Vol. X No. 109 (New Series) OCTOBER, 1928.

THE CEYLON LAW RECORDER

CONTENTS

PRINTERS AND PUBLISHERS:
THE CEYLON DAILY NEWS PRESS.
COLOMBO.

THE CEYLON LAW RECORDER.

(A MONTHLY LEGAL MISCELLANY & LAW REPORT)

SUBSCRIPTION RATES.

Annual Rs. 15 post free.

Application for copies, payment of subscriptions and all communications of a business character should be addressed to

THE PUBLISHER,
THE MANAGER,
"Ceylon Daily News,"
28, Baillie Street,
Colombo.

THE CEYLON LAW RECORDER

Vol. X. (New Series) OCTOBER, 1928. Part I

RETIREMENT OF SIR STEWART SCHNEIDER.

Farewell Words from the Bar.

Sir Stewart Schneider, Senior Puisne Judge of the Supreme Court presided at the Appellate Court for the last time prior to his retirement, on December 21st, last.

The members of the Bar assembled in the Chief Appellate Court and bade farewell to His Lordship, with whom were Mr. Justice Dalton, Mr. Justice Drieberg and Mr. E. W. Jayawardene, the Commissioner of Assize.

The Judges wore their scarlet robes and full bottomed wigs.

The Hon. Mr. L. H. Elphinstone, the Attorney-General on behalf of the members of the Bar addressing Their Lordships, said :—

May it please Your Lordships, I understand that this is the last occasion on which His Lordship, Sir Stewart Schneider is to preside in this Court and it is fitting therefore that as the titular leader of the Bar I should say a few words. My Lord I wish to express on behalf of the Bar the very real regret which we feel on Your Lordship's retirement. The relations between Your Lordship and the Bar have always been most cordial and Your Lordship has always maintained that cordiality which in my opinion is so important in the administration of justice. My Lord, it was only about three months ago when the Bar and Your Lordships assembled here that His Majesty's representative handed to Your Lordship the Letters Patent as Knight Bachelor. Though that in itself is sufficient proof of the esteem in which Your Lordship is held, and no further words on that subject are necessary from me, it only remains for me to express the sincere wish of the Bar that Your Lordship's retirement will be happy and prosperous.

Mr. H. A. P. Sandrasegra, K. C., addressing Their Lordships, said :—My Lords the Attorney-General has asked me to add a few words on behalf of the unofficial Bar and on behalf of friends to express to Your Lordship not only our deep sense of regret, but to many of us a deep sense of personal loss, at Your Lordship relinquishing the reins of office. Throughout a most illustrious career at the Bar and on the Bench, Your Lordship has come in contact, and

most intimate contact, with every member of both branches of the profession and has brought to bear in the discharge of the duties of your high office such an acquaintance with all the peoples of this Island and of the various communities that the Bar looked upon Your Lordship's work and Your Lordship's judgments with the greatest satisfaction and delight, because they always realized that there was one who, throughout his career at the Bar, had acquired the necessary experience and equipped himself with the necessary knowledge of the people to discharge the high functions of your office so well as you have done.

Well, my Lord, I do not want to add very much more to what has fallen from the lips of the learned Attorney-General except to wish that Your Lordship will be preserved for many years in good health and strength and add your quota of useful service to the public life of this country.

His Lordship, in reply, said :—Mr. Attorney and gentlemen,—Allow me to thank you Mr. Attorney, and you, Mr. Sandrasegra, for your very kind words regarding me and my work and you, gentlemen, for your presence here. To-day and now I am finally serving my connexion with these Courts which began in 1898. Such a severance must needs contain a tinge of sadness for me. During all that period no one could have been more conscious than myself of my shortcomings whether as Counsel or as Judge, but I am carrying away the pleasantest remembrances of the loyal and cordial co-operation in my work as a Judge which I received from every single member of the Bar. I need say no more than that I bid you farewell with regret and now let me take my leave of you.

SPEEDING UP THE LAW.

Time Limit For Counsel.

Future litigants who may be expecting to appear before the Judges of the King's Bench Division need not be unduly perturbed by the story of the big lawsuit which is in its fourth week, and still "marching on," writes a special correspondent in the London "Daily News."

The commercial type of case is invariably intricate and expensive, but in regard to common law action with which the man in the street is familiar there never was a period when the law did more discreet hustling than at present.

Judges and Counsel, in fact, combine to shorten the tasks of juries in a way which 20 years ago would have created much heartburning at the Bar. Opening statements are short and pointed, and evidence is confined under the watchful eye of "his lordship" to relevant facts. If a witness shows a tendency to answer a question with a "speech" he is pulled up short, and when the testimony in the box is completed counsel will often agree to limit their final eloquence to a set total of minutes. In these busy days men and women jurors are not ungrateful to Barristers who curtail their observations, and litigants benefit by large savings in costs.

DIVORCE DIVISION RECORDS.

The Divorce Division has created records in the post-war years in regard to celerity. The matrimonial suitor whose petition is not contested enters the box right away, other witnesses are lined up by the usher in close proximity to take their turn, and the decree nisi often clinches a word-drama of five minutes.

There has been a decline, too, in the "jocularity"—the Courts are perhaps duller, but the saving of time is a compensation. It would be unjust to say that our Judges or learned counsel at the Bar have lost their faculty for apt witticism or the admirable bon mot—they are dropping here and there in happy settings, but the vogue of the Court "entertainment" is less pronounced.

Happily the delightful pose of judicial innocence has not been entirely obliterated. Mr Justice McCardie wanted to know the other day "What is a waffle?" and Mr. Justice Lush (now retired) is remembered for his two delightful queries: "What is a jumper?" and "What is 'the ready'"?

SHORTER SUMMINGS UP.

Summings-up are as a rule shorter, and jurors would appear to be able to arrive at quicker decisions. It is seldom nowadays that their deliberations extend, as was often the case years ago, over so many hours that dainty teas and other aids to mental decision had to be set before them in their cloistered retreats below stairs.

Judgments from the Bench must always vary according to the volume of a case. Those given in the Court of Appeal, where the hearings are entirely on points of law, are often of necessity heavy. A day of continual judgment—interrupted only by the half-hour lunch interval, which is all that the Courts still recognise—is not an entire novelty in that Division, but in the average case the decision is given in a brisk way, and where unanimity prevails two members of the Court often utter the simple formula "I agree."

A story is still related in the Courts of "the shortest judgment on record." It was given by the late Mr. Justice Bailhache.

Counsel for the plaintiffs was submitting some hopeless contentions. To each of them he just shook his head. When the final luckless point was advanced he shook his head just a little mere vigorously, and smiling in a kindly way, said to the Associate quite simply: "Call the next case," Everybody knew it meant "judgment for the defendant," and so it was officially recorded.

THE ROMANCE OF THE PRIVY COUNCIL.

By Graham Brooks, Barrister-at-Law.

Strange indeed it is the same British public which crowds its Divorce and Criminal Courts to suffocation displays little interest in its most romantic judicial institution. Such were my thoughts as I walked through the Downing Street entrance of the Privy Council Offices, up the stone stairs, across the ante-room, into the oak-panelled Council Chamber where the Judicial Committee sits.

In the ante-room I had passed two young Indian counsel talking with an equally dark-skinned solicitor, whilst near by a Chinaman—possibly a British subject from Hong-Kong—was engaged in conversation with two other Asiatics, one wearing the Mohammedan "fez," the other a turban; inside the Council Chamber a Canadian "silk" was addressing the Lord Chancellor and four other members of the Committee from the rostrum at which counsel must stand, whilst in the adjoining board room the affairs of an Indian Maharajah formed the subject of investigation.

ROMANCE AND DIGNITY.

Striking indeed is the impression of romance and dignity which the scene

conveys. Dignity without ostentation, for no panoply of State is here; the room, small but lofty, is undecorated save for gilt-framed portraits of Lords Chancellors, severely tidy save for books and papers that crowd all available space; the attendants are dressed more like waiters than Court officials; the members of the Committee, robeless and wigless, seated round their table, look for all the world like directors at a board meeting. Undoubtedly also Romance, for here in the heart of busy London these same unassuming gentlemen are the arbiters to whom a quarter of the world's population looks for final justice.

Thick fog, as only Londoners know it, may surround the room in which they sit, but those whose fate they are deciding may dwell beneath tropical suns, on snow-clad peaks, in the back-woods, the wilds, and the jungles of our far-flung Empire; Mohammedan and Buddhist, Zulu and Maori, white and black, rich and poor, all have a common right—the right of appeal to their King-Emperor.

The Judicial Committee is, indeed, after the Crown itself, the strongest and most popular link that binds the Empire. It is also one of the most important international tribunals in the world, as its decisions are treated as precedents in every country, including U.S.A., which is governed by English common law—that is the law as declared by the judiciary.

