# The Ceylon Law Weekly

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

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## VOLUME XLI

WITH A DIGEST

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The defendant-respondent entered into an agreement with the Assistant Government Agent, Hambantota, for the transport and storage of salt at the rate of not less than 2,375 bags per day. If he failed to employ the necessary labour and vehicles to transport this minimum quantity he was liable to penalty. On certain days during the contractual period the Assistant Government Agent failed to supply the minimum quantity which the contractor was obliged to transport and the contractor sued the Crown for damages suffered by him in employing labour and vehicles sufficient to transport the minimum quantity. It was contended for the Crown that the terms of the agreement did not impose an obligation on the Assistant Government Agent to supply the minimum quantity for the contractor to transport.

**Held :** That by necessary implication the Crown was under an implied obligation to make available to the contractor the minimum quantity to be handled by him under the contract and that the Crown's default in supplying this minimum quantity on any day constituted a breach of contract which entitled the plaintiff to claim damages to compensate him for the consequent loss sustained by him.

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(ii) That the Court has a discretion to make an order of *certiorari* although an alternative and equally convenient remedy is available to an aggrieved party.

(**Note :** On the first point see now the Co-operative Societies (Amendment) Act, No. 21 of 1949—Edd. C. L. W.).

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In a case of murder in which the accused put his character in issue and pleaded that he was so drunk as to be incapable of forming a murderous intention and that he committed the offence under grave and sudden provocation.

**Held :** (1) That the intoxication necessary to reduce the offence from murder to culpable homicide not amounting to murder on the ground of absence of a murderous intention need not merely be the degree of intoxication referred to in section 78 of the Penal Code.

(2) That where the judge's direction appeared to give the impression to the Jury that any intoxication falling short of the degree of intoxication contemplated by section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication, it amounted to a misdirection on the law.

(3) That evidence of good character of an accused was relevant to the consideration whether the act of the accused was unprovoked or not.

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**Held :** That in view of the conflicting evidence in the case and the stage at which the inadmissible evidence was introduced, it would have been perhaps better if the learned Judge referred to that evidence and gave a specific warning to the Jury not to take that evidence into account in arriving at their verdict.

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*and re-examination—Powers of the judge under section 165 of the Evidence Ordinance.*

The accused was charged with the murder of a Police Constable by stabbing. The evidence led by the prosecution proved that the deceased, prior to the stabbing, had attempted to molest a woman named Somawathie living in the same compound as the accused, and that he had refused to go away when the accused asked him to do so. The evidence of the accused's mistress, called by the defence, was to the effect that, when admonished by the accused and asked to leave, the deceased said, " If you are unwilling to allow me to molest this woman, let me have your wife," and that then there was an exchange of blows. In her complaint to the Police, made shortly afterwards, Somawathie referred only to the attempted molestation and not to the subsequent stabbing. In the course of his charge to the jury the trial Judge strongly suggested that the accused, his mistress and Somawathie had together " concocted " a false story before Somawathie went to the Police. All through the trial the Judge took a large part in the questioning of the witnesses, both prosecution and defence, during their examination-in-chief, cross-examination and re-examination, in the exercise of his powers under section 165 of the Evidence Ordinance.

**Held :** (1) That the suggestion that a false story had been " concocted " by the accused, his mistress and Somawathie amounted to a misdirection on the facts unsupported by the evidence.

(2) That on the evidence the Court was satisfied that the accused had established his right to the plea of grave and sudden provocation.

(3) That the trial Judge had not exercised properly the powers given to him under section 165 of the Evidence Ordinance.

*Per* WIJEYEWARDENE, C.J.—" .....in this case the prosecution was represented by a Crown Counsel and the accused was defended by two Counsel. It is not possible to lay down as general rules as to when and how far a Judge should interrupt an examination-in-chief or a cross-examination by questioning the witness himself. These are matters which the Judge is given the discretion to decide for himself in each case coming before him. As I said before, that very fact will make a Court guard against the exercise of those powers without restraint."

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*Rape—Girl alleged to be under 12 years of age—Proof of age solely by X'ray photograph—Admissibility—Failure of judge to put defence fairly to the jury—Misdirection.*

The appellant was charged with rape of a girl called Aslin, who was alleged to be under 12 years of age. The Crown sought to establish age through the medical officer on an X'ray photograph of the girl. Evidence was not led to show that the admitted X'ray photograph was that of Asilin and that the Medical Officer was present when the photograph was taken.

The appellant in his evidence stated that certain witnesses were angry with him because of a certain incident and that he had absconded through fear of bodily harm. The learned Judge in summing up not only failed to draw the Jury's attention to this part of the evidence but indicated to them that the appellant had not assigned any reason for the witness to give false evidence against him.

**Held :** (1) That, in the circumstances, the X'ray photograph should not have been admitted in evidence.

(2) That the learned Judge's omission to direct the jury fairly and adequately on the defence amounted to a misdirection.

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## Criminal Procedure Code

*Sections 188 and 193—Admission of guilt in course of trial of offence not charged with—Failure to frame fresh charge before accepting plea and dealing with accused.*

Where in the course of a trial of a person charged under sections 440 and 369 of the Penal Code, the accused pleaded guilty to a charge under section 394 of the Penal Code and after accepting the plea without framing a fresh charge and explaining to the accused as required by section 193 of the Criminal Procedure Code, the accused was dealt with under section 325 (1) (*b*) of the latter Code.

**Held :** That the order of the Magistrate could not stand.

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*Sections 42 and 126A—Order remanding accused—Accused produced in Court before expiry of 15 days and order remanding again—Warrant of detention—Escape of accused—Immediate unsuccessful search—Accused found after four days—Arrest of accused by Fiscal Officers—Resistance by accused—Rescue of arrested person by others—Causing hurt to Fiscal Officers—Charges under sections 220A and 323 of Penal Code—Legality of arrest—Applicability of sections 92 (1) of the Penal Code—Self-defence.*

On 15-9-47, the 1st accused was produced in Court on a charge of causing hurt to two constables and was remanded till 19-9-47. On this latter day he was produced in Court and was again remanded till 3-10-47. Shortly after the Magistrate signed the warrant of detention on 19-9-47 and the Fiscal's Marshall had entrusted the 1st accused to his officer, the 1st accused escaped. The Fiscal's officer pursued him immediately and searched for him unsuccessfully. This was reported to the Fiscal's Marshall who handed the warrant of detention to his officer directing him to search for and arrest the accused. The search was continued by two officers till the 1st accused was found eventually on 23-9-47.

Despite resistance, the two officers, who were not wearing their uniforms, handcuffed the 1st accused whereupon one of them was stabbed by the 2nd accused at the instigation of the 3rd accused. The 1st accused bit both officers and all the accused ran away.

The accused were charged under 3 counts—

(1) the 1st accused under section 220 A of the Penal Code for offering resistance to the lawful apprehension of himself by the Fiscal's Officers upon a warrant of detention.

(2) the 2nd and 3rd accused under section 220A of the Penal Code for rescuing the 1st accused from the custody of the Fiscal's Officers.

(3) all the 3 accused under section 323 for voluntarily causing hurt to the Fiscal's Officers to prevent them from discharging their duties as public servants.

**Held :** (i) That the order of detention made by the Magistrate had the effect of making the Fiscal's Officers custody a lawful custody on 19-9-47, though the detention of the 1st accused in custody after the expiry of 15 days from 15-9-47 would have been unlawful.

(ii) That the arrest on 23-9-47 is not the arrest contemplated by section 42 of the Criminal Procedure Code and the officers had exceeded their authority in attempting the arrest of the 1st accused on that day.

(iii) That as the attempted arrest on 23-9-47 could not have caused the 1st accused reasonable apprehension that he would be killed or grievously hurt, if he did not resist the arrest, section 92 (1) of the Penal Code is applicable to him.

(iv) That as the 2nd and 3rd accused could not be said to have known that the 1st accused escaped from the custody of the Fiscal's officer who attempted to arrest him, they may claim to have exercised the right of self-defence.

(v) That in stabbing the Fiscal's officer they exceeded the right of self-defence and should be held guilty under section 325 of the Penal Code.



*Charge of rash and negligent driving alleged in same charge—Failure to give proper particulars of the charge.*

**Held :** That it is wrong to allege both rashness and negligence in one and the same charge.



*Section 413—Charge of theft of buffalo—Acquittal of accused—Inquiry to consider claims to buffalo produced in Court—Propriety of order made without hearing evidence.*

Accused who was charged with theft of a buffalo was acquitted by the Magistrate without the defence being called upon. An inquiry was subsequently held by the Magistrate under Sec. 413 of the Criminal Procedure Code to consider the claims of the parties to the buffalo produced in Court. An application made for a postponement of the inquiry by the accused petitioner was refused and the Magistrate made order returning the bull to the respondent on a submission by his Counsel without hearing evidence.

**Held :** (i) That the magistrate could not make such an order in the absence of any proof that an offence had been committed in respect of the buffalo.

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**Held :** (1) That the detention of cargo (suspected to be contraband) temporarily pending a decision by the authorities as to whether or not they should be seized does not constitute a seizure of the goods as forfeited within the meaning of section 146 of the Customs Ordinance.

(2) That the power of seizure conferred by section 123 of the Customs Ordinance includes the power for the purposes of examination to detain for a reasonable period any goods which a Customs officer suspects to be seized as forfeited goods.



## Debt Conciliation Ordinance

*No. 39 of 1941, Sections 24 and 55—Jurisdiction of Court to entertain action after application made by debtor to Debt Conciliation Board—Order made staying proceedings—Correctness of such order.*

Plaintiff instituted this action on a Mortgage Bond on 29th June, 1946. Before the summons returnable date the defendant appeared and applied for stay of proceedings on the ground that prior to the date of the institution of this action he had made an application to the Debt Conciliation Board under the provisions of the Ordinance (No. 39 of 1941). He filed a certificate dated 12th June, 1948 duly signed by the Secretary of the Board in support of his statement.

The preliminary inquiry required by Section 24 of the Ordinance had not been held so far. It was contended for the plaintiff that the matter could not be said to be pending before the Board within the meaning of Section 55 of the Ordinance until after the Board had assumed jurisdiction to effect a settlement following the preliminary inquiry under Section 24.

The learned District Judge rejected this contention and granted the defendant's application to stay proceedings.

The plaintiff appealed.

**Held :** That in view of the language of Section 55 of the Debt Conciliation Ordinance, the proper order should have been to dismiss the plaintiff's action on the ground that the Court had no jurisdiction to entertain it after application was made by the defendant to the Board.



## Decree

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## Deed

*Interpretation of—Conveyance of entire land by two deeds—Deeds conveying two portions of one land in specified proportions—Three boundaries clearly defined—Fourth boundary separating one portion from other not sufficiently clear—Remedy—Action for partition or action for definition of boundaries.*

R, who was entitled to the entirety of land E conveyed it on two deeds to (*a*) the plaintiff describing a part of it as "all that northern 1/3 part or share in extent 2 pelas paddy sowing"; (*b*) the defendant describing the other part as "all that southern portion being a 2/3 share in extent one amunam paddy sowing." In each of the deeds three boundaries were clearly defined. The fourth demarcating one portion from the other was not clear.

The plaintiff instituted an action to partition the land and the defendant disputed his claim on the ground that the deeds transferred specific parcels of land falling within defined boundaries.

**Held**: (1) That as the language used in the deeds is insufficient to demarcate the lands exactly the grants must be interpreted as conveying only undivided shares in the land in the proportions specified in the deeds and a partition action was the proper remedy in such a case.

(2) That the action for definition of boundaries (*actio finium regundorum*) only lies for defining and settling boundaries between adjacent owners whenever the boundaries have become uncertain whether accidentally or through the act of owners or through some third party.

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*Rectification—Action for—When relief will be granted—Admissibility of parol evidence—Refusal of party to take oath without sufficient reason when required by opponent—Should it be taken into consideration by judge—Oaths Ordinance, Section 8.*

**Held**: (i) That a rectification of a deed will not be allowed—

(*a*) where there has been an unreasonable delay in enforcing the right. (The material date for the purpose of deciding whether there has been delay is the date of the notice of the error and not the date when the error was committed).

(*b*) where it would affect prejudicially interests which third parties have acquired for valuable consideration on the assumption that the instrument in the form in which it was originally drawn was good.

(*c*) where the evidence does not clearly and unambiguously establish that there was an actually concluded agreement antecedent to the instrument sought to be rectified and that the term the inclusion of which is sought is a term of the agreement between the parties and continued concurrently in their minds down to the time for execution of the instrument and that by mistake in drafting there has been a failure to make the instrument conformable to the agreement.

(ii) That parol evidence is admissible to make out a case for rectification and the Court can act even on the evidence of the plaintiff alone where no further evidence can be obtained.

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*Revocability—Gift of half-share of property subject to fidei commissum—Acceptance not shown on deed—Extract of encumbrance showing mortgage of entire land by donor and donee—Is it sufficient to prove acceptance.*

**Held**: That the mere production of an extract of encumbrances showing that a fiduciary donee of a half-share of a property joined the donor who was entitled to the remaining half-share in executing a mortgage bond in respect of the entire land does not prove that there was acceptance of the gift by the fiduciary donee.

*Per* WIJEYEWARDENE, C.J.—"Relying on the authority of *Carolis et al vs. Akwis* (1944) 45 New Law Reports 156, the District Judge stated in the course of his judgment that "where a deed of gift creates a valid *fidei commissum* there must be acceptance not only by the donees but also by the *fidei commissarii* on their behalf and if a deed has not been so accepted the donor is entitled to revoke the gift with the concurrence of the donee." I am unable to accept this view as correct and I adhere to the view expressed by me in *Mudaliyar Wijetunga vs. Duwalage Rossie et al* (1946) 47 New Law Reports 361."

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## Estate Duty Ordinance

*Claim under Section 73—Hindu undivided family—Money lending business assets in Ceylon—Effect of Ordinance No. 76 of 1938—Jurisdiction of District Court to order repayment of estate duty overpaid.*

K. M. N. Natchiappa Chettiar died on 30th December, 1938 leaving the assets of a money-lending business as his property in Ceylon. The executrix of his estate objected to the assessment

of the Commissioner of Estate Duty, claiming total exemption from estate duty under Section 73 of the Estate Duty Ordinance, on the ground that the deceased was a member of a Hindu undivided family, and that the property was the joint property of that family.

The District Judge entered a declaratory decree in favour of the executrix on the basis that the property belonged to a Hindu undivided family of which the deceased was a member, and that the exemption conferred by Section 73 accordingly applied. But he held that he had no jurisdiction under the Ordinance to enter a decree against the Crown for the return of the estate duty recovered from the executrix by the Crown.

**Held :** (i) That the evidence established that the assets in Ceylon were the joint property of a Hindu undivided family.

(ii) That the business carried on jointly by the members of a Hindu undivided family is presumed to be joint family property and not an ordinary commercial partnership, unless the business is separately acquired and carried on by a single member of the family.

(iii) That Section 73 of the Estate Duty Ordinance cannot be said to be wholly inoperative on the ground that although the legislature intended to give recognition to the Law of South India, no such Hindu Law has in fact been introduced by express legislation as part of the Law of Ceylon.

(iv) That Section 73 was amended by Ordinance No. 76 of 1938 in order to resort to a fiction which would remove in the case of immovable property the difficulties which do not attach to the movable property belonging to a Hindu undivided family.

(v) That a District Court has jurisdiction under the Estate Duty Ordinance to enter a decree against the Crown for the return of Estate duty overpaid and also for payment of legal interest thereon under Section 192 of the Civil Procedure Code.

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*Trial Judge—Failure to give due consideration to circumstances relevant to issues and to examine significance of documents—Weight to be attached to findings of fact by such Judge.*

Where the trial judge, in weighing the evidence, has not given due consideration to some of the circumstances relevant to the issue which he was called upon to try, and failed to examine the significance of important documents as they stand in relation to each other.

**Held :** That the conclusions arrived at by the Judge are not entitled to as much weight as normally attaches to findings of fact of a court of trial. The case was sent back for a fresh trial.

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## Evidence Ordinance

*Section 33—Evidence admitted on all issues—Judge holding on one issue that he had no jurisdiction—Admissibility in later judicial proceeding of evidence given in former proceeding by witness since dead.*

**Held :** That where all the conditions laid down by section 33 of the Evidence Ordinance for the admission of the evidence of a deceased witness were satisfied, that evidence, having been given before a person authorised by law to take it, was admissable in a later proceeding, although the judge in the former proceeding had held that he had no jurisdiction.

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*Section 92—Transfer of land by deed—Circumstances showing transaction in nature of security for money advanced—Oral promise to re-transfer later to transferee—Can Court act on such oral evidence and hold that transfer was anything other than absolute conveyance.*

*Transfer of land subject to oral agreement to transfer to third party on payment of a sum of money—Can 3rd party enforce such oral agreement.*

**Held :** (i) That where a party transferred a land by deed in circumstances clearly showing that the transaction was in the nature of a security for money advanced and relying on an oral promise by the transferee to transfer the land later, a Court is precluded by Section 92 of the Evidence Ordinance (as between the parties to the deed) from acting on the oral evidence and holding that the transfer was anything other than an absolute conveyance.

(ii) That a person, who is not a party to a deed, is not affected by section 92 of the Evidence Ordinance and can, therefore, enforce an oral promise or condition in his favour subject to which such deed was executed.

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## Exceptio rei venditae et traditae

*Conveyance of land by person without title—Subsequent acquisition of title*—Exceptio rei venditae et traditae—*Extent to which doctrine operates.*

Where A, who had no interests in a land purported, with three others, to convey the entirety of the land and later acquired title to an undivided half-share of the land.

**Held :** (i) That as no specific undivided shares had been conveyed by the four original transferors, each must be deemed to have conveyed a fourth share in the land.

(ii) That the doctrine of *exceptio rei venditae et traditae* operated against A only in respect of an undivided one fourth share in the land.

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## Fidei commissum

*'Gift to two daughters subject to—In the event of one of the donees dying without lawful issue her right to devolve on surviving donee—Transfer of property so gifted with sanction of court by daughters to donor's son in consideration of donors transferring another property—Absence of restrictions upon alienation or designation of beneficiaries in new deed—Do the terms and conditions in the first gift attach to the new deed—Do the transactions amount to an exchange for the purpose of Entail and Settlement Ordinance*—Jus accrescendi—*Meaning of 'surviving donee.'*

On a deed of gift of 1883 (P8) by S and his wife M in favour of their two daughters L and A, premises No. 21, Chatham Street, Colombo, was conveyed subject to the following terms and conditions :—

"To have and to hold the said premises with the easements rights appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando their heirs executors and administrators in equal undivided shares for ever subject however to the conditions following, that is to say, that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and appropriate to his own use the issues rents and profits of the said premises and that after his death and in the event of his wife Colombapatabendige Maria Perera surviving him, she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees, to wit the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando, and subject also to the conditions that the said donees Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando shall not nor shall either of them be entitled to sell, mortgage, lease, for a longer term than four years at a time or otherwise encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said dones dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid."

In 1893 S and M made an application to Court under the Entail and Settlement Ordinance for sanction to transfer the said premises No. 21, Chatham Street, by L and A to their brother J in consideration for the transfer by S and M of No. 20, Baillie Street (now in dispute) to A and of premises No. 22, Baillie Street, to L. This application was granted and the transfers were effected in 1894. The deeds and the decrees of Court granting sanction did not contain the same restrictions upon alienation and designation of beneficiaries as in deed P8 and contained no corresponding gift over to the survivor in the event of any of the two sisters dying without issue.

L died a widow in 1935 leaving nine children who are the plaintiff and the 1—8 defendants respondents. A died in 1941 intestate without having had issue and leaving as her heirs her husband (who left a will) and her brothers and sisters. The appellants claimed premises No. 20, Baillie Street, as the intestate heirs of A or as beneficiaries under the will of her husband.

Held : (1) That the transactions in 1894 aforesaid constituted an "exchange" for the purpose of the Entail and Settlement Ordinance.

(2) That the *fidei-commissum* to which A's share in No. 21, Chatham Street property was subject under deed P8 attached in 1894 to No. 20, Baillie Street property for which it was exchanged.

(3) That P8 created a single *fidei-commissum*.

(4) That upon A dying issueless after the death of L, L's children became entitled to the property in dispute by right of accretion, notwithstanding that L did not survive A.

(5) That the expression "surviving donee" in P8 should be interpreted as "other" donee.



Acceptance not shown on deed—Evidence sufficient to prove acceptance—Revocability of gift.

*See Donation* ... ... ... 61

A testator by last will (Clause 8) devised the land to his two sons, A & P. Clause 9 provided that in the event of the death of either of the sons without lawful issue, the survivor became entitled to the share of the one so dying. By Clause 10 the testator directed that the two sons should only have the right to enjoy the rents, issues and profits derived from land M and all the buildings thereon devised to them by Clause 8, that they should not sell, gift, mortgage or otherwise alienate or encumber the same or lease the same for any period exceeding two years at a time, and that after their death their lawful children should become entitled to the same absolutely. By Clause 12, it was provided that the devisees should have the right to enter into possession of all the properties and take the income only after the death of the testator's widow.

A died unmarried and without children. P then transferred to the plaintiff the half-share which he alleged devolved on him absolutely on the death of A. P's widow and children contested plaintiff's title on the ground that on A's death P became entitled to that share subject to a *fidei-commissum*.

Held : (i) That the testator gave a half-share of M to A & P subject to a life interest in favour of his widow.

(ii) That after the death of the widow, A & P had only a life interest in the half share given to each.

(iii) That on the death of either A or P the half-share given to the person so dying devolved absolutely on his lawful children.

(iv.) That if A or P died without lawful children the half share devised to the person so dying went to his surviving brother absolutely.

(v) That the plaintiff was entitled to a half-share of the land absolutely by virtue of the transfer from P.

## Hindu Undivided Family

Money lending business assets in Ceylon—Liability to pay Estate Duty.
*See Estate Duty Ordinance* ... ... 87

## Immovable Property

*Agreement to transfer in consideration of marriage—Should such agreement be notarially attested—Prevention of Frauds Ordinance, Section 2.*

**Held :** That an agreement to transfer immovable property in consideration of marriage comes under Section 2 of the Prevention of Frauds Ordinance and is therefore, of no force or avail in law unless notarially attested.

NOORUL HATCHIKA vs. NOOR HAMEEM *et al* ... 65

## Income Tax

*Company registered in India having branch business in Ceylon—Claim under Section 46 of Income Tax Ordinance in respect of tax paid in Ceylon for years of assessment 1940/41 and 1941/42—Claim made after lapse of three years—Is it barred by Section 84 (1) of Income Tax Ordinance—What should be taken into consideration in ascertaining the amount with which taxpayer is properly chargeable within the meaning of Section 84 (1).*

The appellant Company (registered in Bombay), having a branch business in Colombo claimed in this action under Section 46 of the Income Tax Ordinance (Chap. 188) a sum of Rs. 13,175.91 being the aggregate of half of two sums of money paid as income tax in Ceylon for the years 1940/41 and 1941/42 respectively.

The claim for relief in respect of 1940/41 was made on 30th May, 1945 and for the year 1941/42 on 18th June, 1945.

The defendant (The Commissioner of Income Tax) filed answer stating *inter alia* that the claim was barred by Section 84 (1) of the Income Tax Ordinance as it was made after the lapse of three years.

The District Court upheld this plea of description and the Company appealed.

In appeal it was contended for the appellant company that section 84 (1) did not apply to the present claim inasmuch as when the appellant paid the two sums for the two years of assessment (charged under section 20 (1) of the Ordinance) without making any deduction on account of the relief provided for under 46 (1), it could not be said to have paid tax by deduction or otherwise in excess of the amount with which it was properly chargeable for those years.

**Held** (i) that Section 84 (1) of the Income Tax Ordinance applied to the applicant's claim and therfore was barred by prescription.

(ii) That in ascertaining the amount with which a taxpayer is "properly chargeable" within the meaning of Section 84 (1) attention should be paid not only to Section 20 (1) but also to provisions of such sections as Section 43 and 46 (1) in appropriate cases.

THE ASSOCIATED CEMENT COMPANIES LTD. OF BOMBAY vs. THE COMMISSIONER OF INCOME TAX, ESTATE DUTY & STAMPS ... ... 97

## Interpretation

of deed—One boundary of land not clearly defined.
*See Deed* ... ... ... ... 62

## Joint and Several Liability

Drawer of cheque and successive endorsees sued by last endorsee—Judgment entered against some defendants—Plaintiff not precluded from recovering judgment against others.
*See Cheques* ... ... ... ... 16

## Judgment

of foreign Court—Enforceability in Ceylon.
*See Action* ... ... ... ... 112

## Jurisdiction

of Supreme Court to issue writ of Prohibition on Commissioner appointed under Commissions of Inquiry Act, No. 17 of 1948.
*See Supreme Court* ... ... ... 28

of court to give effect to lawful compromise entered into pending action between parties.
*See Landlord and Tenant* ... ... 41

of District Court to order repayment of Estate Duty overpaid.
*See Estate Duty Ordinance* ... ... 87

of court to entertain action after application made by debtor to Debt Conciliation Board.
*See Debt Conciliation Ordinance* ... ... 96

## Jus Accrescendi

*See under Fidei commissum.*

## Kandyan Law

*Child inheriting property from mother—Child predeceasing father who was married in deega—Does the father inherit the child's estate.*

**Held :** That a deega married widower is entitled to only a life interest in the estate of his deceased child.

BISONA vs. JANGA & OTHERS ... ... 40

## Land

Conveyance of land by person without title—Subsequent acquisition of title—Extent to which doctrine of *exceptio rei venditae et traditae* operates.
*See Exceptio rei venditae et traditae* ... 7

Transfer of land by deed—Circumstances showing transaction in nature of security for money advanced—Oral promise to retransfer later to transferee—Can Court act on such oral evidence.
*See Evidence Ordinance* ... ... ... 43

Transfer of land subject to oral agreement to transfer to third party on payment of a sum of money—Can third party enforce such oral agreement.
*See Evidence Ordinance* ... ... ... 43

Contract of sale of land by minors jointly with adults—Repudiation of contract by minors—Benefit to minors—Effect of contract on interests of adults.
*See Minor* ... ... ... ... 51

Land—Agreement to transfer in consideration of marriage—Should such agreement be notarially executed.
*See Immovable Property* ... ... ... 65

## Landlord and Tenant

*Rent Restriction Ordinance—House reasonably required for landlord's occupation—When should tenant's claim be preferred.*

**Held**: That the claims of a tenant, who has failed in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord, whose family does at least possess a house in which they can continue to live.

ABEYSEKERE vs. KOCH ... ... 31

*Rent Restriction Ordinance—Action for ejectment of tenant—Compromise without proceeding to trial—Tenant granted time to vacate of consent—Court relieved of duty to call for proof—Decree entered in terms of compromise—Jurisdiction of Court to enter such decree.*

**Held**: That the limitations placed on the Jurisdiction of a Court by the provision of the Rent Restriction Ordinance in actions for ejectment of tenants by landlords do not in any way fetter the right or duty of the Court to give effect to lawful compromises willingly entered into in a pending action between the parties.

NUGARA vs. RICHARDSON ... ... 41

*Rent Restriction Ordinance, No. 60 of 1942, section 8—Action for ejectment of tenant—Reasonably required for landlord's daughter—Dependance of daughter on landlord—Reasonableness of claims of parties.*

The defendant, a dental surgeon, was plaintiff's tenant since 1931 and he carried on his profession on the ground floor of the premises in question. The floor above, which is a self-contained residential flat, was originally occupied by the defendant, but later sublet by him. In January, 1948, the defendant handed over the floor above and the garage to plaintiff's son-in-law and daughter. As a child was born to the plaintiff's daughter, the plaintiff sought to eject the defendant in order to provide the daughter with additional accommodation.

The defendant alleged that he was unable to obtain any other place suitable for his surgery.

**Held**: (1) The plaintiff had to satisfy the Court that, taking into account, *inter alia*, the hardship and inconvenience which would be caused to the defendant by the enforcement of a writ of ejectment, the premises were 'reasonably required' for occupation as a residence for a member of her family (as defined in the proviso to section 8).

(2) That the words 'dependent on him' qualify 'son or daughter over eighteen years of age' as well as "parent, brother or sister."

(3) That as the language of the section is ambiguous, it should be construed in favour of the tenant.

(4) That, even on the assumption that the premises could, in law, have been claimed for the daughter's use, the hardships, which the defendant would suffer, outweighed the owner's needs in this case.

HEWAVITHARANE vs. BRITO-MUTTUNAYAGAM ... 105

*Rent Restriction Ordinance, No. 60 of 1942, section 8 (c)—Landlord's need of premises for purposes of his own business—Reasonableness of demand—When should it be proved to exist—What landlord has to prove—Should the landlord have a business in existence.*

**Held**: (1) That the reasonableness of a landlord's demand to be restored to possession for the purposes of his business under section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, must be proved to exist at the date of the institution of the action and to continue to exist at the time of the trial.

(2) That the landlord must place before the Court the necessary material to assist it in deciding whether his demand to eject the tenant is a reasonable one having due regard to the tenant's position.

(3) That to succeed in a claim to eject a tenant under section 8 (*c*) of the Ordinance, there must exist at the relevant date a *present requirement* to use the premises for the purposes of a business which is in existence or which will be established by him as soon as the premises are made available to him.

ANDREE vs. DE FONSEKA & ANOTHER ... 109

## Lease

*Notarially attested—Lessees' right to possession disputed by third party in possession—Can the lessor maintain action against such third party without making lessor a party to action—Roman-Dutch Law—Distinction between short lease and long lease.*

**Held**: That a lessee who did not get possession of the lands leased under a notarially attested lease can sue third parties disputing his rights without making the lessor a party to the action.

*Per* WIJEYEWARDENE, C.J.—"I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by text book writers, when we are considering the question whether a lessee has rights against third parties. All that we have to consider is whether the lease is duly executed according to law. If a lease for any period exceeding a month is notarially attested it should be regarded as giving "a species of ownership in land" (Lee, Introduction to Roman-Dutch Law, fourth edition page 161), and vesting in the lessee proprietary rights which could be enforced between third parties. If the lease is duly registered, it is entitled to prevail even against those claiming title from the lessor under deeds executed prior to the lease but registered subsequently."

UKKU AMMA *et al* vs. JEMA *et al* ... ... 13

## Lessor and Lessee

*See under Lease.*

## Local Authorities Elections Ordinance, No. 53 of 1946

Teacher in assisted school—Is he disqualified from sitting and voting as a member of a local authority.
*See Quo Warranto* ... ... ... 26

Remedy provided by Ordinance read with Chapter IXA of Penal Code available—Writ of *Quo Warranto* not granted.
*See Village Committees* ... ... ... 53

## Lunatic

Lunatic wife—Guardian and manager of her estate can initiate proceedings for her maintenance.
*See Maintenance* ... ... ... 73

## Maintenance Ordinance

*Section 14—Magistrate issuing summons without examining applicant on oath—Does this vitiate proceedings.*

In this case the Supreme Court, on the facts, varied an order of the learned Magistrate for the payment of a sum of money as maintenance to the wife.

**Held :** That a failure to comply with section 14 of the Maintenance Ordinance does not vitiate the proceedings but is an irregularity against which objection can be taken.

SEBASTIAN PILLAI vs. MARY MAGDALENE ... 2

*Husband's failure to maintain lunatic wife—Application under section 2 by guardian and manager of her estate—Is the application in order.*

**Held :** That the guardian of the person of a lunatic wife and manager of her estate is entitled to initiate proceedings for her maintenance against her husband.

MURUGASU vs. SUPPIAH ... ... 73

## Mandamus

*Writ of—Application for butcher's licence—Refusal by local authority—Remedy available.*

Where an applicant for a butcher's licence to a local authority is aggrieved by an order made by such authority, his remedy is to proceed under section 7 (4) of the Butchers' Ordinance, as amended by Ordinance No. 44 of 1947, and appeal against the order to the Minister in the manner set out in section 7B, and not by way of a writ of *Mandamus*.

DON CAROLIS vs. THE CHAIRMAN, URBAN COUNCIL, GAMPAHA ... ... ... 15

Election of Village Committee Chairman a nullity —Proper remedy is by way of *Mandamus* and not *Quo Warranto*.
*See Village Committees* ... ... ... 53

## Matrimonial Rights and Inheritance (Jaffna) Ordinance

Insurance Policy taken by husband—Premiums paid out of his salary—Is such payment "thediatheddam."
*See Thesawalamai* ... ... ... 59

## Minor

*Contract of sale of land by minors jointly with adults—Repudiation of contract by minors—Benefit to minors—Effect of contract on the interests of the adults,*

Two minors jointly with their parents sold some property. There is no evidence that the purchase money was utilised for the benefit of the minors. In an action by the purchaser for declaration of title, the minors sought to repudiate the contract of sale.

**Held :** (1) That a contract of sale of property by minors may be repudiated by them, but only to the extent of their interests at the time of the contract.

(2) That such a contract will not be set aside if the party seeking to enforce it proves that it has been to the benefit of the minors.

(3) That the onus of proving that a minor did in fact benefit by a contract of sale is on the person seeking to enforce the contract.

(4) That the interests of the adults passed to the purchaser under the contract of sale.

KANAPATHIPILLAI THANGERETNAM vs. ALIARLEVVE UMARULEVVE *et al* ... ... 51

## Oaths Ordinance

Section 8—Refusal of party to take oath—Effect of.
*See Deed* ... ... ... ... 76

## Mortgage

*Action—Mortgagor in Malaya leaving mortgaged property in charge of his wife—Action on mortgage bond—Service of summons on wife under section 66 of Civil Procedure Code—Decree entered—Property sold in execution—Return of mortgagor after sale—Proceedings to set aside sale—Validity of service of summons—Wife's agency—Is it terminated by Malaya being overrun by Enemy—Defence (Trading with Enemy) Regulations.*

In 1935 the 1st respondent hypothecated with the appellants to secure a loan, a property he acquired after his marriage with the 2nd respondent. In 1938 the 1st respondent left Ceylon for Malaya leaving the 2nd respondent in charge of the property. In 1942 the appellants instituted action for recovery of the loan against the respondents and as Malaya was overrun by the Japanese at the time, service of summons was effected on the 2nd respondent under section 66 of the Civil Procedure Code and *exparte* decree was entered in September, 1942. The land was sold in 1944. 1st respondent having returned in 1947 commenced proceedings to set aside the decree and succeeded.

**Held :** (1) That the summons had been rightly served on the 2nd respondent as agent of the mortgagor.

(2) That the agency of the 2nd respondent for the purpose of section 66 of the Civil Procedure Code was not determined by the enemy occupation of Malaya.

(3) That the Defence (Trading with the Enemy) Regulations had no application to the facts of this case, and therefore the decree entered was good in law.

MURUGESU & ANOTHER vs. CHETTIAR & ANOTHER 108

## Muslim Intestate Succession and Wakfs Ordinance

*Application under section 15—Failure to make all trustees respondents—Can Court proceed with such application—Has Court power to add remaining parties under section 18 of the Civil Procedure Code.*

**Held**: (i) That the Court has no jurisdiction to proceed with an application under section 15 of the Muslim Intestate Succession and Wakfs Ordinance, when it has found that the petitioners have failed to comply with the requirements of that section.

(ii) That where the petitioners failed to make all trustees interested in the charitable or religious trust parties to the application, the Court has no power to add them under section 18 of the Civil Procedure Code.



## Omnibus Service Licensing Ordinance No. 47 of 1942

*Certiorari—Writ of—Omnibus Service Licensing Ordinance, No. 47 of 1942, section 10—Renewal of licence—Application made after expiry of licence—Commissioner's discretion to treat it as application for fresh licence.*

Where the Commissioner of Motor Transport treated an application for renewal of a licence for an Omnibus Service received after the licence had already expired as an application for a fresh licence to be considered in competition with other claimants,

**Held**: That the Commissioner did not act in excess of jurisdiction.

*Per* GRATIAEN, J.—"Indeed, if it were necessary to give a ruling on the point, I would be inclined to hold that although the Commissioner had a discretion under the Regulation to treat as valid an application for a "renewal" received less than eight weeks before a licence had expired, he had no such power if the licence had *already* expired before he received the application."



## Partition

*Action—When should a Court order a sale under section 4 of the Ordinance.*

**Held**: That except in a case where parties ask for a sale, a judge should not order a sale under section 4 of the Partition Ordinance, unless it is proved to his satisfaction that a partition would be impossible or expedient.



## Penal Code





*Sections 328 and 329—Charges under—Rash and negligent driving—What is necessary to prove—Presumption of negligence*—Res ipsa loquitur—*Applicability to criminal cases—Evidence Ordinance, section 114.*

**Held**: (i) That to establish a charge under section 328 or 329 of the Penal Code it must be proved that the act done by the offender was not only rash or negligent, but also that it was so rash as to endanger human life or the personal safety of others.

(ii) That where a motor vehicle went across the road to its wrong side and collided with another which was going at a moderate speed along the extreme edge of its own side, such evidence creates a presumption of negligence which is expressed by the phrase *res ipsa loquitur*.

(iii) That such a presumption may be rebutted by establishing that the accident happened without fault on the part of the driver of the offending vehicle.

*Per* BASNAYAKE, J.—"Section 114 of our Evidence Ordinance is wide enough to include the presumption embodied in the phrase *res ipsa loquitur*, which, in my view, is applicable equally to civil and criminal cases. In the latter class of cases the burden that rests on the prosecution of proving every ingredient of the charge may be discharged by proving those ingredients by presumptive evidence."



## Prevention of Frauds Ordinance



## Privy Council

*Conditional leave to appeal—Notice of intended application given and received by Proctors not duly authorised by respective parties at time of such notice—Proctors subsequently authorised—Validity of notice—Notice signed by person holding Power of Attorney—Validity—Can applicant alter the ground on which leave is sought after fourteen days from date of judgment.*

**Held**: (i) That a notice of an intended application for leave to appeal to the Privy Council, given or received by a proctor before such proctor is duly authorised for the purpose, is bad.

(ii) That an applicant cannot be permitted to alter his ground of appeal after the lapse of fourteen days from the date of judgment.

*Per* WIJEYEWARDENE, C.J.—"There remains for consideration the validity of the "notice" signed by the defendant "by his Attorney." It is contended by the plaintiff that that notice too is bad as a notice could be signed only by a party or by a Proctor for a party empowered to act under the

Ordinance. This contention is based on Rule 6 of the Order which states, "A party to an application under the Ordinance.....shall, unless he appears in person, file in the Registry a document in writing appointing a Proctor of the Supreme Court to act for him in connection therewith....." It is, however, not difficult to take the view that Rule 6 applies only to what has to be done in Court and not to a notice of "an intended application" referred to in Rule 2 in Schedule 1 to the Ordinance and not given with the assistance of the Court. Such a view of the law has the merit of not placing unnecessary technical difficulties in the way of a party wishing to appeal to His Majesty in Council. If that view is correct, the party required to serve notice may do so by a writing signed by him "by his Attorney," as that is permissible under the common law and there is nothing in Rule 5 to shew that the right under the common law has been taken away."

VAN DER POORTEN vs. VAN DER POORTEN *et al* 23

## Prohibition

Jurisdiction of Supreme Court to issue writ of Prohibition on Commissioner appointed under the Commissions of Inquiry Act No. 17 of 1948. *See Supreme Court* ... ... ... 28

*Writ of Prohibition—Commission appointed under Commissions of Inquiry Act*, 1948, *to inquire and report on prevalence of bribery and corruption among members of Colombo Municipal Council—Preliminary investigation by Commissioner—Allegations that petitioner, who was a Councillor had on several occasions corruptly given money or other gifts to other Councillors to vote for him at Mayoral elections—Inquiry into allegations against some Councillors who received bribes from petitioner already taken place in his absence—No formal notice of allegations implicating petitioner given—No opportunity given to petitioner for legal representation at such inquiries—Procedure adopted by Commissioner—Principles of natural justice—The Colombo Municipal Council Bribery Commission (Special Provisions) Act, No.* 32 *of* 1949.

In pursuance of the provisions of the Commissions of Inquiry Act, 1948, the Governor-General appointed the respondent to investigate and report :—

(*a*) as to whether any member of the Colombo Municipal Council had corruptly solicited, received or agreed to receive or on the other hand had corruptly given, promised or offered any gifts, loan, fee or reward or other advantage as an inducement to influence official action.

(*b*) as to what steps should be taken to prevent or check such bribery and corruption in the future.

After the appointment of the respondent, but before the commencement of the inquiry, The Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, came into operation. This enactment *inter alia* laid down in section 5 the consequences which would inevitably arise from the publication of a finding adverse to the councillor concerned.

The statutory powers of the respondent are wide and varied, but the procedure he must follow in executing his commission, is nowhere laid down except that section 14 of the Act of 1948 requires him to permit any person whose conduct is the subject of inquiry to be legally represented at the whole of an inquiry.

At the preliminary stages the respondent appears to have called for and collected such information as he could from every available source for the purpose of deciding whether any allegation of corruption against any Councillor merited investigation at all. He decided to have this information *in camera* and in some cases an oath or affirmation was administered before recording the statements.

At the next stage of his investigations he appears to have decided to hold a formal inquiry into the allegations of corruption against each particular Councillor, whose conduct in his opinion called for a full investigation, permitting legal representation as required by section 14 of the Act of 1948.

The respondent called upon the petitioner to meet allegations that he had on 27 separate occasions corruptly given sums of money or other gifts to various Councillors for the purpose of inducing them to vote in his favour at Mayoral elections.

The petitioner thereupon applied to the Supreme Court for a Writ of Prohibition on the respondent to prevent him from proceeding with the inquiry. In his affidavit in support of the application the petitioner averred *inter alia* :—

(*a*) that the respondent had already completed inquiries regarding allegations of corruption against some Councillors in which the petitioner was implicated.

(*b*) that the respondent failed to give him any formal notice of the nature of the allegations that implicated him and thereby had no opportunity to be represented by Counsel or to participate in those inquiries.

(*c*) that the procedure adopted by the respondent had made it impossible for him to hold a fair and unbiassed inquiry into the allegations against the petitioner.

(*d*) that he verily believed that the respondent had already recorded his findings on the allegations relating to the transactions in which other Councillors are accused of having received bribes from him.

Held : (i) That the petitioner had failed to make out a *prima facie* case to justify a rule *nisi* to prevent the respondent from holding an inquiry into the allegations of corruption which he has been called upon to meet.

(ii) That no grounds, supported by legally admissible evidence, existed for apprehension that the principles of natural justice and fair play have or will be violated or that the respondent had prejudged the case.

(iii) That the procedure adopted by the respondent cannot be said to be improper or unjust.

*Per* GRATIAEN, J.—"In cases of this nature a superior Court is not so much concerned with the question whether the party to the proceedings believes that the pending investigation may turn out to be what the petitioner's Counsel describes as "a mock trial with the verdict pre-determined." The real question, as Swift, J. pointed out in *Rex vs. Essex Justices*, (1927) 2 K.B. 475, *is whether a reasonable man might apprehend that the tribunal may not be impartial and unbiassed.*

THE MAYOR OF COLOMBO vs. THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER 33

## Public Bodies (Prevention of Corruption) Ordinance, No. 49 of 1943

Application to set aside election of Village Committee Chairman—Remedy under Ordinance available—Writ of *Quo Warranto* not granted.
*See Village Committees* ... ... ... 53

## Quo Warranto

*Writ—Quo Warranto—Teacher employed in assisted school elected as member of Municipal Council—Salary payable by manager of school paid direct by Government—Is such teacher holder of public office within the meaning of section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946.*

Held : That a teacher, employed in an assisted school and whose salary, payable by its Manager, is paid direct by the Government out of its annual grant to such school, does not " hold a public office under the Crown in Ceylon " within the meaning of section 10 (1) (*d*) of the Local Authorities Elections Ordinance, No. 53 of 1946, and is accordingly not disqualified from sitting or voting as a member of any local authority.

JAYASINGHE vs. SOYSA ... ... 26

Not granted if other remedy available.
*See Village Committees* ... ... ... 53

## Railways Ordinance

Section 15—Liability for damage to goods.
*See Carriage of Goods* ... ... ... 100

## Rent Restriction

*See under Landlord and Tenant.*

## Res Judicata

*Action for declaration of title—Fraud and trust pleaded in answer—Compromise reached without reference to trust—Consent decree—Absence of any indication for or against existence of trust in decree—Does such decree operate as* res judicata *on issue of trust.*

Where a decree was entered embodying an agreement reached independently of the allegations in the pleadings relating to a trust and where the decree could not be interpreted as indicating anything for or against the existence of such trust,

Held : That the consent decree did not operate as *res judicata* against the issue of trust in a subsequent action between the parties.

MENIKRALA VIDANE vs. PUNCHI MENIKA *et al* ... 47

## Roman Dutch Law

Short leases and long leases—No reason for drawing distinction in Ceylon.
*See Lease* ... ... ... ... 18

## Supreme Court

*Its jurisdiction to issue Writ of Prohibition on Commissioner appointed under Commissions of Inquiry Act, No. 17 of 1948, to inquire into allegations that Municipal Councillor acted corruptly as specified by section 5 (1) of the Colombo Municipal Council Bribery Commission (Special Provisions Act No. 32 of 1949).*

Held : That it is competent for the Supreme Court to issue a mandate in the nature of a Writ of Prohibition to prohibit a Commissioner appointed by the Governor-General under the Commissions of Inquiry Act, No. 17 of 1948, from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by section 5 (1) of the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, as such Commissioner is under a duty to act judicially.

THE MAYOR OF COLOMBO vs. THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER 28

## Thesawalamai

*Insurance policy taken by husband—Premiums paid out of his salary—Is such payment " thediatheddam "—Matrimonial Rights and Inheritance (Jaffna) Ordinance (Chapter 48), section 19.*

A person subject to the Thesawalamai, took out a policy of insurance during the subsistence of his marriage and paid the premiums out of his salary.

Held : That such payments do not constitute " thediatheddam " within the meaning of section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance, and, therefore, the money payable under the policy should be according to the terms of the policy.

SHANMUGALINGAM vs. AMIRTHALINGAM & OTHERS 59

## Village Committees

Quo Warranto—*Writ of—Election of Chairman, Village Committee—Allegations of treating, undue influence and bribery against Chairman and supporters—Other remedy available—Is* Quo Warranto *proper remedy.*

Held : (1) That the supreme Court will not grant an application for *Quo Warranto* to declare the election of a Chairman of the Village Committee on the grounds of treating, undue influence and bribery, inasmuch as—

(*a*) the petitioner can pursue the remedy provided by the Public Bodies (Prevention of Corruption) Ordinance, No. 49 of 1943, or Chapter IXA of the Penal Code read with section 10 of the Local Authorities Elections Ordinance, No. 53 of 1946.

(*b*) the proper remedy is to ask for a Mandamus, to proceed to an election *de novo*, the pretended election being a mere nullity.

(2) That the act of electing the Chairman of a Village Committee falls within the definition of the expression " official act " in section 6 of the Public Bodies ( Prevention of Corruption ) Ordinance, No. 49 of 1943.

SAMARAKOON vs. TIKIRI BANDA ... ... 53

*Certiorari and Mandamus—Village Communities Ordinance, sections 14 and 15 (3)—Nominations for election—objections to nomination of candidate—Inquiry—Decision given after time limit prescribed by section 15 (3)—Effect.*

**Held :** That the enactment in section 15 (3) of the Village Communities Ordinance that all objections raised against any candidate on the ground that he is not qualified to be elected shall be disposed of by the Government Agent at any convenient time not less than seven days prior to the meeting of the voters summoned under section 14 is directory only, and consequently the failure on the part of the Government Agent to give his decision within the time limit prescribed in this section does not by itself render an election void.

*Per* JAYATILEKE, S.P.J.—"I think it is reasonable to presume that the object of the legislature in amending the section was to give the candidates who were duly nominated sufficient time to get ready for the election. The neglect of the 1st respondent may have been fatal if the 2nd respondent was not the only candidate who was duly nominated. But as the 2nd respondent was the only candidate it seems to me to be immaterial."



## Words and Phrases Defined



## Workmen's Compensation Ordinance

*Chapter 117, section 48—Appeal—Failure to conform to requirements of section 340 (2) of the Criminal Procedure Code—Effect on Appeal.*

An appeal under section 48 of the Workmen's Compensation Ordinance is governed by Chapter XXX of the Criminal Procedure Code and the failure to state the point of law to be argued and to attach a certificate as required by section 340 (2) of the Code are grounds on which such an appeal must be rejected.

*Present :* GRATIAEN, J.

## SIRISENA vs. REGISTRAR OF CO-OPERATIVE SOCIETIES

*S. C. 215—In the matter of an application for a Writ of Certiorari on (1) Kotawera-Udugama Co-operative Stores, Limited, and others.*

*Argued on :* 2nd September, 1949.
*Decided on :* 7th September, 1949

*Co-operative Societies Ordinance—Claim against past officer of Society—Reference to arbitration—Legality of arbitrator's award—Certiorari—Does it lie when other remedy is available.*

**Held :** (i) That there is no power under the Co-operative Societies Ordinance to refer compulsorily to arbitration a dispute between a registered Co-operative Society and a person who has ceased to be an officer of the Society.

(ii) That the Court has a discretion to make an order of *certiorari* although an alternative and equally convenient remedy is available to an aggrieved party.

[**Note :** On the first point see now the Co-operative Societies (Amendment) Act, No. 21 of 1949—Edd. C. L. W.]

**Cases referred to :** *Illangakoon vs. Bogallagama* (1948) 49 N. L. R. 403.
*Ekanayake vs. Prince of Wales Co-operative Society Limited* (1949) 50 N. L. R. 298.
*Rex vs. Wandsworth Justices—ex parte Reid* (1942) 1 A. E. R. 56.

*C. R. Gunaratne*, for the petitioner.

*M. Thiruchelvam, Crown Counsel*, for the second and third respondents.

GRATIAEN, J.

The petitioner was at one time the duly appointed Manager of the Kotawera-Udugama Co-operative Stores, Limited, of Welimada, which Society is the first respondent in these proceedings. After he had ceased to hold that office the Society claimed from the petitioner a sum of Rs. 911·09 in respect of monies alleged to have been received by him during the period when he was Manager. The claim was disputed, and was referred by the Society to the Registrar of Co-operative Societies. The Registrar purported under Rule 29 framed under the Rules of the Co-operative Societies Ordinance (Chapter 107) to refer the dispute to the second respondent as arbitrator. In due course the second respondent made an award ordering the petitioner to pay to the Society a sum of Rs. 911·09 and costs.

The petitioner challenges the legality of the second respondent's award. He claims that as he had ceased to be an officer of the Society at the relevant date, the purported reference to arbitration was *ultra vires* of the powers vested in the Registrar under Rule 29, and that the purported award of the second respondent in favour of the Society was therefore made without jurisdiction. He accordingly applies for a mandate in the nature of a writ of *certiorari* quashing the award against him. A rule *nisi* has already been issued to this effect from this Court.

The present case is in all fours with the facts in *Illangakoon vs. Bogallagama* (1948) 49 N. L. R. 403, where it was decided, in accordance with earlier decisions of the Court, that Rule 29 does not empower the compulsory reference to arbitration of a dispute between a registered Co-operative Society and a person who had ceased before the date of the purported reference to be an officer of the Society. It follows that the award which is challenged by the petitioner was one which was made in excess of the statutory jurisdiction which the second respondent purported to possess. This is conceded by learned Crown Counsel who appeared for the second respondent and for the Registrar.

The Society has not attempted to show cause why the relief asked for by the petitioner should not be quashed. It has been argued however on behalf of the second respondent and the Registrar that, although the award is admittedly illegal and of no force or avail in law, *certiorari* does not lie in the present case. Their contention is that discretionary writs of this nature should not issue where another and equally effectual remedy was and is available to the petitioner. Learned Crown Counsel points out that, in accordance with the procedure laid down in the relevant rules for the enforcement of awards made under the Co-operative Societies Ordinance, the Society has already taken steps in the District Court of Badulla for the enforcement

of the purported award in its favour. In *Ekanayake vs. Prince of Wales Co-operative Society Limited* (1949) 50 N. L. R. 298, my brother Windham, with whom Nagalingam J. agreed, held that where an application is made to execute an award which is bad for want of jurisdiction it is open to the executing court to refuse to execute it. It is submitted that in the circumstances the petitioner is not without an appropriate remedy if he desires to challenge the illegal award made against him, and that this Court should therefore refuse to exercise in his favour the extraordinary powers vested in it under section 42 of the Courts Ordinance.

It is no doubt a well recognised principle of law that a Superior Court will not *as a rule* make an order of *mandamus* or *certiorari* where there is an alternative and equally convenient remedy available to the aggrieved party. But the rule is not a rigid one. In *Rex vs. Wandsworth Justices—ex parte Reid* (1942) 1 A. E. R. 56, an application was made for an order of *certiorari* quashing a conviction made by the justices in excess of their jurisdiction. Objection was taken, *inter alia*, that as the accused had a right of appeal to quarter sessions, *certiorari* did not lie. Caldecote L.J., in over-ruling the objection, said "as to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, in such circumstances as these, if the applicant prefers to ask for an order of *certiorari* to quash the conviction obtained in the manner I have described, the Court should be debarred from making an order. In this case it has been admitted that a mistake has occurred. This Court is in a position to remedy that mistake by making an order of *certiorari* to quash the conviction, and that it is the proper order which I think this Court should make." Humphreys J. in a separate judgment expressed the view that "if a person can satisfy this Court that he has been convicted of a criminal offence *as the result of a complete disregard by the tribunal of the laws of natural justice*, he is entitled to the protection of this Court *even though an alternative remedy was also available*." I think that these observations are appropriate to the present proceedings. It is not in dispute that a public officer and an extra—judicial tribunal, acting no doubt through ignorance, have flagrantly exceeded the limited statutory powers conferred on them by the provisions of the Co-operative Societies Ordinance. In the result there is on record an illegal award condemning a man to pay to a public institution the amount of a disputed claim upon which only a Court of law is normally competent to adjudicate. I consider that there is no compelling principle of law which fetters this Court's discretion to quash the illegal award, and I now make order accordingly. It is but right and proper that I should accede to the request that the stigma attaching to an award made in excess of the second respondent's jurisdiction in the matter should be speedily wiped out. The first respondent will pay the petitioner's costs in these proceedings.

*Application allowed.*

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*Present :* GRATIAEN, J.

## SEBASTIAN PILLAI vs. MARY MAGDALENE

*S. C.* 568—*M. C. Kayts* 10641

*Argued on :* 31st August, 1949
*Decided on :* 7th September, 1949

*Maintenance Ordinance section* 14—*Magistrate issuing summons without examining applicant on oath—Does this vitiate proceedings.*

In this case the Supreme Court, on the facts, varied an order of the learned Magistrate for the payment of a sum of money as maintenance to the wife.

Held : That a failure to comply with section 14 of the Maintenance Ordinance does not vitiate the proceedings but is an irregularity against which objection can be taken.

**Cases referred to :** *Watt (or Thomas) vs. Thomas*, (1947) A. C. 484.
*Squire vs. Squire*, (1948) 2 A. E. R. at p. 53.
*Followed : Podina vs. Sada*, (1900) 4 N. L. R. 100.
*Not followed : Nomasiyam vs. Saraswathy* (1949) 39 C. L. W. 71.

*S. Nadesan*, with *A. M. Ameen*, for the defendant-appellant.
*C. Thiagalingam*, with *V. Arulambalam*, for the applicant-respondent.

GRATIAEN, J.

In these proceedings the applicant, who is the wife, sued her husband for maintenance. After trial the learned Magistrate ordered the husband to pay to the applicant a sum of Rs. 25 per mensem.

The parties had been married for over ten years and since 1946 there had been much unpleasantness between them, but in my opinion the facts disclosed in the evidence leave reasonable grounds for hope that the union has not broken down irreparably. As so often happens in such cases, the husband and wife have so far had little opportunity of enjoying each other's company except in the presence of their respective relatives. Without attempting to be so foolish as to generalise in matters of this sort, I am content to say that in the present case the arrangement has not worked well, and that the interference of the proverbial "in-laws" proved to be a source of constant irritation. It is common ground that the first year of the marriage was spent in the house of the bride's parents. It was then decided that they should live alone, but they unwisely selected a house situated in the same compound as that of his sister. These two women quarrelled incessantly, and the husband's attempts to associate himself with these petty squabbles aggravated the situation. In November, 1946 the wife left him after a quarrel and returned to her parents. In 1947, through the good offices of a mutual friend, a reconciliation was effected, and for some months the parties lived together again. In March, 1948 there was another incident, and the wife left her husband a second time.

The basis on which the wife initiated proceedings under the Maintenance Ordinance was that her husband "had deserted her on 30th March 1948, and failed to maintain her" since that date. The trial was fixed for 10th December, but on that date a very sensible adjustment was arrived at whereby the wife agreed to return to her husband on condition that he provided a separate house in which they could live together relieved of the irksome and irritating presence of his sister. The evidence shows that the husband thereafter honoured the terms of this arrangement. On 11th February 1949, however, the wife's brother, acting no doubt with good intentions but nevertheless unwisely, offered to vacate his own house so as to provide a different residence in which the husband and wife should make a new start in their married life. This offer was in the first instance accepted by the husband but within a week he retracted, and he insisted that the house which he had himself selected in terms of the original agreement should be their home. Some discussion seems to have arisen in Court on 18th February, 1949 as to the suitability of this house, and the wife, though she alleged for the first time that her husband had been cruel to her agreed to resume married life with him "provided that the house that is taken is agreeable to her". By the time the case was called a week later she had changed her mind and stated unequivocably that she was no longer prepared to live in any house with her husband.

