The Ceylon Law Weekly

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

VOLUME XXVIII

WITH A DIGEST

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Held : (i) That a Bank Manager has no authority implied by law to certify for payment a post-dated cheque.

(ii) That certification of a cheque for payment is not an acceptance within the meaning of the English or Indian Act or the common law.

Per LORD WRIGHT : " Both Chalmers, and Paget (The Law of Banking, 4th ed. p.164), are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded, it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the court in 1810 in *Robson vs Bennett* (1810 – 2 Taunt. 388). That is a practice between bankers for the purpose of clearing. It was judicially recognized by Sir Alexander Cockburn, C.J. in *Goodwin vs Robarts* (L.R. 10 Ex., at p.351) in these words : ' A custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance by which they become bound to one another.' This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of rule 12 of the new regulations and rules of the Calcutta Clearing Banks' Association, which are exhibited in the documents of this case. Rule 12 states : ' It shall be permissible for any member or sub-member in the intervals of clearing hours, to apply for the " acceptance " of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of " acceptance " of the document.' It is to be noted that though it uses the term ' acceptance ' it puts it in inverted commas so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked, and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot, however, be identified with an acceptance."

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" I do hereby authorize you to sell my property bearing assessment No. 44 at Kotta Road, Borella for the sum of Rupees twenty thousand five hundred (Rs. 20,500/–).

I agree to pay you by way of remuneration Rupees five hundred (Rs. 500/–). This holds good for 2 weeks."

The plaintiff found a buyer who was willing to pay the stipulated price, but the defendant when called upon refused to execute the transfer.

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This is an action instituted by an alien enemy. The Custodian of Enemy Property intervened and was added as a party-plaintiff under section **404** of the Civil Procedure Code. The defendant contended that the Custodian was not entitled to proceed with the action in the absence of the plaintiff. The District Judge held that the added-plaintiff was entitled to proceed with the action. The defendant appealed from that decision. The Supreme Court dismissed the appeal and upheld the District Judge's order.

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Held : (i) That once permission to sue or defend has been granted under section **16** of the Civil Procedure Code, the court is not entitled to

hear and decide objections against the application for permission to sue.

(ii) That the notice required to be given by section **16** of the Civil Procedure Code is notice of the institution of the action, and not notice of the application for permission to sue or defend.

Per HOWARD, C.J. : "The appellants put forward their claim as representing a certain number of the original members of the Association. In putting forward this claim they maintained that at the time of filing the action they and they alone were entitled to represent the Association. This is a question which dealt with the merits of the action and could not be decided on an application for a writ of summons. If the plaintiffs are unsuccessful in regard to this question, their action fails. The only questions that should have been considered by the judge at this stage was whether the plaintiffs represented a class of persons with the same interest in suit and whether there was a *prima facie* case."

Civil Procedure

A question which was not expressly raised in the trial court may be taken in appeal when it can be brought under one of the issues framed.

Counsel

The necessity for an assignment of counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the counsel to be present at the hearing.

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Court of Criminal Appeal

Court of Criminal Appeal—Reduction of sentence.

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Court of Criminal Appeal—Misdirection—Erroneous statement of fact by trial judge on the main evidence—Criminal Procedure Code Chapter XII and section **122 (3)**—*Evidence Ordinance sections* **91, 155** *and* **157.**

Held : (i) A statement made to a police officer or inquirer by any person, which expression includes a person accused in the course of any investigation under Chapter XII of the Criminal Procedure Code, must be reduced into writing.

(ii) By reason of section **91** of the Evidence Ordinance only the written record of a statement within the ambit of (i) is admissible in evidence. Hence oral evidence of such a statement is inadmissible.

(iii) The written record of such a statement is admissible by virtue of section **122 (3)** of Chapter 16 to contradict a witness after such witness has given evidence.

(iv) The written record of the statement of a witness used, as formulated in (iii), is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance.

(v) If it had not been for the prohibition contained in section 91 of the Evidence Ordinance, oral evidence of a statement made under Chapter XII of the Criminal Procedure Code might be tendered not only to contradict a witness, but also under the provisions of section **157** to corroborate the testimony of such witness. Such oral testimony would again not be substantive evidence of the facts contained therein, but merely corroboratory.

