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THE CEYLON
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THE LATE MR. H. L. WENDT.

Portrait Unveiled at Hultsdorp.

In the Law Library in Hultsdorp the Chief Justice (Sir Stanley Fisher) formally unveiled the photograph of the late Mr. Justice Wendt

in the presence of a large gathering including Judges of the Supreme Court and of the District Courts as well as members of the Bar. The photograph which is a very faithful likeness of the late Judge is the gift of the two sons, Messrs. L. H. and H. L. Wendt, Advocates, both of whom were present and were introduced to the Chief Justice by Mr. J. R. Weinman, the senior Advocate of the Metropolitan Bar, who started the proceedings with a request to the Chief Justice to perform the ceremony.

In doing so Mr. Weinman said: Your Lordship, the Chief Justice:—I have been asked to request you to be good enough to unveil this picture of the late Mr. Justice H. L. Wendt. Mr. Wendt was a prominent figure in our Courts for many years. He was educated at S. Thomas' College where he distinguished himself and eventually enrolled as an Advocate and practised for some years. It was at a time when the Bar was adorned by such men as Mr. Dornhorst, Mr. C. P. Layard. Mr. Dodwell Browne and Mr. Joseph Grenier, to mention only a few. But by reason of his industry and great learning he was able to hold his own with those members of the Bar. He was an eminently able and conscientious worker at the Bar and it can be safely said of him that he never missed a good point and never pressed a bad one. Subsequently though engaged in strenuous labours as an Advocate he still found the time to bring out a fine set of reports which stand as a model for others

He was later nominated to the Legislative Council where he did good work and made commendably short speeches. He subsequently acted as Solicitor-General and as Attorney-General, and endowed with all the learning and experience gathered from these sources he went up to the Supreme Court. It may be said of him, and I think correctly said of him, that he was never upset in the Privy Council or overruled by the Full Court. But however, it is not as a great Advocate, as a great Judge, as a wise counsellor, that we who know him cherish his memory. It is because he was a great gentleman who lived a clean life. He valued the reputation of the Bar very highly. In fact the honour of the Bar was to him a sacred trust.

"I may add," concluded Mr. Weinman" ,'that this picture is the gift of his sons who are following in the footsteps of their father who so zealously guarded and religiously cultivated the highest traditions of the profession."

The Chief Justice, before unveiling the picture, addressed the gathering. His Lordship said: "Mr. Weinman and gentlemen.—I need hardly say that I esteem it an honour to be asked to unveil this portrait. I think in the first place I should like to offer our thanks to the donors for the gift of the portrait of their distinguished father. I believe it is nearly 20 years now since Mr. Justice Wendt passed away, but his memory is still green and I believe that he is well remembered especially for his genial and happy disposition. I was told by one who knew him that he was the very embodiment of kindness. Added to these he had a vast amount of shrewd common-sense and legal learning based on experience as a very eminent and successful practitioner at the Bar. All these gifts found expression in the reports. We all of us find the judgments very helpful in our work. People like myself who did not know him can realise and appreciate why he was respected and admired by all. It is a pleasure to be called upon to unveil his portrait. Here the presence of his portrait will enrich our walls in dignity and value and those who use this library will have yet another example to look up to and to follow—a large hearted large-minded learned judge and gentleman."

The Chief Justice then released the curtain which concealed the picture, disclosing it to full view.

A CHARACTER SKETCH.

The late Mr. Wendt was born in 1858, was enrolled as an Advocate in 1880 and died in 1911. He was enrolled in the same year as the late Mr. A. de A. Seneviratne, who then was a master at St. Thomas College, Both Mr. Seneviratne and Mr. Wendt were nominated members of the Legislative Council.

Mr. Wendt, who had a distinguished career at St Thomas' College, was of a most retiring disposition and never tried to push himself or rather to shout himself to the front. He was noted for his great industry. He was a most thorough Advocate and accuracy was his strong point. He would study each case with keenness, so much so that he would not be satisfied with the translations of the documents put in evidence but would carefully peruse the original which had the effect of correcting any of the mistakes made by the translator.

Scientific Mind.

Mr. Wendt had a scientific turn of mind which was of great advantage in unravelling the intricacies in patent cases. There was a memorable case know as "Jackson's case" which came up in appeal before a Full Court

consisting of Judges who had not his scientific mind, but Mr. Wendt in his argument in appeal made the matter so clear that the Judges fully appreciated and understood the points in dispute. Chief Justice Burnside had nothing but compliments for him. Mr. Wendt practised largely in the original Courts, going up specially to various outstations, as a rule opposed to Mr. Dornhorst whose industry was not as great but whose quick mind rapidly mastered the facts of the most intricate case. After some time Mr. Wendt confined his practice to the appeal Courts, He was able to do this because as a rule only one Court sat in appeal.

As Law Reporter.

He refused briefs in the original Courts and he was seen day after day at his seat, never quitting that seat unless it was absolutely necessary to do so. He made a note of every case that was argued and it was said, not without truth, that the records made by him were more to be relied on than the records made by the Registry itself. It was no uncommon thing for a Judge to turn round to Mr. Wendt and ask him: "Did we not decide so and so in a particular case?" Mr. Wendt would turn over his notes and give the reference at once. This helped him to bring out a volume of reports which in point of accuracy and importance has not been surpassed. In process of time, much against his wish, he was appointed by Sir West Ridgeway, Burgher Member of the Legislative Council. His speeches there were models of brevity and always to the point. His most important work, however, was when in Committee where his advice was considered most valuable. The work of a leading Advocate and of a member of Council was beginning to be too much for one man, even in the best of health, and Mr. Wendt was not constitutionally a strong man, but Sir West Ridgeway had the highest opinion of him both as to his legal qualifications and high character, and when the acting appointment of Attorney-General was called for, he had no hesitation whatever in asking him to fill the post But, as we all know, the work of Attorney-General requires a man both constitutionally and physically strong, and Mr. Wendt would not accept the permanent office but preferred the more dignified and less onerous post of a Puisne Judge. Here he brought to bear the same grasp of principles, the same patience, and the same accuracy of investigations which distinguished him at the Bar. Here again he would not spare himself but worked his hardest, notably during the Assizes when important criminal cases were being heard before him. The work naturally told on his health and he was compelled to retire on the advice of his doctor.

Sudden Passing.

He spent a short time less than a year, in retirement, and passed away with tragic suddenness. He was at a Queen's House party at about midnight, chatting with his friends and exchanging reminiscences. He then went home and at about 4 a.m. fell down in a fit and expired almost immediately.

Mr. Wendt in his younger days used to contribute legal notes to the "Examiner." His report of a case argued in the District Court during which Judge Berwick made some uncomplimentary remarks of a Judge of the Supreme Court, brought upon the learned Judge, a charge of contempt of the Supreme Court. Nobody questioned the accuracy of that report for everybody knew that any report made by Mr. Wendt was accurate. His death was mourned by the whole legal profession, and Chief Justice Lasceles paid a fine tribute to the man.

Mr. Wendt was married at Kandy to the only daughter of the late Mr. J. H. de Saram, who was sometime District Judge of Kandy. He has two sons, Lionel, well known in musical circles and Harry, who is in his father's profession.

J. R. W.

DISRAELI AND THE LAW.

SIR EDWARD CLARKE, now in his ninth decade, has devoted his leisure to the production of a life of Benjamin Disraeli which, we venture to say, will be generally regarded as the best short biography of that Victorian statesman, (says a writer in the "Law" Journal). Sir Edward was a press gallery reporter in the House of Commons in the early sixties, and the demeanour as well as the oratory of Disraeli made on him an ineffaceable impression. In 1880, when he had entered Parliament as member for Southwark – elected at a by-election just after the celebrity he had gained by his defence of the Penge murderers in their trial before Mr. Justice Hawkins—he met Lord Beaconsfield once more, being invited to luncheon with him, and he noted with admiration the extraordinary variety of topics, literary, theological, artistic, political, historical, scientific, on which his hero discoursed eloquently to him. Nearly forty years later learning that the publishers of Moneypenny's monumental seven-volume "Life of Beaconsfield" were looking out for a successor to complete the work left unfinished by its author's untimely death, Sir Edward offered to undertake the task ; but it was entrusted instead to Mr. Buckle, sometime the Editor of *The Times*. Now, however, Sir Edward has compresses into a most readable book of less than 300 page. the pith and essence of all that is to be found in the larger work, with the additional benefit of his own generous and ever sane comments on men and events. The result is an admirable book, and, moreover, a book in which, rather by accident than by design, Disraeli's relations to the law and the lawyer naturally play a considerable part. For Disraeli has ever been a favourite of the legal profession. Perhaps this is due to the fact that, although a man of action, a novelist, and a somewhat romantic religionist, Disraeli had at bottom much of that part-bohemian, part-worldly, part-dramatic, part-scholarly character which is found so constantly in the average member of the Common Law, and more especially the Old Bailey Bar.

Disraeli's first connection with the law began very early ; in fact, at birth. For, in December, 1804, he was born in a little old-world home in the vicinity of Bedford Row and Gray's Inn, a truly legal environment.

Although the son of a Jewish agnostic, he was baptized and brought up in the Church of England, and his father's friends were composed partly of lawyers who belonged to his own race, and partly of literary men who were of the Christian faith. One of the former class, a legal practitioner in Bedford Row, named Swain, took an interest in the bright and original boy : he had no son to succeed him, but a charming daughter ; it was arranged between the fathers that Disraeli should become the lawyer's pupil, then partner, and, finally, his son-in-law. Benjamin, accordingly, entered his proposed father-in-law's office : he became the confidential secretary of his patron ; he attended even the most secret consultations, and thus came at once into early and intimate contact with high City finance, landed estate management, and the mysteries of family life in High Society. But these opportunities could not make him abandon his youthful preference for politics and literature ; so at the age of twenty he said good-bye at once to Mr. Swain and to his daughter, who afterwards married well and became the mother of a General who distinguished himself in the Zulu War.