As the negotiations had broken down, the case went to trial. The genuineness of the husband's invitation to take his wife back was not in dispute, but the issue which arose for adjudication was whether the wife was nevertheless entitled to refuse his offer of a resumption of *consortium* on the ground that he had "habitually treated her with cruelty" within the meaning of Section 3 of the Maintenance Ordinance (Chapter 76). The finding of the learned Magistrate was that the husband had "subjected his wife to continuous neglect and sometimes cruel treatment". No express finding of *habitual* cruelty has been recorded, but he held that the wife had good and sufficient grounds for refusing to return to her husband, and made an order for maintenance at the rate of Rs. 25 per mensem in her favour. The present appeal is from this order.

The case has caused me much anxiety. I am very conscious of the inestimable advantage which the learned Magistrate has enjoyed over me in having seen and heard the witnesses who testified before him in regard to this unhappy dispute. I am also conscious that, particularly in a matrimonial dispute, an appellant tribunal, with only "the cold written word" to guide it, should be slow to disturb the findings of fact of the original Court unless there is compelling reason to the contrary. *Watt (or Thomas) vs. Thomas* (1947) A. C. 484. Upon an analysis of the relevant evidence, judged in the light of the surrounding circumstances, I have arrived at the conclusion that in the present case the learned Magistrate's findings must be disturbed. To begin with, the wife had made no complaint of cruelty to the mutual friend who had brought about

the earlier reconciliation, but the circumstances which has particularly influenced me is one which the learned Magistrate does not seem to have considered at all. Can the wife's evidence be accepted as true when she complains that she has been the victim of such habitual cruelty at her husband's hands that she genuinely and reasonably fears, as she says she does, that a resumption of *consortium* would lead to a repitition of such treatment? The alternative solution is that she has greatly exaggerated her version of past incidents, and that all that had really taken place might fairly be attributed to "the wear and tear of married life" for which some allowances should be made in this imperfect world—vide *Squire vs. Squire* (1948) 2 A. E. R. at p. 56. It seems to me that the wife has, perhaps unconsciously, greatly exaggerated the story of her past unhappiness in so far as it is attributed by her to cruelty at her husband's hands. The truth is that he had displayed too much partisanship in the many quarrels between his wife and his sister, and that he now realises the folly of such interference. The safest guide to the problem, in my opinion, is the circumstance that on three occasions after these proceedings commenced the wife had consented to return to her husband upon the condition that their house should really be their own. This convinces me that she entertained no fears as to their future happiness as man and wife provided that they were protected from the interference of his relatives. The husband has been very foolish in the past, but I think that so long as there is still room for a happy ending it would be wrong to make a judicial order the effect of which would be to separate the spouses for ever. I accordingly make order setting aside the order of the learned Magistrate, but upon certain conditions which I regard as necessary in order to implement the terms of the original settlement which the parties had effected in Court on 10th December, 1948. If within three weeks of the date on which the record is returned to the Magistrate's Court the husband provides a separate matrimonial home which is suitable to their station in life, the application of the wife will be dismissed. If any disagreement should arise as to the suitability of the house selected by the husband, that dispute should be referred by the learned Magistrate to the Probation Officer of the district whose decision in the matter shall be final. Should the husband fail to provide a suitable house within the time prescribed in this judgment, the order for maintenance made by the learned Magistrate in favour of the wife will stand. In all the circumstances of the case I think that it is in the interests of justice that the husband should pay his wife's costs of this appeal and in the Court below, and I make order accordingly.

It is evident that the future happiness of these parties will depend on the spirit with which they will attempt to honour their solemn obligations to each other. The hope that there will be a genuine reconciliation between them underlies my judgment in this case. As Lord Macmillan pointed out in *Watt (or Thomas) vs. Thomas* (1947) A. C. 484, "a Court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct". It is now left to the parties to make or mar their future happiness.

There is one other question which was raised in the argument before me. Section 14 of the Maintenance Ordinance (Chapter 76) requires a Magistrate before issuing summons in a maintenance action, to examine the applicant on oath or affirmation, and it is only after such examination that he is justified in issuing process. The purpose of this action is to protect a party from the vexation of having to defend himself in proceedings of this nature until there is sworn evidence on the record making out a *prima facie* case against him. In the present action the learned Magistrate failed to comply with Section 14, and there can be no doubt that the issue of summons against the husband was premature. The husband would accordingly have been entitled, if he so chose, to have the order for summons vacated. This however he did not do. On the contrary he submitted to the jurisdiction of the Court and an order was made against him after witnesses were called by both sides. The question is whether the irregularity in failing to comply with section 14 necessarily vitiates all the subsequent proceedings. In "*Podina vs. Sada*" (1900) 4 N. L. R. 109, Bonser C.J., held that failure to comply with Section 14 did not vitiate the proceedings but was at best an irregularity against which the husband could object, but only if he could satisfy the Court that he had been prejudiced by the irregularity. In *Namasiyam vs. Saraswathy* (1949) 39 C. L. W. 71, however, my brother Basnayake took a contrary view. He held that the issue of a summons in strict accordance with the requirements of the Section was a condition precedent to the assumption by a Magistrate of jurisdiction under the Maintenance Ordinance, and that although there was an *inter partes* trial without objection to the irregularity all the proceedings

must be quashed. With great respect I feel that I must follow the judgment of Bonser C.J., with which I am in agreement. It seems to me that whether or not the proceedings were regularly commenced under section 14, it is section 2 of the Ordinance and not section 14 which vests a Magistrate with jurisdiction after trial to make or refuse an order for maintenance in favour of an applicant. The condition precedent to an order for maintenance is in my opinion *the proof* furnished at the trial that the respondent had neglected or refused without just cause to maintain his wife or his children as the case may be. I accordingly overrule Mr. Nadesan's objection on this point. To order a fresh trial at this stage would benefit neither party.

*Order Varied.*

*Present :* GRATIAEN, J.

HEENBANDA vs. HERATH

*S. C.* 614 *M. C. Kandy* 2849

*Argued on :* 14th September, 1949
*Decided on :* 16th September, 1949

*Companies Ordinance, No.* 51 *of* 1938 *Section* 120—*Failure of Director to keep proper books of accounts.*

In this case the conviction of the accused, the Managing Director of a company for failure to keep proper books of accounts as required by Section 120 of the Companies Ordinance was set aside on the ground that inadmissable evidence had been admitted and that the accused's guilt had not been proved by the relevant evidence.

*Per* GRATIAEN, J.—" The Section (*i.e.* S. 120 (3) ) is satisfied so long as a set of ' books of original entry' is maintained in one or other of which books every transaction is faithfully recorded at the time when it occurs."

*H. V. Perera, K.C.* with *Barr Kumarakulasinghe, A. I. Rajasingham,* and *B. S. C. Ratwatte,* for the defendant-appellant.

*N. E. Weerasuriya, K.C.* with *Cyril E. S. Perera,* and *D. S. Jayawickreme,* for the complainant-respondents.

GRATIAEN J.

The accused was throughout the year 1947 the Managing Director of a company in the Kandy District. The Company was registered under the Companies Ordinance No. 51 of 1938, and the object of its incorporation was to maintain an omnibus service along certain prescribed routes. The learned Magistrate points out in his judgment that its affairs had, as so often happens, been entrusted since its inception to persons who, though no doubt well-intentioned, possessed no previous experience of modern methods of business or accountancy.

The charge against the accused is that during his period of office the Company had failed, as required by Section 120 (1) of the Ordinance, " to keep proper books of accounts with respect to (a) all sums of money received and expended by the Company and the matters in respect of which the receipt and expenditure took place ; (b) all sales and purchases of goods by the Company ; and (c) the assets of the Company ", and that the accused was guilty of an offence under Section 120 (3) in that he had failed in his capacity as Director "to take all reasonable steps to secure compliance by the Company " with these statutory requirements. The learned Magistrate found the accused guilty and sentenced him to pay a fine of Rs. 40. This lenient sentence was imposed because in the Magistrate's view there was nothing to indicate any fraud on the part of the accused but only negligence, attributable largely to ignorance, in the manner in which the Company's affairs were carried on.

The background of these proceedings is not unusual in Companies of this particular description. The directors had fallen out among themselves, and representations against the accused were made by the members of one disgruntled faction to the Director of Commerce and Industries who appointed a Chartered Accountant Mr. Satchithananda to investigate and report upon the affairs of the Company under Section 133 of the Ordinance. The report was duly referred to the Attorney-General but he apparently

decided that no prosecution or other action was called for in the public interest. (vide Section 134 of the Ordinance). Nevertheless the complainant who owns shares in the Company, was dissatisfied with this result and he accordingly prosecuted the accused in the present action on his own initiative.

The only witness called at the trial was Mr. Satchithananda to whom I have already referred. As he is an expert in matters of accountancy his evidence would undoubtedly have been of great assistance if it had been confined to his observations on the alleged inadequacy of the Company's books with reference only to the question whether or not they had failed to comply with the special statutory requirements of Section 120 of the Ordinance. Unfortunately this was not done, and his oral evidence introduced a great deal of extraneous matter relating in a general way to the conduct of the Company's affairs with which the Court was not concerned at the trial. His report P1 addressed to the Director of Commerce and Industries and setting out the conclusions arrived at by him in his roving investigation of the Company's activities was also read in evidence. All this inadmissable evidence only served, I fear, to cloud the issue upon which the Magistrate was required to adjudicate. In the circumstances the accused's conviction must be quashed unless I can satisfy myself that he has not been prejudiced by the improper reception of evidence at the trial. This could only arise if there is on the record other evidence which is relevant and demonstrably establishes his guilt.

Before I refer to the evidence it is necessary to examine the provisions of Section 120 of the Ordinance. This Section has been taken over *verbatim* from Section 122 of the Companies Act, 1929, of England. The various transactions in respect of which books must be maintained by a Company are set out in detail, but there is nothing in the section which gives any indication as to where the books of the Company, even though they contain accurate and complete information as to the requisite items, may nevertheless be regarded as not having been "properly" kept. This omission is not without its significance, because I find that Section 262 of the Ordinance (vide also the corresponding Section 274 of the English Act of 1929) which imposes heavier penalties on directors if "it is shown that *proper books* of accounts were not kept *throughout the period of two years immediately before the commencement of the winding up*" of a Company, contains an express declaration as to the circumstances in which "*for the purposes of this Section*" proper books shall be deemed not to have been kept. Having regard to this important difference in the language of two sections of the same Ordinance, I am inclined to the view that there is a sufficient compliance with the provisions of Section 120 if the books of a Company contain an *accurate* record of each and every transaction which the section requires to be recorded. It cannot, I think, be said that the books are not "proper books" so long as they correctly embody at all relevant times such information as is necessary to enable an auditor periodically to prepare the Company's profit and loss account and balance sheet as required by the Ordinance. In other words, Section 120 seems to lay down not a counsel of perfection, but only to prescribe the minimum standard of reliable book-keeping which the Directors must observe at their peril. If, as I have said, this minimum standard is satisfied, the mere fact that it would take an auditor or an official inspector some little time to ascertain the true financial position by a reconstruction of the relevant facts which are *accurately* revealed in the Company's books, an offence punishable under Section 120 (3) is not disclosed. In other words, the section is satisfied so long as a set of "books of original entry" is maintained in one or other of which books every transactions is faithfully recorded at the time when it occurs.

Applying this test, I am not convinced that the guilt of the accused has been brought home to him by the relevant evidence, and in that state of things I am constrained to hold that the reception of a volume of inadmissable evidence at the trial vitiates his conviction. It may well be that if the only issue before the Court had been more satisfactorily investigated the result would have been different, and the accused would do well to realise that non-compliance with the strict requirements of a statute enacted for the protection of the shareholders of public companies cannot be lightly condoned. In the present case he has at any rate been acquitted by the learned Magistrate of fraud or bad faith. For this reason I am content not to order a re-trial. I quash the conviction and acquit the accused.

*Appeal allowed.*

*Present :* BASNAYAKE & GRATIAEN, JJ.

CARLINA *alias* HAMINE vs. NONHAMY

*S. C.* 98—*D. C. Galle* 1343/*L*

*Argued on :* 29th August, 1949
*Decided on :* 13th September, 1949

*Conveyance of land by person without title—Subsequent acquisition of title*—Exceptio rei venditæ et traditæ—*Extent to which doctrine operates.*

Where A, who had no interests in a land purported, with three others, to convey the entirety of the land and later acquired title to an undivided half-share of the land.

Held : (i) That as no specific undivided shares had been conveyed by the four original transferors, each must be deemed to have conveyed a fourth share in the land.

(ii) That the doctrine of *exceptio rei venditæ et traditæ* operated against A only in respect of an undivided one fourth share in the land.

*W. D. Gunasekera*, for the first and second plaintiffs-appellants.
*H. A. Kottegoda*, with *J. W. Subasinghe*, for the second defendant-respondent.

GRATIAEN, J.

This was an action for the partition of a land which originally belonged to Don Adirian. The learned District Judge has held, and it has been accepted as correct for the purposes of this appeal, that on Don Adirian's death his rights passed in equal shares to his four children Mathes, Nikulas, Balahamy and Thepanis. Nikulas married a woman named Thotchohamy. There were by this marriage four children, Hendrick, Nonhamy (the first defendant), Podihamy (the second plaintiff) and Jakoris. Thotchohamy predeceased her husband Nikulas, but they were not married in community of property as was alleged by the appellants. Accordingly, she acquired no rights in the land during her lifetime and no rights therein passed to her four children on her death. The claims of the first defendant and the second defendant therefore fail.

By the deed 2D1 of 1910 Nikulas, Thepanis and two of the four children of Nikulas (namely, Hendrick and Jakoris) purported to convey the entirety of the land to Pinhamy whose rights have admittedly passed to the second defendant in 1944. In point of fact, however, the only legal title which the transferors could have conveyed by 2D1 was the undivided one-fourth shares belonging to Thepanis and Nikulas respectively. Neither Hendrick nor Jakoris had at the time any interests in the property. In the result, upon the execution of 2D1 the purchaser Pinhamy acquired legal title to an undivided half-share of the property, while the remaining half-share belonged equally to Mathes and Balahamy. In 1948 Mathes and Balahamy conveyed their interests by the deed P1 to Jakoris who was one of the vendors under the earlier deed 2D1 of 1910. Jakoris' rights under 2D1 have admittedly passed to the first plaintiff who instituted the present action on the basis that he is the owner of half the land.

On the facts which I have set out the learned District Judge held that the plaintiff's action must fail on the ground that the doctrine of *exceptio rei venditæ et traditæ* came into operation, so that the half-share which Jakoris had now acquired, but which he did not possess at the time when he executed 2D1, passed by operation of law to the second defendant. It is no doubt correct that the doctrine of *exceptio rei venditæ et traditæ* applies, but only, I think, in respect of the interests in the land which Jakoris had purported to convey to Pinhamy by 2D1. It is to this extent that the benefit of his subsequent acquisition goes automatically to the earlier grantee. Unless, therefore, the deed 2D1 can be construed as a conveyance by Jakoris of an undivided half-share in the land which he represents himself as owning, his subsequent acquisition of a half-share did not enure entirely to Pinhamy's benefit.

In the view which I have taken, it is necessary to examine the deed 2D1 for the purpose of deciding the extent to which Jakoris had purported to pass title under it. In this deed Jakoris was one of four transferors, and as none of them had conveyed a specific undivided share, it follows in accordance with the accepted principles of construction that each must be deemed to have purported to convey a fourth

share in the land. It follows that the doctrine of *exceptio rei venditæ et traditæ* could operate against Jakoris only in respect of an undivided fourth share in the land, so that legal title to the remaining fourth share acquired by him under P1 must, subject of course to questions of prescription, be held to have passed to the first plaintiff.

The view which I have taken is that on a correct application of the legal principles involved, the legal title to the land in dispute would be vested, *subject to the outstanding question of prescriptive title*, in the first plaintiff in respect of one fourth and in the second defendant in respect of the remaining three fourths. On the issue of prescription, unfortunately, the learned District Judge has not considered the evidence because of the partially erroneous view which he had taken on the issues relating to the legal title. I would set aside the judgment of the learned District Judge and send the case back for the present District Judge to record evidence and give his finding on the issue of prescription. If the learned District Judge holds on the evidence that the first plaintiff's title to one fourth of the land has been lost by prescription, he must enter judgment dismissing the plaintiff's action. If on the other hand he holds that the first plaintiff has not lost his rights by prescription, the learned District Judge will enter a decree for partition on the basis that the first plaintiff and the second defendant are entitled to the land in the proportions of one fourth to three fourths. The second plaintiff and the first defendant are in any event not entitled to any share.

On the question of costs, I would make order that the first plaintiff is entitled to his costs of the present appeal against the second defendant, but that all other costs shall abide the final event.

BASNAYAKE, J.

I agree.

*Set aside and case sent back.*

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*Present :* GRATIAEN & GUNESEKERA JJ.

## RUITHAN vs. GREGORY

*S. C. 173/L—D. C. Negombo 14529*

*Argued on :* 14th September, 1949
*Decided on :* 27th September, 1949

*Evidence Ordinance, section 33—Evidence admitted on all issues—Judge holding on one issue that he had no jurisdiction—Admissibility in later judicial proceeding of evidence given in former proceeding by witness since dead.*

**Held :** That where all the conditions laid down by section 33 of the Evidence Ordinance for the admission of the evidence of a deceased witness were satisfied, that evidence, having been given before a person authorised by law to take it, was admissable in a later proceeding, although the judge in the former proceeding had held that he had no jurisdiction.

**Cases referred to :** *Rammi Reddi vs. Sesha Redhi* I. L. R. 3 Mad. 48.
*Bata Singh vs. Emperor* A. I. R. (1926) Lahore 582.
*Sankappa Rai vs. Koraga* I. L. R. 54 Mad. 561.

*Cyril E. S. Perera*, with *M. H. A. Azeez*, and *Dodwell Gunawardene*, for the appellant.
*H. A. Kottegoda*, with *J. W. Subasingha*, for the respondents.

GRATIAEN, J.

On 6th March, 1940 a woman named Mabel Gregory conveyed to the respondent the property which is the subject matter of this action. At a later date she filed action No. 196/Z in the District Court of Colombo pleading that, in the circumstances in which the conveyance had been executed, the beneficial interest in the property had not been disposed of by her, and that in the circumstances the defendant held the property in trust for her benefit. She accordingly claimed a retransfer of the property and consequential relief.

Action No. 196/Z to which I have referred was sharply contested, and the evidence of a number of witnesses was recorded at the trial. Twelve issues in all were framed for adjudication, including an issue which the respondent had raised as to whether the property in question was situated

outside the local limits of the District Court of Colombo, in which event it was claimed that the Court was not competent to grant the plaintiff the relief which she asked for.

No request was made that the issue relating to jurisdiction should be tried, as is sometimes done, as a preliminary question. The learned trial Judge accordingly proceeded to record evidence, and the parties and their respective witnesses were examined and cross-examined on matters relating to all the issues. In due course he pronounced his judgment on each of the points which arose for his determination. With regard to the issue of jurisdiction, he held in the defendant's favour that the property was situated just outside the limits of his territorial jurisdiction, and on the ground he entered decree dismissing Mabel Gregory's action with costs.

No appeal was filed against this judgment, but Mabel Gregory instead instituted the present action against the respondent in the District Court of Negombo, within whose jurisdiction the property was found to be situated, asking for the identical relief which she had previously claimed in the abortive proceedings. Before the trial commenced, however, she died, and the action was continued at the instance of the appellant, her administrator, who was substituted as plaintiff for the purpose. The issues framed at this trial were substantially the same as those which had arisen for determination at the earlier trial in Colombo. In the course of the trial an application was made to produce in support of the appellant's case a certified copy of the evidence which Mabel Gregory had given in the earlier proceedings. This was objected to by learned Counsel for the respondent. His objection was upheld by the learned District Judge, who at the conclusion of the trial entered judgment dismissing the appellant's action upon the merits.

The appellant contends that as Mabel Gregory was dead, the evidence which she had given at the earlier trial was relevant for the purpose of proving in the present action the truth of the facts to which she had previously deposed. It was argued that section 33 of the Evidence Ordinance applied because (1) the present action was between the same parties or their representatives in interest; (2) the respondent had the right and opportunity of cross-examining Mabel Gregory when she gave evidence, and had in fact availed himself of that right; and (3) the question in issue were substantially the same in both proceedings. Learned Counsel for the respondent submits, on the other hand, that Section 33 had no application because the learned trial Judge who heard the earlier action had ultimately decided, after hearing evidence, that the facts disclosed that he was not competent to grant relief to Mabel Gregory as the property was situated outside the territorial limits of his jurisdiction. He argues that for this reason her evidence was not given "*in a judicial proceeding or before any person authorised by law to receive it*" within the meaning of the Section.

Section 33 of our Evidence Ordinance introduces an exception, which had long been recognised by the common law of England, to the rule excluding second-hand evidence. It provides for one of those instances where "the rule is relaxed because the derivative evidence received is guarded by some security which renders it more trustworthy than derivative evidence in general". *Best on Evidence* (12th Ed.) 420. The Ordinance does not purport to define the limits of what may properly be regarded as a "judicial proceeding" for the purposes of the section. We have, however, been referred to certain decisions of the Indian Courts which, in interpreting the corresponding Section of the Indian Act, have held that a proceeding before a Judge who has no jurisdiction is *coram non judice*, and the evidence of witnesses given in such a proceeding cannot be used under Section 33 of the Evidence Act on a subsequent trial before a competent Court. *Rammi Reddi vs. Seshu Redhi* I. L. R. 3 Mad. 48, and *Bata Singh vs. Emperor* A. I. R. (1926) Lahore 582. A close examination of the judgment in these cases seems to indicate that the facts are perhaps distinguishable, but in a later case, *Sankappa Rai vs. Koraga* I. L. R. 54 Mad. 561 the High Court of Madras laid down as a general proposition that "it is not possible to draw any distinction for the purposes of applying section 33, between want of jurisdiction of one kind and another, and it seems that a necessary test to discover whether what purports to be a judicial proceeding is in fact one lies in the competence of the judicial officer who tried it. The circumstances that, before he can verify his incompetence, he must often try the issue of jurisdiction by taking evidence *does not necessarily make even that evidence admissable*, as taken in a judicial proceeding, *and much less so where the evidence which it is desired to use relates not to the question of jurisdiction at all but to the merits of the case*".

With the greatest respect, I am doubtful whether this proposition does not go too far, because it seems to me that any evidence which

a Court of law *is competent to receive, in accordance with the rules of procedure* which apply, for the purpose of discharging its judicial functions in the matter must be regarded as evidence given in a "judicial proceeding". It is, however, unnecessary to consider the question further in this appeal because, even if the action in the District Court of Colombo may not be strictly regarded as a "judicial proceeding", the learned Judge who tried the case was at any rate "a person authorised by law" to admit the evidence of Mabel Gregory on matters touching the issues which are substantially the same as those which arise in the present case. An examination of the relevant sections of the Civil Procedure Code relating to the procedure laid down for the trial of a regular action makes this clear. The issue relating to the Court's jurisdiction was not a pure question of law, and as that issue was not in fact disposed of as a preliminary issue by consent of the parties with the concurrence of the learned Judge, he was not only "authorised" but was required by the terms of section 147 of the Code to receive evidence and to dispose of the case on *all* the issues which had properly been framed for his adjudication under section 146. Having recorded the evidence of the witnesses including that of Mabel Gregory who was cross-examined generally upon the case, he was under a further duty to record in his judgment the conclusions arrived at by him in every issue (vide Section 187 of the Code). In these circumstances all the conditions laid down by section 33 of the Evidence Ordinance for the admission of the evidence of the deceased woman Mabel Gregory in so far as it is relevant to the present action have been satisfied.

In my opinion the appeal must be allowed. I would set aside the judgment of the learned District Judge and send the case back for a retrial before another judge. The appellant is entitled to his costs of appeal and of the costs of 17th December, 1948 in the Court below. All other costs will abide the result of the new trial.

GUNESEKERA J.

I agree.

*Appeal allowed.*

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*Present :* WIJEYEWARDENE, C.J. & BASNAYAKE, J.

## LUCINA FERNANDO *et al* vs. ASMABAI ADAMALY

*S. C. No.* 182/1949 : *with application No.* 24/1949 : *D. C. (Final) Colombo* 4841.

*Argued on :* 28th, 29th, 30th September and 14th October, 1949.
*Decided on :* 27th October, 1949.

*Civil Procedure Code—Sections* 325, 326 *and* 330—*Execution of proprietary decree—Resistance to Fiscal—Persons resisting instigated by defendants—Sentence of imprisonment not passed—Order to deliver possession made under section* 330—*Correctness of such order.*

**Held :** That, where at an inquiry into a complaint under section 325 of the Civil Procedure Code the evidence shows that a person resisting the Fiscal was instigated by the judgment-debtors, order directing the judgment-creditor to be put into possession of the property should be made under section 326 and not under 330. Section 326 does not make it obligatory for a Court to pass a sentence of imprisonment before making an order of possession.

**Case referred to :** *Radhika Mohan Saha et al vs. Gyan Chandra Saha* (1910) 14 Calcutta Weekly Notes 836.

*H. V. Perera, K.C.*, with *J. N. Fernandopulle*, for the 3rd to 8th respondents-appellants.

*S. J. V. Chelvanayagam, K.C.*, with *S. Nadesan and V. S. A. Pullenayagam*, for the plaintiff. petitioner-respondent.

WIJEYEWARDENE, C.J.

This is an appeal from an order of the District Judge on an application made by the judgment-creditors under section 325 of the Civil Procedure Code.

It is desirable to set out in some detail the circumstances leading to that application in order to bring out clearly the position of the parties to the present proceedings.

The plaint in this action was filed on November 13th, 1945, against two defendants, alleging :—

(*a*) that one Swamicannu owned the premises forming the subject matter of this action, under a deed of 1940, and that he,

by a deed of April 13th 1945, conveyed the premises to the plaintiff, with effect from April 1st 1945;

(*b*) that about June 1st 1945, the defendants wrongfully and unlawfully entered the premises.

The defendants filed answer through their Proctor Mr. T. C. P. Goonewardene on April 3rd 1946, admitting the allegation (*a*) in the plaint and pleading further:—

(*a*) that they and their brother W. Siemen Fernando occupied the premises in question on a monthly tenancy from 1937;

(*b*) that W. Siemen Fernando died on May 27th 1945, "leaving as his heirs the defendants and certain others, and the defendants are entitled to continue in occupation of the said premises *and have also obtained the consent of the other heirs of the said W. Siemen Fernando so to do*". (These words have been underlined by me);

The heirs of W. Siemen Fernando were Lucina, his widow, three brothers, including the two defendants, and two sisters, one of whom was called Adeline. The widow, the two defendants and Adeline were at all times material to these proceedings living together in a house in Moratuwa.

The first defendant and Lucina, the widow, filed papers in D. C. Colombo (Testy.) 11591 through Mr. T. C. P. Goonewardene, Proctor, applying for letters of administration in respect of the estate of W. Siemen Fernando, and letters were issued to them on January 17th 1947.

On November 26th 1946, the defendants filed their list of witnesses including the name of Lucina, in the action for ejectment brought by the plaintiff. That action came up for trial on November 29, 1946, when issues were framed and the Court ruled that the burden rested on the defendants. The case then came up for trial on January 17th, 1947, and on that day the defendants amended their answer by pleading:—

"the first defendant has been appointed joint administrator of the estate of the said W. Siemen Fernando together with his widow in testamentary action No. 11591 of this Court and the defendants are entitled to continue in occupation of the said premises as tenants of the plaintiff and continue to carry on therein the business carried on under the name of Siemen Brothers".

The case was then fixed for trial on February 21st 1947. On that day decree was entered of consent in favour of the plaintiff. It was, however, provided under the decree that writ of ejectment should not issue against the defendants until June 30th 1948, if they made certain payments specified in the decree.

On June 25th 1948, Lucina and Adeline filed papers through their Proctor, Mr. E. A. de Silva, asking that the decree entered on February 21st 1948, be vacated and that all the heirs of W. Siemen Fernando be made parties. Lucina and Adeline, however, took no further action in the matter and as explained in a subsequent affidavit filed by Lucina, they abandoned the application "on legal advice". About this time the Proctor for the defendants was Mr. Gratiaen, the proxy in favour of Mr. Goonewardene having been revoked earlier.

On July 10th 1948, the plaintiff obtained writ of ejectment against the defendants. When the Fiscal Officer went to execute the writ, the defendants were not in occupation. The Fiscal's Officer found on the premises Lucina and five others who have been made third to the eighth respondents to the application under section 325, the defendants being the first and second respondents. As Lucina refused to give up possession the plaintiff filed papers on August 6th 1948, under section 325 of the Civil Procedure Code. In the affidavit filed on that day on behalf of the plaintiff it is stated:—

"On 30th June, 1948, the Proctor for the first and second respondents (Mr. G. H. Gratiaen) together with the Proctor for the third respondent (Mr. E. A. de Silva) in the matter of the application (made on June 25th 1948, by Lucina and Adeline for the vacating of the decree) made a final request for an extension to quit the said premises. Upon the said request the petitioners agreed to grant time till July 7th 1948, for the occupants of the said premises to quit the same".

The third to the eighth respondents—Lucina and the five others who obstructed the Fiscal—filed a counter affidavit on October 16th, 1948. In that affidavit Lucina said that she was not aware that her Proctor Mr. E. A. de Silva made a request for an extension of time and that she at no time authorised him to make such a request.

In that affidavit there is the further allegation—"we the fourth to eighth respondents above named are servants of the third respondent in her business carried on the said premises under the name of Siemen Brothers".

At the inquiry held on the application under section 325 the plaintiff who was the petitioner on that application called as his witness Mr. G. H. Gratiaen who said that the interviewed the Proctors for plaintiff in order to obtain an extension of time for the defendants. He added "Mr.

E. A. de Silva, Proctor, also went with me. I believe he was interested in getting the extension of time".

At the inquiry none of the respondents gave evidence. The District Judge delivered his order on November 1st, 1948, directing the writ of possession to issue against all the respondents. After discussing the material facts in the case, he said in the course of his order, that the fourth to the eighth respondents were, in fact, the servants of the defendants (first and second respondents) who were really the "active partners in the business" of Siemen Brothers and that it was a "reasonable inference" that the fourth to the eighth respondents were instigated by the defendants to obstruct the Fiscal. He found further that the third respondent had "no real claim" to be on the premises and that she had not "acted in good faith in resisting the writ of execution.....and in putting forward this claim".

The District Judge concluded his order by saying, "The plaintiff is entitled to be placed in possession of the premises in question. The interlocutory order entered in this case has not mentioned that the respondents are liable to be committed to jail under section 326 of the Civil Procedure Code and therefore I make no order under that section. The plaintiff is entitled to be placed in possession under section 330 of the Civil Procedure Code".

The third to eighth respondents have appealed against that order of the District Judge.

Mr. Chelvanayagam who appeared for the petitioner (plaintiff) took a preliminary objection against the appeal. He argued that an order made under section 330 of the Civil Procedure Code was final and, therefore, not appealable. He contended that the only remedy available to a person aggrieved by such an order was to file an action within one month of the order. It is not necessary for the purposes of this appeal to consider the various authorities cited by him in order to show that a "final order" is not appealable. It is sufficient to say that the District Judge could not have made an order under section 330 in this case. The section deals with the resistance or obstruction occasioned by any person other than the judgment-debtor not in occupation of "the property sold". Those words "property sold" make it impossible to hold that the section refers to resistance or obstruction to the Fiscal in the execution of a proprietary decree like the decree entered in this case. The preliminary objection must, therefore, fail.

The reason given by the District Judge for not making an order under section 325 is not sound. He refrains from making an order under that section because the interlocutory order served on third to eighth respondents did not state that they were liable to be committed to jail under section 326. That may be regarded as sufficient reason for not committing the respondents to jail but should not prevent the District Judge from directing under section 326 that the judgment-creditor should be put into possession of the property. The section does not make it obligatory for a Judge to pass a sentence of imprisonment before making an order of possession.

Though the judgment of the District Judge does not state in express words that the third respondents acted at the instigation of the defendants, the reasoning of the District Judge leaves no doubt that in his opinion the third respondent was so instigated. Apart from that, on a careful consideration of all the facts, I have no hesitation in holding that the third respondent did, in fact, act at the instigation of the defendants. Therefore, the order in this case could have been made and should have been made under section 326.

I may add that Mr. Chelvanayagam argued that, even if the District Judge was unable to make an order under section 326, the Court should have made an order of possession against the third to eighth respondents in the exercise of its inherent powers under section 839 of the Civil Procedure Code. He pointed out that the District Judge could not have adopted the procedure under section 327 as he found the third respondent was not "claiming in good faith to be in possession of the property" on her own account. The position, then, was that there was no statutory provision in the Code enabling the District Judge to see that the decree passed by his Court is effectively executed. In such a case Mr. Chelvanayagam argued that the Court should have made an appropriate order under section 839. He cited in support of his argument *Radhika Mohan Saha et al vs. Gyan Chandra Saha* (1910) 14 Calcutta Weekly Notes 836 in which the High Court of Calcutta exercised its inherent powers under section 152 of the Indian Code of Procedure, 1908. It is not necessary for me to express an opinion on this, in view of my earlier finding that the District Judge should have acted under section 326.

I would alter the order of the District Judge to an order under section 326 and direct writ of possession to issue against all the respondents.

Subject to that modification I dismiss the appeal with costs.

BASNAYAKE, J.

I agree.

*Appeal dismissed.*

*Present :* WIJEYEWARDENE, C.J. & PULLE, J.

UKKU AMMA *et al* vs. JEMA *et al*

*S. C. No.* 78/1949 : *D. C. (Final) Kurunegala* 4281.

*Argued on :* 6th & 12th October, 1949.
*Decided on :* 24th October, 1949.

*Lease—Notarially attested—Lessees' right to possession disputed by third party in possession—Can the lessor maintain action against such third party without making lessor a party to action—Roman-Dutch Law—Distinction between short lease and long lease.*

**Held :** That a lessee who did not get possession of the lands leased under a notarially attested lease can sue third parties disputing his rights without making the lessor a party to the action.

*Per* WIJEYEWARDENE, C. J.—I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by text book writers, when we are considering the question whether a lessee has rights against third parties. All that we have to consider is whether the lease is duly executed according to law. If a lease for any period exceeding a month is notarially attested it should be regarded as giving " a species of ownership in land " (Lee, Introduction to Roman-Dutch Law, fourth edition page 161), and vesting in the lessee proprietary rights which could be enforced between third parties. If the lease is duly registered, it is entitled to prevail even against those claiming title from the lessor under deeds executed prior to the lease but registered subsequently.

**Cases referred to :** *Issac Perera vs. Baba Appu et al* (1897) 3 N.L.R. 48.
*Goonewardene vs. Rajapakse et al* (1895) 1 N.L.R. 217.
*Carron vs. Fernando et al* (1933) 35 N.L.R. 352.

*H. W. Jayewardene*, for the defendants-appellants.
*H. V. Perera, K.C.*, with *C. R. Guneratne* and *W. D. Gunesekera*, for the plaintiff-respondents.

WIJEYEWARDENE, C.J,

One H. M. Appuhamy who owned the land forming the subject matter of this action mortgaged it in 1928. At a sale held in satisfaction of the hypothecary decree entered against him, the executors of the Last Will of the mortgagee purchased the property in 1939 and conveyed it by deeds executed in 1942 and 1945 to three devisees named in that Last Will. Those devisees leased the property to the plaintiffs by P8 and P9 of 1947 for six years commencing from June 12th, 1947. The instruments P8 and P9 have been duly attested by a Notary.

The plaintiffs filed this action in July 1947 pleading that the defendants disputed their right to possess the property under P8 and P9. The first defendant is said to be the widow of H. M. Appuhamy. The second defendant is the daughter of H. M. Appuhamy and is married to the third defendant. They all denied the title of the lessors of the plaintiffs and pleaded that H. M. Appuhamy was in possession of the land as owner up to the time of his death. The District Judge gave judgment for the plaintiffs.

The only point that was argued by the appellants' Counsel was that the plaintiffs who did not get possession under P8 or P9 could not sue third parties without making the lessors parties to the action, as the lease in their favour was for a period under ten years. He contended that such a lease did not amount to an alienation unlike a lease *in longum tempus*. He relied on an observation of Lawrie, A.C.J., in *Issac Perera vs. Baba Appu et al* (1897) 3 New Law Reports 48 and cited in support of his argument Wessels on the Law of Contract in South Africa, Volume 1, sections 1734 to 1740, Voet (Berwick's Translation) 19-2-1 and van Leeuwen's Censura Forensis 1-4-22-5 and some other authorities.

The question whether an action such as this could be maintained without making the lessor a party did not arise for adjudication in *Issac Perera vs. Baba Appu et al (supra)*, as the lessor was, in fact, a party to that action. Moreover, Withers, J. who delivered the main judgment in the case held, in very clear terms, that a lessee under a notarial lease who had not been put in possession of the property could bring an action against third parties in possession of the property and compel them to surrender possession of the property to him. In giving that opinion, Withers, J. referred to the remarks of Bonser, C.J. in *Goonewardene vs. Rajapakse et al* (1895) 1 New Law Reports 217 that in Ceylon " we ought to regard a notarial lease as a *pro tanto* alienation, and we ought to give the lessee, under such a lease, during his term, the legal remedies of an owner or possessor ".

There is no doubt that, under the Roman law, the *conductor* had only a right *in personam* against the *locator*. If his right to possession is disputed by the *locator* or by a stranger, he could not invoke the aid of the interdicts by which possession was restored. He could only bring an action for damages against the locator for breach of contract. The latter alone could sue the trespassers, and, if he failed to do so, he committed a breach of the contract (Hunter's Roman law pages 506-507). According to Nathan, this principle of the Roman law which holds that the contract of lease is entirely a matter between *locator* and *conductor* and gives the latter no separate right or remedy against third parties, was not adopted in Holland (Nathan, Common Law of South Africa, volume 2, second edition, page 919). According to Lee, the position was somewhat slightly different. He says, "this principle prevailed in some parts of Holland, (at all events as regards short leases) and found expression in the proverb, *Koop breekt huur* (sales break hire).....Elsewhere and later the rule was reversed, *Breekt koop geen huur* (sale breaks no hire), *Huur gaat voor koon* (hire goes before sale); with the result that the hirer could make good his right to the land against any third person to whom his landlord might have sold it". (Introduction to Roman Dutch law, Fourth Edition pages 158-159).

Closely connected with the question of the extent of the rights of a lessee is the question as to the formalities to be observed in respect of a contract of lease. Under the Roman law, the contract need not be in writing. A change was brought about under the Roman-Dutch law chiefly through Placaats dating from 1452. The Jurists are not all agreed on the question whether these Placaats deal with houses or required only after-leases (Nahuyi) of lands to be in writing. There was further the question whether under the Roman-Dutch law a lease for any length of time and, in particular, for a long period, required to be executed *coram lege loci* in order to render it valid against third parties. On this question too there was a conflict of opinion among the Jurists. Some thought that there was no need for such formality, some, that a lease for over ten years should be so executed, while others thought that only a lease for twenty-five years or more required such formal execution. (Wille on Landlord and Tenant, 1910 edition, pages 99-107).

The position in the later stages of the Roman-Dutch law of Holland was that a lease gave the lessee proprietary rights, provided, of course, that the lease was executed in accordance with the formalities required by law.

In South Africa there was a development of the law brought about by judicial decisions and legislation. The position there is described by Lee as follows: "with statutory exception, the validity of a lease as between the parties is independent of the presence or absence of writing, and a lease which is good between the parties is also good as against persons claiming through the lessor by lucrative title. As regards purchasers and creditors the law is otherwise. A short lease is absolutely valid against them. A long lease if only registered against the title, or if the purchase was made or the credit given with the knowledge of the lease. Such is the general law, but there are statutory variations". (Introduction to Roman-Dutch Law pages 159-161).

I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by text book writers, when we are considering the question whether a lessee has rights against third parties. All that we have to consider is whether the lease is duly executed according to law. If a lease for any period exceeding a month is notarially attested it should be regarded as giving "a species of ownership in land" (Lee, Introduction to Roman-Dutch Law, fourth edition page 161), and vesting in the lessee proprietary rights which could be enforced between third parties. If the lease is duly registered, it is entitled to prevail even against those claiming title from the lessor under deeds executed prior to the lease but registered subsequently. Therefore, I would respectfully adopt the views expressed by the Judges in *Carron vs. vs. Fernando et al* (1933) 35 New Law Reports 352. Though the appellants Counsel attempted to distinguish it on the ground that the lease considered in that case was for a period of over ten years, it is clear from the judgments that the distinction between short and long leases was not recognised as part of the law of Ceylon.

I would dismiss the appeal with costs.

PULLE J.

I agree.

*Appeal dismissed.*

*Present :* WIJEYEWARDENE, C.J.

## DON CAROLIS vs. THE CHAIRMAN, URBAN COUNCIL, GAMPAHA

*In the matter of an application for a Writ of Mandamus on the Chairman, Gampaha Urban Council.*

*S. C. No.* 267/1949.

*Argued on :* 24th October, 1949.
*Decided on :* 3rd November, 1949.

*Mandamus—Writ of—Application for butcher's licence—Refusal by local authority—Remedy available.*

Where an applicant for a butcher's license to a local authority is aggrieved by an order made by such authority, his remedy is to proceed under section 7(4) of the Butchers' Ordinance, as amended by Ordinance No. 44 of 1947, and appeal against the order to the Minister in the manner set out in section 7B, and not by way of a writ of *Mandamus*.

*F. W. Obeysekere*, for the petitioner.

*S. W. Jayasuriya*, for the respondent.

WIJEYEWARDENE, C.J.

This is a petition for a writ of Mandamus on the Chairman of the Urban Council, Gampaha. The petitioner states in his petition :—

(*a*) that he applied to the respondent for a licence for 1949 under the Butchers Ordinance ;

(*b*) that the respondent refused unlawfully to issue " a General Licence for Butchers for 1949 to the petitioner which will enable beef to be sold " ;

(*c*) the respondent issued " a pretended General Licence for Butchers.....confining the licence to pigs and excluding cattle ".

The petitioner asks for a writ of Mandamus directing the respondent " to issue to the petitioner a lawful General Licence for Butchers in place of the pretended licence.....confining sales to pork ".

This petition does not set out the facts correctly. The petitioner made two applications to the respondent one for " a pork stall " and the other later, for " a beef stall ". The respondent issued him a licence on the first application but refused a licence on the second application. The application for a writ of Mandamus is now made as the petitioner feels, in fact, aggrieved by the refusal of the respondent to issue a licence in his application for a beef stall.

Now, the Butchers Ordinance No. 9 of 1893 has been amended by Ordinance No. 44 of 1947. Section 7 of the old Ordinance has been repealed and in its place we get a new section 7 and two additional sections 7A and 7B. The procedure according to the new section 7 is as follows :—

(i) An applicant for a licence has to make his application in writing to the lawful authority ; and

(ii) the lawful authority has to publish a notice in the Gazette calling upon any person residing within his area, who desired to object to the issue of the licence, to forward to him in duplicate a written statement of the grounds of the objection within a specified time ; and

(iii) on receipt of any such objection the proper authority shall forward a copy of the written objection to the applicant.

The subsequent procedure is set out in sections 7(3) (*b*) and 7(4).

*Section 7(3) (b)* :—" The proper authority shall, after giving the applicant, and each person by whom a statement of objections is furnished (hereinafter referred to as an " objector "), an opportunity of being heard, make order allowing or disallowing the application. The order shall contain a statement of the grounds upon which it is made and the proper authority shall cause a copy thereof to be served on the applicant and each objector ".

*Section 7(4)* :—" Any applicant for a licence or any objector to the issue of such licence, if he is aggrieved by the order of the proper authority, may, within ten days from the date of the service on him of the order, appeal against the order to the Minister in the manner set out in section 7B ".

In this case there is no evidence that anyone has forwarded any written objections to the issue of a licence. But even where there are no such objections, it is under section 7(3) (*b*) that the proper authority would make his order regarding the issue of a licence. If an applicant is aggrieved by the order so made he must then proceed under section 7(4) and appeal against the order to the Minister in the manner set out in section 7B. That section makes the Minister's

decision final and conclusive and enacts that "it shall not be subject to question or revision in any Court of Law".

I may state that there is no question here as to "the lawful authority" or the Minister exceeding the powers given to them by the Ordinance. It is merely a case of the petitioner not following the procedure laid down in the Ordinance.

I refuse the application with costs.

*Application refused.*

*Present:* WIJEYEWARDENE, C.J., & PULLE, J.

KUHAFA *et al* vs. VAIRAVAN CHETTIAR

*S. C. No.* 273/1949 : *D. C.* (*Final*) Galle 8540.

*Argued on :* 25th October, 1949.
*Decided on :* 31st October, 1949.

*Joint and several liability—Drawer of cheque and successive endorsees sued by last endorsee—Judgment entered against some defendants—Is the plaintiff precluded from recovering judgment against others.*

**Held :** That where the drawer and the endorsees of a cheque are sued together for the recovery of the value thereof, the fact that judgment was entered against some of them earlier does not preclude the plaintiff from recovering judgment against the others as their liability is a joint and several one.

*M. H. A. Aziz*, for third and fourth defendants-appellants.
*H. W. Jayawardene*, with *L. C. Guneratne*, for the plaintiff-respondent.

WIJEYEWARDENE, C.J.

This is an action on a cheque instituted under section 53 of the Code.

The cheque was drawn by the first defendant in favour of the second defendant. The third and fourth defendants were successive endorsees of the cheque. The fourth defendant endorsed the cheque for valuable consideration to the plaintiff. Summons was served on the first and second defendants on May 18th and judgment was entered against them on June 24th, as they failed to obtain leave to appear and defend the action within seven days of the service as required by Court. Summons appears to have been served on the third and fourth defendants in July, and they obtained leave to appear and defend the action. After trial, the District Judge entered judgment against them also.

The only point argued before us in appeal was that the plaintiff was not entitled to ask for judgment against the third and fourth defendants, as judgment had already been entered against the first and second defendants. The appellants' Counsel relied on some decisions of this Court where it was held that judgment against one debtor on a joint debt was a bar to any further proceedings against the remaining debtors. As Mr. H. W. Jayewardene pointed out, these decisions are not relevant in the present case. The defendants in this case are liable jointly and severally to pay the amount of the cheque (*vide* Halsbury's Laws of England, volume 2, paragraph 887). Where the parties are jointly and severally liable, a creditor recovering judgment against one is not precluded thereby from recovering judgment against the others (*Blyth vs. Fladgate* (1891) 1 Chancery 337 at 353). This principle which is recognised in section 89 of our Civil Procedure Code is stated as follows in *Lechmere vs. Fletcher* (1833) 149 English Reports 549 at 554) :—

> "There are many cases in the books as to joint and several bonds, from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to sue the other; unless indeed the judgment has been satisfied; but so long as any part of the demand remains due, you are at liberty to sue the other, notwithstanding you have obtained judgment against one. This, I think, establishes the principle, that where there is a joint obligation, and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other".

I would dismiss the appeal with costs.

PULLE, J.

I agree. Under section 55 of the Bills of Exchange Ordinance (Cap. 68) the drawer of a bill and the endorsees thereof incur distinct obligations towards the holder who is entitled under section 57 to recover from any party liable on the bill. The entering of judgment against one party would result in the merger of only the cause of action against that party and the holder of the bill would still be entitled on the distinct causes of action against the remaining parties to proceed to judgment against them.

*Appeal dismissed.*

*Present :* WINDHAM, J. & GRATIAEN, J.

## N. S. C. PERERA AND OTHERS vs. H. C. DE FONSEKA AND OTHERS

*S. C. No. 425—D. C. Colombo No. 2643/L*

*Argued on :* 13th & 26th September, 1949
*Decided on :* 13th October, 1949

*Fideicommissum—Gift to two daughters subject to—In the event of one of the donees dying without lawful issue her right to devolve on surviving donee—Transfer of property so gifted with sanction of court by daughters to donor's son in consideration of donors transferring another property—Absence of restrictions upon alienation or designation of beneficiaries in new deed—Do the terms and conditions in the first gift attach to the new deed—Do the transactions amount to an exchange for the purpose of Entail and Settlement ordinance*—Jus accrescendi—*Meaning of 'surviving donee.'*

On a deed of gift of 1883 (P8) by S and his wife M in favour of their two daughters L and A, premises No. 21 Chatham Street, Colombo, was conveyed subject to the following terms and conditions :—

" To have and to hold the said premises with the easements rights appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando their heirs executors and administrators in equal undivided shares for ever subject however to the conditions following, that is to say, that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and appropriate to his own use the issues rents and profits of the said premises and that after his death and in the event of his wife Colombapatabendige Maria Perera surviving him, she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees, to wit the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando, and subject also to the conditions that the said donees Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando shall not nor shall either of them be entitled to sell, mortgage, lease, for a longer term than four years at a time or otherwise encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid."

In 1893 S and M made an application to Court under the Entail and Settlement Ordinance for sanction to transfer the said premises No. 21, Chatham Street, by L and A to their brother J in consideration for the transfer by S and M of No. 20, Baillie Street (now in dispute) to A and of premises No. 22, Baillie Street, to L. This application was granted and the transfers were effected in 1894. The deeds and the decrees of Court granting sanction did not contain the same restrictions upon alienation and designation of beneficiaries as in deed P8 and contained no corresponding gift over to the survivor in the event of any of the two sisters dying without issue.

L died a widow in 1935 leaving nine children who are the plaintiff and the 1—8 defendants-respondents. A died in 1941 intestate without having had issue and leaving as her heirs her husband (who left a will) and her brothers and sisters. The appellants claimed premises No. 20, Ballie Street, as the intestate heirs of A or as beneficiaries under the will of her husband.

**Held :** (1) That the transactions in 1894 aforesaid constituted an " exchange " for the purpose of the Entail and Settlement Ordinance.

(2) That the *fidei-commissum* to which A's share in No. 21, Chatham Street property, was subject under deed P8 attached in 1894 to No. 20, Baillie Street property for which it was exchanged.

(3) That P8 created a single *fidei-commissum*.

(4) That upon A dying issueless after the death of L, L's children became entitled to the property in dispute by right of accretion, notwithstanding that L did not survive A.

(5) That the expression " surviving donee " in P8 should be interpreted as " other " donee.

**Cases referred to :** *Abeywardene vs. Tyrell*, 39 N. L. R. 505.
*Tillekeratne vs. Abeysekera*, 2, N. L. R. 313.
*Carlinahamy vs. Juanis* 26 N. L. R. 129.
*Sandeman vs. Iyamperumal*, 3 C. W. R. 58.
*Uscof vs. Rahimath* 20 N. L. R. 225.
*Smith vs. Osborne*, (1857) 10 E. R. 1340.
*re Palmer's Settlements* (1875) 44 L. J. Ch. 247.
*Hodge vs. Foot* (1865) 55 E. R. 669.
*Auger vs. Beaudry* (1920) A. C. 1010.
*Gilmour vs. Phillamy*, (1930) A. C. 712.

*E. B. Wickremenayake, K.C.*, with *D. S. Jayawickrema*, for the 37th and 39th Added Defendants Appellants.

*H. V. Perera, K.C.*, with *N. E. Weerasooriya, K.C., N. M. de Silva, Ivor Misso* and *H. B. White*, for the plaintiff-respondent.

WINDHAM, J.

This is an appeal from a judgment given in favour of the plaintiff-respondent, for the sale, under the Partition Ordinance, of certain premises at No. 20, Baillie Street, Colombo, of which the plaintiff-respondent and the first to eighth defendant-respondents claimed exclusive co-ownership.

The plaintiff-respondent traced title to the premises from as early as 1817, and it is uncontested that by a deed (P7) of 1893 they passed into the ownership of one Mututantrige Siman Fernando, who was the grandfather of the plaintiff-respondent and of the latter's brothers and sisters the first to eighth defendant-respondents.

The points raised in this appeal, however, arise upon the terms of a *fidei commissum* contained in an earlier deed of gift of 1883,—P8—whereby Siman Fernando and his wife Maria Perera, who were possessed of several other properties as well as that at No. 20, Baillie Street, gifted certain premises at No. 21 (now No. 24) Chatham Street, Colombo, to two of their daughters, Leonora and Arnolia, upon the following terms and conditions:—

"To have and to hold the said premises with the easements rights appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantirige Leanora Fernando and Mututantirige Arnolia Fernando their heirs executors and administrators in equal undivided shares for ever subject however to the conditions following that is to say, that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and appropriate to his own use the issues rents and profits of the said premises and that after his death and in the event of his wife Colombapatabendige Maria Perera surviving him, she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees, to wit the said Mututantrige Leanora Fernando and to wit the said Mututantrige Arnolia Fernando and subject also to the conditions that the said donees Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando shall not nor shall either of them be entitled to sell, mortgage, lease, for a longer term than four years at a time or otherwise encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issues her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid".

Before proceeding to consider the effect of the *fidei commissum* or *fidei commissa* which the above recited portions of the deed P8 admittedly created, it is necessary to recite what subsequently happened. In 1893, Siman Fernando and his wife made an application to the Court under the Entail and Settlement Ordinance, No. 11 of 1876 (now Chapter 54), to which their daughters Leonora and Arnolia were parties, to sanction the transfer of the premises at No. 21 Chatham Street by Leonora and Arnolia to their brother (Siman's son) James Fernando, in consideration for the transfer by Siman and his wife of No. 20, Baillie Street, (the premises now in dispute) to Arnolia, and of premises No. 22, Baillie Street, to Leonora. This application was granted, and the transfers were duly effected. By deed P13 of 2nd March, 1894, No. 20 Baillie Street, was transferred to Arnolia, and by deed 9 D4 No. 22, Baillie Street, was on the same day transferred to Leonora. These deeds, and the decrees of Court upon which they were made, did not contain the same restrictions upon alienation and designation of beneficiaries as the deed P8 of 1883 had done, and they contained no corresponding gift over to the survivor in the event of any one of the two sisters dying without issue.

Leonora died a widow in 1935, leaving nine children, namely the plaintiff-respondent and the first to eighth defendant-respondents.

Arnolia died in 1941, intestate, without having had issue, leaving as her heirs her husband (as to one half) and her brothers and sisters (as to the other half). Her husband Dr. W. A. de Silva, died in 1942, leaving a will. The 37th, 38th and 39th added defendants, who are the appellants

in this appeal, claim the premises at No. 20, Baillie Street, as the intestate heirs of Arnolia or as beneficiaries under the will of her husband.

Briefly, the appellants' claim is based on the following contentions. First, it is contended that the devolution of the premises at No. 20, Baillie Street, is to be governed, not by the terms of P8 which have been set out above, but by the terms of the later deed P13 of 1894, which transferred those premises to Arnolia without any gift over to Leonora or the latter's children in the event of Arnolia dying without issue. Secondly it is contended that, even if the terms of P8 are applicable, then in accordance with those terms, by reason of Arnolia.....having died issueless after the death of Leonora, Arnolia's share devolved on her intestate heirs and was not subject to a gift over in favour of the issue of Leonora.

Now the transactions in March, 1894, whereby Arnolia and Leonora transferred No. 21 Chatham Street to their brother James Fernando in consideration for the transfer by their parents of No. 20 Baillie Street to Arnolia and No. 22 Baillie Street to Leonora, purported to be made in pursuance of an application by their father Siman Fernando under the Entail and Settlement Ordinance, and the decrees consequent upon the granting of that application by the District Court purported similarly to be made under that Ordinance. If the transactions constituted an "exchange" of properties within the meaning of section 4 of the Entail and Settlement Ordinance (Cap. 54), then there can be no doubt that No. 20 Baillie Street, which was taken by Arnolia in exchange for her half share in No. 21 Chatham Street, became subject to the same *fidei commissum* as the latter had been subject to under the deed P8, by operation of the clear provisions of section 8 of the Ordinance, which provides that "Any property taken in exchange for any property exchanged under the provisions of this Ordinance shall become subject to the same entail, *fidei commissum*, or settlement as the property for which it was given in exchange was subject to at the time of such exchange".

That such would be the legal effect of section 8, notwithstanding that the terms of the *fidei commissum* in the deed P8 were not embodied in the deed P13 (whereby 20 Baillie Street was transferred to Arnolia) or in the decree to which P13 gave effect, was laid down clearly in *Abeywardene vs. Tyrell*, 39 N. L. R. 505, where the precise point arose. That case was concerned with a similar exchange of properties effected by this same Siman Fernando and his wife in favour of two other daughters of theirs, to whom they had given a property called "The Priory" subject to a *fidei commissum* similar in terms to that contained in the deed P8, which was later exchanged for a property called "Srinivasa" under a decree and consequent deed of transfer which did not embody the terms of that *fidei commissum*.

