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 XXXIX

WITH A DIGEST

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Possessory action—What is possessio civilis *or* possessio ut dominus—*Should the fact that dispossession by defendant was in assertion of a* bona fide *right of co-ownership be taken into consideration in determining nature of possession.*

Held : (1) That the fact that dispossession by the defendant in a possessary action was in the assertion of his right of co-ownership is not a factor to be taken into consideration in determining whether the plaintiff had *possessio civilis* or *possessio ut dominus.*

(2) That *possessio civilis* or *possessio ut dominus* is proved when a person is in possession of property with the intention of holding and dealing with it as his own.

Arbitration—Court acting as arbitrator.

Plaintiff sued defendants, who are co-owners, for recovery of damages for depriving plaintiff of his share of a crop of paddy. Defendants denied the claim. At the trial parties agreed to "refer all matters in dispute to the final arbitration of the Court and the Court is to make its order after inspection of the place."

The Court inspected the land and ordered the plaintiff to be placed in possession of a portion of the field cultivated by one of the defendants.

Held : That in making its order the Court exceeded the authority given to it by the parties.

Buddhist Temporalities

Disturbance of possession of field—Action for declaration of title and ejectment by Buddhist monk who is not the controlling Viharadipathi—Disclaimer of title by Viharadipathi—Possession of Buddhist monk ut dominus—*Sanghika property—Possessory remedy.*

The plaintiff, a Buddhist monk, was in possession of a field as part of the temporalities that have come to him as successor to a monk to whom it had been originally given by "*dayakas*" for his "*siupasa*" or personal needs. The original monk gifted the same to his pupil by deed and plaintiff claimed through him. The defendants, who were his cultivators, refused to give back possession, and plaintiff sued them for declaration of title, ejectment and damages.

This field is situated at Kondadeniya and is included in the plan showing the properties belonging to the Kondadeniya Vihare, whose Viharadhipathy disclaimed title to it.

The learned District Judge held that the property devolved on the plaintiff as pudgalika property and gave judgment for him. The defendants appealed, and it was contended for them that the plaintiff's action must be dismissed as he had no title to the property, the title being in the Viharadipathy of the Kondadeniya Vihare.

Counsel for the plaintiff supported the judgment on the ground that the field was "sanghika" property and requested the Court to treat the matter as a possessory action, allowing him to retain that part of the decree relating to the ejectment of the defendants.

Held : That as it is clear from the evidence that the plaintiff had been holding the field in just the same way as if he were the owner, he was entitled to keep that part of the decree ordering the ejection of the defendants, damages and costs.

Civil Procedure Code

Section 347—Failure to serve notice under—Is sale in execution of decree null and void.

Held : (1) That the provision as to service of notice under section 347 of the Civil Procedure Code is merely directory.

(2) That the Court ought not to interfere with the rights of a purchaser at an execution sale merely on the ground that such notice was not served. The party contesting the rights of such purchaser must prove that the judgment-debtor was prejudiced by the omission.

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Held : That where a pleading to amend a plaint serves only to bring out prominently and clearly some of the real issues between the parties, without introducing a new cause of action, it should be allowed to be filed.

Section 520—Appointment of Secretary of Court as administrator—Proceedings against such administrator—Can they be continued against his successor in office—Is Secretary of the Court a corporation sole.

Held : (1) That the appointment of the Secretary of the Court as administrator under section 520 of the Civil Procedure Code is not an appointment of the individual holding the office of Secretary, but an appointment of the person for the time being holding the office of Secretary.

(2) That the office of the Secretary of the Court falls within the category of *quasi* corporation sole and proceedings commenced against a Secretary in office could be continued against his successor.

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Held : (1) That to uphold an award on the footing that the reference was made under section 41 (*h*) of the Co-operative Societies Ordinance (Cap. 107) it would have to appear on the face of the award that the legal requirement necessary to its validity under that section, namely, the obtaining of the written consent of the other party had been complied with.

(2) That an award which purports on the face of it to have been referred under rule 29 of the Rules framed under the Co-operative Societies Ordinance (kept alive by section 52 of the present Ordinance, Cap. 107) and to have been referred by the Registrar's order cannot be deemed to have been made upon a reference by the liquidator under section 40 (1) (*d*) of the new Ordinance (Cap. 107).

(3) The Registrar has no power to refer a dispute to arbitration under rule 29 (*a*) and (*b*) of the said Rules where the dispute is between an *ex*-officer and the liquidator of a Co-operative Society, whose registration has been cancelled.

(4) That the provisions of paragraphs (*j*) and (*k*) of Rule 29 of the Rules aforesaid only apply to an award which is in fact an award and not to one which, on the face of it, is not.

(5) It is the duty of the Court, where a party seeks to rely on an award, invalid for want of jurisdiction, to declare it null and void, or at the least to decline to act on it and to leave the party to bring an action on it.

Corporation

Is Secretary of Court a Corperation Sole

Court of Criminal Appeal

Witness of tender years—Affirmation—Trial Judge satisfied regarding competency—Value of such evidence—Common intention to murder—When motive is relevant.

Held : (1) That where a trial Judge, on being satisfied that a boy of five years was a competent witness, affirmed him before he gave his evidence, no complaint against the reception of such evidence can be entertained.

(2) That where the Crown relies on an alleged motive to prove community of intention and make one person liable for the injuries inflicted by another, the question of motive deserves some consideration.

(3) That the fact, that two persons have motives for killing a third party, does not necessarily prove common intention.

Criminal Procedure

Prosecution conducted by Police officer who was a material witness but was not the complainant—Denial of justice—Police officer acting as detective and participating in offence—Is he an accomplice—Need his evidence be corroborated—Evidence Ordinance, section 114—Criminal Procedure Code, section 199—Betting on Horse-racing Ordinance.

A Police Officer who had played a leading part in the detection of an offence conducted the prosecution though he was not the complainant. He was a material witness in the case. It was argued that there had been a denial of justice, that the only evidence in the case was the evidence of police officers who had participated in the offence committed by the accused, that they were, therefore, in the position of accomplices whose evidence should have been corroborated in material particulars.

Held : (1) That, on the facts, it did not appear that the interests of justice had suffered by reason of the police officer acting as prosecutor and witness.

(2) That the police officers were not in the position of accomplices whose evidence needed corroboration.

(3) That the words 'any officer of any Government department' in section 199 of the Criminal Procedure Code cannot be regarded as authorising a material witness for the prosecution to act as prosecutor.

Trial of accused on several charges some of which are outside Magistrate's jurisdiction—Conviction on charge within jurisdiction—Validity of conviction.

Held : That the trial of an accused by a Magistrate on charges within his jurisdiction as well as on charges outside his jurisdiction is no ground for setting aside a conviction on a charge within his jurisdiction.

Sentence—Should a mere allegation against accused that he committed the same offence previously be taken into account in passing sentence.

Held : That in assessing the sentence that should be passed on an accused, it is improper for a Magistrate to take into account a mere allegation that he has previously committed the same offence and successfully evaded detection.

Criminal Procedure Code

Sections 152 and 425—Magistrate continuing proceedings initiated before his predecessor without making fresh determination under section 152 (3)—Regularity.

On the date of trial, the Magistrate assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code, charged the accused, recorded their statements under section 188, and postponed the trial. The Magistrate having been transferred, his successor continued the proceedings, convicted the accused and passed sentence.

Held : (1) That when the accused were brought before the Magistrate, accused of an offence, which he had jurisdiction to inquire into, he should have acted in accordance with section 152 (1) or section 152 (3), and as he took neither course, the proceedings were not in accordance with the provisions of the Code.

(2) That the Magistrate's opinion that the case is one that may properly be tried summarily is a condition precedent to the assumption of jurisdiction under section 152 (3) and that as the successor proceeded to try the case without giving his own mind to the propriety of trying the case summarily, there was no jurisdiction.

(3) That as the Magistrate acted without jurisdiction, section 425 was of no avail.

Sections 81, 84 and 85—Proceedings conducted speedily—Non-compliance with provisions of sections 81, 84 and 85 of the Code—Binding over—Person not given sufficient opportunity to meet the case against him.

Held : An order requiring a person to enter into a bond to be of good behaviour cannot be allowed to stand, where it has been made after proceedings conducted with extraordinary speed without full compliance with the provisions of sections 81, 84 and 85 of the Criminal Procedure Code, and in a manner that did not give the person bound over, a sufficient opportunity to meet the case against him.

Sections 304 and 425—Judge passing sentence without assigning "reasons"—Reasons given later on date on which Judge was not duly gazetted to act—Reasons not pronounced in open Court—Validity.

Held : (1) That the failure to comply with the provisions of section 304 of the Criminal Procedure Code is an irregularity curable under section 425.

(2) That reasons given by a judge on a date on which he has not been gazetted to act as a Judge of that Court have no legal validity.

Sections 304 and 306—Magistrate passing sentence before pronouncing judgment.

Held : That a judgment may be pronounced on a date subsequent to the date of the verdict but sentence must not be passed before judgment is pronounced.

Section 407—Depositions recorded in absence of accused—Later accused surrenders to Court—Trial—Witnesses recalled and their depositions already recorded read in evidence—Cross-examination by proctor for accused. Conviction—When may such depositions be read in evidence—Admissibility.

Depositions of prosecution witnesses were recorded by the Magistrate under section 407 of the Criminal Proceedure Code in the absence of the accused. Later when the trial took place on the accused surrendering to Court these witnesses were recalled and their depositions, already recorded, were read in evidence. The proctor for the accused cross-examined them and the accused was convicted.

Held : (1) That the conviction could not stand as the material on which it was based has not been put in evidence according to law.

(2) That depositions so recorded cannot be read in evidence when the witnesses who made the depositions are present in Court.

Section 166—Failure to comply with section vitiates conviction.

Held : That a Magistrate acting under section 166 of the Criminal Procedure Code must comply

with the requirements of that section and a conviction without such compliance is illegal.

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Section 325 (1) (b)—Right of appeal by a person dealt with under—Criminal Procedure Code, section 152 (3)—Need for caution before assuming jurisdiction under—Misdirection—Unjustifiable adverse comments on witnesses for defence—Failure to analyse evidence and consider case of each of several accused—Revisionary powers of Supreme Court.

Held : (1) That Magistrates should not be in too great a hurry to assume jurisdiction under section 152 (3) of the Criminal Procedure Code and deprive accused persons of the benefit of a trial in a higher Court following upon a non-summary inquiry.

(2) That it is doubtful whether the decision in *Cassim vs. Abdurasak* (1937) 38 N.L.R. 428 is correct.

(3) That where the Magistrate in finding the charge proved against several accused and in dealing with them under section 325 (1) (*b*) of the Criminal Procedure Code had (*a*) failed to analyse the evidence and consider the case against each accused separately ; (*b*) given unsound reasons for rejecting the evidence of witnesses for the defence ; (*c*) misdirected himself in making adverse comments on the credibility of a material witness for the defence, even if there is no right of appeal, the Supreme Court will interfere with the orders made in the exercise of its revisionary powers.

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Section 190—Meaning of 'forthwith'—Delay in recording verdict—Is it curable under section 425 of the Criminal Procedure Code.

Held : (1) That the word 'forthwith' in section 190 of the Criminal Procedure Code means "immediately after" and not "within a reasonable time after" the taking of the evidence is over.

(2) That the failure to comply with the provisions of section 190 of the Criminal Procedure Code is not curable under section 425 of the same Code.

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Sections 171 and 425—Failure to draft charge in conformity with section 167 (3)—Accused pleading guilty to charge—Application in revision—Duty of Magistrates in charging accused.

Where an accused person pleaded guilty to a charge which did not conform to the requirements of section 167 (3) of the Criminal Procedure Code, and where it appeared that it is doubtful whether the accused has not been misled by such omission.

Held : That the defect in the charge is not curable either under sections 171 or 425 of the Criminal Procedure Code and that the conviction should be quashed.

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The report of the Commissioner appointed under statutory powers to inquire into allegations of the bribery of members of the State Council, contained the following passage :—

> "Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The Ceylon Daily News published a full report of the Commissioner without comment. The plaintiff brought an action for defamatory libel against the printer and owners of the 'Daily News.' No issue as to express malice was set up. The respondents raised all defences open to them.

The District Judge decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. Accordingly he held that the publication was true in substance and in fact, but was not for the public benefit.

On appeal, the Supreme Court affirmed the decision, but held that the publication was privileged. On appeal to the Privy Council—

Held : (1) That the publication of the Report was in the interests of the public of Ceylon and, therefore, its publication negatived *animus injuriandi*, which is an essential element of the Roman Dutch Law relating to defamation.

(2) That, therefore, the publication as a whole was privileged.

(3) That the reference to the appellant's conduct as a witness is not divisible from the rest of the Report, because his conduct was a factor on which the Commissioner based his conclusions.

(4) That section 6 (1) of Ordinance No. 25 of 1942 prohibits the publication of both the name and evidence of any witness, and not of the name only.

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Money borrowed on promissory note by public servant—Creditor's complaint to Head of Department that debtor defaulted in repaying loan—Is it defamatory—Privileged occasion—Malice.

Plaintiff and his brother were the makers of a promissory note dated 11-6-1938 for Rs. 300 in favour of the defendant. By letter dated 18-11-43 the defendant wrote to the Principal Collector of Customs in whose department the plaintiff was employed, complaining of plaintiff's failure to repay the loan. The letter contained the following paragraph :—

> "Mr. Ondatjee employed under you along with his brother employed.....borrowed from me a sum of Rs. 300. Although I have repeatedly asked for my money neither of the brothers would pay me a cent."

Plaintiff alleged that the statements in the paragraph were capable of the following meanings :— (*a*) That plaintiff was in pecuniary difficulties ; (*b*) that there had been prior demands but long delay on plaintiff's part ; (*c*) that the plaintiff was slow in paying his debt that it was necessary to get someone to urge him to do so ; (*d*) that there was a culpable refusal to pay money borrowed.

Held : (1) That the words complained of are defamatory of the plaintiff.

(2) That they were written on a privileged occasion as the head of the department had an interest in the Government servants employed in his department fulfilling their obligations to their creditors and in upholding the respectability of the Public Service.

(3) That, as the evidence established that the defendant was actuated by malice in writing the letter complained of, plaintiff, was entitled to damages.

Divorce

Divorce proceedings—Effect of on application for maintenance.

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Control of Textiles—Charge of possessing textiles in excess of quantity prescribed by law—What the prosecution has to prove.

Held : That a person, charged with having in his possession a quantity of textiles in excess of the quantity prescribed by law, cannot be convicted unless the prosecution proves that he had intentional control over such goods.

What evidence is necessary to prove charge under Section 17 and 18 of Shops Ordinance.

What Evidence is necessary to prove terms of road service licence.

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Section 114—Police officer acting as detective—Need his evidence be corroborated.

Depositions recorded in absence of accused—admissibility.

Excise Ordinance

Charges of possessing fermented toddy and transporting same toddy—Conviction on both charges—Propriety—Penal Code, section 67.

Where a person was charged with possessing fermented toddy and with transporting the same toddy himself and was convicted on both charges.

Held : That as the act of possession was incidental to the act of transporting, the conviction for possessing should be set aside.

Excise Ordinance, sections 34, 36, 43 *and* 44—*Powers of search and arrest.*

Held : (1) That an Excise Inspector who searches premises without a search warrant must first make the record required by section 36 of the Excise Ordinance, and that such record can be proved only by the document itself or by secondary evidence of its contents, if secondary evidence is admissible.

(2) That under section 34 of the Excise Ordinance there is no power to effect an arrest within a dwelling house.

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Agreement to sell immovable property of deceased for purposes of administration—Action against executor for return of consideration paid at execution of agreement—Is executor entitled to defend action and maintain claim in reconvention personally.

Held : That where an executor is sued for the return of the consideration paid at the execution of an agreement to sell immovable property of the deceased for purposes of administration, he is entitled to defend the action personally and plead a claim in reconvention, if any.

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Action for damages over Rs. 100 instituted in Court of Requests—Damages assessed at Rs. 60 after trial—Should the matter be referred to Rural Court—Rural Courts Ordinance No. 12 of 1945, section 12.

Held : That section 12 of the Rural Courts Ordinance No. 12 of 1945 has no application where the actual value claimed by the plaintiff can be determined by the Court only after the conclusion of the case.

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Kandyan Law

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Landlord and Tenant

Should sub-tenant be joined in an action for ejectment against the tenant—Effect of decree for ejectment against tenant.

Held : (1) That our law does not permit the joinder of a sub-tenant in an action for ejectment against the tenant.

(2) That a sub-tenant is bound by a decree against the tenant, and it is the duty of the Fiscal to remove the sub-tenant and deliver possession to the landlord.

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Decree for ejectment of tenant—Acceptance by landlord of higher rent for three months immediately preceding date of ejectment—Is new tenancy created.

Held : That when a valid notice has been given, a new tenancy can be created only by an express or implied agreement and that the mere acceptance of a payment in excess of what is due to the landlord during the current period of tenancy does not create a new tenancy at the expiration thereof.

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Tenant in arrears of rent for more than one month—Tender of arrears of rent by tenant after notice to quit—Refusal to accept—Institution of action for rent and ejectment—Can landlord maintain action—Rent Restriction Ordinance, section 8, proviso (a).

Held : That a landlord, who refuses to accept arrears of rent due for more than a month tendered to him by his tenant after notice to quit has been served on him, is not entitled to maintain an action for ejectment under proviso (*a*) to section 8 of the Rent Restriction Ordinance.

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Tenancy Action—Compromise—Payment on or before a date—Payment tendered to proctor in the afternoon—Decree obtained in the morning without notice as for default—Validity of decree—Jurisdiction of Court to vacate ex-parte decree.

The parties to a tenancy action arrived at a compromise recorded in the following terms :—

"It is agreed that a sum of Rs. 151·80 is due as rent and damages. If the defendant pays this sum to the plaintiff on or before 19th April, 1948, this action is to be dismissed without costs. If he does not pay the sum as aforesaid, judgment is to be entered for the plaintiff as prayed for with costs."

On the morning of the 19th April, 1948, the plaintiff, without express notice to the defendant, applied for and obtained decree against the defendant on the footing that the defendant was already in default.

The defendant stated that he sent a telegraphic money order for the amount to the plaintiff's proctor on the afternoon of the 19th April, 1948, but the Court failed to inquire into the matter or to vacate the order made in favour of the plaintiff.

Held : (1) That the order made by the learned Commissioner of Requests on the 19th April, 1948, entering decree in favour of the plaintiff against the defendant was premature and made *per incuriam.*

(2) The learned Commissioner should have vacated this order as soon as the error was brought to his notice.

(3) That under the terms of the compromise the defendant was entitled to claim the dismissal of the action on proof of payment of or tender of the amount to the plaintiff or his proctor.

Per GRATIAEN, J.—"If a Judge makes an *ex-parte* order the party who has not been heard has a right to apply to have it set aside except in cases where the Judge is expressly empowered to make such an *ex-parte* order."

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Maintenance Ordinance

Failure to follow procedure prescribed by section 14—Validity of proceedings—When does dismissal of application operate as a bar to subsequent application.

Held : (1) That the failure of a Magistrate to follow the procedure prescribed by section 14 of the Maintenance Ordinance vitiates all subsequent proceedings on an application for maintenance.

(2) That a dismissal of an application without an adjudication on the merits does not operate as a bar to a fresh application.

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Fixing of monthly allowance under section 2—Effect of divorce proceedings on application for maintenance.

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(2) That an application for maintenance is not affected by the institution of an action for divorce by one party against the other.

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Possession of adulterated milk by authorised servant of registered Dairyman—Does it amount to possession by master—Liability of master—Rules 5 and 8 of Chapter XIV of By-Laws of Municipal Council.

Held: (1) That milk found in the possession of a registered dairyman's authorised servant while engaged on his master's business should be regarded as having been in the possession of his master for the purposes of Rule 5 of Chapter XIV of the By-Laws of the Municipal Council.

(2) That Rule 5 does not require proof of sale, exposure of sale or of hawking in cases where adulterated milk is found in the possession of a registered Dairyman or his servant. It only arises in the case of milk found in the legal possession of some person other than a registered Dairyman.

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Matrimonial Rights and Inheritance (Jaffna) Ordinance

Section 27—Devolution of property on death of person leaving a mother and children of paternal uncle—Intestate succession to property derived from father's side—Mother's rights—Determination of persons coming within the expression "all the persons above enumerated failing" in section 27.

On the death of X, intestate his widow, W, inherited half his property and his two daughters, P and S, a quarter each. P died intestate and without issue, whereupon S inherited her share. Then S died, intestate and without issue, leaving the quarter share from "her father's side," a quarter share derived from P and other acquired property. Her property was claimed by her mother, who survived her, and the children of her paternal uncle, the brother of X.

Held: (1) That the mother was not, one of the "persons above enumerated" within the meaning of section 27 of the Ordinance, and hence she was not entitled to S's property inherited from father's side.

(2) That the children of the paternal uncle are entitled to S's property derived from the father's side.

(3) That the persons, coming within the expression "All the persons above enumerated failing" in section 27 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance, must be determined by reference to sections 23 and 25 only and not by reference to all the sections 23, 24, 25 and 26 of the same Ordinance.

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Possession of adulterated milk by unauthorised servant.

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Motor Car Ordinance

No. 45 of 1938—Sections 154 and 127—Driving a bus without certificate of insurance—Suspension of Certificate of Competence—What is meant by "special reasons" in Section 75 (2) (c).

Petitioner was convicted of the offence of driving a bus on the highway when there was not in force in relation to the said bus a policy of insurance or security in respect of 3rd party risk. In addition to a fine the learned Magistrate suspended his certificate of competence for 12 months.

The accused applied to the Supreme Court by way of revision to set aside the order suspending the certificate on the ground that on the day he drove the bus, viz. 16th January, 1948, the bus had been licensed for the new year and he assumed that a certificate of insurance was in force as required by section 33 (2) of the Motor Car Ordinance.

Held: That the petitioner was entitled to act on the assumption that a license would not be issued in contravention of an express provision of the statute and his case fell within the exception to section 75 (2) (*c*) of the Motor Car Ordinance.

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Muslim Intestate Succession and Wakfs Ordinance

Section 3—Effect of proviso.

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Muslim Marriage and Divorce Registration Ordinance

Section 21 (4)—Procedure for enforcing Kathi's award.

Held: That the machinery laid down by section 21 (4) of the Muslim Marriage and Divorce Registration Ordinance is exhaustive of the remedies available for the enforcement of awards made by a Kathi's Court in respect of claims for the payment of *mahr*.

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Muslim Law

Donation of immovable property by deed—Revocability—Muslim Intestate Succession and Wakfs Ordinance, section 3—Proviso—Effect of.

By a deed a father gifted to his daughter (the plaintiff-appellant) certain shares of a land. Later he revoked the gift and conveyed the said shares to the defendants-respondents.

It was contended for the appellant that the deed of gift was irrevocable except by a decree of Court.

Held: (1) That the gift was revocable without the intervention of Court.

(2) That under the proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance a deed of donation could be revoked unless it is stated to be irrevocable in the deed.

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No. 47 of 1942—Road license issued under—How may its terms be proved.

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Interlocutory decree—Intervention after—Interlocutory decree vacated by consent of parties—Order for trial de novo*—Court's power to make such order—What intervenient can claim—Should plaintiff prove his case all over again—Meaning of* " per incuriam."

Held : (1) That the Court cannot vacate an interlocutory decree for partition on the ground that parties consented to it.

(2) That it is not open to an intervenient to ask for a partition of a land different to that described in the plaintiff's libel.

(3) That where an intervention is entertained by the Court after interlocutory decree, the plaintiff should not be ordered to prove his case all over again.

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Partnership

Dissolution of Partnership—Person appointed to determine matters in dispute—Agreement by parties that such person's decision should be final and conclusive—Can decision be canvassed.

Held : That where a person is appointed to determine matters in dispute and his decision is, by agreement of parties, made final and conclusive, the decision cannot be questioned so long as the person acts fairly within the terms of the authority granted to him.

SAMARAKONE & ANOTHER vs. DIAS ABEYSINGHE 31

Penal Code

Section 488*—Is a police station a public place.*

Held : That a police station is not a public place within he meaning of section 488 of the Penal Code.

VANCUYLENBURG (A. S. P. UVA) vs. WEERASEKERA 26

Section 180*—Complaint to police against three persons—Intention to cause officer to use his lawful power to the injury of the three persons.*

Where a complaint was made to the police against three persons, but the complaint did not disclose that any offence had been committed, and the facts showed that the complainant had no intention of causing a police officer to use his lawful power to the injury or annoyance of the three persons.

Held : That the act of the complainant did not fall within the scope of section 180 of the Penal Code.

SILVA vs. NANAYAKKARA (P. C. 3146 AMBALANGODA POLICE) 28

Section 311*—Meaning of " fracture."*

An injury was described as follows :—" Linear lacerated wound 1 inch long and scalp deep over right side of back of head with linear fracture of bone underneath." The witness was unable to state whether the fracture extended to the inner table. It was accordingly argued that there had been no fracture of a bone within the meaning of that expression in Seventhly of section 311 of the Penal Code.

Held : That the injury may correctly be called a fracture of the skull bone.

ARNOLIS APPUHAMY *et al* vs. MAHIL (S. I. POLICE KOSGAMA) 29

Section 158*—Abetment—Offer of bribe to public officer as motive or reward for doing an act not within his official power to perform—Does such offer amount to an offence under our law.*

Held : That a person, who offers a bribe to a public officer for doing something, which it is not within the power of the latter officially to achieve, cannot be found guilty of abetting an offence under section 158 of the Penal Code.

T. B. TENNEKOON vs. DISSANAYAKA, A. S. P. 49

Plaint

Amendment of Plaint—When should it be allowed.

See Civil Procedure Code 84

Possessory Action

See under Action.

Public Place

Is Police Station a public place

See Penal Code 26

Public Servant

Writ of Mandamus—Public Servants—Dismissal of officer in the Post and Telegraph Department—Officer's right to office—Is it enforceable by action—Instructions given under Royal Sign Manual and Signet, (Ceylon State Council) Order in Council 1931 *Article* 86 (2).

An officer of the Post and Telegraph Department, who was dismissed from the Public Service in 1945 by an order of the Governor applied for a writ of mandamus on the Postmaster-General ordering him to hold an inquiry into the charges against him, complaining that he did not have the fullest opportunity of exculpating himself according to the Instructions in the Royal Sign Manual and Signet.

Held : (1) That a public servant holds office at the pleasure of the Crown.

(2) That he has no remedy at law for enforcing any alleged contract of service.

(3) That the Instructions do not entitle a public officer to insist on a particular form of procedure in investigating charges against him, but the duty of giving him a full opportunity of exculpating himself must be honestly discharged.

VALLIPURAM vs. POSTMASTER-GENERAL ... 1

Reconvention

Is executor defendant entitled to maintain claim in reconvention personally

See Executor 65

Rent Restriction Ordinance

No. 60 *of* 1942*—Section* 8 (*c*)*—Premises reasonably required by landlord for the purposes of his business.—Landlord not engaged in any trade or business—Is he entitled to the premises.*

Held : That a person, who has no trade or business *in esse* at the time of the institution of his action, is not entitled to claim any premises of which he is landlord, on the ground that they are reasonably required for the purposes of his trade or business.

MAMUHEWA vs. RUWANPATHIRANA ... 32

No. 60 of 1942—Application of to contracts of tenancy made before the Ordinance came into operation.

Held: That after the Rent Restriction Ordinance is applied to any area, the rent for any premises in that area is the rent payable under the Ordinance, even though a higher rent may have been agreed upon between the parties before the Ordinance came into operation in that area.

PEIRIS vs. RATNABARTHI ARATCHY ... 36

Section 8 (c)—Premises owned by joint landlords—Notice to quit given by one of them—Premises required for partnership business of which landlords as well as others were partners.

The premises in question belonged to four persons jointly. Notice on the tenant to quit was given by one of the landlords. The premises were required for the purposes of a business carried on in partnership by the landlords and some others.

Held: (1) That the notice to quit was bad, as, in the case of joint landlords, notice must be given by each of them.

(2) That the trade or business contemplated in section 8 (c) of the Ordinance is the trade or business carried on by the landlords alone, and not a business of which they are partners along with others.

HASSENALLY vs. JAYARATNE 87

Rural Courts Ordinance

See jurisdiction 105

Rent Restriction Ordinance

No. 60 of 1942, section 8 (c)—Reasonably required for landlord's occupation—Competing claims of landlord and tenant equally genuine.

Held: That a landlord should be entitled to be restored to his property if his need to occupy it is at least as great as that of his tenant.

A. J. DE MEL vs. PIYATISSA 63

Revision

Revisionary powers of Supreme Court.
See Criminal Procedure Code 86

Sentence

See under Criminal Procedure. 10

passing sentence
See Criminal Procedure Code See 69 and 74

Servitude

Grant of Share of Well—Does it include the right—to lead water from the well along another's land—Burden of proof—Presumption.

Held: (1) That the bare grant of a share in a well implies only a right of way to the well and does not imply the right of leading water over the land of another. The right of leading water must be expressly granted.

(2) That a heavy onus lies on a person who seeks to establish a servitude by prescription. In case of doubt the presumption is always against a servitude.

CHELLIAH & ANOTHER vs. NAGARAJAH & ANOTHER 98

Shops Ordinance

No. 66 of 1938, sections 17 and 18—Evidence necessary to prove charge under—Accused "discharged" after close of prosecution and defence counsel had stated that no evidence would be called—Fresh charge—Plea of autrefois acquit*—Criminal Procedure Code, sections 44, 172, 187, 191, 330 and 425.*

Held: (1) That in a charge under section 18 of the Shops Ordinance, there must be evidence that the shop was open for the serving of customers.

(2) That a Court is not bound to take judicial notice of a closing order.

(3) That a "discharge," after the close of the prosecution and after the defence has stated that no evidence would be called, is an "acquittal" within the meaning of section 330 (1) of the Criminal Procedure Code.

(4) That section 330 does not make any distinction between an acquittal on the merits and an acquittal on any other ground.

SOLICITOR-GENERAL vs. ARADIAL 17

Specific Performance

of agreement containing penal stipulations.
See Trust 76

Succession

Devolution of property on death of person leaving a mother and children of paternal uncle.
See Matrimonial Rights and Inheritance (Jaffna) Ordinance 14

Succession to Kandyan mother leaving children of two marriages.
See Kandyan Law 97

Textiles

Charge of possessing excess quantity of textiles—What must prosecution prove.
See Evidence 16

Thesawalamai

Thediatetem—Husband acquiring property during marriage—Death of wife leaving children—Husband sued personally for debt contracted during marriage—Children not made parties to action—Seizure and sale of entire land in execution of decree—Is purchaser entitled to whole land.

The 1st defendant, subject to Thesawalamai, who was married to M, purchased a property in 1920. M died in 1929, leaving children, two of whom are the 2nd and 4th plaintiffs.

The 2nd defendant sued the 1st defendant on a promissory note given by him in 1926 and on a decree obtained in 1932 against the 1st defendant personally the said property was seized and sold and was purchased by the 2nd and 3rd defendants. The children of M who were not parties to the said action disputed the 2nd and 3rd defendants' rights to M's half share of the land.

Held: That the 2nd and 3rd defendants were only entitled to the right title and interest of the 1st defendant, viz., a half share of the land.

Per CANEKERATNE, J.—"Under the old procedure there appears to have been a decree of divorce *a vinculo matrimonii* and a decree of divorce *a mensa et thoro* (Vanderstraaten 180, 4 S. C. C. 29). The latter would seem to be what would now be known as a decree of separation *a mensa et thoro.* Where

a Court passed in those days a decree of divorce *a mensa et thoro* unless the Court made an order interdicting the husband from all interference with the wife's property and ordering a division of the common estate she continued to be a *feme covert*."

Trusts Ordinance

Section 93—Executory contract—Specific performance—Agreements to transfer land pending partition action—Conveyances executed after partition decree—Land seized and sold by Fiscal—Is purchaser bound by agreements.

A and B agreed to transfer to C the parcels of land to be allotted to them in a partition action. After the final decree, the land was seized and sold by the Fiscal to D. Before the sale, A and B executed conveyances in favour of C, who maintained that, (under section 93 of the Trusts Ordinance,) D was bound by the agreements respecting the land.

Held: (1) That section 93 of the Trusts Ordinance had no application as the contract affecting the land had been discharged prior to the sale by the Fiscal.

(2) That, in any event, the agreements were not capable of specific performance, as they contained penal stipulations.

Will

Interpretation—Direction to executor to pay legacy on the occasion of marriage of legatee—Absence of words "give and bequeath"—Vested or contingent legacy—Investment of the amount—Interest—Is such legatee entitled to receive interest before marriage.

A Last Will contained the following clause :—

> "I further direct the executor of this my Last Will and Testament to pay a sum of Rupees Five thousand to the two daughters of Mary at home on the occasion of their marriage as dowry provided by me and a sum of Rupees One thousand to each of her two sons."

The testator died leaving his widow and two daughters by a previous marriage, Mary and Martha. In compliance with an Order of Court the executor deposited in Court the amount due on the legacies which included the sum of Rs. 5,000 referred to in the above clause. The Court "minuted of record" that the sum of Rs. 5,000 be not paid without the consent of the executor in compliance with an application for the purpose.

The appellants, who are "the two daughters of Mary at home," referred to in the said clause and who are still unmarried, applied for an order of payment in respect of a dividend of Rs. 75 that had accrued on the investment of the said Rs. 5,000 in the Loan Board. The Court refused the application and the order was appealed from.

Held: (1) That in the absence of the words "give and bequeath" the words used in the clause do not indicate a direct gift to the grand-daughters, but a mere direction to the executor to pay on a future event.

(2) That the appellants were not entitled to the order of payment asked for.

Witness

Words and Phrases

Present : GRATIAEN, J.

VALLIPURAM vs. POSTMASTER-GENERAL

In the matter of an Application for a Writ of Mandamus on the Postmaster-General. (*S. C. No. 502*).
Argued on : 25th November, 1948
Decided on : 1st December, 1948

Writ of Mandamus—Public Servants—Dismissal of officer in the Post and Telepraph Department —Officer's right to office—Is it enforceable by action—Instructions given under Royal Sign Manual and Signet, (Ceylon State Council) Order in Council 1931 Article 86 (2).

An officer of the Post and Telegraph Department, who was dismissed from the Public Service in 1945 by an order of the Governor applied for a writ of mandamus on the Postmaster-General ordering him to hold an inquiry into the charges against him, complaining that he did not have the fullest opportunity of exculpating himself according to the Instructions in the Royal Sign Manual and Signet.

Held : (1) That a public servant holds office at the pleasure of the Crown.

(2) That he has no remedy at law for enforcing any alleged contract of service.

(3) That the Instructions do not entitle a public officer to insist on a particular form of procedure in investigating charges against him, but the duty of giving him a full opportunity of exculpating himself must be honestly discharged.

Cases referred to :—*Shenton vs. Smith* (1895) A.C. 229.
Venkata Rao vs. Secretary of State (1937) A.C. 248.

E. B. Wikremanayake, K.C., with *A. Sivagurunathan*, for the Petitioner.

GRATIAEN, J.

The petitioner was a Postmaster employed as an officer of the Ceylon Post and Telegraph Department. On 21st June 1945, by an order of the Governor, he was dismissed from the Public Service. Thereafter he unsuccessfully sought through various channels to obtain redress and on 29th October of this year (40 months after the event) he applies to this Court for relief. It is not pretended that he has any other object in view than to challenge the legality of his dismissal and thereby to secure his reinstatement as a public servant. He complains that he was not given the fullest opportunity of exculpating himself in respect of the charges framed against him, and that in particular he was not permitted to cross-examine witnesses or to have access to documents used against him. In these alleged circumstances he asks this Court for a writ of mandamus "ordering the Postmaster-General of Ceylon to hold an inquiry into the charges framed against him."

On the date of the petitioner's dismissal Ceylon was a Crown Colony, and in terms of Article 86 (1) of the Ceylon (State Council) Order in Council, 1931, the appointment, promotion, transfer, dismissal and disciplinary control of public officers in the Colony was vested in the Governor subject (as far as is relevant to this present application) to any instructions given under the Royal Sign Manual and Signet. Article 86 (2) conferred on the Governor a limited right to delegate his powers in this connection. It is expressly laid down in the Royal Instructions to the Governor dated 6th December 1941 that, *inter alia*, "all commissions granted by the Governor or by any Public Officer acting under his authority *shall, unless otherwise provided by law, be granted during Our pleasure only.*" The Royal Instructions also lay down the procedure to be followed before the Governor proceeds to dismiss different grades of public officers. In the case of an officer in the grade to which the petitioner belonged, "the grounds of intended dismissal shall be definitely stated in writing and

communicated to him in order that he may have full opportunity of exculpating himself, and the Governor shall investigate the case with the aid of the head of the department in which the officer shall then be serving." The petitioner, at this late stage, challenges the legality of his dismissal on the ground that these instructions were in his case substantially ignored. I am not satisfied that his complaint is in the slightest degree justified, but, even if it were, it seems to me that a Court of Law would have no right to interfere. The petitioner's application proceeds upon a misconception as to the position of public officers in this Island not only in 1945, when the dismissal actually took place, but also today, when reinstatement is sought through the intervention of this Court.

The effect of Article 86 of the Ceylon (State Council) Order in Council, 1931, coupled with the Royal Instructions to which I have referred, is that all public servants in the Island held their offices during the pleasure of the Crown, *subject to any specific law to the contrary.* In the case of the petitioner, there is not and there never was at any time any law by which he held office otherwise than during the pleasure of the Crown. The Royal Instructions regulating the procedure for dismissal merely issued directions for the guidance of the Governor, *and did not constitute a contract between the Crown and its servants.* As Lord Hobhouse stated in "*Shenton vs. Smith*" (1895) *A. C.* 229, where the Privy Council considered a similar case from Western Australia, "if any public servant considers that he has been dismissed unjustly, his remedy is not by a lawsuit but by an appeal of an official or political kind." Again, with regard to the position where there is a departure from the Royal Instructions regulating the procedure for dismissals he says that any officer who departs from the regulations "is answerable not to the servant dismissed but to his superior officers." The purpose of the Royal Instructions is "to assure that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by the rules.....but there is *no right enforceable by action* to hold office according to the rules and the officer can therefore be dismissed notwithstanding the failure to observe the prescribed procedure." "*Venkata Rao vs. Secretary of State*" (1937) *A. C.* 248.

It seems to me clear that the petitioner held office in the Public Service until 21st June 1945 at the pleasure of the Crown, and that he has therefore no remedy available to him at law for the purpose of enforcing any alleged contractual rights arising from that employment. Besides, his position is even more untenable today. Since his dismissal Ceylon has ceased to be a Crown Colony, and today enjoys the status of a self-governing Dominion in the Commonwealth of Nations. The status of her public servants is now regulated by Article 57 of the Ceylon (Constitution) Order in Council 1946 (as amended) which declares that "save as otherwise provided by this Order, every person holding office under the Crown in respect of the Government of the Island shall hold office during His Majesty's Pleasure." In the result what was provided by the Royal Instructions under the old constitution is now expressly laid down by law. There is no possible means by which a public officer who was dismissed in 1945 can claim *as of right* a place in the Public Service of today. I refuse the petitioner's application. To allow a rule nisi to issue would I think encourage him to entertain false hopes which would not be justified.

I desire to add that I can find nothing in the Royal Instructions dated 6th December 1941 which entitles a public officer to insist upon any particular form of procedure being adopted during the investigations of charges framed against him. The duty to give him "a full opportunity of exculpating himself" should be honestly discharged, but questions of procedure to be adopted in discharging that duty fall within the province of administrative discretion over which the Courts will not exercise any overriding authority. The application is refused.

Application refused.

Present : WIJEYEWARDENE, A.C.J., CANEKERATNE, J., WINDHAM, J.

MARY CATHERINE PERERA *et al* vs. THE MISSIONARY APOSTOLIC OF HALPATOTA *et al*

S. C. No. 91/1947—*D. C.* (*Inty.*) *Galle* 8151/*Testy.*
In the matter of the Last Will and Testament of Francis Abeyewardene Gunasekare

Argued on : July 30th, 1948
Decided on : August 23rd, 1948

Will—Interpretation—Direction to executor to pay legacy on the occasion of marriage of legatee—Absence of words "give and bequeath"—Vested or contingent legacy—Investment of the amount—Interest—Is such legatee entitled to receive interest before marriage.

A Last Will contained the following clause :—

"I further direct the executor of this my Last Will and Testament to pay a sum of Rupees Five thousand to the two daughters of Mary at home on the occasion of their marriage as dowry provided by me and a sum of Rupees One thousand to each of her two sons."

The testator died leaving his widow and two daughters by a previous marriage, Mary and Martha. In compliance with an Order of Court the executor deposited in Court the amount due on the legacies which included the sum of Rs. 5,000 referred to in the above clause. The Court "minuted of record" that the sum of Rs. 5,000 be not paid without the consent of the executor in compliance with an application for the purpose.

The appellants, who are "the two daughters of Mary at home", referred to in the said clause and who are still unmarried, applied for an order of payment in respect of a dividend of Rs. 75 that had accrued on the investment of the said Rs. 5,000 in the Loan Board. The Court refused the application and the order was appealed from.

Held : (1) That in the absence of the words "give and bequeath" the words used in the clause do not indicate a direct gift to the grand-daughters, but a mere direction to the executor to pay on a future event.

(2) That the appellants were not entitled to the order of payment asked for.

Cases referred to :—*In re Pollock, Pugaley vs. Pollock,* (1943) Chancery Division 338.
In re Dickson, Hill vs. Grant, (1885) 29 Chancery Division 331.

F. A. Hayley, K.C., with *H. Wanigatunga*, for the appellants.
E. B. Wikramanayake, K.C., with *E. S. Amarasinghe*, for the respondents.

WIJEYEWARDENE, A.C.J.

This matter has been referred to a Bench of three Judges by my brothers Dias and Basnayake under section 775 of the Civil Procedure Code.

The question for decision depends on the construction of the following clause in the last will of one F. A. Gunasekere :—

> "I further direct the executor of this my last will and testament to pay a sum of Rupees Five thousand to the two daughters of Mary at home on the occasion of their marriage as dowry provided by me and a sum of Rupees One thousand to each of her two sons".

F. A. Gunasekere died in 1945 leaving him surviving his widow, and two daughters by a previous marriage, Mary and Martha. Mary is married and has two sons and four daughters, two of whom have entered a religious Order. The appellants are the two remaining daughters of Mary and are referred to in the above clause as the "two daughters of Mary at home". The respondents are the executor, a Roman Catholic priest, and the residuary legatee, the Roman Catholic Bishop of Galle.

When the executor produced the last will in Court and asked for probate, the two daughters of the testator objected to the Court dispensing with security from the executor under section 541 of the Civil Procedure Code. The Court did not, however, order the executor to give security but directed him to deposit in Court "legacies" due to Mary and Martha and "Mary's family" as soon as probate was issued to him. The executor deposited in Court in June 1945 a sum of Rs. 19,000 which included the sum of Rs. 5,000 referred to in the above clause of the Will. In making the deposit the executor moved that "it be minuted of record" that the sum of Rs. 5,000 "be not paid without the consent of the executor". The Judge made a note accordingly in his record.

The present appeal arises on an application by the appellants who are unmarried for an order of payment in respect of a dividend of Rs. 75 that has accrued on the investment of the sum of Rs. 5,000 in the Loan Board. The District Judge refused the application.

It was argued for the appellants that :—

(*a*) there was a legacy of Rs. 5,000 created by the clause in question in favour of the two appellants.

(*b*) that the legacy vested in the two appellants at the death of the testator, though the time of payment was postponed until their marriage.

(*c*) that the appellants were entitled to receive payment of the dividends even before their marriages.

In support of his argument the appellants' Counsel referred us to Walter Pereira's Laws of Ceylon (1913 Edition) at pages 468 and 469 and Van Leeuwen (Kotze's Translation (second edition)) Book 3, Chapter 9, Section 34. Walter Pereira says in the passage referred to :—

> " Where a bequest is made subject to a mere usufruct, the property in the thing bequeathed passes to the legatees on the death of the testator, and those of them who may be alive at the termination of the usufruct take their shares as a matter of course, and the shares of those who die meanwhile go to their heirs..... So, too, where, for instance, a testator bequeaths a certain sum of money to his grand-daughter to be paid to her by the heir after she has attained majority, or has celebrated her nuptials. The legacy here is an unconditional one, and it is only the payment of it and the right to demand it that have been postponed until majority or marriage; and therefore, if the granddaughter die before the date of payment has arrived, the legacy passes to her heirs (Cens. For. 1-3-8-34)."

The passage from Kotze's translation is :—

> " If the testator has said : ' I bequeath 1,000 guilders to my niece, which my heir shall pay her on attaining majority or marriage ', which bequeath, even if the niece die unmarried and a minor, must be paid to her".

Under this last will, the testator " gives and bequeaths " some cash legacies to his widow, his two daughters, certain charitable institutions and the Bishop of Galle. But when he comes to make provision for the appellants he does not use the words " give and bequeath " but says " I direct the executor.....to pay a sum of Rs. 1,000.....on the occasion of their marriage as dowry.....". These words do not indicate a direct gift to the granddaughters but a mere direction to the executors to pay on a future event. In such a case, the vesting will be postponed till after the event has happened, unless of course a contrary intention could be gathered from the surrounding circumstances. There is no evidence of such a contrary intention in this case. The position would have been different if the words directing payment had been followed by words such as " to whom I give and bequeath the same accordingly " (Williams on Executors and Administrators, Tenth Edition, Volume 1, pages 979 and 980). It will be seen that the passages from Walter Pereira and Kotze (supra) speak of testators " bequeathing " sums of money to their grand daughter and niece.

I do not think the clause in question could, in any event, be considered as creating anything more than a conditional legacy. In discussing the question whether a legacy is vested or contingent when a future time for the payment is defined by the last will, Voet says,

> " Where the time (*dies*) is uncertain, the nature of the uncertainty is not the same in each case; for either it is uncertain *when* the day will arrive though it is certain that the day will arrive during the lifetime of the legatee, or it is certain that the day will arrive, but uncertain whether that will be so during the lifetime or after the death of the legatee, or, finally, it is quite uncertain whether and when the day will arrive." He says that the rule that the legacy is contingent will apply mostly to the third case " since it is evidently wholly uncertain whether the day which has been attached to the legacy will arrive at all; and an uncertain day is treated as equivalent to a condition ". He then proceeds to say : " Under this category of a *dies incertus* (an uncertain day) ought clearly to be brought the matter of a specified age—the age at which the testator desired that the legacy should be paid over to the legatee, for example, on his attaining the age of puberty, of majority, on his marrying in the family ..... unless the uncertain day has merely been put in to defer the time for giving effect to the bequest ". (Voet. 36, 1, 2, McGregor's Translation).

The same view as to the effect of a *dies incertus* is expressed in Williams on Executors and Administrators (Tenth Edition at page 975) where it is stated that in the absence of a contrary intention to be gathered from the will the legacy is to be regarded as a conditional legacy " if the event upon which the legacy is directed to be paid be uncertain as to its taking place ".

In view of the reliance placed on a passage from Van Leeuwen by the appellants it is interesting to note that the passage cited in their behalf is followed immediately (vide Kotze's Translation, Book 3, Chapter 9, Section 35) by the following statement :—

> " Whatever has been bequeathed as marriage property is, in case of doubt, considered subject to a condition, which must first be fulfilled before the bequest becomes vested, so that in the meanwhile it would lapse by death."

Under the English Law a contingent pecuniary legacy carries no interest until the contingency happens except where the testator is the father of the legatee or stands *in loco parentis* and no other provision is made in the will for the maintenance of the legatee (vide *In re Pollock, Pugsley vs. Pollock*, (1943) Chancery Division 338). In the present case the testator is the grandfather of the appellants. He had contracted a second marriage and was living with his second wife. The appellants, the daughters of a child of the testator by the first bed, were living separately with their parents. A grandfather is not considered to be *in loco parentis* unless he intended to assume the office and duty of a parent. No evidence has been led to show that the testator " meant to put himself in the situation of the lawful father " of the appellants " with reference to the father's office and duty of making provision " for them (Williams on Executors and Administrators, Tenth Edition, pages 1076 and 1077). It depends on certain technical rules

and the terms of the particular will whether the interest accruing on a pecuniary legacy forms part of the residue or goes with the principal to the legatee (vide *In re Dickson, Hill vs. Grant*, (1885) 29 Chancery Division 331 and *In re Pollock, Pugsley vs. Pollock* (supra)). No authority was cited to us to show that in the case of a contingent pecuniary legacy the legatees would be entitled to claim the interest on the legacy in every case before the happening of the event. The decisions in the English Courts regarding the appropriation of the income for the maintenance of minors depends on certain Statutes (*e.g.*, 23 and 24 Victoria 145, 44 and 45 Victoria c. 41 and 15 George v c. 19).

It was argued somewhat tentatively that the deposit of the money in Court by the executor might be regarded as " a severance of the fund " which resulted in creating a vested legacy entitling the legatees to the dividends in question (vide Williams on Executors and Administrators, Tenth Edition, page 1167). But the " severance " which has such an effect is a severance by the direction of the testator and cannot include " a mere arrangement for the more convenient dealing with the estate " made by an executor (vide *In re Dickson, Hill vs. Grant* (supra)). I may add that the law in England with regard to the last wills of persons dying after 1925 is governed by the Law of Property Act, 1925.

For the reasons given by me I would dismiss the appeal with costs.

CANEKERATNE, J.
I agree.

WINDHAM, J.
I agree.

Appeal dismissed.

Present : CANEKERATNE, J. & GRATIAEN, J.

SARA UMMA vs. MAIMOOR AND OTHERS

S. C. No. 423—D. C. (F.) Kandy No. 1527.
Argued on : 30th August, 1948.
Decided on : 23rd September, 1948.

Muslim Law—Donation of immovable property by deed—Revocability—Muslim Intestate Succession and Wakfs Ordinance, section 3—Proviso—Effect of.

By a deed a father gifted to his daughter (the plaintiff-appellant) certain shares of a land. Later he revoked the gift and conveyed the said shares to the defendants-respondents.

It was contended for the appellant that the deed of gift was irrevocable except by a decree of Court.

Held : (1) That the gift was revocable without the intervention of Court.
(2) That under the proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance a deed of donation could be revoked unless it is stated to be irrevocable in the deed.

Cases referred to :—*Cader vs. Pitche* (1916) 19 N. L. R. 246.
Mohideen vs. Mohideen (1923) 2 T. L. R. 92.
Weerasekere vs. Peiris (1931) 32 N. L. R. 176.
Weerasekera vs. Peiris (1933) A. C. 190, (1932) 34 N. L. R. 281.
Sahul Hamid vs. Mohideen Natchiya 1 C. L. W. 274 ; 34 N. L. R. 57.
Mohamadu vs. Marikar (1919) 21 N. L. R. 84 ; also (1925) 26 N. L. R. 446.
Sultan vs. Peiris (1933) 35 N. L. R. 57 at p. 62.
Ponniah vs. Jameel (1936) 38 N. L. R. 96 at pp. 99 and 101.
Wickramasinghe vs. Wijetunge (1913) 16 N. L. R. 413.

H W. Tambiah with *M. A. M. Hussain*, for the plaintiff-appellant.

No appearance, for the defendants-respondents.

CANEKERATNE, J.

This is an appeal by the plaintiff from a judgment dismissing her claim to an undivided two ninth share of a land. By deed P5, dated August 20, 1941, one Slema Lebbe granted by way of gift these shares to his daughter the plaintiff, the deed of gift is in Sinhalese and has been attested by a notary practising in the Sinhalese language in a Kandyan district, and like the deed referred to in the case of *Cader vs. Pitche*, (1916) 19 N. L. R. 246 P5 in some respects resembles a Kandyan deed of gift. The father by deed 3D1, dated March 2, 1942, revoked the gift in favour of the plaintiff, and by deed 3D2

sold those shares to the 3rd and 4th defendants respondents. The learned Judge held that the effect of the *proviso* to section 3 of Cap. 50 of the Ceylon Legislative Enactments is to make every gift revocable unless it is stated in the deed that it is irrevocable.

Mr. Tambiah contended firstly that deed P5 was irrevocable and secondly, that it could not be revoked except in the course of judicial proceedings. As there was no appearance for the respondents and we have had no assistance on their behalf it is not desirable to say anything more than what is required for the decision of the present case.

The parties to the action are Sunni Muhammadans of the Shafei sect to which most Muhammadans who are natives of Ceylon belong. The other principal sects of the Sunni School are the Hanafis, Malikis and Hanbalis. Two of the conditions necessary for the validity of a gift, according to the Hanafi Law, are (1) acceptance, expressed or implied, subject to exceptions in the case of a gift to a minor son etc. (2) seisin by the donee of the subject of the gift, *i.e.*, if the property is not already in the hands of the donee. Seisin might be actual or constructive. (Ameer Ali, Muhammadan Law (4th Ed.) Vol. 1. 113, 114 see 14 N. L. R. 295; 26 N. L. R. 446, p. 448.) Actual delivery of possession is not absolutely necessary. If the character of the possession changes, the mere retention of the subject matter of the gift in the hands of the donor, would not affect the validity of the gift. A gift of immovable property in the occupation of tenants will be complete either by the delivery of the title deeds or by requisition to the tenants to attorn to the donee. According to the Hanafi Law, a donor could revoke a valid gift (*i.e.*, one which has been completed by delivery of the property to the donee) whether he has or has not reserved to himself the power to revoke it, except in two cases (*e.g.*, between husband and wife, and a gift to a blood relation within the prohibited degrees). Except in these cases the power of revocation seems to be inherent in the donor of every gift. The power may come to an end in one of six ways. It may, however, be necessary to take proceedings before the Kazee or Judge. (Ameer Ali, 151, 155.) According to the Shafeis, no gift (except such as have been made by parents to their children) can be revoked, whether change of possession has taken place or not. (Ameer Ali, 149.)

Minhaj et Talibin, a Manual of Muhammadan Law according to the school of Shafii by probably En Nawawi (Howard's translation) treats of gifts in Book 24. "A practice has been introduced by the Sonna, by which parents, at any rate when not of notorious misconduct, may by gift *inter vivos* distribute their property equally amongst their children, without distinction of sex; others, however, maintain that the provisions of the law of the distribution of property upon succession cannot be set aside in this way. A father or any ancestor may revoke a gift made in favour of a child or other descendant, provided that the donee has not irrevocably disposed of the thing received". (pp. 214, 235).

Ameer Ali states thus. "A father has the right of revoking a gift made by him to his children, provided the donee has not irrecoverably disposed of the object received. So also other ascendants with respect to gifts made to grandchildren and their descendants". (Ameer Ali, op. cit. p. 190. In Chapter 6 he treats of the Shafei Law.)

Mr. Tambiah in attempting to limit the power to a gift to a son referred to an extract in Wilson's Muhammadan Law (4th Ed.) p. 441. This is a passage from the Hedaya, but it must be remembered that the Hedaya contains a discussion on moral philosophy and theology: in the course of the discussion it refers to the rules which are observed as law but the whole discussion is from the Hanafi standpoint. "It is lawful for a donor to retract the gift he may have made to a stranger". Shafei maintains that this is not lawful; because the Prophet has said—"let not a donor retract his gift; but let a father, if he please, retract a gift he may have made to his son"; and also, because retractation is the very opposite to conveyance.....It is otherwise with respect to a gift made by a father to a son, because (according to his tenets) the conveyance of property from a father to the son can never be complete; for it is a rule with him that the father has a power over the property of his son. The arguments of our doctors on this point are two-fold. First, the Prophet has said.....With respect to the tradition of the Prophet quoted by Shafei the meaning of it is that the donor is not himself empowered to retract his gift, as this must be done by decree of the Kazee, with the consent of the donee—excepting in the case of a father, who is himself competent to retract a gift to his son, when he wants it for the maintenance of the son; and this is metaphorically called a retractation". Wilson, (Muhammadan Law (6th Ed.) p. 430.)