For a time Disraeli did not wholly abandon every avenue to a legal career. Having left one branch of the profession he coquetted with the other, and, like his great rival Gladstone, became a student of Lincoln's Inn. Here he eagerly "frequented" those debating societies

which have always flourished amongst bar-students ; and in the novel "Endymion," which he wrote at the age of seventy-five, he gives a graphic and most realistic description of a society which is unquestionably the Hardwicke and of its budding orators, amongst whom the favourite, Hortensius, is generally indentified with Harcourt. Cairns, under another name, is believed to figure as the astute leader of the small band of High Tories, whom nowadays we should call die-hards.

But the Bar, no more than the Roll, was to possess the honour of numbering Disraeli amongst its famous sons. Politics and Letters claimed him. At first, indeed, perhaps as the result of his early association with a solicitor's office, his literary efforts took the unexpected and very unusual form of financial journalism. South America had just freed itself from the yoke of Spain, and in a burst of enthusiasm company promoters were founding endless syndicates to develop and exploit the untold wealth supposed to be found in the land of Columbus, Cortes and Pizarro. Disraeli, induced by a fellow-pupil at Mr. Swain's office, allied himself to the fortunes of a great promoter, Powles, who in some ways was the Whitaker Wright of his day (except that his transactions were all in accordance with the law), and not only speculated in his South American ventures, but wrote pamphlets in praise of his enterprises. Alas ! the bubble of speculation soon burst. Disraeli soon found himself deeply in debt, and the next fifty years of his life were spent in the shadow of the debts thus piled-up, which in his lifetime he never was able to discharge, although after his death they were paid off out of his estate.

From finance and financial journalism Disraeli, not yet twenty-one, turned to high politics. He persuaded Murray, the great publisher, to found a Tory paper called the *Representative*, induced Sir Walter Scott (whom he visited at Abbotsford) to bless the enterprise, and gained as editor Lockhart Scott's son-in-law and future biographer. But it failed. Then Disraeli took to the composition of fiction, and in a very few years turned out an amazing series of fantastic, if brilliant, works. "Vivian Grey," "Henrietta Temple." "The Young Duke," "Venetia," "Alroy," "Ixion" ; these rushed out in succession from his pen, and won him while scarcely of age, the entree to the exclusive society of the day. He wrote also an epic poem which nobody has ever read, and a very remarkable essay on the British Constitution, the "Runnymede Letters," which contains the germ of his later very original political philosophy, and which Sir Edward Clarke justly praises. Then he fought various contests for Parliament, toured with éclat in the Mediterranean and the East, and finally got into Parliament in 1837. Once in the House he founded the Young England Party ; brought out his most famous novels— the trilogy of "Coningsby," "Sybil," and "Tancred," which discuss respectively the political, social and religious creed of his mysterious hero 'Sidonia" ; and after a Homeric combat with Sir Robert Peel wrested from him the real leadership of the Conservative Party. Marrying, and becoming a landowner of Bucks by his purchase of Hughenden Manor, he spent the next thirty years of his life in unquestioned mastery of the Tory Party, in writing two novels "Lothair" and "Endymion," for each of which he received 10,000*l*. from the publishers, and in founding that modern form of Imperialism which to-day has become a commonplace of all political parties.

Now during the whole, or nearly the whole, of his youth and middle life, Disraeli was actually in one sense a fugitive from the law. To pay his early debts he had borrowed from moneylenders ; their bills were renewed again and again at heavy rates of interest ; and bet-

ween each period of renewal Disraeli was in imminent danger of arrest for debt. For until the enactment of the Judgment Debtors Act of 1869 a debtor could be summarily arrested upon swearing of an affidavit *ex parte* by his creditor, a procedure which is now replaced by the milder Order XIV process as a means of enforcing summary recovery of debt While Parliament sat he was protected by his membership of the House of Commons ; but in the Recess his privilege from arrest vanished, and he never dared to remain in London. He hurried off at once to his father's or his own country house, where his creditors did not think it worth while following him. Disraeli's immunity from actual arrest was largely due to the devotion and skill of his solicitor, Sir Philip Rose, an early friend who showed deep attachment to him, and had an almost miraculous ability for negotiating renewals of spent and unpaid moneylenders' bills. His difficulties, indeed were increased by the purchase of Hughenden for 30,000*l*., of which 25,000*l*. remained on mortgage. It was not until the last decade of his life that he attained comparative ease from the burden of debt ; then a zealous political supporter paid off all his debts for 55,000*l*. and took by way of security a mortgage on Hughenden at the lowrate of 3 per cent.

Next to Disraeli's debts and his love-romances, the most interesting feature in his life is his choice of friends. Nearly all of these were lawyers. Sir Philip Rose, his solicitor, had been a friend and admirer when they were both articled pupils in Bedford Row ; in due course Disraeli gave to him and his partner, Spofforth, the management of the organisation and finance of the Conservative Party. When the greatly increased electorate of 1868 rendered this task too great for a mere by-activity of a busy legal firm, Disraeli selected as the head of his new party organisation a brilliant young barrister, Sir John Gorst, who in due course entered Parliament and filled for a troubled season the office of Solicitor-General. Disraeli's private secretary, too was a young barrister, Montagu Corry, whom he met by chance at a ducal country house, and who for twenty years served him with a fidelity and discretion which have passed into legend. Disraeli, on leaving office in 1880, obtained from Her Majesty Queen Victoria a peerage for his private secretary, who, as Lord Rowton. thereafter achieved a second fame as the founder of philanthropic lodging-houses for the deserving poor.

Amongst his colleagues and opponents in Parliament Disraeli showed the same attraction towards lawyers. His earliest political patron, who did his very best to find Disraeli a seat in the House, and afterwards to win office for him, was the veteran and eloquent ex-Chancellor, Lord Lyndhurst. The lieutenant whom Disraeli chose to lead his serried ranks of country gentlemen supporters in the Commons was Cairns, a Belfast man and a barrister ; in later years he made Cairns a Law Lord in order that he might have a reliable deputy in the Lords. Harcourt was his favourite amongst his political foes, and the only one with whom he was on intimate terms. He helped to get for the great Jessel first law office in the Liberal Party, and afterwards the high office of Master of the Rolls. His selection of Gorst for a job not usually entrusted to lawyers we have already seen. And on Sir Edward Clarke's election t the House he showed this youthful advocate very special favour.

WHAT IS A LOTTERY ?

The recent case of *Howgate* v. *Ralph* in which a Divisional Court reversed the decision of the Hull Stipendiary Magistrate, shows that it is often difficult to ascertain whether a particular transaction falls within the statutes prohibiting lotteries. Most of the

dictionaries define a lottery as "a distribution of prizes by lot or chance," a description which was adopted by Hawkins and Field, JJ., in *Taylor* v. *Smetten* (1883), 11 Q.B.D. 207, and has not been questioned since. In order, however, to deal fairly with the various ingenious devices by which it has from time to time been sought to evade the Lotteries Acts, a considerable body of law has been built on this definition.

Thus it was argued in *Taylor* v. *Smetten* that there could not be a lottery if everyone was to receive a prize. But the Court held that this fact was immaterial, following *Reg* v. *Harris* (1866), 10 Cox Crim. Cases, 352, a case chiefly noteworthy as one of the few in which an indictment has been preferred for a contravention of the Lotteries Acts.

Another question which has engaged the attention of the Courts is whether there is a lottery if the granting of the prize depends to some extent on the skill of the competitors. The answer is that a competition in such circumstances, if fairly conducted, is not a lottery. The first case reported on this point is *Hall* v. *Cox* (1899), 1 Q.B. 198—a civil action in which a prize of 1,000*l.* was offered for a correct prediction of a number of births and deaths in London in a particular week. The plaintiff's figures were correct, but the defendant refused to pay, pleading the illegality of the contract. He obtained judgment in the trial Court and then died. His executors did not contest the matter in the Court of Appeal, which gave judgment for the plaintiff on the ground that although the result of the competition depended *largely* on chance, it did not *entirely* so depend, and was, therefore, not a lottery. Some years later, in *Blyth* v. *Hulton* (1908), 24 T.L.R. 719, and *Smith* v. *Leeds Laboratory Co.* (1910), 26 T.L.R. 335, competitions in which a prize was offered for the best last line of a limerick were held by the Court of Appeal to be contracts to enter for a lottery. However, in *Scott* v. *Director of Public Prosecutions* (1914), 2 K.B. 868, the Court of Criminal Appeal re-affirmed the law as stated in *Hall* v. *Cox*. It had been suggested in these latter cases that among other grounds for holding the competitions to be lotteries was the fact that the decision of the editors of the newspapers organising them was final. The Court in *Scott* v. *Director of Public Prosecutions* dissented from this view, and held that so long as the editor's decision was not given unfairly, its finality did not make the competition illegal. For, as Channell, J., pointed out (at p. 882):

> "The appointment of a judge whose decision is to be final does not make it a lottery any more than the appointment of such a judge to decide a horse-race or a lawsuit makes either a lottery."

Thus, so long as a competition requires skill, it is not a lottery—a principle applied not long ago by Sir Chartres Biron in determining the legality of Cross-Word Competitions.

Where the sale of a chance is joined with the *bona fide* sale of some article of value, is the whole transaction a lottery? In *Smetten* v. *Taylor* (*supra*), in which prizes were given away with every 1 lb. packet of tea, it was held that the tea was bought to obtain the prizes, and that, therefore, there had been the sale of a chance. On the other hand, in *Caminada* v. *Hulton* (1891), 60 L.J., M.C. 116, the last page of a booklet containing general information relative to horse-racing had a coupon to be filled in by inserting the names of the winners of six races there set out. Convictions under the Betting Act, 1853, and the Lotteries Act, 1823, were quashed by the High Court. *Stoddart* v. *Sagar* (1895), 2 Q.B. 474, in which the facts were similar, had the same result. But these two last decisions were explained by Lord Alverstone, C.J., in *Rex* v. *Stoddart* (1901), 1 K.B. 177, as having proceeded on the ground that there was no evidence that the purchases were made in order to take part in the lottery. *Hall* v. *McWilliam* (1901), 20 Cox Crim. Cases, shows that if there is evidence that the purchase was made with a view to qualifying for the prize, the whole transaction is a lottery.