Indeed the only feature which has been argued to distinguish that case from the present one is that in that case Siman and his wife transferred "Srinivasa" to the two sisters, and the two sisters in return transferred "The Priory" to Siman and his wife, whereas in the present case the parties to the transfer of 20 Baillie Street were not the same as the parties to the transfer of 21 Chatham Street. For 20 Baillie Street was transferred by Siman and his wife to Arnolia, while 21 Chatham Street was transferred by Arnolia not to Siman and his wife but to their son (her brother) James Fernando. Such a transaction, it is argued, unlike that in the earlier case, cannot be deemed to be an "exchange" at all, with the result that the Entail and Settlement Ordinance, and section 8 in particular, do not apply. An "exchange", it is contended, must involve two parties, no more and no less, and covers only the case where A transfers property to B, and B in return transfers property to A, (it being conceded that A and B might be the same person acting in two different capacities).

In support of this contention it is pointed out, with truth, that under the Roman Law an "exchange" is a contract (*per mutatio* being one of the innominate contracts "re" according to the Proculean view adopted by Justinian), and that the "do ut des" nature of such a contract necessitates that if A gives property to B it must be A who receives other property back from B in return.

That may well be the position of an "exchange" viewed as a contract under the Roman Law. But I do not consider that this concept, with its implications, should be grafted on to the expression "exchange" in the Entail and Settlement Ordinance. The Ordinance is not concerned with an exchange viewed as a contract. The "exchange" which it has in mind in sections 4 and 8 is an exchange in the sense of the substitution of one property for another,—the coming of one property into the ownership of a person in place of another property which goes out of his ownership. Such properties may correctly be

said to have been "exchanged" the one for the other, whether or not the former owner of the property received in exchange becomes the new owner of the property given in exchange. The Ordinance is not concerned with the origin of the property received, nor with the destination of the property given, but only with the replacement of the latter by the former, its object to reconcile the freedom of alienation with the safeguarding of existing rights in the property alienated. It is in that setting that the word "exchange" in the Ordinance should be construed.

For these reasons I hold that the transactions under consideration constituted an exchange for the purpose of the Entail and Settlement Ordinance, with the result that the *fidei commissum* to which Arnolia's share in the 21 Chatham Street property was subject under the deed P8 attached in 1894 to the 20 Baillie Street property for which it was exchanged.

The next point for determination is whether the deed P8 created one *fidei commissum* in favour of Arnolia and Leonora and their respective issue, or whether it created two separate *fidei commissa*, one in respect of the half share given to Arnolia and one in respect of the half share given to Leonora. For if on a true construction of P8 one *fidei commissum* only was created, then I think there can be little doubt that upon the death of Arnolia without issue, her half share would not devolve on her intestate heirs, as the appellants contend that it did, but would shift over by virtue of a *jus accrescendi* to the children of the already deceased Leonora, in accordance with the rule laid down by the Privy Council in *Tillekeratne vs. Abeysekere*, 2, N. L. R. 313 that so long as one of the persons mentioned or able to show title as an institute or a substitute under the *fidei commissum* exists, there will be no lapse, and the *fidei commissum* will accrue so as to benefit such person to the exclusion of the intestate heirs of a deceased fiduciary or fideicommissary. It was laid down by Bertram C.J. in *Carlinahamy vs. Juanis* 26 N. L. R. 129, that the initial test is the basis of the whole doctrine of *jus accrescendi*. It was further laid down in that case, following earlier decisions on the point, that the *jus accrescendi* (using that expression in its wider modern sense as meaning any right of accrual and not in its narrower and exclusive testamentary sense under the Roman Law) is applicable not only to *fidei commissa* created by a will, but also to *fidei commissa* created by deed of gift, as in the present case, though it was pointed out by Bertram, C.J., that in the case of a deed the *jus accrescendi* will only arise from operative words, which expressly or by implication have this effect".

Do the words in P8 create one *fidei commissum* in favour of Arnolia and Leonora and their respective issues, so that the *jus accrescendi* will operate on the share of Arnolia in favour of Leonora's issue? The important words in P8 for this purpose are those which give the property to them as fiduciaries "in equal undivided shares for ever", and the condition that "the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid".

I will consider presently the bearing of the English decisions of the meaning to be given to the word "surviving" in this passage. But taking the effect of the gift P8 as a whole, it does seem to me that the donor intended, by the words he used, to create a single *fidei commissum* only. With regards to the words "in equal undivided shares for ever" I do not think that these words indicate an intention to make two separate gifts, one to Arnolia and her issue and one to Leonora and her issue, any more than the words "share and share alike" were held to indicate a plurality of gifts in the case of *Sandeman vs. Iyamperumal*, 3 C. W. R. 58, and *Usoof vs. Rahimath* 20 N. L. R. 225. Similarly I consider that the word "respectively" is merely an indication that the children of Arnolia and Leonora were to take *per stirpes* as representing their respective mothers, and not *per capita*. For the rest, the condition that "in the event of *any one* of the said donees" (sic: whether Arnolia or Leonora) "dying without lawful issue her share.....shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid" do seem to indicate a clear intention that neither of the institutes, Arnolia and Leonora is to take anything absolutely, whether her own original half share or the share of a sister predeceasing her without issue, but that the only persons to take absolutely are the *fideicommissaries*, their respective children. Had the words "any one of the said donees" been replaced by such words as "the donee who shall first die", the position would of course have been otherwise. But the condition as worded indicates, to my mind, an intent that the children of both or either sister

shall be the ultimate beneficiaries of the shares of both sisters,—in short, an intent to create a single *fidei commissum*, with the result that the rule in *Tillekeratne vs Abeysekere* will apply.

The use of the words "surviving donee" in the gift over would at first, and if interpreted literally, appear to negative this intention, and to prevent the going over of Arnolia's share to the issue of Leonora by reason of Leonora not having survived Arnolia. This, however, is in my view a case where the intention of the donor appears sufficiently clear from the other words in the gift to enable this Court to construe "surviving" as "other" in order to give effect to that intention. There appears to be no decided case in Ceylon where the question has arisen whether this word should be so construed, as in similar cases it has been construed in England. With regard to the English decisions, there is perhaps no branch of English case law which forms a better example of what has been called a "wilderness of single instances" than that relating to the interpretation of expressions used in wills, and of the expression "survivor" in particular, and it would be profitless to examine the cases in detail. *Smith vs. Osborne*, (1857) 10 E. R. 1340, is the leading case on the subject, and there the House of Lords interpreted "survivor" as "other" on facts very similar to those in the present case, where there was a gift to the testator's two daughters as tenants in common in tail, with a gift over to the survivor and the heirs of her body should either die without issue. The interpretation was allowed as the only means of giving effect to the intention of the testator. In *re Palmer's Settlements* (1875) 44 L.J. Ch. 247, and in *Hodge vs. Foot* (1865) 55 E. R. 669, where "survivor" was similarly interpreted as "other" the wording was again more favourable to such an interpretation, since in both cases the gift over was made expressly to the survivors *and their children*, showing a clearer intention to benefit such children than to make their parents' survivorship a pre-requisite to their benefitings The tendency in more recent English cases, however, appears to be to insist on a more strict interpretation of the word "survivor" unless the testator's intention in a contrary sense is very clearly expressed. In *Auger vs. Beaudry* (1920) A. C. 1010, the Privy Council, in refusing to read "survivor" as "others", laid down the general working rule in the following terms:—

> "The truth is that in the preparation of such gifts the draftsman is liable to fix his mind simply upon the death of the first of the children to die, in which case the gift over works without difficulty, and he does not concentrate his attention upon what will happen in the event of the death of a child without issue, who has been predeceased by another child leaving issue behind. The gift over, therefore, only too often does not carry out what, if speculation were permitted, it would be reasonably certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the word as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognised that that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean".

This decision was followed in *Gilmour vs. Phillamy*, (1930) A. C. 712, where the Privy Council refused to interpret "survivors" in the loose or "stirpital" sense, notwithstanding that that the gift over was to "surviving daughters and their children". It was held that—"In order to justify a departure from the natural and ordinary meaning of any word or phrase there must be found in the instrument containing it a context which necessitates or justifies such departure. It is not enough that the natural and ordinary meaning may produce results which to some minds appear capricious or fail to accord with a logical scheme of disposition".

Upon a consideration of these and other English authorities I think that, if we were to be bound to apply them to the interpretation of the word "surviving" in a *fidei commissum* in a deed of gift in Ceylon, in relation to the question whether the *jus accrescendi* operates, then the donor's contrary intention in P8 might not be held to be clearly enough expressed to justify the word being interpreted as "other". In particular, any mere plea that the strict interpretation would not give effect to the donor's probable wishes, or that it would presume an unlikely capriciousness on his part, would fail, since those were the very pleas which the Privy Council in *Auger vs. Beaudry* and *Gilmour vs. Mac Phillamy* (supra) held to be inadequate, in the passages which I have quoted.

But, while I think this Court would be guided by the principle of interpretation laid down in those English cases, I do not think it need feel bound by them to the extent of being precluded from interpreting the expression "surviving donee" as "other donee" in the present case,

The circumstances differ. In England the trend of the decided cases appears to be towards a stricter interpretation of the word, and the testator's intention will be ascertained not by making the will conform merely to what it is "confidently believed it must have been", but by giving "the fair and literal meaning to the actual language of the will". In Ceylon, on the other hand, while the testator's or donor's intention must of course likewise be ascertained from the terms of the instrument, the position is somewhat different when the meaning to be given to the word "survivor" or "surviving" is, as in the present case, intimately bound up with the question whether he intended to create one single *fidei commissum* or more than one, and whether the *jus accrescendi* was intended to operate. For in Ceylon, the question whether the *jus accrescendi* operates depends on the probable intention of the person creating the *fidei commissum* as disclosed in the last will or donation (Voet 29-2-40); and, as pointed out in *Usoof vs. Rahimath* supra) "the *jus accrescendi* was not an anomaly which the law regarded with horror and restrained by every measure possible; it was a benevolent device invented for the purpose of giving effect to an intention of the testator, which he was supposed to have forgotten to express". And the trend of judicial decisions in Ceylon over the last fifty years appears increasingly to favour the application of the *jus accrescendi*. Bertram, C.J., in *Carlinahamy vs. Juanis* (supra, at page 140) made the following relevant observations, with which I respectfully concur:—"I confess that I am not at all clear that the rule established in *Tillekeratne vs. Abeysekera* (supra) is alien to local conceptions. On the contrary I venture to think that if those who made dispositions of this sort thought the matter out, they would find that this rule gave effect to their real intention. Their object is to endow their descendants with a particular property. What are the circumstances which occasion cases in which that rule is challenged. They generally arise from the fact that some stranger to the family claims to have acquired an interest in the property by marriage. Sometimes it is the husband of one of the daughters; sometimes it is some comparatively remote member of his family claiming by inheritance through the husband. I can scarcely believe that the authors of these liberalities contemplated such invasions. Further, if these liberalities were to be construed as creating separate *fidei commissa* attaching to individual shares, the result would be that, as time went on, certain shares in the property would become disengaged from the *fidei commissum*, while others would remain bound. Some of the shares would be subject to alienation, others would not. The homogeneity of the property as a family endowment would be destroyed. I doubt very much whether this is a prospect which the testator and donors would have contemplated, and I am by no means sure that the rule in *Tillekeratne vs. Abeysekera* (supra), though in fact based on the logical and legal interpretation of a particular document, does not work out as a very discerning interpretation of local conditions".

These factors, in my opinion, justify the Courts in Ceylon in interpreting the expression "surviving" as "other" in certain cases where perhaps the Courts in England would hesitate to do so, and in doing so in the present case. I am therefore of the view that the learned District Judge was right in holding that No. 20 Baillie Street was subject to the single *fidei commissum* imposed by the deed of gift P8 upon the property for which it was exchanged, and in holding that the effect of that *fidei commissum*, upon Arnolia dying issueless after the death of Leonora, was that Leonora's children became entitled to No. 20 Baillie Street by right of accretion notwithstanding that Leonora did not survive Arnolia, and that the property did not devolve upon Arnolia's intestate heirs.

I would accordingly dismiss the appeal with costs.

*Appeal dismissed.*

GRATIAEN, J.

I agree with my brother Windham.

*Present :* WIJEYEWARDENE, C.J. & GUNASEKERA, J.

## VAN DER POORTEN vs. VAN DER POORTEN *et. al.*

*In the matter of an application for Conditional leave to appeal to His Majesty in His Privy Council in S. C. No. 496 ; D. C. (Final) Kandy 1656/M. R.*

*S. C. Application No.* 172/1949.

*Argued on :* 28th October, 1949.
*Decided on :* 7th November, 1949.

*Privy Council—Conditional leave to appeal—Notice of intended application given and received by Proctors not duly authorised by respective parties at time of such notice—Proctors subsequently authorised —Validity of notice—Notice signed by person holding Power of Attorney—Validity—Can applicant alter the ground on which leave is sought after fourteen days from date of judgment.*

**Held :** (i) That a notice of an intended application for leave to appeal to the Privy Council, given or received by a proctor before such proctor is duly authorised for the purpose, is bad.

(ii) That an applicant cannot be permitted to alter his ground of appeal after the lapse of fourteen days from the date of judgment.

*Per* WIJEYEWARDENE, C.J.—" There remains for consideration the validity of the " notice " signed by the defendant " by his Attorney ". It is contended by the plaintiff that that notice too is bad as a notice could be signed only by a party or by a Proctor for a party empowered to act under the Ordinance. This contenion is based on Rule 6 of the Order which states, " A party to an application under the Ordinance.....shall, unless he appears in person, file in the Registry a document in writing appointing a Proctor of the Supreme Court to act for him in connection therewith....." It is, however, not difficult to take the view that Rule 6 applies only to what has to be done in Court and not to a notice of " an intended application " referred to in Rule 2 in Schedule 1 to the Ordinance and not given with the assistance of the Court. Such a view of the law has the merit of not placing unnecessary technical difficulties in the way of a party wishing to appeal to His Majesty in Council. If that view is correct, the party required to serve notice may do so by a writing signed by him " by his Attorney ", as that is permissible under the common law and there is nothing in Rule 5 to shew that the right under the common law has been taken away."

**Cases referred to :** *Annamalay Chetty vs. Thornhill,* (1935) 36 New Law Reports, 413.
*Muttucarupen Chettiar vs. Mohamed Salim* (1939) 40 New Law Reports 145.
*Gooneratne vs. The Bishop of Colombo* (1931) 33 New Law Reports 63.

*N. K. Choksy, K.C.*, with *M. P. Spencer*, for the applicant.
*N. E. Weerasooriya, K.C.*, with *G. T. Samarawickreme*, for the respondents.

WIJEYEWARDENE, C.J.

This is an application filed by the defendant on April 9, 1949, under Rule 2 in the Schedule to the Appeals (Privy Council) Ordinance for leave to appeal to the Privy Council from a final judgment of this Court delivered on March 11, 1949. The application states :—

(i) " that the matter in dispute on the appeal amounts to or is of the value of Rs. 5,000 or upwards " ;

(ii) that the applicant " by notice dated March 24, 1949, duly intimated to the plaintiffs-respondents his intention to so appeal ..... ".

The plaintiff objected to the application on the following grounds :—

(i) that the notice pleaded in the application was bad ;

(ii) that the matter in dispute was below Rs. 5,000.

Before dealing with the objections, I shall give a brief statement of the facts of the case. The first and second plaintiffs who are minors were represented in this action by their mother, the third plaintiff, as next friend. The minors are beneficiaries in respect of 1/20th share, each, in the residuary estate of A. J. van der Poorten who died leaving a last will which was proved in D. C.

Kandy (Testy.) 50. Probate was granted to the defendant and two other executors. The plaintiffs asked for a decree in this action against the defendant personally directing him " to pay into Court in this action for the benefit of the estate of the said A. J. van der Poorten a sum of Rs. 10,000 " being the proceeds of a cheque misappropriated by him or, in the alternative, to pay to the first and second plaintiffs Rs. 1,000 being their 1/10th share of Rs. 10,000. In the course of the action, the plaintiffs restricted their claim to an order on the defendant to pay them Rs. 1,000. After trial the District Judge gave them judgment for Rs. 1,000. The defendant appealed against that judgment and the appeal was dismissed by the Supreme Court.

I proceed now to deal with the objection raised by the respondent's Counsel.

The notices referred to in the application were:

(i) a telegram addressed to Mr. Kolugala, Proctor for the plaintiffs, by Mr. Stave, Proctor for the defendant. That telegram reads :— " As guardian-ad litem of Antoine and Michael (minor plaintiffs) in District Court Kandy case No. 1656 take notice.....".

(ii) a similar telegram addressed to the third plaintiff by Mr. Stave ;

(iii) " notices " sent to the plaintiffs and Mr. Kolugala, signed by Mr. Stave and by the defendant " by his Attorney " Mr. J. F. Martyn, authorised by a power of attorney to act for the defendant in respect of all matters connected with appeals to the Privy Council.

Mr. Kolugala's proxy empowering him to act under the Ordinance is dated May 19, 1949, and Mr. Stave's proxy is dated April 9, 1949.

Apart from the fact that the telegram to Mr. Kolugala was addressed to him " as guardian-ad-litem of Antoine and Michael " Mr Kolugala was not, at the time he received the telegram and " notice ", a Proctor of the plaintiffs " empowered to accept service thereof " (see Rule 5A of the Appellate Procedure (Privy Council) Order, 1921). Mr Stave himself had no authority to act for the defendant and send the telegram and " notices " as his proxy was dated April 9, 1949. There remains for consideration the validity of the " notice " signed by the defendant " by his Attorney ". It is contended by the plaintiff that that notice too is bad as a notice could be signed only by a party or by a Proctor for a party empowered to act under the Ordinance. This contention is based on Rule 6 of the Order which states, " A party to an application under the Ordinance.....shall, unless he appears in person, file in the Registry a document in writing appointing a Proctor of the Supreme Court to act for him in connection therewith.....". It is, however, not difficult to take the view that Rule 6 applies only to what has to be done in Court and not to a notice of " an intended application " referred to in Rule 2 in Schedule 1 to the Ordinance and not given with the assistance of the Court. Such a view of the law has the merit of not placing unnecessary technical difficulties in the way of a party wishing to appeal to His Majesty in Council. If that view is correct, the party required to serve notice may do so by a writing signed by him " by his Attorney ", as that is permissible under the common law and there is nothing in Rule 5 to show that the right under the common law has been taken away. A certain difficulty is however created by a decision of this Court. In *Annamalay Chetty vs. Thornhill*, (1935) 36 New Law Reports 413, a Bench of two Judges held against the validity of an application for conditional leave to appeal which was made by a Proctor appointed by a duly authorised Attorney of a party. When the same question came up subsequently before another Bench of two Judges, it was referred to a Divisional Bench, as it was felt that the earlier decision needed reconsideration. The Divisional Bench overruled the earlier case. There are, however, passages in the judgment of the Divisional Bench. (*Muttucarupen Chettiar vs. Mohamed Salim* (1939) 40 New Law Reports 145) which seem to suggest that a notice given by a duly appointed Attorney is bad. I do not think it necessary to refer this question to a Divisional Bench, as we could give our decision on the regularity of the present application without reaching a decision as to the sufficiency of the notice.

In considering the second objection of the plaintiffs, it should be remembered that the right of appeal given to parties in a civil action is subject to certain limitations. They could appeal.

A. " As of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards " or

B. " As of right, from any final judgment of the Court, where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right

amounting to or of the value of five thousand rupees or upwards " ; or

C. " At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which by reason of its general or public importance or otherwise ought to be submitted to His Majesty in Council for decision " (see Scheduled Rule 1).

Now the decree against which an appeal is sought to be taken orders the defendant to pay a sum of Rs. 1,000 and costs. The applicant therefore, cannot appeal as of right under A above. Counsel for the applicant did not seek to come under C above. He argued, however, that he had a right of appeal under B above. That contention was based on the ground that in view of the decision in the present case the defendant was exposed to the risk of claims being made against him by other beneficiaries in the estate of A. J. van der Poorten trying to recover their shares of the sum of Rs. 10,000 mentioned above. Those shares, it may be stated, would amount to only Rs. 4,500, as the defendant himself is entitled to 9/20th of the residuary estate. The judgment in this case would not operate as *res judicata* in favour of the other beneficiaries. Moreover, it is quite possible that the defendant may have various defences against those beneficiaries which were not available to him in the present action. There is also no evidence that any of the other beneficiaries have sued the defendant or even threatened to sue him. I am, therefore, unable to hold that the applicant is entitled as of right to appeal as stated in B above (vide *Gooneratne vs. the Bishop of Colombo* (1931) 33 New Law Reports 63). On this ground, at least, the application for leave to appeal must fail.

I wish, however, to refer to a matter that was argued at some length before us. In his application to the Court the applicant claimed a right of appeal on the ground that the matter in dispute was of the value of Rs. 5,000. Could he at the argument before this Court long after the lapse of the specified period of thirty days claim that he had a right of appeal as stated in B above? Now Scheduled Rule 2 requires an application for conditional leave to appeal to be made within thirty days of the judgment of this Court and notice of the intended application to be given to the opposite party within fourteen days of that judgment. The main, if not sole, object of giving notice is to enable the opposite party to be prepared to shew, if possible, that the plaintiff is not entitled to appeal. The opposite party should, therefore, know in time whether the applicant claims a right to appeal and in that case, on what ground, or whether he pleads that the Court should exercise its discretion in his favour and permit him to appeal. It appears to me that the very object of requiring a party to give notice within a specified time will be defeated if the applicant is allowed to alter the ground on which he asks for leave to appeal after the lapse of fourteen days from the date of judgment. This view of mine derives some support from an examination of the Appellate Procedure (Privy Council) Order 1921. Those Rules were made by the Supreme Court under section 4 of the Appeals (Privy Council) Ordinance which empowered the Supreme Court to " make rules for regulating the form and manner of proceeding. Now Rule 19 of the Order enacts that " the form contained in Schedule 2 to the Order may be used or others to the like effect ". The " form of petition for conditional leave to appeal " given in Schedule 2 shows clearly that the applicant is expected to state specifically whether the application is made on the ground A, B or C above.

The application is refused with costs.

*Application refused.*

GUNASEKERA, J.

I agree.

*Present :* GRATIAEN, J.

## JAYASINGHA vs. SOYSA

*S. C. 129—Application for a Writ of Quo Warranto*

*Argued on :* 11th November, 1949.
*Decided on :* 13th November, 1949.

*Writ—Quo Warranto—Teacher employed in assisted school elected as member of Municipal Council —Salary payable by manager of school paid direct by Government—Is such teacher holder of public office within the meaning of section* 10 (i) (*d*) *of Local Authorities Elections Ordinance No. 53 of* 1946.

**Held :** That a teacher, employed in an assisted school and whose salary, payable by its Manager, is paid direct by the Government out of its annual grant to such school, does not "hold a public office under the Crown in Ceylon" within the meaning of section 10 (i) (*d*) of the Local Authorities Elections Ordinance No. 53 of 1946, and is accordingly not disqualified from sitting or voting as a member of any local authority.

**Cases referred to :** *Podi Singho vs. Goonesinghe*, (1948) 49 N. L. R. 344 at page 346.
*Bowers vs. Harding*, (1891) 1 Q. B. 560.

*E. B. Wikramanayake, K.C.*, with *M. A. M. Hussain*, for the applicant.
*S. Nadesan*, with *D. S. Jayawickreme*, for the respondent.

GRATIAEN, J.

This application came up before me on 11th November, 1949. At the conclusion of the argument I made order discharging the rule with costs, and I now proceed to record the grounds for my decision.

The facts are not in dispute. The respondent was elected a member of the Municipal Council of Kurunegala on 25th November, 1948 and has functioned in that office since 5th January, 1949. He has at all relevant times been a teacher employed at Christ Church College of which the Reverend Derek Karunaratne is Manager. The school is not a Government school but receives an annual grant from the Director of Education in accordance with the School Grants (Revised Conditions) Regulations, 1945. The school recently entered what is commonly known as the Free Education Scheme, but subject to the statutory rights of supervision and control which the Director enjoys over Assisted Schools, Christ Church College still retains, for what it is worth, its former status as a privately owned educational institution. The annual grant represents a contribution from the Government towards the expenses incurred by the School manager, and is calculated in accordance with the rules of the Code governing Assisted English Schools. The Regulations provide that the salary payable to a teacher by the Manager may either, for convenience, be paid direct to him by the Government *or* paid to the Manager at agreed intervals. In the case of Christ Church College, apparently, the former alternative has been adopted.

The petitioner claims that in these circumstances the respondent is the "holder of a public office under the Crown in Ceylon" within the meaning of Section 10 (1) (*d*) of the Local Authorities Elections Ordinance No. 53 of 1946, and is accordingly disqualified from the sitting or voting as a member of any local authority. The petitioner therefore challenges the respondent's right to exercise the office of a member of the Municipal Council of Kurunegala.

In my opinion the petitioner's application is devoid of merit. The respondent does not hold any "public office under the Crown". His engagement as a teacher at Christ Church College is referable to a contract of employment between himself and the Manager of a privately owned Assisted School. The circumstance that the Government contributes the whole or part of the salary payable to him by the Manager is besides the point, and does not either establish privity between him and the Crown or alter the intrinsic character of his personal contract of service with the Manager. Should he not receive his salary for any month in terms of the contract, his remedy would be against the Manager and not the Crown. If the grant be withheld by the Director, the teacher's right to claim his salary is not affected. Although a Manager is precluded by the Code from employing or discontinuing a teacher without the prior approval of the Director of Education, this does not in any way establish privity of contract between the teacher and the Director. If one applies to the respondent the tests laid down for determining whether a person is a servant of the Crown—namely (1) who makes the appointment? (2) who dismisses him? (3) who pays his salary? (vide "*Podi Singho vs. Goonesinghe*" (1948) 49 N. L. R. 344 at page 346 I would say that the answer to each question would be "the Reverend

Derek Karunaratne" and not "the Director of Education". No doubt the Director controls the appointment and the dismissal, and no doubt the public revenue may be the *source* from which a sum equivalent to the petitioner's salary payable by the Manager is derived, but in each case the privity of contract between the master and his servant remains wholly unaffected. Even if the payment be made direct to the teacher from public funds, it is made *on behalf of* the Manager who is the real debtor under the contract of service. Mr. Wikremanayake referred me to "*Bowers vs. Harding*" (1891) 1 Q. B. 560 it was held that the master of "national school" in England held "a *public* office or employment of profit" within the meaning of Schedule E of the Income Tax Acts. I find myself unable to derive much assistance from this ruling in the absence of some indication of the extent, if any, to which the constitution of a national school in England approximates to that of a privately owned Assisted School in Ceylon.

For the reasons which I have now recorded I refused the petitioner's application with costs which were fixed at Rs. 315.

*Application refused.*

*Present:* WIJEYEWARDENE, C.J.

## RANKIRA vs. SERGEANT SCHULLING

*S. C. No.* 841/1949—*M. C. Gampola* 17401

*Argued on:* 5th October, 1949.
*Decided on:* 26th October, 1949.

*Criminal Procedure Code sections* 188 *and* 193—*Admission of guilt in course of trial of offence not charged with—Failure to frame fresh charge before accepting plea and dealing with accused.*

**Where in the course of a trial of a person charged under sections 440 and 369 of the Penal Code, the accused pleaded guilty to a charge under section 394 of the Penal Code and after accepting the plea without framing a fresh charge and explaining to the accused as required by section 193 of the Criminal Procedure Code, the accused was dealt with under section 325 (1) (*b*) of the latter Code.**

**Held:** That the order of the Magistrate could not stand.

No appearance for the accused appellant.

*A. Mahendra Rajah, Crown Counsel,* for the Crown.

WIJEYEWARDENE, C.J.

The accused was charged on two counts:—

(i) committing house breaking by day by entering the house of one Salalu with intent to commit theft (section 440 of the Penal Code);

(ii) committing theft of articles valued at Rs. 41 and belonging to Salalu (section 369 of the Penal Code).

The accused pleaded not guilty to the charge. After recording briefly the evidence of Salalu, the Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code. Salalu was then recalled and she gave evidence to the effect that when she returned home she found the door of her house forced open and some articles missing. At the close of her cross-examination, the Magistrate recorded as follows:

"At this stage accused states, 'I am guilty of retaining a lock worth Rs. 1·50 belonging to complainant under section 394 P.C.'

Police accept the plea.

Finger print. Sentence 5.5."

On May 5th the accused desired to withdraw the plea, but the Magistrate did not allow him to do so. The Magistrate dealt with the accused under section 325 (1) (*b*) of the Criminal Procedure Code and ordered him to enter into a bond to be of good behaviour for one year.

The "admission" of guilt made by the accused does not come under section 188 of the Criminal Procedure Code, as that section refers to an admission in respect of "the offence of which he is accused". Effect cannot be given to that "admission" under section 193, as the Magistrate failed to frame a charge as required by that section. The order made by the Magistrate cannot, therefore, stand.

Considering the very lenient view the Magistrate has taken of the offence "admitted" by the accused, I do not think it fair to ask the accused to stand a fresh trial.

I would vacate the order of the Magistrate and direct the bond to be discharged.

I delayed delivering this judgment in view of certain inquiries that had to be made from the Magistrate with regard to the recording of the evidence.

*Order set aside.*

*Present:* WIJEYEWARDENE, C.J., WINDHAM, J., GRATIAEN, J.

## THE MAYOR OF COLOMBO vs. THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER

*In the matter of an Application for a Mandate in the nature of a Writ of Prohibition under section 42 of the Courts Ordinance.*

*S. C. Application No. 564/1949.*

*Argued on :* 2nd December, 1949.
*Decided on :* 2nd December, 1949.
*Reasons delivered on :* 8th December, 1949.

*Supreme Court—Its jurisdiction to issue Writ of Prohibition on Commissioner appointed under Commissions of Inquiry Act No. 17 of 1948 to inquire into allegations that Municipal Councillor acted corruptly as specified by Section 5(i) of the Colombo Municipal Council Bribery Commission (Special Provisions Act No. 32 of 1949).*

**Held :** That it is competent for the Supreme Court to issue a mandate in the nature of a Writ of Prohibition to prohibit a Commissioner appointed by the Governor-General under the Commissions of Inquiry Act No. 17 of 1948 from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by section 5 (i) of the Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949, as such Commissioner is under a duty to act judicially.

**Case referred to :** *The King vs. The Electricity Commissioners*, (1924) 1 King's Bench Division 171.

*H. V. Perera, K.C.*, with *S. Nadesan, D. S. Jayewickreme, C. S. Barr Kumarakulasingham*, and *K. C. Nadarajah*, for the petitioner.

*A. E. P. Rose, K.C.*, Attorney-General, with *T. S. Fernando, Crown Counsel*, and *M. Tiruchelvam, Crown Counsel*, as *amicus curiae*.

WIJEYEWARDENE, C.J.

On May 24, 1949, His Excellency the Governor-General acting in pursuance of the provisions of section 2 of the Commissions of Inquiry Act, No. 17 of 1948, appointed a Commissioner to inquire into and report on the questions:—

(*a*) whether any member of the Colombo Municipal Council did at any time after December 2, 1943, corruptly solicit or receive or agree to receive, for himself or for another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such Councillor doing or forbearing to do any official act in his capacity as a member of the Council,

(*b*) whether any member of the Colombo Municipal Council did at any time after December 2, 1943, corruptly give, promise or offer to any other Councillor, whether for the benefit of such other Councillor or of another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such other Councillor doing or forbearing to do any official act in his capacity as a member of the Council.

Shortly after the appointment of the Commissioner but before the commencement of the inquiry the Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949, came into operation on August 5, 1949.

The petitioner is a member of the Colombo Municipal Council and was elected Mayor for 1945, 1947, 1948 and 1949. The respondent gave the petitioner formal notice on November 8, 1949, stating that he would hold an inquiry in public on December 6, 1949, into certain allegations that the petitioner had on various dates after December 2, 1943, corruptly given gifts of money to other members of the Colombo Municipal Council for the purpose of inducing them to exercise their respective votes in his favour at the Mayoral elections. That notice set out in detail the various charges against the petitioner, gave the names of the witnesses summoned to prove the charges and specified the documents relied upon to support those charges.

The petitioner moved this Court on November 19, 1949, for the issue of a Mandate in the nature of a Writ of Prohibition prohibiting the respondent from inquiring into the allegations referred to in that notice. When the matter came up for hearing before my brother Gratiaen the following question was reserved by him for the decision of a Divisional Bench.*

"Whether, having regard to the provisions of the Commissions of Inquiry Act, No. 17 of 1948, the Colombo Municipal Bribery Commission (Special Provisions) Act No. 32 of 1949 or any other relevant legislation, it is com-

* See page 30

petent for the Supreme Court to issue a mandate in the nature of a Writ of Prohibition to prohibit a Commissioner appointed by the Governor-General from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by section 5 (1) of the Act of 1949 ".

For the purpose of deciding this question it is desirable to set out in some detail the provisions of the two Acts mentioned above.

By the Commissions of Inquiry Act No. 17 of 1948, the Governor-General is empowered, whenever it appears necessary to him, to issue a Warrant appointing a Commission of Inquiry consisting of one or more members to inquire into and report upon " any matter in respect of which an inquiry will, in his opinion, be in the interests of the public safety or welfare " [(section 2 (1) (*c*).] A Commissioner so appointed is deemed to be a public servant and every inquiry before him is deemed to be a judicial proceeding within the meaning of the Penal Code (section 8). The Commissioner has *inter alia* the power.

(*a*) to summon any person to give evidence or to produce documents ;

(*b*) to examine witnesses on oath or affirmation ;

(*c*) to decide whether the public should be excluded from the whole or any part of the inquiry and

(*d*) to make certain recommendations as to the costs of any person implicated or concerned in the matter under inquiry (section 7).

Any person failing without good reason to give evidence or produce a document as required by the summons is deemed to have committed an offence of contempt against or in disrespect of the authority of the Commissioner (section 11). Every such offence is punishable by a Judge of the Supreme Court " as though it were an offence of contempt committed against or in disrespect of the authority of that Court " (section 9). Every person whose conduct is the subject of inquiry or who is concerned in the matter under inquiry has a right to be represented by a lawyer (section 14). The presumptions arising under section 80 of the Evidence Ordinance are made applicable to the record of the evidence or any part of the evidence given before the Commissioner (section 13).

The Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949, gives the legal consequences of a report made by the respondent as such Commissioner at the close of his inquiry. Section 5 of that Act enacts as follows :—

> Section 5 (1) Where the Commissioner finds at the inquiry and reports to the Governor-General.
>
> (*a*) that any Councillor did at any time after December 2nd 1943, corruptly solicit or receive or agree to receive, for himself or for any other person, any gift, loan, fee, reward or advantage as an inducement to or reward for such Councillor doing or forbearing to do any official act in his capacity as a member of the Council ; or
>
> (*b*) that any Councillor did, at any time after December 2nd 1943, corruptly give, promise or offer to any other Councillor, whether for the benefit of that other Councillor, or of another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such other Councillor doing or forbearing to do any official act in his capacity as a member of the Council,
>
> the Governor-General shall cause the findings to be published as soon as may be in the Gazette, and the Councillor against whom the finding was made :—
>
> (i) shall, for a period of five years reckoned from the date of the publication of the finding in the Gazette, be disqualified from being registered as a voter or from voting at any election of members of any public body or from being elected, or from sitting or voting, as a member of any public body ; and
>
> (ii) shall, if he is a member of the Council at the date of the publication of the findings in the Gazette, vacate his seat as such member with effect from that date.
>
> Section 5 (2).....
>
> Section 5 (3) Every finding of the Commissioner referred to in, and published as required by, the preceding provisions of this section shall have effect as therein provided, notwithstanding anything in any other law, and shall not be called in question in any Court."

It will thus be seen that a Commission of Inquiry as the present Commission is one created by the Commissions of Inquiry Act No. 17 of 1948 and the members of that Commission are appointed by the Governor-General by virtue of the powers vested in him under that Act. If that Act were not on the Statute Book the present Commission of Inquiry could not have come into existence. The respondent, as Commissioner, has to inquire into various allegations of bribery and for that purpose he has to examine witnesses on oath or affirmation and reach a decision on such evidence with regard to the allegations made against the petitioner. The petitioner is entitled to be represented by a lawyer at the inquiry. At the close of the inquiry the respondent has to report his finding to the Governor-General. It is true that the respondent is not expected to make any order in his report affecting the legal rights of the petitioner. It is, in fact, rendered unnecessary in view of section 5 (1) of the Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949, which states in clear terms that the Governor-General " shall "

cause the finding to be published "as soon as may be" in the Gazette, if the finding is adverse to the petitioner, and that on such publication the petitioner should be subject to the disqualifications set out in that section. An adverse finding of the Commissioner, therefore, results necessarily in affecting the legal rights of the petitioner. For the above reasons, I am of opinion that the respondent is a person having legal authority to determine a question affecting the rights of the petitioner and having the duty to act judicially. Following the decision in *The King vs. The Electricity Commissioners* (1924) 1 King's Bench Division 171, I would answer in the affirmative the question reserved for our decision.

WINDHAM, J.

I agree and have nothing to add.

GRATIAEN, J.

I agree.

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*Present:* GRATIAEN, J.

## MAYOR OF COLOMBO vs. COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER

*S. C. 564—Application for a Writ of Prohibition on Mr. M. W. H. de Silva, K.C.*

*Argued on:* 25th November, 1949.
*Decided on:* 28th November, 1949.

*H. V. Perera, K.C.*, with *S. Nadesan, D. S. Jayawickreme, C. S. Barr Kumarakulasinghe* and *K. C. Nadarajah*, for the petitioner.

GRATIAEN, J.

One of the preliminary questions arising for consideration in this matter is of such importance as to require, in my opinion, an authoritative decision of the Supreme Court before I proceed to deal with the application on its merits.

The petitioner is a member of the Municipal Council of Colombo and was elected to the office of Mayor for the years 1945, 1947, 1948 and 1949. On 24th May, 1949 the Governor-General of Ceylon, acting under the authority of the powers vested in him by the Commissions of Inquiry Act No. 17 of 1948, appointed the respondent, Mr. M. W. H. de Silva, K.C., to be a Commissioner for the purpose of inquiring into and reporting to His Excellency on certain specified questions connected with the alleged prevalence of bribery and corruption among the members of the Colombo Municipal Council. The respondent was authorised and empowered by the terms of his appointment "to hold all such inquiries and make all such investigations as might appear to him to be necessary for the purpose". He was also required to transmit his report to the Governor-General "as early as possible".

As far as I can judge, the Governor-General's power to appoint the respondent a Commissioner for the purposes which I have indicated is derived from the Act of 1948; on the other hand, the respondent's duty to investigate and to report on the matters submitted to him is not imposed on him by any Act of Parliament. It directly emanates from and is regulated by the terms of his particular appointment as Commissioner, although the Act does clothe him with certain powers to assist him in the performance of his duty. Learned Counsel for the petitioner concedes, I think, that if matters had stood in this way the functions with which the respondent was charged could not properly have been described as judicial or quasi-judicial functions over which this Court could exercise any controlling jurisdiction. Whatever other remedy may or may not have been available to a person who claims to be dissatisfied with the procedure adopted by the respondent in executing his commission, an application for a writ in the nature of *prohibition* or *certiorari* would not have been appropriate for the purpose of challenging that procedure.

Learned Counsel submits, however, that although this is the legal position in cases where a person normally acts as a Commissioner appointed by the Governor-General supervening legislation which has come into operation since the date of the respondent's appointment has altered the scope of his status and functions. Before the respondent entered upon his investigation of the matters on which he was required to submit his report to the Governor-General, Parliament passed the Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949. Section 5 of the Act provides as follows:—

"5. (1) Where the Commissioner finds at the inquiry and reports to the Governor-General—

(*a*) that any Councillor did at any time after December 2, 1943, corruptly solicit or receive or agree to receive, for himself or for any other person, any gift, loan, fee, reward or advantage as an inducement to or reward for such Councillor doing or forbearing to do any official act in his capacity as a member of the Council; or

(*b*) that any Councillor did, at any time after December 2, 1943, corruptly give, promise or offer to any other Councillor, whether for the benefit of that other Councillor, or of another person, any gift, loan, fee, reward or advantage as an inducement to or reward for such other Councillor doing or forbearing to do any official act in his capacity as a member of the Council,

the Governor-General shall cause the finding to be published as soon as may be in the Gazette, and the Councillor against whom the finding was made—

(*i*) shall, for a period of five years reckoned from the date of the publication of the finding in the

Gazette, be disqualified from being registered as a voter or from voting at any election of members of any public body or from being elected, or from sitting or voting, as a member of any public body; and

(ii) shall, if he is a member of the Council at the date of the publication of the finding in the Gazette, vacate his seat as such member with effect from that date.

(2) Where any member of the Council, by reason of the operation of the preceding provisions of this section, vacates his seat as such member, the provisions of the Municipal Councils Ordinance, No. 29 of 1947, read with the Local Authorities Election Ordinance, No. 53 of 1946, shall apply for the purpose of filling the vacancy so occurring in like manner as those provisions would have applied if such member had resigned his seat.

(3) Every finding of the Commissioner referred to in, and published as required by, the preceding provisions of this section shall have effect as therein provided, notwithstanding anything in any other law, and shall not be called in question in any Court."

Here again one finds that the Act of 1949 does not directly vest the respondent with additional statutory powers; the Legislature has however thought fit, in its wisdom, to declare that any Municipal Councillor found by the respondent to have committed a corrupt act as specified in Section 5 shall automatically be deprived of certain civic rights as soon as the relevant findings in the respondent's report have been caused by the Governor-General to be published in the Government Gazette. Indeed, the Act seems to give the Governor-General no discretion to decide whether or not such findings shall be made public.

It is argued for the petitioner that by reason of this subsequent legislation the respondent's functions, in so far as they are directed towards the investigations of the question whether any particular Municipal Councillor has acted corruptly in a manner contemplated by Section 5 of the Act of 1949, have in truth become judicial or quasi-judicial functions in view of the statutory consequences which would inevitably arise from the publication of a finding adverse to the Councillor concerned. Learned Counsel contends that in this state of things the respondent has "legal authority"—directly or indirectly —"to determine questions affecting the rights of subjects" (*per* Atkin L.J., in *Rex vs. Electricity Commissioners*, (1924) 1 K. B. 171, and that a writ of *certiorari* or a writ of prohibition may therefore issue from this Court should it be established that the respondent has either exceeded his so-called "jurisdiction" or, in exercising that "jurisdiction", violated in some way the fundamental principles of natural justice.

In the present case the respondent has given the petitioner formal notice of his intention to hold an inquiry in public on 6th December, 1949 into twenty-seven separate allegations to the effect that the petitioner, being a Member of the Colombo Municipal Council, had on various dates corruptly given gifts of money, amounting in the aggregate to over Rs. 60,000, to other Councillors for the purpose of inducing them to exercise their respective votes in his favour at Mayoral Elections. The petitioner complains that for certain reasons deposed to in his affidavit "it would be contrary to all principles of natural justice for the respondent to sit in judgment over him and the respondent has divested himself of jurisdiction to inquire into the allegations against the petitioner". In other words, as learned Counsel summarised his client's contention, the inquiry proposed to be held on 6th December would be "a mock trial with the verdict predetermined". In these circumstances the petitioner asks this Court to issue a mandate in the nature of a writ of prohibition prohibiting the respondent from inquiring into the allegations against the petitioner.

The general principle involved with regard to the jurisdiction of this Court in a matter of this nature is one of public importance and I consider it desirable that the question should be decided by a fuller Bench. I accordingly make order under Section 48 of the Courts Ordinance referring the following question for the decision of a Bench of three judges:—

"Whether, having regard to the provisions of the Commissions of Inquiry Act, No. 17 of 1948, the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949 or any other relevant legislation, it is competent for the Supreme Court to issue a mandate in the nature of a writ of prohibition to prohibit a Commissioner appointed by the Governor-General from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by Section 5 (1) of the Act of 1949".

For the purpose of deciding on the number of Judges to whom this question should be referred, I have thought it my duty to consult my Lord the Chief Justice, and this part of my order has been made with his concurrence.

If the answer to this general question which I have formulated be answered in the negative, the petitioner's application will stand refused. If the answer be in the affirmative, I shall proceed to consider the application on its merits for the purpose of deciding whether or not a rule *nisi* should issue from this Court as prayed for by the petitioner.

Let a copy of this order be forwarded to the Attorney-General with a request that he be good enough to arrange for an officer of his Department to assist the Court as *amicus curiae* when the question referred by me to a Bench of three Judges comes up for consideration.

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*Present:* GRATIAEN, J.

## ABEYASEKERE vs. KOCH

*S. C.* 97—*C. R. Colombo* 17119
*Argued on:* 29th November, 1949
*Decided on:* 13th December, 1949

*Landlord and tenant—Rent Restriction Ordinance—House reasonably required for landlord's occupation.—When should tenant's claim be preferred.*

**Held:** That the claims of a tenant, who has failed in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord, whose family does at least possess a house in which they can continue to live.

*S. J. Kadirgamar*, for the defendant-appellant.
*M. M. Kumarakulasinghe* with *J. M. Jayamanne*, for the plaintiff-respondent.

GRATIAEN, J.

The plaintiff, who is a school-teacher employed at Weligama, rented his bungalow in Nugegoda in March, 1946, to the defendant, who is a clerk. The house has been occupied since that date by the defendant, his wife and child.

On 25th July, 1948, the plaintiff gave the defendant three calendar months' notice to quit the house, explaining that he required it for his wife and child "who frequently fall ill here, the climate disagreeing with them". There is no evidence, however, that the climate in Nugegoda was any more salubrious than that in Weligama. The truth appears to be that although the plaintiff's duties required him to remain in Weligama, he was anxious to make arrangements for the education in Colombo of his daughter who was now of school-going age.

The defendant protested on 10th September that he could not vacate the house as he had not succeeded in finding suitable alternative accommodation. The plaintiff replied that he doubted the genuineness of the defendant's attempts to look for another house but, as far as I can judge, the defendant's *bona fides* in this respect was neither challenged nor disproved at the trial. Indeed, the plaintiff's proctor suggested the names of certain other landlords who might possibly accept the defendant as a tenant, but the defendant has established that this was not correct.

In November, 1948, the plaintiff instituted the present action for ejectment. The provisions of the Rent Restriction Ordinances admittedly apply to the premises in question, and the burden therefore lay on the plaintiff to prove that he reasonably required the house for the occupation of his wife and child. In deciding this issue, it is of course necessary to consider the relative claims of both parties to the contract of tenancy.

The learned Commissioner of Requests decided the case in favour of the plaintiff, and the present appeal is from his judgment. I propose to adopt as substantially correct the learned Commissioner's findings of fact; as to the inferences to be drawn from these facts, an appellate tribunal is placed in no less advantageous a position than the Court below to arrive at a correct conclusion.

In my opinion there is one circumstance which tips the balance in favour of the defendant, and to which insufficient weight has been given by the learned Commissioner. Whereas on the one hand the tenant had signally failed in his endeavours to find alternative accommodation for himself and his family, the landlord has been more fortunate. Shortly after giving notice to quit, the landlord has succeeded in taking on rent a house in Talangama for his wife and daughter, and from there the child, who is a Roman Catholic has attended St. Bridget's Convent as a student. Arrangements have been made for taking the child to and from school each day, and although these are not ideal they seem to me to be not inadequate having regard to the difficulties of the present time. Certain minor inconveniences which the plaintiff complains of are surely insignificant when they are compared with the hardships to which the defendant and his family would be subjected if they were ejected from their house with nowhere else to go. In my opinion the claims of a tenant who has failed, in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord whose family does at least possess a home in which they can continue to they can continue to live. It was suggested at the trial that the defendant could take up residence in the house at Talangama which the plaintiff's wife and daughter now occupy. If that could have been definitely arranged, the defendant would have been unreasonable in refusing to vacate the house in Nugegoda. No such proposal was however made to the defendant before the trial commenced, and at the trial the owner of the Talangama house was extremely non-committal on the point.

In my opinion the plaintiff has failed to establish his claim to be restored to possession of the house in Nugegoda. I therefore allow the appeal and enter decree dismissing the plaintiff's action. The defendant is entitled to his costs of appeal, but as he failed in the lower Court to establish his claim in reconvention in regard to alleged "excess" rent, each party will bear his own costs of trial.

*Appeal allowed.*

*Present :* GRATIAEN, J.

## THE MAYOR OF COLOMBO vs. THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER

*S. C. 564—Application for a Writ of Prohibition on Mr. M. W. H. de Silva, K.C.*

*Argued on :* 25th November, 1949
*Decided on :* 5th December, 1949

*Writ of Prohibition—Commission appointed under Commissions of Inquiry Act, 1948 to inquire and report on prevalence of bribery and corruption among members of Colombo Municipal Council—Preliminary investigation by Commissioner—Allegations that petitioner, who was a Councillor had on several occasions corruptly given money or other gifts to other Councillors to vote for him at Mayoral elections—Inquiry into allegations against some Councillors who received bribes from petitioner already taken place in his absence—No formal notice of allegations implicating petitioner given—No opportunity given to petitioner for legal representation at such inquiries—Procedure adopted by Commissioner—Principles of natural justice—The Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949.*

In pursuance of the provisions of the Commissions of Inquiry Act, 1948 the Governor-General appointed the Respondent to investigate and report:—

(*a*) as to whether any member of the Colombo Municipal Council had corruptly solicited, received or agreed to receive or on the other hand had corruptly given promised or offered any gifts loan fee or reward or other advantage as an inducement to influence official action.
(*b*) as to what steps should be taken to prevent or check such bribery and corruption in the future.

After the appointment of the Respondent, but before the commencement of the inquiry, The Colombo Municipal Council Bribery Commission (Special Provisions) Act No. 32 of 1949 came into operation. This enactment *inter alia* laid down in section 5 the consequences which would inevitably arise from the publication of a finding adverse to the councillor concerned.

The statutory powers of the respondent are wide and varied, but the procedure he must follow in executing his commission, is nowhere laid down except that section 14 of the Act of 1948 requires him to permit any person whose conduct is the subject of inquiry to be legally represented at the whole of an inquiry.

At the preliminary stages the respondent appears to have called for and collected such information as he could from every available source for the purpose of deciding whether any allegation of corruption against any Councillor merited investigation at all. He decided to have this information *in camera* and in some cases an oath or affirmation was administered before recording the statements.

At the next stage of his investigations he appears to have decided to hold a formal inquiry into the allegations of corruption against each particular Councillor, whose conduct in his opinion called for a full investigation, permitting legal representation as required by section 14 of the Act of 1948.

The respondent called upon the petitioner to meet allegations that he had on 27 separate occasions corruptly given sums of money or other gifts to various Councillors for the purpose of inducing them to vote in his favour at Mayoral elections.

The petitioner thereupon applied to the Supreme Court for a Writ of Prohibition on the Respondent to prevent him from proceeding with the inquiry. In his affidavit in support of the application the petitioner averred *inter alia*

(*a*) that the respondent had already completed inquiries regarding allegations of corruption against some Councillors in which the petitioner was implicated.
(*b*) that the respondent failed to give him any formal notice of the nature of the allegations that implicated him and thereby had no opportunity to be represented by Counsel or to participate in those inquiries.
(*c*) that the procedure adopted by the Respondent had made it impossible for him to hold a fair and unbiassed inquiry into the allegations against the petitioner.
(*d*) that he verily believed that the Respondent had already recorded his findings on the allegations relating to the transactions in which other Councillors are accused of having received bribes from him.

**Held:** (i) that the petitioner had failed to make out a *prima facie* case to justfy a rule *nisi* to prevent the Respondent from holding an inquiry into the allegations of corruption which he has been called upon to meet.
(ii) That no grounds, supported by legally admissible evidence, existed for apprehension that the principles of natural justice and fairplay have or will be violated or that the Respondent had pre-judged the case.
(iii) That the procedure adopted by the Respondent cannot be said to be improper or unjust.

*Per* GRATIAEN, J.—" In cases of this nature a superior Court is not so much concerned with the question whether the party to the proceedings believes that the pending investigation may turn out to be what the petitioner's Counsel describes as " a mock trial with the verdict pre-determined ". The real question, as Swift J. pointed out in *Rex vs. Essex Justices*, (1927) 2 K. B. 475, *is whether a reasonable man might apprehend that the tribunal may not be impartial and unbiassed.*

Cases referred to : *Rex vs. Essex Justices*, (1927) 2 K. B. 475.
*Rex vs. Sussex Justices*, (1924) 1 K. B. 256.
*General Council of Medical Education vs. Spackman*, (1943) A. C. 627.
*Board of Education vs. Rice*, (1911) A. C. 179.
*Rex vs. Local Government Board ; ex parte Arlidge*, 83 L. G. Q. B. 86 at pgs. 107 to 110.
*Local Government Board vs. Arlidge*, (1915) A. C. 120.

*H. V. Perera, K.C.*, with *S. Nadesan, D. S. Jayawickrene, C. S. Barr Kumarakulasinghe* and *K. C. Nadarajah*, for the petitioner.

GRATIAEN, J.

This matter was fully argued before me on 25th November, 1949, by learned Counsel who appeared in support of the petitioner's application. Two questions arose for my decision :

(1) Whether, in view of relevant legislation under which the respondent has been appointed to investigate and report on certain matters of public interest connected with the alleged prevalence of bribery and corruption among the members of the Colombo Municipal Council since 2nd December, 1943, it is competent for this Court in an appropriate case to issue a mandate in the nature of a Writ of Prohibition to prohibit him from holding an inquiry into an allegation that a particular Councillor had acted corruptly in a manner specified by Section 5 (1) of the Bribery Commission (Special Provisions) Act No. 32 of 1949.

(2) Whether the facts set out in the petitioner's affidavit filed in these proceedings afford *prima facie* grounds for holding that the respondent has divested himself of jurisdiction to inquire into allegations that the petitioner had on twenty-seven separate occasions corruptly given sums of money or other gifts to various Councillors for the purpose of inducing them to exercise their respective votes in his favour at Mayoral elections.

The first of these questions was one of sufficient difficulty and importance in my opinion to call for a decision of a fuller Bench. That question has now been answered by a Divisional Court of three Judges in the affirmative. * It now remains for me to consider whether, in the circumstances of the present case, I would be justified in issuing a rule *nisi* against the respondent on the grounds relied on by the petitioner. For this purpose I must, of course, assume for the time being that the relevant and admissible facts sworn to by the petitioner are true in substance and in fact.

It is not suggested that when the respondent originally entered upon his commission he lacked jurisdiction to hold an inquiry into allegations of corruption in respect of which any single adverse finding would, upon due publication in the Government Gazette, result in the petitioner being deprived of important civic rights. The gist of the petitioner's complaint, however, is that the procedure which the respondent has so far adopted in the discharge of his functions has been such that it is now impossible for the respondent to hold a fair and unbiassed inquiry into the twenty-seven allegations of corruption framed against the petitioner. In that state of things, it is contended, it would be contrary to all principles of natural justice for the respondent to sit in judgment over the petitioner. There is no doubt in my mind that should there be substance in this complaint, this Court should not hesitate to prevent a person charged with functions of a judicial nature from exercising them in an atmosphere in which there is a reasonable likelihood of his being biassed against the person over whom he proposes to sit in judgment. In cases of this nature a superior Court is not so much concerned with the question whether the party to the proceedings believes that the pending investigation may turn out to be what the petitioner's Counsel describes as "a mock trial with the verdict pre-determined". The real question, as Swift J. pointed out in "*Rex vs. Essex Justices*" (1927) 2 K. B. 475 *is whether a reasonable man might apprehend that the tribunal may not be impartial and unbiassed.* If in the present case the earlier procedure adopted by the respondent in the course of his investigations has already placed him in such a position as to create *a reasonable suspicion* that justice may not be done to the petitioner, it follows that the respondent has divested himself of jurisdiction to proceed with the inquiry. "*Rex vs. Sussex Justices*" (1924) 1 K. B. 256. That "justice must not only be done but must manifestly and undoubtedly seem to be done" is no doubt a somewhat trite phrase, but as a principle of law it remains an undisputed expression of one of the eternal verities.

Before I proceed to examine the petitioner's complaint, it will be convenient if I first consider the scope of the respondent's functions in relation to the various matters which he has been appointed to investigate. The Governor-General has considered it to be "in the interests of the public welfare" that inquiry should be made

* See page 28 (Edd.)