Per HOWARD, C.J. : "It is, therefore, clear that the learned judge told the jury that the accused's story was to the effect that he rolled the chimney before he had held the body of the deceased and in these circumstances the blood must have been on his hands before he touched the body. This was not what the accused had said either in examination-in-chief or in cross-examination. Having regard to this erroneous statement of fact in regard to what was the main piece of evidence in the case, we are of opinion that it is impossible to support the conviction.

The investigation made by a police officer or inquirer under this Chapter covers a wide field and is not limited merely to the examination of persons by the putting of questions. The investigation includes the search for incriminating evidence and the examination of the *locus in quo* and the locality in the vicinity of the scene of the crime. A statement made by any person to a police officer who was so engaged would, in our opinion, be made 'in the course of any investigation.'

The sub-section bristles with difficulties and is so difficult to interpret that, in our view, it is the duty of the legislature to re-draft the section so as to make its meaning clear."

Court of Criminal Appeal—Evidence Ordinance section **33**—*Scope of expression "incapable of giving evidence."*

Held : (i) That the evidence of a witness who is unable to attend the trial owing to illness such as pneumonia cannot be read in evidence under section **33** of the Evidence Ordinance.

(ii) That the expression "incapable of giving evidence" does not mean "incapable" for the time being owing to illness.

(iii) That consent of counsel for the accused to the admission of evidence which is not admissible does not rectify the wrong admission of evidence.

Court of Criminal Appeal—Evidence Ordinance section **144 (a)**—*Presumption arising from possession of stolen goods soon after they have been stolen.*

Held : (i) That possession by a person of property recently stolen from a house in the course of house-breaking gives rise to the presumption that the possessor was either concerned in the house-breaking or received the goods knowing them to be stolen.

(ii) That the strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed since the commission of the offence.

Per HOWARD, C.J. : " 'If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof ; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can only judge of matters with reference to their knowledge and experience of the ordinary affairs of life.

Thus, for instance (to put the present case), if the property were the produce of a burglary, then the possession of it, soon after the burglary, is some evidence that the person in whose possession it is found was a party to the burglary. For, at all events, he must have received it from one who was a party to it ; and this is strong evidence that he was privy to it and some evidence that he was a party to it. Whether or not he was so, must be judged of from all the other circumstances of the case.

If the explanation is, for instance, that the party had found the property where it might have been found, and was going to deliver it up to a constable, and the circumstances were consistent with that account, some evidence ought to be given to contradict it, and show it to be untrue.

What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable, or otherwise'."

Criminal Procedure Code Chapter XII section **122 (3)***—Illegal sentence passed per incuriam—Can it be altered by the judge who passed the sentence—Can statement made in the course of an inquiry into another offence be used to contradict the accused —Can sentence of imprisonment be imposed in the event of a sentence of whipping not being carried out.*

Held : (i) That a statement made by an accused in the course of an inquiry under Chapter XII of the Criminal Procedure Code can be used under section **122 (3)** of that Code to contradict him in proceedings against him in regard to an offence which was not the subject of the inquiry in the course of which the statement was made.

(ii) A judge who imposes an illegal sentence *per incuriam* has the power to set aside the illegal sentence and to impose a legal sentence.

(iii) A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

Criminal Procedure

Chapter XII and section **122 (3)** of the Criminal Procedure Code.

Criminal Appeal—Counsel assigned to accused in appeal—Counsel unable to attend on date of hearing—Appeal heard in absence of counsel—Is hearing regular—Interpretation of provisions as regards the right of a convicted person.

In this case the Privy Council has laid down an important principle in regard to the right of a convicted person.

Shortly, the relevant facts are as follows :

Under section **3 (1)** of the Poor Persons' Defence Ordinance, **1939,** an accused person whose means are insufficient to enable him to obtain legal aid is entitled to have an advocate (assigned) to defend him upon his obtaining a certificate from a certifying officer that he ought to have legal aid.

A person to whom an advocate has been assigned under sub-section **1** is, if convicted at the trial, entitled under sub-section **2,** on his lodging an appeal, to have an advocate assigned for the preparation and conduct of the appeal.