A further matter which has been the subject of argument is how far the exercise of judg-

ment by the distributor of the prizes excludes the distribution being by "chance". *Scott* v. *Director of Public Prosecutions* (*supra*) has made it clear that in a competition involving skill, the fair exercise of judgment by the distributor does not make the transaction illegal. But where the entrants are not required to perform any acts of skill, the law cannot be laid down with such certainty. Arbitrary action on the part of the distributor does not prevent the distribution being "by chance," even though such action requires some acts of will on his part. Thus, in *Morris* v. *Blackman* (1864), 2 H. & C. 912, the giving away of money at an entertainment to the occupiers of certain seats in accordance with the numbers they bore was held to be a lottery. This decision was followed in *Minty* v. *Silvester* (1915), 84 L.J., K.B. 1982, where the distributor chose the beneficiaries at the time of the distribution. Moreover, the existence of a scheme does not appear to be enough; the scheme must be known to the competitors so that they have an opportunity of estimating the value of what they are being offered. This seems to be the result of *Ralph* v. *Howgate* (*supra*). The facts in this case were that tea dealers promised to distribute cash gifts to persons undertaking to become regular customers. Each customer's name was entered in a ledger "in rotation" and the gifts were to be paid out "accordingly." It further appeared that the payments out would be postponed as more customers were obtained. The Court (Lord Hewart, Avory and Swift, J.J.) held that the indefinite time before the prizes would be distributed rendered their value quite uncertain, and that there was, therefore, no evidence upon which it could be found that the scheme did not amount to a lottery.

Finally, the fact that the receiving a prize or other benefit is dependent on performance of some service will not necessarily prevent the transaction from being a lottery. Thus in *Kerslake* v. *Knight* (1925), 94 L.J., K.B. 919, the recipient of a prize was required to sign an undertaking to exhibit a card, bearing the name of the newspaper distributing the prizes, for a period varying in proportion to the value of the prize. The Court held that this was merely colourable, as the recipient might put a card in a back window where it would never be seen, and yet be within the terms of his undertaking. Therefore, notwithstanding the alleged service, the transaction was a lottery. —*Law Journal*.

Present: Lyall Grant, J and Drieberg J.

SULAIMA LEBBE vs. KIRI BANDA.

443 D.C. Kandy 34887.

Decided March 23, 1929.

Kandyan law—Paraveni and acquired property—gift by an ancestor—exception to the general rule.

Held: In Kandyan law, property gifted to a person even by an ancestor, is acquired and not paraveni property.

In the devolution of acquired property a binna married father is preferred to a uterine half brother.

Per Drieberg J.—"The only exception to this rule which has been recognised by our Courts is where the property is acquired by a child by gift from a binna married mother. In such a case, though it has the quality of acquired property, if the child died intestate or without issue, it will pass to the maternal grandmother, the mother being dead, in preference to the binna married father."

Navaratnam with *Wendt* for plaintiff appellant.

No appearance for defendant respondent.

Lyall Grant, J.:—This appeal from the District Court of Kandy raises a question whether certain lands are to be considered paraveni lands.

The land originally belonged to the maternal ancestors of the person whose inheritance is now in dispute. They by a deed of 31st August 1898, donated them to two grand-children, born of their binna married daughter, in equal shares.

We are concerned with the devolution of one of these shares. The grandchild Kiri Bindu died leaving a child, also called Sallelu who inherited this share. This child died and her share passed to her aunt Sirimalie. Sirimalie has now died and the share is claimed on the one hand by her father, the appellant, and on the other by her uterine half-brother, the respondent. Sallelu, the mother of Sirimalie, predeceased her.

It is agreed that the question to be decided is whether in the hands of Sirimalie the land was ancestral (paraveni) or acquired.

The learned District Judge says that this property is the ancestral property of Sirimalie and her mother Sallelu. But it is important to observe that the land never was the property of Sallelu, the mother. Accordingly the passage in Sawer to which the learned District Judge refers does not support the contention that the father cannot succeed to the property.

The learned District Judge thinks that as the property originally came from the parents of the deceased's mother, it had paraveni character in the hands of the deceased and that the mere accident that it did not come by descent through the mother cannot divert it of this character.

On this question the case of *Dingiri Banda vs. Maduma Banda*, (1), is directly in point. There Ukkurala and Mutumenika had a daughter Kirimenika who was married in binna to plaintiff. After the daughter's death Ukkurala and Mutumenika gifted the land to a grandson, Tikiri Banda, who died leaving a son, Ran Banda, who also died. After Ran Badna's death Mutumenika—Ukkurala having died—purported to gift the land to her brothers. It was held that in the hands of Tikiri Banda the property was acquired and not paraveni and that on Ran Banda's death it devolved on his grandfather, the plaintiff, and did not revert to Mutumenika.—De Sampayo, J., there distinguished the case of *Ranhamy vs. Pinghamy* (2).

..In Ukkuwa vs. Banduwa, (3), it was again held that property gifted to a person even by an ancestor is acquired and not paraveni property.

This rule seems in accordance with the principle laid down by Sawer. The present case is even stronger as the property does not come through the mother Sallelu, who never had any interest.

The document D2 to which the learned District Judge refers as showing that Rankira the widower of Sallelu acknowledged respondent's title clearly refers to lands which belonged to his deceased wife and cannot therefore apply to the land in dispute.

The appeal is allowed and judgement will be entered for the plaintiff with costs. The *plaintiff will also have the costs* of this appeal.

(1) 17 N. L. R. 201.
(2) I. S. C. C. 3.
(3) 19 N. L. R. 63.

Drieberg, J.—The question in this appeal is as to the succession to the intestate estate of Sirimalie, who died unmarried and without issue, possessed of an undivided half share of two lands.

The entire lands were owned by Hadaya Horanakaraya who had a daughter, Sallelu whom I shall refer to as the elder. Sallelu the elder had by her first husband, Pina, one child, Kiri Sanda, the defendant respondent. By her second husband, Rankira, to whom she was married in binna, she had two children, Kiri Bindu and Sirimalie.

By a deed of the 31st August, 1898, P 1, Hadaya Horanakaraya gifted these two lands to his grandchildren Kiri Sanda the respondent and Kiri Bindu. Kiri Bindu, who was entitled to a half share under this deed of gift, died leaving an only child, Sallelu, whom I shall refer to as the younger, who succeeded to this half share by inheritance. Sallelu the younger died intestate and without issue and it is common ground that her half share passed by inheritance to her aunt Sirimalie the succession to whose estate is now disputed.

The rival claimants are the appellant and the respondent. The appellant holds a transfer of the 24th March, 1926, P 2 A, from Rankira and contends that Rankira, the binna husband of Sallelu the elder, succeeded to what he says is the acquired property of his child Sirimalie.

For the respondent Kiri Sanda it is contended that as uterine half brother of Sirimalie he must be preferred to her binna married father.

If the half share of these lands is to be regarded as the acquired property of Sirimalie and not as her paraveni property it is clear that her father, her surviving parent, would have succeeded to the inheritance and not the respondent.Express authority for this will be found in the case of *Ukkuhamy v. Bala Ettana*, where the claim of the mother the father being dead, to the acquired property of her child was upheld against that of the child's full brothers and sisters.

Further direct authority will be found in the case of *Ranhoti v. Billinda*, 2, where the conflict between Sawer and Armour on this point is considered. The only exception to this rule which has been recognised by our Courts is where the property is acquired by a child by gift from a binna married mother. In such a case though it has the quality of acquired property, if the child died intestate or without issue it will pass to the maternal grandmother, the mother being dead, in preference to the binna married father, *Ran Manika v. Mudalihamy* 3.

There only remains for consideration therefore the question whether these lands were the acquired or the paraveni property of Sirimalie. There is no express authority so far as I am aware whether land inherited from a collateral or descendant is acquired or paraveni property, but our Courts have in questions of inheritance always regarded paraveni property as meaning ancestral property which has descended by inheritance, property derived by any other source or title or by any other means being regarded as acquired property. Authority for this will be found in the case of *Dingiri Banda v. Madduma Banda* 4 in which the earlier cases are referred to, and also in the case of *Ran Menika v. Mudalihamy* (supra).

The learned District Judge based his judgment on the principle of inheritance in Kandyan Law, of property reverting to the source from which it was derived, and he regarded the property as the ancestral property of Sirimalie and her mother Sallelu the elder, but this principle does not apply to acquired property, (de Sampayo, J., in *Dingiri Banda v. Maduma Banda* (supra) on page 210.) It should also be noted that Sallelu the elder was never the owner of this property.

The judgment in favour of the respondent is also based on the finding that Rankira acknowledged the title of the respondent by the document D 2 of the 20th September, 1918 in which he agreed not to dispute the title of the respondent to "possession of the lands belonging to my deceased wife Epitahenagedera Sallelu and which lands were possessed by her children Kiri Bindu and Sirimalie after her death, who also have died."

Rankira was allowed one pela out of the field of two pelas for his use and maintenance. This arrangement cannot

(1) 1908 XI N L R 226.
(2) 1909 XII N L R 111.
(3) 1913 XVI N L R 131.
(4) 1914 XVII N L R 201.

bar the appellant, who claims from Rankira, from asserting title. The surrender by Rankira by D 2 was of his claims to lands which belonged to his wife Sallelu the elder, and this half share was not at any time her property.

The arrangement was begun within ten years of the filing of this action and the claim of the appellant cannot be barred by prescription.

The appeal is allowed and judgment will be entered for the appellant as claimed. The respondent will pay to the appellant the costs of this appeal.

Present: Dalton, J. and Akbar, J.

JANE NONA v. VAN TWEST.
913 P. C. Kalutara 28836.

Decided: May 1, 1929.

Maintenance Ordinance—Jurisdiction —Criminal Procedure Code—Where cause of action arises.

Held: Maintenance proceedings under Ordinance 19 of 1889 being of a civil and not a criminal nature, the provisions of Criminal Procedure Code are not applicable, and the default to maintain is, therefore, not an offence within Section 3.

An action for maintenance may be instituted in the Court within the local jurisdiction of which the cause of action arises.

