ever visited Nallur, or that it was reasonable to assume that he had done so, or (apart from the evidence of his alleged association with the two Valayans) that he had ever associated with the type of person usually to be found in a Valayan village.

It is obvious that there could not be proof that the appellant knew of the orders or warrants of arrest, unless or until the issue of the warrants had been proved. The proclamation was made under section 87, Criminal Procedure Code, but, there is, in their Lordships' opinion, as will be explained later, nothing in that section which makes the proclamations legal evidence of the issue of the warrant or order of arrest, nor is there anything either in section 87 or in the facts of the case which makes it possible to impute to the appellant notice of the proclamations or their terms. This makes it unnecessary to comment on the curious fact that the date of the warrants of arrest given in the proclamations (5th July, 1940) differs from the date given in the charge (on or about 13th July, 1940). It will not be surprising that the same vagueness as to dates recurs in the evidence called to establish the "harbouring." There was some discussion as to what were the dates of the various occurrences spoken to by the evidence, but there is in their Lordships' opinion no evidence to show that there ever were the orders or warrants, proof of which was essential to the prosecution's case, so that it will not be necessary to make any meticulous examination of the evidence. It is sufficiently clear in their Lordships' opinion that the Sessions Judge was right in his conclusion on this aspect of the case, which was in effect that even on the prosecution's evidence the appellant brought the Valayans to the *pattagar's* compound nearly four months before the proclamations were issued and was not said to have associated with them at the place later than six weeks before the proclamations. The Sessions Judge in his judgment pointed out that although the necessary warrants or orders had not been filed, he nevertheless felt justified in inferring from the terms of the proclamations that they had been issued. On this point their Lordships are unable to agree with the Sessions Judge for reasons to be

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stated later. But they do agree with his conclusion that, even assuming, as he did, it had not been proved that the appellant knew of them. He went on to emphasize the difference between the positive word " knowing " used in section 216 and the words " has reason to believe " as used in section 212 of the Code as an alternative to " knows." He also referred to the definition of " has reason to believe " in section 26 of the Code as meaning " having sufficient cause to believe." In their Lordships' opinion the Sessions Judge was right in holding that the word " knowing " meant something more than and different from the words " had reason (or sufficient cause) to believe." The latter words might be satisfied even though no warrant had in fact been issued. " Knowing," however, implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. The Sessions Judge also held that the proclamations could not be deemed to establish that the appellant " knew " of the issue of the warrants. He accordingly held that the appellant should be acquitted.

Horwill, J. on appeal reversed that decision. It is not necessary to examine his analysis of the evidence of fact. It is enough to say that their Lordships prefer in general that of the Session Judge. But he, erroneously, as their Lordships think, treated the objection that the issue of the warrants had not been proved as a " technical " objection, and he rejected or disregarded the distinction between " knowing " and " having reason to believe." He read section 216 as if it contained the latter words. These two errors are, in their Lordships' opinion, sufficient to vitiate his judgment and the resulting conviction and sentence.

But their Lordships think that the appeal should be allowed on the single ground that there is no evidence that the warrants or orders were ever issued. Sections 62, 64 and 65, Evidence Act, define the only evidence which the law permits in order to prove a warrant of arrest, and that is under section 62 of the Act production of the original order, or, under the conditions specified in section 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasize this point. The objection taken on the appellant's part is not technical but substantial. Mr. Roberts, the above counsel for the Indian Government, did not in the end contest its validity. Indeed, he said the Indian Government would not countenance any relaxation of the stringency, in regard to warrants of arrest, of sections 62 and 65.

It is sufficient to refer briefly to an argument based on sub-section 3 of section 87, the words of which are as follows :

> " (3) A statement in writing by the court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Their Lordships cannot read these words as overriding the requirements of the Evidence Act, or as making the proclamation evidence that the warrants had been issued. The method of proving the warrants is not a requirement of the section which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does section 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published.

Some reference was made to the rule relating to concurrent findings of fact in the court below. If that rule applied at all, it would involve concurrent findings in all the courts below, whereas here there are such findings in only two out of three. But in a criminal appeal brought by special leave of His Majesty in Council their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice, as in their opinion, for the reasons given, there has been in this case.

In their judgment the appeal should be allowed and the conviction set aside.

They will humbly so advise His Majesty.

Appeal allowed.

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Present: DE KRETSER, J.

SCHOKMAN vs SIRISENA

S. C. No. 639—*M. C. Anuradhapura Case No.* 10520.
Argued on 22nd November, 1944.
Decided on 1st December, 1944.

Gaming Ordinance section 5—Written information on oath—Information orally given on oath and recorded by magistrate—Is it imperative that the information so recorded should be read over and explained to the accused.

Held : That where the information is orally communicated on oath to a magistrate who records it the requirements of section 5 of the Gaming Ordinance are satisfied though the recorded statement is not read over and explained to the accused.

Cases referred to : *Police Sergeant, Tangalle vs Porthenis* (22 N.L.R. 163)
Parson vs Kandiah (29 N.L.R. 94)
Sub-Inspector of Police vs Jacolis Peiris (30 N.L.R. 509)
Bartholomeusz vs Mendis (32 N.L.R. 355)
Edwards vs Perera (4 C.L.W. 60)
Beddewela vs Abraham et al (11 Times L.R. 57)

J. Mervyn Fonseka, K.C., Solicitor-General, with *E. H. T. Gunasekera, Crown Counsel,* for the appellant.

L. A. Rajapakse, K.C., with *P. Navaratnarajah,* for the respondents.

DE KRETSER, J.

Fourteen persons were charged with unlawful gaming. They had been arrested when a place was searched under a search warrant. The magistrate held that the search warrant had not been issued in the conditions mentioned in section 5 (formerly section 7) of the Gaming Ordinance. He found two of these persons guilty and acquitted the others. The appeals of the persons found guilty have been dismissed. The complainant appeals from the acquittal with the sanction of the Attorney-General. The learned Solicitor-General contended on his behalf that the cases relied on by the magistrate do not apply in the circumstances of the case. He rather hinted that those decisions might well be reviewed. I was inclined to send this appeal before a fuller Bench but Mr. Rajapakse for the respondents strongly urged that I should not follow that course unless it were really needed.

Section 7 of the Gaming Ordinance raises a presumption of guilt and, as remarked by Bertram, C.J. in *Police Sergeant, Tangalle vs Porthenis* (22 N.L.R. 163), "the result of the issue of a search warrant is so drastic, that this court has come to the conclusion that special care should be taken to see that all the conditions attaching to the issue of a warrant are fully complied with."

In a long series of cases, of which the one just referred to is only one, "the courts have declared that the magistrate must be satisfied upon sufficient *prima facie* evidence. It is not enough that general evidence should be given him that the informant has reason to believe that gaming is going on upon the premises." The evidence must satisfy the magistrate that there is good reason to believe that the place is kept or used as a common gaming place.

Up to the date of that case the written information referred to in section 5 had been in the form of an affidavit. The question considered always was the sufficiency of the evidence before the magistrate.

A new matter, however, came up for consideration before Lyall Grant, J. in *Parson vs Kandiah* (29 N.L.R. 94). There a witness was taken before a magistrate, who recorded his evidence on oath. The witness did not sign the deposition nor was there anything to shew that his deposition had been read and explained to him. Lyall Grant, J. said, "No doubt it would have been sufficient if the information, which was given on affirmation, had been read over and explained to the informant and signed by him." As there was no evidence that this had been done he refused to draw the presumption created by section 7.

This case lays emphasis not on the information being insufficient but on the fact that the information was not "written information."

The same question came up before Drieberg, J. in *Sub-Inspector of Police vs Jacolis Peiris* (30 N.L.R. 509). There the supporting witness put his mark to his deposition and his mark had

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been attested by the magistrate. The written information had come in the form of an affidavit by a Police Sergeant. Drieberg, J. considered the materials in the affidavit insufficient and said, " It is not necessary to consider the sufficiency of the material because the information by the witness was not properly before the court." He purported to follow *Parson vs Kandiah* (*supra*) and agreed that until the statement is read and explained to the deponent it was not written information. With all due respect I would say that the witness did not purport to be the informer in writing. The written information came from the Sergeant and form had been complied with. The witness apparently had been examined by the magistrate in the course of making the inquiry referred to in section 5. Section 5 does not specify any particular form of inquiry nor is there any requirement that the deposition should be read over and explained to a witness and signed. Nor is there any provision of the law requiring a magistrate to read over and explain evidence to a witness and get his signature, except in certain cases specified in the Criminal Procedure Code regarding proceedings under it, and even then there is provision for the defect being supplied by evidence *aliunde*. The fact remains that Drieberg, J. thought that the recorded evidence was not written information unless it were read and explained to the witness and signed by him.

In *Bartholomeusz vs Mendis* (32 N.L.R. 355) an Inspector of Police presented what purported to be an affidavit by him but it had not been signed by him. Akbar, J. held this was not written information on oath. A witness too had been examined but there was nothing to show that the deposition had been read and explained to him. Nor was Akbar, J. sure he had even signed it. Akbar, J. followed the view of Drieberg, J.

These are the three cases followed by the magistrate. The Solicitor-General referred me also to *Edwards vs Perera* (4 C.L.W. 60) where it was conceded that the issue of the search warrant had been irregular inasmuch as the information had not been read over and explained though it was signed. Poyser, J. however, convicted on the evidence. Mr. Rajapakse referred me to *Bedaewela vs Abraham et al* (11 Times L.R. 57) where Poyser, J. followed Drieberg, J.

The present case is distinguishable from the above cases inasmuch as the depositions were not only signed by the witnesses but there is evidence that they were read over and explained to the witnesses, who at the trial had no complaint to make regarding the accuracy of the record made. The case seems to have been tried in the absence of the permanent magistrate, who probably would have been able to supply the assurance that the depositions had been read over and explained, if he had been trying the case.

The defect, if any, is one of form only and I would not be disposed to favour technicality to such an extreme point as the respondent's counsel contends I should.

With all due respect, I should like to express my dissent from the judgments relied upon by the magistrate.

It is true that it is a serious thing to invade a person's house and it is a serious matter to raise a presumption of guilt, but the Ordinance places the public interests as being of paramount importance and it would be unfortunate to raise technicality to such a height that the most important principle is frustrated. I cannot see how if once information is recorded it is converted into written information, it becomes something less if it is not explained to, and then signed by the witness. The magistrate is a responsible judicial officer and one cannot assume he would make an incorrect record or would not realize the gravity of the step he was about to take. Such assumptions are not made when persons are tried on other matters affecting their liberty, and if the judgments referred to were given their full significance it would not be enough to record and explain the deposition and get the witness to sign but there should be a certificate by him that he acknowledges it to be correct. Otherwise we would again be acting on a presumption *viz.* that his signature signifies that he acknowledges it to be correct. We might then even ask to be satisfied that the deposition was properly explained and that the witness understood what was being said, because he was in strange surroundings and in the august presence of a magistrate. When a magistrate records evidence he hears the question, the answer, he sees how the answer fits the question; the record is being made question by question and there is scarcely any occasion for misunderstanding, especially when the witness is speaking in English or when he is speaking in the vernacular and the magistrate understands him and can dispense with an interpreter. Suppose the witness brought an affidavit, written by someone purporting to record his oral information and he swore to it before the magistrate and immediately handed it to the magistrate that would be sufficient. If under section 6 a witness made an oral statement and the magistrate got him to swear it was true that would be enough. If he produced a written statement and swore to it that would be written information, but if the magistrate were himself the scribe it would not do, until it was explained to the witness and

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signed. This seems to be rather a quibble than sound reasoning. The magistrate would record the information in a manner much more likely to create better impression on the witness and on the magistrate.

Under section 6 (*a*) a house is liable to be searched by the magistrate merely because it has been branded within six months as a common gaming place by the conviction of some person. There the magistrate has a record before him, but the conviction spreads such a miasma of suspicion that it lingers on long enough to raise a presumption that the place is still a gaming place and may lawfully be raided. It is a case of the public coming first. It is also a case where the magistrate has information within his knowledge and control and could be trusted to use his discretion.

By section 6 (*b*) a magistrate is empowered to act in an emergency on unsworn and unrecorded oral information. Presumably as a responsible officer he satisfies himself before acting but he is acting in such a hurry that he has no time to record the information. He may act regarding a place hitherto unbranded as a common gaming place. Again a case of the public welfare coming first. It is also a case where he has no time for issuing a search warrant and getting a suitable person to execute it. If he receives written information on oath from some person he has not seen or may not see before he acts, (for the information need not be handed in personally) who may be an ignorant catspaw of some person, he may issue a search warrant.

It seems to me that the provision as to written information may be only a provision as to the means of communication, providing both a convenient and secret method for the informant. Evidence by affidavit is something less than evidence taken by the magistrate and I cannot believe the legislature had a rooted preference for the former. It is a magistrate who must be informed and it is he who must be satisfied that the place is a common gaming place. He is given a discretion as to how he may act. He should not act till he is satisfied and this court cannot, beyond a limited degree, be the guide of the magistrate's conscience.

There is a distinction between written and oral information, but there is also the distinction between little time being available and more leisurely action. Is then the real distinction between a case for quick action and a different case or is the emphasis on form ? Is the magistrate empowered in section 6 to act only because he has no time for issuing a search warrant after selecting a suitable person to execute it or does his presence account for the difference ? It seems to me that the vital matters to be considered are the public welfare and the magistrate's responsibility and the form in which the information comes is an incidental matter.

Section 12 (3) of the Oaths Ordinance does not require a Commissioner of Oaths to explain an affidavit but only to state in his jurat the place and date when the oath was administered and to initial all alterations, erasures or interlineations which had been made (not necessarily by himself) before the oath was administered. Section 4 does not require explanation of the deposition to witnesses nor that their signature should be obtained. Section 6 provides for existing forms and formalities to be continued until fresh rules are made. I inquired but was not referred to any rules governing this matter nor have I been able to find any.

Section 84 of the Courts Ordinance empowers Justices of the Peace to administer oaths. Section 82 relates to judicial officers. Neither section requires explanation of an affidavit. Under the English rule No. 53 where an affidavit is made by a person who appears to the officer taking the affidavit to be illiterate or blind then the jurat should state not merely that it was read over to the deponent but that he seemed perfectly to understand it. If there is no such certificate there must be other evidence that the affidavit was read over and apparently understood by the deponent. A magistrate may well make such inquiry under section 5 if the deponent were before him, but if he was not, why should he assume that the man was either blind or illiterate ? The term " written information " may have been borrowed from the English law, where an information marks the beginning or institution of proceedings before a court of summary jurisdiction and it lies when an offence is alleged to have been committed. I am not aware that in Ceylon proceedings are instituted in any way not provided for in the Criminal Procedure Code. The term " information " was used in earlier enactments.

It seems to me that when a person gives oral information a magistrate may decline jurisdiction if he does not desire to institute the search himself or sees no emergency such as section 6 contemplates.

If a person gives written information it must not only be on oath but should be full enough to justify a magistrate acting on it without further inquiry.

If the information is not full enough, or for any other reason the magistrate desires it, he may make inquiry and that would include the recording of evidence.

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There is nothing to prevent a magistrate being the scribe and preparing the written information, administrating the oath either at the start or after reading over and explaining what he has prepared. He might then present such written information to himself. But this is only saying that he might not only receive evidence but take evidence.

The question seems to be not whether the witness signed or whether the deposition was read over and explained but whether the case is one provided for in the Ordinance: is the search warrant one issued under the Ordinance? The answer would depend on whether the terms of the Ordinance can be satisfied in substance and the form is immaterial. Whether the magistrate has assumed a jurisdiction the Ordinance did not give him, or whether he always had jurisdiction to issue a search warrant and the Ordinance only provides the method of approach to him.

In my opinion the form of approach is not an imperative provision and informality or irregularity should not matter as long as the magistrate is properly satisfied. But I need not do more than decide that the evidence in this case has supplied the material which was wanting in the cases referred to and, therefore, the presumption arises. The accused did not choose to give evidence or to call witnesses, though given an opportunity of doing so. The magistrate has accepted the evidence of the prosecution and the only question is whether that evidence discloses facts rebutting the presumption of guilt, which cannot be a strong presumption. I find no such evidence. The magistrate fined the first accused Rs. 20/- and the 13th accused, who took a prominent part in running the gaming, only Rs. 30/-. I find the respondents guilty and sentence each of them to pay a fine of Rs. 20/-. The magistrate will give them such time as he thinks proper in which to pay the fine. In default, in each case of default, the sentence will be two weeks' rigorous imprisonment.

I would add that I can see no reason why the Police should not adopt a wiser and easier procedure. I was informed that Assistant Superintendents of Police are Justices of the Peace. They could easily record the information, explain it to the deponents and get them to swear to their depositions and sign them. They could then produce the witnesses and the magistrate would act wisely in explaining the depositions to the witnesses and seeing that they stand by them and he could make a record of what he has done. On being satisfied he had sufficient material before him he could then issue the search warrant. This would obviate any occasion for the validity of the search warrant being later questioned.

Appeal allowed.

Present: HOWARD, C.J.

HAPUMALI vs UKKU

S. C. No. 261—*C. R. Panwila No.* 10420.
Argued on 31st May, 1944.
Decided on 12th June, 1944.

Kandyan Law—Donation with intention of receiving succour and assistance during lifetime—Succour and assistance rendered—Can deed be revoked.

Where a Kandyan donated property with the intention of receiving assistance and necessary succour during the donor's lifetime and where the donee rendered such assistance and necessary succour,

Held : That the power to revoke the gift was not exercisable.

Cases referred to : *Gunadasa vs Appuhamy* (36 N.L.R. 122)
Wijesinghe vs Mohotty & Another (26 C.L.W. 48)
Bologna vs Punchi Mahatmaya (Ramanathan's Reps. 1863–1868, p.193)
Ram Menika vs Banda Lekam (15 N.L.R. 407)
Mudiyanse vs Banda (16 N.L.R. 53)
Kiri Menika vs Ganrala (3 Lorenz, 76).

H. W. Thambiah, for the plaintiff-appellant.
Cyril E. S. Perera, for the defendant-respondent.

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HOWARD, C.J.

The plaintiff appeals from the decision of the Commissioner of Requests dismissing her action asking for a declaration of title to certain land and damages. The defendant, who is the plaintiff's daughter, pleaded that the land in question had been donated to her by deed P1 dated the 28th December, 1924 by the plaintiff and that the latter had no right to revoke the gift which the plaintiff purported to do by deed P2 dated the 18th July, 1941. The learned Commissioner held that a deed of gift like P1 was revocable, that the defendant had rendered all assistance to her mother, the plaintiff, and that the plaintiff had no right to revoke the deed of gift. Such revocation was, therefore, of no effect.

P1 recites that the donation to the defendant is made "with the intention of receiving assistance and necessary succour during the term of natural life in this world and in consideration of the love and affection I have and bear unto" the defendant. The *habendum* states that the donee, her heirs, executors administrators and assigns, is to hold the said premises with all the donor's right, title and interest thereto free from dispute. It is conceded by counsel for both parties that the amendment of the law effected by section 5 of the Kandyan Law Declaration and Amendment Ordinance (No. 39 of 1938) does not affect the question that has to be decided in this case. I have, therefore, been referred to various decisions of the law as it stood prior to the enactment of this amending Ordinance. In *Gunadasa vs Appuhamy* (36 N.L.R. 122), Garvin, S.P.J. held that, where a Kandyan deed of gift given in consideration of services to be rendered in the future granted "all the right, title and interest of me the said donor in and to the premises for ever," the donor did not renounce the right of revocation by the use of the words "for ever." In his judgment the learned judge states that the purpose of the gift would seem to be to secure to the donor that she would be well cared for during what remained of her life and such deeds are always revocable under the Kandyan law unless they are expressly declared to be irrevocable or where the power of revocation is expressly renounced. He then went on to hold that the use of the words "for ever" cannot fairly be construed as containing language which imposes a limitation or a renunciation of the ordinary right of the donor. The language of the deed in *Gunadasa vs Appuhamy* (*supra*) is very similar to that employed in the present case. But the learned judge did not deal specifically with the point as to whether, if the services are duly performed, the right to revoke inherent in such a deed is exercisable. The implication of the judgment is that such right is still exercisable. In fact it was so held by Wijeyewardene, J. in *Wijesinghe vs Mohotty & Another* (26 C.L.W. 48) where services had been performed up to date and for 20 years. In spite of this the learned judge held that the deed was revocable. Considerations of natural equity cannot be permitted to override Kandyan law on this subject. In doing so he referred to D.C. Kandy No. 22404 (Austin p. 140) in which case the Supreme Court held a deed to be revocable when the donor transferred a land to another in consideration of assistance to be rendered even after such assistance had been rendered. It was held further that, if the donee had spent any money he could make a claim for it, "the assumption being that the gifted land left him harmless during the time he rendered assistance."

Passages from judgments in other cases indicate that a different view to that expounded in the cases I have cited has been taken. In affirming the decree of the court below in *Bologna vs Punchi Mahatmaya* (Ramanathan's Reps. 1863-1868, p. 193) the Supreme Court stated as follows :

> "It is impossible to reconcile all the decisions as to the revocability or non-revocability of Kandyan deeds; but the Supreme Court thinks it clear, that the general rule is, that such deeds are revocable, and also that before a particular deed is held to be exceptional to this rule, it should be shewn that the circumstances which constitute non-revocability appear most clearly on the face of the deed itself. The words in the present deed as to services 'continued to be rendered by the donee' do not appear to the Supreme Court to be sufficiently clear and strong."

The judgment of the Supreme Court which I have cited above was cited with approval by Pereira, J. in *Ram Menika vs Banda Lekam* (15 N.L.R. 407) in the following passage that is to be found at page 410 :

> "This dictum strikes the keynote of the situation. It implies that if it was clear that the deed in question had been given for future services, and those services had been actually rendered, the court would have inclined towards pronouncing against revocability. The position appears to me to be simply this : If a deed is given in consideration of something to be done in future by the donee, and that thing is done by him, being induced thereto by the giving of the deed, it would, to say the least, be iniquitous to allow such a deed to be revoked."

The question was also considered by Lascelles, C.J. and Pereira, J. in *Mudiyanse vs Banda* (16 N.L.R. 53). At page 57, Pereira, J. cites the following passage from the ruling of the Full Bench in *Kiri Menika vs Ganrala* (3 Lorenz, 76) :

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"The Supreme Court thinks it clear that the general rule is that Kandyan deeds of gift are revocable, and also that before a particular deed is held to be exceptional to this rule, it should be shewn that the circumstances which constitute non-revocability appear most clearly on the face of the deed itself. The words in the present deed as to services 'continued to be rendered' do not appear to the Supreme Court to be sufficiently clear and strong."

Pereira, J. held that the concluding portion of this passage clearly means that, if the words as to services continued to be rendered were clear, and such services were actually rendered, the deed would be an exception to the rule. It is clear that the motive for the deed P1 was the implied promise on the part of the defendant to render the plaintiff assistance and necessary succour during her lifetime. The Commissioner has found that such assistance and necessary succour was actually rendered. I see no reason to disturb this finding of fact. In these circumstances the power to revoke was not exercisable. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Present: HOWARD, C.J. & DE KRETSER, J.

MEDHANANDA THERUNNANSE vs DHAMMANANDA THERUNNANSE & OTHERS

Application in revision in D. C. Kalutara No. 22026.
Argued & Decided on 1st March, 1944.

Civil Procedure Code section 755—Petition of appeal not bearing the signature of proctor or advocate at the end of petition—Stamps cancelled by the signature of the proctor—Objection that appellant had not complied with section 755 upheld by District Court—Order abating appeal—Application in revision.

Held : That the fact that the stamps on a petition of appeal were cancelled by the proctor for the appellant is sufficient compliance with the requirements of section 755 of the Civil Procedure Code.

H. V. Perera, K.C., with *J. G. T. Weeraratne*, for the petitioner.
E. B. Wickramanayake, for the 1st and 2nd respondents.
L. A. Rajapakse, for the 3rd and 4th respondents.

HOWARD, C.J.

The plaintiff appeals from an order of the District Judge in which he declined to act on a petition of appeal presented by the plaintiff. It would appear that this petition of appeal did not bear either the signature of an advocate or proctor at the end of the petition. On the other hand the stamps were cancelled by the signature of the proctor, Mr. Fonseka, and, therefore, it was obvious that the petition had been presented by an authorized person, that is, a proctor. Moreover, the petition had been accepted by the secretary of the court. In these circumstances it is difficult to understand why objection was taken to its reception by the respondents and also why the District Judge listened to those objections. In our opinion it would defeat the ends of justice if the District Judge's order were allowed to stand. In these circumstances we allow this application and direct that the petition of appeal shall be received by the District Judge. We also give the applicant his costs in order that no encouragement should be given to frivolous objections of this nature.

DE KRETSER, J.

I agree.

Application allowed.

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Present: WIJEYEWARDENE, J.

PERIS vs VIRASINGHE

S. C. No. 19—*C. R. Colombo No.* 87736.
Argued on 25th March, 1943.
Decided on 26th March, 1943.

Landlord and tenant—Notice to quit—Action for ejectment and recovery of rent and damages—Subsequent acceptance by landlord of money as damages and not as rent—Does such acceptance amount to a waiver of the notice.

Where a landlord gave notice to a tenant to quit and instituted an action for ejectment and recovery of rent and damages but, after service of summons on the tenant, accepted money from him as damages and not as rent,

Held : That the notice cannot be taken to have been waived.

Cases referred to : *Fonseka vs Naiyan Ali* (22 N.L.R. 447)
London School Board vs Peters (1902 – 18 Times L.R. 509)
Davies vs Bristow (1920 – 3 K.B. 428)

H. W. Thambiah, for the defendant-appellant.
G. P. J. Kurukulasuriya, for the plaintiff-respondent.

WIJEYEWARDENE, J.

The defendant was a tenant of the plaintiff, paying a monthly rental of Rs. 60/–. The plaintiff gave notice to the defendant on September 29th, 1942, asking him to vacate the house at the end of October. The defendant failed to do so and the plaintiff filed the present action on November 6th for the ejectment of the defendant and for the recovery of Rs. 60/– as rent and damages at Rs. 60/– a month from the 1st November. On December 10th the defendant sent the plaintiff's attorney a cheque for Rs. 140/– and filed answer on December 11th. His only plea in the answer was that a month's notice was insufficient and he asked in the prayer that he should be given time till the end of January, 1943 to vacate the premises. Though the answer did not disclose a defence which could have been successfully urged, yet the filing of the answer enabled the defendant to prevent the plaintiff from getting a decree against him on the summons returnable date. When the case came up for trial, the counsel who appeared for the defendant in the lower court suggested the following among other issues : ' Was the notice to quit pleaded in the plaint waived by the subsequent acceptance of rent ? " On the plaintiff's counsel objecting to this issue as it did not arise on the answer, the defendant's counsel stated that the plea could not have been raised in the answer as the payment referred to was made after the filing of the answer. That statement was incorrect as was shown later when the defendant gave evidence and admitted that the payment was made before the answer was filed. However, on the strength of that erroneous statement of his counsel the defendant succeeded in getting that issue framed. After hearing evidence the Commissioner entered judgment against the defendant on December 21st The defendant, thereupon, filed the present appeal and has continued to be in occupation of the premises up to date.

The counsel for the appellant relied on *Fonseka vs Naiyan Ali* (22 N.L.R. 447) in support of his contention that there was a "waiver of notice." That case was an action for ejectment filed on January 9th, 1920 by a landlord against his monthly tenant on the ground that the tenancy had been determined on December 31st, 1919 by a notice to quit. It was proved by the defendant that under the contract of tenancy he had to pay rent on or before the 10th day of each month and that the plaintiff had accepted from him on each of the dates — January 10th and February 10th a sum of money equivalent to the monthly rent and issued receipts to him stating that the sums of money were received as rents for January and February respectively. It was held by this court that these circumstances proved that the landlord had " waived " the notice. The contention of the counsel for the landlord that the acceptance of rent after the institution of the action could not affect the rights of the parties at the date of the action, was rejected by de Sampayo, J. on the ground that the tenant paid the rent before the summons was served on him and that, therefore, the action could not be regarded as pending at the time of the payment,

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The facts of the present case are entirely different. The payment here was made after the service of summons. The defendant himself has stated in his evidence that he knew that he was liable to pay damages to the plaintiff and that the cheque for Rs. 140/- was sent by him "in part payment of the damages." The defendant who has described himself as a teacher at a well-known educational institution must have understood perfectly well the meaning of the words he used. Moreover, his failure to raise this plea in the answer filed by him after the payment shows that it was not made by him as a payment of rent. The plaintiff's attorney who gave evidence stated that he received the cheque but did not accept it on account of rent and did not, in fact, issue any receipts to the defendant in respect of that payment. Moreover, the amount paid was more than the rent due at the date of the payment and it is difficult to base on such a payment an artificial presumption in support of a plea of waiver (*vide London School Board vs Peters* (1902–18 Times L.R. 509)).

The question of waiver of notice — if one may use an expression which has been condemned as a loose and unscientific expression — cannot be discussed as an abstract question of law but should be considered with reference to the facts of each particular case. It would be absolutely unreal to impute to the plaintiff in this case an intention to waive the notice when her conduct right through the proceedings is a negation of such an intention. The plaintiff could not have known her own mind if she waived the notice and yet refused to issue receipts to the defendant, and continued the action for ejectment. Moreover, the evidence of the defendant shews that he did not make the payment as rent. This question has been considered in *Davies vs Bristow* (1920–3 King's Bench 428) and some subsequent cases with special reference to the statutory tenancies created under the Increase of Rent (War Restrictions) Acts of 1915 and 1919. But the following passage from the judgment of Lush, J. in *Davies vs Bristow* (*supra*) shows how one should approach the consideration of this question with regard to tenancies in general:

> "Where a breach of covenant available for forfeiture has been committed by a tenant it is correct enough to say that the landlord can waive the forfeiture, for by the breach of covenant the term is not avoided, it is only rendered voidable at the landlord's option. He can elect whether to affirm or disaffirm the tenancy and if he by some act evinces an unequivocal intention to affirm it, as by the acceptance of rent with notice of the breach, he cannot afterwards insist on the forfeiture, and no statement made by him at the time of doing that act that he does it without prejudice to his right to re-enter will affect the conclusion that the forfeiture is waived. (The earlier cases) were cases of forfeiture ; they were not cases in which the term had been brought to an end by a notice to quit, and in my opinion the principle which is applicable to the former class of cases is not applicable to the latter. When once the notice to quit has expired the position of the parties is precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice. There is in that case no room for election by the landlord. The landlord and the tenant may of course agree that a new tenancy shall be created on the old terms, and that is what in effect they do when they agree that the notice to quit shall be waived. But the agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms."

It is not possible to hold on any reasonable interpretation of the facts in this case that there has been a "waiver of the notice." I would dismiss the appeal with costs.

Appeal dismissed.

Present: MOSELEY, J. & DE KRETSER, J.

BULATHSINGHALA vs MATILDA PERERA

S. C. No. 26—D. C. (F) Colombo No. 579/D.

Argued on 13th June, 1944.

Decided on 16th June, 1944.

Husband and wife—Action for divorce on the grounds of adultery and malicious desertion —Withdrawal of allegations of adultery before filing of answer in view of settlement arrived at between the parties in a money case which was pending between them—Does such withdrawal amount to collusion—What evidence is sufficient to constitute malicious desertion.

Held : (i) That the withdrawal of allegations of adultery in a plaint, in view of a settlement arrived at in a money case pending between the parties, which allegations were denied in the answer, does not, where a feasible explanation is given of such withdrawal, amount to collusion.

(ii) That the refusal of a wife to live with her husband and to go back to him in spite of repeated requests amounts, in the absence of any evidence to the contrary, to malicious desertion.

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H. V. Perera, K.C., with *C. J. Ranatunga*, for the plaintiff-appellant.
No appearance for the defendant-respondent.

MOSELEY, J.

This is an appeal against the judgment of the District Judge, Colombo dismissing the plaintiff's suit for divorce. The plaint, filed on 11th March, 1942, originally prayed for divorce on the grounds of adultery with each of the three co-defendants and malicious desertion. The defendant in her answer denied the allegations of adultery and malicious desertion and asked for a divorce from the plaintiff on the ground of his malicious desertion. Before the answer was filed the court was informed that the plaintiff, in view of a settlement arrived at between the parties in a money case which was proceeding between the parties, withdrew all the allegations of adultery. When the case was called for trial the defendant did not appear and the only questions for decision were whether the defendant had maliciously deserted the plaintiff and if so, was he entitled to a decree. The learned District Judge was not satisfied that malicious desertion has been proved, and held furthermore that the case also failed on the ground of collusion.

Now it seems to me that there was ample evidence upon which the learned judge could find malicious desertion against the defendant. Apart from the evidence of the plaintiff himself, a Mr. Gunetilleke, who in January, 1942, visited the defendant at the plaintiff's request, swore that when he offered to get a car and take her back to her husband she said : " I do not want to go, I have finished with him and I am not going again." This coupled with the plaintiff's evidence that from 13th December, 1941, she refused to live with him although he had several times asked her to do so, seems to me, in the absence of contradiction, to be evidence upon which a court would be irresistibly drawn towards finding malicious desertion. The learned judge, however, would appear to have been influenced by the fact that in the course of his evidence the plaintiff said that defendant had admitted an act of misconduct which he had not alleged in the plaint. He held that there was no adequate proof of such a charge and that he allowed himself to be influenced by that view is clear when he absolves the defendant from blame "for refusing to return to a husband who makes an unfounded charge of further misconduct against her." In my view the learned judge erred in finding against malicious desertion.

In regard to the finding of collusion the learned judge referred to the settlement in the money case dated 6th October, 1942, and the defendant's answer in the divorce proceedings dated 23rd October. Paragraph 3 of the latter is as follows :

> " The 1st defendant while denying the several allegations (*i.e.* of adultery) made in paragraphs 3, 4 and 5 of the plaint states that in view of the express withdrawal of the same by the plaintiff on 6th October, 1942, it is unnecessary specifically to answer the said paragraphs of the plaint."

The learned judge's comment on this is, " What is this but an agreement between the parties that the wife should suppress material facts of defence or recrimination so as to enable the husband to obtain a decree ? " I fear that I am unable to share that view. The defendant denied the allegations of adultery and I do not know what more " specific " answers could be expected. The only agreement between the parties in regard to the divorce proceedings was the withdrawal of the allegations of adultery, a circumstance which, so far from tending to facilitate the obtaining of a decree, was more likely to militate against it. No agreement on the part of the wife not to defend the action has been proved, and a feasible explanation has been given of the withdrawal by the plaintiff of the more serious charges in the plaint. In my view there was no collusion.