Wilson quotes this passage, and adds, after this sentence (for it is a rule with him that the father has a power over the property of his son) "this is a very remarkable statement, of which I have not been able to find any confirmation in the Minhaj". No such words are to be found in Book 24 of Howard's translation. It would

also appear that the words at the end of the passage ("this must be done by a decree of the Kazee" etc.,) seem to be the comment made by Ali Ibn Bakr (the author of the Hedaya), these are not to be found in Book 24 of Howard's translation. The case of *Cader vs. Pitche* (1916) 19 N. L. R. 246 decided that a father can revoke a donation to his son without the decree of a Court of Law. The same view was taken in *Mohideen vs. Mohideen.* (1923) 2 T. L. R. 92. In a case referred to in Mac Naghten's Muhammadan Law (Precedents of Gifts 202) the right of a father to revoke a gift to the sons of a daughter was recognised, there was however another reason given for the gift being void; it may be assumed that the parties belonged to the Shafei sect. The Minhaj does not confine the right of revocation to a gift made to a son only. The text writers Ameer Ali and Wilson—so too Tyabji Muhammadan Law (2nd Ed.) section 423, p. 486—do not place a limitation on the father's right and I can see no reason for doing so. Had the question of revocation of deed P5 to be decided according to the Muhammadan Law of Ceylon, unaffected by anything in Ordinance No. 10 of 1931, the revocation would have been valid.

Gifts made by Muhammadans in Ceylon could formerly, broadly speaking, be divided into two classes—(i) those where the property passed to the donee absolutely, *i.e.*, subject to no condition, where the intention was to make the donee the proprietor of the property and give him the right, title and interest of the donor, (ii) those where the donee held the property subject to conditions, as in the case of *fidei commissary* provisions etc. The former class was often referred to as "pure donations". The expression is first found in the case referred to under note 10. It is repeated in 19 N. L. R. 175. Thus the validity of gifts which were thought to be, or fell, within the former class was determined by the Muhammadan Law—the earliest cases are those in Vanderstraaten's Reports 176 and App. B. XXXI. The decision in the Appendix is the judgment of the District Judge, the case was sent back for a re-trial on certain points. (See the decision on these on page XXXV.) Later cases are found at p. 295 of 14 N. L. R., p. 284 of 21 N. L. R. "For the same reason the rules of construction and validity and effect of such conditions as also indeed the construction etc., of deeds and wills generally including entails and *fidei commissa* must be governed by the ordinary law of the country because this part of the Muhammadan system of jurisdiction has never become part of the law of Ceylon. An exception may be found in the case of pure donation as to which see the decisions in Colombo D. C. 55746 and 29129" (Passage from the judgment of the District Judge.) This Court affirmed the judgment "for the reasons given by the District Judge". (Grenier, 1873, Vol. 2 p. 28 at p. 30—the former case is the one reported on page 175 of Vanderstraaten's Reports the latter on page XXXI of Appendix B.) Resort was had to the general law of Ceylon, and not to the Muhammadan Law, to test the validity of deeds falling within the former class. One of the earliest reported cases where the general law of Ceylon was applied to test the validity of a deed creating a *fidei commissum*, is to be found in Grenier, 1873, Vol. 2. p. 28. A long series of decisions ranging from about 1873 to 1927 had held that it was competent to Muhammadans in Ceylon to take advantage of the general law of the Island and enter into transactions valid according to that law. In *Weerasekere vs. Peiris.* (1931) 32 N. L. R. 176 this Court adopted a different view; it held that where a deed of gift contained a *fidei commissary* provision, the validity of the gift must first be determined by Muhammadan Law, although the validity and perhaps the contruction of the *fidei commissum* is governed by the Roman Dutch Law. At the argument before the Privy Council, the appellant contended that the whole transaction, that is the validity of the gift and the *fidei commissum*, was governed by the Roman Dutch Law, ((1933) A. C. 190.) 192 the respondent, that a *fidei commissum* between Muhammadans in Ceylon must be complete as a gift under Muhammadan Law before the *fidei commissum* became operative. Lord Tomlin, as reported in "Times of Ceylon" of 24th November 1932—"Until you confront me with a distinct authority, I should be reluctant to accede to what I think an absurdity, namely, that you should test the validity of one part of a transfer by one law and another by another" The judgment of this Court was set aside by the Privy Council. (1932) 34 N. L. R. 281. The essential question for decision was whether the disposition made by the father was invalid as a gift according to the Muhammadan Law or valid as a *fidei commissum* under the Roman Dutch Law. It was not intended that there should be a valid gift as understood by the Muhammadan Law. It was intended then "*ut res magis valeat quam pereat*" that there should be a valid *fidei commissum*. (The language used by a writer in L. Q. R. Vol. XLIX. p. 326.)

A Select Committee of the Legislative Council, which was appointed in September 1926, made on October 26, 1928, a report to the Council on the law of testate and intestate succession, donations and trusts. A draft bill was annexed

to the Report and the bill was published in the official Gazette of March 1, 1929, Part II, p. 178. The expression "pure donation" is fonnd in the Report of the Select Committee and in clause 4 of the draft bill. The bill has been very much changed in the process of becoming law—1 C. L. W. at 274; 34 N. L. R. 57—the discussion of the bill in the committee stage of the Council commenced about November 25, 1930, it was then postponed and taken up in the beginning of the following year. On February 4, 1931, the words "to donations not involving *fidei commissa*....." were introduced in lieu of the words "to pure donations" in clause 4, the clause so amended was passed on the same day, it is now section 3 of the Ordinance. Was this due to the decision of this Court in Weerasekere's case, which was delivered on January 20, 1931? The Ordinance, No. 10 of 1931, came into force on June 17, 1931.

Section 3 of Chapter 50, omitting words not material to this case, reads thus :—

> "For the purposes of avoiding and removing all doubts it is hereby declared that the Law applicable to donations not involving *fidei commissa*,..... shall be the Muslim Law governing the sect to which the donor belongs:
>
> "Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or the immovable property donated by the deed."

Sections though framed as provisos upon preceding sections, may contain matter which is in substance a fresh enactment, adding to and not merely qualifying what goes before. A proviso, in the strict sense, is a qualification upon what precedes it: this proviso is not really a qualification upon the preceding clause. It operates rather by way of an addition to the clause which precedes it. The first part of the proviso states "no deed of donation shall be deemed to be irrevocable....." Does the expression "shall be deemed" mean that some deeds which were not actually revocable according to the Muhammadan Law shall hereafter be revocable? Was it used to artificially enlarge the class of deeds that could be revoked? In the case of persons of the Hanafi sect the Hanafi Law is made applicable by the enacting part of the section, of those of the Shafei sect the Shafei Law; a gift to a cousin is not irrevocable according to the former system, (Ameer Ali, op. cit. 150) a gift to a child by a father, according to the latter. The second part refers to possession. Delivery of possession need not be actual (Ameer Ali, Muhammadan Law (4th Ed.) Vol. 1. 113, 114. See 14 N. L. R. 295; 26 N. L. R. 446 p. 448) but may be constructive. In *Mohamadu vs. Marikar*, (1919) 21 N. L. R. 84; also (1925) 26 N. L. R. 446 the delivery of the deed was taken "as a constructive and an effective delivery of possession of the lands"; the deed of gift that came up for consideration in *Sultan vs. Peiris*, (1933) 35 N. L. R. 57 at p. 62. The deed in question was executed on August 15, 1913, refers to the handing of the deed of gift to the donees for the purpose "of vesting the legal title to the premises". (1933) 35 N. L. R. 57 at p. 62. The deed in question was executed on August 15, 1913. Similarly the deed of gift mentioned in *Ponniah vs. Jameel*, (1936) 38 N. L. R. 96 at pp. 99 and 101. Deed states that it was "so done in accordance with the decision of the Supreme Court", deed executed on September 4, 1924, refers to handing "over this deed to the said.....as a token of the transfer of possession". (1936) 38 N. L. R. 96 at pp. 99 and 101. Deed states that it was "so done in accordance with the decision of the Supreme Court". Did the legislature know that there were Muhammadans who took the view that delivery of the deed affords evidence of delivery of possession and did it intend to lay it down as a rule or a *prima facie* rule? Was it also influenced by the view of the general law? Donation was a contract according to the Roman Dutch Law and acceptance of the gift by or on behalf of the donee was thus necessary. Acceptance of a gift may be effected in many ways. It may be presumed from the physical acceptance of the deed of gift. (1913) 16 N. L. R. 413.

There is nothing in the first part of the proviso to section 3 to show that the power of revocation inherent in a case like this has been modified or varied.

The appeal is dismissed.

Appeal dismissed.

GRATIAEN, J.

I agree.

Present : CANEKERATNE, J. & GRATIAEN, J.

SINGARAVELU *alias* PARAMSOTHY *vs.* ANDY PONNAN AND OTHERS

S. C. No. 316—*D. C. Point Pedro No.* 2126.
Argued and Decided on : 26th August, 1948.
Reasons given : 17th September, 1948.

Thesawalamai—Thediatetem—Husband acquiring property during marriage—Death of wife leaving children—Husband sued personally for debt contracted during marriage—Children not made parties to action—Seizure and sale of entire land in execution of decree—Is purchaser entitled to whole land.

The 1st defendant, subject to Thesawalamai, who was married to M, purchased a property in 1920. M died in 1929, leaving children two of whom are the 2nd and 4th plaintiffs.

The 2nd defendant sued the 1st defendant on a promissory note given by him in 1926 and on a decree obtained in 1932 against the 1st defendant personally the said property was seized and sold and was purchased by the 2nd and 3rd defendants. The children of M who were not parties to the said action disputed the 2nd and 3rd defendants' rights to M's half share of the land.

Held : That the 2nd and 3rd defendants were only entitled to the right title and interest of the 1st defendant, viz., a half share of the land.

Per CANEKERATNE, J.—"Under the old procedure there appears to have been a decree of divorce *a vinculo matrimonii* and a decree of divorce *a mensa et thoro* (Vanderstraaten 180, 4 S. C. C. 29.) The latter would seem to be what would now be known as a decree of separation *a mensa et thoro*. Where a Court passed in those days a decree of divorce *a mensa et thoro* unless the Court made an order interdicting the husband from all interference with the wife's property and ordering a division of the common estate she continued to be a *feme covert*."

Cases referred to :—*Avitchy Chettiar vs. Rasamma* (1933) 35 N. L. R. 313.
Sewakeenpillai vs. Murugupillai 18 C. L. W. 49.
Silva vs. Silva (1907) 10 N. L. R. 234 ; *Gopalasamy vs. Ramasamy Pulle* (1911) 14 N. L. R. 236.
Katharuvaloe vs. Menatchipille 2 Ceylon Law Reports 132.
Vanderstraaten 180 4 S. C. C. 29.

E. B. Wikremenayake, K.C., with *H. Wanigatunge*, for the 6th defendant-appellant.
N. E. Weerasooriya, K.C., with *V. Arulambalam*, for the plaintiffs-respondents.
H. W. Tambiah with *S. Mahadevan*, for the 2nd and 3rd defendants-respondents.

CANEKERATNE, J.

We dismissed the appeal at the close of the argument with an intimation that reasons would be given later. The delay is partly due to the fact that some days elapsed before the record in the Kurunegala case referred to later was available.

In this action the 2nd and 4th plaintiffs claimed one third share of a land called Alakkadavai. The 1st defendant who was married to one Muththy purchased this land by deed P1 dated September 18, 1920 ; his wife died on or about June 28, 1929, and the 2nd and 4th plaintiffs are two of the children of the marriage. It is not contended that the view taken by the learned Judge, that a half share of the land devolved on the children of Muththy on her death, is incorrect. But the appellant contends that on D1, dated September 24, 1934, the 2nd and 3rd defendants became entitled to the entire property and that he became the owner by D2.

On December 19, 1931, the 2nd defendant sued the 1st defendant for recovery of a sum of money due on a promissory note dated October 24, 1926, and on March 23, 1932, he obtained a money decree for Rs. 295 with interest and costs. In execution of the judgment in this case, the right, title and interest of the 1st defendant in this land was seized and sold on September 6, 1933, and purchased by the 2nd and 3rd defendants on D1. The children of Muththy were not parties to this case, the judgment was one against the 1st defendant personally and not in a representative capacity. The general rule that a transaction between parties in a judicial proceeding would not be binding upon a third party ought to apply unless the authorities quoted at the argument on behalf of the appellant, namely, *Avitchy Chettiar vs. Rasamma* (1933) 35 N. L. R. 313 and *Sewakeen pillai vs. Murugupillai* (18 C. L. W. 49), established the contrary. Counsel was not able to produce any authority to show that according to the provisions of the Theswalamai, the whole acquired property was liable for the payment of the debts contracted by the husband.

What passes to a purchaser at a sale in execution of a decree for money is the right, title and interest of the judgment debtor, whatever that interest may be, that is, the purchaser buys the property with all the risks and defects in the judgment debtor's title. He obtains only the precise interest, and no more, of the execution debtor ; a Court has no jurisdiction to sell the

property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the sale purporting to be made under the decree would be a nullity.

Section 20 of Cap. 48 of the Ceylon Legislative Enactments is as follows, omitting immaterial words :—

(1) "The thediatetam of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.

(2) " Subject to the provisions of the Thesawalamai relating to liability to be applied for payment or liquidation of debts.....on the death intestate of either spouse, one half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased."

It appears that a *communio quaestuum* takes place on the marriage of a man and woman who are subject to the Thesawalamai, there is thus a community as to the *tediatetum* or things acquired *stante matrimonio* by the spouses. If the husband and wife have, by their economy, industry or trade, acquired a sufficient sum with which they have purchased any property, such property, whether it be purchased in the joint names of the husband and wife, or in the name of the husband alone, becomes part of this community, and the title and possession pass to the husband and wife, in short, every description of property, which from its nature might be the subject of the *communio bonorum* of the Roman Dutch Law, will, if purchased by the husband or wife, *stante matrimonio*, become the subject of the community of profits of the Thesawalamai. In *Avitchy Chettiar vs. Rasamma*, (1933) 35 N. L. R. 313), a property purchased by the wife with money given to her as her dowry by her parents was held to be included among these. Whenever the community as regards acquisition prevails, the husband and wife, and their respective estates become liable for the debts contracted by them *stante matrimonio* and probably other debts.(See Part IX, Section 3 of Cap. 51).

During the joint lives of the husband and wife the husband is entitled *jure mariti* to manage and administer the common property. The husband can, the authorities show, sell or mortgage the property forming part of the *communio quaestuum* without the consent of his wife. It is clear, however, that he cannot, after the wife's death, deal with anything more than his share, for a half share vested in the heirs of the wife on her death. Section 22 (1923) 25 N. L. R. 201. The community is at an end by the death of either party, the separation effected by death abridges the husband's power of alienation.

On the death of K a half share of this estate remained the property of the widow subject to the provisions of the Thesawalamai in respect of debts, the other half vested in the heirs of K subject to the same liability. A creditor was entitled to sue the survivor for the recovery of what was due to him—or is it only a half share ? —and to execute the judgment against the half share of the survivor. Likewise he had a right to sue the heirs of the dying spouse, provided there was adiation, but in a case of a large estate or for the recovery of a large sum he would sue the administrator or executor. Having obtained judgment against the administrator or executor he could execute it against the half share in the hands of the heirs, for the personal representative retains power to sell the property that vested in the heirs of the deceased on his death, and this includes the right of a creditor to follow the property for the payment of the debt. *Silva vs. Silva* (1907) 10 N. L. R. 234 *Gopalsamy vs. Ramasamy Pulle* (1911) 14 N. L. R. 238. Avitchy Chettiar took proceedings against the survivor and the administratrix of the estate of the deceased and obtained judgment, he was thus enabled to bring the whole property for sale in execution of the judgment.

In *Avitchy Chettiar vs. Rasamma*, (1933) 35 N. L. R. 313 D. C. Kurunegala No. 13636, in execution of a decree against the administratrix of the intestate estate of K, the property was seized and on a claim being preferred by Rasamma, his widow, it was upheld. The plaintiff then instituted an action under section 247 of the Civil Procedure Code, Cap. 86 of the Ceylon Legislative Enactments, against Rasamma, personally and as administratrix of the estate of the deceased to obtain a declaration that the property was liable to be sold in execution of the decree. The plaintiff averred in the plaint that the husband bought Mahawatte Estate with his money but obtained the deed in the name of the wife to defraud his creditors : alternatively, that the deed was executed in her favour in trust for the husband : alternatively, by an amendment. that the property was thediatetam property and liable to be sold. The defendant denied the averments. She pleaded further that it was bought out of her dowry money given to her by her parents and that the estate was her separate property. Under the law prior to the enactment of Ordinance No. 1 of 1911, a property purchased under similar circumstances " was regarded as the property of the spouse who purchased it and did not form part of the thediatetam property ". The trial Judge found the facts in favour of the defendant and following a decision of this Court that the old law was not changed by the Ordinance dismissed the action. The only question that seems to have been argued at the hearing of

the appeal was whether the premises in question were of the character of the property which is declared by section, 21 (*a*) to be tediatetam. It was held to be tediatetam and judgment was entered in favour of the plaintiff declaring the property liable to be sold in execution of the judgment. The action was against the defendant personally and as administratrix of her husband's estate.

In *Sewakeenpillai vs. Murugupillai*, 18 C. L. W. 49, the defendant as the heiress of her sister claimed a half share of a land, bought a few weeks before her death by the husband, when it was seized in execution of a judgment against him: the action was filed after the death of the wife. The claim was upheld and the plaintiff instituted the action to have it declared that the half share was liable to be sold in execution of the decree. The plaintiff appellant succeeded in appeal. The judgment contains the following:—"On the death of Sangapathy one half of the property vested in the respondent but such vesting was 'subject to the provisions of the Thesawalamai relating to liability to be applied for the payment' of the debt contracted by Sithambarapillai (vide section 22). The only question is whether under the provisions of the Thesawalamai the half share in question could be seized in execution of the decree against Sithambarapillai. A similar question arising under similar circumstances has been answered in the affirmative by a Divisional Bench of the Court, in *Avitchy Chetty vs. Rasamma* (1933—35 New Law Reports 313)." Had the learned Judge all the facts of the case of *Avitchy Chettiar vs. Rasamma* before him, it is doubtful whether he would have taken the view he did.

At the close of the argument on behalf of the appellant Mr. Tambiah desired to address us and we decided to hear him though he had no right. He referred to *Sewakeenpillai vs. Murugupillai* 18 C. L. W. 49 and to *Katharuvaloe vs. Menatchipille*. 2 Ceylon Law Reports 132. It was mentioned by him that he drew attention to the latter decision at the argument in the former case. The learned Judge properly, if I may be permitted to say so, made no reference to this contention of the appellant. There it was found that "the defendant and one K M were married to each other in 1871". On a promissory note given by K M to the plaintiff in 1886, the latter obtained judgment in October 1890 and seized several parcels of land which constituted the "acquired property" of the spouses. The defendant's claim to a half share being upheld, the plaintiff brought the action to obtain a declaration that the whole of the lands were liable to be sold in execution". The contention of the defendant was that at the time of the institution of the action on the note and at the date of the decree therein the defendant and K M had been judicially separated and that apparently a half share was possessed separately thereafter. It was held that the acquired property was liable for the debts incurred by the husband during coverture and "the decree of divorce could not affect" the right of the plaintiff—or as Withers, J. said "this liability could not be affected by a simple sentence of divorce". It is necessary to bear in mind that the decree in the matrimonial action was entered before the coming into operation of the Civil Procedure Code; in May 1890 she obtained "a decree of divorce *a mensa et thoro*" from her husband. Under the old procedure there appears to have been a decree of divorce *a vinculo matrimonii* and a decree of divorce *a mensa et thoro*. Vanderstraaten 180 4 S.C.C. 29. The latter would seem to be what would now be known as a decree of separation *a mensa et thoro*. Where a Court passed in those days a decree of divorce *a mensa et thoro* unless the Court made an order interdicting the husband from all interference with the wife's property and ordering a division of the common estate she continued to be *a feme covert*. As Voet states—A judicial separation *thori et honorum* and a division of the property of the husband and wife will not terminate the community nor will it, unless it be also accompanied by an interdict restraining the husband from interfering with the wife's property, in any decree abridge his marital power in the administration and alienation of it or in binding her and her property by his contracts, nor will it enable the wife to make any dispositions. Voet, 24—2. de Divort n. 17. Grotius Introduction 1—5—40 et seq, 3—21 last note.

The fact that the word "divorce was used to include two kinds of relief, may afford an explanation for the omission of any reference to an action for separation in section 16 of the Prescription Ordinance of 1871 (Ordinance No. 22 of 1871), now section 15 of Cap. 55 of the Ceylon Legislative Enactments—the words there being "an action for divorce".

GRATIAEN, J.

I agree.

Appeal dismissed.

Present : CANAKERATNE, J. & DIAS, J.

MENIKA AND ANOTHER vs. DHAMMANANDA

S. C. No. 518—*D. C. Kandy No.* 982.
Argued on : 8th & 9th September, 1948.
Decided on : 24th September, 1948.

Buddhist Temporalities—Disturbance of possession of field—Action for declaration of title and ejectment by Buddhist monk who is not the controlling viharadipathi—Disclaimer of title by Viharadipathi —Possession of Buddhist monk ut dominus—*Sanghika property—Possessory remedy.*

The plaintiff, a Buddhist monk, was in possession of a field as part of the temporalities that have come to him as successor to a monk to whom it had been originally given by " dayakas " for his " siupasa " or personal needs. The original monk gifted the same to his pupil by deed and plaintiff claimed through him. The defendants, who were his cultivators, refused to give back possession, and plaintiff sued them for declaration of title, ejectment and damages.

This field is situated at Kondadeniya and is included in the plan showing the properties belonging to the Kondadeniya Vihare, whose Viharadhipathy disclaimed title to it.

The learned District Judge held that the property devolved on the plaintiff as pudgalika property and gave judgment for him. The defendants appealed, and it was contended for them that the plaintiff's action must be dismissed as he had no title to the property, the title being in the Viharadipathy of the Kondadeniya Vihare.

Counsel for the plaintiff supported the judgment on the ground that the field was " sanghika " property and requested the Court to treat the matter as a possessory action, allowing him to retain that part of the decree relating to the ejectment of the defendants.

Held : That as it is clear from the evidence that the plaintiff had been holding the field in just the same way as if he were the owner, he was entitled to keep that part of the decree ordering the ejection of the defendants, damages and costs.

Cases referred to :—*Terunanse vs. Don Aron* (1932) 34 N. L. R. 348.
Dias vs. Ratnapala Terunnanse (1938) 40 N. L. R 41.
Carron vs. Fernando (1933) 35 N. L. R. 352 ; 1 Cur. Law. Rep. 275.
Abdul Azeez vs. Abdul Rahiman (1911) 14 N. L. R. 317.

N. E. Weerasooriya, K.C., with *A. L. Jayasuriya* and *W. D. Gunesekere*, for the defendants-appellants.

E. B. Wikremenayake, K.C., with *C. R. Guneratne* and *M. P. Spencer*, for the plaintiff-respondent.

CANEKERATNE, J.

This is an appeal by the defendants from a judgment declaring the plaintiff entitled to a field and consequential relief.

It appears that Nawinne Dharmadassi the Chief Priest of Asgiriya Vihare, preached *bana* at a *dagoba* and shrine in Kondadeniya and that two dayakayas present at the preaching gave this field to this Chief Priest " for his *siupasa* ". He by document P1 (1729 *Saka* year) conveyed this field to his pupil Potuhera Thero, then officiating priest to the Dalada Mandira. The plaintiff, the secretary of the Asgiriya Vihare, claimed that the title to the field devolved on him and brought the action against the 1st defendant his " *andakaraya* " and the 2nd defendant who was assisting the 1st defendant. The defendants denied the title of the plaintiff and pleaded that one Hawadiya was the owner of the field and that the title thereto devolved on them.

In March 1937 the plaintiff gave the cultivation of the field to the first defendant at the request of one Naida, his father-in-law ; the 2nd defendant is a brother of the 1st. The 1st defendant cultivated the field as the plaintiff's '*andakaraya*' till about March 1943, when the plaintiff gave the cultivation to one Aruma. The defendants obstructed Aruma and prevented him from continuing the cultivation. The learned Judge came to the conclusion that the field in question was held by Potuhera Mahanayake Thero as *pudgalika* property and that it devolved on the plaintiff. Mr. Wikremenayake did not take up this position at the argument in appeal but supported the decree of the lower Court on the ground that the field was the Sanghika property of the donee on the deed of 1729 and that it devolved on the plaintiff as Sanghika property. Mr. Weerasooriya contends that the action must fail, inasmuch as the plaintiff has no title to the property, the title being in the Viharadhipathi of Kondadeniya Vihare. The respondent requested the Court to treat the action as a possessory action and allow the plaintiff to keep that part of the decree that directs that he be put and quieted in possession of the property, the defendants being ejected therefrom and being ordered to pay damages and costs. Mr. Weerasooriya protested against such an application being entertained at this stage, especially as the objection to the maintainability of the action was taken at the earliest opportunity but the plaintiff failed to remedy the defect. It was further contended that the

action cannot be maintained as a possessory action and he referred to the cases of *Terunnanse vs. Don Aron* (1932) 34 N. L. R. 348 and *Dias vs. Ratnapala Terunnanse* (1938) 40 N. L. R. 41.

On the substantial question whether this field belongs to the plaintiff or to the defendants the learned Judge has given strong reasons for holding in favour of the plaintiff and it would be impossible for an Appellate Court to set aside the finding on the question of possession and no attempt was made to challenge this finding. If at the trial the learned Judge who had full control of the record had amended the issue so as to suit the facts proved, he could have given a decree in favour of the plaintiff for possession unless the decisions quoted prevented him, for the plaintiff would have established a good cause of action for the ejection of the defendants.

Potuhera Nayaka Thero, who was later Potuhera Mahanayaka Thero, was the Viharadhipathi of Asgiriya Vihare and also of Kondadeniya Vihare which is said to be under the control of Asgiriya Vihare. He left two pupils Ratnapala and Panawa Deepankara. It is alleged that this field came to Ratnapala on his tutor's death. On September 5, 1944, an application was made by the plaintiff to add "as 3rd defendant the Viharadhipathi of Kondadeniya Vihare in view of the fact that the field in dispute falls within the plan of that Vihare". He was present in Court and expressed a willingness to be added. As defendants' Counsel objected to the addition of this party, the Judge appears to have questioned him and when he said he disclaims title to the field in dispute he (the Judge) made order in these terms "I do not think he is a necessary party to this action. Plaintiff may call him as a witness."

Possessory remedies were granted to persons who had juristic possession. A person must have not merely the corpus, but also the animus of possession: the will coinciding with the physical relationship. A person not only holds the thing in his hands, but intends to hold it for himself alone: it is his intention to exclude every one else from the thing. So far as the exclusion of others is concerned, he holds the thing in just the same way as if he were the actual owner, *i.e.*, as if he had legally sole control over it, whether he is really the owner or not, and whether again, in the later case he knows he is not the owner (as in the case of a pledgee or a lessee) (1933) 35 N. L. R. 352 1 Cur. Law Rep. 275 or believes himself to be the owner (as in the case of a *bona fide* possessor). Any one who intends to exclude everybody else has the *animus domini*, (the will of an owner), just as much as the owner himself. The possession of the juristic possessor entitles him to a legal remedy quite irrespectively of his right. (1911) 14 N. L. R. 317.

By P6, dated December 30, 1853, Panawa Deepankara and Ratnapala the two pupils of the Mahanayaka settled their disputes; Ratnapala was given the right to possess and enjoy the field in question. Ratnapala would take the property not for himself but in trust for his foundation, *i.e.*, his successors in the line of descent. There is evidence to show that since 1853, this field has been in the possession of Ratnapala and his successors: Ratnapala by P7, dated April 2, 1869, gave over the Vihare and the lands including this field to his two pupils Piyaratna and Saranankara. In those days it was not uncommon for an incumbent to give over by deed his Vihare and the properties to the person whom he intended to be his successor. Saranankara by P9 dated April 17, 1918, transferred the field to Piyaratna. The plaintiff is the successor of Piyaratna. The evidence shows that the plaintiff was in possesions of this field as part of the temporalities that have come to him as a successor of Potuhera Mahanayake Thero. It is clear that since 1853 the Viharadhipathi of Kondadeniya Vihare has not exercised any rights over this field and that the present Viharadhipathi does not claim any rights. The plaintiff has been holding the field in just the same way as if he were the owner. What the sections as interpreted by the two cases seem to show is this: if there is any property belonging to a Vihare, it is vested in the trustee—who a trustee is can be ascertained from sections 4, 7, 8, 9, 10, 11 (1)—an action in respect thereof can be brought by the trustee only, a provisional trustee (section 11 (2)) may in some cases but one called a *de facto* trustee. It thus presupposes that the property is one belonging to the Vihare, *e.g.*, a property that admittedly belongs to it or one that may be claimed to belong to it may fall within it. There is not even a superficial resemblance between thoses cases and the present one; the proposition advanced by the appellants does not even follow logically from them.

The plaintiff is entitled to be restored to the possession of this field. The judgment of the District Court is varied by deleting the declaration of title in favour of the plaintiff; he is entitled to keep that part of the decree ordering the ejections of the defendants, the placing and quieting him in possession, damages and costs. The appellants will pay the costs of appeal to the respondent.

DIAS, J.
I agree.

Judgment varied.

Present : WIJEYEWARDENE, A.C.J. & JAYATILEKE, S.P.J.

ANNAM vs. KATHIRAVETPILLAI AND OTHERS

In the Matter of an Appllcation for Revision in D. C. Jaffna 2650—Application No. 561/1947.
Argued on : 20th & 26th July, 1948.
Decided on : 16th August, 1948.

Matrimonial Rights and Inheritance (Jaffna) Ordinance, section 27—Devolution of property on death of person leaving a mother and children of paternal uncle—Intestate succession to property derived from father's side—Mother's rights—Determination of persons coming within the expression "all the persons above enumerated failing" in section 27.

On the death of X, intestate his widow, W, inherited half his property and his two daughters, P and S, a quarter each. P died intestate and without issue, whereupon S inherited her share. Then S died, intestate and without issue, leaving the quarter share from "her father's side", a quarter share derived from P and other acquired property. Her property was claimed by her mother, who survived her, and the children of her paternal uncle, the brother of X.

Held : (1) That the mother was not, one of the "persons above enumerated" within the meaning of section 27 of the Ordinance, and hence she was not entitled to S's property inherited from father's side.

(2) That the children of the paternal uncle are entitled to S's property derived from the father's side.

(3) That the persons, coming within the expression "All the persons above enumerated failing" in section 27 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance, must be determined by reference to sections 23 and 25 only and not by reference to all the sections 23, 24, 25 and 26 of the same Ordinance.

Cases referred to :—*Markandu vs. Vytialingam* (1917) 20 N. L. R. 216.

S. Sharavananda, for the defendant-petitioner.
H. W. Thambiah, for the plaintiffs-respondents.

WIJEYEWARDENE, A.C.J.

This application involves a question relating to the law of inheritance under the Jaffna Matrimonial Rights and inheritance Ordinance (Legislative Enactments Volume 2 Chapter 48).

By right of purchase one Saravanaperumal was entitled to three lands :—

(A) Anaivilunthan of the extent of 1 and 3/8 lms. V. C.

(B) Anaivilunthan of the extent of veedu ¼.

(C) Payatolai of the extent of 1½ lms. V. C.

I give the names and extents of the lands, as a great deal of confusion has been caused by the manner in which the plaint and the decree referred to the subject matter of this action. I shall refer to these three properties as "A", "B" and "C" respectively.

Saravanaperumal died intestate leaving his widow, the defendant, and two daughters, Poompavai and Seethangany, and, thereupon, the defendant became entitled to ½A, ½B and ½C and each of the daughters to ¼A, ¼B and ¼C. Later, Poompavai died intestate and issueless and her shares of the lands devolved on Seethangany. There is no dispute between the parties with regard to the devolution of title so far.

Seethangany died intestate and issueless in 1941 and leaving her surviving her mother, the defendant, and first, second, fourth and sixth plaintiffs who are four out of the six children of Visagaperumal, a brother of Saravanaperumal. The remaining two children of Visagaperumal or their descendants are not parties to this action.

Seethangany had also purchased in 1936 another allotment of Payatolai containing in extent 1½ lms. V. C. I shall refer to this property as "D".

At her death Seethangany was, therefore, possessed of :—

(i) ¼A, ¼B and ¼C as *Mudusam* "derived from the father's side".

(ii) ¼A, ¼B and ¼C as *Urumai* from the sister, which would thus be a part of the "remainder of the estate of the deceased" mentioned in sections 23 and 24.

(iii) D which would also be a part of the "remainder of the estate of the deceased" mentioned in sections 23 and 24.

The estate of Seethangany is governed by part III of Chapter 48 by virtue of the provisions of section 14.

The defendant claimed to be sole heir of Seethangany. Her Counsel sought to support the claim as follows :—The plaintiffs who are children of a parental uncle of the deceased could claim a share of the inheritance only under section 27. But the plaintiffs cannot rely on that section, as it says that such cousins would be entitled to an inheritance only in the circumstances of "all the persons above enumerated failing". Sections 24 and 26 mention the mother who will thus be one of "the persons above enumerated" (vide *Markandu vs. Vytialingam* (1917) 20 New Law Reports 216). There is thus no express provision made by Chapter 48 regarding the estate of a deceased person who

leaves her surviving her mother and cousins on the father's side. Therefore, under section 36 of Chapter 48, the question of inheritance must be decided under the Matrimonial Rights and Inheritance Ordinance (Chapter 47) and by virtue of section 35 of that ordinance the mother becomes entitled to the whole estate of Seethangany.

In order to test the soundness of this argument it is necessary to examine in some detail the scheme of Part III of Chapter 48. Sections 15 to 19 refer to certain classes of property a person may die possessed of. Those sections read with sections 23 and 24 show that all these properties are classified into three groups :—

(i) "Property derived from the father's side".

(ii) "Property derived from the mother's side".

(iii) "Remainder of the estate of the deceased".

Section 20 deals with the right of the surviving spouse of the deceased. All the rules of inheritance given in the following sections are subject to that right of the surviving spouse. Section 21 states that the right of inheritance is "divided in the following order as respects (*a*) descendants, (*b*) ascendants, (*c*) collaterals". Section 22 shows children and remoter descendants have a preferential right. Then we come to a group of sections dealing with the estate of a person who dies without descendants. The estate of such a person is divided into two parts for deciding the mode of devolution :—

(*a*) Property derived from the father's side (i above) and half the remainder of the estate (iii above).

(*b*) Property derived from the mother's side (ii above) and half the remainder of the estate (iii above).

The rules of succession relating to property (*a*) are given in section 23, 25 and 27 while the rules relating to property (*b*) are given in sections 24, 26 and 28. Thus, when section 27 proceeds to designate the heirs who succeed to property (*a*) of the estate of a deceased person on the failure of "all the above persons enumerated", the persons so "enumerated" have to be found by reference to sections 23 and 25 and not by reference to all the sections 23, 24, 25 and 26 as suggested by the defendant's Counsel. Those persons would be the father, brothers and sisters (full or half on the father's side) and the descendants of such brothers and sisters. The paternal cousins, therefore, of Seethangany would be entitled to claim a share of the inheritance, as the mother of Seethangany is not one of the "persons above enumerated" within the meaning of section 27. The interpretation I have given to section 27 receives support from the provision of section 30. That section enacts, "on failure of kindred on the father's side property derived from that side shall devolve on the mother". That shows clearly that "property derived from the father's side" does not devolve on the mother so long as there is a kinsman living on the father's side. The interpretation favoured by the defendant's Counsel would make section 30 irreconcilable with section 27.

I shall consider now the case of *Markandu vs. Vytialingam* (supra) cited by the defendant's Counsel. The facts of that case are briefly as follows :—One Espari Amma died unmarried and without issue, leaving certain property inherited from her father, Siva Subramaniam. Siva Subramaniam himself inherited the property from his mother, Siva Kani. That estate of Espari Amma was claimed by her paternal grandfather, the husband of Siva Kani. His claim was contested by the nearest relatives of Siva Kani. There was no claim by the mother of Espari Amma, even if, in fact, she was alive. In upholding the claim of the paternal grandfather of Espari Amma, the Court relied on section 27. In the course of his judgment Wood Renton, C.J. said :—"The section is explicit on this point. That section provides that "all the persons above enumerated (viz children, father and mother) failing, the property.....". The defendant's Counsel relies on the words within the brackets as an authoritative judicial interpretation of the words "all the persons above enumerated". The Court was not there concerned with the claim of a mother and it is difficult to think that the learned Judge directed his attention to the question which we are considering. He did not have to consider who "the persons above enumerated" were. It was not disputed that all those persons, whoever they might be, were not living at the death of Espari Amma. Moreover, it would have been clearly wrong for him to exclude from the "persons above enumerated" the brothers and sisters (full or half on the father's side) and their children, if he was thinking of giving an interpretation of the words "all the persons above enumerated".

For the reasons given by me I hold that the first, second, fourth and sixth plaintiffs are each entitled to 1/16A, 1/16B, 1/16C and 1/12D.

There is another matter for which I think it prudent to make some provision in this judgment. The defendant claimed a " sum of Rs. 460 being the amount due to the defendant from the estate of the said Seethangany on account of settling the mortgage debt (*i.e.*, a mortgage on lands A, B and C) and Rs. 2,100 being amount due to the defendant as funeral and testamentary expenses ". The plaintiffs in their replication admitted their liability " to pay the defendant their share of the sum of Rs. 722 due to her as shown by the account filed by her in Testamentary Case No. 198P. T. (in which the estate of Seethangany is administered) ". The decree entered in this case is silent on this point. I think it safe to make a reference to that liability in the decree in this case.

I direct that decree be entered declaring the first, second, fourth and sixth plaintiffs entitled each to 1/16A, 1/16B, 1/16C and 1/12D and ordering each of them to pay the defendant one-sixth share of Rs. 722.

The plaintiffs will be entitled to costs here and and in the District Court.

JAYATILEKE, S.P.J.

I agree.

Application refused.

Present : CANEKERATNE, J.

SCHARENGUIVEL (INSPECTOR OF POLICE) vs. DE ALWIS

S. C. No. 31—*M. C. Ratnapura No.* 5775
Argued and Decided on : 30th April, 1948.

Control of Textiles—Charge of possessing textiles in excess of quantity prescribed by law—What the prosecution has to prove.

Held : That a person, charged with having in his possession a quantity of textiles in excess of the quantity prescribed by law, cannot be convicted unless the prosecution proves that he had intentional control over such goods.

H. V. Perera, K.C., with *H. Wanigatunge* and *Wijesundera* for the accused-appellant.
M. M. Kumarakulasingham, for the applicant-petitioner.
R. A. Kannangara, Crown Counsel, for the Attorney-General.

CANEKERATNE, J.

The accused was charged with having in his possession without the authority of a permit a quantity of textiles, in excess of that which he can purchase by surrendering all the coupons for a year. The intention of the legislature is to prevent, except under certain specified conditions, the possession of textiles : the prohibition is an absolute one apart from the exemptions and if an independent and intentional control of the articles on the part of a person is proved, it would amount to possession on his part.

There is a Co-operative Society in the estate of which the accused is the President, and one Ramu the Manager. There is a room at the corner of the verandah of the bungalow occupied by the accused, who is the manager of the tea estate. The accused has allowed the Co-operative Society the use of a part of the room for the purpose of keeping there the textiles belonging to the Society. The accused also keeps tyres and other things belonging to the estate in this room. There are duplicate keys to open the door, one with the accused, the other with Ramu. The evidence discloses that the accused left the house at about 7 p.m., with his family to go to the temple and that he came home at about 10 p.m., and that when the Police came to the premises about midnight he opened the door and pointed out the textiles that were there.

Ramu, who was called as a witness testified that at the request of one John these textiles which belonged to John were taken from a lorry about 7-30 p.m., and taken to the room. The prohibited articles were thus placed in the room of the accused without his knowledge, he had no intentional control over the goods and in these circumstances, he cannot be penalized. The conviction of the accused is set aside.

There is also an appeal by the witness Ramu who has been convicted under Section 440 of the Criminal Procedure Code for giving false evidence. It is very difficult to say whether these two statements are contradictory. If they refer to two different dates as Counsel contends, then the two statements are quite consistent. It seems hardly a case where a man should be held guilty of giving false evidence. The conviction of the witness is also set aside.

Set aside.

Present : BASNAYAKE, J.

SOLICITOR-GENERAL vs. ARADIEL.

S. C. 395—*M. C. Panadure* 46 (*Labour*).

Argued on : 19th May, 1948.
Decided on : 12th November, 1948.

Shops Ordinance No. 66 *of* 1938, *sections* 17 *and* 18—*Evidence necessary to prove charge under*—*Accused "discharged" after close of prosecution and defence counsel had stated that no evidence would be called*—*Fresh charge*—*Plea of* autrefois acquit—*Criminal Procedure Code, sections* 44, 172, 187, 191, 330 *and* 425.

Held : (1) That in a charge under section 18 of the Shops Ordinance, there must be evidence that the shop was open for the serving of customers.
(2) That a Court is not bound to take judicial notice of a closing order.
(3) That a "discharge", after the close of the prosecution and after the defence has stated that no evidence would be called, is an "acquittal" within the meaning of section 330 (1) of the Criminal Procedure Code.
(4) That section 330 does not make any distinction between an acquittal on the merits and an acquittal on any other ground.

Cases referred to : *Ebert vs. Perera* (1922) 23 N. L. R. 362.
Ukkurala vs. David Sinho, (1895) 1 N. L. R. 339.
Senaratna vs. Lenohamy et al., (1917) 20 N. L. R. 44 at 50.
Gabriel vs. Soysa, (1930) 31 N. L. R. 314.
Dyson vs. Khan, (1929) 31 N. L. R. 136 at 140.
Purnananda Das Gupta and others vs. Emperor (1939) A. I. R. Calcutta 65 (Full Bench).
Fernando vs. Rajasooriya (1946) 47 N. L. R. 399.
Ratnayake vs de Silva, (1941) 21 C. L. W. 39.

T. S. Fernando, Crown Counsel, with *A. E. Keuneman, Acting Crown Counsel,* for the Solicitor-General-appellant.

B. Senaratne, for the accused-respondent.

BASNAYAKE, J.

The accused-respondent, K. Aradiel, was on 1st November 1947 tried on a charge under the Shops Ordinance No. 56 of 1938. The accused was charged from a summons which reads :—

> "Whereas complaint hath this day been .....that you did on the 20th day of July 1947 at Moratuwa within the division aforesaid being the occupier of a shop, to wit, premises bearing No. 36 and situated at Galle Road, Digarolla, Moratuwa.....keep the said shop open at 11-30 a.m., for the serving of customers and thereby committed an offence punishable under section 23 (1) read with section 18 of the said Ordinance and that you did permit a customer to enter the said shop on a Sunday and thereby committed an offence punishable under section 23 (1) read with section 18 of the said Ordinance."

The only evidence against the accused was that of one Eric de Silva, Inspector of Labour, who made the report under section 148 (1) (*b*) of the Criminal Procedure Code. His evidence is to the effect that while proceeding on patrol duty on Sunday the 20th July 1947 at 11-30 a.m., at Moratuwa, observing that shop No. 36 Galle Road, Moratuwa, which is owned by the accused, was kept partially open, he entered it and saw the accused hand a bottle of balm to a person who enquired for its price. The witness says he was accompanied by one Rajasooriya, another Inspector of Labour. The accused neither gave nor called any evidence on his behalf, but at the close of the prosecution his proctor took the objection that the summons served on him made no reference to the Ordinance under which he was charged. The learned Magistrate thereupon discharged the accused.

On 6th December 1947 a fresh summons was taken out on the accused and on 14th February 1948, the date fixed for the trial, his proctor took the plea that the accused had already been acquitted of the same charge. The learned Magistrate upheld the objection and discharged the accused. The present appeal is from that order.

In acceding to the submission of the proctor for the accused and in discharging the accused on that ground, the learned Magistrate appears to have overlooked not only the provisions of section 172 of the Code but also of section 425.

The summons is a document issued by the Court (section 44, Criminal Procedure Code). It must be signed by the Magistrate or by any

other officer of the Court specially authorised in that behalf. In cases where the accused appears on summons the Magistrate is not bound to frame a charge against the accused (section 187 (2) Criminal Procedure Code), but he may instead of doing so read to him the statement of particulars of the offence contained in the summons, which is deemed to be the charge. That statement can be amended or altered in the same way as a charge. So that even if the Magistrate has not at the time of issuing the summons given his mind to the statement of particulars therein he should bring his mind to bear on it at the time when he reads it to the accused under section 187 (3) of the Criminal Procedure Code and correct any defects that appear in it. Even thereafter it is open to the Magistrate to amend the statement at any time before judgment is pronounced (section 172, Criminal Procedure Code).

Although section 44 (1) of the Criminal Procedure Code provides that a summons may be signed by an officer specially authorised in that behalf the Magistrate is not relieved of the responsibility for the statement of particulars of the offence contained in the summons because of the importance attached to it by the Code. This fact is emphasised both by Ennis J. and De Sampayo J. in *Ebert vs. Perera* (1922(23 N. L. R. 362 (3 judges). Ennis J. states at page 366 : " I would add that the formulation of the charge or statement in a summons or warrant or a review of the facts by an independent person is, in my opinion, a fundamental principle in our criminal procedure as now laid down in the Code of 1898, and the proviso in section 187 was necessary to make the slightest departure from it lawful."

De Sampayo J. observes at the same page in discussing the reason for the distinction drawn in section 187 between a summons and warrant on the one hand and a report under section 148 (1) (*b*) on the other : " The distinction is, I think, based on the fact that it is the Magistrate himself who states the charge in the summons or warrant, and there is, therefore, no practical object in requiring the Magistrate to record the charge over again."

The question is whether the second prosecution lay so long as the learned Magistrate's order discharging the accused stood unreversed. The answer to it is to be found in section 330 (1) of the Code. That section states :—

> " A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted under section 182."

Now the immediate question that arises for decision is whether the accused has been tried by a Court of competent jurisdiction for an offence and acquitted of such offence. Clearly the accused has been tried by a Court of competent jurisdiction for an offence. Has he been acquitted ? Learned Crown Counsel submits that he has not.

The only provision of the Code that provides for a discharge of an accused person in a summary trial by the Magistrate is section 191, which says :—

> " Nothing hereinbefore contained shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so."

The instant case does not come within that section for the learned Magistrate " discharged " the accused after the close of the prosecution case and after the proctor for the defence had announced that he was not calling any evidence. The mere use of the word discharge does not necessarily indicate that the order comes under section 191, *Ukkurala vs. David Singho*, (1895) 1 N. L. R. 339. *Senaratna vs. Lenohamy et al.*, (1917) 20 N. L. R. 44 at 50, nor does the fact that the order of " discharge " has been made by the learned Magistrate on a technical objection make it a discharge (*Gabriel vs. Soysa*, (1930) 31 N. L. R. 314) and not an acquittal. I am therefore of opinion that the accused has in the present case been acquitted within the meaning of that expression in section 330 (1) of the Code. A plea under section 330 is available even though the order is one that would have been set aside in appeal, had an appeal been taken. So long as it stands unreversed, it is a bar to a second trial for the same offence. *Dyson vs. Khan*, (1929) 31 N. L. R. 136 at 140.

Our section does not make any distinction between an acquittal on the merits and an acquittal on any other ground. It is, therefore, unsafe to resort to the principles appearing in text books and cases on the English law doctrine of *autrefois acquit*. Section 330 (1) is self-contained and the question whether a plea under that section is sound or not has to be determined on an interpretation of its language. The decision of *Ukkurala vs. David Singho* (1895) 1 N. L. R. 339 appears to proceed on this footing. This is the view taken under the Indian Criminal Procedure Code too. It is sufficient if I refer to just one case on the point. I have in mind the case of *Purnananda Das Gupta and*

others vs. Emperor. (1939) A. I. R. Calcutta 65 (Full Bench). The full Court states its view thus at page 71 :—

> " We think the principles underlying the English Common Law pleas of *autrefois convict* and *autrefois acquit* have been embodied so far as this country is concerned within the limits, however narrow they may be or have been stated to be, of the language of the statute itself. In our view, it would be bewildering and, indeed, might result in great injustice to the community at large were we to endeavour to stretch the language or extend the principles in the way we have been invited to do by Mr. Dinesh Ch. Roy."

I find myself unable to agree with the view taken by Soertsz A.C.J. in the case of *Fernando vs. Rajasooriya* (1946) 47 N. L. R. 399 to which learned Crown Counsel invited my attention, that the plea is of no avail in a case where there has been no adjudication upon " the merits ". With great respect, I find nothing in section 330 (1) to support the view taken by the learned judge. I am of opinion that the learned Magistrate was right in upholding the plea of *autrefois acquit.*

Although the Solicitor-General has not appealed against the earlier order of the learned Magistrate and learned Crown Counsel has not asked me to deal with that order in revision, I have nevertheless examined the proceedings with a view to setting aside that order in the exercise of my powers under section 357 of the Criminal Procedure Code if apart from the defect in the summary the prosecution was one that could be maintained, but I am not satisfied that the evidence placed before the Magistrate by the prosecution establishes the charge.

The portion of section 18 of the Shops Ordinance, No. 66 of 1938, relevant to the charge declares that no shop shall be or remain open for the serving of customers in contravention of any provision of any closing order duly made under this Ordinance. The evidence is that the 'shop " was " kept partly open ". It is not clear whether the extent of the opening was such as to create the impression that it was open for the serving of customers, for the evidence is that the accused is the owner and occupier of the premises. I think the prosecution must in a charge under section 18 place before the Court such evidence as will enable it to infer therefrom that the shop was open for the serving of customers. *Ratnayake vs. de Silva,* (1941) 21 C. L. W. 39. The mere fact that the front door of a building which the owner uses both as a shop and as a dwelling is kept partially open does not establish that the shop was open for the serving of customers. The evidence in this case does not necessarily lead to such an inference. The prosecution must establish beyond reasonable doubt all the ingredients of the offence.

The closing order is neither in evidence nor filed of record. Although section 17 (4) declares that a closing order shall upon notification in the Gazette be as valid and effectual as if it had been enacted in the Ordinance, it does not come within the classes of documents enumerated in section 57 of the Evidence Ordinance. A Court is, therefore, not bound to take judicial notice of a closing order.

The prosecution should, therefore, have produced the closing order recited in the report under section 148 (1) (*b*) made by the Inspector of Labour. Sections 167 and 168 of the Criminal Procedure Code require that the accused should be given such particulars as are reasonably sufficient to give the accused notice of the matter with which he is charged. The reference to a number of Gazettes which are not readily available for reference even by the judge cannot give the accused any idea of the charge against him. I realise the practical difficulties in the way of those entrusted with these prosecutions, but those practical difficulties cannot prevail over the interests of justice, which require that the accused should be acquainted with the particulars of the charge against him.

I should like to say a word about the charge itself. Section 18 makes the following acts an offence thereunder:—

> (*a*) No shop shall be or remain open for the serving of customers in contravention of any provision of any closing order ; and
>
> (*b*) No customer shall on any day be permitted to enter any shop after the hour specified in any such order as the hour at and after which that shop shall be closed on that day.

Now the charge as disclosed even in the report to the Court under section 148 (1) (*b*) of the Criminal Procedure Code does not allege which of the two acts was committed by the accused. It merely states that the accused kept the shop open at 11-30 a.m. for the serving of customers. The mere act of keeping a shop open for the serving of customers is not the offence created by section 18. It is the act of keeping a shop open in contravention of any provision of any closing order. The charge goes on to allege that the accused did permit a customer to enter the said shop on a Sunday. Section 18 does not create such an offence. It prohibits the permitting of customers to enter any shop on any day after the closing hour prescribed for that day.

For these reasons I do not think I should interfere with even the earlier order.

The appeal is dismissed.

Appeal dismissed.

Present : NAGALINGAM, J.

KUDOOS BHAI vs. VISVALINGAM

S. C. No. 84—C. R. Colombo No. 4941.

Argued on : 5th October, 1948.
Decided on : 6th December, 1948.

Landlord and tenant—Should sub-tenant be joined in an action for ejectment against the tenant—Effect of decree for ejectment against tenant.

Held : (1) That our law does not permit the joinder of a sub-tenant in an action for ejectment against the tenant.
(2) That a sub-tenant is bound by a decree against the tenant, and it is the duty of the Fiscal to remove the sub-tenant and deliver possession to the landlord.

Cases referred to :—*Ezra vs. Gubbay* A. I. R. 1920 Calcutta, 706.
Sheikh Yusuf vs. Jyotsh Chandra Banerjee and others A. I. R. 1932, Calcutta, 241.
Ramkissendas and another vs. Binraj Chowdhury and another, A. I. R. 1923, 691.
Jairaj Jalowji and others vs. Nowroji Jamshedji Plumber (supra).

G. P. J. Kurukulasuriya with *M. H. M. Naina Marikar,* for the 2nd defendant-appellant.
H. W. Thambiah, for the plaintiff-respondent.

NAGALINGAM, J.

A point of some importance in the law of landlord and tenant comes up for adjudication on this appeal. The plaintiff let to the 1st defendant on the terms of a monthly tenancy certain premises referred to in the plaint. The 1st defendant admittedly fell into arrears with his rent, and after due notice terminating his tenancy, this action was instituted against him by the plaintiff claiming arrears of rent, ejectment and damages for over-holding.

It would appear that the 1st defendant had sublet the premises to the 2nd defendant. The action as originally instituted was against the 1st defendant alone who was named the sole defendant. After service of summons which was effected on him by way of substituted service five months after action, an attempt appears to have been made to compromise the suit. The 1st defendant offered to give over possession of the premises with the sub-tenant but the plaintiff insisted upon vacant possession, the 1st defendant apparently undertaking to file action against the sub-tenant and have him ejected the action was by consent of parties put off for a period of four months. There is no evidence in the case as to what steps if any were taken by the 1st defendant to implement on his part the terms of settlement. But the record shows that three months later the plaintiff moved to amend the plaint with the 1st defendant's consent by bringing on the record the 2nd defendant as a party " so that he may have notice of this action and that he may be bound by the decree for ejectment to be entered in this case ". The amendment was allowed and summons was served on the 2nd defendant, who filed answer disputing *inter alia* the right of the plaintiff to add him as a party. The 1st defendant filed no answer and pending the trial of the action against the 2nd defendant, decree for ejectment was entered against the 1st defendant.

At the trial between the plaintiff and the 2nd defendant the learned Commissioner disposed of the plea raised by the 2nd defendant in the following words :—

> " The 2nd defendant is only sought to be bound by the decree for ejectment.....there is no privity of contract between the plaintiff and the 2nd defendant, but the 2nd defendant, the sub-tenant should have notice of the action to be made bound by the decree for ejectment."