VOLUNTARY SERVICE.

The Judicial Committee sits in two divisions, the first taking Indian appeals, the second taking appeals from the Dominions and Colonies, including the Irish Free State. Each division requires five members. Available for this purpose are, first, the Lord Chancellor and the six Lords of Appeal in Ordinary, but since the House of Lords is usually sitting concurrently as an appellate tribunal, five of this number will normally be required for duty in that House; second, any ex-Lords Chancellors who are alive, but they are under no obligation to serve, though they frequently do so; and third, such other Privy Councillors as have held high judicial office, (such as Lord Phillimore and Lord Wrenbury) or are ex-Indian or Colonial Judges—but not more than five of the latter class may be appointed members of the Committee.

It will thus be seen that, with the exception of the Lord Chancellor and the Lords of Appeal, the Committee has to rely for its composition on persons whose service is voluntary; voluntary in the sense that it is not obligatory, and voluntary also in the sense that it is unpaid. This situation is open to criticism from two points of view. First, it is a patent error that members of the highest tribunal in the Empire should not be adequately remunerated; secondly, it results in a lack of that stability which is so essential to such a tribunal.

REVISION NEEDED.

Greater stability is indeed the quality which the Judicial Committee needs to ensure even greater efficiency. To ensure that stability—that continuity of personnel which is essential to secure the speedy despatch of business and the uniformity of decisions—it is undoubtedly desirable that the present constitution of the Judicial Committee should be revised.

In considering the representation to be accorded to the Indian and Dominion Judiciaries, it must be borne in mind that the Judicial Committee is called upon to decide questions of law which could not arise in the Mother Country—questions of Hindu law, involving marriage and religious

rites—of Dutch law, which affects the Union of South Africa—of French Law, which arise in the Canadian Courts—and of Moslem Law.

The Committee is often called upon to deal with strange cases and strange customs. Only recently an Indian idol was a litigant by his next friend, and the Committee has often been required to decide intricate questions arising out of Chinese marriage laws. Therefore it is essential that there should be a continuous service of members experienced in dealing with each of these legal codes.

APPEALS FROM INDIA.

More appeals come from India than from any other member of the Empire. The reason for this is clear. In most cases, leave to appeal is necessary. In India that leave is granted generously, for she has no central Court of Appeal of her own; in Canada and Australia, each of which has its Supreme Court of Appeal, leave is granted only in cases deemed to be of substantial mportance; whereas in the Union of South, Africa, which has a Supreme Court of Appeal, leave is granted very rarely. The tendency in the Dominions is towards further legislation for restricting appeals; whereas the increasing population of India tends annually to augment the number coming to the Judicial Committee from her Courts.

The Government recently introduced proposals to change the constitution of the Committee by providing for the appointment two Indian judges or lawyers of high standing as additional members. These proposals were withdrawn owing to various objections. It was pointed out that the new members would be paid on a lower scale than the Law Lords, thus lowering the dignity and importance of the new positions. Objection was also made to the proposals that a part of the salaries of the new judges should be paid by the Indian Government, itself a frequent litigant.

HIGH TRADITIONS.

Canadian critics of the scheme urged that the Committee should be strengthened by the appointment of two first-class lawyers specially versed in Indian laws, but also capable of giving decisions on appeals from the Dominions that would command confidence and respect. From less well-informed quarters came the criticism that the additional members would be a needless luxury. It is hoped that this last-mentioned objection will carry no weight, and that Parliament will recognize the vast importance of reconstituting the Committee in a fashion that will enable its high traditions to be maintained.

If we can afford two more police magistrates for London, we certainly should be able to afford the extra judges required to maintain and increase the inefficiency of the great tribunal which is the final court to appeal for 400,000,000 people.

DUTIES AND OBLIGATIONS OF MAGISTRATES.

The Value of the Advocate.

Addressing the Magistrates' Association in England, Lord Atkin, Lord of Appeal, said, that to the ordinary populace, certainly to the less educated portion of the nation, it is the magistrates who represent the law, and upon their administration of the law depends, on the whole, the view that a great part

of the population takes on whether the law is fairly or unfairly administered. From that point of view a great responsib lity rested upon all of them.

"You have to maintain justice and, as has been said over and over again—it is commonplace, but you will agree with it—it is also extremely important to maintain the appearance of justice' (continued Lord Atkin). "It is unnecessary to speak to this audience about the necessity of listening to both sides, and of giving the defence a fair opportunity of being heard and of remembering the great principle of justice in Englaud, the presumption of innocence. You will also remember—and I think this is a difficulty which sometimes befalls us perhaps more in country places than elsewhere—but there is a temptation to people to come to the magistrate and try to talk the case over with him in advance. That, I feel sure, is a temptation that is resisted by everybody in this hall, as it should be. A prejudiced magistrate who, etymologically, has formed his judgment beforehand, and I think it is of extreme importance that anybody who is appointed to the bench should religiously set his face against allowing a case, or any part of it, to by discussed with him before it comes into court. You come into court and have to listen to all sides of the case, remembering that the accused person has very often great difficulty in presenting his real case to the bench. There can be no question, I think, that the poor are very often prejudiced before a Court of Law, and, I think, before the justices, by not being able to afford legal assistance. After all, all kinds of things are said about advocates. They are sometimes called parasites of society, and they are sometimes said to be seeking to bamboozle the judges, but in fact to my mind there can be no higher function than to try to put forward his case on behalf of an accused client so that justice may be done and that the innocent may be acquitted. It is of the greatest assistance. I have seen over and over again even the educated person falter when he seeks to put his own case forward. If a judicial system could be adopted by which legal aid could be given in suitable cases to the poor accused I think it would be great advantage, but it has to be done and thought over very carefully. I do not believe at all in an official defender. I think that scheme is quite unworkable. But with the assistance of justices who would choose suitable cases for legal aid, and with the help of legal profession, legal aid might well be extended to criminal work before the justices as well to civil work.

THE THORNY QUESTION OF THE POLICE.

To my mind it has been a great fortune that some persons, by writing, by speech or by action, should have spread the belief that there is anything like a general distrust of the police force. I do not believe for a moment that distrust exists at all. I am confident that the public trust and belief in the police has never been abated, that it is no weaker now than it has been at any time, and there have been no grounds or reasons why it should have abated. Of course the particular problems that have recently given rise to controversy do not often I suppose, occur before your bench or mine In our part of the world it has not been usual for a criminal charged with an offence to throw himself upon the neck of the benevolent policeman and blurt out a confession of all all his misdeeds in a statement which may have taken three hours to set down without cross-examination and which only takes about three minutes to write. Those are pieces of good fortune that, I think, only befall persons in high places in respect of very serious offences. At any rate, I do not know

whether you are accustomed to receive from the police statements of elaborate confession. That class of case represents an infinitesimal proportion of police work, so infinitesimal that it would not attract attention at all if it were not that it occurs in serious cases, such as murder cases which come prominently before the public. Bnt to condemn or criticise the police as a whole because of some supposed abuse of the way in which statements are taken is an extreme misunderstanding or misconception of the real proportion of the thing.

The other matter concerning police evidence is one that you are very familiar with. We know that the police as a whole are reliable; they are trying to do their duty and they have no particular interest, when they say that they found a particular person breaking into a house, in accusing him of breaking in when he was not doing so. On the the other hand, you and I know that honest people suppose that the police sometimes have faulty observation and sometimes exaggerate. What is the use of magistrates if they are not able to or do not attempt to gauge the value of evidence, regarding policemen as witnesses, certainly not as infallible, but as honest witnesses trying to do their duty? That is the principle upon which justice is administered in all the courts of this country. It is the principle upon which it ought to be administered and which no policeman has resented or ever will resent. I believe that is the view taken of the police by the magistrates and by the people generally of this country. To my mind it is a great misfortune if anybody ventures to think that there is a charge pending against the police to be adjudicated upon by any body of persons whatsoever. This is, of course, not to say that there may be special and particular abuses which should be rooted out, investigated and punished when they are discovered.

CONVICTION AND PUNISHMENT.

One knows the humanity with which justices approach their painful task. I know of no more responsible duty then the task of awarding punishment. At the same time I think it is just as well to remember that magistrates are there primarily, and in the first instance, to maintain the law. They are not primarily and in the first instance welfare workers or educational officers. The principle on which the whole criminal law is based is that there are certain prohibitions which have to be enforced in the interests of society. The way of enforcing them is to award penalties, either fines or imprisonments, and the whole objects of fines or imprisonments is to deter. I think you will agree that the only claim that society has to impose punishment at all is that it should be deterrent, and the punishments are, as we know, graded. This is not a time in which it can be said that the law will, so to speak, maintain itself. We heard the other day—we were given figures—that crime was increasing. Nobody amongst you would say that at the present moment they notice less tendency in the public to disregard the decrees of the law, and that it is unnecessary that magistrates should sit to enforce the law. I myself should find, rather, a tendency to criticise all ordinances and enactments and a tendency on the part of some people to disregard them when they can do so with safety to themselves. Therefore, though no doubt the magistrates must have regard to the condition of the person who comes before them: their duty is firstly and primarily to society. "Is this a class of offence which society can offord to allow to go unpunished?" If it is not, then it is their dut. to award punishment, whatever may be the consequences to the individual who has offended.