The appeal is allowed. The District Judge will enter a decree *nisi* for divorce.

DE KRETSER, J.

I agree.

Appeal allowed.

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

SINGHO APPU vs THE KING

S. C. No. 50/1944—*D. C. Criminal Colombo No. N*606.
Argued on 19th December, 1944.
Decided on 16th January, 1945.

Evidence Ordinance section 45—*Footprint—When may a conviction be based on the evidence of a footprint expert.*

Held : (i) That the words "science" or "art" in section 45 of the Evidence Ordinance are wide enough to entitle a court to form an opinion as to the identity of a footprint on the testimony of a person who has studied footprints and is capable of distinguishing and identifying footprints.
(ii) That a conviction can rest on the evidence of the similarity of footprints alone.

Cases referred to : *Doole (S. I. Police) vs Charles* (6 C.L.W. 79)
Rex vs Steven Mlanto (E.D.L. 11-4-35 — S. A. L. J. Vol. 52 – 1935 p. 359)
Rex vs Matambo (S.A.L.R. D.F.S. Prov. Div. 1935 p. 143)
Sidik Sumar vs Emperor (43 Cr. L.J. 1942 p. 308)
In Re Mylaswami Goundan (39 Cr. L.J. 151)
Emperor vs Badulal (A.I.R. Bom. 1928 – 158)
Chanan Singh vs Emperor (A.I.R. 1933, Lah. 299)
Pathana & Another vs King-Emperor (A.I.R. 1914, Lah. 431)
Indar Singh vs Emperor (A.I.R. 1921, Lah. 385)
King-Emperor vs Biseswar Dey & Others (A.I.R. 1923, Cal. 217)
Ronki vs Emperor (A.I.R. 1915, Lah. 469).

L. A. Rajapakse, K.C., with *S. W. Jayasuriya*, for the accused-appellant.
A. C. Alles, Crown Counsel, for the crown-respondent.

HOWARD, C.J.

This is an appeal from a decision by the District Court of Colombo convicting the appellant of (*a*) house-breaking under section 443 of the Penal Code and (*b*) theft of a clock and other articles under section 367 of the Code. The only evidence against the appellant was that of a foot-print found on a table. It is contended by counsel for the appellant that the latter could not be convicted on this evidence alone. On the night of the 21st January, 1942, a burglary took place at No. 46, Horton Place. In the morning various articles were found missing. On the same morning an Inspector of the Criminal Investigation Department visited the house in question and found a decipherable foot-print on a table. This foot-print on the same morning was photographed by the C.I.D. photographer. On the 15th September, 1943, the appellant was arrested by the Bambalapitiya Police and five foot-prints were taken with his consent. On the 16th September, 1943, the photograph of the foot-print taken on the 22nd January, 1942, at 46, Horton Place, was compared by Inspector Wijemanne, the Finger-Print Registrar, with the foot-print of the appellant. Enlarged photographs had been made of both foot-prints. The Inspector found 37 sequent points of similarity and was of opinion that the two prints are of one and the same person. In giving evidence the Inspector stated that before he compared the foot-print of the appellant with the foot-prints on the scene, he compared over 700 other foot-prints. None of them tallied. He also stated that, apart from the 37 points of similarity, the pattern, formation and shape of the foot-print found on the scene are similar to the appellant's foot-print. Mr. Wijemanne also stated that he had received special training at Scotland Yard and had had considerable experience with regard to finger-prints as well as foot-prints. In both identifications he adopted ridge details. The appellant did not call any evidence.

Counsel for the appellant placed considerable reliance on the decision of Lyall Grant, J. in *Doole (Sub-Inspector of Police) vs Charles* (6 C.L.W. 79). The learned judge in that case held that section 45 of the Evidence Ordinance does not entitle a court to convict a person of theft merely on the opinion of a finger-print expert that a foot-print found at the place where an offence has been committed is that of the accused. In coming to this conclusion Lyall Grant, J. states that the magistrate does not say in his judgment that he is satisfied from a personal comparison of the foot-prints that the one on the car is that of the accused but relies entirely on the opinion given by the expert. I am of opinion that the case of *Doole vs Charles* (*supra*) does not have the

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far reaching effect contended for by the appellant's counsel and is not an authority so far as the present case is concerned. Mr. Wijemanne is not only a finger-print expert, but he has also made a special study of foot-prints. The learned judge has also relied not merely on the opinion of Mr. Wijemanne, but also formed his own opinion from a comparison of the two photographs. He states that in view of the points of similarity there can be no doubt about the identification which is absolute and positive. The evidence of Mr. Wijemanne concludes the matter, particularly as the appellant has offered no explanation for his foot-print being found on the table.

Mr. Rajapakse has also invited our attention to two South African cases, *Rex vs Steven Mlanto* (E.D.L. 11.4.1935 — S.A. Law Journal, Vol. 52 (1935) p. 359) and *Rex vs Matambo* (S.A. Law Rep. D.F.S. Prov. Div. (1935) p. 143). In both of these cases the appeal had been allowed because the appellant had been convicted on the evidence of foot-prints alone. But in both cases this evidence was neither conclusive nor satisfactory. On the other hand the evidence of the foot-prints in this case is of a very different character. At page 230 of the 7th Edition of Wills on Circumstantial Evidence a reference is made to the evidentiary value of foot-prints in the following terms :

> " The impression of shoes, or of shoe-nails, or of other articles of apparel, or of patches, abrasions, or other peculiarities therein, discovered in the soil or clay, or snow, at or near the scene of crime, recently after its commission, frequently lead to the identification and conviction of the guilty parties (Menochius, De Praesumptionibus, Lib. v. praes 31; 2 Mascardus, De Probationibus Conel. DCCCXXXI ; Mittermaier, Traite de la Preuve, c.57). The presumption founded on these circumstances has been appealed to by mankind in all ages and in inquiries of every description, and is so obviously the dictate of reason, that it would be superfluous to dwell upon its importance or upon the grounds of its acceptance."

There is also a note making reference to a number of Indian decisions to the effect that evidence of tracks and foot-prints should always be accurate and unless there is independent evidence to corroborate, it cannot lead to an inference of guilt. The comparison made in the present case was undoubtedly accurate. The foot-print on the table was photographed on the morning after the burglary had taken place. There is no suggestion that the testimony of the foot-print was fabricated with the intention of diverting suspicion from the real offender or that the evidence of the Police Officers was not thoroughly reliable and trustworthy. I can find no Indian case to formulate the proposition that in such circumstances the court could not convict. In *Sidik Sumar vs Emperor* (43 Cr. L.J. 1942, p. 308) it was argued in the Sind Chief Court that statements as to facts made by persons skilled in identifying foot-prints should be held to be excluded by section 45 of the Indian Evidence Act. The case against the accused did not rest on the sole testimony of foot-prints. But Weston, J. at page 309, dealt with the argument addressed to him with regard to such marks in the following manner :

> " Evidence that there were foot-prints at or near a scene of offence or that these foot-prints came from a particular place or led to a particular place, is relevant evidence under section 7 Evidence Act, and there is no reason why statements as to these facts made by persons skilled in identifying foot-prints, as undoubtedly many trackers in Sind are so skilled, should be held to be excluded by section 45, Evidence Act. The learned judge's argument is that as this section was amended in 1899 to include opinion as to identity of foot impression or impressions seen by a witness at the scene of the offence and later in a test is not admissible. We do not think this view is correct. The words ' science ' or ' art ' in section 45, Evidence Act according to the authorities are to be construed widely. The amendment relating to finger impressions appears to have been made to meet particular decisions which had been given by the courts, and we do not think that this amendment operates to limit in any way the wide meanings which should be given to the expressions ' science ' or ' art.' There is no doubt that, particularly in the Province of Sind, there are trackers who, though they may have difficulty in explaining their methods, have a very high degree of skill in observing, tracking and comparing the foot-prints of persons. Whether a particular tracker called upon to assist, is or is not an expert in this art or science, is of course a matter to be decided by the judge or magistrate, before reliance can be placed upon his evidence. But if it is established to the satisfaction of the court that the tracker is a person capable of distinguishing and identifying foot-prints, there is no reason why his evidence should not be given such consideration as it may deserve."

The question of the relevancy of the testimony of a witness who has made a study of the prints made by the human foot was also considered by Burn, J. in the case of *In Re Mylaswami Goundan* (39 Cr. L.J. 151) in the following passage :

> " Mr. K. Krishnamurthi for accused No. 2 has contended that the evidence of the expert was inadmissible and referred to section 45, Evidence Act. He points out that though provision is made for expert evidence regarding finger-impressions, there is no provision for expert evidence regarding impressions of feet. He also contends that the study of foot-marks is not worthy of the name of science and that therefore the evidence regarding foot-marks cannot be brought under the general description given in section 45. There is some force in this contention. It is quite clear that the science, if it could be so called, of foot-prints has not yet progressed very far. There is equally no doubt whatever (as was observed in *Emperor vs Badulal* (A.I.R. Bom. 1928, 158) about the fact that 'evidence of similarity of the impressions of the feet, shod, or unshod, is admitted by the courts in India and in Great Britain, and as far as I know in every other country, though there is no science

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of such impressions.' The fact is that such evidence comes under the head of circumstantial evidence: *vide* Wills on Circumstantial Evidence, p. 285. In a case of this kind it is not the opinion of the expert that is of any importance but the facts that the expert has noticed. It is quite clear that a person who has made a study of the prints made by human foot is better qualified to notice points of similarity or dissimilarity than one who has made no such study. He is able to lay these points before the court and from his evidence the court draws its own conclusions. That is precisely what has been done in the present case."

Here again that testimony against the accused did not rest solely on the evidence of foot-prints. Applying the principles formulated by the courts in these two cases it would appear that the learned judge in the present case was entitled to construe the words "science" or "art" so widely as to include within its ambit the testimony of a person who had studied foot-prints. If he was satisfied that such person was capable of distinguishing and identifying foot-prints, he was also entitled to rely on his testimony.

In *Chanan Singh vs Emperor* (A.I.R. 1933, Lahore 299) the appellant had been convicted of robbery on the evidence of foot-prints and possession of the stolen property. It was held that the foot-print evidence was of no value inasmuch as the comparison was made about two months after the occurrence when the original tracks were no longer preserved. Similarly it was held in *Pathana & Another vs King-Emperor* (A.I.R. 1914 Lahore 431) that track evidence is hardly of any value when the comparison has been made 8 or 9 days after the affair. In the present case the foot-print was examined at once and preserved by photography.

In *Indar Singh vs Emperor* (A.I.R. 1921, Lahore 385) it was held that foot-prints made by shoes and not by bare feet identified as similar to those of the accused and found some little distance from the scene of the offence, coupled with the pointing out by the accused of the place where the stolen property is concealed, is not sufficient evidence to justify his conviction. It has been held that the foot-prints of boots are less valuable than those of bare feet.

That the evidence of foot-print experts is admissible in the Indian Courts is evident from the judgment of the court in *The King-Emperor vs Biseswar Dey & Others* (A.I.R. 1923, Calcutta, 217). At page 221 it is stated as follows:

"The learned Sessions Judge has stated in his letter of reference that foot-print found close to pool of blood was according to the foot-print expert the foot-print of the accused Biseswar; but we can find no such statement in the evidence given by the foot-print expert, Inspector Anansa Kumar Chakravarty (P.W. No. 20). He has stated in detail the points of similarity and dissimilarity between the impression that was taken of Biseswar's foot-print and the foot-print found at the scene of the murder. But he has not stated that the points of similarity preponderate over those of dissimilarity nor has he expressed his opinion as an expert that the two foot-prints are of one and the same person. We are told by the learned counsel for the Crown that he did give evidence to this effect before the Committing Magistrate. But this deposition was not put in evidence at the sessions trial and cannot be considered by us. In the case of Biseswar we therefore hold there are no materials on the record to justify our setting aside the unanimous verdict of the jury."

In the present case Mr. Wijemanne has stated his opinion as an expert that the foot-prints are of one and the same person.

In *Ronki vs Emperor* (A.I.R. 1915, Lahore 469) it was held that track evidence of a flimsy nature should not be believed without sufficient corroboration.

It would appear, therefore, that there is no authority for the contention that a conviction cannot rest on the evidence of the similarity of the foot-print alone. When such evidence is inconclusive and unsatisfactory there must no doubt be corroboration. In the present case the comparison was made by an expert of undoubted experience who gave ample and adequate reasons for his opinion that the foot-prints were made by one and the same person. That evidence was accepted by the learned judge who also had the opportunity of examining the photographs and forming his own conclusions.

In these circumstances the conviction can be supported and the appeal must be dismissed.

JAYETILEKE, J.

I agree.

Appeal dismissed.

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IN THE PRIVY COUNCIL

Present: LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

GOONESINGHE vs KRETSER

Privy Council Appeal No. 51 *of* 1943.
Decided on 20th December, 1944.

Certiorari, Writ of—Courts Ordinance section 42*—Election Judge appointed under the Ceylon State Council (Elections) Order-in-Council* 1931*—Can a Writ of Certiorari issue to such Election Judge.*

Held : That a Writ of Certiorari cannot be granted to bring up any order made by an Election Judge appointed under the Ceylon State Council (Elections) Order-in-Council 1931.

Per LORD GODDARD : " It is well settled, and counsel did not seek to argue to the contrary, that a court having jurisdiction to issue a Writ of Certiorari will not and cannot issue it to bring up an order made by a judge of that court. Nor will a superior court issue the writ directed to another superior court—*Reg. vs Justices of the Central Criminal Court* (11 Q.B.D. 479) —and if the Election Judge is to be regarded as a special or independent tribunal his court would, in their Lordships' opinion, be a superior court. Considering that the court is held before a judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal and their Lordships will humbly advise His Majesty that it should be dismissed with costs."

Cases referred to : *Reg. vs Justices of the Central Criminal Court* (11 Q.B.D. 479)

D. N. Pritt, K. C., with *Polak*, for the appellant.

LORD GODDARD

On the 26th April, 1941, a by-election was held for the return of a member of the Ceylon State Council for the Electorate of Colombo North. The successful candidate was a Mr. de Silva, and the appellant, who takes an active part in political and municipal affairs in Colombo, was one of his prominent supporters. Subsequently a petition was presented to the Supreme Court of Ceylon, under the Ceylon State Council (Elections) Order-in-Council, 1931, asking that the election might be declared void and alleging general intimidation, treating, and undue influence. In two instances undue influence on electors to cause them to vote for Mr. de Silva was alleged to have been exercised by the appellant, and in his judgment which was delivered on 22nd December, 1941, the Election Judge, who is the present respondent, found both these charges proved. The learned judge thereupon ordered that notice should at once be given to the appellant in terms of Article 79 (2) of the Order-in-Council to show cause why he should not be reported to His Excellency the Governor as having been guilty of a corrupt practice. The offence of undue influence, as defined by Article 53 of the Order-in-Council is by Article 55 declared to be a corrupt practice. The combined effect of Article 55 (1) and Article 79 (3) is that a person reported for a corrupt practice is rendered incapable of voting or being elected to the State Council for a period of seven years. The notice given to the appellant to show cause referred to only one of the cases found proved against him. On appearing to show cause, the appellant, who had given evidence on the trial of the petition, desired to call nine witnesses, whose names he had previously given, with the object of proving that he was not guilty of the offences specified in the notice which the Election Judge had found proved. The learned judge refused to hear these witnesses, on the ground that he could not be asked to reverse the findings which he had already made on the trial of the petition. He held that as by Article 78 of the Order-in-Council his determination as to the validity of the election was final it followed that his finding that a person had committed a corrupt or illegal practice must necessarily be final also, and he reported the appellant. The appellant then moved the Supreme Court, for a mandate in the nature of a writ of certiorari to bring up what was called the Order by which he was reported, though it would perhaps be more accurate to call it simply the report, and have it quashed. On June 1st 1942, the Chief Justice of Ceylon delivered judgment refusing to issue the mandate, holding that

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the Election Court in Ceylon was a Superior Court to which no writ in the nature of certiorari would lie. Against his refusal the Supreme Court gave the appellant leave to appeal to His Majesty in Council.

Their Lordships are of opinion that the judgment of the learned Chief Justice is plainly right. By Article 75 of the Order-in-Council every election petition is to be tried by the Chief Justice or a judge of the Supreme Court nominated by him, and the Chief Justice or the nominated judge are referred to in the Order as the Election Judge. By clause 5 of this Article it is provided that unless otherwise ordered by the Chief Judge all interlocutory matters in connection with a petition may be dealt with and decided by a judge of the Supreme Court. Article 76 provides that an election petition may be presented to the Supreme Court by one or more of certain classes of persons. These two sections alone would appear to show quite clearly that an election petition is a proceeding in the Supreme Court, and a reference to the rules of procedure which are enacted in the Sixth Schedule to the Order confirms, if confirmation were necessary, this view. Rule 4 gives the form a petition is to take and its heading is " In the Supreme Court of Ceylon. " Rule 29 deals with the withdrawal of a petition which cannot be done without the leave of the judge, that is the Election Judge. Sub-Rule 2 of this Rule prescribes the affidavits which are to be filed on such an application, but provides that a judge of the Supreme Court, and not only the Election Judge, may on special grounds dispense with the affidavit of any particular person. Again Rule 37 provides that the petition is not to abate because a respondent dies, resigns, or gives notice to the court that he does not intend to oppose the petition, and provision is made as to how and when notice is to be given to the court. While the Ordinance constituting the Supreme Court does not confer upon it original but only appellate jurisdiction in civil cases, their Lordships are of opinion that cognisance of election petitions is a special jurisdiction conferred upon the Supreme Court by the Order-in-Council, and that is abundantly clear from the provisions to which they have referred. It is well settled, and counsel did not seek to argue to the contrary, that a court having jurisdiction to issue a writ of certiorari will not and cannot issue it to bring up an order made by a judge of that court. Nor will a Superior Court issue the writ directed to another Superior Court — *Reg. vs Justices of the Central Criminal Court* (11 Q.B.D. 479) — and if the Election Judge is to be regarded as a special or independent tribunal his court would, in their Lordships' opinion, be a Superior Court. Considering that the court is held before a judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J. (President), KEUNEMAN, J. & JAYETILEKE, J.

REX vs BALAKIRA alias WADU BALAYA

Appeal No. 40 *of* 1944 *with Application No.* 135 *of* 1944
S. C. No. 26—*M. C. Ratnapura No.* 39325.
Argued & Decided on 29th January, 1945.

Court of Criminal Appeal—Rape—Burden of proof.

Held : That in a charge of rape there is no burden on the accused to prove that the intercourse was with the consent of the prosecutrix. The prosecution must prove that the accused had intercourse with the prosecutrix without her consent.

A. H. C. de Silva, for the appellant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

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HOWARD, C.J. (President)

In a case of rape the burden on the prosecution is to prove first of all that the accused has had sexual intercourse with the complainant, and, secondly, when the complainant is over the age of consent, that such intercourse took place without her consent. On page 6 of the charge the learned judge has told the jury as follows : " You must be satisfied by the balance of evidence with his story that he had intercourse with the consent of the complainant." This passage places the burden of proving that he had intercourse with the consent of the complainant on the accused. That is clearly a misdirection. We have been referred by Mr. Gunasekera to various passages in the summing-up which go to show that the burden is correctly placed on the prosecution. Those passages, in our opinion, are not specific enough to minimize the effect possibly on the minds of the jury of the passage on page 6. One of the passages referred to by Mr. Gunasekera is on page 24 and is as follows : " The question is, do you believe the version of the incident as deposed to by the girl in the witness-box ? After making due allowance for the contradictions pointed out to you by counsel for the defence, do you accept her story or not ? If you do not accept her story, then you will acquit the accused." That passage does not make it clear to the jury that the burden was on the prosecution to prove beyond all reasonable doubt that the intercourse took place without her consent. On page 25 Mr. Gunasekera has invited our attention to this passage : " Now it is admitted that the accused went to the house on the day in question and had connection with this girl ; the only question is whether it was forcible or not." There again there is no statement that the onus of proving that it was forcible rests on the prosecution. Then again, on page 27 of the charge Mr. Gunasekera has invited our attention to the following passage : " If, on the other hand, you do not accept the story of the girl, or, if you find that there is a reasonable doubt about the truth of the prosecution case, then you will acquit the accused." With regard to this passage, we think that the direction with regard to the onus of proof was not specific on this question of whether intercourse took place with the consent of the complainant.

In these circumstances we are of opinion that the conviction cannot stand. The only question that remains is whether there should be a fresh trial. The corroboration adduced by the Crown was extremely slender. Moreover, the conduct of the complainant after intercourse had taken place is open to such criticism as throws some doubt on its veracity. We therefore, make no order with regard to a new trial.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J. (President), KEUNEMAN, J. & JAYETILEKE, J.

REX vs JOHN SILVA

Application No. 140 *of* 1944.
S. C. No. 87—*M. C. Panadura No.* 27675—*4th Western Circuit*, 1944
Argued on 29th January, 1945.
Decided on 12th February, 1945.

Court of Criminal Appeal—Misdirection—Comment in the charge to the jury on the failure of the accused to give evidence—In what circumstances is judge entitled to comment on failure of accused to give evidence.

Held : That a statement to the effect that the failure of the accused to give evidence was an element the jury might take into consideration does not by itself amount to misdirection.

Cases referred to : *The King vs Duraisamy* (43 N.L.R. 241)
The Queen vs Rhodes (1899 ; 1 Q.B. 77)
Rex vs Voisin (13 Cr. App. Reps. 89)
Kops vs The Queen (1894 ; A.C. 650)
Rex vs Jane Blatherwick (6 Cr. App. Reps. 281)
Rex vs Bernard (1 Cr. App. Reps. 218)

G. E. Chitty, with *S. E. J. Fernando*, and *T. Paramsothy*, for the applicant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

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HOWARD, C.J. (President)

The only substantial point in this appeal which is from a conviction on a charge of murder is whether the learned judge has misdirected the jury in the following passage that occurs on pages 26–27 of his charge :

> " Let us see what evidence is called for the defence. The prisoner does not give evidence. I have told you and counsel, both for the defence and the Crown, have told you that the burden of proving the guilt of the accused rests upon the Crown, and I have told you that there is no obligation upon the prisoner to establish his innocence. Then you ask yourselves, ' Have the Crown proved the case ? ' Have they satisfied you beyond reasonable doubt, first of all, that the prisoner was the man who caused the fatal wound, and secondly, that he had the specific intention, or in the alternative, the knowledge about which I have addressed you ? If you ask yourselves that question naturally you will say to yourselves, ' Here is the evidence of two eye-witnesses. What is the evidence for the defence ? ' Whereas the accused need not give evidence or say anything at all, the fact that he has not given evidence and contradicted the evidence of the two eye-witnesses is an element which you will be entitled to take into consideration when you are discussing the question, ' Has the Crown proved the case ? Has the Crown satisfied us beyond reasonable doubt.' "

Mr. Chitty on behalf of the appellant, has contended that the direction to the jury that the fact of the appellant not having given evidence and contradicted the evidence of the two eye-witnesses is an element which they will take into consideration when they are discussing the question " Has the Crown proved the case ? Has the Crown satisfied us beyond reasonable doubt " amounted to a misdirection. In support of this contention Mr. Chitty cited the case of *The King vs Duraisamy* (43 N.L.R. 241). In that case also the accused failed to give evidence and in commenting on that fact the learned judge told the jury that on evidence being adduced, which implicated the accused, the fact that he had not given evidence entitled them to draw an inference against him. The judge did not explain the nature of the inference. He also said that in deciding the Crown case, whether it had been established beyond reasonable doubt, the jury were to take notice that the accused had not given evidence at all without pointing out to them that the existence of a reasonable doubt enured to the benefit of the accused whether he gave evidence or not. It was held that the principle, that the standard of proof required in criminal cases remains constant, irrespective of the fact that the accused has not given evidence, may not have been properly appreciated by the jury and that there had been a misdirection with regard to the burden of proof.

The words used by the learned judge in this case were that the failure of the accused to give evidence was " an element that they may take into consideration " in discussing whether the case has been proved beyond all reasonable doubt whereas in *The King vs Duraisamy* (*supra*) the words used were that " they were entitled to draw an inference against him." The discretion vested in a judge to comment on the failure of an accused to give evidence cannot be questioned, *vide The Queen vs Rhodes* (1899; 1 Q.B. at p. 83) where Lord Russell of Killowen states as follows :

> " The third and last question is whether the presiding judge has a right under the Criminal Evidence Act, 1898, to comment on the failure of the prisoner to give evidence on his own behalf. In this case the prisoner was not called ; and the only question that we have to consider is whether the chairman of quarter sessions had a right to comment on his absence from the witness-box. It seems to me that he undoubtedly had that right. There is nothing in the Act that takes away or even purports to take away the right of the court to comment on the evidence in the case, and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case ; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what these comments should be. There are some cases in which it would be unwise to make any such comment at all ; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge ; and it is only necessary now to say that that discretion is in no way affected by the provisions of the Criminal Evidence Act, 1898."

I would also refer to *Rex vs Voisin* (13 Cr. App. Reps. 89). At page 93, Lawrence, J. in his judgment states as follows :

> " The judge's comments on the appellant's not going into the witness-box and his not calling the woman Roche after her discharge were within his judicial discretion and are not matters for this court to review. It was a case demanding explanation by the only persons who could know the facts if ever one could be."

Again in *Kops vs The Queen* (1894 ; A.C. 650) the Lord Chancellor, at page 653, states as follows :

> " The majority of the learned judges of the Full Court have held that the comments made by the learned judge at the trial in this case were made according to law, and that there was no reason to interfere with the verdict which followed.
>
> Their Lordships see no reason to doubt the correctness of the conclusion at which the majority of the court arrived. The learned judges did not lay down— it was not within the scope of the case necessary to lay down — any general rule as to such comments. There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary."

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In *Rex vs Jane Blatherwick* (6 Cr. App. Reps. 281) it was held that, though the fact that the appellant was not called is not of itself corroboration, it entitled a jury to act where perhaps they would not otherwise have done so. In *Rex vs Bernard* (1 Cr. App. Reps. 218) Darling, J. stated in the judgment that it is right that juries should know and if necessary, be told, to draw their own conclusions from the absence of explanations by the prisoner.

From the cases I have cited the following principles may be deduced :

(*a*) It is within the discretion of a judge to comment on the failure of an accused person to give evidence and the Court of Criminal Appeal will not generally interfere with the exercise of that discretion.

(*b*) The comments of the judge on an accused's failure to give evidence should be confined to those cases in which there are special circumstances which the accused can only explain and which therefore call for explanation by him.

(*c*) The failure of the accused to give evidence though not amounting in law to corroboration of the story of the prosecution may enable a jury to act where perhaps they would not otherwise have done so.

In the present case we do not think that the evidence elicited any special circumstances that called for an explanation from the appellant. On the other hand the learned judge did not in his charge state that any particular circumstance or fact called for such an explanation. Nor did he say that from the failure to give evidence the jury might draw an adverse inference. He merely said it was an element they might take into consideration. He was inviting their attention to the fact that the appellant had failed to give evidence and so contradict the testimony of the two eye-witnesses. This fact might be taken into consideration and entitled them to convict whereas if the accused had given evidence and denied the story of the eye-witnesses, they might not have felt themselves justified in so doing. The charge makes it clear that the jury are not to convict if they have a reasonable doubt. In these circumstances we think there was no misdirection, and the appeal is dismissed.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J. (President), KEUNEMAN, J. & JAYETILEKE, J.

REX vs LEWISHAMY & TWO OTHERS

Appeals Nos. 1–3 *of* 1945 (*Leave granted by court*)
S. C. No. 49—*M. C. Badulla-Haldumulla No.* 225.
Argued & Decided on 29th January, 1945.

Court of Criminal Appeal—Unlawful assembly and rioting—Penal Code sections 140, 141, 144, 146, 380, 283 *and* 419—*Possession of property removed by members of the unlawful assembly—Is such possession, in the absence of other evidence, sufficient to establish that the possessors were members of the unlawful assembly.*

Held : That where property is robbed by the members of an unlawful assembly evidence of possession of such stolen property is not in itself sufficient to establish against the possessor the charge of being a member of the unlawful assembly.

N. M. de Silva, for the appellants.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

HOWARD, C.J. (President)

In the cases of the 20th and 22nd accused the only evidence to implicate them in this charge of being members of an unlawful assembly was the fact that certain property removed from the boutique was found in the smithies of these two accused. In connection with that evidence the learned judge, at pages 39 and 40, says : "So upon that ruling I think I may direct you that if you are satisfied that these dishes and the other articles were stolen property, if the accused was the sole occupant of the building in which the stolen property was found, and that the explanation given by him is not in your opinion a reasonable explanation, then it will be open to you, if you are so disposed, to draw the inference that the accused was a member of an unlawful assembly

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and as such he broke into this Zakah Stores and/or other stores and so possessed himself of this property, while being a member of that assembly, and that if not he himself, others, were armed with deadly weapons, and that they or some of them did use violence to get into the buildings from which these things were stolen. That is the position in regard to the 22nd accused." A similar direction is given with regard to the 20th accused. The learned judge, however, has not told the jury that it is possible that the fact that the 20th and 22nd accused were found in possession of stolen property leads to the inference that they were merely receivers of these goods. If they were in fact merely receivers, they would be entitled to an acquittal on this charge of being members of an unlawful assembly. We think that this was a misdirection and the convictions of these two accused the 20th and the 22nd must be set aside.

With regard to the 9th accused, the main evidence against him was that in his garden was also found property which was identified as having come from the boutique where this unlawful assembly took place. There was also some evidence that he was seen amongst persons who were in the boutique that night. On the other hand, the learned judge threw some doubt on the credibility of some of these witnesses; nor was their evidence accepted by the jury with regard to others of the accused who were acquitted. In these circumstances it is possible that the jury merely looked at the testimony which established that the 9th accused was found in possession of property which had been stolen. We, therefore, think that the conviction of the 9th accused must also be set aside.

The appeals of these three accused are allowed.

Appeals allowed.

Present: DE KRETSER, J.

GOONESINGHE vs DE MEL (Mayor, Colombo Municipal Council)

Writ of Mandamus on Mayor, Municipal Council, Colombo.—No. 554.
Argued & Decided on 19th December, 1944.

Mandamus—Courts Ordinance section 42—Municipal Councils Ordinance sections 82 and 85—Where there is another remedy does Mandamus lie?—Delay—Mandamus will not be granted.

Held : (i) That a writ of mandamus will not be granted where there is another remedy available.
(ii) That a writ of mandamus will not be granted where the application is belated.

C. S. Barr-Kumarakulasingham, with *M. M. Kumarakulasingham*, for the petitioner.
H. V. Perera, K.C., with *N. K. Choksy*, for the respondent.

DE KRETSER, J.

This is an application for a Mandamus on the Mayor of the Colombo Municipal Council and the prayer is that this court may issue a writ in the nature of a Mandamus on the respondent "directing him to place the said motion on the agenda for consideration by the said Council."

Many of the facts leading up to this application are not in dispute, some of them are much in dispute. I propose to confine myself only to such facts as are necessary for the purpose of my order. I do not propose to deal at greater length with this matter than absolutely necessary.

It would appear that the Municipal Council undertook the collecting of contributions due on the War Damage Ordinance, and that they were to be paid 6% of the collection by way of remuneration. The amount which it received by way of remuneration amount to Rs. 29,953.41. According to a minute by the Treasurer the expenditure was Rs. 24,688.92. That left a balance of Rs. 5,264.49. The petitioner in his petition states, however, that the sum was Rs. 7,746.37.

By a resolution of the Council, at the time they undertook the collection, any surplus, after meeting the expenses, was to be credited to Revenue. When, therefore, the surplus was found one would imagine it would automatically pass to Revenue. However, some question seems to have arisen regarding the use of this surplus, that should have been credited to Revenue, and the Commissioner of War Risk Insurance was of opinion that it would not be proper for the Council to make a profit on the transaction and

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proposed that the amount should be distributed among the contributors. The Commissioner of the Municipal Council agreed with this opinion but thought that the distribution of it would involve considerable labour and expense. He accordingly recommended the remuneration suggested by the Treasurer, *viz.* that the money should be distributed among certain officers and clerks who had done extra work. Apparently there had been a temporary staff, who had been employed for the work, who did not get the benefit of the largesse.

The matter came up for consideration by the Finance Committee, in which the petitioner seems to form an unfortunate and conspicuous minority. At the meeting a member enquired why the Commissioner of the Municipal Council was not sharing in the money, and according to the affidavits — all but the petitioner's — it was agreed that he should have a month's salary. According to the petitioner, however, there was no such suggestion, and being unaware of the resolution which credited this money to Revenue and finding that the money was to be paid to deserving clerks he made no protest.

On the following day the Treasurer duly minuted to the Secretary, who ought to have been present at the committee meeting, that his previous recommendation had been amended, and he forwarded the amended schedule.

Then the recommendation of the Finance Committee came before the whole Council on the 7th June and the petitioner was present at the meeting. He states that he was unaware that the Commissioner was also to be remunerated and when the item came up that the Treasurer's suggestion recommended by the Finance Committee should be passed, he believed that the money would be distributed among the deserving officers. Five of the gentlemen have sworn to the contrary. The recommendation of the Finance Committee was adopted. The payment was made on that footing.

When that happened the petitioner was quite surprised and he called for the relevant files, and thereupon came to the conclusion that there had been manipulation of the documents. He then gave notice on the 31st August, 1944, of a resolution in the following terms :

> "That the extra payment of Rs. 2,000/6 to the Municipal Commissioner was not contemplated when the Council adopted the Municipal Treasurer's suggestions at the meeting of the 7th June for the distribution of the remuneration to the officers of the Council who were engaged in War Risks Insurance and that this sum be collected from him and remitted to revenue."

He forwarded this motion with a covering letter giving notice that he would move it at a general meeting to be held on the 6th September, 1944. He obtained the signature of five other members to the motion as he feared, he says, that the resolution may be considered one rescinding the resolution passed on the 7th June. Quite clearly he did not intend it to have any such effect, and he was only meeting any possible objection that might arise. His complaint was that the Council had not contemplated the payment to the Commissioner.

However, on this resolution reaching the Secretary, in accordance with by-law 10 (*c*) he placed the matter before the Chairman, who was of opinion that the resolution was out of order, and he ordered that it should not be placed on the agenda, and at the same time, in terms of the rule caused the petitioner to be informed of his decision. The first ground given was that the petitioner's motion was not correct in stating the facts, and the second ground was that motion did not seek to rescind any resolution and that it did not come within the provisions of rule 10 (*e*).