(1) as to whether any member of the Colombo Municipal Council had either corruptly solicited, received or agreed to receive, *or* on the other hand had corruptly given, promised or offered any gifts, loan, fee, reward or other advantage as an inducement to influence official action; (2) as to what steps should be taken to prevent or check such bribery and corruption in the future. The respondent was selected as a suitable person to carry out this comprehensive investigation, and he was authorised "to hold all such inquiries and make all such investigations into the aforesaid matters as may appear to him to be necessary" for the purpose. It is very apparent that the respondent has been entrusted with duties involving a wide range of investigation standing in sharp contrast to the scope of strictly judicial duties which arise when a Court of law, with no previous knowledge of the facts, has to adjudicate upon clear cut issues submitted for its decision by parties to contentious litigation. The Commissions of Inquiry Act of 1948 in terms of which the respondent was appointed vests him with ample powers to summon witnesses and, if he chooses to do so, to require evidence before him to be recorded on oath or affirmation. Statutory provision is also introduced to protect him from interference or obstruction in the performance of his functions, and offences of "contempt" committed in disrespect of his authority are expressly made punishable by law. Various other means have been devised to compel members of the public to assist him to carry out his investigations as expeditiously as possible. While his statutory powers are wide and varied, the procedure which he must follow in executing his commission is, however, nowhere laid down, except that Section 14 of the Act requires him by necessary implication to permit any person "whose conduct is the subject of inquiry or who is in any way implicated or concerned in the matter under inquiry" to be legally represented at the whole of an inquiry. In all other respects, if I may adopt the language of Lord Chancellor Simon in "*General Council of Medical Education vs. Spackman*" (1943) A. C. 627 he is "not a judicial body in the ordinary sense, and is *master of his own procedure*". Indeed, Section 7 (*d*) of the Ordinance does not even require him to be bound by strict rules of evidence. It is true that the later Act of 1949 has, in accordance with the ruling of a Divisional Bench of this Court, vested him with "legal authority to determine questions affecting the rights of subjects", and imposed on him "the duty to act judicially". Parliament has nevertheless been content not to place any additional fetters on his discretion nor has it chosen to regulate the procedure which he should adopt when he inquires into any specific allegations of corruption against a Councillor.

What then is the resulting position? Although the Legislature is silent on the point, does the law charge the respondent with any special duty in regard to the manner in which he should act "judicially" when he enters upon an inquiry into allegations against the petitioner or any other Councillor? Certain general principles affecting the question have been laid down from time to time by the House of Lords in England, and serve as an authoritative guide for tribunals in other countries in which the same ideals of "natural justice" are enshrined. As Lord Loreburn said in "*Board of Education vs. Rice*" (1911) A. C. 179 the respondent "*must act in good faith* and *listen fairly* to both sides (if there be two sides to a dispute) *for that is a duty lying upon everyone who decides anything*". In the words of the dissenting judgment of Lord Sumner (then Hamilton L.J.) in "*Rex vs. Local Government Board; ex parte Arlidge*" 83 L. J. Q. B. 86 at pages 107 to 110 the procedure of a tribunal charged with judicial functions such as those of the respondent "must necessarily be judged by standards different from those of ordinary Court of Justice". He must give the party who may be affected by the decision "the fullest opportunity of knowing what he has to meet and of meeting it.....and of correcting or contradicting the case against him put at its highest by the witness at the inquiry". Lord Sumner's view was upheld by the House of Lords. *Vide* "*Local Government Board vs. Arlidge*" (1915) A. C. 120. The tribunal "must act judicially", said Lord Haldane, "in the sense that it must deal with the question referred to it *without bias*, giving to each party an opportunity of presenting its case adequately. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every tribunal must be the same. In the case of a Court of law tradition has prescribed certain principles to which in the main the procedure must conform. *But what that procedure is to be in detail must depend on the nature of the tribunal*.....When therefore Parliament entrusts (a tribunal other than a Court of law) with judicial duties, *Parliament must be taken in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and which is necessary if it is to be capable of doing its work efficiently*". Referring to the earlier case of "*Board of Education vs. Rice*" (1911) A. C. 179, Lord Haldane

thought that the Board was entitled to obtain information in any way it thought best "provided that it gave a fair opportunity to a party to the controversy to correct or contradict any relevant prejudicial statement". The opinion of Lord Shaw in *the Arlidge case* is no less apposite. The tribunal which is not a Court of law in the ordinary sense "must do its best to act justly and to reach just ends by just means", he said. "If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour with lawyers. But that the judiciary should presume to impose its own methods on (other tribunals set up by Parliament) is a usurpation, and the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded".

In *Spackman's case* (1943) A. C. 627, the House of Lords again had occasion to make a pronouncement on the duty imposed on a tribunal, vested with legal authority to affect the rights of parties, to observe the principles of "natural justice" in the sense in which the term is used "in contrast with any formal or technical rule of law or procedure". Lord Wright, following the observations of Lord Selbourne in an earlier case, adopted the view that "in the absence of special provisions as to how the tribunal is to proceed the law will imply no more than that *the substantial requirements of justice will not be violated.* It must give the party who may be affected by its decision an opportunity of being heard and of stating his case. It must give him notice when it will proceed with the matter, and it must act honestly and impartially, and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to *the* essence of justice". As Lord Wright put it, "*the essential requirements of justice and fair play*" must be observed.

So far as I can understand the case of the petitioner in the present application, the procedure adopted by the respondent and criticised by the petitioner as objectionable is as follows. At the preliminary stages of his investigations, there were of course no parties to a dispute in the sense which is familiar in litigation proper. It, therefore, became necessary for the respondent to call for and collect such information as he could from every available source for the purpose of deciding whether any allegations of corruption which might be made against any particular Councillor merited investigation at all. At this stage he decided in the exercise of his undoubted discretion to receive information *in camera* and in some cases, apparently, an oath or affirmation was received before their statements were recorded. I cannot agree that either this process or the refusal to permit an informant or a witness to be legally represented during what might be described as the exploratory period of the respondent's investigation was in any sense improper or unjust. At the next stage of his investigations he decided to hold a formal inquiry into the allegations of corruption against each particular Councillor whose conduct in his opinion called for a full investigation. Some of these inquiries have already been held, and in each instance the Councillor concerned, against whom an adverse decision might result in a deprivation of civil rights, was not denied the opportunity of legal representation as required by Section 14 of the Act of 1948. In some cases, apparently, an allegation implicated two Councillors, one as the corrupt receiver and the other as the corrupt giver of a bribe. In regard to such an allegation, it became necessary to record a specific and, in my judgment, a separate decision as to the alleged corrupt intentions of the alleged giver and the alleged receiver respectively of the alleged bribe. The inference which I draw from the facts deposed to in the petitioner's affidavit is that in these instances the respondent had decided to give each "accused" person (if I may use that term) an opportunity of meeting the imputation on his own character without the embarrassment of having the inquiry complicated by a contemporaneous investigation into the alleged motives of the "co-accused". Whether this be the ideal procedure to adopt in such a case, it is not for me to say but for the respondent to decide in the exercise of his discretion. All that I need hold, and all that I do hold, is that I cannot see how this procedure can be held to violate the principles of natural justice which the respondent is bound by law and by the dictates of his own conscience to observe. Indeed, if I may presume to say so, it is fairly clear that, in a hypothetical case, Councillor A might well consider it highly prejudicial to his interests if, in meeting an allegation that he had received a single bribe from Councillor B, he were tried together with Councillor B who has to face not only the charge of bribing Councillor A but additional charges of having systematically bribed other Councillors

as well. There is no provision for the case of each Councillor to be tried by a separate tribunal.

In the present case the petitioner has been called upon to meet twenty-seven separate allegations of corruption. Some of these have in a sense been investigated in his absence (whether finally or not I do not know), but only, as far as I can see, with special reference to the motives of the alleged receiver of an alleged bribe. It has been argued for the petitioner that he was at any rate "implicated or concerned in" the matters under inquiry in these earlier proceedings within the meaning of Section 14 of the Act of 1948, and that he was therefore entitled to be represented by his own lawyers at those inquiries. He complains that he was not given formal prior notice by the respondent of the nature of any of the allegations which "implicated" him, and that he therefore had "no opportunity to be represented by Counsel or to participate in" those inquiries where he has been implicated. The petitioner does not go so far as to assert that he did not *in fact* have knowledge from some other source that inquiries were being held into the conduct of other Councillors when he is alleged to have bribed. Speaking for myself, I regret that I find it very difficult to satisfy myself that the procedure which the respondent has chosen to select for discharging the Commission entrusted to him had not become clear to the petitioner at a very early stage, and that the desirability or otherwise of applying for permission to be represented on each of those earlier occasions had not been submitted for the consideration of the very distinguished and competent legal advisers in charge of his case. The petitioner's affidavit is not communicative on this point.

The petitioner states in his affidavit that he "verily believes that the respondent has already recorded his findings on the allegations relating to the transactions" in which other Councillors are accused of having received bribes from him. If this statement of belief could be construed *as a factual assertion* that the respondent has already arrived at an *ex parte* decision that the petitioner is guilty of any of the twenty-seven allegations which he has been called upon to meet, I would not have hesitated to issue a rule *nisi* against the respondent, for in that event the essential pre-requisites of impartiality in the pending inquiry must necessarily be ruled out, and the case would *prima facie* resolve itself not so much into a question of "reasonable suspicion" as of a certainty of bias. The affidavit however falls very short of making any such assertion, even if the petitioner's mere statement of what he believes, *without any indication of the grounds of his belief*, had any relevancy at all.

In my opinion the petitioner had not made a *prima facie* case to justify a rule *nisi* to prevent the respondent from holding an inquiry into the allegations of corruption which he has been called upon to meet. There is no reason of any kind, on the basis of the facts submitted to this Court, for holding that he will not be given the fullest opportunity of meeting these charges at a properly conducted inquiry, at which he may be legally represented in accordance with his statutory rights. No grounds, supported by legally admissible evidence, exist for apprehension that the principles of natural justice have or will be violated, or that the respondent has pre-judged the case. The respondent has been entrusted by the terms of his commission with onerous duties, and Parliament has thought fit to superimpose on his functions the responsibility, should the necessity arise, of making decisions which would automatically affect the civic rights of persons selected by their constituents to administer the affairs of an impotrant local authority. Nothing has been urged before me which entitles me to suspect that the confidence reposed in the respondent by the Governor-General and presumably shared by the Parliament which passed the Act of 1949 has been abused. Nor do I contemplate that there is a risk that the decision of the respondent, in dealing with the petitioner's case, would be influenced by the evidence of witnesses whom the petitioner will not be permitted to cross-examine at the pending inquiry. The apprehensions of bias which the petitioner claims to entertain are not based on substantial grounds. I therefore refuse his application for a mandate in the nature of a writ of prohibition against the respondent.

*Application refused.*

*Present :* WIJEYEWAEDENE, C.J.

## PONNIAH KUMARESU *et. al.* vs. THE DIVISIONAL REVENUE OFFICER, VAVUNIYA

*S. C. Nos.* 1390-1392/1948 ; *M. C. Vavuniya* 21374

*Argued on :* 18th January and 3rd February 1949.
*Decided on :* 15th February, 1949.

*Criminal Procedure Code—Sections 42 and 126A—Order remanding accused—Accused produced in Court before expiry of 15 days and order remanding again—Warrant of detention—Escape of accused—Immediate unsuccessful search—Accused found after four days—Arrest of accused by Fiscal Officers—Resistance by accused—Rescue of arrested person by others—Causing hurt to Fiscal Officers—Charges under sections 220A and 323 of Penal Code—Legality of arrest—Applicability of sections 92(1) of the Penal Code—Self-defence.*

On 15-9-47, the 1st accused was produced in Court on a charge of causing hurt to two constables and was remanded till 19-9-47. On this latter day he was produced in Court and was again remanded till 3-10-47. Shortly after the Magistrate signed the warrant of detention on 19-9-47 and the Fiscal's Marshall had entrusted the 1st accused to his Officer, the 1st accused escaped. The Fiscal's officer pursued him immediately and searched for him unsuccessfully. This was reported to the Fiscal's Marshall who handed the warrant of detention to his officer directing him to search for and arrest the accused. The search was continued by two officers till the 1st accused was found eventually on 23-9-47.

Despite resistance, the two officers, who were not wearing their uniforms, handcuffed the 1st accused whereupon one of them was stabbed by the 2nd accused at the instigation of the 3rd accused. The 1st accused bit both officers and all the accused ran away.

The accused were charged under 3 counts :—

(1) the 1st accused under section 220 A of the Penal Code for offering resistance to the lawful apprehension of himself by the Fiscal's Officers upon a warrant of detention.
(2) the 2nd and 3rd accused under section 220 A of the Penal Code for rescuing the 1st accused from the custody of the Fiscal's Officers.
(3) all the 3 accused under section 323 for voluntarily causing hurt to the Fiscal's Officers to prevent them from discharging their duties as public servants.

**Held :** (i) that the order of detention made by the Magistrate had the effect of making the Fiscal's Officers' custody a lawful custody on 19-9-47, though the detention of the 1st accused in custody after the expiry of 15 days from 15-9-47 would have been unlawful.

(ii) that the arrest on 23-7-47 is not the arrest contemplated by section 42 of the Criminal Procedure Code and the officers had exceeded their authority in attempting the arrest of the 1st accused on that day.

(iii) that as the attempted arrest on 23-9-47 could not have caused the 1st accused reasonable apprenhension that he would be killed or grievously hurt, if he did not resist the arrest, section 92 (1) of the Penal Code is applicable to him.

(iv) that as the 2nd and 3rd accused could not be said to have known that the 1st accused escaped from the custody of the Fiscal's officer who attempted to arrest him, they may claim to have exercised the right of self-defence.

(v) that in stabbing the Fiscal's officer they exceeded the right of self-defence and should be held guilty under section 325 of the Penal Code.

*K. C. Nadarajah*, with *M. Markhani*, for the first accused-appellant.
*N. Kumarasingham*, with *V. Ratnasabapathy*, for the second and third accused-appellants.
*T. S. Fernando, Crown Counsel*, with *L. B. T. Premaratne, Crown Counsel*, for the Crown.

WIJEYEWARDENE, C.J.

There are three counts in this case. On the first count the first accused was charged under section 220A of the Penal Code with "intentionally offering resistance to the lawful apprehension of himself by S. Manickam, Fiscal's Officer, upon a warrant of detention issued by the Magistrate's Court of Chavakachcheri in case No. 25604". On the second count the second and third accused are charged under section 220A with "rescuing the first accused from the custody of S. Manickam, Fiscal's Officer" in whose custody the first accused was lawfully detained. On the third count all the three accused are charged under section 323 with voluntarily causing hurt to S. Manickam and S. Thambayah Fiscal's Officers "with intent to prevent the said public servants from discharging their duties as public servants to wit in re-arresting" the first accused.

On September, 15, 1947, a Police Officer made a report to Court informing the Magistrate that the first accused and another obstructed two Police Constables who went to arrest an accused in M. C. Chavakachcheri 25041 and caused hurt

to the two constables. The first accused was brought to Court by the Police Officer and the Magistrate acting under section 126A (2) of the Criminal Procedure Code remanded the first accused to Fiscal's custody till September, 19th. The first accused was produced in Court on September, 19th and remanded again to Fiscal's custody till October 3 1947. The Magistrate signed the warrant of detention between noon and 1 p.m., and the Chief Clerk of the Court who is also the Fiscal's Marshal and had the first accused in custody entrusted him to S. Manickam. At about 3 p.m., the first accused told Manickam that he wanted to go out for a call of nature. Manickam removed him from the cell and was taking him out when he escaped. Manickam pursued him immediately and searched for him in a jungle towards which he ran. Failing to find him Manickam reported the matter to the Fiscal's Marshal about 5 p.m., when the latter handed him the warrant of detention and asked him to search for and arrest the first accused. Manickam accompanied by Thambayah, another Fiscal's Guard, and Panchadcharam, a labourer employed in the Courts, continued the search and ultimately found the first accused on September, 23rd, at Omanthai, in a Railway waggon used as a waiting room. In spite of the resistance offered by the accused, Manickam and Thambayah put a handcuff on each hand of the accused. The second accused stabbed Manickam on being instigated to do so by the third accused who said, " There they are handcuffing Kumaresu (first accused). Why are you looking on ! Stab him ! " The first accused bit both Manickam and Thambayah and all the accused ran away. When they went to arrest the first accused on September 23rd, neither Manickam nor Thambiayah was wearing his uniform as a Fiscal's Guard.

It was argued by the Counsel for the appellants that the first accused was not in " lawful custody " on September 19th, as the Magistrate had no power under section 126A (2) to extend the detention of the first accused till October 3, 1947. That section authorises " the detention of an accused in the custody of the Fiscal for a term not exceeding fifteen days in the whole " and the Magistrate who had already made an order detaining the first accused from September 15th, to September 19th, could not make a further order detaining him till October 3rd. But, in spite of that, the first accused was, in my opinion, in lawful custody at the time he escaped on September 19. The period of fifteen days contemplated by section 126A had not expired then and the order of detention made by the Magistrate had the effect of making Manickam's custody a lawful custody on September 19th, though the detention of the first accused in Fiscal's custody after the expiry of fifteen days from September 15th, would have been unlawful. Moreover, the Magistrate had not made an order under section 126A (3) and the first accused was, in any event, in the lawful custody of the Court at the time of his escape. In escaping from such lawful custody the first accused committed an offence punishable under section 220A of the Penal Code. He has been charged for that offence in another case and convicted.

The question has to be decided whether the attempted arrest of the first accused on September 23rd, is lawful. The arrest is referred to in the first count as " an apprehension by S. Manickam, Fiscal's Officer, upon a warrant of detention ". No doubt section 42 of the Criminal Procedure Code empowers a Fiscal's Officer to pursue and arrest a person escaping from his custody. But the section requires that such Fiscal's Officer should " immediately pursue and arrest " such person. It is true that in the present case Manickam pursued the first accused immediately after he escaped. But that pursuit proved fruitless. Then Manickam returned to the Fiscal's Marshal, took the warrant of detention and, on the directions of the Fiscal's Marshal, made a complaint to the Police " between the 19th, and 23rd. Up to the 22nd, Manickam was " going all over in search of the first accused " and on the 22nd, he got some information which led him to Omanthai. Manickam searched for the first accused in several places in Omanthai and found him last in the Railway waggon. I am unable to hold that this arrest is the kind of arrest contemplated by section 42.

It was argued on behalf of the Crown that, as the escape from lawful custody was a cognizable offence, Manickam could have arrested the first accused in his capacity as a private person. This, of course, is somewhat different from the position set out in the first count which speaks of an arrest upon a warrant of detention. But, apart from that, I do not think the reasoning of the Crown Counsel is sound. The Crown Counsel relies on the words of section 35 of the Criminal Procedure Code which enacts, " Any private person may arrest any person who in his presence commits a cognizable offence ". The section does not state that any private person may arrest any person who in his presence has committed a cognizable offence. This section contemplates an arrest at the time of the commission or immediately afterwards and not some

time afterwards and certainly not four days afterwards.

There is no doubt that Manickam acted in good faith in attempting to arrest the first accused. The first accused knew Manickam very well as the Fiscal's Guard from whose custody he escaped on September 19th. Manickam who had the power to pursue him immediately and arrest him exceeded his authority in attempting the arrest on September 23rd. That attempted arrest could not have caused the first accused a reasonable apprehension that he would be killed or grievously hurt if he did resist the arrest. In these circumstances section 92 (1) of the Penal Code is applicable to him. I find him guilty of voluntarily causing hurt.

The second and third accused cannot be said to have known Manickam as the Fiscal's Guard from whose custody the first accused had escaped. I think they may claim to have exercised the right of private defence. Moreover, in stabbing Manickam they have exceeded the right of private defence and I find them guilty under section 325 of the Penal Code.

I set aside the convictions appealed against. I convict the first accused under section 314 and sentence him to three months' rigorous imprisonment. I convict the second and third accused under section 325 and sentence each of them to one month's rigorous imprisonment.

*Convictions altered.*

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*Present :* BASNAYAKE, J.

## BISONA vs. JANGA & OTHERS

*S. C.* 135—*C. R. Matale* 9805

*Argued and decided on :* 23rd November, 1948.

*Kandyan Law—Child inheriting property from mother—Child predeceasing father who was married in deega—Does the father inherit the child's estate.*

Held : That a deega married widower is entitled to only a life interest in the estate of his deceased child.

Cases referred to : *Appuhamy vs. Hudu Banda*, (1903) 7 N. L. R. 242.
*Ranhottia vs. Bilinda*, (1909) 12 N. L. R. 111.

*Cyril E. S. Perera*, with *T. B. Dissanayake*, for the plaintiff-appellant.
*C. R. Guneratne*, for the defendant-respondents.

BASNAYAKE, J.

This is an action for partition of a land called Gammahegehena of eight nellies kurakkan sowing extent. The plaintiff traces her title by right of purchase to one Samara Vel Vidane who she asserts became entitled to the half-share she claims on the death of his son Janguwa childless and unmarried. Janguwa inherited the interest in question from his mother Dingavie who married Samara Vel Vidane in *deega*.

The question for decision is whether on Janguwa's death his father Samara Vel Vidane became entitled to anything more than a life-interest in his share. I agree with the learned Commissioner of Requests that Samara Vel Vidane had only a life-interest in Janguwa's share and was not entitled to alienate anything more than that interest.

Paragraph 83 of Marshall's Judgment, page 340, states the rule of succession thus :

"If a wife die intestate, leaving a son who inherits her property, and that son die without issue, the father has only a life interest in the property which the son derived from or inherited through his mother. And at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and, failing them, to the son's nearest heirs in his mother's family."

The above statement is apparently based on paragraph 33 of Sawers' Digest of the Kandyan Law wherein the law of Kandyan succession is stated in almost identical terms.

Sawers' view has been followed in the case of *Appuhamy vs. Hudu Banda* (1903) 7 N. L. R. 242 wherein it is held that the *deega* married widower is entitled only to a life interest in the estate of his deceased child. The case of *Ranhottia vs. Bilinda* (1909) 12 N. L. R. 111 deals with succession to acquired property and is therefore not a binding authority on the present question.

The appeal is dismissed with costs.

*Appeal dismissed.*

*Present :* GRATIAEN, J.

## NUGARA vs. RICHARDSON

*S. C.* 155—*C. R. Colombo* 10948
*Argued on :* 28th and 29th November, 1949
*Decided on :* 7th December, 1949

*Rent Restriction Ordinance—Action for ejectment of tenant—Compromise without proceeding to trial—Tenant granted time to vacate of consent—Court relieved of duty to call for proof—Decree entered in terms of compromise—Jurisdiction of Court to enter such decree.*

**Held :** That the limitations placed on the jurisdiction of a Court by the provisions of the Rent Restriction Ordinance in actions for ejectment of tenants by landlords do not in any way fetter the right or duty of the Court to give effect to lawful compromises willingly entered into in a pending action between the parties.

**Cases referred to :** *Barton vs. Fincham*, (1921) 2 K. B. 291.
*Thomas vs. Bawa*, (1945) 46 N. L. R. 215.
*Sabapathy vs. Dunlop*, (1935), 38 N. L. R. 113.

*S. Canagarayar*, with *M. A. M. Hussain*, for the defendant-appellant.
*Ivor Misso*, with *H. B. White*, for the plaintiff-respondent.

GRATIAEN, J.

The appellant was the tenant of a bungalow in Wellawatta to which the provisions of the Rent Restriction Ordinance No. 60 of 1942 admittedly applied. In May 1947 the landlord died, and the respondent, to whom probate was duly issued, administered the estate as executor.

On 6th February, 1948 the respondent sued the appellant in the Court of Requests of Colombo for rent and ejectment. The appellant filed answer setting up various defences under the Ordinance, and the case came up for trial on 15th June, 1948. There can be little doubt that in the normal course of events the Court would have had no jurisdiction to enter judgment in favour of the respondent at the trial except upon proof to its satisfaction of the relevant facts set out in the provisions of Section 8 of the Ordinance of 1942. When a tenant is in possession *and unwilling to give it up*, possession can only be restored to the landlord by order of the appropriate Court, and such an order can only be made after certain facts specified in the Ordinance are proved or admitted to exist. Section 8 restricts to this extent the jurisdiction of the Courts in making orders in the cases of premises to which the Ordinance applies, vide *Barton vs. Fincham* (1921) 2 K. B. 291, where the Court of Appeal decided that, notwithstanding the fact that a tenant had *prior to the institution of action* agreed to vacate the premises on a future date, the Court was not absolved from the duty of calling for proof of the relevant facts prescribed by the analogous legislation in England if the tenant subsequently refused to implement his agreement. An order for ejectment *in invitum* cannot otherwise be made because, as Atkin L.J., pointed out, "parties cannot by agreement give the Courts jurisdiction which the Legislature has enacted they are not to have". Indeed, if the law were otherwise, the very object of the Rent Restriction Ordinance would be defeated.

In the present action, the case did not proceed to trial on 15th June, 1948 because the parties effected a compromise in terms of Section 408 of the Civil Procedure Code. The terms of the compromise were by consent embodied in a decree in the following terms :

> "It is ordered and decreed of consent that the defendant be ejected from premises No. 3 situated at St. Lawrence Road, Wellawatta, Colombo bounded on the North by premises No. 307 Colombo, Galle Road, South by St. Lawrence Road, East by premises No. 5 St. Lawrence Road, Wellawatta and West by Galle Road.
>
> It is further ordered and decreed of consent that the defendant do pay to the plaintiff damages at Rs. 53·33 per mensem from 1-6-48 till defendant is ejected from the premises. If defendant pays each month's damages by the 15th of the following month as from 15-7-48 writs do not issue till 31-7-49. In default both writs do issue."

The resulting position was that the appellant did not put the respondent to the proof of the various facts which would otherwise have to be established before the Court could enter a decree for ejectment against an unwilling tenant, and in effect the Court was relieved of its duty to call for such proof. The appellant preferred instead to obtain from the respondent the concession of

remaining in occupation of the premises for a further period of 13½ months provided that he made regular monthly payments of Rs. 53·83 to the respondent.

This eminently satisfactory arrangement was implemented by both parties until 25th July, 1949. On that date the appellant, having now enjoyed on his part the full benefit of the terms of the compromise, looked for some means whereby he might deprive the respondent of the corresponding advantage which the latter was entitled to claim under the settlement arrived at in Court. Accordingly, barely a week before "D Day", the petitioner applied to the Court to set aside the consent decree of the previous year, alleging that notwithstanding the solemn agreement which had been entered into by them and sanctioned by the Court as a lawful compromise, that decree was *ultra vires* and made without jurisdiction. This very startling proposition was rejected by the learned Commissioner of Requests, who held that he was bound by the decision of Rose J. in *Thomas vs. Bawa* (1945) 46 N. L. R. 215.

The appellant now invites this Court to set aside the learned Commissioner's order refusing his application to vacate the decree. I decline to do so, and only regret that it has been possible for the appellant, by resorting to the simple device of filing what I regard as a frivolous appeal, to obtain a further extension of time to remain in possession of the premises which he was bound to vacate not later than 31st July, 1949.

It is not suggested that the compromise effected on 15th June, 1948 was tainted with fraud, duress or any other circumstance which would vitiate an agreement of parties in accordance with the principles of the Roman Dutch Law *Sabapathy vs. Dunlop* (1935) 36 N. L. R. 113. The appellant does not suggest that the terms of the compromise were not very acceptable to him when he agreed to them, although the relentless approach of the date fixed for him to implement his part of the settlement must of course have caused him many misgivings. It is however contended, on the authority of *Barton vs. Fincham*, (1921) 2 K. B. 291, that the Court which sanctioned the consent decree in 1948 acted without jurisdiction because no evidence had been led before it at the relevant date to prove that the respondent was in fact and in law entitled to eject the appellant. This argument is without merit. *Barton's case* dealt only with the case of a tenant who was unwilling at the date of trial to give up possession. Scrutton L.J., saw "no reason, however, why the Judge, on being satisfied that the tenant was *then* ready to go out (not that he was once willing but had changed his mind) should not make an order for possession". Atkin L.J., also took the view that "if the parties admit that one of the events had happened which gave the Court jurisdiction and if there was no reason to doubt the *bona fides* of the admission, the Court was under no obligation to make further inquiry as to the question of fact". Rose J. came to the same conclusion in *Thomas vs. Bawa*, (1945) 46 N. L. R. 215.

In my opinion the limitations placed on the jurisdiction of a Court by the provisions of the Rent Restriction Ordinance of 1942 (and the subsequent Act of 1948) in actions between a landlord and a tenant who is unwilling to vacate the premises do not in any way fetter the right or the duty of the Court to give effect to lawful compromises willingly entered into in a pending action between a landlord and his tenant. The provisions of Section 408 of the Civil Procedure Code still remain intact. It is monstrous to contend that a defendant who, in a tenancy action, has entered into an unobjectionable bargain to give up an advantage in consideration of obtaining some other benefit should be relieved from his bargin *after he has received in full measure the benefit accruing from the compromise.* If a tenant is to be placed in a specially privileged position in such cases, the Legislature should say so in unambiguous terms. I dismiss the appeal with costs.

*Appeal dismissed.*

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*Present :* BASNAYAKE, J.

NAGAIAH vs. D. R. O., M. S. & E. P.

*S. C.* 716—*M. C. Batticaloa* 7250.

*Argued & decided on :* 1st September, 1949.

*Criminal Procedure Code—Charge of rash and negligent driving alleged in same charge—Failure to give proper particulars of the charge.*

**Held :** That it is wrong to allege both rashness and negligence in one and the same charge.

*H. Wanigatunge*, for the accused-appellant.
*A. Mahendrarajah, Crown Counsel*, for the Attorney-General.

Basnayake, J.

The appellant has been convicted on the following charges :

" That you did within the jurisdiction of this Court at Kaluvanchikudi on 6-1-49, did (*sic*) cause hurt to Selliah Pakiam of Kaluvanchikudi by doing the following act, to wit, driving car No. Z.5763 in a rash and negligent manner as to endanger the personal safety of others, and thereby committed an offence punishable under section 328 of Chapter 15, Vol. I of the Legislative Enactments of Ceylon."

Learned Counsel for the appellant takes exception to the charge on the ground that it does not satisfy the provisions of the Criminal Procedure Code relating to the particulars to be set out in a charge. Learned Counsel's submission is entitled to succeed. Not only does the charge not satisfy the requirements of the relevant provisions of Chapter XVII but it does not appear to have been drafted with the care with which a charge should be drawn up. It discloses a slavish adherence to the language of the report made to the Court under section 148 (1) (*b*) of the Criminal Procedure Code. The Code requires the Magistrate to frame the charge. In the instant case he appears to have abdicated his functions in favour of some officer of Court who has copied out the relevant portion of the report made to the Magistrate's Court by the Divisional Revenue Officer. A charge under section 328 of the Penal Code should allege that the accused person caused hurt to a person by doing an act so rashly or so negligently (as the case may be) as to endanger human life or the personal safety of others (as the case may be). The particulars of the act which is alleged should be given. It is wrong to allege as in the instant case both rashness and negligence in one and the same charge. I am unable to agree with learned Crown Counsel that the defects in the charge in the instant case are curable under sections 171 and 425 of the Criminal Procedure Code.

In the circumstances, I think the conviction should be quashed and the case sent back for trial before another Magistrate who should after observing the preliminary steps prescribed by the Criminal Procedure Code frame a proper charge.

*Case sent back.*

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*Present :* Wijeyewardene, C.J., & Nagalingam, J.

## APPUHAMY vs. UKKU BANDA

*S. C. No.* 340/1948 ; *D. C.* (*Final*) *Kandy M. R.* 2390.

*Argued on :* 5th & 8th April, 1949.
*Decided on :* 9th May, 1949.

*Evidence Ordinance Section* 92—*Transfer of land by deed—Circumstances showing transaction in nature of security for money advanced—Oral promise to re-transfer later to transferee—Can Court act on such oral evidence and hold that transfer was anything other than absolute conveyance.*

*Transfer of land subject to oral agreement to transfer to third party on payment of a sum of money —Can 3rd party enforce such oral agreement.*

**Held :** (i) that where a party transferred a land by deed in circumstances clearly showing that the transaction was in the nature of a security for money advanced and relying on an oral promise by the transferee to retransfer the land later, a Court is precluded by Section 92 of the Evidence Ordinance (as between the parties to the deed) from acting on the oral evidence and holding that the transfer was anything other than an absolute conveyance.

(ii) that a person, who is not a party to a deed, is not affected by section 92 of the Evidence Ordinance and can, therefore, enforce an oral promise or condition in his favour subject to which such deed was executed.

Case referred to : *Adicappa Chetty vs. Caruppen Chetty*, (1921) 22 New Law Reports 417.

*H. V. Perera, K.C.*, with *H. W. Jayewardene*, for the plaintiff-appellant.
*E. B. Wickremanayake, K.C.*, with *S. W. Jayasuriya*, for the defendant-respondent.

WIJEYEWARDENE, C.J.

We have to consider on this appeal certain questions of law regarding the scope of section 92 of the Evidence Ordinance and section 2 of the Prevention of Frauds Ordinance.

It is desirable to make a preliminary statement regarding the various transactions in respect of the lands referred to in the pleadings.

The defendant was the owner of Ethunhitilanagawa Natheranpotha (hereinafter referred to as Lot No. 2) and the defendant's wife was the owner of Puwakgahayata (hereinafter referred to as Lot No. 3), Heewalgodawatta (hereinafter referred to as Lot No. 4) and Edandehela (hereinafter referred to as Lot No. 5).

The defendant's father owned two tea gardens —Liyanagahawatta of two acres (hereinafter referred to as Lot No. 1) and Dissanayakatenne of seven acres (hereinafter referred to as Lot No. 6). The defendant's father mortgaged Lot No. 1 with one Sandanan and the mortgage debt due to Sandanan in 1940 was Rs. 1,250. He also mortgaged Lot No. 6 with one Appuhamy about 1931. Appuhamy put the bond in suit and obtained a hypothecary decree. The amount of the decree including costs was Rs. 3,700. Appuhamy purchased Lot No. 6 in satisfaction of his decree and obtained a Fiscal's conveyance dated November 1, 1940. The defendant's father died about that time, leaving the defendant as his heir.

According to the evidence accepted by the District Judge, the defendant and his wife wanted to redeem Lot No. 1 and buy back Lot No. 6 but did not have the necessary funds. They approached the plaintiff who was related to them. The plaintiff was willing to finance the defendant and his wife, if the Lots Nos. 1 to 6 were transferred in his favour. It was agreed that the defendant and his wife should continue to occupy the lands in spite of the transfer but pay him interest at 18% on the money advanced by the plaintiff. It was further agreed that the plaintiff would "give back" the land whenever he was paid "the principal". In pursuance of this agreement the defendant and his wife executed deed D6 of October 22, 1940, in favour of the plaintiff for the Lots Nos. 1, 2, 3, 4 and 5 for Rs. 2,500. Out of this sum of Rs. 2,500 the defendant paid Rs. 1,250 to Sandanam in discharge of the mortgage debt due to him. Lot No. 1 was worth about Rs. 5,000 or Rs. 6,000 in 1940. Appuhamy was "anxious, if possible, that the property should go" to the defendant and he was willing to let the defendant have the property for Rs. 3,700. The defendant told Appuhamy that he was making arrangements to buy the property but that the transfer would have to be made in favour of the plaintiff as the plaintiff was financing him. For this transaction, the defendant was paying Appuhamy Rs. 700 of his own money received by him as consideration on D6 and Rs. 3,000 advanced by plaintiff in respect of that specific transaction for the repurchase of Lot No. 6. In these circumstances Appuhamy executed deed D7 of November 19, 1940. The consideration mentioned in the deed was Rs. 3,000 though the actual consideration paid was Rs. 3,700. I have no doubt that the consideration was mentioned only as Rs. 3,000 in order to make it clear that the plaintiff was to "give back" the land on payment of Rs. 3,000 the actual sum advanced by the plaintiff in respect of D7. The Fiscal's conveyance was handed by Appuhamy to the defendant. The defendant himself paid the notaries fees and the stamp fees for D6 and D7.

Having once obtained the transfers D6 and D7 the plaintiff insisted on the defendant entering into the informal agreement P1 of November 25, 1940, if he wanted to remain in possession of the land. This was an agreement to occupy the lands as lessee paying a rent of Rs. 990 a year. It will be noted that the sum mentioned as annual rental is exactly 18% of the sum of Rs. 5,500 advanced by the plaintiff to the defendant. Referring to this transaction the defendant said, "I was forced to do it. I was to possess and pay interest".

The plaintiff filed the present action alleging that the defendant occupied the six lots as his tenant at Rs. 990 per annum from November 25, 1940, to December 23, 1945. He stated that the defendant paid him Rs. 1,751·13 and claimed the balance sum of Rs. 3,281·37. The defendant filed answer referring to the various transactions set out by me earlier. He said further that he was dispossesed by the plaintiff in March 1945 and claimed Rs. 1,500 a year as damages from that date. He stated further that he paid the

plaintiff Rs. 3,500 " in cash, value of tea coupons and value of 350 bushels of paddy ".

The District Judge dismissed the plaintiff's action with costs and held that the plaintiff held the lots 1 to 6 in trust for the defendant and his wife as set out in paragraph 6 of the answer.

I see no ground for disturbing the District Judge's finding of fact. There remains, however, the question as to the legal effect of those findings.

What was the real agreement between the plaintiff and the defendant regarding D6? Defendant did not intend to sell the lots 1 to 5 outright to the plaintiff for Rs. 2,500. He transferred them relying on the promise of the plaintiff to retransfer them later, or it was a transaction in the nature of a security for the sum advanced by the plaintiff. In the latter case the plaintiff is committing a fraud, according to the principles of equity, in insisting that D6 is an absolute transfer of the lots to him. But, in any event, section 92 of the Evidence Ordinance precludes a Court from acting on the oral evidence and holding that D6 was anything other than an absolute conveyance of lots 1 to 5.

The position with regard to D7 is, however, different. The defendant was not a party to D7. He could, therefore, prove an oral agreement for the purpose of contradicting, varying, adding to or subtracting from the terms of D7. The evidence in the case proves that Appuhamy's conveyance was subject to the condition that the plaintiff should convey the property to the defendant on the receipt of Rs. 3,000. Under the Roman-Dutch Law the defendant could enforce this condition. I would, therefore, hold that the plaintiff is bound to convey Lot No. 6 to the defendant on receipt of Rs. 3,000.

The case of *Adicappa Chetty vs. Caruppen Chetty* (1921) 22 New Law Reports 417 was referred to by the appellant's Counsel in the course of his argument. That was a case instituted before the enactment of the Trusts Ordinance. It has also to be noted that the judgment of the Privy Counsel was based on certain paragraphs in the answer of the added defendant and that Their Lordships of the Privy Counsel referred to the absence of a single suggestion in that answer that there was any parol agreement between the added defendant and the parties against whom he pleaded a trust. I do not think that the decision in that case is applicable to the facts of the present case.

The District Judge has found that the defendant paid plaintiff Rs. 1,751·13. Deducting this sum from the amount due up to March, 1945, there is due from the defendant to the plaintiff Rs. 2,538·87.

I set aside the decree of the District Judge and order decree to be entered :

(*a*) directing the defendant to pay the plaintiff Rs. 2,538·87 with legal interest from date of action to date of payment ;

(*b*) declaring that the defendant is entitled to obtain from the plaintiff a conveyance of the land sixthly described in the schedule to the plaint on payment of Rs. 3,000.

I award no costs either in the Court below or in this Court. The parties will be entitled to costs of execution if any.

*Set aside and varied.*

NAGALINGAM, J.

I agree.

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*Present :* GRATIAEN, J.

## W. H. BUS CO., LTD. vs. THE COMMISSIONER OF MOTOR TRANSPORT

*S. C.* 480—*Application for a Writ of* Certiorari *on the Commissioner of Motor Transport.*

*Argued on :* 28th November, 1949.

*Decided on :* 30th November, 1949.

*Certiorari—Writ of—Omnibus Service Licensing Ordinance No.* 47 *of* 1942, *Section* 10—*Renewal of licence—Application made after expiry of licence—Commissioner's discretion to treat it as application for fresh licence.*

Where the Commissioner of Motor Transport treated an application for renewal of a licence for an Omnibus Service received after the licence had already expired as an application for a fresh licence to be considered in competition with other claimants,

**Held :** That the Commissioner did not act in excess of jurisdiction.

*Per* GRATIAEN, J.—"Indeed, if it were necessary to give a ruling on the point, I would be inclined to hold that although the Commissioner had a discretion under the Regulation to treat as valid an application for a "renewal" received less than eight weeks before a licence had expired, he had no such power if the licence had *already* expired before he received the application."

*N. E. Weerasooria, K.C.*, with *C. E. S. Perera* and *M. P. Spencer*, for the petitioner.
*M. Thiruchelvam, Crown Counsel*, for the 1st respondent.
*F. A. Hayley, K.C.*, with *H. W. Thambiah*, for the 2nd respondent.

GRATIAEN, J.

The petitioner is the W. H. Bus Company Ltd. of Kandy. The Company had up to 31st August, 1948 operated twelve omnibus services along defined routes from Kandy to various parts of the Central Province by virtue of licences issued in its favour by the Commissioner of Motor Transport. On that date one of the licences expired, and ten others were due to expire a month later. The twelfth licence would, unless duly revoked by the licensing authority, have remained in operation until 31st October, 1949.

In terms of Section 10 of the Omnibus Service Licensing Ordinance No. 47 of 1942 the authority of a licensee to operate an omnibus service terminates on the date of expiry of the licence subject to the privilege of continuing to operate on the prescribed route for a limited period *provided that an application for renewal is made before the expiration of the licence.*

The petitioner Company did not avail itself of the privilege conferred by the provisions of Section 10. It is common ground that at the relevant time there was much internal strife among the persons charged with the management of its affairs, and the inevitable consequence was that its efficiency as a business organisation considerably deteriorated. No application for a so-called "renewal" of the eleven licences which had already expired was made until 26th October, 1948. In the meantime the omnibuses continued, but without legal sanction, to operate along the routes. I cannot see, however, how official condonation of this irregularity can be construed as conferring as upon the Company any additional rights. The Commissioner's powers in this respect are necessarily restricted by the provisions of the Ordinance under which he is authorised to function.

If the Company was dilatory in its business affairs, it can hardly be said that the Commissioner's office was any less lethargic in its attention to official correspondence. The application for a "renewal" of the expired route licences was received on 26th October, 1948. No reply seems to have been sent to the Company for nine months. On 26th July, 1949 the Commissioner wrote to state that although he was vested with a discretion by the Regulations passed under the Ordinance to accept and deal with an application for renewal received after the time limit prescribed by the Regulations (namely, eight weeks before expiration of the existing licence), he did not propose to do so in the present case because the petitioner's omnibus service had proved unsatisfactory in the past. He decided instead to treat the application as an application for *new* licences, and to consider it on its merits in competition with the claims of other candidates (including the second respondent).

In due course the Commissioner adjudicated upon the respective claims of the petitioner, the second respondent and other applicants. By his order dated 1st October, 1949 he decided to reject the application of the petitioner and to grant licences to the second respondent for the various routes on which the petitioner's omnibuses had previously operated.

This Court has, of course, no power to review the correctness of the Commissioner's decision. The petitioner contends, however, that the order of 1st October, 1949 was made in excess of the Commissioner's jurisdiction under the Ordinance. If that be established, I am undoubtedly entitled to quash the order by the issue of a mandate in the nature of a writ of *certiorari*.

As I understand Mr. Weerasooria's argument, the Commissioner's jurisdiction is challenged by the petitioner on the ground that the Commissioner, having permitted the petitioner's buses to operate on the relevant routes after the existing licences had expired, must be deemed to have already granted the application for renewal—and that he therefore had no right at a later date to have treated the application as

an application for fresh licences to be considered in competition with other claimants. I cannot accept this submission. There is no evidence of any kind which justifies the inference that the Commissioner had on any date prior to 1st October, 1949 made an order granting the petitioner's application for a renewal of its route licences. Indeed, if it were necessary to give a ruling on the point, I would be inclined to hold that although the Commissioner had a discretion under the Regulation to treat as valid an application for a "renewal" received less than eight weeks before a licence had expired, he had no such power if the licence had *already* expired before he received the application. The Regulation cannot in my opinion be interpreted so as to over-ride the substantive provisions of the Ordinance itself. The only benefit conferred on an applicant for *renewal* as opposed to an applicant for a licence which he had not enjoyed before seems to be the privilege granted by the proviso to Section 10—namely, the privilege of operating on the terms of the old licence until the pending application for renewal has been finally determined by the appropriate tribunal. As I have already pointed out, this statutory privilege is not available where (as has happened in the present case) the licences had already expired at the time when their so-called "renewal" was applied for.

I dismiss the petitioner's application with costs in favour of both respondents.

*Application dismissed.*

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*Present :* Wijeyewardene, C.J. and Gunasekere, J.

MENIKRALA VIDANE vs. PUNCHI MENIKA *et. al.*

*S. C. No.* 385/1949 ; *D. C. (Final) Kurunegala* 4967.

*Argued on :* 14th December, 1949
*Decided on :* 20th December, 1949

*Res judicata—Action for declaration of title—Fraud and trust pleaded in answer—Compromise reached without reference to trust—Consent decree—Absence of any indication for or against existence of trust in decree—Does such decree operate as res judicata on issue of trust.*

Where a decree was entered embodying an agreement reached independently of the allegations in the pleadings relating to a trust and where the decree could not be interpreted as indicating anything for or against the existence of such trust,

**Held :** That the consent decree did not operate as *res judicata* against the issue of trust in a subsequent action between the parties.

*C. R. Guneratne*, with *R. Manikavasagar*, for the plaintiff-appellant.

*C. E. S. Perera*, with *T. B. Dissanayake*, for the defendants-respondents.

Wijeyewardene, C.J.

Kiri Hamy, the father of the plaintiff and one Banda Appu, were the owners of a number of lands. According to the plaint, Kiri Hamy conveyed his lands by deed No. 42818 to his son, Banda Appu, but the conveyance was, however, subject to a trust that the defendant should hold a half share of the lands for the benefit of the plaintiff. The plaintiff and Banda Appu, thereafter, came to an amicable agreement regarding the division of the estate. In pursuance of that agreement, the plaintiff entered into exclusive possession of certain lands including Mahawattehena forming

the subject matter of this action. About 1945 the fourth, fifth and sixth defendants claiming to be the lessees of first, second and third defendants the heirs of Banda Appu disputed the right of the plaintiff to possess Mahawattehena. The plaintiff, thereupon, instituted the present action to obtain a declaration of title to that land.

The defendants filed answer denying the existence of a trust as mentioned in the plaint and stated that under the deed No. 42818 Banda Appu became the sole and absolute owner of all the lands of Kiri Hamy. The defendants pleaded further that the decree entered in D. C. Kurunegala 895 operated by way of *res judicata* against the plaintiff's contention that the deed No. 42818 was subject to a trust.

The District Judge held on the issue of *res judicata* in favour of the defendants and dismissed the plaintiff's action with costs.

Now case No. 895 of the District Court of Kurunegala was filed by the present first, second and third defendants claiming to be declared entitled to five of the lands mentioned in deed No. 42818. Mahawattehena which is the subject matter of the present action was not one of those lands. The present plaintiff filed answer pleading *inter alia* as follows :

*Para 7* : The said Kiri Hamy and the defendants were sued by one Dingiri Banda of Wewela in case No. 16230 of this Court and decree was entered for the plaintiff in the said case on the 12th, day of February, 1934, and in order to defraud the said plaintiff, deed No. 42818 dated March 21, 1934, was executed in favour of the defendant's brother the late Banda Appu.

*Para 8* : The said deed was one in trust for the defendant in respect of a half share, it having been expressly agreed upon by the said Kiri Hamy and his son Banda Appu that the latter should hold the deed in the manner indicated for and on behalf of the defendant in respect of a half share.

On the trial date in that case the parties came to a settlement. The relevant terms of that settlement were :

(*a*) " that the deed No. 42818 is declared valid " ;

(*b*) " that the defendant is declared entitled to a life interest " in three lands.

A decree was entered in accordance with that settlement. It is clear that term (*a*) of the settlement was due to the allegation in paragraph 7 of the answer that the deed No. 42818 was executed in fraud of creditors. The reservation of a life interest by term (*b*) does not make the decree operative against the present plaintiff's allegation regarding a trust. It cannot be construed as giving any decision regarding the trust. It was, to say the least, as consistent with the existence of a trust as with the absence of a trust. The fact is that the decree was entered embodying an agreement reached independently of the allegations in the pleadings relating to the trust and the decree cannot be interpreted as indicating anything for or against the existence of the trust. I would in this connection refer to the following passage in Spencer Bower's Doctrine of *Res Judicata* at page 24 :

> " Though consent judgments and orders are undoubtedly in every case decisions in the sense that the actual mandatory or prohibitive parts of the judgment or order is conclusively binding upon, not only the parties, but the rest of the world, it may often be a matter of legitimate doubt and debate as to what, if any particular questions or issues of right, title, or liability were, expressly or impliedly, the subject of the consent and of the decision. For this purpose, as for all other purposes connected with the ascertainment of the subject matter of a decision the Court will closely examine all such evidence, if any, as is available and admissible, and, by the aid of such material, will ascertain whether any and what adjudication of matters in dispute was expressed, or necessarily involved, in the actual decision assented to. Any issue or question which is thus shown to have been recognised or taken by the parties as the subject of the litigation, and of the judgment or order agreed to, is deemed to have been thereby conclusively determined, so as to preclude any subsequent challenge. Where, however, there are no such materials available as are above indicated, there is nothing which can operate as a decision of any particular question or issue, and neither party is estopped from disputing anything but the actual judgment or order itself ".

I set aside the decree appealed against and send the case back for trial on questions of fact and other questions of law arising in the case. I award the appellant costs of appeal and costs of the proceedings in the District Court on March 23, 1949.

*Case sent back.*

GUNASEKERA, J.

I agree.

## *IN THE COURT OF CRIMINAL APPEAL*

WIJEYEWARDENE, C.J. (President), NAGALINGAM, J. AND GRATIAEN, J.

## *THE KING* vs. *HAPITIGE DON MARSHAL APPUHAMY*

*C. C. A. Appeal No.* 61/1949, *with C. C. A. Application No.* 165/1949—
*S. C. No.* 28, *M. C. Negombo,* 58963, *Fourth Western Circuit,* 1949, *Colombo Assizes.*

*Argued on :* December 12th, 1949
*Decided on :* December 14th, 1949

*Court of Criminal Appeal—Charge of murder—Penal Code sections 78 and 79—Plea of drunkenness and provocation—Relevancy of evidence of good character of accused—Misdirection.*

In a case of murder in which the accused put his character in issue and pleaded that he was so drunk as to be incapable of forming a murderous intention and that he committed the offence under grave and sudden provocation,

**Held :** (1) That the intoxication necessary to reduce the offence from murder to culpable homicide not amounting to murder on the ground of absence of a murderous intention need not merely be the degree of intoxication referred to in section 78 of the Penal Code.

(2) That where the judge's direction appeared to give the impression to the Jury that any intoxication falling short of the degree of intoxication contemplated by section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication, it amounted to a misdirection on the law.

(3) That evidence of good character of an accused was relevant to the consideration whether the act of the accused was unprovoked or not.

**Cases referred to :**—*The King vs. Punchi Rala* (1924) 25 New Law Reports 458.
*Alexei Letenocks* (1917) 12 Criminal Appeal Reports 221.
*The King vs. Rengasamy* (1924) 25 New Law Reports 438 at page 444.

*T. B. Dissanayake,* for the appellant.

*R. R. Crossette-Thambiah, K. C., Solicitor-General,* with *A. C. M. Ameer, Crown Counsel,* for the Crown.

WIJEYEWARDENE, C.J. (*President*)

The appellant was found guilty of the murder of a young widow called Elizabeth. It was not disputed that the appellant stabbed Elizabeth and inflicted a number of injuries, one of which was necessarily fatal. The appellant pleaded, however, that he acted on grave and sudden provocation and that he was so drunk that he was unable to form a murderous intention and that, for each of these reasons, his offience was reduced from murder to culpable homicide not amounting to murder.

I shall set out briefly the conflicting versions given by the Crown and the defence as to the circumstances in which the stabbing took place.

According to the Crown, the appellant, a fellow villager of Elizabeth, "was not in the habit of coming" to the house of Elizabeth. On September 17, 1949, the appellant came and spoke to Elizabeth and Elizabeth told her mother that the appellant "suggested to have intercourse with her (Elizabeth)". Then both Elizabeth and her mother asked the appellant not to come to their house in future. "The appellant went away saying nothing". On September 19, the appellant came to Elizabeth's house "rushing in like a mad fellow as if he were possessed" and saying, මගේ වැඩේ හරියි (My work is all right). He stabbed Elizabeth. The only motive suggested by Elizabeth's mother for the act of the appellant was his displeasure at being asked on September 17 not to come to her house.

On the other hand, the appellant suggested that Elizabeth used to encourage men to visit her house for immoral purposes. He saw on September 17, one Charles entering Elizabeth's house and said, "you have a new man now? may I also come?" Elizabeth was offended and abused him. There was a report in the village that some stones were thrown at Elizabeth's house that night. On September 19, he left home to visit his mother who was living four miles away. He rode a cycle belonging to one Arthur. He drank two bottles of toddy on his way, took a meal of hoppers at his mother's and, a little later, drank a bottle of "Yakka Ra". He rode back to Arthur, returned the cycle and was walking homewards when Elizabeth accused

him of throwing stones at her house and abused him, saying, "Go and lie with your mother". He replied, "I did not throw stones at your house; it must be people who are in the habit of coming to your house". The abuse went on for a few minutes and then Elizabeth said, "I have never given birth to illegitimate children. It is your wife who has behaved in this manner". He lost his self control then and stabbed Elizabeth.

On the evidence led in the case the Jury had to consider (*a*) whether the appellant was so intoxicated as to be unable to form a murderous intention (*b*) whether he was so provoked as to be deprived of his self control (*c*) whether owing to some intoxication his faculties were so impaired that he was liable to be provoked more easily than when he was sober [vide *The King vs. Punchi Rala* (1924) 25 New Law Reports 458 and *Letenocks* case (1917) 12 Criminal Appeal Reports 221].

On the questions of intoxication which the Jury had to consider under (*a*) and (*c*) above, the only direction given by the learned Judge was as follows:—

1. "Now Gentlemen, intoxication to be an excuse in law for an offence must be intoxication which is administered by another. In no case does intoxication which is self induced—I mean that if a man takes drinks himself he cannot make that the occasion or excuse for an offence; it is only when drink is administered to a man without his knowledge or against his wish and he commits an offence that it is an excuse".

2. "Learned Counsel would have you take it that the intoxication of this man was such as to provoke him more than a reasonable man. That state of intoxication, that amount of intoxication, is not taken into account by the law".

3. "For intoxication to excuse a man, apart from the circumstances I have already mentioned, it must be of such a degree as to deprive a man of any kind of intention. For instance, to be excused, a man must be intoxicated to that degree when he does not see the difference between a human being and a log of wood".

4. "Now, on the evidence of the prisoner, himself, he was not intoxicated because he rode four miles, he went to his friend, he spoke to him, he returned his bicycle, he went to the boutique, lit a cigarette and had a chat so that, in law, the fact that the accused took two bottles of toddy and, shortly after, a third is not sufficient to excuse him of any offence, or to reduce the offence of murder to that of culpable homicide not amounting to murder".

I have numbered the various paragraphs in the above passage for facility of reference.

In paragraphs 1 and 3 the learned Judge appears to be dealing only with the provisions of section 78 of the Penal Code which enacts:—

> "Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law:
>
> Provided that the thing which intoxicated him was administered to him without his knowledge or against his will".

I do not propose to deal with that statement of the law as we are not concerned with section 78.

In paragraph 2 the Judge appears to have expressed himself in such a way as to give the impression to the Jury that any intoxication falling short of the degree of intoxication contemplated by section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication. None of the above paragraphs 1 to 4 would have indicated to the Jury that the intoxication necessary to reduce an offence from murder to culpable homicide not amounting to murder on the grounds of absence of murderous intention need not necessarily be the degree of intoxication referred to in section 78 of the Penal Code (vide *The King vs. Rengasamy* (1924) 25 New Law Reports 438 at page 444).

In dealing with the general plea of provocation the Judge read out to the Jury the provisions of exception 1 to section 294 of the Penal Code and then proceeded to say:—

> "Provocation must be some kind of passion as will make the person not master of his mind. That is implicit in the words "deprived of the power of self-control". He must not know what he is doing, in order to bring the offence of murder down to the offence of culpable homicide not amounting to murder".

There is no doubt that the sentence in that passage which an ordinary Juror would have most easily understood and remembered was "He must not know what he is doing". That passage would have given the Jury an incorrect view of the law.

On the question of the relevancy of good character the learned Judge remarked :—

"That is a circumstance which you can take into account but, in this case, it is not necessary to go into that because he had admitted the fact that he stabbed. You have to decide in what circumstances did he stab. Did he have the intention of killing? If he did what are the circumstances?"

This is a mis-direction. The evidence of good character would have been relevant when the Jury was considering whether the act of stabbing was or was not an unprovoked act.

In no part of the charge has the learned Judge given a direction to the Jury as to the nature of the burden that rested on the defence to prove the facts necessary to support the pleas of intoxication and provocation.

For these reasons we quash the conviction and order a fresh trial.

*Conviction quashed and retrial ordered.*

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*Present :* NAGALINGAM AND GRATIAEN, JJ.

## KANAPATHIPILLAI THANGARETNAM vs. ALIARLEVVE UMARULEVVE *et al.*

*S. C. No.* 435L. *D. C. Batticaloa No.* 203L

*Argued on :* 7th September, 1948.
*Decided on :* 14th September, 1948.

