The Ceylon Law Weekly

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

VOLUME XL

WITH A DIGEST

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(2) That at the end of that term, the accused person must be produced in Court so that the Magistrate may determine what would be the appropriate order to make should the trial be postponed.

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In the course of an action the matters in difference were referred to arbitration. The reference was in general terms and did not state the particular matters in difference. The record did not show either that all the parties desired a reference to arbitration or that their proctors had the necessary authority to apply for such a reference.

Held : (i) That there had been no compliance with the Civil Procedure Code either in regard to the application for a reference to arbitration or in regard to the reference itself.

(ii) That no finality attached to the award, as it had been made under a reference which was invalid.

GIRIGORIS *et al* vs. PUNCHI SINNO *et al* ... 25

Civil Procedure Code Section 756—Notice of tender of security—Reissue of notice by court for another date—Validity.

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Held : (i) That there is no authority in section 756 of the Civil Procedure Code for the reissue of a notice given by an appellant of tender of security for respondents' costs of appeal for a date other than that mentioned in the notice by the appellant.

(ii) That the court will not be justified in granting relief under section 756 (3) in the absence of an explanation for the failure to serve the notice in time and of evidence that the appellant had done all in his power to comply with section 756.

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Sale of Goods—Goods delivered to buyer—Original date for payment extended by seller-Buyer repudiating liability—When can seller sue for price of goods.

Held : (i) That in a contract for the sale of goods in which delivery has been made, payment of the price cannot be claimed until the date fixed for payment in the original contract or, where an extension of time has been granted, until the date fixed in the contract in so far as it has been varied to this limited extent.

(ii) That where the original date for payment is extended by the seller, a repudiation by the buyer of his liability does not have the effect of restoring the date in the original contract as the operative date for payment.

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Court of Criminal Appeal

Conviction for murder—Evidence of witness in examination in chief and cross-examination supporting plea of provocation—Questions by trial Judge reminding witness of evidence before the Magistrate having the effect of rebutting such plea—Caution by Judge not to consider the witness' evidence given in answer to him—Likely prejudice in spite of caution.

The accused who was charged with the murder of his wife admitted the stabbing but pleaded grave and sudden provocation. At the trial, the mother of the deceased, whose evidence in examination and cross-examination seemed to support this plea, was examined by the Judge who reminded her of her evidence before the Magistrate that the accused threatened to kill the deceased a week before the stabbing, whereupon she asserted that her evidence before the Magistrate was true, and that she even made an entry at the police station (which was not produced at the trial) regarding the threat. The Jury found the accused guilty of murder.

Held : That the evidence of the witness given in answer to questions from court must have prejudiced the jury in spite of the Judge's warning not to consider that evidence and that the proper verdict was one of culpable homicide not amounting to murder.

REX vs. M. R. PERERA *alias* M. A. PERERA... 1

Charge of murder against two accused—Conviction of the first of murder and acquittal of second—Injuries on deceased caused by katty and knife—No definite proof that fatal injury was caused by first accused—Unreasonableness of verdict—Reduction of offence to one of attempted murder—Value to be attached to an accused's unsworn statement from the dock regarding other accused.

Where two accused were charged with the murder of a person on whose body were found several incised injuries, only one being fatal, and the first accused was convicted of the charge, while the second was acquitted by the Jury and there was no evidence to eliminate the fact that the second accused may have caused the fatal injury.

Held : (1) That the offence committed by the first accused was one of attempted murder.

(2) That a statement made by an accused person from the dock cannot be taken into account in considering the case against his co-accused.

REX vs. LIYANAGE SIMEION 6

Charge to the jury—Direction that 'as a matter of law' the jury must not pay attention to evidence of accused's good character—Misdirection.

Held : That it was a misdirection to tell the jury "as a matter of law" that they "must not pay the slightest attention" to the evidence of the accused's good character.

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Accused convicted of murder of his wife's paramour—Plea of provocation—Evidence that accused's wife lived with paramour for one month before offence—Production by prosecution of document referring to agreement by accused and wife to cancel marriage—No legal proof of document—Charge to Jury based on statements in document—Retrial.

Where the accused was charged with the murder of the man with whom the accused's wife was living at the time of the incident and one of the pleas of the accused was that the act was committed under grave and sudden provocation and the Judge directed the Jury on the basis of certain statements in a document not properly proved by the prosecution which statements had the effect of negativing the plea of provocation and there was no other evidence to support the direction negativing the plea of provocation.

Held : That the conviction for murder could not stand as it was difficult to say that the Jury would have refused to entertain the plea even if the document was not read and the trial Judge abstained from making the observations based on the document.

REX vs. RETIGAHALANDEGEDERA RAN BANDA ... 33

When may the deposition of an absent witness be read in evidence—Section 33, Evidence Ordinance.

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In a trial before the Assizes an application was made by the Crown to read in evidence under the provisions of section 33 of the Evidence Ordinance the depositions of four witnesses, recorded during non-summary proceedings by the enquiring Magistrate. Evidence, uncontested by the defence, was led to show that the four witnesses were presently at Tokyo, Bangkok, Singapore and Calcutta respectively. Counsel for the defence opposed the application on the ground that there was no evidence before Court that efforts had been made to secure the personal attendance of the witnesses in question. The application was allowed, the presiding Judge holding that such evidence was unnecessary and that on the material available the Court was satisfied that the presence of the witnesses could not be obtained without an amount of delay and expense which, under the circumstances of the case, was unreasonable. In appeal it was argued on behalf of the defence that the depositions were improperly admitted.

Held : (1) That the discretion of the trial Judge was exercised on insufficient material inasmuch as there was no evidence of the actual delay and expense that would be involved in securing the attendance of the witnesses in question.

(2) That as the evidence of the witness presently in Calcutta was of a vital nature, the delay and expense involved in securing his attendance was not unreasonable under the circumstances of the case, and that steps should have been taken by the Crown to secure his attendance at the trial.

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Statements made by accused, partly incriminating him, partly exculpating him—Should the Court accept or reject such statements.

Held : That if a confession made by the accused contains matter which incriminates him as well as matter favourable to him, the Court should accept the confession as a whole, though the jury may attach different degrees of credit to the different parts.

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Denial of jurisdiction by defendant—Onus on plaintiff.
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Section 36—Application of—Failure to comply with section 54 of the Wages Board Ordinance.
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Criminal Procedure Code

Sections 212 and 237 (1)—Evidence Ordinance section 155—Contradiction of witnesses for the defence by previous statement to the Police—Calling of witness to prove previous statement after close of the defence—Is it evidence in rebuttal—Can such evidence be led in Magistrate's Court.

Held : (i.) That the absence of a provision similar to those of sections 212 and 237 (1) of the Criminal Procedure Code in regard to trials before the Magistrate's Court does not preclude a contradictory statement put to a defence witness being proved after the close of the case for the defence.

(ii) That the proof of such a statement, after the close of the defence, by calling the witness who recorded such statement, is not evidence in rebuttal.

(iii) That the right granted by section 155 of the Evidence Ordinance to impeach the credit of a witness by a previous statement made by him implies that everything indispensable to its proper and effectual exercise is also granted and that the right in this case can only be exercised after the close of the evidence for the defence.

RASIAH VS. SUPPIAH (S. I. POLICE) ... 10

Section 425 (*b*)—Failure to comply with section 54 of the Wages Board Ordinance—Is it curable.
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Section 152 (3)—Assumption of jurisdiction in charge of housebreaking and theft.
See Penal Code 22

Section 199—Report to Court by police officer under Section 148 (1) (b)—Can another police officer conduct the prosecution in a case summarily triable.

Held : (i) That in view of Section 199 of the Criminal Procedure Code, the police officer, who appears and conducts the prosecution in a case triable summarily need not necessarily be the very police officer who makes the report under section 148 (1) (*b*) of the same Code.

(ii) That a Police Officer who conducts the prosecution commenced by another is not entitled to exercise any function which, under the Code, may be exercised by the complainant alone.

DANIEL VS. WIJESINGHE, S. I. POLICE, BELIATTA 39

Section 357—Failure of principal to observe terms of bond—Order on Surety—Application to set aside order.
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Section 325—Magistrate acting under—No Evidence of antecedents of accused.

Held : That a Magistrate acting under Section 325 of the Criminal Procedure Code must have evidence of the good character or antecedents of the accused.

FERNANDO & ANOTHER VS. EXCISE INSPECTOR, WENNAPPUWA 41

Sections 335, 338 and 413—Accused acquitted of charge of retaining stolen property—Order for return of property to lawful owner—Is order appealable.
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Section 340 (2)—Certificate under—Appeal on matter of law.

Held : That a proper certificate under section 340 (2) of the Criminal Procedure Code is a condition precedent to an appeal on a matter of law.

COSMAS VS. ADDITIONAL CONTROLLER OF ESTABLISHMENTS 46

Section 15—Meaning of "penalty."
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Sections 304, 306 and 425—Failure to write out judgment and pronounce it in open Court—Is it an irregularity cured by section 425?

A Magistrate, instead of writing out the judgment and pronouncing it in open Court in the presence of the accused, stated orally the gist of what he intended to embody in the judgment in the absence of the accused, in a case where his absence could not be dispensed with.

Held: That this amounted to an irregularity which could not be cured by the provisions of section 425 of the Criminal Procedure Code.

THIAGARAJAH vs. ANNAIKODAI, POLICE ... 57

Section 190—Forthwith—Should a Magistrate record his verdict immediately after conclusion of trial.

Held: That Section 190 of the Criminal Procedure Code does not require a Magistrate who convicts an accused person to record his verdict immediately after he has concluded the taking of his evidence.

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Section 298 (1), 301 (2)—Does the word 'document' in section 301 (2) include a report under section 148 (b)—Meaning of 'foreign language' in section 302 (2).

Penal Code section 484—Charge under—Need to set out and prove the actual words complained of—Inadmissable evidence—When it viliates a conviction.

Held: (1) That in a charge under section 484 of the Penal Code the actual words complained of must be set out and proved at the trial to have been uttered by the accused.

(2) That the word 'document' in section 301 (2) of the Criminal Procedure Code is wide enough to include a written report initiating criminal proceedings before a Magistrate under section 148 (b).

(3) That the word 'foreign' in section 301 (2) must be construed as referring to any language other than the official language of the Courts.

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See Bail 92

Sections 187 and 188—Plea of "not guilty" Plea withdrawn in course of proceedings and plea of "Guilty" tendered—Regularity.

Held: (i) That the court can allow a person to withdraw a statement not amounting to an admission of guilt and make another containing an admission of guilt;

(ii) That such admission of guilt should be recorded in the manner prescribed by section 188 for statements made under section 187 (3).

RAJARETNAM vs. GOONESINGHE (MOTOR PATROL INSPECTOR, JAFFNA) 109

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Crown is not bound by Rule 3 (*a*) of the Appeals (Privy Council) Ordinance.

See Appeal 77

Customs Ordinance

Sections 64, 128 and 128A—Export of goods the exportation of which is restricted—Forfeiture of vessel used in exportation—Owner unaware that vessel used in contravention of Ordinance—Is forfeiture justified.

The master of a vessel used the vessel, unknown to the owner, for taking certain goods, the exportation of which was restricted, out of the Island in contravention of the Customs Ordinance. He was convicted under section 128 and the vessel was declared to be forfeited under section 128A. The owner appealed.

Held: (1) That in order to justify the forfeiture, it was not essential to prove guilty knowledge on the part of the owner;

(2) That section 128 applies to a case where goods, the export of which is restricted, are taken out of the Island without compliance with the special conditions applicable to the case;

(3) That goods are "exported" as soon as they are taken in a vessel outside the limits of the port.

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Domestic Tribunals

Principles applicable to decisions of—Court cannot intervene where Tribunal Acts honestly and in good faith—Effect of prejudiced person sitting on enquiry—Meaning of "warned off" under Trinidad Turf Club Rules.

The defendants, the Stewards of the Trinidad Turf Club, "warned off" the respondent, an owner and trainer of horses, and made him a "disqualified person" under the Club Rules after an inquiry at which the respondent was represented by counsel, on the ground that the respondent's horse was found to be drugged after a race. The respondent admittedly, had nothing to do with the administration of the drug.

The respondent brought an action in the Supreme Court of Trinidad for a declaration that the defendants had either no jurisdiction to entertain the inquiry or make the order or had exceeded their jurisdiction and that two Stewards were disqualified from participating in the inquiry by reason of their personal animosity to the respondent and that the order was contrary to dictates of natural justice.

The Supreme Court held (1) That the order of the defendants was *ultra vires* the powers conferred upon them by the Trinidad Turf Club; (2) that the defendant's ruling that the respondent had failed to safeguard his horse was contrary to natural justice in that the defendants adjudged the respondent by a rule which precluded them from making a proper inquiry.

On appeal to the Privy Council it was held:—

(1) that under the Turf Club General Rules the defendants had power to "warn off" the respondent resulting in the respondent becoming a "disqualified person" within the Trinidad Rules of Racing.

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(2) that where the Tribunal does not exceed its jurisdiction and acts honestly and in good faith, the Court cannot intervene, even if it thinks the penalty is severe or that a very strict standard has been applied.

(3) that the presence of the prejudiced Stewards on the Tribunal did not inject such an element of bias into the Tribunal as to give rise to a reasonable suspicion that the trial was not a fair one and that the defendants sitting as a Tribunal discharged the obligation to act honestly and in good faith.

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Held: (i) That a breach of a special order under section 28 of the Explosives Ordinance is not punishable under section 7 of the same Ordinance.

(ii) That an accused person who had a licence to stock explosives in the premises in which they were found commits no breach of section 15 of the Explosives Ordinance, although the premises are not registered for the storage of explosives.

(iii) That the definition of the expression "fine" in Section 2 of the Criminal Procedure Code is wide enough to embrace the pecuniary forfeiture provided in section 15 of Chap. 140 under the nomenclature of "penalty."

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Fine

Amount of—Matters to be considered in fixing—Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938.

Where an accused person, 17-years old, was ordered to pay a fine of Rs. 500 forthwith without any inquiry as to whether he possessed the means to do so, and on his failure to pay the fine, was committed to prison.

Held: That the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938 had not been complied with.

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Fraudulent preference—Refusal of certificate of conformity and withdrawal of protection from arrest—Insolvency Ordinance, section 151.

Held: (1) That an insolvent who makes payments to some of his creditors, influenced by the poverty of some and out of gratitude to others, is guilty of fraudulent preference and the Court is right in refusing him a certificate of conformity and withdrawing protection from arrest.

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Held : That where the jurisdiction of the Court of Requests is denied by the defendant, the plaintiff must prove that the court had jurisdiction and that a statement in the plaint that the value of the claim is within the jurisdiction is insufficient.

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Section 39—Person not being a medical practitioner, practising medicine for gain—Ingredients necessary to be proved.

A pharmacist, employed by a registered medical practitioner on a fixed salary diagnosed a patient's ailments in the doctor's absence and gave the patient medicines selected by him out of prescriptions left in his care by the doctor. The fee levied from the patient was paid to the doctor.

Held : (i) That habituality need not be established and that proof of one instance of practising medicine was sufficient.
(ii) That the pharmacist had "practised medicine."
(iii) That, in the circumstances, he had practised medicine "for gain."

PETER FERNANDO vs. FLAMER CALDERA (INSPECTOR OF POLICE) 110

Minimum Wages
Employer's failure to pay—Prosecution—Sanction of Commissioner of Labour.
See Wages Boards 17

Motor Car Ordinance
No. 45 of 1938—Using vehicle for purpose not authorised by licence—Evidence necessary to establish charge—Evidence Ordinance Section 91.

The charge related to the use of a motor vehicle for a purpose not authorised by the licence.

Held : That the licence, being a document required by law to be in writing and in a prescribed form must be proved by the document itself or by secondary evidence of its contents in cases where secondary evidence is admissible.

MUDIYANSE vs. DISSANAYAKE (S. I. POLICE, KEGALLE) 37

Muslim Intestate Succession and Wakfs Ordinance
Applications under Sections 15 and 16—Governed by Civil Procedure Code.
See Trusts 81

Negligence
Damages for injury resulting from—Passenger just alighted at halting place run over by rear wheels of the vehicle—Driving off from halting place without due care and caution—Res ipsa loquitur.

Held : (i) That the driver of an omnibus, who, without taking due care and precautions for the safety of persons, who were known to be in very close proximity to the vehicle, merely depends on the signal given by his conductor to drive off a 'bus from a halting place, is guilty of gross negligence.

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(ii) That the doctrine of "*res ipsa loquitur*" applies to a case where the rear wheels of an omnibus ran over a person who had just alighted from the vehicle at a prescribed halting place.

GAMAGE LUISA PERERA vs. GAMINI BUS CO., LTD. 49

Omnibus Service Licensing Ordinance, No. 47 of 1942

Application for route licence—Route common to whole of route for which Licence already issued to another person—Order made by Officer on behalf of Commissioner of Motor Transport—Reasons for decisions of Commissioner and of Tribunal of Appeal not given.

A and B, who were holders of road service licences under the Omnibus Service Licensing Ordinance, applied for additional road service licences. A part of A's proposed route was common to a route for which there was already a licence in favour of B. A part of B's proposed route was common to the whole of a route for which A held a licence. An officer signing for the Commissioner of Motor Transport refused A's application, and allowed B's. The Tribunal of Appeal upheld the Commissioner's decision. On a case stated.

Held : (i) That the grant of a licence to B was contrary to section 7 of the Omnibus Service Licensing Ordinance.

(ii) That A's application ought to be granted.

(iii) That applications for road service licences must be considered and decided by the Commissioner himself.

THE KANDY TOWN BUS CO., LTD. vs. (1) THE COMMISSIONER OF MOTOR TRANSPORT (2) THE UNITED BUS CO., LTD. 18

Partition

Action—Intervenient claiming by reason of prescriptive right—Period of prescription—Prescription Ordinance, section 3.

Held : That an intervenient in a partition action, claiming under a prescriptive right, is entitled to count the period up to the date of his intervention in the action for the purpose of computing the period of ten years prescribed in section 3 of the Prescription Ordinance.

NERIS PERERA & ANOTHER vs. DON HENDRICK & OTHERS 112

Partnership

Premises let to firm by one partner—Can such partner maintain an action for rent and ejectment against other partner.

See Landlord and Tenant 61

Minority of partner—No bar to formation of partnership.

See Income Tax 79

Payments of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938.

Matters to be considered in fixing fine.

See Fine 96

Penal Code

Sections 443 and 369—Criminal Procedure Code, section 152 (3)—Can a charge of housebreaking and theft be tried summarily by a Magistrate assuming jurisdiction as a District Judge.

Held : (i) That a Magistrate who is also a District Judge can try summarily a charge of housebreaking and theft by assuming jurisdiction under section 152 (3) of the Criminal Procedure Code.

(ii) That the question whether it is "proper" for him to exercise the jurisdiction in a particular case is one for the Magistrate to decide on the facts of that case.

VADIVELU vs. THE INSPECTOR OF POLICE, BADULLA 22

Section 394—Charge under—Accused acquitted and order made for return of stolen goods to lawful owner—Is order appealable.

See Appeal 43

Section 394—Retaining stolen property—Explanation by accused—Sufficiency of explanation.

The accused, who was a dealer in used motor spare parts and accessories, was convicted under section 394 of the Penal Code, although he gave an explanation as to the possession of the stolen property. The stolen property consisted of a motor bicycle gear box worth Rs. 250 which he had bought for Rs. 6.

Held : That the following were sufficient to establish guilty knowledge :—

(*a*) The appellant as a dealer in secondhand motor spare parts should ordinarily be taken to know the market value of the gear box.
(*b*) The unusual character of the seller, a bullock cart driver, coupled with the exceedingly low price demanded by him.
(*c*) The exceedingly low price paid by the appellant.
(*d*) The fact that he had never before purchased any motor accessories from the seller.
(*e*) The fact that the gear box was kept in a gunny bag for over a week while the other motor accessories were exhibited in open shelves.

NADAR vs. PERERA (S. I. POLICE, TRINCOMALEE) 44

Section 484—What should be proved in a charge under.

Held: That a conviction under section 484 of the Penal Code cannot stand where the prosecution has failed to prove that the accused person intended or knew the provocation offered to be of such a character as to be likely to cause the person insulted to commit a breach of the peace or to commit some other offence.

JAYASURIYA vs. RATNAYAKE, S. I. POLICE ... 47

Section 484—Charge under—Actual words complained of must be proved.

See Criminal Procedure Code 66

Prescription

When may trustee plead prescription.

See Trusts 65

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Intervenient in partition action claiming by reason of prescriptive right—Period of prescription.
See Partition 110

Privy Council
See Domestic Tribunal 100

Privy Councils Appeals
See under Appeal.

Public Servants Liabilities Ordinance
Plea of protection under, raised unsuccessfully at trial—Can such plea be raised at later stage in execution proceedings. Res judicata—*Exceptions to the principle.*

Held : That a public servant, who had unsuccessfully claimed protection under the provisions of the Public Servants Liabilities Ordinance at the trial, is not precluded by the principle of "*res judicata*" from raising the same plea at a later stage in execution proceedings.

MADAN vs. NANA ANDY 73

Rent Restriction Ordinance
Landlord and tenant—Rent Restriction Ordinance, No. 60 of 1942, section 8 (c)—Order of ejectment—Death of plaintiff before issue of writ of ejectment—Effect on issue of writ of ejectment.

An order of ejectment was made against a tenant on the ground that the premises were reasonably required for the use of the plaintiff and his family, in a case where the scales were evenly balanced. Before the date fixed for the issue of the writ of ejectment, the plaintiff died.

Held : (i) That as the premises are no longer required for the use of the landlord, a writ of ejectment cannot be issued.

(ii) That the right of the landlord to occupy his premises is a personal right, which does not enure to his executor until the landlord had entered into possession.

ISMAIL vs. HERFT 50

Res Ipsa Loquitur
See under Negligence.

Res Judicata
Plea of protection raised at trial—Same plea raised at execution proceedings.
See Public Servants Liabilities Ordinance ... 73

Sale of Goods
Goods delivered to buyer—Original date for payment extended by seller—Buyer repudiating liability—When can seller sue for price of goods.
See Contract 107

Senatus Consultum Velleianum
Woman subject to Thesawalamai not renouncing—Can be bound as surety.
See Surety 40

Is the Senatus Consultum Velleianum in force in Ceylon.
See Surety 40

Servitude
Cartway of necessity—Principles which should be considered in granting.

The plaintiff, who lived in an urban area, claimed a right of cartway of necessity from his land to the public road. He sought a servitude over a narrow strip of the defendant's land and offered the defendant adequate compensation. The strip of land was of no special use to the defendant. On the facts the plaintiff proved that he had no reasonably sufficient access to the public road.

Held : That the servitude asked for should be granted.

ARNOLIS APPU vs. HEENHAMY 90

Stamps Ordinance
Policy of Insurance—Payment at death of assured or at maturity—Alternative modes of payment after policy matured—Option to receive in monthly instalments during life—Should the policy be stamped as an instrument chargeable with duty under section 23A of the Stamp Ordinance.

A policy of life insurance provided *inter alia:*—

(*a*) That at the death of the insured (before the date of maturity) *i.e.*, before reaching his 55th year a sum of £2,083-6-8 or the cash value of the policy at the end of the policy year in which death occurs, whichever is greater, would be paid to the insured.

(*b*) That on the assured reaching the age of 55 years, he would be entitled to a sum of £3,656-5*s*.

The instrument further provided for three modes of payment of this sum of £3,656-5*s*. to wit :—

(*a*) Payment of £3,656-5.

(*b*) Payment in one instalment of £1,558-6-8 and 119 monthly instalment of £20-16-8 each, or

(*c*) If the assured so desires it, payment of 119 monthly instalments of £20-16-8 each and in addition a monthly income of £20-16-8 during life.

The Commissioner of stamps held that this policy was "chargeable with duty under section 23A and item 23 (2) being an instrument for the creation of an annuity or other right to a periodical payment not before in existence."

On appeal to the Supreme Court—

Held : That the instrument in question was not stampable as an instrument within the meaning of section 23 (*a*) of the Stamp Ordinance as the principal and leading object of the instrument appears to be to effect a policy for the receipt of a sum of money at death or on attaining the age of 55 years.

THE MANUFACTURERS' LIFE INSURANCE CO., LTD. OF CANADA vs. THE COMMISSIONER OF INCOME TAX, ESTATE DUTY AND STAMPS ... 71

Surety
Woman subject to Thesawalamai—Beneficium senatus consultum velleianum not renounced—Is surety bound—Married Women's Property Ordinance section 29—Criminal Procedure Code Section 357.

Held : (i) That a woman subject to the Thesawalamai can be bound as a surety although she has not renounced the *beneficium senatus consultum velleianum.*

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(ii) That the *senatus consultum velleianum* has no force in this Island after the passing of section 29 of the Married Women's Property Ordinance.

THANGAPONNU vs. GEORGE, S. I. POLICE ... 40

Thesawalamai

Woman subject to—Can be bound as surety although she has not renounced *beneficium senatus consultum velleianum.*
See Surety 40

Trial

Irrelevant statements made to judge by police officer —Likelihood of bias.

Where irrelevant statements, which were likely to create a bias in the mind of the judge, were made by a police officer.

Held: That the accused could not be said to have had a fair trial.

SUDERIS vs. KOSGODA POLICE 70

Criminal Trial—Both prosecution and defence versions untrue—Presumption of innocence to prevail.

Where a Magistrate was of opinion that the complainant and his witnesses gave perjured testimony and was equally sceptical as to the accused's version of the incident.

Held: That in the circumstances, the presumption of innocence should prevail.

LIYANAPATHIRANA vs. S. I. POLICE, BELIATTA 80

Trusts

Attorney of plaintiff sued—Debts due to plaintiffs firm—Assignment of decree and endorsement of promissory note to 3rd party by defendant as attorney—Fraudulent breach of trust—When may a trustee plead prescription—Trusts Ordinance Section 111.

Plaintiff, who was residing in India, carried on a money-lending business in Ceylon through his attorney, the defendant. Two persons A and S among others owed money to the plaintiff's firm on a promissory note and a decree of court respectively. Three days prior to his leaving the plaintiff's service, *i.e.*, on 25-1-33 the defendant assigned the said decree to one Alagappa Chetty, who recovered a sum of Rs. 5,706·81 out of the decreed amount. Prior to 25-1-33 the defendant had also endorsed the note granted by A to the same Alagappa Chettiar who recovered a sum of Rs. 8,500 thereon.

Plaintiff brought this action on the 29th January, 1942 against the defendant alleging that the above transactions were fraudulent and apart from fraud the defendant was liable to account for the said sums of money to plaintiff as trustee for the same.

Held: (i) That inasmuch as the plaintiff had failed to prove: (*a*) that the defendant had committed any fraud or fraudulent breach of trust, or (*b*) that at the time of action brought, the said sums of moneys were still retained by the defendant, or (*c*) that the said sums of money were converted to the defendant's use, the defendant is entitled to plead that the claim is barred by prescription under section 111 (2) of the Trusts Ordinance.

(ii) That fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt.

LAKSHMANAN CHETTIAR vs. MUTTIAH CHETTIAR 65

Charitable Trust—Application under sections 15 *and* 16 *of the Muslim Intestate Succession and Wakfs Ordinance (cap.* 50)*—Applicability of Civil Procedure Code—Summary Procedure—Court's Power to vacate decree—Two separate trusts not to be combined in the same action.*

The petitioners acting under section 16 of the Muslim Intestate Succession and Wakfs Ordinance made the trustees respondents and applied by petition *only* for leave to make an application under section 15 of the Ordinance for certain reliefs in respect of the Kataragama Mosque and the Quadiriya Takkiya at Hambantota, which was granted. In the petition which alone was filed without affidavits and other relevant documents under section 15 they prayed *inter alia* that the Quadiriya Takkiya and Kataragama Mosque be declared a trust, that the respondents be appointed members of the Board of Trustees, that the properties belonging to the said Trust be vested in the Board of Trustees and that the scheme of management proposed by them be settled by Court. The Court entered a decree in these terms.

The priest and another claiming to be the owner of the Mosque then intervened to have the decree set aside on the ground of irregularities and of fraud and collusion by the parties to the decree. The Court set aside the decree.

The petitioners and the trustees so appointed appealed from this order on the ground that the District Court had no jurisdiction to set aside or vacate the decree.

Held: (1) That where a decree has been obtained by fraud or collusion, as in this case, the District Court has inherent power to vacate its decree or order in the same proceedings.

(2) That the Civil Procedure Code governs the applications under sections 15 and 16 of the Muslim Intestate Succession and Wakfs Ordinance and should be made by way of Summary Procedure.

(3) That before leave to make an application under section 15 of the Ordinance is granted, the Court must be satisfied judicially that there are sufficient *prima facie* grounds for the application.

(4) That in an application under section 15 of the Ordinance, the admitted *de facto* trustees should be made respondents, and failure to give notice to them of the proceedings may vitiate the proceedings. Since an order under section 15 is a judgment *in rem*, any person other than the *de facto* trustees cannot set it aside on the mere absence of notice.

(5) That each distinct trust must form the subject of a separate application and must not be combined with another trust in the same application

MARJAN & OTHERS vs. MOWLANA & ANOTHER ... 81

Urban Councils

Mandamus—Person duly elected a member of Urban Council—After Election, name ordered to be removed from Electoral List—Vacation of seat—Urban Councils Ordinance No. 61 *of* 1939 *Section* 33 *—Local Authorities Elections Ordinance, No.* 53 *of* 1946, *Sections* 10, 11, 17, 18, 19, 21, 23 *and* 29.

After a person was duly elected as a member of an Urban Council and before the first meeting of the Council the Supreme Court ordered his name

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to be removed from the Electoral List. The Elections Officer did not, therefore, give him the statutory notice of the first meeting.

Held: (1) That there was no provision of law which rendered the member's seat vacant;

(2) That the member was entitled to exercise the rights of membership as long as his election remained unquashed by a competent authority;

(3) That the Elections Officer was under a legal duty to serve on the member the statutory notice convening the first meeting of the Council.

WIJEANATHAN vs. ELECTIONS OFFICER, TRINCOMALEE DISTRICT *et al* 7

Urban Council Election—Impersonation—Validity of Election—Local Authorities Elections Ordinance, No. 53 of 1946 sections 53 and 65.

In an Urban Council Election, the votes of the two candidates being equal, the successful candidate was determined by the drawing of lots. The unsuccessful candidate sought to have the Election set aside on the ground of large scale impersonation. He cited only one case of impersonation which he failed to prove. His applicaiton was therefore refused.

MOHAMED NOON vs. SINNAPPAH 21

Urban Councils Ordinance No. 61 of 1939, section 238—Charge that the member was directly or indirectly concerned or had financial interest in contract made with Council—Credit sale of soap to Council from member's shop through salesman—Payment for soap authorised by member as Chairman—Is the member guilty?—The test to be applied.

Section 230—Is the period of 3 months referred to in the section to be reckoned from the date of the credit sale or from the date of payment of price?—Continuing offence.

On a complaint made on 7th September, 1948 to Court, the accused was charged under section 238 (2) of the Urban Councils Ordinance of 1939 in that, while being a member of the Urban Council of Ambalangoda, he was on or about the 8th June, 1948, directly or indirectly concerned in a contract made with the said Council, the alleged contract being the contract of sale by which the accused's shop had sold 48 packets of Lux soap to the Council on 6th May, 1948.

The evidence established: (*a*) that the accused was the Chairman of the Ambalangoda Urban Council at the relevant dates; (*b*) that he owned a shop in the town known as the Central Stores; (*c*) that on the 6th May, four dozen packets of Lux soap were sold on credit to the Council by the accused's salesman on a requisition signed by the Secretary of the Council for and on behalf of the Chairman; (*d*) that the bill presented for the price due was paid on the 8th June, 1948, on the express authority of the accused in his capacity as the Chairman; (*e*) that the accused was not aware of the sale on the 6th of May. The learned Magistrate held that the charge was proved but the accused was not liable for any penalty by reason of the provisions of section 230 of the Ordinance, as the complaint of the offence was made three months after its commission.

The complainant appealed.

Held: (i) That the test to be applied in this case is whether the accused had the knowledge or at least the means of knowledge that the council was the other contracting party to the contract of sale in question.

(ii) That the evidence established that the accused had at least the means of such knowledge, and, therefore, he was guilty.

(iii) That the price of the goods which were the subject matter of the contract of sale by itself cannot help the accused, nor the fact that the contract represents a single transaction.

(iv) That the provisions of Section 230 of the Urban Councils Ordinance does not apply as there was a continuing offence punishable under section 238 (2) until the contract was discharged by payment on 8-6-1948.

SIRIMAL vs. K. T. S. DE SILVA 27

Use and Occupation

Action for—Foundation for such action—Can it be maintained against a defendant who claims to be a co-owner.

Held: (i) That to maintain an action for use and occupation there must be evidence of the existence of the relationship of landlord and tenant between the plaintiff and the defendant, or evidence which gives rise to a presumption of that relationship.

(ii) That an action for use and occupation cannot be maintained against a defendant who claims to occupy the land as of right.

KATHIRGAMU & ANOTHER vs. NADARAJAH & ANOTHER 34

Wages Boards Ordinance

No. 27 of 1941 sections 21, 39 (1) and 54—Prosecution of employer for failure to pay minimum wage—Written sanction of the Commissioner of Labour—Nature of sanction required—Criminal Procedure Code section 425 (b)—Courts Ordinance section 36.

Held: (i) That a prosecution instituted against an employer for failure to pay the minimum wage in contravention of section 21 of the Wages Boards Ordinance and punishable under section 39 (1) of the Ordinance must have the written sanction of the Commissioner of Labour as required by section 54 of that Ordinance.

(ii) That the sanction of the Commissioner must contain the particulars of the offences alleged to have been committed.

(iii) That the failure to comply with the provisions of section 54 of the Ordinance is a defect which is not curable under section 425 (*b*) of the Criminal Procedure Code or under section 36 of the Courts Ordinance.

M. G. PERERA vs. THE INSPECTOR OF LABOUR, MATUGAMA 17

Words and Phrases

"Document."
See Criminal Procedure Code 63

"Export."
See Customs Ordinance 86

"Foreign Language."
See Criminal Procedure Code 68

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" Forthwith."
See Criminal Procedure Code 59

" Penalty."
See Explosives Ordinance 53

" Sufficient Cause."
See Workmen's Compensation 62

" Warn Off."
See Domestic Tribunals 100

Workmen's Compensation Ordinance

Appeal under—Application of Section 340 (2) of the Criminal Procedure Code to petition of appeal.

Held : (1) That a petition of appeal under the Workmen's Compensation Ordinance must comply with the requirements of section 340 (2) of the Criminal Procedure Code.

(2) That where there is no such compliance there is a fatal irregularity and the petition must be rejected.

THE ADDITIONAL CONTROLLER OF ESTABLISHMENTS VS. LEWIS 3

Cap. 117, Section 16 (1)—Claim for compensation by woman in respect of her husband's death—Failure to institute claim in due time—What is " sufficient cause " within the meaning of the section.

Held : That the failure to institute the claim for compensation within the specified period of six months due to relief being sought through a source not contemplated by section 16 of the Ordinance did not amount to " sufficient cause " within the meaning of the section.

CHRISTOFFELSZ VS. DHANARATH MENIKA ... 62

Section 3—Night-Watcher returning home every night for meals—Killed on highway when so returning —Did he come by his death in an accident arising out of and in the course of his employment under his employer.

The deceased was a night-watcher employed by the appellant—The normal hours of duty were between 6 p.m. and 9 a.m. No meals were served to him while on duty and each night he was in the habit of returning home for a short period to have his dinner. While on his way home to dinner one night he was murdered on the highway outside the premises over which it was his duty to watch.

Widow of the deceased applied for an order for compensation against the appellant under the Workmen's Compensation Ordinance.

Held : That in the circumstances the death of the deceased was not caused in an accident " arising out of and in the course of his employment " under the appellant within the meaning of section 3 of the Ordinance, as he was not on the highway in respect of any duty which he owed to his master.

KRISHNAKUTTY & OTHERS VS. MARIA NONA ... 78

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IN THE COURT OF CRIMINAL APPEAL.

Present: WIJEYEWARDENE, C.J. (President), NAGALINGAM, J. GUNASEKERA, J.

REX vs. MEEMANAGE PODRIGO PERERA
alias MEEMANAGE ADRIAN PERERA

C.C.A. Application No. 51/1949, *S.C. No.* 2, *M.C. Colombo South* 14786, *Second Western Circuit* 1949/*Colombo Assizes.*

Agrued on : 11th April, 1949.
Decided on : 12th April, 1949.
Reasons delivered on : 20th April, 1949.

Court of Criminal Appeal—Conviction for murder—Evidence of witness in examination in chief and cross-examination supporting plea of provocation—Questions by trial Judge reminding witness of evidence before the Magistrate having the effect of rebutting such plea—Caution by Judge not to consider the witness' evidence given in answer to him—Likely prejudice in spite of caution.

The accused who was charged with the murder of his wife admitted the stabbing but pleaded grave and sudden provocation. At the trial, the mother of the deceased, whose evidence in examination and cross-examination seemed to support this plea, was examined by the Judge who reminded her of her evidence before the Magistrate that the accused threatened to kill the deceased a week before the stabbing, whereupon she asserted that her evidence before the Magistrate was true, and that she even made an entry at the police station (which was not produced at the trial) regarding the threat. The Jury found the accused guilty of murder.

Held : that the evidence of the witness given in answer to questions from court must have prejudiced the jury in spite of the Judge's warning not to consider that evidence and that the proper verdict was one of culpable homicide not amounting to murder.

M. M. Kumarakulasingham, with *K. A. P. Rajakaruna*, for the applicant.
H. A. Wijemanne, Crown Counsel, for the Crown.

WIJEYEWARDENE, C.J. (President)

By a majority verdict of 5 to 2 the Jury found the appellant guilty of the murder of his wife Somawathie on November 29, 1947. The day after the argument was concluded before us I pronounced the order of the Court substituting for the verdict of the Jury a verdict of guilty of culpable homicide not amounting to murder (section 296 exception 1 of the Penal Code) and passing a sentence of twelve years' rigorous imprisonment. I proceed to give below the reasons for our order.

The appellant admitted that he stabbed Somawathie. The injuries inflicted by him left no room for doubt regarding his murderous intention. The only question the Jury had to consider carefully in the case was whether the appellant caused the death of Somawathie in circumstances which enabled him to plead successfully that he acted under grave and sudden provocation.

The appellant who gave evidence said that he married Somawathie in January 1944, and lived in her parents' house for about a year. He then went with his wife to Kandy where a girl was born to them. After two years in Kandy they returned to Somawathie's house at the request of her parents and stayed there for about four months. He then engaged a house about ¾ of a mile from that house and lived there with Somawathie and the little girl for about five months. Somawathie left him in October 1947 at the request of her mother " who was working in accordance with Mendis Alwis' request ". Mendis Alwis is a cousin of Somawathie about five years older than Somawathie. Within a few days of leaving the appellant Somawathie filed an action for divorce against him. There was no definite evidence as to the grounds on which the divorce was asked though there was a suggestion that the ground was the appellant's alleged adultery with a woman called Kusuma. Shortly after the institution of the action the appellant went to Somawathie's house as he was " fond of her " and " wanted to come to a settlement ". Somawathie and her mother agreed " to withdraw the case ". That was less than two weeks before the death of Somawathie. On November 29th he happened to pass the house of Somawathie when his little girl cried out, " Mother there father is coming ". He saw Somawathie rushing out of the house of a neighbour Sediris Perera followed by Mendis Alwis. At that time the inmates of the house of Sedris Perera were admittedly away. He gave chase to Mendis Alwis when Somawathie " clung " to him, held him by

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"the male organ" and prevented him from reaching Mendis Alwis. It was then that he stabbed Somawathie.

The appellant's evidence in support of his mitigatory plea was contradicted by Yasohamy a cousin of the deceased. Her evidence was briefly as follows :—Somawathie was seated on a chair in her house when she saw the appellant approaching her. Somawathie got up, picked up her child and ran towards Sediris Perera's house. The appellant pursued her, caught her near the house of Sediris Perera and "flung" the child away. He then held Somawathie by her neck and stabbed her. The medical witness who held the post mortem examination said, however, that he "did not notice any signs of rough handling of the neck" of Somawathie.

In addition to Yasohamy, Jane, the mother of Somawathie, was called by the Crown as a witness and she gave some evidence which a prudent Jury would have considered carefully in deciding the probable circumstances in which Somawathie was stabbed. Jane did not see the stabbing but was present when the appellant visited Somawathie "to come to a settlement". That was the last occasion on which the appellant visited Somawathie. The relevant questions put by Crown Counsel with regard to what happened on that occasion and the answers given by Jane were as follows :—

Q. What was the attitude of the accused towards this case of separation ?

A. One day the accused came and told the deceased to withdraw that case.

Q. And then did he say anything else before he went away ?

A. Then this accused addressed the deceased and said, "You had better remain at home. I will go for some work. I will not take you with me". Having said that the accused went away. When he went away it did not appear to me as if he was angry. The accused did not come to our house after that when I was in the house.

Q. Was that case withdrawn ?

A. The date of the case had not arrived.

The defence Counsel did not cross-examine Jane on that point. If the examination of Jane did not proceed any further the Jury would have considered the mitigatory plea of the appellant on that evidence of Jane and the evidence of Yasohamy and the appellant. In the consideration of that question the evidence of Jane would probably have made the Jury more inclined to accept the version of the appellant. According to that evidence given by Jane the appellant "did not appear to be angry" when he visited Somawathie on the last occasion. A Juror may well have asked himself the question why the appellant returned a week after and committed an unprovoked assault on Somawathie on November 29th. A Juror might have thought that the appellant must have received some provocation on that occasion and in the absence of any explanation from the prosecution might have thought it more prudent to accept the appellant's version. On that view of the case it was open to the Jury to have brought a verdict of culpable homicide not amounting to murder if they thought that the provocation received by the appellant amounted to grave and sudden provocation.

But when the cross-examination was concluded Jane was examined by the Court and the questions put to her by Court and the answers given by her were as follows :—

Q. What did he come there for ?

A. He came to apologise to her and get her to withdraw the case.

Q. When the accused was going away was he pleased or displeased ?

A. Because we said that we could get the case withdrawn on the date on which it came up, he went away pleased.

Q. This is what you have said in the Lower Court. But merely because I say it don't say "yes". Only think about it and if you remember it as the truth you can say it is the truth. If you do not remember, say you do not remember. If you did not say it, say you did not say it. "She filed a divorce against the accused" Did you say that ?

A. Yes, I said so.

Q. Is that true ?

A. Yes.

Q. "The accused threatened to kill my daughter and her parents before the next date in that case." Did the accused say that ?

A. Yes, he said that he would kill all three of us. We made an entry at the Police Station.

Q. Have you any doubt about this ? Did the accused say he would kill all three of you ? Or have you any doubt about it ?

A. No. I have no doubt about it. That is why we made an entry at the Police Station.

The "entry at the Police Station" referred to by Jane in her answers to Court was not produced in evidence. But there can be no doubt that in the context in which she mentioned it the Jury

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would have concluded that, soon after the alleged threat, Jane and Somawathie made a complaint at the Police Station about the appellant's threat. The Jury was so impressed by those answers given by Jane contradicting what she had stated earlier to the Crown Counsel that the Jury put some questions and elicited from her the answer that the threat was uttered in her presence "on the only occasion" on which the appellant came to her house.

That evidence given by Jane in the course of her examination when she was reminded step by step of her statements before the Magistrate must have gone a great way against the appellant. If the Jury accepted the evidence that the appellant had threatened a week earlier to kill Somawathie and her parents, they would have naturally concluded that he came to Somawathie's house on November 29th to carry out his threat.

It transpired at a later stage of the trial that Jane did not mention this threat to the Coroner and that she mentioned it before the Magistrate for the first time when she was giving evidence on March 4, 1948.

In fairness to the learned trial Judge I wish to state that he made the following reference to Jane's evidence in his charge to the Jury :—

"I will give you in Jane Nona's own words what she says. She says accused came and told her to withdraw the case. 'I was present at the time. It was about a month before this incident. Accused said, 'Having got the case withdrawn you remain at home. I will go for some work. I will not take you away. I did not notice he was angry at the time'. Then she said that at that time she did not notice that he was angry. She said I think at one place that he did not seem to be displeased. Then in the Lower Court she had said that the accused said he would kill all three of them. 'We made an entry at the Police Station'. She said that what she said there was true in answer to questions put by me. Then it transpired that she had given evidence on two occasions. First to the Coroner on 29th of November and after that before the Magistrate in March and that was only in March when she gave evidence before the Magistrate that she came out with this threat that the accused made. Then gentlemen on the point that was made about her not telling about this threat till she gave evidence before the Magistrate and her not stating it here till she was questioned it is better not to take that matter into consideration against the accused".

It is difficult to believe that the Jury considered the plea of the appellant, unaffected by the impression left on their minds by the answers of Jane when she was examined by the Judge.

In these circumstances, we felt compelled to squash the conviction. The only question that caused us some anxiety was whether we should order a new trial under section 5 (2) of the Court of Criminal Appeal Ordinance or make an order under section 6 (2) substituting a verdict of culpable homicide not amounting to murder for the verdict of the Jury. After careful consideration of all the circumstances we have decided to make an order under section 6 (2).

Sentence varied.

Present : BASNAYAKE, J.

THE ADDITIONAL CONTROLLER OF ESTABLISHMENTS vs. LEWIS

S.C. 1513—*Workmen's Compensation Case No. C.* 30/8577/46.

Argued on : 20th & 25th January, 1949.
Decided on : 22nd March, 1949.

Workmen's Compensation Ordinance—Appeal under—Application of Section 340 (2) *of the Criminal Procedure Code to petition of appeal.*

Held : (1) That a petition of appeal under the Workmen's Compensation Ordinance must comply with the requirements of section 340 (2) of the Criminal Procedure Code.

(2) That where there is no such compliance there is a fatal irregularity and the petition must be rejected.

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Cases referred to :—*Attorney-General vs. Lamplough*, (1878) 3 Ex. Div. 229.
Maxwell on Interpretation of Statutes, 9th Edn. p. 388.
Dickinson, Re (1882) 51 L. J. Ch. 736.
Maxwell on Interpretation of Statutes, 9th Edn. p. 374.
Orpen vs. Colliers, 20 S.C. 261.
The Queen vs. The Justices of Lancashire (1858) 27 L.J. M.C. 161.
Peacock vs. The Queen (1858) 27 L.J. M.C. 224.
Thomas vs. Ceylon Wharfage Co. Ltd. (1948) 49 N.L.R. 397.
Miskin vs. Ponniah (1902) 6 N.L.R. 132.
Bruin vs. Wijesinghe (1927) 5 Times Law Reports 71.
The Police Officer, Dondra vs. Baban (1923) 25 N.L.R. 156.

S. J. Kadirgamar, for the appellant.

H. Wanigatunge, with *N. White*, for the respondent.

BASNAKAKE J.

This is an appeal by the Additional Controller of Establishments, the respondent to an application for workmen's compensation. Learned counsel for the applicant submits that the appeal should be rejected on the ground of non-compliance with the requirements of section 340(2) of the Criminal Procedure Code.

That provision reads :—

> " Where the appeal is on a matter of law the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an advocate or proctor that such matter of law is a fit question for adjudication by the Supreme Court :
>
> Provided that in courts where there is not more than one advocate or proctor practising such certificate shall not be required."

Under the Workmen's Compensation Ordinance an appeal lies to this Court only on a point of law, and unless the petition bears the certificate contemplated in the above provision the appellant has no right to be heard. The petition in the instant case, omitting all formal parts, reads as follows :—

" 1. The respondent instituted these proceedings against the appellant under the Workmen's Compensation Ordinance for the recovery of compensation on the ground that whilst employed with the Ceylon Government Railway as a substitute call boy he was assaulted when on duty on 6th December, 1948, by W. A. Silva who was at that date Station Superintendent of Maradana Railway Station.

" 2. The respondent alleged that as a result of the alleged assault he suffered permanent total disablement.

" 3. The Deputy Commissioner for Workmen's Compensation inquired into the respondent's application and heard the evidence led by the parties on the following issues :—

(1) Is the applicant a workman as defined in the Ordinance.

(ii) The monthly wages.

(iii) Did the applicant suffer personal injury by accident arising out of, and in the course of his employment.

(iv) The nature and extent of the disablement, if any.

(v) The amount of compensation.

" 4. On or about 6th November, 1948, the learned Deputy-Commissioner for Workmen's Compensation made order answering all the issues in favour of the respondent.

" 5. Being dissatisfied with, and aggreived by, the order of the learned Deputy-Commissioner for Workmen's Compensation, the appellant begs to appeal to Your Lordships' Court on the following among other points of law which appellant's Counsel may urge at the hearing of this appeal :—

(*a*) The said order is contrary to law and the weight of evidence.

(*b*) On the evidence led at the enquiry the learned Deputy Commissioner was not entitled to hold or find that the respondent was assaulted whilst on duty.

(*c*) It was proved through witnesses called by the appellant and the respondent that the respondent was under the influence of liquor and cheeky, that he failed to serve orders on the guards as directed, and that orders given to him were torn and thrown on the railway lines. The appellant submits that the respondent had taken himself out of his employment under the General Manager, Ceylon Government Railway and that in the circumstances it cannot be held in law that the respondent suffered any injury by accident arising out of, and in the course of his employment or that the appellant is liable to pay any compensation.

(*d*) The nature of the respondent's employment was not such that the likelihood of an assault was connected with and inci-

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dental to his employment. There was no proof that there was attached to the respondent's employment a risk of his being assaulted, and the appellant pleads that the respondent has failed to show such a degree of liability to be assaulted as would not be present if he were not in the employment or that by his employment he was exposed to risks not incurred by ordinary members of the public.

(*e*) There was no evidence that the disablement, if any, is permanent and the learned Commissioner cannot hold that the respondent had suffered permanent total disablement or that the appellant is liable to pay compensation on that basis.

(*f*) The respondent led no evidence of his monthly wages and the learned Deputy Commissioner cannot hold that the respondent's wages were Rs. 130 per mensem.

(*g*) The findings of the learned Deputy Commissioner should be varied, modified or reversed for the purpose of disposing of this appeal in the appellant's favour on the points of law stated above."

The certificate of the proctor reads :—" I do hereby certify that the matters of law stated in this petition of appeal are fit questions for adjudication by the Honourable the Supreme Court." Now this certificate is not in the form required by the Criminal Procedure Code. The prescribed form reads :—" I certify that the matter of law stated in the ground of appeal is a fit question for adjudication by the Supreme Court." The prescribed form requires that the grounds of appeal on which the petitioner relies should be stated in consecutively numbered paragraphs and that the certificate should specifically refer by its number to the ground of appeal in which the matter of law to be argued is stated. Section 442 of the Criminal Procedure Code which prescribes the use of the forms in the Second Schedule cannot in my view be regarded as authorising a departure from the form in so important a matter as the certificate required for the purposes of section 340 (2) in a case where there is no right to come to this Court except on a matter of law. The fact that the form is in a schedule affords no ground for ignoring it. A schedule to a statute is as much a part of the statute and is as much an enactment as any other part. (*Attorney-General vs. Lamplough*, 1878 3 Ex. Div. 229). In the instant case there is no certificate as contemplated by the Code. (Maxwell on Interpretation of Statutes, 9th Edn. p. 388). Such a certificate is a condition precedent to the admission of an appeal and is an imperative requirement. The neglect of that statutory requisite is fatal. (Dickinson, Re 1882 (51 L. J. Ch. 736). The principle applicable to a case such as the present is thus stated by Maxwell (Maxwell on Interpretation of Statutes, 9th Edn, p. 374) :—

> " Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred."

It is well established that enactments regulating the procedure in Courts are as a rule imperative and not directory. (*Orpen vs. Colliers*, 20 S. C. 261). The English cases on this point are collected at page 377, note (*n*), of Maxwell on Interpretation of Statutes. As was observed by Coleridge J. in *The Queen vs. The Justices of Lancashire* (1858) 27 L. J. M. C. 161, :—" The right of appeal is a statutory right, and must be regulated by the statute which gives it." In *Peacock vs. The Queen* (1858) 27 L. J. M. C. 224, the Appeal court held the view that unless the conditions governing the appeal are complied with the Appeal Court has no jurisdiction to entertain the Appeal.

In my judgment in the case of *Thomas vs. Ceylon Wharfage Co. Ltd.* (1948) 49 N. L. R. 397. I have discussed some of the previous decisions of this Court. They all take the view that the certificate prescribed by section 340 (2) of the Criminal Procedure Code is essential for the reception of an appeal in a case where there is no right of appeal except on a question of law. Nevertheless, I shall again refer to some of the decisions of this Court on this question.

In the case of *Miskin vs. Ponniah* (1902) 6 N L. R. 132, the petition of appeal contained the statement of the matter of law to be argued and it appeared at the foot of the petition that it was settled by counsel and it bore his signature, but this Court held that in the absence of the prescribed certificate the appeal must be dismissed. In the case of *Bruin vs. Wijesinghe* (1927) 5 Times Law Reports 71, too this Court dismissed an appeal on the ground that the prescribed certificate had not been affixed to the petition.

Schneider J. observes in that case :—

> " I must take exception to the form of the certificate in this petition of appeal. Clearly the accused had no right of appeal except on a matter of law, and the certificate says that the matter of law in the petition of appeal is a fit question. There are four things stated in the petition of appeal as if they were matters of law. One matter of law that has been pressed is not included in the certificate. The certificate is so vague that I cannot regard the certificate as satisfying the requirements of the Criminal Procedure Code."

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In the subsequent case of *The Police Officer, Dondra vs. Baban* (1923) 25 N. L. R. 156, Jayewardene A. J. states :—

> "The petition of appeal in this case contains seven grounds marked (*a*) to (*g*), and the matter of law is raised in paragraph (*a*). All the others raise questions of fact. The certificate of the proctor does not refer specifically to ground (*a*), but certifies generally 'that the above matters of law stated in this petition are fit and proper for the consideration of the Honourable the Supreme Court'. Such a certificate is, in my opinion, not regular. The certificate should refer specifically to the ground which embodies the point of law raised."

Learned counsel for the appellant submitted that section 340 (2) of the Criminal Procedure Code has no application to appeals under the Workmen's Compensation Ordinance. It is needless to refer to his arguments specifically as I have not been convinced by them. Neither the arguments adduced by counsel nor the authorities cited by him shake the view I formed in the case of *Thomas vs. Ceylon Wharfage Co. Ltd.* (*supra*) that the petition of appeal in an appeal under the Workmen's Compensation Ordinance should comply with the requirements of section 340 (2) of the Criminal Procedure Code.

The appeal is rejected with costs.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : WIJEYEWARDENE, C.J. (President), NAGALINGAM, J. GUNASEKERA, J.

REX vs. LIYANAGE SIMEION

C. C. A. Application No. 52/1949 ; *S. C. No.* 6 ; *M. C. Colombo South* 17587 ; *Second Western Circuit* 1949/*Colombo Assizes.*

Argued on : 11th April, 1949.
Decided on : 11th April, 1949.
Reasons delivered on : 20th April, 1949.