The letter is dated 2nd September, 1944. The meeting came on the 6th September. The petitioner made no attempt to move his resolution at the meeting and in November he filed his present papers.

Now, there is more than one ground on which this application is bound to fail, whatever the facts may be. The petitioner's application refers to his motion not being placed on the agenda paper of the General Meeting held on the 6th September, 1944. That meeting is long passed and cannot be reheld. This court cannot issue a Mandamus merely to find it futile. Secondly, there has been delay that has not been explained—at least a delay of two months. Thirdly, under the Municipal Councils Ordinance, section 85, the petitioner had the right to bring forward his resolution in Council despite the opinion expressed by the Chairman. He had, therefore, a remedy open to him, which he did not avail himself of. It is sought to get over this difficulty by stating that the Chairman had no right to rule out the motion in advance, and since he did, that it was useless on the petitioner's part to move the resolution which would also be ruled out. I do not agree with this contention.

Section 82 of the Municipal Councils Ordinance requires the Chairman to cause a printed or written notice of every meeting and of the business of the meeting to be served on each member at least 4 days before the meeting. He is, therefore, the person responsible for giving due notice of the agenda. There is, however, provision made in section 85 for matters being considered that do not appear on the agenda. Now, by the rules which have the virtue of law by reason of

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section 109 of the Ordinance, three clear days' notice of every motion should be given to the Secretary, and unless it is given the motion will not be included on the agenda. The agenda has to go out 4 days before the meeting is held. Why notice of a motion should be given three days before the meeting is a mystery which nobody has attempted to solve. The due notice being given, the Secretary is required by rule 10 (*b*) to date and number each of such notices and to enter them in the order in which they are received. Section 10 (*c*) requires him to submit notices of motion to the Chairman before they are placed on the agenda. The two rules are not inconsistent as far as I can see. One has to bear in mind they are notices of motions and the motions themselves are moved at a meeting. The Chairman may be of opinion that a motion is out of order and may inform the giver of the notice, but nevertheless the notice should be on the agenda and should come before the meeting. The mover will then have notice of the attitude of the Chairman and he could abandon the motion or successfully meet the Chairman's opposition. As a matter of fact rule 10 (*c*) gives the Chairman the right to express an opinion regarding a notice of motion, not regarding the motion itself — whether any distinction is intended I do not know. Nobody was able to tell me how the Chairman guided himself in deciding that a notice of motion was out of order. There is rule 10 (*d*) which says : " Every notice of motion shall be relevant to some question affecting the Municipal Council of Colombo." That would be one guide. Rule 10 (*e*) says : " No motion to rescind any resolution which has been passed, etc." That would be another guide. But the Chairman in this particular case chose to order the matter out on the ground that facts were not correctly stated. If the facts were not correctly stated, the body who could properly have dealt with it would have been the body to which the appeal was made, namely, the members of the Municipal Council.

However, it is unnecessary to go into these details except in passing to express an opinion on this matter. As I said before, the application must be refused because another remedy is available, because it is belated and because this court cannot now pass an order which would be futile. In this connection I refer to Halsbury's Laws of England, Vol. No. 9 at p. 1308.

The application is refused. I shall fix the costs tomorrow.

20.12.44.

Having heard counsel, I fix the costs to be paid by the petitioner to the respondent at a sum of Rs. 1,500/–.

Application refused.

Present: HOWARD, C.J.

RODRIGO (Excise Inspector) vs PUNCHI MAHATMAYA

S. C. No. 1053—*M. M. C. Kandy No.* 34976.
Argued on 22nd January, 1945.
Decided on 31st January, 1945.

Joinder of charges—Criminal Procedure Code section 184—*Two persons charged under the Excise Ordinance with jointly being in unlawful possession of arrack—Guilty knowledge established only against one person—Can both be acquitted on ground of misjoinder of charges.*

Two parcels, one containing four bottles of arrack and the other three bottles of arrack were found in a bus under the seats of the driver and the conductor who were its sole occupants. They were charged with jointly being in possession of seven bottles of arrack. The evidence established that only the conductor, who on the approach of a party of Excise Officers was seen trying to push something under his seat, knew that his parcel contained arrack. The magistrate acquitted both accused on the ground of misjoinder of charges.

Held : (i) That there was no misjoinder of charges.
(ii) That the conductor was in exclusive possession of the four bottles of arrack under his seat.

Per HOWARD, C.J. : " If he (the magistrate) had come to the conclusion that there was no evidence against the 1st accused, he should have discharged him and considered the case made against the respondent, the 2nd accused."

Cases referred to : *Excise Inspector vs Marikkar* (8 Times of Ceylon L.R. 65)
Khan vs Kanapathy & Four Others (9 C.L.W. 21)
Wijemanne vs Sinnathamby (9 C.L.W. 165)
Babulal Choukhani vs King-Emperor (39 Cr. L. J. 452).

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E. H. T. Gunasekera, Crown Counsel, for the complainant-appellant.
G. E. Chitty, for the accused-respondent.

HOWARD, C.J.

This is an appeal with the sanction of the Attorney-General from an order of the magistrate at Kandy acquitting the respondent on a charge of having on the 20th June, 1944, committed an offence punishable under section 43 (*a*) of the Excise Ordinance in that he, together with another person, the 1st accused in the case, had in their possession, without a permit, an excisable article, namely 24 drams of arrack, in breach of section 16 of the said Ordinance. The prosecution established the following facts :

(*a*) The two accused were the only occupants of a bus which was halted at a bus stand in Kandy, the 1st accused the driver being seated in the driving seat and the respondent the conductor in a seat immediately behind it.

(*b*) A party of Excise Officers on approaching the bus in a car saw the respondent trying to push something under the seat.

(*c*) The Excise Officers got out of the car and found under the respondent's seat 4 bottles of arrack wrapped in a mat bag. Under the driver's seat in a box were found three bottles of arrack. The bottles contained 8 drams each and were sealed with Government warehouse seals.

At the close of the case for the prosecution, the magistrate after hearing argument held that the respondent, the 2nd accused, knew that the parcel under his seat contained arrack, but there was no evidence to prove that the 1st accused knew the contents of this parcel. He further held that the 1st accused should have been separately charged with the possession of 3 bottles of arrack and the respondent with 4 bottles of arrack and that there had been a misjoinder of charges. He, therefore, acquitted the accused. The complainant has appealed against the acquittal of the respondent, the 2nd accused.

Section 184 of the Criminal Procedure Code is worded as follows :

> "When more persons than one are accused of jointly committing 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."

The respondent and the 1st accused were accused of jointly being in unlawful possession of 7 bottles of arrack. The evidence, according to the magistrate, failed to establish the guilty knowledge of the 1st accused. This fact, however, does not make the joinder of the two accused in one charge bad. The section deals with three matters : accusation, charge and trial. It says nothing about verdict. In this connection I would refer to the case of *Babulal Choukhani vs King-Emperor* (39 Cr. L.J. 1938 p. 452). In my opinion the magistrate was wrong in holding there was a misjoinder of charges. If he had come to the conclusion that there was no evidence against the 1st accused, he should have discharged him and considered the case made against the respondent, the 2nd accused.

Counsel for the respondent has put forward the further contention that, even if the magistrate was wrong in holding that there was a misjoinder of charges, there was no evidence to establish that the respondent was in exclusive possession of the four bottles of arrack under the seat. It is suggested that the parcel may have been left by a passenger who left the bus when it stopped or possibly put there by a passenger boarding the bus after it had stopped. The appeal being from a finding of " not guilty " it is urged that it can only be allowed if it is manifest that there has been a miscarriage of justice. With regard to the question as to whether the prosecution have established the sole and exclusive possession of the respondent, I have been referred to the cases of *Excise Inspector vs Marikkar* (8 Times of Ceylon 65), *Khan vs Kanapathy & Four Others* (9 C.L.W. 21) and *Wijemanne vs Sinnathamby* (9 C.L.W. 165). In *Wijemanne vs Sinnathamby*, opium was found under the pillow of the bed occupied by the accused. There was, however, nothing in the conduct of the accused, either before or after the discovery of the opium, to indicate that he knew it was there. In the present case the respondent was seen pushing the parcel containing the 4 bottles of arrack under the seat. In *Khan vs Kanapathy* (*supra*) stolen property, consisting of the carcases of 5 goats, and one live goat, were found in a car in which seven persons were travelling. There was no evidence to show that any one or more of the accused put the stolen property in the car or was responsible for it being found there. In these circumstances it was held that the prosecution had not discharged the onus which lay on it to prove that one or more of the 5 accused were in actual exclusive possession of the stolen property. In *Excise Inspector vs Marikkar* (*supra*) the accused was charged with unlawful possession of ganja which was found under a low platform in the verandah of his boutique. At the time of the discovery there were in the boutique about 6 or 7 people including salesmen. Moreover 3 or 4 salesmen ate and

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slept in the boutique. It was held that there was no proof of actual and exclusive possession by the accused.

I think the various cases cited can be differentiated from the facts of the present case. The case put forward by the Crown has established actual and exclusive possession by the respondent. In these circumstances there has been a manifest miscarriage of justice. I need hardly say that the respondent must be afforded an opportunity of giving evidence and calling witnesses. I set aside the order of acquittal and direct that the case be remitted to the magistrate so that he may call upon the respondent for his defence.

Acquittal set aside and sent back.

Present: JAYETILEKE, J.

FERNANDO vs FERNANDO & OTHERS

S. C. No. 237—C. R. Negombo No. 45221.
Argued on 1st February, 1945.
Decided on 9th February, 1945.

Civil Procedure Code section 347—Execution of decree—Application for execution made after lapse of more than one year from date of decree—Failure to give judgment-debtor notice of the application—Sale in execution—Validity of sale—Form of application.

Where, after the lapse of more than one year from the date of a decree, an application for its execution was made in Form 42 in Schedule II to the Civil Procedure Code and the judgment-debtor's property was sold in execution without giving him notice of the application as required by section 347 of the Civil Procedure Code,

Held : (i) That the form of the application was defective.
(ii) That the sale in execution was void.

Cases referred to : *Ran Menik Etana vs Appuhamy* (24 N.L.R. 357)
Perera vs Novishamy (29 N.L.R. 242)
Kannangara vs Peries (30 N.L.R. 78)
Gopal Chunder Chatterjee vs Gunamoni Dasi (I.L.R. 20 Cal. 371)
Sahdeo Pandey vs Ghasiram Gyawal (I.L.R. 21 Cal. 19)
Ragunath Das vs Sunder Das Khetri (A.I.R. 1914 – Cal. P.C. 129).

D. S. L. P. Abeysekere, for the defendant-appellant.
S. N. Rajaratnam, with *S. P. M. Rajendram*, for the respondents.

JAYETILEKE, J.

This is an appeal by the defendant from an order dismissing her application to have a sale held by the Fiscal set aside. On September 2, 1942, the plaintiff obtained a decree against the defendant for a sum of Rs. 45 and costs payable by monthly instalments of Rs. 3. The defendant paid 13 instalments and defaulted thereafter. On March 27, 1944, the plaintiff applied for and obtained an order for a writ of execution for the recovery of the balance amount due to him on the decree without notice to the defendant. The application is in tabular Form No. 42 in Schedule II of the Civil Procedure Code. On June 27, 1944, the Fiscal put up for sale a land belonging to the defendant and the 2nd respondent purchased it for a sum of Rs. 15. The question that arises for consideration is whether the failure to give the defendant notice of the application for a writ renders the execution proceedings void. Section 347 of the Civil Procedure Code provides that where more than a year has elapsed between the date of the decree and the application for execution the application shall be by petition, and that when no respondent is named in the petition of application for execution the court shall cause the petition to be served on the judgment-debtor. Beal on Cardinal Rules of Legal Interpretation says at page 375, 3rd edition:

> " When a statute declares that something ' shall ' be done, the language is considered imperative, and the thing must be done ; where the word ' may ' is used, the language is, as a general rule, permissible."

In *Perera vs Novishamy* (29 N.L.R. 242) Schneider, J. pointed out that the procedure indicated in this section must be strictly followed. In *Ran Menik Etana vs Appuhamy* (24 N.L.R. 357) where an application to certify payment under section 349 of the Civil Procedure Code was not made by petition, as required by the section,

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it was held that the procedure must be strictly followed before payment can be recognized. In the present case there is, in addition to the defect in the form of the application, the fact that no notice of the application was given to the defendant. The legislature has, presumably, provided for notice to be given to the judgment-debtor in order to give him an opportunity of showing cause against the issue of writ or paying the amount due on the decree. Had the defendant been served with notice of the application it is, at least, probable that she would have paid the amount due having regard to the fact that she has brought it into court when she made the present application.

The effect of the failure to give notice under section 248 of the Indian Code of Civil Procedure of 1882, which corresponds with section 347 of our Code, has been considered in several cases. In *Gopal Chunder Chatterjee vs Gunamoni Dasi* (I.L.R. 20 Cal. 371) Norris, J. said :

> " I am of opinion that the issuing of the notice required by section 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor."

In *Sahdeo Pandey vs Ghasiram Gyawal* (I.L.R. 21 Cal. 19) Ghose, J. and Gordon, J. in their joint judgment said :

> " And we are of opinion that the whole of the proceedings, commencing with the application of the 7th April, 1892, are altogether bad by reason of no notice under section 248 having been issued upon the judgment-debtor, and the judgment-debtor having had no opportunity to show cause why the decree should not be executed, it seems to us that the sale at which Palakdhari purchased the property cannot be sustained. The matter that has been complained of in this case is not one of irregularity but one of illegality, if we may say so, and if the whole of the proceedings were altogether bad and ineffectual so as to bind the judgment-debtor, it is obvious that anything done by the court in the course of the execution that was taken out against the judgment-debtor must fall through."

The same view was taken by the Privy Council in the case of *Ragunath Das vs Sunder Das Khetri* (A.I.R. (1914) - Cal. P.C. 129). Lord Parker said :

> " As laid down in *Gopal Chunder Chatterjee vs Gunamoni Dasi* (*supra*) a notice under section 248 of the Code is necessary in order that the court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor.

These cases were cited with approval in *Kannangara vs Peries* (30 N.L.R. 78) where Drieberg, A.J. said :

> " Notice is required in the interest of parties against whom execution is sought, and the absence of notice makes the execution proceedings void as against them and not merely voidable."

With the views expressed by the learned judges in these cases I respectfully agree. The sale in question is, in my opinion, void and of no effect. I would accordingly allow the appeal with costs here and of the inquiry in the court below.

Appeal allowed.

Present: JAYETILEKE, J.

SIVASAMPU (Inspector of Police) vs RATNAYAKE & TWO OTHERS

S. C. No. 1318-20/45—*M. C. Panadura No.* 34118.
Argued on 19th January, 1945.
Decided on 1st January, 1945.

Criminal Procedure Code section 152 (3)—*Corporal Punishment Ordinance section* 7 (1)—*Can a magistrate acting under section* 152 (3) *of the Criminal Procedure Code exercise the power of imposing a sentence of whipping conferred on a District Judge by section* 7 (1) *of the Corporal Punishment Ordinance.*

Held : That a magistrate acting under section 152 (3) of the Criminal Procedure Code is not entitled to impose a sentence of whipping which a District Court may impose under section 7 (1) of the Corporal Punishment Ordinance.

Cases referred to : *The King vs Kulanthaivelu* (4 Tambyah's Rep. 17)
Usubu Lebbe vs Sopiya Nona (1 C.W.R. 73)
Madar Lebbe vs Kiri Banda (18 N.L.R. 376)
Nadar Rajah vs Gopala (8 Times Rep. 71).

L. A. Rajapakse, K.C., with *Shelton de Silva*, for the 3rd accused-appellant.
D. W. Fernando, for the 2nd accused-appellant.
T. S. Fernando, Crown Counsel, for the Crown.

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JAYETILEKE, J.

There is ample evidence to support the convictions of the 1st and 2nd accused and I would affirm them. But I have doubts about the correctness of the conviction of the 3rd accused. The evidence led by the prosecution was to the effect that on November 1, 1944, at about 8-30 p.m. the 1st and 2nd accused and two others stopped Privates Manns and Hayward of the Royal Air Force when they were going along the road, threatened them with knives and clubs, and took them into a garden. Then one of the four men blew a whistle and about 12 others armed with clubs turned up. The 1st and 2nd accused took everything that Privates Manns and Hayward had in their pockets and handed some of the things to one of the 12 men. The 1st and 2nd accused were identified by Manns and Hayward that very night. On the following day the naval ratings were paid their salaries at the camp and there was a crowd assembled there. Hayward noticed the 3rd accused in the crowd and thought that he was the person to whom the things that were robbed were handed by the first and second accused. He requested the Duty Petty Officer to speak to the 3rd accused in English in order to satisfy himself whether he was the person. He did so, because the person who received the articles the previous night spoke a word or two to him in English. The Duty Petty Officer asked the 3rd accused in English where the foreman was. The 3rd accused replied, " What for master." Hayward was then satisfied that it was the 3rd accused to whom the stolen things were handed the previous night. The 3rd accused was thereupon taken to the guard room where Manns also identified him. The evidence of Hayward shows that before the 3rd accused uttered the words " What for master," he had some doubt in his mind as to his identity. The magistrate does not seem to have given his mind to this aspect of the matter. Nor has he given his mind to the evidence of the 3rd accused. The 3rd accused said that he lived at Moratuwa about two miles away from the scene of the robbery, that he was employed at the camp as a first grade mason and was in receipt of a salary of Rs. 160/– a month. He led evidence to prove that he had hitherto borne a good character. To my mind it seems improbable that at the age of 45 the 3rd accused would have joined the 1st and 2nd accused who are hardly out of their teens in waylaying people and robbing them. I am inclined to think that Manns and Hayward are mistaken about the identity of the 3rd accused. I would accordingly set aside the conviction of the 3rd accused and acquit him.

The only other question is whether the sentence that the 1st and 2nd accused should receive six lashes each is illegal. Counsel for the 2nd accused contended that the accused were convicted by the Magistrate's Court and that for an offence under section 380 of the Penal Code a sentence of whipping can be imposed only by the Supreme Court or the District Court. He relied on section 7 (1) of the Corporal Punishment Ordinance (chapter 17). It reads :

> " Whoever is convicted by the Supreme Court or any District Court of any of the following offences may be punished with whipping....."

In this case the magistrate, who was also an Additional District Judge, assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and tried the accused summarily. The question arises whether he tried the accused as magistrate or as District Judge. Considerable light is thrown on the problem by a consideration of Ordinance 8 of 1896 which was repealed by the Criminal Procedure Code No. 15 of 1898 and replaced by section 152 (3). The preamble to and the title of the Ordinance show that the object of the Ordinance was to enable cases triable by a District Court to be tried summarily by the District Judge without the necessity for a preliminary inquiry and commitment when a District Court and Police Court are presided over by one and the same officer. The reason for the repeal of the Ordinance seems to be that the legislature was anxious that the District Court should not try cases without a committal and without an indictment being presented by the Attorney-General.

In an unnamed case (Koch's Reps. 19) Lawrie, A.C.J. said :

> " The Ordinance 8 of 1896 dealt with the trial of cases by a District Court summarily without a committal for trial. The Ordinance was repealed by the new Criminal Procedure Code and the 152nd section of the Code deals with the trial of cases not only by a District Court but also by a Police Court.
>
> Instead of giving power to the District Court to try without commitment, the law now gives power to the Police Magistrates who are also District Judges, not only to try summarily cases hitherto triable by a District Court, but to impose District Court sentences not as District Judges but as Police Magistrates."

In *The King vs Kulanthaivelu* (4 Tambyah's Rep. 17) de Sampayo, A.J. said :

> " It has often been pointed out that what section 152 of the Criminal Procedure Code does is to enable a judicial officer to hear a case summarily *as a Police Magistrate* and not to give jurisdiction to the District Judge without a committal and without an indictment being presented by the Attorney-General."

The question I have referred to is entirely concluded by these decisions with which I must say, with the greatest respect, I have no hesitation

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in agreeing. These decisions given in 1899 and 1904 are reinforced by the decisions of the subsequent 40 years. I shall refer to only two of them *viz. Usubu Lebbe vs Sopiya Nona* (1 C.W.R. 73) and *Madar Lebbe vs Kiri Banda* (18 N.L.R. 376). In the former de Sampayo, J. said :

> " Misleading language is often employed to describe the nature of the proceedings authorized by section 152 (3). The Police Magistrate, for instance, is said to act as District Judge but is wholly incorrect. The Police Magistrate acts and can only act as Police Magistrate, the only difference being that, being also District Judge, he has power to impose a sentence which ordinarily a District Judge may impose."

And in the latter case he said :

> " The fact to be emphasized is that the Police Magistrate acts in all cases as Police Magistrate and in conformity with the procedure laid down for the trial of cases in the Police Court."

Counsel for the respondent sought to find support in the decision in *Nadar Rajah vs Gopala* (8 Times Rep. 71) where Dalton, J. doubted the correctness of the decisions in *Usubu Lebbe vs Sopiya Nona* (*supra*) and *Madar Lebbe vs Kiri Banda* (*supra*) on the ground that the provisions of Ordinance No. 8 of 1896 appeared to him to have been re-enacted in section 152 (3). With great respect I wish to say I cannot agree with that view. Ordinance No. 8 of 1896 expressly provides that the officer who tries the case should do so *in his capacity as District Judge*. The words italicized by me do not appear in section 152 (3). Nor is there anything in the section which indicates that the judicial officer who tries the case summarily does so in his capacity as District Judge.

Indeed the provision that he shall have the power to impose any sentence which a District Court has power to impose indicates that he tries the case as magistrate. The 1st and 2nd accused were not in my opinion, convicted by the District Court and the sentence of whipping is, therefore, illegal. I cannot accept the view presented by counsel for the respondent that the sentence of whipping can be supported on the ground that the magistrate had the power to impose any sentence which a District Court can impose, for the reason that section 7 (1) of the Corporal Punishment Ordinance is clear beyond mistake on the point. It enacts that a sentence of whipping can be imposed where a person is convicted by a District Court. The 1st and 2nd accused were clearly not convicted by the District Court. For these reasons I would set aside the sentences of whipping. The sentences of imprisonment will stand.

Sentences on 1st & 2nd accused varied.
Conviction of 3rd accused set aside.

Present: HOWARD, C.J.

CALDERA (S. I. Police) vs THAMBY LEBBE

S. C. No. 1316—*M. C. Vavuniya No.* 19173.
Argued on 19th January, 1945.
Decided on 30th January, 1945.

Defence Regulations—Emergency Legislation—Defence (War Equipment) (Purchase by Civilians) Regulations—Regulations 2 and 3—Burden of proof.

Held : (i) That in a charge under Regulation 2* of the Defence (War Equipment) (Purchase by Civilians) Regulations, 1944, the prosecution need not prove that the accused knew the article to be the property of His Majesty.

(ii) That the onus of proving any fact or circumstance which brings the accused within the defence in regulation 2 (2) is on the accused.

H. W. R. Weerasooriya, Crown Counsel, for the Crown-appellant.

S. Nadesan, with *H. W. Jayawardene,* for the accused-respondent.

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* 2 (1) Every person who purchases any article to which these regulations apply, or accepts or takes any such article by way of gift, loan or otherwise, from any member of the fighting forces, shall be guilty of an offence.

(2) In any proceedings in respect of any offence against paragraph (1) of this regulation, it shall be a defence for the person charged with the offence to prove —

(*a*) that he acted in ignorance of the fact that such article was an article to which these regulations apply ; or

(*b*) that the article was sold to him by or under the authority of a commissioned officer of the fighting forces at a public sale of which due notice had been given ; or

(*c*) that the article was the personal property of an officer who had retired or ceased to be an officer, or of a soldier who had been discharged, or of the lawful heir of an officer or soldier who had died, before the date on which the article was sold to him, or

(*d*) that the article was purchased or accepted or taken by him before the second day of July, 1942.

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HOWARD, C.J.

This is an appeal against the acquittal of the respondent and made with the sanction of the Attorney-General. The respondent was charged under Regulation 2 (1) of the Defence (War Equipment) (Purchase by Civilians) Regulations 1944, that he did on the 21st August, 1944, purchase from one J. F. Sankey of the Royal Air Force, Ceylon, 100 tins of corned beef, 50 tins of jam, 50 tins of cheese and 48 tins of herrings, being the property of His Majesty and intended for the use of the fighting forces. It was established by the prosecution that at 5-15 p.m. on the 22nd August, 1944, the articles specified in the charge were found by Flight-Lieutenant Smith in the boutique of the respondent at Vavuniya. The respondent told Lieutenant Smith that he purchased the articles from two members of the Royal Air Force who were pointed out by the respondent at an identification parade, one of whom was J. F. Sankey a witness called by the prosecution. Sankey testified to the fact that about 11-30 a.m. on the 21st August, 1944 he and another man called Hyde, both in uniform, went in a military lorry to the boutique of the respondent and offered him the articles specified in the charge which the respondent agreed to purchase. Sankey went away and returned at 2-30 p.m. with the goods in a lorry and received Rs. 75/- in advance. Sankey says that he told the respondent that the articles were military stores. Sankey, in evidence, also said that the articles were not his but the property of the R.A.F. In cross-examination he said that he had been charged with the theft of the articles and Court-martialled. Also that he drew the articles from the main ration stores and had them with him in the cook-house. Seven days' rations are issued in bulk to him as rations for a certain number of people and there was always a surplus quantity of tinned food in the store of the cook-house which was separate from the main store. In cross-examination Sankey stated that the food in the cook-house store belonged to the persons who get their food at the cook-house. In re-examination, however, he said that the surplus rations belong to the R.A.F. and he was not entitled to sell them. No evidence was called on behalf of the respondent.

In his judgment the magistrate states that there is nothing on the articles to indicate that they are military stores. The only evidence that they are military stores is supplied by the testimony of Sankey who says that he told the respondent that they were military rations. The evidence of Sankey being uncorroborated, he is not prepared to act on it. In these circumstances there is no evidence on which he can hold that the respondent knew that the articles were military rations. He, therefore, found the respondent not guilty.

Crown Counsel appearing on behalf of the appellant has contended that as a matter of law there was no burden on the prosecution to prove that the accused-respondent knew that the said articles were military rations. I am in agreement with this contention. The regulation under which the respondent was charged is worded as follows :

> " 2. (1) Every person who purchases any article to which these regulations apply, or accepts or takes any such article by way of gift, loan or otherwise, from any member of the fighting forces, shall be guilty of an offence."

If the prosecution establishes that the respondent purchased an article within the ambit of the regulations, the burden is cast upon the respondent of bringing himself within the terms of sub-regulation (2). He can prove that he acted in ignorance of the fact that such article was an article to which the regulations apply. The respondent did not give evidence or call any witnesses. Nor does proof of such ignorance emerge from the evidence called by the prosecution. The respondent did not, therefore, discharge this onus.

It has, however, been further argued on behalf of the respondent that the articles were not the property of His Majesty inasmuch as they had passed from the main store to the cook-house. It is contended that, as they were surplus rations, they became the property of the individual soldiers who would eventually consume them. I cannot accept this contention. The rations on issue from the main store did not become the property of the cook or the person in charge of the cook-house. No doubt when issued to an individual soldier they become his property, but previous to such issue such rations remain the property of His Majesty. There is no doubt on the evidence that the articles were the property of His Majesty.

In these circumstances the appeal is allowed and I remit the case to the magistrate so that he may convict the respondent and pass sentence commensurate with the gravity of the offence. In coming to this decision I have not been unmindful of the fact that this court does not reverse a finding of acquittal unless it is satisfied that there has been a miscarriage of justice. In this case I am so satisfied.

Appeal allowed.

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Present: SOERTSZ, S.P.J.

AL-AYAD vs AYAD

S. C. No. 1194—*Kathi Court Slave Island No.* 2205.
Argued on 19th December, 1944.
Decided on 21st December, 1944.

Marriage and Divorce (Muslim) Ordinance (Chapter 99)—Claim under section 21 for payment of Mahr—Application of rule 8 of the Third Schedule and proceedings before the Kathi.

Held : In a claim for the payment of Mahr, where the facts are admitted by the parties, the Kathi is absolved from complying with the requirements of rule 8 of the Third Schedule relating to the recording of the sworn statements of at least two witnesses.

Cases referred to : *Umma Saidu vs Hassim Marikar* (43 N.L.R. p. 165).

H. W. Jayawardene, for the respondent-appellant.
M. M. Kumarakulasingham, for the applicant-respondent.

SOERTSZ, S.P.J.

This was a suit brought by a Muslim wife in the Kathi Court of Slave Island to recover a sum of Rs. 1,000/– as Mahr due to her by her husband. Her suit was successful, and an appeal by the husband to the Board of Kathis failed. The matter has now come up before this court in pursuance of an order made by it, granting the husband's application for leave to appeal, and the two questions submitted for decision are :

(1) Whether the claim for Mahr was satisfied by the granting of the cheque and whether, thereafter, the wife's only course was to sue on the cheque ?

(2) Whether the proceedings before the Kathi were of any legal consequence, the wife and the court having violated, as alleged, the rule which requires that the evidence of at least two witnesses for the wife to be recorded by the Kathi ?

It is this second question that was strongly pressed and I would deal with it at once.

The Marriage and Divorce Ordinance (Muslim) (Chapter 99) contemplates suits for divorce at the instance of the husband or of the wife, as well as the claims enumerated in section 21 of that Ordinance. Section 14 provides that in suits for divorce by the husband, the Kathi shall follow the procedure laid down in the second schedule to the Ordinance. Similarly, section 15 says that in suits for Fasha divorce brought by the wife, the rules of procedure in the third schedule shall be adopted. So far, so good. But when it comes to the question of procedure to be followed in regard to the claims enumerated in section 21, there is the rule, for sub-section 3 of that section says,

"All such inquiries shall be held as nearly as possible *mutatis mutandis* in accordance with the rules in Schedule III," which is entitled "Rules to be adopted in the case of a Fasha divorce by the Wife."

Rule 8 of that schedule says :

"The Kathi shall record in the book to be kept by him for the purpose the sworn statements of the wife and of at least two of her witnesses and the sworn statements of the husband (if he is present) and of his witnesses."

The claim made in this case is within the classes of claims enumerated in section 21 and in virtue of sub-section 3 the rules in the third schedule shall apply as "nearly as possible *mutatis mutandis.*" Counsel for the appellant, basing himself on that requirement, contends that the inquiry in this case which admittedly lacked the evidence of at least two witnesses on the side of the wife, was an inquiry of no legal consequence and that, therefore, the order made upon it is null and void.

There is, it must be conceded, great literal force in this contention and it is difficult to resist the impression that when the legislature framed sub-section 3 of section 21 as it did, it overlooked a case such as this. The rules in schedule III are described as "Rules to be adopted in the case of a Fasha divorce by the Wife," and it is easy to think of many good reasons for the insistence of, at least, two witnesses being called in support of the wife's evidence in a divorce proceeding regardless of any admission or acquiescence on the part of the husband, but in regard to a claim for maintenance, or for Mahr, which are the other claims within the Ordinance, a similar requirement of at least two witnesses, in cases in which the facts are admitted, would be to subject a party to the tyranny of an empty form. In this instance the aggrieved wife's sworn evidence was taken and also that of the Lebbe who registered the marriage. They said

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that the Mahr was Rs. 1,000/- and that a cheque was given in respect of it. The next entry on the record reads thus :

> " Advocate Seyed Ahamed addressed the court and accepted the evidence of the Registrar of Marriage that the Mahr was paid by cheque but contended that the cheque having not been presented to the Bank duly, etc."

In my opinion, once that admission was made, the wife and the Kathi were absolved from the requirement of rule 8 in regard to at least two witnesses, in a case like this, in virtue of the operation of the words "as nearly as possible *mutatis mutandis*," although it seems to me that in a suit for Fasha divorce, there is a peremptory requirement that the sworn statements of the wife and of at least two witnesses shall be taken. What I said in *Umma Saidu vs Hassim Marikar* (43 N.L.R. p. 165), must be read in the light of what I have observed in this case.

In regard to the first question, I see no reason for differing from the view taken by the Board of Kathis.

I dismiss the appeal.

Appeal dismissed.

Present: SOERTSZ, J.

PABILIS SINGHO vs GNANAPIRAGASAM (P.S. 3082)

S. C. No. 986—*M. M. C. Colombo No.* 48044.
Argued on 20th December, 1944.
Decided on 21st December, 1944.

Police Ordinance section 64 (*f*)—*Meaning of " passengers."*

Held : That the word " passengers " in section 64 (*f*) of the Police Ordinance does not include " pedestrians."

A. H. C. de Silva, for the accused-appellant.
M. P. Spencer, Crown Counsel, for the Attorney-General.

SOERTSZ, J.

It is difficult to imagine how it came about that, in this case, there is called in question a state of things that generations of citizens have endured, if not with pleasure, at least with Stoicism.

The appellant was charged under section 64 (*f*) of the Police Ordinance (Chapter 43) with having " exposed for sale a tray containing clothes on the pavement so as to obstruct *pedestrians*."

The magistrate convicted him and sentenced him to pay a fine of Rs. 15/-.

The appellant appeals on a point of law, namely that, on the evidence, no offence under the section adduced in the charge, has been established.

Section 64 (*f*) says that it is an offence for any person to expose " any article or thing, on the roads, or streets, and which may obstruct passengers or frighten horses." Overlooking the grammatical solecism that results from the redundant "and," one cannot overlook the requirement that the article or thing exposed should not be such as would obstruct *passengers*, or frighten *horses*. Those are the only species of the animal kingdom contemplated by this section. In the present case, horses are not concerned, only passengers — and the question is who are *passengers*. The charge seeks to equate *pedestrians* to *passengers*. In other words the two words are regarded as synonymous. The evidence is on the same footing. The police constable says : " This stall caused obstruction to pedestrians." I do not think that there is any justification for the view that "*passengers*" in this section means "*pedestrians*." Etymologically, there is no justification, for the Oxford Dictionary says that, although originally the word passenger meant any passer-by or passer-through, in modern usage it means one who travels in some vessel or vehicle. The phrase "frighten horses" in this sub-section also indicates that that is the meaning given to the class "passengers" in this sub-section. Not only that, an examination of the whole of section 64 supports this view, for this section speaks of passengers, passers-by, and the public and thereby indicates that these words are used not indiscriminately but with particularity.

I would set aside the conviction and acquit the appellant.

Conviction set aside.

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IN THE PRIVY COUNCIL

Present: LORD THANKERTON, LORD WRIGHT & SIR JOHN BEAUMONT

SELLASAMY vs KALIAMMA & OTHERS

Privy Council Appeal No. 13 *of* 1943.
S. C. No. 36/1941—*D. C. Kandy No. T.* 5437
Decided on 27th November, 1944.