The accused in this case were assigned an advocate to defend them at their trial on a charge of murder. Two of them were convicted and sentenced to death. They appealed and were assigned a counsel permanently practising in Aden and the only person enrolled to practice in British Somaliland. When required by the British Somaliland Government to defend accused persons on trial on capital charges he has to travel by sea from Aden to Somaliland. The hearing of the appeal was fixed for June 22nd 1942 and the proper authorities had been instructed to arrange for a passage for counsel but owing to shipping difficulties they failed to secure a passage which would enable him to reach Hargeisa, the place of hearing of the appeal, on or before the date of hearing. On June 22nd 1942 the Appeal Court Judge proceeded with the case without making any inquiry with regard to the absence of counsel or as to the date when he might be expected to arrive. He heard some very short statements by the appellants and dismissed the appeals. Counsel in fact arrived on July 2nd 1942.

It was contended on behalf of the appellants before the Privy Council that there was a disregard of section **3 (2)** of the Poor Persons' Defence Ordinance **1939,** and that the appeal has accordingly not been heard in accordance with the provisions of the law and must be treated as not having taken place.

Held : (i) That the provisions of a statute as regards the right of a convicted person are not of a merely directory character.

(ii) That the necessity for an assignment of counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the counsel to be present at the hearing.

(iii) That the failure to grant an adjournment of the hearing to enable counsel to be heard has resulted in the appeal not being effectively heard.

Per VISCOUNT MAUGHAM : " The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel. (See Holdsworth, History of English Law, Vol. IX, p. 226 *et seq.*) This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by

a counsel assigned to him by the government, who was unable, without any default on his part, to reach the court in time to conduct the appeal."

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Criminal Procedure Code sections **237 (2)** *and* **296 (2)**—*Crown's right of reply where some only of the accused persons adduce evidence on their behalf.*

Held : (i) That where a witness called by the Crown to produce documentary evidence out of a court record is in cross-examination asked by the defence to produce other documents which are in the record or give evidence after reference to the record, the Crown is entitled to reply as against the accused requiring such evidence.

(ii) The fact that one of several accused, giving evidence on his own behalf after the close of the prosecution case, incriminates his co-accused does not affect the Crown's right of reply.

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Criminal Procedure Code section **411**—*Forfeiture of bond.*

Held : A bond should not be forfeited without giving the person affected by the forfeiture an opportunity of showing cause.

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Criminal Procedure Code sections **356, 357** *and* **411**—*Power of Supreme Court to act in revision in any matter in which an appeal lies—Procedure to be followed before declaring a bond given under the Criminal Procedure Code to be forfeited.*

Held : (i) The Supreme Court will exercise its powers of revision even in a case in which an appeal lies in the following cases :—

(*a*) Where there has been a failure of justice.

(*b*) Where a fundamental rule of judicial procedure has been violated.

(*c*) Where the person affected by the order made against him had no knowledge of it till the time for preferring an appeal had elapsed.

(ii) An inquiry is a necessary condition precedent to the reaching of a decision under section **411** of the Criminal Procedure Code to forfeit a bond.

Per SOERTSZ, J. : " The phrase ' whenever it is *proved* to the satisfaction of the court ' necessarily presupposes an inquiry. Indeed, even if the words that had been employed had been less cogent, for instance, ' if the court is of opinion,' still inasmuch as a judicial officer, as distinct from an administrative officer, is concerned, an inquiry is a necessary condition precedent to the reaching of an opinion."

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Character of accused—When may accused be cross-examined as to his bad character—Questions which are unfair to accused should not be allowed—Can suspicion alleged to have been entertained by one of his employers on an earlier occasion be a legitimate topic for cross-examination of accused as to credit.

Held : (i) A question whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in court, or if charged was acquitted, is an example of a case where the judge should intervene.

(ii) A mere suspicion alleged to have been entertained by his previous employer on an earlier occasion cannot be a legitimate topic for cross-examination of an accused person as to credit.

Per LORD SIMON : " Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the jury took only a few minutes to consider their verdict, and the judge stated that he considered the verdict ' perfectly right.' When the transcript is examined it is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to section **4 (1)** of the Criminal Appeal Act, **1907**, should be applied."

(**Editorial Note :** Our law on the question arising in this case is to be found in sections **54, 120 (6)** of the Evidence Ordinance.)

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A statement made by an accused in the course of an inquiry under Chapter XII of the Criminal Procedure Code can be used under section **122 (3)** of that Code to contradict him in proceedings against him in regard to an offence which was not the subject of the inquiry in the course of which the statement was made.