Court of Criminal Appeal—Charge of murder against two accused—Conviction of the first of murder and acquittal of second—Injuries on deceased caused by katty and knife—No definite proof that fatal injury was caused by first accused—Unreasonableness of verdict—Reduction of offence to one of attempted murder—Value to be attached to an accused's unsworn statement from the dock regarding other accused.

Where two accused were charged with the murder of a person on whose body were found several incised injuries, only one being fatal, and the first accused was convicted of the charge, while the second was acquitted by the Jury and there was no evidence to eliminate the fact that the second accused may have caused the fatal injury.

Held: (1) that the offence committed by the first accused was one of attempted murder.

(2) that a statement made by an accused person from the dock cannot be taken into account in considering the case against his co-accused.

A. Jayasuriya, for the applicant.
H. A. Wijemanne, Crown Counsel, for the Crown.

WIJEYEWARDENE, C.J. (President),

At the close of the argument before us we set aside the majority verdict (5 to 2) of the Jury that the appellant was guilty of murder and we found the appellant guilty of attempt to commit murder and sentenced him to twelve years' rigorous imprisonment. I give below the reasons for our order.

The appellant and another (hereinafter referred to as the second accused) were charged with the murder of one Arnolis on June 13, 1948. The Crown called four eye-witnesses, Obias (Suddan), Girigoris, Carolis and Andoris. Obias said that he saw the appellant who was standing on the road striking a blow with a katty "that alighted on the right hand side of the deceased". He said further, "the deceased reeled and fell down for the blow given by the first accused (appellant). Then the second accused also rushed up and stabbed him with a knife while he was on the ground". Girigoris gave substantially the same evidence with regard to the attack on the deceased and said that after the stab by the second accused the deceased ran, pursued by the appellant. Carolis who saw the incident after the attack spoken to by Obias and Girigoris said that the

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deceased rushed into his store in blood-stained clothes and then ran back to the road when the appellant struck him with a katty twice. Andoris stated that he saw the appellant pursuing the deceased who was bleeding at the time and running towards Carolis' store. He saw the appellant cutting the deceased with a katty once before the latter entered the store of Carolis and a second time after he ran out of the store. The evidence of those four witnesses shows that the deceased received four blows with a katty at the hands of the appellant and was stabbed with a knife by the second accused.

The medical witness said that the deceased had five injuries, one of which was necessarily fatal. Of the other four three were skin deep, while the remaining injury was a very severe one. He did not say that the last injury was necessarily fatal or sufficient in the ordinary course of nature to cause death. He expressed the opinion that the fatal injury " was caused by a knife or katty " while the other injuries " could have been caused by a katty ". His evidence supports the view that the four katty injuries which alone were inflicted by the appellant did not include " the necessarily fatal injury ".

The appellant who made a statement from the dock said that he had an altercation with the deceased about the loss of some cart wheel, in the course of which the deceased and Obias struck him. He added, " I had no way to escape. I had the katty with which I struck. I do not know what happened ". It will be noted that the appellant did not state that he caused all the injuries on the deceased.

The second accused too made a statement from the dock, saying that after some exchange of words the deceased struck the appellant. He added, " Aiya (appellant) had a katty, with that he struck Arnolis Appuhamy and ran down. It was only when I was about to interfere they ran away. Then Suddan (Obias) stabbed me. When he stabbed I put up one hand and with the other hand I struck a blow. As a result of that blow the knife in his hand got thrown. For the first stab my palm got injured. After that his knife got thrown for my blow. I picked up that knife. Then Suddan embraced me. Then both fell down. To escape I stabbed in different directions. I do not know what happened ". It will be seen that the second accused does not state in so many words that he did not stab the deceased, though, no doubt, it is possible to infer from his statement that he did not stab the deceased.

The Jury acquitted the second accused. In reaching that decision the Jury must have been influenced by the statement of the second accused. But that statement cannot be taken into account when considering the case against the first accused. It is difficult to see how even apart from the statement of the appellant the Jury could hold him responsible for the fatal injury in view of the evidence of the eye-witnesses and the medical witness.

The majority verdict of the Jury against the appellant is, in our opinion, unreasonable and cannot be supported, having regard to the evidence.

Sentence varied.

Present : BASNAYAKE, J.

WIJEANATHAN vs. ELECTIONS OFFICER, TRINCOMALEE DISTRICT *et al.*

In the Matter of an Application for a Writ of Mandamus on the Elections Officer, Trincomalee District, and the Assistant Commissioner of Local Government, Eastern Region.

Application No. 62.

Argued on : 21st February, 1949.
Decided on : 25th February, 1949.

Mandamus—Person duly elected a member of Urban Council—After Election, name ordered to be removed from Electoral List—Vacation of seat—Urban Councils Ordinance No. 61 *of* 1939 *Section* 33—*Local Authorities Elections Ordinance, No.* 53 *of* 1946 *Sections* 10, 11, 17, 18, 19, 21, 23 *and* 29.

After a person was duly elected as a member of an Urban Council and before the first meeting of the Council the Supreme Court ordered his name to be removed from the Electoral List. The Elections Officer did not, therefore, give him the statutory notice of the first meeting.

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Held : (1) That there was no provision of law which rendered the member's seat vacant ;

(2) That the member was entitled to exercise the rights of membership as long as his election remained unquashed by a competent authority ;

(3) That the Elections Officer was under a legal duty to serve on the member the statutory notice convening the first meeting of the Council.

C. S. Barr Kumarakulasinghe with *Rajasingham* and *Rajaratnam*, for the petitioner.
M. Tiruchelvam, Crown Counsel, for the respondents.

BASNAYAKE J.

The petitioner Balasubramaniam Wijeanathan was elected a member for Ward No. 4 of the Trincomalee Urban Council at a poll held on 4th December 1948. On 22nd December 1948 he received the notice contemplated in section 33(1) of the Urban Councils Ordinance, No. 61 of 1939, signed by the second respondent.

That notice is dated 21st December, 1948, and is in the following terms :—

"*Trincomalee Urban Council*
Election of Chairman

I have the honour to inform you that under the provisions of section 33(1) and (3) of the Urban Councils Ordinance I hereby convene the First Meeting of the members of the Trincomalee Urban Council for 10 a.m. on Friday, 7th January, 1949, at the office of the Urban Council, Trincomalee.

Your presence is kindly requested.

Please acknowledge receipt of this letter."

On the following day the petitioner received the following letter dated 22nd December, 1948, signed by the second respondent :—

"*Trincomalee Urban Council*
Election of Chairman

Please consider my registered letter No. UCT 1*a* of 21-12-48 on the above subject as cancelled.

Please acknowledge receipt."

The subsequent events are better stated in the language of the petitioner's affidavit, which remains uncontradicted.

"9. On the 4th of January 1949 the said Assistant Commissioner of Local Government, Mr. H. Ismail telephoned me cancelling his second letter dated 22nd December 1948 and asked me to be present at the meeting to be held on the 7th January 1949 for the election of a Chairman.

"10. On the 5th January 1949 the said Assistant Commissioner of Local Government, Mr. H. Ismail visited me at my hotel at about 6.30 p.m. and informed me that his letter of 22nd December 1948 would stand and he further informed me verbally that I could not attend the first meeting of the Urban Council and vote at the meeting as the Assistant Government Agent, Trincomalee, had notified him that my seat in the Urban Council was vacant.

"12. The meeting convened for the 7th of January 1949 was cancelled late on the evening of 6th January 1949 and I received letter No. UCT/IA dated 7th January, 1949, (marked E) purporting to be a confirmation of a telegram sent to me on the 6th of January 1949 cancelling the meeting, which telegram I never received."

The letter dated 7th January, 1949, marked (E) sent to the petitioner by the second respondent reads as follows :—

"*Trincomalee Urban Council*
Election of Chairman

I hereby confirm the following telegram sent to you yesterday from Colombo :—

Reference my UCT.IA of 21-12-48 first meeting of Trincomalee Urban Council will not be held on 7-1-49 as informed. Shall inform date and time of meeting in due course."

Thereafter on 11th January, 1949, the petitioner received the following letter dated 10th January 1949, from the first respondent.

"*Trincomalee Urban Council*

The Supreme Court had decided that your name should be removed from the electoral list of Ward No. 4 in Trincomalee Urban Council. Therefore the election proceedings are invalid and you are not entitled to sit or vote at the meetings of the Urban Council. Action is being taken by me to fill the vacancy."

The order of this Court referred to in the first respondent's letter came to be made in this way: Upon the publication of the notice contemplated in section 17 of the Local Authorities Elections Ordinance, No. 53 of 1946, (hereinafter referred to as the Ordinance), the petitioner, whose name did not appear on the electoral list, applied under

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section 18 (1) (*a*) of that Ordinance to have his name entered therein. His application was opposed by one Francis de Silva. After hearing the petitioner's claim and the objections thereto on 6th September 1948 the first respondent allowed the petitioner's claim to have his name entered in the electoral list and under section 19(5) made therein the amendment necessary to give effect to his decision. The objector thereupon appealed to this Court under section 21(1) of the Ordinance, and on 15th December 1948 this Court directed that the peritioner's name be erased from the electoral list. Meanwhile pending the hearing of the appeal, the first respondent had under sections 23(1) & (3) certified the electoral lists. By virtue of section 24 the electoral lists so certified come into force on the date of such certification subject to such alteration as may subsequently be made therein in accordance with section 23(3).

The nominations for the election of a member for Ward No. 4 were received on 9th November 1948. On that day the petitioner's name was on the electoral list, and as he had none of the disqualifications specified in section 10, he was duly nominated under section 29(1). As there was more than one candidate duly nominated, a poll appears to have been taken on 4th December, 1948, while the petitioner's name was still on the electoral list and he was subject to no disqualification.

The question that arises for decision is whether the second respondent is under a legal duty to serve on the petitioner the notices he is required to give under section 33 of the Urban Councils Ordinance, No. 61 of 1939, in respect of the first meeting of the newly elected Urban Council of Trincomalee. In my opinion he is bound to serve the notices contemplated in section 33 on the petitioner so long as he holds the office and his seat is not declared to be vacant by the Court. It is settled law that where a person has been duly admitted to a corporate office and by some act or circumstance has forfeited it, the mere act or circumstance does not operate as a vacation of the office, but the holder must be duly removed therefrom by the corporation or other competent authority. (Halsbury, Vol. 8, p. 39 Hailsham Ed.)

Now the only provision of the Ordinance that declares that in certain events the seat or office of a member shall *ipso facto* become vacant is in section 11(1). That provision reads :—" Where any member of a local authority is, by reason of the operation of any of the provisions of section 10, disqualified from sitting or voting as a member of such authority, his seat or office shall *ipso facto* become vacant." The instant case does not fall within the ambit of that provision nor is there any provision of the Ordinance which declares that like consequences shall attend the removal of the name of a member from the electoral lists. The authority to fill a vacant seat given by section 11(2) is confined to vacancies caused by the operation of sub-section (1) of section 11. In the absence of a provision similar to section 11 in respect of a member whose name is removed from the electoral roll after his election the Elections Officer has no power to declare the election void as he has done in this case, nor has he power to hold another election for Ward No. 4 until the petitioner's right to hold the office has been successfully challenged before this Court by appropriate proceedings. (*The Queen vs. Ricketts* 1838 Vol. III, Nevile & Perry, p. 151 at 153.)

The first respondent in his letter of 10th January, 1949, takes upon himself the responsibility of declaring the petitioner's election invalid, which he has no right to do, and he has committed himself therein to a course of conduct which is unwarranted by law. The first respondent as Elections Officer is entitled to exercise only such powers as are given to him by statute and no more.

The second respondent's conduct in this case is in my view inexcusable in a public officer charged with such important functions. The instant case indicates vacillation of the highest order on his part. He seems to have been utterly confused as to the course he should adopt. His conflicting injunctions must undoubtedly have perplexed the petitioner. After first noticing the petitioner to attend a meeting he cancels that notice, then he cancels by telephone the letter cancelling the notice to attend. He next cancels the telephone message and informs the petitioner that he has no right to attend or vote at the meeting. He follows it up by giving the petitioner notice that the meeting fixed for 7th January, 1949, will not be held and promising to inform him of the date and time of the next meeting. Placed in the predicament he was in, and threatened with consequences so serious as the loss of his office and forfeiture of his rights as a member of the Urban Council, the petitioner has been compelled to invoke the powers of this Court for the enforcement of his rights.

It is in the public interest that officers exercising such statutory functions as have been entrusted to the respondents to this application should properly understand their functions and

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act strictly within the scope of the statute they are called upon to administer. They should not, as the respondents appear to have done in this case, take upon themselves functions which have not been given them by the statute whose creatures they are.

I think this is a case in which a mandate in the nature of a writ of mandamus must issue. No immediate relief is claimed against the first respondent. No mandate need therefore issue on him.

I order the second respondent to serve on the petitioner all notices under section 33 of the Urban Councils Ordinance. There is nothing in the statute whoich prevents the petitioner from exercising the rights of membership so long as his election remains unquashed by an authority competent in law so to do.

The petitioner is entitled to costs as against both respondents.

Application allowed.

Present : WIJEYEWARDENE, C.J., AND CANEKERATNE, J.

SILVA vs. PERICARUPEN CHETTIAR

S. C. No. 93—*D. C. (F) Balapitiya No. B*—1689
Argued & Decided on : 7th April, 1949.

Fraud—Need to plead and to give specific details of

Held : That before evidence is led on a question of fraud, specific details of the fraud should be given in the pleadings.

H. V. Perera, K.C. with *H. W. Jayewardene* and *B. E. de Silva*, for the defendant-appellant
C. Thiagalingam with *C. Renganathan*, for the plaintiff-respondent.

WIJEYEWARDENE, C.J.

The plaintiff filed case B 776 claiming a sum of money on a promissory note. The defendant pleaded that it was a forgery. The District Judge held that it was a forgery and the Supreme Court affirmed his decision in appeal. Before the Supreme Court gave its decision in appeal the plaintiff filed the present action for the recovery of the sum claimed in the earlier case as on a money count. The defendant denied liability and pleaded *inter alia* the decree in the 'previous case as *res judicata*. . At the trial certain issues were framed and the Counsel for the plaintiff stated that he was " attacking the decree in case B776 on the ground that it was procured by fraud and that therefore for that reason amongst others " the decree did not operate as *res judicata*. Counsel for the defendant objected to any evidence being led on the ground of fraud. No fraud was averred in the plaint or in any subsequent pleading. At no stage of the proceedings was any pleading filed setting out the particulars of the fraud referred to. A good deal of evidence was led on this question of fraud. We are of opinion that the District Judge has been confused by this evidence on the question of fraud. We are further of opinion that if evidence was going to be led on this question of fraud it should have been pleaded and specific details given.

We set aside the decree. The defendant is entitled to the costs of the trial in the lower court and the costs of appeal. We direct that the plaintiff should deposit in court a sum of Rs. 1,000 before the 31st of May, 1949, on account of the costs ordered by us but not in full satisfaction of that order for costs. If the amount is so deposited, the District Judge will fix the case for trial. If the amount is not so deposited, the plaintiff's action will be dismissed with csots.

Appeal allowed.

Present : CANEKERATNE, J., DIAS, J. & BASNAYAKE, J.

RASIAH vs. SUPPIAH (S.I. POLICE)

S. C. No. 1310—*M. C. Batticaloa No.* 5954

Argued on : 21st February, 1949.
Delivered on : 11th March, 1949.

Criminal Procedure Code, sections 212 *and* 237 (1)—*Evidence Ordinance section* 155—*Contradiction of witnesses for the defence by previous statement to the Police—Calling of witness to prove previous statement after close of the defence—Is it evidence in rebuttal—Can such evidence be led in Magistrate's Court.*

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Held : (i.) that the absence of a provision similar to those of sections 212 and 237 (1) of the Criminal Procedure Code in regard to trials before the Magistrate's Court does not preclude a contradictory statement put to a defence witness being proved after the close of the case for the defence.

(ii.) that the proof of such a statement, after the close of the defence, by calling the witness who recorded such statement, is not evidence in rebuttal.

(iii.) that the right granted by section 155 of the Evidence Ordinance to impeach the credit of a witness by a previous statement made by him implies that everything indispensable to its proper and effectual exercise is also granted and that the right in this case can only be exercised after the close of the evidence for the defence.

Not followed : *Welipenna Police vs. Pinessa*, (45 N. L. R. 115).

Cases referred to : *Saibu vs. Jayasena*, (45 N. L. R. 91).
Rosalin Nona vs. Perera (S. I. Police), (47 N. L. R. 523).
Wijeratne vs. Ekanayake, (48 N. L. R. 306).
David vs. Idroos, (45 N. L. R. 300).
Fernando vs. Sergeant Samath, (45 N. L. R. 548).
Colquhoum vs. Brooks, (1888) (21 &. B. D., 52, pp. 65).
Jonklaas vs. Silva, (7 N. L. R. 181-182).
Daniel vs. Zoysa, (1 A. C. R. 50).
(25 Cr. L. J. R. 217), (31 Cr. L. J. R.), (37 Cr. L. J. R. 522).
Rex vs. Graniel Appuhamy, (1935) (37 N. L. R. 281).
Rex vs. Crippen, (1910) (5 C. C. A. Reports at pp. 265-267).
Wijeratne vs. Ekanayake, (1947) (48 N. L. R. at pp. 308.).

N. Kumarasingham, with *C. Chellappah*, and *M. A. M. Hussain*, for the accused-appellant.

T. S. Fernando, Crown Counsel, with *G. P. A. Silva, Crown Counsel*, and *A. E. Keuneman*, (Jr.), *Crown Counsel*, for the Attorney-General.

CANEKERATNE, J.

The appeal comes before us on a point reserved. The appellant was convicted of driving an omnibus on the highway in a dangerous manner, contrary to section 82 (2) of Ordinance No.45 of 1938. No argument of any substance was advanced before the learned Judge in appeal, "except for one, that the trial Judge had no power to allow the prosecution to call evidence and prove that the chief defence witness, the conductor of the omnibus, had made to the Police, a statement differing in a material particular from his evidence in the witness-box." The main contention of Mr. Kumarasingham was that a Magistrate had no power under the Criminal Procedure Code to allow rebutting evidence to be called, and he referred to six decisions, *Welipenna Police vs. Pinessa*, (45 N. L. R. 115); *Saibu vs. Jayasena*, (45 N. L. R. 91); *Rosalin Nona vs. Perera* (S. I. Police), (47 N. L. R. 523); *Wijeratne vs. Ekanayake*, (48 N. L. R. 306); *David vs. Idroos*, (45 N. L. R. 300); *Fernando vs. Sergeant Samath*, (45 N. L. R. 548), only the first of which supports him. There in a very short judgment the learned Judge states,

"There is no provision for the calling of evidence in rebuttal in the Magistrate's Court."

Had there been as full and clear an argument before him as before us, he would probably have come to a different conclusion. To ascertain whether testimony of this kind can be received one must resort to the rules of evidence in Ceylon which are found in Chapter 11 of the Ceylon Legislative Enactments, the Evidence Ordinance, the law contained therein, with the exception of certain provisions, applies in criminal cases; it is necessary next to see whether there is any provision, expressly or impliedly modifying the evidentiary rules, in the Criminal Procedure Code (Chapter 16 of the Ceylon Legislative Enactments). Section 135 of the Evidence Ordinance lays down that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Criminal Procedure, and in the absence of any such law by the discretion of the Court. The credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. (Section 155 (3)). If it is intended to bring the

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credit of a witness into question by proof of anything he may have said or declared touching the matter, one would generally ask the witness in cross-examination as to what he is supposed to have said or declared on a previous occasion as to any fact material to the issue; if the witness admits the words or declarations imputed to him, proof on the other side becomes unnecessary; if he denies the utterance, proof in contravention will be received at the proper season. The other side may prove that fact as it is at liberty to prove any fact material to the issue. It may be a statement, verbal or written, but when the statement is in writing the provisions of Section 145 of Chapter 11 apply.

Provision is made for a trial in a Magistrate's Court in Chapter 18, in the higher Courts in the two succeeding chapters. The absence of a provision in Chapter 18 like that contained in section 212 or in section 237 (1), it is argued, is fatal to a right of rebuttal. The significance of the absence of a power in one chapter as importing a change of substance, though material, may easily be exaggerated. The rule of exclusion is only a subsidiary rule of construction, and it is not a rule of universal application. The principle remains as expressed by Lopes L.J. in *Colquhoum vs. Brooks.* (1888) 21 Q. B. D. 52 p. 65.

> "The maxim is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusion is often the result of inadvertance or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice."

The order of production and examination of witnesses is regulated in the case of trials before the District Court and before the Supreme Court by some of the sections in Chapter 19 and 20, respectively. A trial in one of these courts is a formal trial and almost elaborate provisions are contained in these chapters. There has been an inquiry into the charge in another Court; the accused knows the evidence against him and has been served with a copy of the indictment. The prosecution is conducted by the Attorney-General generally through a Crown Counsel or other lawyer. A trial in a Magistrate's Court is regulated by Chapter 18, it is a non-formal trial. No express positive rule as regards the order of production and examination of witnesses found here There is really one section relating to the procedure on trial, (section 189), which however is not a comprehensive section on the procedure. It only provides for certain matters. The other sections are 187, 188, 189 and 190. The Magistrate besides having full control over the proceedings is entrusted with certain powers; often there may be no lawyer appearing for the prosecution. The rules to be observed in a summary trial cannot be gathered from the provisions of the Criminal Procedure Code alone, one must read the provisions of the law of evidence into the Code to evolve the rules to be observed. By so reading one can find three phases: First the prosecution case—the complainant can open his case: secondly, the case for the defence, the accused can open his case and if he adduces evidence and closes his case he can address the Magistrate. Subsequent to this, (*a*) evidence may be called by the Magistrate hoimself (sections 190 & 429), (*b*) where it is necessary to impeach the credit of a person, this may be called proof in rebuttal, if the word rebuttal is used in a very wide sense, but it is speaking strictly not rebutting evidence. After his adversary has closed his proof, a party having the affirmative can only be heard in adducing proofs contradictory of statements of the other side or directly rebutting the proofs given by his adversary.

It is necessary first to see whether he can claim to have a right. Section 155 (3) permits the credit of a witness to be impeached by proof of any statements inconsistent with any part of his evidence which is liable to be contradicted. Testimony "liable to be contradicted" has, it may be said, to be read with reference to the position of the party at the time when he tenders the evidence. If so, testimony can be brought on the record to impeach a prosecution witness almost always, but the prosecution can hardly ever bring evidence to impeach a defence witness because at that time he has already closed his case. This seems an impractical view. The evidence ought to be relevant and material to the issue in the case. Cross-examination upon immaterial matters for the purpose of contradicting a witness is disallowed because a witness cannot be presumed to come forward to defend himself on such collateral questions and otherwise the issues in a cause would be multiplied indefinitely and the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points. The prosecution can claim to have a right to impeach the credit of a defence witness, under this section. How can he assert this claim? It is a question of practice and must be left to the discretion of the Court trying the case. If the Court grants permission to call a witness for this purpose, the witness is a prosecution witness, (*c*) Next come cases where the prosecution is not entitled as of right to call any evidence, all that the complainant can do is to make an application to the Court to exercise its powers under section 429. (such as one where

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proof in rebuttal, used in the proper sense, seems necessary, etc.). Further provisions about a case are these—witnesses called by the prosecution, or by the defence can be cross-examined by the adverse party, or be re-examined by the party calling. The witnesses called by the Court can also be cross-examined. There are thus three classes of witnesses. Next the conviction or acquittal must turn upon the evidence given by the prosecution, the defence, and the evidence taken by the Court on its own motion, not on a statement made to a Magistrate out of Court (section 190). A headman was called by the Magistrate in *Jonklaas vs. Silva*, (7 N. L. R. 181-182), another witness, after the defence counsel began his address, in *Daniel vs. Zoysa*, (3 A. C. R.—50) section 429 applies to all Courts. It is divisible into two parts, a permissive and an obligatory, the former enables a Court at any stage to, among other things, summon any person as a witness. Where, however, the evidence of any person appears to be essential to the just decision of the case, it must summon and examine the person. Under section 190 a Magistrate might, on reading the evidence or reading an authority submitted by one side, take the view that evidence on a particular point should be produced, he would then be acting on his own motion. One side or the other may file a list containing the name or names of new witnesses, (section 429 of Chapter 16) as seems to have been done in some of the cases in India, or make an application and suggest to the Magistrate that it is proper case for the exercise of his discretion. The Indian cases (25 Cr. L. J. R. 217), (31 Cr. L. J. R. 198), (37 Cr. L. J. R. 522), quoted by Mr. Fernando are cases where a Judge acted under the section corresponding to section 429 of Chapter 16. Two of them appear to be cases where rebutting evidence was allowed, the other case too is probably of the same class. They are not cases where evidence was called to impeach the credit of a witness. Two of the cases quoted by counsel for the appellant are instances where the Court did not exercise its discretion under section 429.

There was no opportunity to lead the evidence objected to in this case before the prosecution case was closed. There seems to be no reason why the matter which arose while the case for the defence was being conducted may not be answered by contrary evidence on the part of the prosecution when the prosecution has the right to impeach such evidence. It is said that such evidence would prejudice the defence ; it may be inconvenient to a party to discover that his witness has made an inconsistent statement earlier, but what prejudice can there be in such a case ? It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the Court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the Court where it has discretionary powers to summon that witness, merely because that evidence supports the case of the prosecution, and not that of the accused. As counsel said there is no other ground in support of the appeal, the appeal should be dismissed.

DIAS, J.

I agree. In view of the practical importance of the question raised, I desire to deal with two points :—

In the first place, when the credit of the prisoner or of a defence witness is impeached by the prosecution under section 155 (*c*) of the Evidence Ordinance " by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ", and when the case for the defence is closed, the prosecution moves formally to prove the previous statement which the witness denied on oath—such evidence cannot, in my opinion, be called " rebutting evidence."

It is a matter of legal history that for a great many years defending counsel in criminal cases in this Island made free use of the Magisterial depositions in order to " discredit " prosecution witnesses under section 155 (*c*) of the Evidence Ordinance. Despite a few protests from individual Judges, counsel were freely allowed to confront the witness without having to prove such statements, if the witness denied having made them, and without losing the highly prized right of reply in consequence. The matter, however, was placed beyond all doubt by the decision of a Bench of three Judges in *Rex vs. Graniel Appuhamy* (1935) 37 N. L. R. 281. Since that decision it has been the invariable practice " to prove " the alleged inconsistent statement by calling the person who recorded the alleged statement or to whom it was made. The contention now advanced is that, while this can be done in the Supreme Court or in a District Court, it cannot be done in a Magistrate's Court. The answer to this contention is that section 155 of the Evidence Ordinance, while it lays down a rule of " adjective law ", does not lay down a rule of " criminal procedure ". It is a rule of evidence, and is found in the Evidence Ordinance.

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Rex vs. Graniel Appuhamy (1935) 37 N. L. R. 281 was not laying down a principle of Criminal Prorocedure, but was explaining the scope of section 155 of the Evidence Ordinance. Therefore, when *in any Court* to which the Evidence Ordinance applies a witness under cross-examination denies having made a previous statement which is inconsistent with his present testimony the cross-examiner, if he desires to pursue the matter further, must formally "prove" that inconsistent statement. In the case of a prosecution witness, the defence will prove the inconsistent statement as part of the defence. In the case of a defence witness, including an accused-witness, the prosecution at the close of the case for the defence must be given the opportunity, if it desires to do so, of proving that statement. I fail to see how this can be called "evidence in rebuttal". The trouble appears to have arisen by the misuse of the expression in *Welipenna Police vs. Pinessa* (1943) 45 N. L. R. 115.

In the second place, section 189 of the Criminal Procedure Code does not lay down any general rules regarding the order in which witnesses are to be examined in a summary trial before a Magistrate. Section 189 (1) provides that "When the Magistrate proceeds to try the accused, he shall take *in manner hereinafter provided* all such evidence as may be produced for the prosecution or defence respectively". The only rules "hereinafter provided" are (*a*) the right of the prisoner to cross-examine all witnesses for the prosecution and called or recalled by the Magistrate; (*b*) the complainant and the accused or their pleaders can "open" their respective cases; and (*c*) the complainant or his pleader shall not be entitled to make any observations in reply *upon the evidence* given by or on behalf of the accused. I am unable to agree with the submission that, because special reference has been made to evidence in rebuttal in criminal trials before the Supreme Court and District Courts by sections 212, 237 (1) of the Criminal Procedure Code, therefore, by implication no evidence in rebuttal can be led in a summary trial before a Magistrate. In criminal trials in England the prosecution is allowed to lead evidence in rebuttal when, during the evidence led for the defence, something transpires which takes the prosecution by surprise, and which, in the opinion of the trial Judge, in the interests of truth and justice, the prosecution should be allowed to rebut or nullify, if it can do so. The law was laid down in the judgment of Darling J. in the Court of Criminal Appeal in *Rex vs. Crippen* (1910) 5 C. C. A. Reports at pp. 265-267. The prosecution begins its case. After the case for the prosecution is closed, the Crown as a general rule cannot be allowed to support its case by calling fresh evidence simply because they are met by certain evidence of the defence which contradicts the case for the Crown. The prosecution as a rule stands or falls by the evidence led for the prosecution. But there is an exception to this general rule. If any matter arises *ex improviso* which no human ingenuity can foresee, there is no reason why the matter which arose *ex improviso* may not be answered by contrary evidence on the part of the prosecution. This rebutting evidence must be admissible evidence. If so it then becomes a question for the trial Judge to determine in his discretion whether the evidence, not having been tendered in chief, ought to be given as rebutting the case set up by the defence. I can see no grounds in reason or in justice why this rule of evidence should not be equally applicable to a summary trial before a Magistrate. There is nothing in the Criminal Procedure Code which prohibits it. In *Wijeratne vs. Ekanayake* (1947) 48 N. L. R. p. 308, I ventured to give some examples of this rule in action.

I, therefore, agree with the order proposed by my brother Canekeratne.

BASNAYAKE, J.

I have had the advantage of reading the judgment of my brother Canekeratne, and I agree with him that this appeal should be dismissed. But, as I wish to rest my decision on section 155 of the Evidence Ordinance, I think I should not content myself with expressing my bare concurrence with the order proposed.

This appeal comes up for decision by a bench of three judges on the following order made by my brother Windham:—

> "The appellant, a bus driver, was convicted of driving a bus on the highway in a dangerous manner, contrary to section 82 (2) of Ordinance No. 45 of 1938. No argument of any substance has, in my view, been advanced except for one, namely, that the learned Magistrate had no power to allow (as he did) the prosecution to call rebutting evidence to prove that the chief defence witness, the bus conductor, had made to the police a statement differing in a material particular from his evidence in the box. From the learned Magistrate's judgment it is clear that this rebutting evidence which he accepted, may well have affected his decision. This question whether a Magistrate has power to allow the prosecution to call

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rebutting evidence in such circumstances, or at all, in the absence of any specific enabling provision in the Criminal Procedure Code, has been the subject of decisions by Mosley S.P.J. and Dias J. reported in 45 N. L. R. 115 and 47 N. L. R. 526, respectively, to the effect that he has no such power. In a later decision reported in 48 N. L. R. 306, however, Dias J. himself expressed, *obiter*, considerable doubts as to the correctness of this view, and suggested that the question merited consideration by a bench of two judges or a Divisional Court. In view of the importance of the point, the doubt as to the legal position, and the desirability of a clear ruling, I agree that it is one which should be reserved for the decision of two or more judges of this Court, and I so reserve it accordingly, acting under the powers conferred by section 48 of the Courts Ordinance."

Shortly the facts material to the decision of this appeal are as follows :—

In the course of his evidence for the defence, one M. Kidnapillai stated when cross-examined : " I did not tell the Police.....coming fast behind the bus and that the accused did not allow it to overtake thinking that the van would collect passengers on the road. I deny that I said that at this time the accused increased speed and then the bus toppled. The Police Officer only asked me at what speed the bus was driven and I said 25 miles. He asked me whether I saw a van following and I said ' No, I did not notice.' "

The defence was closed after his evidence. The sub-inspector who conducted the prosecution thereupon sought to discredit the witness Kidnapillai by proving the statement he had made to Police Constable de Hoedt. In that statement the witness appears to have said : " When the bus had just passed the Padiruppu coconut estate past the old Food Control Barrier in Kaluvanchikudy a van came from behind and the bus quickened its speed and was travelling at about 30 m.p.h. approximately as we did not want to allow the van to get ahead and pick up passengers when suddenly the bus toppled."

Objection is taken to the evidence given by Police Constable de Hoedt and the production of the statement made to him by the witness Kidnapillai on the ground that Chapter XVIII of the Criminal Procedure Code does not permit the prosecution to call evidence in rebuttal. Learned counsel points to sections 212 and 237 of the Criminal Procedure Code where, in trials before the District Court and the Supreme Court respectively, special provision is made whereby the prosecuting counsel is permitted with the leave of the Court to call witnesses in rebuttal. Learned counsel bases his argument on the absence of a corresponding provision in the chapter that deals with the procedure to be followed in cases triable summarily by a Magistrate.

In my view the evidence that the prosecution sought to adduce in this case is not evidence in rebuttal. Evidence in rebuttal is evidence produced in refutation of testimony previously introduced by an opponent in a trial. In the instant case the prosecution sought not to lead evidence in rebuttal but to exercise the right given to an adverse party by section 155 of the Evidence Ordinance. That section reads :—

> " The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him :—
>
> (*a*) by the evidence of persons who testify that they from their knowledge of the witness, believe him to be unworthy of credit ;
>
> (*b*) by proof that the witness has been bribed or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ;
>
> (*c*) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;
>
> (*d*) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character."

It is a well-established rule of interpretation that when a right is granted everything indispensable to its proper and effectual exercise is impliedly granted. A witness for the defence can be discredited in the manner provided by section 155 (*c*) of the Evidence Ordinance only after he has given evidence. The right under that provision to prove former statements made by a witness for the defence may therefore be exercised at the close of the evidence for the defence. In the instant case it was only after Kidnapillai had given evidence that it became apparent that what he stated under cross-examination was inconsistent with his statement to Police Constable de Hoedt. The prosecution thereupon became entitled to prove the latter. As it was a statement reduced to writing, proof of it could properly be given only by the production of the writing by a witness competent to give evidence in regard to it. The statement has therefore been duly proved by its production and by the evidence of Police Constable de Hoedt.

If learned counsel's contention were correct, in cases summarily triable by a Magistrate the prosecution would be denied the right granted by

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section 155 of the Evidence Ordinance, for, proof of former statements inconsistent with the evidence of the witnesses for the defence can only be given after the defence case is closed. I can find no authority in the Evidence Ordinance or any other enactment relating to Criminal Procedure for placing such a limitation on that section, nor has learned counsel been able to support his contention by reference to any statutory provision or judicial decision.

Appeal dismissed.

Present : BASNAYAKE, J.

DAVID SILVA vs. BABY NONA

S. C. 148—*C. R. Colombo* 228

Argued on : 10th March, 1949.
Decided on : 8th April, 1949.

Jurisdiction—Court of Requests—Denial of jurisdiction by defendant—Onus on plaintiff.

Held : That where the jurisdiction of the Court of Requests is denied by the defendant, the plaintiff must prove that the court had jurisdiction and that a statement in the plaint that the value of the claim is within the jurisdiction is insufficient.

N. K. Choksy, K.C. with *S. W. Jayasuriya,* for the appellant.
Thillainathan, for the respondent.

BASNAYAKE J.

Learned counsel for the respondent objects to the hearing of this appeal on the ground that the requirements of section 756 of the Civil Procedure Code have not been complied with. The judgment was delivered on 25th May, 1948. On 28th May, 1948, the appellant's proctor presented his petition of appeal and on the same day gave notice that on 2nd June, 1948, the appellant would move to tender security for the respondent's costs of appeal by deposit of cash. The proctor for the plaintiff-respondent accepted notice and no cause was shown against the acceptance of the security. On 7th June, 1948, a sum of Rs. 26 was deposited in the Kachcheri as security for costs of appeal, and on 9th June, 1948, a bond was executed hypothecating that sum.

In the instant case the objection of counsel for the respondent is not entitled to succeed. The respondent did not show cause on the day fixed for the purpose although he had notice. Thereafter the security and the expenses of serving the notice of appeal were deposited and the bond executed within the prescribed time. There has been no failure to comply with the requirements of section 756.

I shall now discuss the question arising on this appeal. The plaintiff instituted this action as one of the owners of a divided portion of land marked lot B in plan 3891 (P1) made by H. D. David, Surveyor, dated 9th September, 1946. She claimed the right of way X-Y over Lot A in that plan, by virtue of adverse user for over 10 years. In the alternative the plaintiff claimed a right of way of necessity. She valued her claim at Rs. 250. The defendant denied that she was entitled to a right of way either by prescription or of necessity. He specifically objected to the jurisdiction of the court on the ground that the value of the right of way claimed was about Rs. 2,000.

Where the jurisdiction of the Court of Requests is denied by the defendant, the plaintiff must prove that the court has jurisdiction. Apart from her bare statement in the plaint that the value of the claim is Rs. 250 the plaintiff made no endeavour to establish it. The defendant on the other hand has given and led evidence to show that a perch of the land over which the alleged right of way lies is worth Rs. 200. According to surveyor David the road claimed is 4½ perches in extent. At the rate of Rs. 200 per perch the value of the plaintiff's claim would be Rs. 900. The learned Commissioner has actually allowed a path half the width of that claimed as learned counsel for the plaintiff said he would be satisfied with such a path. The value of land needed for a path 4 feet wide from X-Y in plan P1 would, on the above computation, be Rs. 450.

It is clear that the court has acted without jurisdiction. I allow the appeal with costs and dismiss the plaintiff's action with costs. She is at liberty if so advised to assert her claim in a court of competent jurisdiction.

Appeal allowed.

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Present : WIJEYEWARDENE, C.J.

M. G. PERERA vs THE INSPECTOR OF LABOUR, MATUGAMA.

Application for Revision in M. C. Kalutara 553—S. C. No. 85/1

Argued on : 24th May, 1949.
Delivered on : 27th May, 1949.

Wages Board Ordinance No. 27 of 1941 sections 21 39 (1) and 54—Prosecution of employer for failure to pay minimum wage—Written sanction of the Commissioner of Labour—Nature of sanction required—Criminal Procedure Code section 425 (b)—Courts Ordinance section 36.

Held : (i.) That a prosecution instituted against an employer for failure to pay the minimum wage in contravention of section 21 of the Wages Boards Ordinance and punishable under section 39 (1) of the Ordinance must have the written sanction of the Commissioner of Labour as required by section 54 of that Ordinance.

(ii.) That the sanction of the Commissioner must contain the particulars of the offences alleged to have been committed.

(iii.) That the failure to comply with the provisions of section 54 of the Ordinance is a defect which is not curable under section 425 (*b*) of the Criminal Procedure Code or under section 36 of the Courts Ordinance.

Cases referred to : *Cornelis Hamy vs. Thoronis et. al.* (1924) (2 Times of Ceylon Law Reports 192).

H. V. Perera, K.C. with *C. Senewiratne*, for the applicant.

A. C. Alles, Crown Counsel, on notice issued by Court.

WIJEYEWARDENE, C.J.

The complainant, an Inspector of Labour, filed a written report under section 148 (1) (*b*) of the Criminal Procedure Code charging the accused on two counts. The first count was that the accused " being an employer in trade, to wit, the motor transport trade.....did on or about the 10th day of September, 1947, at Maggona.....in breach of section 21 of the Wages Board Ordinance.....fail to pay to one G. D. Lewis Singho a class B worker in the motor transport trade, employed by the said employer in the said trade, the minimum time rate of wages in respect of work done by the said worker during the month of August, 1947, in accordance with the decisions of the Wages Board.....and that he has thereby committed an offence punishable under section 39 (1) of the said Wages Board Ordinance.....". The second count was in identically similar terms, but referred to the accused's failure to pay the minimum wages to one W. M. Guneratne Banda for August, 1947.

The Magistrate held that the charges were proved but dealt with the accused under section 325 (1) (*a*) of the Criminal Procedure Code. In the course of his judgment he said :—

" In my opinion the accused has not been dishonest in not making the payments to these two lorry drivers. He appears to have withheld this payment at the basic rates upon a certain view of the law he has taken ; and when called upon by the Commissioner of Labour he has deposited with the latter the total amount of the underpayment. The view taken by the accused appears to be arguable. In the circumstances the law will be sufficiently vindicated if I act under the provisions of section 325 of the Criminal Procedure Code in warning and discharging the accused".

The question I have to consider is whether the prosecution in this case has been instituted in contravention of section 54 of the Wages Boards Ordinance, No. 27 of 1941.

That section reads :—

" No prosecution for any offence under this Ordinance shall be instituted in any Court except (*a*) with the written consent of the Controller and (*b*) within one year of the commission of the offence ".

The designation " Controller of Labour " has been changed into " Commissioner of Labour " by Ordinance No. 22 of 1945.

In this case I find in the record a typed writing signed by the Acting Commissioner of Labour which reads as follows :—

" I.....Acting Commissioner of Labour do hereby in terms of section 54 of Ordinance No. 27 of 1941 sanction the prosecution of.....New Buller's Road, Colombo, upon the following charges :—

Charge 1. Breach of section 21 of Ordinance No. 27 of 1941—an offence punishable under section 39 (1) of the said Ordinance.

Charge 2. Breach of section 21 of Ordinance No. 27 of 1947 an offence punishable under section 39 (1) of the said Ordinance."

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It will be noted that this sanction is in very general terms and does not state that the offences have been committed in respect of payments due to G. D. Lewis Singho and W. M. Gunaratne Banda or in fact to any employee in the motor transport trade at Maggona. It does not state that the offences were in respect of wages due for August, 1947, or that the offences were committed on or about September 10, 1947. There is nothing to show that the sanction refers to the particular charges made in the written report of the complainant. There would have been no difficulty if the sanction was endorsed on the written report, as it is usually done. The record does not show how and when the sanction was presented to the Court. There is nothing to connect the sanction with the report. The report itself is undated. This defect was cured by the prosecution calling evidence to show that the report was handed to the Chief Clerk of the Magistrate's Court on September 2, 1948, about a week before the expiry of the period of limitation. Even then no evidence was led to show that the sanction was handed with the report. There is no evidence in the case to show that the Commissioner of Labour sanctioned this prosecution. In view of the remarks of the Magistrate cited by me earlier this appears to me to be particularly a case in which a Court should be satisfied that the Commissioner of Labour gave his mind to the particular facts connected with the charges made and that he sanctioned the prosecution. Of course if the sanction was properly drawn up or was endorsed on the report the Court would have been satisfied without any further evidence. The defect I have referred to cannot be cured by the application of the provisions of section 425 (*b*) as that section refers to a sanction required by section 147 of the Code. Nor do I think it possible to have recourse to section 36 of the Courts Ordinance. To do so would be to extend the operation of section 425 (*b*) of the Criminal Procedure Code, when legislature itself had restricted its scope by reference to actions under section 147 of the Code (*vide* Bertram, C.J's observations in *Cornelis Hamy vs. Thoronis et al* (1924) 2 Times of Ceylon Law Reports 192.

For the above reasons I quash the finding of the Magistrate and discharge the accused.

Application allowed.

Present : BASNAYAKE J.

THE KANDY TOWN BUS COMPANY LIMITED vs. 1. THE COMMISSIONER OF MOTOR TRANSPORT, 2. THE UNITED BUS COMPANY LIMITED

Case stated under section 4 of the Motor Car Ordinance No. 45 of 1938

Application No. 29

Argued on : 30th June, 1948.
Decided on : 3rd February, 1949.

Omnibus Service Licensing Ordinance, No. 47 of 1942—Application for route licence—Route common to whole of route for which Licence already issued to another person—Order made by Officer on behalf of Commissioner of Motor Transport—Reasons for decisions of Commissioner and of Tribunal of Appeal not given.

A and B, who were holders of road service licences under the Omnibus Service Licensing Ordinance, applied for additional road service licences. A part of A's proposed route was common to a route for which there was already a licence in favour of B. A part of B's proposed route was common to the whole of a route for which A held a licence. An officer signing for the Commissioner of Motor Transport refused A's application, and allowed B's. The Tribunal of Appeal upheld the Commissioner's decision. On a case stated

Held : (i.) That the grant of a licence to B was contrary to section 7 of the Omnibus Service Licensing Ordinance.

(ii.) That A's application ought to be granted.

(iii.) That applications for road service licences must be considered and decided by the Commissioner himself.

Per BASNAYAKE, J.—" In the case of decisions under section 4 of the Omnibus Service Licensing Ordinance No. 47 of 1942 the Commissioner should state his reasons in view of the injunction to the Commissioner in section 4 (*a*) that in making his decision thereunder he should have regard to the matters enumerated therein. The decision should be in the form of a reasoned document which states the conclusion as to the facts and as to the questions of law, if any, which have arisen for determination by the Commissioner."

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Per BASNAYAKE, J.—" Although the regulations do not, as observed by me in the case of *Fernando vs. Paul E. Pieris and four others*, (1948) 37 C. L. W. 32, require the Tribunal to give its reasons, it is desirable that it should do so, especially in view of the fact that it is open to a party dissatisfied with its decision to require that a case be stated for the opinion of this Court not only on questions of law but also on questions of fact."

H. V. Perera, K.C. with *D. W. Fernando*, for the applicant.
D. Jansze, Crown Counsel, for the 1st respondent.
H. W. Jayawardena, for the 2nd respondent.

BASNAYAKE J.

The applicant, the Kandy Town Bus Company Limited (hereinafter referred to as the applicant), and the second respondent, the United Bus Company Limited (hereinafter referred to as the second respondent), are the holders of road service licences under the Omnibus Service Licensing Ordinance No. 47 of 1942. On 12th December, 1945, the applicant applied for an additional road service licence under the Omnibus Service Licensing Ordinance, No. 47 of 1942, to provide a road service between the Kandy Market Bus Stand and a point at the 5th Mile Post on the road to a place called Palkumbura along Ward Street, Trincomalee Street, Katugastota Road, Ranawana Road and Medawala Road via Mahaiyawa, Mawilmada, Katugastota, Yatiwawala, Uduwawala, Kunnanoya and Conigoda. A part of the proposed route, viz., that from the Kandy Market Bus Stand to the junction of Katugastota and Kurunegala Roads, was common to a route for which there was already a road service licence in favour of the second respondent. Earlier, on 12th September, 1945, the second respondent had also applied for an additional road service licence to provide a road service between the King's Street Bus Stand at Kandy and a place called Medawala via Katugastota, Ranawana, and Attaragama. A part of the route proposed by the second respondent was common to the whole of the Kandy-Katugastota road service of the appellant for which he already held a licence.

On 9th March, 1946, Annex 5 was sent to the applicant. It is in the following terms :—

"No. N. A. 138,
Colombo, 9th March, 1946.

Routes : Kandy Market Stand—Medawela Junction & Kandy Market Stand—5th Mile Post at Palkumbura.

Dear Sirs,

I have refused your applications for road service licences for the above routes and have allowed a road service licence to the United Bus Co. Ltd. for the route Kandy-Medawela via Ranawana.

Yours faithfully,
(Sgd) D. R. C. HANWELLA.
For Commissioner of Motor Transport.

Kandy Town Bus Co. Ltd.,
Kandy."

That letter is not under the hand of the Commissioner but is signed by a person purporting to act on his behalf. It does not appear therefrom that the Commissioner himself has made the decision thereby conveyed. Applications for road service licences under the Omnibus Service Licensing Ordinance No. 47 of 1942 must be considered and decided by the Commissioner himself as that Ordinance does not contain a provision similar to section 2 (2) of the Motor Car Ordinance No. 45 of 1938 whereunder an Assistant Commissioner may subject to the general directions of the Commissioner exercise the powers and duties of the Commissioner under the latter Ordinance. The reasons for the Commissioner's refusal of the applicant's application are not contained in Annex 5, which in all probability is intended to be the notice of refusal contemplated in section 8 of the Omnibus Service Licensing Ordinance No. 47 of 1942, nor do they appear to have been recorded elsewhere. In the case of decisions under section 4 of the Omnibus Service Licensing Ordinance No. 47 of 1942 the Commissioner should state his reasons in view of the injunction to the Commissioner in section 4 (*a*) that in making his decision thereunder he should have regard to the matters enumerated therein. The decision should be in the form of a reasoned document which states the conclusion as to the facts and as to the questions of law, if any, which have arisen for determination by the Commissioner. A statement of the reasons underlying the Commissioner's decision would not only materially assist the tribunal of appeal in the exercise of its appellate functions, but also help the appellant to formulate the grounds of appeal which he is required to state by regulation 5 of the regulations made under section 4 of

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the Motor Car Ordinance. The instant case offers a good example of the difficulties caused by the absence of such a statement. A bare refusal of the applicant's application as in Annex 5 gives no indication that the Commissioner has exercised his judgment with due regard to all matters he is required by the statute to consider.

Dissatisfied with the decision of the Commissioner the applicant appealed to the Tribunal of Appeal. Its decision is recorded with the same brevity as the Commissioner's. It reads : " We have carefully considered everything and have come to the conclusion that there is insufficient evidence to vary the decision of the Commissioner. Appeal dismissed."

Dissatisfied with the decision of the Tribunal of Appeal the applicant made application to it to state a case under section 4 (6) (*a*) of the Motor Car Ordinance No. 45 of 1938. That section is made applicable to the Omnibus Service Licensing Ordinance No. 47 of 1942 by section 13 (8) of that Ordinance subject to one important modification, viz, that an applicant for a case stated under the latter Ordinance is entitled to make an application to the Tribunal to state a case not only on a question of law but also on a question of fact. The applicant's application has not been sent up to this Court but the case stated which is set out below appears to raise both questions of law and fact.

" The appellant is the Kandy Town Bus Co. Ltd. It had applied (copy of application marked Annex 1) for a route starting from Palkumbura at the 5th Mile Post from Katugastota, leading down to the smaller bridge at Katugastota, then 200 yards to the larger bridge, over the Mahaveli-ganga, on to Trincomalee Street, up to the Market Bus Stand at Kandy (Sketch Map marked Annex 2). There was before the Commissioner another application (copy of application marked Annex 3) by the United Bus Co. Ltd., covering the whole of that route and in addition a distance of about a mile from Medawala to Palkumbura (Sketch Map marked Annex 4). After consideration the Commissioner allowed the latter application and rejected the former application (copy of the order of the Commissioner of Motor Transport marked Annex 5).

"2. Both the companies interested are operating buses in the district. For instance the Kandy Town Bus Co. Ltd. is operating from the smaller Katugastota bridge over the larger bridge, down Trincomalee Street, through Ward Street, and the market bus stand, up to Peradeniya. The United Bus Co. has routes along the Kurunegala route with subsidiary lines from Hedeniya through Medawala to Bokkawala, another subsidiary line from Arambakade through Horambawa to Bokkawala (Sketch Map marked Annex 6).

" 3. The only question which had to be decided was which of the applications should be allowed. From the point of view of the greater convenience of the public, the Commissioner arrived at a certain decision (Annex 5) and this Tribunal after listening to everything that had been urged (copy of the petition of appeal to the Tribunal marked Annex 7) saw no reason to differ from the order of the Commissioner (copy of order of Appeal Tribunal marked Annex 8).

" 4. The only question that arises for the opinion of the Supreme Court is :—

Is the Tribunal of Appeal justified in upholding the decision of the Commissioner of Motor Transport ?"

It does not appear from the stated case that any facts outside the documents annexed to it were before the Commissioner of the Tribunal of Appeal, for if there were they would have been stated.

It appears from Annex 6 that the route to be taken by the road services proposed by the applicant as well as by the second respondent overlaps the entirety of the route now taken by the applicant's existing road service between the Kandy Market Bus Stand and Katugastota. It also overlaps a part, but not the greater part, of the route taken by the second respondent's existing road service to Kurunegala and Bokkawala, but only to the extent that the latter is already overlapped by the existing road service of the applicant.

Section 7 of the Omnibus Service Licensing Ordinance No. 47 of 1942 provides that the Commissioner may issue licences to two or more persons authorising the provision of regular omnibus services involving the use of the same section of a highway if, but only if, that section of the highway is common to the respective routes to be used for the purposes of the services to be provided under each of the licences, but does not constitute the whole or the major part of any such route. The issue of the road service licence to the second respondent for the new road service proposed by him is therefore contrary to the express direction contained in section 7.

In view of the above considerations I think the Tribunal of Appeal was not justified in upholding the decision of the Commissioner of Motor Trans-

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port. On the material before me I am of opinion that the applicant's application for a road service licence should be granted.

The applicant is declared entitled to the costs of the hearing in this Court.

Although the regulations do not, as observed by me in the case of *Fernando vs. Paul E. Pieris and four others*, (1948) 37 C. L. W. 32, require the Tribunal to give its reasons, it is desirable that it should do so, especially in view of the fact that it is open to a party dissatisfied with its decision to require that a case be stated for the opinion of this Court not only on questions of law but also on questions of fact.

Application allowed.

Present : BASNAYAKE J.

MOHAMED NOON vs. SINNAPPAH

In the matter of an Application for a Writ of Quo Warranto on Thambirajah Sinnappah of Gampola.

Application No. 51
Argued on : 17th March, 1949.
Decided on : 23rd March, 1949.

Urban Council Election—Impersonation—Validity of Election—Local Authorities Elections Ordinance, No. 53 of 1946 sections 53 and 65.

In an Urban Council Election, the votes of the two candidates being equal, the successful candidate was determined by the drawing of lots. The unsuccessful candidate sought to have the Election set aside on the ground of large scale impersonation. He cited only one case of impersonation which he failed to prove. His application was therefore refused.

Per BASNAYAKE, J. (*obiter*)—" I am not prepared to hold that an Election may be avoided on the grounds of personation where it is not possible to get rid of the votes comprising the majority of the successful member by demonstrating that those votes have been cast by personators."

Cases referred to : *Galway Case*, (2 O'M. & H. 57).
Ipswich Case, (4 O'M. & H. 72).
Nottingham Case, (1 O'M & H. 245).
Coventry Case, (1 O'M & H. 105).
Belfast Case, (4 O'M & H. 108).

C. S. Barr Kumarakulasinghe with *T. W. Rajaratnam* for the petitioner.

S. Nadesan with *K. S. Rajah* and *Sharvananda* for the respondent.

BASNAYAKE J.

The petitioner, one Thambiah Vyramuthu Mohamed Noon, sought election as a member of the Gampola Urban Council for Ward No. 4. He was contested by the respondent. Each of them obtained 108 votes. The returning officer, by virtue of the powers vested in him by section 65 of the Local Authorities Elections Ordinance, No. 53 of 1946, determined by the drawing of lots that the additional votes contemplated in that section should be given to the respondent, whom he declared elected. The petitioner seeks to have the election of the respondent set aside on the ground that there was " large scale impersonation at the election calculated to defeat the whole purpose of an election ". In support of the allegation of " large scale impersonation " the petitioner is able to give only one instance of an alleged impersonation of one O. Rasiah Thevar Kayandu by one Karupiah Thevar. The allegation that Karupiah Thevar impersonated O. Rasiah Thevar Kayandu is denied by the respondent, and, what is more, the alleged impersonator himself has declared in the declaration made by him in the form subjoined to section 53 of the Local Authorities Elections Ordinance No. 53 of 1946 that he is the same person whose name appears as O. Rasiah Thevar Kayandu on the electoral list. The petitioner's allegation that Karupiah Thevar is an impersonator is unsupported by any affidavits besides his own. The petitioner states that a prosecution for impersonation is pending against Karupiah Thevar. But that fact does not entitle me to assume that Karupiah Thevar is an impersonator.