Matrimonial Rights and Inheritance Ordinance section 35—Meaning of the phrase "on the occasion of their marriage"—Evidence of circumstances not mentioned in deed—On whom lies burden of proving release from collation.

Held : (i) That the phrase "on the occasion of their marriage" in section 35 of the Matrimonial Rights and Inheritance Ordinance does not mean on the happening of the marriage. If the marriage or, contemplated marriage, was a factor inducing the gift, then the gift is a gift made on the occasion of the marriage, and it is irrelevant whether the marriage takes place or not.

(ii) Once it is accepted that a gift was made on the occasion of the marriage the burden of proving that the property was released from collation is on the person who asserts it.

(iii) Although a deed of gift does not mention the fact that the gift is made in contemplation of the marriage of the donee, evidence can be led as to the circumstances in which the deed was executed and the state of the donor's knowledge at that date.

(**Edd. C.L.W.**— The judgment of the Supreme Court is reported at p. 6 of 21 C.L.W.)

SIR JOHN BEAUMONT

This is an appeal from the judgment and decree of the Supreme Court of the Island of Ceylon dated the 17th June, 1941, affirming an order of the District Court of Kandy, dated the 3rd February, 1940, in proceedings for the administration of the estate of one Ponniah who died in the year 1936. The appellant is the eldest son of Ponniah by his first marriage, and the respondents are children by a subsequent marriage. After the death of Ponniah, his widow applied for letters of administration to his estate which were granted on the 28th June, 1937, various matters, which were in dispute between the parties, being referred to a judicial settlement. The only dispute which is relevant to this appeal is as to whether the appellant is bound to bring into hotchpot in the distribution of the estate a gift made to him by his father on the 1st November, 1927. Both the lower courts have held that the appellant is so bound.

The relevant facts may be stated shortly: The appellant was born in the year 1896, and in the year 1926 his father was anxious that he should marry a cousin, by name Ponnamma. On the 7th September, 1927, the appellant gave to the Registrar of Marriages of the Division of Matale South in the District of Matale written notice that a marriage was intended to be held within three calendar months from the date thereof between himself and Ponnamma who was described in the notice. The deed of gift which has occasioned this dispute was made on the 1st November, 1927, that is during the currency of this notice. It was executed by the deceased, Ponniah, and the appellant, and it states that in consideration of natural offspring love that the deceased had towards the appellant in expectation of all necessary aid and assistance from him during the deceased's lifetime and divers other good causes, the deceased gave unto the appellant as an absolute gift irrevocable on any account the immovable property therein described, of the value of Rs. 6,000/–, subject to the donor's life interest, and the appellant accepted the gift. The contemplated marriage did not in fact take place, and although the donor lived until the year 1936, he took no steps to recall the gift.

The question whether this gift is liable to be brought into hotchpot by the appellant in the distribution of his father's estate depends upon the construction of section 39 of Ordinance 15 of 1876 (subsequently replaced by section 35 of Chapter 47 in the revised legislative enactments issued in 1938) which is in the following terms:

> "Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others, either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parents, either expressly or implicitly, released any property so given from collation."

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Although the deed of gift does not mention the contemplated marriage, the lower courts were clearly right in admitting evidence as to the circumstances in which the deed was executed and the state of the donor's knowledge at that date. The principal argument for the appellant before their Lordships has been that a gift cannot be said to have been made on the occasion of a marriage if in fact no marriage takes place. If the expression "on the occasion of their marriage" be held to mean on the happening of the marriage, the occasion of the marriage and the occasion of the gift being the same, such a construction would rule out the normal case of a gift by a parent to a child made shortly before or after the child's marriage designed to help the child to set up a matrimonial home. Such gift can seldom be made upon the actual solemnization of the marriage. Their Lordships agree with both the lower courts in thinking that this is too narrow a construction to be placed upon the section. They think that the relevant consideration is what, at the time of the gift, was the donor's intent. If the marriage, or contemplated marriage, was a factor inducing the gift, then the gift was made on the occasion of the marriage, and, in their Lordships' view, it is irrelevant that a marriage, in fact, never took place. Both the lower courts construed the section in this sense, and, so construing it, held as a fact that the gift was on the occasion of the marriage. Their Lordships see no reason for departing from their normal practice of not interfering with a concurrent finding of fact.

It was further argued that the donor impliedly released the property given from collation within the last sentence of the section, because, during the nine years in which he lived after the date of the gift, he took no steps to recall it. Once it be accepted that the gift was made on the occasion of the marriage, the burden is upon the appellant to prove that the property was released from collation, and there are concurrent findings of fact by the lower courts that there was no such release ; these findings again their Lordships accept.

Their Lordships will humbly advise His Majesty that this appeal be dismissed and that the appellant pay the respondents' costs of the appeal.

Appeal dismissed.

Present: KEUNEMAN, J. & ROSE, J.

ISMAIL vs LYE

S. C. No. 96/1944—*D. C. (F) Colombo No.* 14011.
Argued on 7th & 8th February, 1945.
Decided on 15th February, 1945.

Contract—Transfer of licences to import regulated textiles of Japanese origin—Agreement to refund value of licences unused "in the event of the permit system being abolished by the Government for reasons unforeseen or due to force majeure*"—Importation of Japanese textiles subsequently restricted by law, but not abolished—Effect on contract—Meaning of* force majeure*—The Defence (Trading with the Enemy) Regulations—The Defence (Control of Imports) Regulations.*

The defendant transferred to the plaintiff certain licences to import regulated textiles of Japanese origin and contracted that " in the event of the above permit system being abolished by the Government for reasons unforeseen, or due to *force majeure* if you are unable to use the above permits or any portion of same, we bind ourselves to refund (at the same rate paid to us) such value of the licences as may remain unused on the date of such abolition." On the entry of Japan into the war, the Defence (Trading with the Enemy) Regulations and the Defence (Control of Imports) Regulations affected the contract. These regulations authorized the importation of Japanese textiles without a licence from any part of the British Empire other than Canada or Newfoundland. The plaintiff claimed a refund under the contract on the ground that certain licences could not be used by him.

Held : That as the licences were available for use in a very restricted sense, namely, for the importation of Japanese textiles from Canada or Newfoundland, the plaintiff had failed to prove that the permit system had been abolished and was therefore not entitled to a refund under the contract.

Per KEUNEMAN, J. : " As regards the meaning of '*force majeure*' see the judgment of McCardie, J. in *Lebeaupin vs Crispin* — ' The phrase "*force majeure*" was not interchangeable with "*vis major*" or "Act of God." It goes beyond the latter phrases Any direct legislative or administrative interference would of course come within the term ; for example, an embargo'."

Cases referred to : *Lebeaupin vs Crispin* (L.R. 1920 – 2 K.B. 714)

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H. V. Perera, K.C., with *S. J. V. Chelvanayagam* and *P. Navaratnarajah*, for the plaintiff-appellant.

N. Nadarajah, K.C., with *D. W. Fernando*, and *G. Samarawickrema*, for the defendant-respondent.

KEUNEMAN, J.

Plaintiff sued on contract P1 of 13th January, 1941, whereby defendant transferred to plaintiff certain licences to import regulated textiles whose country of origin was the Empire of Japan. By clause 2 of P1 the defendant undertook as follows:

> " In the event of the above permit system being abolished by the Government for reasons unforeseen, or due to *force majeure* if you are unable to use the above permits or any portion of same, we bind ourselves to refund (at the same rate paid to us) such value of the licences as may remain unused on the date of such abolition."

Plaintiff maintained that certain licences, P2 to P4, current from August 1st 1941 up to July 31st 1942, could not be used by him, and that he was entitled to claim a refund in respect of them from the defendant under clause 2.

It has been established in this case that shortly prior to August 1st 1941 — *viz.* on the 27th July, 1941 — the Finance Regulation called the " Freezing Order " was applied to the Empire of Japan. Financial transactions between Japan and Ceylon thereupon became impossible. The licence or permit system was, however, not abolished, and in fact the licences P2 to P4 were issued to have validity from August 1st 1941.

It was not in dispute in this appeal that from August 1st 1941 till the entry of Japan into the war on the 7th December, 1941 these licences had validity and were usable — though not for direct importation from Japan owing to the " Freezing Order." It was, however, possible to obtain goods of Japanese origin from India and other countries, including the British Empire. The entry of Japan into the war as a belligerent created a new situation. The Trading with the Enemy Regulations then came into force, which forbade trading in any goods " coming from " enemy territory. To meet this situation the Defence (Control of Imports) Regulations had been amended on the 1st August 1941 by the promulgation of regulation 8A, which stated :

> " Where goods which are imported from any territory forming part of the British Empire are goods of enemy origin, such goods shall, for the purposes of these Regulations, be deemed to be grown, produced or manufactured in that territory notwithstanding that they are goods of enemy origin.
>
> In this regulation ' goods of enemy origin ' means goods grown, produced or manufactured in any territory which is enemy territory within the meaning of the Defence (Trading with the Enemy) Regulations, 1939."

It is clear that under regulation 8A goods of Japanese origin could be imported into Ceylon provided they were imported from any territory forming part of the British Empire. The prohibition contained in the Trading with the Enemy Regulations did not apply in such cases.

Ordinarily such goods would be imported upon licence. But under regulation 5A of the Defence (Control of Imports) Regulations, Open General Licence No. 4 was promulgated on the 1st August, 1941 whereby " the importation to Ceylon by any person of such goods of any class or description specified in the Schedule hereto as have been grown, produced or manufactured in any territory forming part of the British Empire, except Canada and Newfoundland or any other territory which is enemy territory within the meaning of the Defence (Trading with the Enemy) Regulations 1939," was authorized.

Admittedly the Schedule of the Open General Licence No. 4 covers the class and description of goods mentioned in P2 to P4.

It is contended for the appellant that the Defence (Trading with the Enemy) Regulations prevented the importation of goods of Japanese origin from allied or neutral countries, and that the licences P2 to P4 were not usable for that purpose. It is also urged that under regulation 8A of the Defence (Control of Imports) Regulations goods of Japanese origin could be imported from the British Empire, but the promulgation of Open General Licence No. 4 made the licences P2 to P4 useless, because any person could now import such goods from the British Empire without the necessity of obtaining a licence. But on the other hand the Open General Licence No. 4 did not apply to Canada and Newfoundland which were parts of the British Empire, and importation from Canada and Newfoundland of goods of Japanese origin was permitted under licence, and it was necessary for the plaintiff to shew that the licences P2 to P4 were not usable for that purpose. It was not sufficient for the plaintiff merely to show that the use of these licences was restricted.

I agree with the argument of counsel for the respondent that the plaintiff has failed to prove that " the permit system was abolished by the Government." The only question is whether the words in clause 2 of P1 *viz.* " or due to *force majeure* if you are unable to use the above permits or any portion of same " are applicable to this case. As regards the meaning of '*force*

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majeure" see the judgment of McCardie, J. in *Lebeaupin vs Crispin* (L.R. 1920 - 2 K.B. 714 at 719) :

" The phrase '*force majeure*' was not interchangeable with '*vis major*' or 'the Act of God.' It goes beyond the latter phrases. Any direct legislative or administrative interference would of course come within the term ; for example, an embargo."

On the face of them the licences P2 to P4 apply to certain textiles whose country of origin is the Empire of Japan. There is no restriction as to the country from which they can be imported, and Canada and Newfoundland are not excluded from the countries from which they could be obtained. To import from Canada or Newfoundland a licence was necessary. There is nothing to show that these licences P2 to P4 were not available for the importation of goods of Japanese origin from Canada or Newfoundland. In this connection the questions put to the Controller of Imports, who was a witness, are relevant.

" Q . After the Japanese entered the war a person in Ceylon desiring to import goods from Canada and Newfoundland of Japanese origin required a licence ?

A . Yes.

Q . On this licence with the conditions attached to it would it have authorized a holder to import goods of Japanese origin from any part of the Empire ?

No answer "

This evidence shows at any rate that there is no proof of any administrative embargo which rendered these licences P2 to P4 unusable for import of goods of the character described from Canada or Newfoundland. The witness called by the plaintiff admittedly knew nothing about these permits, and there is no evidence that the plaintiff tried to use these permits and was prevented from doing so. There is some evidence in the case that Canada and Newfoundland fall outside the sterling group but there is no evidence of any financial or other regulations which rendered trading by persons in Ceylon with Canada or Newfoundland impossible.

Counsel for the appellant seeks to get over this difficulty by relying on regulation 8A of the Defence (Control of Imports) Regulations. His argument is briefly this: Goods imported from Canada or Newfoundland although of enemy origin must be deemed to be grown or produced or manufactured in Canada or Newfoundland.

There has been a change in the nature and the character of the goods, and the licence to import goods of Japanese origin would have no application to these goods and could not be used for the purpose of importing them.

I do not think this argument can be sustained. Regulation 8A must be restricted to the purposes of the Defence (Control of Imports) Regulations. Those regulations deal *inter alia* with the prohibition of importation into Ceylon of specified goods by Order of the Governor, or of importation of such goods without a licence from the Controller. Under regulation 8A when goods which were in fact " of enemy origin " are imported from any part of the British Empire they are to be deemed to be grown, produced or manufactured in the British Empire, and accordingly capable of being imported into Ceylon. But I do not think it is possible to apply regulation 8A to the interpretation of the licences P2 to P4. In these licences certain specified goods whose country or origin was in fact the Empire of Japan have been described and their import permitted.

I do not think it will be open to the Controller to say (as has been suggested by the appellant) that goods originating from Japan in the licence must under the circumstances be regarded as having lost that character and become goods originating in the British Empire, and that the licences are no longer applicable.

I agree with the finding of the District Judge that plaintiff has failed to prove that " the effect of those Regulations and Orders was either directly or indirectly to abolish the permit system, or to turn P2 to P4 into mere pieces of waste paper." As the District Judge points out, the evidence is more favourable to the view that the licences were available for use in a very restricted sense. The plaintiff's case accordingly fails, and this appeal must be dismissed with costs.

ROSE, J.

I agree, and have nothing to add.

Appeal dismissed.

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Present: ROSE, J.

WICKRAMASINGHE vs CROSSETTE THAMBYAH

Application for a Writ of Mandamus on R. R. Crossette Thambyah.
Argued on 12th January, 1945.
Decided on 15th February, 1945.

Mandamus—Courts Ordinance section 42—Commissions of Inquiry Ordinance section 7—Powers of Commissioner acting under the Commissions of Inquiry Ordinance—Under what circumstances may he hear evidence in the absence of parties who are implicated or concerned in the matter under inquiry.

Held : That a Commissioner acting under the Commissions of Inquiry Ordinance is not entitled to use for the purpose of compiling his report facts elicited by him in the absence of parties concerned or implicated in the matter under inquiry without having such facts tested at a formal sitting.

Per ROSE, J. : " I am of opinion therefore that the only reasonable interpretation of the Ordinance as a whole is that if a Commissioner is to avail himself of the powers contained in sections 2, 3 and 4, he must also be liable to the corresponding obligations contained in section 7."

H. V. Perera, K.C., with *N. Nadarajah, K.C.*, and *E. B. Wickramanayake*, in support.
N. E. Weerasooriya, K.C., with *C. S. Barr-Kumarakulasingham* and *H. W. Jayawardene*, for the respondent.

ROSE, J.

This is the return to a rule directed to the respondent to show cause why he should not disclose to the petitioner all the evidence, both oral and documentary, which he obtained in the petitioner's absence, and give the petitioner due and sufficient notice of any inquiry that he may hold in the future. The respondent was appointed by the Governor as sole Commissioner to inquire into certain matters relating to the Kalatuwawa leases. His appointment was made in pursuance of Article VII of the Letters Patent constituting the office of Governor and Commander-in-Chief of the Island of Ceylon, and the requisite notice was published in the Ceylon Government Gazette dated 25th September, 1944. For the purpose of the present proceedings the material term of inquiry is as follows : " Whether any person has been guilty of any impropriety, negligence, omission or misconduct in regard to the receipt, custody, scrutiny or disposal of tenders received in respect of the Kalatuwawa leases, or in regard to any other matter anyway relating to or arising out of the grant of those leases."

It is to be noted, as counsel for the respondent points out, that there is no specific mention in the above notice of the Commissions of Inquiry Ordinance (Chapter 276). It is therefore contended that the respondent is not bound by the terms of section 7 of the Ordinance which provides *inter alia* that any person who is in anyway implicated or concerned in the matter under inquiry shall be entitled to be represented by an advocate during the whole of the inquiry. I may add that it is common ground that the petitioner is a person who is so implicated or concerned. It seems to me, however, that, without the powers provided by sections 2, 3 and 4 of the Ordinance which relate to the issuing of summonses to persons to appear as witnesses or to produce documents, the powers of the Commissioner in enforcing such summonses and the provision of penalties for any person giving false evidence, it would be impossible for the Commission to function efficiently. In fact in the present matter I am informed that the Commissioner, quite properly, has made use of the powers provided by these sections. I am of opinion, therefore, that the only reasonable interpretation of the Ordinance as a whole is that if a Commissioner is to avail himself of the powers contained in sections 2, 3, and 4, he must also be liable to the corresponding obligations contained in section 7.

The complaint of the petitioner, shortly stated, is that the respondent had declared on more than one occasion that it was his intention not only to hold formal sittings of the Commission (which may of course be held either in public or in *camera*) but concurrently to hold private sittings for the purpose either of interviewing witnesses or of examining documents : at which private sittings the petitioner and his counsel would not be permitted to be present. Mr. Perera, counsel for the petitioner, concedes that there can be no reasonable objection to the Commissioner interviewing witnesses or reading documents in private with a view to ascertaining whether the material so elicited is of sufficient materiality

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to be adduced at a formal sitting. What he does object to is the use of facts so elicited for the guidance of the Commissioner in compiling his report, without having such matters tested at a formal sitting.

Now, it is true that from a perusal of the various statements made by the respondent from time to time at the formal sittings (copies of which are attached to the papers), the petitioner might not unreasonably have feared that it was the intention of the respondent to hold such concurrent inquiries, and it may be that at an earlier stage of this matter the respondent himself held the view that he was entitled to do so. At the present hearing, however, counsel for the respondent has in the final resort taken up the position that his client proposes to make private investigations only for the purpose of eliciting material to be adduced, sifted, and tested at a subsequent formal sitting. So stated, his attitude seems to me to be unexceptionable and it is to be noted that on an earlier occasion — I refer to a passage appearing in exhibit A2 — the respondent himself said, " the object of these public sessions is that relevant matters must be brought up in the way of evidence to enable the evidence to be tested by those who may consider themselves affected."

Even assuming that the petitioner is right in his opinion that the respondent at one time took too wide a view of his powers it seems to me that that of itself would not entitle the petitioner to succeed unless he can show that the respondent acted on such a view. Mere apprehension on the part of the petitioner that the respondent might in the future fall into error, does not, in my view, entitle him to the relief claimed. The only matters specifically complained of were the private questioning of a Mr. Attygalle by the respondent and the private perusal by the respondent of a document handed to him at a formal sitting by a Mr. Fernando. It is now admitted that neither this questioning of Mr. Attygalle nor the document handed in by Mr. Fernando disclosed any fact material to the inquiry. That being so, and for the reasons that I have stated, I am of opinion that the petitioner fails and that the rule must be discharged. I would add that these proceedings may well have served a useful purpose in that they have demonstrated that, whatever may have been the position at an earlier stage, there now exists an identity of view between the petitioner and the respondent as to the proper procedure to be followed.

The petitioner must pay the costs of these proceedings.

Rule discharged.

Present: JAYETILEKE, J. & ROSE, J.

RAVANNA MANA EYANNA & CO. vs THE COMMISSIONER OF INCOME TAX

Argued on 5th February, 1945.
Decided on 20th February, 1945.

Excess Profits Ordinance No. 38 *of* 1941 *section* 10 (1) (*b*)—*Meaning of phrase "assets being debts due to the business" in section* 10 (1) (*b*).

Held : Debts appearing in the books of an assessee and in respect of which no reduction has been allowed under section 9 (1) (*d*) of the Income Tax Ordinance, though prescribed, are nevertheless " debts due to the business " for the purposes of section 10 (1) (*b*) of the Excess Profits Ordinance No. 38 of 1941.

Per JAYETILEKE, J. : " Section 10 (1) (*b*) of the Excess Profits Duty Ordinance provides that the capital of a business shall be taken to be, so far as it consists of assets being debts due to the business, the nominal value of these debts less any reduction which has been allowed for bad and doubtful debts under section 9 (1) (*d*) of the Income Tax Ordinance. It seems to me that on the true construction of section 10 (1) (*b*) it is quite plain as a matter of language that the legislature regards both bad and doubtful debts for which a reduction has not been claimed or allowed under section 9 (1) (*d*) of the Income Tax Ordinance as ' debts due.' In the present case no claim having been made or allowed at any time in respect of the debt in question under section 9 (1) (*d*) of the Income Tax Ordinance, the appeal must fail."

The facts are set-out in the case stated which is reproduced below.

Cases referred to : *Curtis vs J. & V. Oldfield, Ltd.* (9 T.C. 319)
Coombe vs Coombe (1866 L.R. 1 P. & D. 288)
Whatmore vs Murray (1908 Trans. L.R. 969)
Flint vs Bernard (1889 L.R. 22 Q.B.D. 90)
Ex parte Kempe, in re Fastnedge (L.R. 9 Chan. App. 383)
Ex parte Cowley (34 S.J. 29)
In Re Stockton Malleable Iron Co. (1875 – 2 Chan. Div. 101)
Bize vs Dickson (1786 – 1 T.R. 286)
Arunasalem vs Ramasamy Nayaker (3 C.A.C. 134).

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N. Nadarajah, K.C., with *N. Kumarasingham*, for the appellants.
H. H. Basnayake, Crown Counsel, for the respondent.

JAYETILEKE, J.

This is an appeal by way of Case Stated by the Board of Review, at the request of the assessees, for the opinion of this court as provided by section 74 of the Income Tax Ordinance (Chapter 188) the provisions of which have been made applicable to an appeal against an assessment of Excess Profits Duty by section 13 of the Excess Profits Duty Ordinance No. 38 of 1941.

The facts may be shortly summarized as follows :

The 1st appellant and one Krishnapillai carried on business in partnership as Commission Agents and General Merchants under the name of Suna Einna Keena & Co. at Norris Road and Fifth Cross Street in Colombo. On June 8, 1932 by an indenture marked "A" they admitted one Gopalakrishnapillai as a partner and changed the name to Ravanna Mana Eyanna and Co. Clause 6 of "A" reads :

> " All and singular the debts now due to the partnership of S.E.A. & Co. and also the debts due to the said Ekambarampillai under No. 690 dated November 11, 1931, attested by N. Mahendra of Colombo, Notary Public, in respect of the firm of S. S. V. Paramanayagampillai all aggregating to Rs. 30,619/- (after having deducted all debts due to the said partnership) shall form the capital of the said partnership business created by this indenture and shall belong to all the parties in equal shares."

On June 4, 1927, Gopalkrishnapillai retired from the business and on the same day by indenture marked "B" the remaining partners admitted one Deivanayagampillai as a partner. The indenture provided that all three partners should be entitled to the stock-in-trade, book and other debts. On July 9, 1940, Krishnapillai died. On July 10, 1940, the remaining partners looked into the accounts of the business and decided to write off Rs. 29,387/- as debts that had become bad prior to April 1, 1938.

The Excess Profits Duty Ordinance came into operation on October 5, 1941. In computing the pre-war capital for the purpose of section 11 of the Ordinance the appellants claimed that the debts which they had written off should be excluded. The Assessor excluded a sum of Rs. 4,188/- in respect of which a claim had been made under section 9 (1) (*d*) of the Income Tax Ordinance and refused to exclude the balance. The assessees appealed to the Commissioner of Income Tax who confirmed the assessment. The Board of Review were of the opinion that the order of the Commissioner was right. Hence this appeal by way of Case Stated.

Excess Profits Duty is imposed by section 2 of the Ordinance upon the amount by which the profits arising from any business to which the Ordinance applies exceed, by more than Rs. 3,000, the pre-war standard of profits. The pre-war standard of profits adopted in this case under section 6 (1) is the profits standard based on the profits of the year ended March 31, 1939. In making the adjustment for increase of capital under section 11 the average capital of the accounting period ended March 31, 1941, has to be compared with the average of the year ended March 31, 1939. The assessees contend that in arriving at the initial capital of the year ended March 31, 1939, all debts that were statute-barred prior to April 1, 1938, should be excluded on the ground that they are not "debts due" within the meaning of section 10 (1) (*b*).

The appeal turns entirely upon what construction we put upon the words "debts due" in section 10 (1) (*b*). It is quite plain that for the purpose of construing these words we are entitled to look not only at the verbal context of the sub-section, if we can get any assistance from that, but also at the other sections of the Ordinance and, at section 9 (1) (*d*) of the Income Tax Ordinance and the language employed in them. Now section 10 (1) (*b*) of the Excess Profits Duty Ordinance deals with debts which are the subject of valuation for income tax purposes. Section 9 (1) (*d*) of the Income Tax Ordinance provides that for the purpose of ascertaining the profit or income of any person from any source there shall be deducted such sum as the Commissioner in his discretion considers reasonable for bad debts incurred in any trade, or business, which have become bad during the period for which profits are being ascertained, and for doubtful debts to the extent that they are estimated to have become bad during the period, notwithstanding that such bad and doubtful debts were due and payable prior to the commencement of the said period. In *Curtis vs J. & V. Oldfield, Ltd.* (9 T.C. 319) Rowlett, J. said :

> " When the rule speaks of a bad debt it means a debt which is a debt that would have come into the balance sheet as a trading debt in the trade that is in question and that it is bad."

There can be little doubt that a statute-barred debt is a bad debt or, at least a doubtful debt within the meaning of the sub-section.

In *Coombe vs Coombe* (1866 L.R. 1 P. & D. 288) Sir J. P. Wilde said :

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"The statute furnishes an absolute legal answer to the hand of the supposed debtor, and in the sense of a legal obligation enforceable by law, it does therefore extinguish the debt at his volition."

Section 10 (1) (*b*) of the Excess Profits Duty Ordinance provides that the capital of a business shall be taken to be, so far as it consists of assets being debts due to the business, the nominal value of these debts less any reduction which has been allowed for bad and doubtful debts under section 9 (1) (*d*) of the Income Tax Ordinance. It seems to me that on the true construction of section 10 (1) (*b*) it is quite plain as a matter of language that the legislature regards both bad and doubtful debts for which a reduction has not been claimed or allowed under section 9 (1) (*d*) of the Income Tax Ordinance as "debts due." In the present case no claim having been made or allowed at any time in respect of the debt in question under section 9 (1) (*d*) of the Income Tax Ordinance, the appeal must fail. But out of respect for the argument that has been addressed to us by counsel engaged on both sides I think that I ought to deal with the question whether a statute-barred debt can be regarded as a "debt due." Counsel for the appellants relied upon the case of *Whatmore vs Murray* (1908 Trans. L.R. 969). In that case the respondent who was the judgment-creditor of one Main, a prisoner awaiting trial and detained in gaol, obtained a garnishee order on the appellant, as gaoler, ordering him to pay out of the monies in his possession belonging to Main, the monies due by the latter to the respondent under the judgment with costs. The appellant refused to comply with the order, and on the return day opposed the confirmation of the order on the ground that under regulation 493 of the gaol regulations he was prohibited from parting with the money so taken from a prisoner without the sanction of the Director of the Prisons, which sanction had not been obtained. In the course of his judgment Innes, C.J. said :

"The real point is whether the money sought to be attached could rightly be made the subject of a Garnishee Order. The provisions for garnishee proceedings constitute a very special machinery provided by the legislature to enable judgment-creditors to obtain payment of their judgment-debts : but its operation ought to be confined to cases to which it clearly applies under the statute. By Ordinance No. 12 of 1904 it is necessary that there should be a debt due by the garnishee to the judgment-debtor. A 'debt due' means a debt actually due at the time when application is made for an order. That was decided in White's case (1906 T.S. 47). There a salary which the debtor could not at the moment claim and which possibly he might never be able to claim was held not to be a debt due. It seems to me that for a debt to be due there must be a liquidated money obligation presently claimable by the debtor for which an action could presently be brought against the garnishee. If such an obligation exists, then, to my mind, a debt is due."

I do not think this case assists us in the solution of the present problem though some of the words used by the learned Chief Justice appeal to be favourable to the appellants. It seems to me that all that the learned Chief Justice meant to say was that a debt which had not actually become payable at the time of the attachment could not be said to be "due." Counsel for the appellants also relied on the case of *Flint vs Bernard* (1889 L.R. 22 Q.B.D. 90) in which Lord Esher, M.R. said :

"If the words of section 18 sub-section 8 'so far as relates to any debts due to them' are to be construed in their strictest sense, the words that follow—'provable in bankruptcy'—are not necessary, for such debts must be provable in bankruptcy. If the words are not to be taken so strictly, what is a reasonable interpretation ? I think this would be 'any claim against the debtor such as would be provable in bankruptcy'."

This judgment too is not helpful on the words "debts due" as they have been used in three different senses in three different sections of the Bankruptcy Act. Moreover, the words have been interpreted in the sections in which they appear with reference to other sections in the Act and to the scheme of the Act. In *Ex parte Kempe, in re Fastnedge* (L.R. 9 Chan. App. 383) Sir George Melliah, L.J. pointed out that in section 6 the word "due" means payable : in section 19 it does not mean payable but that all debts which have been contracted, whether the time for payment has arrived or not, were intended to be included : and in section 49 it means all provable demands whether they have been payable or not and whether they are in point of law strictly debts or not.

Counsel for the respondent invited our attention to the case of *Ex parte Cowley* (34 S.J. 29) the report of which is not available to us but a note of which appears in Stroud's Judicial Dictionary, 2nd Edition, page 578. It reads :

"A debt is still due notwithstanding that the Statute of Limitations may have run against it, for the statute only bars the remedy and does not extinguish the debt."

This decision, I think, is in accord with the primary meaning of the word "due." In Wharton's Law Lexicon the word "due" is defined thus :

"Anything owing. That which one contracts to pay or perform to another ; that which law or justice requires to be paid or done."

In Re Stockton Malleable Iron Co. (1875 – 2 Chan. Div. 101) Jessel, M.R. said :

"The word 'due' may mean either 'owing' or 'payable.'"

It is well settled law that money paid under a mistake on the part of the payer as to a material fact, such as that no money was due, can be recovered by action for money had and received,

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But in *Bize vs Dickson* (1786 – 1 T.R. 286) Lord Mansfield observed that if a party voluntarily pays money, which the law has not compelled him to pay, but which in justice he ought to have paid — such as a debt barred by the Statute of Limitations — he cannot recover it back. It has also long been established that an executor does not commit a *devastavit* in paying a statute-barred debt. In the case of *Arunasalem vs Ramasamy Nayaker* (3 C.A.C. 134) it was held that a payment on account of a debt, whether such debt at the time of payment is already statute-barred or not is necessarily acknowledgment of the debt, and the law in the absence of anything to the contrary implies from the acknowledgment a promise to pay the balance.

These authorities appear to me to lend support to the view that the expression " debts due " should not be read in a limited sense as meaning debts, the payment of which can be enforced by action. I, therefore, come to the conclusion that the items included in the sum of Rs. 25,199/– are " debts due " within the meaning of section 10 (1) (*b*) of the Excess Profits Ordinance. I would accordingly dismiss the appeal with costs.

ROSE, J.

I agree.

Appeal dismissed.

CASE STATED

Under the provisions of the Excess Profits Duty Ordinance No. 38 of 1941 read with section 74 of the Income Tax Ordinance 1932, for the opinion of the Hon'ble the Supreme Court of the Island of Ceylon upon the application of

Messrs. Ravanna Mana Eyanna & Co. of Colombo, Appellants.

1. The original partners of the above firm were N. Krishnapillai and S. Ekambrampillai. In the year 1932, by deed No. 3422 dated 8th June 1932 attested by Mr. S. Somasundaram of Colombo, Notary Public (a copy whereof is annexed hereto marked "A"* as part of this case) R. Gopalakrishnapillai joined the business as a partner from the 8th June, 1932. The partnership was to continue for a period of 5 years unless dissolved earlier as provided in that deed. All the debts then due to the former firm were also to form the capital of the partnership created by deed No. 3422 and was to belong to all the 3 partners in equal shares.

2. By deed No. 4516 of the 4th June 1937, attested by Mr. S. Somasundaram (a copy whereof is annexed to this case marked "B"*) the partnership between the 3 partners mentioned above was dissolved so far as R. Gopalakrishnapillai was concerned, as from the 15th May 1937. It was also agreed that all the assets and property of the firm were to belong to, and be the property of, the remaining 2 partners as from 15th May 1937. The retiring partner was to be paid a sum of Rs. 4,067/11 as his share of the capital, profits and other assets of the business. By deed No. 4517 of the same date Ekambrampillai and Krishnapillai admitted S. Deivanayagampillai as a partner in the said firm as from the 15th May 1937 in consideration of the contribution by him of a sum of Rs. 5,101/– as his share of the capital. All the stock-in-trade of the existing business and all the book and other debts due to the business at the time were to belong to the 3 partners in equal shares. A copy of deed No 4517 is also annexed to this case marked " C."*

3. For the purpose of arriving at the capital of the firm, for purposes of Excess Profits Duty, payable for the first accounting period ending 31st March, 1941, it was necessary to compare the average capital of the accounting period ending 31st March 1941 with the average capital of the year ending 31st March 1939. In arriving at the initial capital of the year ending 31st March 1939, the Accountants acting for the appellants excluded book-debts totalling Rs. 29,387/– out of the book-debts appearing on the books of the appellants as due to the firm on 31st March 1938 on the ground that these debts were considered bad debts even prior to 1st April 1938. Of the sum of Rs. 29,387/–, debts amounting to Rs. 18,345/– appeared in the books of the appellants as on 31st March 1933. With the exception of certain debts amounting to Rs. 4,188/– the rest of the debts included in the sum of Rs. 29,387/– had not been claimed or been allowed for income tax purposes at any time. The Assessor refused to exclude the whole of the sum of Rs. 29,387/– in arriving at the initial capital of the year ending 31st March 1939. According to the Assessor the Excess Profits Duty which the firm was liable to pay for the relevant period was Rs. 2,449/–. The amount of the duty in dispute is Rs. 1,469/–.