Of course, different offences merit different punishments. There are some cases in which, to my mind, at the present moment the ordinary standard of penalty is not sufficiently severe. I hope you will not regard me as a severe judge ; I do not think that has been my reputation. At the same time, nobody who has administered the criminal law can fail to remember that there are times when a man or a women must harden his or her heart, and see that he does his duty. There is a class of offences which unfortunately is becoming increasingly prevalent, and that is driving vehicles on the highways to the public danger. I see, hear and read of cases where the offence, as committed and as proved, is little short of attempted manslaughter. Really it is sometimes a matter of mere good fortune to the motorist whether he is charged with an offence for which he can be given penal servitude for life or whether he is merely charged with the summary offence of driving to the danger of the public. In these cases I think I am right in saying that for the first offence you cannot award punishment, but for the second offence you can fine, and you can, if you please, award imprisonment. I cannot help thinking that there are many cases in which, if a man is convicted for the second time of driving to the public danger, it is necessary in the interests of society that a deterrent be administered and that he should be sent to prison. This is probably a heresy. I am not at all sure that the popular offence—on which people are very much down—of being drunk in charge of a motor car is not in some ways a less serious one than that of driving when sober to the danger of the people. In some cases it is an accidental matter, not likely to occur again ; at any rate the offender is not in as full possession of his senses as the offender who drives to the public danger when sober.

The man or woman who sends diseased food to market ought to be sent to prison straightaway. I think he can be, even for the first offence, and I think he ought to be ; at any rate he can be sent there for the second offence. I hope very much that you will take that view. The adulteration of milk simply means the slow murder of infants, and the second offence deserves to be treated with firmness.

THE MAGISTRATE'S DUTY TO THE PRISONER.

You yourselves are not responsible for what happens in prison, and the question of prison welfare is a different matter. We talk a great deal about reforming people in prison, but I am very doubtful whether the actual reform or promise to reform works really effectively if it is confined to the time during which a man is in prison. The question is : can you keep them when you are out of prison ? When a man comes out and finds that his home has been broken up, his wife has gone away, his friends look askance at him and he has lost his job, that is the time when he needs help. It is the after-care of prisoners that ought to be before the magistrate's mind always. You have sent the man to prison, but you ought to do the good citizen's part and help him when he comes out of prison. Every magistrate should help, as far as he can, the societies for aiding discharged prisoners.

THE QUESTION OF APPEAL.

The whole system which exists at the present moment of appeals from justices to Quarter Sessions is old-fashioned and really quite unjustifiable. You know you have had your jurisdiction increased enormously. There are dozens of cases now heard before the justices which in the old days would have been heard at quarter sessions and at assizes. If those cases were heard at sessions or assizes the ac-

cused person would have the right of appeal without any trouble. He would only have to apply for leave to appeal in respect of some matters, and on questions of law would have an appeal as a right. He could put forward his case without any formalities at all, and it would be quite certain to be very carefully considered before His Majesty's judges. That case comes before the justices now, and he has lost all those rights. He has got a right of appeal, but only if he gives sureties and gives notice within a certain time, The rules are very technical. The truth of the matter is that it is only relatively rich men who can appeal at all from the justices. The poor are incapacitated from doing so; they are tied up by regulations which are sometimes so technically administered as to amount to a perfect scandal. We had a case some time ago in the Court of Appeal in which a man had had an order made against him. He appealed to quarter sessions. He had to give his notice of appeal and to find his sureties. He had done both within the right time, but had found his surety before he had given notice of appeal. When the case came up before quarter sessions they refused to hear him, on the technical ground that these matters, although they had taken place within five minutes of each other, had been done in the wrong order. The magistrates had the power to hear the case if they had chosen to, but they did not, and although there was a very favourable case for appeal he had no redress at all. That matter ought to be altered. It requires very careful consideration and I think that your association, perhaps more than any other in the country, could help in formulating a more practical scheme by which appeals from the justices could be made simpler and more effective, so that persons who really want to complain of the conviction may have adequate facilities for doing it.

THE CROWN IN LITIGATION.

Sir L. Scott on Case for Reform.

A lecture on "Proceedings by and Against the Crown," a subject of great public importance and of exceptional interest of the entire commmercial community, was given by Sir Leslie Scott, M.P., at the London School of. Economics Mr. Justice Wright presided.

The subject of his address, said SIR LESLIE SCOTT, was the present nature of the proceedings by and against the Crown and the question of their assimi'ation to the ordinary law and procedure which obtained in disputes between citizens. A special committee appointed in 1921 to consider this matter had embodied their report in the text of a draft Bill in 1927, but there was now no possibility of it becoming law during the lifetime of the present Parliament. The functions of the Crown, speaking, generally, were to-day carried on by the various Governments, Departments, and in Crown proceedings it was usually one of those which in fact sued or was sued. The object of reform should be to assimilate Crown law and procedure to ordinary law and procedure, while at the same time steering a middle course between prejudicing the rights of the subject and endangering the interest of the State.

A clear distinction must be drawn between the Crown in its administrative amd political relations with the subject, and the Crown in its business relations. In the latter case it was difficult to see why the Crown should have any special privilege or advantages.

The procedure used by the Crown when it brought a suit against a private person was by High Prerogative Writ and by English

Information. The chief objection to this procedure was that it was antiquated, and in fact a survival from the ordinary procedure in use between subjects before the great procedural reforms introduced by the Judicature Act of 1873. The immense practical convenience to all concerned, of having a uniform system for both Crown and subjects was the main argument for the abolition of this special procedure. Only in certain cases, particularly in revenue cases, did grounds exist for any special procedure, and in most cases the ordinary procedure would be convenient and effective and those Government Departments which were empowered by Statute to use it were already doing so. Procedure by English Information was the Crown method of procedure in Equity on the Revenue side of the King's Bench Division, and was used mainly to obtain the delivery of an account for revenue purposes, to elicit information from defaulting Government servants, and to recover Crown lands which had come into the hands of the subject.

Serious abuse might result from this method of procedure, and it ought to be considerably modified, if not abolished; and it ought not to be possible for the Crown to administer limitless interrogatories, and leave ought to be obtained to administer them, at all events after the first set.

IMPRISONMENT FOR DEBT.

The position with regard to execution by the Crown was that Crown debts took priority over ordinary debts, and the Crown had available to it certain special methods of execution which were more expeditious and more efficent than the ordinary methods of execution. The most important writ in execution was the Writ of Extent, which was used when the Crown did not proceed by the ordinary methods of execution. By means of this writ the Crown could seize the debtor's person and imprison him, and seize all his estate, real and personal. The Debtor's Act, 1869, which abolished imprisonment for debt except in one case, did not apply to the case of Crown debts. There seemed no good reason for the Crown's procedure on execution. It was antiquated and strange, and in the interests of uniformity and convenience it should be abolished and replaced by ordinary methods.

The subject brought an action against the Crown by Petition of Right. In theory the subject could not sue the Crown at all as of right, but only if the Crown would consent to be sued. It was unreasonable, however, that in some purely business transaction between a Government Department and private person the subject should not be able to sue as a matter of right. This was, in fact, possible in those cases where certain Departments were required by Statute to sue in their own name by the ordinary methods of procedure. It showed that the matter was perfectly practicable, and he thought that it should be extended to all the Departments of State. Moreover, the procedure by Petition of Right had at times worked hardship on the subject by causing a substantial degree of delay owing to the initial proceedings necessary to obtain the Royal fiat. For those reasons he thought that the procedure should be abolished subject to its retention as the appropriate procedure in claims against the King personally, or his property. In most of the Dominions, except Canada and Newfoundland, proceedings might be obtained against the Government as of right, and without a fiat, and there was nothing to indicate that the system had not worked well in practice.

TORTS.

Of all the matters in respect of which the present law as to Crown proceedings stood in need of reform, the inability of the Crown to be sued in tort was probably the most glaring, and worked the greatest amount of hardship in actual practice. The theory of the law at present was: The King acted through his servants; the King could do no wrong, therefore the King could not authorize his servant to do wrong, so that if wrong were done the servant was liable and could be sued, not the Crown. In this connexion it might be very difficult or impossible for the subject to find the particular official in a public department who authorized or commanded a wrongful act, particularly if it were an act of omission and not of commission, and under the present procedure the Crown could not be compelled to answer interrogatories or disclose any documents which might lead to the necessary information.