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Not only is the petitioner's allegation of " large scale impersonation " not established, but there is also no material before me to prove even the sole instance of impersonation alleged by him. The petitioner is, therefore, not entitled to succeed.

Learned counsel for the petitioner referred me to the *Galway Case* (2 O'M & H 57) the *Ipswich Case* (4 O'M & H 72), and the *Nottingham Case* (1 O'M & H 245). Those decisions do not apply to the instant case.

I am unable, on the facts before me, to uphold learned counsel's contention that in the election under consideration the majority had been prevented from returning the candidate they might have preferred.

In view of the conclusion I have formed on the facts it is unnecessary for the purposes of this decision to discuss the question whether an election may be avoided by " general personation ". But as it has been stated at the Bar that this is the first time that it is sought to have an election set aside by way of *quo warranto* on the ground of general personation I think I should express my opinion particularly as counsel on both sides have addressed me on the matter.

According to the principles of law applicable in England, where it is shown that the corruption was so extensive that there could not have been a free election, an election may be avoided at common law by general bribery, treating or intimidation, even though bribery, treating, or intimidation is not brought home to the candidate or his agents. But those principles have not been regarded as applying to general personation.

In the *Conventry Case* (1 O'M & H 105) the opinion was expressed by Willes J. that if it were established that the agent of the member had got voters personated it would be sufficient fraud at common law to set aside the election. But in the *Belfast Case* (4 O'M & H 108) the Court refused to avoid the election even though thirteen cases of personation were proved because none of them was brought home to the member or his agents. The remarks of the Bench in that case are not without interest. Dowse B. and O'Brien J. observed :—

> " It has been said, and evidence has been given on that basis, that if the personation was general in its nature it might unseat the member, irrespective of any agency at all. With that view we admitted some evidence in the early part of the case, but it is now perfectly apparent that nothing of the kind can be maintained. It would be impossible, even if such were the law, that 13 cases of personation out of a constituency of ever 8,000, and where there were upwards of 3,500 who voted for the successful candidate, could be said to so infect the whole constituency as to make the election void at common law. But I find no authority that the election would be void at common law in such a case as this."

I am in respectful agreement with the views I have quoted and if the question whether an election may be avoided by general personation arises for decision I should be guided by those views.

As at present advised, I am not prepared to hold that an election may be avoided on the ground of personation where it is not possible to get rid of the votes comprising the majority of the successful member by demonstrating that those votes have been cast by personators.

There is no merit in this application, and it is refused with costs.

Application refused.

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

VADIVELU vs. THE INSPECTOR OF POLICE, BADULLA

S. C. 1236/1948—*M. C. Badulla* 6043

Argued on : 30th May, 1949.
Delivered on : 16th June, 1949.

Penal Code, sections 443 *and* 369—*Criminal Procedure Code, section* 152 (3)—*Can a charge of housebreaking and theft be tried summarily by a Magistrate assuming jurisdiction as a District Judge.*

Held : (i.) That a Magistrate who is also a District Judge can try summarily a charge of housebreaking and theft by assuming jurisdiction under section 152 (3) of the Criminal Procedure Code.

(ii.) That the question whether it is " proper " for him to exercise the jurisdiction in a particular case is one for the Magistrate to decide on the facts of that case.

S. Nadesan, for the accused-appellant.
H. A. Wijemanne, Crown Counsel, with *S. S. Wijesinha, Crown Counsel*, for the Crown.

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WIJEYEWARDENE, C.J.

The accused appeals from a conviction under section 443 of the Penal Code and a sentence of two months' rigorous imprisonment.

This appeal comes before a Bench of Two Judges on a reference made by my brother Dias in the following terms :—

1. " I think this case should be decided by a Bench of Two Judges ".

2. " The question is whether a charge of house-breaking and theft, namely sections 443 and 369 or under sections 440 and 369 may summarily be tried by a Magistrate under the powers conferred on him by section 152 (3) of the Criminal Procedure Code ."

3. " In this case the Magistrate assumed jurisdiction before any evidence was led and the case therefore falls within the principle laid down by my brother Nagalingam in the case of *Kandiah et al vs. D. R. O. of Pallai* (1948) 49 New Law Reports 503. On the other hand there is my judgment in *Pancha vs. Veloo* (1946) 47 New Law Reports 567 where I came to a different conclusion after citing a number of authorities ".

I have numbered the various paragraphs for facility of reference.

The question propounded in paragraph 2 has to be answered in the affirmative in view of the language of section 152 of the Criminal Procedure Code which enacts :—

" Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of opinion that such offence may properly be tried summarily he may try the same summarily.....".

Such a Magistrate has, therefore, the jurisdiction to try an offence of that nature but, of course he has to decide whether it is " proper " for him to exercise that jurisdiction in the particular case before him.

I have read carefully the judgments in *Kandiah et al vs. D. R. O. of Pallai* (*supra*) and *Pancha vs. Veloo* (*supra*) mentioned in paragraph 2.

In the former case the Magistrate assumed jurisdiction stating " that the facts were simple and no complicated questions of law or fact were involved ". He made that statement at a time when he had " no material before him excepting the written report itself ". Pointing out these facts Nagalingam J. observed that " the serious nature of the charge is in itself an important factor which must not be lost sight of " in deciding whether the case may be properly tried under section 152 (3). He proceeded to examine the charge and the sentences passed and then remarked that in the circumstances of that case the Magistrate should have " hesitated " to try the case summarily. In that case nine persons were charged with being members of an unlawful assembly with intent to commit robbery. There were six other charges one of which referred to robbery of Rs. 617. The sentences passed on each of the accused aggregated to four years' rigorous imprisonment.

In *Pancha vs. Veloo* (*supra*) one accused was charged with housebreaking and theft and sentenced to six months' rigorous imprisonment. The only point taken in appeal was " that the Magistrate should have taken non-summary proceedings ". Dias, J. referred to a number of authorities and then said :—

" I think the point of law fails. I have read through the proceedings and can find no sufficient ground for setting aside these proceedings and sending the case back for non-summary proceedings ".

I am unable to read these two judgments as being in conflict with each other. They were concerned with the question of fact whether any particular case could " properly " be tried summarily.

In accordance with the view expressed by Dias, J. in paragraph 1 that this case should be decided by a Bench of two judges we permitted counsel to argue the entire appeal before us.

The proceedings commenced with a written report filed by Police Officer on April 8th, 1948, charging the accused with the offence of house-breaking by night with intent to commit theft. The case was called before the Magistrate on April 12th. Without recording any evidence the Magistrate decided to try the case under section 152 (3), as he thought it " expeditious " to do so.

The main evidence for the prosecution was given by one Serasinghe, a junior Assistant Tea Maker of St. James' Estate, Hali-Ela, where the accused was employed as a labourer. He said :—

" I was on night duty, my hours being 4-30 p.m. to 12-30 a.m. I went to the sifting room of the factory about 7 p.m. to check up the windows and the padlocks on the bin boxes. I then went into the nailing room. I saw a bundle of sacks near a bin box. I tried to check up the padlock of the bin box when I saw the sacks moving. I called out. There was no answer. I shouted out there was a rogue. The rogue jumped on me.....He had a kris knife in his hand. I struggled with him .....The key was in the padlock and the padlock was on the frame of the bin box. The padlock was open. The keys of the bin boxes and the keys of the nailing room door and the other keys are in my charge till firing is over (*i.e.* after 7-15 p.m.).....I told the Police I

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was injured with a kris knife.....All the keys are kept in a steel trunk in the office. This trunk is not closed. When the firing is over the steel trunk is sent to the Head Tea Maker's Bungalow and he brings it with him in the morning at 6. I gave the accused a few blows".

The other witnesses for the prosecution were Thomas, a watcher, Vidane, an Engine Driver, and Fernando, the Tea Maker. The first two witnesses came to the sifting room on hearing the cries of Serasinghe and the third, on receiving a message from him. On arriving at the sifting room Vidane and Fernando found it desirable to give "a few blows" to the accused. So did Serasinghe. Even Mr. de Mel, the Assistant Superintendent who came after the Tea Maker could not help giving "a few blows".

Now the defence in the case is that this is a false charge engineered by the Tea Maker who was annoyed at the accused telling the other labourers a few days earlier "that the Head Tea Maker took some tea chests with him when he went on leave". The accused suggested that the other witnesses, excluding Mr. de Mel, have been induced by the Tea Maker to help him in making the charge. He said :—

"Piyadasa came to my line room and told me that the Head Tea Maker wanted me. I then went alone to the Head Tea Maker's Bungalow. The Head Tea Maker asked me to go to the Factory and bring a bulb.....I went to the Factory packing (nailing) room. Mr. Serasinghe, the Assistant Tea Maker was there. I asked him for a bulb. He then took me into a room adjoining the packing room. Mr. Serasinghe then seized my hand and raised cries. Then Vidane, Piyadasa and Thomas came up.....They assaulted me saying that I had come there to commit theft. About five or ten minutes later the Head Tea Maker came there. He remarked, 'you have said that I was a thief; now you have become a thief'. Then Mr. de Mel came. He assaulted me. He asked me why I came there to commit theft. I told him that I did not come there to commit theft. I said that it was the Head Tea Maker who did all this".

I have no doubt that the accused made the accusation against the Tea Maker on the arrival of Mr. de Mel. Mr. de Mel himself said in his evidence :—

"After I struck him (the accused) he spoke. He answered in Tamil which I cannot recollect. He said something to the effect that he and the Tea Maker committed this offence".

We have been seriously handicapped by the failure of the prosecution to produce a sketch showing the positions of the sifting room, the nailing room and the office and the possible means of access which the accused had to the nailing room so as to go and conceal himself near the bin box without being observed by Serasinghe who was all the while in the sifting room. If the Magistrate had taken non-summary proceedings it is most likely that the prosecuting department would have instructed the Magistrate to call for such a sketch before the accused is asked to stand his trial in a Higher Court.

There is moreover an air of unreality about the case for the prosecution. The accused has been employed on the estate for over thirteen years. He has been working in the nailing room itself for a number of years. He must have been well aware of the fact that the assistant Tea Maker went usually to the sifting room shortly after 7 p.m. "to check up the windows and the padlocks in the bin boxes". And yet it is suggested that the accused opened the padlock with a key stolen from the steel trunk and kept the key in the padlock though he knew well that Serasinghe would inspect the padlock in the course of his duty and close it. If this was what happened it looks as if the accused kept the key in the padlock for the express purpose of rousing the suspicion of the Tea Maker. Though Serasinghe received an injury at the hand of the accused he did not choose to show his injury to the Police Constable but only showed the bandage covering the alleged injury. Moreover, the successive attacks made by the various Crown witnesses on the accused seem to me to be indicative more of revenge for a personal wrong than of anger at the attempted theft of estate property.

I am of opinion that the Magistrate who desired to try the case "expeditiously" has not paid sufficient attention to all these matters. The question that caused me some anxiety was whether I should acquit the accused or quash the proceedings and send the case back for non-summary inquiry, but in view of the fact that more than a year has passed since the alleged commission of the offence and the accused has been put to a great deal of expense already, I think the accused should be spared the anxiety and expense of fresh proceedings.

I allow the appeal and acquit the accused.

Appeal allowed.

GUNASEKARA, J.

I agree.

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Present : BASNAYAKE, J.

GIRIGORIS *et al.* vs. PUNCHI SINNO *et al.*

S. C. 185—*C. R. Ratnapura* 2561

Argued on : 8th February, 1949.
Decided on : 12th April, 1949.

Civil Procedure Code Chapter LI—Reference to arbitration—Reference in general terms—No record of desire of parties to arbitrate or of proctor's authority to apply for arbitration—Validity of Award.

In the course of an action the matters in difference were referred to arbitration. The reference was in general terms and did not state the particular matters in difference. The record did not show either that all the parties desired a reference to arbitration or that their proctors had the necessary authority to apply for such a reference.

Held : (i.) That there had been no compliance with the Civil Procedure Code either in regard to the application for a reference to arbitration or in regard to the reference itself.
(ii.) That no finality attached to the award, as it had been made under a reference which was invalid.

Cases referred to :—*Gonsales vs. Holsinger* (1885) 7 S. C. C. 101.
Cassim Lebbe Marikar vs. Samal Dias, (1896) 2 N. L. R. 319.
Menike vs. Ukku Amma, (1915) 18 N. L. R. 413.

H. Wanigatunge, for the appellants.

G. P. J. Kurukulasuriya, for the respondents.

BASNAYAKE, J.

In this action instituted by the plaintiff-respondents (hereinafter referred to as the plaintiffs) against the defendant-appellants (hereinafter referred to as the defendants), the former pray :—

(*a*) that they be declared entitled to 403/2880 shares of a land called Lindagawa Kumbure Godella and that they be placed in quiet possession thereof, and

(*b*) for damages in the sum of Rs. 150 and further damages at Rs. 5 per month from the date of action till possession is restored.

The latter resist the action and ask that it be dismissed with costs.

The case was fixed for trial on 9th April, 1946, but was postponed from time to time. The last postponement was on 24th June, 1947, when the trial was fixed for 2nd September, 1947. The journal entry of that date reads :—

"Mr. M. A. W. Goonesekere for Plaintiffs
Mr. P. Marapona for Defendants
Trial :—
Ot consent all matters in dispute to be referred to arbitration of D. R. O., Kuruwiti Korale, whose decision will be final.
Reference papers 16-9-1947."

Underneath the above entry appear the signanatures in Sinhalese of the 1st, 2nd, 3rd, and 7th plaintiffs and the 1st, 2nd, 3rd, and 4th defendants, with the subscription "Explained by me" and the signature of a person whose identity is not disclosed. The 4th, 5th, 6th, and 8th plaintiffs did not sign that entry either on that day or subsequently. The record does not show that they were even present on 2nd September, 1947, and desired that the matter in difference be referred to arbitration, nor does it appear that the proctors who represented the respective parties had the special authority contemplated in section 676 to apply for a reference to arbitration.

Before I proceed further it will be convenient to set out below the journal entries of 16th and 30th September, 1947.

'16-9-1947 Mr. M. A. W. Goonesekere for Plaintiffs
Mr. P. Marapona for Defendants
Commission for arbitration not issued as arbitration fees is (*sic*) not deposited.
4. (Sgd). Arnolis Appu
5. (Sgd). Babasingho (in Sinhalese)
Explained by me.
(Sgd). A. L. A. Majeed (Intr.)
Call 30-10-1947."
'30-9-1947 Appearances as above.
Case called. 5 & 6 present and sign record.
Arbitration fees 23-10-1947.
5. Thumb Mark of Menikhamy
6. (Sgd). U. K. A. Peiris."

On 23rd October, 1947, the order was made "Issue commission for 2-12-1947." On 2nd December, 1947, there was no return to the commission, but the D. R. O. appeared and applied for time. An extension till 8th January, 1948, was granted. On 16th December, 1947, the award was received in Court. On 17th February

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1948, an application under section 687 of the Civil Procedure Code was made. The following are the grounds stated therein :—

"1. The award of the Arbitrator is invalid for the following reasons :—

(*a*) That there was no order of reference or an application for reference as contemplated in section 676 of the Civil Procedure Code.

(*b*) The award was not made within the period allowed by the Court.

(*c*) That the award is not dated.

"2. The Arbitrator was guilty of misconduct in admitting the documents marked P1 to P5 unstamped and P1 to P9 untranslated.

"3. The Arbitrator was further guilty of misconduct in not allowing the defendants to call evidence and produce their documents in support of their case."

After notice to the parties on 6th May, 1948, the learned Commissioner heard the application and disallowed it. This appeal is from that order.

A reference to arbitration in the course of an action is governed by Chapter LI of the Civil Procedure Code. In the instant case the record does not show either that all the parties to the action desired the matters in difference between them to be referred to arbitration or that their proctors had the necessary authority to apply for a reference to arbitration. Section 676 (2) provides that every reference of any matter in difference between the parties to an action shall be in writing and shall state the particular matters sought to be referred. I have not been able to find, nor has learned counsel drawn my attention to, any writing containing the particular matters sought to be referred to arbitration. The reference itself is in general terms and does not state the particular matters in difference. The relevant portion of it reads :—

"Whereas the abovenamed plaintiff and defendant have agreed to refer all matters in difference between them in the abovenamed action to your arbitration and award :—

"You are hereby appointed arbitrator accordingly to determine all the said matters in difference between the parties and with power to determine which party shall pay the costs of the action and of this reference."

A reference in the above form does not in my view satisfy the provisions of section 677 of the Civil Procedure Code which in my opinion require the court to state in the reference the particular matters which the arbitrator has to determine. The court should not leave the matters in difference to be ascertained by the arbitrator as it has been done in this case.

It is clear that in the instant case there has been no compliance with the statute either in regard to the application for a reference to arbitration or in regard to the reference itself. The finality given by section 692 to an award attaches only to an award made in pursuance of a reference to arbitration in compliance with the Code. Here there is no such award. Although the Full Bench case of *Gonsales vs. Holsinger* (1885) 7 S. C. C. 101, cited by learned counsel for the defendants is a decision under the Arbitration Ordinance, it applies to the instant case as the principle involved is the same. It was argued by learned counsel for the plaintiffs that the parties, having taken part in the arbitration proceedings, are not entitled to canvass them. I am unable to uphold that view. The participation of the parties in an arbitration does not give statutory authority to proceedings which are void *ab initio*. (*Cassim Lebbe Marikar vs. Samal Dias*), (1896) 2 N. L. R. 319.

Learned counsel for the plaintiffs placed great reliance on the case of *Menike vs. Ukku Amma*. (1915) 18 N. L. R. 413. In that case, the parties having signified their desire to refer their dispute to arbitration, the Commissioner of Requests made the following entry in his record which was signed by the parties.

"The parties agree to refer all matters in dispute between them to the arbitration of Mr. J. W. Udulagama, Interpreter Mudaliyar of this Court, whose award shall be final."

The Commissioner of Requests thereupon proceeded on the footing that an application under section 676 (2) had been made. It was held in appeal that the agreement constituted a valid reference.

The instant case is not on all fours with the case cited by learned counsel, and I am unable to regard it as binding on me. With great deference to the learned judges who decided that case it seems to me that that decision does not pay due regard to what I think are the imperative requirements of section 676 (2).

The appeal is allowed with costs. The proceedings after 24th June, 1947, are set aside and unless all the parties desire to have the matters in difference referred to arbitration the action should take its normal course.

Appeal allowed.

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Present : GRATIAEN, J.

SIRIMAL vs. K. T. S. DE SILVA

S. C. 34—M. C. Balapitiya 61651

Argued on : 31st March, 1949
Decided on : 6th April, 1949

Urban Councils Ordinance No. 61 *of* 1939, *section* 238—*Charge that the member was directly or indirectly concerned or had financial interest in contract made with Council—Credit sale of soap to Council from member's shop through salesman—Payment for soap authorised by member as Chairman—Is the member guilty?—The test to be applied.*

Section 230—*Is the period of* 3 *months referred to in the section to be reckoned from the date of the credit sale or from the date of payment of price?—Continuing offence.*

On a complaint made on 7th September, 1948 to Court, the accused was charged under section 238 (2) of the Urban Councils Ordinance of 1939 in that, while being a member of the Urban Council of Ambalangoda, he was on or about the 8th June, 1948, directly or indirectly concerned in a contract made with the said Council, the alleged contract being the contract of sale by which the accused's shop had sold 48 packets of Lux soap to the Council on 6th May, 1948.

The evidence established : (*a*) that the accused was the Chairman of the Ambalangoda Urban Council at the relevant dates ; (*b*) that he owned a shop in the town known as the Central Stores ; (*c*) that on the 6th May, four dozen packets of Lux soap were sold on credit to the Council by the accused's salesman on a requisition signed by the Secretary of the Council for and on behalf of the Chairman ; (*d*) that the bill presented for the price due was paid on the 8th June, 1948, on the express authority of the accused in his capacity as the Chairman ; (*e*) that the accused was not aware of the sale on the 6th of May. The learned Magistrate held that the charge was proved but the accused was not liable for any penalty by reason of the provisions of section 230 of the Ordinance, as the complaint of the offence was made three months after its commission.

The complainant appealed.

Held : (i.) That the test to be applied in this case is whether the accused had the knowledge or at least the means of knowledge that the council was the other contracting party to the contract of sale in question.

(ii.) That the evidence established that the accused had at least the means of such knowledge, and, therefore, he was guilty.

(iii.) That the price of the goods which were the subject matter of the contract of sale by itself cannot help the accused, nor the fact that the contract represents a single transaction.

(iv.) That the provisions of Section 230 of the Urban Councils Ordinance does not apply as there was a continuing offence punishable under section 238 (2) until the contract was discharged by payment on 8-6-1948.

Per GRATIAEN, J.—" In transactions of this nature the knowledge of a servant acting within the scope of his employment must, I think, be regarded as the knowledge of his master unless the master can at least satisfy the Court that he took all possible steps to prevent the commission of the offence. If it were otherwise, the statutory prohibition could be set at naught by any employer who leaves the conduct of his business in another's hands."

Cases referred to : *Nutton vs. Wilson* (1889) 58 L. J. Q. B. 443.
Holden vs. Southwark Borough Council (1921) 1 Ch. 557.
Nell vs. Longbottom (1894) 1 Q. B. 764.
Tranton vs. Astor (1869) 4 C. P. 311.
Royse vs. Birley (1898) 3 Q. B. 306.
Coppen vs. Moore (1898) 3 Q. B. 306
Galapathy vs. Martin (1948) 50 N. L. R. 17.

D. S. Jayawickrema for the complainant-appellant.

H. V. Perera, K.C., with *U. A. Jayasundere, K.C.*, and *C. G. Weeramantry* for the respondent.

GRATIAEN J.

This is an appeal against an acquittal, and has been filed with the sanction of the Attorney-General.

The accused was, throughout the period relevant to the present proceedings, the Chairman of the Urban Council of Ambalangoda. He also owned a shop in the town known as the Central Stores. Early in May, 1948, supplies of soap in the Council's resthouse ran short, and the Council's officers bestirred themselves with refreshing promptitude to make good the deficiency. On 6th May the Secretary of the Council at the storekeeper's request forwarded a written order P1 to the accused's shop for the supply of 4 dozen packets of Lux soap to the Council. The requisition was signed by the Secretary for and on

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behalf of "the Chairman". The order was executed on the same day by the accused's salesman, but the storekeeper who actually attended to the transaction admitted in evidence that the accused was not personally aware at the time that the soap had been purchased from the Central Stores. It was a credit sale, and in due course an account P6 was rendered by the shop to the Council for payment. The bill was paid on 8th June on the express authority of the accused in his capacity as Chairman of the Council. He has stated in his evidence that he did not appreciate that he was in fact authorising payment to himself, but this statement had been rejected by the learned Magistrate. The learned Magistrate's finding to the effect that the accused read and clearly understood that the bill P6 was a demand for payment from his own shop, has not been challenged in appeal.

The evidence in the case, as disclosed in the questions put in cross-examination to more than one witness, shows that the atmosphere in the Ambalangoda Urban Council was very far from cordial at the time of this transaction. Fortunately it is not necessary for me to examine and far less to adjudicate upon the merits, if any, of the petty squabbles which seem largely to have influenced the actions of the rival parties and their respective supporters. Suffice it to say that on 7th September, 1948—the date is important—the complainant, claiming somewhat speciously to be actuated by a mission to "purify" local politics and incidentally public life, instituted the present proceedings in the Magistrate's Court of Balapitiya, charging the accused with the commission of an offence punishable under section 238 (2) of the Urban Councils Ordinance No. 61 of 1939. The substance of the charge is that, whilst being a member of the Council, he was on or about 8th June, 1948, directly or indirectly concerned in a contract made with the said Council—the alleged contract being the contract of sale by which the accused's shop had sold 48 packets of Lux soap to the Council on 6th May, 1948.

After trial the learned Magistrate came to the conclusion: "that the commission of the offence complained of had been established beyond all reasonable doubt, but that the accused was not liable to any fine or penalty by reason of the provisions of section 230 of the Urban Councils Ordinance of 1939. The accused was accordingly acquitted.

In appeal it was argued on behalf of the accused that the learned Magistrate had wrongly decided that the evidence disclosed the commission of an offence. Counsel for the complainant, on the other hand, supports this part of the judgment, but challenges the finding that the accused was protected by the provision of section 230 from the consequences of his offence. The facts of the case as decided by the learned Magistrate are not in dispute and, as far as they are relevant to this appeal, are substantially as I have set out earlier in my judgment.

The main questions for consideration are whether the transaction by which the accused's salesman sold a quantity of soap to the Urban Council, of which the accused was admittedly a member at the relevant date constituted a "contract" of the kind which is prohibited by section 238 (1) of the Ordinance, and if so, whether the accused was "concerned or had any financial interest in" such contract within the meaning of the section. It is only if these questions are answered in the affirmative that the operation of section 230 would arise.

Section 238 (1) of the Ordinance prohibits any member, officer or servant of the Council from directly or indirectly being concerned or having any financial interest in any contracts or work made, done, or executed for the Council. Section 238 (2) declares that a person so concerned or interested shall (subject to a proviso which is inapplicable here) be guilty of an offence, and shall also be subject to a disqualification to which I shall later refer. Legislation of this kind is not unfamiliar in the case of local bodies, and, notwithstanding differences in language which sometimes create additional problems, the intention as Lord Esher said in *Nutton vs. Wilson* (1889) 58 L. J. Q. B. 443, "is clearly to prevent members of local bodies, which may have occasion to enter into contracts, from being exposed to temptation or even *to the semblance of temptation*." Lindley L.J. said in the same case that "the object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise". In *Holden vs. Southwark Borough Council* (1921) 1 Ch. 557, Astbury J., considered the scope and object of analogous legislation and decided that the enactment had to be construed as referring to exceptional bargains or contracts entered into for profit between the person in question and the corporation, when the interest and duty of the member might come into conflict. He accordingly took the view, which I readily and respectfully adopt, that *some limitation must be put upon the general words of the section*." The difficult problem which confronts itself, however, is, the legitimate extent to which limitations can be placed upon the words without doing violence to their plain meaning and to the accepted canons of construction. Moreover, the

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right to limit must itself be limited if the mischief aimed at is to be avoided. Clearly, an actual and conscious conflict between interest and duty need not be established in each particular case, for proof of such a conflict would seldom be forthcoming. Rather is it sufficient to prove a possible conflict or, in the words of Lindley L.J., "the semblance of temptation." Indeed, it seems to me that the mischief which the Legislature seeks to avoid is the risk of temptation not only in the way of the member concerned in the contract but also in the way of other officers of the local authority who may, in theory, be less disposed to scrutinise transactions in which an influential member of the local authority is known to have some financial interest. Again it would not be legitimate to construe the section so as to limit its operation to contracts which are proved to have been *corruptly* entered into. In *Nutton vs. Wilson* (1889) 58 L. J. Q. B. 443, a member was expressly absolved from the stigma of corrupt intention but was nevertheless held to be disqualified. I am also satisfied that, as learned counsel themselves concede, the price of the goods which forms the subject-matter of a contract of sale cannot by itself turn the scales one way or the other. "That," said Cave J., in *Nell vs. Longbottom* (1894) 1 Q. B. 764, "is a matter into which we cannot enter, as the Legislature has not entrusted us with any dispensing power." It is noteworthy that in that particular decision one of the grounds for holding a member to be disqualified was that he had sold half-a-gallon of oil to the local authority for only four-pence. Indeed, it would be very difficult, without a clear direction from the language of the enactment itself, to draw the line with any confidence between contracts which are clearly mischievous at one end and others which, when regarded as isolated transactions, seem to be of trivial consequence. Nor am I satisfied that the circumstance that a particular contract represents a single transaction can necessarily make a difference. It seems to me that certain *obiter dicta* of Low J., in "*Tranton vs. Astor*" (1869) 4 C. P. 311, go too far. If the only contracts which are prohibited are those of a continuing character, the decision in *Royse vs. Birley* (1898) 3 Q. B. 306, which he purported to follow and to which I shall shortly refer might well have been disposed of on that simple ground. If that were the law, a member could with impunity derive a very considerable profit from an isolated transaction, whereas another would be disqualified for entering with less profit into a series of transactions. I cannot conceive that the Legislature did not necessarily intend to bring both such members within the ambit of the prohibition.

For the purpose of deciding whether the sale of soap on the 6th May, 1948, renders the accused liable under section 238 (2) I am content to accept the submission of Mr. H. V. Perera that this transaction represented nothing more than a sale by the accused's salesman over the counter in the ordinary way of business. The question is whether such transactions, must always, upon a reasonable interpretation, be excluded from the operation of the section. In *Royse vs. Birley* (1898) 3 Q. B. 306, the Court of Common Pleas considered the case of a Member of Parliament whose election was challenged on the ground that he "held or enjoyed" an interest in two contracts with the Government. The second of these contracts was very similar in nature to the transaction with which we are now concerned. Shortly after Mr. Birley's election, an officer of a Government establishment purchased certain goods for the establishment from a shop in which Mr. Birley had a proprietary interest. The officer making the purchase however did not inform the salesman that he was contracting for the Government "nor did he supply the means of ascertaining that he was so or not." The salesman therefore who supplied the goods was not aware that he was dealing with the Government. In these circumstances Willes J., held that the contract did not disqualify Mr. Birley "because there was a total absence of knowledge that the contract was with the Government." Having regard to the highly penal provision of the statute, he took the view that "knowledge *or at least means of knowledge* should be a condition of the penal consequences which are to follow." Montague Smith J., agreed that "there must be a contract which is known *or which at least ought reasonably be known* by the person sought to be disqualified to be a contract with the Government." I would with great respect adopt in the present case the test which commended itself to the learned judges in *Royse vs. Birley* (1898) 3 Q. B. 306. The principle appears to have been regarded in England as settled ever since. In *Nutton vs. Wilson* (1889) 58 L. J. Q. B. 443, it was conceded by counsel during the argument at page 445 that the cases "where trivial articles are purchased at the shop of a local member *without his knowledge*" fell outside the scope of the statute under consideration.

The test then to be applied is whether in the present case the appellant had the knowledge *or at least the means of knowledge* that the Council was the other contracting party to the contract for the sale of 48 packets of soap on 6th May, 1948.

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If the answer to this question be in the affirmative, I think that however innocent the transactions may have been, it was within the mischief which section 238 seeks to avoid.

In the present case the accused had no personal knowledge of the transaction when the soap was actually ordered and delivered. But unfortunately that circumstance is not in itself sufficient to entitle him to an acquittal. He had so arranged the affairs of his shop that, as is usual in such cases, he delegated its management largely to someone else. That person not only possessed the means of knowledge but knew in fact that the soap was being ordered for the Urban Council, of which the accused, his master, was Chairman. The requisition P1 and the subsequent bill P6 establish this beyond doubt. In transactions of this nature the knowledge of a servant acting within the scope of his employment must I think be regarded as the knowledge of his master unless the master can at least satisfy the Court that he took all possible steps to prevent the commission of the offence. If it were otherwise, the statutory prohibition could be set at naught by any employer who leaves the conduct of his business in another's hands. *Coppen vs. Moore* (1898) 3 Q. B. 306. In the present case the fact that the accused later adopted the transaction and knowingly authorised the payment of the price makes the strict application of the legal principles involved less disagreeable than it would otherwise have been.

For the reasons which I have given I hold, though with little enthusiasm, that the evidence in the case disclosed the commission of an offence prohibited by section 238 of the Ordinance. I cannot accept the submission that, on the analogy of the judgments of the Court in *Royse vs. Birley* (1869) 4 C. P. 311, regarding the earlier of the two contracts proved in that case, section 238 does not apply to contracts of sale where the member concerned has already fulfilled his obligations under the contract, so that all that remains is for him to receive payment of the price from the local authority. In *Royse vs. Birley* (1869) 4 C. P. 311, the defendant had entered into a contract with the Government and had performed his obligations under it *before* the date of his election to Parliament, and it would clearly have been inequitable to hold him disqualified by reason only of the Government's delay in paying him what was his due. In that case the contract was at its inception unobjectionable, and no disqualification could attach to a contractor who secured election to Parliament thereafter unless at that later date the contract still remained unperformed by him in any respect. But in the present case the contract of sale was entered into at a time when the accused was already a member of the Council. If the view that the section aimed only at executory contracts was intended by Willes J., to be of general application, he would not have found it necessary to insist upon "knowledge" as a condition of Mr. Birley's guilt in the case of the later contract executed and instantaneously performed by his agents *after* the date of his election to Parliament.

It remains only to consider whether the learned Magistrate was justified in holding that the accused is protected by the provisions of section 230 of the Ordinance. Section 230 declares that "no person shall be liable to any fine or penalty under this Ordinance.....for any offence triable by a Magistrate unless the complaint respecting such offence shall have been made three months next after the commission of such offence." The learned Magistrate took the view that the contract was concluded on 6th May, 1948, when delivery of the soap was effected, and that the institution of proceedings on 7th September, 1948, was therefore out of time. I think that this was taking too narrow a view of the transaction. Payment of the price was not made by the Council until 8th June (which date falls within the prescribed period) and the contract was clearly subsisting until that date in so far as the Council's obligations were concerned. The contract had not till then been finally discharged in any of the ways recognised by law, and the accused had a financial interest therein which was very real. I hold that section 230 does not apply because there was a continuing offence punishable under section 238 (2) until the contract was finally discharged by payment on 8th June, 1948. It was not the making of the contract but "being concerned or having a financial interest" in it which constituted the offence complained of.

The verdict of acquittal recorded by the learned Magistrate must be quashed. It is with much regret that I have come to this conclusion. The transaction proved against the accused is of a trivial nature, but that is a circumstance which I am powerless to consider except on the question of sentence. It is very likely—although this affords no defence—that he was unaware that transactions of this nature were in fact prohibited by law. I would use as my own in this connection the concluding words of Lord Esher in *Nutton vs. Wilson* (1889) 58 L. J. Q. B. 443. "I do not find that the accused acted with any corrupt motive. But he has made a blunder and brought himself within the provisions of this act." I think that it would meet the ends of

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justice if, in setting aside the order appealed from, I record my findings that the accused is guilty and, without proceeding to conviction, make order under section 325 of the Criminal Procedure Code discharging him with an admonition. I make order accordingly.

As I do not proceed to conviction, it is not necessary to consider whether I have the power to order, by way of "punishment", that the accused be declared disqualified from sitting in Council. Whether or not any *statutory* consequences follow from the transaction which I have held, for the purposes of the present appeal, to constitute an offence, it is not for me to say. Learned Counsel had invited me to hold in this connection that *Galapathy vs. Martin* (1948) 50 N. L. R. 17, was wrongly decided. It is not necessary for me to consider this question in view of the order which I have made.

The appeal is now disposed of, and the appellant is entitled to his victory, for what it is worth. It is only to be hoped that what has transpired will not in any way discourage the praiseworthy aspirations of any resthouse-keeper to provide soap for the customer.

Appeal allowed.

Present : CANAKERATNE, J. (President), GRATIAEN, & GUNESEKERE, JJ.

REX vs. GUNATILAKE

Appeal No. 17 *of* 1949 *with application No.* 33 *of* 1948—68 *M. C. Gampaha.*

Argued on : 28th and 29th March, 1949.
Decided on : 5th April, 1949

Court of Criminal Appeal—Charge to the jury—Direction that 'as a matter of law' the jury must not pay attention to evidence of accused's good character—Misdirection.

Held : That it was a misdirection to tell the jury "as a matter of law" that they "must not pay the slightest attention" to the evidence of the accused's good character.

Cases referred to : *Rex vs. Noble* (20 Cr. App. Rep. 191).

H. V. Perera, K.C., with *Titus Goonetilleke* and *A. B. Perera*, for the accused-appellant.
R. A. Kannangara, Crown Counsel, for the Attorney-General.

GRATIAEN J.

The appellant in this case was charged with the murder of P. K. Karunaratne Silva (to whom I shall hereafter refer as "the deceased"). It is common ground that prior to 17th July, 1948, on which date the deceased was stabbed once by the appellant in the upper arm and died in consequence, there had been no ill feeling between them. The appellant and the deceased were at the time students of Ananda Vidyalaya School in Gampaha. On 17th July there was an earlier incident, in the course of which the deceased struck the appellant. This incident was relied on by the prosecution as providing the motive for what occurred later in the day when the parties met again, on which latter occasion the appellant at some stage, as he himself admitted at the trial, stabbed the deceased. The only eye-witness called by the Crown to speak to the events of the second incident was the deceased's father. According to him, he and the deceased were returning from the Police Station, after making a complaint regarding the earlier incident, when the accused's father, unaccompanied in the first instance, came up and struck the deceased ; thereupon the accused arrived on a bicycle, dismounted, and, having first attacked the witness, rushed up and stabbed the deceased.

In his dying declaration, however, which was recorded on the same day by a Justice of the Peace, this witness said that his son had been stabbed not by the appellant but by the appellant's father, and in his account to the Police of what had happened he merely stated, with regard to the injuries sustained by the deceased, that he "saw him bleeding." Mr. Perera submits that these inconsistent statements, and particularly the dying declaration implicating the appellant's father (who admittedly did not stab the deceased at all) create serious doubts as to whether the witness did in fact observe how the deceased came by the fatal injury. In other words, the inconsistency becomes material, when the circumstances in which the stabbing occurred, came to be considered by the Jury.

A witness Arnolis was also called for the prosecution. He claimed no personal knowledge of what had taken place, but stated that the deceased had told him that it was the appellant who had stabbed him. This evidence was attacked by the defence as untrue.

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The appellant gave evidence in his own defence. He admitted having stabbed the deceased, but his version is that he did so in entirely different circumstances to those spoken to by the deceased's father. According to him he arrived on the scene after the altercation had commenced, and saw the deceased on the point of stabbing the appellant's father. He thereupon stabbed the deceased in the arm in order to save his father's life. On this version, if accepted by the jury, his action was justified and he would have been entitled to an acquittal.

At the conclusion of the learned judge's charge the jury retired and in due course returned a verdict against the appellant that he was guilty of the offence of culpable homicide not amounting to murder. The foreman explained, in answer to the judge, that in their view the appellant "had no murderous intention." The appellant was sentenced to a term of 10 years' rigorous imprisonment.

The main ground of appeal was that at the trial the defence called as a witness the appellant's headmaster who gave evidence of the appellant's good character, but that the learned judge in his summing-up had gravely misdirected the jury by telling them, *inter alia*, "as a matter of law" that they must not pay "the slightest attention to this circumstance."

The presiding judge's charge to the jury on this matter was as follows :—

> "Then gentlemen you are also told that the character of an accused person is a fact to be taken into consideration, a circumstance that some judges do direct juries in cases on, that the good character of an accused person is a factor to be taken into consideration, but speaking for myself as a matter of law, I direct you that you will not pay the slightest attention to that circumstance, because if you have a man of the most exemplary character you are not going to act upon that, if a case is proved beyond reasonable doubt. On the other hand a man may be a villain. If the evidence does not prove the case beyond reasonable doubt against him the fact that he is a villain, his character has nothing to do with it. If after hearing the whole of the case you have doubts in your minds, it is immaterial even if there is evidence of bad character. You must give the benefit of the doubt to the accused. Similarly if the case is proved beyond reasonable doubt against an accused person the fact that he has got a good character has no bearing on the question. It is sometimes put in this way by judges. If you find doubts in your minds on hearing the case for the prosecution and the defence and if the man's character is a good character, then give the benefit of the doubt to him. I go further and say, 'If you have any doubts in your minds after considering the prosecution and the defence, after viewing the whole case together, then you must give the benefit of the doubt to the accused."

The majority of us are of the opinion that the effect of this direction, taken as a whole, was to withdraw entirely from the jury's consideration the evidence relating to the appellant's good character, and that the jury must have understood that, whatever view they might be disposed to take of the other evidence in the case, they were precluded in law from attaching any weight whatsoever to the evidence of the appellant's good character. Upon that interpretation of the summing-up, the learned judge has misdirected the jury in law.

In this country Section 53 of the Evidence Ordinance expressly declares that in criminal proceedings the fact that the person accused is of good character is relevant, and his good character is therefore one of the matters which, in view of the definition of the word "proved" in Section 3, the jury should take into consideration before arriving at a verdict. It was therefore a misdirection to tell the jury "as a matter of law" that they "must not pay the slightest attention" to evidence of the accused's good character. Such evidence may of course in the facts of a particular case carry little or no weight but cannot properly be declared to be totally irrelevant. In *Rex vs. Noble* (20 Cr. App. Rep. 191), the accused put his character in issue, but the Chairman "categorically told the jury that this consideration was immaterial and not for them." The Court of Criminal Appeal in England quashed the conviction on the ground that there was misdirection. The majority of us think that this decision should be applied in the present case.

The only question which remains for consideration is whether the conviction of the appellant can be upheld notwithstanding the ruling that there has been misdirection in law. There was a conflict of evidence with regard to the circumstances in which the deceased was stabbed, and the majority of us find ourselves unable to arrive at the conclusion that the jury, if properly directed, would not have taken a view favourable to the defence. We cannot therefore say that no substantial miscarriage of justice has actually occurred. The conviction is accordingly quashed and the appellant is acquitted.

Conviction quashed.

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IN THE COURT OF CRIMINAL APPEAL

Present : WIJEYEWARDENE, C.J., (President), CANEKERATNE & GUNASEKERA JJ.

C. C. A. Application No. 91/1949—*S. C. No.* 24—*M. C. Teldeniya* 6247 *First Midland Circuit* 1949/*Kandy Assizes.*

REX vs RETIGAHALANDEGEDERA RAN BANDA.

Argued on : 18th July, 1949.
Decided on : 20th July, 1949.

Court of Criminal Appeal—Accused convicted of murder of his wife's paramour—Plea of provocation—Evidence that accused's wife lived with paramour for one month before offence—Production by prosecution of document referring to agreement by accused and wife to cancel marriage—No legal proof of document—Charge to Jury based on statements in document—Retrial.

Where the accused was charged with the murder of the man with the whom accused's wife was living at the time of the incident and one of the pleas of the accused was that the act was committed under grave and sudden provocation and the Judge directed the Jury on the basis of certain statements in a document not properly proved by the prosecution which statements had the effect of negativing the plea of provocation and there was no other evidence to support the direction negativing the plea of provocation.

Held : That the conviction for murder could not stand as it was difficult to say that the Jury would have refused to entertain the plea even if the document was not read and the trial Judge abstained from making the observations based on the document.

D W. F. Jayesekere, for the accused-applicant.
H. A. Wijemanne, Crown Counsel, for the Crown.

WIJEYEWARDENE, C.J. (President).

The accused was found guilty of the murder of one Herath Hamy on September, 21, 1948.

The chief witness for the Crown was K. Tikiri Banda, a servant of Herath Hamy. He said that Mutu Menika, the wife of the accused, came with her three-year old son to Herath Hamy's house about a month before his death and continued to live in his house up to his death. The only other occupants of the house besides Mutu Menika during that period were her child Herath Hamy and Tikiri Banda. The accused was living about five miles away. On September, 21, Herath Hamy and the other inmates of his house retired after their dinner and "the deceased (Herath Hamy) Mutu Menika and the child slept in the room on mats" while Tikiri Banda slept in "the kitchen passage". Sometime later, Tikiri Banda was awakened by Mutu Menika's cries and saw the accused coming out of the room. The accused cut his right hand and ran away. Entering the room he found Herath Hamy injured and dying. In the course of his evidence Tikiri Banda said:—

"Mutu Menika and her child had been living with the deceased for one month before he died. The accused used to visit his child. He visited his child three or four times during that month. The accused well knew his wife was the mistress of the deceased. He raised no objection when he visited the child. The deceased was also present. They were quite friendly".

It is not clear why Tikiri Banda was allowed to say that the accused "well knew" that Mutu Menika was living as the mistress of Herath Hamy.

Some other witnesses gave evidence to the effect that they saw the accused near the house of Herath Hamy shortly before or after the commission of the offence. According to the opinion of the medical witness Herath Hamy must have received his injuries about 7-30 p.m. The Crown relied further on a petition P8 alleged to have been forwarded by Mutu Menika on July 27 to the Government Agent Central Province referring to the agreement between her and her husband "to cancel the marriage". The record shows that the accused's Counsel had "no objection to P8 being read".

The main defence of the accused was that he did not commit the offence. The Counsel for the accused however addressed the Jury on the plea of provocation also. In respect of that plea the trial Judge said :—

(*a*) "On the 27th July, 1948 (that is another important date) the document P2 which was produced at the request of the defence Counsel

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shows Mutu Menika was asking for a divorce, and she stated also that the accused also was willing for the divorce, and it was there stated as a matter of fact that the accused himself was desirous of contracting another marriage".

(*b*) "With the approval and consent of the accused, Mutu Menika commenced to live and co-habit with the deceased as his mistress".

(*c*) "On the question of grave and sudden provocation which the defence Counsel has raised in his closing speech that is a matter for you to consider. Is it a fact or is it not a fact that one month before the deceased man died the accused voluntarily, of his own accord and free will, handed over his lawful wife to the deceased man with the child to live and reside with the deceased? What did the accused expect if that is the truth? Did he expect that the deceased and Mutu Menika would live in two rooms of the house with a desert stretching in between? Would not that, if the prosecution evidence is true, make the accused realize that cohabitation as man and wife would take place between them? And if then the accused knew that these two were going to live as man and wife, can it be said that even if the accused saw the two people lying side by side or actually in the act of copulation that would cause any provocation to the accused who had voluntarily surrendered the person of his wife to the deceased to be his mistress? That is the point. On this plea of grave and sudden provocation it is said that the accused suddenly coming up after dinner to sleep with his wife, or for some other purpose to enjoy the society of his wife or to see his child, he saw these two people on a mat or in the act of copulation and he was incensed, (that is if you find it was the accused who cut the deceased man), and he stabbed the deceased, and that therefore his offence is not murder but culpable homicide not amounting to murder. But the Crown answers that by saying, can there be grave and sudden provocation when the man one month before the event voluntarily surrendered the person of his wife to the embraces of the deceased"?

The document P8 was not proved. There is no evidence that P8 was sent by Mutu Menika, the wife of the accused, and no attempt was made to prove the statements in it. The fact that accused's Counsel had "no objection" to P8 "being read" did not dispense with the need for proof of P8 or render admissible evidence otherwise inadmissible. The document P8 must have been considered by the Jury as tending to negative the plea of provocation to an appreciable extent. If the accused was anxious to divorce Mutu Menika and contract another marriage the Jury might have thought it somewhat unlikely that the accused would be provoked on seeing her and the deceased sleeping in the same room.

I am unable to find any evidence in the case to justify the statement that Mutu Menika was living with the deceased as his mistress "with the approval and consent of the accused" or that the accused "had voluntarily surrendered the person of his wife to the deceased to be his mistress". The material evidence of Tikiri Banda which is the only evidence on the point is quite consistent with Mutu Menika coming to the house of the deceased as the result of some misunderstanding between her and the accused and the accused attempting to persuade her to go back and live with him.

It is difficult to say that in this case the Jury would have refused to entertain the plea of provocation even if, P8 was not read in evidence and the learned trial Judge abstained from making the observations referred to by me.

We quash the conviction and order a new trial.

New trial ordered.

Present : BASNAYAKE, J.

KATHIRGAMU & ANOTHER vs NADARAJAH & ANOTHER

S. C. 111—*C. R. Point Pedro* 1382

Argued on : 1st and 11th March, 1949.
Decided on : 8th June, 1949.

Use and occupation—Action for—Foundation for such action—Can it be maintained against a defendant who claims to be a co-owner.

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Held: (i.) That to maintain an action for use and occupation there must be evidence of the existence of the relationship of landlord and tenant between the plaintiff and the defendant, or evidence which gives rise to a presumption of that relationship.

(ii.) That an action for use and occupation cannot be maintained against a defendant who claims to occupy the land as of right.

Cases referred to: *Gibson vs. Kirk*, (1841) 1 Q. B. 850.
Perera vs. Fernando, Ramanathan's Reports, 1863-68, p. 83 at 86.
Perera vs. Fernando, Ramanathan's Reports, 1863-68, p. 83 at 87.
Perera vs. Thelenis Peries, 5 S. C. C. 133.

C. Thiagalingam, for the appellants.

H. W. Thambiah, with *S. Sharvananda*, for the respondents.

BASNAYAKE J.

This is an appeal on questions of law from the judgment of the Commissioner of Requests of Point Pedro. The defendants are the appellants and the plaintiffs are the respondents. The latter allege in their amended plaint that the former used and occupied 30 *paddies* of a land called Silaikaddaithoddam belonging to the plaintiffs from July, 1944, to the end of June, 1946, agreeing and undertaking to pay the plaintiffs' agent Thangammah, widow of Velupillai the sum of Rs. 300 as compensation for such use and occupation. They seek to recover the sum of Rs. 300 which they allege the defendants have failed to pay. The defendants deny the allegations of the plaintiffs and ask that the action be dismissed.

The following issues were framed at the trial:—

"1. Did the defendants use and occupy 30 *paddies* of the land called Silaikaddaithoddam belonging to the plaintiff from July, 1944, to 30-6-1946?

2. If so, what is the reasonable compensation

3. Does the amended plaint disclose a cause (*sic*) against the defendant?

4. Can the agreement referred to in the plaint be enforced in view of Section 2 of the Prevention of Frauds Ordinance?

5. Is the action correctly instituted?

6. Did the 2nd defendant use and occupy this land?"

The learned Commissioner of Requests, who has answered, in favour of the plaintiffs, all the issues except the fourth, which was not pressed by the defendant who suggested it, does not appear to have had before his mind the true principles applicable to an action for use and occupation. It is necessary, therefore, before I discuss the facts of the instant case, to refer to the principles underlying such an action.

The action for use and occupation is founded on some contract or promise, express or implied. (Foa on Landlord & Tenant, 7th Edn, p. 392). The fact of occupation by one person of premises belonging to another, by permission express or implied, gives rise to a presumption that a reasonable compensation for their use has been agreed upon between the parties. (*Gibson vs. Kirk*, (1841) 1 Q. B. 850). It is essential that the defendant must have held or occupied the premises as tenant thereof to the plaintiff, or by his permission or sufferance. There need not be an actual demise to support this action. A mere agreement for a lease, coupled with proof of possession thereunder, is sufficient. The principle is, that if a person have the actual use or enjoyment of land by the permission or on sufferance of another, whether there be a demise or not, this form of action may be maintained to recover the agreed rent (if any) or a reasonable satisfaction for such use and occupation. This Court has held so far back as 1884 (*Perera vs. Fernando*, Ramanathan's Reports, 1863-68, p. 83 at 86), that a landowner in this country can recover for use and occupation without a notarial instrument, if there has been actual use and occupation. The principle underlying the action appears to be the maxim "*Nemo alterius detrimento locupletari debet*". All the evidence that is admissible to prove compensation is admissible in an action for use and occupation. (*Perera vs. Fernando*, Ramanathan's Reports, 1863-68, p. 83 at 87).

To found the action for use and occupation the relation of landlord and tenant must be established. In the instant case there is no evidence of the existence of that relationship between the plaintiffs and the defendants, nor is there evidence which gives rise to a presumption of that relationship. One Thangammah, the mother of the second plaintiff, gave evidence in support of the case of the plaintiffs. Her evidence, which the learned Commissioner accepts, does not establish that the plaintiffs are entitled to maintain the action. The learned Commissioner says:—"Thangamma stated that she rented the land to both the defendants and she

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sent the letter of demand to both of them. I accept her evidence as true, in preference to that of the 1st defendant." The letter of demand D1 referred to by the learned Commissioner contained no reference to the fact that the plaintiffs are the landlord and that Thangammah was their agent. Thangammah says that the land Silaikaddaithoddam in respect of which this action has been brought was given by her as dowry to her daughter the second plaintiff, but the deed of gift has not been produced and her oral testimony is not legal evidence of that fact.

There is a further obstacle to this action to which the learned Commissioner makes no reference at all. It is the fact that the second defendant, who is the wife of the first, claims as a co-owner of the land to occupy it as of right. An action for use and occupation cannot be maintained against a defendant who claims to occupy the land as of right. *Nemo potest esse tenens et dominus.* (*Perera vs. Thelenis Peries*, 5. S. C. C. 133).

For the foregoing reasons the appeal is allowed with costs and the action of the plaintiffs is dismissed with costs.

Appeal allowed.

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

BANDARAMENIKA vs. IMBULDENIYA

S. C. No. D. C. (F) 28L/1949—D. C. Kandy No. L2040

Argued on : 23rd May, 1949
Decided on : 3rd June, 1949

Kandyan Law—Widow's right to mortgage husband's lands for payment of his debts.

Held : That a Kandyan widow is at liberty to mortgage the whole of her husband's estate for the purpose of paying her deceased husband's debts.

Cases referred to : *Appuhamy vs. Kirihenaya* (1896) 2 N. L. R. 155.
S. C. 89 ; *D. C. Badulla* 8470 (S. C. M. 15-11-1948).
Supen Chetty vs. Kumarihamy (1905) 3 Bal. 96.
Britoe vs. Moekoetna (1838) Morg. Dig. 252.
Murugappa vs. Christina (1846) B. & S. 6 ; (1843-55) Ram. 65.
Lokoo Banda vs. Medduma Banda (1862) B. & S. 34.

H. W. Jayawardene, for the plaintiff-appellant.

N. E. Weerasooria, K.C., with *H. W. Thambiah*, for the defendant-respondent.

GUNASEKARA J.

This is an action for declaration of title to a land. The original owner Kiri Banda died leaving as his heirs his widow Pinchi Menika and four children, one of whom is the plaintiff-appellant. In 1944 the other three children conveyed their interests in the land to the plaintiff. Pinchi Menika died in 1948.

On January 17, 1910, after Kiri Banda's death Pinchi Menika (who was subject to the Kandyan Law) had mortgaged the land and raised a loan to pay off his debts. The mortgagee's rights ultimately passed to one Silpa, who put the bond in suit and in due course bought the mortgaged property at a sale held in satisfaction of the mortgage decree. His rights devolved on the defendant-respondent in 1935.

It appears to be common ground that the value of Kiri Banda's estate was less than a thousand rupees.

The learned District Judge dismissed the plaintiff's action, holding that Pinchi Menika was entitled to mortgage the land.

At the time of the execution of the mortgage bond Kiri Banda's children were all minors ; but two of them were over fourteen years of age, having been born on May 12, 1892 and March 13, 1895, respectively. It is contended for the plaintiff that the mortgage bond could bind only Pinchi Menika's life interest and was ineffective to bind the interests of the children, for the reason that Pinchi Menika had not obtained the consent of the two children who were over the age of fourteen ; and that consequently all that

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passed to Silpa and later to the defendant was only the life interest of Pinchi Menika, who died in 1948.