4. The appellants appealed to the Commissioner of Income Tax against the assessment. They urged that it could not be said that the debts in question were due to the business, within the meaning of section 10 (1) (*b*) ; their contention was that only good debts should be taken into account for this purpose. These bad debts, they said, were not capital utilized in the business. They also relied on the argument that these debts represented lost assets and should therefore be deducted in computing capital. The Assessor maintained that under section 10 (1) (*b*) the nominal amount of the debts due to a business, subject to a reduction of debts allowed for income tax purposes, must be taken as part of the capital. He argued that so long as the debts appeared in the books they had to be regarded as part of the capital for purposes of section 10 although they may have been bad in the sense that recovery was not possible ; that the deduction " for assets disposed of or lost " in section 10 (4) could only be applied to capital proved to the satisfaction of the Commissioner to have been introduced into the business after its acquisition and not to bad debts which are dealt with in the earlier sub-section 1 (*b*).

5. The Commissioner confirmed the assessment (subject to an agreed reduction of Rs. 4,188/–) in computing the pre-war capital. A copy of the Appeal Minute relative to the appeal before the Commissioner embodying his reasons for the determination, is annexed hereto marked " D."*

6. The appellants appealed to the Board of Review constituted under the Income Tax Ordinance against the decision of the Commissioner. A copy of the grounds of appeal dated 7th June 1944, submitted to the Board of Review is annexed to this case stated and is marked " E."*

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7. After hearing, the Board of Review confirmed the decision of the Commissioner and dismissed the appeal. A copy of the decision of the Board is annexed to this case and is marked " F."*

8. The appellants now request the Board to state a case on a question of law for the opinion of the Hon'ble the Supreme Court. The question for the consideration of the court is whether the sum of Rs. 25,199/- (*i.e.* Rs. 29,387/- less Rs. 4,188/-) should be deducted for ascertaining the initial capital of the year ending 31st March 1939 on all or any of the following grounds namely :

(*a*) Whether these debts cannot be said to be debts due to the business within the meaning of section 10 (1) (*b*) on the ground that only good debts should be taken into account for the purpose of arriving at the amount of the capital of a business, and not debts whose recovery is barred by prescription ;

(*b*) Whether this sum cannot be said to be capital utilized in the business, and if it is not capital utilized in the business, whether it should be allowed as a deduction in computing capital ;

(*c*) Whether these debts represent assets which are lost within the meaning of section 10 (4) and whether, even if so, the sum of Rs. 25,199/- should be deducted in computing capital ;

(*d*) Whether in the case of assets " being debts due to the business " a reduction can be allowed from the nominal amount of those debts in excess of any reduction which has been allowed in respect of those debts, for income tax purposes.

9. We have accordingly stated and signed this case.

Colombo day of 1944.

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Members of the Board of Review.

Present: DE KRETSER, J. & JAYETILEKE, J.

NAVARATNAM & ANOTHER vs SITHAMPARAPILLAI

S. C. No. 92—D. C. (F) Jaffna No. 323.
Argued & Decided on 15th December, 1944.

Thesawalamai—*Right of pre-emption—What is the proper price to be paid by person asserting the right.*

Held : That a person having the right of pre-emption of a land under the *Thesawalamai* is entitled to assert the right by offering to buy the land at the price actually paid for it by a purchaser.

Per DE KRETSER, J. : " When a co-owner wishes to sell, the other co-owner is at liberty to claim or demand the preference of being the proprietor. That must mean that the person owning a right is not deprived of his natural right to procure the best possible price for his share but that he cannot sell it to an outsider if a co-owner is willing to buy it at that price."

Cases referred to : *Seneviratne vs Sabapathy* (2 Times of Ceylon L.R. 139)
Mylvaganam vs Tambiah (32 N.L.R. 211)

N. Nadarajah, K.C., with *T. Paramasothy*, for the 2nd defendant-appellant.
L. A. Rajapakse, K. C., with *H. W. Thambiah*, for the plaintiffs-respondents.

DE KRETSER, J.

The plaintiff brought this action claiming pre-emption in a land of which she owned a half share. The 1st defendant had sold his half share to the 2nd defendant for Rs. 750 and the trial judge sees no reason to believe that this sum was not actually paid. The plaintiff, however, estimated that the half share should be worth Rs. 400, alleged that that was the sum really paid by the 2nd defendant to the 1st defendant and brought that sum into court as being the fair market value and asked that the deed in favour of the 2nd defendant be set aside and she be allowed to buy the land. The plaintiff also professed to be willing to pay any further sum which the court ordered her to pay, but it is clear that this further sum was to be on the value which the court decided was the market value. At no stage did she profess to be willing to pay the sum of Rs. 750 if in fact that had been paid for the land.

The right of pre-emption given by the *Thesawalamai* is given by Chapter 51, Part 7 section 1 of the Legislative Enactments. There is no mention there of any such thing as a market value. As its very term implies, when a co-owner wishes to sell, the other co-owner is at liberty to claim or demand the preference of being the proprietor. That must mean that the person owning a right is not deprived of his natural right to procure the best possible price for his share

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but that he cannot sell it to an outsider if a co-owner is willing to buy it at that price. That is the only preference given to a co-owner. A case in Morgan's Digest at page 27 was interpreted by Ennis, J. in *Seneviratne vs Sabapathy* (2 Times of Ceylon L.R. 139) to say that a neighbour who wishes to purchase must pay the best price which can be obtained for the land. In the course of that case Ennis, J. uses the expression "reasonable price" but does not state where he gets it from and his only comment on the report in Morgan's Digest is that the case does not assist the court to say what is a reasonable price in the eyes of relations. Had the *Thesawalamai* referred to a reasonable price in the case of relatives, then, of course, that would have to be ascertained. But, with all due respect, I fail to see that any such restriction is placed on the already heavy restriction placed on a co-owner. Even the expression "market price" is open to misconstruction. As was pointed out by Dalton, J. in the case of *Mylvaganam vs Tambiah* (32 N.L.R. 211) a genuine sale taking place at Rs. 3,500 the District Judge was not entitled to hold that the land was only worth Rs. 2,700. One can understand if the market price is the price which the land would fetch at a public auction. In that case presumably the 2nd defendant would have to pay Rs. 750 and the plaintiff would have the right of pre-emption at that price; just as a co-owner has a right of pre-emption when a land is sold by the Fiscal in execution of a writ. But to ascertain the market price by taking the average price of lands in the neighbourhood seems to me to place an undue burden on the court in ascertaining what should be the proper price paid and to deprive a co-owner of a price which he might legitimately obtain.

In this case the plaintiff is willing to pay Rs. 750. Our order will be that the money necessary to bring the purchase price to Rs. 750 should be deposited within a fortnight of the record reaching the District Court of Jaffna and the order being communicated to the proctors in the case.

We think the order as to costs in the lower court was not correct. The 2nd defendant failed on the question of notice but succeeded substantially on the question of the price. We think that the costs in the lower court should be borne by the respective parties. As regards the costs of appeal, we think the appellant has substantially succeeded and is entitled to half the costs of appeal.

JAYETILEKE, J.

I agree.

Appeal allowed.

Present: JAYETILEKE, J.

THAMBIPILLAI vs KANDIAH & OTHERS

S. C. No. 153—*C. R. Jaffna No.* 15544.
Argued on 13th December, 1944.
Decided on 21st December, 1944.

Growing crop of tobacco—Seizure by Fiscal—Is such crop to be regarded as movable or as immovable property—Validity of seizure effected under section 227 of the Civil Procedure Code.

Held : A growing crop of tobacco must be considered as *fructus industriales* and, therefore, as movable property, and a seizure of such crop under section 227 of the Civil Procedure Code is valid.

Cases referred to : *Cheda Lal vs Mulchand* (I.L.R. 14 All. 30)
Madayya vs Yenkata (I.L.R. 11 Mad. 193)
Sadu vs Sambhu (I.L.R. 6 Bom. 592)
Perera vs Perera (3 N.L.R. 56)
Lee Hedges & Co. vs Saville (8 S.C.C 21)

N. Kumarasingham, for the appellant.
H. W. Thambiah, for the respondents.

JAYETILEKE, J.

This is a simple case. In execution of a decree entered against the 1st and 2nd defendants in action No. 7922 of the District Court of Jaffna, the Fiscal seized a tobacco crop standing on a land called Nadunkanny, on May 8th, 1943. He treated the crop as movable property and effected the seizure in the manner indicated in section 227 of the Civil Procedure Code.

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On May 9th, 1943 the 1st and 2nd defendants and their son-in-law, the 3rd defendant, reaped and removed the crop that was under seizure. The plaintiff thereupon instituted this action for the recovery of Rs. 250 as damages. The learned Commissioner dismissed the action on the ground that the evidence as to the seizure was conflicting. It seems to me that the judgment cannot be supported on this ground. The officer who effected the seizure has given very definite evidence as to what he did. In the absence of any evidence to the contrary there is no reason why his evidence should not be accepted. Counsel for the respondent sought to support the judgment on the ground that the seizure was bad in law. He urged that a standing crop should be treated as immovable property for the purpose of seizure under the Civil Procedure Code and relied on the following decisions of the Indian courts : *Cheda Lal vs Mulchand* (I.L.R. 14. All 30), *Madayya vs Yenkata* (I.L.R. 11 Mad. 193), and *Sadu vs Sambhu* (I.L.R. 6 Bom. 592). I do not think any guidance is to be found from these decisions which turned upon the definition of the expression "immovable property" in the General Clauses Acts of 1868 and 1887. The definition reads :

> " Immovable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

Counsel for the appellant invited my attention to the case of *Perera vs Perera* (3 N.L.R. 56) in which it was held that an agreement in respect of a tobacco crop need not be notarially executed inasmuch as a tobacco crop is *fructus industriales.*

In the case of *Lee Hedges & Co. vs Saville* (8 S.C.C 21) it was pointed out that as regards contracts affecting crops and vegetation a distinction has to be drawn between *fructus naturales* and *fructus industriales.* The former expression applies to crops which draw their nourishment principally from the soil and the latter to crops produced by the manual labour of man in sowing and reaping, planting and gathering. Growing crops if *fructus naturales,* are part of the soil before severance and an agreement in respect of them is governed by section 2 of the Prevention of Frauds Ordinance (Chapter 57). Growing crops if *fructus industriales* are chattels and an agreement in respect of them is governed by the Sale of Goods Ordinance (Chapter 70). Tobacco is sown, cultivated and reaped annually. It is produced essentially by the labour of man and must be considered as *fructus industriales.* The seizure of the crop has, in my opinion, been properly made. I would accordingly set aside the judgment appealed from and send the case back for issues 4 and 5 to be decided. The appellant is entitled to the costs of appeal. All other costs will abide the final result.

Judgment set aside.

Present: HOWARD, C.J.

EKANAYAKE (S. I. Police) vs WASSIRA

S. C. No. 1072—*M. C. Kandy No.* 15276.
Argued on 22nd January, 1945.
Decided on 31st January, 1945.

Control of Prices—Order under Control of Prices Ordinance, No. 39 of 1939, fixing maximum price of one-pound and half-pound loaves of bread—Sale of quarter-pound loaves—Applicability of order.

Held : That an order under the Control of Prices Ordinance fixing the maximum price of one-pound and half-pound loaves of bread has no application to the price at which quarter-pound loaves may be sold.

Per HOWARD, C.J. : " With regard to the weighing of the bread on the scales of the respondent, criminal cases of this nature must be established beyond all reasonable doubt. With no evidence as to the accuracy of the scales it cannot be said that this standard of proof has been reached."

Cases referred to : *Weerasekera vs Subramaniam* (44 N.L.R. 545).

M. P. Spencer, Crown Counsel, for the complainant-appellant.
G. E. Chitty, for the accused-respondent.

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HOWARD, C.J.

This is an appeal with the leave of the Attorney-General from an order of the Kandy Magistrate acquitting the respondent on a charge framed under section 5 of the Control of Prices Ordinance, No. 39 of 1939, as amended by the Defence (Control of Prices) (Supplementary Provisions) Regulations, 1942, in that he did on the 18th July, 1944, sell 4-ounce loaves of bread at 15 cents when the maximum controlled price was 13 cents. It was proved by the prosecution that a decoy went to the boutique of the respondent and asked the respondent for half a pound of bread and tendered a 50-cent note. The respondent then gave him 2 loaves of 4 ounces each and 35 cents in change. After the purchase, a constable came to the boutique and weighed the bread on the balance in respondent's boutique. The constable found that the two loaves weighed 8 ounces. The magistrate acquitted the respondent for the reason that there was no evidence as to the accuracy of the scales and weights on which the bread was weighed. A further point has also been made in this court on behalf of the respondent. His counsel has argued that inasmuch as the amounts of bread controlled is 16-ounce and 8-ounce loaves, the respondent has not offended against the provisions of the order in selling two quarter-pound loaves at more than the controlled price for one half-pound loaf. In my opinion this contention is sound. In *Weerasekera vs Subramaniam* (44 N.L.R. 545) the accused was charged with the sale of 8 sulphapyridine tablets at 50 cents a tablet, a price in excess of the maximum price, in breach of an order made under section 3 of the Control of Prices Ordinance. It was held by Wijeyewardene, J. that the accused had not offended against the provisions of the order as the article controlled was a bottle of tablets and not single tablets. I am of opinion that the same principle must be applied in regard to the sale of bread in this case. The regulation is a penal enactment and must be strictly construed.

With regard to the weighing of the bread on the scales of the respondent, criminal cases of this nature must be established beyond all reasonable doubt. With no evidence as to the accuracy of the scales it cannot be said that this standard of proof has been reached. I think the magistrate's decision on this point was correct.

The appeal is dismissed.

Appeal dismissed.

Present: HOWARD, C.J. & DE KRETSER, J.

GUNANANDA THERO vs ATHUKORALE & OTHERS

S. C. No. 232—D. C. Colombo No. 14842.
Argued & Decided on 13th December, 1944.

Evidence Ordinance section 57—Proclamation under section 3 of the Buddhist Temporalities Ordinance—Is a court bound to take judicial notice of such proclamation.

Held : That a court is bound to take judicial notice of a proclamation under section 3 of the Buddhist Temporalities Ordinance.

H. V. Perera, K.C., with *Kingsley Herat*, for the plaintiff-appellant.
L. A. Rajapakse, K.C., with *J. V. Fernandopulle*, for the 1st defendant-respondent.

HOWARD, C.J.

In this case the learned District Judge found himself unable to find in favour of the plaintiff by reason of the fact that a proclamation exempting this temple from the provisions of section 4 (1) of the Buddhist Temporalities Ordinance had not been proved. By "proved" presumably he meant "strict proof," but in this case no strict proof is required having regard to the provisions of section 57 of the Evidence Ordinance and section 2 (v) of the Interpretation Ordinance. By reason of section 57 of the Evidence Ordinance judicial notice has to be taken of all laws, which by section 2 (v) of the Interpretation Ordinance includes a proclamation.

In these circumstances, that part of the judgment of the District Judge was not in accordance with the law, and he should have taken judicial notice of the proclamation which exempted this temple from the provisions of section 4 (1) of the Buddhist Temporalities Ordinance. All the other issues were in favour of the plaintiff. We have come to the conclusion that the District Judge was right so far as those issues were concerned.

The appeal is allowed with costs. Judgment must be entered for the plaintiff as claimed, in a sum of Rs. 1,000/- as damages, together with costs in this court and in the court below.

DE KRETSER, J.

I agree.

Appeal allowed.

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Present: KEUNEMAN, J. & CANNON, J.

ETHAL ALIAS SILVA vs VELUPILLAI

S. C. No. 39—D. C. (Inty.) Galle No. M.B. 63.
Argued on 15th November, 1944.
Decided on 17th November, 1944.

Action on mortgage bond—Mortgaged property transferred by mortgagor before institution of action—Sale of mortgaged property in execution of decree—Surplus proceeds of sale after satisfying decree—Rights of transferee and holder of a money decree against the mortgagor to surplus—Mortgage Ordinance section 6.

In an action on a mortgage bond, the property mortgaged was sold in execution and a sum in excess of the amount necessary to satisfy the decree was realized. Before the institution of the action, the mortgagor had transferred the mortgaged property to a third party, but the deed of transfer had not been registered. The transferee and the holder of a money decree against the mortgagor, both claimed the surplus proceeds of sale.

Held : That the transferee was entitled to the surplus.

H. V. Perera, K.C., with *G. Thomas*, for the judgment-creditor-appellant.
E. B. Wickramanayake, for the 1st respondent-claimant.

KEUNEMAN, J.

This is an action on a mortgage bond brought by the plaintiff against the defendant, neither of whom is concerned with the present appeal. Decree was entered in this case on the 9th February, 1943 for Rs. 3,112/50. The property mortgaged was sold and realized over Rs. 6,000, and after the plaintiff was paid off a surplus of over Rs. 2,500 remained in the case. The present conflict is between the 1st respondent and the appellant. The 1st respondent claimed the surplus on the ground that the defendant had transferred the property mortgaged to her by deed before the institution of the mortgage action. The deed was not registered, and the 1st respondent was accordingly not a necessary party to the mortgage action but was bound by the mortgage decree under section 6 (2) and (3) of the Mortgage Ordinance, Chapter 74. The 1st respondent claimed to be entitled to the surplus remaining after the plaintiff's decree was satisfied.

The appellant held a money decree against the defendant, and seized the surplus lying in court as belonging to the defendant, and claimed that the surplus should be paid to him in satisfaction of his decree.

The short point in the appeal is whether the 1st respondent who had title to the mortgaged property can claim title to the surplus remaining in the mortgage action after the sale. Mr. H. V. Perera concedes that had the 1st respondent been a party to the action before decree she would have been entitled to claim the surplus, but argues that as the 1st respondent was no party to the action before decree she is not entitled to claim the surplus. I do not agree with this distinction.

Even if the 1st respondent has been a party to the decree, there would have been nothing in the mortgage decree establishing a right in the 1st respondent to the surplus. The mortgage decree would have established the right of the plaintiff only, viz. to the hypothecation and the order for the sale of the mortgaged property. Whatever right the 1st respondent had would have arisen from the fact that she had title to the mortgaged property before the sale.

Mr. Wickramanayake draws our attention to section 6 (3) of the Mortgage Ordinance, under which a person who is not a necessary party under section 6 (2) is bound by every order, decree and sale or thing done in the mortgage action " as if he had been a party to the action," but he may be permitted to intervene at any stage of the proceedings before distribution of the proceeds of sale on such terms as to the court may seem just. Under section 6 (4) nothing in the section shall affect any right to participate in the surplus proceeds of the sale which remains after the satisfaction of the mortgage in suit, or to follow such proceeds.

It is clear in this case that the 1st respondent was bound by the decree and sale " as if she had been a party to the action." She has clearly been permitted to intervene in the action before the distribution of the proceeds of sale was completed. The decree has now been fully satisfied, and there are no outstanding claims by the plaintiff. I can see nothing that can prevent the 1st respondent from claiming that in virtue of her

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original title to the mortgaged property she is entitled to the surplus remaining from the sale of the property. Her claim is superior to that of the appellant who is the holder of a mere money decree against the defendant, and has no claim against the 1st respondent.

If Mr. Perera's argument is sound, then had the conflict been between the 1st respondent and the defendant who had transferred the property to her, we should have been compelled to hold that the claim to the surplus by the defendant was superior to that of the 1st respondent. I do not think that proposition can be entertained.

The appeal is dismissed with costs.

CANNON, J.

I agree.

Appeal dismissed.

Present: KEUNEMAN, J. & JAYETILEKE, J.

ASLIN NONA vs PERERA & ANOTHER

S. C. No. 65—D. C. (Inty.) Colombo No. 655.
Argued on 19th February, 1945.
Decided on 23rd February, 1945.

Action for divorce—Order for payment of alimony pendente lite—*Non-compliance with order—Powers of court—Civil Procedure Code section* 839.

Held : (i) That where a plaintiff fails to comply with an order for the payment of alimony *pendente lite*, the court has power, under section 839 of the Civil Procedure Code, to stay further proceedings until alimony is paid.

(ii) That such failure constitutes contempt of court.

Cases referred to : *Silva vs Silva* (8 N.L.R. 280)
Abeyagoonesekere vs Abeyagoonesekere (12 N.L.R. 95)
East Indian Railway Co. vs Jit Mal Kallo Mal (A.I.R. 1925 Allahabad 280)
Leavis vs Leavis (37 Times L.R. 578)
P. V. P. & T. (26 Times L.R. 607)
Chappell vs Chappell (1938 – 4 A.E.R. 814)

H. V. Perera, K.C., with *P. Malalgoda*, for the 1st defendant-appellant.
N. Kumarasingham, for the plaintiff-respondent.

KEUNEMAN, J.

The plaintiff brought this action for divorce against the 1st defendant on the ground of malicious desertion and adultery with the 2nd defendant. The 1st defendant denied the allegations made and counter-claimed for a divorce against the plaintiff on the ground of malicious desertion and adultery.

On the 24th of March, 1943, the District Judge ordered plaintiff to pay the 1st defendant alimony *pendente lite* at the rate of Rs. 20 per mensem and also Rs. 125 as expenses of litigation.

Admittedly the plaintiff has paid the expenses of litigation but has failed to pay any of the alimony. At the time of this inquiry the 1st defendant had taken out writ, and subsequently a small part of the alimony due was recovered. On the trial date, 4th April 1944, application was made on the part of the 1st defendant that as the plaintiff had avoided payment of the alimony the court should stay the proceedings until the alimony due was paid.

The District Judge refused this application. He held that there was no provision in the Civil Procedure Code which enabled him to grant it, and that he had no authority to adopt the procedure and practice of the English courts in this matter, and that he would be making law if he acceded to that argument. He held this to be the case even if the plaintiff was possessed of means and refused to pay or avoided paying the alimony ordered. The 1st defendant appeals from this order.

Counsel for the appellant argues that the District Judge has failed to take into account the inherent power of the court, now set out in section 839 of the Civil Procedure Code, but recognized even before that section came into being. Counsel contends that the application he made was " necessary for the ends of justice or to prevent abuse of the process of the court,"

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For example, in 1905 and 1909, long before section 839 was enacted, it was held that our courts could adopt the rule of English practice that in a divorce case the husband is as a general rule liable to pay into court or give security for an amount sufficient to cover the wife's costs in connection with the case. This decision was arrived at in spite of the fact that our Civil Procedure Code was silent on the point: see *Silva vs Silva* (8 N.L.R. 280) and *Abeyagoonesekere vs Abeyagoonesekere* (12 N.L.R. 95). Since these cases were decided section 839 has been enacted reserving to the court the inherent power of the court "to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court."

Under the corresponding section of the Indian Code of Civil Procedure (section 151) it was held that when payment of costs is made a condition precedent of adjournment granted to the defendants it is open to the court to strike off the defence and proceed *ex parte* when the costs are not paid as directed: *East Indian Railway Co. vs Jit Mal Kallo Mal* (A.I.R. 1925 – Allahabad 280). In this case Mukerji, J said:

> "Further, section 151 of the Civil Procedure Code would also justify the court in acting in the way it did act. To have allowed the defendant to flout the orders of the court would certainly have been an abuse of the process of the court, and would certainly not have been consistent with the ends of justice. I am prepared therefore to hold that if no other rule applied section 151 would enable the court to exercise its inherent power by enforcing its reasonable orders."

It is unnecessary to consider whether in view of our own decision this dictum is applicable in Ceylon to its fullest extent. But in my opinion the court would certainly, in circumstances such as these, be entitled to order a stay of proceedings until the costs have been paid. I may add, in view of the District Judge's comment on this matter, that if the matter be treated as a contempt we are not in fact increasing our punitive powers as regards contempt; for contempt may also operate as an abuse of the process of the court, and may therefore bring the party within the ambit of section 839.

I think it is also open to us to consider the English practice in this matter, not indeed for the purpose of importing English practice and procedure into Ceylon but for the purpose of considering the principles on which the English courts act and of seeing whether those principles are reconcilable with section 839.

In the case of *Leavis vs Leavis* (37 Times L.R. 578) it was held that orders of the Divorce Division for payment of costs and alimony cannot, since the Debtors Act of 1869, be enforced by attachment, but non-compliance with such orders still constitutes contempt of court. The court may in its discretion refuse to hear a party to divorce proceedings so in contempt, or to permit him to take further proceedings in the suit. In this connection Hill, J. said:

> "Compliance with orders for the payment of the wife's costs and alimony *pendente lite* is regarded by this court as important to the administration of justice in order that the wife should be provided with the means to carry on the litigation, and should not be left destitute. I have come to the conclusion that it is a matter of discretion for the court to determine upon all the circumstances of the case whether the respondent so in contempt should be heard; and that it is a matter material to the exercise of that discretion to consider whether non-compliance with the orders is due to the fault or to the misfortune of the respondent."

See also the case of *P. V.P. and T.* (26 Times L.R. 607) where the non-compliance was with regard to an order for alimony — not in the suit stayed but in a separate suit, but where the alimony was not granted in a particular suit but was given to the wife for her support generally. See also *Chappell vs Chappell* (1938 – 4 A.E.R. 814).

These English cases are interesting because they are based on the matter of contempt, and in my opinion the principles enunciated are applicable to Ceylon because contempt may be regarded as an abuse of the process of the court.

An attempt was made in this case to distinguish between the order for the prepayment of costs and the order for alimony *pendente lite*. I do not think there is any substance in the distinction. If it is a contempt to refuse to prepay costs, it will equally I think be a contempt to try to starve the wife into surrender, or to reduce her to such a state of destitution that she cannot efficiently carry on the litigation.

In this case the District Judge has assumed that the plaintiff being possessed of means has refused to pay or avoided paying the alimony. He has not definitely held that this is the fact. The order appealed from is set aside with costs, and the case is remitted to the District Judge so that he may consider the facts and exercise his discretion in the matter. Either party may adduce any evidence he desires in this connection. All other costs will be in the discretion of the District Judge.

JAYETILEKE, J.

I agree.

Order set aside.

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Present: KEUNEMAN, J., JAYETILEKE, J. & ROSE, J.

SARAM vs THIRUCHELVAM

S. C. No. 73—D. C. Kegalle No. 2289.
Argued on 21st & 22nd February, 1945.
Decided on 5th March, 1945.

Usufructuary mortgages—Property mortgaged first to one person and subsequently to another—Right of subsequent mortgagee to compel prior mortgagee to accept payment of the amount due to him and give a discharge of his bond.

A person granted to the defendant a usufructuary mortgage bond in 1940, and subsequently granted another usufructuary mortgage bond to the plaintiff in 1942. The plaintiff brought the amount of the earlier mortgage bond into court and asked for an order that the defendant should accept the said sum and give a discharge of the bond. The plaintiff maintained the action in his capacity as mortgagee and not as an agent of the mortgagor.

Held : That the plaintiff has no right, as mortgagee, to compel the defendant to accept payment of the amount due to him and give a discharge of his bond.

Per KEUNEMAN, J. : " In my opinion the various authorities establish the following propositions :

(1) It is open to any person who has an interest in the payment to offer to the prior mortgagee the amount of the debt without the consent and even in opposition to the orders of the debtor. The prior mortgagee can be compelled to accept the offer. In the case of a valid offer there will be an end of any action brought by the prior mortgagee, and the accumulation of interest will be stopped and the right of hypothecation extinguished. But for the offer to be valid it must be made in the name of the debtor, and the offer will not be regarded if there is no advantage to the debtor, for example if all that results is a change of creditor (*vide* Pothier 3.1.1 and Voet 20.4.34).

(2) The person who makes the offer and compels its acceptance will not obtain the cession of action nor the right to any preference in the pledge, but any person may by agreement with the prior mortgagee obtain a transfer of the latter's rights, provided the transfer is made according to the form permitted by law (*vide* Voet 20.4.35).

(3) Where the prior mortgagee has brought action, or has taken steps to enforce his rights, the position is different (*vide* Voet 20.4.5)."

Cases referred to : *Heema vs Punchibaba* (23 N.L.R. 95)
Rattaranhamy vs Appunaide (30 N.L.R. 97)
Sanmugam Chetty vs Khan (2 A.C.R. 10).

E. B. Wickramanayake, with *Samaranayake*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *H. W. Thambiah*, for the defendant-respondent.

KEUNEMAN, J.

This matter has been referred to this Bench of three judges in terms of section 775 (1) of the Civil Procedure Code. One Liyanasekera granted to the defendant a usufructuary mortgage bond — D2 of 1940 — and subsequently granted another usufructuary mortgage bond — P2 of 1942 — to the plaintiff. The plaintiff brought the amount of the earlier bond into court and asked for an order that the defendant should accept the said sum and give a discharge of the bond. At the trial the following issues were framed :

i. As the plaintiff is only a mortgagee from the owner of the land, is he entitled to maintain this action and obtain a discharge of the bond in favour of the defendant ?

ii. Did the plaintiff tender the amount due on the bond in favour of defendant prior to action ?

The second issue is immaterial as the money was brought into court with the plaint. The District Judge answered the first issue against the plaintiff, who appeals from that judgment.

The two Ceylon cases cited at the hearing do not cover this point ; *Heema vs Punchibaba* (23 N.L.R. 95) and *Rattaranhamy vs Appunaide* (30 N.L.R. 97). In each of these cases the plaintiff had authority from the mortgagor to pay off the prior mortgage, and was acting as the agent of the mortgagor. In the present case counsel for the plaintiff admitted that he could not maintain the action as agent of the mortgagor, and that he did not come in that capacity. Counsel claimed to maintain the action as mortgagee. The question we have to consider is whether a subsequent mortgagee has the right to compel a prior mortgagee to accept payment of the amount due to him and to give a discharge of his bond.

Voet in his Commentary on the Pandects deals with this matter. In 20.4.5 he refers to the rights of persons in possession of pledges to pay, on action brought by another pledgee, and considers whether cession of action takes place under those circumstances. He admits that the matter is not quite clear, but argues as follows ;

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"It cannot indeed be denied that a stranger who spontaneously (*sponte sua — i.e.* without being impelled by his own interests) offers to pay another's debt to a creditor on behalf of a debtor has no legal right to have the obligation (*i.e.* the mortgage) transferred to him (by the creditor whose claim he thus satisfies) .....but it is otherwise when one either in pursuance of a contract, as in the case of guaranty (*constitutum*) and suretyship, or under the apprehension of losing possession of any kind (more especially when an action has been commenced by the creditor against him as the 'detentor' of a pledge) offers payment to a creditor who is neither unwilling nor reluctant (to receive it) but is taking every means of enforcing it, and, in default of this, is about to deprive him of the possession." (Berwick's Voet p. 584)."

I have cited this passage in full because some reliance was placed upon it by counsel for the appellant. But I do not think it covers the present case. Voet talks of a case "where an action has been commenced by the creditor," or else the creditor "is taking every means of enforcing it, and in default of this is about to deprive him of the possession." In the latter case Voet also postulates that the creditor "is neither unwilling nor reluctant to receive it." In that case a person who is not a mere "stranger" may pay the debt and obtain cession of action.

See in this connection *Sanmugam Chetty vs Khan* (2 A.C.R. 10, at 13). "Voet's reasoning .....shows that the condition of being sued by the creditor is essential to the right of a possessor to pay and claim cession."

Voet deals with the tender by a posterior to an anterior hypothecary creditor in 20.4.34 and 35. The passages which are of importance are as follows:

"34. The second part of this title treats of those who succeed in the place of prior hypothecary creditors: as to which it should be known that posterior hypothecary creditors could tender to a prior one, even against his will, what was due to him, and thus succeed in the place of the prior mortgagee thus settled with, in respect both of principal and interest, although the debtor was not a consenting party to such succession." (Berwick's Voet p. 428).

In 35 Voet deals with the fact that these tenders had some "inequity," and adds:

"They were inequitable in this, that the anterior creditor was deprived of the benefit of a mortgage obtained (it might be) through the greatest prudence and foresight as security for his loan and interest (*i.e.* by way of a convenient and prudent investment of his money: Tr.); and so the more fortunate he had been in providing himself with a sufficient hypothec the more liable was he to be thrust out of it by a tender from a posterior creditor; his vigilance thus profiting not himself but others. They were necessary however because the second creditor could not efficaciously sell the pledge against the will of the prior mortgagee without first tendering to him payment of the debt .....But as by our usages the posterior creditor may rightly demand a solemn (*i.e.* judicial) sale of the pledge against the will of the first, this right of tender fails thus far, that it cannot be forced on an anterior unwilling creditor so as to transfer the right of preference in the pledge: though for the rest, it may be agreed by convention between the first and second creditor.....that the right to the debt, and equally the right of mortgage and of preference, should pass to him with whose money the hypothecary creditor has been paid....." (Berwick p. 429).

It is important to remember that in section 34 Voet is setting out the law as contained in Justinian's Code and Digest, and his references are to the Code and the Digest. In section 35 he sets out first the "inequity" in this, and also argues that at that time there was a necessity so to regard the law "because the second creditor could not efficaciously sell the pledge against the will of the prior mortgagee without first tendering to him payment of the debt." This ground of "necessity" had ceased to exist under the Roman-Dutch law, for "by our usages" the posterior mortgagee could demand a judicial sale of the pledge against the will of the first. Consequently the right of tender could "not be forced on an anterior unwilling purchaser, so as to transfer the right of preference in the pledge." But it was open to the second creditor "by convention" to obtain a transfer of the rights of the prior creditor according to the legal form.

The authority of Pothier on Obligations has also been cited to us: Part III c.1 Art. 1, 463-464 (Evans's translation pp. 330, 331.) The following passage may be noted:

"463. It is not essential to the validity of the payment that it was made by the debtor or any person authorized by him; it may be made by any person without such authority or even in opposition to his orders, provided it is made in his name and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will." (The authority cited for this is Gaius.) "But if the payment was not made in the name of the real debtor it would not be valid."

Later, Pothier (in 464) points out that no difficulty arises in this connection where the creditor has agreed to receive the payment, but that the authorities "do not decide whether the creditor can or cannot be obliged to receive the payment." He then considers certain texts and continues: "From these texts the rule may be inferred that any tender made to the creditor by any person whatsoever in the name of the debtor will be valid, and place the creditor *en demeure*, when the debtor has an interest in the payment, so as to put an end to any action which the creditor may have commenced, or to stop the accumulation of interest or to extinguish a right of hypothecation. But if the payment offered would not procure any "advantage to the debtor, and would have no other effect than to change his creditor, the offer ought not to be regarded." Here the right is given to any

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person interested in the payment to offer to the prior mortgagee the amount of the debt and so to obtain an extinguishment of the obligation. But two points may be noted in this connection: (1) that the offer of payment must be made in the name of the debtor; (2) that the offer should not be regarded if it does not procure any advantage to the debtor, for instance if it has no other effect than to change his creditor.