Also, the Crown did not undertake beforehand, in any given case, to pay any damages or costs which might be recovered against its servants, and there had been cases where claims had been abandoned on the refusal of the Crown to give such an undertaking. In altering the law to make the Crown liable for torts there was nothing to prevent exceptions being made when necessary in the interests of the State, as, for example, the Postmaster-General in respect of loss or damage to unregistered letters and parcels, but such exceptions could be provided for specially. Most of the Dominions of the Crown were liable to a greater or lesser degree, in tort, and apparently no evil results had followed.

SALVAGE AND DISCOVERY OF DOCUMENTS.

On the question of salvage, at present no claim could be made by or against the Crown in respect of salvage services rendered by or to a King's ship, except under the Merchant Shipping (Salvage) Act, 1916, when if the King's ship were a tug or specially fitted salvage. A change in the law on this matter would not only be fairer to the subject, but would be an advantage to the Crown.

In litigation between the Crown and the subject the Crown could not, stated briefly, be compelled to give discovery of documents, whereas the subject could to be compelled. No doubt the law could be changed so as to compel the Crown as a matter of right to give discovery in all cases where it would not be detrimental to the public interest to do so, but that did not get over the difficulty that the question that whether or not a document was the subject of privilege was decided by the department concerned. The best thing to be done would be to compel the Crown to deliver a list akin to an affidavit of documents, and a certificate should be given by the head of the department concerned that privilge was claimed for certain of the documents on the ground of public interest.

There was no matter relating to Crown proceedings as to which the law was in such a state of confusion as that of costs. The legal iability of the Crown to pay or not to pay costs was far from easy to ascertain, and in theory each side paid its own costs, but in practice there were many exceptions.

In concluding, he said that he had put the case for reform with as much restraint as possible, but he thought that it was unanswerable.

COURT OF CRIMINAL APPEAL.

Murder Conviction Quashed—Manslaughter Verdict.

REX v. HALL.

(*Before the* LORD CHIEF JUSTICE, MR. JUSTICE AVORY, *and* MR. JUSTICE ACTON.)

The COURT quashed the conviction of William Richard Hall, who was tried before Mr. Justice MacKinnon at Aylesbury Assizes on October 18, 1928, for the murder of Belcher Sines on May 19, 1928, and was sentenced to death. The Court now substituted a verdict of *Guilty* of manslaughter, and sentenced the appellant to ten years' penal servitude.

Mr. Fearnley-Whittingstall appeared for the appellant; Mr. Leslie Marks for the Crown.

JUDGMENT.

The LORD CHIEF JUSTICE (Lord Hewart), in giving the judgment of the Court, said that the case for the Crown was that a few minutes after 10-30 on May 19, the appellant and a man named Mark Sines had a fair fight, and that 15 or 20 minutes later, as Mark Sines passed the appellant's house, the latter ran out and chased him, but failed to catch him; that the appellant shortly afterwards met Shipton Sines, a brother of Mark Sines, and stabbed him, and also found and stabbed Belches Sines, another brother, whose wounds, unfortunately, proved fatal.

The appellant's case was that it was not a fair fight between him and Mark Sines, but that he was set on by a crowd, knocked down, kicked on the head, and put in such a state of mind and body that he did no know what he was doing. He said that he was walking home when one of the men shouted after him; that could not stand that, and turned round and took off his coat with the intention of fighting, but he never had a chance to fight, because he was set on by the whole gang.

The appellant was a labourer, 36 years of age. The Sines brothers lived with a man named Brazil in a caravan. There was nothing previously against any of them. Earlier on May 19 Mark Sines had accused the appellant of kicking him, and said, "All right, I'll see you to-night" at night the three brothers with other men found the appellant in a public-house, and Mark said, "What did you kick me for?" The appellant denied it, and Mark replied, "We'll have it out fair outside." It was at the County Bridge on the way home that the fight or attack on the appellant took place. The appellant's face was serverely injured, and it was hard to believe that those injuries were caused by a bare first.

HIS LORDSHIP detailed the events from the time of the "fight" to the discovery of Shipton and Belcher Sines stabbed near the appellant's house. The police found the appellant in his back kitchen rather dazed and excited, and asked how he got the wounds on his face. He replied, "Them Sineses did it; but I've had my revenge.

THE JUDGE'S RULING.

The Judge at the trial was of opinion that the only issue for the jury was the issue "Murder or acquittal." It was now made clear to the Court that another defence was indicated and to some extent developed—namely, that at the time when the act of killing was committed the appellant was labouring under such provocation that the charge ought to have been reduced to manslaughter. Admittedly, that defence was faced with grave difficulties not the least being the difference between the prosecution and defence about what took place on the bridge.

The appellant's account depended on his own testemony, supplemented by the gravity of his wounds, which was admitted by the medical witnesses for the prosecution. A graver difficulty was the interval which elapsed between the acts giving the provocation and the act with which the appellant was charged. The Judge was of opinion that there was no evidence on which the jury could return a verdict of manslaughter. That might have been because, as the case appeared to him, the provocation proceeded from one man and another man was killed:

But the question for that Court was whether the issue of provocation ought to have been left to the jury. No doubt, if the preliminary question "Was the version of the prosecution or the version of the appellant correct as to the fight ?" was answered in favour of became difficult. But it was for the jury to decide that question, and also the length of the interval which elapsed.

THE LAW OF PROVOCATION.

The law as to provocation had been thus laid down by Chief Justice Tindal in Rex v. Hayward (1833) 6 C. and P., 157, at p. 159):—

The remaining and principal question for their consideration would be whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding ; in which case the law, in compassion to human infirmity, would hold the offence to be manslaughter only ; or, whether there had been time for the blood to cool and for reason to resume its seat, before the mortal wound was given ; in which case the crime would amount to wilful murder.

And in the same summing-up Chief Justice Tindal also said :—

It would be for them to say, whether the prisoner had shown thought, contrivance, and design,, in the mode of possessing himself of this weapon and again replacing it immediately after the blow was struck ; for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion.

So in this case it seemed to the Court that it was for the jury to consider, first, what was the true version of what happnened ; secondly, what, as precisely as possible, was the interval which elapsed before the stabbing of Belcher Sines ; and thirdly, whether the prisoner was at the critical moment "smarting under a provocation so recent and so strong that the might not be considered at the moment the master of his own understanding."

Unfortunately, that defence was never submitted to jury. The only question left to them was whether the prisoner was guilty of murder. In the view of the Court, it would have been right to leave to the jury to question of manslaughter.

The difficult question which now arose was, What was to be done ? No one could doubt that the defence of manslaughter was beset by great difficulties by reason of the weapon chosen, the time which elapsed, and the statements afterwards made by the appellant. But whatever those difficulties might have been, it was impossible to say that the jury would inevitably have found a verdict of murder.

The conviction of murder would, therefore, be quashed, and a verdict of manslaughter substituted. It was obvious that the appellant must undergo severe punishment for that grave offence, and he would be sentenced to ten years' penal servitude.

Solicitors.—Registrar of the Court of Criminal Appeal ; Director of Public Prosecutions.

LADY LAW STUDENTS.

In view of the rejection of an application by a young lady for admittance into the Law College, the following from the "Law Journal" will be read with interest :—

A WELL-KNOWN lawyer, writing in the year 1903 concerning Miss Cave's abortive appeal from the decision of the Bencher's of Gray's Inn refusing to admit her to their Honourable Society, sadly observed that the uprising of a race of female advocates became thereafter a remoter possibility than ever. "Till the Legislature in its gallantry removes existing impediments, none of her sex, save in the capacity of litigants in person, may hope to address a judge of the High Court, the Court of Appeal, or the House of Lords. Should Miss Cave carry out her reported resolution to become a solicitor it is interesting to note that she will be legally entitled to the designation of gentleman."

The remote possibility has become an accomplished fact ; the Courts referred to have been severally and well addressed by women barristers, and have survived. Women counsel and solicitors are so numerous that they are no longer news ; and women "gentlemen" may be seen any day in the Court ; or moving hither and thither outside with papers, or, in the case of counsel, with bags blue, and even red.

Present: Lyall Grant, J.

GUNARATNA vs. SOYSA.

709 P.C. Kalutara 26814.

Decided: November 15, 1928.

Unlawful assembly—Common object of persons composing it, Sections 138, 140 Penal Code—Specific nature of offence in charge—Simple hurt, Section 314 Penal Code—Person to complain in offence of criminal mischief, Section 409 Penal Code.

Where the accused were convicted of being members of an unlawful assembly under Section 140 of the Penal Code on a charge, which stated that their common object was to commit an offence without specifying what particular offence it was

HELD:—The conviction is bad.