The basis of this contention is the rule formulated in the following passage in *Sawers' Memoranda and Notes* :—

> "A widow having the administration of her deceased husband's estate may, in the minority of her children from necessity, mortgage the landed property; but it must be clearly to satisfy the most necessary and urgent wants of the family, otherwise the children might not be held liable to pay the debt. But in all cases where the children are grown up to fourteen or fifteen years of age, their consent is necessary to such a mortgage being valid against them and their land." (Hayley's Sinhalese Laws & Customs, App. I, p. 33).

What is dealt with in this passage, however, appears to be the extent of the widow's right to mortgage the family property to meet urgent family needs, and not her right to mortgage it to pay the debts of the deceased.

The Kandyan Law imposes on the widow the duty of paying her husband's debts and gives her the right to sell his lands for that purpose: *Appuhamy vs. Kirihenaya* (1896) 2 N. L. R. 155, *S. C.* 89. *D. C. Badulla* 8470 (S. C. M. 15-11-48). It is argued for the appellant that it does not follow that she has a right to mortgage the property without the children's consent. It is not suggested that while the widow is responsible for the payment of the deceased's debts the children have the right to decide whether she should be permitted to sell his lands for the purpose. It is contended, however, that a mortgage would need their consent because, it is said, other lands of the estate would be liable to be sold for the recovery of any portion of the debt that may be left unsatisfied after the sale of the mortgaged property. It appears to be a sufficient answer to this contention that all the property of the estate would in any event be liable to be sold for the recovery of the deceased's debts, and that under the Kandyan Law the widow is entitled to sell all the lands, if necessary, for the payment of these debts.

The liability of a widow under the Kandyan Law to pay the debts of her deceased husband has been described as that of "a sort of administratrix": *Supen Chetty vs. Kumarihamy* (1905) 3 Bal. 96. In *Britoe vs. Moekoetna* (1838) Morg. Dig. 252, a case reserved for collective decision, the Supreme Court held that "by the settled practice, an administrator is at liberty to alienate, and consequently to encumber, the whole of the estate entrusted to him." Dr. Hayley says (*Sinhalese Laws and Customs*. p. 496), that this decision was followed in several cases in the Kandyan districts, and he cites the cases of *Murugappa vs. Christina* (1846) B. &. S. 6, 1843-55 Ram. 65, and *Lokoo Banda vs. Medduma Banda* (1862) B. &. S. 34). The former was a case of a mortgage by a widow acting in the capacity of administratrix of her husband's estate and the latter was a case of a sale by an administratrix. Though neither of these cases is directly in point, they appear to support the view that a Kandyan widow, being at liberty as "a sort of administratrix" to alienate the whole of her husband's estate, is consequently at liberty to mortgage it for the purpose of paying the deceased's debts. There appears to be no reason in principle for holding that while she has the right to alienate the property she has not the right to mortgage it.

I would dismiss the appeal with costs.

WIJEYEWARDENE, C.J.

I agree.

Appeal dismissed.

Present : BASNAYAKE, J.

MUDIYANSE vs. DISSANAYAKE (S. I. POLICE, KEGALLE)

S. C. 79—*M. C. Kegalle* 21093.

Argued and Decided on : 23rd February, 1949.

Motor Car Ordinance No. 45 *of* 1938—*Using vehicle for purpose not authorised by licence—Evidence necessary to establish charge—Evidence Ordinance Section 91.*

The charge related to the use of a motor vehicle for a purpose not authorised by the licence.

Held : That the licence, being a document required by law to be in writing and in a prescribed form must be proved by the document itself or by secondary evidence of its contents in cases where secondary evidence is admissible.

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Ivor Misso, for the Accused-Appellant.

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

BASNAYAKE J.

The two accused were charged as follows :—

"You are hereby charged, that you did, within the jurisdiction of this Court, at Kegalle on 16-10-1948 :—

(1) The 1st accused being the driver of station waggon No. C. Y. 5992 use the said vehicle for a purpose not authorised by licence for the time being in force for the said vehicle to wit : to ply the said vehicle for hire in breach of section 42 (1) of Ordinance No. 45 of 1938 and thereby committed an offence punishable under section 158 of Ordinance No. 45 of 1938.

(2) At the same time and place aforesaid the 2nd accused did abet the 1st accused in the commission of the offence of plying the said vehicle for hire in breach of section 151 of Ordinance No. 45 of 1938, and thereby committed an offence punishable under section 158 of Ordinance No. 45 of 1938."

The evidence for the prosecution is that the second accused organised a pilgrimage to Mahiyangana on 16th October, 1948, from a place called Arandara by station waggon C.Y. 5992. The evidence does not disclose that he is the owner of the station waggon, but it appears that he engaged the first accused who holds a certificate of competence to drive motor omnibuses to drive the vehicle to Mahiyangana and back. Among those who joined the pilgrimage at Arandara are the witnesses Y. M. D. C. Banda, his children, and O. Mudianse. The fare agreed was in the form of a contribution towards the expenses of the pilgrimage. Banda contributed Rs. 5 some four or five days before the journey. Mudianse made a like contribution in two instalments. He paid Rs. 3 at Arandara and Rs. 2 at Mahiyangana. The latter says that passengers were taken *en route* as well.

The learned Magistrate has acquitted the first accused but convicted the second. I am of opinion that the conviction cannot be upheld. In the first place there is no legal evidence that station waggon C.Y. 5992 was used for a purpose not authorised by the licence for the time being in force. The only evidence on the point is that of the passenger Banda. A licence for a motor car is a document required by law (Section 34, Motor Car Ordinance No. 45 of 1938), to be in writing and in a prescribed form. Now section 91 of the Evidence Ordinance provides that "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof.....of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible....." I therefore quash the conviction of the second accused and acquit him of the charge.

The learned Magistrate appears to have taken the view that without any evidence of abetment of the offence of the first accused by the second in the instant case it was open to him to convict the latter of the offence alleged against him. I am unable to share the learned Magistrate's view. Section 151 of the Motor Car Ordinance No. 45 of 1938 declares that a person "who attempts to commit or abets the commission of an offence" shall be guilty of that offence. A person cannot be convicted of an "attempt to commit" an offence or of "abetting the commission of an offence" unless the evidence establishes the "attempt or "abetment" as the case may be.

Appeal allowed.

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

THE ATTORNEY-GENERAL vs TUAN KITCHI JOHAR *et. al.*

S. C. No. 1521/1948—*M. C. Colombo* 44680.

Argued on : 20th July, 1949.
Delivered on : 22nd July, 1949.

Betting on Horse-racing Ordinance—Cap. 36 *Section* 15 (2) *as amended by Section* 8 *of Ordinance No.* 55 *of* 1943—*Should a Police Officer making a search of premises under this section be in charge of a station.*

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Held : That a Police Officer making a search of any premises under section 15 (2) of the Betting on Horse-racing Ordinance Cap. 36 as amended by section 8 of Ordinance 55 of 1943 need not be an officer in charge of a Police Station.

F. B. P. Jayasuriya, Crown Counsel, for the Crown.

E. B. Wikramanayake, K.C. with *H. W. Jayewardene,* for the respondents.

WIJEYEWARDENE, C.J.

The two accused were charged with having committed certain offences punishable under section 10 (2) of the Betting on Horse-racing Ordinance as amended by Ordinance No. 55 of 1943.

Inspector Thiedeman, the Officer-in-Charge of the Cinnamon Gardens Police Station, stated in the course of his evidence that the premises and the two accused mentioned in the charges were searched by two Sub-Inspectors of Police who were not in charge of a Police Station. Thereupon, the Magistrate discharged the accused, as he thought that, in the absence of a search warrant, the search could not be made by an officer who was not in charge of a Police Station.

The relevant words in Section 15 (2) of the Betting on Horse-racing Ordinance as amended by Ordinance No. 55 of 1943 are :—

> "Where a Police Officer of or above the rank of a Sergeant in charge of a Police Station has reason to suspect that any such offence is being.....committed .....he may exercise all or any of the powers which could have been conferred on him by sub-section 1".

These words empower "a Police Officer of or above the rank of a Sergeant in charge of a Police Station" to make the necessary search. The Officers indicated by those words are :—

> (*a*) a Police Officer of the rank of Sergeant in charge of a Police Station and ;
> (*b*) a Police Officer above the rank of a Sergeant in charge of a Police Station.

I am unable to hold that the Officers referred to in (b) must be also Officers in charge of a Police Station. In order to construe the section in that way, one has to read the section as if there was a comma or "and" after "Sergeant".

The Magistrate had misdirected himself in holding that a Police Officer making a search under section 15 (2) must always be an Officer in charge of a Police Station.

I set aside the order of discharge and direct the Magistrate to proceed to hear the case according to law.

CANEKERATNE J.

I agree.

Appeal allowed.

Present : BASNAYAKE, J.

DANIEL vs WIJESINGHE, S. I. POLICE, BELIATTA.

S. C. 457—M. C. Tangalle 25396

Argued and Decided on : 28th May, 1948.

Criminal Procedure Code, Section 199—*Report to Court by Police Officer under Section* 148 (1) (*b*) —*Can another police officer conduct the prosecution in a case summarily triable.*

Held : (i.) That in view of Section 199 of the Criminal Procedure Code, the police officer, who appears and conducts the prosecution in a case triable summarily need not necessarily be the very police officer who makes the report under section 148 (1) (*b*) of the same Code.

(ii.) That a Police Officer who conducts the prosecution commenced by another is not entitled to exercise any function which, under the Code, may be exercised by the complainant alone.

No appearance for the appellant.

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

BASNAYAKE J.

When dismissing this appeal I indicated that I would give a written ruling on the question of law discussed in the judgment of the learned Magistrate.

He has held that the police officer who appears and conducts the prosecution in a case triable summarily need not necessarily be the very police officer who makes the report under section 148 (1) (b) of the Criminal Procedure Code. I agree with the conclusion of the learned Magistrate. Section 199 of the Criminal Procedure Code provides that the complainant or any officer of any Government department may appear in person or by pleader to prosecute in any case in which such complainant or Government depart-

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ment is interested. That section is in my view sufficient authority for one police officer to appear and prosecute in a case commenced by another. But an officer who is not the complainant, *i.e.*, the person who makes the report to Court, though he may appear and prosecute, is not entitled to exercise any function which under the Code may be exercised by the complainant alone. For instance he may not withdraw prosecution under section 195.

Appeal dismissed.

Present : BASNAYAKE, J.

THANGAPONNU vs. GEORGE S. I. POLICE

Application No. 410—*M. C. Point Pedro* 10119

Argued on : 8th March, 1949.
Decided on : 11th April, 1949.

Surety—Woman subject to Thesawalamai—Beneficium senatus consultum velleianum not renounced—Is surety bound—Married Women's Property Ordinance section 29—*Criminal Procedure Code Section* 357.

Held : (i.) That a woman subject to the Thesawalamai can be bound as a surety although she has not renounced the *beneficium senatus consultum velleianum*

(ii.) That the *senatus consultum velleianum* has no force in this Island after the passing of section 29 of the Married Women's Property Ordinance.

S. Mahadevan, for the Petitioner.

H. A. Wijemanne, Crown Counsel, for the Attorney-General.

BASNAYAKE J.

The petitioner, one Thangaponnu, wife of Sinnathamby, executed a bond in the sum of Rs. 200 as surety in case No. 10119 of the Magistrate's Court of Point Pedro in which one Ponnadurai Konalingam was accused. She has been ordered by the learned Magistrate to pay the sum of Rs. 200 on account of the failure of the principal to observe the terms of the bond. This is an application to have that order set aside in the exercise of the powers of this Court under section 357 of the Criminal Procedure Code.

Learned counsel submits that the petitioner is a woman subject to Thesawalamai and that as she has not renounced the *beneficium senatus consultum velleianum* she is not bound as a surety. The *senatus consultum velleianum* was introduced in the sixth year of the Emperor Claudius A. D. 46 in the Consulship of Marcus Silanus and Velleius Tutor and was named after the latter. It prohibited women from interfering in every kind of business matters and obligations in behalf of males as well as of females. A woman was entitled under the Roman-Dutch law to expressly renounce the benefit of the *senatus consultum* and make herself bound as surety or guarantor. Section 29 of the Married Women's Property Ordinance declares that the benefit of the *senatus consultum velleianum* and of certain other laws mentioned therein shall not apply or have any force whatsoever in this Island. It is clear therefore that under our law today a woman can offer herself as surety and is bound by the obligation. Learned counsel submits that, as section 29 occurs in an Ordinance which governs married women generally and as no express mention is made therein of women governed by the Thesawalamai, section 29 does not apply to the petitioner who is subject to Thesawalamai. I am unable to uphold learned counsel's contention. The effect of section 29 is to abolish in this Island the laws specified therein. It is clear therefore that after the date of the Married Women's Property Ordinance those laws do not apply or have any force whatsoever in this Island and no person, be she Muslim, Tamil, or any other race can invoke the aid of laws that do not exist in the Island.

The application is refused.

Application refused

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Present : BASNAYAKE, J.

FERNANDO & ANOTHER vs. EXCISE INSPECTOR, WENNAPPUWA

S.C. 1477-78—*M.C. Chilaw* 38039.
Argued & decided on : 27th January, 1949.

Criminal Procedure Code Section 325—Magistrate acting under—No Evidence of antecedents of accused.

Held : That a Magitrate acting under Section 325 of the Criminal Procedure Code must have evidence of the good character or antecedents of the accused.

A. C. M. Ameer, Crown Counsel, for the Attorney-General.
No appearance for the accused-appellant.

BASNAYAKE J.

The two accused have been found guilty of offences punishable under sections 43(*b*), 44, and 43(*f*) of the Excise Ordinance. The learned Magistrate has fined the first accused a sum of Rs. 300 on the first charge and warned and discharged him on the other charges. He has directed the second accused to enter into a bond in Rs. 200 to be of good behaviour for a term of three years.

After the learned Magistrate made his order the Excise Inspector appears to have brought to his notice the fact that the accused were not first offenders. But the learned Magistrate observed that even if that fact had been brought to his notice earlier it would have made no difference to the sentence.

I do not think the learned Magistrate is right in proceeding under section 325 of the Criminal Procedure Code without any evidence of the good character or antecedents of the accused. The offences are by no means trivial, nor are there extenuating circumstances. The power given by section 325 should not be capriciously exercised. The observations of the learned Magistrate which I have referred to, drive me to the conclusion that he is unfamiliar with the provisions of section 325 of the Criminal Procedure Code.

I set aside the order of the Magistrate in which he warns and discharges the accused, and impose a fine of Rs. 100 in respect of each of the second and third charges against the first accused. The second accused is the wife of the first accused. The learned Magistrate finds that she participated in the offences. I therefore order her to pay a fine of Rs. 100 on each of the charges. I order the accused to undergo a month's rigorous imprisonment in default of payment of each of the fines imposed on them.

Sentences varied.

Present : BASNAYAKE J.

RAHUMAN vs. MOHAMED

S. C. 180—*C. R. Jaffna* 17352

Argued on : 22nd and 24th February, 1949.
Decided on : 11th April, 1949.

Civil Procedure Code Section 756—Notice of tender of security—Reissue of notice by court for another date—Validity.

Held : (i.) That there is no authority in section 756 of the Civil Procedure Code for the reissue of a notice given by an appellant of tender of security for respondents' costs of appeal for a date other than that mentioned in the notice by the appellant.

(ii.) That the court will not be justified in granting relief under section 756 (3) in the absence of an explanation for the failure to serve the notice in time and of evidence that the appellant had done all in his power to comply with section 756.

Cases referred to : *De Silva vs. Seenathumma,* (1940) (41 N. L. R. 241).
Helena vs. Fernando, (1914) 3 Bal. Notes of Cases, p. 13.

Chittampalam for the appellant.
H. W. Thambiah, for the respondent.

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BASNAYAKE J.

Learned counsel for the respondent submits that this appeal cannot be entertained as the appellant has failed to comply with the requirements of section 756 of the Civil Procedure Code.

The facts material to the decision of the question are as follows :—

On 8th September, 1947, the learned Commissioner of Requests delivered his order. On 10th September, 1947, the appellant applied to the Commissioner under section 833 A of the Civil Procedure Code for leave to appeal. That application was refused on 13th September, 1947. On 16th September, 1947, the appellant's proctor filed a petition for leave to appeal and his petition of appeal and a motion in the following terms : "I file leave to appeal and Petition of Appeal, notice of tendering security and tender stamp to the value of Rs. 6 for S. C. decree and move that the same be accepted and that the said notice be ordered to be issued on the plaintiff and his proctor Messrs. Aboobucker & Sultan of Jaffna. Also I move for a certified copy of the proceedings on payment of charges."

On the same day the learned Commissioner made the following order on that motion.

"1. Accept leave to appeal and petition of appeal.
2. Issue notice of security returnable 23-9-1947.
3. Issue certified copy on payment of usual charges."

The notice of security issued by the Court was addressed to the plaintiff-respondent and his proctor Messrs. Aboobucker and M. M. Sultan. Omitting the formal parts, it is in the following form :—

"Take notice that the Petition of Appeal presented by the Defendant-Appellant in the abovenamed action dated 16th September, 1947, against the judgment or order of the Court of Requests dated 8th September, 1947, in the said action having been received by the said Court on behalf of the Defendant-Appellant will on the 23rd day of September, 1947, at 9 o'clock in the forenoon or so soon thereafter move to tender security by hypothecating cash for any costs which may be incurred in Court a sufficient sum of money to cover the expenses for serving the notices of appeal on you.

20th day of September, 1947."

On 22nd September, 1947, the respondent's proctor filed an application to execute the decree and moved for writ against the appellant, and notice was ordered on him. On 23rd September, 1947, the case was called but as notice of security had not been served the respondent did not appear and show cause. Nevertheless the learned Commissioner fixed the security at Rs. 31 and that sum was deposited at the Kachcheri on that very day by the appellant. The learned Commissioner also reissued the notice on the respondent to appear on 6th October, 1947, a date long after the period of fourteen days within which notice must be given. There is no authority in section 756 for the reissue of a notice for a date other than that mentioned therein by the appellant, nor is any purpose served by re-issuing a notice for a date after the prescribed period of fourteen days. That section does not contemplate an extension of the date specified by the appellant in the notice, for it says : "And on such day the respondent shall be heard to show cause, if any, against such security being accepted." The "such day" contemplated is the day specified in the notice.

On 24th September, 1947, the appellant's proctor filed the security bond, the Kachcheri receipt for Rs. 31 and notice of appeal and moved that the bond be accepted and that the notice of appeal "be ordered to be issued on the plaintiff-respondent's proctor Messrs. Aboobucker & Sultan for service."

The order made on that motion is :—

"1. Accept bond.
2. Issue notice of appeal for 6-10-1947."

On 6th October, 1947, the following journal entry appears :—

"Messrs. Aboobucker & Sultan for plaintiff-respondent.

Mr. S. Rasiah for defendant-appellant.

No return to notice of security and notice of appeal.

Call for and re-issue for 9/10.

Later

Return to notice of appeal and notice of security received.

Notice of appeal served on Messrs. Aboobucker & Sultan.

Notice of security not served. Reissue for 9-10-1947."

The journal entry of 9th October, 1947, shows that both the notice of appeal and the notice of security had been served by that date. After the Commissioner made order that the record be forwarded to this Court Mr. Sultan for the respondent made a submission to Court which is recorded as follows :—

"Mr. Sultan for Plaintiff-Respondent points out that notice of tendering security was served on him on 8-10-1947 to the effect that the Defendant-Appellant shall move to give security on 9-10-1947. He further objects to the security being accepted and states that the appeal has abated."

The learned Commissioner made no order on the above submission.

It has been held by a Full Bench of this Court in the case of *De Silva vs. Seenathumma* (1940) 41 N. L. R. 241, that section 756 requires that the notice should be served within the period prescribed in that section, viz., twenty days in the

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case of appeals from a District Court and fourteen days in the case of appeals from a Court of Requests. My own view is, if I may venture to express it with the gretest respect to the Bench that decided the case of *De Silva vs. Seenathumma* (*supra*), that the notice must be served before the date mentioned therein as the date on which the appellant will tender security. I say so because section 756 provides, as I mentioned earlier, that the respondents shall be heard "on such day" meaning thereby the day mentioned in the notice.

The learned Commissioner does not appear to have given his mind to the requirements of section 756, for his order of 23rd September, 1947, cannot be reconciled with its requirements, nor was he, on 24th September, 1947, acting within his powers in ordering the acceptance of the bond and the issue of the notice of appeal when still the notice of security remained unserved. The appellant cannot rely on the failure of the Fiscal to serve the notice of security in time (*Helena vs. Fernando*, (1914) 3 Bal. Notes of Cases, p. 13. *De Silva vs. Seenathumma*, (1940) 41 N. L. R. 241. The Fiscal's failure to serve the notice on the proctor for the respondent who appears to have been present in Court every day the case was called is difficult to understand. If the appellant was diligent he could have avoided the situation in which he found himself either by taking steps to ensure that the notice was served on the respondent's proctor or by asking the court to direct under section 356 of the Civil Procedure Code a more expeditious form of notice.

The appellant has not explained why he failed to serve notice in time, nor has he placed any material before me on which I can be satisfied that he has done all in his power to comply with section 756. In the absence of such an explanation I will not be justified in granting relief under section 756 (3) of the Civil Procedure Code.

This appeal must therefore be rejected with costs.

Appeal rejected.

Present : BASNAYAKE, J.

RANASINGHE vs. JUSTIN

S. C. No. 82—M. C. Colombo 45380

Argued and decided on : 1st March, 1949

Retaining stolen property—Charge under section 394 of Penal Code—Accused acquitted—Order made for return of stolen property to lawful owner—Can accused appeal from such order—Criminal Procedure Code sections 335, 338 and 413.

The accused was charged with retaining stolen property and acquitted. Order was then made for the return of the property to its lawful owner. The accused appealed from that order.

Held : That the accused had no right of appeal from the order as the order was made after his acquittal and after the conclusion of the case to which he was a party.

Cases referred to : *Silva vs. Hamid*, (1918) (20 N. L. R. 414).

N. M. de Silva, for the appellant.

M. M. Kumarakulasingham, for the complainant-respondent.

BASNAYAKE J.

The appellant was charged with the offence of dishonestly retaining a stolen G. E. C. wireless set bearing No. 816081 and two loudspeakers (hereinafter referred to as the stolen wireless set) property of Pathirage Don Justin of Etul Kotte, knowing them to be stloen property, and thereby committing an offence punishable under section 394 of the Penal Code. It appears from the evidence of the Assistant Superintendent of Police that a stolen wireless set was found in the boutique of the appellant. His explanation is that it was sent to his brother by one C. Wijesinhe, a repairer of radio sets, in place of his own wireless set which had been given to Wijesinhe for repairs. He said that he did not know that the stolen wireless set was stolen property. On that evidence the learned Magistrate acquitted the appellant and ordered that the stolen wireless set be returned to the complainant. The learned Magistrate is satisfied that the wireless set is the property of the complainant, and that it had been stolen from his house when it was burgled. The identifying marks which the complainant mentioned to the Police were found on the stolen wireless set which the appellant had in his possession. The present appeal is from the order directing that the stolen wireless set be returned to the complainant.

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In my view the appellant has no right of appeal from that order. He does not claim the stolen wireless set. He was able to secure his acquittal by disclaiming all knowledge that it was stolen. He cannot bring himself within the ambit of section 335 because the order he is appealing from does not fall within any of the appealable orders specified therein. Nor has he a right to come under section 338 which gives a person "who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court or District Court in a criminal case or matter to which he is a party". The order in question has not been made in a criminal case or matter to which the appellant is a party, for an order under section 413 can be made only when an inquiry or trial in any criminal court is concluded. The appellant was undoubtedly a party to the criminal case which terminated with his acquittal. But the decision which he now canvasses was made after the conclusion of that case and the appellant can in no sense of the term be said to be a party to what took place after his acquittal. In the instant case the appellant was able to secure his acquittal by disclaiming any knowledge that the stolen wireless set was stolen property. In his evidence he conceded that it was the property of the repairer Wijesinhe and made no claim to it. However, as I heard the arguments of learned counsel for the respondent and the appellant on the question whether the learned Magistrate's order is correct I shall dispose of this matter by way of revision under section 357 of the Criminal Procedure Code.

Section 413 (1) of the Criminal Procedure Code empowers a criminal court to make such order as it thinks fit for the disposal of property produced before it, regarding which any offence appears to have been committed. In the instant case the prosecution rests on the allegation that the stolen wireless set was stolen property and that in regard to it the offence of theft had been committed. The evidence establishes that the stolen wireless set was stolen property and in my view the learned Magistrate acted correctly in making an order under section 413.

My view of that section gains support from the following observations of Bertram C.J. in *Silva vs. Hamid* (1918) 20 N. L. R. 414 :—

> "Where property has been stolen, and the charge is made against the person for receiving the property so stolen, even though the Magistrate acquits the person charged with so receiving it, he may, if he comes to the conclusion that the property actually was stolen, order it to be delivered to the person from whom it was taken, and disregard the possession of the receiver."

The order of the learned Magistrate is affirmed.

Order affirmed.

Present : BASNAYAKE, J.

NADAR vs PERERA (S. I. POLICE, TRINCOMALEE)

S. C. 1449—*M. C. Trincomalee* 2450.

Argued on : 22nd February, 1949.
Decided on : 12th April, 1949.

Penal Code Section 394—*Retaining stolen property—Explanation by accused—Sufficiency of explanation.*

The accused, who was a dealer in used motor spare parts and accessories, was convicted under section 394 of the Penal Code, although he gave an explanation as to the possession of the stolen property. The stolen property consisted of a motor bicycle gear box worth Rs. 250 which he had bought for Rs. 6.

Held : That the following were sufficient to establish guilty knowledge :—

(*a*) the appellant as a dealer in secondhand motor spare parts should ordinarily be taken to know the market value of the gear box.

(*b*) the unusual character of the seller, a bullock cart driver, coupled with the exceedingly low price demanded by him.

(*c*) the exceedingly low price paid by the appellant.

(*d*) the fact that he had never before purchased any motor accessories from the seller.

(*e*) the fact that the gear box was kept in a gunny bag for over a week while the other motor accessories were exhibited in open shelves.

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Cases referred to : *Otto George Gfeller vs. The King*, (from West Africa), (1943) (A. I. R. Privy Council 211, 212)
Attorney General vs. Rawther, (1924) (25 N. L. R. 385).
Rex vs. Abramovitch, (1914) (112 L. T. Reports 480).
Rex vs. Booth, (1946) (175 L. T. Reports 306).

H. W. Thambiah, for the Appellant.
A. E. Keuneman (Jnr.), *Crown Counsel*, for the Attorney-General.

BASNAYAKE J.

The appellant has been convicted of an offence punishable under section 394 of the Penal Code and sentenced to six weeks' rigorous imprisonment. It is submitted by learned counsel that the appellant's explanation of his possession of the stolen article should have been accepted and that the conviction is bad in law.

Shortly the facts are as follows :—

On 1st October, 1948, at about 7-45 p.m. one P. M. K. P. Rajah, the Manager of Wellington Theatre in Trincomalee, complained to Sub-Inspector Simon Perera that his Norton Motor Bicycle gear box worth Rs. 250 had been stolen. Kandasamy and Suppiah, two of the employees at the theatre, were arrested as they confessed that they had stolen the gear box and sold it to the appellant, who is a dealer in old metal and used motor spare-parts and accessories. The gear box was found in the appellant's premises in a gunny bag along with some pieces of old metal. Kandasamy is the driver of the bullock cart used for advertising the programmes of the Wellington Theatre, and Suppiah distributes hand-bills from that cart.

Kandasamy says that he and Suppiah took the gear box to the appellant's old metal shop and sold it to him on 24th September, 1948, for Rs. 6. Suppiah has been prosecuted for and convicted of the theft of the gear box. He gave a receipt (P2) which he signed as T. Kandappu.

The appellant admits the purchase but denies that he knew the gear box was stolen. He says that on questioning Kandasamy he was told by him that the manager of the theatre had asked him to sell the gear box. He also admits that he knew Kandasamy but denies that he knew his name.

Section 394 of the Penal Code reads :—

> "Whoever dishonestly receives or retains any stolen property, knowing or having reasons to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

In the instant case it is established that the property in question is stolen property. If the appellant received the property dishonestly, knowing or having reason to believe it to be stolen, he is guilty of the offence. In considering his conduct from the standpoint of an issue as to guilty knowledge the following considerations are relevant :—

(*a*) the appellant as a dealer in secondhand motor spare parts should ordinarily be taken to know the market value of the gear box.

(*b*) the unusual character of the seller, a bullock cart driver, coupled with the exceedingly low price demanded by him.

(*c*) the exceedingly low price paid by the appellant.

(*d*) the fact that he had never before purchased any motor accessories from the seller.

(*e*) the fact that the gear box was kept in a gunny bag for over a week, while the other motor accessories were exhibited in open shelves.

The above considerations taken singly might not be conclusive of guilt, but taken together are sufficient to establish guilty knowledge. The appellant's explanation has, in the instant case, been rejected by the learned Magistrate and I am not prepared to say that he is wrong. A court is not bound to accept any explanation that a person charged with the receipt of stolen property may choose to give. Where in a charge under section 394 of the Penal Code it is established, as in this case, that a person is in possession of stolen goods soon after the theft the court may presume that he has received the goods knowing them to be stolen, unless he can account for his possession. (Section 114 (*a*), Evidence Ordinance). The effect of section 114 (*a*) of the Evidence Ordinance is that the court may regard the fact it "may presume" as proved unless and until it is disproved. (Section 4, Evidence Ordinance).

Learned counsel for the appellant relies mainly on the cases of *Otto George Gfeller vs. The King* (from West Africa), (1943) A. I. R. Privy Council 211, 212, the *Attorney-General vs. Rawther*, (1924)

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25 N. L. R. 395, and *Rex vs. Abramovitch.* (1914) 112 L. T. Reports 480. In my view the principles enunciated in these cases do not entitle the appellant to an acquittal.

In deciding the principles according to which a case of possession of stolen property should be decided, it is in my view unnecessary to resort to the principles of law applied in other jurisdictions. With respect I agree with the observations of Ennis J. in the *Attorney-General vs. Rawther* (*supra*), wherein he says : " —

" The Ceylon law supplies sufficiently safe and explicit rules for the guidance of the Courts in arriving at a decision in such a case."

His approach to the question commends itself to me.

In regard to the case of *Rex vs. Abramovitch* (*supra*), which is often cited in this Court, I think it is not out of place to quote here the remarks of Goddard C.J., in *Rex vs. Booth* (1946) 175 L. T. Reports 306 :—

" It is argued that the recorder did not give the direction which follows *Rex vs. Abramovitch* (1914, 112 L. T. Rep. 480). This is a very hard-worked case, and, I think very often misunderstood. It laid down no new rules of law. All that it said was this : The onus is always on the prosecution in a criminal case. In the case of receiving stolen goods, the prosecution may discharge the onus by showing that the prisoner was in possession of property recently stolen, and, in the absence of any explanation given by the prisoner, the jury are entitled, on that evidence alone, to convict. If, however, the prisoner gives in evidence a story which leaves the jury in doubt, that is to say, creates a doubt in their minds whether he received the goods feloniously then they should acquit."

The appellant has not in my opinion accounted for his possession.

The appeal is dismissed.

Appeal dismissed.

Present : BASNAYAKE, J.

COSMAS vs. ADDITIONAL CONTROLLER OF ESTABLISHMENTS

S. C. 1558—*Workmen's Compensation Case No. C.* 30/7195/44.

Argued and Decided on : 8th March, 1949.

Criminal Procedure Code section 340 (2)—*Certificate under—Appeal on matter of law.*

Held : That a proper certificate under section 340 (2) of the Criminal Procedure Code is a condition precedent to an appeal on a matter of law.

H. W. Jayawardena, for the applicant-appellant.

B. C. F. Jayaratne, Crown Counsel, for the respondent.

BASNAYAKE J.

This is an appeal under the Workmen's Compensation Ordinance. Objection is taken by the learned Crown Counsel to the hearing of this appeal on the ground that the petition of appeal does not satisfy the requirements of section 340 (2) of the Criminal Procedure Code.

The certificate of the proctor which is at the end of the petition is in the following form :—

" I certify that the above points of law are fit questions for adjudication by the Supreme Court."

Neither the proctor nor the counsel who signed the petition in the instant case appears to have paid any heed to Form No. 12 in the Second Schedule to the Criminal Procedure Code, for the petition bears no resemblance to the form prescribed for use by section 442 of the Criminal Procedure Code. It is important that matters which come up before this Court should be submitted in the prescribed form where a form is prescribed by law. Neither petitioners nor pleaders should regard themselves as free to ignore such forms and make their submissions in any way they please. There is no excuse for the omission of the proctor to make out a proper certificate. It has been previously pointed out in previous decisions of this Court that a proper certificate under section 340 (2) is a condition precedent to an appeal on a matter of law.

The appeal is rejected.

Appeal rejected.

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Present : GRATIAEN, J.

JAYASURIYA vs. RATNAYAKE, S.I. POLICE

S. C. 1444/P—M. C. Kalutara 905

Argued on : 9th February, 1949

Decided on : 15th February, 1949

Penal Code, section 484—What should be proved in a charge under.

Held : That a conviction under section 484 of the Penal Code cannot stand where the prosecution has failed to prove that the accused person intended or knew the provocation offered to be of such a character as to be likely to cause the person insulted to commit a breach of the peace or to commit some other offence.

Per GRATIAEN, J.—" If a man offends against the law, it seems to me contrary to the principle and to the spirit of section 67 of the Penal Code to punish him more than once for what he has done, merely because a single act happens to contravene more than one provision of the criminal law."

Cases referred to :— *Cader Baicha vs. Dunn* (3 S. C. D. 80).
Rahaman vs. Perera (7 Times 66).
S. I. Police vs. Wijesekara (38 N. L. R. 30).
Perera vs. Fernando (1 C. L. G. Notes 49).

H. V. Perera, K.C. with *Eardley Perera,* for the appellant.

E. R. de Fonseka, Crown Counsel, for the respondent.

GRATIAEN, J.

On the morning of 2nd October 1948 a person employed by the appellant was arrested by the Beruwela Police and detained at the Police Station. The appellant on hearing of the arrest arrived at the Police Station and desired to bail him out, but his application was refused by Inspector Ratnayake pending the production of a certificate of worth from the village headman. This decision of the Inspector was perfectly reasonable, but his insistence on a certificate of worth appears to have upset the balance of the appellant's mind, no doubt because, as the evidence discloses, he was under the influence of liquor at the time. There can be no doubt that he was unpardonably rude to the Police Officers whom he wrongly imagined to have acted unjustly towards him. He was in due course charged in the Magistrate's Court of Kalutara with having (1) intentionally insulted P. C. 1867 Perera in breach of Section 484 of the Penal Code, and (2) used obscene words to the annoyance of Inspector Ratnayake in breach of Section 287 of the Penal Code.

On the first charge the learned Magistrate sentenced the appellant to undergo a term of six months rigorous imprisonment, and on the second to undergo a term of one month's rigorous imprisonment. Both charges relate to the same incident and to the use of the same abusive and filthy language, so that one single conviction and certainly one sentence would in any event have met the ends of justice. If a man offends against the law, it seems to me contrary to the principle and to the spirit of Section 67 of the Penal Code to punish him more than once for what he has done merely because a single act happens to contravene more than one provision of the criminal law. However, it is not necessary to consider this aspect of the matter further because I have come to the conclusion that the conviction under Section 484 of the Penal Code cannot stand.

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Inspector Ratnayake in his evidence has related in graphic language his version of the event which preceded the alleged commission of the offences with which the appellant has been charged. "The accused," he states, "*invaded* the Police Station with some others and demanded the release of Peduru Fernando. I asked him to produce a certificate of worth for Rs. 500 from the headman. He *refused and stated that he would take the man by force.* I was alarmed at his attitude. I ordered the accused to leave the Station and *rang up the A. S. P. for armed assistance.*" This story of an invasion by gangsters of a Police Station and a threat to remove a prisoner "by force" in such circumstances as to necessitate a hurried appeal by the Police for reinforcements is either true or it is not. If it be true, I fail to understand why the Police did not charge the appellant with the commission of the very serious offences which the Inspector's evidence discloses, and why they were content instead to file a plaint relating only to the alleged use of abusive language after the "gangsters" had left the Police Station. I can only assume in the circumstances that the version of a mob-invasion followed by a threat to rescue a prisoner from Police custody is greatly exaggerated and partly imagined.

The first charge against the appellant is that after leaving the Police Station, he voluntarily insulted Constable Perera in breach of Section 484. The language used by him is unquestionably insulting. It is not necessary for the purposes of this appeal to repeat the words which were actually uttered. They betray the usual mania for indecent plagiarism which seems to overcome vulgar persons when they are angry and particularly when they are drunk. But a breach of Section 484 involves a great deal more than the mere employment of abusive language, however offensive it may be to decent people. Section 484 is "intended to deal only with persons who are as responsible for breaches of the peace or the commission of offences as those who openly abet or incite them." *Ratanlal on Crimes 16th ed. p.* 1262. The prosecution must therefore prove that the accused person intended or knew the provocation offered to be of such a character as to be likely to cause the person insulted to commit a breach of the peace or to commit some other offence. This is precisely what has not been proved or held to have been proved in the present case. The evidence and the learned Magistrate's judgment are silent on this aspect of the case. It is strange how often the clear language of the Section needs to be brought to the notice of prosecuting officers and (though less often) of Magistrates. *Cader Batcha vs. Dunn* (3 S. C. D. 80) *Rahaman vs. Perera* (7 Times 66) *S. I. Police vs. Wijesekara* (38 N. L. R. 30) *Perera vs. Fernando* (1 C. L. J. notes 49). As Abrahams C.J. pointed out in the last of the decisions to which I have referred, cases under the Section must be proved to the hilt and people are not to be punished merely for bad temper or abusive language. I quash the conviction under Section 484 and set aside the sentence of six months' rigorous imprisonment imposed on the appellant.

There remains for consideration the conviction under Section 287. Of this offence the appellant is clearly guilty. The words complained of have no doubt in the course of time lost much of their sting but they have not yet completely lost their literal meaning especially among those who are as sensitive as the Police officers of Beruwela claim to be. These words were uttered in a public place; they sufficiently pass the test of obscenity; and we must of course believe Inspector Ratnayake when he says that he was annoyed when he heard these words uttered with reference to one of his constables. The conviction under Section 287 must therefore stand. But the offence does not call for a sentence of imprisonment. I respectfully share the indignation of the learned Magistrate at any person who presumes to invade a Police Station and defy lawfully constituted authority but such alleged conduct is not the subject of the charges which were framed against the appellant. I vary the sentence to a fine of Rs. 30 and in default a term of two weeks' simple imprisonment. I hope that the appellant is now fully and permanently restored to sobriety and that he realises that vulgarity such as he has been guilty of carries its own condemnation quite apart from any punishment imposed by a court of law.

In the result I set aside the conviction under section 484 of the Penal Code. I affirm the conviction under section 287 but alter the sentence to a fine of Rs. 30.

Conviction under section 484 set aside.
Conviction under section 287 affirmed.

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Present : CANAKERATNE, J. & GRATIAEN, J.

GAMAGE LUISA PERERA vs GAMINI BUS COMPANY, LTD.

S. C. 281/*M*—*D. C. Colombo* 17078

Argued on : 22nd March, 1949

Decided on : 25th March, 1949

Negligence—Damages for injury resulting from—Passenger just alighted at halting place run over by rear wheels of the vehicle—Driving off from halting place without due care and caution—Res ipsa loquitur.

Held : (i) That the driver of an omnibus, who, without taking due care and precautions for the safety of persons, who were known to be in very close proximity to the vehicle, merely depends on the signal given by his conductor to drive off a 'bus from a halting place, is guilty of gross negligence.

(ii) That the doctrine of "*res ipsa loquitur*" applies to a case where the rear wheels of an omnibus ran over a person who had just alighted from the vehicle at a prescribed halting place.

Per GRATIAEN, J.—It is I think more satisfactory for a trial Judge to express his opinion on all the issues of fact in the event of his judgment on the major issue of liability being reversed in appeal.

Cases referred to :—*Scott vs. London Dock Company* (159 E. R. 665.

N. E. Weerasooriya, K.C. with *H. A. Koattegoda,* for the plaintiff-appellant.

H. W. Jayawardene, for the defendant-respondent.

GRATIAEN J.

On 22nd June 1945 the plaintiff, an elderly lady of 59, was a passenger in an omnibus belonging to the defendant Company. The omnibus stopped at a halting place in Pamankade to admit new passengers and also to enable certain passemgers, including the plaintiff, to alight. According to a witness whose evidence has been accepted by the learned District Judge, "there was a rush of people trying to board the 'bus; there was no queue at the halting place, and everybody was crowding round the 'bus." In this state of things the situation clearly demanded special caution from the driver of the omnibus before he drove the vehicle away. He should have realised the possibility that someone who was either pressing forward to board the omnibus or who was attempting to alight might be jostled into a position of danger when the vehicle resumed its journey. It was therefore incumbent on him not to drive off without eliminating the risk of running over members of the undisciplined crowd or over others who, like the plaintiff, had unwillingly been caught up, so to speak, in the tide. What actually did take place illustrates what any reasonable person should have anticipated and made it his business to avoid. According to the case as presented at the trial on behalf of the Company, when the omnibus eventually drove off, its rear wheels ran over the plaintiff who had been knocked down by some persons who wanted to get into the omnibus. To quote a witness called by the Company, "as the plaintiff fell, the 'bus started and the rear wheels ran over her."

The plaintiff's version of the incident is rather different, but it was rejected by the learned Judge and I will therefore assume for the purposes of this appeal that the Company's version represents the truth. But I do not think that this can avail the Company, because the Company's version discloses an equally strong *prima facie* case of negligence against the driver. In the ordinary course of things the rear wheels of an omnibus which is carefully and competently handled do not run over a person who has just alighted from the vehicle at a prescribed halting place. The doctrine of *res ipsa loquitur* clearly applies to such a case, because "where the accident was such as does not normally happen if those that have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident rose from want of care" *Scott vs. London Dock Company* (159 E, R. 665). In the present case the driver has signally failed to give or even to suggest an explanation which can be regarded as sufficient to rebut the presumption of negligence raised against him. Indeed, he unblushingly confessed to almost complete ignorance of what had happened. "I did not see how the accident occurred," he said, "I saw the plaintiff alighting from the 'bus. The conductor gave me the signal to start and I started the 'bus. When the 'bus

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travelled about two or three feet the people shouted that a woman was run over. I stopped the 'bus and saw that this woman had been run over." Far from serving to rebut the presumption of negligence, this frank admission by the driver seems to me to strengthen the case against him. If the driver of an omnibus is content to surrender his judgment to the conductor on the question whether it is safe to drive on without risk to the persons who were known, in an atmosphere of chaos and confusion, to be in very close proximity to the vehicle, he does so at his peril. To drive "in blinkers" on such an occasion is to my mind an act of gross and unpardonable negligence. It shows callous disregard for the safety of others.

In my opinion there is no evidence to justify the learned Judge's view that the accident occurred "due to some cause beyond the control of the Company's driver. I would accordingly hold that the Company is liable to compensate the plaintiff for the damages sustained by her by reason of the driver's negligence.

There remains the issue of damages. In addition to other injuries, the plaintiff sustained a compound fracture in her left leg. She had been employed as an attendant in a Government hospital, and it is clear that apart from the very considerable pain and discomfort which she must have experienced, she has incurred a great deal of expense and also been deprived of her income for many months. The learned trial Judge did not record his findings on the issue of damages in view of his decision that negligence had not been established against the driver. It is I think more satisfactory for a trial Judge to express his opinion on all the issues of fact in the event of his judgment on the major issue of liability being reversed in appeal. As this has not been done, the case should normally be sent back for retrial on the issue of damages. The accident occurred, however, nearly four years ago, and I am very reluctant to put the parties, and particularly the plaintiff, to further expense and inconvenience if it can be avoided. The plaintiff is now 63 years old, and it would be wrong to deprive her any longer of the compensation which is her due. I prefer in all the circumstances to assess the damages on the materials which are already before us. Considering that part of the evidence on this issue which the defendant Company has not disputed, I am satisfied that the trial Judge could not reasonably have awarded the plaintiff a sum of less than Rs. 2,500 as damages. This seems in all the circumstances of the case to be a fair award. I would accordingly set aside the judgment of the learned District Judge and enter decree in favour of the plaintiff against the defendant Company for the sum of Rs. 2,500. The plaintiff is also entitled to her costs of appeal and in the Court below.

Appeal allowed.

CANAKERATNE, J.

I agree.

Present : WINDHAM, J.

ISMAIL vs. HERFT

S. C. 40—C. R. Colombo 6939

Argued on : 9th December, 1948

Decided on : 21st December, 1948

Landlord and tenant—Rent Restriction Ordinance, No. 60 of 1942, section 8 (c)—Order of ejectment—Death of plaintiff before issue of writ of ejectment— Effect on issue of writ of ejectment.

An order of ejectment was made against a tenant on the ground that the premises were reasonably required for the use of the plaintiff and his family, in a case where the scales were evenly balanced. Before the date fixed for the issue of the writ of ejectment, the plaintiff died.

Held : (i) That as the premises are no longer required for the use of the landlord, a writ of ejectment cannot be issued.

(ii) That the right of the landlord to occupy his premises is a personal right, which does not enure to his executor until the landlord had entered into possession.

Cases referred to :—*Thassim vs. Cabeen* (1946) N. L. R. 440.

H. W. Tambiah with *R. Manickavasagar*, for the defendant-appellant.

A. M. Charavanamuttu, for the substituted plaintiff-respondent.

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WINDHAM, J.

This is an appeal by the tenant of a dwelling house against a judgment of the learned Commissioner ordering his eviction on the ground that the premises were reasonably required for the use and occupation as a residence for the plaintiff-respondent and his family. In his judgment, which was delivered on November, 17th 1947, the learned Commissioner ordered that writ of ejectment should not issue until May, 31, 1948, provided that damages in Rs. 65 per month should be regularly paid, that being the amount *of the monthly rent payable under the tenancy.* They were so paid. Meanwhile, this appeal was lodged on November, 21, 1947. On March, 9 1948, before writ of ejectment was due to be issued, the plaintiff died, leaving a widow and four children. One of his sons, as sole executor of his will, was substituted as respondent. Under his will, which was proved on September, 27, 1948, the plaintiff left all his property to his three sons (including the above executor) and his daughter in equal shares absolutely.

Three grounds of appeal have been urged. First, it is said that the plaintiff failed to give to the defendant a valid notice to quit. On March, 31, 1947, the plaintiff purchased the premises in question from another. He forthwith on the same day gave notice to quit to the defendant, who had been the vendor's tenant. The notice reached the defendant on the same day, March 31st, and required him to vacate by the end of April, failing which he would be sued for ejectment and damages as from May 1st. The tenancy being a monthly one which ran from the first of each month, having begun on the first of a month, this was to my mind a perfectly good notice to quit, in accordance with the requirements of the law, as recently clarified in *Thassim vs. Cabeen*, (1946) 47 N. L. R. 440. But it is argued for the defendant that since the notice to quit contained a direction to the defendant (as it did) that he should pay the plaintiff "all rent accruing as and from April 1st, that is to say, it did not require him to pay the plaintiff as and from March, 31st—and since the plaintiff in his evidence stated that "up to the 31st March, the defendant was liable to pay rents to the previous landlord, and from the 1st April, the defendant was my tenant,"—therefore the plaintiff cannot be heard to say that he became the defendant's landlord before the 1st April, with the result that when he served the notice to quit on 31st March, he was not his landlord and the notice was accordingly bad and of no effect. I do not think this contention can be acceded to. As the learned Commissioner rightly held, the plaintiff became the defendant's landlord at the moment he purchased the premises on 31st March, before he served the notice to quit, if only a few hours before. The plaintiff could not modify this legal result by merely stating that he became landlord as from 1st April, and by requiring the defendant to pay him rent only as from that day. Clearly the plaintiff's not requiring him to pay rent in respect of the last day of March, or in respect of a proportionate fraction of that day, was a mere arrangement of convenience, which could be adjusted if necessary (though there was *no evidence that it was adjusted) between the* plaintiff and his vendor. This ground of appeal accordingly fails.

The second ground of appeal is that the learned Commissioner erred, in the light of the evidence, in finding that the premises were reasonably required for the use and occupation as a residence for the plaintiff and his family. The defendant bases this contention mainly on the plaintiff's answers to two questions put to him in cross-examination. These questions were the following:—(1) "The real reason why you want these premises is to get your second son, Shelton to run a dairy in these premises"; (2) "You require these premises for the business of your second son?" To each of these questions the plaintiff answered "Yes" It is accordingly contended that by his answers the plaintiff was admitting that the enabling of his son to run a dairy there was the only genuine reason why the plaintiff wanted the premises, and that he did not in truth want them as a residence for himself and the other members of his family at all. But the learned Commissioner went into this point very carefully, and he considered these particular answers of the plaintiff along with his definite statement, both in examination in chief and in re-examination, that he did want to live in the house himself, which statements were corroborated by other evidence that was accepted. I see no cause to interfere on this ground with the reasonable conclusion of the learned Commissioner that, in the light of all the plaintiff's evidence, the latter did not intend to convey the idea that he wanted the premises for the son's business only. He never said that this was his *only* reason. It may well be that this was the real reason, in the sense of the primary reason, and that but for the fact that these particular premises could be used as a dairy the plaintiff might have sought other premises for his own residence. But that is quite compatible with his having at the same time a genuine desire to reside in the premises himself also, and thereby to "kill two birds with one

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stone." The learned Commissioner was accordingly justified in holding on all the evidence that the premises were reasonably required for the use and occupation as a residence for the plaintiff and his family.

In support of same ground of appeal a further argument has been advanced. From the terms of his judgment it is clear that the learned Commissioner considered that the hardship which would result to the defendant if the action were to succeed, and the hardship which would result to the plaintiff if it were to be dismissed, were about evenly balanced and in deciding in favour of the plaintiff he followed the principle laid down in *Raman vs. Perera* (1944) 46 N.L.R. 133, that where the hardships are equal the landlord should succeed by reason of his ownership. It is argued that this decision must be taken to have been impliedly overruled in *Mahroof vs. Issadeen* (1946) 48 N.L.R. 14, where it was held that where neither the plaintiff nor the defendant proved their respective allegation the plaintiff must fail since he has not discharged the burden cast upon him as plaintiff. But I do not consider that *Mahroof vs. Isadeen* (*supra*) affects the principle laid down in *Raman vs. Perera* (*supra*). For although by a rigid application of the axiom that "if equals be added to equals the wholes are equal" it might be contended that the position where neither side has proved its allegations must be the same as where each side has adduced equally cogent evidence in support of its allegation, and that the landlord must accordingly fail in the latter case as in the former, nevertheless the legal position is not truly the same in the two cases. For in the latter case the landlord has made out a case to answer, and it is for the Court, in the light of the tenant's evidence to decide whether the landlord's requirement is a reasonable one; whereas in the former case the landlord has adduced no evidence on which it could be held even in the absence of any evidence on the tenant's behalf, that his requirement was a reasonable one. Furthermore, I find that the principle laid down in *Raman vs. Perera* (*supra*) has been very recently approved and applied by my brother Gratiaen in *Piyatissa vs. De Mel.** I respectfully agree with my brother that the principle should be followed by reason both of its intrinsic merits and of the undersirability of fluctuating judicial interpretations with their resulting uncertainty.

The second ground of the appeal accordingly fails, and one ground remains, based on the admitted fact that the plaintiff died on a date after the judgment of the learned Commissioner and the filing of the appeal, but before the date fixed for the issue of the writ of ejectment and before the hearing of this appeal. Although this ground could not of course have been included in the grounds of appeal, I consider that the plaintiff's death is a fact which can properly be taken into account by this Court in considering whether the defendant ought to be ejected. For the right of the plaintiff to occupy the premises by virtue of section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, is a personal right, conferred on him only on the ground that the premises are reasonably required, in the words of his plaint, "as a residence for the plaintiff and his family." Until he had actually entered into occupation of the premises, which he never did, this was not a right which would be transmissible to his heirs or successors, being personal to himself and founded upon his personal requirements. It is certainly not a right which enures for his executor, for his executor's requirements as to residence are not the plaintiff's. Nor can the learned Commissioner's judgment be construed as holding that the premises were proved to be reasonably required as a residence for the plaintiff's family apart from the plaintiff himself. The plaint did not allege this (the words are "for the plaintiff and his family"). And the Commissioner's judgment made two things quite clear. First, as I have already said, the respective needs of the plaintiff and of the defendant for the premises were considered to be about equally balanced, so that the fact of the plaintiff's being the landlord had to be brought into tip the scale in his favour. It may be noted here that the plaintiff was a married man with a wife and four children, of whom one was under age, and that at the time of hearing his two elder sons were living away from him at the house of one of them, while the remainder of his family were temporarily also living elsewhere, he himself residing alone in a friend's house until he should be able to move into the house in dispute and be rejoined by them. The defendant, on his part was a married man with a wife and two children, and also two nephews and two nieces, all living with him in the premises in dispute, and no alternative accommodation for him was offered or available. Secondly, the conclusion reached by the learned Commissioner, upon adequate evidence, was that "the premises are reasonably required by the plaintiff for his own use as a residence". In arriving at this conclusion he found that—"the fact that the plaintiff is obliged to rely on the charity of a friend for his own accommodation, and has to live separate from the other members of his family for want of proper accommodation, would indicate that the

*39 C. L. W. 63.

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plaintiff does require the premises for use as a residence."

In view of these observations and findings it seems to me that the ground was entirely cut from beneath the plaintiff's case by the fact of his untimely death before the writ of ejectment issued and before he could occupy the premises. The time at which the conditions set out in section 8 (*c*) of the Rent Restriction Ordinance, No. 60 of 1942, must be shown to exist by a landlord is, I conceive, the time when the court is required to make the ejectment order. But in a case where there is an appeal from such an order, and the landlord who brought the action has died before writ of ejectment has issued and before he has entered into possession of the premises, then I think that the appeal court should likewise satisfy itself that the premises are still reasonably required for the purpose set out in the plaint, that is to say, in the present case, as a residence for the landlord and his family. This has now become impossible, and in any case his death must obviously have tipped in favour of the defendants scales which even while the plaintiff lived were so evenly balanced. This appeal must, therefore, be allowed, and the judgment of the learned Commissioner set aside. Nothing in this judgment, of course, will operate to preclude whatever person may have succeeded, or may succeed, the deceased plaintiff as landlord of the premises, from suing the defendant for eviction on the ground that the premises are reasonably required as a residence for him or her, the new landlord. In view of the learned Commissioner's judgment for eviction having been good when it was made, I order that the substituted plaintiff-respondent shall have the plaintiff's costs of the trial, while the defendant shall have his costs of this appeal.

Appeal allowed.

Present : BASNAYAKE, J.