Reference has also been made to Grotius — Bk. 2, Ch. 48, 43 — (Maasdorp 3rd Edn. p. 192): "A later mortgagee may tender to one who has precedence of his claim, and thus step into his place by cession of action." It is sufficient to say that Grotius is not here dealing with the right of a posterior creditor to compel a prior creditor to receive payment. I need only add that in Schorer's Notes on this section there is a reference to Voet 20.4.35. (Maasdorp 3rd Edn. p. 546).

There is also a passage in Burge (1838 Edn. Vol. III. p. 816) based on the Digest. But Burge is not considering whether the creditor can be compelled to accept the payment. "It (payment) may be made by any person without any authority from and even in opposition to the orders of the debtor, if it is made in the name of and in discharge of him."

It may be argued that the passages in Voet and in Pothier are not reconcilable. If this is so, I think we ought to rely on the authority of Voet rather than of Pothier. But it is possible that in 20.4.35 Voet was in fact dealing with the cession of action, as distinct from the extinction of the debt, and that he said no more than that a cession of action could not be forced upon an unwilling creditor. I think the two passages may be reconciled upon this view. But even accepting the law as laid down by Pothier as applicable to this case, it is clear that the tender of payment in this case was not made in the name of the debtor. The plaintiff has all along in the proceedings insisted on his right as subsequent mortgagee to pay off the debt. In his plaint (paragraph 6) he asserted that he acted as agent for the debtor but he withdrew from this position in the course of the proceedings, and he has nowhere asserted that he made the tender in the name of the debtor. I may add that if in fact the plaintiff claimed cession of action, his offer should be disregarded, for there would be no advantage to the debtor, in that the only result would be a change of creditor. But counsel for the plaintiff has stated that he does not claim cession of action, and the plaintiff has not asked for it in the prayer of his plaint.

In my opinion the various authorities establish the following propositions:

(1) It is open to any person who has an interest in the payment to offer to the prior mortgagee the amount of the debt without the consent and even in opposition to the orders of the debtor. The prior mortgagee can be compelled to accept the offer. In the case of a valid offer there will be an end of any action brought by the prior mortgagee, and the accumulation of interest will be stopped and the right of hypothecation extinguished.

But for the offer to be valid it must be made in the name of the debtor, and the offer will not be regarded if there is no advantage to the debtor, for example if all that results is a change of creditor (*vide* Pothier 3.1.1. and Voet 20.4.34).

(2) The person who makes the offer and compels its acceptance will not obtain the cession of action nor the right to any preference in the pledge, but any person may by agreement with the prior mortgagee obtain a transfer of the latter's rights, provided the transfer is made according to the form permitted by law (*vide* Voet 20.4.35).

(3) Where the prior mortgagee has brought action, or has taken steps to enforce his rights, the position is different (*vide* Voet 20.4.5).

In the present case the prior mortgagee (the defendant) has not taken steps to enforce his rights. The plaintiff has made his offer to pay the amount of the debt but he has not done so in the name of the debtor, but in his own rights as subsequent mortgagee. His action must therefore fail.

The appeal is dismissed with costs.

JAYETILEKE, J.

I agree.

ROSE, J.

I agree.

Appeal dismissed.

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Present: HOWARD, C.J. & DE KRETSER, J.

HAY vs ABDUL GANY

S. C. No. 23—D. C. Kandy No. 1.70.
Argued on 17th October, 1944.
Decided on 26th October, 1944.

Insolvency—Application by creditor to re-open proceedings after grant of certificate of conformity to insolvent—Matters to be taken into consideration in determining whether the application ought to be allowed—Insolvency Ordinance (Chapter 82) sections 127, 129 and 133.

Held : That an application by a creditor of an insolvent to re-open proceedings after the insolvent has been granted a certificate of conformity will not be allowed where the creditor has delayed to make the application and has refrained, for his own benefit, from disclosing to the court facts which were within his knowledge.

Cases referred to : *Sedris vs Ramanathan* (23 N.L.R 315)
Hughes vs Morley (1 B. & Ald. 22)
Courtivron vs Meunier (6 Exch. 74)
Moule ex parte (14 Vesey's Rep. 602).

H. V. Perera, K.C., with *A Seyed Ahamed*, for the proved creditor-appellant.
No appearance for the insolvent-respondent.

DE KRETSER, J.

After the insolvent had been granted a certificate of the third class on the 15th May, 1942, and after his assets had been distributed, the appellant, who was one of the earliest creditors to prove a claim and had actively interested himself in attempts at composition of the debts, moved the court under section 133 alleging that the insolvent had not disclosed property worth Rs. 25,000 which he had inherited from his father. On the insolvent filing a counter-affidavit disclosing the fact that he had transferred this property to his sister in January, 1939, *i.e.* 16 months before the adjudication, the petitioner filed an amended petition praying for action under either section 127 or section 133, alleging that a contemporaneous agreement existed on which the insolvent had certain rights.

Even now his affidavit was not at all as it should have been and many important facts were not disclosed or accounted for. He actually stated that because the insolvent induced him to refrain from opposing the certificate by promising to abide by the " deed of composition " (which provided for the appellant being paid in *full*) he was therefore " not in a position to bring to the notice of the court the facts referred to in paragraphs 9 and 10." He was thus admittedly a party to any fraud practised by the insolvent and deliberately refrained from availing himself of the remedy then open. But he made no move even after the composition had been refused and a fresh certificate meeting ordered and he delayed a year therefrom. The affidavit is silent as to the amount due at its date and the reason for the delay in taking action. None of the many creditors took steps to be associated with the move made by the appellant. If the insolvent had assets they vested in the assignee who could receive them for the benefit of all the creditors. The appellant by proving his claim had elected to take relief in the insolvency case.

What then could be gained by this move ? He could exert pressure on the insolvent and so get undue preference or he might commit him to jail perhaps.

The learned judge in the court below stated in his order that the application under section 127 was not pressed, but the petition of appeal says it was not abandoned, and counsel has devoted most of his attention to this application. The judge refused the application under section 133 on the ground that it was contrary to public policy to allow the appellant, who had known all the facts and refrained from disclosing them for his own benefit, to re-open proceedings.

It is necessary to consider both sections 127 and 133. No case decided under section 127 was found by the judge or has been brought to our notice nor have I been able to discover one. As a matter of first impression it strikes me that no provision is made in section 127 to move the court to have the certificate declared void. An order allowing a certificate is final and conclusive until revised under section 133. Provision is made in sections 129 and 133 to have the certificate annulled and cancelled. All that section 127 declares is that the certificate is in fact void if the facts mentioned therein are proved. This

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would mean that on the insolvent opposing his certificate to any claim made against him these facts may be proved and the certificate would be of no avail to the insolvent. Section 127 is drawn from 12 & 13 Vict. c 106 s 201. This was similar to 6 Geo. 4 c 16 s 130, and exactly like 5 & 6 Vict. c 122 s 38. Under the Statute of Geo. 4 it was held that in an action against the bankrupt, where he pleads his certificate, there was no need to specially plead the facts but it was sufficient to join issue on the plea and give evidence, for by the Statute his certificate, in such a case, was a nullity. (*Hughes vs Morley* 1 B. & Ald. 22). The words in that Statute were, "No bankrupt shall derive any benefit from his certificate." It seems to me that the application to court was misconceived.

Besides, the concealment must be after an act of insolvency or in contemplation of insolvency or with intent to defeat the object of the Ordinance. Under the Statute 5 & 6 Vict. c 122 s 38 it was held that concealment of property rendered a certificate void, notwithstanding the bankrupt made a full disclosure before his last examination. (*Courtivron & Another vs Meunier* 6 Exch 74). In that case the insolvent concealed boxes containing clothes, jewellery, etc. Pollock, C.B. held that s 38 had reference to s 32 (our section 147) and must be read with the words "remove or embezzle." Alderson, B. was of the same opinion and Parke, B. remarked, "It is unnecessary to decide whether the word 'concealment' would be satisfied by the bankrupt not disclosing a full account of his estate and effects." "Concealment" seems to me to refer to tangible assets. Section 127 seems to be concerned with an offence committed before the adjudication. Section 151 (5) which refers to property of any kind and to a subsequent period uses the words "conceal or make away with." "Make away with" might be applied to intangible assets. Section 151 (5) does not render a certificate void or prohibit its issue. It seems, therefore, to contemplate something less serious than section 127.

Now, there is no proof that there was any concealment of property and the deeds referred to seem to have been executed by a Notary Public, in pursuance of some agreement, between the heirs of the late Dr. G. P. Hay and a creditor or creditors of his. There is nothing to indicate, and it is not alleged, that the agreement was fraudulent or made in contemplation of insolvency or to defeat the object of the Ordinance. What is alleged is that the insolvent did not disclose to the court his rights under the contemporaneous deed, but even if he did disclose them, the question would still remain whether he has concealed his rights in the way indicated in the section.

Besides there is no clear indication as to what his right were. The deed itself was not annexed to the petition, and the alleged summary of its relevant provisions is quite unsatisfactory. The point would be whether the insolvent had assets at the time of his adjudication and up to the date of his certificate. The summary states that the insolvent's sister was empowered to sell all the five lands transferred to her and to pay Rs. 35,000. Meanwhile, presumably, the insolvent was to receive 1/3 of the rents "less various deductions." But there is no evidence there were any rents or what the deductions were or whether any balance remained. After the sale the insolvent was to have a life interest in a 1/3 share of the properties remaining unsold and a life interest in any investment made of a third of the balance remaining after payment of the debts specified. It would, seem, therefore, that the insolvent merely had some contingent interests, which, if they are reliable might or might not be available to the assignee.

In my opinion section 127 has no application to the present proceedings. Under it the court does not cancel or recall the certificate, as it must do if it declares it to be void. The Supreme Court may do so under section 129, and under section 133 the Insolvency Court may re-open proceedings. The scheme of the Ordinance seems to provide for three safeguards *viz.* firstly, an application to the Insolvency Court to revise; secondly, an application to the Supreme Court; and thirdly, when neither is made the certificate might be nullified.

The provisions of the Ordinance render it extremely perilous to the insolvent to be other than frank in his dealings with his creditors, and the court. Equally, the court which is acting in the interests of the creditors, expects a high standard of conduct from them.

Turning to section 133, it says that the order of the District Court shall be final and conclusive and shall not be revised ordinarily. Finality is of the utmost importance once when an order has been made regarding the certificate. The court is empowered to revise its order but only if it has *good and sufficient cause* to believe that its order has been obtained on false evidence or by the improper suppression of evidence, or has otherwise been fraudulently obtained. The application may be made by a creditor. It is the duty of the applicant to establish his right to have the proceedings reopened by adducing good and sufficient cause. In my opinion the court is not confined to considering only the suppression of evidence improperly made, but also whether in the circumstances it should re-open proceedings. In the case of *Moule ex parte*

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(14 Vesey's Rep. 602) the court refused to interfere to grant relief where there has been delay and where the petitioner was aware of all the circumstances. That case related to an application to annul an adjudication. This court followed that principle in *Sedris vs Ramanathan* (23 N.L.R. 315) and refused relief where the petitioner had not been diligent in procuring information.

As a matter of fact, the examination of the insolvent was not satisfactorily done. The creditors abstained from taking part. But even so the insolvent might have been questioned closely on the matters made important by the Ordinance. The court was not misled by such evidence as it had in the insolvent's affidavit and there is nothing to show any evidence was improperly suppressed.

I think the court was within its rights in refusing an application by a creditor, who had not only delayed one year, but had also been guilty of conspiratorial silence regarding matters within his knowledge.

The appeal is dismissed.

HOWARD, C.J.

I agree.

Appeal dismissed.

Present: KEUNEMAN, J. & JAYETILEKE, J.

WICKREMASURIYA vs DAVITHAPPU & OTHERS

S. C. No. 226—*D. C. Tangalle No.* 3884.
Argued on 23rd & 28th February, 1945.
Decided on 7th March, 1945.

Action for partition of land—Decree ordering sale of land in lots and declaring one party to be entitled to a house and the soil covered thereby—What share of the proceeds of sale is such party entitled to.

A decree entered in an action for the partition of a land ordered the sale of the land in lots and declared one of the parties to the action to be entitled to a house and the soil covered thereby.

Held : That such party is entitled to the entirety of the amount realized by the sale of the house and the soil on which it was standing.

Cases referred to : *Kanapathipillai vs Nagalingam* (22 N.L.R. 223)
De Silva vs Odiris (34 N.L.R. 176) *

H. V. Perera, K.C., with *C. E. S. Perera*, for the 20th—22nd defendants-appellants.
N. Nadarajah, K.C., with *D. W. Fernando*, for 1A and 1C defendants-respondents.
L. A. Rajapakse, K.C., with *Vernon Wijetunga*, for 1E defendant-respondent.

JAYETILEKE, J.

The plaintiff brought this action for a partition of the land depicted in plan No. 1598 made by C. P. Wickremasinghe, Licensed Surveyor. On November 23, 1940, a decree was entered for a sale of the land in not less than 10 blocks approved by court. By that decree, 1A — 1E substituted-defendants, who are the respondents, were declared entitled to an undivided 150/960 shares of the said land less the extent covered by house No. 4 in lot E, and to certain buildings and a well on lot E. The 20th to 22nd defendants, who are the appellants, were declared entitled to the house marked 4 in lot E and the soil covered thereby. The appellants claimed that house and the soil on which it stood through the 1st defendant who died before decree and in whose place the respondents were substituted.

The Commissioner who was appointed to carry out the sale submitted a fresh plan bearing No. 485T dividing the land into 16 blocks, and a valuation report of the various blocks, and of the buildings and plantations standing thereon. In that plan house No. 4 is marked 26 in lot J. House No. 26 was valued at Rs. 600 and the soil of lot J at Rs. 124. At the sale the 1st respondent purchased house No. 26 and the soil on which it stood for Rs. 11,835/48. We are unable to say why the particular lot fetched such a large sum at the sale, but, having regard to the valuation of the Commissioner, we have reason to think that the purchase price does not represent the true value of the lot. It is a matter of common knowledge that at auction sales properties fetch, at times, much more than their true value.

When the purchase price was brought into court the respondents claimed Rs. 11,404/58 out

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* 1 C.L.W. 385

of it. It must be noted that though 19 persons were allotted shares in the soil the five respondents are the only persons who contested the appellant's claim to the proceeds of the sale. They contended that under the decree the appellants are entitled to the value of house No. 26 as assessed by the Commissioner and to a proportionate share of the proceeds of the sale of the 150/960 shares of the soil to which their predecessor, the 1st defendant, was entitled. The learned District Judge upheld their contention and this appeal is against that order.

The result of the appeal seems to us to turn on the construction that we place on the terms of the decree for sale, which, admittedly, is binding on the parties. That decree has, in clear and unambiguous language, declared the appellants entitled not only to the building but to the soil on which it stands. That being so, it seems to us that the appellant's claim to the entirety of the sum of Rs. 11,835/48 cannot be resisted.

Counsel for the respondents relied on the judgments of this court in *Kanapathipillai vs Nagalingam* (22 N.L.R. 223) and *De Silva vs Odiris* (34 N.L.R. 176)* in which it has held that when property held in common is sold under the Partition Ordinance the value of any improvements should be deducted from the proceeds and the balance divided proportionately among the owners of the soil. In those cases there was no declaration similar to that under consideration in this case. If the appellants were declared entitled to the buildings and to an undivided share of the soil proportionate to the extent covered by the building those decisions would undoubtedly have been in point. But that is not the case before us. For the reasons given above we are of the opinion that the appeal should be allowed with costs here and of the inquiry in the court below.

KEUNEMAN, J.

I agree.

Appeal allowed.

Present: KEUNEMAN, J., JAYETILEKE, J. & ROSE, J.

IN RE WICKREMESINGHE

In the matter of an application (622) by W. P. A. Wickremesinghe to be restored to the Roll of Proctors

Argued on 2nd February, 1945
Decided on 5th March, 1945

Proctor—Application for re-enrolment—Courts Ordinance sections 16 and 18—What formalities should a proctor seeking re-enrolment observe—Inherent jurisdiction of Supreme Court to re-admit to the profession a proctor who has been disenrolled.

Held : (i) The restoration of a proctor to the Roll, after his name has been removed, cannot be regarded as an admission and enrolment of the proctor under section 16 of the Courts Ordinance, and the Second Schedule to that Ordinance has no application to such restoration to the Roll.

(ii) Unless the court is satisfied that the effort of the applicant to live a decent and respectable life has been continued over a period sufficient for it to say with confidence that he can safely be entrusted with the affairs of clients, an application for re-enrolment will not be granted.

Cases referred to : *In re Moonesinghe* (4 C.W.R. 370)
In re a Proctor (39 N.L.R. 517)
In re Abiruddin Ahmed (8 Indian Cases 1108)
Ex Parte Pyke (6 B. & S. 703)

N. Nadarajah, K.C., with *E. B. Wickramanayake* and *C. J. Ranatunge*, for the petitioner.

Marshall Pulle, Crown Counsel, for the Attorney-General as *amicus curiae*.

KEUNEMAN, J.

The petitioner was a proctor of this court. In 1938, he was charged with offences alleged to have been committed in 1930. The charges consisted of three counts: (1) That the petitioner in a curatorship case falsely represented to the District Judge that Mrs. T. F. Wickremesinghe was the owner of a land called Egodawatte tendered as security for a proposed mortgage, and so falsely and dishonestly induced the District Judge to issue an order of payment in his favour for the sum of Rs. 4,038.

(2) That he falsely represented to the District Judge that a mortgage bond hypothecating *inter alia* Egodawatte was ready, and so fraudulently and dishonestly induced the District Judge to issue the said order of payment for Rs. 4,038.

(3) That he falsely represented to the District Judge that Mrs. T. F. Wickremesinghe had perfect title to Egodawatte, and so fraudu-

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* 1 C.L.W. 385

lently and dishonestly induced the District Judge to allow his application that a loan of Rs. 500 be given to Mrs. T. F. Wickremesinghe on a mortgage by her.

The petitioner was convicted of these offences on the 1st April, 1939, and his appeal from the conviction was dismissed on the 26th July, 1939. On the 26th of September, 1939 this court made order directing that the petitioner's name be removed from the Roll of Proctors. The petitioner now moves for an order that he be restored to the Roll of Proctors.

At the hearing Crown Counsel raised a preliminary objection. He argued that this was an application to be admitted and enrolled as a Proctor within the meaning of section 16 of the Courts Ordinance (Chapter 6), and that the Rules set out in the Second Schedule of the Courts Ordinance applied. Crown Counsel insisted that Rule 37 had not been complied with — *viz.* notice to the Registrar and in the Government Gazette and in an English newspaper — and claimed that publicity was necessary in a case of this kind. This is certainly a very novel objection, and has not previously been raised although this court has for a considerable period exercised jurisdiction to restore to the Roll proctors whose names have been removed therefrom. In this case some colour has been given to this objection by the fact that the petitioner purported to base his application on section 16 of the Courts Ordinance.

I have considered the objection but I do not think it can be maintained. Wood Renton, C.J. said in this connection :

> " No express power of reinstatement is conferred upon us by section 19 " (*i.e.* our present section 17) " of the Courts Ordinance. But both in England, before the matter was expressly dealt with by the legislature, and in South Africa, the view has been adopted that a court which has the right to remove the name of a solicitor from the Rolls has also an inherent discretionary power to re-admit him, when he has subsequently expiated the offence of which he has been guilty and redeemed his character. That principle is as applicable in Ceylon as in England and in South Africa." (see *In Re Moonesinghe* 4 C.W.R. 370).

In the case reported in 39 N.L.R. 517 (*In re a Proctor*) Bertram, C.J. said :

> " There is no question that this court has an inherent jurisdiction in the exercise of its discretion where it is of opinion that an offender has subsequently expiated his offence to restore him to the Roll of practising members of the profession."

The important point in these decisions is that the court exercises " an inherent jurisdiction " in restoring a proctor to the Roll. This jurisdiction is not based upon any section of the Courts Ordinance.

I do not think it is necessary to examine the numerous English cases on the point. They were considered in the Indian case of *In re Abiruddin Ahmed* (8 Indian Cases 1108), and I agree with the opinion expressed therein, to wit :

> " The principle deducible from the long series of English decisions.....has been adopted in the American courts and it is regarded there as indisputably settled that an order or udgment of disbarment is not necessarily final or conclusive for all time, but an attorney who has been disbarred may be reinstated, on motion or application, for reasons satisfactory to the court."

It is however of interest to note that the law relating to solicitors was codified in England by the Solicitors Act 1932. Section 3 of this Act deals with the admission and enrolment of solicitors. Under section 13 the Master of the Rolls is given power to replace on the Roll the name of a solicitor whose name has been removed or struck off the Roll. Under section 13 (2) an order under this section " shall for the purposes of section 3 (2) of the Act be deemed to be an admission." I take it that apart from section 13 (2) this would not have been regarded as an admission.

In my opinion in Ceylon the restoration of a proctor to the Roll, after his name has been removed from the Roll, cannot be regarded as an admission and enrolment of the proctor under section 16 of the Courts Ordinance, and the Second Schedule to that Ordinance has no application to such restoration to the Roll.

The preliminary objection therefore fails.

As regards the merits of the application, it is clear that the offences of which the petitioner was found guilty were of a serious character. When the petitioner's name was removed from the Roll Soertsz, A.C.J. was of opinion that " the offences .....are more serious than they appeared to be to the trial judge. " I cannot myself see any element of mitigation in respect of these offences. The person for whose benefit the order of payment was obtained was the petitioner's mother, and the petitioner must have been well aware of the fact that she was not the owner of Egodawatte, and yet the petitioner deliberately misled the District Judge into thinking that she was the owner and in fact had mortgaged Egodawatte. This was a very serious lapse on the part of the petitioner. No doubt the record of the petitioner has otherwise been excellent, but the trial judge took this into consideration in passing on the petitioner a fairly lenient sentence.

It is now urged that the petitioner has made reparation to the minor, and that his conduct and behaviour since his name was removed from the Roll of Proctors has been excellent. I have carefully examined the question whether repa-

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ration has been made to the minor. It certainly appears that the minor and his curator were satisfied with the reparation made, but it is by no means clear that full reparation has been made. Further, there are two points which stand out in this connection, (1) that the reparation was made only after the curator had moved the authorities in this matter, and when criminal proceedings were anticipated, and (2) that the bulk of the reparation was made by the relations of the petitioner, and that the petitioner's only contribution towards reparation was the payment of a sum of Rs. 500 in 1935. It is not possible from these facts to draw the conclusion that reparation was made by the petitioner in a spirit of contrition and repentance.

Since the petitioner was removed from the Roll of Proctors he appears to have led a respectable life. He is the Chairman of the Village Committee of Godapitiya, and in this connection he is said to have control over the funds of the committee. He is also Chairman of the Local Assistance Committee of certain areas, and is the Nominated Member for Weligam Korale and Gangaboda Pattu in the Land Advisory Committee for Matara District. He has also been Chief Warden of Kandaboda Pattu and Gangaboda Pattu under the A.R.P. Controller. He appears to have done useful work in respect of all these matters. The petitioner also was for a period of about 1½ years the Secretary of the Ruhuna Transit Co., Ltd. until August 1944, and as such he had control of collections amounting to over four lakhs of rupees a year. The petitioner discharged his duties satisfactorily and honestly. The petitioner has also produced a number of certificates from judges before whom he had appeared, from proctors and other members of the public, which show the confidence still reposed in the petitioner.

I have carefully considered all these matters, but I am not satisfied that the petitioner has made out a case for restoration to the Roll. I may say the lapse on the part of the petitioner apparently was due to the pressure put upon him by his creditors. There is nothing in the affidavit or in the connected papers to show what his financial position is at the present day. Petitioner's counsel stated that his financial position is now sound but fuller particulars should have been given on this point. But quite apart from this I am not satisfied that the effort of the petitioner to live a decent and respectable life has been continued over a period sufficient to make me say with confidence that he can be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation.

" We have a duty to perform to the suitors of the court, and to the profession of the law, to see that the persons admitted to it are persons on whose integrity and honour reliance may be placed," said Cockburn, C.J. in *Ex parte Pyke* (6 B. & S. 703, at 707 ; 34 L.J.Q.B. 121). " Still, if we are satisfied that the conduct of the man has been such as to inspire confidence in his character, we might admit or readmit him." The application is refused with costs fixed at Rs. 52/50.

JAYETILEKE, J.

I agree.

ROSE, J.

I agree. *Application refused.*

Present: KEUNEMAN, J. & ROSE, J.

DHAMMANANDA vs PEMANANDA THERO

12-*S*—*D. C.* (*Inty.*) *Colombo No.* 10590.
Argued on 14th March, 1945.
Decided on 22nd March, 1945.

Civil Procedure Code section 518—*Instrument in writing by Buddhist priest appointing pupil priest to be the executor and the incumbent of a temple—No specific disposition of property—Is such instrument a Last Will—If so, is the executor entitled to probate.*

Where a Buddhist priest, who was the incumbent of a temple, died leaving an instrument in writing whereby he appointed a pupil priest as his executor and as the successor to the incumbency but made no specific disposition of property,

Held : That the instrument in question was a Last Will which affected property in Ceylon and that the executor was therefore entitled to probate.

Cases referred to : *Piyatissa Terunnanse vs Saranapala Terunnanse* (40 N.L.R. 262)
Devarakkita vs Dharmaratne (21 N.L.R. 255)
Re Elizabeth Tomlinson (1881—6 P.D. 209)

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H. V. Perera, K.C., with *Dodwell Goonewardene*, for the petitioner-appellant.
L. A. Rajapakse, K.C., with *Kingsley Herat* and *T. B. Dissanayake*, for the objector-respondent.

ROSE, J.

In this matter the appellant asks for probate of a Will. It appears that the testator, a Buddhist priest, was the incumbent of a certain temple and that there was consequently vested in him a power to appoint his successor from among his pupils. He purported to exercise this power by the instrument of which probate is requested. No point has been raised as to the form of the instrument, which in that respect would seem to comply with the requirements of the law as to a Will.

The appellant was appointed executor of the Will, and it is, therefore, contended on his behalf that on that ground alone the Will is entitled to be admitted to proof, provided that " property is in any way affected " within the meaning of section 518 of the Civil Procedure Code. I would add that it is common ground that an incumbent may amongst other methods be appointed by Will — indeed, as was pointed out in *Piyatissa Terunnanse vs Saranapala Terunnanse* (40 N.L.R. 262), while the more solemn the form of nomination the easier will be the proof, there is no particular form required — and that the right to such an incumbency is a legal right and not purely an ecclesiastical matter, as was held in *Devarakkita vs Dharmaratne* (21 N.L.R. 255).

Section 518 reads as follows : " (1) When any person shall die leaving a Will under or by virtue of which any property in Ceylon is in any way affected, any person appointed executor therein may apply to the District Court.....to have the Will proved and to have probate thereto issued to him....."

Counsel for the respondent contends, in the first place, that there is a distinction between the conception of a Will in England and according to the Roman-Dutch law and that according to the latter, which he suggests is operative in Ceylon, the instrument in question is not a Will at all, in that it does not purport to dispose of any property ; and secondly, in the alternative, that by the mere appointment of an incumbent no property in Ceylon is " affected " within the meaning of the section.

For the first proposition he relies on a definition contained in page 1 of Steyn on " The Law of Wills in South Africa " where it is said that " a Will or testament is the declaration in proper form by the person making it, the testator, with regard to the disposal of his property after his death " ; also on a somewhat similar definition contained in Maasdorp's " Institutes of South African Law " at page 146 where it is stated that " a Will is a declaration made by any person during his lifetime as to what he wishes should become of his property after his death." This definition appears to be based on a passage in Voet. Counsel further suggests that the terms of the Wills Ordinance (Chap. 49 of the Legislative Enactments of Ceylon) are consistent with his submission in that they relate exclusively to Wills which dispose of property.

Even assuming that counsel is correct in his contention that the Roman-Dutch conception of a Will is the one to be considered, it seems to me that it would be incorrect to assume that the definitions contained in Steyn and Maasdorp are intended to be exhaustive. The same observation would seem to apply to the Wills Ordinance, and I consider that the better view is that a wider meaning should be given to the term " Will " and that a Will should be regarded as including any testamentary paper drawn up in proper form which complies with the requirements of section 518.

As to the respondent's second position, I would point out that the phrase " in any way affected " is not a term of art and, that being so, the legislature have made use of a very wide expression. It seems to me that according to the ordinary usage of language it cannot reasonably be held that property is not affected by the appointment of a person to administer it, as it is unlikely that any two persons would administer property exactly in the same manner.

Counsel for the respondent referred to an old case, *Re Elizabeth Tomlinson* (1881–6 P.D. 209) to show that even in England the mere appointment of an executor is insufficient to entitle a Will to probate. That case, however, refers to the Will of a married woman, who at that date was subject to certain disabilities, and insofar as Wills in general are concerned it would seem to be against his contention. The learned President in the course of his judgment said as follows : " Where the Will is of a man or a femme-sole the appointment of an executor has been held sufficient to entitle the Will to proof ; but where it is the case of a married woman executing a power by Will different considerations arise.....In the case of a femme-sole, making her Will the rule applicable to Wills in general would, of course, be put in force, namely that the appointment of an executor *prima facie* entitles the Will to be admitted to proof."

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I would add that the fact that the construction of this Will may well give rise to difficulty is not in my opinion a good ground for refusing to grant probate.

For these reasons the appeal must be allowed, the judgment of the District Court set aside and the order *nisi* dated the 9th of September, 1943, made absolute. The appellant will have the costs of the proceedings here and below.

KEUNEMAN, J.

I agree.

Appeal allowed.

Present: WIJEYEWARDENE, J.

THEVAR vs FERNANDO

S. C. No. 708/1944 *Workmen's Compensation No.* C3/95/43.
Argued on 9th March, 1945.
Decided on 27th March, 1945.

Workmen's Compensation Ordinance (Chapter 117) *section* 3—*Death of workman—Disobedience by workman of orders — Accidents arising out of and in the course of employment—Liability of employer.*

The deceased workman was employed as a labourer to load bags of tea leaves from lighters into ships in the Colombo Harbour. The bags were carried from the lighters to the ship by means of a sling worked by a crane. When all the bags had been loaded the workmen were required to go on board the ship to have their names registered by a clerk. The deceased workman, acting against orders, used the sling to go on board the ship, and fell, and was killed.

Held : That the accident arose out of his employment within the meaning of section 3 and that the employer was liable to pay compensation.

Cases referred to : *Noble vs Southern Railway Co.* (1940 – App. Cases 583)
Moore (A.G.) & Co. vs Donnelly (1921 – 1 App. Cases 329)
Blair & Co., Ltd. vs Chilton (1915 – 8 Butterworth's Workmen's Comp. Cases 324)
Plumb vs Cobden Flour Mills Co., Ltd. (1914 – App. Cases 62)
Wilsons & Clyde Coal Co., Ltd. vs M'Ferrin & Kerr or *M'Aulay & Another vs James Dunlop & Co., Ltd.* (1926 – App. Cases 377)
Kelaart vs Piyadasa (1942 – 43 N.L.R. 394).

H. W. Thambiah, for the applicant-appellant.
H. W. Jayawardene, for the defendant-respondent.

WIJEYEWARDENE, J.

This is an appeal from an order made by a Commissioner for Workmen's Compensation dismissing the appellant's claim for compensation in respect of the death of his son Suppiah.

Suppiah was a labourer employed in the Colombo Harbour by the respondent in loading bags of tea leaves. The bags are carried up from the lighter to the ships in the harbour by means of a sling — described by one witness as " merely a loop of a rope " — worked by a crane. When all the bags have been sent to the ship, Suppiah and his co-workmen on the lighter have to go on board the ship, get their names registered by a clerk and leave the ship by a gangway and go ashore in a boat provided by the respondent. On the day in question Suppiah clung to the last load of bags carried by the rope sling. The deckman who was on board the ship saw Suppiah coming up on the loaded sling and gave orders for the sling to be " halted." Immediately afterwards, the bag to which Suppiah was clinging got unloosened. Suppiah fell down with the bag and was killed.

Evidence was led before the Commissioner to shew that a net sling was used to convey labourers between the lighter and the ship and that they had been warned not to go up or down in an empty or loaded rope sling. There was evidence also to shew that Suppiah had been warned on this occasion too not to come up on the loaded sling. The Commissioner has accepted that evidence.

The issues framed by the Commissioner at the commencement of the inquiry were :

(*a*) Did the deceased Suppiah receive personal injury by accident arising out of his employment under the respondent.

(*b*) Is the applicant a dependant of the deceased ?

(*c*) What compensation, if any, is payable by the respondent ?

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The Commissioner answered issue (*a*) in the negative and issue (*b*) in the affirmative and awarded no compensation to the applicant. It will be noted that the parties were not at issue on the question whether the accident was " in the course of the employment."

In dealing with issue (*a*) the Commissioner held :

> " This case falls to be dealt with on the lines of the three questions framed by Lord Maugham in *Noble vs Southern Railway Co.* (1940 Appeal Cases 583.) The answers are as follows :—
>
> 1. Looking at the facts proved as a whole including the order given to the workmen not to use the loaded sling to go up to the ship it must be held that the accident was not one which arose out of the employment of the deceased under the respondent *Moore (A.G.) & Co. vs Donnelly* (1921 – 1 App. Cases 329).
>
> 2. The answer to the first question is in the negative as the accident was due to the deceased contravening an order given to him by the person who supervised his work by going up to the ship on the loaded sling.
>
> 3. The act of the deceased was not done for the purposes of and in connection with his employer's trade or business.....The object appears to have been to get ashore as early as possible after the actual work of loading the bags of tea leaves had been accomplished.....It would have been different if the accident occurred when the deceased descended to the lighter from the ship in order to work expeditiously."

I may observe at this stage that in answering the third question the Commissioner appears to have considered the motive of Suppiah in disobeying the prohibition. Such a consideration is irrelevant as Lord Wright observed in *Noble vs Southern Railway Co.* (*supra*) :

> " The motive, in the narrower sense of the immediate urge in choosing to go by the prohibited route is immaterial, whether it was to save time or to save himself trouble. The test is objective and depends on the fact that his proceeding to the station was within the sphere of his employment."

A large number of English cases were cited at the hearing before me. As was remarked by Earl Loreburn in *Blair & Co., Ltd. vs Chilton* (1915 – 8 Butterworth's Workmen's Compensation Cases 324) —

> " The Workmen's Compensation Act is an Act lending itself to infinite refinement. The words of the Act itself rule in every case. Previous decisions are illustrations of the way in which judges look at cases, and in that sense are useful and suggestive ; but I think we ought to beware of allowing tests or guides which have been suggested by the court in one set of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself."