It has been contended on appeal that the amended plaint discloses no cause of action against the 2nd defendant and that no relief in point of fact was claimed against him in the prayer to the plaint. On behalf of the plaintiff, however, an argument was advanced seeking to justify the addition of the 2nd defendant as a party defendant on the analogy of the addition of puisne encumbrancers to a mortgage action as parties defendant. I may say at once that there is no parallel between an action upon a mortgage bond and an action by a landlord against his tenant. An action by a mortgagee is one to enforce a real right of property, while an action by a landlord is entirely one involving personal rights. The distinction will be better appreciated if the full significance of the term " real right " is borne in mind. A real right is a right in a thing which entitles a holder to vindicate his right, that is, to enforce his right

in the thing for his own benefit as against the world, that is *against all persons whatsoever.* " Wille, Principles of South African Law, 2nd edition, 153. A slight acquaintence with the history of hypothecary actions in our courts will reveal the considerations that led to the formulation of the rule that every person who claims an interest in the mortgaged property acquired by him subsequent to the date of the hypothe should be added a party defendant to the hypocary action. But, these considerations are totally inapplicable to the case of an action by a landlord who sues his tenant on the basis of a monthly tenancy. It is needless to say that different considerations would apply under our law to leases and sub-leases entered into notarially.

A landlord cannot seek to enforce his right of recovery of possession of the property let " against all the world," but only against his tenant. Hence no person other than the tenant can properly be sued by a landlord for ejectment. There is the high authority of Voet for this proposition who lays down, 19-2-21 " *non tamen locatori primo contra secundum conductorem ull ex locato actio est, cum nihil inter eos conveniri sit,*" that is to say in the words of Nathan in his Common Law of South Africa, Vol. 2, Edt. 1904, P. 807, " a lessor will not have an action on the lease against a sub-lessee since there is no contract between the parties and a person cannot sue or proceed upon the contract of a third party."

It is, therefore, obvious that the contention put forward by the plaintiff for adding the 2nd defendant as a party defendant cannot be sustained.

No other argument has been adduced for adding the 2nd defendant as a party defendant to this action. But it has been urged on behalf of the plaintiff that unless the 2nd defendant is brought on the record he would be left with no remedy to recover the possession of the property. I do not think so. The answer to the difficulty propounded is to be sought in Section 324 of the Civil Procedure Code. A decree for ejectment entered in favour of the landlord against the tenant is a decree for recovery of possession of immovable property within the meaning of Section 323 and in terms of Section 324 on receipt of the writ, it is the duty of the Fiscal to deliver over possession of the property described in the writ to the judgment creditor, if need be, by removing any person bound by the decree who refuses to vacate the property. To this provision there is a proviso which directs that " as to so much of the property as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment debtor and not bound by the decree to relinquish such occupancy," the Fiscal shall give, what may be termed for the sake of brevity, constructive possession.

The first point to decide is whether a sub-tenant is a person who can be said to be bound by the decree entered in favour of the landlord against the tenant so as to subject him to removal by the Fiscal under the main provision of this Section. It is not gainsaid that members of the family of the tenant such as the wife, child or servant are persons falling within the category of persons bound by the decree and who need not therefore be named defendants in the action or against whom a separate action need be brought to have them removed from the premises in order to deliver possession to the judgment creditor. But, it is said that the case of a tenant is specificially dealt with in the proviso and that in regard to a tenant only constructive possession is possible in accordance with it. The phrase, " and not bound by the decree to relinquish such occupancy " qualifies also the word " tenant " in the proviso. The proviso therefore deals with tenants not bound by the decree thereby implying recognition of a class of tenants who would be bound by the decree. A common instance of a tenant who would not be bound by the decree entered against his landlord is the case of a tenant in occupation of property sold in execution against his landlord at the instance of a judgment creditor of the landlord. No argument is necessary in such a case to demonstrate that the tenant is not bound by the decree and cannot be removed from the premises. Delivery of possession to the purchaser in such a case can only be a constructive one. In the case of a sub-tenant where judgment has been entered against the tenant himself the position is different. Such a tenant is one who is bound by the decree. The right of the sub-tenant to continue in occupation is entirely dependent on the title of his landlord, the tenant, and on the tenancy of the tenant being determined, the sub-tenant's right too comes to an end and with reference to execution proceedings had by the landlord against the tenant, the sub-tenant is in no better position than a member of the family of the tenant.

This view is given expression to by De Kretser, J. in the case of *Siripina vs. Ekanayake* 1944, 45, N. L. R. 403 :—

> " One can conceive of a tenancy where the lessee of a house or a set of rooms lets in some person into one room—such a person is more or less his dependant."

This case has however been relied upon to support the contention that a sub-tenant is not

bound by the decree entered against the tenant. The facts of the case show that the sub-tenant was one who had been let into possession *with the consent of the lessor* or his representative and that he had besides the rights of an improver. The learned Judge held that the sub-tenant in those circumstances was not liable to be evicted under the decree obtained by the lessor against his lessee. The case is really no more than an authority for the proposition that where *the sub-tenancy is created with the consent of the landlord* a decree entered against the tenant cannot be enforced against the sub-tenant.

The learned Judge however proceeded to discuss the question generally as to the extent a sub-lessee was bound by a decree against the lessee and expressed the view, "the ruling principle is that no person is bound by the decree unless he is a party to the action. Certain subordinates may be bound by a decree but a tenant's position is different. Ordinarily he would not be bound by the decree unless he were a party to the case. Section 324 seems to recognise such a situation for it says, that if the Fiscal finds the property in the occupancy of a tenant or other person entitled to occupy the same as against a judgment debtor and not bound by the decree to relinquish such occupancy he shall give possession in the manner indicated, that is constructive possession." The learned Judge appears to have been influenced in arriving at this view by the case of *Ezra vs. Gubbay* A. I. R. 1920, Calcutta, 706. That was a case where a sub-tenant resisted the landlord in obtaining possession of the premises under a decree entered against the tenant and Rankin, J. after considering the provisions of Order 21, Rules 97 and 99 of the Indian Civil Procedure Code corresponding to sections 327 and 328 of our Code held that the remedy of the land-lord was by way of a separate action against the sub-tenant. But this case was not followed subsequently. Page J. sought to distinguish it in the case of *Ramkissendas and another vs. Binjraj Chowdhury and another*, A. I. R. 1923, 691. That was a case where sub-tenants instituted an action against the landlords who had obtained a decree for ejectment against the latter's tenant for a declaration that the landlords are not entitled to have them ejected under that decree. It was held that that action was wholly unjustifiable and further that the sub-tenants were bound by the decree entered against the tenant and that the sub-tenants were not necessary parties to the action instituted against the tenant by the landlord. An excerpt from the judgment of Page J. will bear reproduction as it reflects effectively certain aspects of the argument at the Bar :—

> "The effect of that decree (in favour of the landlords against the tenant) was that the present defendants who were the head landlords of the plaintiffs were entitled to possession of those premises as against the plaintiffs and against the plaintiff's landlords and that the plaintiffs have not and have never suggested that they had a shadow of a right to remain in possession after the decree had been passed against their immediate landlords. What they say is this. That although it is perfectly true that they have no legal ground for resisting the execution of that decree yet as they have not been made parties to the action they were not bound by the decree.
>
> Or in other words, unless a landlord chooses to make all the sub-lessees, and everybody who may have acquired an interest through those under tenants parties to this action he could only execute against those persons against whom decrees have been obtained with the result that he may have to bring any number of suits ultimately against other persons who remained in possession.
>
> If that were so it would, tend unduly to multiply the number of suits."

It would be seen that the view taken was that a sub-tenant was bound by the decree entered against the tenant. In the case of *Jefferji Ibrahimji vs. Yadin Mangal*, A. I. R. 1922 Bombay, 273, where again Order 21, Rules 97 and 99 came up for consideration on a resistence by a sub-tenant to execution of a decree entered against the tenant in favour of the landlord, Macleod, C. J., said :—

> "In this case the tenants do not say they are in possession of the suit property on their own account or on account of some person other than the judgment debtor. They admit that they are *tenants of the judgment debtor*. The question whether they are servants or agents of the judgment debtor and not tenants is not really relevant to the question at issue, because in either case they are not entitled to obstruct the decree holder."

It will be realised that the effect of this holding is that had the learned Chief Justice been called upon to construe Order 21, Rule 35, (our Section 324), he would have had no hesitation in holding that a sub-tenant was bound by the decree against the tenant and the only reason why he did not consider that provision was because the case came up for adjudication after the stage had been reached of obstruction by the sub-tenant. The learned Chief Justice expressed himself more fully in the later case of *Jivam Jadowj and Others vs. Nowraj Jamshedji Plumber* A. I. R., 1922, 449, where too the sections corresponding to our sections 325, 327 and 328 came up for consideration and particularly the words, "person other than the judgment debtor claiming in good faith to be in possession of the pro-

perty on his own account or on account of some person other than the judgment debtor," in regard to a proceeding taken with reference to an obstruction by a sub-tenant in delivering possession of the property to the landlord in a decree against the tenant :—

> " It seems to me clear that a sub-tenant cannot claim to be in possession of property on his own account and if admittedly his immediate landlord is the tenant and judgment debtor he cannot be in possession on account of some person other than the judgment debtor. It is obvious therefore that the execution plaintiff is entitled to get possession of the premises from the sub-tenant : and if any other construction were placed on rules 97 and 99 obstruction could be caused to an execution plaintiff in a suit for possession in a manner which was never contemplated by the Code.
>
> Mr. Jinnah, for the fruit seller (the sub-tenant) relies upon the decision in *Ezra vs. Gubbay* (supra.) No doubt the learned Judge in dismissing the execution of the plaintiff's application held on the construction of rule 99 that the under-tenant can be said to claim to be in possession on his own account. With all due respect it appears to me to require explanation for, I cannot see how it can be said that the under-tenant is in possession of the premises on his own account. And in my opinion those words can only refer to a person who claims to be in possession on his own title. Other wise it would not be necessary to add the words, " on account of some person other than the judgment debtor " the person in possession may either claim to be in possession on his own title or as *tenant of some person other than the judgment debtor.* But, if he claims to be in possession as a tenant of the judgment debtor then it seems to me that the Court is bound to make the Order in favour of the execution plaintiff, otherwise a landlord may get a decree for ejectment against his tenant, but may find that decree an absolute nullity if the tenant had sublet the premises as he may have again to file a suit against the sub-tenant."

The main provision of Section 324 of our Code corresponding to Order 21, Rule 35 and Section 325 corresponding to Order 21, Rule 97 came up for consideration in the Calcutta High Court in the case of *Sheikh Yusuf vs. Jyoish Chandra Benerjee and Others* A. I. R. 1932, Calcutta, 241 before a bench of two judges. In that case the question whether a sub-tenant is a person who comes within the class of persons bound by the decree under the first part of Section 324 (Order 21, Rule 35 Indian Civil Procedure Code) was specifically discussed as well as the legal position of a sub-tenant who obstructs delivery of property to the landlord in execution of a decree against the tenant. In that case the landlord in execution of a decree for ejectment against his tenant who had sublet portions of the premises to various tenants recovered possession of all the buildings barring one of which the petitioner the sub-tenant was in possession and which he refused to vacate. The landlord applied to the Court for police help to obtain possession by ejecting the petitioner. The petitioner then made an application to Court under Section 151 of the Indian Civil Procedure Code corresponding to our Section 839 urging that he should not be evicted in execution of the decree against his lessor but that the proper procedure to be followed by the landlord was that under Order 21, Rule 97, (our Section) 325). Suhrawardy, J., in delivering the judgment of the Court, said :—

> " The decree under execution is a decree for delivery of possession of immovable property and was being executed under Order 21, Rule 35 under which possession of the property shall be delivered, if necessary by removing any person bound by the decree who refuses to vacate the property. The question therefore that falls for determination is whether the petitioner is a person bound by the decree. If he is not so, the only remedy open to the decree holder is to proceed under Order 21, Rule 97. If he is so, he is liable to be evicted in execution of the decree under Rule 35. The learned advocate for the petitioner argues that the words " any person bound by the decree " are synonymous with " judgment debtor ". In my judgment the words include judgment debtor as well as any person who may be held under the law as bound by the decree. The word judgment—debtor " is defined in S. 2 (10) Civil Procedure Code, as meaning any person against whom a decree has been passed or an order capable of execution has been made. If the scope of Rule 35 is limited only in respect of the person against whom a decree has been passed or an order capable of execution has been made then it would have been much easier to use the expression " judgment debtor " in the rule instead of the descriptive clause " any person bound by the decree."
>
> Now it has been seen whether the petitioner is a person who is bound by the decree. Under Section 115, T. P. Act, he being a sub-lessee his interest ceased with the forfeiture of the lease and he ceased to have any tangible right to the property. It seems to me that it would be unreasonable to force a landlord to make in a suit for ejectment against his lessee all the under lessees or even persons under such under-lessees who may be in actual possession, parties to the suit the nature of which may change from a simple suit for ejectment on forfeiture or determination of the lease. So far as the landlord is concerned the possession is with his lessee. The possession may be by his occupying premises himself or by his allowing other persons to occupy the premises on his behalf either as sub-lessees or licensees or as servants. It would be most oppressive to insist upon the landlord to make all such persons parties to a suit. For instance in the case of a house in Calcutta which is popularly called " mansion " or " Court " there may be some 150 sub-tenants in occupation of different portions of it. The owner, if the view urged by the petitioner is accepted, will have to make all these persons parties in a suit for ejectment against his lessee. Take another common instance of a market or bazaar held under lease. If the owner seeks possession of it by ejecting the lessee, it will be absurd to hold that he must make every squatter or stall holder party to the suit."

The learned Judge after expressing his disapproval of the judgment in *Ezra vs. Gubbay* continued ;

> " A decree in ejectment passed against a lessee at the instance of a lessor is not only binding upon the lessee but also upon his sub-tenants provided they have no right, independent of the right of their lessor in the demised premises."

The learned Chief Justice obviously did not consider it necessary to refer to Order 21 Rule 36 corresponding to the proviso of our Section 324 for the reason that the view had been taken in the Indian Courts that that rule did not apply to sub-tenants but to tenants under a judgment—debtor who was not sued in his capacity as a tenant by a landlord. See the case of *Shama Soonderee vs. Jardine Skinner and Company* 7 W. R. 376 and *Uppala Raghava vs. Uppala Ramanuja* I. L. R. 26, Madras 78.

Following the principles underlying these judgments, I would hold that a sub-tenant is bound by the decree for ejectment entered against the tenant and that it is the duty of the Fiscal to remove the sub-tenant as he is a person bound by the decree and deliver possession to the landlord. But, if for any reason the Fiscal is unable to deliver over possession by removal of the sub-tenant from the premises the landlord would have to take proceedings under Section 325 of the Code and if the Court finds that the person obstructing was a sub-tenant under the tenant the Court would then direct the ejectment of the sub-tenant, for as was said by Macleod, C.J., in the case of *Jairaj Jalowji and Others vs. Nowroji Jamshedji Plumber* (*Supra*) :—

> " Now, the only justification of the fruit seller (the sub-tenant) being in the occupation of the premises is the agreement of tenancy which originally existed between himself and the judgment—debtor. He He does not claim to be in possession on his own account or to be holding on account of some person other than the judgment—debtor."

I should however add that in some of the earlier Indian cases it has been suggested that although a sub-tenant may not be a necessary party to an action by a landlord against his tenant for ejectment, nevertheless it would be advantageous to add the sub-tenants as parties. But this view has not prevailed later and in the case of *Sheik Yusuf vs. Jyotish Chandra Bannerjee* (Supra) Shurawardy, observed in regard to it as follows :—

> " A question similar to this came for consideration incidentally in England in *Geen vs. Herring* where the tenant had made all sub-tenants parties to an action for the recovery of a house. The Court disallowed the costs of serving all the sub-tenants with writs or notices on the ground that it was not necessary to make all the sub-tenants parties to the action. In delivering the judgment of the Court of Appeal Stirling, L.J., observed :—
>
> " It was not disputed, and I think rightly so, by the Counsel for the plaintiff that the action for recovery of these houses would have been well brought against Herring (the lessee) alone, without joining his weekly tenants."
>
> The position will be more intolerable if a person in the position of the decree holder in this case is compelled on resistance being offered by each of the sub-tenants to bring a suit for possession of this property against each of them. A valid notice to quit not only determines the original demise, but any under-lease which the tenant might have made. Fox, on the Law of Landlords and Tenants, Edt. 6, P. 683. The petitioner therefore is a person who has no right to remain on the land and whose right, if any, came to an end along with that of his lessor."

Having regard to the principles of Roman Dutch Law there is all the more reason to adopt the later Indian view.

In view of the fore-going reasons the conclusion I reach is that the 2nd defendant was improperly added and that the action against him should be dismissed with costs, both in this Court and in the Court below. But, I think, I have said enough to indicate my view that the 2nd defendant is one who is bound by the decree entered against the 1st defendant and is liable to be ejected under it.

Appeal allowed.

Present : BASNAYAKE, J.

ALLES vs. MUTHUSAMY.

S. C. 112—*C. R. Colombo* 6647.

Argued on : 29th September, 1948.
Decided on : 20th December, 1948.

Landlord and tenant—Decree for ejectment of tenant—Acceptance by landlord of higher rent for three months immediately preceding date of ejectment—Is new tenancy created.

Held : That when a valid notice has been given, a new tenancy can be created only by an express or implied agreement and that the mere acceptance of a payment in excess of what is due to the landlord during the current period of tenancy does not create a new tenancy at the expiration thereof.

Case referred to : *Bowden vs. Rallison* (1948) 1 All E. R. 841 at 845.

S. Subramaniam, for the appellant.

H. W. Thambiah, for the respondent.

Basnayake, J.

The plaintiff-appellant (hereinafter referred to as the plaintiff) and the defendant-respondent (hereinafter referred to as the defendant) are landlord and tenant. The plaintiff instituted this action in order to recover arrears of rent and to have the defendant ejected from the premises of which he was tenant. The defendant did not file answer and the learned Commissioner entered judgment by default against him. The defendant appeared later and moved under section 823 (3) of the Civil Procedure Code to have the judgment set aside. On 8th July 1947, the date fixed for inquiry into the defendant's motion, both parties were represented by Counsel who informed the Court that the parties had arrived at a settlement. The learned Commissioner's record of the settlement reads :—

> " It is agreed that all rents and damages to December 1946 have been paid and settled. Of consent judgment for plaintiff for Rs. 462 being rent and damages up to the end of June 1947. Ejectment and further damages at Rs. 77 per month from 1-7-47. If defendant pay each month's damages together with Rs. 77 out of arrears by the 25th of each month as from 25-7-47 writ of ejectment not to be executed till 31-12-47. Defendant undertakes to give vacant possession on 31-12-47. Defendant says he is living in the premises with boarders but when he leaves he will give vacant possession."

On 8th July 1947 decree was entered in terms of the agreement. The defendant failed to keep his undertaking to vacate the premises on 31st December 1947, and on 27th February 1948 the plaintiff applied for execution of his decree under section 224 of the Civil Procedure Code stating the particulars required therein. That application was allowed on the same day. It must be assumed that it was allowed after the Court had satisfied itself as required by section 225 of the Civil Procedure Code that the application was substantially in conformity with the directions in section 224 and that the applicant was entitled to obtain execution.

On 1st March 1948 the defendant's proctor moved to recall the writ and stay execution, but not in accordance with section 343 (2) of the Civil Procedure Code, for no petition as required therein was filed.

The main ground of objection was that the plaintiff had demanded and received a sum of Rs. 6 in excess of the amount due to him for the months of October, November and December 1947 and that a new tenancy had been created thereby.

On 22nd April 1948 the learned Commissioner heard the parties in regard to the defendant's motion and dismissed the plaintiff's application for writ which he had allowed on 27th February 1948. The defendant stated in his evidence that after the decree was entered the plaintiff demanded a sum of Rs. 6 in excess of the amount of Rs. 77 per mensem awarded as damages for the period July 1947 to December 1947 during which the defendant was permitted to remain in occupation of the premises, and that he paid each month by cheque Rs. 160 being Rs. 77 out of arrears and Rs. 83 by way of damages. Under cross-examination he states that the plaintiff asked for a higher amount by way of monthly damages in October 1947 after he had paid for three months at the rate of Rs. 154 per mensem. The plaintiff denies that he asked for Rs. 6 more than the amount of monthly damages awarded. He says that after making three payments of Rs. 154 each in cash the defendant began in October to send through his proctor to the plaintiff's proctor cheques for Rs. 160 each month for October, November and December 1947, although the amount payable was Rs.154. Three such payments had been made by December 1947. He denies that there was a fresh contract of tenancy and that he asked for higher damages.

I am unable to agree with the learned Commissioner that the acceptance by the plaintiff of a few rupees in excess of the minimum amount the defendant was obliged to pay under the decree constitutes a new tenancy. Although out of the arrears of Rs. 462 due to the plaintiff the defendant was bound under the decree to pay only Rs. 77 each month, there was nothing to prevent his paying more each month if he was so minded, as he would be entitled to credit in respect of whatever amount he paid in reduction of arrears. There is no evidence that each remittance was accompanied by a note stating how it was made up. Even if there had been such a note, the plaintiff was entitled to appropriate any extra sum that was remitted to him each month against the arrears due to him.

Sub-section (1A) of section 3 of the Rent Restriction Ordinance, No. 60 of 1942, declares

that it is unlawful for a tenant to pay or offer to pay a rent of an amount in excess of the authorised rent, while section 7 of that Ordinance forbids a tenant to pay or offer to pay as a condition of the continuance of the tenancy of any premises, in addition to the rent of such premises, any premium, commission, gratuity or other like payment or pecuniary consideration whatsoever. If the defendant's story is true, he has himself on his own showing acted contrary to the provisions of the Ordinance. He cannot be allowed to claim the benefit of his own wrong. If he has paid more than the authorised rent, he has his statutory remedy in section 9 of the Ordinance whereby he is entitled to recover the excess paid by him from the rent payable by him to the landlord without prejudice to any other method of recovery.

I find myself unable to agree with the learned Commissioner that the overpayment of Rs. 6 for each of the months October, November, and December 1947, creates a new tenancy. When a valid notice has been given, a new tenancy can be created only by an express or implied agreement. In the instant case there is no convincing evidence of such an agreement. The mere acceptance of a payment in excess of what is due to the landlord during the current period of tenancy does not create a new tenancy at the expiration thereof. It has been held in *Bowden vs. Rallison* (1948) 1 All E. R. 841 at 843 that since the Rent Restriction Acts the mere acceptance of rent by the landlord and the payment of rent by the tenant is no evidence of a new tenancy between them. The reason for this view is thus stated by Goddard C.J.: "The position is that when a notice to quit expires, the house being protected by the Rent Restriction Acts, the landlord may not be able to get possession unless he can show certain things. He may not, therefore, attempt to get possession, and the mere fact that he accepts the rent does not show that there is a new contractual tenancy. It is equally consistent with what is known as a statutory tenancy. As the justices have not found here anything except that the tenant remained in possession after the notice to quit had expired in 1939, and had paid his rent, the inference must be that he remained there as a statutory tenant."

Section 8A of our Rent Restriction Ordinance, No. 6 of 1942, as amended by Ordinance No. 20 of 1946, appears to be designed to create a statutory tenancy in respect of tenants who are protected by the provisions of the Rent Restriction Ordinance from ejectment from the premises they occupy.

I am unable to uphold the learned Commissioner's order dismissing the application of the plaintiff which he had already allowed.

I therefore set aside the order appealed from, with costs, and direct a writ of execution to issue to the Fiscal.

Order set aside.

Present : BASNAYAKE, J.

VAN CUYLENBURG (A. S. P., UVA) vs. WEERASEKERA.

S. C. 652—*M. C. Badulla-Haldummulla* 5985.

Argued on : 27th July, 1948.
Decided on : 11th November, 1948.

Penal Code, section 488—*Is a police station a public place.*

Held : That a police station is not a public place within the meaning of section 488 of the Penal Code.

Cases referred to : *Pietersz vs. Wiggin* 2 Ceylon Law Reports 111 ; (1892) 1 S. C. R. 320.
Wijesuriya vs. Abeyesekera (1919) 21 N. L. R. 159.
Sub-Inspector of Police, Dehiowita vs. Boteju (1926) 28 N. L. R. 311 ; 4 Times 88 ; 8 Law Recorder 6.
Muhandiram Tissa vs. Charles Appu S. C. 24/P. C. Hambantota 6911/S. C. Minutes of 22nd February, 1926.
Perkins vs. Don Samel (1926) 28 N. L. R. 173 ; (1926) 4 Times 12.
Toussaint vs. Silva (1926) 6 Tamb. 31.
Jayasuriya vs. Arnolis Appu (1919) 6 C. W. R. 307.
Inspector of Police, Batticaloa vs. Ponniah (1938) 40 N. L. R. 255.

R. A. Kannangara, Crown Counsel, for the appellant.
No appearance for the respondent.

BASNAYAKE, J.

The charge alleged against the accused-respondent (hereinafter referred to as the accused) is that he did " whilst in a state of intoxication appear in a public place, to wit, the Welimada Police Station, and there conduct himself in such a manner as to cause annoyance to the staff of the Welimada Police and thereby committed an offence punishable under section 488 of Chapter 15."

The learned Magistrate accepts the evidence for the prosecution that the accused appeared at the Welimada Police Station in a state of intoxication and that he conducted himself in such a manner as to cause annoyance to the officers on duty. But he holds on the authority of *Pietersz vs. Wiggin* 2 Ceylon Law Reports 111 ; (1892) 1 S. C. R. 320 (hereinafter referred to as Wiggin's case) that a Police Station is not a public place. He therefore acquits the accused. The present appeal is from that acquittal.

Section 488 of the Penal Code makes it an offence for any person to appear in a state of intoxication in any public place, or in any place which it is a trespass in him to enter, and there conduct himself in such a manner as to cause annoyance to any person. The question that arises for decision on this appeal is whether a Police Station is a public place. The rule of construction sometimes styled the golden rule is that the words of a statute must be given their ordinary meaning unless the context indicates otherwise. The word " public " when used as an attribute means " of, pertaining to, or affecting the public at large or the community, open for the use, enjoyment, or participation of all, either free or on payment of a fee : maintained by or for the public ; as public streets or parks." There is nothing in the context which requires that the word " public " should be given a meaning other than its ordinary meaning. According to that meaning a public place is a place which is open for the use or enjoyment of the community as a whole or, in other words, the public at large, like a public street, square, or park. There would naturally be regulations as to the manner in which the public may use such a place, the payment of a fee may even be stipulated as in the case of public stands for vehicles etc. It is in this sense that Withers J. has interpreted the expression in Wiggin's case (*supra*). He says : " In my opinion a public place in the said section is a place to which and from which the public have ingress and egress as of right and without reference to any particular purpose, as a public thoroughfare, square, etc. A Police Station is defined in the Criminal Procedure Code (section 2 (1) as any post declared generally or specially by the Government to be a Police Station. There is nothing in the Criminal Procedure Code, the Police Ordinance or any other enactment or law to indicate that the public have the same right to enter a Police Station as they may have to enter a street or park. Nor is there anything in its very nature that places it in the category of such places as parks and streets. A person may go to a Police Station only on lawful business. In that respect it is like most other Government offices which the public are permitted to enter for the transaction of legitimate business.

I am unable to agree with learned Crown Counsel that Wiggin's case (*supra*) is wrong. The meaning given by Withers J. to the expression " public place " in section 488 of the Penal Code has been followed in a number of cases since 1892. In the case of *Wijesuriya vs. Abeyesekera* (1919) 21 N. L. R. 159 Shaw J. held that a circus is not a public place. Garvin A.C.J. in the case of *Sub-Inspector of Police, Dehiowita vs. Boteju* (1926) 28 N. L. R. 311 ; 4 Times 88 ; 8 Law Recorder 6 has decided that a Buddhist temple is not a public place within the meaning of that expression in section 70 (1) of the Police Ordinance. In doing so he appears to have adopted the definition of that expression in Wiggin's case (*supra*). Jayewardene J. has in the unreported case of *Muhandiram Tissa vs. Charles Appu* S. C. 94/P. C. Hambantota 6911/S. C. Minutes of 22nd February 1926 ruled on the authority of Wiggin's case that a Government hospital is not a public place. It appears from the judgment of Jayawardene J. that his decision in *Perkins vs. Don Samel* (1926) 28 N. L. R. 173 ; (1926) 4 Times 12 that a resthouse maintained by a road committee under the Thoroughfares Ordinance is a public place cannot be regarded as a departure from the definition of public place which has been adopted in the cases I have cited above.

The decision of Clarence J. in *Toussaint vs. Silva* (1889) 6 Tamb. 31 that a courthouse verandah is a public place for the purpose of section 156 of the Penal Code, though earlier than Wiggin's case (*supra*), is not inconsistent with it. But I find myself unable to reconcile with Wiggin's case (*supra*) the decision of de Sampayo J. in *Jayasuriya vs. Arnolis Appu* (1919) 6 C. W. R. 307 which is also a decision on section 156 of the Penal Code and which declares it to be an offence for two or more persons to fight in a public place and disturb the public peace. He holds that the witness shed of a Gansabhawa is a public place. With great respect, I am unable to agree that the public *qua* public have a right to enter the witness shed

of a Gansabhawa. It is only those who have been cited by the respective parties to the cases before the tribunal on any particular day that have a right to be in the witness shed. Those who are not witnesses are as a rule excluded. As there is no reference to Wiggin's case (*supra*) in the judgment I think it may be assumed that it was not cited. For, if it had been, the learned judge would not have failed to discuss it. In the case of *Inspector of Police, Batticaloa vs. Ponniah* (1938) 40 N. L. R. 255 Koch J. holds that a post office is a public place, purporting to follow the decision of Jayawardene A.J. in *Perkins vs. Don Samel* (*supra*). He appears to proceed on the assumption that Jayewardene A.J. has in that case departed from the meaning given to the expression public place in Wiggin's case (*supra*). With respect, there seems to be no room for such an assumption, for the learned judge says : " I agree with the Magistrate that a resthouse is a public place. As he says, the term " resthouse " as defined by Ordinance No. 10 of 1861 includes any ambalam, maddam, or other public buildings for the shelter of travellers, and any member of the public, so long as he conforms to the rules framed under section 19 of that Ordinance, where they are called public resthouses, is entitled to seek shelter in a resthouse."

Wiggin's case has been consistently followed by this Court, and I see no reason to depart from the view taken therein.

It is, therefore, unnecessary to discuss the English and Indian cases cited by learned Crown Counsel.

The appeal is dismissed.

Appeal dismissed.

Present : BASNAYAKE, J.

SILVA vs. NANAYAKKARA (P. C. 3146, AMBALANGODA POLICE)

S. C. 1043—*M. C. Balapitiya* 61366

Argued and decided on : 29th October, 1948

Penal Code, section 180—*Complaint to police against three persons—Intention to cause officer to use his lawful power to the injury of the three persons.*

Where a complaint was made to the police against three persons, but the complaint did not disclose that any offence had been committed, and the facts showed that the complainant had no intention of causing a police officer to use his lawful power to the injury or annoyance of the three persons.

Held : That the act of the complainant did not fall within the scope of section 180 of the Penal Code.

Case referred to : *Juan Appu and another vs. Fernando* (*Inspector of Police, Maradana*), (1948) 37 C. L. W. 41.

A. L. Jayasuriya with *C. C. Weeramantry*, for the accused-appellant.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The accused-appellant has been charged and convicted of the following charges :—

" That you did, within the jurisdiction of this Court at Ambalangoda on 10-7-1948 give information to a public servant to wit : P. C. 3146 Nanayakkara of Ambalangoda Police, that " This morning at about 6 a.m., I was at home. Jane Nona, Missy Nona and Jossie Nona neighbours started abusing me and my ancestors. They continued this till about 7-30 a.m., etc.," which you knew or had reason to believe to be false intending thereby to cause or knowing it to be likely that you will thereby cause such public servant to use his lawful power to the injury or annoyance of the said Jane Nona, Missy Nona and Jossie Nona all of Patabendimulla and thereby committed an offence punishable under section 180 of Chapter 15 C. L. E."

He has been ordered to pay a fine of one hundred rupees and in default of payment of the fine sentenced to a term of six weeks' rigorous imprisonment.

The complaint (hereinafter referred to as P1) on which the charge is founded reads :—

" This morning at about 6 a.m , I was at home. Jane Nona, Missy Nona and Jossie Nona neighbours started abusing me and my ancestors. They continued this till about 7-30 a.m., when the insult became intolerable,

I informed about the situation to Mr. Jayasooriya who is also one of my neighbours. Next I went to the A. S. P., and complained. He requested me to make an entry at the Police Station. I did not abuse. The reason is because Inspector Saram had visited the house at about 6 p.m., last evening, with the result they have taken the upper hand. I lodge this complaint for my future guidance. This is all."

It appears from P1 that the allegation was one of abuse and the appellant says therein that he lodges the complaint for his future guidance.

To be an offence insult must be such as will fall within the ambit of section 484 of the Penal Code. Now, a perusal of P1 does not disclose that any offence under the Penal Code or any other law has been committed by the three persons named therein. There was therefore no lawful power that police constable Nanayakkara could have exercised to the injury or annoyance of Jane Nona, Missy Nona and Jossie Nona.

Section 71 of the Police Ordinance expressly forbids a police officer to receive any complaint of any petty offence. That section mentions a few of the petty offences contemplated therein. They are—" trespass, assault, quarrelling, or the like ". In this instance the complaint is not even of a petty offence. In the circumstances it is not possible to say that the accused gave the information to Police Constable Nanayakkara intending thereby to cause, or knowing it to be likely that he will thereby cause such a public servant to use his lawful power to the injury or annoyance of any person, although, in consequence of the complaint, a police officer was sent to the house of Jane Nona, Missy Nona and Jossie Nona in their absence to investigate the matter. Apart from that, any intention or knowledge on the part of the appellant to cause Police Constable Nanayakkara to use his lawful power, even if he had such power, to the injury and annoyance of the three persons mentioned in the complaint is negatived by the concluding words of the appellant's own statement wherein he says " I lodge this complaint for my future guidance." I wish to guard myself against being understood as saying that the use of these or similar words will be of avail in every case as negativing intention or knowledge. Intention or knowledge is a question of fact depending on the circumstances of each case. A person who gives false information as to the commission of, say, the offence of murder to a police officer in charge of a police station or an inquirer cannot by merely saying that he was conveying the information for his guidance to escape the consequences of his act.

I have already stated in my judgment in *Juan Appu and another vs. Fernando* (*Inspector of Police, Maradana*) (1948) 37 C. L. W. 41 that the provisions of section 180 of the Penal Code should be very sparingly used in the case of information given to an officer in charge of a police station, especially when the alleged false complaint has not been made the basis of legal proceedings against the person affected thereby. Too frequent a use of section 180 in regard to information given to an officer in charge of a police station or to any of the other officers described in section 121 of the Criminal Procedure Code may serve as a deterrent to the discharge of the duty imposed on the public by section 21 of the Criminal Procedure Code. Such a result would not be in the public interest.

The act of the accused does not fall within the scope of section 180 of the Penal Code

I allow the appeal, set aside the conviction, and acquit the appellant.

Appeal allowed.

Present : BASNAYAKE, J.

ARNOLIS APPUHAMY *et al* vs. MAHIL (S. I. POLICE, KOSGAMA)

S. C. 1102-1103—*M. C. Avissawella* 41317

Argued on : 16th November, 1948.
Decided on : 21st December, 1948.

Penal Code, section 311—*Meaning of "fracture."*

An injury was described as follows :—" Linear lacerated wound 1 inch long and scalp deep over right side of back of head with linear fracture of bone underneath ". The witness was unable to state whether the fracture extended to the inner table. It was accordingly argued that there had been no fracture of a bone within the meaning of that expression in Seventhly of section 311 of the Penal Code.

Held : That the injury may correctly be called a fracture of the skull bone.

Cases referred to : In *re* Castioni, (1891) 1 Q. B. 149.
Burton vs. Reevell, 16 M. & W. 309, per Parke, B.
Not Followed : *Inspector of Police vs. Pedrick* (1944) 45 N. L. R. 62 ; 26 C. L. W. 96.

Stanley de Zoysa, for the appellants.
R. A. Kannangara, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The learned counsel for the appellants does not canvass the findings of fact, but he submits that the conviction of the first appellant of the offence of causing grievous hurt on grave and sudden provocation is bad in law as the hurt caused by him is not any one of the kinds of hurt enumerated in section 311 of the Penal Code and is, therefore not grievous hurt.

The injury in question is thus described by Dr. Tissaweerasinghe : " Linear lacerated wound 1" long × scalp-deep over right side of back of head with linear fracture of bone underneath." In cross-examination he states : " I cannot say whether the fracture extended to the inner table."

It is submitted on the authority of the case of *Inspector of Police vs. Pedrick* (1944) 45 N. L. R. 62 ; 26 C. L. W. 96 that as there is no proof that the crack in the bone underneath the scalp extended to the inner table there has been no fracture of a bone within the meaning of that expression in Seventhly of section 311. In the Rangoon case which is followed in the case relied on by counsel, Spargo J. does not give the reason for his statement " that if it is a crack it must be a crack which extends from the outer surface of the skull to the inner surface." I have great difficulty in accepting his statement as I find myself unable to reconcile it with the meaning of the word " fracture " in medico-legal parlance. It is permissible according to the rules of interpretation of statutes to resort to technical works to ascertain the meaning of technical expressions in *re* Castioni, (1891) 1 Q. B. 149. Law Journal, Volume LXXIX, page 268, 20-4-31. Dwarris on Statutes, 2nd Edn., p. 578 because when the Legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning unless the contrary manifestly appears. *Burton vs. Reevell*, 16 M. & W. 309, per Parke, B. For that reason I turn for assistance to the Dictionary of Medico-Legal Terms (Crew & Gibson), where the word " fracture " is defined as " a crack or break in a bone ".

" There are several types :—
" (1) Simple, one in which the periosteum—the covering of the bone—is intact, or in which there is little or no surrounding damage.
(2) Comminuted, the bone is broken into several pieces.
(3) Impacted, the ends of the bone are dovetailed and held in position.
(4) Green stick, one side of the bone is cracked and the other bent like a green twig.
(5) Compound, one where the bone ends of the fracture have penetrated through the skin and overlying tissues or where there is a wound leading down to the fracture.
(6) Complete, one where the bone is severed right through.
(7) Depressed, one where the bone is bulged inwards, a common fracture of the skull.
(8) Ununited, one in which the ends have not welded together.
(9) Spontaneous, one occurring at a point weakened by disease such as cancer or syphilis and requiring little or no external force."

It appears from the above definition and catalogue of the different kinds of fractures that a fracture of a bone is a crack or break which need not necessarily extend right through it. In regard to fractures of the skull, Dr. Kerr observes in his work on Forensic Medicine : Forensic Medicine by Douglas J. A. Kerr, 4th Edn., p. 115.

" When the skull is struck it bends slightly, thus stretching the inner table more than the outer table. The inner table will therefore fracture first, and if the blow is slight the fracture may be confined to a small crack of the inner table, the outer table remaining intact. With slightly greater force both tables are fractured, causing, an ordinary fissured fracture."

It is clear, therefore, that in medico-legal phraseology the injury described by Dr. Tissaweerasinghe may correctly be called a fracture of the skull bone. As there is nothing in the context of section 311 to exclude its technical meaning the expression " fracture " therein should, according to the canons of construction, be interpreted in the same sense.

Learned Crown Counsel relies on an unreported decision in S. C. Minutes of 3rd May 1948, S. C. 253/M. C. Bambalapitiya 60121, wherein it has been held that the chipping off of a piece of bone amounts to a fracture for the purpose of section 311. That question does not arise here, and I prefer to reserve my opinion thereon. The judgment shows that the case of *Inspector of Police vs. Pedrick* (*supra*) was cited but not followed.

The appeals are dismissed.

Appeals dismissed.

Present : NAGALINGAM & BASNAYAKE J. J.

SAMARAKONE AND ANOTHER vs. DIAS ABEYESINGHE

S. C. 507/M—*D C Colombo* 47/Z.
Argued on : 8th October, 1948.
Decided on : 6th December, 1948.

Dissolution of Partnership—Person appointed to determine matters in dispute—Agreement by parties that such person's decision should be final and conclusive—Can decision be canvassed.

Held : That where a person is appointed to determine matters in dispute and his decision is, by agreement of parties, made final and conclusive, the decision cannot be questioned so long as the person acts fairly within the terms of the authority granted to him.

Case referred to : *Mediterranean and Eastern Export Co., Ltd. vs. Fortress Fabrics (Manchester) Ltd.*, (1948), 2 All E. R. 186.

F. A. Hayley, K. C., with *Samarakone* and *Kottegoda* for the appellant.
N. K. Choksy, K. C., with *H. W. Jayawardena*, for the respondent.

BASNAYAKE, J.

This is an action for the dissolution of a partnership On the trial date the parties entered into the following agreement :

" Parties agree that Mr Hallock Wijenathen be appointed Commissioner for the purpose of placing a valuation on the stock which appears in the exercise books which will be submitted to him and also motor lorry Z. 658. The valuation he will place on these goods is the market value on 31-12-42. The Commissioner can make use of any material he wishes in order to arrive at the market value of these things and which market value he will place and judge to the best of his ability.

" Parties agree to abide by the decision of the Commissioner as to the valuation which decision will be final and conclusive. After this valuation is ascertained the plaintiff will be entitled to one-third of this amount less Rs. 8,725 already paid to the plaintiff on account of the value of the stock.

" Each party will pay half of the Commissioner's fees and also costs of commission."

A commission was accordingly issued on 17th June 1946 requiring the Commissioner to make his return on or before 23rd August 1946. On 20th August 1946 the Commissioner asked for an extension of time till 6th September 1946 and on 31st August 1946 he made his return in which he valued the stock at Rs. 96,456.08.

On 18th October 1946 the defendants filed an objection to the Commissioner's valuation on the following grounds :—

(*a*) that he did not inspect the articles,
(*b*) that the parties were not required to attend before the Commissioner,
(*c*) that the Commissioner failed to hold any inquiry or to record any evidence,
(*d*) that the Commissioner's return is not accompanied by the documents on which he based his valuation, and
(*e*) that the Commissioner's valuations are arbitrary.

The learned District Judge over-ruled the objections and entered judgment for the plaintiff in the sum of Rs. 23,426.69 with legal interest and costs.

The Commissioner, who gave evidence at the inquiry into the objections against his report, says that although he sought the assistance of one Samuel who was a dealer in articles of the type he was required to value, the valuation is his own. The figures given by Samuel were adopted by him where he agreed with them and were altered by him in cases in which he did not agree.

The material portion of the authority given to the Commissioner by the Court in pursuance of the express agreement of parties is as follows :—

" And whereas in terms of the order of Court dated 6th June 1946 you have been appointed Commissioner for the purpose of placing valuations on the stock which appears in the two exercise books which will be submitted to you (by Mr. D. H. N. Jayamaha, Proctor for the defendants) and also the value of Motor Lorry No. Z 658. The valuation you will place on these goods is the market value as on 31st December 1942. You are at liberty to make use of any material you wish in order to arrive at the market value of these things and which market value you will place and judge to the best of your ability."

I agree with the learned District Judge that the Commissioner has carried out his commission within the terms of his authority. His decision is therefore, in terms of the agreement of the parties, "final and conclusive". Where, as in this case, an expert is appointed to determine matters which he is specially qualified to determine, it is expected that he shall use his own expert knowledge rather than receive evidence on them in the same way as a Court of Law. *Mediterranean and Eastern Export Co., Ltd., vs. Fortress Fabrics (Manchester) Ltd.*, (1948) 2 All E. R. 186. The objections that the Commissioner did not hear or record evidence and that he did not send to the Court the material on which he based his conclusions do not lie in a case such as the one before us.

Where the decision of a person is by agreement of parties made final and conclusive it is not open to them to question that decision so long as the person has acted fairly within the terms of the authority granted to him.

This appeal is, therefore, dismissed with costs.

Appeal dismissed.

NAGALINGAM, J.

I agree.

Present : BASNAYAKE, J.

MAMUHEWA vs. RUWANPATIRANA

S. C. 176—*C. R. Matara* 2440
Argued on : 30th September, 1948.
Decided on : 17th December, 1948.

Rent Restriction Ordinance No. 60 of 1942—Section 8 (c)—Premises reasonably required by landlord for the purposes of his business.—Landlord not engaged in any trade or business—Is he entitled to the premises—

Held : That a person, who has no trade or business *in esse* at the time of the institution of his action, is not entitled to claim any premises of which he is landlord, on the ground that they are reasonably required for the purposes of his trade or business.

Christie Seneviratne, for the appellant.
M. H. A Azeez, for the respondent.

BASNAYAKE, J.

The plaintiff-appellant (hereinafter referred to as the plaintiff) is since 20th October 1947 the owner of premises bearing assessment No. 1708 in Chetty Street, Weligama. The defendant has been the tenant of those premises for nearly 13 years. When he first entered on the tenancy the plaintiff was only a co-owner with his brothers and sisters. Some time prior to the institution of this action the plaintiff acquired their rights and became sole owner.

The plaintiff seeks to eject the defendant from the premises in question on the ground that he requires them to conduct a business of his own. The defendant resists the action on the ground that they are not reasonably required by the plaintiff for "his business" as at present he has no business. He also states that he cannot obtain suitable alternative accommodation.

The learned Commissioner has dismissed the plaintiff's action, holding that the premises are not reasonably required for the business of the plaintiff and that no suitable alternative accommodation is available to the defendant.

It is clear from the evidence that the plaintiff was not, either on the date on which he instituted this action or at the time at the trial, engaged in any trade or business. Two years prior to the date on which he gave evidence he had a cafe at a place called Pelena outside the Weligama town limits, which he managed for about six months. He was never a baker, and now he wants the premises occupied by the defendant to run a bakery.

I do not think that under section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, a person who has no trade or business *in esse* at the time of the institution of his action is entitled to claim any premises of which he is landlord on the ground that they are reasonably required for the purposes of his trade or business. The words "for the purposes of his trade, business, profession, vocation or employment" to my mind suggest an existing trade, business, etc. A business or trade *in posse* cannot in my view be properly described as "his business". The same may be said of profession, vocation or employment.

The plaintiff is, therefore, not entitled to succeed. The appeal is dismissed with costs.

Appeal dismissed.

Present : CANEKERATNE, J. & DIAS, J.

SILVA vs. KAVANIHAMY

S. C. No. 416—*D. C. Matara No.* 15477.

Argued on : 6th and 7th September, 1948.

Decided on : 23rd September, 1948.

Civil Procedure Code, Section 347—*Failure to serve notice under—Is sale in execution of decree null and void.*

Held : (1) That the provision as to service of notice under section 347 of the Civil Procedure Code is merely directory.

(2) That the Court ought not to interfere with the rights of a purchaser at an execution sale merely on the ground that such notice was not served. The party contesting the rights of such purchaser must prove that the judgment-debtor was prejudiced by the omission.

Followed :—*Perichchiappa Chetty vs. Jacolyn*, 3 Ceylon Law Reports 91.
Nanayakkara vs. Sulaiman, 28 N. L. R. 314.

Disapproved :—*Fernando vs. Thambiraja*, 46 N. L. R. 81.

Cases referred to :—*Ragunath Das vs. Sundar Das Khetri* A. I. R. (1914) Cal. P. C. 129.
Latiff vs. Seneviratne(1938) 40 N. L. R. 141 at p. 142.
Wijewardene vs. Raymond (1937) 39 N. L. R. 179 at p. 181.

Per CANEKERATNE, J.—The view taken in these two cases (of *Perichchiappa Chetty vs. Jacolyn* 3 Ceylon Law Reports 91 and of *Nanayakara vs. Sulaiman* (1926) 28 N. L. R. 314) that a Court ought not to interfere where the party had shown no prejudice appears very reasonable. This view had stood unchallenged for a period of a little over fifty years. It is especially important for the proper and expeditious conduct of judicial business that the rules of procedure should be stable. Hence it is almost an invariable rule to adhere to former decisions settling the rules of procedure, when they are generally known and acted on, and when they have been established for such a length of time as to make a change injudicious, even though it may have become apparent that they were wrongly decided, or although the Court would have reached a different conclusion if the case were before it for the first time.

N. K. Choksy, K.C., with *E. B. Wikremenayake, K.C.*, for the plaintiffs-appellants.

N. E. Weerasooriya, K.C., with *M. H A Aziz* and *W. D. Gunesekere*, for the 5th defendant-respondent.

CANEKERATNE, J.

This is an appeal by the plaintiffs from a judgment dismissing their action for a declaration of title to lot B of the land called Manamala Sayakkarage Jambisse Padinchiwasitiyawatta and for certain other relief.

The 4th defendant Eramanis was at one time entitled to an undivided one fourth share of this land. He was indebted to one Babahamy, who sued him and obtained judgment in action No. 4883 of the same Court. On September 17, 1928, Eramanis made a gift of the property to his three children, the 1st, 2nd and 3rd defendants and when this share was seized in execution of the judgment on January 15, 1931, a claim was unsuccessfully preferred on their behalf. The children thereafter assisted by their mother, the 5th defendant, instituted an action against the judgment creditor under section 247 of Cap. 86 of the Ceylon Legislative Enactments to obtain a declaration that the share was not liable to be sold in execution of the judgment. On the date of trial May 5, 1933, a settlement was arrived at between the parties to this action No. 7016 and the parties in action No. 4883, and the plaintiffs moved to withdraw their action. The Judge in sanctioning the withdrawal said " the plaintiffs are minors but this settlement seems to be to their advantage and I approve it ". In action No. 4883 an order was made on the same day that the defendant was to pay the sum due to the plaintiff by instalments of Rs. 20 per month, " in failure of instalment writ to issue and land to be sold ". On May 12, 1933, an action for partitioning the land was instituted and by the final decree, dated October 5, 1937, the 1st, 2nd and 3rd defendants were declared the owners of lot B in lieu of the undivided interests transferred by the father. For non-payment of costs due, probably in the partition case, lot B was sold on August 1, 1938, and purchased by one Fais who obtained conveyance 5D2, dated November 11, 1938 ; Fais on July 30, 1940, by deed 5D4, sold the lot to the 5th defendant, the mother of the 1st, 2nd and 3rd defendants. The debtor by about August 20, 1934, had paid twelve instalments, and obtained four months' time on March 28, 1935, to pay some

other instalments; on September 17, 1935, he obtained an order to pay by instalments of Rs. 6 a month "till one month after final decree is entered in the partition case", in pursuance of this order he paid one instalment on October 17, 1935. The judgment creditor having died, an application for substitution was made thereafter, and after notice to the debtor, certain persons, one of whom was P. H. W. Edwin Singho, were substituted on January 13, 1937. On November 8, 1937, an application for execution was made to the Court by the substituted plaintiffs. It is in the form specified in the Code, Form 42 in the Schedule and is marked 5D5, the names of the plaintiffs and of the defendant are given in the application and the amounts paid are shown. The prayer is that the writ lying in the above case may be executed and be issued for execution to recover Rs. 691.83½ with further interest. It was allowed by the Judge. Lot B was seized on November 9, 1937, and sold on November 30, 1937, and the purchaser obtained Fiscal's conveyance P3 dated March 15, 1938. The 5th defendant appears to have had notice of this sale, for on June 2, 1938, she sent a petition to the Court praying that she and her children be allowed to stay in the premises.

The plaintiff's title to lot B is prior in point of date both of sale and conveyance and his right ought to prevail unless the respondents can show that the judgment creditor had no right to sell lot B or that the seizure and sale were void transactions. The children of the judgment debtor brought an action to establish their right to the land claimed by them. The order passed at the claim inquiry is made conclusive subject to the result of the action (section 247 of the Code). The action was dismissed and thus the land became liable to be sold in execution of the writ. The learned Judge has held that the judgment creditor was entitled to seize and sell lot B and there is evidence to support this finding.

A compulsory sale, *i.e.*, sale forced upon an unwilling vendor, and being one ordered by the Court, conducted by its officer and subject to its approval before being treated as final, may be attacked because the order on which it is founded is void or voidable. Void sales are sales which, as against the original purchaser, may without any proceeding to set them aside, be treated as not transferring the title of the property assumed to be sold. A voidable sale is one that is valid until it is set aside, there is an irregularity or some defect but the debtor may make an application or take steps to have the sale annulled. A judgment creditor can obtain by execution only such property as belongs to the debtor. Generally execution can be levied without leave but in certain cases leave must be obtained, the most important instances being where a period of one year has elapsed since the judgment or order, or any change has taken place by death or otherwise of the parties entitled or liable to execution.

Section 347 of the Code, omitting immaterial words, is as follows:—

> "In cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the Court shall cause the petition to be served on the judgment debtor, and shall proceed thereon as if he were originally named respondent therein:
>
> "Provided that.....for execution".

It is contended that the provisions of the section as regards service on the judgment debtor are imperative.

A statutory enactment passed for the purpose of enabling something to be done and prescribing the way in which it is to be done, may be either what is called an absolute enactment, or a directory enactment. If an enactment is merely directory it is immaterial, so far as relates to the validity of the thing to be done, whether the provisions of the statute are accurately followed or not. As Sedgwick says—Strict compliance with all the minute details which modern statutes contain is impossible, owing to the practical inconvenience likely to result from it, and consequently sagacious and practical men who desire to free the law from the reproach of harshness or absurdity are tempted not to enforce strictly all provisions contained in statutes, but to treat them as merely directory. Sedgwick—Statutory and Constitutional Law Quoted on p. 231 of Craies, Statute Law. No universal rule can be laid down as to whether mandatory enactment shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed. One must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act. Craies—Statute Law (3rd Ed.), 230, 231. The presence of the word "shall" is not decisive, it is a circumstance to be taken into consideration with other facts. A notice under this section stands upon a different footing from a summons or other notice which a party is bound to serve and it is the Court's

duty to issue the notice. Sections 225, 347, Cap. 86, C. L. E. The provision as to service of notice seems to me to be merely directory. It does far less harm to allow a sale held as this one was, with the opportunities there would be to pay the sum due on the judgment or to complain of the irregularity, to stand good, than to hold the proceedings null and void : so to hold would not of course, prevent the Court's setting aside the sale in cases where there was reason to think that prejudice had been caused to the debtor. The non-issue of a notice to the judgment debtor is a material irregularity in proceedings which are anterior to the publishing or conduct of the sale.

It was contended by Counsel for the respondent that the omission to give the notice was by itself sufficient to render the sale null and void. He referred to *Ragunath Das vs. Sundar Das Khetri* A. I. R. (1914) Cal. P. C. 129 and *Fernando vs. Thambiraja.* (1945) 46 N. L. R. 81. Counsel for the appellants contended that the Indian cases were decisions under the second part of section 248 of the old Indian Code of Civil Procedure (under part " b " of Order 21, rule 22 of the present Code), and that they are not applicable to a question arising under section 347 of our Code. He pointed out that section 341 of our Code makes provision for the death of the judgment debtor, the corresponding section of the old Indian Code being section 234, of the new Code section 50 and that section 248 of the old Indian Code makes provision for two cases, a and b. He referred to the case of *Nanayakara vs. Sulaiman* (1926) 28 N. L. R. 314 as a direct decision on section 347, and also to the cases of *Latiff vs. Seneviratne* (1938) 40 N. L. R. 141 at p. 142 and *Wijewardene vs. Raymond.* (1937) 39 N. L. R. 179 at p. 181. He referred to the facts in *Fernando vs. Thambiraja* (1945) 46 N. L. R. 81 and contended that in deciding the case the Court had failed to take notice of the fact that two of the Indian cases referred to therein (*G. C. Chatterjee vs. G. Dasi* and *Ragunath Das vs. Sundar Das Khetri*) were decisions on part " b " of the Indian section. The cases quoted by him, he said, have not been quoted at the argument of *Fernando vs. Thambiraja* (1945 46 N. L. R. 81 and that the latter decision does not bind this Court.