*Contract of Sale of Land by minors jointly with adults—Repudiation of contract by minors—Benefit to minors—Effect of contract on the interests of the adults.*

Two minors jointly with their parents sold some property. There is no evidence that the purchase money was utilised for the benefit of the minors. In an action by the purchaser for declaration of title, the minors sought to repudiate the contract of sale.

**Held :** (1) That a contract of sale of property by minors may be repudiated by them, but only to the extent of their interests at the time of the contract.

(2) That such a contract will not be set aside if the party seeking to enforce it proves that it has been to the benefit of the minors.

(3) That the onus of proving that a minor did in fact benefit by a contract of sale is on the person seeking to enforce the contract.

(4) That the interests of the adults passed to the purchaser under the contract of sale.

**Cases referred to :**—*Appu vs. Silva* (1922) 24 N. L. R. 428.
*Haturasinghe vs. Ukku Amma* (1944) 45 N. L. R. 499.

*H. V. Perera, K.C.* with *G. Thomas*, for the plaintiff-appellant.

*N. E. Weerasooriya, K.C.* with *C. E. S. Perera*, for the 3rd and 4th defendants-respondents.

GRATIAEN, J.

The relevant facts in this case are not seriously in dispute. The 3rd and 4th defendants, who were minors at all times material to these proceedings, became in 1935 entitled to the property which is the subject matter of this action by virtue of a deed of donation executed in their favour by their grandparents. In 1943 by a deed of sale in which their parents (the 1st and 2nd defendants) joined them as vendors, the property was conveyed to a person named Ibrahim for a consideration of Rs.1, 000. On 19th April, 1944, Ibrahim reconveyed the land to all four defendants, and on the same day all of them joined in a sale of the property to the plaintiff by deed No. 9201 (P2). The agreed consideration of Rs.4, 000 was paid to the 1st defendant in the presence of the 2nd, 3rd and 4th defendants.

The plaintiff who has hitherto been kept out of possession of the property purchased by her, sued all four defendants for a declaration of title and for ejectment and damages. The 1st and 2nd defendants did not file answer, but the 1st defendant, who was appointed guardian-ad litem of the 3rd and 4th defendants as they were still minors, contested the plaintiff's claim on their behalf. Pending the trial the 1st defendant died, and the 6th defendant was appointed

guardian-ad-litem for the 3rd and 4th defendants after the 5th defendant, who had acted in that capacity for a short time, was superseded.

The 3rd and 4th defendants who were admittedly in possession of the land, notwithstanding the sale by them by the deed P2, claimed that they were entitled on the ground of minority to repudiate the contract of sale under which the plaintiff purchased the land in April 1944, and asked in reconvention that the deed of sale No. 9201 dated 19th April, 1944 (P2) in favour of the plaintiff be set aside and that they be declared entitled to the premises. After trial the learned District Judge dismissed the plaintiff's action and declared the deed P2 to be null and void.

The plaintiff's appeal was pressed on two grounds. Mr. Perera submitted to us, in the first instance, that the deed of sale No. 9201 should not be set aside because, although the sale by the minors had taken place without the sanction of Court, the evidence established that they had in fact benefited by the transaction. But the onus of proving that a minor did in fact benefit by a contract of sale is on the person seeking to enforce the contract, and I agree with the learned District Judge that the plaintiff has not discharged this onus. The consideration of Rs. 4,000 was paid not to the 3rd and 4th defendants but to their father the 1st defendant, and it had not been proved that any portion of it was utilised for their benefit. In my opinion the 3rd and 4th defendants were entitled to repudiate the sale, *but only to the extent of their interests in the property* as at the date of the execution of the deed No. 9201 (P2). On the other hand, any title which the other vendors, the 1st and 2nd defendants had at the relevant date must clearly be held to have passed to the plaintiff under the deed P2.

This brings me to Mr. Perera's alternative submission which I think is entitled to succeed. Immediately before all the defendants sold the land to the plaintiff, they had obtained in their favour a conveyance of the entirety of the property from Ibrahim to whom I have already referred. This latter deed (P1) does not specify what share was conveyed or intended to be conveyed to each of the four transferees and Mr. Perera rightly contended that in the absence of clear evidence of a contrary intention on the part of those who were parties to the transaction we must assume that the four defendants acquired title to the property in equal shares. *Appu vs. Silva*, (1922) 24 N. L. R. 428. In other words, the 1st defendant and the 2nd defendant each became entitled under this deed to an undivided one-fourth share of the property and their respective shares were validly conveyed by them to the plaintiff by the deed P2.

Mr. Weerasooriya sought to meet this position by contending that the 3rd and 4th defendants who had been sole owners of the property from December, 1935 until 4th December, 1943 were entitled to repudiate the earlier transaction by which they had conveyed the property to Ibrahim by the deed of transfer D3 of 4th December, 1943 on the same ground on which they repudiated the later deed P2 namely, the ground of minority. I agree that this was a *voidable* transaction in respect of which they might have been entitled to relief in an appropriate action to which Ibrahim was a party unless Ibrahim could prove that they had benefited by the sale. But no action was ever instituted and no relief in respect of this transaction was asked for, even if it could have been granted, in the present action. In the result the deed D3 must be regarded for the purpose of this case as having passed good and valid title to Ibrahim who in due course conveyed the title by the deed P1 not only to the 3rd and 4th defendants but to their parents as well. I cannot accept Mr. Weerasooriya's submission that D3 can in law be regarded as *ipso jure* void. The decision of this Court in *Haturasinghe vs. Ukku Amma*, (1944) 45 N. L. R. 499, is, I think, clearly distinguishable. It was held in that case that a *donation* by a minor was void *ab initio* and did not require to be set aside by a decree of Court in an action for *restitutio in integrum*. The reason is that in cases of donation and suretyship, the absence of any benefit to the minor is manifest. Where, on the other hand, the contract which a minor seeks to avoid is a contract of sale, it is clear and settled law that the transaction is not void but merely voidable, and must be regarded as valid unless and until it is set aside by the decree of a competent Court.

For the reasons which I have given I would set aside the judgment appealed from and make order (*a*) declaring the plaintiff entitled to an undivided half share of the land and premises described in the schedule to the deed No. 9201 dated 19th April, 1944 attested by a Ganeshamudaly, Notary Public, and to a writ of possession in respect of this share (*b*) setting aside the said deed No. 9201 in respect of the remaining half share of the land and premises and declaring the 3rd and 4th defendants entitled thereto. I would also order the 3rd and 4th defendants jointly and severally to pay damages to the plaintiff for having wrongfully kept her out of possession of her undivided half share of the land

and premises from 19th April, 1944 until she is placed in possession thereof. The case must go back for the learned District Judge to assess these damages and to enter decree for the sum so assessed in favour of the plaintiff. Both parties have partially succeeded in the Court below and in appeal. I would, therefore, make no order as to costs of suit or of this appeal. Further costs will be in the discretion of the learned District Judge.

*Set aside and sent back.*

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*Present :* BASNAYAKE, J.

SAMARAKOON vs. TIKIRI BANDA

*In the Matter of an Application for a Writ of Quo Warranto against H. M. Tikiri Banda.*

*Application No.* 421.

*Argued on :* 25th February and 17th March, 1949.
*Decided on :* 7th June, 1949.

Quo Warranto—*Writ of—Election of Chairman, Village Committee—Allegations of treating, undue influence and bribery against Chairman and supporters—Other remedy available—Is* Quo Warranto *proper remedy.*

**Held :** (1) That the Supreme Court will not grant an application for *Quo Warranto* to declare the election of a Chairman of the Village Committee on the grounds of treating, undue influence and bribery, inasmuch as
(*a*) the petitioner can pursue the remedy provided by the Public Bodies (Prevention of Corruption) Ordinance No. 49 of 1943 or Chapter IXA of the Penal Code read with section 10 of the Local Authorities Elections Ordinance No. 53 of 1946
(*b*) the proper remedy is to ask for a Mandamus, to proceed to an election *de novo*, the pretended election being a mere nullity.

(2) That the act of electing the Chairman of a Village Committee falls within the definition of the expression "Official Act" in section 6 of the Public Bodies "Prevention of Corruption" Ordinance No. 49 of 1943.

*C. S. Barr Kumarakulasinghe*, with *A. I. Rajasingham* and *T. W. Rajaratnam*, for the petitioner.
*G. E. Chitty*, with *N. Nadarasa*, for the respondent.

BASNAYAKE, J.

The petitioner and the respondent are members of the Village Committee of Udagampaha. The respondent successfully contested the petitioner for the Office of Chairman. The petitioner seeks to have the respondent's election as Chairman declared void. The grounds on which he relies are thus stated in his petition.

"4. Before and after the said Village Committee Elections the Respondent and his agents committed various acts amounting to general bribery, general treating and general undue influence, more fully described in the affidavits annexed A to J to this petition and filed herewith.

5. The said acts were designed to prevent the free and fair exercise of the vote at the Election of the Chairman held on the 27th of July, 1948 and the said acts had the effects so designed.

6. For some time before the Election of the Chairman, the Respondent together with a number of his supporters treated the said members of the Village Committee and detained them in his house and later at other places in order to prevent their independently exercising their judgment in the matter of the choice of a Chairman.

7. On various occasions before the election of the Chairman, the Respondent bribed and attempted to bribe various members of the said Village Committee."

I am unable to see how "general bribery, general treating and general undue influence" before and after the Village Committee election can affect the respondent's election as Chairman of the Village Committee by his fellow members.

In regard to the allegations of treating and bribery by the respondent, I have not been referred to any case in which the election of a member to the office of Chairman of a local body or Mayor of a council has been successfully questioned by way of *quo warranto* on the grounds alleged by the petitioner. Before I can allow an application in support of which no precedent is cited, I must be satisfied upon the affidavits that the allegations of the petitioner are true. In the instant case the respondent denies that he either treated or bribed the members of the Committee and six out of the twelve members constituting the Committee deny that they were treated or bribed or that any other form of undue influence was exercised in respect of them. A mandate in the nature of a writ of *quo warranto* is not issued as a matter of course. It is a writ in the discretion of this Court and the onus is on the petitioner to satisfy the Court that the matter is one that calls for the remedy he asks.

Learned counsel for the respondent submitted that the petitioner should first pursue the remedy provided by the Public Bodies (Prevention of Corruption) Ordinance No. 49 of 1943 or Chapter IXA of the Penal Code. A conviction under either of those enactments operates by virtue of section 10, sub-section (1) (*k*) and sub-section (2) (*c*) of the Local Authorities Elections Ordinance, No. 53 of 1946, as a disqualification of the person convicted from sitting or voting as a member of a local authority (which expression is defined to include a Village Committee—section 88) for a period of five years. Learned counsel for the petitioner contended that neither the Public Bodies (Prevention of Corruption) Ordinance No. 49 of 1943, nor Chapter IXA of the Penal Code, applies to the instant case. He submitted that the expression "official act" as defined in section 6 of the former enactment does not include the act of electing a Chairman.

I find myself unable to agree with the submission of learned Counsel for the petitioner. In my opinion the act of electing the Chairman of a Village Committee falls within the definition of the expression "official act". The words "any matter of transaction whatsoever" in that definition are wide and sweeping and embrace all acts which a member of a Village Committee is called upon to perform *qua* member. There is nothing in Chapter IXA of the Penal Code that excludes the application of section 169B in that Chapter to the exercise of the right to vote at the election of a Chairman of a Village Committee.

The contention of the Counsel for the respondent that there are other equally effective remedies open to the petitioner is in my opinion correct. A writ of *quo warranto* will not as a rule issue when there are other remedies.

The petitioner comes to this Court on the footing that "there was no election of a Chairman for the Village Committee of Udagampaha." If that be the case, mandamus and not *quo warranto* is the remedy. *Quo warranto* lies where the office is full *de facto*. (The Law of Corporations by James Grant, p. 266.) If the election is merely colourable, and therefore void, so that in point of law the office is vacant, then the dissatisfied person should ask for a mandamus to proceed to an election *de novo*, the pretended election being a mere nullity.

For the above reasons the rule is discharged with costs.

*Rule discharged with costs.*

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*Present :* Wijeyewardene, C.J.

## DE SILVA vs. BABA SINNO

*In the matter of an application for Revision in M. C. Chilaw 39152—S. C. Application No. 454/1949.*

*Argued on :* 15th December, 1949.
*Decided on :* 19th December, 1949.

*Criminal Procedure Code, Section 413—Charge of theft of buffalo—Acquittal of accused—Inquiry to consider claims to buffalo produced in Court—Propriety of order made without hearing evidence.*

Accused who was charged with theft of a buffalo was acquitted by the Magistrate without the defence being called upon. An inquiry was subsequently held by the Magistrate under Sec. 413 of the Criminal Procedure Code to consider the claims of the parties to the buffalo produced in Court. An application made for a postponement of the inquiry by the accused petitioner was refused and the Magistrate made order returning the bull to the respondent on a submission by his Counsel without hearing evidence.

Held : (i) That the Magistrate could not make such an order in the absence of any proof that an offence had been committed in respect of the buffalo.

(ii) An order under Sec. 413 must be based on evidence.

*A. B. Perera*, for the petitioner.

*G. F. Sethukavaler*, for the respondent.

WIJEYEWARDENE, C.J.

A plaint was filed on October, 15, 1948, charging one Sinnatamby with the theft of a she-buffalo, branded S. B. B., and belonging to Baba Sinno, the respondent.

Baba Sinno gave evidence stating that he lost a she-buffalo in April 1948 and that he searched for it till October, 12, 1948. He did not make a complaint to anyone during that period, as he thought the animal had strayed. It occurred to him on October, 12, 1948, that the animal might have been stolen and then he made a formal complaint to the Village Headman. Three days afterwards he happened to see the animal produced in Court on the estate of Mr. R. M. De Silva (the petitioner) as he was going along the bank of an Oya that ran by Mr. de Silva's estate. He identified the animal as his lost she-buffalo, as it bore the marks S. B. B. He explained that B. B. stood for "Baba Sinno" and S for his village Suruvila. He admitted, however, under cross-examination that he was a resident of Anavilundawa for eight years, that he intended always to reside permanently at Anavilundawa and that his lost animal was born three years after he came to live at Anavilundawa. Later, he altered his evidence and stated that the animal was born at Suruvila.

Mr. de Silva who was the only other material witness for the prosecution said that as he desired to buy a she-buffalo, the accused brought a number of animals to him and that he purchased the animal in question on March, 27, 1948, on the receipt P2. Mr. de Silva added that he had seen the animal "sometime prior to the purchase being used in the fields by the accused".

At the close of the case for the prosecution the Magistrate did not call upon the defence and acquitted the accused. Even in the absence of Mr. de Silva's evidence it would not have been possible to accept the extraordinary story narrated by Baba Sinno and convict the accused. The evidence of Mr. de Silva proved beyond any doubt the innocence of the accused.

Five months after this order of acquittal, the Magistrate held an inquiry under section 413 of the Criminal Procedure Code to consider the claims of the petitioner and the respondent for the buffalo produced in Court. The Magistrate refused to allow an application for a postponement made on behalf of the petitioner on the ground that he was too ill to attend Court and then made the following order :—

> "Mr. Muttukumaru for Baba Sinno (the respondent) states that the bull belongs to him. As there is no other evidence against this claim I make order returning the bull to Baba Sinno".

I find it difficult to understand the Magistrate's reference to "no other evidence", when no evidence whatever regarding the ownership of the animal was led at the inquiry, and the evidence at the trial did not prove the ownership of the respondent. It looks as if the Magistrate regarded as evidence the statement made by the respondent's lawyer. It may be added that the animal was taken from the possession of the petitioner for the purposes of the trial and the petitioner produced P2 in support of his claim as soon as the Village Headman questioned him on October, 15, 1948.

The Counsel for the respondent cited *Thyriar vs. Sinnetamby*, (1916) 3 Ceylon Weekly Reporter 9, and *Joseph vs. The Attorney-General*, (1946) 47 New Law Reports 446, in support of the Magistrate's order. These decisions do not help the respondent. In each of these cases there was evidence to enable the Magistrate to hold that an offence appears to have been committed in respect of the property forming the subject matter of the inquiry. In this case there was no such evidence whatever. Moreover, the Magistrate does not appear to have exercised his discretion in a judicial manner.

I set aside the order of the Magistrate and direct the animal to be delivered to the petitioner.

*Set aside.*

*Present :* WINDHAM & GRATIAEN, JJ.

## ATTORNEY-GENERAL vs. JUNAID

*S. C.* 364/*F*—*D. C. Tangalle* 5407.

*Argued on :* 20th October, 1949.
*Decided on :* 26th October, 1949.

*Contract—Agreement by a contractor for transport of a certain specified minimum quantity of salt per day—Penalty for failure to transport such minimum—Implied obligation to make such minimum available to the contractor—Necessary implication—Damages.*

The defendant-respondent entered into an agreement with the Assistant Government Agent, Hambantota, for the transport and storage of salt at the rate of not less than 2,375 bags per day. If he failed to employ the necessary labour and vehicles to transport this minimum quantity he was liable to penalty. On certain days during the contractual period the Assistant Government Agent failed to supply the minimum quantity which the contractor was obliged to transport and the contractor sued the Crown for damages suffered by him in employing labour and vehicles sufficient to transport the minimum quantity. It was contended for the Crown that the terms of the agreement did not impose an obligation on the Assistant Government Agent to supply the minimum quantity for the contractor to transport.

**Held :** That by necessary implication the Crown was under an implied obligation to make available to the contractor the minimum quantity to be handled by him under the contract and that the Crown's default in supplying this minimum quantity on any day constituted a breach of contract which entitled the plaintiff to claim damages to compensate him for the consequent loss sustained by him.

**Cases referred to :** *The Attorney-General vs. Abram Saibo* (1915) 18 N. L. R. 417.
*The Moorcock*, 14 P. D. 64.
*Pordage vs. Cole* 85 English Reports 449.
*Hamlyn vs. Wood* (1891) 2 Q. B. 488.
*The Times of Ceylon Co. Ltd. vs. The Attorney-General* (1936) 38 N. L. R. 430.
*Yorkshire Dale Co. vs. Minister of War Transport* (1942) 111 L. J. K. B. at page 518.

*R. R. Crossette-Thambiah, Solicitor-General*, with *G. P. A. Silva, Crown Counsel*, for the defendant-appellant.

*N. E. Weerasooriya, K.C.*, with *Vernon Wijetunge*, for the plaintiff-respondent.

GRATIAEN, J.

This is an action against the Crown for damages for breach of contract. On 1st November, 1944, the Assistant Government Agent, Hambantota invited tenders from private contractors for the transport and storage of salt collected in the Hambantota District during the calendar year. The notice specified the nature of the services to be performed, and stipulated *inter alia* that " the transport of bags of salt from the collection centres and emptying the salt from the bags into heap spaces on the platform *should be at the rate of not less than* 2,375 *bags of salt per diem* ". Tenderers were required to submit their quotations at " *a rate per* 1,000 bags ".

The plaintiff's tender was accepted by the Tender Board and in due course on 26th January, 1945, a formal agreement was signed by the plaintiff on his own account and by the Assistant Government Agent, Hambantota on behalf of the Crown. The relevant terms of the document read as follows :

" 2. The contractor agrees to the transport and storage of salt collected at Maha and Kohalankala Lewayas during the year 1945 at the rate given below.

Rs. 182·75 per 1,000 bags (Rupees one hundred and eighty-two and cents seventy-five per one thousand bags).

The services include :

(*a*) Furnishing vehicles for transport of salt, stitching bags filled with salt, loading stitched bags of salt into vehicles (carts and lorries) at collection sites, transporting such salt to platform sites, unloading bags of salt into trollies at platforms, pushing trollies, unloading bags of salt, emptying the bags of salt into heap spaces on platform stacking salt, and shaping heaped salt, pegging, roping and covering salt heaps with cadjans, as directed by the officer in charge (materials necessary for the service will be supplied by the Salt Department).

(*b*) The transport of bags of salt from the collection centres of each lewaya and emptying the salt from the bags into heap spaces of the platforms should be at a rate of not less than 2,375 bags of salt per diem. Payment will

be made by the Assistant Government Agent on the production of a voucher certified by the Salt Superintendent.

(*c*) The contractor is required to employ a sufficient number of both labourers and vehicles in the service as at (*a*) above to enable transport of the necessary amount of bags per diem (in all other details connected with the services the instructions of the officer in charge should be followed).

7. The Contractor hereby agrees to carry out the work to the entire satisfaction of the Assistant Government Agent, Hambantota. If it is found that the vehicle and the labour provided by the Contractor at any one centre or at any one time are insufficient to execute the services in clause 2 above, the Assistant Government Agent shall notice the contractor to provide the additional vehicles and labour forthwith. Should the Contractor fail to provide the additional vehicles and labour demanded of him, the Assistant Government Agent shall be at liberty to engage the additional labour and vehicles at any rate of pay. Should the cost of such vehicles and labour so engaged be more than the amount agreed to be paid to the contractor, the contractor hereby agrees to pay to the Assistant Government Agent the excess of such costs together with damages at the rate of Rupees ten (Rs. 10) only for each day or any part thereof.

8. The Contractor agrees that on his failure to deliver at the platform centres the full quantity of salt as stipulated in clause 2 above, he shall be liable to a forfeiture at cents ten (-/10) per bag as liquidated damages on the deficit and further the said Assistant Government Agent shall be at liberty after giving four days notice to the contractor in writing to arrange for the transport and storage of the said salt bags in respect of which he is in default from the collection centres to the platform centres.

16. In case the Contractor shall fail, neglect or refuse to do the aforesaid services within the time and in the quantities stipulated in Clause 2 of this agreement, the said Assistant Government Agent, may, if he thinks fit, after giving seven days notice to the contractor in writing determine and terminate the contract created by these presents and in the event of such determination, the contractor shall forfeit to the said Assistant Government Agent on behalf of His Majesty the King, the sum of rupees two hundred only (Rs. 200) he has deposited as security with the Assistant Government Agent for the due performance and fulfilment of this contract in addition to the sums he may have become liable to pay under clauses 5, 6, 7, 8, and 9 of this contract."

During the early period of the contract large quantities of salt required to be dealt with by the plaintiff, but for reasons apparently beyond his control (but nevertheless irrelevant on the question of his liability as a defaulting party) he was unable to handle the prescribed minimum of 2,375 bags each day. For this failure the stipulated penalty was duly exacted from him by the Crown. He was also warned by the Assistant Government Agent to engage more labour and to keep to the terms of the contract. Thereafter he placed himself in a position to handle the prescribed minimum quantity of bags each day, but largely I think due to a failure on the part of a collecting contractor and perhaps to other circumstances as well, the quantities of salt made available to the plaintiff for transporting and storage after 4th August fell far short of the daily minimum of 2,375 bags.

In these circumstances the plaintiff claimed from the Crown a sum of Rs. 10,847 as damages on the ground that the Crown had failed to fulfil its alleged obligation to supply him with at least 2,375 bags of salt to be handled under the contract. For a second cause of action he claimed a refund of a sum of Rs. 983·20 representing the penalties exacted from him for his earlier defaults. This latter part of his claim was rejected by the learned District Judge, and no appeal has been filed against his findings on the point. Only the question of the Crown's liability on the first cause of action arises for our consideration.

The view taken by the learned District Judge was that " the plaintiff had no right to demand that by necessary implication the defendant should supply him with 2,375 bags a day. In terms of the contract however the plaintiff was entitled to employ labourers and vehicles sufficient to carry 2,375 bags a day, and if he employs labourers and vehicles sufficient to carry that number and was not given work for them or insufficient work for them he was entitled to recover that loss from the defendant ". After a very careful analysis of the evidence on this later basis of liability, he entered judgment in favour of the plaintiff for a sum of Rs. 5,794·75. The present appeal is from this judgment.

I am in agreement with the learned Solicitor-General that the Crown cannot be held liable in damages on the grounds indicated by the learned Judge. The plaintiff's claim must clearly stand

or fall on the question whether, upon a proper interpretation of the agreement dated 26th January, 1945, the Crown was under an implied contractual obligation to supply him with 2,375 bags a day for transport and storage to the same extent as the plaintiff was admittedly under a duty to handle that quantity if supplied. I shall, therefore, proceed to examine the terms of the agreement.

The formal document nowhere *explicitly* imposes obligations of any kind upon the Crown. The language employed does not even state in so many terms that the Crown was under a duty to pay the plaintiff at the stipulated rate for services actually and properly performed. There can be little doubt, however, that such an obligation does arise by necessary implication. Is it then unreasonable to hold that, corresponding to the plaintiff's explicit obligation on pain of a stipulated penalty to be ready to handle a minimum quantity of 2,375 bags of salt each day, there was an implied duty cast on the Crown to supply the plaintiff with that minimum quantity?

In *The Attorney-General vs. Abram Saibo* (1915) 18 N. L. R. 417 a Divisional Bench of this Court was called upon to interpret an agreement between the General Manager of Railways and the defendant that the latter should supply rice for one year at a specified price "in such quantities as may from time to time be required for the general service of the railway". The agreement did not explicitly state that the General Manager was under an obligation to order or to pay for any rice. It was decided however that by necessary implication the Crown was obliged by the terms of the contract to place all its requirements for rice with the defendant. The Court applied the rule laid down in *The Moorcock* 14 P. D. 64 that it was necessary to draw this inference "from the presumed intention of both the parties, *with the object of giving to the transaction such business efficacy as they both must have intended that it should have*".

It is, I think, important to note that the contract which is now under consideration is a bilaterial contract the terms of which are expressed to have been agreed upon by both the plaintiff and the Assistant Government Agent, and that both parties signed the document as contracting parties. In *Pordage vs. Cole* 85 English Reports 449 A and B had mutually agreed that B should pay A a stipulated sum of money for his land. The Court held that these words amounted to a corresponding implied covenant by A to convey the lands, "*For agreed is the word of both*". To my mind this line of argument is appropriate to the present case.

Once the principle of interpretation has been elucidated, it is of course of little assistance to examine a number of decided cases in which a submission that an implied obligation should be read into the language of a particular contract was either accepted or ruled out. Each transaction must necessarily be considered in the light of the general rule that an obligation imposed by necessary implication can only be admitted where it "*prevents such a failure of consideration as cannot have been within the contemplation of either party*". *Hamlyn vs. Wood* (1891) 2 Q.B. 488. *The Times of Ceylon, Co., Ltd. vs. The Attorney-General* (1936) 38 N. L. R. 430.

In this case the parties had agreed that the plaintiff should, in a district where man-power and transport facilities were admittedly scarce, provide each day an organisation sufficient to handle a minimum quantity of 2,375 bags of salt a day. In return for those services he was to be paid not a lump sum calculated in a manner commensurate with the cost of procuring such an organisation but merely to receive payment at a rate calculated according to the actual number of bags handled. I fail to see how it would be possible to give "business efficacy" to such a bargain unless there is read into the contract an obligation on the part of the Crown to supply the quantity of salt which the other contracting party was under a duty to handle. The contention for the Crown seems to be that it was open to them, having put the plaintiff to all the expense of employing labour and transport sufficient for 2,375 bags to give him, say, fifty bags (or perhaps no bags at all) on any particular day and to pay him only for the quantity actually handled at the stipulated rate (or nothing, as the case may be). With the greatest respect, I should imagine that a reasonable and experienced man of business would regard such a proposition as very strange indeed. It would certainly be impossible as a business proposition for a contractor to submit a tender for a transaction of this nature at an economic rate on this basis. This case is concerned with a commercial contract and should, as far as the language permits, be construed "with reference to the commonplace tests which the ordinary business man conversant with such matters should adopt". Per Macmillan, J. in *Yorkshire Dale Co. vs. Minister of War Transport* (1942) 111 L. J. K. B. at page 518. When the Crown undertakes an incursion into the fields of commerce, the same

test must serve as the standard. I observe that in the following year the Crown called for tenders in respect of similar services on the express understanding that the Crown was not committed to supplying any daily specific quantity of salt per day. In that event the tenderer would have at least known exactly where he stood, and his quotation would no doubt have been prepared with special reference to the risk involved.

In my opinion the Crown was under an implied obligation to make available to the plaintiff a minimum quantity of 2,375 bags of salt to be handled by him under the contract, and any other interpretation of the terms of this particular contract would result in "such a failure of consideration as could not have been within the contemplation of either party". The Crown's default in supplying this minimum quantity on any day constituted a breach of contract entitling the plaintiff to claim damages to compensate him for the consequent loss sustained by him.

I agree with the learned Solicitor-General that it would normally have been desirable to send the case back for a reassessment of damages on the true basis of liability which is somewhat different from that on which the learned Judge had condenmed the Crown to compensate the plaintiff. In the present case, however, this would involve both parties in needless expense, because I am satisfied that the sum which should be awarded to the plaintiff would, if correctly computed, have exceeded the amount for which judgment has been entered in his favour. The learned Judge in fixing damages has taken into account only the additional expenditure incurred by the plaintiff in fulfilling his part of the bargain. The other important item of *loss of profits* resulting from the Crown's default has not been considered. As the plaintiff has not appealed against the inadequacy of the damages awarded him, I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

WINDHAM, J.
I agree.

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*Present :* BASNAYAKE & GRATIAEN, JJ.

## SHANMUGALINGAM vs. AMIRTHALINGAM AND OTHERS

*S. C.* (*Inty.*) 12—*D. C. Jaffna* 951.

*Argued on :* 28th May, 1948.
*Decided on :* 6th September, 1948.

*Thesawalamai—Insurance policy taken by husband—Premiums paid out of his salary—Is such payment "thediatheddam"—Matrimonial Rights and Inheritance* (*Jaffna*) *Ordinance* (*Chapter* 48), *Section* 19.

A person subject to the Thesawalamai, took out a policy of insurance during the subsistence of his marriage and paid the premiums out of his salary.

**Held :** That such payments do not constitute "thediatheddam" within the meaning of section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance, and, therefore, the money payable under the policy should be according to the terms of the policy.

**Case referred to :** *Thamotheram vs. Nagalingam* (1929) 31 N. L. R. 257.

*H. W. Thambiah*, for the appellant.
*N. Nadarasa*, for the respondent.

BASNAYAKE, J.

This is a matter arising out of the testamentary proceedings in respect of the estate of one Ponnambalam Nagalingam who died on 21st May, 1940. The appellant, one Nagalingam Shanmugalingam, who is a minor son of the deceased by his second marriage, lodged objections to the final account filed by the administrator, his step-brother, one Nagalingam Amirthalingam.

Of the issues which were tried at the inquiry the following only need be noticed :

1. Did Nagalingam the deceased leave behind money due to him on bonds which were assigned to Sellathurai by deed 16918 of 14-9-34 to be held by him in trust for Nagalingam ?

3A. Did the said Nagalingam leave behind the land called Pillaiyanvalavu which was assigned to the 3rd respondent by deed

No. 16919 of 14-9-34 to be held by him in trust for Nagalingam ?

4. Was the sum of Rs. 2,380 received from the Insurance Company the result of an insurance effected by the deceased after his marriage with his second wife ?

5. If so, is the child of the second bed entitled to a 3/4th share ?

8. Did the deceased die possessed of lands Mappulam 1/12th share of 60 lms, Kottayanpulam 1/12th share of 40 lms, Theythavady 1/12th share of 45 lms, Venkesan 1/12th share of 15 lms, Kesan 1/12th share of 57 lms situated at Urumpirai, Senmarayanadiapattuvayal 1/2 share of 18 lms and Moonrupanaiadyvalavu 1/2 share of 9 lms situated at Maravanpulo ?

The learned District Judge held that there was no evidence on which he could hold that Sellathurai, the third respondent, held the bonds assigned to him or the land transferred to him in trust for the deceased Nagalingam. The lands referred to in issue 8, he held, should be included in the inventory. In regard to the insurance policy the learned District Judge was of opinion that the minor would be entitled to a ¾ share of the premiums paid between 15th November, 1929, the date on which the policy commenced, and 15th September, 1934, the date on which the mother of the minor appellant died. In the course of his judgment, he says : " Premiums paid between these two dates would be the common savings of the spouses and the minor would be entitled to a 3/4th share of those premiums. Deducting those premiums from the Rs. 2,380 received after the death of the deceased the difference would belong to the administrator and the minor in equal proportion."

Learned Counsel for the appellant has not convinced me that the learned District Judge's findings in regard to the bonds and the lands are wrong. I am, therefore, not disposed to interfere with his findings in regard to those matters.

I am unable to agree with the learned District Judge's view in regard to the insurance money. According to the terms of the Policy (R4) the money due thereon is payable to the person or persons mentioned in the Schedule thereto. The persons mentioned are the proposer or his assigns or proving executors or administrators or other legal representatives who shall take out representation from any British Court to his estate or limited to the moneys payable under this policy. The Policy (R4) which is dated 4th December, 1929 was taken when the deceased policy-holder was employed in the Federated Malay States' Railway, after his marriage with the mother of the minor appellant, whom he married on 4th February, 1921. It was for a period of 14 years. That period had not expired when the policy-holder died in May, 1940. The sum assured and the half-yearly premiums were payable at Kuala Lumpur.

Now, according to the Jaffna Matrimonial Rights & Inheritance Ordinance (hereinafter referred to as the Ordinance), a married man is free to effect a policy of insurance upon his life for his separate use. Such a policy of insurance and all benefits thereunder if expressed on the face of it to be so effected enure accordingly. If the policy R4 had become payable in the life-time of both the deceased and his late wife, she would have had no claim to any part of the money payable thereon. The insurance money is payable in terms of the policy to the administrator and should be divided equally among the two sons of the deceased. Apart from this provision of the statute I am unable to agree with the learned District Judge that the half-yearly payments made by the deceased on account of the policy up to the date of his wife's death was *thediatheddam*. The deceased was employed in the Federated Malay States. The evidence indicates that his savings were sufficient not only to pay the premiums on the policy but also to enable him to remit money for investment on loans in Jaffna. There is no evidence that he had any source of income besides his salary. The salary of a person subject to *Thesawalamai* is not according to section 19 of the Ordinance *thediatheddam*. That section declares :

> "No property other than the following shall be deemed to be the *thediatheddam* of a spouse :—
>
> (*a*) Property acquired by that spouse during the subsistence of the marriage for valuable consideration, such consideration not forming or representing any part of the separate estate of that spouse.
>
> (*b*) Profits arising during the subsistence of the marriage from the separate estate of that spouse."

The salary received by the deceased from his employment is neither property acquired by him within the contemplation of paragraph (*a*) nor profits arising from his separate estate within the contemplation of paragraph (*b*). Similarly, the money payable on the policy falls into neither category.

It was held in the case of *Thamotheram vs. Nagalingam* (1929) 31 N. L. R. 257 that the salary of a teacher who is governed by *Thesawalamai* is not *thediatheddam* within the meaning of that expression as defined by section 19 of the Ordinance before its amendment in 1947. Under the statute the onus of establishing that any property is *thediatheddam* is on the person who asserts it. The appellant has failed to establish it.

Subject to my decision in regard to the money payable on the insurance policy, the appeal is dismissed with costs.

Gratiaen, J.

I agree.

*Appeal dismissed.*

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*Present :* Wijeyewardene, C.J. & Pulle, J.

## PODI APPUHAMY vs. MOHEMEDU ABUSALI

*S. C. No.* 99/1949—*D. C.* (*Final*) *Kegalle* 5165.

*Argued on :* 12th & 13th October, 1949.
*Decided on :* 13th October, 1949.

*Donation—Revocability—Gift of half-share of property subject to fidei commissum—Acceptance not shown on deed—Extract of encumbrance showing mortgage of entire land by donor and donee—Is it sufficient to prove acceptance.*

**Held :** That the mere production of an extract of encumbrances showing that a fiduciary donee of a half-share of a property joined the donor who was entitled to the remaining half-share in executing a mortgage bond in respect of the entire land does not prove that there was acceptance of the gift by the fiduciary donee.

*Per* Wijeyewardene, C.J.—" Relying on the authority of *Carolis et. al. vs. Alwis* (1944) 45 New Law Reports 156, the District Judge stated in the course of his judgment that " where a deed of gift creates a valid *fidei commissum* there must be acceptance not only by the donees but also by the *fidei commissarii* on their behalf and if a deed has not been so accepted the donor is entitled to revoke the gift with the concurrence of the donee ". I am unable to accept this view as correct and I adhere to the view expressed by me in *Mudaliyar Wijetunga vs. Duwalage Rossie et. al.* (1946) 47 New Law Reports 361."

*N. E. Weerasooriya, K.C.*, with *S. W. Walpita*, for the first-defendant-appellant.
*H. W. Jayewardene*, for the plaintiff-respondent.

Wijeyewardene, C.J.

One Mariam Beebee was the original owner of a divided lot of land called Parana Alutwatte. By P1 of 1913 she gifted a half share of the land to her daughter Ameena Umma and Salihu Lebbe who was then engaged to be married to Ameena Umma. That deed created a *fidei commissum* in favour of the children of Ameena Umma. By deed P2 of 1932 Mariam Beebee revoked P1 and on the same day gifted the entirety of the property to Ameena Umma absolutely by P3. Ameena Umma sold the property in 1939 by P4 to Mariam Beebee and Mohamadu Ali and their rights have devolved on the plaintiff by deed P5 of 1939 and P6 of 1940.

The first defendant disputes the title of the plaintiff to the undivided half share referred to in P1 on the ground that P1 was irrevocable. According to him Salihu Lebbe, one of the donees under P1, died leaving Ameena Umma and three children born to Ameena Umma by him. Ameena Umma and those three children conveyed 3/5th of a half share of the property to Karunaratne and Karupiah by D1 of 1941 and those rights devolved on the second and third defendants by D2 of 1945 and they conveyed their rights to the first defendant by D3 of 1946. The main point in dispute in the case was whether the deed of gift P1 was revocable. Neither the plaintiff nor the defendants led any oral evidence. The proceedings show that the defendants understood clearly that the question of the revocability of the deed P1 involved the question of the acceptance of the gift by the fiduciary donees. The deed of gift P1 does not show on its face that it was accepted by the fiduciary donees. The defendants' Counsel however was content to rest his case regarding acceptance on the extract of encumbrance D4 to D7 and on the admission of the plaintiff's Counsel that he admitted " the bare execution of all documents pleaded ". The District Judge gave judgment for the plaintiff,

In appeal it was contended that there was sufficient evidence furnished by D4 to D7 to prove the acceptance of P1 by the fiduciary donees. That contention is based on the fact that D4 to D7 refer to a mortgage of the entire property in 1919 by Mariam Beebee and her husband and the two donees under P1. Now the admission of the plaintiff's Counsel referred to earlier by me does not amount to an admission of the execution of the mortgage bond as this mortgage bond was not referred to in the pleadings. Apart from that, the mortgage bond itself has not been produced in evidence. The extract of encumbrances does not show us in what capacity the donees joined in the execution of the bond. It is quite possible that they and the donors of P1 borrowed the money referred to in the bond and that the donors alone mortgaged the property to secure that debt. I am unable to hold that this entry in D4 to D7 proves the acceptance of the gift by the fiduciary donees.

Relying on the authority of *Carolis et al vs. Alwis* (1944) 45 New Law Reports 156, the District Judge stated in the course of his judgment that " where a deed of gift creates a valid *fidei commissum* there must be acceptance not only by the donees but also by the *fidei commissarii* on their behalf and if a deed has not been so accepted the donor is entitled to revoke the gift with the concurrence of the donee ". I am unable to accept this view as correct and I adhere to the view expressed by me in *Mudaliyar Wijetunga vs. Duwalage Rossie et al* (1946) 47 New Law Reports 361.

I would dismiss the appeal as there is no evidence of the acceptance of the gift P1 by the fiduciary donees. The plaintiff is entitled to the costs of appeal.

*Appeal dismissed.*

PULLE, J.

I agree.

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*Present :* GRATIAEN & PULLE, JJ.

## PONNA vs. MUTHUWA AND ANOTHER

*S. C.* 308/*L*—*D. C. Kandy* 1397.

*Argued on :* 3rd November, 1949.

*Decided on :* 15th November, 1949.

*Deeds—Interpretation of—Conveyance of entire land by two deeds—Deeds conveying two portions of one land in specified proportions—Three boundaries clearly defined—Fourth boundary separating one portion from other not sufficiently clear—Remedy—Action for partition or action for definition of boundaries.*

R, who was entitled to the entirety of land E conveyed it on two deeds to (*a*) the plaintiff describing a part of it as " all that northern ½ part or share in extent 2 pelas paddy sowing " ; (*b*) the defendant describing the other part as " all that southern portion being a ½ share in extent one amunam paddy sowing ". In each of the deeds three boundaries were clearly defined. The fourth demarcating one portion from the other was not clear.

The plaintiff instituted an action to partition the land and the defendant disputed his claim on the ground that the deeds transferred specific parcels of land falling within defined boundaries.

**Held :** (1) That as the language used in the deeds is insufficient to demarcate the lands exactly the grants must be interpreted as conveying only undivided shares in the land in the proportions specified in the deeds and a partition action was the proper remedy in such a case.

(2) That the action for definition of boundaries (*actio finium regundorum*) only lies for defining and settling boundaries between adjacent owners whenever the boundaries have become uncertain whether accidentally or through the act of owners or through some third party.

**Cases referred to :** *Jalaloon vs. Cassim Lal* (1914) 2 Bal. Notes of Cases 9.
*Maria vs. Fernando* (1913) 17 N. L. R. 65.
*Senanayake vs. Selestina Hamine* (1923) 23 N. L. R. 481.
*Dingiriamma vs. Appuhamy* (1914) 4 C. A. C. 44.

*L. H. de Alwis*, with *G. C. Niles*, for the 1st defendant-appellant.
*N. E. Weerasooriya, K.C.*, with *S. Canagarayar*, for the respondent.

GRATIAEN, J.

This is an action for the partition of the land depicted in the Plan No. 400 filed of record. It is common ground that until 13th October, 1930, the entire land belonged to Rajapakse who was the father of the plaintiff and the 1st defendant. On that date Rajapakse executed two deeds. By the deed marked 1D[1] he conveyed to his child the 1st defendant :

> " All that Southern portion being 2/3rd shares in extent one amunam paddy sowing from and out of the land called Ehelagahamulahena (presently garden) of one Yelamunam etc., which said southern portion is bounded on the North by the rock and the lolu tree forming the boundary of the remaining one-third share of the land, on the East by Galheeriya, on the South by the Gahena of Ukkigehena and on the West by the ditch together with the plantations and everything appeartaining thereto ".

To the plaintiff he conveyed by the contemporaneous deed P4 :—

> " All that Northern 1/3rd part or share in extent two pelas paddy sowing from and out of land called Ehelagahamulahena (now a garden) of Yelamunams (6 or 7 pelas) in extent in the whole situate at Galabawa aforesaid which said Northern one-third part or share being bounded on the North Gala, East by Galheeriya, South by the rock on the limit of the remaining 2/3rd share of this land and lolu tree ".

The 1st defendant disputed the plaintiff's claim to have the entire land partitioned on the ground that the deeds 1D[1] and P4 transferred specific parcels of land falling within defined boundaries. There is no doubt that if this be the correct interpretation of the conveyances the present action would not lie, as " ownership in common " is a pre-requisite to the institution of proceedings under the Partition Ordinance. Against the interpretation relied on by the 1st defendant, however, the plaintiff argues that the deeds operated only as conveyances of undivided shares in the land. The learned District Judge upheld the latter view and entered an interlocutory decree for partition on the terms set out in his judgment. The present appeal is from this decision.

Certain facts are not in dispute. Rajapakse continued to possess the entire land until he died in 1933. The rock and the " lolu " tree referred to in the deeds stand thirteen feet away from each other within the limits of the land, and it would doubtless have been practicable to demarcate a boundary so as to separate an area representing an exact one-third on the North from an area representing two-thirds on the South in such a manner that these landmarks stood on the common boundary. But this result could have been achieved in an infinite variety of ways. In point of fact, no boundary was demarcated or even selected for demarcation during Rajapakse's lifetime. After he died the 1st defendant took possession of the entire property on behalf of himself and the plaintiff, to whom a proportionate share of the produce was duly handed over. Apart therefore, from the legal effect of the deeds 1D[1] and P4, no question of either party having acquired a title by prescription to a defined allotment of the land arises for consideration. The decision in this appeal turns solely upon the proper interpretation of the deeds to which I have referred.

In each of the deeds three of the boundaries are indicated with sufficient precision but the fourth boundary is not so clearly described that it could be precisely located by reference only to the language of the document itself. Mr. de Alwis contends that in such a situation the proper remedy is to bring an action for definition of boundaries and to invite the Court to order a demarcation on some equitable basis designed to implement the wishes of the grantor. Certain decisions of this Court were cited to us, but though they help to elucidate a general principle the facts in those cases are clearly distinguishable. In *Jalaloon vs. Cassim Lal* (1914) 2 Bal. Notes of Cases 9 two co-owners had entered into a formal deed of partition whereby they agreed to divide the common land, each party possessing a defined allotment for himself. The deed expressly provided that the boundary separating these two allotments should be demarcated so as to give effect to the proposed partition. It was held that in those circumstances either party could seek the intervention of the Court to have the boundary demarcated should disagreement arise as to how the agreement should be implemented. The present case is very different. There is no express or implied contractual obligation imposed on either the plaintiff or the 1st defendant which the Court could be invited to enforce. Nor do I think that the common law remedy of an action for definition of boundaries is appropriate. The *actio finium regundorum* only lies for defining and settling boundaries between adjacent owners " whenever the boundaries *have become uncertain* whether accidentally or through the act of the owners or some third party ". (*Voet* 10-1-1.

*Maria vs. Fernando*) (1913) 17 N. L. R. 65. Such proceedings, in my opinion, presuppose the prior existence of a common boundary which has been obliterated by some subsequent event. The remedy cannot be sought for the purpose of *creating* on some equitable basis a line of demarcation which had never been there before. The true basis of the remedy, as in England, is that there is "a tacit agreement or duty between adjacent proprietors *to keep up and preserve* the boundaries between their respective estates". (Story on Equity (third edition) p. 259). When confusion arises as to the precise location of the common boundary, the Court enforces a specific performance of the implied engagement or duty imposed by the common law.

I now proceed to consider the submission that the deeds 1D1 and P4 only created undivided interests in the larger land in the proportions specified in the respective conveyances. In so deciding, the learned District Judge purported to follow the ruling of this Court in *Senanayake vs. Selestina Hamine* (1923) 23 N. L. R. 481. Mr. Weerasooriya concedes that this case is not not precisely in point because the conveyance which was there interpreted purported to deal only with "an *undivided* eastern portion, in extent two acres" of a larger land. In such a deed, as Bertram C.J., pointed out, "it is clearly impossible to give effect to a word of locality introduced into a grant of an undivided share, and such a word is in itself of no legal significance".

Were it necessary to lay down any general principle for the purpose of deciding the effect of a deed whereby an owner of land purports to convey to someone a share in it, I would say that where the words of description contained in the grant are sufficiently clear with reference to extent, locality and other relevant matters to permit of an exact demarcation of all the boundaries of what has been conveyed, then the grant is of a *defined* allotment. If however, the language is insufficient to permit of such a demarcation, the grant must be interpreted as conveying only an undivided share in the larger land. The authority which seems to approximate most closely to the facts of the present case is *Dingiriamma vs. Appuhamy* (1914) 4 C. A. C. 44 where a person had gifted to one of the parties "a 2/3rd share towards the southern side from and out of" a larger allotment of land. This deed was held, for want of sufficient particularity in respect of metes and bounds, to convey only an undivided share in the land.

Applying the test of precision which appears to me to be called for in such cases, I have taken the view that Rajapakse by the deeds 1D1 and P4 conveyed to his two children only undivided shares in the proportions of two-thirds to one-third respectively. It may perhaps have been his intention to make a grant of specific allotments of land, but that intention cannot be effectively implemented in the absence of a clear direction in the documents as to the line of the common boundary contemplated for the proposed division. Indeed, neither deed would be capable of due registration as an instrument dealing with a *divided* portion of land because the particular boundaries have not been "clearly and accurately defined" as required by Section 14 (2) of the Registration of Documents Ordinance (Cap. 101). Nor would it be possible in a *rei vindicatio* action to comply with the provisions of Section 41 of the Civil Procedure Code which requires the land to be described "by reference to physical metes and bounds".

As has been pointed out by Bertram C.J., in *Senanayake vs. Selestina Hamine* (1923) 23 N. L. R. 481 the only remedy available to a party whose undivided share has words of locality attached to it is to ask in partition proceedings for an order in the decree that, if possible, the portion allotted to him should be in the direction indicated. This special relief has in fact been granted to the 1st defendant by the Learned District Judge.

I would dismiss the appeal with costs and affirm the decree except that the costs of the contest in the lower Court should be borne by each party. The question which arose with regard to the interpretation of the deeds was properly raised for the decision of the trial Judge and did not in any event involve the plaintiff in additional expenditure.

*Appeal dismissed with costs.*

PULLE, J.

I agree.

*Present:* WIJEYEWARDENE, C.J., JAYETILEKE, S.P.J., NAGALINGAM, J., GRATIAEN, J., PULLE, J.

## NOORUL HATCHIKA vs. NOOR HAMEEM *et. al.*

*S. C. No.* 355/1949 ; *D. C. Colombo* 4907/*Land.*

*Argued on :* 19th December, 1949.
*Decided on :* 2nd February, 1950.

*Immovable property—Agreement to transfer in consideration of marriage—Should such agreement be notarially attested—Prevention of Frauds Ordinance, Section 2.*

**Held :** That an agreement to transfer immovable property in consideration of marriage comes under Section 2 of the Prevention of Frauds Ordinance and is therefore, of no force or avail in law unless notarially attested.

**Over-ruled :** (1) *Thamby Lebbe et. al. vs. Jamaldeen,* (1937) 39 N. L. R. 73.
(2) *Lila Umma vs. Majeed,* (1943) 44 N. L. R. 524.
**Followed :** (1) *Perera vs. Abeydeera,* (1910) 2 Matara Cases 113.
(2) *Levvai vs. Packeer Tamby,* (1915) 6 Bal. N. of C. 46.

**Cases referred to :** *Wright vs. Barry and Another,* 1 S. 6 ; 1 M. 175.
*Steyler vs. Dekkers,* 1 R. 111.

*Per* WIJEYEWARDENE, C.J.—"Our Legislature drew a distinction between agreements in respect of immovable property and agreements in respect of movable property. The position under the Prevention of Frauds Ordinance is that agreements in consideration of marriage fall under section 2 if they relate to immovable property and agreements in consideration of marriage relating to movable property fall outside the Ordinance."

*E. B. Wikremanayake, K.C.*, with *I. Misso*, and *J. B. White*, for the defendant-appellant.

*F. A. Hayley, K.C.*, with *C. E. S. Perera, M. H. Aziz*, and *V. K. Kandaswamy*, for the plaintiffs-respondents.

WIJEYEWARDENE, C.J.

This appeal was argued first before my brothers Gratiaen and Pulle and as they doubted the correctness of two decisions of this Court—*Thamby Lebbe et. al. vs. Jamaldeen,* (1937) 39 New Law Reports 73, and *Lila Umma vs. Majeed,* (1943) 44 New Law Reports 524—it has come before the present Bench.

The second plaintiff is the wife of the first plaintiff. The first defendant is the father and the second defendant, the mother of the second plaintiff. The plaintiffs alleged that "in consideration of their marriage the second defendant undertook to give as dowry to the second plaintiff" the premises bearing assessment No. 17, 17th Lane, Kollupitiya. The register kept under the Muslim Marriage and Divorce Registration Ordinance, No. 27 of 1929, contains the following entry in respect of the marriage of the plaintiffs, signed by the second defendant :—

"The dowry promised by the bride's mother is :—

The entirety of premises No. 17, 17th Lane, Kollupitiya and given when both bride and groom ask for it".

Following the decisions mentioned above, the District Judge held that the agreement pleaded by the plaintiffs was valid though it was not executed before a Notary as required by section 2 of the Prevention of Frauds Ordinance No. 7 of 1840.

It was argued for the respondents before us (i) that the Roman Dutch Law did not require agreements in consideration of marriage to be notarially attested or even to be in writing and (ii) that the Prevention of Frauds Ordinance kept the Roman Dutch Law alive as it designedly omitted any reference to such agreements and refused to follow in that respect the Statute of Frauds (29 Car. ii. Chap. 3 Sec. 4) which contained a specific provision dealing with such agreements.

As regards the first point I may state that there is a conflict of opinion among the Roman Dutch Law writers.

Dealing with this question Nathan says :—

"Voet holds that an antenuptial contract need not be in writing and in support of his view cites Neostadius (on Antenuptial Agreements, Sections 18, 19) : and Dutch Consultations (3, 1, 149, 164). Van Leeuwen (Cens. For. 1, 1, 12, 9) takes the same view of the matter. Voet, a little further on, proceeds to state that antenuptial contracts containing gifts amounting in value to above 500 aurei (fixed in modern practice at 500L), require to be in writing although even then they need not be notarial. It is the same, Voet says, with antenuptial contracts which provide for the future devolution of property by inheritance. Van der Linden (1, 3, 3; Juta p. 15) says distinctly that the contract must be in writing, and must be contained in a notarial instrument although in general Dutch Law, no legal registration thereof is required (23, 4, sections 2-4)

Van der Linden's view was followed by the Cape Supreme Court, which decided that an underhand antenuptial contract signed by the spouses and attested by witnesses could not avail as against the wife's creditors, who claimed payment of a debt contracted by

the wife before marriage (*Wright vs. Barry and Another* 1 S. 6; 1 N. 175). Van der Keessel (section 229; see also *Steyler vs. Dekkers*, 1 R. 111) holds with Voet that antenuptial contracts need not be in writing. Van der Linden's is the more modern opinion, and, supported, as it is by the opinion of the Cape Supreme Court (given in 1850), would appear to be correct as to the general Dutch Law".

"Voet himself (23-4-50) says that publicity is required; but this only means that a notarial contract is necessary; and the necessity for such notarial contract is limited by Voet as stated above to gifts of 500L and upwards, of landed property and property to go by way of inheritance". (Nathan, 2nd Edition, volume 1, paragraph 424).

Whatever be the position under the Roman Dutch Law, the important question is whether the Prevention of Frauds Ordinance does not require such agreements to be embodied in a notarial document when such agreements relate to immovable property.

Section 2 of the Ordinance enacts that:—

> (*a*) "No sale, purchase, transfer, assignment or mortgage of land or other immovable property";
> (*b*) "No promise, bargain, contract or agreement for effecting any such object, or establishing any security, interest or incumbrance effecting land or other immovble property....."; (*c*) "Nor any contract or agreement for the future sale or purchase of any land or other immovable property".
>
> shall be of force unless it is in writing and signed by the party making the same in the presence of a Notary Public and two witnesses and unless the execution of such writing is duly attested by such Notary and witnesses.

I do not see any reason why it should be said that an agreement to transfer immovable property in consideration of marriage does not come under clause (*b*) when that clause is wide enough to embrace all agreements for the transfer of immovable property. I note that a restrictive interpretation was sought to be given to that clause in *Thamby Lebbe et. al. vs. Jamaldeen*, (*supra*) by holding that the clauses referred to "a means of and a stage in the formal effectuation of a sale, purchase, transfer, assignment or mortgage". It is sufficient to state that the respondent's Counsel was unable to throw any light on the significance of those words "a means of and a stage in the formal effectuation".

I am unable to appreciate the argument based on the fact that our Ordinance makes no specific reference to agreements in consideration of marriage while the Statute of Frauds makes such a reference. Section 4 of the English Statutes provide that agreements in respect of several transactions shall not be enforceable unless they are in writing and includes among such transactions (*a*) a contract or sale of lands, (*b*) a promise to answer for the debt, default or miscarriage of another, (*c*) an agreement in consideration of marriage. The arrangement under our Ordinance is quite different. Section 2 of our Ordinance refers only to transactions in respect of immovable property. It is section 21 which refers to the need for a writing (not necessarily a notarial writing) for contracts of suretyship and for agreements to pledge movable property where there is no delivery of the property to the pledgee. Section 21, as it was originally passed, referred also to contracts for the sale or purchase of movable property where there was no delivery of the property or part payment of the price by the purchaser. This latter provision was repealed by section 57 of the Sale of Goods Ordinance (vide Legislative Enactments, 1923 Edition, Volume 2) as the necessary law with regard to contracts for the sale of movable property was re-enacted in section 5 of the Ordinance as numbered in the 1938 edition of the Legislative Enactments. When the English Statute made special reference in section 4 to agreements in consideration of marriage it thereby required a writing for all such agreements whether they referred to immovable property or movable property. Our Ordinance classified various transactions under three heads —(*a*) those requiring a notarial document (*b*) those requiring a non-notarial writing and (*c*) those which require no writing at all. Our Legislature drew a distinction between agreements in respect of immovable property and agreements in respect of movable property. The position under the Prevention of Frauds Ordinance is that agreements in consideration of marriage fall under section 2 if they relate to immovable property and agreements in consideration of marriage relating to movable property fall outside the Ordinance.

I am unable to follow the decisions in *Thamby Lebbe et. al. vs. Jamaldeen*, (*supra*) and *Lila Umma vs. Majeed*, (*supra*). The view I have taken is supported by two earlier decisions of this Court—*Perera vs. Abedeera*, (1910) 2 Matara Cases 131, and *Levvai vs. Pakeer Tamby*, (1915) 6 Balasingham's Notes of Cases 46.