Apart from the danger indicated above, a court has to act cautiously in following the English decisions, as section 3 of the Workmen's Compensation Ordinance is not identical with the corresponding provisions of the English Acts which govern those decisions. It is, I think, desirable to examine the various statutory provisions made in England from 1906.

The Workmen's Compensation Act of 1906 enacted :

> " Section 1 (1). If in any employment persona injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule in this Act.
>
> (2) Provided that :
>
> (*a*) .....
>
> (*b*) .....
>
> (*c*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

Under this Act one of the methods used to show that the injury was not caused by an " accident arising out of the employment " was by proving that the workman was doing some thing which he was prohibited from doing. This gave rise to the distinction drawn in *Plumb vs Cobden Flour Mills Co., Ltd.* (1914 – App. Cases 62) between " prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment." It was held that it was only a " scope limiting prohibition " that prevented an accident from arising out of the employment.

In *Moore (A.G.) & Co. vs Donnelly* (*supra*) a miner, in the course of his employment fired a shot by means of a fuse and detonator and retired to a place of safety. The shot missed fire. Acting in contravention of certain statutory orders made under the Coal Mines Act, the miner returned to the place of the shot in less than one hour, when the shot blew off in his face and disabled him permanently. It was there held that the miner was not entitled to compensation. Lord Birkenhead, L.C., stated :

> " On principle, no distinction can logically be drawn between a prohibition founded upon statute and one imposed by the employer to regulate the employment.....Where a prohibition for which the employer is responsible, in matters comparable to those under discussion, is brought clearly to the notice of the workman, his breach of it takes him outside the sphere of his employment, so that the risk in which he involves himself has ceased to be reasonably incidental to that employment."

As a result of this decision, the legislature amended the law by an Act of 1923 providing that even in such circumstances as those in *Moore (A.G.) & Co. vs Donnelly* (*supra*) the accident " shall be deemed to arise out of and in the course of the employment," if the act done by the workman in contravention of orders was done by the workman " for the purpose of and in connection with his employer's trade or business,"

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That Act of 1923 was an amending Act to be read with the principal Act of 1906 and the relevant provision was contained in section 7 which read :

> " For the purposes of the principal act, an accident resulting in death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

In the new Act of 1925 the relevant provisions are as follows :

Section 1 (1)		Same as section 1 (1) of the 1906 Act.
Proviso	(*a*)	Same as section 1 (2) (*a*) proviso of 1906 Act with a slight amendment.
Proviso	(*b*)	Same as section 1 (2) (*c*) proviso of 1906 Act.
Section 1 (2)		Same as section 7 of the 1923 Act.

Wilsons & Clyde Coal Co., Ltd. vs M'Ferrin & Kerr or *M'Aulay & Another vs James Dunlop & Co., Ltd.* (1926 – App. Cases 377) showed the scope of section 1 (2) of the Act of 1925. In the first case M'Ferrin and Hendry, two miners, had to bring down a " nose " of coal by blasting. Each miner had to bore a hole, charge it with an explosive, stem it and then light a strum. After stemming his hole M'Ferrin gave the usual warning to all in the vicinity. He then lit his strum and went to a place of safety. Hearing a shot going off, M'Ferrin thought it was his, having forgotten temporarily that there were two shots to go off. After a few minutes M'Ferrin went back to find out if his shot had brought down the coal. The shot which went off was Hendry's shot. His shot had, in fact, misfired and went off in his face when he returned, and injured him seriously. In returning within an hour he contravened the provisions of a statutory order. Though the facts were similar to those in *Moore (A.G.) & Co. vs Donnelly* (*supra*) it was held that the workman was entitled to compensation in view of section 1 (2). In the second case M'Aulay, a miner, was engaged along with a fireman and another miner, in firing by electricity a series of shots in a mine. When one of the shots had exploded, M'Aulay came from his place of safety and coupled the cable to the detonator of the next shot. At the time the fireman was moving the handle of his firing battery, which was still attached to the cable, to free some mechanism which had jammed. The shot exploded and M'Aulay was killed. There was a statutory mining regulation which provided that the person authorized in writing by the Manager to fire the shots should himself do the coupling. It was held that in coupling the cable to the detonator, M'Aulay was arrogating to himself a duty restricted to the authorized shot firer and that the accident did not arise out of the employment and that section 1 (2) did not apply.

I shall discuss now the case of *Noble vs Southern Railway Co.* (*supra*) relied on by the Commissioner. In that case the Court of Appeal had to consider again the effect of section 1 (2) of the English Act. Noble, the husband of the claimant, was a fireman employed by the Railway Company and attached to the locomotive depot at Norwood Junction. He was asked to go to East Croydon to carry out duties there. For that purpose he had to walk from the depot to Norwood Junction and then take train to East Croydon. The recognized route from the depot to Norwood Junction was along a lighted footpath. There was another route which was shorter along the lines of the Railway. That route was a dangerous one and its use by the employees of the Company was prohibited by written instructions which stated further that an employee using that route would be acting " outside his employment." Noble went along the prohibited route and was killed by an electric train. The decision of the House of Lords was in favour of the claimant. In the course of his judgment, Lord Porter said :

> " It is clear that if the case comes within sub-section (2) the man will be entitled to compensation notwithstanding the added risk which the man has run by his disobedience. That obviously is the very object of the sub-section in the case of death or serious and permanent disablement being caused by the accident."

The effect of this decision as may be gathered from the various judgments appears to me to be as follows : The question has to be considered first whether the accident arose " out of and in the course of the employment " within the meaning of section 1 (1) of the Act. In the consideration of this question the Judge of the County Court should ignore the order in contravention of which the workman was acting when he was killed or seriously injured. The order to be ignored may be even one of such a nature as would have been held before 1923 to be a " scope-limiting " order. If the answer to the question so considered is in the negative then the claim fails. An instance given by Lord Atkin is that of a guard not employed as engine driver and injured while driving the train. His injury would not arise out of and in the course of his employment, apart from the fact that his employers had made an express regulation that no guard was to drive an engine. Another instance is afforded by *M'Aulay & Another vs James Dunlop & Co., Ltd.* (*supra*). If the answer to the

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question is in the affirmative, then the further question has to be considered whether in view of the contravention of the order or regulation it is or it is not an accident arising out of the employment. If the answer to that question is also in the affirmative the claim succeeds. If the answer to this further question is in the negative, then the judge must inquire whether the "act was done by the workman for the purposes of and in connection with his employer's trade or business." The inquiry should not be whether the act was done for the purposes of and in connection with the *workman's job*. If the answer to that inquiry is in the affirmative then by section 1 (2) "the accident shall be deemed to arise out of and in the course of the employment" and the claim will succeed. Otherwise the claim will fail.

In the above case Viscount Maugham stated concisely in another form the questions which the County Court Judge will have to answer :

1. "Looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of and in the course of his employment. ?"
2. "If the first question is answered in the negative, is the negative answer due to the fact that when the accident happened the workman was acting in contravention of some regulation or order ?"
3. "If the second question is answered in the affirmative was the act which the workman was engaged in performing done by the workman for the purpose of and in connection with his employer's trade or business ?"

It was those three questions which the Commissioner thought he was obliged to answer in considering the first issue in this case and he answered those questions :

1. No.
2. Yes.
3. No.

It has to be considered whether the Commissioner was right in proposing to himself those three questions.

The relevant provisions of our Ordinance are :

"Section 3. If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Ordinance :

Provided that the employer shall not be so liable :

(*a*) .....

(*b*) In respect of any injury, not resulting in death caused by an accident which is directly attributable to :

(i) .....

(ii) The wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) ....."

If one adopts the method of approach suggested by Viscount Maugham in *Noble vs Southern Railway Co.* (*supra*) the Commissioner should have put to himself only the first two questions suggested by him as section 3 (*b*) (ii) of our Ordinance does not render it necessary to consider whether or not the workman contravening any order was acting "for the purpose of and in connection with the employer's trade or business."

The Commissioner having answered those two questions, the first in the negative and the second in the affirmative, should have held in favour of the appellant. He misdirected himself when he proceeded to consider the third question formulated by Viscount Maugham which finds no place in a case governed by our Ordinance.

In going by the rope-sling instead of the net-sling Suppiah was, no doubt, disobeying his master's orders in that respect but he was not placing himself outside the scope of his employment. He was at the time engaged in performing his duty — going to the ship to have his name registered — and was not "engaged in a frolic of his own under the pretence of doing his master's work." If the mere fact that at the time of the accident the workman was doing an act in wilful disobedience of the employer's order rendered the accident to be one not arising out of the employment, then the legislature has failed to achieve its object in creating an exception in section 3 (*b*) in respect of claims arising from the death of a workman, because the success of every claim depends on the proof that the injury was caused by accident arising out of the employment.

Adapting the line of reasoning in *Noble vs Southern Railway Co.* (*supra*) to cases under our Ordinance I am of opinion that the Commissioner should have approached the consideration of the first issue by asking himself first whether the accident arose out of the employment within the meaning of section 3, ignoring the prohibition with regard to the use of the rope-sling. If he answered that question in the negative then the claim would fail (*vide Kelaart vs Piyadasa* (1942 – 43 N.L.R. 394). If he answered that in the affirmative, then it did not matter that the deceased met with his death because he acted in wilful disobedience of the prohibition regarding the use of the rope-sling.

I set aside the order of the Commissioner and send the case back to him for the assessment of compensation. The appellant is entitled to costs of the proceedings before the Commissioner and the costs of appeal.

Order set aside.

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Present: HOWARD, C.J.

SUBASINGHE vs MUTTIAH

S. C. No. 735—M. C. Negombo No. 40776.
Argued on 23rd January, 1945.
Decided on 30th January, 1945.

Penal Code section 484—What are the ingredients of the offence under section 484.

Held : That to constitute an offence under section 484 of the Penal Code the following ingredients must exist —

(*a*) The insult must be intentional.
(*b*) The insult must be of a provocative character likely to produce a breach of the peace.
(*c*) The accused must have the knowledge that his words would produce that result.

Cases referred to : *Balasuriya vs Dharmasiri* (1 C.L.W. 343)
U. J. Perera vs Fernando (1 C.L.J. 49 — notes).

S. Nadesan, with *N. Nadarasa*, for the accused-appellant.
T. S. Fernando, Crown Counsel, for the Attorney-General.

HOWARD, C.J.

The appellant appeals from his conviction on a charge under section 484 of the Penal Code that he did insult Mr. A. P. Wickremasuriya, Station Master, Negombo Railway Station, by using the following words, " I will take off your uniform and teach you a good lesson." and thereby gave provocation to the said Mr. A. P. Wickremasuriya intending that such provocation will cause the said Mr. A. P. Wickremasuriya to break the public peace or to commit any other offence. The appellant on the day in question went to the railway station to fetch his parcel of papers. The station master was on the platform attending to two trains which had arrived at the station at that time. The appellant approached the station master and complained that his papers were being delayed and demanded immediate inquiry. The station master was busy at the time and wanted the appellant to wait a few minutes. The appellant then became boisterous and threatened to report the station master to the General Manager. After the trains had gone the station master went to the booking office and found that the papers had been delivered to the appellant. As the appellant was going through the gate where the policeman collects tickets the appellant used the words which have been made the subject of this charge. The station master says that he was greatly provoked by these words and went up to the appellant and told him that he proposed to detain him till he handed him over to the Police. He says that he detained him fearing a breach of the peace.

Counsel for the appellant contends that the words alleged to have been used by the appellant cannot, in the circumstances of this case, be said to constitute in law an offence under section 484 of the Penal Code. It has been held by this and the Indian Courts that a charge of insult cannot be substantiated if the language used amounted to mere verbal abuse. It must also appear from the circumstances, from the terms of the abuse itself and having regard to the person to whom it was addressed that the accused intended or knew it would be likely to cause him to break the peace or commit some other offence. In this connection the cases of *Balasuriya vs Dharmasiri* (1 C.L.W. 343) and *U. J. Perera vs Fernando* (1 C.L.J. 49 — notes) are very much in point. In the latter case Abrahams, C.J. held that in the absence of a finding that the accused had the necessary intention or knowledge that the person insulted was likely to break the public peace, the conviction of the accused for an offence under section 484 was not sustainable. Now, in this case the magistrate has satisfied himself that the insult was intentional. He also finds that the insult was of a provocative character likely to produce a breach of the peace and that considering all the evidence, he is satisfied that the accused must have known he would produce that result. I find it impossible to say, having regard to all the circumstances of the case, that the magistrate's finding on this point was wrong.

The appeal is therefore dismissed.

Appeal dismissed.

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Present: MOSELEY, S.P.J.

JIRASINGHE vs SETUNGA

S. C. No. 874/75—M. C. Gampola No. 5235 with Application No. 397.
Argued & Decided on 23rd October, 1944.

Penal Code section 434—Criminal trespass—Nature of intention necessary to support charge.

Held : That a subsidiary intention to annoy or mere knowledge that annoyance might result is not sufficient to prove a charge of criminal trespass.

H. V. Perera, K.C., with *M. M. Kumarakulasingham*, for the accused-appellants and petitioners in application.

A. H. C. de Silva, for the respondent in appeal.

MOSELEY, S.P.J.

The accused-appellants in this case were convicted of committing criminal trespass by entering the complainant's room with intent to annoy him and thereby committing an offence punishable under section 434 of Chapter 15 of the Legislative Enactments of Ceylon.

It is common ground, I think, that the two accused were instrumental in effecting forcible entry into the room occupied by and locked by the complainant. It seems to me that the only question that arises is whether they did so with intent to annoy the complainant. That is a question of fact and before a conviction could be had, it must be established beyond reasonable doubt. It has been proved that there was a certain amount of ill-feeling between the complainant and the first accused. It is possible that the first accused might to some extent have been influenced by that ill-feeling. It appears, however, that before the action out of which these proceedings arose took place, the first accused, according to his own story, had reason to believe that the complainant was concerned in the theft of rice, the property of the school of which the first accused was Headmaster. It seems to me that if that is accepted, and I feel that I must accept it, that the feeling uppermost in the mind of the first accused was to investigate without delay the offence which rightly or wrongly he believed had been committed. The second accused it would appear was the driver in the employ of the first accused and was not unnaturally acting under the orders of the first accused.

A number of authorities have been brought to my notice and I am satisfied after consideration of these authorities that a subsidiary intention to annoy or mere knowledge that annoyance might result is not sufficient to prove a charge of this nature. It will be sufficient if a substantial intention to annoy existed.

The evidence given by the first accused is not entirely satisfactory but it does not seem to me that the prosecution has proved beyond reasonable doubt that there was a substantial intention in the mind of the first accused to annoy the complainant. To put it no higher, the accused must, in my opinion, receive the benefit of the doubt.

I allow the appeals and set aside the convictions and sentences.

Appeals allowed.

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IN THE COURT OF APPEAL

Present: LORD GREENE, M.R., MACKINNON, L.J. & DU PARCQ, L.J.

YUILL vs YUILL

Appeal of the petitioner from a decision of Wallington, J., dated September, 5, 1944, dismissing the petition for a divorce.
Decided on 20th November, 1944.

Divorce—Appeal—Trial judge taking large part in examining witnesses—Whether ground for new trial—Discretion of judge—Limits of judicial intervention—Submission of no case at close of petitioner's evidence—Judge's ruling against such submission—Can respondent call evidence thereafter—Election.

Witnesses—Their demeanour—Judge's duty to test demeanour of witness in the light of whole evidence—Appellate court's power to review trial judge's view involving demeanour of witness.

The appellant (husband) sued the respondent (wife) for divorce on the ground of adultery. Prior to September, 1942, during several months the respondent had committed adultery with the co-respondent in the appellant's house during his absence. In September, 1942 these acts of adultery were condoned and the only act of adultery complained of in the petition was one committed on August 3, 1943. While evidence on this issue was being led the judge took a large part in the examination of witnesses. At the close of the appellant's case counsel for the respondent made a submission that no case had been made out by the appellant and that his petition be dismissed. The judge ruled against this submission and heard evidence of the respondent and the co-respondent without calling upon respondent's counsel previously to elect between calling evidence and relying on his submission. After trial the learned judge dismissed the petition holding that on the appellant's evidence he could not draw the inference that adultery took place on August 3, 1943 and that upon a "careful observation" of the demeanour of the respondent and of the co-respondent while giving evidence and the opinion he formed of their "type and characteristics" "he was not satisfied that they were deliberately dishonest in the box."

On appeal it was argued for the appellant :

(*a*) That as the submission of no case failed, the appellant was entitled to a decree or alternatively the appeal court in considering the appeal ought to disregard the evidence led for the respondents.

(*b*) That a new trial ought to be ordered inasmuch as the trial judge took a large part in the examination of witnesses.

(*c*) That on the evidence adduced in the case the appellant's case should have been accepted and the respondent's rejected. Counsel for respondent replied that the appellate court ought not to interfere with the view taken by a trial judge of witnesses whose demeanour he could observe.

Held : (i) That a submission by the respondent before calling his evidence that the petitioner has made out no case does not deprive him of his right to call evidence if such submission failed. He loses the right if he elects, expressly or impliedly, to call no evidence.

(ii) That the part which a judge ought to take while witnesses are giving their evidence must rest with his discretion.

(iii) That the mere fact that a judge takes a large part in the examination of witnesses during trial is not sufficient to justify an order for retrial.

(iv) That a judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence.

(v) That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded.

Per LORD GREENE, M.R. : (*a*) "It is, of course, always proper for a judge — and it is his duty — to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself.

(*b*) "If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.

(*c*) "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself

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of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."

Cases referred to : *Alexander vs Rayson* (1936 – 1 K.B. 169)
Parry vs The Aluminium Corporation, Ltd. (1940 – 162 L.T. 236)
Laurie vs Raglan Building Co., Ltd. (1942 – 1 K.B. 152)
Hvalf, Polaris & Another vs Unilever, Ltd. & Others (46 Ll. L.R. 29 – H.L.).

H. B. Durley Grazebrook, K.C., with *William Latey*, for the appellant.
P. L. E. Rawlins, with *Horace Vester*, for the respondent.

Lord Greene, M.R.

Before I come to the principal question in this case it will be convenient to dispose of two arguments submitted by counsel for the appellant. The first is as follows: In the court below, when the case for the appellant was closed, counsel for the respondent made a submission. It was intended to be a submission of no case — not, as I understand, in the sense that the evidence led by the appellant was insufficient in law to support a decision in his favour — but by way of an invitation to the judge to dismiss the petition without calling on the respondent. Wallington, J. did not at the time appreciate the nature of counsel's submission : in particular it did not occur to him that in taking the course which he did the respondent's counsel was in any way intending to call no evidence. In the result he did not follow the practice which, we are informed, has been adopted in the Divorce Division of calling upon the respondent's counsel to elect whether to call evidence or to proceed with his submission. The submission having failed, counsel for the appellant contended before Wallington, J. that the respondent's counsel, by making the submission, had lost his right to call evidence and that the judge's ruling necessarily mean that the appellant was entitled to a decree. This contention was rejected by Wallington, J. It was, however, repeated before us and we were invited to say that the appellant ought in the circumstances to have been granted a decree as a matter of course and to allow the appeal accordingly. Alternatively, it was said that if the mere fact that the judge had ruled against the submission of no case was insufficient, we ought in considering the facts to disregard the evidence led by the respondent.

This argument is, in our opinion, based on a misapprehension of the meaning of the practice which in appropriate cases is followed where counsel for a defendant desires to make a submission of no case. The practice is discussed in *Alexander vs Rayson* (1936 – 1 K.B. 169), *Parry vs The Aluminium Corporation, Ltd.* (1940 – 162 L.T. 236), and *Laurie vs Raglan Building Co., Ltd.* (1942 – 1 K.B. 152), and I will assume that it is a proper practice to follow in the Divorce Division. It does not mean that counsel by submitting no case *ipso facto* loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in *Laurie vs Raglan Building Co., Ltd.* (*supra*)) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound : but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel is entitled to call his evidence just as much as if he had never made the submission. This argument, therefore, fails.

The other argument was to the effect that the trial was unsatisfactory owing to the fact that the judge took an undue part in the examination of witnesses. It was said that the judge put many more questions to witnesses than all the counsel in the case put together and that he in effect took the case out of counsel's hands to the embarrassment of counsel and the prejudice of his case. 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 as he did. I wish to say at once that having read the many pages of the transcript over which the judge's questions extend to the exclusion of counsel, often at the most critical points of the examination or cross-examination, I can find no trace whatever of any tendency to take sides or to press a witness in any way which could be considered undesirable. It is quite plain to me that the judge was endeavouring to ascertain the truth in the manner which at the moment seemed to him most convenient. But he must, I think, have lost sight of the inconveniences

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which are apt to flow from an undue participation by the judge in the examination of witnesses. It is, of course, always proper for a judge—and it is his duty—to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be the crucial point, himself intervenes and prematurely puts the question himself. I think it desirable to throw out these suggestions in case they may be found helpful in the future. So far as the present case is concerned, although the part taken by the judge has in my view a bearing upon another branch of the case, I am quite unable to accept the argument that anything that took place would justify this court in ordering a new trial.

I now come to the principal question in the case which is one of pure fact, namely, did the respondent commit adultery with the co-respondent in the co-respondent's lorry on August 3, 1943? During many months down to the middle of September, 1942, adultery had taken place in particularly flagrant circumstances in the matrimonial home during the absences of the appellant. At a date near the middle of September, 1942, condonation admittedly took place, and the only act of adultery alleged subsequent to the condonation was that now in issue, namely, on August 3, 1943. It was argued that even if the act of adultery was not actually committed on August 3, yet what then took place coupled with the meetings which preceded it amounted to an amorous association which was sufficient to revive the condoned adultery. Quite apart from the question whether anything short of a matrimonial offence can revive a condoned act of adultery (upon which I express no opinion) I agree with the judge that on any view of the law the facts (if adultery is not established) would be insufficient to bring about revival. It seems to me that there is no room for a middle view on the evidence. It was either adultery or nothing on August 3, and there is no evidence of acts of familiarity during the preceding meetings.

The judgment of Wallington, J. falls into two parts. Having regard to the argument which had been addressed to him on the subject of counsel's submission of no case, he first examined the evidence called on behalf of the appellant without regard to the evidence of the respondent or the co-respondent. He came to the conclusion that upon the appellant's evidence he ought not to draw the inference that adultery took place in the lorry on August 3. He accepted the appellant and Young as witnesses of truth but he refused to draw the inference for two reasons. The first was that he did not think that they could have seen from their post of observation everything which they said that they saw; the second was that he thought that it was impossible to commit adultery in the available space. I will deal with the last point first. The judge appears to have relied to some extent on his own knowledge of the layout and dimensions of the cabs of lorries. He also, I infer, thought the suggestion to be that when the respondent and co-respondent disappeared from the view of the appellant and Young they must have lain on the floor a thing which I agree would probably have been impossible. But their disappearance from the view of these witnesses was clearly consistent with their bodies being supported in a semi-recumbent position by parts of the seat next to the driver's seat. I am afraid that I cannot agree with the judge's view as to the impossibility of adultery being committed in the circumstances stated by the appellant and Young—if their evidence is to be accepted. These two persons had a long history of passionate intimacy. There was no element of unfamiliarity or reluctance to contend with. The respondent, as will appear later, had been seeking out the co-respondent in spite of the promises which she had made to the appellant. She had written him a love letter although, for reasons which will appear later, she never posted it. To hold that these two persons could not have overcome such inconveniences as existed, is, in my opinion, an inference which ought not be to drawn.

On the question of the ability of the appellant and Young to see what they said they saw, it is to be noticed that the cross-examination directed to this point was of a very meagre description and neither witness was really shaken upon it. In considering the probabilities it is important to remember that the witnesses were evidently able

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to see two things quite clearly. They could see the co-respondent seated in the driving seat; and they could see with particularity his actions in taking his lunch — eating, and drinking out of a bottle. That their observation in this latter respect was unhampered and accurate is entirely borne out by the evidence of the respondent and the co-respondent. If they could see this they must (as indeed counsel for the respondent was constrained to admit) obviously have been able to see the other movements of the co-respondent including in particular his disappearance from their sight. It was suggested in argument that the respondent, however visible the co-respondent may have been, must have been invisible to the witnesses since his body as he sat in the driver's seat would have prevented them from seeing her. I see no real warrant for this suggestion. Their vision may, it is true, have been obstructed as to parts of her body; but at any rate there appears to me to be no reason for thinking that they could not have seen her movement in raising herself up in the manner which they described. The judge described the evidence of these witnesses as "nebulous." I do not so regard it. Indeed, the details which they described were, as it seems to me, particularly clear. The judge also said that they had to draw inferences. When asked to give his explanation of the matters to which this observation referred, counsel for the respondent said that he thought that it referred to the statement that his clients appeared to be kissing. I can see nothing to criticize in this. On the contrary, it appears to me to show that the witnesses were being careful not to state more than they in fact saw, and the expression surely means no more than that the attitudes adopted were those of persons kissing one another. I do not propose to go into the details of what the witnesses say that they saw. If their evidence is to be believed and the past association of the parties and the circumstances of their meeting are borne in mind, the inference that adultery took place appears to me to be irresistible once the suggestion that this was physically impossible is put aside.

But our task is to consider the evidence as a whole. Wallington, J., in the latter part of his judgment dealt with the evidence of the respondent and the co-respondent which he held to be substantially truthful on certain vital matters, in particular the origin of the meeting on August 3 and the events of that day. The evidence of the respondent was to the effect that she went out to meet the co-respondent on August 3, in order to tax him with having caused rumours to circulate as to their relations; that she went with him in the lorry in order to achieve this object; that she asked him no more than two or three questions on the subject and he denied the accusation; that they spent the rest of the time in the lorry seated on their respective seats and talking about indifferent matters such as tomatoes and chickens. The co-respondent in substance gave evidence to the like effect. Now, this evidence is in direct conflict with that of the petitioner and Young and is, of course, quite inconsistent with the movements to which they deposed. If the story is true, the statement that the respondent and the co-respondent disappeared from sight must have been pure imagination on the part of those witnesses since, if accepted, it entirely destroys the allegation that the parties remained in their seats in friendly conversation. Again, the purpose of the meeting as alleged by the respondent seems to me (for reasons which will appear later) very difficult to believe; and her conduct in remaining in the lorry for a long time after that purpose had been achieved was scarcely the conduct of a woman who was anxious to put a stop to rumours regarding her relations with the co-respondent.

The improbabilities of the story are increased when the circumstances which led up to the meeting are examined. About the month of May, 1943, the appellant noticed a change in the respondent's attitude to himself, similar, as Wallington, J. found (in spite of the respondent's denial), to that which had caused the earlier unhappiness between them. She refused to have relations with him (on one occasion only, according to her) and when accused by the appellant of still loving the co-respondent she said, according to the appellant, "He is a b—— sight better man than you will ever be." This statement by the appellant she swore was an invention. On July 3, the appellant discovered a love letter written by the respondent to the co-respondent. The respondent realized that her husband had discovered it and she did not post it. In the words of Wallington, J. —

> ".....it is impossible to resist the conclusion that it disclosed a continuing affection on the part of the respondent for the co-respondent and a desire for his society."

With regard to her evidence upon the subject, the judge said it was "not wholly satisfactory"; she had said that sometimes she did intend to send it and sometimes she thought she would not. If by the words "not wholly satisfactory" the judge meant to convey that the evidence was in part, at any rate untrue, I can understand it. The most striking things about this letter were the direction given to the co-respondent as to communicating with the respondent and the enclosure of an envelope addressed to a certain lady with the letter "N" written on the flap.

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The object of this was to inform the lady in question that the letter enclosed in the envelope was intended not for her but for the respondent. Thus the respondent was proposing to arrange for the services of a go-between, a detail of intrigue scarcely consistent with her statement that the letter was written in a fit of misery and that she did not know what her mind was at that time. One thing she did say, that when she wrote the letter, she was, to use her own words, "wishing I had someone to love me — a black man would have done — anybody who would be kind to me." The reference to a black man is no doubt a picturesque exaggeration, but the answer is significant. I cannot resist the conclusion that the respondent intended to post the letter and that she was only prevented from doing so by her admitted realization that her husband had discovered it, although he did not in fact tell her so.

She did in fact admittedly see the co-respondent on several occasions before August 3. I will not pause to examine the evidence with regard to them. But on July 29 she went by train to Billingham taking her cycle with her, and on her own admission waited at the roundabout for half an hour for the purpose of seeing the co-respondent. As he did not appear she went along the Stockton Road and waited for an hour or possibly less, hoping to see him. When the appellant asked for an explanation of this incident she admitted to him (as she herself said) that she had seen the co-respondent eight times since the reconciliation. She denied the appellant's statement that he asked her whether she has carrying on the same association as previously and that she replied that she was and still intended to do so. She admitted that she offered to give him written evidence which would enable him to obtain a divorce, but said that she only made the offer in fun. Her explanation was that she thought the appellant was asking about her association with the co-respondent merely for fun. This remarkable statement, be it observed, was made by a wife who knew at the time that her husband had discovered the letter which she had written to her former lover. I find it impossible to believe that she was speaking the truth about this interview. The only reference to it in the judgment of Wallington, J. is to the effect that there was on this occasion a quarrel between her and the appellant "of a bitter character." This statement is quite inconsistent with the account of the interview given by the respondent, which the judge must have disbelieved, as I disbelieve it. I do not find it necessary to examine the other evidence given by the respondent or that given by the co-respondent with regard to the events leading up to the meeting of August 3. From a careful perusal of the whole of her evidence, I have come to the conclusion that she was deliberately seeking out the co-respondent with the intention of renewing her previous relations with him, and that in pursuance of this design she brought about the meeting of August 3 and that with regard to that meeting the evidence of the appellant and Young ought to be accepted and that of the respondent and co-respondent rejected.

But it is said that we are not entitled to take this view because the judge believed the evidence of the respondent and the co-respondent and based his belief, as he said, upon a careful observation of their demeanour and the opinion which he formed of their "type and characteristics." He said that much of their evidence — particularly that of the respondent — was given in a very unsatisfactory manner and that the respondent was on some occasions resentful and consequently reckless in her answers. Both of them, he said, were affected by nervousness and embarrassment, and he was "not satisfied that they were deliberately dishonest in the box." He was, however, satisfied, despite his serious criticism, that they were substantially truthful in their testimony on the vital matters which he mentioned.

We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part upon his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question.

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If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value. There is one further consideration which is particularly relevant to the present case. A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue.

That it is open to an appellate court to find that the view of the trial judge as to the demeanour of a witness was ill-founded has indeed been recognized by the House of Lords itself. The case to which I refer was one in which I was engaged as counsel in the Court of Appeal and in the House of Lords, and I think it right to place the matter on record as the only report of the case does not bring out the relevant circumstances. The case is that of *Hvalf, Polaris & Another vs Unilever, Ltd. & Others* (46 Ll. L.R. 29–H.L.). In one respect it resembles the present since the trial judge had himself taken a most active part in the examination of the witnesses. As appears from the printed record he expressed the following opinion with regard to two of them at p. 197:

> "It is necessary for me, in view of this contradiction, to decide which evidence to accept. I have already expressed my opinion as to the reliability of Blom as a witness. I did not form anything like so good an opinion of either Young or Bjelke. Their evidence and the manner in which they gave it were both unconvincing. ....Bjelke, who was called to corroborate Young's evidence as to his second conversation with Blom says nothing of any communication by Young to Blom of Young's controlling interest in the Polaris Company. Finally these alleged communications of his interest do not fit into his story. I think they were invented on the spur of the moment where it appeared important to show that Blom must have known for certain that the Polaris Company would want to use a tanker."

When the case came to the Court of Appeal Scrutton, L.J., who delivered the leading judgment, said, at p. 220:

> "As to this last allegation, the judge below having seen the witnesses and heard the conflicting evidence, declines to accept Young's version. It is impossible for this court to interfere with this finding."

There were two issues in the case, one of construction and one a claim to rectification. It was on the latter issue that the evidence in question was relevant and although in the House of Lords the appeal was ultimately decided on the issue of construction, the issue of rectification was fully argued and the whole of the evidence examined in the greatest detail. In the result the House was satisfied by this examination that the strictures passed by the trial judge on the two witnesses in question were unjustified and that their evidence was truthful. The following passages are to be found in the opinion of Lord Atkin, at p. 36:

> "Similarly, Blom failed to recollect a telephone conversation of February 10, 1930, testified to by Young, in which he was corroborated by the bank clerk, Bjelke. The conversation is entirely consistent with the probabilities and the business conditions proved to be in existence at the time. Blom's version of a conversation at a later date in March is not. I cannot see that Blom's recollection affords any ground for distrusting the evidence of either Young or Bjelke. The result produced on my mind is that there is no satisfactory reason shown for any imputation on the substantial accuracy or good faith of any of the witnesses called by the plaintiffs."

Lord Warrington said, at p. 70:

> "In this view of construction the claim of the appellants to rectification does not arise, and it is unnecessary to discuss the question whether or not the findings of fact arrived at by Branson, J. and not set aside by the Court of Appeal were correct or not. I desire to say, however, that having since the hearing reperused the material evidence, I entirely concur with the remarks on this point contained in the opinion of Lord Atkin, which I have had the opportunity of reading."

Lord Russel of Killowen said, at p. 72:

> "I concur with the motion proposed, but I desire to add this, that having carefully studied the shorthand notes of the evidence I can find therein no trace of any matter or thing which would justify the view that the evidence given by the witnesses on behalf of the appellants was otherwise than truthful and accurate."

Lord Wright said, at p. 48:

> "Indeed, Young (who, I am convinced, was a fair and candid witness though subjected to severe and not quite merited cross-examination) had in fact contracted on February 8, 1930, to purchase from British shipbuilders for £146,000 a tanker, which he intended to have transferred to the Polaris Co. (in which he controlled a majority of shares), for use in the season. I also desire to express my concurrence in what has been observed by Lord Atkin in regard to the accuracy and good faith of the appellants' witnesses."

The case shows how important it is that the judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence. If there the trial judge had done this as it was done in the

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House of Lords he could not have expressed the opinion which he did as to the demeanour of the witnesses.