See Court of Criminal Appeal 78

A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

See Court of Criminal Appeal 78

Criminal Procedure Code Chapter XII section **122 (3)**—*Illegal sentence passed* per incuriam—*Can it be altered by the judge who passed the sentence—Can statement made in the course of an inquiry into another offence be used to contradict the accused—Can sentence of imprisonment be imposed in the event of a sentence of whipping not being carried out.*

Held : (i) That a statement made by an accused in the course of an inquiry under Chapter XII of the Criminal Procedure Code can be used under section **122 (3)** of that Code to contradict him in proceedings against him in regard to an offence which was not the subject of the inquiry in the course of which the statement was made.

(ii) A judge who imposes an illegal sentence *per incuriam* has the power to set aside the illegal sentence and to impose a legal sentence.

(iii) A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

See Court of Criminal Appeal 78

Emergency Powers (Defence) Act, **1939** *section* **1**—*Palestine Defence (Judicial) Regulations* **1942** *regulation* **3**—*Constitution of court by direction by Chief Justice under regulation* **3**—*Is formal order necessary*—*Overriding effect of a Regulation which modifies a local Ordinance*—*Delegation of power*—Ultra vires—*Discretion of prosecuting counsel to call witnesses named in the indictment*—*Alteration of judgment by judge after it had been dictated in court.*

The facts which are fully set out in the judgment, shortly, are as follows :

On March 24th 1943, the Chief Justice of Palestine sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder under the Palestine Criminal Code Ordinance, **1936** section **214 (b),** and sentenced him to death. An appeal by the appellant was dismissed on April 17th 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal. The appellant by special leave appealed against that judgment.

It was contended by the appellant that :

(*i*) regulation **3** which was made by the High Commissioner under the powers vested in him by the Emergency Powers (Colonial Defence) Order-in-Council, **1939,** article **3,** and the Emergency Powers (Defence) Act, **1939,** was not within the powers thus vested in him, and was, therefore, *ultra vires* of the High Commissioner ;

(*ii*) assuming that regulation **3** was *intra vires* of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case ;

(*iii*) in any event, such a direction was an order within the meaning of the Palestine Interpretation Ordinance, **1933,** section **7,** which was applied to the Defence (Judicial) Regulations, **1942,** by regulation **9** thereof, and which required publication in the Gazette before such an order could have the force of law ;

(*iv*) the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him ;

(*v*) there was no sufficient evidence before the Chief Justice to justify a finding of " premeditation" within the meaning of the Palestine Criminal Code Ordinance, **1936,** sections **214** and **216,** and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon ; and

(*vi*) the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was an obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

Of the above points (*iii*) and (*v*) are of little or no local interest ; but the other points are of assistance to us. The decision of the Privy Council on points (*i*), (*ii*), (*iv*) and (*vi*) is as follows :—

(*i*) That the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers but was an executive discretion necessary to the carrying out of the High Commissioner's conclusion and was therefore *intra vires.*

(*ii*) The constitution of the court which was to try the appellant was prescribed in the cause list of the Supreme Court of Palestine for the week ending Saturday, March 20th 1943, which had been approved by the Chief Justice prior to Monday, March 15th 1943. There was no objection to this course for fixing the constitution of the court which was to try the appellant, and which is obviously the usual method of administering the business of the court. In the absence of any provision for the form which the direction by the Chief Justice is to take, the Chief Justice was free to adopt the course he did.

(*iv*) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on April 17th 1943, which the Chief Justice now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon is admitted by the Chief Justice in his statement, *viz.* the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his disposition at the preliminary inquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villagers, but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the Chief Justice.

(*vi*) The prosecution is under no obligation to tender witnesses whose names are in the indictment and are not called for the prosecution. The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

On the question of the conflict of the defence regulation with the Courts Ordinance of Palestine the Privy Council decided that the regulation prevailed.

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Customs Ordinance

Customs Ordinance sections **34** *and* **139A**—*Meaning of the expression "fine."*

Held : (i) That the word " fine " in sections **34** and **139A** of the Customs Ordinance does not mean a " fine " imposed by a court of law.

(ii) That the words " such fine and dues " used in the latter part of section **34** clearly refer to the penalties mentioned earlier,

(iii) That a penalty imposed under section **34** of the Customs Ordinance in respect of each missing package is a "fine" within the meaning of that expression in sections **34** and **139A**.

(**Editorial Note.**— Since the date of this action section **34** of the Customs Ordinance has been amended and the expression "fines and dues" no longer occurs in that section—*Vide* section **4** of Ordinance **8** of **1944**).