I allow the appeal and direct decree to be entered dismissing the plaintiffs' action with costs in both the Courts.

JAYETILEKE, S.P.J.
I agree

NAGALINGAM, J.
I agree

GRATIAEN, J.
I agree

PULLE, J.
I agree.

*Appeal allowed.*

*Present :* GRATIAEN, J.

## PALASAMY NADAR AND OTHERS vs. THE PRINCIPAL COLLECTOR OF CUSTOMS

*S. C. 402—In the matter of an application for a Mandate in the nature of a writ of Mandamus under Section 42 of the Courts Ordinance, (Cap. 6).*

*Argued on :* 26th October, 1949.
*Decided on :* 1st November, 1949.

*Mandamus—Customs Ordinance—Alleged contravention of Section 46 read with Defence (Control of Exports) Regulations—Cargo detained for further examination—Subsequent intimations declaring goods forfeited—Does detention of goods temporarily for examination constitute seizure of goods as forfeited within the meaning of Sections 146 of the Customs Ordinance—Section 123—Does the power to seize include power to detain.*

**Held :** (1) That the detention of cargo (suspected to be contraband) temporarily pending a decision by the authorities as to whether or not they should be seized does not constitute a seizure of the goods as forfeited within the meaning of section 146 of the Customs Ordinance.

(2) That the power of seizure conferred by section 123 of the Customs Ordinance includes the power for the purposes of examination to detain for a reasonable period any goods which a Customs officer suspects to be seized as forfeited goods.

**Cases referred to :** *The Annandale* (1877) 38 L. T. 139.
*De Keyser vs. Harris* (1936) I. K. B. 224.
*Attorney-General vs. Great Eastern Railway Co.* 5 App. Cas. at p. 478.
*Attorney-General vs. Fulham Corporation* (1921) 1 Ch. 440.
*Winnipeg Electric Railway Co. vs. Winnipag City* (1912) A. C. 355.
*Cory vs. Burr* (1883) 52 L. J. Q. B. 657.

*H. V. Perera, K.C.*, with *C. Suntheralingam*, for the applicant.
*R. R. Crossette-Thambiah, Solicitor-General*, with *Weerasooriya, Crown Counsel*, and *Jayaratne, Crown Counsel*, for the Attorney-General.

GRATIAEN, J.

Certain facts relating to these proceedings are not in dispute. On 11th May, 1949, the petitioners obtained from the Controller of Exports a licence to export to a firm in Madras 129 tons of motor accessories of various descriptions specified with elaborate detail in the licence. Purporting to act on the authority of this licence they caused a number of packages containing motor spare parts to be loaded into a brig named "Patueul Cani" which was berthed in the port of Colombo. On 17th May, before the vessel had sailed, information was received by the Customs authorities which aroused their suspicions in regard to this cargo. The vessel was closely watched, and at 10 a.m., on 20th May, three Assistant Preventive Officers boarded her after first sending a message to a representative of the petitioners' firm notifying him of their intention to examine the cargo. Four other Customs Officers followed the original party on board. One of them, named Brohier, examined certain cases which were lying on deck and he was satisfied that they contained motor spares which were covered by the licence. In the stern of the vessel, however, he discovered other packages containing goods which in his opinion were not covered by the licence. In the meantime some of the other Customs officers, including Aluwihare, had examined further packages and come to the conclusion that they too contained goods not covered by the licence or, in some cases, goods covered by the licence but in excess of the authorised weight. Further detailed examination of the goods on board with a view to investigating the extent of the suspected contravention of the terms of the licence was in the very nature of things impracticable. The entire cargo, *including the goods which Brohier had satisfied himself to be beyond suspicion and therefore not liable to forfeiture as contraband*, were "detained" (I use this non-commital term in my summary of the facts in view of the legal arguments which were addressed to me at the hearing of the present application).

On returning ashore Aluwihare duly reported the action taken by himself and his brother-officers to the Deputy Collector of Customs who gave instructions that all the goods should be re-landed. Mr. Christoffelsz, who was then the Principal Collector of Customs, was summoned for consultation. He approved of the action

taken, and gave directions that the goods were to be further examined with a view to ascertaining which of them were covered by the licence, and which were not so covered. He also directed that his Deputy should hold an official inquiry into the matter after the detailed preliminary examination of the goods had been completed. This inquiry commenced on 10th June and was continued on 18th June. In the meantime Mr. Lanktree had succeeded Mr. Christoffelsz in the office of Principal Collector of Customs. There is no evidence as to the precise date on which a final decision was arrived at arising from the Deputy Collector's inquiry nor did the petitioners receive any information on this matter until August 1st, when the Principal Collector wrote to them in the following terms :

" *Motor Parts seized* ex s.v. ' *Patucul Cani* ' 20-5-49

" Gentlemen,

With reference to the above seizure of Motor parts, I have the honour to inform you that the following goods have been forfeited under Section 46 of the Customs Ordinance read with the Defence (Control of Exports) Regulations :

(*a*) Packages consisting of unlicensed goods ;

(*b*) Packages consisting of licensed and unlicensed goods mixed together ;

(*c*) Goods in excess of the individual maxima of each item specified by licence, subject to a maximum of 113 tons as covered by the cart notes.

2. The rest of the articles will be released.

3. You have been found guilty of an offence under section 128 of the Customs Ordinance in connection with this attempted shipment and are accordingly ordered to pay a penalty of Rs. 1,000. This amount should be remitted to me at a very early date.

4. The examination of the goods for the purpose of implementing paragraph 2 will commence at Pettah 3 Warehouse at 2-30 p.m. tomorrow, 2nd August, 1949. Please be present in person or by representative.

I am, Gentlemen,
Your obedient servant,
Sgd. G. P. THAMBIYAH,
*for Principal Collector.*"

The released goods were in due course recovered by the petitioners and were sold by them to a third party. This application relates to the remaining goods which the Principal Collector has, in terms of his letter which I have quoted above, declared to be forfeited for alleged contravention of the provisions of Section 46 of the Customs Ordinance (Chapter 185).

Section 46 provides that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions " *shall be forfeited* and shall be destroyed or disposed of as the Principal Collector of Customs may direct ". The Customs Ordinance is an antiquated enactment which first found its way into the Statute Book in 1869 and has been subjected to various amendments from time to time thereafter. Some of its provisions declare that in certain circumstances goods " shall be forfeited " while in other circumstances they are merely " liable to be forfeited ". The learned Solicitor-General has been kind enough to assist me with a careful analysis of the somewhat obscure scheme of the Ordinance, and I am prepared to concede that the draftsman must be given credit for having intended the terms " forfeited " and " liable to forfeiture " to convey different meanings. If goods are declared to be " forfeited " as opposed to " liable to forfeiture " on the happening of a given event, their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture. This seems to be the effect of the decisions of the English Courts in *The Annandale* (1877) 38 L. T. 139 and *De Keyser vs. Harris* (1936) I. K. B. 224.

A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 of the Ordinance provides the machinery for this purpose. It empowers any officer of the Customs to seize any goods which are " declared to be forfeited " by the Ordinance. When that is done, the goods " shall be deemed and taken to be condemned " and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner " shall, *within one month from the date of seizure*... give notice in writing to the Collector.....that he intends to enter a claim to the.....goods,..... and shall further give security to prosecute such claim before the Court having jurisdiction to entertain the same ". (Section 146). If notice is given and security tendered within the prescribed time, the Collector is required to deliver up the goods to the claimant who is given a further thirty days within which to prosecute his claim in the appropriate Court. Unless notice and security are so given, and the action filed within the prescribed period, the owner no longer retains a right to claim property in the goods and is also precluded from challenging the validity of the seizure and alleged forfeiture in judicial proceedings. In that event he may only hope for but he may not demand as of right from the appropriate authority a merciful mitigation

of the full rigours of the forfeiture. (Section 155, 156 and 157).

The petitioners claim that they have complied in all respects with the requirements of Section 146. On receipt of the Collector's letter of August 1st informing them of his decision, their lawyers interviewed Mr. Lanktree and eventually it was agreed that a sum of Rs. 50,000 should be fixed as security for the goods and a further Rs. 3,500 as security for the costs of the action which they contemplated instituting in terms of Section 146. Thereafter, on 26th August they gave the Collector formal notice of action and tendered security in the sums agreed upon. An affidavit in terms of Section 147 was also furnished to the Collector. All these facts are not denied. In the meantime Mr. Lanktree had personally consulted the Crown lawyers, and on their advice he rejected the notice and the security on the ground that they were tendered out of time.

The case for the petitioners is that the goods were not "seized as forfeited" until August 1st on which date Mr. Lanktree arrived at and communicated to them his final decision as to which part of the cargo did and which part did not represent goods condemned for alleged contravention of the terms of the export licence under whose authority they purport to have been shipped. On this basis it would follow that the notice of action was given and the agreed amount of security tendered well within the time prescribed by Section 146. They accordingly apply for a writ of mandamus directing the Principal of Mandamus to accept the notice and security and affidavit tendered to him on 26th August and to release to them the goods declared by him to be forfeited in terms of his letter dated 1st August, 1949.

The application is resisted on the ground that the goods were "seized as forfeited" not on August 1st but on 20th May, when they were *detained* (I again employ a non-committal term) on board the brig and in due course re-landed for further examination and inquiry. If this be the correct view, the petitioners' right to challenge the alleged forfeiture is admittedly barred by lapse of time, as the period of one month fixed by Section 146 had clearly expired long prior to August 26th. It is therefore necessary to determine upon the affidavits submitted by the respective parties whether the action by the Customs' party on 26th May, constituted a seizure of the goods "as forfeited" within the meaning of Section 146.

It appears that the petitioners were represented by Counsel at various stages of the examination of the cargo ashore and also at the proceedings conducted by the Deputy Collector. Much lively discussion no doubt ensued as to whether any part of the cargo did in fact contravene the terms of the export licence. Only one letter was received by the petitioners from the Customs authorities during this period, and there is certainly nothing in that letter which could reasonably be construed as indicating that the goods had all been irrevocably seized as forfeited goods. Nor is there any suggestion that the examination of the cargo was being carried out for any purpose other than to assist the authorities in forming a decision as to the extent, if any, to which the terms of the export licence had been contravened. I agree with the learned Solicitor-General that the Customs Ordinance nowhere requires the authorities to notify the owner of the fact that his goods have been seized or of the grounds of seizure. (Some such provision is made, I find, in the Customs Consolidation Act of England 39 and 40 Vic. c. 36, Section 207). Be that as it may, it stands to reason that any communication which is in fact made to the owner should be unambiguous and should leave no room for misunderstanding on the point.

It is necessary to examine the affidavits relied on by the Crown. The Deputy Collector states that on 20th May, he was informed by Aluwihare that he, Aluwihare, "had seized the entire cargo on board". Aluwihare's affidavit does not state in so many terms that he had seized the cargo, but he asserts that on 20th May, one of his brother officers, named Pathirane, informed the petitioners' Manager who was on board "that the entire consignment and the brig were seized". No affidavit from Pathirane is however forthcoming which helps me to ascertain what he actually said on this occasion. The word "seized" is not a term of art, and a great deal therefore would turn on the language employed by Pathirane before one can decide what meaning the words conveyed and were intended to convey. The 2nd petitioner's original affidavit indicates that he formed the impression that the goods on board had been "seized for examination" and that the Customs officials had not yet arrived at a final decision that they were irrevocably divested of their property in the cargo by reason of a forfeiture arising by operation of law. In a counter-affidavit filed in reply to Aluwihare's affidavit, the petitioners' Manager states that he was at no time prior to August 1st, informed that any part of the cargo was "seized as forfeited",

This is the only affidavit in which the language of Section 146 is specifically employed.

The view I have formed is that the affidavit of Aluwihare does correctly set out what actually occurred on board on 20th May, but that the official action taken by the Customs' officials on that day did not constitute a seizure of the goods "as forfeited" within the meaning of Section 146 of the Ordinance. I hold that on 20th May the intention was merely to detain the goods and impound them pending a final decision after further examination and inquiry. When a final decision was arrived at by Mr. Lanktree on August 1st, the continued detention of part of the cargo as contraband constituted in law a "seizure" as contemplated by Section 146. I believe that this was the impression created in the minds of the petitioners by the various steps taken by the Customs officers between 20th May and 1st August. I doubt if any Customs officer himself entertained any contrary view until the position was subsequently reviewed in the light of what was understood to be the true legal position. In my opinion, if the petitioners had taken steps as early as 21st May, to resort to the machinery of Section 146 for the purpose of challenging the validity of the so-called seizure, that action would have been rightly regarded by the authorities as premature.

I am fortified in my view when I pause to consider the position with regard to the steps taken on board with regard to that part of the cargo which was not suspected of having been shipped in contravention of the export licence. Brohier's affidavit shows that these goods at least were not and could not be regarded as "forfeited", and indeed they were ultimately released—not in the exercise of some statutory prerogative of mercy vested in the Principal Collector of Customs, but because no other alternative action was legally possible. Nevertheless, *the entire cargo* (comprising alleged contraband as well as unoffending goods) were detained so that the extent to which the terms of the licence had been contravened could be precisely ascertained. This, I think, was a reasonable method of exercising official powers involving the possibility of an eventual forfeiture of a man's property in goods.

As against the view which I have expressed, the learned Solicitor-General pointed out that Section 123 empowers Customs Officers to "seize" goods which are "declared to be forfeited", but no power is expressly conferred on them to *detain* them temporarily pending a decision as to whether or not they should be seized. This is in my opinion an unduly narrow interpretation of the powers conferred on public officers. Where power to do an act is conferred by statute, it carries with it an implied power to do whatever may fairly and reasonably be regarded as incidental to the exercise of that power. *Attorney-General vs. Great Eastern Railway Co.* 5 App. Cas. at p. 478 *Attorney-General vs. Fulham Corporation* (1921) 1 Ch. 440 and *Winnipeg Electric Railway Co. vs. Winnipeg City* (1912) A. C. 355. I therefore hold that the power of seizure conferred by Section 123 includes the power, for the purposes of examination, to detain *for a reasonable period* any goods which a Customs officer suspects to be liable to be seized as forfeited goods. Any other construction would only lead to precipitate action in respect of goods where no offence against the Customs laws may have been committed.

The meaning of the word "seizure" with reference to action by Customs officers was considered by the House of Lords in *Cory vs Burr* (1883) 52 L.J.Q.B. 657. It was there held that goods must be regarded as seized when they are "taken forcible possession of, and that *not for a temporary purpose*" (per Lord Selborne) but with the intention that "ultimate loss" by forfeiture and condemnation would result from the seizure (per Lord Bramwell). In the present case there was no seizure intended to cause "ultimate loss" to the petitioners until August 1st. The action taken on May 20th fell short of seizure. It was only detention for the temporary purpose of further examination pending a decision as to whether "seizure" would ultimately be justified.

For the reasons which I have given I direct that a *mandamus* do issue to the Principal Collector of Customs as prayed for in the petition. When the security bond has been duly perfected, the goods must be returned to the petitioners, and they will be entitled to institute proceedings in the appropriate Court within thirty days from that date for the purpose of challenging the validity of the seizure of their goods.

The respondent will pay to the petitioners their costs of this application as taxed by the Registrar of this Court.

*Writ allowed.*

*Present :* BASNAYAKE, J.

## THOMAS vs. CEYLON WHARFAGE CO. LTD.

*S. C.* 151—*Workmen's Compensation Appeal C.* 30/6102/46.

*Argued on :* 17th May, 1948.
*Decided on :* 22nd June, 1948.

*Workmen's Compensation Ordinance* (*Chapter* 117), *Section* 48—*Appeal—Failure to conform to requirements of Section* 340 (2) *of the Criminal Procedure Code—Effect on Appeal.*

An appeal under section 48 of the Workmen's Compensation Ordinance is governed by Chapter XXX of the Criminal Procedure Code and the failure to state the point of law to be argued and to attach a certificate as required by Section 340 (2) of the Code are grounds on which such an appeal must be rejected.

**Cases referred to :** *University Motors Ltd. vs. Barrington* (1939) 1 All E. R. 630 at 632.
*Green vs. Lord Penzance* 6 App. Cas. 657.
*Re* Davies (1932) 49 T. L. R. 5.

*H. Wanigatunge*, for the appellant.
*D. W. Fernando*, for the respondent.

BASNAYAKE, J.

This is an appeal under the Workmen's Compensation Ordinance (hereinafter referred to as the Ordinance) by the injured workman. Under section 48 of that Ordinance an appeal lies on a point of law only. Learned Counsel for the respondent submits that, in the petition of appeal, the point of law is not stated and certified in the manner required by section 340 (2) of the Criminal Procedure Code (hereinafter referred to as the Code). He therefore asks that the appeal be rejected. If section 340 (2) of the Code applies to an appeal under section 48 of the Ordinance, learned Counsel's contention is entitled to succeed.

Appeals to this Court under the Ordinance are regulated by Part X thereof. Section 48 (1) of the Ordinance gives the right of appeal on a point of law, but it does not say how that right is to be exercised. Section 49 contemplates the existence of a position of appeal, for it provides that every petition of appeal should bear uncancelled stamps to the value of Rs. 5 and should be filed in the Supreme Court within a period of thirty days reckoned from the date of the order against which the appeal is preferred. There is no special provision in the Ordinance itself which prescribes how the petition of appeal should be drawn up and authenticated, but section 51 declares that subject to the provisions of Part X of the Ordinance, the provisions of Chapter XXX of the Code shall apply *mutatis mutandis*, in regard to all matters connected with the hearing and disposal of an appeal preferred under section 48.

The question is whether the words " in regard to all matters connected with the hearing and disposal of an appeal " are wide enough to make section 340 of the Code applicable. The words are in my view wide and far reaching. It would appear from the observations of Clauson L.J., in the case of *University Motors Ltd. vs. Barrington*, (1939) 1 All E. R. 630 at 632 that the word " hearing " is itself an expression susceptible of a very wide meaning in certain contexts. The remarks of Lord Selborne in *Green vs. Lord Penzance* 6 App. Cas. 657 illustrate the wide scope of the expression. He says :

> " There are various things to be done by him under the Act before the hearing and preparatory to it: orders as to evidence, orders as to attendance of witnesses, notices, orders for the production of documents. Technically those are not a part of the hearing, but I entertain no doubt whatever that those things and every other thing, preliminary and antecedent to the hearing, are covered by and are included in the authority to 'hear', which I consider means to hear and finally determine 'the matter of the representation' which I consider to be equivalent to the cause,—the whole matter. Those antecedent things are in my judgment within that authority, and the 'hearing' within the meaning of these words does not appear to me to terminate till the whole matter is disposed of; therefore it includes not only the necessary antecedents, but also the necessary or proper consequences."

In the present context the word " hearing " which by itself is capable of including " not only the necessary antecedents, but also the necessary or proper consequences " is further enlarged by the words " all matters connected with ". These words have the effect of extending the scope of the expression " hearing " Re Davies (1932) 49 T. L. R. 5. They are in my view designedly

used by the legislature so as to apply all such provisions of Chapter XXX of the Code as are necessary for the proper presentation and hearing of an appeal under the Ordinance. Any other construction would be an undue restriction of the scope of section 51. There is nothing in the Ordinance to indicate that the Legislature intended that the lay appellant should perform the well-nigh impossible task of formulating, for the decision of this Court, points of law arising in his case. A petition of appeal under section 48 of the Ordinance should in my opinion not only contain a statement of the matters of law to be argued but it also must bear a certificate by an advocate or proctor that such matter of law is a fit question for adjudication by the Supreme Court. An appeal under the Code on a matter of law which does not comply with the requirements of section 342 (2) cannot be entertained unless the case is one that falls under the proviso to the section. This appeal does not conform with the requirements of the Code and must therefore be rejected.

## *IN THE COURT OF CRIMINAL APPEAL.*

WIJEYEWARDENE, C.J. (President), NAGALINGAM, J. AND GRATIAEN, J.

## REX vs. RAIGAMA BADALGE DINESHAMY

*C. C. A. Appeal No.* 62/1949, *with C. C. A. Application No.* 157/1949—
*S. C. No.* 8, *M. C. Panadura* 7635, *Fourth Western Circuit* 1949, *Colombo Assizes.*

*Argued on :* December 12th, 1949.
*Decided on :* December 14th, 1949.

*Court of Criminal Appeal—Charge of attempted murder in which accused was undefended—Evidence of bad character given by accused—Failure of trial Judge to warn the Jury not to take inadmissible evidence into account—Retrial.*

Where in a case of attempted murder an undefended accused while giving evidence referred to the fact that he had served a term of imprisonment, and where the learned trial Judge failed to give a specific warning to the Jury that they should not take that evidence into account in arriving at their verdict,

**Held :** That in view of the conflicting evidence in the case and the stage at which the inadmissible evidence was introduced, it would have been perhaps better if the learned Judge referred to that evidence and gave a specific warning to the Jury not to take that evidence into account in arriving at their verdict.

*M. Ratnam*, for the appellant.
*A. C. M. Ameer, Crown Counsel*, for the Crown.

WIJEYEWARDENE, C.J.

The appellant is a man of about sixty years. He was charged with the attempted murder of one Awneris, convicted and sentenced to ten years' rigorous imprisonment. Awneris had three incised injuries, one of which endangered his life for twelve hours. He was in hospital for six days. There appears to have been some ill-feeling between Awneris and the appellant owing to their rival claims to a field. The appellant stated, by way of defence, that he was attacked by Awneris and a number of others when he was cultivating the field and that he thereupon stabbed his assailants. The appellants evidence received some corroboration from the fact that he had nineteen injuries, eighteen of which had been caused by blunt instruments. The appellant was so severely assaulted that according to him he was in hospital for twenty-three days. The material point the Jury had to decide was whether the appellant received those injuries before he stabbed Awneris or afterwards.

The appellant was undefended at the trial. In giving evidence as to his possession of the field in question the appellant stated that he cultivated the field from the time that he returned from jail during the Independence Day Celebrations after serving a long term of imprisonment. I do not think that in giving this evidence the appellant intended to introduce some inadmissible evidence. He was merely referring to an important event in his life, as he found that to be the most convenient way, probably, of stating when he began to cultivate the field. Though the presiding Judge

"explained" to the appellant at that stage "that he need not say anything against him unless that matter was necessary for his defence in this case" he did not tell the appellant that he was prepared to consider an application for a re-trial. The charge itself did not contain any reference to this inadmissable evidence. Of course, it is one of the difficult questions which Judges have to decide—whether they should refer to an item of inadmissible evidence and ask the Jury not to allow their verdict to be affected by it or omit to make any reference to that evidence. Considering the stage at which this inadmissible evidence was introduced, it is not likely that any greater prejudice would have been caused to the appellant by reference to it in the charge. It would have been perhaps better if the learned Judge referred to that evidence and gave a specific warning to the Jury not to take that evidence into account in returning their verdict.

In view of the conflicting evidence in the case it is not unlikely that the Jury was influenced by this item of inadmissible evidence in rejecting the plea of self defence.

This case has caused us some anxiety as the evidence in question was given by the appellant himself, but in view of the special circumstances of this case I think it prudent to quash the conviction and order a fresh trial.

*Conviction quashed and new trial ordered.*

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*Present :* BASNAYAKE, J.

## MURUGASU vs. SUPPIAH

*S. C.* 1091—*M. C. Jaffna* 7053

*Argued on :* 9th November, 1948.
*Decided on :* 26th January, 1949.

*Maintenance Ordinance—Husband's failure to maintain lunatic wife—Application under Section 2 by guardian and manager of her estate—Is the application in order.*

**Held :** That the guardian of the person of a lunatic wife and manager of her estate is entitled to initiate proceedings for her maintenance against her husband.

**Cases referred to :** *Anna Perera vs. Emaliano Nonis*, (1908) 12 N. L. R. 263 at 265.
*A Girigoris vs. G. Don Jacolis*, (1914) 1 Cr. App. Reps. 4.
(1929) 30 N. L. R. 484; and *Annapillai vs. Saravanamuttu*, (1938) 40 N. L. R. 1.

*T. W. Rajaratnam*, for the appellant.
*V. K. Kandasamy*, for the respondent.

BASNAYAKE, J.

This is an application under section 2 of the Maintenance Ordinance by one Nagalingam Suppiah the cousin of one Meenachchy wife of the respondent Vairamuttu Murugasu. The applicant makes the application in his capacity as guardian of the person of the lunatic and manager of her estate.

The learned Magistrate has allowed the application and ordered the respondent to pay a monthly allowance of Rs. 100. The present appeal is from that order.

The learned Magistrate has in my opinion rightly inquired into the respondent's failure to maintain his wife upon the application of her cousin and guardian. I am in respectful agreement with the view expressed by Middleton J. in *Anna Perera vs. Emaliano Nonis* (1908) 12 N. L. R. 263 at 265 wherein he says :

"Section 3 (now section 2) also, I think, contemplates that the Magistrate may make an order for maintenance of wife and children upon an application made by a person other than one of those to be benefited by the order."

In the same case Wood Renton J. says : "Under the Ordinance it is open to any one to bring to the notice of the Court the failure of a man to maintain his wife and children."

It has also been held by this Court in the case of *A. Girigoris vs. G. Don Jacolis*, (1914) 1 Cr. App. Reps. 4 to which I have been referred by learned counsel for the respondent, that it is open to the brother of an insane woman, under the Maintenance Ordinance, to initiate proceedings for her maintenance against her husband.

The cases (1929) 30 N. L. R. 484; and *Annapillai vs. Saravanamuttu*, (1938) 40 N. L. R. 1 cited by learned counsel for the appellant have no application to the present case, and I do not propose to discuss them.

The appeal is dismissed with costs.

*Appeal dismissed.*

*Present :* WIJEYEWARDENE, C.J., & BASNAYAKE, J.

## THINORIS DE SILVA vs. PREETHY WEERASIRI *et. al.*

*S. C. No.* 363/1948 ; *D. C. (Final) Galle* 35919

*Argued on :* 28th September, 1949.
*Decided on :* 11th October, 1949.

A testator by last will (Clause 8) devised the land M to his two sons, A & P. Clause 9 provided that in the event of the death of either of the sons without lawful issue, the survivor became entitled to the share of the one so dying. By Clause 10 the testator directed that the two sons should only have the right to enjoy the rents, issues and profits derived from land M and all the buildings thereon devised to them by Clause 8, that they should not sell, gift, mortgage or otherwise alienate or encumber the same or lease the same for any period exceeding two years at a time, and that after their death their lawful children should become entitled to the same absolutely. By Clause 12, it was provided that the devisees should have the right to enter into possession of all the properties and take the income only after the death of the testator's widow.

A died unmarried and without children. P then transferred to the plaintiff the half-share which he alleged devolved on him absolutely on the death of A. P's widow and children contested plaintiff's title on the ground that on A's death P became entitled to that share subject to a *fideicommissum*.

**Held :** (i) that the testator gave a half-share of M to A & P subject to a life interest in favour of his widow.

(ii) that after the death of the widow, A & P had only a life interest in the half share given to each.

(iii) that on the death of either A or P the half-share given to the person so dying devolved absolutely on his lawful children.

(iv) that if A or P died without lawful children the half share devised to the person so dying went to his surviving brother absolutely.

(v) that the plaintiff was entitled to a half-share of the land absolutely by virtue of the transfer from P.

**Cases referred to :** *Steenkamp vs. Marais*, (1908) 25 S. C. 438.
*Abeyeratne vs. Jagaris*, (1924) 26 New Law Reports 181.
*Rees vs. Registrar of Deeds, et. al.* (1938) South African Law Reports, Cape Provincial Division 459.
*Ex parte Bosch*, (1943) South African Law Reports, Cape Provincial Division 369.

*H. V. Perera, K.C.*, with *U. A. Jayasundere, K.C.*, and *Vernon Wijetunga*, for the plaintiff-appellant.

*N. E. Weerasooria, K.C.*, wigh *H. A. Chandrasena*, and *W. D. Gunasekera*, for the intervenients-respondents.

WIJEYEWARDENE, C.J.

One Don Fredrick Weerasiri was the original owner of a land called Medawatte. By Last Will P1 he devised his property to his two sons, Ariyadasa and Piyatileke, subject to certain conditions. The Last Will was duly proved at his death. Subsequently Ariyadasa died unmarried and without children. By deed P2 of 1936 Piyatileke conveyed to the plaintiff the half share which, he alleged, devolved on him absolutely on the death of Ariyadasa. The intervenients, who are the widow and children of Piyatileke, contested the title of the plaintiff to this land on the ground that, on the death of Ariyadasa, Piyatileke became entitled to that share subject to a *fidei commissum* and that, therefore, Piyatileke could transfer to the plaintiff only his life interest in that half share. The present appeal is from the judgment of the District Judge upholding the contention of the intervenients.

The clauses of P1 which have to be considered are clauses 8, 9, 10 and 12.

By clause 8 the testator devised to Ariyadasa and Piyatileke his residing land Medawatte and several other lands. By clause 12 he provided that the devisees should have the right to enter into possession of all those properties and take the income only after the death of his widow.

**Clause 9 :** " In the event of the death of either of my said two sons without lawful issue I do hereby direct that the survivor shall become entitled to the share of the one so dying ".

Clause 10 : (*a*) " I hereby Will and direct that my said two sons shall only have the right to enjoy the rents, issues and profits derived from my residing land Medawatte and all the buildings thereon devised to them by clause 8 of the Will ".

(*b*) " They shall not sell, gift, mortgage or otherwise alienate or encumber the same or lease the same for any period exceeding two years at a time and "

(*c*) " after their death their lawful children shall become entitled to the same absolutely ".

I have divided clause 10 of the Will into paragraphs (*a*), (*b*) and (*c*) for convenience of reference.

Now under clauses 8 and 12 Ariyadasa and Piyatileke would have become each entitled to an undivided half share of Medawatte subject to the life interest of the widow of the testator. Under these clauses alone there would have been no right of survivorship (vide section 7 of the Wills Ordinance). Then we get clause 9 which says that on the death of either Ariyadasa or Piyatileke without lawful issue the survivor shall become entitled to the share of the one so dying. If this clause stood by itself the question would have arisen whether the Last Will created a *fidei commissum* in favour of the lawful issue. In other words, if Ariyadasa had lawful issue and Ariyadasa transferred his shares to a third party, could the rights of that third party have been defeated by the lawful issue of Ariyadasa claiming that half share as *fidei commissaries* on the death of Ariyadasa? This is a matter on which the views of Grotius and Bynkershoek are opposed to the views of Sande and van Leeuwen (Censura Forensis) as adopted in *Steenkamp vs. Marais*, (1908) 25 S. C. 438. The latter case is however criticised by A. J. Mc Gregor in volume 53 of the South African Law Journal (1936) page 265 and is also in conflict with the view expressed by Lee in his " Introduction to Roman-Dutch Law ", fourth edition, page 380. It is clause 10 of the Last Will that puts the matter beyond any doubt in this case.

I shall now proceed to examine clause 10 in detail. Paragraph (*a*) shows that Ariyadasa and Piyatileke could only take the income from Medawatte " devised by clause 8 of the Will ". It will be noted that the words used in this paragraph are " devised by clause 8 of the Will " and not " devised by clauses 8 and 9 of the Will." This paragraph shews that Ariyadasa and Piyatileke were each given only the income of the half share devised by clause 8 but the testator was silent in that sub-paragraph with regard to the extent of the interest in the half share that came to the survivor of Ariyadasa and Piyatileke under clause 9. The paragraph (*b*) prohibited Ariyadasa and Piyatileke from making certain alienations again in respect of what has been devised to them by clause 8 of the Will. These two paragraphs (*a*) and (*b*) taken by themselves would not have been sufficient to create a *fidei commissum* (vide section 3 of the Entail and Settlement Ordinance). It is paragraph (*c*) which indicates the *fidei commissaries* clearly. The question, however, arises as to the time at which the property devolves on these *fidei commissaries*. When do the lawful children referred to in paragraph (*c*) become entitled to their interests absolutely? Suppose Ariyadasa died first leaving " lawful children " and Piyatileke died 40 years after, leaving " lawful children ". Have the " lawful children " of Ariyadasa to wait for forty years after the death of their father or do they come in immediately after the death of Ariyadasa? The answer to that question will depend on the interpretation of the words " after their death " and " their lawful children " in paragraph (*c*). Do these words mean " after the death of both " and " the lawful children of both " or do they mean " after the death of each" and " the lawful children of each "? Of course the question whether the word " their " is to be interpreted distributively depends to a large extent on the context. Considering that we are dealing here with a devise in favour of two sons and not in favour of a husband and wife and taking into consideration the provisions of clause 8 I think that the word " their ." is used in this Will distributively (vide *Abeyeratne vs. Jagaris*, (1924) 26 New Law Reports 181).

After a consideration of the various clauses in the Last Will including those mentioned by me earlier I have reached the decision :—

(*a*) that the testator gave a half share of Medawatte to each of his two sons, Ariyadasa and Piyatileke, subject to a life interest in favour of his widow ;

(*b*) that the devisees, Ariyadasa and Piyatileke, had after the death of the widow, only a life interest in the half share so given to each ;

(*c*) that on the death of either Ariyadasa or Piyatileke the half share given to the person so dying would devolve absolutely on his lawful children :

(*d*) that if Ariyadasa and Piyatileke died without lawful children the half share devised to the person so dying would go to his surviving brother absolutely.

I find, therefore, that the plaintiff is entitled to a half share of the land absolutely by virtue of the transfer P2.

I set aside the order of the District Judge and direct him to enter a partition decree in accordance with the above finding.

The intervenients-respondents will pay the plaintiff-appellant the costs of appeal and the costs of the proceedings in the District Court on October, 8th 1947.

After I wrote the above judgment my attention was drawn by my brother Basnayake to *Rees vs. Registrar of Deeds et. al.* (1938) South African Law Reports, Cape Provincial Division 459 and *Ex parte Bosch*, (1943) South African Law Reports, Cape Provincial Division 369. The reasoning in those cases appears to support the view expressed above.

BASNAYAKE, J.
I agree.

*Set aside.*

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*Present :* BASNAYAKE, & GRATIAEN, JJ.

## SINNAPODY & ANOTHER vs. MANNIKAN & ANOTHER

*S. C.* 305—*D. C. Jaffna* 3786

*Argued on :* 6th October, 1949.
*Decided on :* 19th December, 1949.

*Rectification—Action for—When relief will be granted—Admissibility of parol evidence—Refusa of party to take oath without sufficient reason when required by opponent—Should it be taken into consideration by judge—Oaths Ordinance, Section* 8.

**Held :** (i) That a rectification of a deed will not be allowed :—

(*a*) where there has been an unreasonable delay in enforcing the right. (The material date for the purpose of deciding whether there has been delay is the date of the notice of the error and not the date when the error was committed.)

(*b*) where it would affect prejudicially interests which third parties have acquired for valuable consideration on the assumption that the instrument in the form in which it was originally drawn was good.

(*c*) where the evidence does not clearly and unambiguously establish that there was an actually concluded agreement antecedent to the instrument sought to be rectified and that the term the inclusion of which is sought is a term of the agreement between the parties and continued concurrently in their minds down to the time for execution of the instrument and that by mistake in drafting there has been a failure to make the instrument conformable to the agreement.

(ii) that parol evidence is admissible to make out a case for rectification and the Court can act even on the evidence of the plaintiff alone where no further evidence can be obtained.

*Per* BASNAYAKE, J.—" A judge in weighing the evidence is entitled to take into consideration the refusal of a party, without sufficient reason, to make an oath when required to do so by the opponent.

*Per* GRATIAEN, J.—" The defendant's bare refusal to take a decisory oath was not in my opinion a " fact " which a prudent man could accept as " proof " of any contentious matter which arose for adjudication in the case."

**Cases referred to :** *Iyanohamy vs. Carolis*, (1900) 4 N. L. R. 78.
*Gilmour vs. Coats*, (1949) A. C. 426.
*Perampalam vs. Kandiah*, (1937) 17 Law Recorder 158.

*N. E. Weerasooria, K.C.*, with *S. Thangarajah*, for the defendant-appellants.

*S. J. V. Chelvanayakam, K.C.*, with *C. Vanniasingham*, for the plaintiff-respondents.

BASNAYAKE, J.

This is an action for rectification of a usufructuary mortgage bond attested by one S. Sinnathurai, a Proctor and Notary, on 5th October, 1946. The plaintiffs who are husband and wife are the mortgagees and the defendants who are also husband and wife are the mortgagors. The plaintiffs allege that the amount of the loan is incorrectly stated in the bond as Rs. 275 when it should in fact be Rs. 2,750. The defendants deny that allegation.

At the trial the following issues were settled—

(i) Was the true consideration for deed No. 731 of 5-10-46 Rs. 2,750?
(ii) Has the consideration been stated wrongly as Rs. 275?
(iii) Is the plaintiff entitled to rectification?

After hearing the evidence placed before him by the parties the learned District Judge held in favour of the plaintiffs on all the issues and entered decree ordering the rectification of the deed. The present appeal is by the defendants from that judgment and decree.

The material portions of the mortgage bond, which is in English, read :—

"Know all men by these presents that we Kathirkaman Sinnapody and wife Varaththai of Palaly, Jaffna hereinafter called the mortgagors, are jointly and severally held and firmly bound and do hereby acknowledge to be justly and truly indebted to Sinnapodi Mannikan and wife Umaiaththai both of Palaly, Jaffna, hereinafter called the mortgagees, in the sum of Rupees Two hundred and seventy five (Rs. 275) of lawful money of Ceylon which we have this day borrowed and received of and from the said Sinnapody Mannikan and and wife Umaiaththai and therefore renouncing the *beneficium non numeratae pecuniae* the meaning of which has been explained to us agree and undertake and bind ourselves and our heirs, executors and administrators to pay the said sum of Rupees Two hundred and seventy-five (Rs. 275) to the said Sinnapodi Mannikan and wife Umaiththai or to either of them or their heirs executors administrators or assigns on demand and until such payment we engage and bind ourselves and our aforewritten to permit the mortgagees and their aforewritten to possess the four lands and premises described hereinafter and take and enjoy the produce of the said 4 lands by way of Otti Mortgage under the Law of Thesawalamai, in lieu of interest on the said sum of Rs. 275.

And for securing the due payment of the said sum of Rs. 275 we the said mortgagors do hereby specially hypothecate....."

The case for the plaintiffs is that in pursuance of an agreement to lend to the first defendant a sum of Rs. 2,750 on a usufructuary mortgage of certain lands the first plaintiff on 25th September, 1946 made a payment of Rs. 2,475 which the defendants needed to pay one Gambukeswara Kurrukkal in order to obtain a reconveyance of certain lands transferred to him conditionally and that on 5th October, 1946 when the defendants executed a bond securing the loan by a usufructuary mortgage of four of their lands the first plaintiff paid the balance sum of Rs. 275. He says that he asked the notary to execute the bond for 275 meaning thereby 275 "pounds" or Rs. 2,750, a "pound" according to his usage being equal to Rs. 10. The notary bears him out on the point that the first plaintiff mentioned only the number 275 without qualifying it; but he says that when the first plaintiff said the bond was for 275 he understood him to mean Rs. 275 and prepared the document accordingly. The first plaintiff is also supported by the Village Headman to whom the first defendant admitted, on being questioned in consequence of a complaint by the former, that the amount Rs. 275 in the bond was a mistake for Rs. 2,750.

Although the bond was written in October, 1946 it was not till July, 1947 that the first plaintiff removed the deed from the notary's office. He was also given a Tamil translation of the bond by the notary. When he took the documents home his son pointed out to him that the bond was for Rs. 275 and not Rs. 2,750. On that very day he pointed out to the notary the mistake in the bond. The notary at first refused to believe him but later undertook to ascertain from the first defendant whether he admitted that the bond was for Rs. 2,750. After meeting him the notary informed the first plaintiff that the error would be rectified by the defendants as it was admitted that the amount to be secured by the bond was Rs. 2,750. Despite the admission however, the defendants on various pretexts avoided the execution of a deed of rectification.

The first defendant denies that the true amount is Rs. 2,750. He denies that he ever admitted to the headman or to the notary that Rs. 275 was a mistake and that Rs. 2,750 was the amount intended to be secured. He alleges that the headman is ill-disposed towards him and that his evidence is false. He does not attack the notary's evidence beyond saying that it is not true.

The learned District Judge who has had the advantage of seeing the witnesses give their evidence, has preferred the evidence of the first plaintiff and his witnesses to the unsupported testimony of the first defendant. I see no ground on which I can interfere with his finding of fact.

Before I discuss the law applicable to this case it will be convenient at this point to refer to an incident which occurred at the trial and to which the learned District Judge has referred in his judgment. After the issues had been framed and before the evidence commenced the first plaintiff challenged the first defendant to take an oath at the Palaly Kanagaimman Temple that the true consideration for the deed was not Rs. 2,750 and that he did not borrow Rs. 2,750. The first plaintiff undertook to withdraw the action if the first defendant made the oath. The latter refused to make the oath.

Under our law (Section 8, Oaths Ordinance), a party to a judicial proceeding of a civil nature may offer to be bound by any oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency. If a party or witness refuse to make such oath or solemn affirmation he cannot be compelled to make it but the court is required to record as part of the proceedings "the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it and that he refused it, together with any reason which he may assign for his refusal". In the instant case the first defendant gave no reason for his refusal.

It was contended for the defendants that the learned District Judge was prejudiced by the refusal of the first defendant to make the oath. The judgment does not show that he was prejudiced by the first defendant's refusal. After reaching a conclusion against the defendants on the facts he has referred to the first defendant's failure to make the oath as an added circumstance against him. A judge in weighing the evidence is entitled to take into consideration the refusal of a party, without sufficient reason, to make an oath when required to do so by the opponent.(*Iyanohamy vs. Carolis Appu*, (1900) 4 N. L. R. 78. The provisions of section 8(4) which require a careful record to be made in the case of the refusal of a party to make an oath would be pointless if the refusal to make an oath was entirely irrelevant. In the instant case the learned judge has in my view rightly regarded it as a circumstance against the refusing party.

I shall now proceed to consider whether on the facts as found by the learned trial judge the plaintiffs are entitled to an order for rectification. Rectification will not be allowed where there has been an unreasonable delay in enforcing the right. The material date for the purpose of deciding whether there has been delay is the date of the notice of the error and not the date when the error was committed. In the instant case the error was noticed in July, 1947 and the present action was instituted on 26th August, 1947. The period between the detection of the mistake and the institution of the action was spent in persuading the defendants to rectify it. There has therefore been no delay.

Rectification will also not, as a rule, be allowed where it would affect prejudicially interests which third parties have acquired for valuable consideration on the assumption that the instrument in the form in which it was originally drawn was good. In the instant case the defendants have by deed of gift dated 20th August, 1947 (D4) gifted the lands dealt with in the bond along with other lands to their second daughter Sinnammah, wife of Vairavy Vallipuram whose marriage was in 1944 or 1945. The first defendant does not give a satisfactory explanation for the execution of a deed of gift by way of dowry so long after his daughter's marriage. The close proximity of the date of the gift to the date of the institution of this action throws considerable doubt as to the *bona fides* of the transaction especially as the defendants were at the time aware of the position taken up by the plaintiffs. Donees stand on a different footing from a purchaser for valuable consideration without notice. Even though the donees would be affected by an order for rectification because the amount they will have to pay for the redemption of the mortgage will be nine times more than that expressed in the deed P2, I am of opinion that it will not be contrary to the principles of law or equity to allow the rectification of the bond in the instant case.

In order to obtain an order for rectification of an instrument the party claiming relief must show by clear and unambiguous evidence that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified and that the term the inclusion of which is sought was a term of the agreement between the parties and continued concurrently in their minds down to the time for execution of the instrument and that by mutual mistake in drafting there has been a failure to make the instrument conformable to the agreement. The evidence which the learned trial judge has accepted satisfies the above requirements.

The plaintiff's case rests on parol evidence. There is no objection in law to that class of evidence in an action for rectification. Parol evidence is admissible to make out a case for rectification, and the Court can even act on the evidence of the plaintiff alone where no further evidence can be obtained.

For the above reasons the plaintiffs are entitled to succeed, and I uphold the learned District Judge's order for rectification and dismiss the appeal of the defendants.

This is a case in which both parties are to blame, the plaintiffs for making the mistake and the defendants for failing to correct it. The costs of trial should therefore be borne by either

party. But as the defendants not content with the decision of the trial judge have brought the plaintiffs to this Court the plaintiffs' costs of appeal should be paid by the defendants.

GRATIAEN, J.

I agree that this appeal should be dismissed and that no good grounds exist for disturbing the conclusion arrived at by the learned trial Judge upon the evidence. The probabilities in the case strongly support the version of the plaintiff. With respect, however, I cannot agree with my brother Basnayake that, as an additional ground for disbelieving the defendant, any weight could legitimately be attached to the circumstance that he refused to accept a challenge to take an oath at the Palaly Kanaigiamma Temple that the true consideration for the deed was not Rs. 2,750.

A party to an action is entitled to demand that his claim or his denial of a claim (as the case may be) should be decided upon legally admissible evidence at a trial regulated by the normal procedure which governs Courts of civil jurisdiction. No doubt Section 8 of the Oaths Ordinance (Chapter 14) lays down a special process whereby parties, *should they so desire*, may have their disputes settled if one of them takes a decisory oath in an agreed form. But in such cases mutual agreement is of the essence of the matter, and no party can be compelled to waive his right to have the action tried in the normal way. The decision of Bonser C.J., in *Iyanohamy vs. Carolis*, (1900) 4 N. L. R. 78 dealt with a maintenance case where the defendant, who had in the first instance agreed to take a decisory oath, later retracted from his undertaking on the ground of impossibility for a reason which the Magistrate characterized as specious. Bonser C.J., held that the duty of the Magistrate in the circumstances was to try and determine the action upon the evidence, but that "when he came to weigh the evidence, *if he was satisfied that the reason given by the defendant for refusing to take the oath was inadequate and a mere quibble, and that the defendant was really afraid to take a solemn oath, he might take the fact into consideration.* But he must hear what both sides and their witnesses have to say before he decides the case".

Section 8 of the Oaths Ordinance permits a party to specify his reasons for refusing to take a decisory oath, and in that event the Court is required to record those reasons. There may, perhaps, be instances in which a Court might regard itself as qualified and competent to decide that the reasons assigned are so inherently fantastic that an adverse inference may properly be drawn against the party who propounds them. But such instances, if I may say so with respect, must be rare indeed. A Court of law would to my mind be involved in a most hazardous and embarrasing enterprise if it attempted to examine the merits of a litigant's personal objections to have his mundane disputes determined in accordance with the extraordinary procedure contempleted by Section 8. In our present limited state of knowledge of matters spiritual and metaphysical, it is I think safer for a judicial tribunal to follow the principle adopted by the House of Lords when called upon, in a case dealing with a charitable bequest, to assess the efficacy of prayer. "The faithful", said Lord Simonds, "must embrace their faith believing where they cannot prove: *the Court can act only on proof*". *Gilmour vs. Coats*, (1949) A. C. 426.

Whether or not the ruling of Bonser C.J., could with safety be adopted in appropriate cases, it cannot in my opinion apply to the present action. The defendant was challenged to take a decisory oath; he refused to do so, assigning no reasons for his refusal. He could not be compelled to give his reasons, nor had the Court any power to investigate what was not divulged to it. In that state of things, I do not see what material existed upon which the learned Judge could draw any inferences, favourable or adverse to the defendant, from the incident. The defendant's bare refusal to take a decisory oath was not in my opinion a "fact" which a prudent man could accept as "proof" of any contentious matter which arose for adjudication on the case. (Section 3 of the Evidence Ordinance). I prefer to follow the decision of this Court in "*Perampalam vs. Kandiah*, (1937) 17 Law Recorder 158, where Abrahams C.J., said, "The provision that cases can be disposed of by taking an oath in a place of worship is no doubt an excellent one, but there is nothing in the enactment which makes provision for this mode of deciding cases which sanctions an adverse finding against the party refusing. A man may have his reasons for issuing a challenge and the other party may have his reasons for refusing to accept the challenge, and not only is the Court not justified in coming to an adverse conclusion against the party who refuses to accept such a challenge but is also not entitled to investigate his reasons."

If I took the view that the relevant and admissible evidence in the case was evenly balanced and that the adverse inference erroneously drawn by the trial Judge had in his judgment turned the scales against the defendant, I should have thought it necessary for the case to be tried afresh. In my opinion, however, the other grounds on which the learned Judge has quite independently held in favour of the plaintiff are very substantial and convincing. I therefore agree to the order proposed by my brother Basnayake.

*Appeal dismissed.*

*Present :* BASNAYAKE, J.

## MARTIN & ANOTHER vs. INSPECTOR OF POLICE, VEYANGODA

*S. C.* 907-908—*M. C. Gampaha* 51574

*Argued and decided on :* 22nd September 1949.

*Brothels Ordinance—Section 2—Keeping or managing a brothel—Meaning of.*

**Held :** That a person who is not the controlling head of a brothel with a proprietary interest and control over it and who does not direct, govern or administer the brothel cannot be said to keep or manage the brothel.

**Cases referred to :** *Rex vs. Stannard*, 33 L. J. M. C. 61.
*Rex vs. Barett*, 32 L. J. M. C. 36.
*Halligen vs. Ganly*, 19 L. T. 268.

*C. S. Barr-Kumarakulasinghe*, with *Issadeen Mohamed*, for the accused-appellants.
*A. Mahandrarajah, Crown Counsel*, for the Attorney-General.

BASNAYAKE, J.

The appellants have been convicted of "keeping and managing" a brothel. The first appellant has been sentenced to six months' rigorous imprisonment and to a fine of Rs. 400 while the second appellant who is the mistress of the first has been sentenced to three months' simple imprisonment.

Learned counsel for the appellants does not canvass the conviction of the first appellant. In regard to the second appellant he submits that the evidence does not support the finding of the learned Magistrate. The evidence against her is that of one Piyadasa. He says "I asked for a woman from the 1st accused. He said that there was a woman but she was with a man but he undertook to produce two women. The 2nd accused went and brought two women. The 2nd accused placed the mats and pillows in two rooms and gave the woman.....The 2nd accused took 15 minutes to half an hour to bring the women.....Whilst the police rushed in the 2nd accused was in the house where I was."

Section 2(*a*) of the Brothels Ordinance under which the charge is made reads :—

"Any person who—
(a) keep or manages or acts or assists in the management of a brothel shall be guilty of an offence."

To keep a brothel involves the idea of a controlling head with a proprietary interest and control over it. (*Rex vs. Stannard*, 33 L. J. M. C. 61) *Rex vs. Barrett*, 32 L. J. M. C. 36, *Malligan vs. Ganly*, 19 L. T. 268. To manage a brothel means to control, direct, govern or administer a brothel, not necessarily in the capacity of a proprietor. The keeper of a brothel and the manager of it need not necessarily be one and the same person. One can conceive of a case in which an individual is the keeper of a brothel without being its manager himself. There can also be a brothel whose keeper is, as in the instant case, also its manager.

In the instant case the evidence does not show that the second appellant was the keper or manager in the sense I have indicated. She has not been charged with acting or assisting in the management of the brothel. I therefore do not propose to consider whether her conduct comes within the second limb of the section.

I quash her conviction and allow the second appellant's appeal.

The first appellant's appeal is dismissed.

*Second Appellants' appeal allowed*
*First appellants' appeal dismissed.*

## *IN THE COURT OF CRIMINAL APPEAL*

*Present :* WIJEYEWARDENE, C.J. (President), CANEKERATNE, J., GUNASEKERA, J.

## REX vs. TUDAWA HEWAGE NANDIAS SILVA

*C. C. A. Application No.* 108/1949 ; *S. C. No.* 48 ; *M. C. Anuradhapura Case No.* 375/*First Midland Circuit* 1949/*Kandy Assizes.*

*Argued on :* 19th & 20th July, 1949.
*Decided on :* 20th July, 1949.
*Reasons delivered on :* 28th July, 1949.

*Court of Criminal Appeal—Questions put to witness by the trial judge in the course of the examination in chief, cross-examination and re-examination—Powers of the judge under section* 165 *of the Evidence Ordinance.*

The accused was charged with the murder of a Police Constable by stabbing. The evidence led by the prosecution proved that the deceased, prior to the stabbing, had attempted to molest a woman named Somawathie living in the same compound as the accused, and that he had refused to go away when the accused asked him to do so. The evidence of the accused's mistress, called by the defence, was to the effect that, when admonished by the accused and asked to leave, the deceased said, " If you are unwilling to allow me to molest this woman, let me have your wife ", and that then there was an exchange of blows. In her complaint to the Police, made shortly afterwards, Somawathie referred only to the attempted molestation and not to the subsequent stabbing. In the course of his charge to the jury the trial Judge strongly suggested that the accused, his mistress and Somawathie had together " concocted " a false story before Somawathie went to the Police. All through the trial the Judge took a large part in the questioning of the witnesses, both prosecution and defence, during their examination-in-chief, cross-examination and re-examination, in the exercise of his powers under section 165 of the Evidence Ordinance.

**Held :** (1) That the suggestion that a false story had been "concocted" by the accused, his mistress and Somawathie amounted to a misdirection on the facts unsupported by the evidence.

(2) That on the evidence the Court was satisfied that the accused had established his right to the plea of grave and sudden provocation.

(3) That the trial Judge had not exercised properly the powers given to him under section 165 of the Evidence Ordinance.

*Per* WIJEYEWARDENE, C.J.—" .....in this case the prosecution was respresented by a Crown Counsel and the accused was defended by two Counsel. It is not possible to lay down as general rules as to when and how far a Judge should interrupt an examination-in-chief or a cross-examination by questioning the witness himself. These are matters which the Judge is given the discretion to decide for himself in each case coming before him. As I said before, that very fact will make a Court guard against the exercise of those powers without restraint."

**Cases referred to :** *Cain's case,* (1936) 25 Criminal Appeal Reports 204.
*Gilson and Cohen,* (1944) 29 Criminal Appeal Reports 174.
*Bateman's case,* (1946) 31 Criminal Appeal Reports 106.

*Colvin R. de Silva,* with *K. A. P. Rajakaruna,* for the appellant.
*H. A. Wijemanne, Crown Counsel,* for the Crown.

WIJEYEWARDENE, C.J.

The accused in this case was found guilty of the murder of a Police Constable, J. K. Sugathapala, on February 26th 1949.

The deceased received three stab wounds one of which was necessarily fatal. The medical witness was of opinion that the deceased would have died within ten minutes of his receiving that injury.

The evidence of the accused denying that he stabbed the deceased could not have involved in any doubt the question whether the accused stabbed the deceased ; but, on the evidence led both by the prosecution and the defence, the Jury had to consider the further question whether there were not mitigating circumstances reducing the offence to culpable homicide not amounting to murder. The trial Judge referred to these mitigatory pleas in the course of his charge to the Jury.

The accused and his mistress, Leelawathie, occupied a room in a line of three rooms adjoining the main road. The other two rooms were occupied by the two Crown witnesses, Nair and Mohamadu. Close to the accused's room and standing in the same compound, was another room occupied by two young women, one of whom was Somawathie, the Crown witness. On the night in question, Somawathie alone was occupying that room. She was at that time in an advanced state of pregnancy. The accused

appears to have been a lessee of all these rooms. Close to the accused's room and on the other side of the main road, was a Cinema which was open till about 1 a.m.

I give below a summary of the evidence of the more important witnesses.

(*a*) Somawathie stated that the deceased came to her room about midnight. Answering a question of the Judge, she said that the room was used as a brothel. Further, she answered in the affirmative the following series of questions which, according to the Stenographer's notes, were put by the Judge :—

*Q.* "Now what was it that happened? Had not the Constable wanted a free show? You refused that. Is it not that what happened?"

She said she went to accused's room and complained to him that she was molested. Then the accused went out and directed the deceased to go away but the deceased did not do so. The deceased, however, kept silent. Then the accused stabbed the deceased once. Some time after the accused spoke to Nair and Mohamadu as he wanted their help to throw the body of the deceased into a tank. They did not agree to help him. She went to the Police Station, half a mile away, and made the following statement P 3 :—

"A man came to my house and he asked me to come for immoral reasons. I told him that I was pregnant. Even then he will not go. Hence I came to inform the Police. He is drunk and threatening to do me harm. No one else is in the house".

She did not tell even the Magistrate that she saw the accused stabbing the deceased, as the accused asked her not to mention that fact.

(*b*) Nair said that he was awakened by the cries of "oh mother". He thought that happened about 11-30 p.m. Half an hour later, the accused came and sought his help to throw into a tank the body of a man "who had been stabbed". He refused to help the accused.

(*c*) Mohamadu's evidence was more or less similar to that of Nair.

(*d*) The accused said that Somawathie came and complained to him that a man was trying to molest her. However, he did not leave his room nor did he stab the accused.

(*e*) Leelawathie, the mistress of the accused and a witness for the defence, said that the accused went out when Somawathie complained to him that a man was trying to molest her. The accused told the deceased "not to molest a pregnant woman", when the deceased retorted, "if you are unwilling to allow me to molest this woman, let me have your wife". Then she heard both exchanging blows. Shortly after, the accused returned but remained silent, though she asked him more than once "what happened". She noticed then "a small swelling" under the right eye of the accused.