In Ragunath's case, on January 7, 1904, a mortgagee from the lessees obtained a decree against them. On June 22, 1904, the lessors obtained decree in the suit filed by them against the lessees and on July 13, 1904, they obtained thereunder an attachment against the colliery. On September 3, 1904, the lessees filed in the High Court their schedule in insolvency giving a list of their creditors under the Insolvency Act 1848 and upon that date an order vesting the property in question in the official assignee was made. On September 10, 1904, the Judge in the execution proceedings stayed the sale therein directed until further orders. A notice was thereafter served on the official assignee but it was not a notice about substitution and he did not appear. Thereafter they obtained an order substituting the official assignee in the place of the judgment debtors—but this was not an order binding on them. The property was sold on March 6, 1905, and bought by the lessors ; it was confirmed on April 18, 1905, and a certificate dated April 25, 1905, was issued to the lessors. In the course of the judgment, Lord Parker said—" The judgment debtors had no longer " (on and after September 8, 1904) " any interest which could be sold. As laid down in *G. C. Chatterjee vs. G. Dasi* (1892) 20 C. 370, 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 ". Here a change had taken place, it was very similar to a change by death, the debtor having become insolvent the creditor could take no proceedings against him : execution could not go as against the colliery because it no longer belonged to the debtor. In the present case there was a valid decree against the judgment debtor, he was subject to the jurisdiction of the Court. The Court ordering execution is the same Court that passed the decree not as sometimes happens in India a different Court. The property was seized in execution of the writ against the defendant in 1930 and there is no evidence to show that this seizure was withdrawn or had lapsed. The Court had jurisdiction as regards the property that was sold in execution in this case. Mr. Weerasooriya could not produce any decision of the Privy Council on the provisions of the Indian Code corresponding to our section 347 or one showing that the seizure was under a void order, but he contended that there are decisions of Indian Courts on this point and referred us to a passage in one of the Commentaries on the Indian Code. For reasons which will be given hereafter I have not thought it necessary to discuss the view in this Commentary.

In the case of *Perichchiappa Chetty vs. Jacolyn*, 3 Ceylon Law Reports 91 to which reference was made by my Brother, the judgment creditor made an application for execution of the decree after a year had elapsed and writ was issued

without notice to the judgment debtor; the application made subsequently by the defendant to recall the writ was refused. Lawrie, J. who delivered the judgment in appeal said—"it is proved that the debtor failed to pay the instalment due.....The issue of writ without notice to him was irregular but it was an irregularity which really did him no harm....." Withers, J. agreed. In *Nanayakara vs. Sulaiman*, (1926) 28 N. L. R. 314 Dalton, J. came to the comclusion that the objection of the petition not being served on the judgment debtor was a technical one: he declined to interfere as no injustice whatever had been done to the appellant. In *Fernando vs. Thambiraja*, (1945) 46 N. L. R. 81 the defendant made an application to have a sale held by the Fiscal set aside; writ of execution had been allowed on an application made under section 347 of the Code about eighteen months after the decree without the petition being served on the judgment debtor. The Court undoubtedly had the right to set aside the sale, as there was a material irregularity but in giving judgment the learned Judge said that the sale in question was void and of no effect; the dicta about the effect of section 347 were really not necessary for the decision of the appeal. It is probable that if there was as full and clear an argument with reference to the previous cases as we have had, the learned Judge may have modified some of the dicta contained in the judgment. The view taken in these two cases (of *Perichchiappa Chetty vs. Jacolyn* 3 Ceylon Law Reports 91 and of *Nanayakara vs. Sulaiman*) (1926) 28 N. L. R. 314 that a Court ought not to interfere where the party had shown no prejudice appears very reasonable. This view had stood unchallenged for a period of a little over fifty years. It is especially important for the proper and expeditious conduct of judicial business that the rules of procedure should be stable. Hence it is almost an invariable rule to adhere to former decisions settling the rules of procedure, when they are generally known and acted on, and when they have been established for such a length of time as to make a change injudicious, even though it may have become apparent that they were wrongly decided, or although the Court would have reached a different conclusion if the case were before it for the first time. A mere matter of practice, once settled by the decision of a Court of appeal and unchallenged for years, ought not to be disturbed except in case of "glaring and dangerous error". The decisions of Indian Courts are not binding on our Courts, though they are useful as showing the view of the law held by a qualified body of men. There is a rule of practice in Ceylon on this matter and further our section differs to some extent from the Indian section.

I set aside the judgment of the District Court and declare the plaintiffs entitled to the land as prayed for. The defendants will pay the plaintiffs the costs of the trial in the District Court and the costs of appeal.

Set aside.

DIAS, J.

I agree.

Present: BASNAYAKE, J.

PEIRIS vs. RATNABARTHI ARATCHY

S. C. 255—*C. R. Panadure* 11203

Argued on: 19th November, 1948.

Decided on: 20th December, 1948.

Rent Restriction Ordinance, No. 60 *of* 1942—*Application of to contracts of tenancy made before the Ordinance came into operation.*

Held: That after the Rent Restriction Ordinance is applied to any area, the rent for any premises in that area is the rent payable under the Ordinance, even though a higher rent may have been agreed upon between the parties before the Ordinance came into operation in that area.

Cases referred to: *Wijemanne and Co. Ltd. vs. Fernando* (1946) 47 N. L. R. 62.
Edmund vs. Jayewardene, (1945) 46 N. L. R. 306.
De Silva vs. Siriwardene, (1946) 47 N. L. R. 487.

E. B. Wikramanayake, K.C., with *H. Wanigatunga* and *B. E. de Silva*, for the appellant.

M. D. H. Jayawardena, for the respondent.

BASNAYAKE, J.

The defendant-appellant (hereinafter referred to as the defendant) is the tenant of the plaintiff-respondent (hereinafter referred to as the plaintiff). By deed No. 8153 dated 25th May 1942, the plaintiff purchased the premises from one Madappulli Arachchige Mercy Harriet Fernando, whose tenant the defendant was at the time. After the plaintiff became the owner, and before the Rent Restriction Ordinance, No. 60 of 1942 (hereinafter referred to as the Ordinance) came into operation in the area where the house was, a rental of Rs. 12 per mensem was agreed on. That rental is in excess of the standard rent, which is Rs. 3 per mensem.

The learned Commissioner holds that, as the agreement to pay Rs. 12 per mensem was made on a date prior to that on which the Ordinance came into operation in that area, the plaintiff is entitled to continue to receive rent at the agreed rate. He regards the Ordinance as applying only to contracts of tenancy made after the Ordinance has come into operation in any area.

I am unable to agree with the learned Commissioner. I think it is clear from sections 3 (1) and 3 (1A) of the Ordinance* that regardless of the time at which the tenancy commenced it is unlawful for any land- lord to demand, receive, or recover, and for any tenant to pay, or offer to pay, in respect of a period commencing on or after the day on which the Ordinance comes into operation in any area, any rent in excess of the rent which may lawfully be received or paid under the Ordinance.

A retrospective statute is a statute that has effect from a date anterior to that on which it becomes law. If, for instance, section 3 (1) (*a*) of the Ordinance had the words " in respect of any period commencing on or after 3rd September 1939 ", it would be retrospective and not prospective as at present. The fact that the Ordinance interferes with the future operation of existing contracts does not make it retrospective. Where a statute affects an existing contract, the contract must yield to the statute.

In the case of *Wijemanne and Co., Ltd., vs. Fernando* (1946) 47 N. L. R. 62 † the argument that the plaintiff now puts forward was advanced in respect of a notarially attested lease but was rejected by this Court. It does not appear that case was cited to the learned Commissioner.

The other cases *Edmund vs. Jayewardene*, (1945) 46 N. L. R. 306. *De Silva vs. Siriwardene*, (1946) 47 N. L R 487 cited by the learned counsel for the plaintiff have no application to the instant case, and I do not propose to discuss them

I uphold the defendant's contention that the Ordinance applies to the tenancy in question. He is entitled to a refund of all payments in excess of the rent that may lawfully be recovered under the Ordinance The case will go back for the determination of the respective rights of parties on that footing The defendant will be entitled to the benefit of the learned Commissioner's finding in his favour in regard to the repairs effected by him

The appeal is allowed with costs

Appeal allowed.

* (Sections 3 (1) and 3 (1A) of the Rent Restriction Ordinance, No. 60 of 1942 :)

† 32 C. L. W. 28 28 (Ed.)

Present : BASNAYAKE, J.

HASSENALLY vs. JAYARATNE

S. C. 133—*C. R. Colombo* 2552.

Argued on : 28th September, 1948.
Decided on : 21st December, 1948.

Rent Restriction Ordinance—Section 8 (*c*)—*Premises owned by joint landlords—Notice to quit given by one of them—Premises required for partnership business of which landlords as well as others were partners.*

The premises in question belonged to four persons jointly. Notice on the tenant to quit was given by one of the landlords. The premises were required for the purposes of a business carried on in partnership by the landlords and some others.

Held : (1) That the notice to quit was bad, as, in the case of joint landlords, notice must be given by each of them.

(2) That the trade or business contemplated in section 8 (*c*) of the Ordinance is the trade or business carried on by the landlords alone, and not a business of which they are partners along with others.

Cases referred to : *Parker and Parker vs. Knox*, 1947 (2) S. A. L. R. 1190.
Decharms vs. Horwood, 10 Bing. 526 ; 4 M. & Scot 400.
Baker vs. Lewis, (1946) 2 All E. R. 592 at 595 (a case of two sisters).
Owen vs. Overy, decided on 25-10-48, unreported (a case of husband and wife).
McIntyre vs. Hardcastle (1948) 1 All E. R. 696 at 699.

F. A. Hayley, K.C., with *H. A. Koattegoda*, for the appellant.
J. R. V. Ferdinands with *Victor Joseph*, for the respondent.

BASNAYAKE, J.

The plaintiff-appellant (hereinafter referred to as the plaintiff), one Ebramjee Hassanally, is a merchant carrying on, in partnership with his four brothers and three sons, a wholesale and retail business in imported goods such as glass-ware, stationery, cutlery, etc., at No. 195, Prince Street, Colombo, under the name of Hassanally & Sons. The defendant-respondent (hereinafter referred to as the defendant) is also a merchant carrying on business at No. 85, Fourth Cross Street, and No. 234, Gas Works Street, Colombo. The plaintiff and his three sons own No. 85, Fourth Cross Street and No. 195, Prince Street. The defendant as stated in his answer occupies only a portion of No. 85 in extent 12′ × 16′. That portion, the plaintiff asserts, is required for the expansion of the partnership business of Hassanally & Sons. The plaintiff's sons in addition to being partners in the firm of Hassanally & Sons, own separate businesses. His son Abdul Hussein has a separate business at Kandy under the name of Abdul Hussein Ebrahamjee, and another business at No. 10 Dam Street, and is also a director of the limited liability business in radio and electrical goods carried on by his two brothers at Third Cross Street, Colombo.

The following notice dated 30th April 1946, terminating his tenancy, was sent by proctor Kanagarajah :—

> " Under instructions from Mr. Ebramjee Hassanally of 4th Cross Street, Colombo, I hereby give you notice to quit the premises No. 85 Fourth Cross Street, Colombo now occupied by you as his monthly tenant and to deliver possession of same to my client on the 31st day of May 1946 as he requires the premises for his own use and that of his sons."
>
> " In the event of your failure to do so an action will be instituted to eject you from the said premises with damages at Rs. 35 per month from the 1st day of June 1946 until my client is placed in possession."

Although the notice purports to be on the instructions of the plaintiff, his son Abdul Hussein admits that it was he who instructed the proctor. As the defendant failed to vacate the premises these proceedings were instituted against him by plaint dated 3rd July 1946. The reason for seeking to have the defendant ejected therefrom is thus stated therein :—

> " On the 30th day of April 1946 the plaintiff gave the defendant due notice in writing requiring him to quit and deliver possession of the said property and premises on or before the 31st day of May 1946, as the Plaintiff required the premises for his own use and of his sons."

In the amended plaint dated 9th October 1946 it is stated that the premises are required for the plaintiff's own use and of his sons in connection with their business or trade.

It is significant that although the plaintiff appears to have been present in Court on the day of trial, he did not give evidence, but remained in the background and sought to prove his case through his son. There is therefore no sworn testimony from the plaintiff himself that he requires the premises. The son says : " On the 30th of April 1946 we gave the defendant notice to quit at the end of May 1946. The notice was handed over at Gas Works Street by my younger brother. .....Before notice to quit was given to the defendant I had spoken to the defendant and told him that we wanted these premises for our own business."

The learned Commissioner of Requests dismissed the plaintiff's action on the ground that they were not reasonably required by him for his business and that due notice was not given by him to the defendant. I am not satisfied that the learned Commissioner is wrong. The premises are reqiured for the partnership business of the plaintiff, his brothers and his sons. The plaintiff is neither the sole owner of the premises nor the sole owner of the business for the purpose of which he alleges he requires them. In the circumstances, the notice is bad, for in the case of joint landlords notice of the termination of a tenancy must be given by each of them. *Parker and Parker vs. Knox*, 1947 (2) S. A. L. R. 1190. As there is no evidence that the plaintiff let the premises as sole landlord, he is not entitled to maintain this action as at present constituted,

for it is not open to one of four joint landlords to sue their tenant in ejectment.(*Decharms vs. Horwood*, 10 Bing. 526 ; 4 M. & Scot 400). (Tiffany Landlord & Tenant—Vol. 2, pp. 1831). It appears from the evidence that the sons also regarded themselves as landlords. Receipt D1 is signed by one of the plaintiff's sons. D2, another receipt, is signed by his son Abdul Hussein, while D3, the receipt for May 1944, is stamped with the seal of the partnership, Ebramjee Hassanally, and signed by his youngest son.

Section 8(*c*) of the Rent Restriction Ordinance permits the institution of an action for ejectment of a tenant of any premises without the authorisation of the Board in a case where the premises are, in the opinion of the Court, reasonably required for the purposes of the landlord's trade, business, etc Where a house is owned by more persons than one the expression landlord in that section should I think be read as including the plural (Section 2 (x) of the Interpretation Ordinance) Although, so far as I am aware, the question has not been decided by this Court, there are decisions of the English Courts (*Baker vs. Lewis*, (1946) 2 All E. R. 592 at 595 (a case of two sisters). (*Owen vs. Overy*, decided on 25. 10. 46, unreported, (a case of a husband and wife), which hold that in an Act containing the words(Schedule 1, paragraph (*h*), Rent and Mortgage Interest Restrictions (Amendment) Act,1933 Section 3(1), " the dwelling-house is reasonably required by the landlord.....for occupation as a residence for (*a*) himself ", the word " landlord " can be read as including more than one person where there is more than one legally entitled to be landlord. But as Asquith L.J. observed in *Baker vs. Lewis*, (1946) 2 All E. R. 592.

> " Where there are two or more joint beneficial owners, (i), (ii), and (iii) of (*h*) should, I think, be read as follows : in (i) for " himself " read " thenselves ", in (ii) for " any son or daughter of his " read " any son or daughter of theirs ", and in (iii) read " their father or mother ". Where, read in this way, neither (i), (ii), nor (iii) has any application, such beneficial owners would fail, for instance, if they proceed under (ii) and are not a married couple with a child, or if they proceed under (iii) and have not got a parent in common ; but they would fail in that case not because there are several of them or because they are not a " landlord " within the opening words of the section, but because they could not bring themselves within the language of (i), (ii), or (iii), construed in the way I suggest."

In the case of *McIntyre vs. Hardcastle*, (1948)1 All E. R. 696 at 699, Tucker L. J. in adopting with approval the view of Asquith L. J. says :

> " I feel convinced that the interpretation put on it by Asquith L.J. was the correct one and I do not desire to attempt to put into better language that which he so clearly expressed in the judgment which I have just read."

In the instant case, as I said before, the premises are required for the business of the partnership of which not only those who are landlords are partners but also others. In such a case I do not think it can be said that the premises are required for the purposes of the trade or business of the landlords. The trade or business contemplated in section 8(*c*) of the Ordinance is in my view the trade or business carried on by the landlords alone, and not a business of which they are partners along with others.

For the above reason the appeal is dismissed with costs

Appeal dismissed

Present : BASNAYAKE, J.

HENDRICK HAMY AND ANOTHER vs. INSPECTOR OF POLICE, KANDANA

S. C. 1172-73—*M. C. Gampaha* 44759

Argued on : 8th November, 1948.

Decided on : 21st December, 1948.

Criminal Procedure Code, sections 152 and 425—*Magistrate continuing proceedings initiated before his predecessor without making fresh determination under section* 152 (3)—*Regularity.*

On the date of trial, the Magistrate assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code, charged the accused, recorded their statements under section 188, and postponed the trial. The Magistrate having been transferred, his successor continued the proceedings, convicted the accused and passed sentence.

Held : (1) That when the accused were brought before the Magistrate, accused of an offence, which he had jurisdiction to inquire into, he should have acted in accordance with section 152 (1) or section 152 (3), and as he took neither course, the proceedings were not in accordance with the provisions of the Code.

(2) That the Magistrate's opinion that the case is one that may properly be tried summarily is a condition precedent to the assumption of jurisdiction under section 152 (3) and that as the successor proceeded to try the case without giving his own mind to the propriety of trying the case summarily, there was no jurisdiction.

(3) That as the Magistrate acted without jurisdiction, section 425 was of no avail.

Cases referred to : 1 C. W. R. 6.
Punchi Naide vs. Raltramhamy, Leembruggen's Reports 95.
Peneris Appu vs. Babun, 6 C. W. R. 319.
Silva vs. Silva, (1904) 7 N. L. R. 182.
Gunawardena vs. The King, 38 C. L. W. 63.

M. M. Kumarakulasingham, for the appellants.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The accused-appellants (hereinafter referred to as the appellants) were convicted of offences punishable under sections 443, 369, and 314 of the Penal Code and each of them was sentenced to a term of one year's rigorous imprisonment on each count, the sentences to run concurrently.

The proceedings which ended with the conviction of the appellants on 3rd September 1948 commenced on 3rd May 1948. A report (hereinafter referred to as the report) under section 148 (1) (*b*) of the Criminal Procedure Code (hereinafter referred to as the Code) bearing that date is in the record. It appears from the first journal entry which bears the same date as the report that the appellants were present on that day on remand. The following remarks in the handwriting of two different persons appear on the record under the same date. " Police files plaint under sections 443, 369, and 314. Cite pros. w.s.s. (1) and (2) for 17-5-48. Bail accused in 200/200 each." The trial commenced on 17th May 1948. On that day after the examination of one B. W. Pablis Naide, a person whose name does not appear on the list of witnesses in the report, the learned Magistrate assumed jurisdiction as District Judge under section 152 (3) of the Code. The reasons given by the learned Magistrate for his opinion that the case may properly be tried summarily are as follows :—

" 1. Facts appear to be simple.

2. Can be disposed of expeditiously."

After the charges had been read to the appellants under section 187 (3) of the Code and their statements had been recorded under section 188, the trial was postponed to 12th July 1948. By that date the Magistrate who originally assumed jurisdiction under section 152 (3) of the Code having been transferred, the successor after recording the evidence of the District Medical Officer again postponed the trial for 27th August 1948. On that day two witnesses, including the one who had been examined earlier, gave evidence for the prosecution, and the appellants gave evidence for the defence. Thereafter the learned Magistrate recorded a verdict of guilty and remanded the appellants, having under section 3 (1) of the Prevention of Crimes Ordinance caused their finger prints to be taken and forwarded to the Registrar of the Finger Prints Identification Office. On 3rd September 1948 he gave his reasons and passed sentence on the appellants.

The proceedings in the instant case are not in my view in accordance with the provisions of the Code. On 3rd May 1948, when the appellants appear to have been brought before the Magistrate in custody without process, accused of having committed an offence which he had jurisdiction to inquire into, he should have in accordance with section 152 (1) followed the procedure laid down in Chapter XVI of the Code, or if he was proceeding under section 152 (3) followed the procedure laid down in Chapter XVIII and held the examination directed by section 151 (2) of the Code. Without taking either course the learned Magistrate postponed the proceedings for another date. On that day he assumed jurisdiction under section 152 (3). He did so on grounds which I have already mentioned above.

The case has certainly not been disposed of expeditiously, for it was concluded exactly four months after it commenced. It is not clear how the learned Magistrate after hearing one witness, who was not even cross-examined on that day, formed the conclusion that the facts were simple. Learned counsel for the appellants has submitted that the Village Headman to whom the first complaint of the offence had been made, and one Gabo Naide who came up on hearing the cries of the witness B. W. Pablis Naide, have not been called. Of the six persons whose names are mentioned as witnesses in the report, only one besides the D. M. O., has given evidence. The others have not been examined, and learned counsel invites me to presume that their evidence,

if produced, would have been unfavourable to the prosecution. Having regard to the fact that a report under section 148 (1) (*b*) is made after an investigation under Chapter XII of the Code, it may fairly be assumed that those whose names appear in the list on the report are persons whom the officer making the report regards as material witnesses. When such witnesses are not called without any excuse or explanation, the Court is entitled to presume that they are unfavourable. In the learned Magistrate's order of 3rd May 1948 he singled out two of the witnesses whose names were on the report and ordered summons on them. The record does not indicate why he did so. Of the two on whom summons was ordered only one, Enga Nachchari, gave evidence. The other, P. Pablis Naide, was not called ; but instead of him one B. W. Pablis Naide gave evidence. These are certainly features of the case which are unsatisfactory, and learned counsel for the appellants has rightly complained of them.

There is also a very important departure from the provisions of the Code which I think affects this conviction. Mr. Alles, the Magistrate who formed the opinion that the offence is one that may properly be tried summarily, did not try the offence. After he had taken the steps prescribed by section 187 (3) and 188 of the Code, and before the trial, he appears to have been transferred. His successor, Mr. Senaratne, proceeded to try the appellants without himself giving his mind to the propriety of trying them under section 152 (3) and without indicating to the accused the fact that he was trying them in his capacity as District Judge. In fact there is no statement on record that Mr. Senaratne was also a District Judge at that date. There is nothing in the Courts Ordinance to indicate that every Magistrate is also a District Judge, nor is there any presumption to that effect. The record should contain a statement that the Magistrate is acting under section 152 (3), (1 C. W. R. 6), and that he is also a District Judge having jurisdiction to try the offence. *Punchi Naide vs. Raltramhamy*, Leembruggen's Reports 95. *Peneris Appu vs. Babun*, 6 C. W. R. 319. In view of the fact that a Magistrate acting under section 152 (3) has jurisdiction to impose any sentence which a District Court may impose, it is important that the accused should not be left in any doubt as to the capacity in which the Magistrate is acting. It has been held by this Court that the Magistrate's opinion that the case is one that may properly be tried summarily, is a condition precedent to his assumption of jurisdiction under section 152 (3). *Silva vs. Silva*, (1904) 7 N. L. R. 182. That being so, a Magistrate who succeeds another who has commenced proceedings under section 152 (3), must give his own mind to the propriety of trying the case summarily under that section and form his own opinion as to whether the case is one which he may properly try summarily as District Judge. Unless he does so, the condition precedent to the exercise of the Magistrate's jurisdiction as District Judge would be absent and without it he would have no jurisdiction. The opinion of a Magistrate is not binding on his successor, and it may well be that the successor may not share his predecessor's opinion. In the context the words "he may try the same summarily" to my mind indicate that the trial should be by the Magistrate who forms the opinion that the case should be tried summarily, and not by another who has not given his mind to the question.

Learned Crown Counsel has drawn my attention to the case of *Gunawardena vs. The King* 38 C. L. W. 63 where my brother Wijeyewardene has held that section 292 of the Code is sufficient authority for a Magistrate who is also a District Judge to continue proceedings commenced under section 152 (3) by his predecessor without himself giving his mind to the propriety of trying the offence summarily. I wish to say with the greatest respect, that I find myself unable to subscribe to that view. Section 292 permits a Magistrate who succeeds another to act on the evidence recorded by his predecessor, but I am unable to find therein any authority for a Magistrate to continue to exercise a special jurisdiction assumed by his predecessor in pursuance of an opinion his predecessor had formed. The successor may, by virtue of that section, peruse the evidence, if any, recorded by his predecessor with a view to forming his opinion ; but he must form his independent opinion.

In my view the learned Magistrate has acted without jurisdiction, and section 425 of the Code is therefore of no avail. That section applies to judgments passed by a Court of competent jurisdiction. The learned Magistrate having acted without jurisdiction, the judgment in the instant case cannot be said to be a judgment passed by a Court of competent jurisdiction.

I observe that the learned Magistrate has imposed a term of one year's rigorous imprisonment in respect of the offence punishable under section 314 of the Penal Code. That is an offence summarily triable by a Magistrate, and in imposing a sentence of one year's rigorous imprisonment in respect of that offence he has acted in disregard of the decisions of this Court which have

repeatedly laid down that a Magistrate acting under section 152 (3) is not entitled to impose in respect of an offence triable summarily by a Magistrate a punishment greater than that which a Magistrate may award *qua* Magistrate.

Judging by the appeals that have come up before me, there appears to be a tendency on the part of Magistrates who are also District Judges to use section 152 (3) for the purpose of trying summarily offences which should properly be tried by a District Court. Magistrates seem to lose sight of the fact that the rule to be adopted in the case of offences which appear to be not triable summarily is prescribed in section 152 (1). Section 152 (3) is an exception to that rule, and as an exception it must remain. It cannot be gainsaid that an accused who is tried under section 152 (2) is deprived of the advantage of a preliminary investigation, a consideration of his case by the Attorney General prior to indictment, and a subsequent trial at which he had the benefit of knowing beforehand the recorded depositions of the prosecution witnesses and the documents that will be in evidence against him. To my mind it is clear from section 152 that the Legislature did not intend that accused persons should be denied all those advantages save in exceptional cases, and that too for good reasons. If it is felt that the jurisdiction of Magistrate is too limited, the remedy seems to be an extension of that jurisdiction by the Legislature and not the usurpation of a higher jurisdiction. Having regard to the fact that they are all trained lawyers, I personally feel that the jurisdiction of Magistrates can safely be enlarged not only in regard to the kind of offences a Magistrate may try, but also in regard to the maximum punishment a Magistrate may impose. Such an extension will no doubt be in the public interest; but those are matters for the legislature.

For the above reasons I set aside the conviction of the appellants and send the case back for non-summary proceedings.

Conviction set aside and case sent back.

Present: LORD UTHWATT, LORD MORTON OF HENRYTON, LORD MACDERMOTT AND SIR JOHN BEAUMONT

M. G. PERERA vs. ANDREW VINCENT PEIRIS AND ANOTHER

PRIVY COUNCIL APPEAL No. 2 of 1947

FROM THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 13th October, 1948

Defamation—Publication in newspaper of Report of Commissioner appointed under statutory powers to inquire into allegations of bribery against members of the State Council—Observations in Report of Commissioner regarding manner in which plaintiff testified before him—Publication of full Report without comment—Lack of express malice—Justification—Public interest—Privilege—Basis of privilege in publication of reports of judicial and parliamentary proceedings—Divisibility of publication—Ordinance No. 25 of 1942, section 6 (1).

The report of the Commissioner appointed under statutory powers to inquire into allegations of the bribery of members of the State Council, contained the following passage:—

> "Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The Ceylon Daily News published a full report of the Commissioner without comment. The plaintiff brought an action for defamatory libel against the printer and owners of the Daily News. No issue as to express malice was set up. The respondents raised all defences open to them.

The District Judge decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. Accordingly he held that the publication was true in substance and in fact, but was not for the public benefit.

On appeal, the Supreme Court affirmed the decision, but held that the publication was privileged.

On appeal to the Privy Council—

Held : (1) That the publication of the Report was in the interests of the public of Ceylon and, therefore, its publication negatived *animus injuriandi*, which is an essential element of the Roman Dutch Law relating to defamation.

(2) That, therefore, the publication a s a whole was privileged.

(3) That the reference to the appellant's conduct as a witness is not divisible from the rest of the Report, because his conduct was a factor on which the Commissioner based his conclusions.

(4) That section 6 (1) of Ordinance No. 25 of 1942 prohibits the publication of both the name and evidence of any witness, and not of the name only.

Per Lord Uthwatt.—" In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary—viewed as isolated facts—but that it is in the public interest that all such proceedings should be fairly reported ".

Cases referred to :—*Macintosh vs. Dun* (1908) A. C. 390.
Stuart vs. Bell (1891) 2 Q. B. 341.
Rex vs. Wright 8 T. R. at p. 298.
Davison vs. Duncan 7 E. & B. at p. 231.
Wason vs. Walter L. R. 4 Q. B. 73.
Cox vs. Feeney, 4 F. and F. 13.

Lord Uthwatt

This is an appeal from the judgment of the Supreme Court of Ceylon affirming the dismissal by the District Court of Colombo of an action brought by the appellant Dr. M. G. Perera in which he claimed damages for defamatory libel from the respondents who are the printer and owners of a newspaper called " The Ceylon Daily News ". The libel complained of appeared in the issue of that paper of the 25th May, 1943, and consisted of an extract from the published report of a Commissioner who had been appointed under statutory powers to enquire into certain matters. The extract ran as follows :—

> " Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The respondents took all defences. They denied that the words were defamatory—a formal defence in the circumstances. The other defences were not formal. They pleaded justification in the sense that the statement was true and that its publication was for the public benefit. Fair comment was pleaded. Privilege was relied on upon two grounds, first, that the proceedings before the Commissioner were judicial proceedings and the extract was part of an accurate report of those proceedings, and second, that, apart from the supposed judicial nature of the proceedings, the circumstances were such that the publication in the newspaper of the Report was made on a privileged occasion. Neither the pleadings, the issues settled in the course of the proceedings, nor the conduct of the case at the trial, in any way limited the field of defence open to the respondents.

On the settlement of the issues in the action it was made clear that the appellant did not set up express malice with a view to destroying any qualified privilege that might exist.

The action arose in the following circumstances. It appears that in 1941 there were rumours in Ceylon that bribes had been offered to and accepted by members of the State Council. On the 13th August, 1941, the Governor, pursuant to a resolution passed by the State Council on the 15th May, 1941, set up a Commission of Inquiry under the Commissions of Inquiry Ordinance (No. 9 of 1872). Under the terms of the appointment Mr. de Silva, K.C., was appointed the Governor's Commissioner for the purpose of inquiring into and reporting upon the following questions :—

(*a*) whether gratifications by way of gift, loan, fee, reward, or otherwise, are or have been offered, promised, given or paid to members of the existing State Council, with the object or for the purpose of influencing their judgment or conduct in respect of any matter or transaction for which they, in their capacity as members of that Council or of any Executive or other Committee thereof, are, have been, may be, or may claim to be, concerned, whether as of right or otherwise : and

(*b*) whether such gratifications are or have been solicited, demanded, received or accepted by members of the existing State Council as a reward or recompense for any services rendered to any person or cause, or for any action taken for the advantage or disadvantage of any person or cause, or in consideration of any promise or agreement to render any such services or to take any such action, whether as of right or otherwise, in their capacity as members of that Council or of any Executive or other Committee thereof.

The instrument of appointment then contained the following direction by the Governor :—

> "And I hereby authorise and empower you to hold all such inquiries and make all such investigations into the aforesaid matters as may appear to you to be necessary ; and I do hereby require you to transmit to me a report thereon under your hand as early as possible."

To assist the Commissioner in this particular enquiry a further Ordinance (No. 25 of 1942) was passed which empowered the Commissioner to hear the evidence or any part of the evidence of any witness *in camera*. Sections 5, 6 (1) and (2) and 10 (*b*) of the Ordinance run thus :—

> "5. The Commissioner may, in his discretion, hear the evidence or any part of the evidence of any witness *in camera* and may, for such purpose, exclude the public and the press from the inquiry or any part thereof.
>
> 6.—(1) Where the evidence of any witness is heard *in camera*, the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.
>
> (2) A disclosure, made *bona fide* for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence *in camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1).
>
> 10. Nothing in this Ordinance shall—
>
> (*b*) prohibit or be deemed or construed to prohibit the publication or disclosure of the name or of the evidence or any part of the evidence of any witness who gives evidence at the inquiry, for the purpose of the prosecution of that witness for any offence under Chapter XI of the Penal Code."

The Commissioner duly held his enquiry, and on the 3rd April, 1943, the Commissioner made his report to the Governor. In light of the claim to privilege, the general nature of the Report and the circumstances in which it was produced are of importance. It appears from the Report that the Commissioner by public advertisement and otherwise made wide appeals to persons who were in possession of relevant information to place that information before him. Despite the immunity given to witnesses by the Ordinance, the public response was small and of the 124 witnesses examined only 12 were volunteers. All the evidence was taken *in camera*. There were made to the Commissioner allegations of gratification in respect of matters which came before open Council and in respect of matters which came before the Executive Committee. The chief items in respect of which complaints were made were :—

(1) appointments to various offices ;

(2) nominations to Municipal and Urban Councils and

(3) decisions on policy, the repercussions of which resulted in advantage or disadvantage to private parties.

The Commissioner states in his report (para 16) that suggestions were made against 19 Councillors. In some cases he states, the allegations were made upon slender material. He found that eight members, whom he was able to identify, had received gratifications. Among that number were three European members who had taken gratifications openly. He also came to the conclusion that there were in all probability four other members whom he had not been able to identify who received gratifications. In other cases he found room for strong suspicion. He stated that there was a widespread belief that the number of Councillors who received gratifications was much greater than the number he had found so to do. On consideration of the evidence, the reading of debates in the Council and articles in the Press he had no doubt that this belief was honestly held, but he thought that popular belief was exaggerated.

The Commissioner in the main body of the Report dealt with the broad results of his enquiry, reserving details to appendices. In each appendix he states the witnesses examined on the particular subject matter, makes his comment, summarises the evidence and gives his finding.

Among the matters investigated by the Commissioner was an affair which he called the "Arrack contract gratification Incident", and it is in connection with his treatment of this affair that the appellant appeared on the scene. The appellant, it should be stated, was, among other activities, engaged in distilling arrack. He complied with the Commissioner's request to attend, and his evidence was taken *in camera*. The arrack incident is dealt with by the Commissioner in para 18 of his Report and in Appendix C.

Para. 18 and Appendix C were as follows :—

> "18. *Arrack Contract gratification incident.*—There was evidence before me that in 1939 contractors to the Government for the supply of arrack decided to pay to the same four members a sum of about Rs. 2,000 for the purpose of having their contracts extended without competition from outside. There is evidence, which I believe, that money for this purpose was paid to one of the members, now dead, Mr. C. Batuwantudawe, but there is no evidence that it was paid by him to the others. I did not for this reason call upon the members now alive to answer the allegation as it cannot be held against them that, with regard to this particular incident, they actually received the money. This matter is more fully discussed and reasons for my view given in Appendix C.
>
> "APPENDIX C.
>
> **Allegation of Payment of Gratifications to Messrs. C. Batuwantudawe, E. W. Abeygunasekera, E. R. Tambimuttu, and H. A. Gunasekera for the purpose**

of securing their services in the Executive Committee of Home Affairs in the matter of the extension of a Government contract.

Witnesses examined.—Messrs. M. F. P. Gunaratne, D. E. Seneviratne, W. F. Wickremasinghe, M. G. Perera, C. M. Rodrigo, and A. J. Siebel.

Allegation —These witnesses gave evidence with regard to the alleged payment of gratifications to four Councillors, Messrs. C. Batuwantudawe, E. W. Abeygunasekera, E. R. Tambimuttu, and H. A. Gunasekera, for the purpose of securing their services in the Executive Committee of Home Affairs. Certain contracts held by distillers for the supply of arrack to Government were due to expire on 30th April, 1939. The allegation was that money was paid to the Councillors mentioned in order to secure their support to a proposal that the contracts should be extended without calling for tenders. The proposal itself was put forward by the Excise Commissioner for reasons which I need not go into. It was ultimately adopted by Government.

Finding.—My finding upon this matter is that without a doubt a sum of Rs. 2,000 was paid by the distillers to Mr. Batuwantudawe. The distillers earmarked this sum for payment to members of the Executive Committee. They believed that portions of the sum would find their way to the other Councillors mentioned. One distiller at least thought that the money would be paid direct to them. Others received the impression that it would be paid through Mr. Batuwantudawe. Mr. Batuwantudawe is now dead and there is no evidence that he distributed money among the others. I do not think that any direct payments were made to them.

Comment.—In 1939 there were eight distilling plants in Ceylon, the proprietors of which were supplying arrack to Government. These suppliers consulted each other in matters of common interest and were loosely associated with each other as a body without a formal set of rules or any of the other formalities adopted by Associations proper. They regarded Mr. D. E. Seneviratne, proprietor of the Diyalagoda Distillery, as Treasurer, and Mr. W. F. Wickremasinghe, proprietor of the Anvil Distillery, as Secretary. They collected money from time to time as occasion required for meeting various expenses.

Mr. Gunaratne, the owner of Sirilanda Distillery, Kalutara, stated to me that either Mr. Wickremasinghe or Mr. Seneviratne or both came to see him and asked him for a contribution towards a fund from which the four Councillors mentioned were to be paid. Mr. Gunaratne says that Messrs. Wickremasinghe and Seneviratne (either or both) mentioned the names of the four Councillors and that he paid Rs. 500. There is no doubt about this payment. The only question is what the conversation was. Messrs. Seneviratne and Wickremasinghe deny that they mentioned the four names in the explicit manner deposed to by Mr. Gunaratne. After carefully weighing up the evidence I feel that none of these witnesses is deliberately stating an untruth. Mr. Gunaratne says that he was told by Messrs. Wickremasinghe and Seneviratne that Mr. Batuwantudawe was the go-between between them and the other members. Mr. Seneviratne states that he paid Rs. 2,C00 to Mr. Batuwantudawe but that he paid no money to any of the other Councillors. It is common ground that there were informal conferences at which the distillers discussed various matters of importance to themselves. It appears that at these conferences the distillers sat in small groups for the purpose of informal discussion and that there was no meeting in the proper sense of that word. Mr. Seneviratne says that the names of the other Councillors were mentioned at these conferences as persons to whom Mr. Batuwantudawe would probably have to pay something. But he says that there was no definite arrangement with Mr. Batuwantudawe that they should be so paid. Mr. Wickremasinghe says that Mr. Seneviratne told him that Rs. 2,000 was paid to Mr. Batuwantudawe and that Mr. Seneviratne undertook to obtain the votes of the four Councillors mentioned through Mr. Batuwantudawe. He also states that at the time it was common talk that these four members took bribes. The clear impression which I have formed is that as a result of the general talk that these four members took bribes their names were mentioned at conferences and discussions, that the manner of approach to them, if agreed upon at all, was not agreed upon with any degree of precision but that the distillers believed that the money would reach them. I believe that Mr. Seneviratne is speaking the truth when he says he paid Rs. 2,000 to Mr. Batuwantudawe and that it is also true that neither he nor Mr. Wickremasinghe nor anyone else paid any money direct to the other Councillors.

Dr. M. G. Perera, who gave evidence, was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did.

Mr. C. M. Rodrigo, the other witness referrde to above, was a clerk of Mr. Gunaratne and

was able to speak only to the conferences and not to anything that took place at them.

Mr. Siebel was merely an officer of a bank producing certain cheques before me.

L. M. D. de Silva."

April 3, 1943.

The Governor having received the Report caused the Report to be printed as a Sessional Paper. The instructions given to the Government Printer were that it should not appear before the publication of a Government Gazette Extraordinary which was to contain a Bill to be introduced into the State Council connected with the Report. Those instructions were carried out, and simultaneously with the publication of the Report on the 19th May, 1943, there was published in the Gazette the text of a Bill enabling the State Council to expel any member on the ground of the acceptance of a pecuniary reward or other gratification in connection with the performance of his duties as a member.

Two hundred and twelve copies of the Report were published for circulation, 250 for sale to the public and 20 for the Commissioner. The 250 available to the public were quickly sold at the Public Record Office. Two hundred and twenty-five reprints were immediately asked for and they became available on the 24th May. They, too, it appears, were also quickly sold.

The practice in Ceylon is that Government Sessional Papers are issued free of charge to the Press. That practice was followed in the present case, and the Sessional Paper was sent to the Ceylon Daily News among other newspapers. In the office of the Ceylon Daily News the view was taken that the Report was a matter of public interest. Practically the whole of the Report was published. Only those portions were omitted which in the opinion of the Associate Editor were not of public interest or which had been sufficiently covered by other portions of the Report which were published. The Commissioner was quoted *verbatim*. Included in the matter published was the whole of para. 18 exactly as it appeared in the Report with an immaterial alteration in the heading, and the whole of Appendix C except the first and the last two paragraphs. Some immaterial cross headings were inserted and two sentences (neither affecting the appellant) were printed in bold type. The publication of the Report began on the 18th May, 1943, and ended on the 25th May, 1943, para. 18 appearing on the 20th May and Appendix C on the 25th May. The newspaper did not make any comments of its own.

The appellant forthwith instituted these proceedings.

At the trial there appears to have been some confusion on the issue of justification. Some observations by the appellant's Counsel as recorded in the Judge's notes rather support the view that he admitted the peccant statement to be true. No evidence was called directed to prove the truth of the statement. The District Judge, however, did not, in his judgment, rely on any admission of Counsel as to truth, and decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. He accordingly held that what the respondents published was true in substance and in fact, but he took the view that the publication by the respondents was not for the public benefit. In the Supreme Court, to which the appellant appealed, his Counsel did not query the finding of the District Judge that the words were true in substance and in fact and appears so far as the issue of justification is concerned to have dealt only with the question whether the publication was for the public benefit. The Supreme Court answered this question in the affirmative.

The Supreme Court were clearly entitled to determine the case on the footing as to the truth of the statement conceded by the appellant's Counsel at the hearing before them. But a determination of the matter at issue on the ground of justification is obviously not satisfactory, for the District Judge's reasons for arriving at a decision that truth was proved are plainly wrong, and the reasons for the concession made by the appellant's Counsel in the Supreme Court are not apparent. Their Lordships, having arrived at the conclusion that the respondents are entitled to succeed on other grounds, do not propose to deal further with the issue of justification. They will assume the statement as to the appellant's conduct as a witness not to accord with the fact. Fair comment does not therefore arise for consideration and the only question is whether the publication was made on a privileged occasion, the absence of express malice being conceded. On the question of privilege the District Judge took the view that any privilege which might attach to the publication of the Report in the newspaper did not extend to the matter published as regards the appellant, as it was foreign to the duty which the newspaper owed to the public. The Supreme Court held that this publication was privileged.

Their Lordships will now turn to consider whether this view is or is not correct.

In Roman Dutch Law *animus injuriandi* is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing *animus injuriandi* rests upon the defendant. The course of development of Roman Dutch Law in Ceylon has, put broadly, been to recognise as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman Dutch Law as matters relevant to negativing *animus injuriandi*. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions under the common law are indeed of the greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman Dutch Law. The "gladsome light of Roman jurisprudence" once shone on the common law: repayment to the successor of the Roman Law should not take the form of obscuring one of its leading principles.

Their Lordships' attention has not been drawn to any case under the Roman Dutch Law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an enquiry whether the proceedings before the Commissioner fell within one or other of these categories. Their Lordships do not propose to enter upon that enquiry. They prefer to relate their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather than to debate the question whether the case falls within some specific category.

The wide general principle was stated by their Lordships in *Macintosh vs. Dun* (1908) A.C. 390, to be the "common convenience and welfare of society" or "the general interest of society" and other statements to much the same effect are to be found in *Stuart vs. Bell* (1891) 2 Q.B. 341 and in earlier cases, mostof which will be found collected in Mr. Spencer Bower's valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary—viewed as isolated facts—but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to *Rex vs. Wright* 8 T.R. at p. 298 where the basis of the privilege is expressed to be "the general advantage to the country in having these proceedings made public", and to *Davison vs. Duncan* 7 E. & B. at p. 231 where the phrase used is "the balance of public benefit from publicity"; while in *Wason vs. Walter* L. R. 4 Q.B. 73 the privilege accorded to fair reports of parliamentary proceedings was put on the same basis as the privilege accorded to fair reports of judicial proceedings—the requirements of the public interest.

Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman Dutch Law as being in truth directed to serving that interest. *Animus injuriandi* is negatived.

On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the Report should be widely communicated to the public. The Report dealt with a grave matter affecting the public at large, viz., the integrity of members of the Executive Council of Ceylon, some of whom were found by the Commissioner improperly to have accepted gratifications. It contained the reasoned conclusions of a Commissioner who, acting under statutory authority, had held an enquiry and based his conclusions on evidence which he had searched for and sifted. It had, before publication in the newspaper, been presented to the Governor, printed as a sessional paper and made available to the public by the Governor contemporaneously with a Bill which was based on the Report and which was to be considered by the Executive Council. The due administration of the affairs of Ceylon required

that this Report in light of its origin, contents and relevence to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity.

As regards the newspaper the Report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish —that would in their Lordships' opinion be relevant only if malice were in issue. Their Lordships take the view that the respondents as respects publication stand in no better and no worse position than any other person or body in Ceylon. A newspaper as such has in the matter under consideration no special immunity. But it would be curious to hold that either the editor or the proprietor of the newspaper was disqualified by the nature of his activities from having the same interest in the public affairs of Ceylon as that proper to be possessed by the ordinary citizen. In their Lordships' view the proprietor and editor of the newspaper and the public had a common interest in the contents of the Report and in its wide dissemination. The subject matter created that common interest. To this it may, perhaps irrelevantly in law, be added that the ordinary member of the community of Ceylon would indeed conceive it to be part of the duty of a public newspaper in the circumstances to furnish at least a proper account of the substance of the Report.

Taking that view of the facts of the case, and applying the general principle their Lordships have stated, their Lordships are of the opinion that the immunity afforded by privilege attached to the publication by the respondents of this Report considered as a whole.

It remains to deal with two further matters. First, it was argued that assuming that the Report was published by the defendants on a privileged occasion the Report was divisible and that the statement relating to the appellant's conduct as a witness was not referable to any matter on which the privilege was founded. Malice, it will be recalled, was not alleged. Their Lordships cannot accept this contention. The main matter of public interest was the question of the extent to which members of the Executive Council had accepted bribes, and, linked up with that, the value which might properly be attributed to the Report as one which covered the whole ground. No just estimation of the general position as to bribery or as to the value of the Report could be formed without knowledge of the grounds on which the Commissioner stated he had acted and of the difficulties which the Commissioner stated he had encountered in coming to a conclusion, or in failing to come, on particular topics, to a definite conclusion. Their Lordships have recited the facts which bear on the lines on which the Report was framed. It is in their Lordships' view clear that the statement as to the appellant was germane and appropriate to the occasion and does not fall to be distinguished in any degree from the other contents of the Report. Their Lordships would add that a view corresponding to that entertained by their Lordships here was expressed by Cockburn, C.J., in *Cox vs. Feeney*, 4 F. and F. 13.

Second, it was argued that the publication of the matter complained of was illegal in that it constituted a breach of section 6 (1) of the Special Ordinance and that therefore a defence based on privilege must fail. In their Lordships' opinion the publication was not a breach of that section. On this point they agree with the view of the Supreme Court as expressed by the learned Chief Justice when he said :—

> " In my opinion publication is not prohibited of the name, but of ' the name and the evidence or any part of the evidence '. The name and the evidence or any part of the evidence has not been published."

It is true that section 6 (2) and section 10 (*b*) both say :—

> ".....of the name *or* of the evidence.....",

but this use of the disjunctive accords with the saving or qualifying nature of these provisions and in no way conflicts with the conjunctive form of the prohibition enacted by section 6 (1). Their Lordships can see nothing in the other terms of the Ordinance to justify any modification of the natural meaning of the words of that sub-section :—

> ".....the name *and* the evidence or any part of the evidence....."

On the contrary it may well be said that the context points away from a disjunctive construction for section 6 (1) clearly relates only to evidence which is heard *in camera* and if, as section 5 contemplates, but part of a witness's evidence was so heard, that construction would have the strange effect of forbidding the disclosure of the witness's name while allowing publication of part of his testimony.

In the circumstances their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Present : GRATIAEN, J.

T. B. TENNAKOON vs. DISSANAYAKA, A.S.P.

S. C. No. 1285/*P*—*M. C. Colombo South No.* 19010

Argued on : 3rd December, 1948
Decided on : 8th December, 1948

Ceylon Penal Code, section 158—*Abetment—Offer of bribe to public officer as motive or reward for doing an act not within his official power to perform—Does such offer amount to an offence under our law.*

Held : That a person, who offers a bribe to a public officer for doing something, which it is not within the power of the latter officially to achieve, cannot be found guilty of abetting an offence under section 158 of the Penal Code.

Per GRATIAEN, J.—"I am satisfied that the provisions of section 158 of the Code do not, in their present form, prohibit the receipt by a public officer of an illegal gratification as a motive or reward for doing an act which it is not within his official power to perform and which does not answer to the description of an "official act". This is certainly a most unsatisfactory state of affairs, and it is to be hoped that the law will soon be amended to meet the situation."

Cases referred to :—*Newstead vs. London Express Newspapers Ltd.* (1940) 1 K. B. 377.
De Zoysa vs. Suraweera (1941) 42 N. L. R. 357.
In re Pulipati Venkiah, A. I. R. (1924) Madras 851.
Venkatarama vs. Emperor A. I. R. (1929) Madras 756.
Afzalur Rahman vs. Emperor, A. I. R. (1943) F. C. 8 at page 23.
Perera vs. Kannangara (1939) 40 N. L. R. 465.
Hendrick Silva vs. Imbuldeniya (1948) 49 N. L. R. 159.

H. V. Perera, K.C., with *A. H. C. De Silva* and *C. E. Jayawardene*, for the accused-appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

This case illustrates the unsatisfactory state of the law in Ceylon relating to bribery. The provisions of the Penal Code are not always wide enough to deal with the iniquity of persons attempting by improper means to influence the actions and decisions of public servants. It is not surprising that this is so. Chapter 9 of the Code was adopted in this Country from the corresponding provisions of the Indian Penal Code of 1860, the final draft of which had been completed by its distinguished author in June 1837. At that time the law aimed principally at the taker and not at the giver of bribes, because "the giver was so often found to be a person struggling against oppression by the taker." (*Law Quarterly Review, Volume 60 at page 46*). For this reason it was not thought necessary to introduce a substantive section directly prohibiting persons from giving or offering bribes to public officials, such conduct being caught up, if possible, by the somewhat circuitous application of the law dealing with abetment. In spite of the mischievous changes which have taken place during the present era of enlightment, the law which was conceived over a century ago still stands unamended. That is of course a matter for the consideration of the Legislature. In the meantime the plain meaning of the language of an antiquated enactment cannot be given an extended judicial interpretation so as to cope with modern methods of corruption.

The facts of the present case are set out in the learned Magistrate's very helpful judgment. An uncertified teacher named H. M. Ratnayake *alias* Mudalihamy, in whom the appellant was interested, had through past failure almost abandoned hope of passing by honest means the Government examination in Sinhalese for Ceylon teachers. For this examination he had again presented himself as a candidate in November 1947. On 6th September 1948 the appellant approached Mr. Lorage, the 3rd Assistant Director of Education, and offered him a bribe of Rs. 50 to ensure that Ratnayake "obtained a pass either in Part 1 or Part 2 of the examination for 1947." As it turned out, this was an official act which it was not within Mr. Lorage's power to perform. Apart from the Government regulations which ruled out the possibility of any official action by Mr. Lorage in the matter, and apart from Mr. Lorage's unwillingness to act dishonestly, the true position was that Ratnayake *had already irrevocably failed* the examination in accordance with what had become a somewhat painful habit. The decision of the Examiners that he had failed had been announced in May 1948, four months before the offer of the bribe.

The appellant has certainly been guilty of most deplorable conduct. A person enjoying the status of a School Manager cannot reasonably expect the sympathy which is reserved for the "struggling victims of oppression," whom the draftsman of the Indian Penal Code had in mind.

The prosecution have been handicapped in this case by the absence of any simple provision of law which directly makes the offer of a bribe to a public officer a punishable offence. An attempt was therefore made to lead the appellant to his punishment through the side-entrance, so to speak, of the law dealing with abetment. The substance of the charge is that he "abetted the commission by Mr. Lorage of the offience of obtaining for himself a gratification other than legal remuneration.....as a motive or reward for showing favour to Ratnayake *in the exercise of his official functions.*" In other words, the case against the appellant is that he had abetted an act which, if it had been committed by Mr. Lorage, would have rendered Mr. Lorage liable to punishment for an offence under section 158 of the Penal Code. As Mr. Lorage had neither the intention nor the power to commit the offence which the appellant is alleged to have abetted, the strategy which the prosecution was compelled to employ might well appear to a layman to border on unreality. To the Advocate the situation presents may opportunities for the exercise of skill and ingenuity, and the Judge finds it difficulty at times to realise that he is not merely "supervising a game of forensic dialectics". (Per Lord Justice Mackinnon in "*Newstead vs. London Express Newspapers Ltd.*" (1940) 1 *K.B.* 377.) All this could be avoided by an amendment of the law. In the meantime, persons who commit acts which certainly should be made punishable sometimes escape punishment. The question for decision is whether the appellant is such a person.

The argument for the defence in this case can be summarised as follows :—

(*a*) that it was not within the power of Mr. Lorage to do any official act in the exercise of his official functions in respect of which the bribe was offered ;

(*b*) that it was accordingly impossible for Mr. Lorage to commit an offence (punishable under section 158 of the Penal Code) which the appellant sought to abet ;

(*c*) that the appellant was therefore not guilty of abetment because the act abetted could not constitute an "offence".

The Crown in reply to these submissions maintained that although the propositions (*a*) and (*b*) above were not seriously disputed, all that was relevant in disposing of a charge of abetment was to consider the state of mind of the abettor. It was therefore argued that as the accused clearly intended to abet the commission of an offence by Mr. Lorage, the requisite *mens rea* was established, and his conviction by the learned Magistrate was justified. I have come very regretfully to the conclusion that the contention of the defence is correct, and that the submission for the prosecution sets out what the law ought to be and not, unfortunately, what it is at present.

It is first necessary to analyse the provisions of section 158 of the Penal Code. This section is directed against public officers who take bribes, and not as I have already pointed out against persons who offer bribes to them. The intention is to ensure that public officers should not be subjected to any sinister temptations while performing their official duties. What the section specially prohibits is (*a*) the receipt by any public officer of an illegal gratification of any description whatsoever in connection with the performance of his *official* acts or functions, and (*b*) any form of subtle influence which might be exercised upon a public servant who has official duties to perform *by another public servant* who has been bribed for the purpose. Section 158 therefore makes it a punishable offence for any public officer or prospective public officer to receive an illegal gratification which is intended *either* to influence him in respect of any official duty which he has to perform *or* to persuade him to exercise some influence upon another public officer in respect of some official duty which the latter has to perform. It similarly prohibits the receipt of any illegal gratification for official favours of the same description which have already been granted. If the matter is considered from this point of view, it follows that the first part of the section has no reference to any bribes received or about to be received in respect of the performance of functions other than strictly official acts. A public officer who takes a bribe in connection with a matter in respect of which he has no power to act officially is not therefore guilty of an offence under the first part of section 158 of the Penal Code although his conduct may in certain cases amount to the commission of some other offence with which we are not at present concerned. Learned Crown Counsel also concedes that the second part of section 158 which prohibits the taking of a bribe "for rendering or attempting to render any service or disservice to any person with the Legislative or Executive Government or with any public servant" does not apply to this case.