Rajapakse with *Wendt* for accused-appellants.

Lyall Grant, J:—The three accused-appellants were charged:—

(1). With being members of an unlawful assembly whose common object was to commit an offence,

(2). With voluntarily causing simple hurt to ten persons with clubs and stones, and

(3). With committing mischief by damaging a 'bus.

All the accused were convicted and sentenced on each count.

On appeal it was objected:—

(1). That the Magistrate should not have tried this case as he had previously received a complaint from one of the complainants against the accused,

(2). That a charge of being a member of an unlawful assembly whose common object was to commit an offence must specify the offence,

(3). That there is no evidence against any of the accused of causing simple hurt to any of the persons mentioned in the charge, and

(4). That there is no complaint of mischief by the owner or the driver of the 'bus.

I do not think there is any substance in the first objection. It was not taken at the trial and appears to be a mere after-thought on appeal. There is nothing to show that it ever occurred to the accused that they were prejudiced by the complainants having made a previous complaint against them or that they were in fact so prejudiced.

The second objection is more serious. The offence of being a member of an unlawful assembly if proved may have far reaching results. It may make the member responsible for acts which he did not commit and did not intend to commit.

The law therefore requires strict proof that the assembly is unlawful. It is not sufficient to aver that the assembly is for the purpose of committing an offence without specifying the nature of the offence. In order to make a member of an assembly criminally liable for joining that assembly, it must be clearly shown in what respect the assembly was unlawful, and the nature of the unlawfulness must be specified in the charge, otherwise the accused does not know of what offence he is accused. Suppose he were accused of joining an assembly the common object of which was to commit a murder and the evidence showed that the common object was to commit insult, he would be gravely prejudiced in making his defence, if he could be convicted without an alteration in the charge.

If however the charge as here merely sets forth that the common object of the assembly was to commit an offence without specifying what offence, it is impossible for the accused to know the charge which he is called upon to meet. Very often an assembly meets quite lawfully but in course of time it forms the intention to do some unlawful act. That intention is imputed to each individual who remained in the assembly after the general intention is held to have been formed whether he personally had such intention or not. But the intention may change as time goes on. There may be formed an intention to commit trespass and later there may be added an intention to commit arson and murder. Before the latter intention is formed the accused may have left the assembly.

The words of the sub-section are:—

"To commit any mischief or criminal trespass or other offence," not merely to "commit an offence."

The Indian Courts have insisted on the common object being distinctly described in the indictment. See *Tafazzul Ahmed Chowdrey vs. Queen Empress,* (1), and also *Sabir and another vs. Queen Empress* (2).

In the latter case the conviction was quashed because it was not clear which of two common objects the Jury held to be proved and also because if the Jury held that the common object was to 'injure Nidu' that common object was never charged at all and the accused person had no opportunity of meeting it. The Court goes on to observe that "the finding of the Jury with regard to the common object may have very great effect upon the seriousness of the crime and therefore the punishment."

In *Behari Marton vs. Queen Empress,* (3), it was held that an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him and unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to make him responsible for acts not committed by himself but by others with whom he was in company.

The charge here is merely that the accused were members of an unlawful assembly composed of five or more persons with the common object of committing an offence. The conviction agrees with the charge.

No hint is given of the nature of the offence intended and it is clear that a conviction on this count is bad. It is true that in the judgment the Magistrate says the common object was that of abusing and harassing the Police Vidane and his supporters, but there is nothing to show that the accused knew that they were charged with this offence. Even here it is doubtful what offence is disclosed.

The failure of this charge makes it necessary to examine closely the evidence on the other charges against each of the accused.

(1) 26 I.L.R. Cal. Series. p. 633.
(2) 22 Cal. 276 (new series).
(3) 11 Cal. 106.

The only specific act of hurt which the Magistrate has found proved against any of the accused is a blow received by one Haramanis. The Magistrate says that Haramanis stated that he received this injury from the first accused. But Haramanis distinctly says that he received this injury from the second accused, and that the first accused did nothing. It was Pedrick who says the first accused struck Haramanis.

The Magistrate makes a passing reference to the injury to Pedrick but Pedrick says he cannot say who gave him these injuries.

Of the ten persons alleged to have been assaulted only one other was called as a witness and though she says she was hit by a stone she does not say who threw it.

There is therefore no evidence on which any of the accused can be convicted of hurt.

In regard to the charge of criminal mischief to the 'bus, no complaint has been made by the owner or driver or anyone responsible for it.

The only evidence against any of the accused on the charge is that Haramanis says the first accused "dug" the 'bus with a closed clasp knife. He does not say where or with what result.

On the other hand Pedrick says the accused did not strike the 'bus. Here again the evidence is altogether inconclusive.

The evidence generally gives one the impression that the witnesses are either unable or unwilling to give definite testimony against any of the accused.

No case has been made out against any of the accused. Their appeals must be allowed and they must be acquitted.

Present: Schneider J., and Garvin, J.

PAVALAMMA VS. ARUMUGAM.

177 D. C. Jaffna 23049

Decided: 7th November, 1928.

Divorce—Malicious Desertion—Intention—Habitual Cruelty as a Ground for Separation Mensa et Thoro.

HELD:—Malicious desertion which entitles a person to claim a divorce is

not a mere departure from the house but a departure for such a length of time and under such circumstances as to show that the spouse does not intend to return.

H. V. Perera for defendant-appellant.

Keuneman for plaintiff-respondent.

Schneider, J.—In this action the plaintiff sues the defendant, her husband. Her first prayer is for a separation *a mensa et thoro* on the ground of cruel, intolerable and dangerous conduct on the part of her husband towards her. Her next prayer is in the alternative for a decree *e vinculo matrimonii* on the ground of his malicious desertion of her. She also claims alimony and a sum of Rs. 600 which she alleges she had spent during an illness. The defendant resisted all her claims and denied the truth of the allegations upon which they were founded.

The parties went to trial upon certain issues which specifically raised all the matters in dispute. They are called issues "settled" and would appear to be issues upon which the parties were agreed to proceed to trial. It appears to me that the learned District Judge has taken a correct view of the facts. I agree with him that the plaintiff's father's interference between the plaintiff and her husband has greatly contributed to the estrangement of the plaintiff from her husband. I accept nearly all the learned District Judge's findings on the facts. The touchstone by which the evidence of the plaintiff is to be tested is the letter D. 1, which she wrote to her husband. Her explanation in her evidence of the object with which it was written is obviously false. Her true feelings towards her husband, her desire to return to him even if it should entail any punishment at his hands, and the view she took of the events which led to his estrangement from her are truthfully set out in that letter undistorted by the influence of her father.

I accept the evidence as proving that, in consequence of a violent quarrel between her father and her husband she and her husband also had a quarrel and that he beat her. But she forgave him and continued to live with him in his mother's house. There she was subjected to abuse both by her mother-in-law and her husband. Upon her appealing to her father he obtained a warrant from the Police Court and removed her from her husband. She then lodged a complaint at a Police Station, making an exaggerated statement of her husband's behaviour towards her and stating that she would not go back to him. Her husband was aware of this complaint. He is a Government Surveyor, and was stationed at the time in the Tangalle District. His vacation leave having expired, he returned to his station alone.

The plaintiff next sued him to recover some jewellery and obtained a decree in June 1927. She instituted the present action in October, 1927. The letter to which I have referred, D 1, was written presumably on the 10th January, 1927. She addresses her husband in affectionate terms and suggests to him to call for her at a time when her father was out of the house and take her away. Her case is that she received no reply to it from the defendant, but she admits that the Postmaster to whom she sent that letter did ask her to come to where her husband was stationed with one of her brothers. The defendant says he sent a reply to it, and the learned District Judge appears to adopt the view that it probably fell into her father's hands and did not reach her.

The farthest extent to which the evidence will carry the case for the plaintiff is that the defendant has been guilty of simple desertion. It fails to prove habitual cruelty on his part, or conduct that made life with him intolerable or dangerous. Without proof of such facts a decree for separation cannot be granted. See *Wright vs. Wright* (1.)

Simple desertion is not sufficient to entitle a plaintiff to claim a divorce. The desertion must be malicious. In *Sinnathankan vs. Vyramuthan* (2) in 1901, this Court, consisting of a Bench of three Judges, stated what the meaning was of malicious desertion. It is not a mere departure from the house, but a departure for such a length of time and under such circumstances as to show that the spouse does not intend to return.

---

(1) 1903. 9 N. R. 31.

(2) 2 Browne's Reports 138.

Garvin, J.—I agree.

Not only am I bound by that decision but I agree with the exposition of the term malicious desertion given there.