DINAPALA vs. INSPECTOR OF POLICE, GALLE

S. C. 954—*M. C. Galle* 8889

Argued on : 16th and 17th November, 1948
Decided on : 23rd March, 1949

Explosives Ordinance (Chap. 140), *sections* 7, 15 *and* 28—*Charge of keeping fireworks in breach of special order under section* 28—*Is it punishable under section* 7—*Charge of keeping explosives in an unlicensed store—Is it an offence under section* 15 (3). *Meaning of 'penalty' in Section 15 Criminal Procdure Code, Section 2.*

Held : (i) That a breach of a special order under section 28 of the Explosives Ordinance is not punishable under section 7 of the same Ordinance.

(ii) That an accused person who had a license to stock explosives in the premises in which they were found commits no breach of section 15 of the Explosives Ordinance, although the premises are not registered for the storage of explosives.

(iii) That the definition of the expression "fine" in Section 2 of the Criminal Procedure Code is wide enough to embrace the pecuniary forfeiture provided in section 15 of Chap. 140 under the nomenclature of "penalty."

D. S. Jayawickrema, 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 ordered to pay a fine of Rs. 150 on the first charge and a fine of Rs. 50 on the second.

(1) "That you did, within the jurisdiction of this Court, at Dadalla on 20-2-1948 keep fireworks containing a mixture of potassium chlorate and aluminium powder in breach of the Special Order No. 1 made under section

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28 of Chapter 140 of the New Legislative Enactments of Ceylon published in Government Gazette No. 6295 of 11-6-37 and thereby committed an offence punishable under section 7 of Chapter 140 of the New Legislative Enactments of Ceylon.

(2) "At the same time and place aforesaid the abovenamed accused did keep explosives exceeding sixty pounds in a place except in a store for explosives either lawfully existing or licensed under the Explosives Ordinance for keeping such explosives or in premises registered under the Explosives Ordinance for keeping such explosives in breach of section 15 (1) of Chapter 140 of the New Legislative Enactments of Ceylon and thereby committed an offence punishable under section 15 (3) of Chapter 140 of the New Legislative Enactments of Ceylon."

The facts relating to the charges are as follows :

On 20th February 1948 Sub-Inspectors Schokman, Jayasekera and Seedin visited the fireworks factory of one Deonis, a brother-in-law of the accused. The accused was in the factory at the time actively engaged in the manufacture of fireworks. The Sub-Inspectors went from there along with the accused to a tea boutique about a quarter of a mile away. They recovered therefrom 175 boxes of triangular crackers called "batta", 58 packets of crackers, and 14 boxes of mixed fireworks. Some of them were in, and others on the top of, a glass show case of the boutique. The Government Analyst examined specimens of these crackers and fireworks and he identified potassium chlorate and aluminium powder in all the specimens.

I shall now discuss the charges in their order. The first charge alleges an offence punishable under section 7 of the Explosives Ordinance. The material portion of that section reads: "The breach of any of the regulations made under the provisions of this Ordinance shall constitute an offence punishable, on conviction, by a fine not exceeding two hundred rupees....." It is not alleged in the charge that the accused committed a breach of any of the regulations made under the Ordinance. The allegation is that he committed the breach of a special order made under section 28. Does a special order come within the ambit of the words "any of the regulations made under the provisions of this Ordinance" in section 77. Section 3 provides for the making of rules, section 5 provides for the making of regulations and section 6 gives both classes of delegated legislation upon publication in the Gazette the same force as if they had been inserted in the Ordinance. There is a further class of delegated legislation spoken of as "special rules" in section 18. Then comes the class of delegated legislation known as "special order" empowered by section 26. The expressions "rules", "regulation", "special rule" and "special order" are not defined in the Ordinance. But it is clear from the context of the Ordinance that those expressions have not been used indiscriminately to mean the same thing. It seems to me that in the Explosives Ordinance the Legislature intended to create four classes of instruments of delegated legislation. Delegated legislation by "special order" is rare in Ceylon although in English legislation the term "special order" is "used with bewildering variety" (Report of the Committee on Ministers' Powers, p. 27). I have no doubt in my own mind that a "special order" under section 28 does not come within the ambit of section 7. The breach of a special order is, therefore, not punishable under the latter section. The breach of a special order not being punishable under section 7 or any other section of the Explosives Ordinance, the conviction on the first charge cannot be sustained and must be set aside.

The allegation in the second charge is that the accused "did keep explosives exceeding sixty pounds in a place except in a store for explosives either lawfully existing or licensed under the Explosives Ordinance for keeping such explosives or in premises registered under the Explosives Ordinance for keeping such explosives." That allegation does not bring him within the pale of any offence under the Ordinance or any other enactment.

The accused had a licence to stock explosives in the premises in which they were found although the premises were not registered for the storage of explosives. It is not alleged that he kept explosives in breach of his licence. He has therefore committed no breach of section 15 of the Explosives Ordinance. The conviction on this charge too cannot be sustained and must be quashed.

When he imposed a fine of Rs. 50 on the accused in respect of the second charge the learned Magistrate does not appear to have had before him the provisions of section 15. It is, therefore, necessary that I should draw his attention to that section. The consequences of a breach of section 15 are the forfeiture of all or any part of the explosives found in premises in which they

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are kept contrary to its terms and a maximim penalty of one rupee for every pound of explosive so kept. Although the word used in section 15 for the purpose of indicating the pecuniary forfeiture that may be imposed thereunder is "penalty" and not "fine", I am of opinion that the "penalty" prescribed therein is in fact what in the language of the Criminal Procedure Code is a fine. The definition of the expression "fine" in section 2 of the Criminal Procedure Code is in my view wide enough to embrace the pecuniary forfeiture provided in section 15 under the nomenclature of "penalty". All the penal provisions of the Explosives Ordinance, save section 7, speak of penalty. The use of the expression "fine" in that section does not in my view afford a sound basis for holding that the expression "penalty" should bear a different meaning. According to Wharton's Law Lexicon a penalty is a sum, also called a fine, recoverable in a Court of Summary Jurisdiction from a person infringing a statute. In my view a penalty imposed under section 15 may be recovered in the same way as a fine. The Customs Ordinance is another Ordinance wherein the words "penalty" and "fine" are used indiscriminately. In that Ordinance special provision is made (section 139) that all penalties and forfeitures incurred thereunder may be recovered by civil suit in the name of the Attorney-General. It is unnecessary for the purposes of this case to consider whether penalties under the Customs Ordinance may also be recovered in the manner prescribed in the Criminal Procedure Code.

In passing I wish to say a word about the way in which the Explosives Ordinance is described in the charges. It is referred to as "Chapter 140 of the New Legislative Enactments of Ceylon". The correct way to describe an Ordinance in the Revised Edition of the Legislative Enactments is by its short title. It is sufficient to refer to the Explosives Ordinance as "the Explosives Ordinance" without more. So in the case of any other Ordinance in the Revised Edition.

The appeal is allowed and the accused is acquitted.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : JAYETILEKE, S.P.J. (President), CANEKERATNE, J., GUNASEKARA, J.

REX vs. FERNANDO

Appeal 29 *of* 1949 *with Application* 72 *of* 1949—*S. C.* 4/*J. M. C. Colombo* 21960
Argued on : 20th June, 1949
Decided on : 27th June, 1949

Court of Criminal Appeal—When may the deposition of an absent witness be read in evidence—Section 33, *Evidence Ordinance.*

In a trial before the Assizes an application was made by the Crown to read in evidence under the provisions of section 33 of the Evidence Ordinance the depositions of four witnesses, recorded during non-summary proceedings by the enquiring Magistrate. Evidence, uncontested by the defence, was led to show that the four witnesses were presently at Tokyo, Bangkok, Singapore and Calcutta respectively. Counsel for the defence opposed the application on the ground that there was no evidence before Court that efforts had been made to secure the personal attendance of the witnesses in question. The application was allowed, the presiding Judge holding that such evidence was unnecessary and that on the material available the Court was satisfied that the presence of the witnesses could not be obtained without an amount of delay and expense which, under the circumstances of the case, was unreasonable. In appeal it was argued on behalf of the defence that the depositions were improperly admitted.

Held : (1) That the discretion of the trial Judge was exercised on insufficient material inasmuch as there was no evidence of the actual delay and expense that would be involved in securing the attendance of the witnesses in question.

(2) That as the evidence of the witness presently in Calcutta was of a vital nature, the delay and expense involved in securing his attendance was not unreasonable under the circumstances of the case, and that steps should have been taken by the Crown to secure his attendance at the trial.

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Cases referred to :—*The King vs. Beyal Singho* (48 N. L. R. at p. 25.)
Empress of India vs. Mula (I. L. R. 2 All. at p. 646).

E. D. Cosmé with *O. M. Da Silva*, for the appellant.
H. A. Wijemanne, Crown Counsel, with *Ananda Pereira, Crown Counsel*, for the Attorney-General.

JAYETILEKE, S.P.J.

The main objection taken at the argument before us was that the deposition of Mr. Peterson, the Assistant Accountant of the Hong Kong and Shanghai Banking Corporation, was wrongly admitted in evidence. Mr. Peterson left the Island shortly after he gave evidence in the Magistrate's Court and, at the date of the trial, was employed at the branch office of the Corporation at Calcutta.

The learned Judge admitted the deposition in Evidence under section 33 of the Evidence Ordinance (Cap. 11) on the ground that the presence of the witness could not be obtained without an amount of delay and expense which, under the circumstances of the case, was unreasonable. Section 33 (Evidence Ordinance S. 33 (Cap. 11) reads :—

> " Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truths of the facts which it states when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay and expense which, under the circumstances of the case, the Court considers unreasonable ".

Ameer Ali (Law of Evidence p. 365) says :—

> " The Court has no discretion as to admitting a deposition when the witness (1) is dead or (2) cannot be found or (3) is incapable or (4) is kept out of the way ; the deposition of such witness is declared to be relevant and must, therefore, be admitted. The Court has such a discretion in the case of the circumstances mentioned at the close of the section."

Ameer Ali (Law of Evidence p. 369) says further :—

> " The last ground for admitting the deposition of an absent witness is governed by three considerations,—the delay, the expense, and the circumstances of the case. Of the last ' one of the chief which the Judge has and ought to weigh, *is the nature and importance of the statements contained in the deposition* '. It would be unreasonable to incur much delay and expense when the facts spoken to in the deposition are of the nature of formal evidence for the prosecution, or supply some link in the case for the prosecution as to which little or no dispute exists, or are facts to which other witnesses speak besides the deponent, and which witnesses are produced at the trial. On the other hand, it might be very reasonable to submit to much delay and considerable expense, when the evidence of the deponent is vital to the success of the prosecution, or has a very important bearing upon the guilt of the accused ".

In the King vs. Beyal Singho (48 N. L. R. at p. 25) the power of this Court to review the discretion exercised by the trial Judge where a manifest injustice is disclosed was recognised.

In the present case the main charge against the accused was that he had conspired with an unknown person to forge Mr. Peterson's signature and that of one of the receiving shroffs to a paying-in counterfoil (P1) acknowledging the deposit of a sum of Rs. 78,000 to the credit of his account with the Corporation. On this charge Mr. Peterson was a vital witness. In the Magistrate's Court he admitted that the signature on P1 looked like his but he denied that it was his. Mr. Nagendra, the Government Examiner of questioned documents, in his reports P26 and P27 stated that he was unable to say definitely whether P1 was a forgery but in the witness box he said " I reached the opinion that P1 is a forgery ".

The evidence on deposition (A5) of Mr. Muthukrishna, an expert on handwriting, shows that Mr. Muthukrishna was of opinion that P1 was not a forgery.

In view of the similarity between the impugned and genuine signatures of Mr. Peterson and in view of the conflict of evidence between the two experts we think that, in the interests of the accused, the Jury should have been given the opportunity of seeing Mr. Peterson in the box.

No evidence was led as to what delay was likely to be occasioned by a postponement of the trial and as to what expense would have to be incurred to procure the attendance of Mr. Peterson. Having regard to the fact that Calcutta is about 12 hours flying distance from Ceylon we do not think that the delay or expense would be very much.

In Empress of India vs. Mula (I. L. R. 2 All. at P. 646) it was held that it is only in extreme cases of delay and expense that the personal attendance of a witness should be dispensed with.

We are of opinion that the deposition of Mr. Peterson was inadmissible under the circumstances of this case. We would set aside the conviction and sentence and send the case back for a fresh trial.

Set aside and sent back for fresh trial.

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Present : NAGALINGAM, J.

THIAGARAJAH (Appellant) and ANNAIKODDAI POLICE (Respondent)

S. C. 1354—*M. C. Jaffna* 7537.
Argued on : 2nd September, 1948.
Decided on : 23rd September, 1948.

Criminal Procedure Code, sections 304, 306 *and* 425—*Failure to write out judgment and pronounce it in open Court—Is it an irregularity cured by section* 425 ?

A Magistrate, instead of writing out the judgment and pronouncing it in open Court in the presence of the accused, stated orally the gist of what he intended to embody in the judgment in the absence of the accused, in a case where his absence could not be dispensed with.

Held : That this amounted to an irregularity which could not be cured by the provisions of section 425 of the Criminal Procedure Code.

Cases referred to : *Henricus vs. Wijesuriya* (1946) 47 N. L. R. 378.
Tissera vs. Daniels (1948) 49 N. L. R. 162.

C. Ranganathan, with *V. K. Kandasamy*, for the accused-appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

NAGALINGAM, J.

The appellant in this case was convicted under section 272 of the Penal Code with having driven car No. X 5050 in a rash and negligent manner so as to endanger human life, and has been sentenced to undergo a term of six weeks' rigorous imprisonment.

The case for the prosecution was dependent upon the evidence of two police officers, while the defence of the accused, which was that he had not driven the vehicle in question on the date of the alleged offence, was supported by his employer.

In view of the order I propose to make in this case I do not think it necessary to express an opinion on the merits.

The main point argued in appeal was that the learned Magistrate had not delivered his judgment in open Court and that therefore the conviction was bad. In support of the averment that the judgment was not delivered in open Court an affidavit was filed by the appellant. In view of the state of the record the affidavit was forwarded to the Magistrate for his observations. The Magistrate has informed this Court that his usual practice when he convicts a person is to tell him in short the reasons for the conviction and " not read out word to word the reasons " that he has written out ; but in regard to this case he states that it may be that he did adjourn after the conclusion of the trial and that the reasons were written out in chambers. He, however, adds that even in this instance he would not have departed from his usual practice of telling the accused shortly his reasons for convicting him, though the reasons may not have been reduced to writing at that stage. The Magistrate does not, however, state that after he had written out his reasons for the conviction in chambers he pronounced those reasons at any time in open Court or in the presence of the accused.

Section 190 of the Criminal Procedure Code prescribes that where the Magistrate finds the accused guilty he should forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence. The learned Magistrate in this case complied with those provisions by recording the verdict and sentencing the accused immediately at the conclusion of the trial. The verdict is, however, treated as something apart from the judgment. The necessity for a judgment is to be inferred from the provisions of section 304 of the Code. I say " to be inferred ", because there is no express provision which requires that Magistrate—I shall confine my remarks to summary trials before a Magistrate—should write out a judgment or the stage at which he is required so to do. Section 304 of the Code assumes that a judgment would be written out by a Magistrate and proceeds to set out the stage at which it should be pronounced. That the judgment is required to be pronounced after the verdict is clear from the section—either immediately after the verdict was recorded or at some time.

Section 304, however, does not make it equally clear whether the judgment is to precede the sentence or follow it. De Silva, J. in *Henricus vs. Wijesuriya* (1946) 47 N. L. R. 378 took the view that " the judgment must be contemporaneous with the sentence and that the sentence forms

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in fact a part of the judgment". For the purpose of this case it is unnecessary to go into this question.

The two points that have been pressed on this appeal are : firstly, that the judgment should have been pronounced in open Court ; and, secondly, that the accused person should have been required to attend Court to hear judgment delivered. The term "judgment" is not formally defined in the Code but its essential characteristics or qualities are set out in section 306. Confining the requirements of a judgment to a case of conviction, it would appear that (1) it should specify the offence, if any, of which, and the section under which the accused is convicted ; (2) (*a*) the point or points for determination, (*b*) the decision thereon, (*c*) the reasons for the decision ; and (3) the punishment to which the accused is sentenced. Section 306 also requires that the judgment should be dated and signed by the Magistrate in open Court at the time it is pronounced.

The learned Magistrate after he had written out the judgment neither pronounced it nor signed and dated it in open Court, nor was the accused person present to hear judgment delivered—this is not a case where the presence of the accused could have been dispensed with. Learned Crown Counsel sought to have the conviction affirmed by invoking to his aid section 425 of the Criminal Procedure Code which provides *inter alia* that a judgment should not be reversed or altered on appeal on account of any error, omission or irregularity in the judgment unless such error, omission or irregularity or want has occasioned a failure of justice. His contention was that, at best, the failure to pronounce the judgment after it had been written out and to sign and date it in open Court in the presence of the accused amounted to an irregularity in the judgment which would be cured by the provisions of the section and would therefore not furnish an adequate ground to the appellant to have the conviction set aside.

In support of his contention the case of *Tissera vs. Daniels* (1948) 49 N. L. R. 162 was quoted by by him and he particularly relied upon the quotation therein made of a judgment of Soertsz, J. in S. C. No. 646/M. C. Trincomalie, No. 11304, where that learned Judge held that the total absence of a judgment amounted to an irregularity of procedure which did not vitiate the conviction. But Dias, J. to whom the earlier case of *Henricus vs. Wijesekera* (supra) had not been cited, came independently to the conclusion that the facts of the case he was dealing with were far removed from those which were before Soertsz, J. and quashed the conviction. De Silva, J., however, held in the case of *Henricus vs. Wijesekera* (supra) that the non-compliance with the provisions of section 304 by a Magistrate was sufficient ground to set aside the conviction. It seems to me that the question whether in any particular case non-compliance with the provisions of sections 304 and 306 amounts to an irregularity or to something more in the nature of an illegality which must be held to vitiate the conviction must depend on the facts of each case. Had the learned Magistrate written out his judgment and then in pronouncing the judgment referred to the main points of his findings, such a case I do not doubt, would only amount to an irregularity, an appellate Court would not interfere in those circumstances. But where a Magistrate without writing his judgment indicates orally to the accused the gist of what he proposes to embody in his judgment, there is no guarantee that the language employed by him in his judgment would not have suffered some modification compared with that employed in orally indicating to the accused his reasons.

The essence of a judgment, to my mind, consists in the reasons which a Magistrate is called upon to give for taking the view he takes either for convicting or acquitting an accused person. That being an integral part of the judgment, I do not think a failure to give reasons in writing before pronouncing it can be said in all cases to amount to an irregularity only which could be covered by section 425 of the Code. In this case there were two versions placed before the Magistrate, the defence of the accused being in the nature of an *alibi*. I would, concurring in the view expressed by my brother Dias, J. in the case of *Tissera vs. Daniel* (supra), hold that the failure passed beyond the bounds of what may be described as an irregularity within the meaning of section 425 of the Criminal Procedure Code.

In this view of the matter, the conviction cannot be allowed to stand. I quash the conviction and send the case back for a new trial before another Magistrate.

Re-trial ordered.

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

BANDA vs. DAVID (S. I. POLICE),

S. C. 299—*M. C. Matale*, 7954

Argued on : 30th May, 1949
Decided on : 29th June, 1949.

Criminal Procedure Code, section 190—Forthwith—Should a Magistrate record his verdict immediately after conclusion of trial.

Held : That Section 190 of the Criminal Procedure Code does not require a Magistrate who convicts an accused person to record his verdict immediately after he has concluded the taking of his evidence.

Overruled : *Vethanayagam vs. Inspector of Police, Kanekesanturai* (50 N. L. R. 185) ; 39 C. L. W. 93

Cases referred to : *Rodrigo vs. Fernando* (1899) 4 N. L. R. 176
Peris vs. Silva (3 Bal. 165)
Samsudeen vs. Suthoris (1929) 29 N. L. R. 10
Venasy vs. Velan (1 N. L. R. 124)
The Queen vs. Kiriya (3 S. C. R. 100)

C. Jayawickreme, with *Malcolm Perera*, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, with *S. Wijesingha, Crown Counsel*, for the Crown.

GUNASEKERA, J.

This case comes before us upon the following reference by Windham J. ;—

" There are no merits in this appeal on the facts. But a point of law has been raised, namely, that the learned Magistrate, having concluded the taking of the evidence on both sides, did not convict and sentence the accused immediately (*i.e.*, without leaving the Bench) but did so on the following day. This, it is argued, was a non-compliance with section 190 of the Criminal Procedure Code, and was not curable under section 425. There are conflicting decisions on this point by single Judges of the Supreme Court : I refer, among others, to 3 Balasingham 165, 29 N. L. R. 10, and 50 N. L. R. 185. Magistrates and advocates have accordingly no authoritative judgment to guide them. I, therefore, consider that this is a proper question to be reserved for the decision of two or more Judges of the Court under section 48 of the Courts Ordinance. I so reserve it accordingly."

Section 190 of the Criminal Procedure Code is in the following terms :—

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

The question is whether this section requires a Magistrate who convicts an accused person to record his verdict immediately after he has concluded the taking of the evidence and, if so, whether a Magistrate's omission to record his verdict at that stage is fatal to the conviction. This question came up for consideration in the case of *Rodrigo vs. Fernando* (1899) 4 N. L. R. 176, which was decided shortly after the present Criminal Procedure Code came into operation and Withers J. said :—

" It is very important that a Magistrate should observe the provisions of section 190 of the Criminal Procedure Code, 1898, which enacts that a Magistrate shall, after taking " the evidence for the prosecution and defence, forthwith record a verdict of acquittal or guilt as he may find ".

He took the view that the section " enacts that the Magistrate shall record his verdict of acquittal or guilt forthwith after hearing the evidence for the prosecution and defence ". It is apparent from what purports to be a quotation from the section that this view was based on a misreading of the enactment.

In *Peris vs. Silva* (1903) 3 Bal. 165 decided in 1905 Wendt J. appears to have assumed the correctness of this view. He said, however, that he was " not prepared to hold that the mere fact of a Police Magistrate's judgment not having been pronounced " forthwith " as required by section 190 of the Procedure Code, is fatal to its validity " Twenty-two years later, in 1927, the question

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was expressly considered in the case of *Samsudeen vs. Suthoris* (1927) 29 N.L.R. 10, and Dalton J. held that what the section requires is that the verdict should be recorded, not forthwith after the taking of evidence but forthwith after the finding of the verdict. This decision was followed for the next twenty-two years until it was dissented from the judgment of Basnayake J. in *Vethanayagam vs. Inspector of Police, Kankesanturai* (50 N. L. R. 185) ; (39 C. L. W. 93)

Basnayake J. considers that Dalton J's interpretation is an impractical view of the section. It seems to me, however, that that interpretation is in accordance with the plain meaning of the words of the section which are by no means ambiguous. I should say, with all respect, that there seems to be nothing impractical in a requirement that if the Magistrate finds the accused not guilty he shall record a verdict of acquittal forthwith after he finds him not guilty, and that if he finds him guilty he shall record a verdict of guilty forthwith after he finds him guilty.

There is no doubt, everything to be said for the view that it is eminently desirable that the Magistrate should record his verdict forthwith after the conclusion of the cases for the prosecution and the defence. But it seems equally clear that if it was the intention of the Legislature to lay down such a procedure as an imperative requirement of law it had language adequate for the purpose. Thus, it is enacted in section 214 of the Code that :—

> " When the cases for the prosecution and defence are concluded.....the District Judge shall forthwith or within not more than twenty-four hours record a verdict of acquittal or conviction "

What is enacted in section 190 on the other hand, is that :—

> " If the Magistrate.....finds the accused not guilty he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty.....

Clearly, section 214 requires a District Judge to record a verdict forthwith (or within twenty-four hours) after the close of the cases for the prosecution and defence, but section 190 requires a Magistrate to record a verdict forthwith after he finds the accused guilty or not guilty as the case may be.

Basnayake J. refers to the cases of *Venasy vs. Velan* (1895) 1 N.L.R. 124 and *The Queen vs. Kiriya* (1894) 3 S.C.R. 100 as showing that the earlier decisions of this Court (under the Code of 1883) do not support the view taken by Dalton J. In the former case Bonser C.J., observed that it was " most desirable that Magistrates and District Judges should state their findings as to the guilt or innocence of the accused immediately at the conclusion of the trial, and that if the impression left upon their minds by the prosecution, after hearing all the evidence, is so weak and unsatisfactory that they are unable to say whether they consider the accused to be guilty or not, they should give the accused the benefit of the doubt and acquit ".

I do not see anything in the view taken by Dalton J. that is inconsistent with this view ; it is one thing to say that it is " most desirable " that a Magistrate should state his finding immediately at the conclusion of the trial, and quite another to say that there is an imperative statutory requirement that he should do so.

The reason for the view taken in *The Queen vs. Kiriya* (*supra*), that upon the conclusion of a District Court trial the verdict should be given at once, appears to be that it is important that the verdict should be given while the impression made by the evidence is fresh in the mind of the judge. Bonser C.J., says in one of the passages quoted :—

> " A subsequent reading over the notes of evidence is by no means the same thing as the fresh and lively impressions made by the oral testimony of the witness. A story which looks very cogent and convincing on paper may, when heard from the lips of the witnesses, be anything but satisfactory, and for a judge to wait until the impression made by the conduct and demeanour of the witnesses, which are often more important than their words, has faded from his mind, and nothing is left but the dry bones of notes of evidence, is in my opinion an irregularity which is fatal to the interests of justice ".

The view taken by Dalton J. does not, as I understand it, suggest that a Magistrate may wait until the impression made by the conduct and demeanour of the witnesses has faded from his mind to arrive at his verdict.

I would answer the question referred to us as follows :—Section 190 of the Criminal Procedure Code does not require a Magistrate who convicts an accused person to record his verdict immediately after he has concluded the taking of the evidence.

WIJEYEWARDENE, C.J.

I agree.

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Present : WIJEYEWARDENE, C. J.

NEINA MOHAMED *et. al.* vs. SAHUL HAMEED

S. C. No. 257/1947—*C. R. Kandy* 2569.

Argued on : 21st March, and 24th May, 1949.
Delivered on : 6th June, 1949.

Landlord and Tenant—Premises let to firm by one partner—Can such partner mcintain an action for rent and ejectment against other partner.

Held : That a landlord who lets his premises to a firm of which he is a partner, cannot maintain an action for rent and ejectment against the other partners of the firm in respect of the premises so let.

Cases referred to : *Bosanquet et. al. vs. Wray et. al.* (1815) 6 Taunton 597
De Tastet vs. Shaw et. al. (1818) 1 Barnwell & Alderson 664.
Meyer & Co. vs. Faber (1923) 1 Chancery 421.

H. W. Thambiah, for the defendants-appellants.

H. V. Perera, K.C., with *C. E. S. Perera,* and *M. A. M. Hussain,* for the plaintiff-respondent.

WIJEYEWARDENE C. J.

This is an action for rent and ejectment filed by the plaintiff against the defendants.

The question that has to be decided is whether the plaintiff can maintain this action as he and the defendants are partners. In view of that question it is necessary to set out the following paragraphs in the plaint :—

Para 2 : " The plaintiff and the defendant are persons carrying on business under the name, style and firm of M. K. A. Mohamed Mutalib at premises No. 132, Colombo Street, Kandy....."

Para 3 : " The plaintiff let to the said partners premises No. 132, of Colombo Street, Kandy, at a monthly rent of Rs. 60 ".

Para 4 : " The defendants wrongfully and acting in concert refused and failed to pay plaintiff such rent as from October 1, 1946, and there is now due to the plaintiff as arrears of rent up to February, 28th 1947, the sum of Rs. 300 ".

Para 5 : " The plaintiff on December 17th 1946, noticed the defendant to quit and vacate on or before January, 31st 1947, the said premises as he required the same for his own use but the defendants have failed and neglected to quit ".

It will be seen from paragraphs 2 and 3 of the plaint that the contract of tenancy was between the plaintiff and the " partners " whom he described in paragraph 2 as consisting of himself and the two defendants. The position was made clearer by the specific admission made by plaintiff's Counsel at the trial " that the premises were let out to the plaintiff himself and the two defendants who were partners by the plaintiff ". In this action the plaintiff claims the entirety of the arrears of rent and asks for a writ of ejectment against the two defendants. The evidence in the case shows that the plaintiff and the defendants were at the time of the action carrying on the business of the partnership at the premises in question.

It is contended by the appellant's Counsel that on the contract set out in the plaint the plaintiff has to sue the firm of which he is a partner and the plaintiff would then appear as a defendant in the action filed by him. Moreover, it is contended that under the English Law of partnership no legal contract could subsist between the plaintiff and the firm and that the plaintiff could have entered into a contract only so far as to render him liable in equity vide *Bosanquet et. al. vs. Wray et. al.* (1815) 6 Taunton 597 and *De Tastet vs. Shaw et. al.* (1818) 1 Barnwell & Alderson 664). Such an "equitable debt" would be an item in a partnership account and it would be necessary to go into partnership accounts to ascertain the amounts due to the party sued.

The respondent's Counsel argued that the law as laid down in the earlier cases has been modified by the operation of the Judicature Acts, 1873 and 1875 and the rules made thereunder and he makes particular reference to Order 48 A Rule 10. No doubt the Judicature Acts provided generally that the Rules of Equity should prevail in various matters in which there was a conflict between the Rules of Equity and the Rules of the Common Law. But referring to these rules Lord Sterndale, M. R. said in *Meyer & Co. vs. Faber* (1923) 1 Chancery 421 :—

> " The rules do not in any way, as it seems to me, alter the substantive law as it existed before, or alter the rights which in law and equity partners have one against the other ; all they do is to provide that the procedure which is laid down in the Order shall apply to actions between partners and that the firm name will be used for those actions ".

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These rules being rules of procedure are not binding on us though in deciding questions with respect to the law of partnership the law to be administered is the same as would be administered in England (Civil Law Ordinance Section 3). Moreover, the rule particularly referred to is restricted in its operation even in England as it applies only in case of persons who are carrying on business within the jurisdiction of the High Court (Lindley on Partnership, Ninth Edition, page 344).

It has also to be noted that the deed of partnership executed by the plaintiff and the defendants requires the business to be carried on " at No. 132, Colombo Street, Kandy, or at such other place as the partners shall from time to time agree on ". The giving of notice by the plaintiff and the refusal of the defendants to vacate the premises appear to me to show that the partners are at variance with regard to the place of business.

I would allow the appeal and direct decree to be entered dismissing the plaintiff's action. The appellants will have costs here and in the Court below.

Appeal allowed.

Present : WIJEYEWARDENE, C.J.

CHRISTOFFELSZ vs DHANARATH MENIKA

S. C. No. 314/1949—*Workmen's Compensation Case No.* C3/140/47.

Argued on : 13th July, 1949,
Delivered on : 25th July, 1949.

Workmen's Compensation Ordinance, Cap. 117, *Section* 16 (1)—*Claim for compensation by woman in respect of her husband's death—Failure to institute claim in due time—What is " sufficient cause " within the meaning of the section.*

Held : That the failure to institute the claim for compensation within the specified period of six months due to relief being sought through a source not contemplated by section 16 of the Ordinance did not amount to " sufficient cause " within the meaning of the section.

Case referred to : *Roles vs. Pascall & Sons* (1911) 1 King's Bench 982).

H. W. Jayawardene, for the appellant.

N. D. M. Samarakoon, Crown Counsel, as *amicus curiæ.*

WIJEYEWARDENE, C.J.

This is an appeal on a question of law under the Workmen's Compensation Ordinance.

The applicant-respondent instituted this claim for compensation against the respondent-appellant in respect of the death of her husband, W. M. Punchi Banda, on the ground that Punchi Banda died as the result of an accident arising out of and in the course of his employment under the respondent-appellant.

Punchi Banda died on December 17th 1947, immediately after he was gored by a bull of the respondent-appellant. The applicant-respondent sent petition A2 of December 29th 1947, to the Assistant Labour Controller, Ratnapura, making her claim for compensation and asking him to hold an inquiry and grant compensation. She wrote letter A1 of January 12th 1948, inviting attention of that Officer to A2. She instituted the present claim for compensation under section 16 of the Ordinance on July 12th 1948.

The Deputy Commissioner for Workmen's Compensation expressed the view that A2 and A1 indicated that the applicant-respondent "first sought relief through the intervention of the Assistant Commissioner of Labour at Ratnapura" and held, therefore, that the failure to institute the claim in due time was due to " sufficient cause ". He awarded Rs. 600 as compensation in addition to costs.

Section 16 (1) of the Ordinance enacts that " no proceedings for the recovery of compensation shall be maintainable before a Commissioner unless.....the claim for compensation..... has been instituted.....within six months from the date of death ". Section 16 (2) states that " The Commissioner may admit and decide any claim to compensation in any case notwithstanding.....that the claim has not been instituted in due time.....if he is satisfied that the failure so.....to institute a claim.....was due to sufficient cause ".

The petition A2 or the letter A1 cannot be regarded as an application for compensation to the Commissioner of Workmen's Compensation (vide

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sections 2 and 34). The proceedings before the Commissioner do not show why the applicant-respondent sent A2 and A1 to the Assistant Labour Controller, Ratnapura. No evidence has been given seeking to explain the delay in making the claim before the Commissioner. The Crown Counsel, who appeared as *amicus curiæ*, pleaded that the applicant-respondent addressed A2 and A1 to the Assistant Labour Controller, Ratnapura, owing to her ignorance of the provisions of the Ordinance. Even on that plea, I am unable to hold there is "sufficient cause" within the meaning of section 16 (2). If I hold that the ignorance of the provisions of section 16 (1) is a "sufficient cause" for failing to comply with its requirements, I would, in effect, be repealing that part of the Ordinance (vide *Roles vs. Pascall & Sons* (1911) 1 King's Bench 982).

I am compelled to reverse the order of the Commissioner and dismiss the application of the applicant-respondent. I make no order as to costs.

Application dismissed.

Present : GRATIAEN, J.

ISMAIL vs. THANGIAH (INSPECTOR OF POLICE)

S. C. 1314/*P*—*M. C. Kalmunai* 4556
Argued on : 1st April, 1949.
Decided on : 7th April, 1949

Criminal Procedure Code, section 298 (1), 301 (2)—*Does the word 'document' in section* 301 (2) *include a report under section* 148 (*b*)—*Meaning of 'foreign language' in section* 302 (2).

Penal Code section 484—*Charge under*—*Need to set out and prove the actual words complained of*—*Inadmissable evidence*—*When it vitiates a conviction.*

Held : (1) That in a charge under section 484 of the Penal Code the actual words complained of must be set out and proved at the trial to have been uttered by the accused.
(2) That the word 'document' in section 301 (2) of the Criminal Procedure Code is wide enough to include a written report initiating criminal proceedings before a Magistrate under section 148 (*b*).
(3) That the word 'foreign' in section 301 (2) must be construed as referring to any language other than the official language of the Courts.
(4) That inadmissible evidence led by the prosecution, though without objection from the defence, vitiates a conviction where it appears that the Court has taken into consideration such evidence in arriving at the conclusion.

Per GRATIAEN, J.—"I cannot agree with my brother Basnayake's interpretation of section 301 (2) in "*Attamlebbe vs. Inspector of Police* (1948) 49 N. L. R. 234".

Case referred to : *Attamlebbe vs. Inspector of Police* (1948) 49 N. L. R. 234.

G. E. Chitty, for the accused-appellants.
S. S. Wijesinha, Crown Counsel, for the Attorney-General.

GRATIAEN J.

There are two appellants in this case. They were jointly charged with the commission of offences punishable under Section 484 of the Penal Code in that each had used insulting words to a Police Constable on an occasion the details of which I shall refer to in due course. Both were found guilty. The first accused appellant was also convicted under Section 344 with having used criminal force on the Constable whilst the latter was engaged in the execution of his official duties.

I will deal first with the charges of insult. It is not necessary to consider whether this is one of those rare cases when two persons may properly be tried together on charges of insult, because the convictions must be quashed for a more fundamental reason. In section 484 the actual words complained of must be set out in the charge and must be proved at the trial to have been uttered by the accused, because the Judge must be in a position to satisfy himself that the provocation caused by the alleged insulting language was intended or known to be likely to lead to one or the other of the consequences contemplated by the section. In this case, however, this has not been done. The words specified in the charge appear to be of Tamil origin transliterated into English. But neither in the charge nor in the evidence led at the trial is there any indication as to the meaning of these words. This omission has proved to be more than a technical irregularity in the present case, because both Mr. Chitty, who appeared for the appellants, and Mr. Wijesinha, who appeared for the Crown, shared my ignorance as to what the words complained of actually mean. In our desire for enlightenment we invited another Crown Counsel, a Muslim gentleman who was in Court, to help us, but he too failed as we had done. Finally, a Tamil advocate in Court claimed to recognise some of the words set out in the charge, but with how much confidence I

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really do not know. I feel that as an appellate Judge I have already persisted too far in my search for information on this puzzling matter.

So long as English remains the official language of our Courts it is necessary to insist upon strict compliance with the provisions of Section 298 (1) of the Criminal Procedure Code (which requires the evidence of each witness to be recorded in English and not merely transliterated into English) and of Section 301 (2) which requires that an English translation of every material portion of a document which is "in a foreign language" should be filed in Court. The word "document" in Section 301 (2) is wide enough to include a written report initiating criminal proceedings before a Magistrate under Section 148 (*b*). With the greatest respect, I cannot agree with my brother Basnayake's interpretation of Section 301 (2) in "*Attamlebbe vs. Inspector of Police*" (1948) 49 N. L. R. 234. In the context in which it appears in the section, the word "foreign" must surely be construed as referring to any language other than the official language of the Courts. Section 301 (2) lays down a rule of convenience and has no concern with questions of international law.

In the present case the absence of any evidence on the record as to the true meaning of the cryptic words set out in the charge makes it impossible for me to satisfy myself that the ingredients of an offence under Section 484 of the Penal Code has been established. The convictions in respect of these offences must therefore be quashed.

The first accused has also appealed against his conviction under Section 344 of the Penal Code. Here too I think that he is entitled to succeed. The case for the prosecution is that he obstructed a Police Constable in the execution of his official duty, viz., to prevent a breach of the peace when an Irrigation officer was "engaged in releasing water which had been unlawfully blocked for the use of certain paddy fields". Up to a certain point the facts are common ground. The accused is one of many paddy cultivators in a district much affected by seasonal drought, and during certain periods of the year it is the concern of the Government to secure as best it can an equitable distribution of such water as is available. On 18th August, 1948, the Cultivation officer of the Pattipolai Aru Scheme decided that a particular bund (within the jurisdiction of a "Vata Vidana" named Yassim Lebbe) should be cut so that neighbouring fields would be benefited by the water which would be released by this operation. A letter was accordingly given by the Cultivation officer to be delivered to Yassim Lebbe by Ismail, who was the "Vata Vidana" of an adjoining area. A letter was also sent to the Police requesting that some form of assistance (the precise nature of which has not been proved) be given to the authorities during the proposed operation which was expected to prove unpopular with some cultivators who would have much preferred the bund to remain as it was. Police Constable No. 3634 Asaithurai accordingly accompanied Ismail to the spot with the letter containing orders for Yassim Lebbe. But Yassim Lebbe—perhaps, as the learned Magistrate suspects, to suit his own purposes—was conveniently absent. Ismail thereupon proceeded, in the teeth of opposition from the accused and other cultivators, to try and cut the bund himself. The Constable claims that he himself was there solely "to prevent a breach of the peace", but it is clear that, in accordance with what he conceived to be his duty, he identified himself much more actively with Ismail's plan to cut the bund. It is equally clear that Ismail's actions, though well-intentioned, left much scope for misunderstanding and suspicion on the part of the accused and others as to his motives. It is not immaterial, in considering the accused's state of mind at the time, that shortly before this incident some persons disguised as policemen are alleged to have cut the same bund. At any rate, on the present occasion the 1st accused did push the Constable during a heated argument as to his rights, with the result that the Constable fell down from the bund. His uniform was soiled, and I can very well imagine that his dignity was greatly wounded.

The question is whether an offence under section 344 of the Penal Code has been established beyond reasonable doubt against the 1st accused. His defence, in effect, was that he acted *bona fide* in defence of his proprietary rights against what he honestly believed to be an unauthorised act on the part of Ismail in attempting to cut the bund with the Constable's assistance. To rebut this defence the prosecution sought to prove that the accused knew or had the means of knowing that Ismail was vested with official authority to cut the bund. On this part of the case however, the prosecution introduced a great deal of inadmissible evidence. Such orders as the Cultivation officer gave his subordinates were admittedly reduced to writing and are alleged to have been read out to the accused on the spot by the Constable. The document or documents were, however, not produced and the prosecution was permitted instead (without objection from the defence but nevertheless illegally) to lead oral evidence of the contents of the documents. I think that this circumstance vitiates the conviction which was largely based on this inadmissible evidence. The accused must accordingly be acquitted. He would do well to realise that his good fortune is not likely to continue if he persists in obstructing the authorities.

Conviction quashed.

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through Alagappa has collected the sums mentioned and that the defendant is liable to pay the said sum to the plaintiff.

The position of the defendant is that the plaintiff's business was failing and as he was in insolvent circumstances the plaintiff directed the defendant to close the business at Colombo, to assign the decree to Alagappa and to endorse the note and to write off in the books the amount due on the note. The defendant executed these directions. He received no consideration of any nature from Alagappa, nor did Alagappa pay sums recovered by him to the defendant. After the termination of his services the defendant rendered an account to plaintiff of his stewardship. The plaintiff was satisfied and gave him a written discharge dated 28th April, 1934. Therefore the plaintiff is not entitled to maintain this action.

By his answers to the issues the learned Judge has held as follows :—

(1) That the defendant wrongfully, unlawfully, fraudulently and without the consent and approval of the plaintiff endorsed the promissory note P 1 and assigned the decree in case No. 27002 for the sum of Rs. 3,000 to Alagappa Chetty, thereby misappropriating the said note and decree or their proceeds.

(2) That the said Alagappa recovered a sum of Rs. 8,500 on P 1 and a sum of Rs. 5,706·81 under the said decree and the plaintiff was entitled to recover the said sums from the defendant.

(3) The frauds in connection with P 1 and the decree were discovered by the plaintiff on or about February 1942.

(4) The defendant neglected and failed to hand over to the plaintiff a sum of Rs. 3,000 alleged to be paid by Alagappa as consideration for the assignment of the decree in D. C. 27002.

(5) The consideration of Rs. 3,000 alleged to have been received by the defendant prior to the execution of the deed was not paid in the presence of the notary. The learned Judge did not think the consideration of Rs. 3,000 was paid by Alagappa to the defendant. It was only a colourable transaction to enable the defendant to collect the monies due on the decree through Alagappa as his agent. Therefore it is not Rs. 3,000 but Rs. 5,706·81 which the plaintiff is entitled to recover from the defendant.

(6) That the said Alagappa Chetty collected the two sums of Rs. 8,500 and Rs. 5,706·81 for and on behalf of the defendant and the latter became the trustees of these two sums for the plaintiff who is entitled to recover the said two sums with interest thereon at 5 per cent. from the defendant.

(7) The defendant wrongfully and fraudulently represented to the plaintiff that the two debts were irrecoverable and after the recovery of the same fraudulently and wrongfully concealed the fact of collection from the plaintiff.

(8) Defendant realized the sum of Rs. 5,706·81 through Alagappa Chetty. There was no direct evidence that Alagappa Chetty paid the defendant this sum, but is it unlikely that Alagappa Chetty double-crossed the defendant of the amount collected by him on the assignment.

(9) The defendant did not endorse P 1 or assign the decree at the direction and on the orders of the plaintiff.

(10) The defendant rendered an account to the plaintiff of the defendant's transactions as plaintiff's agent, but failed to disclose the fact of his assigning the decree and endorsing the note. All the account books were left with the firm and were available to the plaintiff. No letters written by the plaintiff to the defendant were handed to the plaintiff.

(11) The plaintiff on April 28th 1934, gave the defendant a complete discharge and acknowledged that the plaintiff had no present or future claims against him.

(12) The defendant did not hand over the books and papers to the plaintiff relying on representation that the defendant was discharged from all present and future claims.

(13) The plaintiff's causes of action were not prescribed.

It will be observed that the plaintiff's case against the defendant has been based on the contention (*a*) that the assignment of the decree in case No. 27002 and the endorsement of the promissory note P1 to Alagappa Chetty were fraudulent transactions and (*b*) that apart from fraud the defendant was a trustee of these sums and liable to account for the same to the plaintiff. Both these contentions have been answered by the learned Judge in favour of the plaintiff. With regard to (*b*) the decision of the learned Judge is contained in (6) and (13). The reasons guiding him to this decision receive but scant consideration in his judgment. So far as P1 and the decree in case No. 27002 were concerned the relationship between the plaintiff and the defendant was that of beneficiary and trustee. Moreover, the question was one of an express trust. So far as prescription is concerned the matter is

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

LAKSHMANAN CHETTIAR *vs.* MUTTIAH CHETTIAR

S. C. 234—D. C. Galle, X 56

Argued on : 12th November, 1948
Decided on : 25th November, 1948

Trust—Attorney of plaintiff sued—Debts due to plaintiffs firm—Assignment of decree and endorsement of promissory note to 3rd party by defendant as attorney—Fraudulent breach of trust—When may a trustee plead prescription—Trusts Ordinance Section 111.

Plaintiff, who was residing in India, carried on a money-lending business in Ceylon through his attorney, the defendant. Two persons A and S among others owed money to the plaintiff's firm on a promissory note and a decree of court respectively. Three days prior to his leaving the plaintiff's service, *i.e.*, on 25-1-33 the defendant assigned the said decree to one Alagappa Chetty, who recovered a sum of Rs. 5,706·81 out of the decreed amount. Prior to 25-1-33 the defendant had also endorsed the note granted by A to the same Alagappa Chettiar who recovered a sum of Rs. 8,500 thereon.

Plaintiff brought this action on the 29th January, 1942 against the defendant alleging that the above transactions were fraudulent and apart from fraud the defendant was liable to account for the said sums of money to plaintiff as trustee for the same.

Held : (i) That inasmuch as the plaintiff had failed to prove: (*a*) that the defendant had committed any fraud or fraudulent breach of trust, or (*b*) that at the time of action brought, the said sums of moneys were still retained by the defendant, or (*c*) that the said sums of money were converted to the defendant's use, the defendant is entitled to plead that the claim is barred by prescription under section 111 (2) of the Trusts Ordinance.

(ii) That fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt.

Cases referred to :—*How vs. Earl Winterton*, (1869) 2 Ch. 626.
Re Bowden, Andrew vs. Cooper (1890) 45 Ch. 444.
Re Gurery, Mason vs. Mercer (1893) 1 Ch. 590.
Nicon vs. Smith (1902) 1 Ch. 176 at pp. 185-186.
A. L. N. Narayanan Chettyar and another vs. Official Assignee, High Court, Rangoon, and another (1941) A. I. R. (P. C.) 93.

H. V. Perera, K.C., with *C. Renganathan*, for the defendant-appellant.
F. A. Hayley, K.C., with *M. Somasunderam*, for the plaintiff-respondent.

HOWARD, C.J.

The defendant appeals from a judgment of the District Court of Galle entering judgment for the plaintiff for the sum of Rs. 8,500 with legal interest thereon at 5 per cent. from October 3rd 1934, and the sum of Rs. 5,706·81 with legal interest thereon at 5 per cent. from January 15th 1938, and costs. The plaintiff is a professional money lender who resides in India. The defendant was his agent and attorney at Colombo from about 1919 to January 28th, 1933. Amongst the debtors of the plaintiff were two persons, I. M. Alles and C. B. A. Samaranayake, both of Galle. Alles died while a sum of Rs. 6,500 and interest was owing to the plaintiff's firm on a promissory note (P1) for Rs. 7,000. Alles' estate was administered by his executor Mr. W. R. de Silva. Samaranayake died while a sum of Rs. 7,000 was due to the plaintiff's firm. One E. C. Abeygoonewardene who had intermeddled with the estate of Samaranayake was sued by the defendant as the plaintiff's attorney in D. C. 27002 and a decree had been obtained on September 23rd, 1929 for a sum of Rs. 8,619·20 with legal interest and costs. Of this sum Rs. 2,695 had been recovered and accounted for by the defendant. On January 25th, 1933, three days prior to his leaving the services of the plaintiff and departing for India, the defendant by P 20 assigned this decree to one A. L. A. S. M. Alagappa Chetty for an alleged consideration of Rs. 3,000. Alagappa had himself substituted as plaintiff in D. C. 27002 and had recovered a sum of Rs. 5,706·81 (*vide* P19). The defendant has also prior to January 28th, 1933 endorsed promissory note P 1 granted by Alles to the same Alagappa Chetty who has recovered from the executor of Alles' estate the sum of Rs. 8,500 on October 3rd, 1934. It is the plaintiff's case that the defendant assigned the decree and endorsed the note to Alagappa without plaintiff's authority and with fraudulent intention, that no consideration received from Alagappa has been accounted for, that the assignment and endorsement had been made for the defendant's benefit and that

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governed by sections 111 of the Trusts Ordinance, Cap. 72. This section is worded as follows :—

"(1) In the following cases, that is to say—

(*a*) in the case of any claim by any beneficiary against a trustee founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy ;

(*b*) in the case of any claim to recover trust property, or the proceeds thereof still retained by a trustee, or previously received by the trustee and converted to his use ; and

(*c*) in the case of any claim in the interests of any charitable trust, for the recovery of any property comprised in the trust, or for the assertion of title to such property.

the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance.

(2) Save as aforesaid, all rights and privileges conferred by the Prescription Ordinance shall be enjoyed by a trustee in all actions and legal proceedings in the like manner and to the like extent as they would have been enjoyed if the trustee had not been a trustee ;

Provided that in the case of any action or other proceeding by a beneficiary to recover money or other property, the period of prescription shall not begin to run against such beneficiary, unless and until the interest of such beneficiary shall be an interest in possession.

(3) No beneficiary as against whom there would be a good defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(4) Nothing in this section shall preclude the Court from giving effect to any application by a trustee for any equitable relief to which he would otherwise be entitled on any ground recognised by the Court.

(5) This section shall not apply to constructive trusts, except in so far as such trusts are treated as express trusts by the law of England."

The claim to recover this property arose in the case of P 1 some few days prior to January 28th 1933, when it was endorsed to Alagappa Chetty, and in the case of the decree in case No. 27002 on January 25th, 1933, when it was assigned to Alagappa Chetty for Rs. 3,000 (*vide* P 20). Section 111 (2) of Cap. 72 states that save as aforesaid all rights and privileges conferred by the Prescription Ordinance shall be enjoyed by a trustee in all actions and legal proceedings and to the like extent as they would have been enjoyed if the trustee had not been a trustee. In these circumstances the claim comes within section 6 of Cap. 72 and action must be instituted within six years unless it is a case that comes within sub-section (1) of section 111 of Cap. 72. The phraseology employed in section 111 is similar to that of section 8 of the Trustee Act, 1888, which is worded as follows :—

"(1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fruad or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use the following provisions shall apply :—

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary as against whom there would be a good defence by virtue of this action, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding, and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

The comment in Lewin on Trusts on this section is as follows :—

"The general effect of the section appears to be that in future, whenever an action is brought by a cestui-que trust against a trustee or any other person claiming through him, whether in respect of land or money, and whether the defendant is sought to be charged under an express or a constructive trust, there the defendant will be entitled to the protection which the section gives, unless the plaintiff can prove either (1) fraud or fraudulent breach of trust ; or (2) that at the time of action brought, the trust property, which is the subject-matter of the action, or the proceeds thereof, is or are still retained by the trustee ; or (3) that, previously to the bringing of the action, such property or proceeds were received by the trustee, and converted to his use. If the plaintiff brings his case within one of these three exceptions, the old law will still apply ; if not, the section will take effect."

The section has been the subject of judicial interpretation in several cases. In *How vs. Earl Winterton* (1896) 2 Ch. 626, the plaintiff, under a will on the expiration of a term of fourteen years from the death of the testatrix (who died on May 20th, 1875), became entitled to an annuity for her life. During the term it was the duty of the defendant, as trustee under the will, to receive the rents of certain devised estates, and after payment of some immediate annuities,

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to accumulate the surplus rents and invest the accumulations in the purchase of lands. The plaintiff's annuity was charged upon the accumulations and the lands to be purchased therewith, as well as upon the devised estates. Without any fraudulent intent the defendant instead of accumulating the surplus rents, applied them in keeping down interest on incumbrances and in necessary repairs.

The term expired on 20th May, 1889, the plaintiff's annuity fell into arrear in November 1894, and on 9th August, 1895, she brought this action for an account.

The defendant had no trust moneys in his hands at the issue of the writ, and had never converted any trust moneys to his own use; and he relied on section 8 of the Trustee Act, 1888, but admitted that with six years before the issue of the writ he had rents in his hands which he ought to have accumulated and invested:—It was held (1) that the plaintiff was entitled to an account of the moneys in the hands of the defendant six years before the issue of the writ and liable to the trust for accumulation, and also to an account of the rents which ought afterwards to have been accumulated, but not to an account from the death of the testatrix; and (2) that the case fell either within clause (*a*) or clause (*b*) of section 8 of the Act of 1888, but (per Rigby L.J. preferably within clause (*a*); and that whichever clause was applicable, the defendant was protected from demands more than six years before the issue of the writ". At pages 640-641 Lindley L.J., stated as follows:—

"Section 8 is cumbrously worded, and it is difficult to grasp the idea which underlies it; but the short effect of section 8 appears to me to be that, except in three specified cases, namely, fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use, a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them."

Again the headnote of *In re Bowden Andrew vs. Cooper* (1890) 45 Ch. 444, is as follows:—

"A newly appointed trustee of a will brought an action against an old trustee and the representatives of two deceased trustees to compel them to make good losses arising from investments negligently made on insufficient security more than six years before the action. R. G., the executor of D. G., one of the deceased trustees, had after D. G.'s death issued the proper statutory advertisements and administered the estate, retaining in hand two legacies which had been bequeathed to him on trust. By leave of the Court at the trial the statement of claim was amended to make it a claim against R. G. as trustee of the legacies and to follow the legacies into his hands, R. G. to be at liberty to claim the benefit of any statutes of limitation:—

Held, that having regard to Order xvi, r. 8, the cestui-que trust of the legacies were not necessary parties to the action.

Held, that section 8, sub-section (1) (*a*) of the Trustee Act, 1888 (51 and 52 Vict. c. 59) did not apply to the case, but that section 8, sub-section 1 (*b*) did apply; that under it R. G. was entitled to plead the lapse of time as he might have done in an action of debt, and that, as the cause of action had accrued more than six years before the action, R. G. had a good defence."