In the view which I have taken, it follows that even if Mr. Lorage had accepted the bribe which he was offered and which he very properly disdained, he would not have been guilty of an offence under section 158 because it was not within his power to perform any official act or to confer any official favour in connection with the Examination which had caused Mr. Ratnayake *alias* Mudalihamy so much frustration. This conclusion is in conformity with the decision of my brother Wijewardene in "*De Zoysa vs. Suraweera*" (1941) 42 N. L. R. 357, where he held that a Police constable who took a bribe for promising to confer a favour which he was powerless to confer was not guilty of an offence under section 158. The same view has been consistently taken by the High Courts of Madras and Calcutta (*in re Pulipati Venkiah*—A. I. R. (1924) *Madras* 851 and *Venkatarama vs. Emperor*—A. I. R. (1929) *Madras* 756). With respect, I agree with my brother Wijewardene that the reasons given in certain judgments of the High Court of Lahore for taking a contrary view do not appear to be sound. In fact the Federal Court of India has recently accepted as correct the decisions of the Madras Court *as far as the first part of the corresponding Indian section 161 goes*. (*Afzalur Rahman vs. Emperor*—A. I. R. (1943) F. C. 8 *at page 23*) but rightly pointed out that in appropriate cases a public servant may by found guilty *under the second part of the section* if, though acting independently of his official functions, he obtains a reward for rendering or attempting to render any service to a person *with another public servant*. I am satisfied that the provisions of section 158 of the Code do not, in their present form, prohibit the receipt by a public officer of an illegal gratification as a motive or reward for doing an act which it is not within his official power to perform and which does not answer to the description of an "official act." This is certainly a most unsatisfactory state of affairs, and it is to be hoped that the law will soon be amended to meet the situation.

The only question which remains for consideration is whether a person can be found guilty of abetment if he offers a bribe to a public officer for doing something which it is not within the power of the latter officially to achieve. Section 100 of the Penal Code defines abetment and it is clear that the appellant has "abetted" *by instigation* the commission by Mr. Lorage of what he desired Mr. Lorage to do. But section 100 only lays down when a person "abets the doing *of a thing*," and it is section 101 which declares when a person must be regarded as having *abetted an offence*. The effect of section 101 is to render a person liable to punishment for the abetment of an offence only in one or other if the following cases :—

(*a*) when he abets the commission of an offence which has actually been committed by the person abetted ;

(*b*) when the act abetted has not been committed but would, *if it had been committed by a person capable of committing an offence* (*e.g.*, a person not protected from the consequences of his actions by reason of lunacy, minority, or other incapacity recognised by the criminal law), have constituted an "offence". It is the second of these alternatives which indicates, as shown in the statutory explanations of section 101, that a man can be regarded as guilty of the abetment of an offence even though the offence has not in fact been committed. It is in that sense also that when a person is charged with abetment the relevant state of mind is not that of the person to whom the offer is made but of the person making the offer. ("*Perera vs. Kannangara*" (1939) 40 N. L. R. 465 and "*Hendrick Silva vs. Imbuldeniya*" (1948) 49 N. L. R. 159). In both those cases, however, the act abetted was an act which, if committed by the public officer concerned, would have possessed the requisite elements of a punishable offence. It is not the law that a man can be regarded as having "abetted *an offence*" if the act abetted, judged from an objective standard, could not possibly constitute an offence. In other words it is essential that the act abetted should be capable, if committed, of constituting an offence. A man cannot be punished for abetting an act which is not an offence even though he believes that it is an offence. In the present case the appellant offered a bribe to Mr. Lorage in order to induce Mr. Lorage to do something which Mr. Lorage in the discharge of his official functions, was powerless to achieve. He has therefore abetted an act in respect of which it was legally impossible for Mr. Lorage to commit an offence punishable under section 158. The judgment of the High Court of Madras in "*Venkatarama vs. Emperor*" (*ibid*) is precisely in point. His Lordship the Chief Justice of Madras, in disposing of that case said, "it is time that fresh legislation was introduced into the Penal Code to make these most dangerous offences of giving and taking bribes punishable in much wider terms than are contained in the Code at present." I venture to express the view that this suggestion also merits the consideration of the Legislature in this Country. In the present state of the law the appellant is not guilty of the offence with which he was charged.

During the argument I suggested to learned Counsel to whom I am greatly indebted for their

assistance that the appellant might perhaps have been found guilty under section 490 of the Penal Code of an *attempt* to abet the commission of an offence, and that the verdict of the learned Magistrate could with propriety be varied accordingly in terms of section 183A of the Criminal Procedure Code. That aspect of the matter was not however fully argued before me, and learned Crown Counsel did not make any submission on the point. I do not therefore feel justified in giving any direction other than on the basis that the appellant is not guilty of the particular offence with which he was charged. I make order acquitting the appellant.

Acquitted.

IN THE COURT OF CRIMINAL APPEAL

Present : WIJEYEWARDENE, A.C.J., CANEKERATNE, J. & NAGALINGAM, J.

REX vs. DINGO *et al.*

C. C. A. Application Nos. 248-249/1948 ; *S. C. No.* 13 ; *M. C. Matara* 3366—*Second Southern Circuit* 1948 *Galle Assizes*

Argued on : 18th October, 1948
Delivered on : 22nd October, 1948

Court of Criminal Appeal—Witness of tender years—Affirmation—Trial Judge satisfied regarding competency—Value of such evidence—Common intention to murder—When motive is relevant.

Held : (1) That where a trial Judge, on being satisfied that a boy of five years was a competent witness, affirmed him before he gave his evidence, no complaint against the reception of such evidence can be entertained.

(2) That where the Crown relies on an alleged motive to prove community of intention and make one person liable for the injuries inflicted by another, the question of motive deserves some consideration.

(3) That the fact, that two persons have motives for killing a third party, does not necessarily prove common intention.

Per WIJEYEWARDENE, A.C.J.—"However, as reference has been made to *Ramasamy's* case (supra)* I wish to state that the decision in that case would have to be re-considered in view of the Privy Council decision in *Mohamed Sugal Esa Mamasan Rer Alalah* (1946 Appeal Cases 57) that section 13 of the Indian Oaths Act 1873 which is in identically the same terms as section 9 of our Oaths Ordinance applies not only in cases where the omission to administer the oath occurs *per incuriam* but also where the Court deliberately refrains from administering the oath."

Cases referred to :—*The King vs. Ramasamy* (1941) 42 N. L. R. 529.
Mohamed Sugal Esa Mamasan Rer Alalah (1946 Appeal Cases 57).

H. A. Chandrasena, for the applicant.

R. A. Kannangara, Crown Counsel, for the Crown.

WIJEYEWARDENE, A.C.J. (*President*).

The second accused is the son of the first accused and the deceased. The two accused were found guilty of the murder of the deceased on August 16, 1947.

About six years before his death, the deceased left his village Pallewella and got employed on a rubber land at Rotumbe about twelve miles away. He also cultivated in *ande* a paddy field at Rotumbe. The first accused and the children continued to live at Pallewella, but the first accused visited the deceased at Rotumbe occasionally for a few days and the deceased himself used to visit his family at Pallewella. The first accused admitted that she was greatly annoyed, as the deceased was keeping a mistress. The deceased, however, went to Pallewella and invited the first accused to go to Rotumbe and help him to reap the harvest. Accordingly, the first accused went there on August 9, with her young son Deonis, a boy of four or five years. The second accused got married one or two years before the death of the deceased and lived with his wife in the house at Pallewella. In July 1947 there appears to have been some unpleasantness between the deceased and the second accused's wife and the second accused sought the assistance of the Village Headman to "obtain by peaceful means" some brass utensils, tumblers etc., belonging to his wife, and in the possession of the deceased. Shortly afterwards, the second

*42 N. L. R. 529.

accused and his wife appear to have gone and lived somewhere else in the vicinity. The deceased had been issued a permit P5 under the Land Development Ordinance in respect of a lot at Pallewella and the deceased had nominated the second accused as his successor. The deceased took no steps to cancel that nomination in spite of the incident in July. The Crown witness Deonis, and the first accused both gave evidence stating that the second accused came to Rotumbe a few days before August 16th and worked in the deceased's field. In fact, the first accused said the second accused came at the invitation of the deceased. The Crown witness, Udenis—brother of the deceased—stated that the second accused went to Rotumbe on August 15th. The evidence of Udenis does not show that he was in a position to say from his own knowledge when the second accused went to Rotumbe.

The deceased was murdered in the early hours of August 16th when he was sleeping in the hut. The other occupants of the hut at the time were the first accused, second accused and Deonis. The deceased had four injuries. Two of them were very serious injuries—one being necessarily fatal. They caused a fracture of the jaw and a comminuted fracture of the cheek bone one inch from the right eye. These injuries had been admittedly caused by an axe. Close to each of these injuries was found an incised wound about ¾" long and skin deep. The Doctor undertook to say that these injuries could not have been caused by a glancing blow of the axe and that they must have been caused by a " sharp cutting weapon like a knife ". Unfortunately, this expression of opinion does not appear to have been sufficiently tested by cross-examination.

The only eye witness for the Crown was the little boy Deonis. He appears to have been in the arms of the deceased's mother when he gave evidence from the witness box. He has been living with the deceased's mother and brother ever since the murder. The learned trial Judge was satisfied that he was a competent witness in spite of his tender years. Assuming that the trial Judge had deliberately omitted to administer an oath or affirmation to Deonis, the appellant's Counsel contended that Deonis' evidence was inadmissible, on the authority of *Ramasamy's* case (1941) 42 New Law Reports 529. That assumption was found to be erroneous, as the Judge had, in fact, affirmed the boy. It must, of course, be presumed that in spite of the boy being about five years old the trial Judge was satisfied that he understood the sanctity of an affirmation and the necessity of speaking the truth. However, as reference has been made to *Ramasamy's* case (supra) 42 N. L. R. 529. I wish to state that the decision in that case would have to be reconsidered in view of the Privy Council decision in *Mohamed Sugal Esa Mamasan Rer Alalah* (1946 Appeal Cases 57) that section 13 of the Indian Oaths Act 1873 which is in identically the same terms as section 9 of our Oaths Ordinance applied not only in cases where the omission to administer the oath occurs *per incuriam* but also where the Court deliberately refrains from administering the oath.

Deonis who was examined in the Magistrate's Court only some months after the incident stated at the trial :—

> " I saw my mother (first accused) and my elder brother (second accused) attacking my father that night with the axe and the knife. I saw that by the lamp light (i e., light from a clay lamp with coconut oil and a wick). When my father was attacked he was lying down. Mother used the axe. Brother used the knife ".

The first accused gave evidence to the effect that she used an axe and caused the injuries under grave and sudden provocation, as she saw the deceased sleeping with his mistress on the verandah. She stated that the second accused did not join in the assault.

The Counsel for the appellant pointed out that the evidence of the first accused was supported by Deonis who said that the mistress was in the house at the time that his father was killed. Unfortunately, no reference was made to this evidence in the charge. But, on the ground of this omission we are unable to interfere with the verdict of the Jury against the first accused.

On the evidence in the case the conviction of the second accused could be sustained only on the ground that the murder was committed in pursuance of a common murderous intention shared by the first and the second accused. The facts alleged to prove the common intention and referred to in the charge to the Jury are :—

> (*a*) *Motive :*—The first accused was annoyed with the deceased, as he kept a mistress and the second accused was not only displeased with the deceased over the incident of July but stood to benefit by the death of the deceased, as he would then become the permit holder under P5.
>
> (*b*) The second accused joined his mother at the hut at Rotumbe on August 15 and the deceased was killed that very night.

(*c*) The second accused made a false statement P8 to the Village Headman the morning after the murder.

(*d*) The second accused hid the axe with which the first accused hacked the deceased.

(*e*) The second accused inflicted certain injuries on the deceased at the same time as the first accused.

I shall deal with each of the matters in order :—

(*a*) It is, no doubt, correct that in a criminal case it is futile to inquire into the question of the adequacy of a motive when a motive is proved. But when the Crown relies on this alleged motive to prove community of intention and make one person liable for the injuries inflicted by another the question of motive deserves some consideration. The fact that two persons have motives for killing a third party, does not necessarily prove a common intention. They may each have an intention to kill the third party but they need not necessarily have a common intention. Moreover, with regard to the alleged motive of the second accused there is no evidence that the second accused was impatient to succeed his father as permit holder on P5. No doubt, in a sense the second accused stood to gain by the death of his father. But in that sense every child may be said to have a motive for killing his father, as he may then expect to succeed to a share of the father's estate by intestate succession if, of course, it is not proved that he was responsible for the death.

As for the incident in July we find that the deceased does not appear to have been annoyed very much by it. He does not seem to have taken any steps to cancel the nomination of the second accused as his successor.

(*b*) In referring to this point the learned trial Judge has failed to draw the attention of the Jury to

(i) the evidence of Deonis and the first accused that the second accused came to Rotumbe a few days before the murder ;

(ii) the fact that Udenis' evidence on the point has to be carefully examined ;

(iii) the evidence of the first accused that the second accused came at the invitation of the deceased.

(*c*) No doubt, the second accused made a statement to the Headman suggesting that the deceased had been killed by some unknown man in the night. That statement was, of course, untrue. But I fail to see why any inference of common intention should be drawn from this fact when the most natural explanation is that the second accused was trying to protect his mother who, he thought, had been badly treated by his father.

(*d*) The second accused hid the axe as he wanted to protect his mother and at her request.

(*e*) Even accepting the evidence of Deonis it is impossible to infer from the infliction of those injuries either a murderous intention or a common murderous intention. Is such an intention established by the fact that the second accused inflicted two injuries skin deep. Moreover there is an error in the charge of the learned trial Judge on this point. Deonis' evidence was that having gone to sleep he got up at midnight and saw by the light of the coconut lamp that the second accused was using a knife. The first accused admitted that there was such a lamp in the house but she added, " I blew out the light when I went to sleep ". There was nothing in the statement P8 of the second accused to contradict that statement. In that statement the second accused said,

> " About midnight my mother put me up and told me that she heard a noise outside. Opening the door and lighting the lamp I and my mother came out ".

In the course of his charge to the Jury the learned trial Judge said :—

> " Then what about the lamp ? Deonis says there was a lamp. P8, the statement of the second accused, says there was a lamp. First accused says, " No, there was no lamp ".

The question whether there was a light at the time of the murder is very important. If there was no light then Deonis could not have seen the second accused using his knife to inflict those two trivial injuries quite close to the serious injuries inflicted by the first accused.

If the attention of the Jury had been directed to all these matters, we do not think the Jury would have found the second accused guilty of murder.

We would, therefore, acquit the second accused.

2nd accused acquitted.

Present : NAGALINGAM, J.

GEORGE vs. RICHARD

S. C. No. 154—*C. R. Panadure No.* 11903
Argued on : 20th October, 1948
Decided on : 9th December, 1948

Landlord and Tenant—Tenant in arrears of rent for more than one month—Tender of arrears of rent by tenant after notice to quit—Refusal to accept—Institution of action for rent and ejectment—Can landlord maintain action—Rent Restriction Ordinance, section 8, proviso (a).

Held : That a landlord, who refuses to accept arrears of rent due for more than a month tendered to him by his tenant after notice to quit has been served on him, is not entitled to maintain an action for ejectment under proviso (*a*) to section 8 of the Rent Restriction Ordinance.

Per NAGALINGAM, J.—"If rent is in arrear, a cause of action accrues to the landlord to sue for it, but if before he files or can file action, rent is tendered or paid to him, the cause of action is extinguished, and with it the right to sue. Hence at the date of institution of action the plaintiff must be in a position to show that not only had a cause of action accrued to him prior to institution of action but that the cause of action continued to subsist even at the date of institution."

Cases referred to :—*Bird vs. Hildage* 1947-2, All E. R. 7.

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

NAGALINGAM, J.

This is a landlord's action against the tenant primarily for ejectment of the latter from the premises let. The plaintiff let the premises described in the plaint to the defendant on the terms of a monthly tenancy at a rental of Rs. 10. The defendant according to the plaintiff made default in the payment of the rents for the months of January to June 1947, although neither the pleadings nor the proceedings in the lower Court disclose the agreement between the parties as to when the rent was payable. On the 19th June 1947, the plaintiff instituted this action alleging *inter alia* that the rent for the month of June as well had fallen into arrears. The defendant did not dispute this allegation ; but pleaded that he had tendered the rent for the month of June on the 10th of June 1947. Under the Roman Dutch Law the rent of any one month would be payable only at the expiry of the month in the case of a monthly tenancy, but in view of the plea of the defendant himself I assume that there was an agreement between the parties that the rent should be paid at the beginning of each month.

When the defendant was in arrears with his rent for the months of January to April 1947 the plaintiff caused his proctor to send a letter of demand dated April 24, 1947 claiming the arrears and also giving notice to the defendant terminating his tenancy at the end of May 1947. On receipt of this demand the defendant remitted to the plaintiff's proctor by money order the sum claimed, but the plaintiff's proctor on instructions from his client declined to accept it. Notwithstanding this refusal, the defendant on June 10, 1947 remitted by another money order the rents for the months of May and June as well but this money order too was returned to him by the plaintiff's proctor.

Thereafter the plaintiff commenced this action for arrears of rent, ejectment and damages for overholding. The defendant resists the claim for ejectment by calling to his aid the provisions of section 8 of the Rent Restriction Ordinance No. 60 of 1942. The Rent Restriction Ordinance does not purport to interfere with the ordinary contractual rights as between landlord and tenant. The ordinance does not prevent a landlord from giving notice terminating the tenancy and a notice due and proper in form in fact terminates the tenancy of the tenant. It cannot be said that after such termination the ordinary relationship of landlord and tenant continues to subsist between them. The occupation of a tenant thereafter is without the consent of the landlord. The effect of the Rent Restriction Ordinance, however, is to bar a landlord from instituting an action for ejectment on the footing of an overholding by the tenant unless the landlord can make out a case falling withing the provisions of section 8 of the Ordinance. If the landlord is unable to make out such a case the tenant acquires a right to continue in occupation paying the statutory rent and in law his position may best be described as a statutory tenant, if one may adopt the English nomenclature adopted in similar circumstances.

The main provision of section 8 of the Ordinance prevents the institution of an action for the ejectment of the tenant unless the assessment board has authorized such institution. In the present case no such authorization is relied upon by the landlord, but proviso (*a*) to the section is said to provide the foundation for the action. The question for decision therefore, is whether the present case is one where rent has been in arrear for one month after it has become due. The rents for the months of January to May may be said to have remained unpaid for over a month after they had fallen due on the basis of course, that the rent of any one month was payable at the commencement of that month. But the point is whether the rent " has been in arrear " within the meaning of the term as used in the proviso. The words "has been" denote a continuous fact that is to say a fact continuing to subsist up to the occurrence of a certain event or the performance of some act. Those words have received judicial interpretation in this sense, Ex parte Kinning, 16 L.J., Q.B., 257 and Re Storie, 2 D.G.F. and J. 529.

Now what is the event or act in relation to which the rent should continue to be in arrears? In the context it seems to me that the event or act contemplated is the institution of the action and the proviso should be construed as meaning that rent should have been in arrear *at the date of institution of action* for one month after it has become due. This construction would become manifest if the proviso is redrafted making use of the phraseology of the main provision; it would then run so far as is material to the present discussion as follows :—

"No action for the ejectment of the tenant shall be instituted unless rent has been in arrear for one month after it has become due"; that is to say the arrears must exist at the date of institution of action.

The contention on behalf of the appellant is that if at any time the tenant was in arrear with his rent for over one month, then the right vests in him under this proviso to institute action. If this argument is sound the subsequent payment of rent by the tenant cannot take away from the landlord his right to institute an action for ejectment. One would have expected in those circumstances the plaintiff to have accepted payment and instituted the action. But the plaintiff on the other hand deliberately declined to receive the payments tendered; I have little doubt that he did so because whatever position he may have taken later at the trial, he or rather his legal advisors were of opinion at the date of institution of action that it would be essential to aver in the plaint at least that the defendant was in arrear with his rent. As a matter of fact, the plaint alleges that the defendant has failed and neglected to pay to the plaintiff (the arrears of rent) though thereto often demanded,—an allegation, to put it mildly, not quite true to facts. Why then did the plaintiff make a misstatement of fact in the plaint? No explanation has been given, but the answer is obvious and reveals clearly the view held by the plaintiff's lawyers themselves.

The construction I have placed on this proviso is supported by the view taken in the English Courts in regard to a similar provision in the Rent and Mortgage Interest Restrictions (Amendment Act 1933 (23 and 24) George the Fifth, Chapter 32, Schedule 1 Clause (*a*) which empowers the Court to direct delivery of possession to the landlord, " if any rent lawfully due from the tenant has not been paid." Though the language of our enactment is not identical with that of the English Provision a striking correspondence can be noticed if the term " has been in arrear " is paraphrased as " has not been paid."

In the case of *Bird vs. Hildage* 1947—2. All E. R. 7, the facts were that the landlord commenced his action in ejectment against the tenant after refusing to accept the arrears of rent tendered to him before commencement of suit; the Court of Appeal held that as the tender of rent had been made before the commencement of proceedings such tender prevented rent being lawfully due and that the landlord was not therefore entitled to maintain the action. Although the words "lawfully due" do not find a place in our enactment, yet the notion underlying these words is implicit under our law as well. With regard to the meaning to be attached to those words Cohen J., said " In our view, rent is not lawfully due unless it can be recovered by process at law."

Now a landlord under our law too cannot institute an action for recovery of rent unless it remains unpaid at date of institution of action. If rent is in arrear, a cause of action, accrues to the landlord to sue for it but if before he files or can file action, rent is tendered or paid to him, the cause of action is extinguished, and with it the right to sue. Hence at the date of institution of action the plaintiff must be in a position to show that not only had a cause of action accrued to him prior to institution of action but that the cause of action continued to subsist even at the date of institution. In the present case, therefore, it is essential for the plaintiff to

show that not only had the defendant allowed the rents to remain unpaid for over a month as they fell due, but that in fact the rents remained so unpaid even at date of institution of action. The plaintiff is clearly unable to establish the second requirement. The rents that were in arrears were tendered to him before institution of action and he wrongfully refused to accept them. The plaintiff must in those circumstances be deemed to have been paid the rent on the dates they were tendered and therefore it must follow that the tenant was not in arrear with his rent. The plaintiff cannot, therefore, avail himself of proviso (*a*) In this view of the matter the plaintiff's action fails. The appeal is, therefore, allowed and the plaintiff's action dismissed with costs in both Courts.

Appeal allowed.

Present : NAGALINGAM, J. & WINDHAM, J.

H. B. EKANAYAKE vs. THE PRINCE OF WALES CO-OPERATIVE SOCIETY, LIMITED

S. C. No. 113—*D. C.* (*Inty.*) *Colombo No.* 480/X
Argued on : 21st January, 1949
Decided on : 9th February, 1949.

Co-operative Societies Ordinance, Cap. 107, *sections* 40 (1) (*d*), 41 (*h*)—*Rule* 29 *framed under Co-operative Societies Ordinance,* 1921—*Cancellation of registration of Co-operative Society—Liquidator's claim against ex-President of Society—Reference to arbitration—Enforcement of award—Validity of award—Can the Court question the validity of award in view of the provisions of paragraphs* (*j*) *and* (*k*) *of rule* 29.

Held : (1) That to uphold an award on the footing that the reference was made under section 41 (*h*) of the Co-operative Societies Ordinance (Cap. 107) it would have to appear on the face of the award that the legal requirement necessary to its validity under that section, namely, the obtaining of the written consent of the other party had been complied with.

(2) That an award which purports on the face of it to have been referred under rule 29 of the Rules framed under the Co-operative Societies Ordinance (kept alive by section 52 of the present Ordinance, Cap. 107) and to have been referred by the Registrar's order cannot be deemed to have been made upon a reference by the liquidator under section 40 (1) (*d*) of the new Ordinance (Cap. 107).

(3) The Registrar has no power to refer a dispute to arbitration under rule 29 (*a*) and (*b*) of the said Rules where the dispute is between an *ex*-officer and the liquidator of a Co-operative Society, whose registration has been cancelled.

(4) That the provisions of paragraphs (*j*) and (*k*) of Rule 29 of the Rules aforesaid only apply to an award which is in fact an award and not to one which, on the face of it, is not.

(5) It is the duty of the Court, where a party seeks to rely on an award, invalid for want of jurisdiction, to declare it null and void, or at the least to decline to act on it and to leave the party to bring an action on it.

Cases referred to :—*Abdul Ghani vs. Anjuman-Imdas Qarsa Bahami Chak No.* 127 *R. B.*, A. I. R. (29) 1942 Lahore 237.
Dassanayake vs. Jayawardene, 48 N. L. R. 293.

H. V. Perera, K.C., with *G. Thomas*, for the appellant.
J. R. V. Ferdinands, for the respondent.

WINDHAM J.

The defendant-appellant, until 27th March, 1947, was the president of the Prince of Wales Co-operative Society Limited, a society duly registered under the Co-operative Societies Ordinance (Cap. 107). On that date the registration of the society was cancelled, and it went into liquidation, the plaintiff-respondent being the society in liquidation. On 8th April, 1947, the defendant was called upon to pay to the liquidator the sum of Rs. 2174·50, said to be owing from him to the society. The defendant declined to do so. On 4th September, 1947, a document was filed in the District Court, bearing date 24th May, 1947, purporting to be an arbitrator's award made upon a reference under rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921. The defendant was ordered, in this document, to pay to the society the said sum of Rs. 2174·50, together with interest and costs. Eventually, upon application on behalf of the plaintiff society, the document, on the footing that it was an award, was made an order of the court, and writ of execution issued against the defendant. Notice was thereupon served upon the defendant under section 219 of the Civil Procedure Code. To this the defendant objected, arguing that he was not bound by anything in the

document purporting to be an award, and that the "Award" was a nullity. The learned District Judge, after considering his objections dismissed them, in an order dated 22nd July, 1948 From that order the defendant now appeals.

The documents purporting to be the award consisted of a printed form in which a number of spaces were left blank to be filled in. Some of these spaces were filled in; others were not. The document reads as follows :—

"AWARD"

Under Rule 29 of the Rules framed under the Co-operative Societies Ordinance.

No. 34 of 1921.

WHEREAS the following matter in dispute between the Liquidator, Prince of Wales Co-operative Stores Society of.....and Mr. H. B. Ekanayake..... Principal.....surety.....Surety, viz, whether the said Mr. H. B. Ekanayake.....owe to the said Prince of Wales Co-operative Stores Society the sum of Rupees 2174·50.....of.....together with interest to date and until realisation of the debt in full.....has been referred to me for determination by the Registrar's order dated.....I, having duly considered the matter hereby direct that the said H. B. Ekanayake do pay to the said Prince of Wales Co-operative Stores Society the sum of Rs. 2174·50 Principal with Rupees..... interest at 6 per cent to this date, and Rupees 42..... costs or Rupees.....in all, together with interest on the principal sum awarded at the rate of.....per cent per annum until the realisation of the sum awarded.

The above amount shall be paid by 15-6-47.....if it is so paid, the amount may be realised through a Civil Court.

Award given in the presence of
Mr. N. Moonesinghe,
Sgd. (Illegibly),
"*Arbitrator*"

Dated 24-5-47.

I may say at once that the leaving blank of some of the blank spaces in the above document indicates a most slovenly attitude on the part of the arbitrator or of whoever was responsible for completing it, and it would be most disturbing to think that this was the manner in which awards made upon references under the Co-operative Societies Ordinance or Rules were commonly drafted. The points of determination now, however, are first, whether this document was a valid award at all, and secondly, if it was not, whether, since it purported to be an award, the court had power to go behind it and to refuse to treat it as such.

There are three provisions of the Co-operative Societies Ordinance, or the Co-operative Society Rules, under which it has been urged that this "award" either was or could have been made. First, there is rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921, under which it purports to have been made. These rules, which now appear at page 561 of Volume I of the Subsidiary Legislation of Ceylon, were kept alive by section 52 of the present Co-operative Societies Ordinance (Cap. 107) which Ordinance repealed and re-enacted with considerable amendment the old Ordinance of 1921 under which the Rules were made. Secondly, there is section 40 (1) (*d*) of the Co-operative Societies Ordinance (Cap. 107). Thirdly, there is section 41 (*h*) of the same Ordinance.

The contention that the award was made under section 41 (*h*) may be disposed of at the outset, nor was it seriously pressed by counsel for the plaintiff. For, quite apart from the fact that the award purports on the face of it to have been made under rule 29 of the Rules, and not under section 41 of the Ordinance, section 41 (*h*) provides that the Registrar may refer "any subject of dispute between a liquidator and any third party" only "if that party shall have consented in writing to be bound by the decision of the arbitrator". The expression "any third party" in this context can only mean any person other than the Registrar or the liquidator, and would thus include the defendant. It is not even suggested in the present case that the defendant ever consented in writing, or at all, to be bound by the decision of any arbitrator. And in order to enable any party to uphold an award on the footing that the reference was made under section 41 (*h*)., it would have to appear on the face of the award that the legal requirements necessary to its validity under that section, namely the obtaining of the written consent of the other party, had been complied with. The award cannot therefore be treated as having been made upon a reference by the Registrar under section 41 (*h*).

With regard to the section 40 (1) (*d*) of the Ordinance, however, it has been argued strongly by counsel for the plaintiff that, notwithstanding that the award purports on the face of it to have been referred under rule 29 of the Rules, and to have been so referred "by the Registrar's order", nevertheless it must be deemed to have been made upon a reference by the liquidator under that section. Section 40 (1) (*d*) provides that :—

"A liquidator appointed under section 39 shall, subject to the guidance and control of the Registrar and to any limitations imposed by the Registrar by order under section 41, have power to—

* * * * *

(*d*) refer dispute to arbitration and institute and defend suits and other legal proceedings on behalf of the society by his name or office;"

Now to my mind there is more than one reason why the award in the present case cannot be deemed to have been made upon a reference under section 40 (1) (*d*). In the first place, the award on the face of it does not purport to have been made upon a reference under that section, but under rule 29 of the Rules framed under the Co-operative Societies Ordinance, No. 34 of 1921. In the second place, it purports in the body of it to be an award upon a reference by the Registrar, which is provided for in Rule 29, and not upon a reference by the liquidator, which is provided for by section 40 (1) (*d*). No doubt the printed form upon which the award is made was printed when the Ordinance No. 34 of 1921 was still in force, which Ordinance contained no provisions for the reference to arbitration corresponding to section 40 (1) (*d*) and 41 (*f*) of the new Ordinance (Cap. 107). But if this fact indicates anything at all (beyond laxness in using obsolete forms) it indicates that the reference was intended to be under the only provision relating to references to arbitration which did exist under the old Ordinance, namely rule 29 of the Rules, which is preserved under the new Ordinance. Lastly, upon a perusal of sections, 40, 41 and 42 of the present Ordinance, I am driven to the conclusion, which was urged by learned Counsel for the defendant, that section 40 (1) (*d*) confers on a liquidator nothing more than that which is the inherent right of any legally competent individual under the Arbitration Ordinance (Cap. 11), namely the right to refer a dispute to arbitration upon a proper submission of that dispute, that is to say, under an agreement with the other side so to refer it. The necessity for making specific legal provision in the case of a liquidator of a Co-operative society is to enable him to exercise this right *on behalf of the society*, in the same way as he is given specific power in the same clause to institute legal proceedings on behalf of the society. For a liquidator has no power to act for or bind the society save in so far as such power is statutorily conferred upon him. To place upon section 40 (1) (*d*) the construction urged by learned counsel for the plaintiff, namely to hold that it enables a liquidator to refer to arbitration any dispute in which he himself is a party, without the consent of the other party, would be to adopt a construction not only most iniquitable, but one entirely inconsistent with the provisions of section 41 (*h*), which deals specifically with the subject by enacting that such a dispute may be referred by the Registrar, and not even by him save with the written consent of the other party. If the latter's written consent is required even where the dispute is being referred by one who is not a party to it (*i.e.* the Registrar) how much more must his consent be required to a reference sought to be made by one who is a party to the dispute (*i.e.* the liquidator). For all these reasons I hold that the award in the present case cannot be deemed to have been made by the liquidator under section 40 (1) (*d*) of the Co-operative Societies Ordinance (Cap. 107).

There remains the question whether the Registrar had power to make the reference under rule 29 (*a*) and (*b*) of the Rules, under which the award purports on the face of it to have been referred. That rule provides as follows :—

> "29. (*a*) Any dispute concerning the business of a co-operative society between members or past members of the society or persons claiming through them, or between a member or past member or persons so claiming and the Committee or any officer shall be referred to the Registrar.
>
> Reference may be made by the Committee or by the society by resolution in General Meeting or by any party to the dispute, or if the dispute concerns a sum from a member of the Committee to the society by any member of the society.
>
> (*b*) The Registrar may either decide the dispute himself or appoint an arbitrator, or refer the dispute to three arbitrators, of whom one shall be nominated by each of the parties and the third shall be nominated by the Registrar and shall act as Chairman."

It is not seriously contended that the Registrar had power, under paragraph (*b*) of rule 29 to refer the present dispute to an arbitrator ; for it is clear that the dispute is not one which falls within the first part of paragraph (*a*) of the rule. It appears on the face of the award that the dispute is between Mr. H. B. Ekanayake (the defendant) and the liquidator. Rule 29 (*a*) relates to dispute between a member or members or a past member or past members or persons claiming through them, on the one hand, and " the committee or any officer " on the other hand. A liquidator falls into none of these categories. He cannot be argued to be an " officer " of the society, for as soon as it goes into liquidation the society ceases to have any officers ; nor does he fall within the definition of " officer " in section 54 of the Ordinance (Cap. 107) which in the absence of any definition of that term in the Rules, may be taken to apply to the Rules. For while " officer " under that definition includes any persons " empowered under the rules or by-laws to give directions in regard to the business of a society ", a liquidator derives his powers not under the rules or by-laws but under the Ordinance itself.

Thus it appears on the face of this document purporting to be an award that it was not such an award as could legally be made upon a reference under rule 29, nor indeed (for the reasons I have

already given) under section 40 or 41 of the Ordinance. As an award, it is thus bad on the face of it. That being so, ought the learned District Judge to have given effect to it, making it an order of Court and allowing consequential execution proceedings upon it ? The learned District Judge held that he had no power to " Go behind " the award unless it was patent on the face of it that it was irregular. But for the reasons I have given, this award was patently irregular, indeed it was patently *ultra vires*. The learned District Judge held himself bound to enforce and unable to question the validity of the award by reason of the provisions of paragraphs (*j*) and (*k*) of rule 29, which read as follows :—

> " (*j*) Any decision or award of the Registrar shall in every case be final. No decision of an arbitrator shall be set aside by a Court except on the ground of corruption or misconduct on the part of the arbitrator.
>
> (*k*) A decision or award shall on application to any Civil Court having jurisdiction in the area in which the society operates be enforced in the same manner as a decree of such Court."

But these paragraphs can only apply to a document which is in fact an award, and not to one which on the face of it is not. For an award invalid for want of jurisdiction, such as that in the present case, is no award, and so far from the Court's being bound to act on it, it is the duty of the court, where a party seeks to rely on it, to declare it null and void, or at the least to decline to act on it and to leave the party to bring an action on it. Such is the position in England, where in a case where the validity of an award is doubtful, even though the reference was by consent, it will not be enforced as a judgment, but the successful party will be left to bring an action upon it. (Vide Russell on Arbitration and award, 13th Edition, at page 240).

The general position has been clearly laid down in India, where the relevant legislation is identical with that of Ceylon, in *Abdul Ghani vs. Anjuman -Imdas Qarsa Bahami Chak* No. 127 R. B., A. I. R. (29) 1942 Lahore 237. In that case the question arose whether the court was bound to execute an order made by the liquidator of a co-operative society determining a certain sum of money to be the contribution due from the appellant to the assets of the society, where that order was *ultra vires* as being in excess of the jurisdiction conferred on the liquidator under the section of the Act under which he purported to make it. The Act made provision that an order of the liquidator under that section should be enforced by a civil court as if it were a decree of that court, and it made further provision, identical with section 43 of the Co-operative Societies Ordinance (Cap. 107) that, save as otherwise expressly provided, " no civil court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act." Nevertheless the court on appeal laid down the legal position in the following terms :—

> " The question for decision, therefore, is whether the civil court could decline to execute the order of the liquidator passed in the circumstances mentioned above. The answer must depend on whether the liquidator in making the order exceeded the limits of his jurisdiction, and therefore, the order was a nullity, or whether it was an irregular or erroneous order passed in the exercise of his jurisdiction. If the former, the executing court could, indeed it must refuse to execute it. But if it was latter the court could not question its correctness and must enforce it.....

It is common ground that the general rule is that an executing court cannot go behind the decree. It must take the decree as it is and must proceed to execute it.....To this general rule, however, there is a well established exception that if there was a lack of inherent jurisdiction in the court which has passed the decree for some other reasons, the decree is a nullity, the executing court must refuse to execute it." The principles set out in the passage which I have quoted, though they were there applied to the case of an order of the liquidator, apply equally, in my view, to the case of an award made without jurisdiction, in particular where, as in the present case, the lack of jurisdiction is due to there having been no power to refer and is patent on the face of the award.

I am unable to discover any decision of the courts of Ceylon directly in point, but the legal position as I have set it out appears to have been tacitly assumed in *Dassanayake vs. Jayawardene*, 48 N. L. R., 293, where the appeal was against an order of the District Judge refusing to execute an award made in the appellant's favour upon a reference by the Registrar under section 45 of the Co-operative Societies Ordinance (Cap. 107), his refusal being on the ground that no " dispute " existed between the parties such as could be the proper and only subject matter of the reference to arbitration under that section. This order was thus in effect a refusal to execute the award on the ground that it was a nullity for lack of jurisdiction, owing to there having been no power in the Registrar to refer to arbitration the matter which he purported to refer. The case was

accordingly similar to the present one, and as I have said, the upholding by this court of the District Judge's refusal to act on the award involved a tacit recognition of the principles which I have held to be applicable.

For the foregoing reasons this appeal must be allowed with costs here and in the court below. The order of the learned District Judge dated 22nd July 1948, is set aside, the award dated 24th May 1947 is declared to be null and void, and the respondents application for writ of execution upon it is dismissed.

Dismissed.

NAGALINGAM, J.
I agree

Present :—GRATIAEN, J.

REV. SANGARAKKITA THERO vs. INSPECTOR OF POLICE, PELIYAGODA

S. C. No. 1235 *of* 1948—*M. C. Colombo* 45,038/*A (with application in revision)*
Argued on : 17th and 18th January, 1949
Decided on : 24th January, 1949

Criminal Procedure Code, sections 81, 84 *and* 85—*Proceedings conducted speedily—Non-compliance with provisions of sections* 81, 84 *and* 85 *of the Code—Binding over—Person not given sufficient opportunity to meet the case against him.*

Held : An order requiring a person to enter into a bond to be of good behaviour cannot be allowed to stand, where it has been made after proceedings conducted with extraordinary speed without full compliance with the provisions of sections 81, 84 and 85 of the Criminal Procedure Code, and in a manner that did not give the person bound over, a sufficient opportunity to meet the case against him.

Cases referred to : *Culantiavelu vs. Somasundaram* (1904) 2 Bal. Rep. 122.
63 Law Quarterly Review at p. 187.
Kanagasingham vs. Thambiah (1923) 4 Law Recorder 211.
Jayatilleke vs. Udiya (1925) 26 N. L. R. 496.
Weerasingha vs. Peter (1937) 39 N. L. R. 426.

C. E. Jayawardene, for the appellant.

Ananda Pereira, Crown Counsel, for the Attorney-General.

GRATIAEN J.

The appellant is a Buddhist priest. He complains of an order made by the learned Magistrate of Colombo under Section 88 of the Criminal Procedure Code requiring him to enter into a bond to keep the peace for a period of six months. It has been conceded on his behalf that the order is not one against which an appeal lies ("*Culantiavelu vs. Somasundaram*"), (1904) 2 Bal. Rep. 122, but learned Crown Counsel agreed that the proceedings could, in accordance with precedents, appropriately be examined and if thought fit quashed by this Court in the exercise of its revisionary powers.

At a time when the law's delays have attracted so much criticism, it is no doubt refreshing to discover judicial proceedings which have been disposed of expeditiously, but there is, I think, a pace at which and beyond which the dispensation of justice becomes almost impossible of achievement. The fundamental rights of even undeserving litigants should not be sacrificed for speed alone. One of those rights is the right not to be condemned unheard, and "if this right is to be a reality, *a litigant must know in good time the case which he has to meet,*" 63 Law Quarterly Review at p. 107. In the present case I am satisfied that the appellant has in a certain measure been denied this right.

Chapter 7 of the Criminal Procedure Code makes salutary provision for the prevention of offences, and Part B of the Chapter, which embraces Sections 81 to 88, is of a very special nature in that it contemplates preventive action in certain circumstances against a person who has not even been convicted of any criminal offence. The Chapter provides many safeguards against such encroachments upon the liberty of unconvicted persons, and it is beyond argument that these should be carefully and most jealously observed ("*Kanagasingham vs. Thambiah*"), (1923) 4 Law Recorder 211. It has been argued

on behalf of the appellant that some of these safeguards have been unwittingly ignored in these proceedings.

From the facts which have emerged in the course of the evidence it certainly does appear that the appellant had for some time prior to September, 1948, conducted himself in the precincts of the Kelaniya temple in a fashion which the Police authorities regarded as likely to provoke a serious clash between two rival factions of the congregation, and I am far from satisfied that the situation did not justify the decision of the Police to invoke the provisions of Chapter 7 of the Code. But, however tense the situation might have been and however imminent the risk of a breach of the peace, a departure from the exact and precise procedure laid down by the relevant sections and emphasised by judicial authority cannot be condoned. Indeed, it is apparent that the proceedings in this case which were initiated and terminated on the 17th September, 1948 were conducted at such breathless speed that the appellant however reprehensible his conduct may have been has been denied the opportunity to defend himself as satisfactorily as any litigant is entitled to.

On the morning of September 17th, 1948, Inspector K. S. Perera of the Peliyagoda Police reported to the learned Magistrate in writing that he had received information that the appellant " was likely to commit a breach of the peace or do any wrongful act that may probably occasion a breach of the peace ". On this extremely bold report which gave no indication whatsoever as to the source of the Inspector's information or as to the nature of the appellants alleged acts or conduct which had given cause for apprehension, the learned Magistrate ordered summons to issue on the appellant " to appear forthwith " to show cause why he should not be ordered to execute a bond to keep the peace. Section 85 of the Code requires the summons or warrant in such cases to " contain a brief statement of the substance of the information " on which the Magistrate has acted, and it is therefore clear, as was pointed out by Bertram C.J. in *Kanagasingham vs. Thambiah* (1923) 4 Law Recorder 211. that a Magistrate, before he acts at all, must see that the information is of a very definite character. Indeed, I would respectfully adopt the view expressed by Ennis A. C. J. in *Jayatilleke vs. Udiya* (1925) 26 N. L. R. 496., that before process is issued in such proceedings the information should be made upon oath. In *Weerasingha vs. Peter* (1937) 39 N. L. R. 426, Abrahams C. J. held that summons should not issue even upon information which is given upon oath but is based only upon hearsay evidence. It is too late now to depart from the wholesome principle that process under any section of Chapter 7 of the Criminal Procedure Code should not be issued until precise information is given upon oath by a witness who can speak with personal knowledge to facts which warrant the inference that there are grounds for taking proceedings against some person for one or other of the various reasons set out in the Chapter. Moreover, the summons or warrant must give the person noticed sufficient information of the precise nature of the case which he will be called upon to meet. Neither of these principles have been followed in the present case, and learned Crown Counsel very frankly conceded that this was so. Indeed, in the haste with which everything seems to have been done on the 17th September, 1948, the summons which was irregularly ordered to be issued appears in fact to have been so hurriedly drafted by some officer of the Court that it was worded so as to call upon *not the appellant but the prosecuting Inspector himself* to show cause against an order to keep the peace. This summons, which I suppose the appellant might strictly have ignored, was served on him 12-30 p.m. on the same day. At 3-10 p.m. the learned Magistrate decided that the appellant was in default, and on this occasion again without any sworn information of any kind upon which he could act, he decided—the record does not show upon what material—that there was a "reason to fear a breach of the peace unless (the appellant) is immediately arrested ". He accordingly issued a warrant for arrest. This warrant was also defective for non-compliance with the provisions of both Section 84 or 85 of the Code.

From this point of time on the same day events took place even more dramatically. At 3-30 p.m. the appellant's proctor arrived in Court without his client and asked for a postponement of the enquiry on the basis of a medical certificate, the accuracy of which has not been challenged, to the effect that the appellant was ill. The learned Magistrate nevertheless ruled that he would take up the enquiry at 5 p.m. that evening even if it were necessary to dispense with the presence of the appellant. At 5 p.m. the appellant, whose physical condition had apparently deteriorated in consequence of an unnecessary but prolonged period of self-imposed starvation, was carried bodily into Court, and the proceedings commenced. No further particulars of the case against him were however furnished either to him or to his counsel who had been retained to appear at the very last moment. It is not very surprising that after a somewhat half-hearted cross-examination of doubtful relevancy of the

witnesses called by the Police, counsel refrained from calling any evidence on behalf of the appellant. And so in the fading light on the same day on which the proceedings had been initiated, an order adverse to the appellant was made.

In my opinion the proceedings must be quashed because of the irregularities to which I have referred and in particular because the appellant and his lawyers had not received sufficient notice of the specific allegations against him so as to ensure a satisfactory investigation of the issues in the case. It is perhaps likely that an order against the appellant would, if made in more regular proceedings, have been fully justified, but it is not, I regret to say, possible to say so with any certainty. The appellant would do well to realise that, although the order against him now stands quashed, the proceedings have been set aside without reference to the merits or demerits of the case against him. It is open to the police if so advised to initiate fresh proceedings against the appellant if they consider that his conduct and behaviour in recent months warrants such action. It certainly would be a matter for regret if a person in Holy Orders were found to require the persuasive influence of an order of Court to induce him to refrain from committing or provoking a breach of the public peace.

I desire to add that in appropriate cases the possibility of a breach of the peace may be so imminent that drastic and most urgent action under the proviso to Section 84 and under Section 86 is called for. I do not state that it would never be proper in rare cases to initiate and to conclude proceedings under Chapter 7 of the Code on the same day. But the more drastic and more urgent the action which is necessary so as to preserve the public peace, the more important is it that the procedural safeguards which protect the individual should also be meticulously followed. If it be true that peace is the aim of law and justice the means, it can never in my opinion be entirely satisfactory to achieve the aim of the law by adopting some procedure which is or even appears to be the negation of justice. I set aside the order of the learned Magistrate requiring the appellant to execute a bond to keep the peace for a period of six months.

Order set aside.

Present : GRATIAEN, J.

A. J. DE MELL vs. PIYATISSA

S. C. No. 177—*C. R. Colombo No.* 9239

Argued on : 7th December, 1948

Decided on : 9th December, 1948

Rent Restriction Ordinance, No. 60 *of* 1942, *section* 8 (*c*)—*Reasonably required for landlord's occupation—Competing claims of landlord and tenant equally genuine.*

Held : That a landlord should be entitled to be restored to his property if his need to occupy it is at least as great as that of his tenant.

Per GRATIAEN, J.—"Besides, I think that it is very necessary that rulings of this Court regarding the interpretation of the various provisions of the Rent Restriction Ordinance should not be lightly disturbed. This is the only basis on which the Ordinance can be satisfactorily worked by Judges and tribunals who are required to administer its provisions."

Cases referred to :—*Gunasena vs. Sangaralingam Pillai* 49 N. L. R. 473.
Raman vs. Perera (1944) 46 N. L. R. 133.

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

M. M. Kumarakulasingham, for the plaintiff-respondent.

GRATIAEN, J.

This is an appeal against a decree for ejectment in a tenancy action. The housing shortage in Colombo is such that it is not an easy matter to adjudicate between competing claims of a landlord and his tenant when both claims are manifestly genuine. So it is in the present case. The learned Commissioner has decided, after consideration of all relevant matters in accordance with the principles laid down in *Gunasena vs. Sangaralingam Pillai* (49 N. L. R. 473), that the premises are reasonably required for the landlord's occupation. I find it quite impossible to reverse this finding. Indeed, the true position appears to be that the hardship which would be caused to the tenant by an order for ejectment and the hardship which would be caused to the landlord, should he be denied his common-law right to terminate the tenancy, are almost equally balanced. In such a situation the landlord's claim must prevail. That is the effect of the decision of Cannon, J. in *Raman vs. Perera* (1944) 46 N. L. R. 133. I do not think that this view of the effect of section 8 (*c*) of the Ordinance should now be reconsidered. In the first place, I consider it eminently fair to hold that the owner of the premises should be entitled to be restored to his property if his need to occupy it is at least as great as that of his tenant. Besides, I think that it is very necessary that rulings of this Court regarding the interpretation of the various provisions of the Rent Restriction Ordinance should not be lightly disturbed. This is the only basis on which the Ordinance can be satisfactorily worked by Judges and tribunals who are required to administer its provisions. The difficulties of landlords and their tenants, and of those who are called upon to advise them, would be greatly increased if the principles of the enactment were to be regarded as liable to fluctuating judicial interpretations. There should be the minimum of uncertainty as to the extent to which, in the existing emergency, the law intends to interfere with the contractual rights and obligations of landlord and tenant.

I dismiss the appeal with costs, but make order that writ of ejectment should not issue until 28th February 1949.

Appeal dismissed.

Present : BASNAYAKE, J.

LAZARUS vs. DE ZYLVA (EXCISE INSPECTOR, JA-ELA)

S. C. 1154—*M. C. Gampaha No.* 46299.
Argued and decided on : 9th November, 1948.

Excise Ordinance—Charges of possessing fermented toddy and transporting same toddy—Conviction on both charges—Propriety—Penal Code, section 67.

Where a person was charged with possessing fermented toddy and with transporting the same toddy himself and was convicted on both charges.

Held : That as the act of possession was incidental to the act of transporting, the conviction for possessing should be set aside.

M. M. Kumarakulasingham, for the accused-appellant.
E. R. de Fonseka, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The accused has been convicted of the offence of possession of 16 drams of fermented toddy in contravention of the Excise Ordinance. He is also charged with transporting the very same toddy contrary to the provisions of that Ordinance. The learned Magistrate has imposed a fine of Rs. 100 in respect of the first charge and a further fine of Rs. 50 in respect of the second. The learned Magistrate has accepted the evidence for the prosecution and found the accused guilty of both charges against him. I am not disposed to interfere with the finding of fact but I think that in the circumstances of this case there should be only one punishment. The act of possession was incidental to the act of transporting, as, in this case, the accused carried the bottles of toddy himself. This seems to me to be a case to which Section 67 of the Penal Code may properly be applied.

I therefore set aside the fine of Rs. 100 in respect of the charge of illicit possession and affirm the conviction and fine of Rs. 50 in respect of the charge of transporting toddy contrary to the provisions of the Excise Ordinance.

Sentence varied.

Present : CANEKERATNE, J. & GRATIAEN, J.

DORAISAMY vs. WINIFRED

S. C. No. 79—D. C. (F) Jaffna No. 2291
Argued on : 3rd February, 1949
Decided on : 9th February, 1949

Executor—Agreement to sell immovable property of deceased for purposes of administration—Action against executor for return of consideration paid at execution of agreement—Is executor entitled to defend action and maintain claim in reconvention personally.

Held : That where an executor is sued for the return of the consideration paid at the execution of an agreement to sell immovable property of the deceased for purposes of administration, he is entitled to defend the action personally and plead a claim in reconvention, if any.

Per CANEKERATNE, J.—"A legal representative, *i.e.* an executor or administrator, has an interest or power in or over the immovable property of the deceased which is sufficient to enable him to deal with the property so far as is required for purposes of administration, he has power to do whatever is essential for the purpose of selling it. In the performance of this duty the representative may enter into a contract pure and simple such as an agreement to sell, or make an executed contract which is a contract plus a conveyance ; in the former case the rights and obligations of the parties are contractual, and the representative is himself personally liable to the one with whom the contract is made, notwithstanding that he avowedly contracts as representative."

Cases referred to :—*Labouchere vs. Tupper*, 1857, M. R. 198.
Gavin vs. Hadden, 1871, 8, M. P. C. N. S. 90.

H. V. Perera, K.C., with *H. W. Thambiah*, for the plaintiff-appellant.

C. Thiagalingam with *V. Arulambalam*, for the defendant-respondent.

CANEKERATNE J.

This is an appeal by the plaintiff from a judgment dismissing his claim for the recovery of a sum of Rs. 10,000. The defendant was the widow and administratrix of one R. W. Alagakone deceased. By an agreement, (P.2), dated July 24, 1945, the plaintiff agreed to purchase and she, as administratrix of the estates of her deceased husband, to sell to the plaintiff a piece of land situated at Chundikully for the sum of Rs. 19,000, " within two weeks of her obtaining necessary sanction in the said Testamentary Case No. 146 authorising the vendor to sell the said land ; " a sum of Rs. 10,000 was paid at the time of the execution of the agreement.

No conveyance was executed in favour of the purchaser. The plaintiff alleges that the failure to implement the agreement was due to the act of the vendor, the defendant to the act of the purchaser. The former claims the return of his money the latter the right to retain a sum of Rs. 5,000, as liquidated damages in terms of the agreement and such sum as is found by the Court to be damages for improperly obtaining an injunction.

Parties went to trial on seven issues. After evidence had been led, the learned Judge himself framed three issues which were numbered as 8, 9 and 10. Counsel for the plaintiff then suggested certain further issues, some of which were accepted and those were numbered as 11, 12*a* and 12*b*. The learned Judge formed the view that the agreement was made with the administratrix of the estate of the deceased ; on the ground that she was defending the action and making the claim in reconvention personally he dismissed both claims. Perhaps on this account he did not consider it necessary to give specific answers to any of the issues in the case. Nor did he examine the case set up by the parties with thoroughness to ascertain who was the party responsible for the failure to complete the sale and purchase. His view that there was no breach of the conditions by the administratrix and that it was the plaintiff who was in default can in these circumstances hardly be taken as a finding on the facts led in evidence.

A legal representative, *i.e.* and executor or administrator, has an interest or power in or over the immovable property of the deceased which is sufficient to enable him to deal with the property so far as is required for purposes of administration, he has power to do whatever is essential for the purposes of selling it. In the performance of this duty the representative may enter into a contract pure and simple such as an agreement to sell, or make an executed contract

which is a contract plus a conveyance ; in the former case the rights and obligations of the parties are contractual, and the representative is himself personally liable to the one with whom the contract is made, notwithstanding that he avowedly contracts as representative. (*Labouchere vs. Tupper*, 1857, M. R. 198.) A representative may be entitled to be indemnified out of the assets of the estate for all liabilities properly incurred, and to the extent of the right of indemnity creditors may possibly be entitled to stand in his place as against the estate, so on a bond given by a representative for moneys *bona fide* advanced for the purposes of the estate a suit may be sustained against him in his representative capacity. (*Gavin vs. Hadden*, 1971, 8, M. P. N. S. 90.) The agreement in this case was one made with the defendant personally and the decision of the Judge on this point which really covers issues 8, 9, 10, 11, 12*a*, and 12*b*, is wrong.

It is not desirable to discuss the documents or the evidence led as the case must go back for a retrial on the first seven issues. The parties can, if they so desire, raise any further issues on the pleadings. The suit will be heard before another Judge and he will be entitled to make an appropriate order as regards the costs of the abortive trial. The defendant will pay the plaintiff the costs of appeal.

Set aside and sent back.

GRATIAEN J,

I agree.

Present : BASNAYAKE, J.

NANDASENA vs. WICKREMARATNE (S. I. POLICE, PANADURE)

S. C. 609—*M. C. Panadure* 49793
Argued on : 17th September, 1948
Decided on : 4th March, 1949

Criminal Procedure—Prosecution conducted by Police officer who was a material witness but was not the complainant—Denial of justice—Police officer acting as detective and participating in offence—Is he an accomplice—Need his evidence be corroborated—Evidence Ordinance, section 114*—Criminal Procedure Code, section* 199*—Betting on Horse-racing Ordinance.*

A Police Officer who had played a leading part in the detection of an offence conducted the prosecution though he was not the complainant. He was a material witness in the case. It was argued that there had been a denial of justice, that the only evidence in the case was the evidence of police officers who had participated in the offence committed by the accused, that they were, therefore, in the position of accomplices whose evidence should have been corroborated in material particulars.