The plaintiff has failed in this case to prove that her husband deserted her maliciously. Her action accordingly fails in regard to both reliefs prayed for. It is dismissed, but without costs, as the defendant is her husband. But I would add that if the defendant persists in keeping away from his wife without an effort on his part to get her back, there might be room to construe his conduct as malicious desertion.

Present: Lyall-Grant, J.

PERERA vs. SILVA.

120 D. C. (Crl.) Kalutara 10574

Decided: 12th November, 1928.

Civil Procedure Code Sections 325 and 377—Obstruction to a Fiscal's Officer—Judgment debtor must be made a party.

HELD:—In proceedings under Section 325 of the Civil Procedure Code, both the judgment debtor and the person resisting and obstructing must be made respondents. Failure to do so is a fatal objection to a conviction.

Under Section 325 the complainant should be the judgment creditor under a decree for the possession of property.

N. E. Weerasooria for appellants.

Zoysa, K.C., with *Rajapakse* for the respondent.

Lyall-Grant, J.—This is an appeal from an order made under Section 325 and 377 of the Civil Procedure Code, dealing with the appellants for obstruction to a Fiscal's Officer delivering the possession of property. The 1st and 2nd appellants were sentenced, the 1st appellant to imprisonment till the rising of the Court, and the 2nd appellant to one week's simple imprisonment.

It appears that the petitioner, who is the respondent to this appeal, got a decree in a mortgage action which was originally brought against the 2nd defendant as representative of the estate of the deceased mortgagor. In the course of the proceedings, however, it was objected that the defendant was not the legal representative of the estate, as it was of the value of over Rs. 1,000, and the Secretary of the Court was substituted in his place. The decree actually proceeded against the Secretary of the Court and the purchaser of the land which was mortgaged. Accordingly neither of the present appellants was mentioned in the decree.

Now, Section 325 provides that in proceedings for and in respect of obstruction to a Fiscal's Officer The judgment debtor and the person resisting and obstructing shall be named respondents. It was decided by Hutchinson, C. J., and Wood-Renton, J., in the case of *Kumarathy Fernando vs. Hetu Etana* (1) that the fact that the defendant was not made a respondent to the proceedings was a fatal objection to a conviction under these provisions.

This in itself would be sufficient to set aside the convictions, but it was further pointed out that that Section 325 was not applicable to the present case inasmuch as the complainant was not a judgment creditor under a decree for the possession of property. What she had obtained was a decree on a mortgage under which the land was sold, and it was as purchaser of the land on a Fiscal's sale that she acquired a direct interest in the property. That also in itself takes these proceedings outside the operation of Section 325. This has been decided by a Full Bench of this Court in the case of *De Silva vs. De Silva et al* (2).

For these reasons, the appeals must be allowed and the convictions quashed.

Present: Schneder, J.

KARUNARATNE vs. ELIAS.

253 C.R. Gampaha 503.

Decided: 20th November, 1928.

Ordinance No. 7 of 1840—An agreement to cut cabook from a land and a contract to supply labour for cutting cabook distinguished—When is a notarial agreement necessary?

HELD:—Where a defendant agreed to pay the plaintiff for work and labour expended by him in cutting

(1) 2 Weerakoon's Reports 43.
(2) 3. N. L. R. 161.

cabook stones from the defendant's land (not a sum of money but 90 per cent. of the stones cut by the plaintiff) a notarial agreement is not necessary before an action can be maintained. The agreement is not the same as one entitling the plaintiff to enter upon the defendant's land and to cut cabook stones therefrom.

C. V. Ranawake for appellant.

N. E. Weerasooria for respondent.

Schneider, J.:—The plaint is "2, that the plaintiff and the defendant mutually agreed that the plaintiff should supply labour for cutting cabook stones on the land of the defendant commonly known as Kadewatte situated at Uruwala aforesaid and that the defendant should allow the plaintiff to remove the cabook stones so cut minus 10 per cent. for his benefit as ground share.

"3, that in or about January, 1928, in pursuance of the above contract the plaintiff abovenamed cut 4,000 cabooks from the said land and out of which 400 were allotted to the defendant as his ground share, 3,600 to the plaintiff as his share as agreed upon."

I think the meaning of those allegations is clearly this. The defendant agreed to pay the plaintiff for work and labour expended by him in cutting cabook from the defendant's land not a sum of money but 90 per cent. of the stones cut by the plaintiff, the balance 10 per cent. being the property of the defendant. In pursuance of this agreement the plaintiff became entitled to 3,600 stones after deducting the defendant's share. He was wrongfully prevented by the defendant from removing 3,100 of them and he thereby suffered damage. He is not seeking to enforce an agreement entitling him to enter upon the defendant's land and to cut cabook stones therefrom. That clearly would be an agreement for "establishing any interest affecting immovable property" within the meaning of Ordinance No. 7 of 1840 and would have to be executed with the formalities required by that Ordinance.

The issue formulated and tried was "can the plaintiff maintain the action in the absence of a notarial agreement?" I do not agree with the interpretation placed on that issue by the learned Commissioner that it raised the question "whether the agreement set out in para 2 of the plaint was one creating an interest in land." The issue is somewhat wider. It raises the question whether the plaintiff can maintain this action, that is, accepting all the allegations in the plaint. I have already given my reasons for holding that he can, and it would be apparent that this case is quite different to the case of *Perera vs. Amarasooriya* referred to by the Commissioner. There the claim was for damages because the defendant prevented the plaintiff from going on a land to prospect for plumbago.

I set aside the decree of the lower Court and send the case back for trial upon issues such as the following:—Whether the agreement was that the plaintiff should receive 90 per cent. of the stones cut by him; whether the defendant appropriated 3,100 stones belonging to the plaintiff; if so, what damages the plaintiff sustained.

The plaintiff will have his costs of the trial already had, and of this appeal. All other costs will abide the final result of the action.

Present: Schneider, J.

APPUHAMY vs. PUNCHI HAMY.

181 C.R. Gampaha 190.

Decided: 23rd November, 1928.

Promissory Note—Assignment by the Payee—Notice of the Assignment.

HELD:—Before a plaintiff can sue upon a promissory note which has been assigned to him by the payee, the defendant should have had notice of the assignment in writing.

Mohamadu vs. Ahamad Ali 17 N.L.R. 504, followed.

Tisseverasinghe for appellant.

H. V. Perera for respondent.

Schneider, J.:—The learned Commissioner has dismissed the plaintiff's action deciding on the second issue framed and tried that the plaintiff cannot maintain the action on the promis-

1. 12 N.L.R. 87.

sory note sued on, as it had been duly endorsed. It would appear from the pleadings and the documents on the record that the defendant made a promissory note payable on demand to one Charlotte Hamine, and the latter by a separate writing assigned the promissory note in question to the plaintiff with notice to the defendant. The defendant denies that there was notice of the assignment.

It would appear from the manner the action has been disposed of in the lower Court that both parties did not precisely realize what exactly was the legal situation. In the case of *Mohamadu vs. Ahamadali* (1) will be found the law applicable. The obligation arising upon this document, which is called a promissory note in this action, on the part of the defendant, can be assigned, and it would appear *prima facie* to have been legally assigned by the payee to the plaintiff. But before the plaintiff can sue upon that assignment the defendant should have had notice of the assignment in writing.

I set aside the order of the Commissioner and remit the action for trial in due course. In regard to the costs of the proceedings already had and of this appeal, my order is that they abide the final result.

—o—

Present: Schneider, J.

SUB-INSPECTOR OF POLICE vs. SILVA.

789 P.C. Kalutara 28042.

Decided: 28th November, 1928.

Ceylon Penal Code Sections 287, 484 and 488—Insult—Offences which involve a breach of the peace.

HELD:—Insult, to be an offence under Section 484 of the Ceylon Penal Code must be offered to a person's face or must be uttered in his presence or hearing.

A conviction under Section 287 or 484 or 488 of the Penal Code is not a conviction of an offence involving a breach of the peace.

(1) 1914, 17 N.L.R. 504.

Aiyer for accused-appellant.

Schneider, J.:—I am not disposed to interfere with the conviction of the accused in so far as the conviction under Section 484 relates to Sheriff. The evidence is that at the time the insulting words were used towards the sub-Inspector of Police he was not there. I am disposed to accept the contention of Mr. Aiyer that in those circumstances the sub-Inspector cannot be said to have been insulted. Insult must be offered to a person's face or must be uttered in his presence or hearing. I would therefore vary the conviction of the accused under Section 484 to insult offered to P.C. Sheriff only.