The words "converted to his use" were considered by Kekewich J. in re *Timmins Nicon vs. Smith* (1902) 1 Ch. 176 at pp.185-186 in the following passage:—

"As I pointed out in the argument, the Legislature has carefully used the word 'retained' as meaning what it says, namely, money which is not merely in the eye of the law in the hands of the trustee, because he has never paid it away to a person entitled to give a discharge, but money which is really in his pocket in the sense that it is invested in his name or in land belonging to him, or in the name of some other person as trustee from him. In order to say that it is 'retained' you must be able to put your finger on the property or the proceeds and say that it is still under the control of the trustees. There is no suggestion that that can be done here, but it is said that the case can be brought within the succeeding words. It is said that each of the three trustees must be taken to have received one-fourth of the share belonging to the children of Ann Pointon, and to have converted such fourth to his use. I pointed out to Mr. Renshaw that in that point of view, if entitled to succeed, he is entitled to go against each trustee in respect of a fourth, and not against three trustees in respect of three-fourths, because the statute points only to the personal use by a trustee, and does not speak of the payment by one trustee to another, which, after all, is only a breach of trust as much as a payment to a stranger who is not a trustee. Then Mr. Renshaw says Peter Smith (to take his case) has received and converted to his use one-fourth of this share, and therefore the case is taken out of the statute, and of course the plaintiff is entitled to an amount of that. The answer to that is, that Peter Smith was himself entitled to a one-fourth share; that this is not the case of a trustee putting into his own pocket what belongs to a cestui-que trust so as to defraud the cestui-que trust, but he only appropriated to himself that which the will gave him. I think that answer is complete. The point is a new one, and at first I felt some difficulty about it, but I think that when one looks at the statute there can be no doubt what was meant. The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, *i.e.*, money of the trust received by him and converted to his own use. That seems to me the proper construction of the words, and I think the context confirms that view. Here Peter Smith (and so with the others) only received that to which he was entitled. They ought to have put one-fourth of the fund apart. Whether they did that or not could not in the least interfere with their right to receive their own shares; and it would be extremely

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hard to say that having paid themselves what they were entitled to, they were not to have the advantage of the statute as to which ought to have been paid to a cestui-que trust."

In my opinion this is not a claim to recover trust property or the proceeds thereof still retained by a trustee. Nor was the trust property or proceeds thereof previously received by the defendant and converted to his use. Nor in view of the learned Judge's finding referred to in (5), was part of the trust property or its proceeds converted to the use of the defendant. In the absence of fraud or fraudulent breach of trust to which the defendant was party or privy the claim should have been brought within six years from January 28th, 1933. As the action was not instituted till January 29th 1942, the Prescription Ordinance applies and the claim is statute barred.

The next point for consideration is whether the learned Judge was right in holding that the defendant when he endorsed P 1 and assigned the decree in case No. 27002 to Alagappa was guilty of fraud or fraudulent breach of trust. The following passage occurs in the judgment :—

"It is admitted that the defendant assigned the Samaranayake decree and assigned Alles' note to Alagappa Chetty. That being so the burden rests on him to prove that he did so at the instance of the plaintiff."

The burden of proof is thus placed on the defendant.

In *A. L. N. Narayanan Chettiar and another vs. Official Assignee, High Court, Rangoon, and another* 1941 A. I. R. (P. C.) 93, it was held that fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture. The burden of proof in regard to fraud has therefore been placed by the learned Judge wrongly on the defendant. For this reason the judgment cannot stand. Even with the burden so placed I am of opinion that the defendant has raised a reasonable doubt as to whether he was guilty of fraud when he assigned the decree and endorsed P 1 in favour of Alagappa Chetty. It has not been established that the defendant obtained any financial advantage from these transfers. His power of attorney ceased on 28th January, 1933, from which date he was no longer the agent of the plaintiff. From that date Chinniah held the power of attorney and was the agent of the plaintiff. Again the relationship between the latter and Alagappa Chetty is a factor requiring careful consideration when one embarks on an inquiry as to whether the defendant in making the transfer to Alagappa was acting *bona fide* and carrying out the plaintiff's instructions. According to the plaintiff the defendant's instructions prior to handing over to Chinniah in January, 1933 were "to collect whatever possible from my assets, pay as much as possible to the creditors, and then hand over the remaining assets to Chinniah and come over to India, Chinniahpulle was to go on carrying on as best as he could". It is quite obvious from this that the defendant on 29th October, 1932 informed the plaintiff that Alles debt was recoverable. In regard to the assignment of the decree and the proceedings for the recovery of the amount due thereon by Alagappa it is quite obvious from the letters of Chinniah, the plaintiff's agent, to Alagappa dated 14th February, 1933 and 8th December, 1933 (D7 and D8) that Chinniah was aware of the assignment and the proceedings taken by Alagappa. The fact that Chinniah was aware of the proceedings instituted by Alagappa for the recovery of the money owed by Samaranayake's estate suggests that defendant in making the assignment to Alagappa was acting on the plaintiff's instructions or to put this evidence at its lowest value from the defendant's point of view it raises a reasonable doubt as to whether his conduct was fraudulent. So it may also be said of Alles having regard to the defendant's letter (D6). Again the relationship of Alagappa Chetty with the plaintiff raises a reasonable doubt as to whether the defendant has been guilty of a fraud. Plaintiff in evidence states that Alagappa is a relation of his. An adopted son of his son is married to the plaintiff's daughter. This is what the plaintiff states with regard to the suggestion of the defendant that he had instructions from the plaintiff to endorse P 1 and assign the decree in case No. 27002 to Alagappa :—

"In 1932, Alagappa Chettiar was in India. I did not send him to Colombo to settle my accounts. He did not come to my firm of A. T. K. P. L. M. On one occasion when he came to my house he told me that he was going to Ceylon to see to his business in Pussellawa. So I suggested to him to settle my matters and to assist Letchimanan in settling my affairs in Colombo. I do not know whether he complied with that request. I do not know whether he stays in my firm when he stays in Colombo. The defendant wrote to me that Alagappa Chettiar did not come to the shop in Colombo. I do not remember whether I wrote to the defendant informing him that Alagappa Chettiar would come to the shop to assist him. I do not know whether I have got a letter written by Letchimanan stating that Alagappa did not come to my shop at Colombo. I have got several letters, but I have to examine them. That copy was in the press copy book. I will have to ask

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my agents and find out the date. Chinniahpulle and Velaithan Chettiar are my agents. I told Alagappa Chettiar when you go to Colombo, assist the defendant in settling my affairs by recovering as much as could be recovered and paying off the creditors : the defendant was in Colombo alone ; and I would like to see the affairs wound up decently ". That was in 1932. I do not remember whether it was during the end of 1932.

It was in the latter part of 1932. At that time Alagappa and I were not friends as he had failed to repay my loans. In spite of that I had confidence in him. He was my relative and my son's adopted son was married to his daughter and therefore I requested him to do that. I therefore had confidence in him.

Q. Alagappa Chettiar never deceived you ?

A. He borrowed Rs. 80,000 and arranged to pay the amount but has been paying me little from time to time.

Q. Isn't that deception ?

Still because he was my relative and my Sammandie, my son's adopted son had married his daughter, therefore I thought he would not play me false. We are even now on speaking terms. I will not trust him with regard to money matters. It may be that when I had some disputes here and there I had asked him to be a joint arbitrator with others on my behalf." Later in his evidence plaintiff states that about 5 or 6 months ago in a dispute in the village he asked Alagappa to be an arbitrator. The plaintiff concedes that Alagappa was instructed to assist the defendant in settling his affairs by recovering as much as could be recovered. This evidence of the plaintiff raises a reasonable doubt as to whether he is speaking the truth when he says he did not instruct the defendant to transfer the rights in Samaranayake's and Alles' debts to Alagappa. I think that fraud has not been established beyond all reasonable doubt.

The appeal is allowed and judgment must be entered for the defendant with costs in the court and the court below.

CANEKERATNE, J.

I concur.

Appeal allowed.

Present : BASNAYAKE, J.

SUDERIS vs. KOSGODA POLICE

S. C. 1022—*M. C. Balapitiya* 61478.

Argued and Decided on : 18th November, 1948.

Trial—Irrelevant statements made to judge by police officer—Likelihood of bias.

Where irrelevant statements, which were likely to create a bias in the mind of the judge, were made by a police officer,

Held : That the accused could not be said to have had a fair trial.

H. Wanigatunge, for the accused-appellant.

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

BASNAYAKE, J.

Learned counsel for the appellant submits that in this case the accused has not had a fair trial. He draws my attention to the following record made by the learned Magistrate at the very outset of the case, when an application for bail was made on behalf of the accused. " The accused is charged from charge sheet. The police objected to bail as this offence has been committed while the accused was out on bail in another matter in 1,000/1,000. The police object to bail as they fear another offence. I fix the trial for 17-8-48 and disallow application for bail."

The statements made by the Police Officer in question are clearly prejudicial to the accused. They are irrelevant to the charge against him, and it cannot be said that the accused has had a fair trial. They are statements likely to create a bias in the mind of a judge and should never have been made in the circumstances in which they are made.

I, therefore, set aside the conviction and sentence and send the case back for re-trial before another Magistrate.

Case sent back.

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

THE MANUFACTURERS' LIFE INSURANCE CO., LTD. OF CANADA vs. THE COMMISSIONER OF INCOME TAX, ESTATE DUTY AND STAMPS

In the matter of a case stated by the Commissioner of Income Tax, Estate Duty and Stamps, Ceylon under the provisions of section 31 of the Stamp Ordinance (Chapter 189) as amended by Ordinance No. 47 of 1941 affecting Policy No. 944727 of the Manufacturers' Life Insurance Co., Ltd., of Canada.

S. C. No. 378/1948.
Argued on : June 3, 1949.
Delivered on : June 27, 1949.

Stamps Ordinance—Policy of Insurance—Payment at death of assured or at maturity—Alternative modes of payment after policy matured—Option to receive in monthly instalments during life—Should the policy be stamped as an instrument chargeable with duty under section 23A of the Stamp Ordinance.

A policy of life insurance provided *inter alia* :—

(*a*) that at the death of the insured (before the date of maturity) *i.e.*, before reaching his 55th year a sum of £ 2,083-6-8 or the cash value of the policy at the end of the policy year in which death occurs, whichever is greater, would be paid to the insured.

(*b*) that on the assured reaching the age of 55 years, he would be entitled to a sum of £ 3,656-5*s*.

The instrument further provided for three modes of payment of this sum of £ 3,656-5*s*. to wit :—

(*a*) payment of £ 3,656-5.

(*b*) payment in one instalment of £ 1,558-6-8 and 119 monthly instalments of £ 20-16-8 each, or

(*c*) if the assured so desires it, payment of 119 monthly instalments of £ 20-16-8 each and in addition a monthly income of £ 20-16-8 during life.

The Commissioner of stamps held that this policy was " chargeable with duty under section 23A and item 23 (2) being an instrument for the creation of an annuity or other right to a periodical payment not before in existence ".

On appeal to the Supreme Court—

Held : That the instrument in question was not stampable as an instrument within the meaning of section 23 (*a*) of the Stamp Ordinance as the principal and leading object of the instrument appears to be to effect a policy for the receipt of a sum of money at death or on attaining the age of 55 years.

Per WIJEYEWARDENE, C.J.—" It has been laid down in *Price vs. Thomas* [(1831) Barnewell and Adolphus's Reports 218] and *The Liver Alkali Co., vs. Johnson* [(1872) 41 Law Journal 110] that " there is no better established rule as regards stamp duty than that all that is required is, that the instrument should be stamped for its leading and principal object and that this stamp covers everything accessory to this object ".

Cases referred to : *In the matter of an application of V. Coomaraswamy, Notary Public* (1924) 27 New Law Reports 62).

Price vs. Thomas (1831) Barnewell and Adolphus's Reports 218
The Liver Alkali Co., vs. Johnson (1872) 41 Law Journal 110)

H. V. Perera, K.C. with *S. J. Kadiragamar,* for the appellants.
H. W. R. Weerasuriya, Crown Counsel, for the Crown.

WIJEYEWARDENE, C.J.

This is an appeal on a case stated by the Commissioner of Stamps under section 31 of the Stamp Ordinance as amended by the Stamp (Amendment) Ordinance No. 47 of 1941.

The Manufacturers Life Insurance Co.—the appellants—insured the life of one B. W. J. Antony under the Policy of Insurance No. 944727. The following are the relevant particulars contained in the policy :—

1. *Plan of Insurance :* Endowment at age 55 with optional Life endowment.

2 (*a*) *Sum insured at Maturity :* £3,656-5*s*. which together with interest, shall be payable in 120 consecutive monthly instalments commencing on November 1, 1960 (hereinafter called the maturity date) if the life insured is living and the policy is in force, the first instalment being £1,558-6-8 and the remaining 119 instalments being £20-16-8 each.

2 (*b*) *Sum insured at prior death :* £2,083-6-8 or the cash value of the policy at the end of the policy year in which death occurs, whichever is the greater on the death of the life insured prior to the maturity date while the policy is in force.

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4. *Premium payable :* £239-1-6 payable yearly for 15 years or until prior death of the life insured.

6. *Insurance age :* 40 years.

7. *Surplus :* Apportioned annually in accordance with the Annual Dividend Options.

8. *Commuted value :* £3,656-5 payable in lieu of the "sum insured at maturity".

Paragraphs 11 and 12 of the provisions forming a part of the contract read as follows :

Commuted value : The insured may elect to receive at the maturity date, by written request prior to that date, the commuted value stated on the first page hereof, payable either in one sum or under one of the Optional Methods of Settlement.

Optional Life Income Settlement : On written request of the insured prior to the maturity date the Company, in lieu of the first instalment payable under the terms of section 2 (*a*)..... will pay £20-16-8 and in consideration of the retention of the balance of £1,537-10-0 which shall become the property of the Company, promises to pay an income of £20-16-8 per month commencing one month after the last instalment has been paid and continuing until the payment preceding the date of the death of the life insured. The remaining 119 instalments described under section 2 (*a*) shall be paid as provided in the policy ;.....".

One of the Annual Dividend Options in the following terms :—

"At the end of the first policy year upon payment in full of the premium for the second year and at the end of each subsequent policy year thereafter, provided this policy is in force, the Insured shall be entitled to receive the share of the surplus securing to this policy, as ascertained and determined by the Company, in accordance with one of the following options :—

(1) A participating bonus or paid-up addition to the sum insured.

(2) A single cash payment.

(3) A reduction of premium for the ensuing year.

(4) Allow the cash payment to remain with the Company and accumulate to the credit of this policy at the rate of interest declared by the Company on such funds, guaranteed to be not less than three per cent. per annum.

In reply to a written request made by the Commissioner under section 31 (3), the Proctors for the appellants wrote letter G informing him that "the annual premium on an ordinary endowment Life Policy for £2,083-6-8 maturing at 55 years or prior death in the case of an assured of 40 years is £145-2-0".

In the case stated by him, the Commissioner of Stamps set out his adjudication that the policy No. 944727 was "chargeable with duty under section 23A and item 25 (2) being an instrument for the creation of an annuity or other right to a periodical payment not before in existence".

The appellant questioned the correctness of the Commissioner's adjudication and stated that the policy was only a Life Policy within the meaning of section 90.

At the argument before us the Crown Counsel conceded that the policy was a Life Policy but contended that it was also "an instrument for the creation of a right to a periodical payment not before in existence" within the meaning of section 23 (*a*) and that it, therefore, became chargeable with the higher rate of duty provided under that section (vide *In the matter of an application of V. Coomaraswamy, Notary Public* (1924) 27 New Law Reports 62.)

The question for our decision, therefore, is whether Policy No. 944727 falls under section 23 (*a*) as "an instrument for the creation of a right to a periodical payment not before in existence".

The policy of insurance in this case is what is generally known "an endowment policy" providing for payment on the assured attaining a particular age or on his previous death. Under this policy a sum of £2,083-6-8 or cash value of the policy would have been payable at his death. That would be the simplest form of Life Policy. It also provides for the payment of a sum of £3,656-3 on the assured reaching the age of 55 years. The instrument retains the character of a policy of insurance in spite of this provision. It is the mode of payment of this sum of £3,656-5 which has given rise to the present question. The instrument contemplates three modes of payment of this sum :—

(*a*) payment of £3,656-5 ;

(*b*) payment in one instalment of £1,558-6-8 and 119 monthly instalments of £20-16-8 each or

(*c*) if the assured so desires it, payment of 119 monthly instalments of £20-16-8 each and in addition a monthly income of £20-16-8 during life.

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The principal and leading object of the instrument appears to me to be to effect a policy for the receipt of a sum of money at death or on attaining the age of 55 years. The instrument, no doubt, gives the assured the right to exercise an option as regards the mode of payment on his attaining the age of 55 years. That provision is merely accessory to the principal object.

By mentioning these different modes of payment, the Insurance Company appears to me to have merely adopted a legitimate means of inducing people to take a policy by describing the various advantages of such a policy. This provision has not, in my opinion, altered the true character of the instrument. Looking at the instrument fairly I do not find it possible to say that it is an instrument for the purpose of creating a right to a periodical payment not before in existence.

Mr. Weerasuriya pointed out that in letter G the appellants stated that the annual premium on an ordinary endowment life policy for £2,083-6-8 maturing at 55 years or prior death in the case of an assured of 40 years was £145-2 while the premium charged in the instrument considered in this case was £239-1-6. He argued that the difference in the two premium was due to the fact that the instrument in question created a right to a periodic payment besides effecting an insurance. There is, however, a fallacy in this argument. The present policy of insurance differs from the policy referred to in G with regard to the amount payable at death and provides also for the assured receiving a share of the surplus accruing to the policy in accordance with the Annual Dividend Option cited earlier in the judgment. The policy provides for the payment at death of £2,083-6-8 or cash value of the policy, whichever is greater, and not merely £2,033-6-8 as stated in G. It is, therefore, impossible to draw the inference which Mr. Weerasuriya contends for, as the difference in the two premiums may be due to the differences indicated by me between this policy and the policy referred to in G.

[It has been laid down in *Price vs. Thomas* [(1831) Barnewell and Adolphus's Reports 218] and *The Liver Alkali Co. vs. Johnson* [(1872) 41 Law Journal 110] that "there is no better established rule as regards stamp duty than that all that is required is, that the instrument should be stamped for its leading and principal object and that this stamp covers everything accessory to this object".] Following that principle I hold that the instrument in this case is not stampable as an instrument within the meaning of section 23 (*a*) of the Stamp Ordinance.

The appellants will be entitled to the costs of this appeal.

GUNASEKERA, J.
I agree.

Appeal allowed.

Present : GRATIAEN, J.

MADAN vs. NANA ANDY

S. C. 212—*C. R. Colombo No.* 9656

Argued on : 7th June, 1949.
Decided on : 13th June, 1949.

Public Servants Liabilities Ordinance—Plea of protection under, raised unsuccessfully at trial—Can such plea be raised at later stage in execution proceedings. Res judicata—Exceptions to the principle

Held : That a public servant, who had unsuccessfully claimed protection under the provisions of the Public Servants Liabilities Ordinance at the trial, is not precluded by the principle of "*res judicata*" from raising the same plea at a later stage in execution proceedings.

Per GRATIAEN, J.—"In England there are recognised exceptions to the operation of the general rule to which I have referred. For instance, the principle of estoppel and the principle of *res adjudicata* cannot apply where to give effect to them would be to go counter to some statutory direction or prohibition."

Cases referred to :—*Henderson vs. Henderson* 3 Hare at p. 114.
Roysted vs. Taxation Commission (1926) 95 L. J. P. C. 79 at p. 83.
Griffiths vs. Davies (1943) 112 L. J. K. B. 577.
Bradshaw vs. M'Mullan (1920) 2 Ir. R. 412.
Perera vs. Perera (1910) 13 N. L. R. 259.

K. S. Rajah, for the plaintiff-appellant.
S. W. Jayasuriya, for the defendant-respondent.
N. D. M. Samarakone, Crown Counsel, as amicus curiae.

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GRATIAEN, J.

In October 1947 the appellant sued the respondent in this action for the recovery of a sum of Rs. 200 and interest due to him on a contract of loan. The respondent pleaded certain defences all of which were later abandoned. At the trial, however, he claimed for the first time that he was entitled to the protection of the Public Servants (Liabilities) Ordinance (Chapter 88). Some evidence was led on this issue, but the learned Commissioner held that the proof relied on by the respondent was inadequate. He accordingly rejected the claim to statutory protection, and entered judgment in favour of the appellant as prayed for with costs. The respondent did not appeal against this judgment.

The judgment remained unsatisfied for some time, and the appellant proceeded to take steps to have the decree executed. The respondent then made an application to the Court renewing his claim to the protection of the Public Servants (Liabilities) Ordinance and asking *inter alia* that the decree against him be vacated on the ground that the proceedings in the action were void. At the inquiry he proved to the satisfaction of the learned Commissioner that at the date of the loan he was in fact a "public servant" entitled to the protection of the Ordinance. The learned Commissioner accordingly declared all proceedings in the action to be void. The appellant has appealed from this order.

I am not prepared to hold that the learned Commissioner has wrongly decided that the respondent was a "public servant". The only question which remains to be decided is whether the respondent was precluded in law from reagitating at the inquiry the identical issue which he had unsuccessfully raised at the trial—namely, whether he was at the relevant date a "public servant" within the meaning of the Ordinance.

There can be little doubt that the principle of *res adjudicata* would normally have operated against the respondent. This principle of the English law, which is embodied in the Civil Procedure Code, is specifically intended, in the interests of finality, to prevent litigants from reagitating "not only points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but also every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have put forward at the time." *Henderson vs. Henderson* 3 Hare at p. 114. The need for this general rule of estoppel is very clear, because otherwise "litigation would have no end, except when legal ingenuity is exhausted"—per Lord Shaw in *Hoysted vs. Taxation Commission* (1926) 95 L. J. P. C. 79 at p. 83. Indeed, in this country, it might well be found that the litigation would in the majority of cases endure until the lawyer's ingenuity and the litigant's purse have both given up the unequal struggle.

In England there are recognised exceptions to the operation of the general rule to which I have referred. For instance, the principle of estoppel and the principle of *res adjudicata* cannot apply where to give effect to them would be to go counter to some statutory direction or prohibition. This exception was recently given effect to in *Griffiths vs. Davies* (1943) 112 L. J. K. B. 577 where a tenant against whom a decree for rent in excess of the amount authorised by the Rent Restriction Acts was nevertheless held entitled to challenge the validity of the decree by raising this issue which he had omitted to raise the original trial. "There is a statutory direction to the Court," said the Master of the Rolls, "to abstain from giving a judgment for recovery of rent which is shown to the Court to be excessive. The earlier judgment cannot give to the Court a jurisdiction which the Act has denied to it." The Master of the Rolls adopted the proposition laid down by the House of Lords in an Irish case *Bradshaw vs. M'Mullan* (1920) 2 Ir. R. 412 (the report of which I regret is not available to me) that *where there is a statutory prohibition or direction, it cannot be over-ridden or defeated by a previous judgment between the parties.*

If this exception to the rule of *res adjudicata* is applicable in Ceylon—and for reasons which I shall shortly indicate I am satisfied that it is—its operation seems to me to be especially appropriate to cases such as the present case. The protection afforded by the Public Servants (Liabilities) Ordinance was granted in the general interests of the public and not with the idea of conferring any special favours or privileges on public officers. In order that officers in receipt of salaries below a prescribed limit may be protected from the dangers and temptations arising from indebtedness to money-lenders, Section 2 of the Ordinance expressly prohibits legal proceedings from being maintained in certain cases against certain classes of public servant. Section 3 declares all proceedings in or incidental to an action in contravention to the Ordinance to be void; it also directs the Court to examine and to take action upon complaints that any public officer has been dealt with in contravention of the Ordinance by any process, execution or order. It seems to me that the statutory prohibitions, declarations and directions contained in the

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Ordinance are absolute, and that the whole scheme of the Ordinance would be defeated if a public servant were to be precluded from claiming the protection of the Ordinance by reason of any act or omission on his part or by the terms of any judgment entered against him which is proved to have been obtained in contravention of the Ordinance. In *Perera vs. Perera* (1910) 13 N. L. R. 259 Sir Alexander Wood Renton held that a public servant who had not raised the plea of privilege and claimed the protection of the Ordinance at the time was not precluded from raising it at a later stage when he was arrested for his debt. This authority has been consistently followed in our Courts, but as far as I am aware, the question has not previously been considered in relation to a public servant who had claimed the protection of the Court at the trial, but unsuccessfully. On principle, however, I cannot see that this circumstance can over-ride the unequivocal statutory prohibitions and directions which the legislation has deemed it necessary to introduce for the public benefit. If the doctrine of *res adjudicata* embodied in Section 207 of the Civil Procedure Code were to apply to the present case, it would be equally applicable in a case where a plea of protection which was available to a public officer was not raised by him at the trial. In my opinion the principle of *res adjudicata* cannot give validity to any judgment or decree which is declared by the express provisions of the Public Servants (Liabilities) Ordinance to be void. I dismiss the appeal with costs. In conclusion I desire to express my indebtedness to learned Crown Counsel for the assistance which he gave me as *amicus curiae* at the argument of this appeal.

Appeal dismissed.

Present : NAGALINGAM AND WINDHAM, J. J.

NAGALINGAM vs. THANABALASINGHAM

S. C. 537—Application for conditional leave to appeal to the Privy Council in D. C. Point Pedro 2, 198

Application for conditional leave to appeal to the Privy Council

Argued on : 18th January, 1949.
Decided on : 2nd February, 1949.

Privy Council Appeal—Application for conditional leave to appeal—Notice of intended appeal to parties—Failure to notify one of the parties—Errors in notices to others—Appeals (Privy Council) Ordinance, rule 2 of the Schedule.

Held : (1) That the failure to serve notice on one of the parties to the action, (although no relief was asked for and was not represented) is a fatal non-compliance with the provisions of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

(2) Strict compliance with the provisions of rule 2 is required and no indulgence can be granted in respect of errors in notices to the parties.

C. Chellappah, for the petitioner.

H. W. Tambiah, with *S. Canagaraya* for 2nd, 3rd and 4th respondents.

WINDHAM, J.

This is an application for conditional leave to appeal to the Privy Council from a judgment of this Court upon two consolidated appeals, which were lodged by the present plaintiff-petitioner and by the second, third and fourth defendants-respondents, respectively, against a judgment for partition. More than one objection has been taken by the defendants-respondents, the main one being that the plaintiff failed to give the defendants due notice of their intended application for conditional leave to appeal as required by rule 2 of the Schedule to the Appeals (Privy Council) (Ordinance Cap. 85) which provided that "the applicant shall, within fourteen days of the date of such judgment, give the opposite party notice of such intended application".

The judgment from which conditional leave to appeal is sought was dated October 13, 1948, and it is not disputed that the plaintiff accordingly had until the end of October 27, in which to give the required notice. He proceeded to take the following action.

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On October 26, he sent a telegram to the second defendant, which the latter admits having received on the same day, in the following terms :—

"Please take notice for yourself and others that I am appealing to Privy Council in 2198 D. C. Point Pedro".

On the same day he sent a telegram to the firm of proctors who had in the original proceedings represented the second, third and fourth defendants, in the following terms :—

"Please take notice that I am applying for conditional leave to appeal to Privy Council in 2198". The second, third and fourth defendants each deny that at that time the proctors to whom this telegram was sent were authorized to act or to receive such notices for them.

On the next day, October 27, the plaintiff sent a telegram to the fourth defendant in the following terms :—"Take notice that I the plaintiff intend to make an application to the Honourable the Supreme Court for leave to appeal to the Privy Council from the judgment and decree of the 11 (sic) day of October 1948". The fourth defendant denies having received this telegram on October 27, or at all.

On October 27, the plaintiff sent an express letter to each of the three (second, third and fourth) defendants in the following terms :—"Take notice that I intend to make an application to the Honourable the Supreme Court for leave to appeal to the Privy Council from the judgment and decree of the Supreme Court dated the 11th (sic) day of October 1948, in the above case" At the head of the letter the case number and reference was correctly cited. The second defendant admits receiving this letter, but only on October 31, it was received at his residence on October 27, by a person who was not his agent for service, he himself being away from his residence from October 27 to 31. The third defendant received the letter on October 28. The fourth defendant denies receiving it at all.

Now on the above facts, even if we were to assume in favour of the plaintiff that the second, third and fourth defendants had each received, before the end of October 27 both the telegrams and the letters sent to them respectively, and that the proctors to whom the telegram was sent were acting for them at the time, there would still be a failure by the plaintiff, in more than one respect, to comply with the provisions of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

In the first place, neither any telegram nor a letter nor any other form of notice under rule 2 was ever sent to the first defendant-respondent, although he was a party to the appeal. It is true that this first defendant asked for no relief in the appeal and was not represented, and that there was no contestant between him and the plaintiff. But nevertheless a proper compliance with rule 2 required notice to be served on him, since he was a respondent in the appeal. I would refer to *Wijesinghe Hamine vs. Ekanayake*, (1948) 41 N.L.R. 415 where the judgment of Howard C.J. (Soertsz J. concurring) contained the following decision on the point :—"Rule 2 of the Schedule to the Ordinance provides that the applicant shall, within fourteen days from the date of such judgment, give the "opposite party" notice of such intended application. Inasmuch as only the first plaintiff has been given notice it is obvious that compliance has not been made with the provisions of the rule. Counsel for the applicant has contended that as the second plaintiff has not executed the deed, he is not a necessary party to the appeal. I do not consider there is any substance in this contention. "Opposite party" must imply all the parties in whose favour the judgment appealed against was given. In this connection I would refer to the judgment of the Full Bench in *Ibrahim vs. Beebee* (1916) 19 N.L.R. 289 and *Suppramaniam Chettiar vs. Senanayake and others* (1939) 41 N.L.R. 271. In the latter case de Kretser J. held that even when parties against whom no relief is claimed are made respondents to an appeal notice of security should be given to them. For these reasons I am of opinion that notice has not been served on the opposite party. The application must, therefore, be dismissed with costs". With this decision I respectfully concur, and I must accordingly hold that the failure of the plaintiff to notify the first defendant-respondent was a fatal non-compliance with the requirements of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance.

Secondly, the telegram sent to the fourth defendant in the present case, and the letter sent to all three contesting defendants wrongly described the judgment in respect of which the application was to be made as being dated October 11, whereas in fact there was no judgment of that date, the correct date being October 13. No doubt this was a clerical error and would not have misled any of the defendants. But strict compliance with the requirements of the rules set out in the Schedule to the Appeals (Privy Council) Ordinance has always been demanded by this Court : and it has been held more than once that the rules admit of no relaxation even in hard cases. In *Weerakoon Appuhamy vs. Wijesinghe* (1929) 30 N.L.R. 256 their requirements were held to be

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"peremptory and paramount" and in *Tarrant & Co., vs. Ibrahim Lebbe Marikkar,* Garvin S.P.J. said, in a case calling for the grant of indulgence. "It does not appear to us that the terms of the rule vest in us any power to relax it in any case which may appear to us to be a case in which some indulgence might be accorded the applicant". In the light of these considerations I am unable to hold that the telegram to the fourth defendant, or the express letter sent to all three defendants, constituted valid notices under rule 2. And the failure to serve a valid notice on the fourth defendant was alone sufficient to vitiate the present application, in view of the decision in *Wijesinghe Hamine vs. Ekanayake* to which I have already referred.

For these reasons I hold that the plaintiff has failed to comply with the requirements of rule 2 of the Schedule to the Appeals (Privy Council) Ordinance with regard to notify the opposite party, and his application is accordingly dismissed with costs.

NAGALINGAM, J.
I agree.

Application dismissed.

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

THE ATTORNEY-GENERAL vs VALLIAMA ATCHI

In the Matter of an Application for Conditional Leave to Appeal to His Majesty in His Privy Council.

S. C. Application No. 318/1949—*S. C. No.* 512—*D. C. (F) Colombo* 10

Argued & decided on : 20th July, 1949.

Application for leave to appeal to Privy Council from final judgment of Supreme Court—Appeals (Privy Council) Ordinance Cap. 85, *Rules* 1 *and* 3—*Is the Crown bound by Rule* 3 (*a*).

Held : That the Crown is not bound by the provision in Rule 3 (*a*) of the Appeals (Privy Council) Ordinance as the Rule does not state expressly that the right of the Crown is affected by it and does not appear by necessary implication that the Crown is bound by it.

H. W. R. Weerasuriya, Crown Counsel, for the Crown.
N. M. De Silva, for the respondent.

WIJEYEWARDENE, C.J.

This is an application for leave to appeal to His Majesty in Council from a final judgment of this Court.

Rule 3 of the Rules set out in the Schedule to the Appeals (Privy Council) Ordinance enacts :—

"Leave to appeal under Rule 1 shall only be granted by the Court in the first instance :—

(*a*) upon the condition of the appellant..... entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding Rs. 3,000 for the due prosecution of the appeal and the payment of all such costs as may become payable to the respondent.....;

(*b*) upon such other conditions....."

It is contended by Mr. Weerasuriya that the Attorney-General who represents the Crown in this case is not bound to give security under that Rule. His statement at the Bar that it has been the practice for the Attorney-General not to give security in such cases has not been canvassed by the Counsel for the respondent. That practice appears to follow naturally from the proposition that the Crown cannot be compelled to pay but makes payment as an act of grace when ordered to do so by any of His Majesty's Courts. I may in this connection refer to the provisions of section 462 of the Civil Procedure Code that "no writ against person or property shall be issued against the Attorney-General in any action brought against the Crown in any case".

I am of opinion that the provision in Rule 3 (a) requiring the giving of security does not apply in the present case as the Rule does not state expressly that the right of the Crown is affected by it and as it does not appear by necessary implication that the Crown is bound by it (Section 3 of the Interpretation Ordinance).

Leave to appeal is granted under Rule 3 but such leave is not subject to the condition in Rule 3 (a).

CANEKERATNE, J.
I agree.

Allowed.

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Present : GRATIAEN, J.

KRISHNAKUTTY & OTHERS vs. MARIA NONA

S. C. 315—Workmen's Compensation C. 3/149/47

Argued on : 23rd May, 1949.
Decided on : 25th May, 1949.

Workmen's Compensation—Section 3—Night-Watcher returning home every night for meals—Killed on highway when so returning—Did he come by his death in an accident arising out of and in the course of his employment under his employer.

The deceased was a night-watcher employed by the appellant—The normal hours of duty were between 6 p.m. and 9 a.m. No meals were served to him while on duty and each night he was in the habit of returning home for a short period to have his dinner. While on his way home to dinner one night he was murdered on the highway outside the premises over which it was his duty to watch.

Widow of the deceased applied for an order for compensation against the appellant under the Workmen's Compensation Ordinance.

Held : That in the circumstances the death of the deceased was not caused in an accident " arising out of and in the course of his employment " under the appellant within the meaning of section 3 of the Ordinance, as he was not on the highway in respect of any duty which he owed to his master.

Cases referred to :—*Parker vs. " Black Rock " (owners)* (1915) A. C. 725.
Bell vs. Armstrong Whitworth & Co., (1919) 88 L. J. K. B. 844.
Armstrong Whitworth vs. Redford (1920) A. C. 757.

N. K. Choksy, K. C. with *J. N. David*, for the appellant.
Vernon Wijetunge, for the respondent.

GRATIAEN, J.

This is an appeal against an order for compensation under the Workmen's Compensation Ordinance (Chapter 117) in favour of the widow of a man named Solomon who was at the date of his death employed as a night-watcher on certain premises belonging to the appellant. The question of law which arises for my determination is whether Solomon came by his death in an accident " arising out of and in the course of his employment " under the appellant within the meaning of Section 3 of the Ordinance.

The relevant facts as found by the learned Commissioner are that Solomon's normal hours of duty as a night-watcher were from 6 p.m. till 9 a.m. No meals were supplied to him while on duty, and in the circumstances he returned home each night for a short period to have his dinner. I will assume that he absented himself from his place of duty on these occasions with the knowledge and even the approval of his employer. On the night of 30th July he was murdered on his way home to dinner. The murder took place on a highway which did not form part of his master's premises over which he had been employed to keep watch.

The learned Commissioner took the view that in all the circumstances of the case " the course of employment had not been interrupted at the time the accident took place ", and awarded compensation to Solomon's widow. Were I permitted in exercising my appellate jurisdiction to be swayed by sympathy I should not have been reluctant to affirm this order, but I am bound by the provisions of the statute. The issue arising in cases where an employee meets with an accident when he is " off duty " during the dinner-hour has been answered by the Courts with a consistency which is somewhat rare in Workmen's Compensation claims. In *Parker vs. " Black Rock " (owners)* (1915) A. C. 725 a seaman had signed articles for a coasting voyage, which contained the term " crew to provide their own provisions." When the ship arrived in port he went ashore to buy the necessary provisions, and then returned in the direction of the pier where the ship was lying. It was a dark and stormy night, and the next day the unfortunate man's corpse was found floating in the water near the pier. The House of Lords decided that the accident by which he lost his life did not arise out of his employment. " It is not sufficient," said Lord Parker, (1919) 88 L. J. K. B. 844 " that the accident happened during a period when the man was lawfully absent from the vessel. In order to make it an accident arising out of the employment, *the absence must be in pursuance of a duty owed to the employer.*" The argument that the man's absence arose from the need for food was ruled to be irrelevant on the ground that that was " a necessity common to all mankind." A later decision of the Court of Appeal in *Bell vs. Armstrong Whitworth & Co.* (1919) 88 L. J. K. B. 844

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went even further. In that case a workman left the premises during the luncheon interval to go to a canteen specially provided for the purpose by his employers. The canteen was some distance from the employer's gates at the opposite side of a public highway. Employee was knocked down and killed by a lorry on the highway as he was approaching the canteen. It was held that the principle laid down in *Parker vs. "Black Rock" (owners)* (1915) A. C. 725 applied, and that the fact that the employers by installing the canteen had in a sense invited the workmen to go there did not affect the position.

Learned Counsel for the widow relied on *Armstrong Whitworth vs. Redford* (1920) A. C. 757 but the facts of that case are very clearly distinguishable, because there the workman returning to work after lunch from a canteen met with an accident as he was coming down the stairs "which were the provided means of access from part of the employers' premises to the particular part where the machines were, where he slipped and fell" (per Lord Sumner), I note that in his opinion Lord Sumner agreed that if the accident had happened in the street, the case would have been different.

In the present case Solomon came by his death when he was on the highway for a purpose (no doubt a very necessary purpose) of his own. He was not there in respect of any duty which he owed to his master. It, therefore, follows that the accident did not arise "out of and in the course of" his employment within the meaning of the Ordinance. I set aside the order appealed from, but make no order as to costs.

Set aside.

Present : WIJEWARDENE C.J. AND NAGALINGAM, J.

EBRAHIMJEE vs. THE COMMISSIONER OF INCOME TAX

In the Matter of a Case stated under Section 74 of the Income Tax Ordinance (Cap. 188)

S. C. 162 *Income Tax Appeal*

Decided on : 17th January, 1949

Income Tax—Appeal—Partnership—Some of the partners minors—Is it a bar to the formation of a partnership.

Held : That the minority of a partner is no bar to the existence of a partnership.

H. V. Perera, K.C. with *Cyril E. S. Perera*, for the appellant.

H. W. R. Weerasuriya, Crown Counsel, for the Crown.

WIJEYEWARDENE, C.J.

This is an appeal under section 74 of the Income Tax Ordinance.

The Board of Review upheld the finding of the Commissioner that the appellant was the sole proprietor of the business carried on under the name of A. M. Esufali & Co., and that there was no partnership existing between the appellant, his wife and sons in regard to that business.

The appellant relied on a number of circumstances to prove the existence of a partnership, to wit, the registration of the partners under the Business Names Ordinance, the institution of actions for and against the firm in the names of the partners, the fact that the account of A. M. Esufali & Co., in the Mercantile Bank was operated on by the alleged partners and that accounts had been opened in the books for the appellant's wife and sons and each year a certain share of the profits had been credited to each of these accounts.

The appellant relied on a number of circumstances to prove the existence of a partnership, to wit, the registration of the partners under the Business Names Ordinance, the institution of actions for and against the firm in the name of the partners, the fact that the account of A. M. Esufali & Co., in the Mercantile Bank was operated on by the alleged partners and that accounts had been opened in the books for the appellant's wife and sons and each year a certain share of the profits had been credited to each of these accounts.

The appellant's Counsel contended that the sole reason why the Board refused to "consider

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any of these factors conclusive as to the existence of a partnership" was the fact that the appellant's sons were minors, *i.e.*, young men under the age of twenty-one years. The Crown Counsel who appeared for the Commissioner was unable to invite our attention to any other reason given by the Board.

The Board has misdirected itself on a question of law. The minority of a partner is no bar to the existence of a partnership. No doubt a minor is not bound by a contract of partnership made by him during his minority. But, if he agrees with adults to be their partner and subsequently on behalf of the partnership enters into contracts with third persons, those contracts bind his adults partners and they are entitled to insist that the partnership assets shall be applied in payment of the partnership liabilities before he receives anything. (Halsbury's Law of England. Volume 22, para 30 : see also Lindley on Partnership (ninth edition) pages 96-98, and *Nagoor Meera vs. Meera Saibo* (1919) 6 *C. W. R.* 89 *at* 91.)

I annul the assessment determined by the Board and direct the case to be remitted for an assessment to be made on the footing that there was a partnership as alleged by the appellant.

The appellant is awarded his costs in this Court and is declared entitled to receive the fee paid by him under section 74 (1).

Appeal allowed.

NAGALINGAM, J.

I agree.

Present : GRATIAEN, J.

LIYANAPATHIRANA vs. S. I. POLICE, BELIATTA

S.C. 451/P—*M.C. Walasmulla* 1819

Argued on : 7th June, 1949.
Decided on : 16th June 1949.

Criminal Trial—Both prosecution and defence versions untrue—Presumption of innocence to prevail.

Where a Magistrate was of opinion that the complainant and his witnesses gave perjured testimony and was equally sceptical as to the accused's version of the incident,

Held : That in the circumstances, the presumption of innocence should prevail.

Vernon Wijetunge, for the accused-appellant.

E. R. de Fonseka, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

The accused is a person whose previous good character was proved at the trial. He appeals from a judgment of the learned Magistrate of Walasmulla finding him guilty of having caused grievous hurt to a man named Dissanayake on 1st June 1948.

The learned Magistrate found himself in the embarrasing position of having to give a verdict in a case in which he was satisfied that, apart from Doctor Seevaratnam (whose evidence was equally consistent with the versions of the prosecution and the defence), none of the witnesses in the case had given a true account of what actually happened. He held that the complainant Dissanayake had given perjured testimony, supported by two untruthful witnesses suborned for the purpose, as to the circumstances in which he came by the injuries which he undoubtedly did sustain on the day in question. He was equally sceptical as to the accused's version of the incident. He accordingly arrived at a speculative conclusion that it was the accused who caused the injuries, but in circumstances which were not spoken to by any witness in the case. Whether this conclusion be justified or not, it is not possible for me to say. All that is clear is that it is not supported by the evidence. In these circumstances justice demands that the presumption of innocence should prevail. I set aside the judgment of the learned Magistrate and make order acquitting the accused.

Set aside.

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went even further. In that case a workman left the premises during the luncheon interval to go to a canteen specially provided for the purpose by his employers. The canteen was some distance from the employer's gates at the opposite side of a public highway. Employee was knocked down and killed by a lorry on the highway as he was approaching the canteen. It was held that the principle laid down in *Parker vs. "Black Rock" (owners)* (1915) A. C. 725 applied, and that the fact that the employers by installing the canteen had in a sense invited the workmen to go there did not affect the position.

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In the present case Solomon came by his death when he was on the highway for a purpose (no doubt a very necessary purpose) of his own. He was not there in respect of any duty which he owed to his master. It, therefore, follows that the accident did not arise "out of and in the course of" his employment within the meaning of the Ordinance. I set aside the order appealed from, but make no order as to costs.

Set aside.

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

EBRAHIMJEE vs. THE COMMISSIONER OF INCOME TAX

In the Matter of a Case stated under Section 74 of the Income Tax Ordinance (*Cap.* 188)

S. C. 162 *Income Tax Appeal*

Decided on : 17th January, 1949

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Held : That the minority of a partner is no bar to the existence of a partnership.

H. V. Perera, K.C. with *Cyril E. S. Perera,* for the appellant.

H. W. R. Weerasuriya, Crown Counsel, for the Crown.

WIJEYEWARDENE, C.J.

This is an appeal under section 74 of the Income Tax Ordinance.

The Board of Review upheld the finding of the Commissioner that the appellant was the sole proprietor of the business carried on under the name of A. M. Esufali & Co., and that there was no partnership existing between the appellant, his wife and sons in regard to that business.

The appellant relied on a number of circumstances to prove the existence of a partnership, to wit, the registration of the partners under the Business Names Ordinance, the institution of actions for and against the firm in the names of the partners, the fact that the account of A. M. Esufali & Co., in the Mercantile Bank was operated on by the alleged partners and that accounts had been opened in the books for the appellant's wife and sons and each year a certain share of the profits had been credited to each of these accounts.

The appellant's Counsel contended that the sole reason why the Board refused to "consider any of these factors conclusive as to the existence of a partnership" was the fact that the appellant's sons were minors, *i.e.*, young men under the age of twenty-one years. The Crown Counsel who appeared for the Commissioner was unable to invite our attention to any other reason given by the Board.

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The Board has misdirected itself on a question of law. The minority of a partner is no bar to the existence of a partnership. No doubt a minor is not bound by a contract of partnership made by him during his minority. But, if he agrees with adults to be their partner and subsequently on behalf of the partnership enters into contracts with third persons, those contracts bind his adults partners and they are entitled to insist that the partnership assets shall be applied in payment of the partnership liabilities before he receives anything. (Halsbury's Law of England. Volume 22, para 30 : see also Lindley on Partnership (ninth edition) pages 96-98, and *Nagoor Meera vs. Meera Saibo* (1919) 6 *C. W. R.* 89 *at* 91.)

I annul the assessment determined by the Board and direct the case to be remitted for an assessment to be made on the footing that there was a partnership as alleged by the appellant.

The appellant is awarded his costs in this Court and is declared entitled to receive the fee paid by him under section 74 (1).

Appeal allowed.

NAGALINGAM, J.
I agree.

Present : GRATIAEN, J.

LIYANAPATHIRANA vs. S. I. POLICE, BELIATTA

S.C. 451/P—*M.C. Walasmulla* 1819

Argued on : 7th June, 1949.
Decided on : 16th June 1949.

Criminal Trial—Both prosecution and defence versions untrue—Presumption of innocence to prevail.

Where a Magistrate was of opinion that the complainant and his witnesses gave perjured testimony and was equally sceptical as to the accused's version of the incident,

Held : That in the circumstances, the presumption of innocence should prevail.

Vernon Wijetunge, for the accused-appellant.

E. R. de Fonseka, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

The accused is a person whose previous good character was proved at the trial. He appeals from a judgment of the learned Magistrate of Walasmulla finding him guilty of having caused grievous hurt to a man named Dissanayake on 1st June 1948.

The learned Magistrate found himself in the embarrasing position of having to give a verdict in a case in which he was satisfied that, apart from Doctor Seevaratnam (whose evidence was equally consistent with the versions of the prosecution and the defence), none of the witnesses in the case had given a true account of what actually happened. He held that the complainant Dissanayake had given perjured testimony, supported by two untruthful witnesses suborned for the purpose, as to the circumstances in which he came by the injuries which he undoubtedly did sustain on the day in question. He was equally sceptical as to the accused's version of the incident. He accordingly arrived at a speculative conclusion that it was the accused who caused the injuries, but in circumstances which were not spoken to by any witness in the case. Whether this conclusion be justified or not, it is not possible for me to say. All that is clear is that it is not supported by the evidence. In these circumstances justice demands that the presumption of innocence should prevail. I set aside the judgment of the learned Magistrate and make order acquitting the accused.

Set aside.

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Present : CANEKARATNE & NAGALINGAM, J.J.

MARJAN & OTHERS vs. MOWLANA & ANOTHER

S. C. No. 38—D. C. (Inty.) Tangalle No. 198.

Argued on : 10th September, 1948.
Decided on : 30th September, 1948.

Charitable Trust—Application under sections 15 and 16 of the Muslim Intestate Succession and Wakfs Ordinance (cap. 50)—Applicability of Civil Procedure Code—Summary Procedure—Court's Power to vacate decree—Two separate trusts not to be combined in the same action.

The petitioners acting under section 16 of the Muslim Intestate Succession and Wakfs Ordinance made the trustees respondents and applied by petition *only* for leave to make an application under section 15 of the Ordinance for certain reliefs in respect of the Kataragama Mosque and the Quadiriya Takkiya at Hambantota, which was granted. In the petition which alone was filed without affidavits and other relevant documents under section 15 they prayed *inter alia* that the Quadiriya Takkiya and Kataragama Mosque be declared a trust, that the respondents be appointed members of the Board of Trustees, that the properties belonging to the said Trust be vested in the Board of Trustees and that the scheme of management proposed by them be settled by Court. The Court entered a decree in these terms.

The priest and another claiming to be the owner of the Mosque then intervened to have the decree set aside on the ground of irregularities and of fraud and collusion by the parties to the decree. The Court set aside the decree.

The petitioners and the trustees so appointed appealed from this order on the ground that the District Court had no jurisdiction to set aside or vacate the decree.

Held : (1) That where a decree has been obtained by fraud or collusion, as in this case, the District Court has inherent power to vacate its decree or order in the same proceedings.

(2) That the Civil Procedure Code governs the applications under sections 15 and 16 of the Muslim Intestate Succession and Wakfs Ordinance and should be made by way of Summary Procedure.

(3) That before leave to make an application under section 15 of the Ordinance is granted, the Court must be satisfied judicially that there are sufficient *prima facie* grounds for the application.

(4) That in an application under section 15 of the Ordinance, the admitted *de facto* trustees should be made respondents, and failure to give notice to them of the proceedings may vitiate the proceedings. Since an order under section 15 is a judgment *in rem*, any person other than the *de facto* trustees cannot set it aside on the mere absence of notice.

(5) That each distinct trust must form the subject of a separate application and must not be combined with another trust in the same application.

Cases referred to :—*Woodroffe vs. Taylor.* 20 Vt. 76.
Arumugam Chetty vs. Seeni Mohamedo (2 C. L. R. p. 15).

N. E. Weerasooriya, K. C. with *M. H. A. Aziz, S. W. Walpita, S. Sharvananda,* for the appellants.

H. V. Perera, K. C. with *C. Renganathan,* for the Intervenient respondent.

M. M. K. Subramaniam, for the second respondent.

NAGALINGAM, J.

The Kataragama Mosque situated at Kataragama is the subject of the dispute which has given rise to this appeal. Acting under section 16 of the Muslim Intestate Succession and Wakfs Ordinance, Chapter 50, five persons hereinafter called the petitioners applied to Court for leave to make an application under Section 15 of the Ordinance for certain reliefs claimable thereunder in respect of not only the Kataragama Mosque but also of a Takkiya, referred by them as Quadiriya Takkiya, situated at Hambantota. To this application the trustees proposed were made respondents, and as they were subsequently appointed such, they will for the sake of convenience be referred to hereinafter as trustees.

The application was allowed by Court and the petitioners in pursuance thereof filed an application under Section 15 praying *inter alia* that the Quadiriya Takkiya and Kataragama Mosque be declared subject to a Wakf or trust, that the trustees who alone were respondents to their application be appointed members of a Board of Trustees, that the properties belonging to the said Trust be vested in the Board of Trustees so constituted, and that the scheme of management proposed by them be settled by Court. The Court granted the prayer of the petitioners as prayed for and entered a decree in terms thereof dated 13th March, 1946. Armed with this order of Court the trustees appear to have taken charge of the movable properties lying in the Kataragama Mosque.

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Shortly afterwards, two persons intervened, one claiming to be the priest in charge (referred to hereinafter as the priest intervenient) and the other claiming to be the owner of the Mosque (referred to hereinafter as the owner intervenient) and applied to Court, the former to have "all proceedings including the decree entered on 13-3-46, as far as they affect the Mosque situated in Kataragama and its temporalities be declared null and void and be set aside", and the latter to have "further proceedings in the case relating to the said Kataragama Kovil be stopped until the jurisdiction of the Court relating to that part of the proceedings affecting the said Kataragama Kovil be established".

The learned Judge who was other than the Judge who entered the decree of 13th March, 1946, before whom the application of the Intervenients came granted the application in substance and declared that the decree of 13th March, 1946, insofar as it purported to affect the Kataragama Mosque and its temporalities was a nullity. From this order the petitioners and trustees appeal.

The main contention on behalf of the appellants is that the District Court had no jurisdiction to set aside or vacate the order or decree entered by it earlier, for they contend that the declaration that the decree entered on 13th March, 1946, was a nullity was in effect an order setting aside the decree.

Several reasons have been given by the learned Judge for holding the decree entered in the proceedings to be a nullity. All these reasons centre round various irregularities and errors in the proceedings which culminated in the order of the Court declaring the trust, the appointment of trustees and the granting of other ancillary reliefs. The petitioners when they made the preliminary application under Section 16 for leave of Court to make the application under Section 15 filed only a petition. The petition was not supported by an affidavit of facts, nor was any oral evidence led at the time when the petition came up for consideration by Court. The Section itself does not use the term "petition"; it refers to an application to Court. The procedure in regard not only to an application under this Section but even in regard to the other applications under the Muslim Intestate Succession and Wakfs Ordinance would, I imagine, be governed by the Civil Procedure Code except in so far as any special procedure is indicated therein. Section 6 of the Civil Procedure Code defines an action very widely and declares that every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority or otherwise to invite its interference constitutes an action. The application, therefore, to the Court under section 16 of the Muslim Intestate Succession and Wakfs Ordinance for leave to make an application under Section 15 is an application to the Court for relief obtainable through the exercise of the Court's power and is therefore an action. Under section 7 of the Civil Procedure Code the procedure of an action may be either regular or summary and Section 8 provides that excepting in cases where by the Code it is specially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by way of regular procedure. Under the Muslim Intestate Succession and Wakfs Ordinance, which is a later enactment, the procedure adumbrated is clearly one by way of summary procedure, for it nowhere refers to the filing of a plaint but to an application, and it must be held that the Muslim Intestate Succession and Wakfs Ordinance creates another class of cases in regard to which the procedure should be what is designated as summary procedure by the Court.

In regard to an application to Court by way of Summary Procedure Section 373 of the Civil Procedure Code indicates the steps to be taken and provides that a written petition should be presented. After setting out in Section 374 the requirements of the petition the Code in Section 376 goes on to provide that with the petition shall be exhibited such affidavits, authenticated copy record, processes or other documentary evidence as may be requisite to furnish *prima facie* proof of the material facts set out or alleged in the petition, or the Court may in its discretion permit or direct the petitioner to adduce oral evidence before the Court for the purpose, which shall be taken down in writing.

Under Section 16 of the Muslim Intestate Succession and Wakfs Ordinance, the Court is required on a perusal of the application to determine whether there are sufficient grounds for the making of the application, and if in the judgment of the Court there are such grounds, leave should be given for the making of such application. A condition precedent, therefore, to the granting of the leave is that that the Court must be satisfied that there are sufficient *prima facie* grounds for the making of the application. Obviously, the Court is called upon to exercise its functions judicially and the only way that the Court can feel satisfied is by a consideration of evidence relating to the matters upon which it has to form an opinion, and the necessity for an affidavit or oral testimony becomes ap-

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parent and the view that the Legislature intended summary procedure to be adopted receives further confirmation.