Per Dalton, J: "Normally one would take the custody and residence of an illegitimate child to be with its mother."

Chosky for appellant.

Dalton, J:—This case has been set down for hearing before two judges in view of the fact that the question that has arisen for decision had not always received the same answer in earlier decisions of this Court. We have now had the advantage of hearing a comprehensive argument on the point, in the course of which all the earlier decisions have been reviewed.

The appellant was sued in the Police Court of Kalutara by the respondent for the maintenance of her two sons of whom appellant was the father. The evidence shows that appellant kept the respondent as his mistress for a period of fifteen years. He admits the paternity of the two boys who are stated to be 12 and 7 years of age. He states, however, that they lived together in Colombo where he lives now, and that the Police Court of Kalutara has no jurisdiction. The evidence shows that some eight months prior to the proceedings respondent came to Kalutara with appellant's permission as she had obtained the post of mid-wife to the Kalutara Urban District Council. That of course necessitated her living where her work was to be done. Four months after she went there, she says appellant took another mistress and failed to maintain his two sons, the younger of whom was living with her at Kalutara, the elder having been kept from his mother by the second wife or mistress of appellant. She accordingly sued him for maintenance in the Kalutara Court.

The question to be decided on this appeal is whether the Kalutara Court had jurisdiction to hear and decide her claim for maintenance for her children, or for the child residing with her at Kalutara, or whether the appellant's objection that the case should be heard by the Court (Colombo) within the jurisdiction of which he resided. The Magistrate has applied the decision in **Herft v. Herft** (29 N.L.R. 324), a case of a claim by wife for maintenance, to the question arising in this case, a claim for maintenance of an illegitimate child, but it seems to me that different considerations apply here.

As I decided **Herft v. Herft** (supra) however I think it opportune to state here that, as now advised, a view of the law taken by me in that case, a somewhat guarded view it is true, is wrong. I there stated that "I am inclined to agree with Wendt, J. in his conclusion as regards the default to maintain being an offence within Section 3 of the Criminal Procedure Code." That opinion of Wendt, J. is given expression to in **Fernando v. Cassim** (1908, 11 N.L.R. 329). From the numerous cases that have now been cited to us, it is clear that although there are decisions (vide **Rankiri v. Kiri Hatana** 1891, I.C.L. Rep. 86; **Saboor Umma v. Coos Kanny** 1909 12 N.L.R. 97; **Weerasinghe v. Perera** 1922, 4 C.L.R. 67) that would support Wendt, J.'s conclusion, by far the larger number of cases—as set out here:—

Chivakannipillai x. Chupramaniam (1896) 2 N.L.R. 60. Subaliya v. Kannangara (1899) 4 N.L.R. 121. Eina v. Eraneris (1900) 4 N.L.R. 4. Isobel v. Pedru Pillai (1902) 6 N. 2. R. 85. Anna Perera v. Emiliano Nonis (1908) 12 N.L.R. 263. Bebi v. Tidiyas Appu (1914) 12 N.L.R. 81. Sampihamy v. Carolis (1914) 3 Bal. Notes 56. Elisa v. Jokino (1917) 20 N.L.R. 157. Menika v. Banda (1923) 25 N.L.R. 70.

Podihamy v. Wickremesinghe (1924) 27 N.L.R. 93. and I think I may properly add more authoritative decisions —lead one to conclude that maintenance proceedings are of a civil nature. I had the advantage when hearing **Herft v. Herft** (supra) of no such argument as we have now had from Mr. Choksy and Wendt, J. seems to have been in the same position when he heard **Fernando v. Cassim** (supra).

In the result then, in my opinion one is not able to apply the provisions of Section 3 of the Criminal Procedure Code to a failure to maintain an illegitimate child, maintenance proceedings under Ordinance 19 of 1899 being a civil and not a criminal nature.

If one is not able to go to the Criminal Procedure Code for assistance on the question of jurisdiction, where is one to go? The Maintenance Ordinance itself is silent on the point. Here it may be noted that the equivalent law in India has been amended to remove all doubt on the question. No assistance is given by Section 3 of our Ordinance. On the other hand, as has been pointed out before, the Maintenance Ordinance does not provide a new remedy previously unknown to the law but merely provides a simpler, speedier, and less costly remedy which a woman is compelled to take if she wishes to obtain maintenance for herself and her children. In **Subaliya v. Kannangara** (supra) Bonser, C.J. points out that in his opinion. "The foundation of the jurisdiction of a Police Court in these matters is the civil liability already existing; the Ordinance simply provides a speedier process." Wood Renton, J. follows this exposition of the law in **Anna Perera v. Emaliano Nonis** (supra at 6. 267) pointing out that since the enactment of the Maintenance Ordinance in 1889 it is no longer competent for a woman to bring a civil action in this Colony to recover maintenance for herself and her children as a debt due to them by the father, the Ordinance having superseded the common law. But if the Ordinance is silent on the question of jurisdiction, it would appear to follow that the answer to that question would be found in the law on the point as it existed at the time of the enactment of the Ordinance. The Civil Procedure Code (No. 2 of 1889) provides inter alia, by Section 9, that an action shall be instituted in the Court within the local limits of whose jurisdiction the cause of action arises. Evidence has been led by the applicant (respondent) to show that she was employed and was residing in the Kalutara District with her younger son. In addition in this case it is shown that she was doing so with the consent of the appellant. Her younger son was properly in her care, and the appellant so the evidence shows, refuses to maintain him. The cause of action therefore arises at Kalutara where the claim has been brought and the Police Magistrate has jurisdiction to hear the matter. This is in respect of the claim for maintenance of the younger son. What is the position in respect of the elder son is not made clear. He is apparently not in his mother's custody but in Colombo with his father. It does not appear whether or not his father is failing to maintain him in Colombo. Normally one would take the custody and residence of an illegitimate child to be with its mother. but on the facts as disclosed on the record at present. That is not the case here in respect of the elder boy. If he is being kept from his mother by the father but nevertheless is being maintained by him, the claim by the mother for maintenance for him is at any rate premature.

The Court having jurisdiction to hear and decide part of the claim brought, the appeal must be dismissed

In view of what I have stated above respecting the opinion expressed by me on my earlier opinion in **Herft v. Herft** (supra) on the application of the provisions of Section 3 of the Maintenance Ordinance, I think it well to add that it does not follow that the decision in **Herft v. Herft** (supra) was wrong. A wife's residence is normally with her husband, but cir-

cumstances may arise where it is otherwise; the cause of action may then presumably arise in a jurisdiction other than that of the husband's residence. See **In re Malcolm De Castro** (13 Allahabad 348 (1891). There are other cases in Indian Courts some of which agree and others disagree with this authority, but the matter is apparently now settled that by an amending Ordinance.

Akbar, J.: I entirely agree

PRESENT: DALTON J. AND DRIEBERG J.

Jinadasa vs. Weerasinghe.

208 D.C. Inty. Matara 3418.

Decided: 1st May, 1929.

Action for obstruction of right of way —injunction—Adjudication on issues —Answer not filed.

Held: Injunctions are not obtainable for actionable wrongs for which damages are the proper remedy.

An application for an injunction must be supported by sufficient material, and all necessary facts must be disclosed.

De Zoysa, K. C. with **Speldiwine** for plaintiff, appellant.

H V Perera with **Keunneman** for defendant, respondent.

Dalton, J.—There are two appeals (1) against an order dated 20th August last dissolving an injunction granted in this action on 20th December, 1927 (2) against an order of the trial Judge allowing certain issues to be tried at the inquiry as to whether the injunction should be dissolved or not.

A simple matter has been most unnecessary complicated by the procedure followed by the parties and the Court below. It is necessary to state what has taken place to understand how the matter now comes before this Court.

The appellant is the plaintiff in the action. He launched his plaint on the 17th December, 1927. The defendant, be it noted, has not yet filed his answer. The claim sets out that plaintiff is the lessee of 70 coir husk pits from the Crown, these pits we are informed being fenced off portions of a lagoon. Adjoining these pits it is pleaded is a strip of land reclaimed from the lagoon which has been used from time immemorial for the purpose of beating coir husks. Adjoining this strip of land is land belonging to defendant across which it is stated from time immemorial has existed a public road leading fro the Matara-Tangalle Road to the husk pits. Plaintiff pleads that this public road over defendant's land has been obstructed by defendant, the obstruction being the erection of a fence across it, and he is prevented from using the public road and the strip of land adjoining his pits, and from access to his pits. He claimed an interim injunction directing the defendant to allow him to use the road and the strip of land, and also damages.

In support of this application for the interim injunction one affidavit by himself was produced setting out very briefly his claim. The principal ground urged in support of the application is clearly the alleged wrongful and unlawful obstruction of a public road preventing it is alleged access to the strip of land and the coir pits. On this affidavit alone the District Judge allowed the ex-parte application. In my opinion his order was not in any way justified by the material before him. Further, even if he thought there was ground for granting an injunction, on the plaintiff's case as set out in his plaint, he should have applied the provisions of Section 664 of the Civil Procedure Code and directed that notice be served on the other side. A party must have very strong grounds and put all the necessary facts before the Court to obtain an interim injunction on an ex-parte application and even if granted it should as a general rule only be to a certain date to allow of notice to the other side. On the next day, December 21st, also on an ex-parte application, the injunction was amended and the Fiscal was directed to remove the alleged obstruction across the road. Defendant thereupon moved that the injunction be discharged under the provisions of Section 666 of the Code. After most informal proceedings which are described in the judgment of this Court under date April 30, 1928 the District Judge "suspended" the injunction and appointed a date to

go into the question whether it should be granted or not "de novo." Naturally plaintiff objected to this, appealed and was successful. The Appeal Court held (April 30, 1928) that he had obtained his interim injunction to last apparently until the case should be determined, and it could only be discharged by following the procedure laid down by law. The matter thereupon went back to the District Court for defendant's application to discharge the injunction to be properly heard.