Customs Ordinance section **146**—*Who should be made party defendant to proceedings under section* **146**.

Held : (i) That the Attorney-General is the proper person to be made party defendant to proceedings under section **146** of the Customs Ordinance.

(ii) That the special remedy provided by section **146** of the Customs Ordinance is the only remedy open to a subject whose goods are seized as forfeited under that Ordinance.

Defence Regulations

Control of Prices Regulations **2 (7)** and **6**.

Defence (*Miscellaneous No.* **3**) *Regulations*—*Detention Order under Regulation* **1 (1)** —*Does the non-recital of the grounds on which the Governor has reasonable cause to believe that the detainee is a person of hostile origin etc. invalidate the order.*

Held : That the non-recital in the Detention Order of the fact that the Governor has reasonable cause to believe that the detainee is a person of hostile origin etc. or the grounds for such belief does not invalidate the order.

Divorce

Divorce—Condonation.

Held that : (i) It is fraudulent misstatement of fact, not assurances as to future conduct, which may remove the disabling consequences of condonation.

(ii) There cannot be such a thing as contingent condonation by a husband of his wife's adultery when the condonation includes the irrevocable act of sexual connexion.

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Held : That a Government contractor cannot escape the disqualification created by Article **9 (d)** by merely transferring his contracts to an incorporated company, which is specially designed for the purpose of providing a cover under which he may remain as the virtual contractor though not in name.

Evidence

Evidence Ordinance section **114 (a)**—Possession by a person of property recently stolen from a house in the course of house-breaking gives rise to the presumption that the possessor was either concerned in the house-breaking or received the goods knowing them to be stolen. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed since the commission of the offence.

Evidence Ordinance sections **30** *and* **120 (b)**—*Accused giving evidence on his own behalf implicating his co-accused—Is the evidence admissible as against the co-accused.*

Held : (i) That the evidence of an accused which implicates his co-accused is admissible in evidence.

(ii) That the confession made by a co-accused in the witness-box cannot be shut out on the ground that it is prejudicial to the other accused.

By reason of section **91** of the Evidence Ordinance only the written record of a statement made to a police officer under Chapter XII of the Criminal Procedure Code is admissible in evidence.

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The evidence of a witness who is unable to attend the trial owing to temporary illness cannot be read in evidence under section **33** of the Evidence Ordinance.

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Held : That a devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-Dutch law, and in the case of a *fidei commissum* with which a legacy is burdened, it does not lapse by the death of the immediate legatee before the testator.

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See Price Control 23

Gift

Where a husband donates the whole of the *thediathetam* property to a son and the donee conveys it to a *bona fide* purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation.

See Thesawalamai 63

A gift by a Kandyan minor is *ipso jure* void.

See Kandyan Law 107

Injunction

A court will not prohibit a person from building on his land so as to affect the light and air of his neighbour unless the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used.

See Servitude 12

Interpretation of Statutes

Interpretation of statutes—Proviso—Function and effect of.

Held : That the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

MADRAS & SOUTHERN MAHRATTA RAILWAY CO., LTD. VS BEZWADA MUNICIPALITY .. 65

The provisions of a statute as regards the right of a convicted person are not of a merely directory character.

See Criminal Procedure 97

Kandyan Law

Minor—Kandyan law—Does marriage confer majority on a Kandyan minor—Is a gift by a Kandyan minor void—What is the remedy of a minor who has executed a conveyance which is ipso jure *void.*

Held : (i) That marriage does not confer majority on a Kandyan minor.

(ii) A gift by a Kandyan minor is *ipso jure* void.

(iii) A minor who has effected a conveyance which is *ipso jure* void need take no legal action to have it set aside unless he has lost possession of the property conveyed. In such a case the remedy is by *actio rei vindicatio.*

HATURUSINGHE VS UKKU AMMA 107

Mandamus

Urban Councils Ordinance No. **61** *of* **1939** *sections* **8, 9 (7)** *and* **11**—*On nomination day can a candidate whose name is not on the lists as certified under section* **9 (6)** *claim the right to be nominated on the ground that he is qualified within the meaning of section* **8**—*Mandamus.*

Held : That a candidate whose name is not on the lists as certified under section **9 (6)** of the Urban Councils Ordinance is entitled under section **11** to claim nomination on nomination day on the ground he is qualified under section **8** to be a candidate.