A petition does not furnish proof of the allegations made therein. The proof must thereafter be tendered either by means of affidavit or at least by oral testimony being placed before it. In as much as in Section 16 of the Muslim Intestate Succession and Wakfs Ordinance the Court is required to adjudicate upon the existence of *prima facie* grounds by a " perusal of the application " it would seem to follow that oral testimony in the first instance at least is excluded. It will, therefore, be seen that when the application under Section 16 of the Muslim Intestate and Wakfs Ordinance was made there was no material whatever before the Court, even by way of oral testimony, upon which it could have reached a conclusion judicially of the existence of *prima facie* grounds for the making of the application or upon which it could have arrived at a judgment of the existence of such grounds; but nevertheless, the Court allowed the application. This, there can be little doubt, was a gross irregularity.

Even when the application under Section 15 was made there are stronger reasons for holding that summary procedure was intended as the parties to the application are referred to as petitioners and respondents and not as plaintiffs and defendants—it was neither supported by an affidavit of facts nor was evidence tendered by means of any other documents nor even was oral evidence led before the Court in support of the allegations contained in the petition. Here too, without any material before it, the Court made order declaring the trust, appointing trustees vesting property and settling a scheme of management. There can again be equally little doubt that there has been no exercise by Court judicially of any of the questions that were before it? granted the application of the petitioners on 13th March, 1946.

Apart from these irregularities the learned Judge has also referred to non-compliance with other provisions of the Ordinance as matters affecting the validity of the order of 13th March, 1946. When the application under Section 15 of the Muslim Intestate Succession and Wakfs Ordinance was made, the Courts in the exercise of the powers vested in it under sub-section 2 (*a*) thereof, directed the trustees to file account for a period of three years prior to that date. A statement of accounts however, was filed, but it was for a period of thirteen months. But that the accounts were not for a period of three years was not brought to the notice of the Court and in fact they were submitted as a statement of accounts tendered in compliance with the order of Court. The Court does not appear to have made any investigation in regard to the accounts, for a perusal of those accounts would have revealed that they can in no sense be regarded as proper accounts relating to the Trust, and even the correctness of the accounts were not verified by any person claiming to be a trustee, but the accounts were signed by one calling himself " Asst. Hony. Treasurer ". The Court, however, assuming that the accounts were in order, proceeded to grant the application of the petitioners.

Section 15 of the Ordinance requires that the trustee or trustees, if any, should be made respondents to the application. The petitioners averred in their petition that the Hambantota Quadiriya Association had been the *de facto* trustees of the trust, but they failed to make all the members of the Association who, according to them, were *de facto* trustees, respondents, but only made the trustees who were alleged to be some of the members respondents. The learned Judge held this non-compliance to be also, a factor which vitiated the order made on 13th March, 1946. The priest intervenient himself claims to be the *de facto* trustee, and the learned Judge has taken the view that he should have been made a respondent to the application and the order made in his absence is bad for that reason as well. But, of course, as the petitioners did not admit the claim of the priest intervenient as trustee, I do not think that the failure to make him a respondent can be said to vitiate the proceedings. Having regard to the various irregularities above set out, the learned Judge came to the conclusion that " the Court had no power or jurisdiction to make the order under Section 15 " and that " all the proceedings were irregular and therefore the foundation was bad and consequently the decree a nullity ".

I do not, however, think that any of the grounds set out by the learned District Judge can properly form the foundation for an attack on the validity of the order made on 13th March, 1946. The Court was a competent Court of jurisdiction. By statute it was vested with powers to appoint trustees in respect of a trust proved to its satisfaction to exist, to make vesting orders in regard to the temporalities thereof and to settle a scheme for the due management of the trust. It had jurisdiction both over the persons who appeared for it and in regard to the subject matter in respect of which relief was sought. The petition of the petitioners alleged the existence of all these relevant facts and the

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Court thereupon was vested with the necessary jurisdiction irrespective of the question whether the facts alleged were true in fact or not.

As stated by Hukm Chand (1894 ed. page 240) jurisdiction "does not depend upon facts or the actual existence of matters or things but upon the allegations made concerning them." Hukm Chand quotes a passage from Vanfleet in support:

> "If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant if true, that gives it jurisdiction over the proceedings.....A great deal of trouble has arisen from the mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things instead of upon allegations concerning them".

The Court, therefore, had jurisdiction to make the order granting the application of the petitioners. A Court as has been said, has jurisdiction to make a right order as well as a wrong order, but whatever be the order, it is valid and binding upon the parties until reversed by an appellate tribunal. It cannot be disputed that the order on 13th March, 1946, was an order that was binding upon the parties. The words of Bean J. of the Oregon Supreme Court quoted by Hukm Chand at page 475 are very apposite. Said the learned Judge:

> "After a Court has acquired jurisdiction as well as a right to decide every question arising in the causes, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent Court with admitted jurisdiction of the subject matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because forsooth it was mistaken either as to the law applicable to the facts before it or to the facts themselves."

The principle is so well settled that it is said to be an axiom of law that when a Court has jurisdiction of the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularity in practice.

But on behalf of the appellants it has been contended further that not only is the decree binding on the parties but even on strangers to the suit. The intervenients urge that this proposition would be true if confined to an action which has for its objective the determination of the rights only of parties before Court, but that it would have no application where a judgment intended to have operation as a judgment *in rem* is concerned and that in the latter case, where it can be shown that parties interested in the subject matter of the suit have not had even constructive notice by means of publication or otherwise, though not actual notice, such a judgment would not be binding on parties other than the immediate parties to the suit. Now it is true that a decree of a Court pronouncing in favour of the existence of trusts and appointing trustees is a decree which is in the fullest sense of the term a judgment *in rem*, for neither the existence of the trust nor the title of the trustees can be impeached by any one so long as the decree remains unreserved. In support of the proposition that where in proceedings terminating in a judgment *in rem* no constructive notice at least has been given to parties interested, the judgment cannot bind others than the immediate parties thereto, a passage was cited from the judgment of Hall J. in *Woodroffe vs. Taylor* which is quoted by Hukm Chand at pages 495-6:

> "In every Court and in all countries where judgments are respected, notice of some kind is given. It is just as essential to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment *in personam*. A proceeding professing to determine the right of property where no notice actual or constructive is given, whatever else it might be called, would not entitle it to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict and *not to be regarded anywhere as the judgment of a Court*."

This passage has reference not to the Municipal Law of the country of the Court which pronounced the judgment but rather to the principle of non-recognition of the judgment by other countries and leads one into the realm of international law.

Section 15 the Muslim Intestate Succession and Wakfs Ordinance expressly enacts that the application may be made "without joining as applicant any of the other persons interested," and that only "the trustee or trustees, if any, should be made respondents." There is no provision here to give notice of the application to any other parties. In fact no procedure is indicated to give notice to "all the world." The bare facts, therefore, that notice is not given to the world cannot detract from the weight which should be attached to the judgment and decree which the legislature enacts should be accorded to it. I do not therefore think that the mere lack of notice either constructive or actual can be urged as a ground for treating a judgment which is in the nature of a judgment *in rem* to be not binding upon every and all persons. Two familiar instances of the operation of this principle are to be found in the order for sale entered under partition proceedings and in the order admitting a will to probate. But, of course, where a party named respondent to the proceedings has not

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been given notice either actual or substituted, it may be open to him to have the decree vacated. No person who is not named as respondent in the proceedings can on the mere allegation that no knowledge of the proceedings had come to him claim the right to have the decree set aside, so that the judgment cannot be impeached by any such person either on the ground of irregularity of the proceedings or on the ground of lack of notice, either actual or constructive. But the application of this principle must be limited to judgments entered in proceedings taken honestly and *bona fide* by the parties before the Court.

The intervenients, however, not only allege irregularities in the proceedings and want of notice to them but go further and challenge the decree on the ground that it has been procured by fraud or collusion of the petitioner and the trustee respondents. Undoubtedly the intervenients would have a right to bring a *separate action* to have the decree set aside and declared void on the ground of fraud. It has been contended on behalf of the appellants that the relief cannot be claimed by invoking any other procedure, and in particular that it cannot be demonstrated in the course of the same proceedings that the judgment or decree was obtained by fraud or collusion. I do not think so.

It is by virtue of the decree entered on 13th March, 1946, that the appellants on an assertion of right removed the movable properties belonging to the trust and claimed by the two intervenients to have been in their charge. The removal is alleged to have been effected during the temporary absence of both of them from the premises. Had the attempt at removal been made in the presence of the intervenients, they would have been entitled to resist the removal on the ground that the decree on the basis of which the removal was sought was a nullity. The resistance would, if the appellants wanted to proceed further have been reported to Court or they would have had to institute a fresh action against the intervenients. In either case, it is not denied that the intervenients would have been entitled to show that the decree was obtained by fraud or collusion, for Section 44 of the Evidence Ordinance enacts quite clearly that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant and which has been proved by the adverse party was delivered by a Court not competent to deliver it or *was obtained by fraud or collusion*. Therefore, merely because the removal of the goods had been effected during their absence, are the intervenients to be deemed to have forfeited their rights to demonstrate in this very proceedings that the decree is a nullity as it had been obtained by fraud or collusion and that it is not binding upon them? I can see no good ground for holding that the answer to the question should be in the affirmative. I am of opinion that the intervenients were rightly permitted to intervene in order to show that the decree was a nullity.

It was, however, urged that the District Court had no inherent power to vacate its own decree or order in the same proceedings and that the only jurisdiction it possesses in regard to such matters is what is conferred upon it by the Civil Procedure Code and no other. See *Arumugam Chetty vs. Seeni Mohamedo* (2 C. L. R. p. 15). But this is a principle that is applicable only where the Court is called upon to set aside its decree. It does not extend to cases where it is sought to prove that the decree was one obtained by fraud or collusion and therefore a nullity,—a right expressly granted by Section 44 of the Evidence Ordinance. There is ample material on the record which shows—and it has not been controverted, that the entire proceedings have been commenced and concluded by collusion at least between the petitioners and the trustees, if not by fraud; in these circumstances, the proceedings were rightly held to be a nullity.

The point was also taken on behalf of the intervenients that the application was bad in that both the Kataragama Mosque and Quadiriya Takkiya had been included in one and the same application. They assert that it is not alleged or shown by the petitioner that both the trusts had either a single or a common foundation or that the two trusts though separately founded were at any stage consolidated and constituted into one trust or that the two trusts were even managed at any time as one entity or that the temporalities belonging to the two institutions were treated as the joint property of both trusts or even that the worshippers at the Kataragama Mosque have any interest in the Quadiriya Takkiya or *vice versa*. They contend that the Kataragama Mosque and Quadiriya Takkiya are in fact two separate and distinct trusts having nothing in common between them. It is stated by them that by combining the two trusts in one application the petitioners and trustees have been able to obtain an order insidiously in regard to the Kataragama Mosque which otherwise they would not have been able to do. I think there is substance in this allegation. A perusal of the Ordinance leads me to the conclusion that each distinct trust must form the subject of a separate application and that two or more separate trusts cannot be combined in one application. Such

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a combination would offend against the salutary principle underlying the rule well-known in civil proceedings that separate causes of action cannot be joined in one action against distinct parties.

There now remains for consideration the question as to whether these collusive proceedings teeming as they do with irregularities, a lack of application of the elementary principles underlying the administration of justice in a court of Law in regard to the orders made on and prior to 13th March, 1946, should be permitted to stand even as regards the Quadiriya Takkiya. To do so would be to set the seal of approval of this Court on what must be deemed to be arbitrary orders made by a Court under semblance of judicial proceedings. These proceedings cannot be permitted to disfigure the record of a Court of Law.

I would, therefore, in the exercise of the revisionary powers of this Court, quash all the proceedings. This however, would not debar any persons interested from making a fresh and proper application to Court. The appeal must therefore be and is dismissed with costs.

CANEKARATNE, J.

I agree.

Appeal dismissed.

Present : CANEKERATNE & GRATIAEN, JJ.

ATTORNEY-GENERAL vs. NAGAMANY

S. C. 8/M—D. C. Trincomalee 3047
Argued on : 21st September, 1949
Decided on : 26th September, 1949

Customs Ordinance, sections 64, 128 *and* 128*A—Export of goods the exportation of which is restricted—Forfeiture of vessel used in exportation—Owner unaware that vessel used in contravention of Ordinance—Is forfeiture justified.*

The master of a vessel used the vessel, unknown to the owner, for taking certain goods, the exportation of which was restricted, out of the Island in contravention of the Customs Ordinance. He was convicted under section 128 and the vessel was declared to be forfeited under section 128A. The owner appealed.

Held : (1) That in order to justify the forfeiture, it was not essential to prove guilty knowledge on the part of the owner ;
(2) That section 128 applies to a case where goods, the export of which is restricted, are taken out of the Island without compliance with the special conditions applicable to the case ;
(3) That goods are " exported " as soon as they are taken in a vessel outside the limits of the port.

Cases referred to : *Arugaperumal vs. the Attorney-General* (1947) 48 N. L. R. 510.
The Attorney-General vs. Rodriguesz (1916) 19 N. L. R. 65.
De Keyser vs. Harris (1936) 1 K. B. 224.
Muller vs. Baldwin L. R. 9 Q. B. 457.

H. W. R. Weerasooriya, Crown Counsel, with *Granville Perera, Crown Counsel,* for the defendant-appellant.

C. Thiagalingam with *S. Mahadevan,* for the plaintiff-respondent.

GRATIAEN, J.

The plaintiff in this case was the owner of a sailing vessel " Mathurai Ammal " whose tonnage did not exceed 250 tons. In December 1947, he had hired the vessel to Supramaniam Nadarajah on the terms of contract which provided that the owner, to use his own words, was " to be in no way concerned with the use to which the hirer put the vessel." Supramanaiam Nadarajah obtained an " outward coastwise clearance " under Section 64 of the Customs Ordinance (Chapter 185) entitling the vessel to proceed in ballast to Trincomalee from the harbour of Valvettithurai. The master of the vessel of this voyage was K. Kandasamy.

On 20th December the " Mathurai Ammal " arrived alongside Muthur Jetty in a small harbour on the east coast of the Island not far from Trincomalee Harbour. On 21st December she was again observed at Muthur. Two days later, without having obtained a certificate of clearance to leave Muthur, she was sighted by the crew of a Customs patrol-launch sailing in a

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northerly direction off Pigeon Island twenty miles from Muthur. On the approach of the launch there was much agitation on board the "Mathurai Ammal", and several gunny bags were hastily thrown over the side of the vessel. This naturally aroused suspicion, and in consequence a customs officer boarded the vessel and discovered in the hold a cargo of sixty-six bags of paddy for the export or transportation of which no official permit could be produced. The inference to be drawn from these facts is irresistible in the absence of any explanation which would justify a more charitable view of the transaction. Kandasamy, in breach of Section 128 of the Customs Ordinance and of the Defence (Control of Export) Regulations in force at the time had used the vessel under his charge to smuggle paddy out of Muthur Harbour. Whether the ultimate destination of this unauthorised cargo was Valvettithurai or a foreign port is a secret which he has not chosen to divulge. In my opinion it is unnecessary to attempt to solve this problem.

Kandasamy was in due course convicted in the Magistrate's Court of Trincomalee on a charge under Section 128 of the Customs Ordinance of having been "concerned in exporting or taking out of the Island sixty-six bags of paddy the exportation of which was restricted under the provision of the Ordinance". At the same time the vessel "Mathurai Ammal" was declared by the Assistant Collector of Customs to be forfeited under Section 128 A (1) of the Ordinance on the ground that (to quote only the relevant words of the Section) she had been "knowingly used in the exportation of goods prohibited of export". On receiving information of this order of forfeiture, the plaintiff, after due compliance with the requirements of Section 146 of the Ordinance, instituted the present action against the Crown for the release of his vessel. He contended that its purported forfeiture under Section 128A was not authorised by law. After trial the learned District Judge upheld this submission and entered judgment in favour of the plaintiff as prayed for with costs. The Crown appeals from this judgment.

The main ground on which the learned District Judge declared the forfeiture of the vessel to be contrary to law was that the plaintiff was entirely unaware (which I will assume to be correct) of the fact that his vessel had been used on the day in question for taking contraband goods out of Muthur Harbour. The learned Judge accordingly held that the vessel was not "knowingly used" in the exportation of prohibited goods within the meaning of Section 128A. It is unfortunate that the learned Judge's attention had not been drawn to a decision of this Court where it was held that in order to justify forfeiture of a vessel under Section 128A (1) it was not essential to prove guilty knowledge on the part of the owner. *Arugaperumal vs. The Attorney-General* (1947) 48 N. L. R. 510. Mr. Thiagalingam concedes that this authority was binding on the learned District Judge, but he has invited us to take a contrary view in appeal. I decline to do so because I am in respectful agreement with the opinion expressed by Howard C.J. in that case. Section 128A (1) nowhere states that a condition precedent to its operation is that the offending vessel shall have been "knowingly used" *by her owner* on the unlawful occasion, and it seems to me that to read such an unexpressed condition into the section would be quite unwarranted. There are other statutory provisions where the penalty of forfeiture is similarly imposed without regard to the guilt or innocence of the owner of goods in respect of which the Ordinance has been contravened. Section 106, for instance, not merely empowers but makes obligatory the forfeiture of goods in certain circumstances. It seems to me that Section 128A is intended to catch up the case of a vessel which is being "*used*" in the exportation of prohibited goods by any person, be he owner, charterer, master or anyone else who has effective control of the vessel at the time of its improper use. The word "knowingly" is introduced only to ensure that the penalty of forfeiture shall not be exacted if, unknown to the owner or the person in control of a vessel, prohibited goods are surreptitiously smuggled on board. In such a case the principle laid down in "*The Attorney-General vs. Rodriguesz*" (1916) 19 N. L. R. 65, would seem by analogy to apply.

The provisions of Section 128A of the Customs Ordinance are no doubt rigorous in their operation. This circumstance does not however justify a Court in refusing to give effect to the clear intention of the Legislature where it is proved that a vessel has been wilfully used by those in charge of her for the conveyance of contraband. As Lord Hewart said in *De Keyser vs. Harris* (1936) 1 K. B. 224, in dealing with a similar provision of law, there is "no opportunity for mercy" in applying the section, and as the Court has "no option between alternatives", it cannot take into consideration mitigating circumstances (should such exist) to relieve an owner of the penalty imposed by law. The remedy lies elswhere in cases which may be thought to warrant remission of the forfeiture. The power of mitigation is vested not in the Courts but in

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other hands—*vide* Section 155 and 157 of the Ordinance.

This disposes of the ground on which the learned District Judge entered judgment against the Crown. Mr. Thiagalingam has also argued with much ingenuity that the order of forfeiture was bad in law on two further grounds, namely;

(1) that section 128A does not apply because the bags of paddy which were found on board by the Customs authorities were not "goods prohibited of export" but merely goods "the exportation of which is restricted" within the meaning of Section 128;

(2) that as it was clearly the intention of the master of the vessel to transport the paddy from Muthur Harbour to Valvettithurai and *not to a foreign port*, the paddy had not been "exported" from the Island, and that the provisions of Section 128 could not therefore be brought into operation.

I shall now proceed to consider each of these submissions. Schedule B of the Customs Ordinance contains a "table of prohibitions and instructions" and Section 10 declares that the goods enumerated therein "shall not.....be exported or taken out of the Island save in accordance with the conditions expressed in the said Schedule". (I have omitted the words which do not apply to the present case.) The result is that there are certain goods the exportation of which is absolutely prohibited, while other goods can only be taken out of the Island upon certain conditions which must first be satisfied. Paddy undoubtedly belongs to the latter class which may for convenience be described as "restricted goods". Mr. Thiagalingam's contention is that Section 128 does not apply where goods of that description are taken out of the Island without compliance with the special conditions which apply in the particular case. It seems to me that this very subtle distinction is not warranted by the language of the statute. In the case of paddy, the restriction imposed by law is that it cannot lawfully be taken out of the Island except under the authority of a licence issued by the Controller of Exports. With the greatest respect, I fail to see how the view can reasonably be taken that any paddy in respect of which this restriction has not been removed falls outside the description of goods "prohibited of export" within the meaning of Section 128A.

With regard to the second submission made by Mr. Thiagalingam, I would hold that the paddy was "exported" (as the term must be understood in the context of the Customs Ordinance) as soon as it was taken in the vessel outside the limits of the port of Muthur. It makes no difference whether Kandasamy's intention was to transport it for consumption on board or in some other part of the Island or in a neighbouring country or merely, as seems to have happened in the case of some of the cargo, to gratify a sinister impulse to dump it into the sea. The Customs official is concerned on such occasions only with the fact of exportation, and he need not seek to probe the dark and mysterious workings of the smuggler's mind. I would follow in this connection the authority of *Muller vs. Baldwin* L. R. 9 Q. B. 457 where, in interpreting an analogous statute, Lush J. held that the word "export" must be used in its ordinary sense, namely "carried out of port". Indeed, other provisions of the Customs Ordinance would appear to indicate that the Legislature did not recognise a distinction between exportation "*outwards or coastwise in the Island*" for the purposes of the Customs Ordinance (Sections 18 and 67).

In my opinion the forfeiture of the "Mathurai Ammal" was justified because it was "knowingly used" on 23rd December, 1947 by the person who was in charge of the vessel in the "exportation" of goods which were "prohibited of export" in the sense that the restriction imposed on their exportation had not been removed as required by law. I would accordingly set aside the judgment appealed from and enter decree dismissing the plaintiff's action with costs both here and in the Court below.

Appeal allowed.

CANEKERATNE J.

I agree.

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COURT OF CRIMINAL APPEAL

Present : JAYETILEKE, S.P.J., (President), CANEKERATNE AND GRATIAEN, J.J.

THE KING vs. SATHASIVAM

Appeal No. 72 of 1948. S. C. 8—M. C. Jaffna, 10.091.

Decided on : 24th September, 1948

Court of Criminal Appeal—Statements made by accused, partly incriminating him, partly exculpating him—Should the Court accept or reject such statements.

Held : That if a confession made by the accused contains matter which incriminates him as well as matter favourable to him, the Court should accept the confession as a whole, though the jury may attach different degrees of credit to the different parts.

Cases referred to :—*Balmakund vs. Emperor.* A. I. R. (1931) All. at p 1.
Rex vs. Jones. (1827) 2 C and P 629
R. vs. Higgins. (1929) 3 C and P 603
R. vs. Cleves. (1930) 4 C and P 221

S. Sharvananda, with *A. Jayasuriya* and *G. A. Thavathuray,* for the appellant.

J. A. P. Cherubim, Crown Counsel, for the Crown.

JAYATILEKE, S.P.J.

The appellant was convicted at the Jaffna Assizes on 25th August, 1948 of murder and was sentenced to death.

The deceased was the wife of one Kandiah, a dhoby who washed for the appellant and the members of his family. The prosecution led evidence to prove that the appellant went to Kandiah's house on the morning of the tragedy with a message from his mother requesting the deceased to come for her wages, and the deceased went with the appellant. A little later one Ponniah, a boutique-keeper, went into a palmyrah grove hearing cries of murder and saw the appellant running away from it and the deceased lying fallen in a dying condition. The prosecution proved further a confession made by the appellant to one Suppiahpillai that he had killed a woman, and another confession (P9) made by him to the Magistrate. In P9 the appellant has stated that two or three days before the tragedy the deceased abused him for not paying a sum of Rs. 2 which he owed her, and attempted to strike him with an ekel broom. On the day of the tragedy he met the deceased when he went to cut palmyrah leaves, and the deceased abused him again. He then lost his temper and stabbed the deceased. The prosecution led evidence to prove that there was no quarrel between the deceased and the appellant two or three days before the tragedy, but it was unable to lead any evidence as to the circumstances under which the appellant inflicted injuries on the deceased.

The presiding Judge in his charge to the jury pointed out that there was no motive for the crime and invited the jury to consider whether the circumstances under which the appellant inflicted the injuries were such as to reduce the offence from one of murder to culpable homicide not amounting to murder. He said :—

> " Once the Crown has discharged the burden then prima facie it will be a case of murder. Then you will go on to consider, on all the evidence, that these blows were delivered upon grave sudden provocation while the accused was deprived of his power of self-control. And you will bear in mind that the only evidence as to the circumstances in which they were delivered, is his confession to the Magistrate. But, of course, it is open to you, if you feel like that, to find that that confession was a fabrication, and you will bear in mind the evidence of Kandiah, who certainly contradicts some of the earlier parts of that confession. Of course, nobody was in a position to contradict the part which immediately dealt with the offence ".

At the argument before us two points were taken by Counsel for the appellant :—

(1) That the Court was bound to accept the confession (P9) as a whole and that it could not reject a part of it as inherently incredible.

(2) That the verdict of the jury is unreasonable.

On the first point Counsel relied on a judgment of a Divisional Bench in *Balmakund vs. Emperor,* (A. I. R. (1931) All. at p 1.) in which it was held that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. We are

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of opinion that this judgment does not apply to the facts of this case because there is evidence which, if accepted by the jury, would show that a portion of the exculpatory element in P9 is false. Even if it does apply, we are of opinion that we should not follow it because it seems to us that it is wrong in principle. The learned Judges have based their decision on *Rex vs. Jones*, (1827) 2 C and P 629 in which it was held that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true. The principle has not been accepted in two later decisions which were cited to us in the argument. They are *Rex vs. Higgins* (1929) 3 C and P 603 and *Rex vs. Clewes* (1930) 4 C and P 221.

In *Rex vs. Higgins*, the prisoner was charged with larceny in stealing two yards of woollen cloth. It appears that the prosecutor was at an inn at Berkeley, and that, having the piece of cloth with him, he left it on a chair in one of the rooms in the inn while he went out, and that on his return he missed the cloth. It was proved that about four hours after the loss of the cloth the prisoner sold it at a place about 8 miles distant from Berkeley. The prosecution read as evidence the statement made by the prisoner before the Magistrate. In it the prisoner said "that the cloth was honestly bought and paid for". In summing up Parke J. said :—

> "In this case the prosecutor has given evidence of what the prisoner said before the Magistrate. Now, what a prisoner says is not evidence unless the prosecutor choose to make it so, by using it as part of his case against the prisoner : however : if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him : but still, like all evidence given in any case, it is for you to say whether you believe it. If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him ; but if from his selling the cloth so very soon after it was lost and that, too, at a distance of eight miles, you feel satisfied that the statement of his buying it is all false, then you must find him guilty".

In *Rex vs. Clewes* a confession made by the prisoner was read in evidence by the prosecution. In the course of his summing up Littledale J. said :—

> "If a prisoner, charged with murder, says in a confession which is read in evidence against, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him : but the Judge will not direct an acquittal as the jury may believe one part of the confession, and disbelieve another".

Archbold says that the better opinion is that expressed in *Rex vs. Higgins* and *Rex vs. Clewes*. Phipson takes the same view. He says that the whole confession must, in general, be taken even though containing matter favourable to the prisoner though the jury may attach different degrees of credit to the different points.

On the second point we are unable to say that the verdict of the jury is unreasonable. The burden of proving the existence of circumstances which would bring the case within exception 1 to section 296 of the Penal Code was upon the appellant, and the jury were obviously not satisfied with the evidence adduced by him. They may not have believed that there was any provocation or they may have thought that the alleged provocation was not grave. We would, accordingly, dismiss the appeal and the application.

Appeal dismissed.

Present : GRATIAEN, J.

ARNOLIS APPU vs. HEENHAMY

S. C. 34—C. R. Tangalle 17547
Argued on : 14th September, 1949
Decided on : 20th September, 1949

Servitude—Cartway of necessity—Principles which should be considered in granting.

The plaintiff, who lived in an urban area, claimed a right of cartway of necessity from his land to the public road. He sought a servitude over a narrow strip of the defendant's land and offered the defendant adequate compensation. The strip of land was of no special use to the defendant. On the facts the plaintiff proved that he had no reasonably sufficient access to the public road.

Held : That the servitude asked for should be granted.

Per GRATIAEN, J.—"The underlying principle seems to be that laid down in the opinion of Grotius which is followed in *De Vaas vs. Mendis* (1948) 49 N. L. R. 525, namely that where a party proves that he has 'no *reasonably sufficient access* to the public road' the Court will grant him 'a necessary road whereby to reach the high road *by the shortest way and with the least damage*.'"

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Cases referred to : *De Vaas vs. Mendis* (1948) 49 N. L. R. 525.
Fernando vs. Silva (1928) 30 N. L. R. 56.
Amarasuriya vs. Perera (1944) 45 N. L. R. 348.
Akwis vs. Silva (1882) 8 N. L. R. 76.

N. E. Weerasooriya, K.C., with *A. F. Wijemanne*, for the plaintiff-appellant.

Vernon Wijetunge, for the defendant-respondent.

GRATIAEN, J.

This is an action for a declaration of a right of cartway of necessity leading from the plaintiff's residing land to a public road which is maintained by the Urban Council of Tangalle. Access to the road is at present available only by foot along a dewata which is fifteen yards long and is, according to a surveyor whose evidence was not challenged at the trial, too narrow for even a half-cart to proceed with safety. The defendant's land lies to the immediate south of this dewata and the plaintiff seeks a servitude over a narrow strip of land adjoining the dewata to enable his motor car and his carts to proceed to the public road. The area involved is less than half a perch in extent, valued on a generous assessment at Rs. 90. This sum has been offered by the plaintiff as compensation for the servitude of necessity which he claims. The defendant contested the plaintiff's claim although the narrow strip of land had been proved to be of no special use to her. " I have no reasons for my objections to give up the land " she said in the course of her evidence, " I merely do not want to give it ". There is evidence that other houses exist in the vicinity and that these would share the benefit of the widening of the dewata. The learned Commissioner in a very careful judgment records that the defendant's evidence created " the poorest possible impression " on his mind, and he regarded as " deplorable " her stubborn refusal to accommodate her neighbour by a gesture which would prove advantageous to all concerned. He also held that she would herself have suffered no loss or inconvenience by granting the plaintiff's request in return for adequate compensation. The learned Commissioner nevertheless dismissed the plaintiff's action, though with reluctance, on the ground that the principles of the Roman-Dutch law, as interpreted by the decisions of this Court, seemed to prevent him from granting the relief claimed in this action. He purported to apply the test laid down in " *De Vaas vs. Mendis* " (1948) 49 N. L. R. 525, where it was held that the word " necessary " in a claim for a right of way of necessity must be very strictly construed.

Let us first examine the facts. The plaintiff had for over fifteen years occupied the same substantial dwelling house, which he had himself constructed at a cost of Rs. 20,000, in what has now become a residential area enjoying the benefit of being administered by what must be assumed to be a progressive Urban Council. He has established himself as a successful business man whose fortunes have greatly flourished in recent years. He is also a landed proprietor and the produce which is brought to his premises from his estates is now conveyed in bullock-carts as far as the spot where the public road joins the dewata in question. The carts are then of necessity halted, and the produce has to be conveyed from there by labourers on foot. Again until the Urban Council in due course succeeds in introducing more modern conditions for the convenience of its rate-payers, water carts have to transport water to the plaintiff's house, or at least as near to it as is possible. These too are halted at the entrance to the dewata, and from there the water has to be carried by labourers in suitable receptacles. The plaintiff also owns and needs a motor car for the purposes of his business. Indeed, the evidence discloses that even during the period of petrol rationing he had been registered as an " essestial consumer ". This car is also prevented under existing conditions from proceeding as far as his house, and it has to be garaged at a spot almost a quarter of a mile away along the public road. I can well understand how specially irksome and inconvenient this arrangement must prove to the plaintiff in times of sickness, sorrow or inclement weather.

The only question is whether the facts which I have recounted at some length justify me in holding that a slight but all-important extension of the dewata by taking in a narrow strip of the defendant's land—which she herself does not use and is not likely to require—should be authorised by declaring a right of cartway of necessity over it on payment of compensation. I leave out of consideration certain additional grounds on which the plaintiff seeks to support his claim. They are but specious arguments which indicate the intensity of his desire to be rid of the many discomforts which he suffers by reason of the defendant's stubborness.

The benefits which would be derived by the enjoyment of a wider passage to the public road cannot with reason be characterised as a mere

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luxury in all the circumstances of the case. Do they, however, extend beyond that narrow border line which is not always easy to define between the concepts of *convenience* and "*necessity*"? It is of course a truism that what would have been regarded as a luxury in the times of our ancestors may well have become an essential requirement with the march of time. To employ labourers to carry produce or water was the obvious solution in a different age. Today this procedure, if avoidable, merely diverts manpower from more profitable tasks. A claim to enjoy a right of cartway of necessit in an undeveloped rural area consisting of numerous small holdings has rightly been rejected as unreasonable in *Fernando vs. Silva* (1928) 30 N. L. R. 56 and *Amarasuriya vs. Perera* (1944) 45 N. L. R. 348, but the same test cannot, I think, be fairly applied to the entirely different conditions which obtain within the limits of a progressive Urban Council. Many decisions of this Court have been referred to me, with all of which I am in respectful agreement, but none of them profess to lay down for all time and for every situation a rigid rule which is incapable of adaptation to the altered conditions of the age we live in.

The underlying principle seems to be that laid down in the opinion of Grotius which is followed in *De Vaas vs. Mendis* (1948) 49 N. L. R. 525, namely that where a party proves that he has "*no reasonably sufficient access* to the public road" the Court will grant him "a necessary road whereby to reach the high road *by the shortest way and with the least damage*". If this test be applied in the present case, I think that the plaintiff's claim is entitled to succeed. The servitude asked for is "by the shortest way" and it has been proved that the defendant would suffer no material damage or inconvenience by the proposed widening of the dewata but would rather derive financial benefit from an award of compensation in her favour. Ther term "reasonably sufficient access" is at best a comparative term, and in deciding a case which falls somewhere near the indefinable border-line between "necessity" and obvious "convenience" it is relevant to consider, among other factors, to what extent the defendant would suffer by a grant of the servitude asked for. It was on this basis that a right of way of necessity was granted by De Wet C.J. in *Alwis vs. Silva* (1882) 8 N. L. R. 76 where "the plaintiff had no other reasonable means of obtaining access *per viam* to his property but the pieces of land over which he sought to claim this right were very small indeed, and in addition to this the defendants had failed to show that by the plaintiff's obtaining this right they would be materially affected in the enjoyment of their rights to their property". This is exactly the position in which the defendant stands in the present action, and if one measures the very reasonable requirements of the plaintiff with reference to the absence of any substantial interference with her rights, I think that any doubts which one might previously have entertained must be resolved in the plaintiff's favour.

For the reasons which I have given I allow the plaintiff's appeal and order decree to be entered as prayed for in the plaint upon payment of compensation to the defendant of a sum of Rs. 90. The plaintiff is entitled to his costs of appeal, but as the defendant was justified in calling for strict proof of the plaintiff's claim, I see no reason to interfere with the order in her favour for costs in the lower Court. The plaintiff is enjoined, when constructing the proposed cartway, not to damage any building adjoining it which belongs to the defendant.

Appeal allowed.

Present : GRATIAEN, J.

ATHURUPANE vs. ANDERSON (S. I. POLICE, PANADURA)

Application for Revision in M. C. Panadura Case No. 8977 (457)
Argued and Decided on : 27th September, 1949

Bail—Fixing of—Judicial discretion to be exercised—Warrant committing accused to custody of Fiscal pending trial—Period of validity—Criminal Procedure Code, sections 289 *and* 396.

Held : (1) That the maximum term for which an accused person can be remanded by a Magistrate is seven days at a time, except in certain Courts proclaimed by the Minister of Justice, where the maximum term is fourteen days.

(2) That at the end of that term, the accused person must be produced in Court so that the Magistrate may determine what would be the appropriate order to make should the trial be postponed.

(3) That in fixing bail, which must not be excessive and which must be fixed with due regard to the circumstances of the accused, a judicial discretion must be exercised.

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Per GRATIAEN, J.—If special grounds exist in any case to justify the belief that the granting of bail in a reasonable sum within the means of the accused who is charged with a bailable offence is likely to defeat the ends of justice there should be something on record to indicate that these circumstances have been brought to the notice of and been considered by the Magistrate."

Accused present in person.

R. A. Kannangara, Crown Counsel, for Attorney-General.

GRATIAEN J.

This case was brought to my notice when I recently visited the remand jail at Welikade. It was then brought to my notice that the accused one Reginald Athurupane, a young lad of 17, has since 23rd June, 1949, been continuously on remand pending his trial in the Magistrate's Court of Panadura on charges of criminal trespass and connected offences. I considered it necessary that I should call for the record in the case for the purpose of satisfying myself with regard to the legality and propriety of the orders made by the learned Magistrate in this connection. I requested the Attorney-General to be good enough to arrange for Crown Counsel to assist me in examining this matter, and I am indebted to Mr. Kannangara for the valuable help which he has placed at my disposal.

On an examination of the record it appears that on 27th June, 1949 the Sub-Inspector of Police, Panadura, instituted criminal proceedings against the accused under Section 148 (*b*) of the Criminal Procedure Code charging the accused with the commission of the offences which I have referred to. It is not apparent from the record whether summons was issued in the first instance, but I find that on the date on which the proceedings commenced, namely, 27th June, 1949, the accused was present and pleaded 'not guilty'. The trial was fixed for 29th August, 1949, and an order was made granting the accused bail in the sum of Rs. 750 with one surety. How a young man could have been expected to furnish such an excessive amount at such short notice pending his trial on bailable offences I fail to understand. As was to be expected, the accused was unable to furnish bail and he was accordingly remanded under Section 289 pending his trial.

The warrant committing the accused to custody pending trial commanded the Fiscal to take the accused to the remand jail in Colombo to be kept there until 29th August, 1949, on which date he was to be produced in Court. This warrant of committal is to my mind in direct contravention of the provisions of Section 289 (2) of the Criminal Procedure Code. Under the section "No Magistrate shall remand an accused person to custody under Section 289 for a term exceeding seven days at a time save and except at such Magistrates' Courts as the Minister of Justice shall from time to time proclaim to be Magistrates' Courts at which longer remands may be made, when it shall be lawful to remand accused persons at any such Magistrates' Courts *for a term not exceeding fourteen days*." In the present case the learned Magistrate has thought fit to remand the accused to custody, in excess of the jurisdiction vested in him, for a period of two months. Learned Crown Counsel quite rightly concedes that this order was contrary to law.

On 29th August, 1949, when the accused was produced in Court the trial was postponed until 31st October, 1949 as he was for obvious reasons unable to take the necessary steps to place his defence before the learned Magistrate. Without further consideration, apparently, as to what would represent a reasonable sum which should be furnished as bail in the circumstances of the case, the learned Magistrate remanded the accused for a further period of two months and two days. This order is equally irregular. I notice however that on this occasion an order was made, with the intention presumably of paying lip-service to the strict requirements of Section 289 (2), that the warrant (and not the accused) should be returned to the Court for extension at the expiry of each successive period of 14 days. Learned Crown Counsel informs me that this practice has come into force in various Magistrates' Courts in the Island and he concedes that it amounts to an unwarranted circumvention of the provisions of Section 289 (2). Where an accused person is remanded for a term not exceeding 14 days, it is essential that he should be produced in Court at the expiry of that term so that the Magistrate might bring his mind to bear once more on what would be the appropriate order to make should the trial be postponed. If it were otherwise, the accused would be deprived of the opportunity to which he is entitled to make such representations as may be necessary for the purpose of applying that bail in a smaller sum might be granted.

Under our Criminal Procedure Code bail "shall be fixed with due regard to the circumstances of the accused and shall not be excessive" section 396 of the Code. The fixing of bail calls for the exercise of judicial discretion and for the most anxious care in each case. As has been pointed

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out in a series of decisions of the English Courts, the main consideration that should apply is whether it is probable that the accused will appear to stand his trial. The other matters for consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Section 289 (4) also lays down that where the accused has attended the Court on summons he *shall* be enlarged on his own recognizance or on his simple undertaking to appear, *unless for reasons to be recorded the Court orders otherwise*. In the present case the effect of the various orders made by the learned Magistrate is that the accused has already been in jail as an unconvicted person for a period of three months, and that he would have been on remand for yet another month if these proceedings had not been brought to my notice. I quash the orders made by the learned Magistrate committing the accused and direct that the accused be handed forthwith by the jail authorities to the Fiscal to be produced before the learned Magistrate who is at present officiating in Panadura at the earliest possible date. On being produced before the learned Magistrate he shall be enlarged on his own recognizance to appear in Court on the date fixed for trial. The accused has been examined in open Court before me and it appears that he is a person of fixed abode.

If special grounds exist in any case to justify the belief that the granting of bail in a reasonable sum within the means of the accused who is charged with a bailable offence is likely to defeat the ends of justice there should be something on record to indicate that these circumstances have been brought to the notice of and been considered by the Magistrate. There are always grave objections to the incarceration of unconvicted persons charged with bailable offences and it can only be in rare cases that reasons of such cogency arise as to out-weigh these objections. To fix bail in a sum which is excessive almost invariabley has the effect of an order refusing bail. If the unconvicted person is a young lad standing his trial on a bailable offence such a procedure is almost always indefensible. I have ascertained from the statistics maintained by the Prison authorities that during the year 1948 the number of unconvicted persons remanded for failing to furnish security amounted in the Colombo jails alone to 7,154, and during the first half of this year to 3,215. I find it difficult to satisfy myself that in every one of these instances the judicial discretion which was vested in a Magistrate was wisely and cautiously exercised.

Orders remanding accused quashed.

Present : BASNAYAKE, J.

JAYASEKERA (S. I. POLICE, GALLE) vs. DALADAWATTEGE ALEXANDER

S. C. 60—M. M. C. Galle 2948.

Argued & Decided on : 11th March, 1949.

Judicial notice—Relative ranks of Sub-Inspector and Sergeant in charge of police station—Motor Car Ordinance, No. 45 of 1938, section 124.

In the absence of any evidence to show that a Sub-Inspector of Police is a police officer of a rank not below that of sergeant in charge of a Police Station, the Court refused to take judicial notice of the matter.

Per BASNAYAKE, J.—" I am unable to agree with the learned Magistrate that section 124 of the Motor Car Ordinance requires that the " police officer of a rank not below that of sergeant in charge of a station" should also be in charge of a Police Station. It is sufficient if the police officer is in rank not below that of sergeant in charge of a Police Station."

Arthur Keuneman, Crown Counsel, for the Attorney-General. (Appellant.)

No appearance for the accused respondent.

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BASNAYAKE, J.

This is an appeal by the complainant, Sub-Inspector Jayasekera, from the acquittal of the accused on the following charge :

"That you did, within the jurisdiction of this Court, at Magalle, Galle, on 14th September 1948, being the driver of lorry No. CE. 4897, on a highway to wit at Magalle on Galle-Matara Road, refuse to drive it or permit it to be driven to the wheel weigher for the purpose of its being weighed when required to do so by a Police Officer in uniform of a rank not below that of a sergeant in charge of a station to wit Sub-Inspector Jayasekera of Galle Police who had reasonable cause to believe that the load of goods carried in the said lorry on the said highway was in excess of the maximum load authorised to be carried there in breach of Section 124 of Ordinance No. 45 of 1938 and thereby committed an offence punishable under Section 158 of the Ordinance No. 45 of 1938."

The learned Magistrate finds that the accused refused to drive or permit the lorry to be driven to the wheel weigher for the purpose of its being weighed when requested to do so by Sub-Inspector Jayasekera.

In view of the finding of fact the only question which arises for decision is whether Sub-Inspector Jayasekera is an officer of a rank not below that of sergeant in charge of a Police Station. Now that is a question of fact. In the instant case there is no evidence whatsoever that Sub-Inspector Jayasekera is an officer not below the rank of sergeant in charge of a Police Station. I allowed learned Crown Counsel time to produce any book or document containing a seniority list of officers of the Police Department in support of the allegation that Sub-Inspector Jayasekera is an officer of or above the rank of a sergeant in charge of a Police Station. He has not been able to produce any such book or document. He has, however, referred me to the Estimates of Revenue and Expenditure of the Island, but that document does not indicate the relative ranks of police officers. He has also referred me to the correction slip to the Departmental Order No. 94 of the Police Department which reads :

"It will be clearly understood that in the absence of the Officer-in-charge of the Station (*i.e.*, the Inspector or Sub-Inspector or Sergeant as the case may be) the Police Officer present and available at the Station who is next in rank to such Officer will be the Officer-in-charge, and that the Reserve Constable is NOT "The Officer-in-charge" unless he is the next Senior Officer present and available."

Now even this departmental order does not indicate that a Sub-Inspector is a police officer of a rank not below that of sergeant in charge of a Police Station.

In the absence of any official document which states that a Sub-Inspector of Police is a "police officer of a rank not below that of sergeant in charge of a station", I cannot take judicial notice of the matter. When a Court is invited to take judicial notice of a matter, it is the duty of the party making the request to satisfy the Court that it is justified in making the desired ruling for dispensing with evidence. Where the Court asks Counsel to offer material containing the information it requires in order to take judicial notice of a fact, and such assistance is not given, it may decline to notice the desired fact. I am therefore unable to hold that in the instant case the Sub-Inspector was entitled to act under Section 124. This appeal is dimisssed.

This decision should not be regarded as binding any future case where evidence is available as to whether a Sub-Inspector is of a rank not below that of sergeant in charge of a Police Station.

I am unable to agree with the learned Magistrate that Section 124 of the Motor Car Ordinance requires that the "police officer of a rank not below that of sergeant in charge of a station" should also be in charge of a Police Station. It is sufficient if the police officer is in rank not below that of sergeant in charge of a Police Station.

Appeal dismissed.

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Present : GRATIAEN, J.

WIJE vs. ABEYSUNDERA (EXCISE INSPECTOR) TELDENIYA

S. C. 695/E—M. C. Teldeniya 6379
Argued on : 12th September, 1949
Decided on : 14th September, 1949

Fine—Amount of—Matters to be considered in fixing—Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938.

Where an accused person, 17 years old, was ordered to pay a fine of Rs. 500 forthwith without any inquiry as to whether he possessed the means to do so, and on his failure to pay the fine, was committed to prison.

Held : That the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938 had not been complied with.

T. B. Dissanayake with *S. A. Pullenayagam*, for the appellant.

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

GRATIAEN J.

The accused in this appeal is 17 years old. He has been convicted of two offences punishable under the Excise Ordinance, namely of possessing a small quantity of fermented toddy in excess of the permitted amount, and of having been tempted to sell a part of it to a decoy for cts. 25. He was sentenced on each count to pay a fine of Rs. 250 or in default to undergo a term of six weeks' rigorous imprisonment to run consecutively.

On the merits I am satisfied that the charges have been clearly proved, and the convictions must therefore be affirmed. The appeal against the sentences remains for consideration.

No previous convictions had been recorded against the appellant, and having regard to his age the learned Magistrate rightly decided that the imposition of a fine in lieu of a sentence of imprisonment would meet the ends of justice. It is therefore unfortunate that before fixing the amount of the fine the salutary and indeed the imperative requirements of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance No. 49 of 1938 were not consulted and applied. This Ordinance has been substantially taken over from the Criminal Justice Act, 1914 of England, and its terms are especially designed to give a convicted person, in cases where the imposition of a fine is thought to be appropriate, an opportunity of paying within a reasonable time an amount which is fixed with reference to his means. The procedure prescribed enables the offender to avoid the alternative sentence of imprisonment which has in all the circumstances of the case been regarded by the Magistrate to be less appropriate. It is for this reason that Section 2 requires that *the means of the offender* among other factors shall be taken into consideration in fixing the amount of the fine, and that Section 3 makes it obligatory that *time shall be given* for the payment of the fine (by instalments in suitable cases) unless the Court is satisfied that he has sufficient means to pay the amount forthwith *or* that he has no fixed abode *or* that other reasons exist (the nature of which *shall be recorded*) why the time for payment should not be postponed. Section 8 lays down for very obvious reasons special conditions to protect young persons in cases where fines are imposed. Indeed, the entire Ordinance abounds in beneficial provisions which, however irksome they may prove to those who officiate in a busy Court, should not be neglected or ignored if avoidance of the imprisonment of first offenders and young delinquents in minor offences is recognised as one of the ends of justice.

In the present case the accused was ordered to pay a sum of Rs. 500 forthwith by way of fine without any inquiry as to whether he possessed the means to do so. On the failure of this young man to achieve the impossible he was transported from Teldeniya to Kandy and committed to prison. He filed an appeal against the convictions and sentences, but it took some days before his relations could find an accommodating bailsman to procure, no doubt for a suitable consideration, his release pending this appeal by furnishing security in the sum of Rs. 1,000 to abide the decision of this Court. In the result, the accused has already spent a short and, I fear, unprofitable period as an inmate of an overcrowded prison. I do not, therefore, consider that any further punishment is called for, and I accordingly set aside the order requiring him to pay a fine of Rs. 500 as well.

I should like to be convinced that the provisions of the Payment of Fines Ordinance of 1938 are as well known as they ought to be. The amount of a fine must be fixed not only with reference to the gravity of the offence but to the ability of the offender to pay. Once the amount is fixed it is but right and it has now become an obligation imposed by law to give the offender sufficient time to make the payment. Otherwise it might often happen that, as in this case, a man is unnecessarily sent to prison at the public expense without corresponding benefit to the individual concerned.

Order to pay fines set aside

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Present : BASNAYAKE J. & GRATIAEN, J.

JANSZ vs. WEERASEKERA *et al*

In the Matter of the Insolvency of Bertram Clifford Jansz of Pamankada Lane, Wellawatte, Colombo.
S. C. 245/M—D. C. Colombo 5777/Insol.
Argued on : 23rd August, 1949
Decided on : 28th September, 1949

Insolvency—Fraudulent preference—Refusal of certificate of conformity and withdrawal of protection from arrest—Insolvency Ordinance, section 151.

Held : (1) That an insolvent who makes payments to some of his creditors, influenced by the poverty of some and out of gratitude to others, is guilty of fraudulent preference and the Court is right in refusing him a certificate of conformity and withdrawing protection from arrest.
(2) That where there are extenuating circumstances the certificate should not be refused for all time.

Cases referred to : *Nunes vs. Carter*, 1 L. R. P. C. (1865-67) 342 at 348.
Re Vingoe and Davies, *ex parte* Viney (1894) 1 Mans. 416.
In *re* Skegg, (1890) 59 L. J. 546 at 548.
In *re* Bryant, (1895) L. R. 1 Q. B. D. 420.
Re Patrick and Lyon Ltd. (1933) L. R. Ch. 790.

S. Nadesan with *M. A. M. Hussain*, for the insolvent-appellant.
S. J. Kadirgamar with *R. S. Wanasundera*, for the opposing-creditor-respondent.

BASNAYAKE J.

The appellant (hereinafter referred to as the insolvent) appeals from the order of the District Judge refusing him a certificate of conformity and withdrawing the protection from arrest granted to him under section 36 of the Insolvency Ordinance.

Objection has been taken to the grant of a certificate of conformity by one Verona Florence Weerasekera, a creditor (hereinafter referred to as the opposing creditor), to whom a sum of Rs. 1,950 is due on a promissory note dated 4th December, 1945. The grounds on which her objection is based are as follows :

"(1) The insolvent has, in contemplation of insolvency or with the intent to defeat the object of the Insolvency Ordinance, concealed part of his property.

(2) The insolvent has contracted debts under false pretences and has by false pretences obtained the forbearance of his creditors.

(3) The insolvent has within two months next preceding the filing of the petition for sequestration of his estate, fraudulently in contemplation of insolvency and with intent to diminish the sum to be divided among his creditors, or to give undue preference to some of his creditors, paid some creditors wholly or in part and has made away with part of his property.

(4) The insolvent has under his insolvency attempted to account for his property by fictitious losses.

(5) The insolvent has not made a full and true disclosure of all his matters and assets."

One Richard James Norton Weerasekera, a brother of the opposing creditor, has given evidence on behalf of the opposing creditor. He details the circumstances in which the opposing creditor came to make the loan to the insolvent. He says that the insolvent whom he had known for about 15 years came to see him in December 1945 and told him that he was in debt and that if his father came to know about it he would be in a bad way, but that if he managed to clear his debts his father would take him on as a partner in his father's business. The insolvent wanted Rs. 1,500 to clear all his debts. The witness knew that the insolvent's father was a prosperous business man and says he believed him. The witness therefore arranged for a loan from his sister, the interest charged being 15 per cent. per annum. The witness says : "I would not have given this money to him if I knew that the representations he made were false." The evidence of the witness does not in my opinion support the allegation that the opposing-creditor was induced to lend the money on false representations made by the insolvent to her, nor is there any evidence to the effect that the witness acted as the insolvent's agent or made any false representations on his behalf and thereby induced the opposing creditor to lend the money.

On the evidence of the witness Richard James Norton Weerasekera the learned District Judge holds that the opposing creditor was induced by her brother the witness to make the loan on the false representations made to him. He says : "I

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accept this evidence and find that, apart from the Insolvent having been unable to give a satisfactory explanation for the full Rs. 5,000 that came into his hands as commuted pension about three months prior to his coming to the insolvency Court, the insolvent on his own admission, has given undue preference to some of his creditors. I also find on the evidence of Mr. R.J.N. Weerasekera that the Insolvent has been contracting the debt of Miss Weerasekera by fraud and by means of false pretences, and that on this ground he is not entitled to a certificate of conformity."

I am unable to agree with the learned District Judge that in the instant case it is established that the insolvent contracted the debt with the opposing creditor "by fraud and by means of false pretences", nor is there any evidence to support objections (1), (4) and (5) mentioned above. The only question that merits examination is the question of "fraudulent preference."

I shall first discuss the meaning of the expression "fraudulent preference" and then consider whether the evidence discloses that the insolvent is guilty of fraudulent preferences. In our law the expression "fraudulent preference" bears the same meaning that it bears in English law at the corresponding period of time. Section 58, Insolvency Ordinance.

A "fraudulent preference" is well known to the law of bankruptcy. It arises where the debtor, in contemplation of bankruptcy that is, knowing his circumstances to be such as that bankruptcy must be, or will be, the probable result, though it may not be the inevitable result, does *ex mero motu*, make a payment of money, or a delivery of property to a creditor, not in the ordinary course of business, and without any pressure or demand on the part of the creditor. *Nunes vs. Carter*, 1 L. R.P.C. (1865-67) 342 at 348. The elements which go to make up a fraudulent preference are two: first, insolvency—inability on the debtor's part to pay his debts as they become due, from his own moneys; and, secondly, a payment to a creditor with a view to giving him a preference over the other creditors. Preference given to a creditor from a mere sense of duty or honour will not prevent the transaction being a fraudulent preference. *Re Vinge and Davies, Ex parte Viney*, (1894) 1 Mans. 416. It is the duty of a debtor who is unable to pay his debts as they become due not to interfere in any way amongst his creditors. If he interferes in any way in order to give an advantage to one creditor over the others, he cannot escape the consequences of his act. *In re Skegg*, (1890) 59 L. J. 546 at 548. An insolvent is not free to pay some only of his creditors, even though it be in part, during the two months preceding his adjudication on the ground that they had done him services or because they were friendly to him and because he liked them better than his other creditors. He cannot be allowed to anticipate the action of the Bankruptcy Court with an intention of preferring one of his creditors to another and virtually take the administration of his estate out of bankruptcy into his own hands, preferring one creditor to another, even though the creditors whom he paid might or would be entitled to priority in the bankruptcy. *In re Bryant* (1895) L. R. 1 Q. B. D. 420

It should be observed that although the early English legislation described the preferring of creditors by a bankrupt in contemplation of bankruptcy as a fraudulent preference the act need not be accompanied by any fraud practised on the creditors. Maugham J. in the case of *Re Patrick and Lyon Ltd.* (1933) L.R. Ch. 790 observes: "A fraudulent preference.....possibly may not involve any moral blame at all; for example, there may be a discrimination between creditors, irrespective of pressure, on grounds with which most people would sympathise." The debtor may be influenced by the affluence of his other creditors and, as in the instant case, by the poverty of the preferee; or again, as in the instant case, by gratitude to some of the preferees.