It came before another Judge thereafter. On July 18th when the matter was called issues for the purpose of determining whether the injunction should be discharged or not were suggested by both sides and by the Court. Certain issues suggested by defendant were obtained to by plaintiff. In so far as they raise the question whether plaintiff had any substantial ground for his claim they were rightly allowed. In such a matter the Court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that plaintiff is entitled to relief ("Preston v. Luck" (1)). Plaintiff however wished to restrict the enquiry to the question of convenience and to his own solvency in case he should fail and be ordered to pay damages as a result of his obtaining the interim injunction.

As I have stated the issues objected to were rightly allowed by the trial Judge, but only for the limited purpose have mentioned. The Judge however goes on in effect to decide plaintiff's action. Evidence is led by both sides not on affidavit, but numerous witnesses are put into the box, examined and cross-examined at length, plaintiff beginning. Then in a very long and diffuse judgment the learned Judge in effect decides plaintiff's action. He holds that there is no public road over defendant's land as plaintiff pleads. If that finding is correct it is clear plaintiff's action must fail, for it is obstruction of a public road, thereby preventing access to the strip of land and pits, that is the basis of the claim.

Plaintiff naturally object to his action being heard and determined in this indirect way. Defendant has not even yet filed his answer. If the learned Judge had confined his enquiry on defendant's application to discharge the injunction to the question whether there was a serious matter to be tried at the hearing, he may or may not have directed that the injunction be discharged. He might however urge that he was in the unfortunate position of not having obtained real assistance from Counsel before him. If it had been advanced on behalf of defendant that from the very facts set out in the plaint this was no case for an injunction at all and that the injunction must therefore be discharged, it seems to me the Judge must have taken that view. In his plaint plaintiff has himself fixed at a definite figure all the damage he has suffered and will suffer at the hand of defendant, even if the alleged obstruction of which he complains continues. He will not be concerned, so far as his claim here is concerned, beyond the time limit of his leases to the pits. That date, it may be noted here, a most material fact is nowhere disclosed. As pointed out by Lindley, L J., in "London and Blackwall Railway Co. v. Cross" (2.) the very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy. Plantiff has himself assessed all his damages which presumably in his view will recompense him for the alleged infringement of his rights.

There is in my opinion a further reason why this injunction must be dissolved. This again is not a reason advanced in the Lower Court. Assuming for the moment it is on the face of the plaint a proper case for an interlocutory injunction, the application must be supported by sufficient material, and all necessary facts must be disclosed. An obstruction of a public road is an offence under the Penal Code. If it be thought inadvisable to take any action under the Penal Code, it can be dealt with as a public nuisance under Section 105 of the Criminal Procedure Code which gave the plaintiff a simple remedy for the removal of the obstruction. Was any action of this nature taken? If not, why not? There was in addition not a little of evidence produced by him when he asked for his interlocutory injunction

(1) 27 Ch. D. at p. 506.

(2) 31 ch. D. at p. 369.

from any public officer or public body that any public road had been obstructed. All the Court had was the meagre affidavit of plaintiff himself to which I have already referred. It has come to my notice more than once before that there is a tendency in some District Courts to grant injunctions on quite inadequate material.

It is not necessary in the circumstances to say anything about the suppression of facts by the plaintiff to which the trial Judge refers. For the reasons set out which are sufficient, I am of opinion that the order discharging the interim injunction was correct and the appeals must be dismissed. I think I have also stated sufficient to justify an order that the costs of these two appeals and of the proceedings in the lower Court from which these appeals are taken should follow the event in the action. I so order.

Drieberg, J. I agree.

Present: Dalton, J. and Drieberg, J.

BAKLEMAN vs. GOULDING AND REDDIAR.

415 D.C. Colombo 26676.

Decided: May 13, 1929.

Fidei Commissum—Effect of a sale by the Municipal Council, for arrears of taxes of a property subject to a fidei commissum—Municipal Councils Ordinance of 1910, Sections 143 and 146.

A property subject to a fidei commissum was sold by the Municipal Council for arrears of taxes. The Council purchased the property at the sale. Upon the fiduciary paying the arrears of taxes, the property was conveyed to him subject to the condition that the fiduciary could not sell or encumber the property, but that it should devolve on his death upon his children and, if there be no children, upon his heirs.

Where it was contended that the former fidei commissum was wiped out by the purchase of the property by the Municipal Council and, that since the new fidei commissum was one created "inter vivos," a fidei commissary who predeceased the fiduciary could have transmitted his "spes successionis" to a purchaser from the fiduciary during the lifetime of both the fiduciary and fidei commissary;

Held: Whatever may be the effect of the certificate under Section 146 of the Municipal Council Ordinance of 1910 upon the fidei commissum existing before the sale, where the conveyance by the Council intends to maintain the "status ante quo," the new fidei commissum will not be regarded as in any way different from the one it seeks to preserve.

Francis de Zoysa, K.C., with *Croos Da Brera* for appellant.

H. V. Perera for respondent.

Dalton, J.:—The plaintiffs brought this action to partition a property at Slave Island, Colombo, allotting a 1/3 share each to themselves, and 1/3 to the defendant. Defendant filed answer in agreement with the plaint. Added defendant, the present appellant, however intervened, pleading that he had purchased the property and asking that plaintiff's action be dismissed. He further pleaded that the Partition Ordinance was being used by the plaintiff and defendant to settle a dispute as to title.

The property originally belonged to one Thomas Goulding. By joint will dated June 16, 1869, he and his wife left this property to their son Charles, creating a fidei commissum in favour of the children of Charles. The will set out that Charles should not sell or encumber the property and after his death it should devolve upon his children, and, if there be no children, upon his heirs.

A dispute arose in the case as to who were the children of Charles, but the finding of the trial Judge upon that point is not now questioned. The two plaintiffs and the first defendant are his children by his first marriage, whilst Mabel Rose, Thomas Patrick, and Gladys Maud are his children by his second marriage.

Charles died in 1927. During his life time the Municipal taxes on the property got into arrears and it was sold for default of payment by Charles, the Municipality purchasing the property

for the sum of Rs. 250. A certificate was signed by the Chairman under the provisions of Section 146 of the Municipal Councils Ordinance 1910, and thereafter the property vested absolutely in the Council free of all encumbrances. The value of the property has been variously given as from Rs. 7,000 to Rs. 30,000.

In accordance with what we are informed is a common practice in such cases, the Municipality conveyed the property back to Charles on payment of all the taxes in arrears. The legality of this action has not been questioned in this case, so it is not necessary here to say anything on that point. By deed P11 of September 5, 1922, the property is conveyed back to Charles for the sum of Rs. 1,586150. It is however made subject to certain conditions, namely, that Charles could not sell or encumber the property, but on his death it was to devolve upon his children and "if there be no children," upon his heirs. It is suggested that the Council here sought to put Charles in the same position he occupied prior to the purchase of the property by the Council. As against that it is urged however that whatever limitations are placed upon Charles after September 5, 1922, in respect of the property they are created by the deed P11, and not by will.

On September 29, 1922, by a further deed AD1, Charles and three of his children Mabel Rose, Thomas Patrick, and Gladys Maud purported to sell and convey the property to P. S. Subbiah Reddiar, the present added defendant. That deed does not refer to deed P11 obtained by Charles less than a month before, but recites the terms of the will of Thomas Goulding. It also sets out only the second marriage of Charles and is silent about his first marriage, and the children of that marriage. Two days before the execution of this deed Charles swore to an affidavit that he was only married once and that beside the three children joining him in the deed AD1, he had no other children. It is admitted now that that is false. Although not seeking to put himself in any better position than he was under the will, there seems to be ground for the conclusion that he was seeking to benefit the children of his second marriage at the expense of the children of his first marriage and the former were aware of this.

Charles died in 1927, and this partition action was commenced on February 1, 1928, deliberately ignoring the added defendant. The question arising on the appeal is as to the share to which added defendant is entitled on the decree. He has been given a 2/5th share, the shares, that is, that would have gone to Mabel Rose and Gladys Maud. Thomas Patrick died before Charles and although he was a party to AD1, the trial Judge holds that, owing to the death of Thomas Patrick before Charles, nothing vested in Thomas that he could pass on to his vendee. Added defendant wants a 3/6 and not a 2/5 share of the property. As his reason for his conclusion that nothing had vested in Thomas, the learned Judge states that this is a case of a will and not a contract made by way of donation.

In his argument that this decision is wrong Mr. De Zoysa urges that the fidei commissum was created by an act inter vivos, that is the deed P11, the former fidei commissum having been wiped out by the purchase of the property by the Municipal Council. It was urged that the fidei commissum did not extend beyond the children of Charles, of whom Thomas Patrick was one. Relying upon the decision in *Mohamed Bhai vs. Silva* (1) it is argued that the fidei commissary Thomas Patrick having died before the fiduciary Charles, the former transmitted the expectation of fidei commissum to his heirs, an inasmuch as here he had conveyed during his life time the expectation to the added defendant in deed AD1, the added defendant is entitled in this action to that 1/6 share, making his total share on the partition 3/6.

It has been pointed out in a later case (*Carlinahamy vs. Juanis* (2) that *Mohamed Bhai vs. Silva* (supra) must be considered as authoritative of the law of Ceylon. It has however been carefully analysed, and the principle it embodies has been carefully examined by the Court in the later case I cite. Does the case before us come within that principle?

(1) 14 N. L. R. 193.
(2) 26 N. L. R. 129.

The first matter for consideration on this argument is the effect of the purchase by the Council of the property which is subject to the fidei commissum created by the will of Thomas Thomas Goulding. What is the the effect of the certificate, signed under the provisions of Section 146, upon that fidei commissum? It will be noted that if the property seized is purchased by the Council the certificate "shall vest the property sold absolutely in the Council free from all encumbrances." On the other hand, if the property had been purchased by some one other than the Council, under Section 143 a certificate granted under that Section "shall be sufficient to vest the property in the purchaser free from all encumbrances." The difference between the two Sections is at once apparent although in both cases the property vests "free from all encumbrances."