Held : (1) That, on the facts, it did not appear that the interests of justice had suffered by reason of the police officer acting as prosecutor and witness.

(2) That the police officers were not in the position of accomplices whose evidence needed corroboration.

(3) That the words 'any officer of any Government department' in section 199 of the Criminal Procedure Code cannot be regarded as authorising a material witness for the prosecution to act as prosecutor.

Per BASNAYAKE, J.—"In England as in Ceylon a police officer, who is himself the informant or complainant, is, like any other litigant in person, entitled to appear as such and open his case, examine and re-examine his witnesses and cross-examine the witnesses for the defence ; but in England, unlike in Ceylon, a police officer who is not the informant or the complainant has no right to appear as advocate on behalf of some other police officer or member of the public. Stone's Justices Manual, 1943 Edn., pp. 2082-3. Both in England and in Ceylon a police officer or other public officer who is not the informant or complainant has no right to appear and conduct the prosecution in a case in which he is a material witness. A conviction had in any case in which this rule is not observed is liable to be quashed as in the case of *Police Sergeant Kulatunga vs. Mudalihamy et al* (Supra), where this Court is satisfied that "justice does not seem to have been done".

Cases referred to : *Police Sergeant Kulatunga vs. Mudalihamy et al* (1940) 42 N. L. R. 33.
Grenier vs. Edwin Perera (1941) 42 N. L. R. 377.
Santiapillai vs. Sittampalam (1948) 49 N. L. R. 138.
Hormazdyar Ardeshir Irani and others vs. Emperor 49 Criminal Law Journal (Indian) 23.
Peiris et al vs. Dole (1948) 49 N. L. R. 142.
Chelumal Rekumal vs. Emperor (1934) A. I. R. Sind 185 at 137.
R. vs. Mullins 7 St. Tr. N. S. 1110 ; 3 Cox Cr. 756.
R. vs. Bickley 2 Criminal Appeal Reports 53.
Brannan vs. Peck (1947) 2 All E. R. 572.

K. C. Nadarajah with *M. Markhani*, for the appellant.
F. R. de Fonseka, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The accused-appellant (hereinafter referred to as the appellant) appeals from the conviction on the following charge :—

> "You did within the jurisdiction of this Court at Panadura on 15-11-47 receive from P. C. 3304 Dias of Panadura a bet to wit a win and place Re. 1 all on bet on horses Aliban, Sri Lanka, Royal Tip, and Ranjit in the Schofield Plate (Div. 11) the Roseberry Stakes Schofield Plate (Div. 1) and the Juddah Stakes respectively proposed to be run at a race meet held at the Havelock Race Course Colombo on 15-11-47 which said bet is in contravention of section 3 (3) (*b*) of Ordinance No. 55 of 1943 and thereby committed an offence punishable under section 10 of Chapter 36 (Betting on Horse-Racing)."

The case for the prosecution is that on 15th November 1947 Police Constable Dias and Police Sergeant Haniffa were sent with money to place a bet with the appellant who has a boutique in which he sells betel and tobacco. Dias handed to the appellant a rupee note and two slips of paper in each of which were written the names of four horses which were entered for horse-races to be run that day at the Havelock Race Course in Colombo. The appellant retained one of the slips and returned the other and fifteen cents in cash. Sub-Inspector Taylor who had arranged that Dias and Haniffa should place the bet followed them in a motor van with Sub-Inspector Wickramaratne, a police sergeant and a police constable, and from about 20 yards from the appellant's boutique watched them. On a signal given by Sergeant Haniffa he entered the boutique. As he entered, the appellant threw away something which on examination turned out to be the slip containing the names of the horses handed to him by Police Constable Dias the counterpart of which he had returned earlier to Police Constable Dias. He also found the rupee note he had given to Police Constable Dias. In the appellant's boutique were found several racing guides, a number of racing newspapers, and a racing programme.

Learned Counsel for the appellant submits that justice does not appear to have been done in this case as Sub-Inspector Taylor, who planned the trap laid for the appellant and who played a leading part in the detection of the offence alleged against him, not only gave evidence in the case but also led the evidence for the prosecution. He relies on the judgment in the case of *Police Sergeant Kulatunga vs. Mudalihamy et al* (1940) 42 N. L. R. 33 wherein Howard C. J., set aside the conviction of the accused on the ground that a police sergeant who was a material witness for the Crown had conducted the prosecution.

The right of a person to appear and conduct the prosecution in a case which a Magistrate has power to try summarily has to be determined according to section 199 of the Criminal Procedure Code. That section reads ;—

> "The Attorney-General, the Solicitor-General, a Crown Counsel, or a pleader generally or specially authorised by the Attorney-General shall be entitled to appear and conduct the prosecution in any case tried under this Chapter, but in the absence of the Attorney-General, the Solicitor-General, a Crown Counsel, and any such pleader as aforesaid the *complainant* or any officer of any Government department or any officer of any Municipality, District Council or Local Board may appear in person or by pleader to prosecute in any case in which such complainant or Government department or Municipality or District Council or Local Board is interested."

According to that section the "complainant is one of those entitled to appear and conduct the prosecution. Though the Criminal Procedure Code does not contain a definition of the expression "complainant", the expression "complaint" is defined therein (section 2). It means the allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person whether known or unknown, has committed an offence. A "complainant" is one who makes a complaint. Sub-Inspector Wickremaratne who has made the report under section 148 (1) (*b*) is therefore the complainant in the instant case. I find that the same view has been taken in *Grenier vs. Edwin Perera.* (1941) 42 N. L. R. 377. Sub-Inspector Taylor who was a witness in the case, and whose name appears in the list of witnesses subjoined to Sub-Inspector Wickremaratne's report under section 148 (1) (*b*) had therefore no right to appear and conduct the prosecution *qua* complainant. Was he then entitled to appear and conduct the prosecution under the authority given by section 199 to any officer of any Government department to prosecute in any case in which that department is interested? I do not think those words can be regarded as authorising a material witness for the prosecution to act as prosecutor. Although the section empowers the complainant who in certain circumstances is likely to be a material witness, to appear and conduct the prosecution, it cannot be regarded as authority for any other person who is a material witness to play the dual role of prosecutor and witness.

In England as in Ceylon a police officer, who is himself the informant or complainant, is, like any other litigant in person, entitled to appear as such and open his case, examine and re-examine

his witnesses and cross-examine the witnesses for the defence ; but in England, unlike in Ceylon, a police officer who is not the informant or the complainant has no right to appear as advocate on behalf of some other police officer or member of the public. Stone's Justices Manual, 1943 Edn., pp. 2082-3. Both in England and in Ceylon a police officer or other public officer who is not the informant or complainant has no right to appear and conduct the prosecution in a case in which he is a material witness. A conviction had in any case in which this rule is not observed is liable to be quashed as in the case of *Police Sergeant Kulatunga vs. Mudalihamy et al* (supra), where this Court is satisfied that " justice does not seem to have been done ".

In my judgment* in the case of *Santiapillai vs. Sittampalam* (1948) 49 N. L. R. 136 I said : " I am of opinion that the mere fact that the officer who conducts a prosecution gives evidence in the course of it, is not fatal to the conviction of the offender. Nevertheless, an officer whose duty is to conduct the prosecution in certain classes of cases should, if he knows beforehand that in any particular case his evidence is material to the case, arrange for some other officer to conduct the prosecution and avoid a situation in which he has to perform the dual role of prosecutor and witness, for it may turn out that in certain events the performance of such a dual role is not in the interests of justice."

In the instant case, as in that case, the interests of justice do not appear to have suffered by Sub-Inspector Taylor's acting as prosecutor and witness. Had objection been taken at the trial to the appearance of Sub-Inspector Taylor as prosecutor, or had his integrity been called in question in the trial Court I should certainly have quashed this conviction. Although the appellant was defended by the very counsel who appeared for him at the hearing of this appeal, no objection was taken at the trial, as in the case of *Police Sergeant Kulatunga vs. Mudalihamy et al* (supra), to the prosecution being conducted by Sub-Inspector Taylor. Nor was it alleged at the trial, as in that case, that this is a false prosecution engineered by Sub-Inspector Taylor.

The conviction of the appellant cannot be set aside on the ground submitted by learned Counsel. Learned Counsel also submits that the only evidence in the case is the evidence of police officers who have, in fact, participated in the offence committed by the appellant and are therefore accomplices. He relies on the presumption in illustration (*b*) of section 114 of the Evidence Ordinance that an accomplice is unworthy of credit unless he is corroborated in material particulars and also on the following remarks of Sen J., in the case of *Hormazdyar Ardeshir Irani and others vs. Emperor.* 40 Criminal Law Journal (Indian) 362.

" It would seem, therefore, that however good an individual bogus punter may be, his evidence would need a certain amount of corroboration before it can be accepted. Obviously the evidence of one bogus punter cannot ordinarily be used to corroborate the evidence of another nor, as I have already shown, can the finding of marked coin normally be regarded as corroboration of the bogus punter's evidence." With great respect I am unable to agree that bogus punters who, at the instance of the police, and for the purpose of detecting offences under the statute relating to Betting on Horse-Races, take part in a trap laid by the police can be regarded as accomplices. An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is, not every participation in a crime which makes a party an accomplice in it so as to require his testimony to be confirmed. *Peiris et al vs. Dole* (1948) 49 N. L. R. 142. *Chetumal Rekumal vs. Emperor*, (1934) A. I. R. Sind 185 at 187. This definition finds support in the case of *R. vs. Mullins* 7 St. Tr. N. S. 1110 ; 3 Cox Cr. 756 wherein Maule J. says :—

> " An accomplice is a person who has concurred in the commission of an offence.....(But such are different from) spies, that is, persons who take measures to be able to give to the authorities information so as to prevent those who are disposed to break out from effecting their purpose.....In the case of an accomplice, he acknowledges himself to be a criminal ; in the case of these men, they do not acknowledge anything of the kind."

Wigmore's discussion of this topic is illuminating : Wigmore on Evidence, 3rd Edn., Vol. VII, p. 339, sec. 2060.

> " (*d*) The case of a pretended confederate, who as detective, spy, or decoy, associates with the wrong doers in order to obtain evidence, is distinct from that of an accomplice, although the distinction may sometime be difficult of application. The line should perhaps be drawn in this way : When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice ; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy or paid informer is therefore not an accomplice ; nor an original confederate who betrays before the crime's committal ; yet an accessory after the fact would be if he had before betrayal rendered himself liable as such.
>
> " (*e*) The burden of proving the witness to be a accomplice is of course upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. Whether the witness is in truth an accomplice is left to the jury to determine, and if they conclude him to be such, then and then only are they to supply the rule requiring corroboration."

*36 C. L. W. 49.

The Court of Criminal Appeal of England has in the case of *R. vs. Bickley*, 2 Criminal Appeal Reports 53, approved the setting of a trap in order to obtain evidence against someone reasonably suspected of indulging in a course of criminal conduct. In more recent times Birkett J., 21 Police Journal 120 is reported to have approved the practice at Nottingham Assizes in November 1943 in the following terms .

> "Every matter of this kind is of great importance to the public and it was quite right for the Police to use every means at their disposal to investigate the purpose for which the pills were being sold. In this case the two policewomen discharged the difficult duty they had been instructed to perform well—it cannot have been an easy or pleasant thing to do—and they gave their evidence with the utmost fairness. Nobody criticised the authorities in the smallest degree for any step taken in the case. It was quite right and proper that legitimate steps should be taken where it was thought offences had been committed."

It is clear therefore that Police Constable Dias is not an accomplice in the sense in which that term is understood in section 114, illustration (*b*), of the Evidence Ordinance, which states that an accomplice is unworthy of credit, unless he is corroborated in material particulars. My view finds support in the examples to illustration (*b*).

In this connexion I should not pass unnoticed the case of *Brannan vs. Peek* (1947) 2 All E. R. 572 wherein Lord Goddard C.J. made the following observations .—

> "There is another point of much greater public importance. The Court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasised that, unless an Act of Parliament provides for such a course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow, or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so he had committed an offence. I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone ; if they do commit offences they ought also to be convicted and punished for the order of their superior would afford no defence."

With the greatest deference to the high and eminent authority that pronounced these words I find myself unable to give my unqualified assent to the above sentiments, which are in fact *obiter*.

There are certain classes of offences the majority of which are the creation of modern statutes introduced to meet the complexities of modern life, that baffle detection, and the only way of detecting them is by employing reliable detectives. Those who are genuine participators in that type of offence cannot be expected to, and will not own the act. Besides, their evidence carries with it the infirmity of being an accomplice's evidence.

On the facts I see no reason to interfere with the conviction. The appeal is dismissed.

Appeal dismissed.

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

ELIYATAMBY *et al* vs. THE KING

S. C. No. 224-229—*D. C. (Cril.) Batticaloa No.* 59

Argued on : 10th March, 1949

Decided on : 16th March, 1949

Criminal Procedure Code, sections 304 *and* 425—*Judge passing sentence without assigning "reasons"—Reasons given later on date on which Judge was not duly gazetted to act—Reasons not pronounced in open Court—Validity.*

Held : (1) That the failure to comply with the provisions of section 304 of the Criminal Procedure Code is an irregularity curable under section 425.

(2) That reasons given by a judge on a date on which he has not been gazetted to act as a Judge of that Court have no legal validity.

Cases referred to : *Henricus vs. Wijesooriya* (1946) (47 N. L. R. 278).
Queen Empress vs. Hargobind Singh (1892) (I. L. R. 14 Allahabad 392).
Bandama Atchaya vs. Emperor (1903) (I. L. R. 27 Madras 237)
Tissera vs. Daniels (1948) (49 N. L. R. 162). S. C. 646-647 ; M. C. Trincomalee 11304 (S. C. Minutes of October 23, 1948).
Tiagarajah vs. Annaikoddai Police (1948) (50 N. L. R. 109).

G. E. Chitty with *Vernon Wijetunge*, for the 1st, 7th and 21st accused-appellants.

S. Nadesan, for the 2nd, 8th and 25th accused-appellants.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

WIJEYEWARDENE C.J.

The accused are Muslim worshippers at the Periapallai Mosque and are said to have been opposed to some other Muslim worshippers who had formed themselves into an Association called the Baransanjee Association. The accused entered the Mosque on January 2 1948, when the members of the Baransanjee Association were at their prayers and created a disturbance. They were charged in this case with having committed various offences punishable under sections 140, 144, 291, 316/146 and 314/146. The case came up for trial before Mr. F. E. Alles, District Judge of Padulla, who was specially gazetted as Additional District Judge of Batticaloa for 23rd to 26th August, 1948, and 1st to 3rd September, 1948, to try the case. The case proceeded to trial against all the accused except the 24th who was too ill to attend Court. At the conclusion of the hearing on September 2 1948, Mr. Alles acquitted the 20th accused and convicted all the other accused tried by him on all the counts in the indictment. On the same day he sentenced the 1st 2nd and 7th accused to six month's rigorous imprisonment, the 8th, 21st and 25th to 3 months' rigorous imprisonment each and ordered each of the remaining accused whom he had convicted to enter into a bond under section 325 (*a*) of the Criminal Procedure Code for a period of two years, and to pay Rs. 50 as Crown costs. Mr. Alles gave his " reasons " in a writing dated September 12, 1948. Those " reasons " were not pronounced in open Court as required by section 304 of the Criminal Procedure Code. The present appeals are preferred by 1st 2nd, 7th, 8th, 21st and 25th accused who filed their petitions of appeal on September 2, 1948, immediately after the sentences were passed.

So far as I have been able to gather from the proceedings the only reasons for sentencing the 8th, 21st and 25th accused to terms of imprisonment appear to be that each of them " admitted " a previous conviction. The District Judge has not specified the particular offences admitted by them. The Crown Counsel was unable to state definitely which conviction sheet applied to each of these accused. The trial Judge should have taken care to see that there was definite evidence as to the particular offence committed by each of the accused previously so as to enable the Court to decide the question as to the appropriateness of the sentence passed on them. As regards the 21st accused the Crown Counsel stated that the previous conviction of the 21st accused appeared to be for retaining a stolen head of cattle in 1946. I am unable in these circumstances to see any good reason for passing a sentence of imprisonment on the 8th, 21st and 25th accused when the accused who have not appealed have been dealt with under section 325 (2) of the Criminal Procedure Code.

As regards the other appellants it was urged that :—

(*a*) the failure of the Judge to observe the provisions of section 304 of the Criminal Procedure Code amounted to an irregularity which could not be cured by section 425 of the Criminal Procedure Code.

(*b*) that the " reasons " dated September 12, 1948, could not be regarded as of any legal validity as Mr. Alles was not the District Judge of Badulla on that day.

The cases of *Henricus vs. Wijesooriya* (1946) (47 New Law Reports 378), *Queen Empress vs. Hargobind Singh* (1892) (I. L. R. 14 Allahabad 392), and *Bandama Atchaya vs. Emperor* (1903) (I. L. R. 27 Madras 237) were cited in support of argument (*a*). Our attention was also invited to *Tissera vs. Daniels* (1948) (49 N. L. R. 162) S. C. 646-647 : M. C. Trincomalee 11304 (S. C. Minutes of October 23 1948), *Tiagarajah vs. Annaikoddai Police* (1948) (50 N. L. R. 109) and some Indian decisions. I am of opinion that the failure to comply with section 304 is an irregularity curable under section 425 of the Criminal Procedure Code and that we need not acquit the accused or send the case for a re-trial if we are satisfied that the convictions are supported by the evidence.

As regards the argument (*b*) the position is that we have to ignore the reasons dated September 12, 1948, and deal with the case as we

have merely the conviction and sentence of September 2, 1948.

On a careful perusal of the evidence I find no reason whatever to set aside the conviction of the appellants. On the other hand we have some conflicting evidence as to the 1st 2nd and 7th accused carrying some weapons. As there is no finding by Mr. Alles of which we could take judicial notice to show us whether he accepted the evidence that the 1st, 2nd and 7th accused carried weapons I am unable to see any reason why they should be dealt with differently from those who were asked to enter into a bond.

For the reasons given by me, I uphold the convictions of the appellants but set aside the sentences passed by the District Judge. I order each of the appellants to enter into a bond in a sum of Rs. 200/200 with one surety for a period of 2 years under section 325 of the Criminal Procedure Code and pay a fine of Rs. 50 as Crown costs.

I direct that the attention of the District Judges and Magistrates should be drawn to the important provisions of sections 304 and 306 of the Criminal Procedure Code and that an explanation should be called for from Mr. F. E. Alles as to his failure to see that he was gazetted as a District Judge of Batticaloa on the relevant days.

WINDHAM, J.
I agree.

Convictions upheld : Sentences varied.

Present : BASNAYAKE, J.

NAMASIVAYAM vs. SARASWATHY (w/o NAMASIVAYAM)

S. C. 1192—*M. C. Mallakam* 6080
Argued on : 10th November, 1948
Decided on : 11th February, 1949

Maintenance Ordinance—Failure to follow procedure prescribed by section 14*—Validity of proceedings—When does dismissal of application operate as a bar to subsequent application.*

Held : (1) That the failure of a Magistrate to follow the procedure prescribed by section 14 of the Maintenance Ordinance vitiates all subsequent proceedings on an application for maintenance.

(2) That a dismissal of an application without an adjudication on the merits does not operate as a bar to a fresh application.

Cases referred to: *Anna Perera vs. Emaliano Nonis* (1908) 12 N. L. R. 263.
Menikhamy vs. Loku Appu (1898) 1 Bal. 161.
Podina vs. Sada (1900) 4 N. L. R. 109.
Beebee vs. Mahmood (1921) 23 N. L. R. 123.

H. W. Thambiah with *Sharvananda*, for the appellant.

No appearance for the respondent.

BASNAYAKE, J.

On 19th June 1948 the applicant one Saraswathy, (hereinafter referred to as the applicant), wife of Sinnathurai Namasivayam, the defendant-appellant, (hereinafter referred to as the defendant), made an application for maintenance, in writing, as required by section 13 of the Maintenance Ordinance (hereinafter referred to as the Ordinance), in which she complained that her husband having sufficient means failed and neglected for the last eight months to maintain her and his child Thavamany Devi aged six years and asked that the defendant be ordered to make a monthly allowance for their maintenance under section 2. On the same day without following the procedure indicated in section 14 the learned Magistrate made order that summons should issue on the defendant.

Learned Counsel for the defendant submits that the failure of the learned Magistrate to follow the procedure prescribed by section 14 of the Ordinance vitiates all subsequent proceedings had on the application. I think learned Counsel's submission is entitled to succeed. Section 14 is imperative in its language and it requires the Magistrate to examine the applicant on oath or

affirmation and record such examination and issue summons if there is after such examination sufficient ground for proceeding. It appears therefore that the judgment of the Magistrate that there is sufficient ground for proceeding is a condition precedent to the issue of summons and to all subsequent proceedings. Although the enactment is affirmative and does not expressly prohibit the issue of summons without the examination contemplated therein it is a rule of construction that " every statute limiting anything to be in one form, although it be spoken in the affirmative, yet it includes in itself a negative." Viner's Abridgement, Tit. Neg. A. pl. 2. Another rule of construction that should be noticed in this connexion is that " if an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there be no negative words, be done in any other manner." Dwarris on Statutes, p. 477.

A Magistrate's jurisdiction under the Maintenance Ordinance is a special jurisdiction treated by the statute and it is a rule of construction that when a statute confers jurisdiction upon a tribunal of limited authority and of statutory origin, the condition and qualification annexed to the grant must be strictly complied with. The fact that the defendant raised no objection to the proceedings in the trial Court does not in my view make legal what has not been done according to law. The legislature has in its wisdom enacted this provision as a safeguard against a person being summoned on an unsworn allegation to answer charges of neglect or refusal to maintain his wife or child legitimate or illegitimate. Before a summons can issue it requires the judgment of a Magistrate as to whether the allegation is one that needs inquiry, which judgment must be upon evidence on oath or affirmation. The evidence taken prior to the issue of summons is in the nature of a preliminary investigation for section 16 provides that all evidence taken by the Magistrate under the Ordinance shall be taken in the presence of the defendant. So that when the defendant appears the applicant's evidence must be recorded *de novo*. This is not a case in which in my view the maxim *Quilibet potest renuntiare juri pro se introducto* can be applied because this is not a statute designed to benefit a particular person or class of persons. It is and has been held to contain our entire law governing maintenance of wives and children. *Anna Perera vs. Emaliano Nonis* (1908) 12 N. L. R. 263. *Menikhamy vs. Loku Appu*, (1898) 1 Bal. 161. The object of the statute being one of general policy, the conditions prescribed by the statute are indispensable and when a statute directs a particular mode of proceeding or gives a particular form that form must be observed. Dwarris on Statutes, p. 611.

The fact that the statute imposes a duty on the Magistrate and not on a party does not affect its imperative character. Maxwell on Interpretation of Statutes, p. 378, 9th Edn. In *Podina vs. Sada* (1900) 4 N. L. R. 109. Bonser C. J. while holding that the failure to comply with section 14 was irregular, seems to have taken the view that the irregularity did not vitiate the proceedings. With the greatest respect I find myself unable to share that view.

The other question that has been raised is that the applicant is not entitled to maintain the present claim in view of the fact that a previous application by her on 15th December 1947 in M. C. Mallakam Case No. 4847 was dismissed. The written application made on that occasion reads :—

> " I, Saraswathy wife of Sinnathurai Namasivayam of Chulipuram do hereby complain to this Court that the respondent having sufficient means did fail and neglect to maintain me—his lawful wife—and his child Thavamany Devi aged 5 years for the past one month. The respondent earns Rs. 125 per mensem.
>
> " Wherefore I pray that the respondent be ordered to pay me and to his child maintenance in terms of section 2 of 18 of 1889."

The learned Magistrate, as in the instant case, without complying with section 14 of the Ordinance issued summons on the defendant, who appeared on 10th January 1948. On that date the Magistrate's record reads —

> " 10-1-48. Applicant Saraswathy present. Respondent : S. Namasivayam—present.
>
> Summons served on respondent.
>
> Respondent present. He denies marriage and paternity.
>
> Inquiry on 31-1-48."

On 31st January 1948 the inquiry was postponed owing to the applicant's absence, and on 14th February 1948 owing to the defendant's absence, and on 13th March 1948 owing to the absence of the proctor for the defendant. On 3rd April 1948 the applicant was again absent owing to illness. Thereafter on 17th April 1948 the case was again postponed. The reason is thus recorded : " Parties moving. Call case on 1-5-48." After another postponement, on 15th May 1948 the inquiry was fixed for 5th June 1948. On that day the applicant was absent and the application was dismissed.

There has been no adjudication on the merits and the dismissal of the applicant's application does not operate as a bar to a fresh application. The cases of *Anna Perera vs. Emaliano Nonis* (1908) 12 N. L. R. 263 and *Beebee vs. Mahmood* (1921) 23 N. L. R. 123 are authority for the proposition that an applicant whose application has been dismissed on the ground of her failure to appear on the day fixed for the hearing without any kind of inquiry into the merits is not precluded from making a fresh application.

In view of the opinion I have formed on the first question arising on this appeal I set aside these proceedings and send the case back so that the Magistrate may proceed *de novo* from the stage indicated in section 14 of the Ordinance.

I make no order as to costs in view of the defendant's failure at the appropriate stage of the proceedings to raise the objection that has now been taken.

Sent back.

Present : BASNAYAKE, J.

BUHARY & OTHERS vs. PASSARA POLICE

S. C. 685-688—*M. C. Badulla* 4883

Argued on : 19th July, 1948

Decided on : 3rd March, 1949

Criminal Procedure—Trial of accused on several charges some of which are outside Magistrate's jurisdiction—Conviction on charge within jurisdiction—Validity of conviction.

Held : That the trial of an accused by a Magistrate on charges within his jurisdiction as well as on charges outside his jurisdiction is no ground for setting aside a conviction on a charge within his jurisdiction.

C. E. Chitty, for the appellants.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

Each of the accused-appellants has been convicted of the offence of rescuing one Mani from the lawful custody of police sergeant Charles and sentenced to one month's rigorous imprisonment. The appeals are from that order, with the leave of Court under section 335 (1) (*f*) of the Criminal Procedure Code.

These appellants and Mani, the person in respect of whom they committed the offence of which they have been convicted, were originally charged with two further offences punishable under sections 140 and 144 of the Penal Code. The offence punishable under section 144 of the Penal Code is triable by a District Court and not summarily triable by a Magistrate. In the instant case the learned Magistrate tried the accused *qua* Magistrate and not in the capacity of a District Judge under section 152 (3) of the Criminal Procedure Code.

Learned counsel for the appellants therefore objects to the conviction on the ground that the learned Magistrate acted without jurisdiction. I am unable to uphold this contention. The learned Magistrate has no jurisdiction to try the offence punishable under section 144, but he has jurisdiction to try the offence of which he has convicted the appellants. Although the acquittal of the accused of the offence under section 144 is bad for want of jurisdiction their conviction under section 220 of the Penal Code cannot be impeached on that ground. The offence of which the appellants have been convicted is not inseparable from the offence of which they have been acquitted.

In my opinion the trial of an accused by a Magistrate on charges which he has jurisdiction to try as well as on a charge beyond his jurisdiction affords no ground for setting aside a conviction on any charge within his jurisdiction. No plea of *autrefois acquit* will avail the accused if a second prosecution is instituted in respect of the offence under section 144, but a second prosecution for the offence under section 220 can in my view be properly met by a plea of *autrefois convict.*

There is not sufficient ground for interfering with the conviction on the facts.

The appeals are therefore dismissed.

Appeals dismissed.

Present : GRATIAEN, J.

R. D. PERERA vs. INSPECTOR OF POLICE (KADAWATTA)

S. C. No. 1252/*P*—*M. C. Gampaha No.* 44693
Argued on : 7th December, 1948
Decided on : 10th December, 1948

Magistrate passing sentence before pronouncing judgment—Criminal Procedure Code, sections 304 *and* 306.

Held : That a judgment may be pronounced on a date subsequent to the date of the verdict but sentence must not be passed before judgment is pronounced.

Cases referred to : *Henricus vs. Wijesooriya* (1946) 47 N. L. R. 378).

H. W. Jayawardena, for the accused-appellant.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

GRATIAEN J.

On 27th April 1948 the appellant was charged in the Magistrate's Court of Gampaha on a charge of house-breaking. Eddy Fernando who has since been acquitted, was charged with abetting the offence.

Non-summary proceedings were duly commenced and after recording the evidence of Daniel Fernando, who was one of the persons in charge of the Co-operative Store in respect of which the offence is alleged to have been committed the learned Magistrate, Mr. J. E. A. Alles, decided to try the case summarily in terms of section 152 (3) of the Criminal Procedure Code. Before the trial commenced however, Mr. Alles was transferred from Gampaha, and it was his successor Mr. Senaratne who tried the case. After trial the appellant was convicted and sentenced to undergo a term of one year's rigorous imprisonment. The present appeal is from this conviction.

The case for the prosecution was that Daniel Fernando, who gave evidence at the non-summary inquiry had suspected that thefts from the store were regularly taking place. He accordingly set a trap for the unknown burglar leaving his brother inside the store to witness any offence which might take place. The plan succeeded, and the appellant was caught red-handed in the commission of the offence.

The defence was that the appellant had been forcibly taken into the store by Daniel who it was alleged, was himself responsible for the shortages in the property entrusted to him and was therefore anxious to divert suspicion from himself.

The trial took a most unusual course. Daniel Fernando, for a reason which has not been explained, did not give evidence at the trial although he obviously was the person in the best position to speak to many of the relevant facts. Instead, the prosecution called a Police Sergeant who spoke to a number of statements which Daniel Fernando had made to him regarding the incident. An extract from the Police Information Book setting out Daniel's first information to the authorities was also produced. In the result a considerable body of hearsay evidence was introduced. This irregularity does not seem to have been objected to by the defence in the Court below—possibly because they anticipated that Daniel would be called to give evidence at a later stage of the trial—but in any event no question of condonation of fundamental departures from correct procedure can arise in criminal cases. The conviction must therefore be quashed, and the case must go back for fresh non-summary proceedings to be taken before another Magistrate. It will be for the new Magistrate to decide whether the provisions of section 152 (3) of the Criminal Procedure Code should be invoked by him.

This disposes of the present appeal, but there is another matter to which I desire to direct the attention of the learned Magistrate. The trial was concluded on 26th August on which date a verdict was recorded and the appellant remanded for identification and sentence. On 2nd September the appellant was sentenced to a term of imprisonment. At no time however, was the learned Magistrate's judgment, containing the many particulars required by section 306 of the Code, pronounced in open Court in the presence of the appellant or otherwise. On the date on

which the verdict was recorded the learned Magistrate stated that he would give his "reasons later." Section 304 of the Code no doubt empowers a Magistrate to postpone the pronouncement of his reasons for convicting an accused person until a date which is subsequent to the verdict, but the provisions of sections 304 and 306 of the Code should be strictly complied with. ("*Henricus vs. Wijesooriya*" (1946) 47 N. L. R. 378.) I respectfully agree with de Silva J. that an analysis of the relevant sections also makes it clear "that the judgment must be contemporaneous with the sentence and that the sentence forms a part of the judgment." In other words, the judgment may be pronounced on a date subsequent to the date of the verdict, but its pronouncement cannot be indefinitely postponed, and the passing of sentence must not precede it. I am not unmindful of the difficult conditions under which a Magistrate who presides in a busy Court often has to work, but I consider that there can never be any justification for a procedure by which a man can be punished and perhaps made to commence to serve his term of imprisonment for a criminal offence without being aware of the grounds for his conviction. He is legally entitled to that information and very rightly so. Another reason for strict compliance with the provisions of sections 304 and 306 is that the Code fixes a time limit for preferring an appeal from a conviction, and in some cases the right of appeal is limited to questions of law certified by an advocate or proctor as fit for adjudication by this Court. It stands to reason that the appellant and his professional advisors should be informed of the grounds for the conviction well in advance of the date on which the right of appeal expires.

Conviction quashed and case sent back.

Present : BASNAYAKE, J.

WIMALAWATHIE KUMARIHAMY vs. IMBULDENIYA

S. C. 843—*M. C. Kandy* 30754

Argued on : 15th November, 1948

Decided on : 8th February, 1949

Maintenance Ordinance—Fixing of monthly allowance under section 2—Effect of divorce proceedings on application for maintenance.

Held : (1) That in fixing the monthly allowance for maintenance under section 2 of the Maintenance Ordinance, a Magistrate must exercise his discretion.

(2) That an application for maintenance is not affected by the institution of an action for divorce by one party against the other.

Cases referred to : *Peiris vs. Peiris* (1940) 45 N. L. R. 18.
Fernando vs. Amarasena (1943) 45 N. L. R. 25.
De Silva vs. Seneviratne (1925) 7 Ceylon Law Recorder 58.

N. E. Weerasooria, K.C., with *T. B. Dissanayake*, for the appellant.

C. V. Ranawaka, for the respondent.

BASNAYAKE, J.

This is an application under section 2 of the Maintenance Ordinance for maintenance by one Lenawa Wimalawathie Kumarihamy wife of the respondent. At the conclusion of the applicant's evidence the learned Magistrate made the following record on 26th April 1948 :—

"At this stage the respondent states he is technically responsible for payment of maintenance but he has filed a Divorce on the ground that his wife had deceived him when she married him by not telling him she had been kept by another man and had a child by him.

Order.

"It is clear from all the circumstances that applicant got married to respondent hiding not merely her age but the fact that she had lived with another man and had a child by him many years ago. I, therefore, make order that the respondent pay maintenance of 50 cents a month commencing 1-4-48."

The present appeal is from the above order. The learned Magistrate's order is wrong and must be set aside. The Magistrate is required by section 2 of the Maintenance Ordinance to exercise his discretion in fixing the monthly allowance for

the maintenance of the wife of a person who is proved to have neglected or refused to maintain her. In the instant case the learned Magistrate has not exercised his discretion but acted capriciously. The respondent is an apothecary in receipt of a monthly salary of Rs. 215. A monthly allowance of 50 cents is a pittance on which the applicant cannot maintain herself even for a day. I, therefore, increase the amount of maintenance to Rs. 75 per mensem. The applicant is entitled to the costs of this appeal and of the proceedings in the Court below.

The divorce proceedings which the respondent says he has instituted do not in my view affect the application for the maintenance and a Magistrate is not entitled to refuse an application for a monthly allowance under section 2 of the Maintenance Ordinance on the ground that divorce proceedings have been instituted by the husband of the applicant. The cases of *Peiris vs. Peiris* (1940) 45 N. L. R. 18 and *Fernando vs. Amarasena* (1943) 45 N. L. R. 25 to which learned Counsel for the appellant has referred me support my view. With great respect I find myself unable to agree with the view taken by Jayawardene J. in *De Silva vs. Seneviratne* (1925) 7 Ceylon Law Recorder 58. In the absence of a provision in the Maintenance Ordinance enabling a Magistrate to adopt the course suggested therein he has no power in law to deny to an applicant the relief provided by the statute.

Appeal allowed.

Present : Nagalingam & Gratiaen, JJ.

HAWADIYA vs. UNOOS

S. C. 35—*D. C. Kandy* 1586/*L*
Argued on : 27th January, 1949
Decided on : 3rd February, 1949

Trusts Ordinance, section 93—*Executory contract—Specific performance—Agreements to transfer land pending partition action—Conveyances executed after partition decree—Land seized and sold by Fiscal—Is purchaser bound by agreements.*

A and B agreed to transfer to C the parcels of land to be alloted to them in a partition action. After the final decree, the land was seized and sold by the Fiscal to D. Before the sale, A and B executed conveyances in favour of C, who maintained that, (under section 93 of the Trusts Ordinance,) D was bound by the agreements respecting the land.

Held : (1) That section 93 of the Trusts Ordinance had no application as the contract affecting the land had been discharged prior to the sale by the Fiscal.

(2) That, in any event, the agreements were not capable of specific perfromamce, as they contained penal stipulations.

Cases referred to : *Mathes vs. Raymond* 2 N. L. R. 270.
Paiva vs. Marikar 39 N. L. R. 255.

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

Cyril E. S. Perera with *W. D. Gunasekera*, for the plaintiff-respondent.

Gratiaen, J.

By deed No. 273 dated 14th January 1940 R. B. Nanduwa agreed to transfer to the plaintiff for a consideration of Rs. 300 whatever specific parcel of land would be alloted to him in a pending partition action. By deed No. 312 dated 4th October 1940 Nalla Periyasamy entered into a similar agreement in favour of the plaintiff in respect of what might be alloted to him in the same action. It is common ground that these agreements were not obnoxious to the provisions of the Partition Ordinance. In due course a final decree was entered on 26th May 1941 in the partition action and Nanduwa and Nalla Periyasamy respectively became entitled to the defined allotments of land in respect of which the present action has been instituted. On 10th July 1941 both allotments were however seized in execution proceedings against their respective owners. At a Fiscal's sale held on 31st July 1941 the defendant-appellant was the highest bidder. The sale was confirmed on 24th November 1941

and on 7th January 1942 a Fiscal transfer was executed in terms of which both allotments of land were conveyed to him.

The plaintiff contends in the present action that, by virtue of the provisions of Section 93 of the Trusts Ordinance (Chapter 72) the defendant having acquired the two allotments of land with notice of the plaintiff's rights under the agreements No. 273 and 312 to which I have referred and both of which were duly registered, must be regarded in law as holding the property for the plaintiff's benefit to the extent necessary to give effect to these agreements. The plaintiff accordingly claimed that the defendant should in exchange for the consideration stipulated in the agreements, be ordered to convey both allotments to him.

Section 93 of the Trusts Ordinance requires *inter alia* (1) that the contractual rights sought to be enforced by the plaintiff must be rights in an *executory* contract which was in existence at the time when the property was acquired by the defendant and (2) that the contract must be one in respect of which specific performance would be judicially enforced in accordance with principles which are well recognised.

In my opinion the learned Judge in entering judgment for the plaintiff has lost sight of the fact that at the time when the defendant acquired the property in dispute there was no outstanding executory contract which the plaintiff could seek to enforce. It has been proved that at the relevant date Nanduwa by the Deed D1 of 22nd July 1941 had in fact already purported to execute a conveyance of his allotment of land in favour of the plaintiff in discharge of his obligations under the agreement No. 273, and that nine days later Nalla Periyasamy had also executed a conveyance D2 in respect of his allotment. It seems to be clear that in these circumstances the contractual obligations created by the agreements on which the plaintiff relied were already discharged by their respective vendors. It is unnecessary to consider whether the plaintiff's title under these two conveyances was in law superior to that created by the later Fiscal's transfer in favour of the defendant because the present action is not a *rei vindicatio* action but is concerned only with the applicability or otherwise of Section 93 of the Trusts Ordinance. I observe that in an earlier action the plaintiff had for a reason which is to say the least somewhat obscure, consented to a decree declaring the defendant to be the owner of the land, without prejudice only to the plaintiff's rights if any, under the agreements No. 273 and 312 of 1940. I am satisfied that no further rights under these agreements did in fact exist after July 1941 and that the relief prayed for by the plaintiff in the present action is, therefore, not available to him.

Learned Counsel of the defendant has also argued that in any event the agreements No. 273 and 312 did not create contractual rights in respect of which specific performance could appropriately be ordered. He pointed out that both agreements contained clauses which expressly provided that if the vendor failed to execute a conveyance when called upon to do so, he should refund all moneys received by him under the agreement and also pay a specified sum as liquidated damages. It is settled law that when an agreement provides a penal stipulation as an alternative to performance of the original obligation, specific performance will not be ordered. (*Fry on Specific performance* (*5th edit.*) *p.* 68). Indeed, the only difficulty in such cases is one of interpretation, as it is not always easy to decide whether a penal stipulation provides an alternative obligation or merely an accessory obligation to the original obligation. It is not necessary to decide this question in the present case, but as at present advised I am inclined to the view that, on the authority of "*Mathas vs. Raymond*" 2 N. L. R. 270 and *Paiva vs. Marikar*" 39 N. L. R. 255 the agreements No. 273 and 312 of 1940 did not create obligations in respect of which specific performance should be decreed, and that a claim for damages against the defaulting vendors would be the only appropriate remedy.

I would set aside the judgment of the learned District Judge and make order dismissing the plaintiff's action with costs in both Courts.

Set aside.

NAGALINGAM, J.

I agree.

Present : DIAS, J. & GRATIAEN, J.

MARIKAR vs. HABIBU

S. C. No. 210M—D. C. Puttalam No. 5026
Argued on : 13th December, 1948
Decided on : 20th December, 1948

Muslim Marriage and Divorce Registration Ordinance, section 21 (4)—Procedure for enforcing Kathi's award.

Held : That the machinery laid down by section 21 (4) of the Muslim Marriage and Divorce Registration Ordinance is exhaustive of the remedies available for the enforcement of awards made by a Kathi's Court in respect of claims for the payment of *mahr*.

M I. M. Haniffa with *M. H. M. Naina Marikar*, for the defendant-appellant.

G. E. Chitty with *N. Nadarasa*, for the plaintiff-respondent.

GRATIAEN, J.

The parties to this action are Muslims, and were married on 24th December 1943. The husband, who is the appellant, had admittedly not fulfilled his promise to pay to his wife a sum of Rs. 1,000 as *mahr*, and in October 1944 she claimed the recovery of this sum from the appellant in the Kathi's Court of Puttalam. In view of the sum involved, the Kathi's Court undoubtedly had jurisdiction in the matter by virtue of section 21 (1) (*a*) of the Muslim Marriage and Divorce Registration Ordinance (*Chapter* 99). In due course the appellant was ordered to pay Rs. 1,000 to his wife, the respondent, as prayed for by her ; but he has successfully evaded payment up to the present moment, and has not made the slightest attempt to justify his default.

This appeal relates to the machinery available to the respondent for the purpose of enforcing the award in her favour. Section 21 (4) of the Ordinance provides that any sum awarded by the Kathi in respect of a claim upon which he is empowered to adjudicate "*may be recovered as though it were a fine* imposed under the Ordinance on application made to the Magistrate.....". In accordance with the procedure laid down, the application requires to be supported by a certificate under the Kathi's hand specifying the amount recoverable. The section also states, out of an abundance of caution, that the Magistrate's powers in the matter shall not be limited to the recovery of amounts which he is competent, *qua* Magistrate, to impose by way of fine. All sums recovered by the Magistrate are remitted to the Kathi's Court for payment in due course to the person thereto entitled.

The machinery laid down by section 21 (4) of the Ordinance is clearly exhaustive of the remedies available for the enforcement of awards made by a Kathi's Court in respect of claims for the payment of *mahr*. In the present action the respondent did in fact avail herself of that remedy in the Magistrate's Court of Puttalam, but she became discouraged by the completely negative results achieved in that Court. She has therefore sought to avail herself of some other machinery (operating either concurrently with or alternatively to that prescribed by the Ordinance) in her efforts to compel the appellant to honour his obligations. She sued the appellant in a regular action, with which we are now concerned, in the District Court of Puttalam to enforce the award of the Kathi's Court. For the reasons which I have already given, I think that the respondent's rights are restricted to the procedure laid down by section 21 (4). The remedy of enforcing by regular action the awards and decrees of another tribunal are confined to very special instances such as arise for example in the case of foreign judgments and the awards of arbitrators. The District Courts of the Island cannot be regarded as courts of execution in respect of the awards of a Kathi's Court unless there is some express statutory provision to that effect. Least of all can they be so regarded when, as in the present case, some other tribunal has been specially selected by the Legislature for the purpose.

The learned District Judge has, in my opinion, wrongly rejected the preliminary issue of law raised by the appellant with regard to the maintainability of the action. I agree with him that the *proviso* to section 21 (4) which empowers a Magistrate to commit a person to prison for non-compliance with a Kathi's order *for the payment of maintainance has not* (and advisedly not in my opinion) been extended to cases where

the order is made in respect of *mahr*, but I do not see how that circumstance can affect the present question. The primary purpose of section 21 (4) is not to punish persons affected by a Kathi's order but to provide a convenient and speedy means of recovering sums awarded thereby and the provisions of the Criminal Procedure Code which deal with the recovery of fines are by no means limited to the weapon of incarceration. Besides, the appellant's obligation in the present action merely represents a civil debt which for purposes of convenience has been made "*recoverable as though it were a fine.*" The theory of punishment does not seem to intrude upon the problem at all.

In my opinion the respondent's remedy is misconceived and her present action cannot be maintained. On the other hand, the appellant's conduct disentitles him to the slightest sympathy, and I would make order that the respondent's action should be dismissed, but without costs in either Court.

Appeal allowed.

DIAS, J.
I agree.

Present : BASNAYAKE, J.

JAMES SINGHO vs. RATNAPURA POLICE

S. C. 10—*M. C. Ratnapura* 3408
Argued and decided on : 9th March, 1949

Criminal Procedure Code, section 407—Depositions recorded in absence of accused—Later accused surrenders to Court—Trial—Witnesses recalled and their depositions already recorded read in evidence—Cross-examination by proctor for accused. Conviction—When may such depositions be read in evidence—Admissibility.

Depositions of prosecution witnesses were recorded by the Magistrate under section 407 of the Criminal Procedure Code in the absence of the accused. Later when the trial took place on the accused surrendering to Court these witnesses were recalled and their depositions, already recorded, were read in evidence. The proctor for the accused cross-examined them and the accused was convicted.

Held : (1) That the conviction could not stand as the material on which it was based has not been put in evidence according to law.

(2) That depositions so recorded cannot be read in evidence when the witnesses who made the depositions are present in Court.

M. M. Kumarakulasingam with *Eardley Perera*, for the accused-appellant.
Arthur Keuneman, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

Learned Counsel for the appellant submits that the conviction in this case cannot be sustained as the appellant has been convicted on evidence illegally admitted.

The proceedings commenced with a report under section 148 (1) (*b*) of the Criminal Procedure Code dated the 28th October, 1946. On that day the appellant was present in custody and was represented by Proctor Gunawardena. Police Sergeant Dissanayake who was also present was examined by the learned Magistrate, and the appellant was charged as follows :—

"You are hereby charged that you did within the jurisdiction of this Court at Ratnapura on 18-10-46 commit theft of a Humber Push Bicycle No. AF 77465 valued Rs. 75 property belonging to Dr. A. P. Kuruppu of Ratnapura and thereby committed an offence punishable under section 367 C. P. C. Chapter 15 N. L. E.

Or in the alternative the above-said accused on 20-10-46 at Cetanigewatta dishonestly retain stolen property to wit a Humber Push Bicycle No. AF 77465 valued Rs. 75 property belonging to Dr. A. P. Kuruppu of Ratnapura knowing or having reason to believe the same to be stolen property and thereby committed an offence punishable under section 394 C. P. C. Chapter 15 N. L. E."

To this charge the appellant pleaded not guilty. On 9th December, 1946, the appellant was absent but when the case was called Proctor Siriwardena appeared for him. The learned Magistrate issued a warrant against the appellant returnable on the 6th January, 1947. On that date too the appellant was absent but his Proctor, Mr. Siriwardena, appeared for him. The surety to the appellant's bail bond was present and asked for time to produce the appellant. The warrant was re-issued and the surety warned. On the 20th of

January, 1947, the appellant was again absent though his surety was present. The warrant was returned unexecuted and re-issued returnable on the 10th February, 1947, and the surety warned. On that date too the appellant was absent and unrepresented, but the surety was present. The Magistrate then proceeded to record the evidence of Police Constable Carolis who stated that he had made inquiries in the Ratnapura Police area and in the village of Nivitigala and also in the appellant's wife's village of Welikada but was unable to find him, and that there was no likelihood of arresting him in the near future. The Magistrate then recorded his finding that the appellant was absconding and made order that he should be proclaimed, and called for a list of his property for attachment. He also ordered that the bicycle be returned to the owner on his undertaking to produce it when required. He forfeited the appellant's bail bond and ordered the issue of a distress warrant. On the 20th of February the surety paid Rs. 40 out of the amount of forfeiture and the case was postponed. The case was called on several occasions thereafter and on the 13th of January, 1948, the learned Magistrate proceeded to record, in the absence of the appellant, the depositions of witnesses Dr. A. P. Kuruppu, Udagedera Radage Nandoris and M. N. Mudianse, and postponed proceedings for 21st January, 1948, on which day too the appellany was absent and the learned Magistrate recorded the deposition of one Kirimenike.

On the 12th of November, 1948, the appellant surrendered to Court and was represented by Mr. Jayawardena who moved for bail which was refused. Then finally on the 25th of November, 1948, Police Constable de Silva was examined and the trial took place on the 2nd of December, 1948, when Dr. Kuruppu, Nandoris and Mudianse were re-called and their depositions read in evidence. They were cross-examined by the Proctor for the appellant. The learned Magistrate then found him guilty and sentenced him to undergo a term of six months' rigorous imprisonment.

The only provision whereunder the deposition of a witness recorded in the absence of an accused person may be given in evidence against him at his trial is section 407 of the Criminal Procedure Code, but a deposition so recorded can be given in evidence under that section only if the deponent is " dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable ".

It is not suggested that in the instant case the attendance of the witnesses could not have been procured without an amount of delay, expense or inconvenience which under the circumstances of the case would have been unreasonable. The conviction of the appellant cannot be sustained as the material on which he has been convicted has not been put in evidence according to law.

I therefore set aside his cobviction with liberty to the prosecution to institute fresh proceedings against him.

Set aside.

Present : BASNAYAKE, J.

PIYADASA & ANOTHER vs. VEYANGODA POLICE

S. C. 137-38*P* (*A. J.*)—*M. C. Gampaha* 47719
Argued and Decided on : 22nd February, 1949

Criminal Procedure Code, section 166—*Failure to comply with section vitiates conviction.*

Held : That a Magistrate acting under section 166 of the Criminal Procedure Code must comply with the requirements of that section and a conviction without such compliance is illegal.

H. W. Jayawardena, for the accused-appellant.
Arthur Keuneman, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The accused-appellants were charged with having committed offences punishable under sections 440 and 369 of the Penal Code. The learned Magistrate appears to have tried the appellants under section 166 of the Criminal Procedure Code without obtaining the consent of the accused. A Magistrate who acts under section 166 of the Criminal Procedure Code must comply with the requirements of that section and any conviction without such compliance is illegal. I therefore set aside the convictions of the accused with liberty to the prosecution to take proceedings *de novo* against the appellants.

I am informed by Counsel that the accused are in jail and are at present in custody. I order that they be discharged immediately.

Convictions set aside.

Present : CANEKERATNE, J, NAGALINGAM, J. & BASNAYAKE, J.

YAR vs. ONDATJEE

S. C. No. 324—*D. C. (F) Colombo No.* 16136

Argued on : 7th February, 1949.
Decided on : 28th February, 1949.

Defamation—Money borrowed on promissory note by public servant—Creditor's complaint to Head of Department that debtor defaulted in repaying loan—Is it defamatory—Privileged occasion—Malice.

Plaintiff and his brother were the makers of a promissory note dated 11-6-1938 for Rs. 300 in favour of the defendant. By letter dated 18-11-43 the defendant wrote to the Principal Collector of Customs in whose department the plaintiff was employed, complaining of plaintiff's failure to repay the loan. The letter contained the following paragraph :—

" Mr. Ondatjee employed under you along with his brother employed.....borrowed from me a sum of Rs. 300. Although I have repeatedly asked for my money neither of the brothers would pay me a cent."

Plaintiff alleged that the statements in the paragraph were capable of the following meanings :—(*a*) That plaintiff was in pecuniary difficulties ; (*b*) that there had been prior demands but long delay on plaintiff's part ; (*c*) that the plaintiff was slow in paying his debt that it was necessary to get someone to urge him to do so ; (*d*) that there was a culpable refusal to pay money borrowed.

Held : (1) That the words complained of are defamatory of the plaintiff.

(2) That they were written on a privileged occasion as the head of the department had an interest in the Government servants employed in his department fulfilling their obligations to their creditors and in upholding the respectability of the Public Service.

(3) That, as the evidence established that the defendant was actuated by malice in writing the letter complained of, plaintiff, was entitled to damages.

Cases referred to : *Sims vs. Stretch* (1936) 2 A. E. R. 1237.
Winstanley's case (1943) 1, K. B. 319.
Stuart vs. Bell (1894) 2, Q. B. D. 341, 350.
Watt vs. Longsdon (1930) 1, K. B. 144.
Jones vs. Boston (1845) 2, C. Q K. 4.
Winstanley vs. Bampton (1943) 1, K. B. 319.
From Lord Halsbury's speech in *Kilpatrick vs. Dunlop* S. C. 632 n.

H. V. Perera, K.C., with *V. S. A. Pullenayagam*, for the defendant-appellant.

Ivor Misso with *T. B. Dissanayake*, for the plaintiff-respondent.

CANEKERATNE J.

This is an appeal by the defendant from a judgment condemning him to pay a sum of Rs. 2500 as damages for defaming the plaintiff.

The defendant, who is a money-lender belonging to the class of persons commonly known as Afghans, appears to have been approached by a brother of the plaintiff for a loan ; he was prepared to lend the money provided a promissory note for Rs. 300 was delivered to him executed by the borrower and the plaintiff. On June 11, 1938 he lent a sum of money to the plaintiff's brother or to him and the plaintiff on a promissory note signed by both for Rs. 300 payable with interest at 18 per cent per annum. The defendant according to his story lost his account books, in which the money lending transactions were entered, in 1943, and sent letters of demand to the plaintiff and his brother but received no reply. This apparently annoyed the appellant and he then wrote a letter to the Principal Collector of Customs, (P.1), dated November 18, 1943. The plaintiff had made an application on October 29, 1943 to retire from Government Service and P1 was referred to him for his explanation. On November 21 he sent an explanation stating that he merely accommodated his brother who was in great difficulty at the time, and that he lost sight of the P. S. R. and requesting the head of the department to overlook this fact as it happens to be on the verge of his retirement. The defendant instituted an action No. 6058, for the recovery of the sum due on the promissory note on December 7, 1943. Each of the makers filed an answer and the action was dismissed of consent on January 30, 1945. P.1 contained the following paragraph " Mr. Ondatjee employed under you along with his brother employed.....borrowed from me a sum of Rs. 300. Although I have repeatedly asked for my money neither of the brothers would pay me a cent."

Plaintiff alleged that the statements contained in this paragraph were capable of the meanings referred to in paragraphs 5 and 5*a* of the plaint

and that the "said statements and the innuendoes were defamatory of the plaintiff. It was not seriously denied that the words were reasonably capable of the innuendoes pleaded; but, Mr. Perera contended that neither the statements nor the innuendoes were defamatory and he laid great stress on the decision in *Sims vs. Stretch*, (1936) 2 A. E. R. 1237. The defendant in that case having enticed the plaintiff's housemaid to leave his services, sent him a telegram containing the words, "Please send her possessions and the money you borrowed, also her wages ...." The communication was made to the debtor himself by a person on behalf of the creditor and would not be defamatory per se. The words used were substantially true. A letter sent to a debtor demanding payment of a debt would not generally be defamatory, otherwise no creditor would be safe in sending a letter. It may be an exhibition of bad manners to demand payment by a telegram. The trial Judge and the majority of the Court of Appeal held that the words were capable of conveying that the plaintiff had acted in a mean way in not paying back the money he had borrowed from his own maid and in withholding her wages. The House of Lords allowed the appeal, Lord Atkin saying that, under modern conditions "the mere fact of borrowing from a servant bears not the slightest tinge of meanness." His speech shows that in certain circumstances a demand for repayment of a loan may amount to a derogatory imputation. The words used in the present case imply that the plaintiff was in pecuniary difficulties, the language connotes prior demands and a long delay. The defendant conveys by P1 that the plaintiff was so slow in paying his debt that it was necessary to get someone to urge him to do so. The language reasonably implies a culpable refusal to repay money borrowed. The words complained of are clearly defamatory of the plaintiff; they bear a close resemblance to the language used in *Winstanley's Case*. (1943) 1. K. B. 319.