The petition to have the appellant adjudged insolvent was filed on 20th January, 1948. At 1-30 p.m. on the same day the appellant filed his declaration of insolvency and asked for protection. On these representations the District Judge made order on the same day adjudging the appellant an insolvent and ordered that his estates be placed under sequestration in the hands of the Fiscal. There is proof that the appellant through the very proctor who filed his declaration of insolvency paid certain sums of money to some only of his creditors within two (Section 151 (4) of the Insolvency Ordinance) months of his adjudication. The payments made by the appellant's proctor are as follows:

Name	Amount due Rs.	Amount paid Rs.
A. Nanayakkara ...	400	150
Etta de Silva ...	1,250	750
Q. R. de Silva ...	500	250
P. F. G. Fernando ...	200	50
Sayed Karim Bhai	375	150
P. T. P. Gunaratne	400	200
P. Don Albert ...	200	100
M. de Zilva ...	150	100
S. Guluvite ...	750	250
...	4,225	2,000

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Of the above payments two at least were paid on the very day the appellant was adjudged insolvent. The actual dates of the other payments are not stated in the list filed by the appellant's proctor, nor have I been able to find any receipts for them in the record.

The appellant's explanation as to why he preferred certain creditors to others is in his own words as follows ;

> " I released Rs. 2,000 to Mr. Stave so that he might come to some sort of settlement with my creditors. He has distributed that Rs. 2,000. I have got the names of the persons to whom this money was distributed. They were good friends of mine and they wanted full amounts."

From the foregoing it appears that the insolvent has deliberately in contemplation of insolvency with intent to give an undue preference to certain of his creditors paid them in part a course of conduct which the law of insolvency declares to be an offence. But what is surprising in this case is the action of the insolvent's proctor, who, without advising the insolvent as to the proper course he should take, himself undertook to act for him in distributing the sum of Rs. 2,000 among his creditors at a time when he appears to have known that the appellant was about to declare himself as insolvent. His conduct needs explanation. Even on the very day the appellant was adjudged insolvent, the appellant's proctor made a payment of Rs. 100 to a creditor to whom only Rs. 150 was due. The appellant's instructions were written on paper bearing his proctor's name and address and read :

" Mr. Stave,

I owe this body Rs. 150. Please pay him Rs. 100 as this is a very deserving case.

(Sgd.)
28-1-1948.

The receipt dated the same date on the same paper is as follows :

" Received Rs. 100 from Proctor Stave on behalf of Mr. B. C. Jansz.

M. de Silva
28-1-1948.

The insolvent had no right to make payments to his creditors in the way he did influenced by the poverty of some and out of gratitude to others. I am therefore unable to hold that the learned District Judge is wrong in refusing him a certificate and withdrawing his protection under section 151 of the Insolvency Ordinance.

But having regard to the circumstances of the instant case I do not think that the insolvent should be refused a certificate of conformity for all time. The insolvent is 43 years of age. He started life as a clerk in a Bank on a salary of Rs. 50 per month. Thereafter in 1922 he joined the Railway Department as an Inspector of Railway Telegraphs on a starting salary of Rs. 80 per month, and later in the year 1927 he became an Inspector of Telegraphs of the Post & Telegraphs Department on a starting salary of Rs. 103 per month. He married in the year 1933 and has three children of the ages of 13, 10 and 7 two girls and a boy. They are being educated at Ladies' College, Colombo.

In the year 1939 he was in difficult financial circumstances and was compelled to borrow, for the first time to meet the expenses connected with the illness of his uncle who was staying with him. The insolvent's domestic budget was strained by the fact that he had also to support his mother-in-law and brother-in-law. The insolvent's father is a prosperous business man with trading establishments at Wellawatte and Nugegoda, but he says he is unable to turn to him for the solution of his financial troubles because he had incurred his displeasure on his marriage without his approval.

The insolvent's creditors are Chettiars, Afghans, and others, and the rates of interest charged by them range from 120 to 200 per cent.

In 1941 the insolvent's wife took employment in the Naval Office on a salary of Rs. 200 in order to alleviate their financial difficulties. His wife's services came to an end in 1944 owing to her illness. In 1946 she again sought employment and she is now employed at Lee Hedges & Co. on a salary of Rs. 60 per month and a cost of living allowance of Rs. 56.

Owing to financial worry he ran down in his health and retired from Government Service in the year 1947, having been condemned by a Medical Board as unfit for work. He drew as commuted pension and retirement allowance a sum of about Rs. 5,000. It is Rs. 2,000 of this sum that he handed over to his proctor for settlement among some of his creditors.

The insolvent says that he never gambled on the racecourse or otherwise and that his present financial difficulties are due entirely to misfortune. His monthly pension together with the cost of living allowance is Rs. 124·85, and his wife's income is Rs. 105·50 with allowance. His father pays him Rs. 50 a month on account of his children's schooling and has given him a house to live in free of rent.

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Having regard to the above facts I think it is sufficient if the issue of the insolvent's certificate is suspended till he brings into court a sum of Rs. 2,000, which is the amount he took upon himself to distribute among some only of his creditors, either by a lump or in monthly instalments of Rs. 100. The first of such instalments is to be paid within thirty days from the day on which this judgment is communicated to him by the learned District Judge and the subsequent instalments monthly on the date corresponding to the date on which the first instalment is paid in pursuance of this order. I order that upon the completion of the payment of that sum the insolvent be granted a certificate of conformity, if, meanwhile he does not do anything to forfeit his claims to it on any other ground, or any other circumstance which disentitles him to a certificate is not disclosed. The District Judge should determine the class of the certificate on the material before him at the time he grants it. The insolvent has undertaken to pay monthly a sum of Rs. 50 for the benefit of his creditors. The record indicates that he has in pursuance of this undertaking made certain payments, which should be credited to the amount I have ordered him to pay, *i.e.*, he will pay Rs. 2,000 less any sum he has already paid in instalments. The insolvent shall be entitled to protection from arrest pending the grant of a certificate of conformity so long as he duly complies with the order I have made.

The respondent is entitled to the costs of this appeal.

GRATIAEN J.

I agree.

Order varied.

PRIVY COUNCIL

LORDS PORTER, SIMONDS, NORMAND, MORTON OF HENRYTON & MACDERMOTT

LENNOX ARTHUR PATRICK O'REILLY AND OTHERS vs. CYRIL CUTHBERT GITTENS

Decided on : 14th July, 1949

From the Supreme Court of Trinidad and Tobago

Domestic Tribunal—Principles applicable to decisions of—Court cannot intervene where Tribunal Acts honestly and in good faith—Effect of prejudiced person sitting on enquiry—Meaning of " warned off " under Trinidad Turf Club Rules.

The defendants, the Stewards of the Trinidad Turf Club, " warned off " the respondent, an owner and trainer of horses, and made him a " disqualified person " under the Club Rules after an inquiry at which the respondent was represented by counsel, on the ground that the respondent's horse was found to be drugged after a race. The respondent admittedly, had nothing to do with the administration of the drug.

The respondent brought an action in the Supreme Court of Trinidad for a declaration that the defendants had either no jurisdiction to entertain the inquiry or make the order or had exceeded their jurisdiction and that two Stewards were disqualified from participating in the inquiry by reason of their personal animosity to the respondent and that the order was contrary to dictates of natural justice.

The Supreme Court held (1) That the order of the defendants was *ultra vires* the powers conferred upon them by the Trinidad Turf Club ; (2) that the defendant's ruling that the respondent had failed to safeguard his horse was contrary to natural justice in that the defendants adjudged the respondent by a rule which precluded them from making a proper inquiry.

On appeal to the Privy Council it was held :—

(1) that under the Turf Club General Rules the defendants had power to " warn off " the respondent resulting in the respondent becoming a " disqualified person " within the Trinidad Rules of Racing.

(2) that where the Tribunal does not exceed its jurisdiction and acts honestly and in good faith, the Court cannot intervene, even if it thinks the penalty is severe or that a very strict standard has been applied.

(3) that the presence of the prejudiced Stewards on the Tribunal did not inject such an element of bias into the Tribunal as to give rise to a reasonable suspicion that the trial was not a fair one and that the defendants sitting as a Tribunal discharged the obligation to act honestly and in good faith.

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Cases cited: *MacLean vs. The Workers' Union* (1929) 1 Ch. 602 followed.
Lesson vs. General Council of Medical Education and Registration (1890) 43 C. H. D. 366.
Dawkins vs. Antrobus (1881) 17 C. H. D. 615.
Chapman vs. Ellesmere (1932) 2 K. B. 431.
Thomson vs. British Medical Association (N. S. W. Branch) 1924 A. C. at p. 781.
Russel vs. Duke of Norfolk and others (1949) 1 All. E. R. 109.

Sir Walter Monckton, with Richard Elwes and *John Hobson*, for the appellants.
Sir D. Maxwell Fyfe, with G. D. Squibb and *H. S. Grannum*, for the respondent.

LORD MORTON OF HENRYTON

This appeal and cross-appeal arise out of an action brought by Dr. Cyril Cuthbert Gittens hereafter called the respondent as plaintiff against the appellants, which succeeded in part and failed in part.

The appellants were at all material times the stewards of the Trinidad Turf Club. That Club is the recognised turf authority in the Colony of Trinidad and Tobago, and exercises its powers and jurisdiction by the stewards of the Club. The respondent is a dental surgeon and an owner and trainer of race horses. At all material times the respondent held a trainer's licence which expressly provided as follows:

"This licence is issued subject to the rules, regulations and resolutions of the Trinidad Turf Club for the time being and may be withdrawn or suspended by the stewards of that club in their absolute discretion, and such withdrawal or suspension may be published in any local newspaper or newspapers, for any reason which may seem proper to such Stewards, and they should not be bound to state their reasons".

The respondent entered a horse called "Tommy Boy", owned and trained by himself, in certain races at a meeting held by the Tobago Race Club, under the authority of the Trinidad Turf Club, in the spring of 1944. All entries for the said races were made "subject to the rules and regulations of the Trinidad Turf Club". "Tommy Boy" won the first and fifth races on the second day of the meeting, namely, 4th March.

In accordance with a practice recently instituted by the stewards of the Trinidad Turf Club, swabs of the saliva of each winner were taken on the course. After examination, the Government analyst reported on 18th April, 1944, to the Trinidad Turf Club that the swabs taken from "Tommy Boy" contained evidence of the presence of heroin. On 25th, 27th and 29th April, 1944, the appellants, acting as stewards of the Trinidad Turf Club, held an inquiry into this matter. The respondent attended the inquiry and was represented by solicitor and counsel. At the hearing the respondent was given a full opportunity to cross-examine, to lead evidence and to put forward his contentions by his counsel. At the beginning of the hearing the respondent by his counsel objected to the presence of the appellants de Nobriga and Liddelow on the ground that they were biased against him. This objection was overruled and all the appellants accordingly sat in the inquiry. At the conclusion of the hearing the appellants issued findings and an Order in the following terms:

"Turf Club Office, 29th April, 1944.

The stewards of the Trinidad Turf Club having, investigated the circumstances relating to 'Tommy Boy' find as follows:

(i) A drug was administered to 'Tommy Boy' on the second day of the Tobago Races (4th March 1944) which was calculated to affect its speed.

(ii) The Stewards hold the trainer, Doctor Cyril Gittens, responsible for the safeguarding of the horse. They Order:

(*a*) That 'Tommy Boy' be disqualified as from this date from all future racing under the Rules of the Trinidad Turf Club;

(*b*) That the licence of Dr. Cyril Gittens, as trainer be withdrawn;

(*c*) That Dr. Cyril Gittens be warned off pursuant to the powers vested in the Stewards of the Trinidad Turf Club.

L. A. P. O'REILLY, *Steward*.
C. A. CHILD.
C. LLOYD TRESTRAIL.
GEORGE DE NOBRIGA.
S. LIDDELOW."

The writ in this action was issued on 5th May, 1944. By his statement of claim delivered on 16th October, 1944, the respondent claimed:

"(A) A declaration that the defendants acting or purporting to act as Stewards of the Trinidad Turf Club had no jurisdiction to entertain the said inquiry or to make any of the said decision or orders thereon or alternatively that they exceeded their jurisdiction by making any decision or order against the plaintiff and/or his racehorse 'Tommy Boy' and/or that the defendants de Nobriga and Liddelow (either or both of them) were disqualified from participating in the said inquiry or in any of the decision orders thereon and/or that the said tribunal was improperly constituted and/or that the said defendants failed to make any due or proper inquiry and/or that the said decision or orders were and are, contrary to the dictates of natural justice.

(B) A declaration that for the reasons aforesaid (or any of them) the said decision and/or orders were, and are, null and void and/or should be set aside.

(C) An injunction restraining the defendants (and each of them), as Stewards of the Trinidad Turf Club or otherwise from taking any step or doing any act or thing in respect of the plaintiff and/or his said racehorse 'Tommy Boy' to implement or carry into effect

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in any manner whatsoever the said decisions and/or orders made by the defendants as aforesaid.

(D) Such further and/or other relief as the nature of the case may require."

On 21st June, 1946, Hallinan, J., made an order in the Supreme Court of Trinidad and Tobago granting the respondent (1) a declaration that the appellants by their order of 29th April, 1944, purported to warn off the respondent in such a manner as to make him a "disqualified person", and in so doing acted *ultra vires* the powers conferred upon them by the Trinidad Turf Club and therefore had no authority or jurisdiction to make such order; (2) a declaration that the appellants' ruling that the respondent had failed to safeguard his horse and the order warning him off were contrary to natural justice for the reasons that the appellants adjudged the respondent by a rule or principle which precluded them from making a proper inquiry.

The learned Judge held that the respondent's claim for an injunction could not be maintained, and that the Court could not interfere with the appellants' orders disqualifying the horse "Tommy Boy" from all future racing under the rules of the Trinidad Turf Club, and withdrawing the respondent's licence to train, because the appellants had power under the Trinidad Rules of Racing to disqualify a horse which had been the the subject of fraudulent practice and the licence to train could be withdrawn or suspended in the absolute discretion of the stewards. The learned Judge did not uphold the respondent's claim that the appellants de Nobriga and Liddelow were disqualified from participating in the inquiry.

At the hearing of this appeal the appellants contended that the action should have been dismissed. The respondent on his cross appeal did not press his claim for an injunction, but contended that all the declarations claimed in the action should have been granted.

The issues arising for the decision of the Board may therefore be summarised as follows: (1) Had the appellants power to "warn off" the respondent, and if so did the order warning off the respondent result in his becoming a "disqualified person?" (2) Was the inquiry null and void because, to quote the order of the learned Judge, "the appellants adjudged the respondent by a rule or principle which precluded them from making a proper inquiry?" (3) Was the inquiry null and void because the appellants de Nobriga and Liddelow, or one of them, were or was disqualified from sitting by reason of bias against the respondent? (4) Had the learned Judge power to grant any declaration in the present case? and (5) Were the orders of the appellants disqualifying the horse "Tommy Boy" and withdrawing the licence of the respondent as trainer, valid or invalid?

The first question depends upon the true construction and effect of certain rules. At the hearing of the appeal reference was made to five sets of rules; Rules of Racing of the Trinidad Turf Club (hereafter called the Trinidad Rules of Racing), General Rules of the Trinidad Turf Club (hereafter called the Turf Club General Rules), Rules and Orders of the Jockey Club 1890, English Jockey Club Rules of Racing, 1940, and the Rules of the Tobago Race Club. It is necessary at this stage to quote the following rules:

Trinidad Rules of Racing

"*Rule 1.* 'Stewards.' Unless otherwise stated wherever word 'Stewards' is used, it means the Steward or Stewards of the meeting or their duly appointed deputy or deputies.

Rule 17. The Stewards of the Trinidad Turf Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, grooms, and race courses, to fix the dates on which all meetings shall be held, to make enquiry into and deal with any matters relating to racing in the Colony. They also have power in cases of emergency or expediency to modify or to suspend any Rule or Regulation, for such period or periods as they shall think fit, without giving previous notice.

Rule 125. Any person who shall:—

(i) administer or cause to be administered, for the purpose of affecting the speed of a horse, drugs or stimulants internally, by hypodermic, or other method, or

(ii) corruptly give or offer or promise, directly or indirectly, any bribe in any form to any person having official duties in relation to a race or race horse, or to any trainer, jockey, or agent or to any other person having charge of, or access to, any race horse: or

(iii) having official duties in relation to a race, or if any trainer, jockey, or agent, or other person, having charge of, or access to, any race horse, corruptly accept or offer to accept any bribe, in any form: or

(iv) wilfully enter or cause to be entered or to start for any race a horse which he knows or believes to be disqualified: or

(v) be guilty of, or shall conspire with any other person for the commission of, or shall connive at any other person being guilty of any other corrupt or fraudulent practice in relation to racing in this or any other country,

shall be warned off by the Stewards and reported forthwith to the Stewards of the Trinidad Turf Club.

When any person is warned off, and as long as his exclusion continues he is a disqualified person. *Rule 127.* A 'disqualified person,' so long as his disqualification lasts, is unable—

(1) to act as Steward or Official at any recognised meeting;

(2) to act as authorised agent under these Rules;

(3) to subscribe for, or enter, run, train, or ride a horse in any race at any recognised meeting or ride in trials;

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(4) enter any Race Course, Stand, or Enclosure;

(5) except with permission of the Stewards of the Trinidad Turf Club be employed in any Racing Stable.

Rule 132. The English Jockey Club Rules of Racing for the time being in force shall apply in any case not provided for in these Rules."

Turf Club General Rules

"*Rule 17.* In addition to the powers conferred on them by the Rules of Racing of the Trinidad Turf Club the Stewards have a discretionary power to warn any person off any premises belonging to, occupied by, or under the control of the Trinidad Turf Club, and in case of such notice being disregarded, to take legal proceedings against the offenders. In deciding any question the Stewards may call in any other member to their assistance, or if they think the importance or difficulty of the case requires such a course, to refer it to a General Meeting.'

The last-mentioned rule gives the appellants, in the clearest possible terms, a power to warn any person off any premises belonging to, occupied by, or under the control of the Trinidad Turf Club. In their Lordships' view the appellants exercised this power, whether or not they exercised any other power, by their order warning off the respondent "pursuant to the powers vested in the Stewards of the Trinidad Turf Club". It is contended, however, by counsel for the respondent that this is a "warning off" of a domestic character which merely has the effect of preventing the person so warned off from going upon the premises of the Trinidad Turf Club, and has not the effect of making him a "disqualified person" within the meaning of Rr. 125 and 127, Trinidad Rules of Racing. They point out, quite correctly that the respondent was not found guilty of any of the practices mentioned in R. 125, Trinidad Rules of Racing, and they contend that the words "when any person is warned off, etc.", at the end of that Rule, apply only to a person who is warned off by the Stewards of the meeting under R. 125, and have no application to any person who is warned off by the Stewards of the Trinidad Turf Club under any other rule. Their Lordships cannot accept this contention. It involves the proposition that there are two distinct kinds of warning off, one of which does, and one of which does not, have the result of rendering the person warned off a "disqualified person". The phrase "warn off" is a phrase of well-recognised meaning in racing circles, and by reason of certain mutual arrangements, which need not be set out in full but are referred to in R. 1, English Jockey Club Rules of Racing, a person who is warned off the premises of the Trinidad Turf Club is treated as having been warned off the premises of a large number of other clubs all over the world. After a careful consideration of all the relevant rules, their Lordships are unable to give to the words "when any person is warned off" the limited meaning for which the respondent's counsel contend. In their Lordships' view, any person who is warned off by the Stewards of the Trinidad Turf Club, whether under the Turf Club General Rules or under the Trinidad Rules of Racing, becomes a "disqualified person".

It would appear from the evidence that some at least of the appellants considered that the respondent was warned off under R. 17, Trinidad Rules of Racing, and not under R. 17, Turf Club General Rules. Counsel for the appellants contended that the appellants had power to impose a sentence of warning off under either of these rules. They relied upon the power given by the former rule "to make enquiry into and deal with any matters relating to racing in the Colony". They pointed out that it was unlikely that the Stewards of a meeting would be given power to warn off under R. 125, Trinidad Rules of Racing, but that the superior body, the Stewards of the Trinidad Turf Club, should have no such power under R. 17 of the same Rules. Surely, said they, the power just quoted from R. 17 must include a power to impose such a well-known sentence as warning off. Their Lordships think that there is much force in this argument, but they have found it unnecessary to arrive at a conclusion upon it, as they are satisfied, for the reasons already stated, that under R. 17, Turf Club General Rules, the appellants had power to impose a sentence of warning off resulting in the respondent becoming a disqualified person within R. 197, Trinidad Rules of Racing. The result is that in their Lordships' view the first of the five questions already stated should be answered in the affirmative.

In considering the second question it is important to bear in mind that neither the learned Judge nor their Lordships' Board is entitled to sit as a Court of Appeal from the decisions of a domestic tribunal such as the Stewards of the Trinidad Turf Club. The jurisdiction of the Courts in regard to tribunals of a domestic nature has been discussed in many cases but their Lordships think that the observations which apply most directly to the present case are those contained in the judgment of Maugham, J., as he then was, in the case of *Maclean vs. The Workers' Union* (1929) 1 Ch. 602. The Tribunal in that case was the executive committee of the Union and Maugham, J., observed (at page 620 med.):

"At the outset it may be expedient to point out that the question will not be whether the Court considers that the conduct of the defendants or their executive

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committee was fair and just; but the very different question whether the case is one in which the Court has power to interfere.

The jurisdiction of the Courts in regard to domestic tribunals—a phrase which may conveniently be used to include the committees or the Councils or the members of trade unions, of members' clubs and of professionals bodies established by statute or Royal Charter while acting in quasi-judicial capacity—is clearly of a limited nature. Parenthetically I may observe that I am not confident that precisely the same principles will apply in all these cases; for it may be that a body entrusted with important duties by an Act of Parliament is not in the same position as, for example, the executive committee in the present case. Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to Courts of justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the Judge according to the evidence legally adduced and has a right to be represented by a skilled legal Advocate. All the procedure of a modern trial including the examination and cross-examination of the witnesses and the summing up, if any, is based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence; it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the Judges. Before such a tribunal Counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the statements that may be made. The members of the tribunal may have been discussing the matter for weeks with persons not present at the hearing, and there is no one even to warn them of the danger of acting on preconceived views.

It is apparent and it is well settled by authority that the decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence, since evidence in the proper sense there is none, and since the decisions of the tribunal are not open to any sort of appeal unless the rules provide for one."

Maugham, J., then quoted from the judgment of Bowen, L.J., in *Leeson vs. General Council of Medical Education and Registration* (1890) 43 Ch. D. 366:

"There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at if he has had a full opportunity of being heard."

And observed:

"To my mind that statement of the case *mutatis mutandis* is applicable, apart from any special rule, to all such cases as I am considering, and it follows exactly the same lines as the well known decision of the Court of appeal in the case of *Dawkins vs. Antrobus* (1881) 71 Ch. D. 615.

Their Lordships have set out these passages because they accept the principles thus laid down as being applicable to the case now before them. Applying them they are unable to reach a conclusion that the proceedings at the Court of Inquiry can be set aside on the grounds stated by the learned Judge.

It is true that no evidence was given indicating that the respondent either administered a drug to "Tommy Boy" or had any knowledge that a drug was being administered. It was he himself who had suggested, some time before, that the saliva of winners of races should be tested, and he knew that the winners on the first day's racing at the Tobago spring meeting had had their saliva examined. He had trained and raced horses with success for many years, and it is difficult to believe that he could have so directly imperilled his position merely in order to win another race. In fact, it appears from the evidence given by the appellants at the trial that they were all prepared to believe that the respondent had nothing to do with the administration of the drug. Thus no moral blame was attached to the respondent, and his punishment was no doubt severe. Counsel for the respondent contended that the rule of absolute responsibility of a trainer applied in *Chapman vs. Ellesmere* (1932) 2 K. B. 431 should not have been applied strictly in the present case, having regard to the fact that the trainer was to some extent deprived of the supervision of his horse by the following rule, which had been introduced by the then Stewards of the Trinidad Turf Club in 1934 and appears in the official programme for the 1944 spring meeting of the Tobago Race Club:

"(6) Horses intending to start in a race must be in the Paddock at least one hour and in the saddling stalls 30 minutes before the time appointed for the race."

The learned Judge attached great importance to this rule. He said in his judgment: "There is no doubt in my mind that the new practice did weaken the responsibility of the trainer" and he stated his conclusion as follows:

"By the adoption of what was in the circumstances an unreasonable and arbitrary rule"—here the learned Judge is referring to the rule applied in *Chapman's case* (1932) 2 K. B. 431—"the defendants in effect deprived the plaintiff of a proper opportunity to make his defence. In my opinion the application of this inflexible rule was contrary to natural justice and on this ground alone this Court can and should make a declaration in the plaintiff's favour."

No doubt it was open to the appellants to take a more lenient view of the respondent's responsibility in the present case. They might have thought that in all the circumstances, and having regard to the rule introduced in 1934, he should not have been held responsible for the unfortunate

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incident which took place in regard to "Tommy Boy". All these matters, however, are essentially matters for the domestic tribunal to decide as it thinks right. Provided that the tribunal does not exceed its jurisdiction and acts honestly and in good faith, the Court cannot intervene, even if it thinks that the penalty is severe or that a very strict standard has been applied. The matters dealt with in the judgment of Hallinan, J., under this head do not affect the jurisdiction of the tribunal, and no attack has been made upon the honesty or good faith of its members. Moreover their Lordships cannot agree with the observations of Hallinan, J., already quoted that:

> "by the adoption of what was in the circumstances an unreasonable and arbitrary rule, the defendants in effect deprived the plaintiff of a proper opportunity to make his defence."

From the notes of the inquiry which appear in the record it is plain that counsel for the respondent had every opportunity of putting the respondent's case and he in fact argued at some length that the rule in *Chapman's case* (1932) 2 K. B. 431 should not have been applied, and that the respondent should not have been penalised unless it was found that he was actually implicated in the "doping". For these reasons the second question must be answered in the negative.

Their Lordships now turn to the question of bias. It is convenient to quote at this stage certain observations of Maugham, J., in *Maclean's case* (1929) 1 Ch. 602 which in their Lordships' view, apply *mutatis mutandis* to the present case:

> "A person who joins an association governed by rules under which he may be expelled, *e.g.*, such rules as in the present case exist in Rr. 45 and 46, has in my judgment no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or the action of the expelling tribunal may be, provided that it acts in good faith. It is impossible to doubt that, if the rules postulate an inquiry, the accused must be given a reasonable opportunity of being heard. The phrase, 'the principles of natural justice,' can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation. On that point there is no difficulty. Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a *lis* between two persons, neither of them should sit on the tribunal. But when it is sought to lay down elaborate rules, taken from decisions, as to Courts of law, and to apply them in such a case as the present, I think it is prudent to remember that these more or less artificial principles have no application except so far as they can be derived from a fair construction of the rules, and that the implication can only be made if it is clear that the parties, who are laymen and not lawyers, must have intended it."

On this part of his case, counsel did not lay any stress on the position of the appellant de Nobriga, but he relied very strongly on certain observations of the learned Judge in regard to the appellant Liddelow. These observations are of such importance that they must be set out at some length. After summarising the evidence in regard to the previous unfriendly relations between the respondent on the one hand and the appellants de Nobriga and Liddelow on the other, the Judge continued:

> "The allegations of bias against the defendants de Nobriga and Liddelow may be summed up shortly. The plaintiff has for many years been on bad terms with both defendants: he hates them and they dislike him. I do not consider that the defendants de Nobriga would allow this dislike consciously to bias his judgment against the plaintiff: his dislike of the plaintiff was not sufficient to disqualify him from sitting on the enquiry. At the same time far from trying to avoid the delicate position of adjudicating upon someone he disliked—a feeling which he knew was more than reciprocated—he assisted in the adjudication at Arima and he sat on the enquiry. The comment of the Privy Council upon similar facts in the case of *Thompson vs. British Medical Association (N. S. W. Branch)* (1924) A. C. 764 at p. 781, is appropriate here:
>
> 'In their Lordships' view persons called upon to discharge judicial or quasi-judicial duties can never have it too often impressed upon them how undesireable it is that they should attempt to discharge those duties under conditions which throw suspicion, however undeservedly, on their motives and action.'
>
> In the case of the defendant Liddelow the prejudice went much further. There is, in my opinion, a grave suspicion that he was not an impartial Judge. I can say without hesitation that his bias should have disabled him from sitting on the enquiry and were the enquiry a judicial proceeding and not merely quasi-judicial, his presence on the tribunal would have invalidated the proceedings. But the question here is whether his presence prevented the enquiry from being a proper enquiry and, therefore, contrary to natural justice. It is unreasonable to expect that the standard of impartiality and detachment in a domestic tribunal's members should be as impeccable as in Courts of Law, and therefore I consider that the oft repeated maxim that justice must not only be done but appear to be done, should not be applied too rigorously in the case of domestic tribunals. In this I follow the conclusion reached by Maugham, J. in *Macleans vs. The Workers' Union* (1929) 1 Ch. 602. I think the test should be whether the presence of prejudiced persons inject such an element of bias into the tribunal as to give rise to a reasonable suspicion that the trial was not a fair one. In the circumstances of the present case, I do not consider that the presence of the defendant, Liddelow, on the Tribunal was sufficient to give rise to such a suspicion."

At first sight this passage, and especially the words "There is, in my opinion, a grave suspicion that he was not an impartial Judge" might appear to mean that Mr. Liddelow, sitting as a member of the tribunal, did not honestly apply his mind

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to arriving at the proper conclusion on the evidence; in other words, that he did not act honestly in the discharge of his judicial duty. If that were the meaning of the words just quoted their Lordships would be of opinion that the decisions of the tribunal could not stand. They think, however, that a consideration of the judgment as a whole makes it clear that this could not have been the learned Judge's meaning. He had already said: "In the present case the plaintiff does not challenge the honesty or *bona fides* of the defendants" and after the passage in question he said:

> "I have no doubt the stewards are persons of great integrity and experience. They have striven to keep the sport of racing clean and to protect the racing public. Perhaps it was these very qualities which led them to judge the plaintiff by a rule that it might be both salutary and fair to enforce if the practice before 1934 had remained unaltered or if trainers since 1934 had been expressly warned of their absolute liability."

Further, if the learned Judge had thought that Mr. Liddelow had not honestly discharged his judicial functions as a member of the tribunal he could hardly have said:

> "In the circumstances of the present case, I do not consider that the presence of the defendant, Liddelow, on the Tribunal was sufficient to give rise to such a suspicion."

i.e., the suspicion that the trial was not a fair one. Reading the judgment as a whole their Lordships are satisfied that when the learned Judge used the phrase "a grave suspicion that he was not an impartial Judge" he meant merely that Mr. Liddelow started the proceedings with a dislike for the respondent and a consequent prejudice against him. They do not understand the learned Judge as finding that Mr. Liddelow did not honestly try to arrive at the proper conclusion on the evidence. This being so, their Lordships think that the appellants, sitting as a tribunal, discharged the obligation which lay upon them to act honestly and in good faith. It may be that it would have been wiser, and in better taste, if Mr. Liddelow had refrained from sitting at the inquiry, having regard to the previous relations between the respondent and himself, but their Lordships cannot find that his presence as one of the tribunal rendered its conclusions null and void. They think that the standard to be applied in the present case is the standard laid down by Maugham, J., in *Maclean's* case (1929) 1 Ch. 602 and they do not think it would serve any useful purpose to discuss the many other cases cited in argument in which standards have been laid down, in varying terms, for tribunals of various kinds. In the present case the respondent, from the start of his career as a trainer and owner, submitted himself to the jurisdiction of certain individuals, namely, the Stewards for the time being of the Trinidad Turf Club. No doubt these Stewards would have some personal acquaintanceship with persons who owned and trained race horses in Trinidad and Tobago, and they would have been more than human if they had not been in more friendly relations with some trainers and owners than with others. Yet in submitting himself to the "rules of the Trinidad Turf Club for the time being", the respondent agreed, in effect, that the appellants should be his Judges in the circumstances which arose in 1944. He cannot now complain of their decision against him unless he can establish one of the grounds of objection stated in *Maclean's case* (1929) 1 Ch. 602 and this he has failed to do.

Having arrived at the conclusion that the proceedings of the Stewards cannot be treated as being null and void on any of the three grounds already discussed, their Lordships can deal very briefly with issues 4 and 5. As to issue 4, if there had been any reason for holding that the proceedings were null and void, it would have been necessary to consider whether the present case was one in which a declaratory judgment or order could properly be made under O. 25, R. 5 of the Rules of the Supreme Court. This question does not, however, arise, having regard to the conclusions already arrived at on the first three issues,

As to issue 5, which forms the subject of the cross-appeal, as the proceedings at the inquiry are in no way invalid their Lordships agree with the learned Judge in thinking that he could not interfere either with the disqualification of "Tommy Boy" or with the withdrawal of the respondent's licence. Rule 48, Trinidad Rules of Racing provides:

> "Any horse which has been the subject of fraudulent practice may at the discretion of the Stewards of the Trinidad Turf Club, be disqualified for such time and for such races as they shall determine."

There is no doubt that the unfortunate horse in question had been the subject of a fraudulent practice, namely, the administration to him of a drug with the intention of increasing his speed. This fact gave the Stewards a discretion to disqualify the horse, notwithstanding that his owner and trainer was not shown to have been in any way a party to the fraudulent practice in question. As to the withdrawal of the respondent's licence, the terms of the licence gave the Stewards absolute discretion to withdraw or suspend it. This discretion they exercised at the inquiry. Their Lordships need not consider whether an inquiry was necessary before the licence was withdrawn, as an inquiry was in fact held. Nor need they

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consider whether proof of bad faith could affect the validity of the withdrawal, as bad faith is not suggested in the present case. In these circumstances the questions debated in the recent case of *Russell vs. Duke of Norfolk and others* (1949) 1 All E. R. 109 do not arise for decision in the present case.

For the reasons stated their Lordships are of opinion that the respondent's action should have been dismissed by Hallinan, J. They will humbly advise His Majesty that this appeal should be allowed and the cross-appeal dismissed and that the respondent's action against the appellants should be dismissed. The respondent must pay the costs of the appellants of the action, the appeal and the cross-appeal.

Appeal Allowed.

Present : DIAS, J. & GRATIAEN, J.

ATTANAYAKE vs. CHELLIAH

S. C. 181/*M*—*D. C. Anuradhapura* 2895

Argued on : 5th September, 1949
Decided on : 12th September, 1949

Contract—Sale of Goods—Goods delivered to buyer—Original date for payment extended by seller Buyer repudiating liability—When can seller sue for price of goods.

Held : (i) That in a contract for the sale of goods in which delivery has been made, payment of the price cannot be claimed until the date fixed for payment in the original contract or, where an extension of time has been granted, until the date fixed in the contract in so far as it has been varied to this limited extent.

(ii) That where the original date for payment is extended by the seller, a repudiation by the buyer of his liability does not have the effect of restoring the date in the original contract as the operative date for payment.

Cases referred to : *Horchester vs. Delatour*, (118 E. R. 922).
Frost vs. Knight, (1872) L. R. 7 Ex. 111.
Holland Ceylon Commercial Company vs. Pillai, (24 N. L. R. 152).
Pothier on Obligations 1, pages 386 and 387.

Cyril E. S. Perera, with *S. W. Jayasuriya*, for the defendant-appellant.
N. Kumarasingham, with *P. Navaratnarajah*, and *T. K. Curtis*, for the plaintiff-respondent.

GRATIAEN, J.

On 9th May, 1948 the plaintiff sold to the defendant one hundred bags of gingelly oil at Rs. 100 per bag. There was no note or memorandum in writing setting out the terms of the contract, but it was verbally agreed that payment should be made within one week, and as the goods were duly delivered by the plaintiff on the date of the contract, the defendant became liable to pay the agreed contract price on or before 16th May, 1948. He defaulted, and a cause of action accordingly accrued on 16th May to sue for the recovery of Rs. 10,000. The plaintiff made various unsuccessful attempts to contact his elusive debtor and finally ran him to earth on 22nd May. On that day the defendant gave him a written acknowledgment (P2) undertaking to settle the debt within one year. The plaintiff agreed to this modification of the defendant's original obligation, and no doubt was at that time very willing to grant an extension of time for payment, as he now possessed a written acknowledgment of the debt which he did not possess before. Three days later, however, the defendant, whose standard of business ethics is evidently deplorable, decided to repudiate the whole transaction. He even went so far as to make a false complaint to the police that the document P3 had been extracted from him under duress. The police investigated this allegation and found it to be baseless. So did the learned District Judge at the trial. It is not surprising that in these circumstances the plaintiff became exasperated by his dishonest tactics. He sued the defendant on 8th August, 1948 for the recovery of the price of the goods.

After trial the learned District Judge rejected the defence that the goods had not been delivered under the contract and that P3 had been obtained under duress. Judgment was entered in favour

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of the plaintiff with costs. The appeal is from this judgment.

No attempt was made at the argument before us to attack the learned Judge's findings of fact with which I am in entire agreement. The defendant has been proved to be a thoroughly unscrupulous person. The only question for consideration, however, is whether the action was not instituted prematurely in view of the admitted extension of time granted for payment of the contract-price until one year after the date of the document D 3.

The rights of the parties in this matter are governed by the provisions of the Sale of Goods Ordinance (Chapter 70). Where the property in the goods sold has passed on delivery to the defaulting buyer, a cause of action will accrue to the seller under Section 48 (1) to sue for the payment of the price *in terms of the contract.* Indeed, that is the sole remedy which is available to him. (*Benjamin on Sale page* 864). The date for payment had originally been fixed under the contract for 16th May, 1948 but had eventually been extended to 22nd May 1949. Unless, therefore there is some principle of law in accordance with which the subsequent wrongful repudiation of the contract by the defendant has the effect of restoring 16th May, 1948 as the operative date for payment, it follows that the plaintiff s action was prematurely instituted.

The question involved must, I think be decided with reference to the principles of the English law in view of the express provisions of Section 58 (2) of the Sale of Goods Ordinance. After consideration of the submissions made by learned Counsel and of the authorities which my brother Dias and I have been able to discover on the point, I have come, not without reluctance, to the conclusion that no cause of action accrued to the plaintiff at the date on which he instituted these proceedings, and that no remedy for the recovery of the price was available until 22nd May of this year. In the result the present action must be dismissed.

Learned Counsel for the plaintiff relied on *Horchester vs. Delatour* (118 E. R. 922), and *Frost vs. Knight* (1872) L. R. 7 Ex. 111, in support of his proposition that as the defendant had repudiated his obligations under the contract, the agreement whereby he was granted an extension of time for payment of the price was superseded so that the original date, namely 16th May 1948, became operative once more. Neither of these cases seem to me to be applicable. They both relate to *executory* contracts which the defendant had repudiated before the date fixed for performance, and it was held that in that state of things the plaintiff could at his option either sue immediately *for damages* for breach of contract or hold the defaulter to his contract and wait till the time fixed for performance before enforcing his appropriate remedy. (vide also *Holland Ceylon Commercial Company vs. Pillai* (24 N. L. R. 152). If the former alternative is selected, the damages are assessed by the Court, but not on the basis that the time for performance has become antedated. The present case deals with quite a different set of facts. This is a contract in which the seller has already fulfilled his obligations to deliver the goods sold *and seeks to recover not damages for breach of contract, but payment of the price.* I am not aware of and have certainly not been referred to any decided case where a defaulting buyer has been condemned to pay the contract-price on a date prior to that fixed by agreement between the parties merely because he has dishonestly repudiated his obligations under the contract. The cases cited by Mr. Kumarasingham relate to a point of time when one party to a contract is entitled at his option to regard himself as *excused from performance* by reason of the repudiation of the transaction by the other party. In that event he is entitled to sue immediately for damages for breach of the contract which he himself had been ready and willing to perform until it was repudiated. In a contract for the sale of goods in which delivery has been duly made, payment of the price cannot be claimed until the date fixed for payment in the original contract or, where an extension of time has unconditionally been granted, until the date fixed in the contract in so far as it has been varied to this limited extent.

The Roman-Dutch Law on the point, if applicable, would have led to the same result. " If subsequent to the contracting of a debt, some act pass between the creditor and the debtor allowing a further time for payment..... it should be decided that no novation has taken place (whereby the original contract is regarded as wholly extinguished) but that the parties intended *to modify or vary the original obligation* (*Pothier on Obligations* 1, *pages* 386 *and* 387). Caney in his treatise on " Novation (pages 17-18) after considering the decided cases in South Africa and the opinions of the jurists concludes that in such cases " if the terms of the extension be not observed by the debtor it is open to the creditor to sue upon the original cause of indebtedness which is, in truth, the only cause, since the subsequent agreement is only one of extension of time ". This does not mean that the date originally fixed for payment is revived by operation of law. When the terms of a concluded contract of sale are later modified in

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respect of the date for payment of the price, the contract as modified becomes the measure of the debtor's obligation and of the creditor's rights. On that basis it follows that the attempt of the debtor dishonestly to repudiate his liability cannot automatically ante-date the time for payment of the price. No issue of estoppel was raised at the trial against the defendant. In fact the plaintiff, as he was entitled to do, relied on the agreement of 22nd May which is embodied in the document P 3. He cannot, as far as I can see on the arguments addressed to me, approbate part of its terms and conveniently ignore the rest.

I would set aside the judgment of the learned District Judge on the ground that a cause of action had not accrued to the plaintiff to sue for the price of the goods at the date of institution of proceedings. The defendant is entitled to his costs of appeal, but in view of the various dishonest defences set up by him at the trial the learned Judge's order condemning him to pay the plaintiff's costs in the lower Court will stand.

Appeal allowed.

DIAS J.
I agree.

Present : BASNAYAKE, J.

RAJARETNAM vs. GOONESINGHE (MOTOR PATROL INSPECTOR, JAFFNA)

S. C. 1125—*M. C. Jaffna* 12351.

Argued and Decided on : 10th November, 1948.

Criminal Procedure Code sections 187 *and* 188—*Plea of " not guilty " Plea withdrawn in course of proceedings and plea of " Guilty " tendered—Regularity.*

Held : (i) That the court can allow a person to withdraw a statement not amounting to an admission of guilt and make another containing an admission of guilt;

(ii) That such admission of guilt should be recorded in the manner prescribed by section 188 for statements made under section 187 (3).

Cases referred to :—*Shyama Charan Bharthuar & others vs. Emperor*, (1934) A. I. R. Patna 330 at 331.
Jansen vs. Arnolis, (1895) 1 N. L. R. 274.

M. M. Kumarakulasingham, with *T. W. Rajaratnam*, for the accused-appellant.
A. Mahendrarajah, Crown Counsel, for the Attorney-General.

BASNAYAKE, J.

In this case the accused, who has been convicted of four offences under the Motor Car Ordinance, No. 45 of 1938, appeals on a question of law, namely, that the provisions of section 188 of the Criminal Procedure Code have not been complied with. When the charges were framed and read over to him on 13th July, 1948 under section 187 (3) of the Code, the accused said : " I am not guilty ". On 27th July, 1948 after the evidence of the Judicial Medical Officer of Jaffna, the trial was postponed to 3rd August, 1948 on the application of the counsel for the accused. On that day the trial was put off for 30th August, 1948 for want of time. The entry on the record on the last mentioned date reads :—

" Acd. K. Rajaratnam—present.

Mr. Sabapathy with Mr. Sinnadurai for accused. It appears that the accused was totally incapable as a result of being intoxicated. He has driven a bus which collided with a cyclist and then proceeded and collided with a car referred to herein.

Mr. Sabapathy states that the accused who is a Director of a Bus Company on account of misfortunes is not quite normal in his ways.

The accused now pleads guilty."

Learned counsel for the appellant submits that the accused's admission of his guilt has not been recorded " as nearly as possible in the words used by him " as prescribed by section 188 of the Code. Section 188 of the Code applies to the statement made by an accused on being asked under section 187 (3) if he has any cause to show why he should not be convicted. The statement under consideration was made by the accused of his own motion after he had made his statement under section 188. The questions that arise for decision are : (a) whether the court has power to

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allow a person to withdraw a statement not amounting to an admission of guilt made under section 187 (3) and make another containing an admission of guilt; and (b) whether any such admission of guilt made by an accused person should be recorded in the same manner as the statement made thereunder at the commencement of the proceedings.

It is usual in trials before the Supreme Court to allow an accused person to withdraw a plea of not guilty and substitute a plea of guilty, although there is no express provision of the Code in that behalf. This practice is perhaps based on the English procedure on the authority of section 6 of our Code. There is no reason why that practice should not be followed even in proceedings under Chapter XVIII of the Code. I am of opinion that it is open to the Court to act on such an admission, record a verdict of guilty and pass sentence according to law. A similar view has been expressed *Shyama Charan Bharthuar & others vs. Emperor*, (1934) A. I. R. Patna 330 at 331, under section 271 of the Indian Criminal Procedure Code.

Now in regard to the second question I am of opinion that an admission when made in the course of a trial should be recorded as nearly as may be in the words used by the accused, especially as an appeal lies to this Court from a conviction on such an admission. This Court should in the event of an appeal be in a position to decide whether the Magistrate has correctly construed what the accused said. (*Jansen vs. Arnolis* (1895) 1 N. L. R. 274). It is in keeping with the policy of the Code to require that admissions of guilt made in the course of proceedings should be recorded in the manner prescribed by section 188 for statements made under section 187 (3). In the instant case, the entry made by the learned Magistrate from perhaps what he gathered from the submissions of accused's counsel does not show that the accused intended to make an unqualified admission of his guilt.

I quash the conviction of the accused and order a re-trial before another Magistrate.

Case sent back.

Present : GRATIAEN, J.

PETER FERNANDO vs. FLAMER CALDERA (INSPECTOR OF POLICE)

S. C. 514/P—M. C. Horana 6087

Argued on : 2nd September, 1949
Decided on : 3th September, 1949

Medical Ordinance Section 39—Person not being a medical practitioner, practising medicine for gain—Ingredients necessary to be proved.

A pharmacist, employed by a registered medical practitioner on a fixed salary diagnosed a patient's ailments in the doctor's absence and gave the patient medicines selected by him out of prescriptions left in his care by the doctor. The fee levied from the patient was paid to the doctor.

Held : (i) That habituality need not be established and that proof of one instance of practising medicine was sufficient.
(ii) That the pharmacist had " practised medicine."
(iii) That, in the circumstances, he had practised medicine " for gain."

Cases referred to : *re Horton*, (1881) 8 Q. B. D. 434.
Station House Officer of Tebuwana vs. Jansz, (1909) 1 Cur. L. R. 14.
The King vs. Ramanayake, (1929) 8 Cey. L. R. 44.

U. A. Jayasundera, K.C. with *A. H. C. de Silva* and *D. Wimalaratne*, for the accused-appellant.
A. A. Rajasingham, Crown Counsel, for the Attorney-General.

GRATIAEN, J.

The accused was a pharmacist employed by Dr. Samuel, a registered Medical practitioner, who owns a dispensary at Horana. Dr. Samuel visited the dispensary daily for the purpose of carrying on his professional work, but had apparently arranged for his patients to be attended to during his absence by the accused who is admittedly not a qualified doctor. The procedure was that Dr. Samuel would leave at the dispensary his stock prescriptions for a variety of common

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ailments. If a sick patient arrived for treatment when the doctor was not available, the accused would examine him to the best of his ability, diagnose the ailment or at least attempt to do so, and give the patient one of Dr. Samuel's mixtures which he selected on his own judgment as most likely to effect a cure. A fee would be charged, but the money was on each occasion accounted for to the doctor. The accused received from the doctor in return for these and other services rendered a fixed monthly salary.

The dispensary appears to have done good business; so much so that its activities came to the notice of the local police. Inspector Caldera engaged a decoy to visit the dispensary and receive treatment there from the accused while Dr. Samuel was not in attendance. The plan succeeded, and the present prosecution was the consequence.

The relevant facts, as proved to the satisfaction of the learned Magistrate, are that the decoy Baby Nona complained to the accused of "difficulty in breathing, and slight fever and a cough", and she asked him to prescribe for her ailment. She said that she would prefer not to wait till Dr. Samuel arrived, and the accused thereupon examined her with a stethescope, took her temperature, examined her throat, and on the basis of his diagnosis gave her a tablet and a mixture to be taken three times a day. The mixture was dispensed in accordance with one of Dr. Samuel's many prescriptions. A fee of Rs. 3 was demanded and duly paid. Whether the amateur diagnosis was correct or whether the prescribed cure would have proved successful we shall never know, as the Police party raided the dispensary and took charge of the money and the medicines for production at the trial.

The charge against the accused was that, not being a medical practitioner, he had "practised medicine for gain" in breach of the provisions of Section 39 of the Medical Practioners Ordinance, Chapter 90. The learned Magistrate found him guilty and sentenced him to pay a fine of Rs. 100. The appeal is from this conviction. Mr. Jayasundera conceded for the purposes of his argument that the facts as set out by me may be assumed to be correct.

The main submission for the defence is that a man cannot be said to have "practised" medicine within the meaning of the Ordinance unless some degree of *habituality* is established—not, in other words, where a single patient is treated on an isolated occasion. Even if one considers this question without reference to decided cases, one is driven to the conclusion that such an interpretation of the statute would defeat the very purpose which it seeks to achieve. The mischief aimed at is the treatment of the sick by unqualified persons whose inexpert administrations might prove disastrous to the patient. Indeed, as one would naturally expect, Section 39 prohibits either "medicine" or "surgery" in such cases, and I cannot imagine that the Legislature could have intended, for instance, to condone an amateur amputation of a single limb of the human body merely because it happened to be the first attempt. It is no doubt true that in certain statutes the words "act or practice" in relation to the learned professions have been construed as "striking at the *general* carrying on of business and practising" and not a single isolated transaction—vide *re Horton* (1881) 8 Q. B. D. 434—but I do not think this can help the accused in the present case. The question has already been decided against his contention in earlier decisions of this Court. In *Station House Officer of Tebuwana vs. Jansz* (1909) 1 Cur. L. R. 14, it was held by Grenier J. that an unregistered person was guilty of the offence of practising medicine although he had prescribed for only one patient. This view was later followed by Maartensz J. in *The King vs. Ramanayake* (1929) 8 Cey. L. R. 44. I am not disposed to give a different interpretation to the language of the Ordinance today. There is some difference between "practising *medicine*" and "practising *as a medical man*", and I am not convinced that the idea of habituality is necessarily involved in the first of these contexts. Besides, in the present case the admissions made at the trial by the accused and his employer sufficiently establishes that the business of their dispensary was in fact habitually conducted on lines which violated both the letter and the spirit of the Medical Practitioners Ordinance. The evidence shows that it was a common occurrence for the accused, in Dr. Samuel's absence, to diagnose a patient's ailment and, acting on the basis of his own diagnosis, to give that patient, in return for a stipulated fee, medicines selected by him and by him alone out of the large assortment of prescriptions left in his care by Dr. Samuel for this very purpose. That is "practising medicine" in the fullest sense of the term, with all the dangers which the process involves if left to an unqualified practitioner. Such a transaction is very different from a sale over the counter, without any prior attempt or pretence at diagnosis, of a popular patent medicine. In fact, I doubt if the accused would have been guilty if he had merely sold to a customer at the latter's request a bottle of Dr. Samuel's cough mixture.

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I see no merit in the further argument that the accused did not in any event practise "for gain" because the ultimate destination of the fee levied from the patient was Dr. Samuel's pocket and not his own, whereas he received from Dr. Samuel only a fixed salary in return for this and other services rendered. This mutual arrangement, to which the patient was not a party, worked and was intended to work to the financial advantage of both the doctor and his pharmacist. I affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

Present : CANEKERATNE, J. & BASNAYAKE, J.

NERIS PERERA & ANOTHER vs. DON HENDRICK & OTHERS

S. C. 262—D. C. Colombo 2878
Argued on : 14th September, 1949
Decided on : 26th September, 1949

Partition action—Intervenient claiming by reason of prescriptive right—Period of prescription—Prescription Ordinance, section 3.

Held : That an intervenient in a partition action, claiming under a prescriptive right, is entitled to count the period up to the date of his intervention in the action for the purpose of computing the period of ten years prescribed in section 3 of the Prescription Ordinance.

Cases referred to : *Hamido Aratchy vs. Lucy Hamy* 2 Times 112.

Cassius Jansz, for the 12th and 13th defendant-appellants.
E. S. Amerasinghe, for the plaintiff-respondent.

BASNAYAKE J.

This is an action for the partition of a land called Etahetaliyagahawatta situated at Aturugiriya in extent 6 acres and 26·5 perches. The plaintiff traces his title through one Agoris who was entitled to a 5/16ths share in the land. He purchased Agoris's share at a sale in execution of a mortgage decree on 17th July, 1933 and obtained a Fiscal's conveyance therefor on 25th May 1934. The 12th defendant, a grandson of Agoris, intervened in the present action on 12th July 1944 and made a claim on the ground that he had acquired prescriptive right to the 5/16ths share claimed by the plaintiff. The 13th defendant who intervened on 13th December, 1944 made a similar claim to the 5/16ths share. The latter and the former are uncle and nephew.

The learned District Judge finds that the 12th and 13th defendants (hereinafter referred to as the intervenients) have been in adverse possession of the land, but he holds as a matter of law that they have not acquired a prescriptive right thereto as the period of possession was less than ten years at the date of the institution of this action.

Learned counsel for the intervenients submits that the learned District Judge is wrong in holding that the institution of this action interrupted this adverse possession. He further submits on the authority of the case of *Hamido Aratchy vs. Lucy Hamy* (2 Times 112), that the intervenients are entitled to count the period up to the date of their intervention in this action for the purpose of computing the period of ten years prescribed in section 3 of the Prescription Ordinance. I wish to say with great respect that I agree with that decision, which is in keeping with the provisions of section 3 of the Prescription Ordinance. When the intervenients filed their respective statements of claim more than ten years had elapsed since the execution of the Fiscal's conveyance in favour of the plaintiff. The claim of these two intervenients to a prescriptive right in the land by virtue of adverse possession is, therefore, entitled to succeed.

The judgment of the learned District Judge must, therefore, be set aside and the case sent back in order that he may determine the nature and extent of the rights the intervenients have acquired by prescriptive possession and enter decree accordingly.

The appellants are entitled to the costs of this appeal.

CANEKERATNE J.

I agree.

Appeal allowed.

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