In the present case the judge cannot, I think, have subjected the evidence to an adequate scrutiny before expressing the view which he did as to the demeanour of the respondent and the co-respondent. I will not repeat what I have said as to the incidents of August 3, the love letter (as to which the judge expressed an unfavourable view), with regard to the evidence of the respondent, and the quarrel of July 30 (as to which the judge did not believe the respondent). There is, however, another matter upon which I find the evidence of the respondent and the co-respondent frankly unbelievable, the incident of September 11, 1942, which took place before the reconciliation. The evidence of the appellant and Young was that they found the respondent and co-respondent in bed together asleep and in the dark, the respondent in pyjamas, the co-respondent naked except for his vest. Both of them denied that they had committed adultery on this occasion although they had done so on numerous occasions in the same place. Wallington, J. accepted their denial of adultery and it may well have been true. But he does not comment upon their story as to how they came to be in the situation in which they were found, nor does he anywhere say that he believed it. It is not one of the specific matters upon which he expresses himself satisfied with their evidence, and I find it impossible to suppose that he gave to it the importance which it deserved as bearing upon their credibility. All that he did was to refuse to draw the inference that adultery had taken place. He did not say that he accepted the statement that the respondent was lying on, not in the bed, nor did he suggest that the evidence of the appellant and Young as to what they saw ought not to be accepted. He said, however, that the conduct of these two persons

> ".....on that occasion cannot be too strongly condemned and they put themselves in such a position that they could not fairly complain if they were found guilty. If the story was untrue, it is impossible to regard these people as honest witnesses. The story, in my judgment, was flagrantly untrue. It was as follows: The co-respondent came to the house finding the respondent in pyjamas over which, according to her account, she was wearing something in the nature of a dressing gown. She did not want to see him and told him so. Nevertheless she allowed him to remain and they had supper together. She then lay down on (not in) the bed and fell asleep, leaving the co-respondent seated on a chair. The next thing she knew was that her husband was hitting the co-respondent who was lying beside her in (not on) the bed, wearing only his vest. The co-respondent in substance repeated the story. Can anyone believe it? I certainly cannot, when I remember the previous relations of these parties and, in particular, that this same bed had been the scene of their previous acts of adultery committed during the absence of the husband, an absence which they both expected on this occasion. If true, it would mean that the respondent so far repressed her desire that the co-respondent should depart as to entertain him at supper in her night clothes, that she then went to sleep in his presence lying on the bed, that he then undressed, turned the lamp either out altogether or so low as to leave the room practically in darkness and then got into bed beside her without disturbing her, whereupon they both slept peaceably until they were awakened by the unexpected appearance of the appellant and Young. The irresistible inference to my mind is that they deliberately got into bed together although they may not have actually committed adultery."

I conclude by referring to the fact that the respondent in giving her evidence was quite clearly on many occasions fencing with the questions put to her. She was rebuked many times by the judge for doing this as appears on the shorthand note of the evidence but not on the judge's own note. We were informed by counsel that the judge was not furnished with a transcript of the shorthand note so that when considering his judgment he had nothing before him to remind him of what he had said and of how often he said it. When the questions and answers are read together the clear impression left on my mind is that the respondent was doing her best to avoid answering the questions put to her, an impression which the answers read apart from the questions could not have produced. The only remaining question relates to the discretion of the court which the appellant asks to have exercised in his favour. If Wallington, J. had thought that the appellant had proved his case he would, as he said, have been disposed to accede to this request. I have considered the circumstances and the discretion statement and I think that the view which the judge was disposed to take on this matter was a proper one. There will be a decree *nisi* with costs against the co-respondent. The decree will be dated as of September 5, last.

I should add that MacKinnon, L.J. has read this judgment and agrees with it.

DU PARCQ, L.J.

I also agree with the judgment which has been delivered, and I could not state my own reason without repeating what has been said by Lord Greene, M.R., with which I am in complete agreement.

Appeal allowed.

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Present: JAYETILEKE, J.

VELMULADENIYA vs SIYATU & ANOTHER

S. C. No. 236—*C. R. Teldeniya No.* 514.
Argued on 7th February, 1945.
Decided on 15th February, 1945.

Evidence Ordinance section 108—*Presumption—Person not heard of for seven years —Burden of proving that he is alive not discharged—Does his property devolve on heirs.*

Held : That where the burden of proving that a person, who has not been heard of for seven years, is alive, has not been discharged, such person's rights to property devolve on his heirs.

Cases referred to : *Willyams vs Scottish Widows' Fund* (4 T.L.R. 489)
Doe vs Deakin (1828 – 3 C. & P. 402).

L. A. Rajapakse, K.C., with *S. R. Wijayatilake*, and *T. B. Dissanayake*, for the plaintiff-appellant.

C. E. S. Perera, for the defendant-respondent.

JAYETILEKE, J.

This is an action for a declaration of title to an undivided half share of a field called Kongahakumbura. It is common ground that the field belonged originally to one Appu and that he died leaving six children Punchirala *alias* Unnanse, Kiri Menika, Punchi Menika, Mudalihamy and the 1st and 2nd defendants. Ukku Menika and Mudalihamy died leaving as their heirs their brothers and sister. The contest is with regard to the shares of Kiri Menika and Punchirala *alias* Unnanse. The plaintiff alleges that Kiri Menika married in *deega* and thereby forfeited her rights to paternal inheritance, and that Punchirala left the village about 25 years ago and has not been heard of since. The learned Commissioner has held that Kiri Menika was not married in *deega*. That finding is supported by the evidence. With regard to Punchirala it seems to me that the finding of the learned Commissioner is wrong. He has overlooked the statement made by the 1st defendant in an answer (P6) filed by him in the year 1943 in action No. 433 of the Court of Requests of Teldeniya that he has not heard of Punchirala for many years. That statement supports the evidence of the plaintiff and of Ukkurala that Punchirala left the village about 20 or 25 years ago and has not been heard of since. Under section 108 of the Evidence Ordinance when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the presumption of life ceased, and the burden is shifted to the person who denies the death. The burden of proving that Punchirala is alive would, therefore, be upon the 1st defendant. That burden has not, in my opinion, been discharged. Counsel for the 1st defendant contended that even if Punchirala may, upon the evidence, be presumed to be dead his property cannot be divided among the heirs. I do not think this contention is well founded. In *Willyams vs Scottish Widows' Fund* (4 T.L.R. 489) where a person whose life was insured had not been heard of for seven years those who effected the insurance were held to be entitled to have it paid at the end of that period. In *Doe vs Deakin* (1828–3 C. & P. 402) where the lessor of the plaintiff, to prove his title in an action of ejectment, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume that those persons were dead.

The shares should, in my opinion, be allotted on the basis that Punchirala's rights have devolved on Punchi Menika, the 1st defendant, and the 2nd defendant. The plaintiff has purchased the interests of the 2nd defendant. I would set aside the judgment appealed from and direct that judgment be entered declaring the plaintiff entitled to a 1/3rd share of the land. The parties will bear their own costs here and in the court below.

Judgment set aside.

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Present: KEUNEMAN, J. & ROSE, J.

DE MEL vs KODAGODA

S. C. No. 8 (*Inty.*)—*D. C. Colombo No.* 14802.
Argued on 13th & 15th March, 1945.
Decided on 20th March, 1945.

Civil Procedure Code section 84—*Application to have decree* nisi *set aside*—*Date of commencement of period of fourteen days prescribed by section* 84—*Power of court to extend such period.*

Held : (i) That the period of fourteen days prescribed by section 84 of the Civil Procedure Code commences on the date on which the decree *nisi* is passed.

(ii) That a decree *nisi* under that section cannot be said to be passed until the necessary form has been drawn up, approved and signed by the court.

(iii) That the court has no power to extend the period prescribed by that section.

PER KEUNEMAN, J. : (*a*) " It has been suggested that where the court signs a document containing the essential details contained in Form 21, it may be taken that he has passed the decree *nisi* although the document has not been formally drawn up in the office, and that an entry of such a kind made among the journal entries would be sufficient. I agree with the argument, but at the same time it is a question to be determined in each case as to whether the court was in fact passing the decree *nisi* or merely giving an instruction to the office to prepare a decree *nisi* to be passed thereafter.

(*b*) " I would urge upon the legislature the need of a speedy amendment of section 84 so that the unreasonable hardships imposed upon the plaintiff may be removed."

Cases referred to : *Annamalay Chetty vs Carron* (3 C.L.R. 48)
Mohideen vs Marikar (41 N.L.R. 249)
De Saram vs De Silva (41 N.L.R. 419)

H. V. Perera, K.C., with *D. W. Fernando*, for the plaintiff-appellant.
N. Nadarajah, K.C., with *W. W. Mutturajah*, for the defendant-respondent.

KEUNEMAN, J.

In this case, on the 26th November, 1943, trial was fixed for the 15th February, 1944. On the latter date the plaintiff and his proctor were absent and the defendant was represented by counsel. The journal entry of that date reads :

> " 15/2/44. Case called —
> *Advocate Mr. Wickramanayake*, for defendant.
> Plaintiff and proctor absent.
> Enter D.N. dismissing the plaintiff's action with costs to be made absolute on 3/3/44.
> M.A.S."

The initials M.A.S. are the initials of the presiding judge Mr. Samarakoon.

Thereafter the journal entries read :

> " 1/3/44. D/N entered.
> 3/3/44. Fourteen days having elapsed since the entering of the decree *nisi* dismissing plaintiff's action with costs, proctor for defendant moves that the court be pleased to make the decree *nisi* absolute.
> A needless motion, the order being absolute automatically.
> R.F.D."

R.F.D. are the initials of the judge then presiding, Mr. Dias. This judge has verified the fact that the decree *nisi* presented to him was signed on the 3rd March, 1944.

On the 13th March, 1944, the plaintiff moved by affidavit showing cause for setting aside the decree *nisi*. This was fixed for enquiry on the 15th March, 1944, and on that date the District Judge upheld an objection that the application was out of time as fourteen days had elapsed since the 15th February, 1944. The District Judge thought it unnecessary to consider the merits of the application.

The plaintiff appeals from this order, and argues that the period of fourteen days did not begin to run until the 3rd March, 1944, and that on the date of enquiry (15th March, 1944) the period of fourteen days had not elapsed. He contends that the District Judge did not " pass the decree *nisi* " within the meaning of section 84 of the Civil Procedure Code until the 3rd March.

Under section 84 where the plaintiff fails to appear on the date of hearing and where the defendant is present or represented and does not admit the plaintiff's claim or consent to a postponement, " the court shall pass a decree *nisi* in the Form No. 21 in the First Schedule or to the like effect, dismissing the plaintiff's action, which said decree shall at the expiration of 14 days from the date thereof become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown good cause by affidavit or otherwise for his non-appearance."

Certain points are of significance. First, the court must pass the decree *nisi*. I think this means that the court must authenticate a docu-

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ment which he regards as the decree *nisi*, and Form 21 itself shows that the court must sign the document. Further, the form is specifically mentioned in the section, and it is necessary that the court should pass a decree in that form or " to the like effect." It has been suggested that where the court signs a document containing the essential details contained in Form 21, it may be taken that he has passed the decree *nisi* although the document has not been formally drawn up in the office, and that an entry of such a kind made among the journal entries would be sufficient. I agree with the argument, but at the same time it is a question to be determined in each case as to whether the court was in fact passing the decree *nisi* or merely giving an instruction to the office to prepare a decree *nisi* to be passed thereafter.

The difference in the case where a trial has taken place may be noted. After the trial the judge has to pronounce judgment (sections 184–187). As soon as may be after the judgment is pronounced " a formal decree bearing the same date as the judgment " is drawn up in accordance with Form 41 or " to the like effect " (section 188). Here there is a definite direction in the Code that the decree must bear the date of the judgment. But section 188 cannot be applied to section 84 where no judgment is pronounced and the only section which the court is required to take is to " pass a decree *nisi*."

The District Judge was of opinion that the signing of the decree was a ministerial act which may be done at any time, and that the decree when signed speaks as from the date on which the court ordered that it should be drawn up. This argument no doubt applies to a decree which follows on a judgment, but under section 84 the " passing " of the decree *nisi* cannot be completed until the necessary form has been drawn up, and in my opinion, the " passing " becomes effective when the form so drawn up is approved and signed by the court.

In the present case it has been argued that the essential particulars required by Form 21 are contained in the journal entry of the 15th February 1944, and that the entry of that date must be regarded as " of like effect " to Form 21, and that the District Judge has approved of and authenticated this entry by annexing his initials thereto, and that he must be regarded as having passed the decree *nisi* on the 15th February.

It is however difficult to arrive at this conclusion. The words " Enter D/N " read more naturally as an instruction to the office to prepare and present to the judge a decree *nisi* drawn up in proper form, and it has certainly been so understood in the office, for a decree *nisi* was drawn up and presented to the judge on the 1st March and was actually signed on the 3rd March by the judge then presiding in the court. Further, the fact that the judge has on the 15th February merely appended his initials to the journal entry instead of his full signature reveals a degree of formality which is hardly in keeping with the " passing " of a decree *nisi*.

In this case I am of opinion that the decree *nisi* was not " passed " until the 3rd March, and that the plaintiff was within time on the date of enquiry, namely, the 15th March.

Unfortunately for the plaintiff, that is not the end of his difficulties in connection with this appeal, for it has been argued for the defendant that we cannot now remit this matter to the District Judge for determination of the question whether " good cause " exists for setting aside the decree *nisi*. Three decisions have been cited to us.

In *Annamalay Chetty vs Carron* (3 C.L.R. 48) Schneider, J. examined the terms of section 84 and drew attention to the marked difference between the case of default by the plaintiff and that of default by the defendant. He continued: " The difference in the procedure is undoubtedly made advisedly. I can conceive of instances where it would be a distinct hardship on a plaintiff to deny to him an opportunity to shew cause against the decree because the period of 14 days has expired. He may have been prevented from attending court or showing cause within the prescribed period by unavoidable circumstances or circumstances beyond his control. He may be prevented from showing cause within that period because he was prevented by no default of his from notifying the day to the defendant or to the defendant's proctor. The defendant may have died or have had no proctor on the record, or have purposely evaded service of the notice. In all these cases it does seem unjust to deprive a plaintiff of the opportunity to shew cause why the decree should not be allowed to stand. But my duty is to interpret the law as I find it, not to try to adapt it because of the hardship which may arise from a correct interpretation of it. In view of the unequivocal language of section 84 I do not find it possible to escape from giving to the words of the section their plain meaning and effect, namely, that cause must be shown upon a day of which the defendant shall have had notice and before the decree *nisi* has become absolute by the expiration of the period of 14 days. It is clear that no cause was shown within the prescribed period." De Sampayo, J. agreed with this decision.

The same point came up again in *Mohideen vs Marikar* (41 N.L.R. 249) * where Soertsz, J.

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* 16 C.L.W. 93 (Edd.)

accepted the ruling in *Annamalay Chetty vs Carron*. He expressed his feelings of surprise when the argument based upon that case was first presented to him. " At one stage of the argument I inclined to the view that what a plaintiff was required to do within 14 days was to begin proceedings to have the decree set aside, that is to say I felt that ' show good cause ' must be understood to mean to make out a good *prima facie* case for setting aside the decree *nisi* by submitting an affidavit, for instance, as was done in this case. But the latter part of section 84 which reads ' in case of such cause being shown the court shall set aside the decree ' debars me from construing the same words when they occur in the earlier part of the section in the manner I suggested. It seems quite clear that the setting aside of the decree must be obtained, if at all, by good cause being shown, not merely by good cause being attempted to be shown, within 14 days. " Nihill, J. agreed with this decision.

In *De Saram vs De Silva* (41 N.L.R. 419)* the matter again came up. Soertsz, J. pointed out that " section 84 provides for the entering of a decree *nisi* due to become absolute by mere effluxion of time, by the lapse of 14 days, unless *previously* the plaintiff has succeeded, with notice to the defendants, in showing cause for it to be set aside." Nihill, J. agreed.

What is the position in the present case ? The plaintiff has come into court within 14 days and has succeeded in giving notice to the defendant and fixing the inquiry for a date within that period. But he has been prevented from " showing good cause " within the period in consequence of the preliminary objection taken by the defendant, which in fact was allowed by the District Judge. In view of the decisions I have cited it is not open to the District Judge now, after the period of 14 days had elapsed, to take up the inquiry into " good cause," nor is it open to us to do so in appeal. This is a real case of hardship, I may almost say of injustice. But as long as these decisions stand I have no alternative but to follow them.

We have been urged to submit the point covered by the decisions to a Divisional Bench for final determination. I am no less conscious than were the learned judges who decided those cases that hardship and injustice can be caused to a plaintiff by the interpretation given of the section. I would urge upon the legislature the need of a speedy amendment of section 84 so that the unreasonable hardships imposed upon the plaintiff may be removed. But I regret that in the present case I do not feel justified in submitting this matter to a Divisional Court for final decision. For one thing, as regards the actual circumstances disclosed in the affidavit, I incline to the view that while they may be regarded as a misfortune to the plaintiff, it is at the least doubtful whether they can be regarded as " good cause " for depriving the defendant of the decree *nisi* which he has obtained.

The appeal must be dismissed. The defendant has however set up a preliminary objection which on examination cannot be supported in appeal, and in all the circumstances I think the fair order to make is that there be no costs to either party of the inquiry on the 15th March, 1944 or of this appeal.

ROSE, J.

I agree.

Appeal dismissed.

Present: ROSE, J.

LA BROOY (S.I. Police) vs AMARADASA

S. C. No. 119—*Jt. M. C. Colombo No.* 12827.
Argued on 23rd March, 1945.
Decided on 27th March, 1945.

Defence (Service Employees) Regulations 1942—*Regulations* 2 *and* 3—*Person employed by the Admiralty—Condition of leaving such employment—Agreement to terminate contract of employment by notice—Effect of notice—Meaning of term " employed by the military."*

Held : (i) That the effect of the Defence (Service Employees) Regulations 2 and 3 is to prevent any employee of the Admiralty, irrespective of the terms of his contract, from leaving his employment without prior written consent from the Captain Superintendent, Ceylon, or any other officer acting under his authority.

(ii) That a person is deemed to be employed by the Admiralty if the name of that person appears in any salary book, pay book or muster book kept for the purposes of any naval establishment in Ceylon.

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H. W. R. Weerasooriya, Crown Counsel, for the complainant-appellant.
H. V. Perera, K.C., with *J. L. M. Fernando* and *N. M. de Silva*, for the accused-respondent.

ROSE, J.

In this case the respondent was acquitted by the magistrate of an offence contra the Defence (Service Employees) Regulations 1942. It appears that on the 15th of July, 1943, the respondent signed a document (exhibit P1), which Mr. Weerasooriya, Crown Counsel, agrees should be regarded as a contract, in which there appears a provision that the contract may be terminated by either side on the giving of one week's notice. At the foot of this contract appears an endorsement in the following terms: "Each entrant undertakes that he will be subject to the Defence (Service Employees) Regulations 1942." In the Magistrate's Court, however, the respondent stated that this endorsement, which is type-written, whereas the remainder of the contract was printed, did not appear on the document at the date of signature. The magistrate accepted this contention and the case was therefore argued before me on the footing that no such endorsement was present.

An issue of fact arose in the trial court as to whether a week's notice was in fact given. For the purposes of this appeal I feel that I am bound by the magistrate's finding that the respondent in fact gave two weeks' notice and that therefore he would seem to have complied with the term of his contract as to notice.

The relevant part of regulation 2 of the Defence (Service Employees) Regulations 1942 reads as follows: "No person who, on or after the date on which these regulations are published in the Gazette, is employed by the Admiralty .....in any capacity in Ceylon shall leave such employment .....without prior consent obtained in writing ..... from the Captain Superintendent, Ceylon, or any other officer acting under his authority." It is common ground that no such prior consent was obtained by the respondent.

Mr. H. V. Perera for the respondent contends, in the first place, that the charge was defective in that it did not disclose an offence. It is true that the charge is wrongly drafted, but, in my opinion, this point cannot be sustained in view of section 171 of the Criminal Procedure Code (Cap. 16). The substantial point of Mr. Perera's argument was that by the wording of the regulation itself it is necessary that at the time of the leaving of employment the person in question must have been employed by the Admiralty. In the present case it is contended that the respondent was not employed at the date of his leaving (*i.e.* the 1st of April, 1944) in that the effect of his two weeks' notice, which was in accordance with the express terms of his contract, was that he ceased to be in the employment of the Admiralty at midnight on the 31st of March, 1944, which was the time when the period of his notice expired.

On the face of it this argument would seem to be logically correct, but learned Crown Counsel relies — and it seems to me correctly — on regulation 3 of the above Regulations which reads as follows: "For the purposes of these regulations a person shall be deemed to be employed by the Admiralty.....if the name of that person appears in any salary book, pay book or muster book kept for the purposes of any Naval.....establishment in Ceylon." Having regard to that, it seems to me that it is not open to me to hold otherwise than that it is the intention of the legislature, which is adequately implemented by the language of the regulations, to prevent any employee of the Admiralty, irrespective of the terms of his contract, from leaving his employment without prior written consent. That being so, I am of opinion that the appeal must be allowed, the judgment of the magistrate set aside and the respondent convicted of the offence with which he is charged.

I would add that learned Crown Counsel himself stated that this case was only regarded as of importance in view of the legal issue involved. On the merits it would seem to be unfortunate that this particular respondent should have been put to such inconvenience.

Having regard to the circumstances of the case, I am of opinion that a purely nominal penalty will suffice and I, therefore, impose a fine of Re. 1/–, in default one day's simple imprisonment.

Appeal allowed.

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Present: KEUNEMAN, J. & JAYETILEKE, J.

MENSALINE HAMINE vs DIAS & ANOTHER

S. C. No. 234—*D. C.* (*F*) *Colombo No.* 619.
Argued on 7th & 8th March, 1945.
Decided on 13th March, 1945.

Divorce—Condonation by wife of husband's adultery—What amounts to—Section 602 *of Civil Procedure Code.*

Held: That mere residence of husband and wife in the same house for a few months does not amount to "conjugal cohabitation" within the meaning of section 602 of the Civil Procedure Code. There should be in addition proof of forgiveness and reinstatement of the offending spouse.

PER KEUNEMAN, J.: "No doubt where the husband after knowledge of the wife's adultery shares her bed the law presumes condonation, but this is a special rule applicable to the husband, and not to the wife in similar circumstances."

Cases referred to: *Cramp vs Cramp* (1920–Probate Division 158)
Keats vs Keats & Montezuma (1 Sw. & Tr. 334–347)
D'Aguilar vs D'Aguilar (1 Hagg. Ec. 773)
Durant vs Durant (1825–1925—1 Hagg. Ec. 733)
Turner vs Turner (1854–2 Spinks 201)
Beeby vs Beeby (1 Hagg. Ec. 789–795)
Snow vs Snow (2 Notes of Cases, Supp. XIII)
Newsome vs Newsome (1871–L.R. 2 P. & M. 306)

N. Nadarajah, K.C., with *H. W. Jayawardene*, for the 1st defendant-appellant.
H. V. Perera, K.C., with *H. Deheragoda*, for the plaintiff-respondent.
Kingsley Herat, for the 2nd defendant-respondent.

KEUNEMAN, J.

The plaintiff brought this action for divorce against her husband the 1st defendant on the ground (*a*) of constructive malicious desertion by him, and (*b*) of his adultery with a servant woman Asilin in or about May, 1942.

The 1st defendant replied denying these allegations, and himself claimed a divorce on the ground that the plaintiff had committed adultery with the 2nd defendant between the latter part of 1940 and August 12th 1942 and thereafter.

The case went to trial on a number of issues, and the District Judge found that the 1st defendant had committed adultery with Asilin in May 1942, and dismissed the 1st defendant's claim for divorce on the ground that the plaintiff had committed adultery with the 2nd defendant. Both these findings are fully supported by the facts proved, and I am satisfied that the conclusions arrived at by the District Judge are correct and unassailable in appeal.

The District Judge further held that the plaintiff had condoned the 1st defendant's adultery but that the 1st defendant's misconduct later and more particularly on the 12th of August 1942 revived the earlier condoned adultery. He entered decree for divorce in favour of the plaintiff against the 1st defendant with costs.

The alleged misconduct of the 1st defendant consisted in the fact that shortly after he was caught in the act of adultery by the wife, and after Asilin was sent away from the house, he had written the letter P6 to Asilin and met her twice in the neighbourhood of the office in Maradana where he was employed. On the second occasion the plaintiff, who had received information, kept watch and caught the 1st defendant and Asilin together, and thereafter the plaintiff left the house of her husband with her five children.

Counsel for the 1st defendant addressed to us an interesting argument to the effect that under our law there can be no recognition of the revival of an adultery that had been condoned, and that the principle accepted in the English law had no application in Ceylon. He also contended that the facts disclosed did not amount to a matrimonial offence, and that the question of revival did not arise in this case. I do not think it is necessary to consider these matters because, as counsel for the plaintiff argued, the fact of condonation has not been established in this case, and I do not agree with the finding of the trial judge that there had been condonation.

In dealing with the law in this connection the District Judge said: "Our law is codified, and what condonation in a case of adultery amounts to is to be found in section 602 of the Civil Procedure Code." He then proceeded to cite a portion of section 602, to wit:

"No adultery shall be deemed to have been condoned within the meaning of this chapter unless where conjugal cohabitation has been resumed or continues."

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The District Judge thereafter spoke of this as a "definition" of condonation. He considered whether the words "conjugal cohabitation" included sexual intercourse, and held that the mere continuance of residence in the same house amounted to "conjugal cohabitation" although there had been no sexual intercourse. The District Judge ended as follows: "Therefore on the facts I am bound to hold that the plaintiff has in law condoned her husband's adultery."

I am unable to agree with the District Judge's argument. The clause quoted by him can in no sense be regarded as a definition of condonation. On the contrary it sets out only one essential ingredient of condonation, *viz.* conjugal cohabitation. The clause does not profess to set out what the other ingredients are. The District Judge appears to have held that if conjugal cohabitation is established, then condonation must be assumed. That is not the law.

For the purposes of this appeal, I may cite the judgment of McCardie, J. in *Cramp vs Cramp* (1920 – Probate Division 158) where the earlier authorities are reviewed. The learned judge was considering the point whether sexual commerce by a husband with a wife known to be guilty of adultery is to be deemed conclusive evidence of condonation. He came to the conclusion that "a husband who has sexual relations with his wife after knowledge of her adultery must be conclusively presumed to have condoned her offence. That is the rule of righteousness and I am glad to think it is the rule of law." But he made this very significant observation :

"I find that the authorities draw a clear distinction between a wife who permits intercourse after knowledge of her husband's adultery, and a husband who has intercourse with his wife after he is aware of the infidelity. As to condonation by a wife, Sir Cresswell in *Keats vs Keats & Montezuma* (1 Sw. & Tr. 334 – 347) says : 'With reference to a wife, to whom a knowledge of her husband's adultery has been brought home, and who has yet continued to share his bed, the rule has not been so strict. The wife is hardly her own mistress ; she may not have the option of going away ; she may have no place to go to ; no person to receive her ; no funds to support her ; therefore her submission to the embraces of her husband is not considered by any means such strong proof of condonation as the act of a husband in renewing his intercourse with his wife.' This passage illustrates the view that the wife may be the passive rather than the active agent in the matter in question. It is in conformity with the older cases of *D'Aguilar vs D'Aguilar* (1 Hagg. Ec. 773), *Durant vs Durant* (1825 – 1925 — 1 Hagg. Ec. 733), and *Turner vs Turner* (1854 – 2 Spinks 201). The point was concisely put by Lord Stowell in *Beeby vs Beeby* (1 Hagg. Ec. 789 – 795): 'It would be hard if condonation by implication was held a strict bar to the wife. It is not improper she should show a patient forbearance ; she may find a difficulty either in quitting his house or withdrawing from his bed. The husband on the other hand cannot be compelled to the bed of his wife ; a woman may submit to necessity.' When a woman therefore submits to her husband's embraces, it is only evidence, strong indeed at the present day, but not necessarily conclusive of condonation : see per Dr. Lushington in *Snow vs Snow* (2 Notes of Cases, Supp. XIII) and per Lord Penzance in *Newsome vs Newsome* (1871 – L.R. 2 P. & M. 306)."

Now, if the fact that a wife after knowledge of her husband's adultery shares his bed is not strong or conclusive proof of condonation, the fact that she had merely resided in the same house with the husband must be weaker still. There should be in addition proof of forgiveness and of the reinstatement of the offending spouse. No doubt where the husband after knowledge of the wife's adultery shares her bed the law presumes condonation, but this is a special rule applicable to the husband, and not the wife in similar circumstances.

The facts on which the allegation of condonation is based in this case are very meagre. Unfortunately no issue of condonation was raised. It was no doubt open to the District Judge to raise that question, but the framing of an issue was desirable though perhaps not imperative, so that the parties should be made aware of the point on which the District Judge intended to find. In the present case it is difficult to say whether the parties knew that condonation was really in issue, until the later stages of the case.

In one passage the plaintiff talked of the episode in May when the 1st defendant and Asilin were caught in the act of adultery, and added — "The next morning I sent her away. After that I continued to live with my husband and we lived as man and wife.....I did it for the sake of the children." In cross-examination she said : "On the next day I sent Asilin out. I sent her out after 1st defendant went to work. He was very angry when he came in the evening .....Thereafter I made up and we lived as husband and wife till 12/8 when I left."

It is significant that no question was put to plaintiff as to whether there had been intercourse after the adultery was known. The 1st defendant said that there was no such intercourse, but asserted it was because the plaintiff was sick. On the facts I think I must hold that there was

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no intercourse. There is no evidence that the 1st defendant was penitent and asked or was granted forgiveness. His letter written to Asilin within a few days shows that he was not penitent. No acts are spoken to from which forgiveness or reinstatement of the offending husband can be presumed. The District Judge has correctly put the position as follows: "The plaintiff says that she decided to take no action for the sake of the children and also as she hoped to redeem her husband and start life afresh."

The defendant in his evidence mentioned no facts from which condonation may be presumed.

The evidence certainly shows forbearance on the part of the wife but in my opinion it falls far short of showing forgiveness or reinstatement of the husband. The only solid fact that emerges is that the husband and wife lived together in the same house for a few months. Some emphasis was laid by counsel for the appellant on the phrase of plaintiff — "Thereafter I made up," but no attempt was made to obtain any details concerning the "making up," and in considering what it consisted of we are left to surmise.

In all the circumstances I do not think the District Judge was justified in finding that the plaintiff condoned the adultery of the 1st defendant. In consequence it is unnecessary for me to consider the other interesting questions which were raised in the appeal.

The appeal is dismissed with costs.

JAYETILEKE, J.

I agree.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

ANDIRISHAMY vs DEONISHAMY

Application in Revision in M. C. Matara No. 52311 (128).
Argued & Decided on 9th March, 1945.

Criminal Procedure Code section 289—*Procedure to be followed when magistrate refuses to grant application for postponement of trial.*

Held : That when a magistrate refuses to grant an application for the postponement of a trial, he should record his reasons for the refusal and proceed with the trial.

S. C. E. Rodrigo, with *S. Saravanamuttu*, for the petitioner.
P. S. W. Abeywardene, Crown Counsel, for the Attorney-General–respondent.

WIJEYEWARDENE, J.

The complainant charged the accused in this case with offences under sections 486 and 311 of the Ceylon Penal Code. The plaint was filed on 10th January, 1944. On January 25th the accused was present and he pleaded not guilty. The case was fixed for trial on March 4th. An entry made on that date by the magistrate is as follows: "The complainant not ready. He moves for a date. I refuse. I discharge the accused." The magistrate has not given reasons for refusing the postponement, but apart from that when he refused a postponement he should have proceeded with the trial and asked the complainant to place his evidence before him. There is nothing in the record to show that he has done so. I am unable to sustain the order of the magistrate. I set aside the order of discharge and send the case back for trial.

Order set aside and case sent back.

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Present: KEUNEMAN, J.

A. G. A., HAPUTALE vs CAROLIS APPU

S. C. No. 197—*M. C. Badulla-Haldumulla No.* 1452.
Argued & Decided on 27th March, 1945.

The Defence (Purchase of Foodstuffs) Regulations, 1942—*Accused charged with transporting kurakkan without a permit—Transport of kurakkan not an offence under the principal regulations but made an offence by an amending regulation—No reference made, in the charge, to the Gazette in which the amending regulation was published—Validity of conviction.*

Where the transport of kurakkan without a permit was made an offence by an amendment of the Defence (Purchase of Foodstuffs) Regulations, 1942, and no reference was made in the charge to the Gazette in which the amending regulation was published,

Held : That the failure to refer to such Gazette invalidates the conviction.

Cases referred to : *Sivasampu vs Juan Appu* (38 N.L.R. 369).

H. V. Perera, K.C., with *L. E. J. Fernando*, for the accused-appellant.
M. Spencer, Crown Counsel, for the Attorney-General.

KEUNEMAN, J.

This accused was charged with having transported 7 bushels of kurakkan in lorry No. CE 2699 without a permit issued by the Government Agent, Uva, and D. F. C. Badulla or anyone authorized by him in breach of Regulation 4 of the Defence (Purchase of Foodstuffs) Regulations, 1942, published in Gazette No. 9004 of the 11th September, 1942, and that he had thereby committed an offence punishable under section 52 (3) of the Defence (Miscellaneous) Regulations.

It has been pointed out here that the Gazette referred to, namely No. 9004 of the 11th September, 1942, referred only to the transport of country paddy and country rice and did not make it an offence to transport kurakkan at all. It is true that there is a later Gazette, No. 9103, of the 26th March, 1943, which makes it an offence to transport country paddy, country rice or kurakkan except under a permit. It is obvious that if Gazette No. 9004 is looked at, the accused is not guilty of any offence. The question is whether the failure to refer to the Gazette No. 9103 which does constitute the offence is fatal.

A Divisional Court in *Sivasampu vs Juan Appu* (38 N.L.R. 369) discussed this question among others and Soertsz, J. who wrote the judgment in the case states as follows: "Inasmuch as the rules of subordinate legislation require publication in the Gazette for acquiring the force of law, there should be some material before the court to show that the condition precedent has been satisfied. In our view there is sufficient compliance with that requirement if in the complaint or report to the court there is reference to the Gazette in which the rule invoked appears, for in that case under section 114 of the Evidence Ordinance, the court may presume that the official acts of stating the rule and citing the Gazette have been regularly performed." He went on to hold thereafter that the production of the Gazette in the case was not necessary.

Now, in the present case it does appear that there is no reference to the Gazette which may constitute an offence of transporting kurakkan and I think that this defect is one which invalidates the conviction. It is not merely a matter of making a mistake with regard to the number and the date or either of them, but it goes further and declares that the authority for the charge is a Gazette which in point of fact has no application to the case at all. In the circumstances I set aside the conviction in this case and discharge the accused.

Conviction set aside.

END OF VOL. XXIX

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