Then arises the question, was the publication made on a privileged occasion? Qualified privilege extends to all communications made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he had a duty, to a person having a corresponding duty or interest, and embraces cases where the duty is not a legal one, but is of a moral or social character, of imperfect obligation. Reciprocity of interest is essential. It is easy enough to decide where the duty is a legal one. Often there is no difficulty in coming to the conclusion that a person's moral or social duty is to communicate some particular information to another, *e.g.* a host making a statement to his guest and friend about the latter's servant. Sometimes it may be an officious and uncalled for act on the part of a defendant. It looks as if one has to ascertain what view reasonable persons would take; the quest may at times be an elusive one. It was thought that "if the great mass of right minded men in the position of the defendant," to borrow the language of Lindley L. J., "would have considered their duty, under the circumstances to give the information it would be a moral or social duty; a duty such as is recognised by English people of ordinary intelligence, and moral principle." (*Stuart vs. Bell*, (1894) 2, Q. B. D. 341, 350.

A complaint addressed to someone who has some power of redressing a grievance may be one published on a privileged occasion, *e.g.* one to correct the alleged delinquencies of a local postmaster." *Watt vs. Longsdon*, (1930) 1. K. B. 144. A member of the public would be entitled to make a complaint about the conduct of a Government Servant to him in a government office Is it limited to the time during which the servant is within the four walls of the office? The superior officer who is entrusted with the conduct of business in the department must to some extent have an authority over the subordinate. If this servant sees the man a few minutes after he made the complaint in a road and insults him or hits him, it would be a most anomalous result to hold that in such a case the complainant had no remedy by complaint to the superior, who could take disciplinary action against him, but must go before a Magistrate to enforce a remedy between them as citizens. It cannot be that such a duty or power ceases the moment the servant leaves for home. Would not a complaint made of the illicit sale of an excisable article by a government servant to the head of the department be one made on a privileged occasion? Would not information furnished about the giving of a present by one who has the reputation of being a smuggler with the idea perhaps of getting some favour in the future to a servant employed at the Customs be a privileged one? The government has a right to the service of its employee unhampered and unimpaired by the burden of debts and consequent litigation; to prevent the obstruction of public business as a consequence of legal proceedings against public servants, the government, years ago, obtained legislative authority. The servant has certain obligations to his employer, one is to perform the work entrusted to him diligently, another is to be free from serious pecuniary embarrassment and not to be a party to accommodation bills and notes. Serious pecuniary embarrass-

ment is regarded as a circumstance which necessarily has the effect of impairing the efficiency of an officer and of rendering him less valuable than he would be. It is conduct derogatory to the character of a government servant, it may affect the respectability of the Public Service and the trustworthiness of the officer. Public Servants (Regulations—207—209). The head of the department has an interest in the government servants employed in his department fulfilling their obligations to their creditors and in upholding the respectability of the Public Service. Besides his interest in the payment of his just debt, the defendant had the interest which every person in the country has in the good name of the employee of the government. The occasion on which the letter was written was privileged. In *Winstanley vs. Bampton*, (1943) 1. K. B. 319 the letter which the latter wrote to the Commanding Officer of the plaintiff's regiment—wherein after stating " he has been in arrears with his rent and.....is owing £50.8s " there was a threat of taking the matter to Court—was held to have been one sent on a privileged occasion. Counsel for the respondent contended that the reason for the decision was that the normal practice was for an officer to write to the Commanding Officer of the debtor before an action was instituted. The decision however, did not turn on this ground, nor was this circumstance adverted to in the judgment.

The conclusion reached by the learned Judge was that the defendant was actuated by express malice. It is not denied that, if the sum due on the promissory note had been paid before November 18, 1943, the finding of the trial Judge would be correct. Mr. Perera contends that the Judge has failed to appreciate the documentary evidence produced by the plaintiff as regards the endorsements on P1, and that the probabilities are in favour of the defendant.

The fact that the action brought by the defendant was dismissed of consent without costs is not decisive ; it may bear the construction placed by the plaintiff or by the defendant. Stress is laid on the circumstance that the plaintiff did not claim in reconvention damages for defamation in the action of the note. A defendant in an action is not bound to set up a claim in reconvention and the omission to make such a claim, where it arises on a distinct and separate cause of action, can hardly be reckoned as a circumstance against him. Different defendants, or their pleaders, may act in different ways, one may be tempted to make such a claim, another may refrain from setting up such a claim thinking it likely to cause embarrassment to his defence or to prejudice and delay the hearing of the action. The plaintiff admittedly did not pay any money on the note. Had the case depended on the evidence of the parties only, it may be contended with great force that the plaintiff had failed to discharge the burden of proof. The promissory note remained in the hands of the creditor, and though there was a delay in instituting the action, the circumstance that the learned Judge has not specifically considered the endorsement made by the plaintiff on November 21, 1943, (P 1A) may tend to throw doubt on the plaintiff's story. But, it is difficult to get over the fact that the question of payment depends really on the testimony of Mr. Cutilan and the defendant. The versions of the two are irreconcilable. The plaintiff's witness appears, on the evidence, to be a man of property and to be a person of some importance in his community. It is not disputed that he had a hand in arranging the loan. He had no interest in the transaction or in the parties. According to the witness the note was payable by instalments, according to the defendant it was not so payable. Mr. Cutilan testified that the plaintiff's brother handed him on several occasions the sums payable as instalments, each of which was Rs. 30 or so, that the defendant came to his house about the date of each instalment and he paid the sum to the defendant, and that after the last payment by him the defendant did not come and claim any further sum. The defendant, on the other hand, said that he did not ask the witness to collect any instalment and that nothing whatever was paid on the note. He admitted going to his house, but that, according to him, was because there was at least one or two debtors of his, living in this house. The defendant appears to have created an unfavourable impression on the Judge. He got into some difficulties and tried to extricate himself by saying ; " I am feeling dizzy ". He made, perhaps, a slip in cross-examination about his Proctor being present when the money was paid in action No. 6058. It is not very clear who appeared on this occasion, but the Proctor who filed this action was a lady ; there was no similarity whatever between her name and that of the Proctor appearing for him in the present action. In re-examination, however, he took upon himself definitely to make the bold assertion that it was the present Proctor who appeared for him in the promissory note case and that it was in his office and in his presence that the money was paid. Did the witness make an honest mistake or was it a reckless statement ? The Judge saw the consternation on the face of the Prcotor and notes what happened in Court at the time these statements were made, and he appears to

adopt the latter view. He has in vigorous language expressed his view of the two witnesses.

"I have not the slightest doubt that the defendant has lied about this payment on the trial date. I reject his evidence altogether and I unhesitatingly hold that all the evidence of Mr. Cutilan is true, namely, that all the instalments were paid through him to the defendant and there was nothing due."

I am unable to determine whether the appellant or the plaintiff's witness was worthy of credit. It is a question of credit where each gives an account of what he has done and contradicts the other. Under these circumstances it is impossible that a Judge sitting in appeal should take upon himself to say, by simply reading the typewritten evidence, which is right, when he has not had that decisive test of hearing the verbal evidence and seeing the two witnesses which the Judge had who had to determine the question of fact, and to determine which story to believe. (From Lord Halsbury's speech in *Kilpatrick vs. Dunlop* S. C. 632 n.)

The appeal is dismissed with costs.

Appeal dismissed.

NAGALINGAM J.
I agree.

BASNAYAKE, J.
I agree.

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

DE MEL vs. THENUWARA

S. C. No. 41—*D. C. (Inty.) Colombo No.* 13629/*M*
Argued on : 15th June, 1948, and 5th April, 1949
Decided on : 7th April, 1949

Amendment of Plaint—When should it be allowed.

Held : That where a pleading to amend a plaint serves only to bring out prominently and clearly some of the real issues between the parties, without introducing a new cause of action, it should be allowed to be filed.

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

WIJEYEWARDENE, C. J.

The plaint in this case alleged that the defendant employed the plaintiff company as brokers for the purchase and sale of rubber coupons. The plaintiff company claimed a sum of money as due to them on various transactions in respect of the purchase and sale of rubber coupons entered into by them in the course of such employment.

The defendant filed answer pleading, *inter alia* that the plaintiff company knew that the defendant was acting as a broker on behalf of his principals in employing the plaintiff company and that the defendant was not, therefore, liable to make any payment.

The trial was postponed on several occasions. The journal entry relevant to the postponement granted on February 6, 1946, shows that the defendant knew and admitted that "a question of usage in the rubber coupon market was involved" in this case.

On February 11, 1947, the plaintiff company moved to file a pleading under section 79 setting out *inter alia* a usage of the trade in the rubber coupon market that brokers who enter into contracts for the purchase and sale of rubber do not disclose the names of their principals and are personally liable on such contracts. The defendant objected to the filing of the pleading on the ground that it sought to introduce a new cause of action. The District Judge made order refusing to allow the pleading to be filed.

I am of opinion that the pleading does not introduce a new cause of action (vide section 5 of the Civil Procedure Code). The cause of action remains the same, namely, the breach of contract referred to in the plaint. The pleading sets out merely an implied term of the contract. It serves to bring out prominently and clearly some of the real issues between the parties.

I set aside the order of the District Judge and direct the plaintiff's pleading to be filed in Court.

The defendant will pay the plaintiff company the costs of this appeal and the costs of March 10, 1947, in the District Court.

Order set aside.

NAGALINGAM, J.
I agree.

Present : GRATIAEN, J.

RODRIGUES vs. SOMAPALA

S. C. 222—*C. R. Colombo* 10113

Argued on : 8th February, 1949
Decided on : 10th February, 1949

Tenancy Action—Compromise—Payment on or before a date—Payment tendered to proctor in the afternoon—Decree obtained in the morning without notice as for default—Validity of decree—Jurisdiction of Court to vacate ex parte decree.

The parties to a tenancy action arrived at a compromise recorded in the following terms :—

"It is agreed that a sum of Rs. 151.80 is due as rent and damages. If the defendant pays this sum to the plaintiff on or before 19th April, 1948, this action is to be dismissed without costs. If he does not pay the sum as aforesaid, judgment is to be entered for the plaintiff as prayed for with costs."

On the morning of the 19th April, 1948, the plaintiff, without express notice to the defendant, applied for and obtained decree against the defendant on the footing that the defendant was already in default.

The defendant stated that he sent a telegraphic money order for the amount to the plaintiff's proctor on the afternoon of the 19th April, 1948, but the Court failed to inquire into the matter or to vacate the order made in favour of the plaintiff.

Held : (1) That the order made by the learned Commissioner of Requests on the 19th April, 1948, entering decree in favour of the plaintiff against the defendant was premature and made *per incuriam.*

(2) The learned Commissioner should have vacated this order as soon as the error was brought to his notice.

(3) That under the terms of the compromise the defendant was entitled to claim the dismissal of the action on proof of payment of or tender of the amount to the plaintiff or his proctor.

Per GRATIAEN, J.—"If a Judge makes an *ex parte* order the party who has not been heard has a right to apply to have it set aside except in cases where the Judge is expressly empowered to make such an *ex parte* order."

Cases referred to : *Weerasingha vs. Barlias* (1943) 44 N. L. R. 466.
Arulanandam vs. Kumariah (1946) 48 N. L. R.f37.
Singh vs. B. Lall 13 Sutherland's W. R. 232.

A. C. Nadarajah, for the defendant-appellant.

C. E. Jayawardene, for the plaintiff-respondent.

GRATIAEN, J.

The plaintiff, who is the respondent to this appeal, sued his tenant the defendant-appellant in the Court of Requests of Colombo for rent and ejectment. On the day of trial the parties arrived at a compromise the terms of which were as follows :—

"It is agreed that a sum of Rs. 151·80 is due as rent and damages. If the defendant pays this sum to the plaintiff on or before 19th April, 1948, this action is to be dismissed without costs. If he does not pay the sum as aforesaid, judgment is to be entered for the plaintiff as prayed for with costs."

The effect of this compromise was that the defendant was entitled to a decree in his favour dismissing the action against him without costs provided that he paid or tendered the sum of Rs. 151·80 to the plaintiff *at any time during the course of 19th April, 1948.* No restrictions were imposed as to the precise time before which payment had to be tendered, and no such restrictions can, therefore, legitimately be read into the terms of the compromise. *Weerasingha vs. Barlis* (1943) 44 N. L. R. 466 and *Arulanandam vs. Kumariah* (1946) 48 N. L. R. 37.

With regard to the place of payment the terms of settlement are also silent, and in consequence the defendant was under no obligation to deposit the sum agreed upon in Court, although of course he was free to do so if he chose. The mere fact that, after the settlement was recorded, the learned Commissioner of Requests permitted the issue of a deposit note for Rs. 151.80 in favour of the defendant's proctor cannot be regarded as having introduced a fresh term to the compromise which the parties had arrived at.

In the result the defendant would have been entitled to claim a dismissal of the action on proof that he had paid or tendered payment of the amount either to the plaintiff or to the plaintiff's proctor whose authority to receive payment is not in dispute, before or at any time during the final date fixed in the terms of settlement. He claims that he has in fact done so by sending a telegraphic money order for the amount in question addressed to the office of the plaintiff's proctor on the afternoon of 19th April 1948.

Whether this claim be true and whether the money order arrived at the proctor's office in time to comply with the terms of settlement are questions of fact which will require adjudication at a proper enquiry in the lower Court. No such enquiry has yet been held. On the morning of 19th April, 1948 however the plaintiff—without any express notice to the defendant—had applied for and obtained an order of Court entering judgment against the defendant on the footing that the defendant was already in default. This application was clearly premature. No possible interpretation of the terms of settlement has been suggested to me which can justify a decision that the defendant was already in default on the morning of 19th April 1948.

When parties have lawfully compromised an action Section 408 of the Civil Procedure Code confers upon the Court jurisdiction to enter a decree which must be in strict conformity with the terms of settlement agreed upon by the parties and approved by the Court. In the result I hold that the order made by the learned Commissioner of Requests on 19th April, 1948 entering decree in favour of the plaintiff against the defendant as prayed for with costs was premature and was made *per incuriam* without notice to the defendant. It should have been vacated as soon as the error was brought to the notice of the learned Commissioner, and if this had been done many of the complications which have since arisen might have been avoided. I cannot accede to Mr. Jayawardene's submission that the learned Commissioner had no jurisdiction to vacate an order which was made irregularly in the circumstances which I have described, particularly as the order was made without notice to the party prejudiced thereby. If a Judge makes an *ex parte* order the party who has not been heard has a right to apply to have it set aside except in cases where the Judge is expressly empowered to make such an *ex parte* order. *Singh vs. B. Lall* Sutherland's W. R. 232.

I set aside the order of the learned Commissioner of Requests dated 19th April 1948 and all consequential orders made thereafter. The defendant is entitled to the costs of this appeal and of the proceedings in the lower Court held on 1st June, 1948. It is now open to either party to make an appropriate application in the lower Court to have a decree entered in conformity with the terms of settlement approved by the Court on 23rd March, 1948. The form of the decree must depend on the question whether the defendant's money order for Rs. 151·80 was delivered or at least taken for delivery by the postal authorities to the office of the plaintiff's proctor on 19th April, 1948. The plaintiff cannot claim his " pound of flesh " unless the answer to this question is in the negative. I feel constrained to express the view that there is still time for the parties if they are so minded, to arrive at some honourable compromise which would avoid the inconvenience, expense and anxiety of further litigation.

Set aside and sent back.

Present : WIJEYEWARDENE, C.J.

SANGHARAKKITA THERO *et al* vs. BUDDHARAKKITA THERO

S. C. Nos. 1545-1554/1948; *M. C. Colombo* 44988 *with Application Nos.* 595/1948, 596/1948, 604/1948, 10/1949 *and* 10A/1949

Argued on : 28th and 29th March, 1949

Decided on : 4th April, 1949

Criminal Procedure Code, section 325 (1) (*b*)—*Right of appeal by a person dealt with under—Criminal Procedure Code, section* 152 (3)—*Need for caution before assuming jurisdiction under—Misdirection—Unjustifiable adverse comments on witnesses for defence—Failure to analyse evidence and consider case of each of several accused—Revisionary powers of Supreme Court.*

Held : (1) That Magistrates should not be in too great a hurry to assume jurisdiction under section 152 (3) of the Criminal Procedure Code and deprive accused persons of the benefit of a trial in a higher Court following upon a non-summary inquiry.

(2) That it is doubtful whether the decision in *Cassim vs. Abdurasak* (1937) 38 N. L. R. 428 is correct.

(3) That where the Magistrate in finding the charge proved against several accused and in dealing with them under section 325 (1) (*b*) of the Criminal Procedure Code had (*a*) failed to analyse the evidence and consider the case against each accused separately; (*b*) given unsound reasons for rejecting the evidence of witnesses for the defence; (*c*) misdirected himself in making adverse comments on the credibility of a material witness for the defence, even if there is no right of appeal, the Supreme Court will interfere with the orders made in the exercise of its revisionary powers.

Per WIJEYEWARDENE, C.J.—"Would not an "order" made under section 325 (1) (*b*) be a "final order" within the meaning of section 338 to which the provisions of section 347 (*c*) are applicable? The question as to the construction of the words "judgment" or "final order" is one of difficulty. But I think where there is doubt or difficulty in such a matter we should be slow to adopt an interpretation which tends to curtail the right of appeal given by section 338."

Cases referred to: *Cassim vs. Abdurasak* (1937) 38 N. L. R. 428.
Piyatissa Therunnanse vs. Saranapala Therunnanse (1938) 40 N. L. R. 262.

N. K. Choksy, K.C., with *C. E. Jayewardene* and *J. W. Subasinghe*, for the first accused-appellant and petitioner in application for revision.

C. S. Barr Kumarakulasinghe with *K. C. de Silva* and *T. W. Rajaratnam*, for the second, third, fourth, sixth, seventh, eighth and ninth accused-appellants and petitioners in applications for revision.

D. S. Jayewickrema with *E. Perera*, for the fifth accused-appellant and petitioner in application for revision.

A. H. C. de Silva with *H. Wanigatunga*, for the tenth accused-appellant and petitioner in application for revision.

E. B. Wikramanayake, K.C., with *L. C. Gooneratne*, for the complainant-respondent in the appeal and on notice in the applications for revision.

WIJEYEWARDENE, C.J.

On September 15, 1948, the complainant filed a plaint under section 148 (1) (*a*) of the Criminal Procedure Code charging ten accused with various offences punishable under sections 140, 144, 146, 486/146, 441, 486, 434 and 434/32 of the Penal Code. A King's Counsel with two junior Counsel appeared in support of the plaint and moved for summons on the accused. All the accused were present in Court on October 6, 1948. In the meantime the Magistrate had received the report made by the Police under sections 121 (2) and 131 of the Criminal Procedure Code. On that day the Magistrate decided to try the case summarily under section 152 (3) of the Criminal Procedure Code, as he was of opinion that the case did not involve complicated questions of fact or law and that it would be more expeditious to follow that procedure. I find some difficulty in ascertaining on what material the Magistrate formed that opinion. The case was heard for six days. The evidence covers one hundred and fifteen pages of typed sheets of foolscap and the Magistrate's judgment covers twenty pages. It would not be surprising if the Magistrate revised at some stage of the proceedings the opinion formed by him earlier that the case was a simple one. This is certainly not a case in which the Magistrate should have assumed jurisdiction under section 152 (3). Magistrates should not be in too great a hurry to assume such jurisdiction and deprive accused persons of the benefit of a trial in a higher Court following upon a non-summary inquiry.

The Magistrate found the first four charges proved and dealt with the accused under section 325 (1) (*b*) of the Criminal Procedure Code. All the accused have appealed against that "order" and have also filed papers in revision.

There are conflicting judgments of this Court on the question whether an "order" of this nature is an appealable order. It is not necessary for me to decide in this case which view I should adopt as I find that this is a case which calls for the exercise of the revisionary powers of this Court, if the accused are not entitled to appeal. I wish, however, to state that I am not prepared, as at present advised, to subscribe to the view expressed in *Cassim vs. Abdurasak* (1937) 38 New Law Reports 428.

Section 332 of the Criminal Procedure Code states that no appeal shall lie from "any judgment or order" of a Criminal Court except as provided for by the Code or by any other law for the time being in force. Section 335 refers to appeals from convictions, section 336 to appeals from acquittals, and section 337 to appeals against a Magistrate's refusal to issue process. Section 338 states that subject to the provisions of sections 335, 336 and 337, any person "dissatisfied with any judgment or final order" pronounced by a Magistrate's Court or a District Court in a criminal case or matter to which he is a party may prefer an appeal.

Does not a Magistrate who acts under section 325 (1) (*b*) pronounce a "judgment"? The Code does not define "judgment." But, if the pronouncement in such a case is not a "judgment" the Magistrate need not observe the provisions of section 304, and 306. Again what is the position of an accused person who is dealt with under section 325 (1) (*b*)? The Magistrate

finds the charge proved against the accused, though he does not proceed to conviction. He is then asked to enter into a bond as a result of that finding of the Magistrate. Does not his execution of the bond amount to an acceptance of the finding of the Magistrate as correct? Could he then appeal against that finding if at a later stage the Magistrate convicts and sentences him in the event of his committing a breach of the terms of the bond? It may be noted also that the Magistrate is given the power to order the accused to pay damages or compensation under section 325 (3). Again, we see that section 347 (*c*) refers to appeals from "any other order"—orders other than "orders of acquittal" and "conviction." Would not an "order" made under section 325 (1) (*b*) a "final order" within the meaning of section 338 to which the provisions of section 347 (*c*) are applicable? The question as to the construction of the words "judgment" or final order" is one of difficulty. But I think where there is doubt or difficulty in such a matter we should be slow to adopt an interpretation which tends to curtail the right of appeal given by section 338.

I shall deal now with the facts of the case.

Rev. Mapitigama Dhammarakkita, *Viharadhipathi*, and Trustee of Kelaniya Raja Maha Vihara, had as his pupils the complainant and the first accused—the latter being the senior pupil. About three weeks before his death Rev. Dhammarakkita executed a deed P2 on June 26, 1947, appointing the complainant to succeed him as *Viharadhipathi*. On the death of Rev. Dhammarakkita the complainant and the first accused set up rival claims to the *Viharadhipathiship*, and the Public Trustee acting under section 11 (3) appointed the second accused as provisional Trustee in September 1947. On October 25, 1947, the second accused purported to make an application to the District Court under section 32 of the Ordinance for an order on the complainant and the first accused to deliver to him possession of the movable and immovable property of the temple. The District Judge dismissed the application on August 6, 1948, upholding the objection of the complainant that such an application would lie only against a *Viharadhipathi* and not against a person who is described in the application as one claiming to be a *Viharadhipathi*. In the meantime the complainant obtained a formal declaration from the Malwatte Chapter on April 4, 1948, that the Chapter accepted the appointment of the complainant under the deed P2.

On September, 1948, the first accused accompanied by some others including the sixth, seventh and eighth accused entered the Maluwa of the temple. He offered flowers and started a "fast". There is no direct evidence led by the complainant as to the object of the first accused in commencing this "fast". The Police came to the temple that day, and the next day a temporary Police Station was established on the premises. Crowds of Buddhists from neighbouring villages visited the temple to see the "fasting" priest—probably because it appeared to them somewhat strange that a person calling himself a Bhikku should "fast" in connection with a dispute regarding the *Viharadhipathiship* of a temple. It is interesting to note that the assembly of learned Theros who came to the temple on September 11, condemned the fast as entirely repugnant to the *Vinaya* rules. On September 10, a public meeting was held on a land adjoining the temple premises but "no incident happened that day." In fact the complainant himself stated that "everything was quiet" until the evening of September 11. In the meantime various efforts were made by a number of priests and laymen to persuade the first accused to break the fast. On September 11 at about 6 p.m., the complainant got information from Rev. Seelaratne and Rodrigo—two of his witnesses—that the door of a room set apart for a clerk was forced open by some of the accused and that the first accused was taken from the *Bo-Maluwa* to that room by a crowd. It is in respect of that incident on September 11, that the accused are charged in the present case.

The main witnesses for the complainant are Rev. Seelaratane, Rodrigo and a Sub-Inspector of Police.

Rev. Seelaratane is a young Bhikku sent by his tutor from Weligama to prosecute his studies at the Vidyalankara Pirivena. He stayed at the Kotahena temple, studied English there and attended classes at the Pirivena. About eight months before this incident he paid a visit to the Kelaniya temple on the invitation of his friend, the complainant, and continued to remain there at the request of the complainant.

He said that on September 10, he heard the second accused addressing a public meeting and attacking the members of the family of the late Mrs. Wijewardana—admitted to be the greatest benefactress of the Kelaniya Vihare in modern times—for supporting the complainant in his claim for the *Viharadhipathiship*. On September 11, he heard that a doctor had come to examine the first accused. About the same time he saw Mr. J. R. Jayewardene going towards the Bo tree with the second, fifth, sixth and eighth accused and speaking to the first accused. Then

Mr. Jayewardene went behind the *Viharage* with the second, third, fourth, fifth, sixth and eighth accused but returned with them shortly afterwards and spoke again to the first accused. Then Jayewardene and the fifth accused went towards the front of the *Viharage*, the third and fourth accused remained with the first accused near the Bo tree and the second, sixth and eighth accused went towards the front door of the clerk's room. There were cries of '*Sadhu*' from the large crowd in the *Maluwa* and Mr. Jayewardene and the fifth accused "gave a signal" with their hands. At a later stage in the trial he said that Mr. Jayewardene said "something" as he raised his hands. Then the second accused said to the crowd, "Our Member of Parliament (Mr. Jayewardene) is also here. We are not afraid of anyone. We will make a pool of Buddharakkita's (complainant's) blood." So saying the second accused tried to break open the front door of the clerk's room, while the sixth, seventh and eighth accused who had entered the room by a side door opened the front door from inside. A crowd carried the first accused into the room, and the third, fourth and ninth accused "led the crowd." His evidence given at a later stage showed that when he said "led the crowd" he meant "went ahead of the crowd." He said that Mr. Jayewardene and the second and fifth accused came to the temple "frequently" but corrected himself later and said that Mr. Jayewardene came about twice. He admitted in cross-examination that the fifth accused "did nothing except that he followed Mr. Jayewardene." Rev. Seelaratane went and informed the complainant of what happened that evening. It appears from the evidence that the complainant never spoke to the first accused during the entire period of the fast but remained more or less in his *Pansala* and got all the information he wanted from Rev. Seelaratne or Rodrigo. Rev. Seelaratne did not tell the complainant on September 11, anything about the prominent part played by Mr. Jayewardene with regard to the incident that evening nor did he mention the name of the seventh accused as one of those who entered the clerk's room and opened the front door from inside.

Simon Rodrigo is a villager living more than thirty miles away from the Kelaniya temple. He put on the robes of a Bhikku about fifteen years ago and moved from temple to temple during the time he was wearing the yellow robes. At the end of five years he disrobed himself as he found it difficult "to observe the rules" of the Vinaya. He went to his village and became an astrologer and occasionally composed Sinhalese verses "to please people". When the War broke out he joined the C. A. S. C. He was charged for desertion sentenced to eighteen months' rigorous imprisonment and dismissed from the Corps. He remained as a guest of the complaniant at the Kelaniya temple from the day before he gave evidence in Court.

Rodrigo says that on hearing about the first accused's fast he came on September 8th from his village about thirty miles away, and remained at the Kelaniya temple for a number of days "just to see what was going on". During this time he used to sleep on the verandah of the complainant's room.

Rodrigo says he saw Mr. Jayewardene coming to the temple on September 11, with the fifth accused. That was the only occasion on which he saw the fifth accused at the temple. Mr. Jayewardene went and spoke to the first accused who was near the Bo tree and then went behind the *Viharage* with the second, fourth and fifth accused. Shortly afterwards Mr. Jayewardene returned in the company of the fifth accused and spoke again to the first accused and then Mr. Jayewardene and the fifth accused went and stood on the steps of the *Viharage*. Rodrigo himself went and stood near the *Devale* when he heard cries of '*Sadhu*.' Then Mr. Jayewardene and the fifth accused looked towards the second accused who was hurrying past them and gave him "a signal" with their hands. At a later stage of his evidence Rodrigo chose to make it clear that the "signal" was not a mere accidental movement of the hand by stating that the fifth accused said *hari*. At a still later stage he found it possible to place the matter beyond all doubt by saying that both Mr. Jayewardene and the fifth accused said *hari* as they raised their hands simultaneously. Then the second accused uttered the threat referred to by Rev. Seelaratane and tried to open the the front door of the clerk's room. Sixth accused opened the door from inside. A crowd carried the first accused on a mattress from the Bo tree to the room. He saw the third and fourth accused going "ahead of the crowd" which was carrying the first accused.

From the concise statements I have given of the evidence of these two witnesses it will be seen that there are contradictions with regard to certain matters. There are further contradictions of a similar nature which I have not referred to. I do not, however, attach any importance to these contradictions as such contradictions are bound to occur even in the case of truthful witnesses who are trying to describe in Court some event which happened rapidly before them some weeks earlier.

The Sub-Inspector of Police who was on duty at the Kelaniya temple said that he saw the third accused on September 11, only after the removal of the fifth accused to the clerk's room. He said also that he saw the tenth accused and Dr. Ratnapala in the temple compound on September 11. He admitted that about the time the first accused was carried from the *Bo Maluwa* "the sky was cloudy and there was a slight drizzle.',

Among the witnesses for the defence were Dr. Ratnapala, two Nayaka Theros and Mr. J. R. Jayewardene.

Dr. Ratnapala said that he examined the first accused on three or four occasions during the fast. On the 11th evening he found the first accused "very weak and feeble" and he feared that the first accused "might contract a chill and contract pneumonia" if he continued to remain in the open. The Magistrate has thought it necessary for the purpose of deciding this case to refer to this witness as "an utterly untruthful witness." He expresses this opinion (*a*) in view of Dr. Ratnapala's evidence regarding his knowledge of a judgment given in another case—D. C. Colombo Trust Case 99—and (*b*) because he thinks that the medical certificate P7 given by Dr. Ratanapala for use in some proceedings connected with this case was "a deliberate deception" practised by him in the Magistrate's Court. The proceedings referred to as D. C. Colombo Trust Case 99 have no connection whatever with the present case and the Magistrate had permitted Dr. Ratnapala to be submitted to a long and severe cross-examination regarding those proceedings. The Magistrate has also permitted him to be cross-examined with regard to certain documents without the documents being first shown to him. It is not unlikely —as it often happens—that Dr. Ratnapala was roused into a spirit of hostility by this cross-examination, but whatever may be the reason there is no doubt that Dr. Ratnapala has shown a certain lack of candour in answering questions regarding that case. I cannot agree, however, with the Magistrate's observations regarding P9 that it was "a deliberate deception practised by Dr. Ratnapala." He forms this opinion because, he says, he was misled by P7 to conclude that Dr. Ratnapala "had seen the first accused just before he issued P7". I find great difficulty in understanding how anyone reading P7 intelligently could come to that conclusion. I do not see any reason for rejecting the evidence of Dr. Ratnapala as regards the condition of the first accused on September 11. In fact, one does not require a medical opinion to believe that a person starving for six days and remaining exposed to sun and rain would be in a very weak condition and would run the risk of catching a chill if he got wet.

Karandana Jinaratna Thero is seventy three years old and is the Nayake Thero of Salpiti and Rayigam Korales. The complainant himself felt constrained to admit that he was "a fairly respected priest both in the ecclesiastical as well as in other affairs."

The Nayake Thero stated that at the invitation of the third accused about twenty five priests including himself and fourth and ninth accused assembled at the Abayasingharamaya on September 11. All the priests left the temple in a bus and the third accused was at the time in Abayasingharamaya. He believed the third accused reached the Kelaniya temple a few minutes earlier than he and the other priests. When they entered the temple they found the first accused lying on a mat in the clerk's room.

Upananda Nayaka Thero corrobrated the evidence given by Jinaratna Nayaka Thero. He believed, however, that the third accused came to the Kelaniya temple after the arrival of the bus carrying the priests.

The Magistrate dismisses the evidence of these two Elders of the Sangha with the brief remark "these two witnesses did not impress me favourably." The demeanour of a witness is undoubtedly a matter to be taken into consideration in weighing his evedence. Now each of these two witnesses could not have remained in the witness box for more than six or seven minutes. They were not cross-examined by complainant's Counsel. No question was put to any other witness tending to impugn the credibility of these two witnesses. There is not the slightest suggestion anywhere in the proceedings that they were partisan witnesses. They were not interested in the rival claims of the complainant and the first accused. They went on September 11 with a number of other Bhikkus because they did not want the first accused "to desecrate" the ancient Kelaniya Vihare by a fast which they considered as repugnant to the principles of the *Vinaya*. They came to Court to give evidence in obedience to summons served on them and stated that the fourth and ninth accused—Bhikkus themselves —were among the group of Bhikkus who accompanied them on their visit to the Kelaniya Vihare. There is nothing inherently improbable in their evidence unless, of course, one is prepared to consider as improbable any evidence contradicting any part of the story narrated by Rev. Seelaratane and Rodrigo. It is difficult to believe that the demeanour of these two witnesses

during the short period they were examined in chief could have been so unsatisfactory as the Magistrate's observation would lead one to think. The Magistrate would have been well advised if he did not have recourse to this formula about demeanour to justify his rejection of the evidence of these two Nayaka Theros.

Mr. Jayewardene said that he received a large number of letters and telegrams from people who were "getting agitated" as the fast continued and he thought it was his duty as the Member of Parliament for Kelaniya "to intervene and stop the fast." On September 10, the third accused telephoned that he was going to invite a number of Bhikkus to Abayasingharamaya, Maradana, and take them with him to the Kelaniya temple the next day, get them to chant *Pirith* to the first accused and give a formal and ecclesiastical order "to stop the fast." Mr. Jayewardene was busy having to attend some meeting of the Cabinet of which he is a member and some other meetings of his Party. He found time, however, to go to the Kelaniya temple about 6 p.m., on September 11. He met Dr. Ratnapala there. There was a crowd, five or six feet deep, round an enclosed open space where the first accused was lying on the ground "with his eyes closed and a bandage round his head." He told the first accused that Dr. Ratnapala had come to see him, and as Dr. Ratnapala went in to examine the first accused Mr. Jayewardene went towards the back of the Vihare with a few others including the second and the fifth accused. He said that he did so "to have some privacy." This is a natural explanation and Mr. Jayewardene appears to have behaved as any normal person would have done in similar circumstances. I am unable to draw from this any sinister inference that Mr. Jayewardene returned to the rear of the Vihare in order to discuss some nefarious scheme for furthering the cause of the first accused. Mr. Jayewardene said that Dr. Ratnapala came to him shortly afterwards and said that the first accused was getting weaker and that he "would suffer more by exposure of the body than by lack of food." At Mr. Jayewardene's request Dr. Ratnapala went back to the first accused to ask him to allow the Dayakayas "to put a shed over him." A few minutes later, Mr. Jayewardene went towards the front of the Vihare with the second and fifth accused and he found that the first accused was not lying near the Bo tree. Shortly afterwards he found "the third accused and priests coming" when he was in front of the Vihare. Seeing some lights in the clerk's room towards his left he went there and found the first accused lying on a mat, surrounded by a crowd. He heard the chanting of *Pirith*. He was told that the first accused had broken the fast. Mr. Jayewardene denied that either he or the fifth accused gave a signal or uttered the word *hari* as stated by Rev. Seelaratane and Rodrigo. He said that he did not hear the second accused uttering the threat referred to by those two witnesses.

Now Mr. Jayewardene is a senior Advocate of this Court of nearly twenty years' standing. In reply to a question of mine why Mr. Jayewardene's evidence was rejected by the Magistrate Mr. Wikramanayake who appeared for the complainant drew my attention to the following reasons given by the Magistrate :—

(*a*) "The first accused was a supporter of his (Mr. Jayewardene) at the last General Election and the first accused worked for him. He says that the complainant worked against him and even financed the election petition filed against him. This is a land where even people highly placed have been known to bear grudges against people for long periods of time. They even descend to doing mean and petty things."

(*b*) "At one stage he (Mr. Jayewardene) tried to make out that he did not know that the second accused was his supporter at the last Election. But he had to later admit that the second accused worked for him at the last Election. Why did he then say that the second accused was not his supporter at the last Election?"

(*c*) Mr. Jayewardene was not "truthful" as he made two "inconsistent" statements—(1) "I did not know what the purpose of the fast was" (2) "I believed that he was fasting in order to see that the Government took over the premises."

(*d*) That Mr. Jayewardene could not have been "sincere" in his attempt to settle the dispute as he did not "approach the complainant."

(*e*) That Mr. Jayewardene's attitude that the first accused should be in charge of the temple till the matter of the incumbency was decided in a Court of law and that the Public Trustee should be in charge of the temporalities was not a reasonable attitude for him to take as a lawyer in view of the decision in *Piyatissa Therunnanse vs. Saranapala Therunnanse.* (1938) 40 New Law Reports 262 that a *Viharadhipathi* could select anyone of his pupils to succeed him.

As regards (*a*) I am not aware that it is only in this country that people doing "mean and

petty things " are to be found. It appears to me like a cheap sneer at one's own country. It is no doubt right for the Judge to bear in mind that Mr. Jayewardene's evidence would have the effect of weakening the case of the complainant who worked against him at the election and helping the first accused who was on his side. Such circumstances are relevant matters to be taken into consideration in deciding the credibility of witnesses. Such circumstances do not however, prove that a witness is perjuring himself to help a friend. In this case Mr. Jayewardene entered the witness box after Rev. Seelaratane and Rodrigo had given their evidence. Mr. Jayewardene, was therefore, aware of the evidence led for complainant and it is difficult to believe that a senior Advocate of this Court would have deliberately entered the witness box and contradicted that evidence and thus run the risk of having his evidence disbelieved unless a strong sense of duty as a citizen compelled him to give that evidence.

As regards reason (*b*) it is sufficient to state that the Magistrate would not have given that reason if he understood the distinction drawn by Mr. Jayewardene between a worker and a supporter.

As regards reason (*c*) the Magistrate has failed to appreciate the fact that Mr. Jayewardene was speaking of not " knowing " a thing for certainty and of yet " believing " it or thinking it highly probable.

It is unfair for the Magistrate to advance the reason (*d*) when Mr. Jayewardene was not put a single question on the point whether he " approached " the complainant.

The reason (*e*) seems to me to lay down the strange proposition that a lawyer who holds an opinion contrary to a decision of the Supreme Court must be presumed to act dishonestly. Moreover, it ignores the fact that the first accused was questioning the due and proper execution of the deed P2.

In fairness to the eminent King's Counsel who appeared for the complainant I wish to state that he did not seek to support those reasons given by the Magistrate. In fact, he asked me to consider the evidence independently of the " utterances " of the Magistrate on the credibility of Mr. Jayewardene.

I accept unreservedly the evidence of Mr. Advocate Jayewardene. I am strongly of opinion that the Magistrate has misdirected himself grossly in making adverse comments on Mr. Jayewardene's credibility. The strictures passed by the Magistrate have no justification whatever.

The Magistrate has failed to analyse the evidence and consider the case against each accused. I shall do so.

According to the prosecution the first accused entered the temple compound and continued to fast near the Bo tree for six days. All that time everything was " quiet." The first accused had a right even to occupy a room in the *Pansala* as he was a pupil of the last *Viharadhipath*. Even if the complainant is regarded as the lawful *Viharadhipathi* he had no right to question the first accused's right to reside in the temple. As the complainant has abstained from giving any directions to the first accused as to any particular part of the temple he should occupy it cannot be said that the first accused acted wrongly in sitting at the foot of the Bo tree. In fact, if the accused intended to annoy the complainant I should have expected them to carry the first accused to one of the rooms in the *Pansala* and not to a room used by a clerk close to the *Devale*. This aspect of the matter strongly supports the defence that the persons who carried the accused were merely actuated by a desire to take him to a place where he would find shelter from sun and rain. Apart from that, there was no evidence led by the complainant to show that the first accused aided in any way his removal from the Bo tree to the clerk's room. He was in a very weak condition. He was lying on a mattress with his eyes closed. The crowd of humble devotees heard the opinion of the doctor that the first accused would catch a chill if he got wet. The sky became cloudy and there was a slight drizzle. Acting on the impulse of the moment the crowd carried the priest. It is difficult to see how the first accused could have resisted the crowd and prevented them from carrying him. The first accused would have been acquitted at the close of the case for the prosecution, if the Magistrate had followed the evidence that was being taken down by his steonographer.

The evidence against the second accused is that he went near the clerk's room uttering a threat against the complainant and tried to break open the front door of the room. The evidence given by Mr. Jayewardene makes it impossible to act on the evidence of Rev. Seelaratana and Rodrigo.

The evidence against the third, fourth and ninth accused is that they were in the temple *Maluwa* before the first accused was carried to the clerk's room and that they went ahead of the crowd carrying the priest. That in itself proves nothing. A man may go ahead of a crowd and may have nothing to do with the acts of the crowd. They may have been merely three out of the

hundreds of people who were brought there by the fast. Moreover, the evidence of the two Nayaka Theros proves quite clearly that the fourth and ninth accused could not have taken any part in the removal of the first accused. There is, no doubt, some conflict in the evidence of the two Nayaka Theros as to the exact time of the arrival of the third accused but there is the definite evidence of the Sub-Inspector of Police that he saw the third accused only after the removal of the first accused into the room.

Rev. Seelaratane and Rodrigo said that the fifth accused raised his hand and said *hari*. Rev. Seelaratane, however, admitted in cross-examination that " the fifth accused did nothing except that he followed Mr. Jayewardene." Mr. Jayewardene denied that the fifth accused gave a signal or in any other way encouraged the crowd to carry the first accused.

Rev. Seelaratane said that the sixth and eighth accused entered the room by a side door and opened the front door from inside. Rodrigo also gave similar evidence as against the sixth accused. The evidence against these two accused remains uncontradicted.

The case against the seventh accused is somewhat different from the case against the sixth and eighth accused. It is only Rev. Seelaratane who says that the seventh accused was one of those who entered by the side door and opened the door from inside. He had to admit however that he did not mention the name of the seventh accused to the complainant when he was reporting the incidents of that evening to the complainant.

The tenth accused set up an *alibi*, but it is not possible to say that the Magistrate was wrong in refusing to accept his *alibi* in view of the definite evidence given by the Sub Inspector of Police that he was seen in the temple *Maluwa* on the 11th. Nothing, however, has been proved against him except his mere presence in the temple *Maluwa* as one of a crowd attracted by the strange spectacle of a fasting Bhikku.

I direct that the first second, third, fourth, fifth, seventh, ninth and tenth accused be acquitted. I set aside the order of the Magistrate against the sixth and eighth accused and leave it open to the complainant, if he so desires, to initiate non-summary proceedings against the sixth and eighth accused.

Accused acquitted.

Present : BASNAYAKE, J.

VETHANAYAGAM vs. INSPECTOR OF POLICE, KANKESANTURAI

S. C. 1484—*M. C. Mallakam* 5660
Argued on : 27th January, 1949
Decided on : 31st January, 1949

Criminal Procedure Code, section 190—*Meaning of 'forthwith'—Delay in recording verdict—Is it curable under section* 425 *of the Criminal Procedure Code.*

Held : (1) That the word 'forthwith' in section 190 of the Criminal Procedure Code means " immediately after " and not " within a reasonable time after " the taking of the evidence is over.

(2) That the failure to comply with the provisions of section 190 of the Criminal Procedure Code is not curable under section 425 of the same Code.

Not Followed : *Samsudeen vs. Sathoris*, 29 N. L. R. 10.

Cases referred to : *Venasy vs. Velan* (1895) 1 N. L. R. 124.
The Queen vs. Kiriya (1894) 3 S. C. R. 100.
Rodrigo vs. Fernando (1899) 4. N. L. R. 176.
P. C. Panadure 9292 (1901) 5. N. L. R. 140.
Assistant Government, Kegalle, vs. Podi Sinno et al (1914) 18 N. L. R. 28.
Peris vs. Silva (1905) 3 Balasingham's Reports, p. 165.
Sahul Hamid vs. Hamadu (1926) 4 Times 145.
The King vs. Fernando (1905) 2 Balasingham's Reports, p. 46.
Howard vs. Bodington (1877) 2 P. D. 203.
R. vs. Chorlton Union (1872) L. R. 8, Q. B. 5.
Queen vs Samaranayake & Others (1892) 1, S. C. R. 335.

Park Gate Iron Co. vs. Coates (1870) L. R. 5, C. P. 634 at 639.
Rex vs. Bertrand (1867) L. R. 1, P. C. 520.
The Queen vs. The Justices of Berkshire (1879) 48 L. J. M. C.137.
Smurthwaite vs. Hannay (1894) A. C. 494 at 501.
Subramania Ayya vs. King Emperor (1901) 28 Indian Appeals 257.

R. L. Pereira, K.C., with *C. S. Barr Kumarakulasinghe* and *Sivagurunathan*, for the appellant.
A. C. M. Ameer, Crown Counsel, for the Attorney-General.

BASNAYAKE J.

The appellant and seven others were charged with offences punishable under sections 140, 141, 433, 434 and 409 of the Penal Code. The proceedings commenced on 12th April 1948. The case for the prosecution was closed on 25th September 1948. At the conclusion of the evidence for the defence on 15th October 1948, the learned Magistrate made the following order : " Defence closed. Verdict 20/10." On 20th October 1948 the learned Magistrate made the following order :

" I find the 1st accused guilty on counts 1, 2, 3, 4, 5, 6 and 9. I convict him on the said counts. I impose a fine of Rs. 10 on each of the said seven counts in all a fine of Rs. 70. I acquit the other accused."

At the same time the learned Magistrate indicated that he would pronounce his reasons on 22nd October 1948, and on that day they were read in open court in the presence of the accused.

Learned counsel for the appellant submits that the learned Magistrate should have recorded his verdict on 15th October and that in postponing it for 29th October he has acted in violation of section 190 of the Criminal Procedure Code. He submits that the violation of the statute is an illegality which vitiates the conviction.

Section 190 reads :

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

It is submitted by learned Crown Counsel on the authority of the case of *Samsudeen vs. Suthoris* (1927) 29 N. L. R. 10, that the verdict need not be recorded forthwith after taking the evidence. I find myself unable to agree with the opinion expressed by Dalton J. in that case. He seems to take the view that the Magistrate may form his decision as to the guilt or innocence of the accused at any time after the taking of the evidence is over, but at the same time he regards it essential that the verdict must be recorded forthwith after the finding of the verdict, and without any time elapsing between the two. This seems to me, and I say so with the greatest respect, an impractical view of the section. The finding of the verdict is a mental process and it is only when the Magistrate declares his decision that it can be known that that mental process is over. If the finding need not be declared in court at the end of the evidence, and any period of time may be taken to arrive at the finding, it will be almost impossible to ascertain when the finding was actually reached in order to test whether it was forthwith reduced to writing in the form of a verdict. The Magistrate himself may not be able to say exactly at what point of time in his own mind he formed the conclusion that the accused is guilty or not. There are other reasons why the view that the verdict must be recorded immediately upon the termination of the taking of the evidence is to be preferred. The section fixes the point of time at which the Magistrate has to make his finding, viz., after taking the evidence for the prosecution and defence, and such further evidence (if any) as he may of his own motion cause to be produced. There is nothing in the section which supports the view that the finding of acquittal or guilt may be made at any time after the taking of evidence is over. The word " after " unqualified as it is in this context means immediately after. The finding of acquittal or guilt must therefore be declared in open court immediately after the evidence is concluded. The section requires that the finding must be forthwith reduced to writing in the form of a verdict of acquittal or guilt as the case may be.

The earlier decisions of this Court do not support the view taken by Dalton J. In the case of *Venasy vs. Velan* (1895) 1 N. L. R. 124 decided in 1895 under the Code of 1883 Bonser C. J. says :

" Now, I have already stated in another case that I think it most desirable that Magistrates and District Judges should state their finding as to the guilt or innocence of the accused immediately at the conclusion of the trial, and that, if the impression left upon their minds by the prosecution, after hearing all the evidence, is so weak and unsatisfactory that they are unable to say whether they consider the accused to be guilty or not, they should give the accused the benefit of the doubt and acquit."

These observations were made at a time when the provision of the Criminal Procedure Code corresponding to section 190 was not expressed in such definite and peremptory terms. Section 223 of the Criminal Procedure Code of 1883 reads :

> " If the Police Magistrate, upon taking the evidence referred to in the last preceding section, and such further evidence as he may of his own motion cause to be produced, finds that no case against the accused has been made out, which, if unrebutted, would warrant his conviction, the Magistrate shall record an order of acquittal. Nothing in this section shall be deemed to prevent a police court from acquitting the accused at any previous stage of the case, if, for reasons to be recorded by the Police Magistrate, he considers the charge to be groundless."

In the case of *The Queen vs. Kiriya* (1894) 3 S. C. R. 100, Bonser C. J. gave expression to similar sentiments in commenting on the failures of a District Judge to record his verdict immediately upon the termination of the trial. His remarks are appropriate to the question under discussion and bear repetition. It will be useful if I begin by quoting section 275 of the Code in relation to which they were expressed. It reads :

> " When the case for the defence and the prosecutor's reply (if any) are concluded, and the assessors' opinion, if the trial has been with the aid of assessors, has been recorded, the court shall proceed to pass judgment of acquittal or conviction. If the accused person is convicted, the court shall proceed to pass sentence on him according to law."

It will be seen that the section does not expressly require the court to pass judgment immediately upon the termination of the trial. The judge took a week to deliver his judgment. Bonser, C. J. observes at page 102 :

> " But there is a serious irregularity in this case which, to my mind, is fatal to the conviction, and that is, that at the conclusion of the trial the District Judge instead of stating at once his verdict, reserved it for a week. No reason for such a postponement is recorded, and there was nothing in the facts of the case, as they appear on the record, to justify any such delay. Such a proceeding is, in my opinion, not warranted by the Criminal Procedure Code. Section 275 which deals with trials by District Judges provides that (here are quoted the material parts of the section). By that I understand that forthwith on the conclusion of the trial, the Judge is to state whether he finds the prisoner guilty or not guilty of the offence charged, and that ' the judgment of acquittal or conviction ' corresponds to the verdict in a jury trial."

After discussing section 371 of the Code of 1883, Bonser C. J. proceeds to say :

> " It must be remembered that a District Judge trying a prisoner without assessors has to perform a double function. As regards the issues of fact, he is a jury; as regards questions of law, he is a Judge. Now, whoever heard of a jury being allowed to reserve their verdict for a week? In my opinion it is the duty of the District Judge, acting as a jury, to record at once, at the conclusion of the trial, his finding on the issues of fact. It may be that he would be justified in reserving to a later day the formal statement of the reasons for his verdict, but that his duty is to declare and record at once his verdict of guilty or not guilty, is to my mind clear."

In the course of the same judgment Bonser C. J. says :

> " It is in my opinion of the utmost importance that the verdict on which depends the prisoner's liberty, should be given at once, while the impression made by the evidence is fresh in the mind of his judge. A subsequent reading over the notes of evidence is by no means the same thing as the fresh and lively impressions made by the oral testimony of the witnesses. A story which looks very cogent and convincing on paper, may, when heard from the lips of the witnesses, be anything but satisfactory, and for a Judge to wait until the impression made by the conduct and demeanour of the witnesses, which are often more important than their words, has faded from his mind, and nothing is left, but the dry bones of notes of evidence, is, in my opinion, an irregularity, which is fatal to the interests of justice."

It is convenient and appropriate to mention at this point that section 214 of our present Criminal Procedure Code is different from the corresponding provision of the Criminal Procedure Code of 1883 in that it provides that the verdict shall be recorded by the District Judge " forthwith or within not more than twenty-four hours ".

I now come to the cases under the Code of 1898. In *Rodrigo vs. Fernando* (1899) 4 N. L. R. 176., Withers J. says at page 177 :

> " It is very important that a Magistrate should observe the requirements of section 190 of ' The Criminal Procedure Code, 1898 ' which enacts that a Magistrate shall, after taking ' the evidence for the prosecution and defence, *forthwith* record a verdict of acquittal or guilt as he may find '. If this point had been pressed, I might have had to send the case back for a re-trial, which would not have been at all satisfactory."

In a later case *P. C. Panadure* 9292, (1901) 5 N. L. R. 140, Lawrie A. C. J., in quashing the proceedings in that case, expressed the following view :

> " I think it was *ultra vires* to give a verdict a month after the trial. It must be given forthwith."

These decisions were followed by Pereira J. in the case of *Assistant Government Agent, Kegalle vs. Podi Sinno et al.* (1914) 18 N. L. R. 28. The case of *Peris vs. Silva* (1905) 3 Balasingham's Reports, p. 165, is in my opinion not an authority for the proposition that the failure to record the verdict as required by section 190 of the Criminal Procedure Code is not a fatal irregularity. In that case although the oral evidence was con-

cluded before the date on which the verdict was recorded the case was postponed to enable the accused's proctor to tender certain documentary evidence. On the day fixed for the taking of the documentary evidence after the documents had been tendered the court recorded its verdict of guilty and fixed another day for pronouncing the reasons for the verdict. Wendt J. observes in that connexion : " I am not prepared to hold that the mere fact of a Police Magistrate's judgment not having been pronounced ' forthwith ' as required by section 190 of the Procedure Code, is fatal to its validity. It is at most an irregularity of procedure which, if it has occasioned a failure of justice and not otherwise, may be a ground for reversing or altering the judgment of a competent court." With great respect I wish to say that the verdict should be recorded forthwith. All it requires is that a verdict of acquittal or guilt as the case may be should be recorded forthwith after the taking of evidence is over. In *Sahul Hamid vs. Bomadu* (1926) 4 Times 145, Maartensz A. J. purporting to follow the opinion of Wendt J. in *Peris vs. Silva* (*supra*) held that the failure to comply with section 190 of the Criminal Procedure Code was not fatal to the conviction in that case as the delay in recording the verdict had not occasioned a failure of justice. One other case, viz., *The King vs. Fernando* (1905) 2 Balasingham's Reports p. 46, deserves mention although it is a decision on section 214 of the Criminal Procedure Code. In that case Wendt J. held that the fact that the verdict of a District Judge is recorded after the time within which he is required by section 214 to record his verdict does not vitiate the conviction. With great respect I find myself unable to share that view. I prefer to follow the view taken by Bonser C. J., Withers J., and Lawrie A. C. J., in the earlier decisions I have cited. Enactments regulating the procedure in the courts are as a rule imperative (Maxwell on Interpretation of Statutes, 9th Edn, p. 377), and non-compliance therewith is fatal to a conviction. The fact that the observance of the statute is a duty imposed on a court or public officer and not on a party makes no difference to the imperative effect of the enactment. The cases of *Howard vs. Bodington* (1877) 2 P. D. 203, and *Rex vs. Chorlton Union* (1872) L. R. 8 Q. B. 5, appear to support the view. It is a well-known rule that an accused person cannot waive any procedural statutory requirements even though they be intended for his benefit. (*Queen vs. Samaranayake and others*, (1892) 1 S. C. R. 335.) *Park Gate Iron Co. vs. Coates*, (1870) L. R. 5 C. P. 634 at 639. *Reg vs. Bertrand*, (1867) L. R. 1 P. C. 520. Sections 190 and 214 of our Criminal Procedure Code are two such provisions the failure to observe which cannot be waived.