The terms of Section 143 have been considered by the Court in the case of *Sivacolundu v. Noormaliya* (3). That case seems to be almost on all fours with the case now before the Court save that there the fiduciary himself was the purchaser and not the Council. Here the Council is the purchaser, but the Council subsequently conveys to the fiduciary. In both cases the fiduciary had stood by and allowed the property to be sold for rates for which he the fiduciary was presumably liable. The question raised there was whether by his purchase and obtaining of a certificate under Section 143 the purchaser could convert his fiduciary interest into an absolute one and extinguish the rights of the fidei commissaries. Here the question is whether, by his purchase from the Council, who had a certificate under Section 146, the purchaser could rid himself of his character of fiduciary as created by the will of Thomas Goulding, and detrimentally affect the interests of some at any rate of those who were the fidei cmmissaries named in the will creating the fidei commissum.

In reply to the argument that a certificate under Section 143 vested the property in the purchase "free of all encumbrances" and therefore obliterated any *fidei commissum*, Bertram, C. J. in the case cited sets out at length his reasons for disagreeing with any such interpretation of the Section. His opinion is of course *obiter*, inasmuch as the appeal was allowed on other grounds, but he comes to the conclusion that the word "encumbrance" does not include *fidei commissum*, being satisfied that it is clear there was no intention on the part of the legislature to confiscate the interest of *fidei commissaries*. He terms the Section an extremely violent provision if that is the meaning of it. With this De Sampayo, J., agrees. A similar conclusion, it may be noted, was come to, in respect of the application of Section 9 of the Partition Ordinance, which it has been held does not extinguish a fidei commissum (*Weerasekere vs. Carlina* (4)); (*Marikar vs. Marikar* (5) The terms of that Section are considerably stronger and more explicit than those of Section 146.

The same words "free from all encumbrances" also appear in Section 146 and it does not seem possible to argue that the word "encumbrancse." There has any different meaning to the word as used in Section 143. It is clear however, as has been pointed out in *Natia Umma vs. Abdul Aziz* (6), the legislature considerably strengthened the provisions of Section 146 as compared with those of Section 143. In this latter case the Court held that a certificate granted under Section 146 excluded all evidence setting up another title, either directly or through impugning the certificate on the ground of a fundamental infirmity. It may well be argued from this that the opinion expressed by the Court as to the effect of a certificate issued under Section 143 in regard to a *fidei commissum* is no guide to the interpretation of the effect of a certificate granted under Section 146 in a similar case. It is a difficult question and I should wish to hear further argument upon the point

(3) 22 N. L. R. 427

(4) 26 N. L. R. 140.
(5) 22 N. L. R. 137.
(6) 27 N. L. R. 150.

before coming to any conclusion. The argument before us was chiefly on other points. It is possible, however, for the purposes of this case, to assume that the *fidei commissum* created by the will was terminated by the issue of the certificate under Section 146. The construction of the deed P. 11, and the effect of the *fidei commissum* set out therein remains to be decided. Whatever the effect of the certificate under Section 146 upon the then existing *fidei commissum*, there is not the least doubt in my mind that by the deed P 11 th Council, who had the title vested in them, intended to do no more than maintain the *status quo ante*, that is to keep in force the effect of the will of Thomas Goulding. The *fidei commissaries* referred to in the deed are no more and no less than the *fidei commissaries* referred to in the will, namely, the children of Charles, who could only be ascertained on the death of Charles. This was the evidence of the second defendant in the lower Court to which no objection was taken. This was clearly the intention also of Charles when he entered into the agreement with the Council upon which the property was conveyed to him by the deed. It was not in my opinion open to him under the circumstances to take up any other position. His intention and position are quite clear from the recital in his subsequent deed A. D. 1 to the added defendant. There the only reference is to the *fidei commissum* created by the will. There is no reference at all in A. D. 1, to the deed P 11 or to any *fidei commissum* created by that deed. The added defendant accepted that position, as did the three children who were parties to the deed. In these circumstances there seems to me to be no room for the argument that the Court must shut its eyes as to what had happened prior to and subsequent to the execution of the deed P 11, and deal with this document alone.

Further, the question raised in this appeal cannot be answered by merely ascertaining whether the *fidei commissum* was created by deed or by will. It is a question of the construction of the *fidei commissum* set out in the deed P 11. As pointed out by De Sampayo, J. in *Carry vs. Carry* (7), the decision of the Privy Council in *Tillekeratne vs. Abeysekera* (8) lays down a rule of construction which is applicable to all *fidei commissary* dispositoins whatever the form of instrument may be. With this view Bertram, C. J., entirely agrees (see Carlina Hamy vs. Juanis, (9). Applying these authorities to the case before us I am satisfied that the *fidei commisum* set out in the deed P. 11 definitely vested no "spes successionis" in Thomas Patrick and the other children in existence at the time, but it is a case of a deed entered into between Charles and the Council to give continued effect to the *fidei commisum* created by the will of 1869, the *fidei commissaries* being a class, namely the children of Charles, which was only definitely ascertainable on his death. This case does not come therefore within the principle embodied in Mohamed Bhai vs. Silva (Supra).

Other grounds urged in support of the judgment appealed from were also it seems to me most weighty and authoritative, but it is sufficient to say that for the reason I have given the judgment of the trial judge must be affirmed.

A small matter respecting costs remains. The District Judge directed that the added defendant (appellant) pay to the plaintiffs half their taxed costs of the contest. It is urged for the appellant that there is no jurisdiction for this order. Both parties were in part successful and in part failed in their claims, but there is no doubt there was some ground for the argument put forward that plaintiffs' action was an abuse of the Partition Ordinance. The trial Judge even considered the question of imposing double stamp duty. Further, they deliberately ignored the added defendant in bringing their action, whilst they also affect in their plaint to be ignorant of their father's second marriage and of the existence of his second family. Under all the circumstances I consider it is only just that each party should pay his own costs of the contest and I would so order.

(7) 4 C. W. R. 55.
(8) 2 N. L. R. 314; 1897 A. C. 277.
(9) 26 N. L. R. 140.

With this variation in the decree, I would dismiss the appeal. The appeal having failed save on a minor point, the respondents are entitled to the costs of the appeal.

Drieberg, J.—I agree.

Present: Dalton, J. and Drieberg, J.

UDUMA LEBBE vs. LEVENNA MARIKAR.

15 D. C. Interlocutory Colombo 4005.
Decided: May 27, 1929.

Will—Failure of Notary to explain the terms of a will where testator cannot read—Mohammedan law—Limit on testamentary dispositions.

Held:—The provision of the Mohammedan law in no way differs from the Roman Dutch Law regarding the Legitimate Portion, and is merely a limitation on the disposing power of a testator. Such limitations have been removed by Ordinance No. 21 of 1844.

Where a testator is unable to read the will, the Notary has to read over and explain it to the testator—Section 29 (11) of the Notaries Ordinance 1907—but failure to do so does not affect the validity of a will.

H. V. Perera with *Garvin* and *Deraniyagala* for appellants.

B. F. de Silva with *Canakaratne* for respondent.

Drieberg, J.:—The respondent applied for probate of the last will of her husband Uduma Lebbe Ibrahim, dated May 24, 1917, by which he left all his property to her and appointed her executrix. There were no children of the marriage.

Ibrahim died on April 30, 1928. Order Nisi issued declaring the respondent entitled to probate, whereupon the appellants petitioned the Court opposing grant of probate on several grounds, viz., that the will was not duly executed, that it did not express the true intention of the testator, undue influence, and that under the Mohammedan Law the testator could not dispose by will of more than one-third of his estate. They prayed for a declaration that Ibrahim died intestate and that letters of administration be issued. The learned District Judge held against the appellants on all these grounds and they have appealed. The first and second appellants are the brothers, and the third appellant a sister, of the deceased.

The will was prepared in accordance with instructions given by the testator to the Notary, Mr .Fuard, on May 21. The attesting witnesses were Dr. S. C. Paul and Perera, the Notary's clerk. Dr. Paul is Senior Surgeon of the General Hospital, Colombo. He was the medical attendant of the testator whom he had known for twenty or thirty years. Dr. Paul says that he had been asked to be at the testator's to sign the will as a witness; that when he went there he met the Notary, whom he did not know before; the Notary gave him a copy of the will and he found the testator reading the other copy of it; he asked the testator what the purport of the will was and he replied that it was in favour of his wife. Dr. Paul says that he glanced at the copy given him and found that it was in favour of the testator's wife; he did not however read through it. The Notary then took back both the copies and they were signed in the presence of the two attesting witnesses. The attestation states that the will was duly read over by the testator in the presence of the Notary and the witnesses. Dr. Paul says that the testator's mind was quite clear and he was able to give instructions for the will. There is no suggestion that he was otherwise than normal mentally.

The evidence of the Notary is to the same effect. He says that he gave the testator a copy of the will after Dr. Paul came, but the disagreement on this point cannot affect the clear evidence that the testator read over the will before he signed it.

There is the evidence of Dr. Paul that the testator told him that the will was in favour of the testator's wife but, apart from this, if the testator could read and understand the will no further question could well arise. The will was one which was to be expected; the testator was very fond of his wife and she previously had made a will in his favour.

That the testator could read and write English is fully proved. He was a building contractor under Messrs. Walker Sons and Company and had a considerable business. Mr. Bottoms, the Manager of the building department of that firm, who does not know Sinhalese or Tamil, says he met him daily, that he spoke English very well, and that he discussed bills of quantities specifications of plans with him. Mr. Fonseka, a Proctor, states that he used to meet the testator when he was a Master at Wesley College. A nephew of the testator was a pupil of Mr. Fonseka. The testator used to speak in English to Mr. Fonseka and they used to go through the boy's school reports.

P13 is a book of accounts and D6 P253, a press copy of a letter. It has been proved that these were written by the testator, and there is no evidence to the contrary.

P17 and P18 are two notarially attested conditions of sale of land, the Notary being Mr. E. R. Williams of Messrs Julius and Creasy. It is accepted that Mr. Williams, who is an Englishman, did not know Tamil. In both documents Mr. Williams certified that the testator, who was one of the executing parties, "duly read over" the documents. It may fairly be presumed that Mr. Williams ascertained whether the testator knew English and that if he found that the testator did not, he would have prepared the attestation in the form required by Section 29 (11) in cases where the executing party does not know the language in which the instrument is written.