In regard to the convictions under Sections 287 and 488, I see no reason to differ from the learned Magistrate, nor do I see any reason to interfere with the sentence of a fine of Rs. 50 which has been imposed upon the accused. But it is not possible to sustain the Magistrate's order that the accused should give security to keep the peace for a period of one year. The first mistake the Magistrate has made is in stating that he makes the order under Section 81. In the circumstances of this case the order was made because the person has been convicted of an offence and therefore the order comes under Section 80. Then the Magistrate had no jurisdiction to make an order for a period exceeding six months. Therefore his order that it should be for a period of one year is *ultra vires*. For a third reason he had no authority to make the order because the offences of which the accused has been found guilty are not those mentioned in Section 80 (1). They are not offences involving a breach of the peace.

Mr. Aiyer's diligence has discovered three decisions which entirely cover this case. In *Silva vs. Fernando* (1) it was held that a conviction under Section 484 was not a conviction of an offence involving a breach of the peace. In *Rahim vs. Nonahamy* (2) it was held that a conviction under Section 287 was not a conviction of an offence involving a breach of the peace, and in *Wijesuriya vs. Abeyesekere* (3) it was held that a conviction under Section 488 was not a conviction of an offence

(1) 1917, 4 C.W.R. 260.
(2) 1916, 19 N.L.R. 169.
(3) 1919, 21 N.L.R. 159.

involving a breach of the peace. It would therefore appear that the Magistrate had no jurisdiction to make the order requiring the accused to enter into a bond to keep the peace. That part of the order is set aside and with the variation already indicated the conviction and sentence are affirmed.

—o—

Present: Garvin J., and Lyall-Grant, J.

MEIYA NONA VS. DAVITH VEDERALA.

280*D. C. Chilaw 8466.

Decided: November 16, 1928.

Deed of Gift—Fidei commissum—Prohibition against alienation—No designation of fidei commissaries—Meaning of "their heirs"—Rule of interpretation—Vesting of full rights of ownership.

A deed of gift contained the following words:—

"I, for and in consideration of the love and affection I have and bear to my children (A, B, C, D, and E).. have granted conveyed and set over (the land in question) unto them by way of gift, subject to the condition and promise that the same shall not be changed or altered at any time hereafter or in whatever manner."

Then followed in general terms a prohibition against alienation and thereafter the following words:—

"Therefore full power is hereby granted unto the five donees, and their executors administrators and assigns to own all the right and power, which I, the donor, and my heirs executors administrators and assigns have and hold in the same, and to possess the same undisturbedly for ever subject to the aforesaid conditions and stipulations."

HELD:—These words do not create a valid *fidei commissum*, as there is no indication who the person or persons in whose interests the prohibition has been inposed are.

H. V. Perera with *Weerasooriya* for defendant-appellant.

Samarakoon for plaintiff-respondent.

Garvin, J.—By a certain Deed of Gift dated, the 16th of July, 1894, and marked P1, one Naide, who was the owner of a half share of the land described in the plaint, made a gift of the premises to his five children. One of these children has died intestate and unmarried and the case has proceeded upon the assumption that his share vested in the other four. Lethina Manamali, one of the remaining four, was married to one Aratchi Naide, and died leaving surviving her husband Aratchi Naide and two children—the plaintiff and another. Under the ordinary rules of intestate succesSon, at Lethina's death, her share of 1/8 vested as to 1/16 in her husband and as to the remaining 1/16 in her two children in the proportion of a half to each. At a sale in execution against Aratchi Naide his 1/16 share was seized and sold and purchased by the defendant. The plaintiff brings this action claiming that the whole of Lethina's share vested in him and his sister to the exclusion of their father Aratchi Naide, and that the defendant has, therefore, acquired nothing of the purchase in sale in execution against Aratchi Naide. The foundation of this contention is that the Deed of Gift by Naide to his five children vested the property in those children subject their heirs up to the fourth generation. to a "fidei commissum" in favour of

The question for determination, therefore, involves a construction of this Deed. After reciting his title to the several allotments of land which were the subject of the Deed, the donor proceeds as follows:—

"I, for and in consideration of the love and affection which I have and bear to my children (here follow the names of the five children), and for divers other good causes, have granted, conveyed and set over the same unto them by way of gift, subject to the condition and promise that the same shall not be changed or altered at any time hereafter or in whatsoever manner."

There is here a simple gift of the premises to the five children and a declaration by the donor that the gift shall be irrevocable. There follows in general terms a prohibition of sale, mortgage, gift, exchange, or alienation in any other manner. Then follows a clause which conatins the words which are

relied on as creating a "fidei commissum":—

"Therefore full power is hereby granted unto the five donees, and their heirs, executors, administrators and assigns to own all the right and power, which I, the donor and my heirs, executors, administrators and assigns have and hold in and to the same and to possess the same undisturbedly for ever subject to the aforesaid conditions and stipulations; and besides I have bound myself to settle any disputes which may arise regarding this donation owing to any defect of title of me the donor." It must be remembered that the Deed in question was drawn in the Sinhalese language and the clause as above quoted is taken from a translation filed of record and accepted by the parties as correct. Now, these words it seems to me are in the nature of a habendum clause and are intended to vest in the donees, their heirs, executors, administrators and assigns all rights and powers in regard to this land which at the time of the making of this gift were vested in the donor. The conditions and stipulations subject to which this grant of the rights of the donor is made clearly refer to the prohibition against alienation earlier referred to. There is, therefore, here a gift to certain donees subject to a prohibition against alienation, but there is no indication who the person or persons in whose interests the prohibition has been imposed, and to whom the title to these premises is to pass at the death of the donees.

It has been urged that the words to which I have just referred, namely, that the grant to the five donees, their heirs, executors, administrators and assigns of all the right and power of the donor, subject to the aforesaid condition, namely, the prohibition against alienation, clearly indicates that the prohibition against alienation is imposed upon the donees and after them on their heirs and in default of heirs on the executors, administrators and assigns of the original donees. Reading the document in this way, it is urged that there is here a grant to the donees subject to a "fidei commissum" in favour of their heirs. But that does not carry the case for the plaintiff very far. Aratchi Naide was the heir of Lethina in that at her death the property would vest as to her share in him, and consequently the defendant would be entitled to the share he claims.

It is then sought to interpret the words "their heirs" to mean the heirs of the donees and the heirs of those heirs from generation to generation, and the sole basis upon which it is sought to base this contention is the presence of the words "to possess the same undisturbedly for ever."

Now, as I have already indicated, I am quite unable to assent to the interpretation it is sought to place upon these words. It is impossible to do so without taking the greatest liberty with the language employed by the donor. Moreover, the clause as a whole is such as one would expect, where it is intended to vest the donee with full rights of ownership, and the language which has been employed is language which would ordinarily be employed for that purpose. The words "to possess the same undisturbedly for ever" are words which are usually employed to indicate the vesting of the full rights of ownership and no more. It seems to me that the plain and ordinary interpretation of the language of this clause is that the premises were to be vested in the donees, their executors, administrators and assigns for ever. This is a Deed of Gift and whatever the intention of the donor may have been the rules of interpretation require that one should give to the language which he has used the ordinary meaning which would be attached to those words. Interpreting this Deed in the light of that well-known rule of interpretation, the utmost that can be said is that there is here a Deed of Gift in favour of five donees and a prohibition against alienation, but with no indication as to the persons or persons or class of persons who were to take in succession to the donees. In my opinion, the property which was the subject of this Deed of Gift vested in the five donees absolutely.

In this view, the judgment under appeal must be set aside, and the plaintiff's action dismissed with costs both here and in the Court below.

Lyall-Grant, J.—I agree.

Present: Schneider, J.

SILVA VS. SAMARAWICKRAMA.

227 C. R. Matara 14727.

Decided: November 19, 1928.

Interlocutory order from Court of Requests—Meaning of final order—S. S. 39 and 80 of the Courts Ordinance.

HELD:—No appeal lies from an order which is not a final order from the Court of Requests.

Weerasooriya for defendant-appellant.
Rajapakse for plaintiff-respondent.

Schneider, J.—Out of four issues which were formulated and tried the learned Commissioner decided two and made order that the other two should be tried on another day. This appeal is from the decision of those issues.

A preliminary objection was taken to it on the ground that no appeal lies as the judgment in question is not a "final judgment or any order having the effect of a final judgment" within the meaning of Sections 39 and 80 of the Courts Ordinance (No. 1 of 1889).

There are two cases to which I would refer, in which this question has been considered. In *Culantaivalu vs. Somasundram* Lascelles, C. J., described a final order as an "ultimate or last order that the Court could make in any such case." In *Arnolis Fernando vs. Selestinu Fernando et al* (2) Bertram, J. J., expressed himself to the same effect. The Court has not made its ultimate order. The preliminary objection accordingly prevails and the appeal is dismissed with costs.

As Mr. Weerasooriya wishes me to do so I would add that my present judgment decides nothing but the question that no appeal lies at this stage from the decision of the Commissioner on issues 1 and 2. That decision might be brought up in appeal when the action is finally decided.