DE COSTA VS THE ASSISTANT GOVERNMENT AGENT, COLOMBO 96

Minor

Marriage does not confer majority on a Kandyan minor.

A gift by a Kandyan minor is *ipso jure* void.

A minor who has effected a conveyance which is *ipso jure* void need take no legal action to have it set aside unless he has lost possession of the property conveyed. In such a case the remedy is by *actio rei vindicatio.*

See Kandyan Law 107

Mischief

A person who enters on a paddy field in the lawful possession of another and harvests the crop commits the offence of "mischief."

See Penal Code 46

Money Lending

Money Lending Ordinance sections **13** *and* **14**—*Taking of a fictitious note—Abetment—Penal Code section* **102.**

Held : (i) Where a sum of Rs. 650/– was lent on the understanding that a promissory note for Rs. 2,000/– was to be given by the borrower and a note for Rs. 2,000/– was given in pursuance of the understanding, the promissory note was fictitious within the meaning of that expression in section **13** of the Money Lending Ordinance. The fact that the promissory note was actually given a few hours after the loan and at a different place does not affect the question.

(ii) A proctor who arranges a loan for another on the understanding that a promissory note for a much larger sum than the amount actually lent would be given by the borrower, actually writes out the fictitious note, and takes an active and essential part in the transaction is guilty of abetting the offence of taking a fictitious note.

SYLVA (I.P.) VS AMARASINGHE 25

Order-in-Council

Article **9 (d)** of the Ceylon (State Council) Order-in-Council **1931.**

See Elections 58

Penal Code

Penal Code sections **408** *and* **427**—*Criminal trespass and mischief—Harvesting of paddy crop on land lawfully in the possession of another.*

Held : (i) That a person who enters on a paddy field in the lawful possession of another and harvests the crop commits the offence of "mischief" within the scope of that expression as defined in section **408** of the Penal Code.

(ii) That the failure to read over to the accused the evidence of a witness who was examined before the issue of process or to tender him for cross-examination is an irregularity which does not vitiate a conviction.

A proctor who arranges a loan for another on the understanding that a promissory note for a much larger sum than the amount actually lent would be given by the borrower, actually writes out the fictitious note, and takes an active and essential part in the transaction is guilty of abetting the offence of taking a fictitious note.

Per Incuriam

A judge who imposes an illegal sentence *per incuriam* has the power to set aside the illegal sentence and impose a legal sentence.

Prevention of Frauds Ordinance

Section **11** of the Prevention of Frauds Ordinance has not repealed by implication the Roman-Dutch law rule that the person who writes out a will for the testator cannot insert therein any benefit for himself, and should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other manner clearly confirms the disposition.

A trust may be proved by oral evidence.

Price Control

Defence Regulations—Control of Prices (Supplementary Provisions) Regulation **2 (7)**—*Breach of regulation* **6** *of the Control of Prices Regulations* **1942**—*Can articles kept in an unregistered place be forfeited under Control of Prices (Supplementary Provisions) Regulation* **2 (7).**

Held : (i) That articles in an unregistered place are not liable to forfeiture under Control of Prices (Supplementary Provisions) Regulation **2 (7)** upon the conviction of the owner of such articles for a breach of Regulation **6** of the Control of Prices Regulations **1942.**

(ii) That an order of forfeiture under Control of Prices (Supplementary Provisions) Regulation **2 (7)** should not be made without giving the person affected by such an order an opportunity of showing cause against it.

Prohibition

Prohibition—Courts Ordinance section **42**—*Order issued by District Judge on a proctor to appear in court—Circumstances in which a mandate in the nature of a Writ of Prohibition will be issued.*

The District Judge issued on the petitioner, a proctor practising in the District Court of Kandy, a notice in the following terms :

No. P 1369 In the District Court of Kandy
A. Alias V. Dingoo of Pihillitenna—Plaintiff
vs
D. Gunee and 4 Others—Defendants.

To A. N. Wickramanayake, Esq., Proctor, S.C., Kandy.

You are hereby required to appear before this court at 11 a.m. on 19th May, 1944, in connection with the statement filed by the 3rd defendant in the above case, and alleged to have been drafted by U. B. Wijesinghe, a clerk under your employ.

By order
(Sgd.)
Secretary.

The 10th day of May, 1944.