The only question that still remains to be decided is whether section 425 of the Criminal Procedure Code cures the failure to comply with section 190. But before I discuss that section I think I should record my opinion that in section 190 of the Criminal Procedure Code the word " forthwith " means " immediately after " and not " within a reasonable time after " the taking of the evidence is over. Discussing the meaning of the word immediately in a similar procedural enactment, Cockburn, L.C.J. observes (*The Queen vs. The Justices of Berkshire*, (1879) 48 L. J. M. C. 137.)

> " I think that the words ' immediately ' and ' forthwith ' mean the same thing ; they are stronger than the words ' within a reasonable time ', and imply speedy and prompt action, and an omission of all delay, in other words, that the thing to be done should be done as quickly as is reasonably possible."

I now come to section 425. It reads :

> " Subject to the provisions hereinbefore contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—
>
> (*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or
>
> (*b*) of the want of any sanction required by section 147 ; or
>
> (*c*) of the omission to revise any list of assessors, unless such error, omission, irregularity, or want has occasioned a failure of justice."

In the instant case the Magistrate's failure to comply with the provisions of section 190 is not an error or omission in the judgment or other proceedings. Nor can it be said to be an irregularity in the judgment or other proceedings. Non-observances of a procedural statute is an illegality and not a mere irregularity as was laid down in the case of *Smurthwaite vs. Hannay* (1894) A. C. 494 at 501. This view was adopted with approval in the case of *Subramania Ayya vs. King Emperor* (1901) 28 Indian Appeals 257.

For the above reasons I set aside the conviction of the appellant with liberty to the prosecution to institute fresh proceedings against him in regard to the subject-matter of the charges on which he has been convicted.

Conviction set aside.

Present : WIJEYEWARDENE, C.J., CANEKERATNE & GRATIAEN, JJ.

MOHOTIHAMY vs. ALBINONA

S. C. No. 350/L—D. C. (F) Ratnapura No. 8097
Argued and decided on : 6th April, 1949

Kandyan Law—Mother dying leaving children of two marriages—Rule of succession to her property whether per stirpes *or* per capita.

Held : That the rule governing the succession of children of different marriages of a mother, subject to Kandyan Law, should be *per stirpes* as in the case of the property of a father subject to the same law.

Cases referred to : (1843) Austin Reports 105 ; (1851) Austin Reports 122.
Ran Menika vs. Ran Menika (1857) 2 Lorenz 27 ; (1870) Vanderstraaten Reports 43.
Banda vs. Lebbe et al (1916) 2 Ceylon Weekly Reporter 108.
Siriya vs. Kaluwa (1889) 9 Supreme Court Circular 45.
Appuhamy vs. Hudu Banda (1903) 7 New Law Reports 242.
Nanduwa vs. Punchirala et al (1922) 24 New Law Reports 249.
Pate vs. Pate (1915) 18 New Law Reports 289 at 293.

E. B. Wickremanayake, K.C., with *A. H. E. Molamure* and *J. W. Subasinghe*, for the defendant-appellant.

U. A. Jayasundera, K.C., with *Vernon Wijetunge* and *C. G. Weeramantry*, for the plaintiff-respondent.

WIJEYEWARDENE, C.J.

One Salishamy, a Kandyan woman, was married twice. She had two children, Maggie Nona and defendant, by her first marriage and four children, Saralis, Themis, Jane and Baby by her second marriage. Salishamy died before the commencement of the Kandyan Law Declaration and Amendment Ordinance, leaving her six children as her heirs. Maggie, Saralis and Baby died intestate and issueless. Under the Kandyan Law the share of Maggie would have devolved only on the defendant and the shares of Saralis and Baby only on Themis and Jane (*vide* Hayley on Sinhalese Laws and Customs, page 440).

By Deed P 1 of 1945 Themis sold to the plaintiff 1/3 share of certain lands and houses. By Deed P 2 of 1945, Jane sold to the plaintiff 1/3 share of one of the houses.

The defendant filed answer pleading that the plaintiff was entitled to claim under P 1 only 1/4 share of the lands and houses and under P 2 only 1/4 share of the house referred to in P 2. The District Judge held in favour of the defendant.

The question we have to decide on this appeal is whether the devolution of the property on the death of Salishamy among the children of her two marriages should be *per capita* or *per stirpes*.

It has been settled by a long series of decisions of this Court that the succession should be *per stirpes* where children of different marriages claim property of their father [*vide* (1843) Austin Reports 105 ; (1851) Austin Reports 122 ; *Ran Menika vs. Ran Menika* (1857) 2 Lorenz 27 ; (1870) Vanderstraaten Reports 43 ; *Banda vs. Lebbe et al* (1916) 2 Ceylon Weekly Reporter 108]. It is contended by plaintiff's Counsel that those cases have been wrongly decided and that we should not follow them when we consider the succession of the children to the property of their mother. It is conceded, however, by him that the early text writers do not draw any distinction between the rule governing the succession of children of different marriages of a father and that governing the succession of children of different marriages of a mother. Moreover, there are definite decisions of this Court adopting the rule of succession *per stirpes* in the case of the property of a mother. [*Vide Siriya vs. Kaluwa* (1889) 9 Supreme Court Circular 45 ; *Appuhamy vs. Hudu Banda* (1903) 7 New Law Reports 242 and *Nanduwa vs. Punchirala et al* (1922) 24 New Law Reports 249]. Even if the decisions of this Court are contrary to the rule to be gathered from Sawyer and Armour, I think that the present case is one of those cases in which inveterate error should be left undisturbed because it would be unjust to disturb titles and transactions founded on such an error (*vide Pate vs. Pate* (1915) 18 New Law Reports 289 at 293).

I would dismiss the appeal with costs.

Appeal dismissed.

CANEKERATNE, J.

I agree.

GRATIAEN, J.

I agree.

Present : BASNAYAKE, J.

CHELLIAH & ANOTHER vs. NAGARAJAH & ANOTHER

S. C. 67—*C. R. Kayts* 6349
Argued on : 18th November, 1948
Decided on : 22nd March, 1949

Servitude—Grant of Share of Well—Does it include the right to lead water from the well along another's land—Burden of proof—Presumption.

Held : (1) That the bare grant of a share in a well implies only a right of way to the well and does not imply the right of leading water over the land of another. The right of leading water must be expressly granted.

(2) That a heavy onus lies on a person who seeks to establish a servitude by prescription. In case of doubt the presumption is always against a servitude.

Cases referred to : Censura Forensis Book II, Ch. XIV, Sec. 59—Schreiner's translation, p. 94.
Voet, Book VIII, Tit. 3, Sec. 7.
Smit vs. Russouw & Others (1913) C. P. D. 847 at 853.
Willoughby's Consolidated Co. Ltd. vs. Copthall Stores Ltd (1918) *A. D.* 1 at 16.
Voet, Book VIII, Tit. 4, Sec. 18 ; Censura Forensis, Part I, Book II, Ch. XIV, Sec. 6.

C. Thiagalingam, for the appellants.

P. Navaratnarajah, for the respondent.

BASNAYAKE J.

The plaintiffs, Chelliah and Sornamma, are husband and wife. Sornamma is the owner of lot 1 in plan P1 filed of record. She claims the right of leading water from a well situated in lot 3 belonging to the defendants, Nagarajah and Sellamma, who are also husband and wife, along a channel A B C D on to lot 1. Between lot 1 and lot 3, is lot 2 which the plaintiffs originally claimed but which they later admitted to be the property of the defendants. The plaintiffs base their claim on prescriptive user. The defendants deny that such a right has been acquired by them. The learned Commissioner of Requests has dismissed the action of the plaintiffs. This appeal is from that decision.

The first defendant admits that the plaintiffs irrigated their lot 1 till 1930 from well N in P1, but he says that they did so with his permission. On this point the learned Commissioner accepts the first defendant's evidence. The plaintiffs' right to a share in the well N is not disputed. P3 speaks of " share of water in the well ". P4 of " share of well in eastern boundary land ", and P5 of " half share of the well situated in the eastern boundary land ", The deeds on which the plaintiffs rely give them a share in the well N. But those documents do not give them the right to lead water from the well over lots 3 and 2 to lot 1. The bare grant of a share in a well implies only a right of way to the well and does not imply the right of leading water over the land of another. The right of leading water must be expressly granted. In fact the owner of the servient tenement is entitled to surround the well with a wall, provided however, he puts a gate in it so that the owner of the servitude may have access to the well through it whenever he pleases. (Censura Forensis Book II, Ch. XIV, Sec. 39—Schreiner's translation, p. 94.—Voet, Book VIII, Tit. 3, Sec. 7. The plaintiffs' documents therefore do not avail them. The mere fact that a water-course lies across lot 3 is not evidence of user by the plaintiffs. The document P6 which is a request made by the first defendant from the plaintiffs for their share of the cost of repairing the well, affords no proof of the servitude claimed by them, for, the " cleaning and repairing of the well or cistern is the common business of the owner and of those who have the right of drawing water therefrom, so long as they have not renounced their right of servitude ". (Voet, Book VIII, Tit. 3, Sec. 7)

Surveyor Veerasingham states, and the first plaintiff admits, that at the time of his visit to the land for the purpose of surveying it to make plan P1 there was nothing on the ground to show the continuation of the water-course A B C D on lot 1. In cross-examination the first plaintiff makes a statement which seriously affects his claim. He says : " The defendant has allowed me to use the water from his well. He used the water one day and I used the water another day.". This statement is in keeping with the defendant's evidence that the first plaintiff used the first defendant's channel for leading water to lot 1 with his permission.

A heavy onus lies on a person who seeks to establish a servitude by prescription. Kotze, J.

in *Smit vs. Russouw & others* (1913) C. P. D. 847 at 853, observes : " Seeing that servitudes are onerous, the law does not favour them, and where, therefore, the acquisition of a right such as that claimed by the defendants, which is in the nature of a real servitude, is set up as having been acquired by prescription, it is incumbent on the defendants to establish their claim by clear and satisfactory evidence."

In case of doubt the presumption is always against a servitude. (*Willoughby's Consolidated Co., Ltd. vs. Copthall Stores Ltd*, (1918) A. D. 1 at 16. A person who grants a servitude as a concession, as the first defendant claims to have done, can revoke it. (Voet, Book VIII, Tit. 4, Sec. 18;) Censura Forensis Part 1, Bk 2, Ch. XIV, Sec. 6.

The appellant is in my view not entitled to succeed as he has failed to establish his case. I dismiss the appeal with costs.

Appeal dismissed.

Present : Basnayake, J,

SEMANIS & ANOTHER vs. DHARMARATNE (EXCISE INSPECTOR, GAMPAHA)

S. C. 1004-1005—*M C Gampaha* 44072

Argued on : 9th November, 1948
Decided on : 8th February, 1949

Excise Ordinance, sections 34, 36, 43 *and* 44—*Powers of search and arrest.*

Held : (1) That an Excise Inspector who searches premises without a search warrant must first make the record required by section 36 of the Excise Ordinance, and that such record can be proved only by the document itself or by secondary evidence of its contents, if secondary evidence is admissible.

(2) That under section 34 of the Excise Ordinance there is no power to effect an arrest within a dwelling house.

Cases referred to : *Zilva vs. Sinno* (1914) 17 N. L. R. 473.

No appearance for the accused-appellants.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Basnayake, J.

The two appellants by name Ranaweera Koralage Don Semanis Appuhamy and Ranaweera Koralage Gunarath Appuhamy were tried and convicted of offences punishable under sections 183, 228 (this appears to be a mistake for section 220 A) and 323 of the Penal Code.

The evidence for the prosecution is that Excise Inspector Dharmaratne and Excise Guards Saranelis and Habarakada entered the house of the appellant Semanis at about 1 a.m. on 18th March 1948 as they had information that Semanis and some others were engaged in the unlawful manufacture of arrack. When the Excise Inspector was examining the arrack he found there, Semanis attacked him with a rice pounder. At the same time Gunarath also attacked him. The guards too were attacked. Finding themselves in difficulties the Excise Inspector and his guards left the scene to obtain Police assistance and came back with Inspector Boudewyn and a number of police constables. Semanis was arrested by the Police Inspector that very morning. Semanis admits that he resisted the Excise Inspector and his guards and that a fight ensued in the course of which he struck them with a club. He says he thought that the Excise Inspector and his party were robbers masquerading in uniform. Gunarath Appuhamy denies he was in Semanis's house that night.

Excise Inspector Dharmaratne admits that he had no search warrant to search Semanis's house. That being the case he was not entitled to enter and search the premises except in accordance with section 36 of the Excise Ordinance.

That section provides that whenever any excise officer not below such rank as the Governor may prescribe has reason to believe that an offence under section 43 or section 44 has been, is being, or is likely to be, committed, and that a search warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence, he may, after recording the grounds of his belief, at any time by day or night enter and search any place and may seize anything found therein which he has reason

to believe to be liable to confiscation under the Excise Ordinance. The record of " the grounds of his belief " which an excise officer is required by section 36 to make is a matter required by law to be reduced to the form of a document. Oral evidence of such record is therefore excluded by section 91 of the Evidence Ordinance. It can be proved only by the document itself, or by secondary evidence of its contents in cases in which secondary evidence is admissible under the Evidence Ordinance. In the instant case the record made by Excise Inspector Dharmaratne under section 36 of the Excise Ordinance has not been produced and there is therefore no evidence that their entry into Semanis's house was lawful. My view finds support from the case of *Zilva vs. Sinno* (1914) 17 N. L. R. 473, wherein it has been held that it is the record under section 36 that vests in an Excise Officer the authority to search and that until he makes it he has no more authority in that direction than an ordinary individual. Pereira J. observes in that case : " I think that in every case of search by an Excise Inspector, compliance by him with the requirements of section 36 should be affirmatively established by him by evidence." That being so, charges under sections 183 and 323 of the Penal Code fail for want of evidence that the public servant in question was acting in the discharge of his public functions.

Inspector Dharmaratne's evidence is that he arrested the appellants for possession of unlawfully manufactured arrack in Semanis's dwelling house. Section 34 of the Excise Ordinance empowers an excise officer to arrest any person without warrant for an offence punishable under section 43 or section 44, if such person is found committing such offence in any place other than a dwelling house. One of the essential ingredients of an offence under section 220A is that the apprehension against which resistance or illegal obstruction is offered must be lawful apprehension. The Excise Inspector had no lawful right to arrest the appellants in the house. Any resistance or obstruction the appellants may have offered was not resistance or illegal obstruction to their lawful apprehension. It is, therefore, not possible to sustain even the charge under section 220A which the learned Magistrate has recorded in his charge as section 228.

For the above reasons I set aside the convictions of the appellants and acquit them.

Convictions set aside.

Present : Nagalingam & Gratiaen, JJ.

PERERA vs. PERERA

S. C. 23—*D. C. Colombo No.* 3444/*L*

Argued on : 27th January, 1949
Decided on : 1st February, 1949

Possessory action—What is possessio civilis *or* possessio ut dominus—*Should the fact that dispossession by defendant was in assertion of a* bona fide *right of co-ownership be taken into consideration in determining nature of possession.*

Held : (1) That the fact that dispossession by the defendant in a possessary action was in the assertion of his right of co-ownership is not a factor to be taken into consideration in determining whether the plaintiff had *possessio civilis* or *possessio ut dominus*.

(2) That *possessio civilis* or *possessio ut dominus* is proved when a person is in possession of property with the intention of holding and dealing with it as his own.

Cases referred to : *Sadirisa vs. Attadasi Thero* (1936) 38 N. L. R. 309.
Fernando vs. Fernando (1910) 13 N. L. R. 164.

H. W. Jayawardene, for the plaintiff-appellant.

N. M. de Silva with *C. E. Jayawardene*, for the defendants-respondents.

Gratiaen, J.

This is a possessory action in respect of the land depicted in the plan dated 8th June 1944 marked " X " made by Mr. L. S. Tudugalle Licensed Surveyor. The learned District Judge has found as a fact that the plaintiff had been in the undisputed and uninterrupted possession of the entire land until he was forcibly ousted therefrom by the defendants on the night of 14th January, 1944. One would have thought that

on these findings of fact all the requisite elements were present entitling a plaintiff to relief in a possessory suit, but the learned District Judge, purporting to follow a ruling of this Court in *Sadirisa vs. Attadasi Thero* (1936) 38 N. L. R. 309, has dismissed the action on the ground that the defendants acted as they did in the assertion of their alleged rights of co-ownership to the land and that the plaintiff's possession at the date of ouster could not for this reason be held to be *possessio civilis* as understood in the Roman Dutch Law.

It is necessary to point out that in the present case the plaintiff, with or without justification, had been in possession of the land asserting that he was the sole owner and refusing to recognise as valid any claim of the defendants to be his co-owners. In this respect the case stands on a different basis to the case which Akbar J. dealt with in *Sadirisa vs. Attadasi* (1936) 38 N. L. R. 309 where a person claiming to own only undivided one-tenth share of a certain property sought nevertheless to bring a possessory action in respect of the entire property against persons whom he acknowledged as his co-owners. In that case, if I may say so with respect, Akbar, J. very properly held that the plaintiff could not be regarded as having *possessio civilis* of the entire land. As Wood Renton, C.J. pointed out in *Fernando vs. Fernando* (1910) 13 N. L. R. 164, *possessio civilis* or possession *ut dominus* is proved when a person is in possession of property *with the intention of holding and dealing with it as his own*, and it seems to me that this is exactly what the plaintiff has proved in the present case. The test to be applied with regard to proof of possession *ut dominus* is a subjective test, and in possessory actions it is not appropriate to investigate title for the purpose of deciding whether or not a party's claim to possession of land is justified in law. The purpose of a possessory suit is not to adjudicate upon questions relating to title but to give speedy relief to a person who, claiming to be owner of property in his own right, has been dispossessed therefrom otherwise than by process of law. In the present action possession for over a year and a day before ouster had been established to the satisfaction of the learned District Judge, and was in any event not required because the ouster was proved to have been forcibly achieved.

In my opinion the plaintiff has proved all that was required of him to claim a decree restoring him to possession of the land in dispute as against his alleged co-owners. If the defendants dispute his title to the entire land their claim can only be investigated in a properly constituted *rei vindicatio* action. I would set aside the judgment of the learned District Judge and enter decree in favour of the plaintiff as prayed for in paragraphs (*a*) and (*b*) of the amended plaint dated 12th September 1945, together with damages at the agreed rate of Rs. 30 per annum from 14th January 1944 until he is restored to possession. The plaintiff is also entitled to his costs both here and in the Court below.

Appeal allowed.

NAGALINGAM, J.

I agree.

Present : BASNAYAKE, J.

MUSAFER, A.S.P. vs. CHARLES PEIRIS

Application for revision in M. C. Batticaloa Case No. 7213—(S. C. 33)
Argued and decided on : 27th January, 1949

Criminal Procedure—Sentence—Should a mere allegation against accused that he committed the same offence previously be taken into account in passing sentence.

Held : That in assessing the sentence that should be passed on an accused, it is improper for a Magistrate to take into account a mere allegation that he has previously committed the same offence and successfully evaded detection.

Per BASNAYAKE, J.—" That except where a particular form of proof is permitted as in Chapter XXXVIII of the Criminal Procedure Code and in the Prevention of Crimes Ordinance, all material which a criminal court is required to take into account in passing judgment in a criminal case should be proved by the evidence of witnesses given on oath or affirmation, so that their evidence may be tested by cross-examination."

N. M. de Silva, for the accused-petitioner.

BASNAYAKE J.

The appellant made an unqualified admission of guilt in answer to a charge under section 43(*a*) of the Excise Ordinance. After the learned Magistrate recorded his verdict and before he passed sentence the Assistant Superintendent of Police of Batticaloa who made the report under section 148(1) (*b*) of the Criminal Procedure Code appears to have made a statement which is recorded as follows :

> " The A. S. P. who appears states that the accused had been in the habit of transporting arrack regularly from Valaichanai to Polonnaruwa which is a dry area. This accuesd has been caught travelling by train without ticket for which he has been charged and convicted."

In view of this statement the learned Magistrate records :

> " I take a serious view of this incident. I sentence the accused who is a boutique-keeper to pay a fine of Rs. 500 in default 3 months' R.I. I am not prepared to give him time."

I am surprised that an officer of the rank of Assistant Superintendent of Police should have made such a statement and that the learned Magistrate should have permitted it. The statement contains hearsay and is unfair to the appellant, in that he has not been afforded an opportunity of cross-examining the officer who made so damaging a statement.

In my opinion it is illegal for a Magistrate to act on material which is not in evidence. Nor is it proper for him in assessing the sentence that should be passed on an accused person to take into account a mere allegation that he has previously committed the same offence and successfully evaded detection.

Except where a particular form of proof is permitted as in Chapter XXXVIII of the Criminal Procedure Code and in the Prevention of Crimes Ordinance, all material which a criminal court is required to take into account in passing judgment in a criminal case should be proved by the evidence of witnesses given on oath or affirmation. so that their evidence may be tested by cross-examination. Statements such as the one made in the instant case should not be permitted as they do not afford the person against whom they are made an opportunity of meeting them and are therefore obnoxious to the rules of natural justice.

I cannot escape the conclusion that the punishment imposed by the learned Magistrate on the appellant has been influenced by what was stated in court. I therefore reduce the fine to Rs. 250. If the appellant does not pay the fine, I order him to undergo six weeks' rigorous imprisonment.

Sentence reduced.

Present : BASNAYAKE, J.

NAGALINGAM vs. KAYTS POLICE

S. C. 175 *with Appln. No.* 110—*M. C. Kayts* 10785

Argued and decided on : 18th March, 1949

Criminal Procedure Code, sections 171 *and* 425—*Failure to draft charge in conformity with section* 167 (3)—*Accused pleading guilty to charge— Application in revision—Duty of Magistrates in charging accused.*

Where an accused person pleaded guilty to a charge which did not conform to the requirements of section 167 (3) of the Criminal Procedure Code, and where it appeared that it is doubtful whether the accused has not been misled by such omission.

Held : That the defect in the charge is not curable either under sections 171 or 425 of the Criminal Procedure Code and that the conviction should be quashed.

Per BASNAYAKE, J.—It does not appear to be generally realised that the Magistrate is required by law to bring his own mind to bear on the charge. That important requirement of section 187 must be rigidly observed. That provision is a safeguard against the liberty of the subject being placed in jeopardy by charges which are untenable in law.

C. S. Barr Kumarakulasinghe with *T. W. Rajaratnam*, for the accused-petitioner.

A. C. Alles, Crown Counsel, appears on notice.

BASNAYAKE, J.

The accused, one Nagalingam, was charged as follows .—

> "That you did within the jurisdiction of this Court, at Karainagar North, on 12-11-48, being a person coming from a foreign port to wit Muthukuda landed in the coast of Ceylon in breach of section 67 (1) Chapter 173 Vol. III. and thereby committed an offence punishable under section 5 (1) Chapter 173 Vol. IV."

Upon being asked if he had any cause to show why he should not be convicted, the accused appears to have stated "I am guilty". The learned Magistrate thereupon imposed a sentence of four months' rigorous imprisonment. The accused has not appealed from that judgment, but he invokes this Court to exercise its powers under section 357 of the Criminal Procedure Code.

Learned Counsel submits that there are material defects in the charge and that the accused has been prejudiced thereby. Learned Crown Counsel who appears as *amicus curiae* submits that the defects pointed out by learned Counsel for the petitioner are curable under sections 171 and 425 of the Criminal Procedure Code.

The allegation in the charge is that the accused landed on the coast of Ceylon in breach of section 67 (1) of Chapter 173, Vol. III. There is no such Chapter in Vol. III. of the Revised Edition of the Legislative Enactments. Chapter 173 occurs in Vol. IV. of the Revised Edition of the Legislative Enactments. But that Chapter has only twelve sections. The accused's plea of guilty when read with the charge leaves one in doubt as to the nature of the offence which the accused admits he committed, and it would be doing manifest injustice to act on such a plea and punish the accused.

Section 167 (3) of the Criminal Procedure Code requires that in every charge there should be stated the offence with which the accused is charged. If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as will give the accused notice of the matter with which he is charged. In the instant case the law which creates the offence does not give it any specific name and so much of the definition of the offence which is necessary to give the accused notice of the matter with which he is charged is not stated.

The mistakes in the charge and its non-conformity with the requirements of section 167 (3) drive me to the conclusion that the learned Magistrate has not in the instant case given his own mind to the charge as he is required to do by section 187 of the Criminal Procedure Code.

It does not appear to be generally realised that the Magistrate is required by law to bring his own mind to bear on the charge. That important requirement of section 187 must be rigidly observed. That provision is a safeguard against the liberty of the subject being placed in jeopardy by charges which are untenable in law.

I find it difficult to assent to the proposition that the accused has not been misled by the charge which is meaningless, nor can I agree that there has been no failure of justice.

I quash the conviction with liberty to the prosecution to institute fresh proceedings on a properly drafted charge.

Conviction quashed.

Present : BASNAYAKE, J.

MUDALIHAMY vs. APPUHAMY & OTHERS

Application for Revision in C. R. Gampola Case No. 7490—(*S. C. Appl.* 493)
Argued and decided on : 24th January, 1949

Arbitration—Court acting as arbitrator.

Plaintiff sued defendants, who are co-owners, for recovery of damages for depriving plaintiff of his share of a crop of paddy. Defendants denied the claim. At the trial parties agreed to "refer all matters in dispute to the final arbitration of the Court and the Court is to make its order after inspection of the place".

The Court inspected the land and ordered the plaintiff to be placed in possession of a portion of the field cultivated by one of the defendants.

Held : That in making its order the Court exceeded the authority given to it by the parties.

Per BASNAYAKE, J.—I have not been able to find, nor has learned Counsel been able to refer me to, any provision of the Civil Procedure Code under which a Judge may step aside from the office of Judge and assume the role of arbitrator.

H. W. Jayawardena, for the defendant-appellant.
S. W. Jayasuriya, for the plaintiff-respondent.

BASNAYAKE, J.

The plaintiff in this action alleged that he had been wrongfully deprived, by the defendants who are co-owners, of his share of the crop of a paddy field called Ganekumbura for the years 1944, 1945, and a part of 1946. He claimed a sum of Rs. 240 as the value of his share of the paddy. The defendants resisted his claim on the ground that they were not owners of a field in common with the plaintiff. They averred that the plaintiff and they owned divided lots of the paddy field in question and denied that they either cultivated the plaintiff's field or appropriated his crop.

It appears from the journal entry of 20th May, 1947, that the plaintiff is a brother of the defendants and perhaps for that reason on 17th June, 1947, they agreed that the Court should arbitrate in their dispute. The journal entry of that date reads :

" Mr. Van Langenberg for plaintiff present.

Mr. Kanagasabai for defendant present.

Parties are agreed that all matters in dispute be referred to the final arbitration of the Court and the Court is to make its order after inspection of the place.

Inspection on 28-6-47. Call on 28-6-47."

The learned Commissioner of Requests inspected the land on the appointed date and on 30-6-47 made order that a portion 15 feet in length be taken off the portion now cultivated by the second defendant and that the plaintiff be placed in possession of it.

The second defendant complains against that order on the ground that the learned Judge has decided an issue which was not in dispute between the parties and that he has exceeded his authority.

The authority given by the parties to the learned Commissioner does not in my view enable him to make the order he has made and he has clearly exceeded his authority. I have not been able to find, nor has learned Counsel been able to refer me to, any provision of the Civil Procedure Code under which a Judge may step aside from the office of Judge and assume the role of arbitrator.

I set aside the order of the learned Commissioner of Requests and send the case back for trial in due course before another Commissioner of Requests.

Order set aside.

Present : BASNAYAKE, J.

JAYASEKERA vs. COOPER (S. I. POLICE, SPECIAL TRAFFIC, COLOMBO)

S. C. 118—*M. M. C. Colombo* 2997

Argued and decided on : 3rd February, 1949

Omnibus Service Licensing Ordinance, No. 47 *of* 1942—*Road license issued under—How may its terms be proved.*

Held : That no evidence can be given in proof of the terms of a road license issued under Ordinance No. 47 of 1942 except the document itself or secondary evidence of its contents when secondary evidence is admissible.

C. de S. Wijeratne, for the accused-appellant.
A. C. Alles, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

The appellant has been convicted of the following charges .—

" That you did on the 19th day of April, 1947, at Alexandra Place,.....being the driver of omnibus Z.1457 drive the same on a highway for the conveyance of passengers for fee or reward other than under the authority of the road service licence issued by the Commissioner of Motor Transport in breach of section 21 (1) of Ordinance No. 47 of 1942 and that you thereby committed an offence punishable under section 15 (1) of the Ordinance 45 of 1942."

The road service licence referred to in the charge is required by law to be reduced to the form of a document, and no evidence can be given in proof of its terms except the document itself or secondary evidence of its contents when secondary evidence is admissible. In the instant case the licence has not been produced. In the absence of legal evidence of the terms of the licence it cannot be held that the appellant contravened its terms by doing what he is alleged in the charge to have done.

The appeal is allowed and the conviction of the appellant is quashed.

Conviction quashed.

Present : BASNAYAKE, J.

SOPIHAMY & OTHERS vs. ABEYARATNE

S. C. 198—*C. R. Panadure* 11776

Argued and decided on : 20th January, 1949

Jurisdiction—Action for damages over Rs. 100 *instituted in Court of Requests—Damages assessed at Rs.* 60 *after trial—Should the matter be referred to Rural Court—Rural Courts Ordinance No.* 12 *of* 1945, *section* 12.

Held : That section 12 of the Rural Courts Ordinance No. 12 of 1945 has no application where the actual value claimed by the plaintiff can be determined by the Court only after the conclusion of the case.

S. W. Jayasuriya for the defendant-appellants.
M. M. Kumarakulasingham, for the plaintiff-respondent.

BASNAYAKE, J.

This is an action for damages in a sum of Rs. 122 alleged to have been sustained by the plaintiff in consequence of the unlawful act of the defendants in forcibly cultivating his field called Meegahakumbura. The defendants claim that they are the owners of the field. The parties went to trial on the following issues :

(1) Did the defendants unlawfully remove the Yala crop of 1946 cultivated by the plaintiff ?

(2) Did the defendants unlawfully work the said field for the Maha season of 1946 and deprive the plaintiff of the income thereof ?

(3) If so what damages ?

(4) Did the plaintiff cultivate the said field for the Yala of 1946 ?

In the course of the trial, while the plaintiff's evidence was still unconcluded, the Counsel for the defendants raised the following further issue :

(5) If the amount of damages due to the plaintiff is found to be less than Rs. 100, has this Court jurisdiction ?

The learned Commissioner disallowed this issue. After trial judgment was entered for the plaintiff for Rs. 60 with costs.

The only question which is raised by learned Counsel in this appeal is that the learned Commissioner of Requests should have referred this matter to the Rural Court under section 12 of the Rural Courts Ordinance No. 12 of 1945.

The material portion of that section reads :—

> " Where in any case, whether civil or criminal, instituted before any Court established under the Courts Ordinance, it appears to such Court at any stage of the proceedings that the case is one within the exclusive jurisdiction of a Rural Court, the Court shall stop the further progress of the case and refer the parties to such Rural Court, and, where such case is a civil case, may make such order as to costs as may seem just :"

In the instant case the actual value of the damages was determined by the Court at the conclusion of the case and there is nothing to indicate that at any earlier stage it appeared to the Court that the case was one within the exclusive jurisdiction of a Rural Court. That section has therefore no application to it.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Present : BASNAYAKE, J.

TISSERA vs. KATHINPILLAI

Application for Revision in M. C. Jaffna 9684—(*S. C.* 116)

Argued and decided on : 11th November, 1948

Motor Car Ordinance, No. 45 *of* 1938—*Sections* 154 *and* 127—*Driving a bus without certificate of insurance—Suspension of Certificate of Competence—What is meant by " special reasons " in Section* 75 (2) (*c*).

Petitioner was convicted of the offence of driving a bus on the highway when there was not in force in relation to the said bus a policy of insurance or security in respect of 3rd party risk. In addition to a fine the learned Magistrate suspended his certificate of competence for 12 months.

The accused applied to the Supreme Court by way of revision to set aside the order suspending the certificate on the ground that on the day he drove the bus, viz. 16th January, 1948, the bus had been licensed for the new year and he assumed that a certificate of insurance was in force as required by section 33 (2) of the Motor Car Ordinance.

Held : That the petitioner was entitled to act on the assumption that a license would not be issued in contravention of an express provision of the statute and his case fell within the exception to section 75 (2) (*c*) of the Motor Car Ordinance.

Meaning of the expression " special reasons " in section 75 (2) (*c*) of the Motor Car Ordinance explained.

Cases referred to : *Whittall vs. Kirby* (1946) 2 All E. R. 552.
Rennison vs. Knowler (1947) 1 All E. R. 302.
R. vs. Crossan (1939) 1 N. I. 106.
R. vs. Recorder of Leicester (1946) 1 All E. R. 615.

C. S. Barr Kumarakulasinghe for the Petitioner.

BASNAYAKE J.

The accused petitioner was found guilty of an offence punishable under section 154 of the Motor Car Ordinance, No. 45 of 1938, in that he drove a bus on the highway when there was not in force in relation to the use of the said bus a policy of insurance or security in respect of third party risk in breach of section 127 of that Ordinance. The petitioner pleaded guilty and the learned Magistrate made the following order : " I fine him Rs. 25 and under section 75 (1) (*c*) (Ordinance 48 of 1938) suspend his certificate of competence for a period of 12 months."

Ordinance No. 48 of 1938 has nothing to do with motor cars. Perhaps the learned Magistrate meant Ordinance No. 45 of 1938, but sub-section (1) of section 75 of that Ordinance does not have a paragraph (*c*). Paragraph (*c*) of sub-section (2) of section 75 does seem to make it obligatory on a Magistrate to make an order suspending the certificate of competence of a person convicted of the offence of contravening the provisions of section 127 unless the court is of opinion that, in the circumstances of any case, such an order should not be made, for special reasons to be recorded in the proceedings.

The petitioner urges that as the motor omnibus which he drove on this day had been licensed for the new year he assumed that a certificate of insurance was in force. The petitioner's assumption is not without justification for section 33 (2) enacts that no license for any motor car shall be issued by any licensing authority unless a certificate of insurance or a certificate of security is produced to that authority by the applicant. The offence alleged was committed at the very commencement of the licensing year, viz., the 16th of January 1948, and the petitioner's assumption is therefore understandable.

What is meant by the expression " special reasons " in the corresponding English statute is discussed in the cases of *Whittall vs. Kirby* 1 (1946) 2 All E. R. 552, and *Rennison vs. Knowler.* (1947) 1 All E. R. 302. In the former case Lord Goddard C. J. quotes with approval the full definition given in *Rex vs. Crossan,* (1939) 1 N. I. 106, a case from Nothern Ireland.

> "A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception."

The fact that a man is a first offender or a professional driver is not a special reason within the scope of the above definition.

In the instant case I think the petitioner was entitled to act on the assumption that a licence would not be issued in contravention of an express provision of the statute and in my view his case falls within the exception. It is unfortunate for the petitioner that the learned Magistrate did not direct his mind to the provisions of section 75 (2) (*c*) with a view to ascertaining whether the petitioner's case was one that fell within the exception.

I think it is competent to this Court in appeal or revision to act under the exception to section 75 (2) (*c*) and pass an order thereunder. The powers conferred by section 37 of the Courts Ordinance are very wide indeed. It is of interest to note that in the case of *Rex vs. Recorder of Leicester* (1946) 1 All E. R. 615, it has been held that it is permissible to a recorder in England in appeal to make an order under the exception.

I therefore, set aside the order suspending the certificate. In other respects the order of the learned Magistrate is affirmed.

Order suspending certificate set aside.

Present : BASNAYAKE, J.

ALASUPPILLAI vs. YAVETPILLAI & ANOTHER

S. C. 218—*C. R. Pt. Pedro L* 3
Argued on : 1st and 2nd July, 1948
Decided on : 22nd March, 1949

Partition—Interlocutory decree—Intervention after—Interlocutory decree vacated by consent of parties—Order for trial de novo—*Court's power to make such order—What intervenient can claim—Should plaintiff prove his case all over again—Meaning* of " per incuriam ".

Held : (1) That the Court cannot vacate an interlocutory decree for partition on the ground that parties consented to it.

(2) That it is not open to an intervenient to ask for a partition of a land different to that described in the plaintiff's libel.

(3) That where an intervention is entertained by the Court after interlocutory decree, the plaintiff should not be ordered to prove his case all over again.

Per BASNAYAKE, J.—" A decision *per incuriam* is one given when a case or a statute has not been brought to the attention of the Court and it has given the decision in ignorance or forgetfulness of the existence of that case or that statute. *Huddersfield Police Authority vs. Watson* (1947) 2 All E. R. 193.

Cases referred to : *Catherinahami et al vs. Babahamy et al*, (1908) 11 N. L. R. 20.
Gunawardene vs. Walgamage Adrian, (1876) D. C. Galle No. 33024, S. C. Minutes of 28-7-1876.
Appuhamy vs. Gunaratne (1913) 1 Wije 60.
Huddersfield Police Authority vs. Watson, (1947) 2 All E. R. 193.
Young vs. Bristol Aeroplane Co., Ltd. (1944) 2 All E. R. 293.

C. Thiagalingam with *S. Mahadevan*, for the appellant.
C. Chellappah, for the respondent.

BASNAYAKE, J.

This action was instituted by the plaintiff-respondent (hereinafter referred to as the plaintiff) in February, 1942 for the partition of a divided one-third share of a land called Vadalysanthai. She claimed one-third of the corpus and allotted to the defendant-respondent (hereinafter referred to as the defendant) the remaining two-thirds. The defendant denied the plaintiff's right to one-third share of the corpus and claimed the whole of it by right of prescription.

The only issues tried by the learned Commissioner were suggested by the plaintiff. They are :

(1) Is the land sought to be partitioned in this case a divided land or is it an undivided portion of a larger land called Vadalysanthai ?

(2) Is the plaintiff entitled to a 1/3 and the defendant to a 2/3 share of the said divided land.

The plaintiff's action was dismissed but without costs. She appealed to this Court and her appeal was upheld and in November, 1944 the case was sent back for the Commissioner to proceed with the partition of the land. The finding of De Kretser, J. is thus stated in the judgment :—

> " I think the plaintiff has made out a case to have this separate block partitioned. The decree is, therefore set aside, and the case remitted for the Commissioner to proceed with the partition of the land. The plaintiff is entitled to the costs caused by the contest in the lower court and the costs of this appeal."

Interlocutory decree was accordingly entered in December, 1944 and a commission was issued for a partition of the land. On 19th March, 1945, one Neekilappillai Alasuppillai the intervenient-appellant (hereinafter referred to as the intervenient), filed a statement of claim and moved that he be added as a party. The learned Commissioner accepted his statement and issued notice on the plaintiff and the defendant. After several postponements of the inquiry into the claim on 20th October, 1945, the learned Commissioner made the following entry of record :

> " Parties now agree that the interlocutory decree entered by the Court on 18-12-44 is made without any evidence being led afresh after Supreme Court order which has set aside the earlier order of the Court. As such the interlocutory decree is not in conformity with the provisions of the Partition Ordinance and this interlocutory decree is one that has been made by Court *per incuriam* of consent. The interlocutory decree is vacated and the case will proceed to trial on fresh evidence. Trial postponed for 17-11-45."

The learned Commissioner's action in setting aside the interlocutory decree entered by his predecessor in pursuance of the judgment of this Court is in my view wrong. The fact that the parties submitted to his order does not give his order validity as parties cannot by consent

confer on him authority to do what he has no power in law to do. The order of this Court made it quite clear that on the evidence led at the trial the plaintiff was entitled to the partition she claimed and the case was remitted for the Commissioner to proceed with the partition of the land. An order for the issue of a commission to Surveyor Seevaratnam to partition the land returnable on 19th February, 1945 was made on 18th December, 1944. The commission was actually issued on 22nd February, 1945 returnable on 9th April, 1945. The report and plan were filed on 7th April, 1945 but notice under section 6 of the Partition Ordinance does not appear to have been ordered; perhaps because of the claim of the intervenient filed on 19th March, 1945.

It has been laid down by this Court that a person may intervene in a partition action at any stage before final decree. *Catherinahami et al vs. Bebahamy et al.*, (1908) 11 N. L. R. 20. But the mere fact that a claim is filed by an intervenient affords no ground for setting aside an interlocutory decree duly entered and for commencing proceedings *de novo* as in the instant case. The intervenient set up a claim not to the corpus which the Court had ordered to be partitioned but to a different corpus, and he asked that he be declared entitled to a one-ninth share of the corpus referred to his claim. It is not open to an intervenient to ask for a partition of a land different to that described in the plaintiff's libel. Even if the intervenient made a claim that could have been entertained he should have been ordered to prove his case without casting on the plaintiff the burden of establishing her case all over again. *Gunawardene vs. Walgamage Adirian*, (1876) D. C. Galle No. 33.024 S. C. Minutes of 28-7-1876; *Appuhamy vs. Gunaratne*, (1913) 1 Wije 60.

In the instant case these illegalities do not affect the final result as at the second trial the learned Commissioner came to the same conclusion as was formed by this Court in appeal. Learned Counsel for the intervenient, who made a searching analysis of the evidence at the hearing of this appeal, has not satisfied me that the learned Commissioner's finding of fact is wrong.

As the learned Commissioner appears to have used the expression *per incuriam* in his order without a correct appreciation of its true meaning, it is desirable that I should advert to that expression. A decision *per incuriam* is one given when a case or a statute has not been brought to the attention of the Court and it has given the decision in ignorance or forgetfulness of the existence of that case or that statute. *Huddersfield Police Authority vs. Watson* (1947) 2 All E. R. 193. The observations of Lord Greene M. R. in *Young vs. Bristol Aeroplane Co., Ltd.* (1944) 2 All E. R. 293 will further help to elucidate its meaning. He says at page 300 :—

> "But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*. We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obvoiusly be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions *per incuriam* fall outside the scope of our enquiry, namely (i) those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow; and (ii) those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords."

The appeal is dismissed with costs.

Appeal dismissed.

Present : BASNAYAKE & GRATIAEN, JJ.

SAMARASEKERA vs. SECRETARY, D. C., MATARA, & ANOTHER

S. C. 77—D. C. Matara 16227

Argued on : 1st February, 1949
Decided on : 12th April, 1949

Civil Procedure Code, section 520—*Appointment of Secretary of Court as administrator—Proceedings against such administrator—Can they be continued against his successor in office—Is Secretary of the Court a corporation sole.*

Held : (1) That the appointment of the Secretary of the Court as administrator under section 520 of the Civil Procedure Code is not an appointment of the individual holding the office of Secretary, but an appointment of the person for the time being holding the office of Secretary.

(2) That the office of the Secretary of the Court falls within the category of *quasi* corporation sole and proceedings commenced against a Secretary in office could be continued against his successor.

Per BASNAYAKE, J.—" Ordinarily a person cannot be appointed an administrator without his consent. But in the case of an appointment under section 520 neither the Court nor the Secretary has a choice.

N. E. Weerasooria, K.C., with *Kulasingham* and *Christie Seneviratne*, for the appellant.

H. V. Perera, K.C., with *M. H. A. Azeez*, for the 1st respondent.

C. V. Ranawake for the 2nd respondent.

BASNAYAKE, J.

On 10th May 1944 one Dona Angonona de Silva Karunanayake Hamine, the widow of Naotunnege *alias* Naurannege Don Andrayas de Silva, sued A. de S. Kanakeratne, the Secretary of the District Court who had been appointed administrator of her late husband's estate, for the recovery of a sum of Rs. 7,400 which she had paid to one E. J. Buultjens in settlement of a mortgage debt incurred by her deceased husband. On 1st December 1944 decree absolute was entered giving the plaintiff judgment in the sum of Rs. 7,400 with interest and costs. On 30th April, 1946 the proctor for the plaintiff appears to have represented to the Court the fact that C. F. A. Palliyaguru, the officer who had succeeded Mr. Kanakeratne as Secretary of the District Court, refused to take notice of taxation of the bill of costs on the ground that he had not yet been appointed administrator. The following order was thereupon made on 11th July 1946 :—

> " The Secretary of this Court is now appointed official administrator in Testy. 4075. Mr. A. P. Daluwatta for plaintiff moves that he be ordered to take notice of the bill and that the same may be taxed. Let him take notice and the chief clerk of the Court tax the bill against the deceased's estates."

Thereafter in execution of the decree on 19th November 1946 certain lands belonging to the estate of the deceased were sold. On 17th December 1946 the present secretary filed a petition, naming the plaintiff and one Sirineris de Silva Samarasekera as respondents, in which he moved to have the sale in execution of the plaintiff's decree set aside on the following grounds :—

> " (*a*) The Official Administrator against whom decree had been obtained in this case has since ceased to function and the 2nd respondent has not taken proper steps to have the petitioner substituted in room (*sic*) of the defendant Mr. A. de S. Kanakaratne, the then Official Administrator.
>
> " (*b*) No seizure of the property sold has been effected and published as required by the provisions of the Civil Procedure Code.
>
> " (*c*) No proper publication of notices of sale have (*sic*) been effected as required by section 255 of the Civil Procedure Code and as a result of such non-publication these properties which are of the value of over R. 10,000 have been sold for a sum of Rs 4,0-5. Substantial loss has therefore been caused to the heirs of the said Naotunnege *alias* Naurunnege Don Andrayas de Silva. An affidavit relating to the above mentioned facts have (*sic*) already been filed by Randorabage Babunappu de Silva who is an heir of the above mentioned estate.
>
> " (*d*) The 1st respondent fraudulently made it known to such members of the public as who (*sic*) were present on the occasion of the alleged sale that the sale was one among the heirs of the above mentioned estate and that the members of the public were not entitled to offer any bids."

The learned District Judge held that there was a material irregularity in the conduct of the sale and that the proceedings were irregular as the present Secretary had not been substituted in the room of his predecessor who had ceased to hold office at the time of the sale.

Learned Counsel for the appellant submitted that proceedings against the successor in office of Mr. Kanakeratne were bad as the Secretary of a Court is not a corporation sole. He also canvassed the finding of the Judge that there was a material irregularity in the conduct of the sale. Learned Counsel has not satisfied us that the Judge's finding that there has been a material irregularity in the conduct of the sale is wrong, and the appeal must therefore fail.

As the question of the competence of the present Secretary to act as administrator has been the subject of decision by the learned trial Judge, and as the matter has been argued before us, we wish to record our opinion thereon.

Section 520 of the Civil Procedure Code which empowers the Court to appoint the Secretary of the Court as administrator reads :—

> " Where there is no person fit and proper in the opinion of the court to be appointed administrator in manner in the last preceding section provided, or no such person is willing to be so appointed, and not in any other case, the court shall appoint the secretary of the court such administrator."

The section specifies the circumstances in which the Secretary of the Court may be appointed administrator. It contemplates the appointment of the Secretary of the Court and not the individual holding the office of Secretary at the time of the appointment. The letters of administration in form No. 87 should be addressed to the " Secretary of the Court ", and not as in the instant case to the Secretary by name. A change of the individuals holding the office will not in our view affect the appointment, once made.

It is clear from section 520 that the Court had, in the instant case, no power to appoint Mr. Kanakeratne administrator in his capacity as an individual. It cannot, therefore, be said that the appointment attached to Mr. Kanakeratne, the individual who held the office at the time the order under section 520 was made. Once the Secretary of the Court is appointed administrator the duties of that office will have to be performed by the person for the time being filling the office of Secretary in the same way as the other duties of the Secretary. Ordinarily a person cannot be appointed an administrator without his consent. But in the case of an appointment under section 520 neither the Court nor the Secretary has a choice.

The contention of learned Counsel would result in the curious situation of a person who has ceased to hold the office of Secretary continuing in the office of administrator *qua* Secretary of the Court, for we can find no provision of the Code by which a change of administrator appointed under section 520 of the Civil Procedure Code can be effected on the sole ground that the individual holding the office of Secretary at the time of appointment has been succeeded by another. It is well known that the holder of the office of Secretary is in a service in which he is liable to be transferred and from which he may resign at his choice or be dismissed at the pleasure of the Crown. If learned Counsel's submission were to prevail all these changes would not by themselves affect the appointment. Although section 521 of the Civil Procedure Code requires the Court to take security for the due administration of the estate from even the Secretary of the Court, the prescribed form of security creates certain difficulties. Form No. 90, which is the form of bond prescribed by the Civil Procedure Code for use in the case of an administrator required to furnish security, reads as follows :—

> " Know all men by these presents that we the administrator and.....and.....are held and firmly bound unto.....Secretary of the District Court of....., the said.....in the sum of.....rupees and the said .....and.....in the sum of.....rupees each, to be paid to the said Secretary....."

This form cannot in law be used by the administrator appointed under section 520 of the Code, for, if he does, the Secretary of the Court will be contracting with himself. A person cannot in law contract with himself. Such a contract cannot be upheld even on the ground that it is a contract by the natural man with the *quasi* corporation sole. It has been held that a corporation sole cannot lease to the natural person because the same person cannot be both lessor and lessee. *Salter vs. Grosvenor*, (1724) 8 Mod. 303, 304. *Grant on Corporations*, p. 635. Nor can such a contract be enforced for there has been no instance in the case books in which the natural man has sued the corporation sole or the corporation sole has sued the natural man. *Maitland Essays*, p. 102.

Although the Secretary of the Court is not a corporation sole in the true sense of the term, having regard to the fact that the Civil Procedure Code provides for the appointment of the Secretary of the Court as administrator it may safely be assumed that the legislature intended that the Secretary of the Court should possess all such attributes of a corporation sole as are necessary for the proper discharge of his functions *qua* administrator. Such offices fall into the category of *quasi* corporations sole. These are generally officers of the Crown, who for certain purposes are in the nature of a corporation sole. Such *quasi* corporations sole are familiar in our statute law, as for example the Attorney-General under the Civil Procedure Code and the Ceylon Savings Bank Ordinance, the Government Agent under the Land Acquisition Ordinance, and the Settlement Officer under the Land Settlement Ordinance.

We think we have sufficiently elaborated our view that the appointment of the Secretary of the Court as administrator under section 520 of

the Civil Procedure Code is not an appointment of the individual holding the office of Secretary but an appointment of the person for the time being holding the office of Secretary and that in the instant case the Secretary of the Court has been rightly made a party to the proceedings to have the sale set aside.

The appeal is dismissed with costs.

Appeal dismissed.

Gratiaen, J.

I agree.

Present : Gratiaen, J.

JAYASENA vs. DABRERA (SANITARY INSPECTOR)

S. C. 274—*M. M. C. Colombo* 42238

Argued on : 17th March, 1949

Decided on : 23rd March, 1949

Possession of adulterated milk by authorised servant of registered Dairyman—Does it amount to possession by master—Liability of master—Rules 5 *and* 8 *of Chapter XIV of By-Laws of Municipal Council.*

Held : (1) That milk found in the possession of a registered dairyman's authorised servant while engaged on his master's business should be regarded as having been in the possession of his master for the purposes of Rule 5 of Chapter XIV of the By-Laws of the Municipal Council.

(2) That Rule 5 does not require proof of sale, exposure of sale or of hawking in cases where adulterated milk is found in the possession of a registered Dairyman or his servant. It only arises in the case of milk found in the legal possession of some person other than a registered Dairyman.

Cases referred to : *White vs. Mayor of Yeovil* (61 L. J. M. C. 213).
Juan Appu vs. Perera (45 N. L. R. 216).
Regina vs. Williams (174 E. R. 497).

F. Obeyesekera, for the accused-appellant.

L. G. Weeramantry, for the complainant-respondent.

Gratiaen J.

The appellant was a Dairyman duly registered under the provisions of the Municipal Councils Ordinance (Chapter 193). During the period relevant to these proceedings he employed a man named Velaythen, among others, to deliver milk to his regular customers, and at the appellant's request a milk vendor's card had been issued to Velaythen by the Municipal authorities in Colombo.

On 27th September 1948 Sanitary Inspector Dabrera of the Colombo Municipal Council met Velaythen who was returning from a bungalow in Karlshrue Place at which he had delivered milk to a customer of the appellant. Samples of the milk still in Velaythen's possession and intended, presumably, for delivery to other customers were taken by the Inspector and, on analysis by the City Analyst, the milk was found to be adulterated to a most scandalous degree. The appellant was accordingly charged with the commission of an offence punishable under the Council's bye-laws relating to the adulteration of milk. He was found guilty and sentenced to pay a fine of Rs. 500.

No attempt was made on the appellant's behalf either in the Court below or at the hearing of this appeal to contest the position that on the day in question Velaythen was engaged on the appellant's business and not on his own account. It has nevertheless been strenuously argued that the evidence does not establish the commission of any offence. I am glad to find that this is not so.

The relevant bye-laws are Rules 5 and 8 of Chapter 14 of the bye-laws of the Colombo Municipal Council. Rule 8 provides as follows:—

> Should any sample of milk taken under the provisions of the preceding by-laws prove to be adulterated, the person in whose possession it is found shall be guilty of an offence. If such person be a vendor of, or a person in the employ of, or acting on behalf, a Dairyman, then both such person and the Dairyman shall be guilty of an offence.

I agree with learned Counsel that no offence could be committed under Rule 8 unless the offending sample of adulterated milk had been taken on an occasion authorised by the by-laws. It is, therefore, necessary to examine the scope of Rule 5 in order to decide whether the sample taken from Velaythen had been lawfully obtained by Inspector Dabrera.

Rule 5 empowers Municipal Inspectors and certain other officers to demand and to take for purposes of analysis samples of any milk "which is in possession of a registered Dairyman or of any person who is found selling hawking or exposing milk for sale." It is I think sufficiently clear that at the time of the incident Velaythen was not "a person selling or hawking or exposing milk for sale." He was not soliciting custom or in any sense negotiating a sale of his master's milk but had merely delivered what was already the subject of a concluded contract of sale between the appellant and the customer concerned, "*White vs. Mayor of Yeovil*"(61 L. J. M. C. 213) and "*Juan Appu vs. Perera* (45 N. L. R. 216). The latter part of Rule 5 is therefore inapplicable. This does not, however, conclude the matter, because I am satisfied that the adulterated milk of which a sample was taken by the Inspector must be regarded as having been "in the possession of" the appellant within the meaning of Rule 5. The appellant was a registered Dairyman and in my opinion it is not necessary for the purposes of Rule 5 that the milk should actually have been found in his physical custody. The Rule is satisfied if milk is found in the possession of a registered Dairyman's authorised servant while engaged on his master's business "*Regina vs. Williams*" (174 E. R. 497). The by-laws prohibiting the adulteration of milk have been specially enacted in the interests of public health and would to a great extent be rendered nugatory and indeed absurd if—unless the prosecution could prove hawking or an actual sale—their scope were to be restricted to those rare cases where milk is traced to the physical custody of a Dairyman himself. The language of Rule 5 does not compel such an unreasonable interpretation of its true meaning. A Dairyman's business requires that the milk which he proposes to deliver to his customers should be handled by one or more persons employed for the phurpose, and it seems to me that the possession of milk by each and every servant acting within the scope of his employment should be regarded in law as his master's possession for which the master is responsible. Rule 5 does not require proof of sale, exposure for sale or of hawking in cases where adulterated milk is found in the possession of a registered Dairyman or his servant. That requirement only arises in the case of milk found in the legal possession of some person other than a registered Dairyman.

For the reasons which I have given I hold that the milk in Velaythen's possession on the day in question was milk "in the possession" of the appellant within the meaning of Rule 5. The appeal is devoid of merit and must be dismissed. In my opinion this is a case where an order for costs against the appellant in terms of Section 352 of the Criminal Procedure Code would be justified. The appellant has flagrantly abused the privilege of carrying on a profitable business as a Dairyman in the city of Colombo. I order him to pay to the respondent a sum of Rs. 52·50 as costs of this appeal. Mr. Obeyesekera's enthusiastic advocacy was worthy of a better cause.

Appeal dismissed.

END OF VOL. XXXIX