No evidence was led to show that the testator could not read English, and no such inference can be drawn from the evidence of Mr. De Rooy and Mr. Abdul Cader who were called by the appellants.

Where a testator is unable to read the will the Notary has to read over and explain it to the testator—Section 29 (11) of the Notaries Ordinance, 1907, but failure to do so does not affect the validity of a will, and apart from the evidence of Mr. Fuard that the will was prepared in accordance with instructions previously given, no question as to the regularity of its execution can arise if the evidence of Dr. Paul, that the testator said that the will was in favour of his wife, is accepted, *Pieris vs. Pieris.* (1) It was sought to meet Dr. Paul's evidence on the ground that he was, so it was said, an old man and too busy to retain a clear recollection of what took place when the will was signed. The Government Civil List shows that Dr. Paul was born in 1872, and there is no reason to doubt his recollection of what the testator told him of the will. The opposition to the will is frivolous and without foundation Asia Umma, the only opponent who gave evidence, said at the end of this protracted enquiry that the will was a forgery while denying knowledge as to who the attesting witnesses were. The learned District Judge has condemned the opposition in terms which I cannot say are unmerited.

The appellants say that Ibrahim would not have made a will without providing for relations whom he helped generously during his life time. The testator derived a good income from his contracts, but this would cease with his death and it is natural that he did not wish further to reduce his wife's income by giving away part of his estate, and it is also natural that he should leave it to his wife to give such help to his relations as their treatment of her merited and her income would allow.

Mr. Fuard says that having heard that the testator was seriously ill on the 19th night he called at his house on the 20th morning to inquire and was told that Dr. Paul and Dr. Cooke had been there the previous night and given the testator oxygen; that on the 21st morning he got a telephone message asking him to call at the testator's; he did so in the afternoon and was given instructions for the will; he was taken into the room by a Cochin boy and nobody was present when he received instructions; he had a draft will prepared and saw the testator with it on the 23rd and went through it with him, explaining to him some legal terms which he did not understand; on this occasion too nobody else was present.

The appellants sought to make out that this serious illness—it was an attack of asthma with cardiac trouble due to his diabetic condition occurred not on the night of the 19th but on the 20th night. It was suggested that

(1) 1906 IX N.L.R. 14.

the Notary folsely placed this on the 19th for the reason that if he said it occurred on the 20th his evidence would be open to the comment that the testator would not have been in a fit condition to give instructions so soon after the serious attack he had the previous night, and further that it was incredible that at such a time he would have been alone in his room without anyone in attendance.

I agree with the opinion of the trial Judge on this point. It has not been proved that the visit of Dr. Paul and Dr. Cooke was on the 20th night and not on the 19th, but apart from this Dr. Paul says that the testator rallied completely after the heart attack, he saw him two or three times daily after it, there was no special necessity for him to have an attendant, and that his mind was clear and he was quite able to give instructions for a will.

The appellants contended that the will was invalid, for under the Mohamedan Law it is not possible for a person to dispose of by will more than one third of his property to the prejudice of his lawful heirs. Mr. Perera referred us to Tyabji (1913 edition) p. 526; and Ameer Ali's Mohamedan Law (4th edition) vol. 1, p. 570.

It was held in *Sariffa Umma et al* v. *Rahamath Umma* (2) that Section 1 of Ordinance 21 of 1844 enabled a Muslim in Ceylon to dispose of the entirety of his property by will free from any limitations imposed by the Mohamedan Law.

> This section provides that " . . . . . every testator shall have full power to make such testamentary dispositions as he shall feel disposed, and in the exercise of such right to exclude from the legitimate or other portion any child, parent, relative, or descendant, or to disinherit or omit to mention any such person, without assigning any reason for such exclusion, disinheritance, or omission any law, usuage, or custom now or heretofore in force in this colony to the contrary notwithstanding. . . . ."

Mr. Perera contended that the Mohamedan Law did not impose a restriction on a person's power of disposal but that it was rather an inability in a legatee to receive property to the prejudice of the heirs, and he relied on the earlier part of the section which empowers a testator to leave property "to such person or persons not legally incapacitated from taking the same." It is clear however that this applies to persons who are prohibited by legislative enactment from taking under a will, such as attesting witnesses (Section 10, Ordinance 7 of 1840), or who on grounds of public policy are incapable of taking under a will, for example, a person who has murdered the testator. A list of the classes of persons who are under this disability under the Roman Dutch Law is given in Morice's English and Roman Dutch Law, p. 274.

The provision of the Mohamedan Law in no way differs from the Roman Dutch Law regarding the Legitimate Portion, and is merely a limitation on the disposing power of a testator. Such limitations have been removed by Ordinance 21 of 1844.

The appeal is dismissed with costs.

Dalton, J.—I agree.

(2) 1911 XIV N.L.R. 464.

Present: Akbar J.

POLICE CONSTABLE VS. ALWIS.

132 P.C. Colombo 36726.

Decided: May 21, 1929.

Choksy for the accused-appellant.

Akbar, J.:—The accused has been convicted of the offence of dishonestly retaining stolen property viz., a second hand bicycle valued at Rs. 75 and sentenced to six weeks' rigorous imprisonment.

As the Police Magistrate says the facts are not contested.

The bicycle was stolen on January 3, 1928, and was found in accused's possession on December 29, 1928. He immediately told the constable the story which he has narrated to the Court, namely, that he was in want of a bicycle to go about in the course of his business as an Agent of the Singer Machine Co., and that he bought the machine from one Elma about 8 months before his arrest for Rs. 25 and that he had paid Rs. 12 and that he has not paid the balance because Elma did not press him for it, excepting for one occasion a month after the sale. It is in evidence that Elma who lives

in the neighbouring village has now disappeared. On the other hand the bicycle is in the same condition in which it was when it was stolen and even the number is still on it. The Police Vidane of accused's village says that accused went about openly on the bicycle and even came to his house on it and occasionally left it at his house. The Police Magistrate has canvicted the accused on the one point of the non-payment of the balance Rs. 13 because he ought to have suspected that he was retaining stolen property. If he did not do so he must be a man of abnormal intelligence as a man of ordinary intelligence and probity would have reflected that there was reason to believe the cycle was stolen.

It is important to bear in mind that the words in Section 394 Penal Code are "knowing or having reason to believe" and not reason to suspect.

It has been held in India (See I.L.R. 6 Bombay 402) that the word "believe" in the corresponding section of the Indian Penal Code is much stronger than the word "suspect" and involves the necessity of showing that the circumstances were such that a reasonable man must have felt "convinced" in his mind that the property was stolen property. It is not sufficient to show in such a case that the accused was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. This case is approved by Gour in paragraph 4171. Further paragraph 4172 shows that the test is, what is the state of mind of the accused, "and not that the circumstances were sufficient to induce such belief in the mind of any prudent and reasonable man. The latter test is often resorted to in the Civil Law but it has no place in the criminal jurisprudence of this country."

If we apply this test and not the one proposed by the Police Magistrate the fact that accused used the bicycle openly in the same condition in which it was stolen, shows to my mind that he was "not convinced in his mind" that the bicycle was stolen property.

I set aside the conviction and acquit the accused.

Present: Akbar, J.

INSPECTOR OF POLICE VS. DE ZOYSA.

245 P.C. Balapitiya 12131.

Decided: May 27, 1929.

Ceylon Penal Code, Sections 314 and 346—Criminal Produce Code, Section 17—Penal Code Section 67—where one offence includes another for which an accused is charged—Punishment.

Where an accused was charged on two counts, namely for voluntarily causing hurt to a Police Officer, thereby committing an offence punishable under section 314 of the Ceylon Penal Code and with assaulting a Police Officer with intent to dishonour him without any grave and sudden provocation.

Held: Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender is not to be punished with a more severe punishment than the Court which tries him could award for anyone of such offences. (Ceylon Penal Code. Section 67).

Rajapakse for the accused-appeallant.

Illangakoon, C.C., for the Crown respondent.

Akbar, J.:—The accused in this case was charged on two counts, namely, with voluntarily causing hurt to sub-Inspector Tillekeratne of the Kosgoda Police Station by striking him with a chair, thereby committing an offence punishable under Section 314 of the Ceylon Penal Code, and with assaulting sub-Inspector Tillekeratne with intent to dishonour him without any grave and sudden provocation, an offence punishable under Section 346 of the Ceylon Penal Code.

The circumstances are admitted by the accused, but the appeal is made on the ground that the sentence of 6 months' rigorous imprisonment on each count's run consecutively is too severe. It is true that an assault, on an Inspector of Police by an accused whom he is going to charge in Court is a serious offence and deserves to be punished severely, but at the same time

these two charges are so connected together that I think the first charge is included in the second and that the two counts have been brought in merely to get the double punishment which the Court can award under Section 17 of the Criminal Procedure Code. Under that section when a person is convicted at one trial of any two or more distinct offences, in the case of a Police Court the punishment cannot exceed twice the amount of punishment which it is competent to inflict. So that it is under that section that the Police Magistrate apparently horrified at the enormity of the offence committed within the precincts of the Police Court has sentenced the accused to a year's rigorous imprisonment.

It was a foolish act of the accused and he stated to the Court that he was provoked because he was assaulted by 8 of them, meaning thereby, I suppose, that he was assaulted by the constables at the Police Station. But whatever that may be, under Section 67 of the Penal Code there is a distinct injunction that where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender is not to be punished with a more severe punishment than the Court which tries him could award for any one of such offences. Now, the Police Court could not award more than 6 months' rigorous imprisonment for each one of these counts. I, therefore, think that the punishment should be reduced from 12 months' rigorous imprisonment to 6 months' rigorous imprisonment on each count to run concurrently.

In other respects I affirm the conviction.

Present: Akbar, J.

INSPECTOR OF POLICE VS. MELDER.

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243 M.C. Colombo 2109

Decided: May 27, 1929.

Police Ordinance of 1865, Section 90 —Making a noise at night to disturb the repose of the inhabitants of a place —Meaning of the word "inhabitants."