Admittedly, the case for the Crown was that the deceased came to the room of Somawathie which he knew to be a brothel and tried to have intercourse with Somawathie without making any payment. That was even indicated in the question put by the Judge even before Somawathie was cross-examined. It is again referred to in an early part of the Judge's charge (page 22) There the Judge said :—

"Now, what is the motive alleged by the Crown? The Crown says the deceased man is a Police Constable—a Ralahamy—he is a man who by virtue of the respect paid to members of the Police Force usually gets front seats in buses or any other vantage point that is going and it is suggested for the Crown that he is the kind of Police Constable who by virtue of his position and by virtue of the fact that a house of ill fame could be closed by the Police would have to be given preferential treatment; therefore this constable after having gone to the Pictures thought he would get further free entertainment".

To judge from another portion of the charge, the Crown Counsel appears to have suggested that Somawathie, the accused and Leelawathie were "concocting some story" to be related to the Police before Somawathie left for the Police Station. Certain questions were put by the Judge to Somawathie during the examination in-chief which seemed to suggest that she delayed to go to the Police Station as she was "concocting some story". At page 45 of the charge the Judge said :—

"The Police Station is half a mile from the scene and this woman got to the Police Station at 2-45 a.m. Assuming that she took 45 minutes to go half a mile—Naina Mohamadu says the accused came at midnight, and Somawathie then must have left about 2 a.m. What were they discussing for two hours? The Crown submits to you if you believe Naina Mohamedu's evidence, the accused, his wife and Somawathie were putting their three heads together and conspiring and concocting some story which had to be told to the Police, after the attempts of the accused to dispose

of the body had failed. The Crown asks you, if the transaction took place in the manner alleged by the defending Counsel, viz., that the accused was gravely and suddenly provoked because the deceased constable asked the accused to produce his wife, the Crown asks—as someone had to go to the Police Station why did he not go? The Crown submits he did not go because they were concocting a story which would exculpate the accused, and the Crown says that the statement made by Somawathie at the Police Station was one clearly which is false because it is not a case of death but a case of molestation. Although Somawathie knew that the man had been grievously hurt and she gives the lie direct to the doctor viz., when she left the deceased was alive and the medical evidence is he could not have lived more than ten minutes, and the Crown submits you will have no difficulty in coming to a conclusion that at that stage Somawathie was trying to save the accused .....So gentlemen, the prosecution submits to you that the deceased having met his death somewhere between 11 and midnight, the accused, his wife and Somawathie were cogitating and conspiring as to what was to be done and what story should be told which would be most advantageous to the accused, and we know as a fact at 2-45 a.m. on the 26th of February, Somawathie appeared at the Police Station and she made, what is now proved to be a false statement".

This part of the charge appears to me to be based on a misapprenhension of the evidence. No doubt, Nair, Mohamedu and Somawathie who were all roused from their sleep fixed the time of the arrival of the deceased about midnight, but it must not be forgotten that these witnesses were trying to tell the Court what they guessed to be the approximate time. On the other hand, we have definite evidence that the Cinema closed about 12-30 or 1 a.m. Considering that some time must have elapsed between the closing of the cinema and the stabbing of the deceased, it is difficult to say definitely that more than half an hour could have elapsed between the stabbing and Somawathie leaving for the Police Station. Apart from all this, it is difficult to understand why it was stressed so much that the statement to the Police was a false statement. The Crown had the strong circumstantial evidence of Nair and Mohamedu in addition to the direct evidence of Somawathie regarding the fact that it was the accused who caused the death of the deceased. The statement P 3 gave more or less substantially the truth according to the Crown with regard to the circumstances immediately preceding the stabbing. It is the evidence regarding those circumstances which was of the greatest importance in the case in deciding the one difficult question of fact whether the accused was entitled to rely on a mitigatory plea. No doubt, Somawathie refrained in P 3 from saying that the accused stabbed the deceased, but, her complaint to the Police was, in itself, an invitation to the Police to come to the scene, and the Police, in fact, went there immediately afterwards and found the body of the deceased close to the room of the accused and Leelawathie. The emphasis on this "concocting" of some story may have had the effect of making the Jury disbelieve the defence plea that the accused met with his death when he came to the room of Somawathie and attempted to have intercourse with her against her will.

The evidence of Leelawathie shows that the deceased refused to leave the room in spite of the accused's request and insulted the deceased by a reference to his wife and that blows were exchanged then. No doubt, Somawathie does not mention the blows or any such reference to the accused's wife. But as the trial Judge himself says at page 51 of his charge :—

> "Undoubtedly, Somawathie is an unsatisfactory witness and if her evidence stood alone in this case I would have had to warn you most solemnly to be most careful about accepting her evidence".

It is difficult to see any good reason for rejecting Leelawathie's evidence as regards the mitigatory plea. There is nothing inherently improbable in her evidence. The accused went to meet the deceased as the deceased insisted on remaining in Somawathie's room and the deceased did not leave the room when the accused asked him to do so. There does not seem to be anything improbable in those circumstances in the deceased making the remark about the wife of the accused or in the accused and deceased exchanging blows.

It is not at all unlikely that the Jury were confused and puzzled by the manner in which the evidence in the case was placed before them.

The evidence of all the witnesses including the six official witnesses covers about 37 pages of typewritten sheets. As soon as Somawathie the most important witness for the Crown, entered the witness box and gave her name and age she was examined by the Judge. I may add at this stage that her evidence has been recorded mostly in the form of questions and answers. Her "evidence in chief" which covers four pages was given in answer to questions put by Court, with the single exception of one question

put by Crown Counsel in asking whether she identified the knife found near the dead body. When the cross-examination began, five lines of evidence were given in answer to defence Counsel and they were followed by five lines of answers given to the Judge. Then she answered one question by Crown Counsel and followed it by answering the questions put by the Judge—those questions and answers covering one page. The rest of the evidence given by her before re-examination covers nearly four and half pages. Of these pages, her evidence in answer to questions put by the Judge on eight occasions covers one and a half pages. The whole re-examination was conducted by the Judge. The defence Counsel was permitted to put one question in further cross-examination and this was followed by some more questions put by the Judge.

Nair was "examined" by Court as soon as he stated his occupation and residence. The evidence when so examined covers over half a page. It was followed by an answer to Crown Counsel that he "knew the accused well". The Judge then resumed the examination of Nair and the evidence then given covers over one and a half pages. The Crown Counsel then examined the witness and that examination covers a little over half a page. The evidence given when the witness was under cross-examination covers one page but nearly three-fourths of that page is taken up by evidence given in answer to the Judge. There was no re-examination.

As soon as Naina Mohamedu gave his age and residence the Judge took in hand his "examination". That examination which covers nearly two pages was interrupted only once by the Crown Counsel who elicited the evidence that the witnesse's wife was in his room at the time of the incident. While under cross-examination there were in all three lines of evidence given in answer to Counsel followed by an equal number of lines in answering the Judge. There was no re-examination.

The accused said to his Counsel that he was the accused and that Somawathie had been in her room for about two months. Then followed five lines of evidence to the Judge, one line of evidence to defence Counsel, an answer to the Judge, four lines of evidence to defence Counsel one answer to the Judge, one answer to the, defence Counsel, six answers to the Judge, two answers to defence Counsel, three answers to the Judge and one answer to defence Counsel. That was the "examination-in-chief". The only evidence in cross-examination was, "I said I was the lessee. None of my tenants pay the rent regularly". There was no re-examination. He was then questioned by the Judge again. Those questions and answers given by the accused covers two and a half pages. The Crown Counsel was then permitted to cross-examine the witness further and there are four lines of evidence given under such cross-examination.

Leelawathie's evidence given to defence Counsel covering ten lines is followed by answers to the Judge covering nearly twenty lines. That was the "examination-in-chief". When the cross-examination started there was one question by Crown Counsel, one question by the Judge and one question by the Crown Counsel, one question by the Judge and one question by the Crown Counsel followed by nearly one page containing the Judge's questions and Leelawathie's answers. Then there was one question by Crown Counsel followed again by the Judge's questions and Leelawathie's answers covering nearly one page. Then there were two questions by Crown Counsel followed again by one page of the Judge's questions and the answers to those questions. Then we get four lines of evidence in reply to Counsel, two lines in reply to the Judge, three lines in reply to Crown Counsel, two lines in reply to the Judge and two lines in reply to Crown Counsel. We then come to an answer to a question by the Judge followed by an answer to a question by Crown Counsel and an answer to a question by Court. There was no re-examination.

The normal procedure to be followed in our Courts in examining witnesses is laid down in section 138 of the Evidence Ordinance. The Judge's right to put questions is stated as follows in section 165 subject to certain provisos :—

> "The Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant"

These are undoubtedly wide powers. Commenting on the corresponding section of the Indian Act, Ameer Ali gives the following observation made by the framer of the Act :—

> "That part of the Law of Evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India and it would be a great mistake to legislate as if it did. In a great number of cases, probably the vast numerical majority, the Judge has to conduct the whole trial himself" (See also, page 1045 of Ameer Ali's Commentary, Ninth Edition).

The circumstances now obtaining in this Dominion are fortunately very different from those referred to in that observation made nearly eighty years ago, dealing with the state of things which "existed in India out of the presidency towns". For instance, in this case the prosecution was represented by a Crown Counsel and the accused was defended by two Counsel. It is not possible to lay down any general rules as to when and how far a Judge should interrupt an examination-in-chief or a cross-examination by questioning the witness himself. These are matters which the Judge is given the discretion to decide for himself in each case coming before him. As I said before, the powers given by section 165 are very wide, but, that very fact will make a Court guard against the exercise of those powers without restraint.

In this connection I would refer to *Cain's case* [(1936) 25 Criminal Appeal Reports 204.] That case dealt with the examination of a witness Chatt who was a co-accused with the appellant who was convicted of conspiracy to defraud and obtain property by false pretences. The observations made by the Court of Criminal Appeal were to the following effect:—

> "There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was however, undesirable that... .....the Judge should proceed, without giving much opportunity to Counsel for the defence to interpose, and long before the time had arrived for cross-examination to cross-examine Chatt with some severity. The Court agrees with the contention that it was an unfortunate method of conducting the case. It is undersirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner".

These observations were cited with approval in *Gilson and Cohen*, [(1944) 29 Criminal Appeal Reports 174.] In *Bateman's case*, [(1946) 31 Criminal Appeal Reports 106,] the Court of Criminal Appeal in England not only adopted those observations but also regarded them as applicable to "any witness whether called by the prosecution or the defence".

At the close of the argument we were satisfied that the accused had established his right to the plea of grave and sudden provocation and that he was entitled to the benefit of that plea for the reasons given by me.

We, therefore, set aside the verdict of the Jury, found the accused guilty of culpable homicide not amounting to murder and sentenced him to six years' rigorous imprisonment.

*Verdict varied to one of culpable homicide.*

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*Present :* BASNAYAKE, J. AND GRATIAEN, J.

## SINNALEBBE & ANOTHER vs. MUSTAPHA & OTHERS

*S. C.* 52 (*Inty*)—*D. C. Batticaloa* 570.

*Argued on :* 16th September, 1949.
*Decided on :* 14th December, 1949.

*Muslim Intestate succession and Wakfs Ordinance* (*Cap.* 50)—*Application under Section* 15—*Failure to make all trustees respondents—Can Court proceed with such application—Has Court power to add remaining parties under section* 18 *of the Civil Procedure Code.*

*H. V. Perera, K.C.*, with *H. Wanigatunge* for the appellants.

*E. B. Wikramanayake, K.C.*, with *J. N. David*, and *Naina Marikkar* for the respondents.

**Held :** (i) That the Court has no jurisdiction to proceed with an application under section 15 of the Muslim Intestate Succession and Wakfs Ordinance, when it has found that the petitioners have failed to comply with the requirements of that section.

(ii) That where the petitioners failed to make all trustees interested in the charitable or religious trust parties to the application, the Court has no power to add them under section 18 of the Civil Procedure Code.

Cases referred to : *Holland vs. Peacock*, (1912) 1 K. B. D. 154 at 156.
*Pasmore vs. Oswaldtwistle Urban Council*, (1898) A. C. 387 at 394.
*The Queen vs. County Court Judge of Essex*, (1887) 18 Q. B. D. 704 at 708.
*Wilkinson vs. Barking Corporation*, (1948) 1 All. E. R. 564 at 567.

BASNAYAKE, J.

On 19th April, 1948 the nine persons who are respondents to this appeal (hereinafter referred to as the petitioners) made a preliminary application under section 16 of the Muslim Intestate Succession and Wakfs Ordinance (hereinafter referred to as the Ordinance) for leave to make an application under section 15 of that Ordinance. They named the two appellants as respondents to that application. The petitioners alleged that they were the regular worshippers and members of the congregation of the Mosque called Meera Pallivasal at Kattankudy and that the first appellant was the Chief Maracair and the second appellant a Maracair of that Mosque, and asked that leave be granted to make a regular application to the District Court under section 15 of the Muslim Intestate Succession and Wakfs Ordinance.

On 22nd June, 1948 leave was granted and on 30th July, 1948 a petition under section 15 was filed. The appellants thereupon lodged a "statement of objections". The matter thereafter proceeded to trial on the following issues :—

1. Were there more than two trustees of the Meera Pallivasal at the date of filing of this application ?

2. If so, have all the trustees been made parties ?

3. If not, can this application be entertained ?

The learned District Judge held that there were thirteen trustees of the place of worship known as Meera Pallivasal and that only two of them had been named as respondents to the petition. He also held that the application was one that he could entertain and make order that the remaining trustees be added as parties. The present appeal is from that order.

The question that arises for decision on this appeal is whether the learned trial judge has jurisdiction to entertain under sections 15 and 16 of the Ordinance an application to which all the trustees of the charitable trust or place of worship are not made respondents.

Section 15 gives the right to any five persons interested in a Muslim place of worship, after obtaining leave under section 16, to apply by petition to the District Court within the local limits of whose civil jurisdiction the subject of such place of worship is situate in order to obtain an order for any or all of the purposes enumerated therein. The enactment requires a person invoking its aid to "apply by petition to which the trustee or trustees (if any) shall be made respondents". In the instant case the petitioners have omitted to make eleven of the trustees respondents to either the application for leave or the petition.

Sections 15 and 16 are provisions which regulate procedure in a court of law and must in this context be construed as imperative in accordance with the general rule of interpretation applicable to enactments regulating procedure in Courts. Unless the requirements of the statute are complied with, the Court has no jurisdiction to proceed with the matter. (*Holland vs. Peacock*, (1912) 1 K. B. D. 154 at 156. The language of section 15 does not to my mind admit of the addition of parties to the petition after it is filed. Apart from that, the Ordinance is a new statute, and where a new statute creates new rights and obligations and provides a special procedure for enforcing those rights and obligations the provisions of the Civil Procedure Code will not, in the absence of any provisions in that behalf, regulate the procedure under such an enactment. *Pasmore vs. Oswaldtwistle Urban Council*, (1898) A. C. 387 at 394. ; *The Queen vs. County Court Judge of Essex*, (1887) 18 Q. B. D. 704 at 708. ; *Wilkinson vs. Barking Corporation*, (1948) 1 All. E. R. 564 at 567. Care has been taken in similar enactments Section 3, Insolvency Ordinance ; Section 32, Land Acquisition Ordinance ; Section 116, Trusts Ordinance ; Section 17, Land Settlement Ordinance, where the ordinary civil courts are designated as the forum for the settlement of disputes thereunder to make express provision prescribing the procedure to be observed. The Ordinance makes no such provision and the Court has no power to invoke the aid of section 18 of the Civil Procedure Code as the learned District Judge appears to have done.

The order of the learned District Judge cannot be sustained and is accordingly set aside.

The appellant's appeal is allowed with costs and the petitioner's petition will stand dismissed with costs.

In order to remove any doubt, I wish to state that the petitioners or any other persons qualified to make an application under section 15 and 16 of the Ordinance in respect of the place of worship known as Meera Pallivasal are not precluded by this judgment from making a properly constituted application thereunder.

*Appeal allowed.*

Gratiaen, J.

I agree.

*Present :* Wijeyewardene, C.J. and Gratiaen, J.

## ATTORNEY GENERAL vs. VALLIAMMA ATCHI

*S. C. 512/F—D. C. Colombo Special 10/Testy. Case No. 8802.*

*Argued on :* 16th, 17th, 18th, 19th, 20th May, 1949 and 14th, 15th, 16th 17th June, 1949.
*Decided on :* 24th June, 1949.

*Estate Duty Ordinance—Claim under Section 73—Hindu undivided family—Money lending business assets in Ceylon—Effect of Ordinance No. 76 of 1938—Jurisdiction of District Court to order repayment of estate duty overpaid.*

K. M. N. Natchiappa Chettiar died on 30th December, 1938 leaving the assets of a money-lending business as his property in Ceylon. The executrix of his estate objected to the assessment of the Commissioner of Estate Duty, claiming total exemption from estate duty under Section 73 of the Estate Duty Ordinance, on the ground that the deceased was a member of a Hindu undivided family, and that the property was the joint property of that family.

The District Judge entered a declaratory decree in favour of the executrix on the basis that the property belonged to a Hindu undivided family of which the deceased was a member, and that the exemption conferred by Section 73 accordingly applied. But he held that he had no jurisdiction under the Ordinance to enter a decree against the Crown for the return of the estate duty recovered from the executrix by the Crown.

**Held :** (i) That the evidence established that the assets in Ceylon were the joint property of a Hindu undivided family ;

(ii) That the business carried on jointly by the members of a Hindu undivided family is presumed to be joint family property and not an ordinary commercial partnership, unless the business is separately acquired and carried on by a single member of the family.

(iii) That Section 73 of the Estate Duty Ordinance cannot be said to be wholly inoperative on the ground that although the legislature intended to give recognition to the Law of South India, no such Hindu Law has in fact been introduced by express legislation as part of the Law of Ceylon.

(iv) That Section 73 was amended by Ordinance No. 76 of 1938 in order to resort to a fiction which would remove in the case of immovable property the difficulties which do not attach to the movable property belonging to a Hindu undivided family.

(v) That a District Court has jurisdiction under the Estate Duty Ordinance to enter a decree against the Crown for the return of Estate duty overpaid and also for payment of legal interest thereon under Section 192 of the Civil Procedure Code.

**Cases referred to :** *Annamalai Chetty vs. Subramaniam Chetty*, A. I. R. (1929) P. C. 1.
*Bhuru Mal vs. Jaganath*, A. I. R. (1942) P. C. 13.
*Rampershad Tewarry vs. Sheochurn Doss*, 10 Moore's Indian Appeals 490.
*Periakarruppan Chettiar vs. Commissioner of Stamps*, 38 N. L. R. 201.

*M. F. S. Pulle, K. C.*, Acting Attorney-General with *H. W. R. Weerasuriya, Crown Counsel*, for the Crown.

*H. V. Perera, K. C.*, with *V. A. Kandiah*, and *N. M. de Silva*, for the respondents.

Gratiaen, J.

K. M. N. Natchiappa Chettiar died on 30th December, 1938. The amount of duty payable in respect of his estate under the Estate Duty Ordinance (Chapter 187) was assessed at Rs. 290,784·12. Notice of objection to this assessment was forwarded to the Commissioner of Estate Duty who, however, affirmed the assessment under Section 37. A petition of appeal was accordingly filed on behalf of the executrix of the estate in the District Court of Colombo, and in terms of Section 40 of the Ordinance the appeal was proceeded with as an action between the executrix and the Crown. Pending the hearing of the appeal the executrix was required to pay to the Commissioner of Estate Duty the full amount of duty claimed from the estate, and it is common ground that, certain adjustments having subsequently been made, the balance sum paid by the executrix and not since repaid to her amounts to Rs. 285,308·48.

The executrix claimed total exemption from estate duty by virtue of the provisions of Section 73 of the Ordinance, as amended by Section 5 of Ordinance No. 76 of 1938, on the ground that the deceased was a member of a Hindu undivided family, and that the property in respect of which estate duty has been assessed was not his separate property but the joint property of the undivided family of which he was a member. It was claimed in the alternative that, apart from the operation of Section 73, the property of a Hindu undivided family could not be regarded as having "passed on the death" of one of its individual members within the meaning of the Ordinance. In the view which I have taken, this alternative proposition does not require to be considered.

Certain preliminary legal objections were unsuccessfully raised on behalf of the Crown in the lower Court and in an interlocutory appeal to this Court. Hence the delay in the final determination of the proceedings. When the trial was eventually resumed the learned District Judge entered a declaratory decree in favour of the executrix on the basis that the property belonged to a Hindu undivided family of which the deceased was a member, and that the exemption conferred by Section 73 of the Ordinance accordingly applied. He held however that, although no estate duty was in fact payable under the Ordinance, he had no jurisdiction under the Ordinance to enter a decree against the Crown for the return of the sum of Rs. 285,308·48 which, on the basis of his judgment, had been overpaid to the Commissioner of Estate Duty. The Crown now appeals to this Court from the judgment of the learned Judge. The executrix has filed cross-objections against that part of the judgment which refuses her a decree for the return of the sum paid by her under protest in terms of Section 44 (2) of the Ordinance.

The main question which calls for decision is whether the property in Ceylon in respect of which the assessment was made had been proved to be the property of a Hindu undivided family and not the separate property of the deceased. The learned Judge held on the evidence (*a*) that the deceased was a member of a Hindu undivided family (*b*) that this family owned on the relevant date certain joint property in India (*c*) that the property in Ceylon in respect of which estate duty has been claimed by the Commissioner was similarly joint property belonging to the family. At the proceedings in the lower Court the Crown had strenuously contested each of these facts, but the learned Attorney-General frankly, and I think very properly, conceded before us that the evidence on points (*a*) and (*b*) which I have enumerated could not reasonably be challenged. In view of this admission, the only issue of fact which remains for our decision is whether the learned Judge was correct in holding that the property in Ceylon was not separate property which the deceased possessed to the exclusion of the undivided family to which he belonged. It is, of course well settled law that "a member of a Hindu undivided family can make separate acquisition of property for his own benefit which would remain free and separate in his hands unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate. *per* Lord Buckmaster in *Annamalai Chetty vs. Subramaniam Chetty*, (A. I. R. (1929) P. C. 1).

As the Crown now accepts the position that the deceased did belong to a Hindu undivided family which possessed joint property in India, it is perhaps convenient at this stage to set out the relevant facts which have been clearly proved and are no longer in dispute. The deceased belonged to a South Indian trading family of Nattucottai Chettiars whose male members for at least three successive generations had also been engaged in business in Ceylon. The deceased's grandfather was K. M. N. Natchiappa (who for convenience will be called "Natchiappa 1"). Natchiappa 1 had two sons, K. M. N. Suppramaniam (the deceased's father) and K. M. N. Natchiappa (who for convenience will be called "Natchiappa 2"). Natchiappa 1 and his two sons lived, after the fashion of a Hindu undivided family, in a common home with common worship and a common mess, and the family, as an undivided unit, owned property which, in India at any rate, admittedly possessed all the characteristics of "joint property" as understood in the system of law obtaining in that country. After Natchiappa 1's death, his two sons and their respective families continued to live in the ancestral home as an undivided family and to possess the Indian property belonging to the family as joint property. (As the position with regard to the property in Ceylon remains controversial, I shall for the time being leave the facts relating to it out of my narrative.) After some years the brothers Suppramaniam and Natchiappa 2 agreed that there should be a separation of the respective branches of their family, and in accordance with the recognised usage in such cases a deed of partition—A8 of 1912—was drawn up by arbitrators selected for the purpose. The legal effect of such a partition is not in dispute. The severance of the two branches from the original undivided family becomes final and complete, but the ancestral property which passes to each branch

under the partition remains joint property in the hands of that branch which now assumes as a fresh unit the character of a Hindu undivided family. So it was with the family of the deceased's father Suppramaniam and the ancestral property which it received under A 8. The contention for the Crown in the Court below was that A 8 operated only as a division between Suppramaniam and Natchiappa 2 of the assets of a commercial partnership as opposed to the assets of a Hindu undivided family. This position has now been abandoned as far as the Indian assets are concerned, but it is still adhered to with some show of tenacity in respect of the Ceylon assets which were dealt with by A 8. The issue must therefore be examined. The Crown no longer argues that A 8 must be regarded as affecting either a partition of the assets of a commercial partnership *and of nothing else* or (as the executrix has consistently claimed) the partition *simpliciter* of the joint property of an Hindu undivided family. No suggestion was made at the trial to a witness who claimed to speak with personal knowledge of the execution of A 8 that it was intended to operate partly as a division of one species of property and partly as a division of the other. Nor is there any evidence that it is customary to complicate the formal separation of the branches of a Hindu family and the division of their ancestral property, involving as it does certain special legal consequences, by introducing into the partition other assets separately owned by individual members to the exclusion of the undivided family. The language in A 8 certainly appears to treat the Ceylon assets as being in no way different from the Indian assets.

The property in Ceylon which was dealt with by A 8 consisted of the assets of a money-lending business which had admittedly been jointly carried on until 1912 by the brothers Natchiappa 2 and Suppramaniam (I shall assume that it has not been *conclusively* proved to be identical with the original business of Natchiappa 1 although I agree with the learned Judge that on the evidence this was very probably the case). There is no evidence that there was any deed of partnership between the brothers regulating the terms of this business enterprise on a strictly commercial basis nor do the books of the business disclose any distribution of profits such as one would expect in the case of a commercial venture as opposed to a joint family business. The learned Judge enjoys the advantage of professional experience of the usages of Chetty traders in Ceylon and after an exhaustive analysis of the oral and documentary evidence in the case he arrived at the conclusion that the Ceylon assets dealt with by A 8 were the joint property of a Hindu undivided family in exactly the same way as the Indian assets admittedly had been. I find the reasons for arriving at this conclusion irresistible, and I do not consider it necessary to refer in detail to the evidence which admittedly tends to support the case for the executrix. It is no doubt true that, as against this evidence, certain documents relied on by the Crown might point to a different conclusion unless an attempt be made to understand them with reference to the business methods of Chetty money-lenders which are matters of common knowledge. For instance, the idea of a Hindu undivided family which owns property as a unit or association distinct from its individual members has for many years been acknowledged and has received both statutory and judicial recognition in this country, but it is well known that members of such families in the transaction of their business have invariably encountered difficulties in seeking to adjust to the requirements of our local laws the special features attaching to the personal laws of their country of domicil. It is in relation to this background that one must interpret the endeavours of Suppramaniam to comply with the provisions of the Business Names Registration Ordinance of 1918. Similarly, it is in this light that one should seek to understand his attempts, before finally retiring from Ceylon, to leave the joint property of his undivided family in the hands of his son, the deceased, who succeeded him in the management of the family business. So it is again that I find nothing specially sinister in the behaviour of the deceased when the time was approaching for him to retire in his turn from the management of the business. The same motive which influenced Suppramaniam when he purported first to admit his son as a " partner " of the business and then to transfer to him entirely his interest in the so called " partnership " for a patently fictitious consideration, is to my mind the explanation for the later devices of the deceased who, in anticipation of death, purported by a last will to " dispose " not only of the Ceylon assets but also of what was admittedly joint property in India belonging to the undivided family. That motive was to preserve the joint property of the undivided family in the hands of succeeding generations of its male members in such a way that, so far as business acumen and legal ingenuity could achieve the desired end, the laws of Ceylon should in no way prevent the joint property of a Hindu undivided family from remaining within the family by survival. I am in complete agreement with the learned Judge that the evidence in the case convincingly

establishes that the business carried on in Ceylon by Natchiappa 2 and Suppramaniam under the vilasam "K.L.M." was the joint property of the undivided family of which they were both members, and that after the division in 1912 of the property by the deed A 8, Suppramaniam continued to carry on the identical business under the new vilasam "K.L.M.S.P." not on his own account but as the joint property of the new undivided family of which he was now the head. When Suppramaniam retired to India and later died, the business remained in the hands of his son, the deceased, as joint family property and not as separate property possessed by him for his own benefit to the exclusion of the family.

It was argued by the Crown that, on the authority of *Bhuru Mal vs. Jaganath*, (A. I. R. (1942) P. C.13) the onus was on the executrix to prove affirmatively that the business of K.L.M. carried on by Suppramaniam and Natchiappa 2, and the later business of K.L.M.S.P. were in fact the joint property of an undivided family. Even if this be so, the burden has been amply discharged. Moreover, in the present case we have clear evidence that there was a Hindu undivided family possessed of some property at least which was admittedly joint. The Ceylon property was also possessed *jointly* by the male members of the undivided family, and in the absence of any evidence of a commercial partnership the terms of which were inconsistent with the the incidence of joint family property, I think that the only reasonable inference which can be drawn from the proved facts is that the business was joint family property and not the separate asset of any individual member of the family. The facts of the present case seem to approximate to those which were considered by the Privy Council in *Rampershad Tewarry vs. Scheochurn Doss*, (10 Moore's Indian Appeals 490) when it was held that a business carried on jointly by the members of a Hindu undivided family is presumed to be joint family property and not an ordinary commercial partnership. The position would no doubt be different in the case of a business separately acquired and carried on by a single member of the family. In that event the principles laid down in *Annamalai Chetty vs. Subramaniam Chetty*, (A. I. R. (1929) P. C. 1) and *Bhuru Mal vs. Jaganath*, (A. I. R. (1942) P. C. 13) would no doubt apply.

As far as the appeal of the Crown is concerned it remains only to consider a legal submission made by the learned Attorney-General which I hope I have not misunderstood. The substance of his argument appears to be that even though the Legislature may have intended by Section 73 of the Estates Duty Ordinance, both in its original and its amended form, to give recognition to the law of South India by which a Hindu family, as a legal *persona* which is distinct from its individual members, may own and possess movable or immovable property, the fact remains that no siuch Hindu law has in fact been introduced by express legislation as part of the law of Ceylon. In the circumstances, it is urged, Section 73 of the Ordinance is wholly inoperative. With the greatest respect, I think that the argument—or at least the argument as I have understood it—is fallacious. We have not been referred to any doctrine of our Common law to which the concept of a family capable of owning property as a legal *persona* is inherently repugnant. In practice, however, the continued ownership of property by an unincorporated association the identity of whose members changes from time to time must inevitably create problems. It is an essential feature of the law of South India relating to the joint property of a Hindu undivided family that on the death of any member of the family the remaining members take not by survivorship but by survival. In the case of movable property situated in Ceylon and belonging to a Hindu undivided family, no difficulties arise on the death of a member of the family, because the law applicable would be the law of the deceased's country of domicil. In the case of immovable property, however, the laws of the country of domicil would not govern the case. It was therefore felt that the original language of Section 73 of the Estate Duty Ordinance exempting "any" joint property of a Hindu undivided family from the operation of the Ordinance might create some difficulty in the case of immovable property (vide the observations of Fernando J. and the admissions of Counsel on this point in *Periakaruppan Chettiar vs. Commissioner of Stamps*, 38 N. L. R. 201.) It was for this reason that Section 73 was in my opinion amended by Ordinance No. 76 of 1938 to read as follows:—

> "Where a member of a Hindu undivided family dies, no estate duty shall be payable—
>
> (*a*) on any movable property which is proved..... to have been the joint property of that family;
>
> (*b*) on any immovable property when it is proved .....that such property, *if it had been movable property*, would have been the joint property of that family."

The intention was to resort to a fiction which would remove in the case of immovable property the difficulties which do not attach to the movable property belonging to a Hindu undivided family. In rejecting the submission made by the learned Attorney-General, I am comforted by the knowledge that a Hindu family is, for income-tax purposes, taxed by the Crown as a "body of persons" capable of owning property in this country and deriving income therefrom. In that respect at least no anxiety seems to exist as to whether the clear intention of the Legislature to regard a Hindu family as an owner of property has been frustrated. It is on behalf of the same "body of persons" for whose benefit exemption from the payment of estate duty is claimed. The Crown cannot have it both ways. In my opinion the appeal of the Crown against the judgment of the learned District Judge should be dismissed with costs, and I would make order accordingly.

I now proceed to consider the cross-appeal of the executrix. On various dates between 30th May 1940 and 22nd February 1941 the Commissioner of Estate Duty has, pending the appeal, recovered from her in terms of Section 44 (2) sums aggregating Rs. 293,330·89. On 5th May, 1941 a sum of Rs. 8022·41 was repaid to the executrix. In the result the nett amount overpaid to the Commissioner as estate duty, on the basis of the learned District Judge's judgment with which I am in agreement, amounts to Rs. 285,308·48. The estate has been deprived of the use of this money for a period which already exceeds eight years. The question is whether the learned District Judge has correctly decided that the provisions of the Ordinance give him no jurisdiction to enter a decree ordering the Crown to refund the money to the executrix. In my opinion he is vested with such jurisdiction, and this is certainly a case in which it should be exercised. I can find nothing in the Ordinance which compels me to hold that an assessee who has been required to pay as estate duty a sum of money on the basis of an erroneous assessment must rest content with the cold comfort of a declaratory decree to the effect that the assessment was wrong.

Section 34 of the Ordinance entitles a person aggrieved by the amount of any assessment of estate duty to appeal to the appropriate District Court against the assessment. The jurisdiction conferred on the Court is not a purely appellate jurisdction such as is vested in this Court, for example, when a case is stated by the Board of Review under the provisions of the Income Tax Ordinance (Chapter 188). Once a petition of appeal has been filed and a copy thereof served on the Attorney-General as required by Section 38, the appeal proceeds not merely as a contest between the assessee and the Commissioner but *as an action between the appellant as plaintiff and the Crown as defendant* (Section 40). The provisions of the Civil Procedure Code are brought into operation, and where an action lies against the Crown, the relief claimed by the plaintiff need not be restricted to a mere declaratory decree. The second proviso to Section 40 makes express reference to the decree which shall be entered in the "action". Under this proviso the decree is required to contain a declaration as to the amount if any, which the assessee is liable to pay as estate duty, but it does not state that the relief granted in the action must necessarily be confined to such a declaration. Indeed, the learned Attorney-General concedes that these decrees invariably order the payment of costs in favour of the successful party, and there is a very clear indication that the language of Section 54 (2) contemplates the possibility of a decree capable of execution for the payment of money to the Crown should the Crown succeed). I do not find any provision which precludes, in appropriate cases, the entering of a decree for the repayment of money against the Crown where an assessee has been compelled to pay as estate duty a sum which he was not liable to pay. In such cases the extent of the assessee's grievance must be the measure of the relief which he has a right to claim in the action which is proceeded with under Section 40 against the Crown. It is for this reason that at a certain stage the Crown, represented by the Attorney-General, steps in and the Commissioner of Estate Duty drops out as a party to the litigation. The appeal proceeds as an "action" so that, in the interests of finality, a decree capable of execution may be entered either in favour of the Crown or binding on it as the case may be. In the present case I would enter a decree in favour of the executrix against the Crown for the payment of a sum of Rs. 285,308·42 overpaid by her as estate duty, together with legal interest at 5% in terms of Section 192 of the Civil Procedure Code from the date of action until the date of this decree, and thereafter on the aggregate amount of the decree until payment in full. The executrix is entitled to her costs of this appeal and in the Court below.

*Appeal of the Crown dismissed.*
*Cross-appeal allowed.*

WIJEYEWARDENE, C.J.
I agree.

*Present :* BASNAYAKE, J.

## PERERA vs. AMARASINGHE (SUB-INSPECTOR OF POLICE, RATNAPURA)

*S. C. 544—M. C. Ratnapura 12453*

*Argued on :* 8th & 9th September, 1949.
*Decided on :* 20th December, 1949.

*Penal Code, Sections 328 and 329—Charges under—Rash and negligent driving—What is necessary to prove—Presumption of negligence—* Res ipsa loquitur*—Applicability to criminal cases—Evidence Ordinance, Section 114.*

**Held :** (i) That to establish a charge under Section 328 or 329 of the Penal Code it must be proved that the act done by the offender was not only rash or negligent, but also that it was so rash as to endanger human life or the personal safety of others.

(ii) That where a motor vehicle went across the road to its wrong side and collided with another which was going at a moderate speed along the extreme edge of its own side, such evidence creates a presumption of negligence which is expressed by the phrase *res ipsa loquitur.*

(iii) That such a presumption may be rebutted by establishing that the accident happened without fault on the part of the driver of the offending vehicle.

*Per* BASNAYAKE, J.—" Section 114 of our Evidence Ordinance is wide enough to include the presumption embodied in the phrase *res ipsa loquitur*, which, in my view, is applicable equally to civil and criminal cases. In the latter class of cases the burden that rests on the prosecution of proving every ingredient of the charge may be discharged by proving those ingredients by presumptive evidence."

**Cases referred to :** *Barkway vs. South Wales Transport Co. Ltd,* (1948) 2 All. E. R. 460.
*Laurie vs. Raglan Building Co. Ltd,* (1941) 3 All. E. R. 332.

*H. V. Perera, K.C.*, with *Sam P. C. Fernando*, and *L. G. Weeramantry*, for the appellant.

*R. A. Kannangara, Crown Counsel*, for the Attorney-General.

BASNAYAKE, J.

The accused-appellant has been convicted of the following charges and sentenced to a term of two months' rigorous imprisonment.

" (1) That the abovementioned accused did drive bus No. CE 4551 along Colombo-Ratnapura road negligently (*a*) by driving the said bus without reasonable consideration for other persons using the highway, (*b*) by driving the said bus as to endanger human life or property, (*c*) by driving the said bus in contravention to the rules of the road to wit by failing to keep to the left or near side of the road, (*d*) by failing to slow down on seeing an approaching vehicle for the purpose of allowing safe passage to the other cars or to any other traffic on the highway thereby contravening the rules of the road and caused grievous hurt to V. Manickavasagar Esq., D.J., Ratnapura, and thereby committed an offence punishable under section 329 of Chap. 15 N. L. E.

" (2) That the abovementioned accused drove bus CE 4551 along Colombo-Ratnapura road negligently (*a*) by driving the said bus without reasonable consideration for other persons using the highway (*b*) by driving the said bus as to endanger human life or property (*c*) by driving the said bus in contravention to the rules of the road, to wit, by failing to keep to the left or near side of the road (*d*) by failing to slow down the said bus on seeing an approaching vehicle for the purpose of allowing safe passage to the other vehicles or to any other traffic on the highway thereby contravening the rules of the road and caused hurt to Abeygoda Liyana Aratchige Charles Karthelis of Ratnapura and thereby committed an offence punishable under section 328 of the Chapter 15 N. L. E."

The evidence for the prosecution is that, at a bend of the road at Ratnapura, motor omnibus No. CE 4551 driven by the appellant, which was on his run from Colombo to Ratnapura struck Car No. CY 3762 which was travelling in the opposite direction keeping to its proper side. The road including the turf was 35 feet wide at the spot. The impact damaged the car and injured its occupants.

The collision is described by the only eye-witnesses called by the prosecution, Mr. Richard Peris, a Proctor, and Mr. V. Manickavasagar, who was then the District Judge of Ratnapura. The former was travelling in a buggy towards Colombo, while the latter was travelling in the car with which the omnibus collided. The description of the collision given by each of them is as follows :—

**Mr. Peris :** " Near the turn to the Residency Mr. Manickavasagar's car overtook my buggy. When the car had proceeded 100 feet in front after overtaking I saw a bus coming from the direction of Colombo. I don't remember the number of the bus. The bus was driven by the accused. The bus was coming fairly fast. Mr. Manickavasagar's car was on the extreme left of the road. Then I noticed the collision. At the time of impact Mr. Manickavasagar's car was on the extreme left side of the road. I am experienced in driving for 25 years.....At the time of the impact Mr Manickavasagar's car was travelling extremely slow. As the driver of the car was getting to the extreme left

I gathered the impression that he was trying to avoid an accident. As a result of the impact the car was pushed to a side. The car was pushed to about 5 feet .....At the time of the impact the road was clear. There was ample room for the bus to pass on its left. The road at this spot was fairly wide.....At the place where this incident took place there was a slight bend. About a hundred yards beyond the spot where this incident took place there was a hill-top.....The speed I say is fast at that spot taking into consideration the bend at the spot."

Mr. Manickavasagar: "I remember my car overtaking Mr. Peris's buggy cart. Short distance after overtaking this buggy cart I noticed this bus coming from the direction of Colombo. The bus was on the right-hand side as it was coming. About 10 feet away I saw this bus coming on to my car. It was within a distance of 10 feet that I was able to see this bus. My car was on the extreme left and the bus was coming on to my car. I realised that a collision could not be avoided. At the time of the impact my car was travelling very slow. The car was going at 15 miles an hour, but after seeing the bus it was slowed down still further. The bus crashed into a considerable part of the radiator on the right-hand side of my car..... When I first saw the bus the bus was 10 feet away and I realised that the collision was inevitable. The bus was coming towards my car. The road at this spot is fairly broad. Two vehicles can pass without any difficulty. The bus was very much on the right."

The examiner of motor cars who tested the offending omnibus and whose name is on the list of witnesses has not been called although he appears to have been in attendance. It is not clear why this witness has not been called to testify to the mechanical condition of the offending vehicle. Nor has another witness, the driver of the damaged car, who was in a position to give useful evidence been called. Learned counsel for the appellant invited me to presume that their evidence was unfavourable to the prosecution.

To establish a charge under section 328 or 329 it must be proved that the act done by the offender was, not only rash or negligent, but also that it was so rash or negligent as to endanger human life or the personal safety of others. The oral evidence does not disclose that the appellant did an act which was so rash or negligent as to endanger human life or the personal safety of others. Mr. Peris has expressed the view that the speed of the omnibus was fast at that spot taking into consideration the bend of the road. But that evidence alone is not sufficient to establish any one of the acts of negligence alleged. The fact that the appellant's vehicle went across the road to its wrong side and collided with motor car which was going at a moderate speed along the extreme edge of its own side is certainly a piece of evidence against the appellant and has to be considered. That evidence carries with it a presumption of negligence which is expressed by the phrase *res ipsa loquitur*. It symbolises the argument that the occurrence of an injury from such a thing as a motor car which is harmless in normal operation but capable of doing serious human injury if not properly handled raises a presumption of culpability on the part of the driver. It is catalogued as a legal maxim by Broom, but certain legal authors and judges refer to it as a doctrine. The most recent discussions of the phrase and its application appears in the case of *Barkway vs. South Wales Transport Co. Ltd*, (1948) 2 All. E. R. 460. In that case Scott, L.J., observes :—

> "I agree that the mounting of the omnibus on the footpath was a fact which raised the presumption expressed in the phrase *res ipsa loquitur*. That phrase, however, represents nothing more than a *prima facie* presumption of fault. It is rebuttable by the same defence as is open to any defendant accused of negligence, against whom the plaintiff's-evidence has made out a *prima facie* case."

while Asquith, J.L., states the rule thus :—

> "If the defendant's omnibus leaves the road and falls down an embankment and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption."

Section 114 of our Evidence Ordinance is wide enough to include the presumption embodied in the phrase *res ipsa loquitur* which in my view is applicable equally to civil and criminal cases. In the latter class of cases the burden that rests on the prosecution of proving every ingredient of the charge may be discharged by proving those ingredients by presumptive evidence.

In the instant case the appellant, who has been a licensed driver of motor vehicles for twelve years with a blameless record, has given evidence and called three witnesses. Their evidence is to the effect that on this day the appellant started at 1-40 p.m. from Colombo and reached Ratnapura near about the time he should have reached it according to the time-table which his omnibus had to maintain; that as it was raining during the last lap of the journey the appellant drove with extra care; that at no time did the appellant drive at an excessive speed having regard to the nature of the road and the traffic thereon; and that the accident was due to a skid.

A skid as was observed by Lord Greene in the case of *Laurie vs. Raglan Building Co. Ltd*, (1941) 3 All. E. R. 332, "by itself is neutral. It may or may not be due to negligence. If, in a case where a *prima facie* case of negligence arises..... it is shown that the accident is due to a skid,

and that the skid happened without fault on the part of the driver, then the *prima facie* case is clearly displaced, but merely establishing the skid does not appear to me to be sufficient for that purpose."

In the instant case the appellant's testimony that the skid was not due to his negligence is supported by the evidence of his witnesses, one of whom is a retired trained teacher who happened to be a passenger in the omnibus.

The prosecution evidence falls short of that necessary to establish the ingredients of the charge. The defence has explained the circumstance of the appellant's vehicle being on the wrong side.

I, therefore, allow the appeal. The appellant's conviction is set aside.

*Appeal allowed.*

*Present :* JAYATILEKE, S.P.J.

MARK vs. A. G. A. MANNAR

*S. C. Application No. 448—Writ of Certiorari and Mandamus against the A. G. A. Mannar.*

*Argued on :* 22nd July, 1949.
*Decided on :* 26th August, 1949.

*Certiorari and Mandamus—Village Communities Ordinance Sections 14 and 15 (3)—Nominations for election—Objections to nomination of candidate—Inquiry —Decision given after time limit prescribed by section 15 (3)—Effect.*

**Held :** that the enactment in Section 15 (3) of the Village Communities Ordinance that all objections raised against any candidate on the ground that he is not qualified to be elected shall be disposed of by the Government Agent at any convenient time not less than seven days prior to the meeting of the voters summoned under Section 14 is directory only, and consequently the failure on the part of the Government Agent to give his decision within the time limit prescribed in this Section does not by itself render an election void.

*Per* JAYATILEKE, S.P.J., "I think it is reasonable to presume that the object of the legislature in amending the section was to give the candidates who were duly nominated sufficient time to get ready for the election. The neglect of the 1st respondent may have been fatal if the 2nd respondent was not the only candidate who was duly nominated. But as the 2nd respondent was the only candidate it seems to me to be immaterial."

**Cases referred to :** Liverpool Bank *vs.* Turner (1861) 30 L. J. Ch. 370.

*S. Mahadevan*, for the petitioner.

*M. Tiruchelvam, Crown Counsel*, for the 1st respondent.

JAYATILEKE, S.P.J.

This is an application for a writ of *Certiorari* to quash the order made by the 1st respondent that the petitioner was not a duly nominated candidate for Ward No. 1 of the Vankalai Village Committee and declaring the 2nd respondent the duly elected member for that Ward and a writ of Mandamus to compel the 1st respondent to hold a poll for the election of the member for that Ward.

The 1st respondent issued a notice under S. 14 (4) of the Village Communities Ordinance (Cap. 198) that he would receive on June 4, 1948 nominations for the election of a member for Ward No. 1 of the Vankalai Village Committee. On that day one nomination paper was tendered to him by the petitioner and another by the 2nd respondent. Immediately after the nomination papers were tendered to him the petitioner objected to the nomination of the 2nd respondent on the ground that the proposer and the seconder were not qualified to vote as they had resided for a continuous period of six months in Ward No. 1 during the 18 months immediately preceding June, 4 1948 and the 2nd respondent objected to the nomination of the petitioner on the ground that the seconder was not qualified to vote for a similar reason. The petitioner states in his affidavit that the 1st respondent did not hold an inquiry into the objections and that the first respondent failed to give his decisions on the objections within the time prescribed in S. 15 (3) of the Ordinance. The 1st respondent states in his affidavit that when the petitioner raised the objection he questioned the Village Headman, who was present, and informed the candidates that he would make his order in a week's time. Thereupon he inquired from the Divisional Revenue Officer whether the petitioner's seconder was a resident of Vankalai and was satisfied that he was not, and he accordingly upheld the 2nd respondent's objection on June 21 1948. He states further that he inquired

into the objection raised by the petitioner and overruled it. The main point taken on behalf of the petitioner was that the 1st respondent failed to give his decision within the period fixed in S. 15 (3) of the Ordinance. The section provides that all objections raised against any candidate shall be disposed of by the government Agent either forthwith or at any convenient time not less than seven days prior to the meeting of voters summoned under S. 14. The date fixed for the meeting was June 18 1948 and it is clear that the order made by the 1st respondent was out of time. The Ordinance contains no enactment as to what is to be the consequence as to the non-observance of the provision in S. 15 (3). It is contended for the petitioner that the consequence is that the election of the 2nd respondent must be treated as a nullity.

The question that arise for decision is whether the enactment that all objections shall be disposed of by the Government Agent at any convenient time not less than seven days prior to the meeting of voters summoned under S. 14 is absolute or merely directory.

In *Liverpool Bank vs. Turner*, (1861) 30 L. J. Ch. 370 Lord Campbell said :—

> "No universal rule can be laid down as to whether a mandatory enactment shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed".

Maxwell says that when the provisions in a Statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the act done. *Maxwell On the Interpretation of Statutes 8th Ed. pp* 322, 326.

Section 15(3) of the Village Communities Ordinance was amended by section 4 of Ordinance No. 11 of 1940 by the substitution for the words 'at any convenient time' of the words 'at any convenient time not less than seven days'. Sec. 15 (3) of the principal Ordinance enabled the Government Agent to dispose of objections even a day before the polling date whereas the amending Ordinance set a time limit to the disposal of such objections. I think it is reasonable to presume that the object of the legislature in amending the section was to give the candidates who were duly nominated sufficient time to get ready for the election. The neglect of the 1st respondent may have been fatal if the 2nd respondent was not the only candidate who was duly nominated. But as the 2nd respondent was the only candidate it seems to me to be immaterial. I would accordingly dismiss the application with costs.

*Application dismissed.*

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*Present :* WIJEYEWARDENE, C.J., AND GRATIAEN, J.

## SILVA vs. KUHAFA

*S. C.* 147/*M*—*D. C. Balapitiya M.* 128

*Argued on :* 16th December, 1949.
*Decided on :* 19th December, 1949.

*Trial Judge—Failure to give due consideration to circumstances relevant to issues and to examine significance of documents—Weight to be attached to findings of fact by such Judge.*

Where the trial judge, in weighing the evidence, has not given due consideration to some of the circumstances relevant to the issues which he was called upon to try, and failed to examine the significance of important documents as they stand in relation to each other,

**Held :** That the conclusions arrived at by the Judge are not entitled to as much weight as normally attaches to findings of fact of a court of trial.

The case was sent back for a fresh trial.

*H. V. Perera, K.C.*, with *M. Aziz*, and *M. L. S. Jayasekera*, for the defendant-appellant.
*N. E. Weerasooria, K.C.*, with *A. Wijeratne*, and *S. W. Walpita*, for the plaintiff-respondent.

GRATIAEN, J.

This is an action for the price of goods alleged by the plaintiff to have been supplied to the defendant in June, 1947. The defence was that no such contract had been entered into between the parties and that no goods were supplied as alleged by the plaintiff. After trial the learned District Judge accepted the version of the plaintiff and entered judgment as prayed for with costs. The appeal is from this judgment.

In view of the order which I propose should be made, it is not desirable that the evidence should at this stage be dealt with in detail. In my opinion the learned trial Judge, in weighing the evidence, has not given due consideration to some of the circumstances which are relevant to the issue which he was called upon to try, nor has he examined the significance of many important documents as they stand in relation to each other. In the result, I do not think that the conclusions arrived at in his judgment are in the present case entitled to as much weight as normally attaches to the findings of fact of a Judge who has had the advantage of seeing and hearing the witnesses who testified before him.

Mr. Perera has subjected the case of the plaintiff to a critical analysis. Similarly, Mr. Weerasooria has urged many reasons why, in his submission, the defendant's version should be rejected. After careful consideration of these powerful arguments, however, I do not think that it is possible for us, as an appellate tribunal, to come to any definite conclusion on a question of fact which is essentially one for a Court of original jurisdiction, properly directed, to determine. I would, therefore, set aside the judgment appealed from, and order a re-trial before another District Judge. The costs of this appeal and of the abortive trial should be costs in the cause.

WIJEYEWARDENE, C.J.,
I agree.

*Set aside and sent back.*

*Present :* JAYATILEKE, S.P.J., AND GRATIAEN, J.

## THE AGRICULTURAL AND INDUSTRIAL CREDIT CORPORATION OF CEYLON vs. DE SILVA AND ANOTHER

*S. C. No. 32/D. C. (Inty.) Colombo Case No. 1817 M. B.*

*Argued and decided on :* 21st June, 1949.

*Debt Conciliation Ordinance No. 39 of 1941, Sections 24 and 55—Jurisdiction of Court to entertain action after application made by debtor to Debt Conciliation Board—Order made staying proceedings—Correctness of such order.*

Plaintiff instituted this action on a Mortgage Bond on 29th June, 1946. Before the summons returnable date the defendant appeared and applied for stay of proceedings on the ground that prior to the date of the institution of this action he had made an application to the Debt Conciliation Board under the provisions of the Ordinance (No. 39 of 1941). He filed a certificate dated 12th June, 1948 duly signed by the Secretary of the Board in support of his statement.

The preliminary inquiry required by Section 24 of the Ordinance had not been held so far. It was contended for the plaintiff that the matter could not be said to be pending before the Board within the meaning of Section 55 of the Ordinance until after the Board had assumed jurisdiction to effect a settlement following the preliminary inquiry under Section 24

The learned District Judge rejected this contention and granted the defendant's application to stay proceedings The plaintiff appealed.

Held : That in view of the language of Section 55 of the Debt Conciliation Ordinance, the proper order should have been to dismiss the plaintiff's action on the ground that the Court had no jurisdiction to entertain it after application was made by the defendant to the Board.

*E. B. Wikremanayaka, K.C.*, with *P. Navaratnarajah*, for the plaintiff-appellant.
*C. Renganathan*, for the defendant-respondent.

JAYATILEKE, S.P.J.

We think that the order made by the learned District Judge that the proceedings should be stayed is wrong in view of the language of section 55 of the Debt Conciliation Ordinance No. 39 of 1941. We think the proper order should have been to dismiss the plaintiff's action on the ground that the Court had no jurisdiction to entertain it after the application was made by the defendant to the Board. We would accordingly set aside the order made by the learned District Judge and dismiss the plaintiff's action reserving to the plaintiff the right to bring a fresh action against the defendant. We think in the circumstances of the case no order should be made as regards costs in this Court or in the Court below.

GRATIAEN, J.
I agree.

*Order varied dismissing plaintiff's action.*

*Present :* WIJEYEWARDENE, C.J. AND CANEKERATNE, J.

## THE ASSOCIATED CEMENT COMPANIES LIMITED OF BOMBAY
vs.
## THE COMMISSIONER OF INCOME TAX, ESTATE DUTY & STAMPS

*S. C. No.* 300/1948—*D. C.* (*Final*) *Colombo* 16757/M

*Argued on :* 22, 25, 26 and 28th July, & 26th August, 1949.
*Decided on :* 13th September, 1949.

*Income Tax—Company registered in India having branch business in Ceylon—Claim under Section 46 of Income Tax Ordinance in respect of tax paid in Ceylon for years of assessment* 1940/41 *and* 1941/42*—Claim made after lapse of three years—Is it barred by Section* 84 (1) *of Income Tax Ordinance—What should be taken into consideration in ascertaining the amount with which taxpayer is properly chargeable within the meaning of Section* 84 (1).

The appellant Company (registered in Bombay), having a branch business in Colombo claimed in this action under Section 46 of the Income Tax Ordinance (Chap. 188) a sum of Rs. 13, 175·91 being the aggregate of half of two sums of money paid as income tax in Ceylon for the years 1940/41 and 1941/42 respectively.

The claim for relief in respect of 1940/41 was made on 30th May, 1945 and for the year 1941/42 on 18th June, 1945.

The defendant (The Commissioner of Income Tax) filed answer stating *inter alia* that the claim was barred by Section 84 (1) of the Income Tax Ordinance as it was made after the lapse of three years.

The District Court upheld this plea of prescription and the Company appealed.

In appeal it was contended for the appellant company that section 84 (1) did not apply to the present claim inasmuch as when the appellant paid the two sums for the two years of assessment (charged under section 20 (1) of the Ordinance) without making any deduction on account of the relief provided for under 46 (1), it could not be said to have paid tax by deduction or otherwise in excess of the amount with which it was properly chargeable for those years.

**Held :** (i) that Section 84 (1) of the Income Tax Ordinance applied to the appellant's claim and therefore was barred by prescription.

(ii) that in ascertaining the amount with which a taxpayer is " properly chargeable " within the meaning of Section 84 (1) attention should be paid not only to Section 20 (1) but also to provisions of such sections as Section 43 and 46 (1) in appropriate cases.

**Case referred to :** *Nadar vs. The Attorney General,* (1940) 41 New Law Reports 379.

*H. V. Perera, K.C.*, with *S. J. Kadirgamar*, for the plaintiff-appellant.

*M. F. S. Pulle, K.C.*, Acting Attorney-General, with *H. W. R. Weerasuriya, Crown Counsel*, for the Crown.

WIJEYEWARDENE, C.J.

The plaintiff company was registered in Bombay under the Indian Companies Act on August, 1, 1936, as the result of the amalgamation of several cement companies which were previously operating separately. The company which owns factories in different parts of India, opened a Branch in Colombo on May, 1, 1940. The Company's accounting year ends on July, 31, and thus the company's accounts are made up from August, 1 to July 31 of the following year. The Income Tax Assessment Year in British India covers the same period as the assessment year in Ceylon.