1. 1904. 2 Bal. Rep. 122.
2. 1922. 4 Cey. Law Rec. 71.

Present: Garvin, J. and Lyall-Grant, J.

ABDUL MAJEED vs. WASAGAM CHETTY.

173 D.C. (Inty.) Matara 41.

Decided: November 14, 1928.

Insolvency Ordinance 7 of 1853—Sections 20 and 26—Adjudication on insolvent's petition—Discretion of the Court—Annulment of adjudication.

Upon his own petition, supported by an affidavit, A was adjudged an insolvent by the District Judge under Section 26 of the Insolvency Ordinance. Subsequently a creditor moved to annul the adjudication on the ground that the available assets of the debtor at the time of the adjudication were not sufficient to pay 5s. in the £ and also that the dates of the debts owing to the insolvent had not been set out (in the inventory under Section 20 of the Ordinance). No further evidence was led.

HELD: The District Judge having exercised his discretion in ordering the adjudication may not later upon the same material annul it. [Majeed vs. Chetty 5 Bal. N.I. explained.]

Weerasooriya for insolvent appellant.

Rajapakse for creditor respondent.

Garvin, J:—In this case the appellant was adjudicated an insolvent upon his own application. The application was in the usual form and to it was attached the usual statements of assets and liabilities duly verified by the required affidavit. The learned District Judge thereupon, acting in pursuance of Section 26, adjudicated him an insolvent. Sittings were fixed for the proof of debts, creditors appeared, and debts were proved. On the 28th of August, a certain creditor appeared to prove a debt; having done so, his Counsel took the objection that the adjudication was bad and should be annulled. The principal grounds upon which his objection was based would seem to be, first, that the material before the Court, to which I have already referred, was insufficient to justify the Court in making such an adjudication, and secondly, that, in any event, the Court was wrong in acting upon the material, for the reason that

the dates upon which the creditors referred to in the list of assets incurred their respective liabilities to the insolvent were not set out. This objection purports to be based on the case of Majeed v. Chetty (1), upon which it is sought to rest the argument that an affidavit is of itself insufficient to justify the Court holding that the insolvent had an available estate sufficient to pay 5 shillings in the pound, and that the law requires evidence in addition to an affidavit before such an averment can be considered to have been established. Upon an examination of the case of *Majeed v. Chetty*, which has been submitted to this Court in two cases to which I shall presently refer, and after a consideration to which I have myself submitted this judgment, I do not think that it affords any foundation for the contention that it is an authority for any such proposition. In *Seāris v. Ramanathan* (2) the case was specially considered in the judgment of Bertram, C.J., and his estimate of the case is expressed in the following words:—"I think it is clear that in *Majeed v Chetty* what the Court must have meant was not that in no case would the petitioner's affidavit be sufficient evidence of the facts alleged but that the affidavit in the particular case was not sufficient." A similar view of this case was taken by De Sampayo, J., in the case of *In Re The Insolvency of Abdul Cader* (3).

The learned District Judge's judgment was obviously influenced by the view submitted to him of the case of *Majeed v Chetty*. The only other observation made by him which might be said to be independent of the case of *Majeed v Chetty* consists in the statement that the recovery of the sums due on the promissory notes and as the price of goods sold and delivered is highly uncertain.

Now, no additional material was placed before the learned District Judge in this case: It would seem, therefore, that while he was satisfied and still is satisfied with the oath of the insolvent that the sums claimed by him to be assets of his estate are really due, a doubt has entered his mind as to whether they may eventually prove to be recoverable. I am unable to see any material on this record to justify such a doubt. There certainly was no material of any kind to raise such a doubt placed before the Court by the opposing creditor.

As to the contention that the adjudication is defective in that the exact dates on which certain liabilities arose have not been fully set out in the schedule, it is sufficient to say that while I agree that it is necessary in the interests of all concerned that a compliance with the requirements of Section 20 should be insisted upon, I am unable to say that the omission to specify such dates is necessarily fatal to an adjudication which a Court has made after consideration of all the material placed before it.

For these reasons, I think that the order annulling this adjudication must be set aside and the appeal allowed with costs.

(1) 5 Bal. Notes of cases p 1.

(2) 23 N.L.R. p 315.

(3) 23 N.L.R. p 381.

Lyall-Grant, J:—I agree. The Court, here, made an adjudication upon certain material supplied to it by the applicant-insolvent and in doing so exercised its discretion. Later, without having any further material placed before it, it proceeded to exercise its discretion in a different way. I should require very strong argument to convince me that the Court having once exercised its discretion could re-open the matter so as to exercise it in a different way.

Present: Garvin, J.

THE KING vs. RATNAM.

544 P.C. Jaffna 1880.

Decided: November 30, 1928.

Criminal Procedure Code, Sections 93, 95, 325—Recognizance—Sureties—Where the accused does not give security.

Held: The provisions of Section 93 of the Criminal Procedure Code have no application to the bonds contemplated by Section 325.

Per Garvin, J: "I am aware of no reason why, when making an order

under Section 325 (b), the Court may not in the interests of the accused specify a date on or before which the recognizance should be given, and adjourn the proceedings for the purpose, either remanding the accused or releasing him on bail.

Rajakariar for the appellant.

Ramachandra for the respondent.

The Deputy Solicitor-General with *Basnayake, Crown Counsel,* as *amicus curiae.*

Garvin, J:—I am indebted to the learned Deputy Solicitor-General for the assistance he has given me in this matter. He appeared upon a notice issued by this Court upon an order made by me on the 18th September last. At the conclusion of a trial the Police Magistrate elected to proceed under the provisions of Section 325. Instead of proceeding to conviction as in the case of a normal trial, for reasons given by him, he decided to proceed under the Section referred to and he accordingly directed the accused under the provisions of sub-Section B of that section to come up for conviction and sentence whenever required to do so at any time within the next three years "giving two sureties in Rs. 200 each (with personal recognizance Rs. 200)." He concluded his order as follows: "Accused to be committed to rigorous imprisonment pending his furnishing such sureties (Section 95 Criminal Procedure Code) (limit to six months.)"

Now, the concluding part of his order is in my opinion clearly wrong. The provisions of Section 93 are applicable in the case of persons ordered to give security under the provisions of Chapter 7 of the Criminal Procedure Code. They have no application to the bonds contemplated by Section 325. That part of the order must therefore be eliminated.

In the course of the argument we have had under consideration the position which will result in the event of the failure of the accused to give the security referred to in the Police Magistrate's order. The order itself specifies no period within which this security is to be given, and the circumstance of the Magistrate proceeding to make that part of the order which I have found necessary to eliminate as irregular and unjustified by law, indicates that security was in fact not given at the time the order was made. There is little purpose in sending the case back to the Police Magistrate without any reference to this aspect of the matter. Section 325 is undoubtedly an extremely difficult section to construe, but it is necessary that an attempt should be made to give it, if possible, an interpretation which will carry out what appears to have been the intention of the legislature. In the first place it is to be noted that the Court is directed "without proceeding to conviction" to make certain orders. Those words it seems to me must be construed as meaning "without proceeding to record a conviction." Presumably it was the benevolent intention of the legislature that a person who, though having been found guilty of having committed a breach of the law, made it appear that his case deserved the special treatment contemplated by Section 325, should not be placed in the position of a person who has been convicted of an offence and hence while he is to be dealt with for having committed a breach of the law, that breach is not to be placed on record as a conviction of an offence. Two alternative courses are indicated. The Court may (a) order such offender to be discharged after such admonition as to the Court shall seem fit, or (b) discharge the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour, and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order of the Court.

The Police Magistrate obviously intended to proceed under the latter of these two alternatives. In a case where the accused is prepared to, and does in fact give security at once, no difficulty arises. But cases do often occur, in which the accused is not in a position to find sureties at the moment, and when it is necessary and desirable that he should be given time to find, sureties and complete the recognizance. The section does not specifically deal with such a case. But I am aware of no reason why when making an order under Section (b) the Court may not in

the interests of the accused specify date on or before which the recognizance should be given, and adjourn the proceedings for the purpose, either remanding the accused or releasing him on bail. On the adjourned date if the accused complies with the order the matter is at an end. If however the order is not complied with, what course should the Magistrate follow?

It seems to me that the order of discharge is conditional and made for the benefit of the accused. If he fails to comply with the condition and take the benefit of the order, the Magistrate is entitled to proceed as from the point at which he stayed his hand under the provisions of Section 325, and enter a conviction and pass sentence in accordance with Section 190. With these observations I would send the case back to the Court below, vary the order, and direct that it be amended so as to give the accused a fortnight's time from the date on which this order is communicated to the accused to comply with the conditions upon which he has been given the benefit of an order under Section 325 (1) b of the Criminal Procedure Code.