Held: The word "inhabitants" in section 90 of the Police Ordinance of 1865 means the inhabitants of the quarter and not one individual of it only.

De Jong for the appellant.

Akbar, J.:—The accused in this case was charged with the offence of making a noise at night, so as to disturb the repose of the inhabitants of a place named Colpetty Lane. He was convicted and fined Rs. 50. The only evidence in this case is that of Mr. and Mrs. Collingwood Carrington. They said that the accused who lived in front of their house carried on the business of loading and unloading lorries, making up of tea cases, and other carpentry works at night. The charge is with reference to the night of February 25. The plaintiff and his wife say that the repairs are carried on from eleven at night till two in the morning, and that in consequence, they and their three children are disturbed at night. The accused has given evidence and has called two neighbours to prove that they were not disturbed. I can quite understand Mr. and Mrs. Collingwood's feelings and wish that the law would allow me to affirm the conviction. Unfortunately, however, the law is too clear. It was decided so long ago as 1879 by Phear, Chief Justice, that the word "inhabitants" in Section 90 of the Police Ordinance 1865 under which the accused has been convicted, means the inhabitants of the quarter in which the noise is made and not one individual of it only. In that case a Mrs. Young and her baby were disturbed. As Phear, C.J., said. "To construe it as the Magistrate has done in such a way as to give a particular house-holder a criminal remedy against his next neighbour for a grievance with which the other inhabitants within more or less proximity are not concerned, is to go beyond the scope and spirit as well as beyond the words of the law. Each occupier of a house or land is always civilly responsible to his adjacent neighbour for the use which he makes of his property to the latter's annoyance, if the use infringes the maxim "Sic utere tuo ut alienum not laedas" and this seems to be sufficient protection under ordinary circumstances for adjacent or conterminous proprietors."

The words of Section 90 are too clear to admit of any doubt. It is not enough to call the inmates of one house only to prove the offence; the prosecution must call several representative inhabitants of the district. This is the same difference which exists between a public nuisance and a private nuisance and the reason why only the former is made penal under Chapter XIV of the Penal Code. In view of the judgment of Phear, C.J., which was quoted to the Municipal Magistrate, I cannot understand how he came to convict this accused. The fact that not only Mr. and Mrs. Collingwood but their children too have been disturbed does not alter the fact that they do not represent the inhabitants of the quarter. The Police has made no effort to call evidence of residents in the vicinity, and I do not think they should have prosecuted in this case without getting proper legal evidence, in view of the case I have quoted.

I set aside the conviction and acquit the accused and remit the fine.

Present: Akbar, J.

YANAGEDERA TIKIRA vs. PALLEGEDERA TIKIRA.

43 C. R. Kandy 4581.

Decided: June 4, 1929.

Kandyan Deed of Gift—Conditions unfulfilled—Burden of such proof—Revocability—Claim for compensation for Improvements by Child Donee—Bona Fide Possessor.

Held:—A donee, being a child of the donor, under a Kandyan deed of gift, is not entitled to claim compensation for improvements effected on the land donated to him, against a person to whom the donor, who had revoked the gift on the ground that the conditions in it had not been fulfilled, had later transferred the land.

Weerasooriya for plaintiff appellant.
Wendt for defendant respondent.

Akbar, J.:—In this case the plaintiff appellant appeals from a judgment dismissing his claim for the value of improvements effected by him on a land which was gifted to him by his mother, the 2nd defendant in this case (now dead) and which was afterwards revoked by her under the Kandyan Law and sold to the first defendant.

It is clear from the plaint that he based his claim as a "bona fide" possessor under the Roman Dutch Law. In the answer the defendants denied that any cause of action had accrued to him to recover from them the value of the improvements. At the trial the plaintiff admitted the title of the first defendant, and the value of the improvements was also admitted as Rs. 77-75.

The following issues were framed:—

1. Did plaintiff possess the land and improve same?

2. Was such possession bona fide?

3. Is the plaintiff entitled to any compensation for improvements?

After evidence was led the Counsel for the first defendant, second defendant being then dead, cited the Kandyan Law from Mr. Hayley's book, page 316. In the judgment the Judge states that if the parties were governed by the Roman Dutch Law the plaintiff would be entitled to compensation as a "bona fide" possessor, but that under the Kandyan Law, the party will not be entitled to any compensation for improvements if the revocation of the deed of gift was due to the failure of the donee to fulfil the condition of the deed. He held that as the deed of revocation specifically stated that plaintiff and his brother had failed to render their mother any assistance the plaintiff was not entitled to succeed. Before I proceed further I may mention that in my opinion on the authorities which I shall mention later, it is clear that the deed of gift in favour of the plaintiff and his brother, by his mother (P1) is revocable under the Kandyan Law. The deed (P1) is in the following terms:—

"I.....being old, with the object of receiving all assistance and succour during my lifetime, do hereby donate grant and convey by way of gift with my good will and pleasure unto my most dutiful and beloved two children Yamanegedere Tikira and Ukkuwa, both of Ranawana aforesaid, all that eastern half share in extent one timba paddy sowing out of the portion in ex-

tent 8 lahas paddy sowing below the minor road towards the south out of the land called Kasakaragedera Kotuwa of one pela paddy sowing in extent situate at Ranawana, etc., which said one timba paddy sowing extent is bounded, etc., etc., together with the plantations and everything thereon, valued at Rs. 70 which said premises have been held and possessed by me free of dispute upon the annexed registered deed of gift No. 2726 dated 10th January, 1868. attested by Warakagoda Ranhamy Notary.

Therefore the heirs etc., of me the said Dotu shall cause no dispute whatsoever by word or deed hereafter contrary to this donation; and my children the said Tikira and Ukkuwa shall during my liftime from this day render me all assistance and succour ungrudgingly; and after my death shall bury my dead body in a fit maner according to customs of the world; and shall also perform all religious rites and ceremonies for the repose of my soul in the next world. And after my death the said two children Tikira and Ukkuwa their heirs etc., may hold and possess the aforesaid land and plantation absolutely and for ever free of dispute as paravent; which I do hereby authorise."

The gift does not state that it is irrevocable. Further the only condition is that the heirs, executors or administrators of the donor are not to cause any dispute whatsoever; and that it is only after the donor's death the two donees are to hold and possess the land absolutely and for ever free of dispute as paraveni. Therefore on the face of the deed I hold on the authority of the various decisions of this Court namely: *Mudiyanse vs. Banda* (1), *Kirihenaya vs. Jotiya* (2), *Ukku Banda vs. Paulis Singho* (3), that this deed is revocable by the donor. Indeed as I have stated, the plaintiff has admitted the 1st defendant's title in this case. The passage on which the Commissioner bases his judgment, quoted from Mr. Hayley's book does not, however, give the full passage from Mr. Perera's Armour. The full passage is as follows: "All deeds or gifts," says Sawers, "excepting those made to priests and temples whether conditional or unconditional, are revocable by the donor in his lifetime, but should the acceptance of the gift involve the donee in any expense he the donee must be indemnified, on the gift being revoked, to the full amount of wha the acceptance of the the Noary falsely placed this on the gift may have cost him, either directly or by consequence, but this rule applies only to gifts made by laymen. Moreover, this rule is to be understood to apply only to gifts of land, or of the bulk of the donor's fortune of goods and effects; as presents if given out of respect or from affection at the moment (or in thankful acknowledgement of a benefit or service rendered to the donor) are not revocable. And to apply to the gifts made to strangers or other persons, not heirs by law to the donor; for gifts to children, if revoked, give such a donee no claim to compensation; but with this exception if a parent having several children makes a donation of a principal part of his lands or effects to one of his children, those lands or effects being in respect to the claims of indemnification by the donee, on the gift being revoked this is only to be understood burthened at the time with debts at the donee paying the debts, as by mortgage or otherwise, and the donee paying the debts or dismortgaging the property that had been so given; the gift and bequeath his lands and effects equally among his children or legatees; in this case, the former donee, who paid debts or dismortgaged should the parents afterwards revoke the property of the donor, must be indemnified by the other heirs or legatees in proportion to th alteration made by the parent in the former gift, by the subsequent disposal of property. It being however promised that the former donee had not already derived so much profit from the property, as was adequate to indemnify him for his expenses. With respect to bequests, and testamentary disposal, whether documentary or verbal, the right

(1) XVI N. L. R. p. 53.
(2) XXIV N. L. R. p. 149.
(3) XXVII N. L. R. p. 449.

to revoke or alter them remains absolutely with the devisor, so long as he retains his life and reason."

According to this authority no claim for compensation is to be allowed when the donor as in this case makes a gift to his children and subsequently revokes it.

The rule requiring payment of compensation is only to apply when the gift is made to a stranger or other person who is not an heir at law. So that the plaintiff's claim in this case is not allowed under the Kandyan Law.

The case of *Tikiri Banda vs. Banda* (4), was quoted as an authority by the appellant but it will be seen that in that case this point was never raised. In fact it will be seen from Berwick, J.'s judgment in that case that he refers to the probability of the deed of gift in that case having been revoked "capriciously or spitefully"; nor was the point raised in the later case of *Mudiyanse vs* **Banda** (2). One other point remains to be determined. It was strongly urged by the appellant's Counsel that no issue on the applicability of the Kandyan Law was raised at the trial and that therefore, this case should be sent back for decision because I think the 3rd issue is wide enough to include this question.

(4 3 S.C.C. p. 31.

The plaintiff should have known that on the law. I do not think any useful purpose can be served by this course this case must be governed by the Kandyan Law; see the judgment quoted above of Berwick, J. in ..*Tikiri Banda vs. Banda*. Further under the Kandyan Law the burden seems to be on the plaintiff. (see Perera's Collection P. 38 and 39). The following passage occurs in this book: "The deed in favour of the plaintiff was granted on a specific condition, not *executed* but *executory*. There can be no doubt therefore, that a failure in the performance of that condition, must defeat the instrument; it was for the plaintiff to shew a real bona fide performance of that condition. In this he has certainly failed." For these reasons I think that the judgment of the trial judge was correct. I hold accordingly (but not for the reasons stated by the Judge) and dismiss the appeal with costs.