The plaintiff company filed this action stating :—

(i) that it has paid Income Tax in Ceylon amounting to Rs. 12,457·08 for the year of assessment 1940/41 on an income of Rs. 69,206 derived from Ceylon and that it has also paid Rs. 22,514 and 8 annas as Income Tax and Super Tax in India in respect of that income and

(ii) that it has paid Income Tax in Ceylon amounting to Rs. 13,894·74 for the year of assessment 1941/42 on an income of Rs. 77,198 derived from Ceylon and that it has also paid Rs. 25,135 and 4 annas as Income Tax and Super Tax in India in respect of that income.

The plaintiff company claimed in this action under section 46 of the Income Tax Ordinance (Chapter 188) a sum of Rs. 13,175·91 being the aggregate of half of Rs. 12,457·08 and half of Rs. 13,894·74 paid as income tax in Ceylon.

The defendant filed answer stating :—

(*a*) that the plaintiff's claim was barred by section 84 (1) of the Income Tax Ordinance ;

(*b*) that the plaintiff company has not proved to the satisfaction of the Commissioner of Income Tax, as required by section 46 of the Ordinance, that it paid or was liable to

pay income tax and super tax in India on the income derived from Ceylon for the years of assessment ending March, 31, 1941 and March, 31, 1942 on income derived from Ceylon;

(*c*) that the relevant Ceylon tax for the two years of assessment were only Rs. 10,380·90 and Rs. 11,570·96 in view of Section 45 (4) (*b*) of the Ordinance and that, therefore, the plaintiff could not claim, in any event more than Rs. 10,979·93.

The plaintiff company made its first claim for relief in respect of the year 1940/41 by P 27 of May, 30 1945, and for the year 1941/42 by P 29 of June, 18, 1945. In the course of the proceedings in the District Court the plaintiff company read in evidence an affidavit of the Chief Accountant of the company marked P 38 and the annexures A to H referred to in the affidavit.

Following the decision of Keuneman, J. in *Nadar vs. The Attorney-General*, (1940) 41 New Law Reports 379, the District Judge held that the plaintiff company's case was barred by section 84 (1) of the Ordinance. Further, he held against the plaintiff company on the ground (*b*) above and on ground (*c*) he held that, in any event, the plaintiff could not claim more than Rs. 10,979·93.

In appeal, the Counsel for the plaintiff company questioned the correctness of the decision in *Nadar vs. The Attorney-General*, (*supra*) and attacked the other findings of the District Judge. Briefly, his argument on the question of prescription was that section 84 (1) did not apply to a claim for relief arising under section 46 (1).

It is desirable at this stage to set out at length the relevant parts of section 84 (1) which enacts as follows :—

> "If it is proved to the satisfaction of the Commissioner by claim duly made in writing within three years of the end of a year of assessment that any person has paid tax, by deduction or otherwise, in excess of the amount with which he was properly chargeable for that year, such person shall be entitled to have refunded the amount so paid in excess :
>
> Provided that :—
>
> (ii) where any person has paid tax by deduction in respect of a dividend in accordance with section 43 or in respect of interest, rent, ground rent, royalty or other annual payment in accordance with section 44, he shall not be entitled by virtue of this section to any relief greater than that provided by section 43 (3), (4) and (5) and section 44 (3)."

It was argued that the plaintiff company which paid Rs. 12,457·08 and Rs. 13,894·74 for the two years of assessment, which were the amounts charged under section 20 (1) of the Ordinance, without making any deduction on account of the relief provided for under section 46 (1) could not be said to have "paid tax, by deduction or otherwise, in excess of the amount with which he was properly chargeable" for those years and that therefore section 84 (1) would not apply to the present action. It was admitted—and it had to be admitted in view of proviso 2 to section 84 (1)—that section 84 (1) applied to the case of a person who had paid tax ascertained under section 20 (1) without deducting the amount he was entitled to set off against such tax under section 43 (3). In fact, the appellant's Counsel relied strongly on this admission to support his argument that section 84 (1) did not apply to the present case. The argument he put forward could be understood clearly by considering a concrete case. Suppose (*a*) that the tax charged upon the income of an individual A under section 20 (1) is Rs. 1000 and (*b*) that his assessable income included a sum from which tax had been deducted under section 43 (1) and the statement issued under section 43 (2) shows the amount of the tax so deducted to be Rs. 100. There is no doubt that, if A has paid Rs. 1000 directly to the Commissioner of Income Tax, he will be entitled to a refund of Rs. 100. In such a case A "has paid tax, by deduction or otherwise", amounting to Rs. 1100. Now, if the amount with which A was "properly chargeable" is not taken as Rs. 1000 (the tax ascertained under section 20) but Rs. 900 (the tax ascertained under section 20 less the amount claimed as set off) then section 84 (1) would enable A to claim a refund of Rs. 200 (the excess of Rs. 1100 over Rs. 900) and not merely Rs. 100. This shows, therefore, that the amount with which A is "properly chargeable" within the meaning of section 84 (1) is the entire tax assessed under section 20. Once that construction is accepted, the position is clear that a claim made by a person in respect of the relief under section 46 (1) is not governed by section 84 (1) as may be seen from the consideration of the following example. Suppose (*a*) that the tax charged upon the taxable income of A under section 20 (1) is Rs. 1000; (*b*) that A paid that amount to the Commissioner of Income Tax in Ceylon and (*c*) that in view of a payment made by him to the Commissioner of Income Tax in India he is entitled to relief from Ceylon tax of a sum of Rs. 100 under section 46 (1). In that case, A has paid only Rs. 1000 and not Rs. 1100, as "tax" in section 84 (1) is the tax imposed by our Ordinance (see section 2), and therefore, any sum paid to the Commissioner of Income Tax in India cannot be

regarded as forming part of the tax referred to in section 84 (1) as the tax "paid by deduction or otherwise" As the amount "properly chargeable" has already been shown to be the amount charged under section 20 (1), the amount properly chargeable in the case under consideration is Rs. 1000 It cannot, therefore, be said that A who has paid Rs. 1000 only "has paid tax by deduction or otherwise in excess of the amount with which he was properly chargeable". This shows that section 84 (1) cannot possibly apply to the case of a person who is claiming to be entitled to relief under section 46 (1).

The fallacy in this argument lies in ignoring proviso (ii) of section 84 (1). It is true that in the first example referred to earlier A would have been entitled to claim Rs. 200 if the amount with which he was "properly chargeable" is regarded as Rs. 900 but the proviso (ii) proceeds to say that A cannot claim anything more than Rs. 100 when it enacts that "he shall not be entitled by virtue of this section to any relief greater than that provided by.....section 43 (3)

The fact therefore, that a person entitled to claim a sum by way of set off under section 43 (3) would be governed by section 84 (1) does not—to say the least—enable the plaintiff company to construe the word "properly chargeable" in a manner helpful to the plaintiff company.

After we reserved judgment, the appellant's Counsel submitted an argument that the Attorney-General would not be able to invoke the aid of proviso (ii) to avoid the effect of his interpretation of the words "properly chargeable" in a case that would arise where a tax payer is entitled to claim a set off under section 23 (2) in respect of a tax paid by a Trustee of property of which the tax payer is the beneficiary. The appellant's counsel supports this argument on the ground that the proviso applies only to a tax payer who "has paid tax by deduction in respect of a dividend in accordance with section 43". I think, however, that the effect of section 23 (2) is to enlarge the meaning of the phrase "dividend in accordance with section 43" so as to include the tax paid by the Trustee under section 23.

I am not prepared to assent to the argument before us in appeal that the words "the amount with which he was properly chargeable" referred to the tax as ascertained under section 20 (1) without taking into account the amount, for example, that may be claimed as set off under section 43 (3) or the amount that could be claimed by way of relief under section 46 (1). Section 5 (1) of the Ordinance enacts that "income tax shall, subject to the provisions of this Ordinance,.....be charged" at certain specified rates "in respect of the profits and income of every person for the year preceding the year of assessment (*a*) wherever arising, in the case of a person resident in Ceylon, and (*b*) arising in or derived from Ceylon in the case of every other person". The words "subject to the provisions of this Ordinance" make it clear to my mind that in ascertaining the amount with which a tax payer is "properly chargeable" within the meaning of section 84 (1) we should not confine our attention only to section 20 (1) but should also consider the provisions of such sections as section 43 and 46 (1) in an appropriate case.

It was also argued that, if section 84 (1) governed the present case, there would be many instances in which the tax payer would not be able to make his claim "within three years of the end of the year of assessment" owing to the failure of the income tax authorities assessing the Empire Tax failing to make the assessment within that period. I find it difficult to see how a tax payer could be placed in such a situation in view of the following passage in the Ceylon Income Tax Manual referred to in the judgment of the District Judge.

> "A claim for repayment must be made in writing within three years of the end of the year of assessment to which the claim relates. It is not essential to furnish within the time limit the full details which are necessary for calculating the exact amount of repayment. If notice of intention to make a claim is made within time, the claim will be treated as valid provided that:
>
> (1) at the time the notice is given it is proved to the satisfaction of the Commissioner that a definite title to repayment exists and
>
> (2) full proof of the claim is received within a reasonable time after the notice of claim has been delivered".

Moreover, section 13 (1) (a) (v) introduced by Ordinance 25 of 1939 shows that the Legislature did not hesitate to give relief against any hardship created by section 84 (1) where the Legislature thought it desirable that such relief should be granted. The Legislature has not provided for any relief with regard to the application of section 84 (1) in case of claims made under section 46 (1), and, if a Court of Law tries to give such relief it will be legislating and not intrepreting the law.

I hold that the claim of the plaintiff company is barred by prescription.

I see no reason to differ from the finding of the District Judge that the plaintiff company has not proved to the satisfaction of the Commissioner of Income Tax in terms of section 46

that the company paid or was liable to pay Indian Income Tax or Super Tax for the assessment years in question.

The Acting Attorney-General submitted P 38 and the connected documents to a close analysis and argued that in any event the plaintiff company would not be entitled to claim more than Rs. 774·50 in view of the statements made in those documents. This position was contested by the Counsel for the plaintiff company. I do not think it necessary to discuss this question in view of my opinion that the plaintiff's claim is barred by prescription.

I would dismiss the appeal with costs.

CANEKERATNE, J.

I agree.

*Appeal dismissed.*

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*Present :* NAGALINGAM, J. AND GRATIAEN, J.

SANGARALINGAM vs. THE ATTORNEY-GENERAL

*S. C. 328/M—D. C. Jaffna 2367*

*Argued on :* 14th December, 1949.
*Decided on :* 22nd December, 1949.

*Carriage of goods—Railway—Liability for damage to goods—Limitation of liability by statute—Further limitation by contract—Meaning of "misconduct" by a servant of the Railway—Assessment of damages—Railway Ordinance, Section* 15.

While goods conveyed by train from South India were being unloaded from a waggon at Jaffna, they received damage as a result of another waggon striking the stationary waggon during shunting operations carried out by a guard who had been clearly warned that an impact of the waggons involved the risk of damage to the goods.

Section 15 of the Railway Ordinance limits the liability of the Railway to loss or damage occasioned by the negligence or misconduct of the agents or servants of the Railway. The liability in this case was further limited by contract to loss from misconduct on the part of a servant of the Railway.

**Held :** (1) That a carrier of goods, if not prohibited to do so by statute, may contract himself out of liability for the negligence of his servants, provided that the exemption is stipulated in express, clear and unambiguous terms.

(2) That the guard was guilty of misconduct in doing a thing which he had been warned may seriously endanger the goods.

(3) For the purposes of compensation ," value of the goods at the time and place of despatch " means the value at the time and place the goods were first handed over to the Ceylon Government Railway.

**Cases referred to :** *Peck vs. North Staffordshire Railway*, (1863) 10 H. L. C. 473.
*Price vs. Union Lighterage Co.*, (1904) 1 K. B. 412.
*Lewis vs. The Great Western Railway Company*, (1877) 3 Q. B. D. 195.
*Forder vs. Great Western Railway Co.*, (1905) 2 K. B. 532.

*H. W. Tambiah*, with *S. Thangarajah*, for the plaintiff-appellant.
*N. D. M. Samarakoon, Crown Counsel*, for the defendant-respondent.

GRATIAEN, J.

This is an action against the Attorney-General as representing the Crown. The first cause of action relates to a consignment of five hundred tins of groundnut oil which had been despatched by rail from Madura in South India to Jaffna. The consignee named in the relative documents is a person called Sithambaram, but it is now common ground that the goods had been imported on the plaintiff's account. Learned Crown Counsel agreed that the plaintiff may for the purposes of this appeal be regarded as the consignee under the contract of carriage entered into for his benefit with the Railway authorities.

The consignment was transported by rail from Madura by the South Indian Railway Company Ltd., and on arrival at Talaimannar it was taken over by the Ceylon Government Railway for transport from that station to Jaffna. The rights and obligations arising from the contract of carriage with the Indian Railway authorities for the first part of the journey, and with the Ceylon authorities for the final trip are contained in a single document which, in effect, constitutes a series of separate contracts entered into with each respective carrier. (vide the current Indo-Ceylon Goods Pamphlet jointly issued by the South-Indian Railway Company Ltd. and the Ceylon Government Railway). The document describes the goods

as being transported "at owners' risk" and the contractual position is regulated by the following clauses :—

"1. This agreement shall be deemed to be made separately with all Railway Administrations or transport agents or other persons who shall be carriers for any portion of the transit.

2. We (that is, the consignee) agree and undertake to hold the Railway administration over whose Railway the said goods may be carried in transit from station to station harmless and free from all responsibility for the condition in which the goods may be delivered to the consignee and for any loss arising from the same *except upon proof that such loss arose from misconduct on the part of the Railway Administration servants*".

It will be necessary to examine the language of this second clause more closely at a later stage. For the present, it is sufficient to state that the liability of the Ceylon Government as a carrier of goods by rail is, apart from contract, limited *inter alia* by the provisions of Section 15 of the Railways Ordinance (Chapter 153) to cases where loss or damage has been occasioned by "*negligence*" or "*misconduct*" on the part of the agents or servants of the Railway. The measure of liability is also restricted so as not to extend in any event beyond *the actual value at the time and place of despatch* of any article in respect of which compensation is claimed. In the case of the plaintiff's consignment the limitations and restrictions placed by statute have been further reduced by contractual agreement, and the plaintiff is precluded from claiming damages unless *misconduct* (as opposed to mere negligence) is established against a servant or agent of the Railway. Carriers of goods, if not prohibited to do so by statute, may contract themselves out of liability for the negligence of their servants provided that the exemption is stipulated in express, clear and unambiguous terms. *Peck vs. North Staffordshire Railway*, (1863) 10 H. L. C. 473. *Price vs. Union Lighterage Co.*, (1904) 1 K. B. 412.

In the present case the plaintiff's consignment, having arrived at Talaimannar, was transported by rail to the Jaffna Station on 4th May, 1945. The tins were stacked in a waggon together with similar tins belonging to other consignees. Checker Thankithurai was in charge of the unloading of the goods after the waggon had been shunted to the Goods Shed for the purpose. Before the unloading was completed however, other waggons were, under the direction of a Railway guard named Namasivayam, shunted to the same goods Shed for unloading and it so happened that this operation necessarily involved the waggon containing the plaintiff's consignment being jolted with consequential risk of damage to the tins of oil. The inevitable result followed. Checker Thankithurai had warned Guard Namasivayam of this danger. To quote his own words in describing what occurred :—

"The waggon containing five hundred tins of groundnut oil was shunted on to the Goods Shed for the purpose of unloading. The tins were arranged in the waggon one upon the other. There were no vacant spaces in the waggon before unloading. The contractor's labourers started unloading the tins of groundnut oil from the waggons. The tins in the centre of the waggon were first unloaded. The guard told me that he wanted to shunt the waggon on that line. I told the guard that it was not possible to move the waggon. *I told him that if it was moved the tins of oil would fall down.* The guard told me that somehow or other the waggon had to be pulled. I think he said that one waggon had to be taken to the waybridge where it was to be weighed. I told the guard that I would first get the tins stacked to the sides of the waggon to the centre and that thereafter he could pull the waggon. *If those tins were not brought down to the centre the tins on top would fall.* Then I sent two of the contractor's labourers and Paramanathan (the plaintiff's agent) into the waggon for the purpose of bringing down the tins which were piled on top to the centre Vallipuram, Kasipillai and Paramanathan were taking the tins piled on the top and putting them down on the floor of the waggon. Some tins had been removed from the centre. *As the tins were being brought down another waggon came and dashed against this stationary waggon.* The tins piled on the sides of the waggon fell into the centre and the labourers inside the waggon sustained minor injuries. I saw the oil falling out".

Forty tins of oil belonging to the plaintiff's consignment toppled over and were completely emptied of their contents. (I accept the finding of the learned Judge that an additional complaint to the effect that thirty other tins were partially emptied is unconvincing). The question for decision is whether these facts establish that the plaintiff's loss has been occasioned by "misconduct" on the part of Guard Namasivayam within the meaning of the contract which I have already quoted and which regulated the obligations of the Railway authorities.

The learned District Judge rejected the plaintiff's claim on this cause of action because he was "unable to come to the conclusion that

there was any impact between the waggons over and above the normal impact which one expects during shunting operations". In my opinion, however, this is not the proper angle from which the incident calls for examination in the present case. The real question is whether having regard to the warning of the special risks involved to the tins of oil in the waggon which was being unloaded at the Goods Shed, Guard Namasivayam was not guilty of "misconduct" in deliberately disregarding those risks and subjecting the waggon to any impact whatsoever which might arise from even "normal shunting operations".

It is first necessary, I think, to consider generally what is meant by the term "misconduct" in the clause which limits the liability of the Ceylon Government Railway as a carrier under the contract. The Courts in England have in many cases interpreted agreements in terms of which carriers had contracted themselves out of their common law liability for damage except in cases of "wilful misconduct" on the part of their servants, and in applying those decisions I am content, in fairness to Namasivayam, to assume (although I do not so decide) that, "misconduct" and "wilful misconduct" are really synonymous terms. In *Lewis vs. The Great Western Railway Company*, (1877) 3 Q. B. D. 195, Bramwell, L.J., said, "what is meant by *wilful misconduct* is misconduct to which the will is a party, it is something opposed to accidental or negligent; the *mis* part of it, not the *conduct*, must be wilful. If a person knows that mischief will result from his conduct, then he is guilty of wilful misconduct if he so conducts himself. Further, I think that it would be wilful misconduct if a man misconducted himself *with an indifference to his duty to ascertain whether such conduct was mischievous or not*". Similarly, Brett, L.J., said, "if a servant of the Railway Company knows that what he is doing will seriously damage the goods of a consignee, *or if it is brought to his notice that what he is doing or omitting to do may seriously endanger the goods, and he wilfully persists in doing that thing against which he has been warned, careless whether he may be doing damage or not*, then he is intentionally doing a wrong thing; that is, he is guilty of wilful misconduct". Cotton, L.J., arrived at the same conclusion. In my opinion these observations are very appropriate to Namasivayam's deliberate decision to disregard the checker's warning and to proceed with his shunting operations before he plaintiff's consignment had been removed out of harm's way. In taking this line of action, regardless of the consequences, he was guilty of wilful misconduct. *A fortiori*, if the term "misconduct" connotes something less, he was guilty of misconduct. vide also *Forder vs. Great Western Railway Co.*, (1905) 2 K. B. 532. I am therefore of opinion that the plaintiff is entitled to claim compensation for the damage which he has sustained by the loss of the entire contents of forty tins of groundnut oil consigned to him. It is true that the oil was being transported in second-hand receptacles and that some small leakage in the course of transit was only to be expected. The fact remains, however, that all the tins of oil had, as far as I can judge, arrived at their ultimate destination having reasonably withstood the normal perils of transit. But for the mishap the primary cause of which was Namasivayam's conduct, they would have reached their owner as merchantable goods capable of being sold in the open market. There is no evidence that some oil detected on the floor of the waggon before the mishap was solely traceable to the plaintiff's consignment.

It remains to assess the plaintiff's damage on the first cause of action. His evidence to the effect that the value of the oil which he lost works out at the rate of Rs. 21·40 per tin was not seriously challenged and was certainly not contradicted. Learned Crown Counsel pointed out that under Section 15 (*b*) of the Railway's Ordinance the liability of the Government "shall not extend beyond *the actual value at the time and place of despatch*" of the goods in question. In my opinion the "place of despatch" for the purposes of this statutory limitation of liability is clearly the place where the goods were first handed over to the Ceylon Government Railway for carriage, and not the source at which they had originally been delivered to some other carrier under a contract to which the Railway was not a party. If this be the correct view, it has not been suggested that the value of groundnut oil was any less at Talaimannar on the relevant date than it was in Jaffna on 4th May, 1945. I, therefore, think that on the first cause of action the plaintiff was entitled to claim a sum of Rs. 856 worked out as the rate of Rs. 21·40 per tin. To this extent the plaintiff's appeal against the judgment of the learned District Judge must I think succeed.

On the second cause of action the learned Judge awarded the plaintiff a sum of Rs. 96.86 as the balance sum due to him on account of the non-delivery of certain other goods consigned to him on a separate contract of carriage. I see no reason to interfere with this part of the

decree, and the respondent's cross-appeal, which was not very seriously pressed before us, should be dismissed without costs.

In the result I would vary the decree of the lower Court and enter judgment in favour of the plaintiff, on both causes of action, in the aggregate sum of Rs. 952·86. He is also entitled to his costs of appeal and to the costs of trial.

*Appeal allowed and decree varied.*

NAGALINGAM, J.

I agree.

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## *IN THE COURT OF CRIMINAL APPEAL*

*Present :* JAYETILEKE, S.P.J. (President), GUNASEKARA, J. PULLE, J.

## REX vs. MENDIS

*Application* 1 *of* 50 *S. C.* 47/*M. C. Colombo* 42583.

*Argued on :* 15th February, 1950
*Decided on :* 27th February, 1950.

*Court of Criminal Appeal—Rape—Girl alleged to be under 12 years of age—Proof of age solely by X'ray photograph—Admissibility—Failure of judge to put defence fairly to the jury—Misdirection.*

The appellant was charged with rape of a girl called Aslin, who was alleged to be under 12 years of age. The Crown sought to establish age through the medical officer on an X'ray photograph of the girl. Evidence was not led to show that the admitted X'ray photograph was that of Asilin and that the Medical Officer was present when the photograph was taken.

The appellant in his evidence stated that certain witnesses were angry with him because of a certain incident and that he had absconded through fear of bodily harm. The learned Judge in summing up not only failed to draw the Jury's attention to this part of the evidence but indicated to them that the appellant had not assigned any reason for the witness to give false evidence against him.

**Held :** (1) That, in the circumstances, the X'ray photograph should not have been admitted in evidence.

(2) That the learned Judge's omission to direct the jury fairly and adequately on the defence amounted to a misdirection.

**Cases referred to :** *Bray vs. Ford,* (1896) A. C. 44.
*Rex vs. Stoddart,* (1909) 2 C. A. R. 217.
*Rex vs. Wann,* (1912) 7 C. A. R. 146.

*M. M. Kumarakulasingham,* for the accused-appellant.
*H. A. Wijemanne, Crown Counsel,* for the Crown.

JAYETILEKE, S.P.J.

The appellant was charged with having committed rape on a girl called Asilin who was alleged to be under 12 years of age. He was convicted on the charge and sentenced to seven years' rigorous imprisonment.

Asilin said that on June 11, 1948, she was attending to an infant in her house when the appellant, who lived close by, came into the house and had intercourse with her, with her consent. The evidence of Asilin that the appellant had intercourse with her was corroborated by the evidence of Alice who said that she went into Asilin's house hearing that the appellant had gone there, and she saw the appellant lying on Asilin's body and having intercourse with her. The Crown called Dr. Amarasingham the Acting Judicial Medical Officer and Agnes, the mother of Asilin, to prove that Asilin was under 12 years of age on June 11, 1948.

Dr. Amarasingham's evidence reads :—

To Court.

"*Q.* Can you on oath say definitely that she was under the age of 12?

*A.* I cannot say that she was under the age of 12. Only what I can say is that she was about 11 years of age at the time I examined her. She may have been 12.

*Q.* Is it a reasonable possibility or fantastic possibility?

*A.* It is not an unreasonable possibility that on 11-6-48 she was 12.

*Q.* So you can definitely say that was under 12?

*A.* I am definite that she was under 12. It is my honest medical opinion. I may sometimes go wrong by a few months. As a result of my examination I am of opinion that she was under 12. I have been practising for 24 years as a Doctor. I got an X'ray taken (marked P6). Epiphysis are in the pelvic region and when a child is born the ends of the bone are not joined to the rest of the bone. The act of growing means that the epiphysis also grow and join. A child growing bigger means that the ends of the bones are growing bigger. They are useful to estimate the age. When a child is 12 the ends of the ulna bones join the bones. They join the bones after 12. Observations are found to be true. At the age of 12 the elecranon joins the ulna. In this case the X'ray discloses that the elecranon has not joined. (At this stage the jury examined P 6 and doctor explains to them.

*Q.* That helps your view that this girl is under 12?

*A.* That is so. There may be exceptions. According to P 6 I say that the girl is under 12. Her general development when I saw her did not suggest that she was 12. She is not 20. She is much younger. She had no hair either in the pubic regions or axilla. You get hair when puberty starts. Some people sometimes pass blood but that is not puberty. At the time I examined her, breasts had not developed at all. As far as medical science goes, I can say that she was under 12."

Agnes said that Asilin was under 12 years of age at the time of the incident and added that she must have been about 11 years of age.

The Crown called two other witnesses Paulis Perera and Inspector Abeysekera to prove that the appellant absconded on June, 11, 1948 and was in concealment for about 13 months.

The appellant went into the witness box and gave evidence on his own behalf. He said that Agnes and Alice were not on good terms with him, that on the day in question Asilin uprooted some plants that were in his compound and he gave her a slap, whereupon Asilin abused him and fell on the ground and cried out. Then Agnes, Alice and others rushed up to attack him, whereupon, he ran away and concealed himself in the bakery. About ten persons followed him to the bakery and threatened to kill him. He thought that Asilin had sustained injuries and through fear he absconded.

At the argument before us Counsel for the appellant raised the following points :—

1. That there was no evidence that P 6 was the X'ray photograph that was taken of Asilin and it should not therefore have been admitted in evidence.

2. That if P 6 was not admitted in evidence Dr. Amarasingham would not have been able to say that Asilin was under 12 years of age.

3. That the learned Judge had omitted to put the defence adequately to the Jury.

4. That the learned Judge had failed to place before the Jury the reason given by the appellant for absconding.

The only evidence relating to P 6 is a passage in Dr. Amarasingham's evidence which reads :—

" I got an X'ray taken (Shown P 6) "

On this evidence we are unable to say whether Dr. Amarasingham was present when the X'ray photograph was taken and whether P 6 is the X'ray photograph of Asilin. We are therefore of opinion that P 6 should not have been admitted in evidence. A perusal of Dr. Amarasingham's evidence shows that his opinion that Asilin was under 12 years of age on June, 11, 1948 was based largely on P 6 and that it is probable that he would have adhered to the answers given by him to the first two questions put by the Court *if P 6 had been admitted in evidence. In his* summing up the learned Judge said :—

(1) The prosecution takes its stand on the footing that the medical evidence has proved, as far as it can be proved, that the girl on June 11, 1948, was under the age of 12.

(2) The age of the girl is not proved by a birth certificate but we have the evidence of the Doctor. He told us that he has no doubt that the girl was under the age of 12 and he has given his reasons.

The learned Judge did not refer to the evidence of Agnes at all. We do not know what view the jury took of the evidence of Agnes but it is possible that they may have thought that the learned Judge did not refer to it because it was vague and it was therefore not safe to act upon it. We are of opinion that the admission of P 6 has caused serious prejudice to the appellant and that it vitiates the conviction.

With regard to the third and the fourth points that were taken it is clear from the summing-up of the learned Judge that there is substance in them. After dealing with the evidence for the Crown the learned Judge said :—

" As against that you have the sworn evidence of the accused that he did not do anything."

It is an elementary principle that a defence made by an accused should be fairly presented to the

Jury. In *Bray vs. Ford*, (1896) A. C. 44, Lord Watson said :—

> "Every party to a trial by jury has a legal and constitutional right to have his case which he has made either in pursuit or in defence fairly submitted to the consideration of that tribunal."

Having regard to the evidence given by the appellant we are of opinion that the learned Judge's summing-up was insufficient as regards the defence. Again the learned Judge said :—

> "The Crown submits to you that the accused's story leaves many points unexplained. Is there any reason why Alice, a respectable woman, should come into the witness-box and give false evidence against the accused? If the evidence is false why did the accused run away if he is an innocent man?"

This passage may have left the impression in the minds of the Jury that the appellant had failed to assign any reason why Alice should give false evidence against him and why he was guilty. His evidence referred to earlier on that point is very clear. We are of opinion that it was the duty of the learned Judge to have invited the attention of the Jury to that evidence.

The question whether there had been misdirection by reason of non-direction is not an abstract question of law. In *Rex vs. Stoddart*, (1909) 2 C. A. R. 217, Lord Alverstone, C.J., said that mere non-direction is not necessarily misdirection and that those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Again in *Rex vs. Wann*, (1912) 7 C. A. R. 146, Lord Alverstone, C.J., said "that to have any effect in itself the mis-statement of the evidence must be such as to make it reasonably probable that the Jury could not have returned their verdict of guilty if there had been no mis-statements".

With regard to the first passage from the summing-up quoted above we are unable to say that it is reasonably probable that the verdict of the Jury was affected by the failure on the part of the learned Judge to place before them the whole of the appellant's defence and we are therefore of opinion there was no misdirection. But with regard to the second passage quoted above we are satisfied that the omission is such that it is reasonable and probable that the Jury were misled. We are, therefore, of the opinion that the non-direction amounts to a misdirection which vitiates the conviction.

We would accordingly quash the conviction.

*Conviction quashed.*

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*Present :* GRATIAEN, J.

## HEWAVITHARANE vs. BRITO-MUTTUNAYAGAM

*S. C.* 145—*C. R. Colombo* 15787

*Argued on :* 8th February, 1950
*Decided on :* 16th February, 1950

*Rent Restriction Ordinance, No.* 60 *of* 1942, *section* 8—*Action for ejectment of tenant—Reasonably required for landlord's daughter—Dependance of daughter on landlord—Reasonableness of claims of parties.*

The defendant, a dental surgeon, was plaintiff's tenant since 1931 and he carried on his profession on the ground floor of the premises in question. The floor above, which is a self-contained residential flat, was originally occupied by the defendant, but later sublet by him. In January, 1948, the defendant handed over the floor above and the garage to plaintiff's son-in-law and daughter. As a child was born to the plaintiff's daughter, the plaintiff sought to eject the defendant in order to provide the daughter with additional accommodation.

The defendant alleged that he was unable to obtain any other place suitable for his surgery.

**Held :** (1) The plaintiff had to satisfy the Court that, taking into account, *inter alia*, the hardship and inconvenience which would be caused to the defendant by the enforcement of a writ of ejectment, the premises were 'reasonably required' for occupation as a residence for a member of her family (as defined in the proviso to section 8).

(2) That the words 'dependent on him' qualify 'son or daughter over eighteen years of age' as well as "parent, brother or sister".

(3) That as the language of the section is ambiguous, it should be construed in favour of the tenant.

(4) That, even on the assumption that the premises could, in law, have been claimed for the daughter's use, the hardships, which the defendant would suffer, outweighed the owner's needs in this case.

Case referred to: *Cumming vs. Danson*, (1943) 112, L. J. K. B. 145.

*H. V. Perera, K.C.*, with *S. J. Kadirgamar*, for the defendant-appellant.
*F. A. Hayley, K.C.*, with *W. D. Gunasekera*, for the plaintiff-respondent.

GRATIAEN, J.

This has been a difficult case to determine, and I am very conscious of the fact, as the learned Commissioner has been, that a decision favourable to either party necessarily involves some measure of hardship to the other.

The plaintiff, Mrs. Hewavitarne, is the owner of premises No. 445, Galle Road, Kollupitiya, which the defendant, who is a Dental Surgeon, has occupied as her tenant since 1931. The ground floor is constructed for use as a Dental Surgery, and it is common ground that the defendant has in the course of years established there a large and lucrative professional practice. On the floor above is a self-contained residential flat which the defendant occupied at an early period of his tenancy. Later, he sublet this flat and moved to another residence, retaining the surgery below for his professional work. This action is concerned with these premises on the ground floor from which the plaintiff seeks to have the defendant ejected in the circumstances which I shall now relate. The monthly rent for this portion of the premises is Rs. 95.

In October, 1947, one of the plaintiff's daughters married Mr. R. T. Ratnatunga who is a member of the public service. He was at that time engaged in official duties at Anuradhapura, but very shortly afterwards he was transferred to the Ministry of Agriculture in Colombo. He was unable to find a suitable residence for himself and his wife in Colombo, and the defendant agreed to place the residential flat, together with the garage, at their disposal. The tenancy of this part of the premises accordingly terminated, and Mr. & Mrs. Ratnatunga have been in residence there since January, 1948. A child was born in August, 1948, and in anticipation of this happy event the plaintiff gave the defendant notice to quit the surgery, stating that it was required to provide her married daughter with additional accommodation. Mr. & Mrs. Ratnatunga would naturally prefer to occupy a more spacious residence if it were available.

Mr. Ratnatunga has stated in evidence, and it is not denied, that the defendant had previously agreed that "when the family increases he would think of finding out another place to go to". The defendant's position is that he has been unable to obtain any other place suitable for his surgery, and he accordingly claimed the protection of the Rent Restriction Ordinance of 1942 which was applicable to the premises at the relevant date.

The plaintiff cannot succeed in the present action unless she can satisfy the Court that taking into account among other factors, the hardship and inconvenience which would be caused to the defendant if a writ of ejectment were to be enforced against him, the premises are "reasonably required" for occupation as a residence *for a member of her family* (as defined in the proviso to Section 8 of the Ordinance).

It must first be decided whether Mrs. Ratnatunga is a "member of the family" of the plaintiff within the meaning of the Ordinance. This phrase is defined in the Ordinance as meaning "the wife (of the landlord) or any son or daughter of his over eighteen years of age, or any parent, brother or sister dependent on him". The circumstance that the landlord is a lady presents no problem in the case, because words importing the masculine gender must for purposes of interpretation be taken to include females. The difficulty which does arise, however, is whether the words "*dependent on him*" qualify "son or daughter over eighteen years of age" as well as those classes of relative described in a later part of the sentence. If one were permitted to pay due regard to the commas appearing in the official reprint of a statutory enactment, I should be inclined to the view that the doubtful privilege of dependence is not a pre-requisite to the claim of a son or daughter on whose account the landlord may ask for a judicial decree to eject his tenant. It is, however, a well-established canon of construction that marks of punctuation are not to be taken as part of a statute *Maxwell on Interpretation of Statutes* (*9th Ed.*), *p.* 45. If therefore the commas in the sentence which I am called upon to interpret be ignored, I think, though not without hesitation, that the contention submitted by Mr. H. V. Perera is correct. In that view, the bonds of relationship do not by themselves entitle the claims of a landlord's son or daughter over eighteen years of age to be recognised unless he or she is also proved to be dependent on him in the sense in which that term is popularly understood. The language in the section is at least ambiguous, and should, I think, be construed in favour of the tenant for whose protection the Rent Restriction Acts have been specially enacted during a period when housing accommodation is notoriously scarce. I see no special reason why, if Parliament does not

say so in unequivocal terms, the right of a tenant to remain in occupation should be surrendered in favour of an emancipated child of a landlord on whom that child does not depend for shelter or subsistence. The pattern of the corresponding provision in the English Act to which I have been referred is different, and would serve as an unreliable guide to a solution of the present problem. The interpretation which I prefer seems to me to safeguard tenants without unduly penalising landlords. (*Vide* in this connection the observations of Lord Greene, then Master of the Rolls, in *Cumming vs. Danson* (1943) 112 L. J. K. B. 145.

In the view which I have taken, it follows that the plaintiff's action fails at the outset. It is not suggested that Mrs. Ratnatunga, who is married to a Government official, is any longer dependent on her mother, and she does not, therefore fall within the class of persons to one of whom the defendant can be called upon to hand over the premises which are not required by the plaintiff for her own use. Indeed, the alternative interpretation would, from a practical standpoint, result in adding "sons-in-law" to the statutory group comprising the members of a landlord's family. The premises are in reality required *by Mr. Ratnatunga* for the use of himself and the family unit of which he is the head.

As the interpretation of the section which I adopt has been reached with some diffidence, I shall proceed to express my opinion on the merits of the case upon the assumption that the premises could, in law, have been claimed for Mrs. Ratnatunga's use.

The parties to the action have, as one would expect from persons in their position, explained their respective difficulties with refreshing frankness. The learned Commissioner, in describing the position of Mr. & Mrs. Ratnatunga, holds that "considering the status of the plaintiff's son-in-law, who is a member of the Ceylon Civil Service, the portion occupied by him is *not quite sufficient* for their occupation, there being only one bedroom, and they have a child". The available accommodation consists of one large bedroom, a large dining room and sitting room combined, a kitchen, a bathroom and a lavatory. There are also two small cubicles, and a suitable garage has been provided by the defendant. I do not doubt that a little extra accommodation would make for greater comforts, but it seems to me that many married couples with an infant child would under the difficult conditions of today regard the inconvenience to which this young couple is subjected as comparatively insignificant.

The learned Commissioner is satisfied that the defendant has made a genuine attempt to find suitable alternative accommodation for his surgery, but without success. It was suggested that the defendant could attend to his patients in the house at Bambalapitiya where he now resides, but he considers that arrangement to be unsuitable; he points out that his surgical instruments would be corroded owing to the sea air, and that his practice would be affected by the suggested change of establishment. The learned Commissioner holds in his favour that "the place (No. 445, Galle Road) has been his dental surgery for over seventeen years, fitted up with all the necessary instruments" and that "a transfer from this place to Glenaber Place would result in a loss in his practice as a Dental Surgeon in addition to damage to his instruments by corrosion". The defendant's evidence which has not been challenged on the point is to the effect that the expenditure immediately involved in removing his surgery elsewhere and in dismantling his various surgical implements which are fitted into the floor of the present establishment would amount to approximately Rs. 4,000. This sum alone represents three and a half years' value of the rental which he now pays to the plaintiff.

The learned Commissioner has taken the view that the hardships which the defendant would suffer "do not outweigh the owner's need for the house for occupation as a residence for Mr. & Mrs. Ratnatunga". With great respect I cannot agree. On the one hand it must be remembered that Mr. Ratnatunga's terms of employment in the public service do not exclude the possibility of transfer to some other station whereas the defendant has practised his profession in the premises for eighteen years and desires to enjoy without interruption the advantages of an established goodwill in the locality. Mr. Ratnatunga and his wife and infant child now reside in a flat which is admittedly small but which many other families of equal status would I fancy greatly envy. He had applied for a Government bungalow in February, 1948, but the claims of other officers were considered more urgent by the allocating Committee after an inspection of the accommodation which he now enjoys. This circumstance is a pointer to the difficulties which other public servants undergo at the present time. I think that, on a balance of convenience, it would unquestionably cause greater hardship to the defendant if he were ordered irrevocably to vacate his surgery than if the present arrangements were to continue, with some inconvenience to Mr. & Mrs. Ratnatunga, for what might prove to be a period of limited duration.

I set aside the order appealed from, and enter decree dismissing the plaintiff's action with costs in both Courts.

*Appeal allowed.*

*Present :* BASNAYAKE, J. & GRATIAEN, J.

## MURUGESU AND ANOTHER vs. CHELLIAH AND ANOTHER

*S. C.* 157—*D. C. Point Pedro* 1658

*Argued on :* 16th September, 1949
*Decided on :* 14th December, 1949

*Mortgage action—Mortgagor in Malaya leaving mortgaged property in charge of his wife—Action on Mortgage Bond—Service of summons on wife under section 66 of Civil Procedure Code—Decree entered—Property sold in execution—Return of mortgagor after sale—Proceedings to set aside sale—Validity of service of summons—Wife's agency—Is it terminated by Malaya being overrun by Enemy—Defence (Trading with Enemy) Regulations.*

In 1935 the 1st respondent hypothecated with the appellants to secure a loan, a property he acquired after his marriage with the 2nd respondent. In 1938 the 1st respondent left Ceylon for Malaya leaving the 2nd respondent in charge of the property. In 1942 the appellants instituted action for recovery of the loan against the respondents and as Malaya was overrun by the Japanese at the time, service of summons was effected on the 2nd respondent under section 66 of the Civil Procedure Code and *exparte* decree was entered in September, 1942. The land was sold in 1944. 1st respondent having returned in 1947 commenced proceedings to set aside the decree and succeeded.

**Held :** (1) That the summons had been rightly served on the 2nd respondent as agent of the mortgagor.
(2) That the agency of the 2nd respondent for the purposes of section 66 of the Civil Procedure Code was not determined by the enemy occupation of Malaya.
(3) That the Defence (Trading with the Enemy) Regulations had no application to the facts of this case, and therefore the decree entered was good in law.

**Cases referred to :** *Duck vs. Bates*, 53 L. J. Q. B. 338 at 344.
*Beckett vs. Sutton*, 51 L. J. Ch. 432 at 433.
Section 4, Civil Law Ordinance.
Section 3, Civil Law Ordinance.
*Nordman vs. Rayner & Sturgess* (1916) 33 T. L. R. 87.
*Schostall vs. Johnson* (1919) 36 T. L. R. 75.
*Soufrachi (v/o) vs. Van Udens Scheepvaart en Agentuur Maatschappij* (N. V. Gebr.), (1943) A. C. 203 ; (1943) 1 All E. R. 76.
*Hugh Stevenson & Sons Ltd. vs. Aktiengesellschaft Fur Carton-Nagon-Industrie*, (1918) A. C. 239.
*Ottoman Bank vs. Jebara*, (1928) A. C. 289.
(1940) 1 Ch. 785 (C. A.).

*H. V. Perera, K.C.*, with *P. Navaratnarajah* and *S. Canagarayer*, for the appellants.
*A. V. Kulasingham* with *S. Sharvananda*, for the respondents.

BASNAYAKE, J.

By a bond dated 25th August, 1935 the first respondent to this appeal mortgaged to the appellants the land called Sarakiri on which he resided as security for a loan of Rs. 2,750 with interest at 10 per centum per annum. It was property acquired by the first respondent after his marriage. In 1936 the first respondent left for Malaya, where he secured employment, leaving his wife, the second respondent, in charge of his property.

In June, 1942 the appellants instituted an action against the first respondent and his wife, the second respondent, for the recovery of the principal and interest which amounted to Rs. 4,449·16. As the first respondent was at the time in Malaya, which was then overrun by Japan, which was at war with this country, an application was made under section 66 of the Civil Procedure Code for the service of summons on his wife, the second respondent, who was in charge of the property. That application was allowed and summons was served on her. But she did not defend the action. Ex parte decree was entered on 4th September, 1942. After the stay of execution for six months on the motion of the second respondent the land was sold on 24th June, 1944.

The first respondent returned from Malaya in February, 1947 and in December, 1947 he commenced proceedings to have that decree and sale set aside. The learned District Judge has given judgment for him, and the present appeal is from that judgment.

The learned District Judge appears to have taken the view that the fact that the first respondent was in a country occupied by the enemy affected the agency of the second respondent for the purposes of section 66 of the Civil Procedure Code. It is admitted that the second respondent

was left in charge of the mortgaged property when the first respondent left for Malaya. After he left the first respondent remitted money to his wife at regular intervals and was in correspondence with her till the enemy occupation of Malaya interrupted means of communication.

The question that arises for decision is whether the service of summons on the second respondent binds the first respondent in the circumstances of this case. Section 66 of the Civil Procedure Code under which service has been effected reads :—

> " In an action to recover money due on a mortgage secured upon immovable property, or to obtain relief respecting or compensation for wrong to immovable property, if the service cannot be made on the defendant in person, and the defendant has no agent empowered to accept service, it may be made on any agent of the defendant in charge of the property ; but without prejudice to the plaintiff's right to proceed under sections 645, 646 and 647."

It is clear from the evidence that the first respondent left the second respondent in charge of his property. The words of the section are " any agent of the defendant in charge of the property ". " Any " is a word of the widest import which excludes limitation or qualification. *Duck vs. Bates*, 53 L.J., Q.B. 338 at 344 ; *Beckett vs. Sutton*, 51 L.J., Ch. 432 at 433. There is nothing in the context of section 66 which restricts its meaning. In my opinion the summons in the mortgage action has been rightly served on the second respondent as an agent of the defendant in charge of the property.

The next question that arises for decision is whether the fact that the principal was in territory occupied by a country at war with Ceylon automatically terminated the second respondent's agency. That question has to be determined in accordance with the law by which such a question would be determined in England Section 4, Civil Law Ordinance, at the present time. The learned District Judge is of the view that the effect of the Defence (Trading with the Enemy) Regulations 1939 was to bring the agency of the second respondent to an end upon the occupation of Malaya by Japan with whom this country was at war. Those regulations appear to have no application to the instant case.

The second respondent's action in remaining as agent in charge of her husband's property even after her husband became a person resident in territory occupied by the enemy does not come within any of the acts which are deemed by regulation 1 to be trading with the enemy, nor does it fall within the ambit of regulations 4, 5 and 6. Under the law of England, which is also our law, Section 3, Civil Law Ordinance, every contract of agency is not determined by the occurrence of war. (*Nordman vs. Rayner & Sturges*, (1916) 33 T. L. R. 87 ; *Schostall vs. Johnson*, (1919) 36 T. L. R. 75. Only agencies which require intercourse with the enemy are determined by the outbreak of war. (*Sovfracht (v/o) vs. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)*, (1943) A. C. 203 ; (1943) 1 All. E. R. 76. *Hugh Stevenson & Sons, Ltd. vs. Aktien gesellschaft Fur Carton-Nagen-Industrie*, (1918) A. C. 239 ; *Ottoman Bank vs. Jebara*, (1928) A. C. 269. The agency of the second respondent does not fall into that category. It has been held in the case of *Eichengruen vs. Mond*, (1940) 1 Ch. 785 (C. A.) that service upon a solicitor who remains upon the record is sufficient, although his client has become an alien enemy.

For the foregoing reasons I hold that summons has been properly served on the second respondent and that the mortgage decree is binding on the first respondent.

The appeal is allowed with costs in both courts.

Gratiaen, J.

I agree.

*Appeal allowed.*

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*Present :* Gratiaen, J.

## ANDREE vs. DE FONSEKA AND ANOTHER

*S. C. 43—C. R. Colombo 9879*

*Argued on :* 8th February, 1950
*Decided on :* 10th February, 1950

*Rent Restriction Ordinance, No. 60 of 1942, Section 8 (c)—Landlord's need of premises for purposes of his own business—Reasonableness of demand—When should it be proved to exist—What landlord has to prove—Should the landlord have a business in existence.*

**Held :** (1) That the reasonableness of a landlord's demand to be restored to possession for the purposes of his business under section 8 (*c*) of the Rent Restriction Ordinance No. 60 of 1942 must be proved to exist at the date of the institution of the action and to continue to exist at the time of the trial.

(2) That the landlord must place before the Court the necessary material to assist it in deciding whether his demand to eject the tenant is a reasonable one having due regard to the tenant's position.

(3) That to succeed in a claim to eject a tenant under section 8 (*c*) of the Ordinance, there must exist at the relevant date a *present requirement* to use the premises for the purposes of a business which is in existence or which will be established by him as soon as the premises are made available to him.

**Cases referred to :** *Gunasena vs. Sangaralingam Pillai & Co.* (1948) 49 N. L. R. 473.*
*Hameedu Lebbe vs. Adam Lebbe* (1948) 50 N. L. R. 181.
*Mamuhewa vs. Ruwanpatirana* (1948) 50 N. L. R. 184.

*H. V. Perera, K.C.*, with *S. J. Kadirgamar*, for the defendant-appellant.
*G. E. Chitty* with *Vernon Wijetunge*, for the plaintiff-respondent.

GRATIAEN, J.

This is a tenancy action in which the landlord, who is a Barrister-at-law, sued the appellant, who is the proprietor of a printing establishment, to have him ejected from premises No. 246, Union Place, Colombo. The action was instituted on 5th November 1947, and the premises are admittedly situated in an area to which the provisions of the Rent Restriction Ordinance of 1942 are applicable. The plaintiff claimed that he was entitled to maintain the action on three separate grounds—(*a*) that rent was in arrears, (*b*) that the condition of the premises had deteriorated owing to the appellant's neglect or default, and (*c*) that the premises were reasonably required for the purposes of his business.

The first of these grounds was abandoned at the trial, and on the second ground the plaintiff failed to satisfy the Court that there had been any deterioration of the premises for which the appellant could be held responsible. On the third ground, however, he succeeded, and the present appeal is concerned only with the correctness of the learned Commissioner's decision on this point.

As the plaintiff had not obtained authorisation from the Assessment Board to institute this action, it was incumbent on him to satisfy the Court that the premises were "reasonably required for the purposes of his business". As I read Section 3 (*c*) of the Ordinance, the reasonableness of the landlord's demand to be restored to possession for the purposes of his business must be proved to exist at the date of institution of the action and to continue to exist at the time of the trial. In determining this issue the Court must take into account the position of the landlord as well as of the tenant together with any other factor which is relevant to a decision to the case. Doubts which had at one time existed as to the proper interpretation of the words "reasonably required" appearing in the Section have now been set at rest by the ruling of this Court in *Gunasena vs. Sangaralingam Pillai & Co.** (1948) 49 N. L. R. 473.

I shall first consider the position of the tenant. He has been in occupation of the premises since March 1938, and according to his uncontradicted evidence he has used them continuously for carrying on his business as a printer and publisher. He prints what he describes as a newspaper called the "Trespasser Racing and All Sports" which is apparently so palatable to the taste of its readers that each bi-weekly publication claims a circulation of 33,000. His efforts to find a suitable place of business since he received notice to quit the premises have failed, and it must therefore be assumed that, should the plaintiff's action succeed, the appellant's business would in all probability have to come to an end. Whether this loss to "literature" and the ensuing frustration of his 33,000 clients would amount to a very great catastrophe, is of course besides the point. The business of printing and publishing is *per si* a lawful occupation.

It is now necessary to assess the reasonableness of the plaintiff's claim to occupy the premises for the purposes of his own business. He is fifty-eight years old, and is a Barrister-at-law, but has admittedly not practised his profession for very many years; it is not suggested that he requires the premises for use as "chambers". Nor does he require to reside on the premises. He states, however, that he "intends" to set himself up in business. When invited in cross-examination to give more information regarding the nature of this proposed undertaking, he refused to do so. A man is no doubt entitled to withhold from others his closely guarded secret as to the details of any future business which he has in contemplation, but in that event I fail to see how he can expect to satisfy a Court of law as to the merits of his claim that the premises which his tenant now occupies are

* 37 C. L. W. p. 91

reasonably required for that business. In my opinion the burden which rests on the plaintiff cannot be discharged unless the Court is furnished with sufficient material on which it can determine that the premises are necessary or suitable for the launching of his new enterprise; that the proposal to start a new business after ejecting a tenant in occupation is a practical proposition; and that it is reasonable to compel the tenant to abandon his own long-established business so to to make room for such a project. The plaintiff is apparently a gentleman of means. He had been away in Europe for some years before the war, and returned to this Island in 1939. Eight years later, he became attracted by the idea of undertaking a business venture of an unspecified nature. At one time he thought of returning to Europe after the war, but later he decided not to. I do not doubt that his somewhat vague intentions as to the future were genuine enough at the time when he gave evidence at the trial but he has not placed before the Court sufficient material upon which it could be inferred that his proposal to enter the field of commerce was something more than a decision to gratify a passing whim. I have therefore come to the conclusion that the plaintiff has not discharged the burden of establishing that he is entitled to have the defendant ejected from the premises. It is not improbable that his decision to claim to be restored to possession for the purposes of establishing a new business was in some measure motivated by the belief that the condition of the premises had deteriorated through some fault of the defendant. That belief has now been proved to be without foundation.

The question has also been raised as to whether it is open to a landlord, in terms of Section 8 (*c*) of the Ordinance, to claim back his premises for the purposes of establishing a business which has not yet come into existence. In *Hameedu Lebbe vs. Adam Lebbe*, (1948) 50 N. L. R. 181, my brother Nagalingam seems to have decided the question in the affirmative. In a later case, however, my brother Basnayake took a contrary view, and held that the section only applied if there was an *existing* trade or business for which the leased premises were required by the landlord. *Mamuhewa vs. Ruwanpatirama*,* (1948) 50 N. L. R. 184. I myself am not prepared to go so far. It seems to me that the section would cover the case of a landlord who has decided to establish a new business and who is only prevented from implementing that decision owing to lack of suitable accommodation for the purpose. In other words, there must exist at the relevant date *a present requirement* to use the premises for the purposes of a business which has already been established or, in the alternative which will be established by him as soon as the premises are made available to him. In either event, he must place before the Court the necessary material to assist it in deciding whether his demand to eject the tenant in occupation is a reasonable one having due regard to the tenant's position. This is precisely what the plaintiff has failed to do in the present action. I accordingly set aside the judgment appealed from and dismiss the plaintiff's action with costs both here and in the Court below.

*Present:* BASNAYAKE J. AND GRATIAEN, J.

## DONA MARY AND ANOTHER vs. DISSANAYAKE

*Application for revision in D. C. Colombo 4673/P (258)*

*Argued & Decided on* 29th August, 1949.

*Partition action—When should a Court order a sale under section 4 of the ordinance.*

**Held:** That except in a case where parties ask for a sale, a judge should not order a sale under section 4 of the Partition Ordinance, unless it is proved to his satisfaction that a partition would be impossible or expedient.

*L. G. Weeramantry*, for the 1st and 2nd petitioners.
*H. A. Kottegoda*, for the plaintiff-respondent.

BASNAYAKE, J.

The petitioners to this application are the second and fourth defendants in an action for the partition of a land. They are dissatisfied with the order made by the learned District Judge decreeing a sale of the land. Learned counsel for the petitioners submits that it is possible to partition the land. Learned counsel for the respondent does not contest that submission. The learned District Judge does not

* 39 C. L. W. p. 32

appear to have examined carefully whether it is possible to partition the land for he does not assign any reasons for his statement that it is not practicable to partition the land. It appears from plan No. 833 which depicts a scheme of division of the land into three blocks that the partition of the land is not impossible. There is no evidence that it is inexpedient. The plaintiff asks that the land be partitioned and that a sale be ordered only if a partition is "impracticable". The defendants who have filed statements do not ask that a sale be ordered. In the circumstances the learned trial Judge should not have ordered a sale without exploring with greater care than he has done the possibility of partitioning the land.

Except in a case where the parties ask for a sale, a Judge should not order a sale under section 4 of the Partition Ordinance unless it is proved to his satisfaction that a partition would be "impossible or inexpedient".

We direct that the case be remitted to the District Court in order that the District Judge may consider the possibility of ordering a partition of the land after taking evidence if he deems it necessary so to do.

As the petitioners have been negligent in placing their case before the trial Judge, the respondent will be allowed the costs of this application, which we fix at Rs. 31·50.

*Appeal allowed.*

GRATIAEN, J.
I agree.

*Present:* NAGALINGAM J. AND GRATIAEN, J.

## NARAYANSWAMI vs. MARIMUTTUPILLAI

*S. C. 63—D. C. Badulla 9256.*

*Argued on:* 17th November, 1949.
*Decided on* 24th November, 1949.

*Judgment of Foreign Court—Does an action lie on it in other Courts—Principles of International Law.*

The judgment of a Foreign Court of competent jurisdiction is, in accordance with the principles of private international law, regarded in other courts as *prima facie* evidence of a debt at common law and an action lies for the recovery of the debt so adjudged subject to such defences as may be raised by the debtor at the trial.

*Kingsley Herat*, for the plaintiff-appellants.
*E. B. Wickramanayake, K.C.*, with *V. K. Kandasamy*, for the defendants-respondent.

GRATIAEN, J.

This is an appeal against an order of the learned District Judge of Badulla rejecting a plaint and refusing to issue process in civil proceedings. The plaintiffs instituted the present action for the recovery of a sum of Rs. 7,130·60 and interest alleged to be due to them on a foreign judgment. The learned Judge seems to have construed the plaint as an application for the registration and enforcement of a foreign judgment in terms of the Enforcement of Foreign Judgments Ordinance (Chapter 78). As that Ordinance has not come into operation, he was correct in taking the view that its special statutory provisions are not yet available to litigants in Ceylon.

This, however, does not dispose of the matter. The judgment of a foreign Court of competent jurisdiction is, in accordance with the principles of private international law, regarded in other Courts as *prima facie* evidence of a debt at common law. This rule has long been recognised in Ceylon, and an action lies for the recovery of the debt so adjudged, subject to such defences as may be raised at the trial by the alleged debtor. It therefore follows that the learned Judge acted prematurely in rejecting the plaint which, on the face of it, discloses a good cause of action.

I would set aside the order of the learned District Judge and direct that the plaint be accepted and summons issued on the defendant in due course.

As the defendant was not responsible for the error into which the learned Judge has fallen, I would make no order as to costs.

*Set aside and sent back.*

NAGALINGAM, J.
I agree.

END OF VOL. XLI.