Shortly, the facts relevant to the matter of the above notice are :

One A. Alias V. Dingoo had filed action No. P 1369 in the District Court of Kandy, naming five persons as defendants. When the case was called in court on 28th April, 1944, the date on which the 3rd defendant had to file his answer, he tendered a document which purported to be an answer written in English. On being questioned by the judge as to who drafted the document for him he informed him that it was the clerk of the petitioner. He also told the judge that he had paid Rs. 1/50 to the clerk by way of remuneration. The judge thereupon directed the above notice on the proctor and another on his clerk. The petitioner appeared by proctor and counsel and filed the following objections :

(1) With regard to the alleged allegation that the clerk U. B. Wijesinghe typed the statement of the 3rd defendant in the above case, this matter is entirely outside the knowledge of the party noticed.

(2) The party noticed states that as a proctor of this court he would have been ready and willing to make such inquiries, if the court so desired, and had the party noticed been satisfied that his clerk had at any time typed unauthorized statements for suitors he would have dealt with the matter suitably.

(3) The party noticed, however, submits with respect, that the issue of this notice was unnecessary and outside the jurisdiction of this court and is detrimental to the professional standing and reputation of the party noticed.

The judge thereupon fixed the matter for inquiry. The present application for a Writ of Prohibition was thereafter made. The rule was made absolute.

Held : That there was no material before the learned District Judge upon which he could make an order directing the petitioner to appear before him at the inquiry which he intended to hold.

Prosecution

The prosecution is under no obligation to tender witnesses whose names are in the indictment and are not called for the prosecution.

Rent Restriction

Rent Restriction Ordinance No. **60** *of* **1942**—*Action for ejectment—To what extent should the court take into consideration the position of the tenant.*

Held : (i) That in deciding whether a house is reasonably required for the occupation of the landlord within the meaning of the Rent Restriction Ordinance the court should take into consideration not only the position of the landlord but also that of the tenant.

(ii) That where the hardship to neither party appears to overbalance that of the other, the landlord should succeed by virtue of his ownership.

RAMEN VS PERERA 110

Rent Restriction Ordinance No. **60** *of* **1942**—*Trial of preliminary issues arising under section* **8** *proviso* (a) *to* (d) *along with the main issues in the action for ejectment—Is there a right of appeal from the decision of the court—Procedure to be followed in actions for rent and ejectment.*

Held : (i) That before an action for rent and ejectment can be tried the court must form the opinion that there exists one at least of the conditions specified in section **8** proviso (a) to (d) of the Rent Restriction Ordinance No. **60** of **1942.**

(ii) That the issues arising under the proviso to section **8** of the Rent Restriction Ordinance should be tried as preliminary issues and till those issues are decided the court is not entitled to proceed to try the case on the main issues.

(iii) That the absence of a right of appeal from the decision of the court under the proviso to section **8** of the Rent Restriction Ordinance No. **60** of **1942** does not affect the right of a party aggrieved by the decision in an action in ejectment to appeal from the final judgment of the court on questions other than those specified in the proviso abovementioned.

JAN SINGHO VS ROSELINE NONA 48

Rent Restriction Ordinance No. **60** *of* **1942** *section* **8**—*Is there a right of appeal from the decision of the Court of Requests under section* **8** *proviso* (a) *to* (d).

Held : That there is no right of appeal to the Supreme Court from the decision of the Court of Requests under section **8** proviso (a) to (d) of the Rent Restriction Ordinance No. **60** of **1942.**

MOHIDEEN VS GUNAPALA 1

Revision

The Supreme Court will exercise its powers of revision, even in a case in which an appeal lies, in the following cases :—

(*a*) where there has been a failure of justice,

(*b*) where a fundamental rule of judicial procedure has been violated,

(*c*) where the person affected by the order made against him had no knowledge of it till the time for preferring an appeal had elapsed.

See Criminal Procedure 22

Sentence

A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

See Court of Criminal Appeal 78

Special Remedy and General Remedy

The special remedy provided by section **146** of the Customs Ordinance is the only remedy open to a subject whose goods are seized as forfeited under that Ordinance.

See Customs Ordinance 5

Servitude

Servitude of light and air—Erection of building on neighbouring tenement so as to affect the enjoyment of light and air—In what circumstances will the court by injunction stop the erection of the building.

Held : That a court will not prohibit a person from building on his land so as to affect the light and air of his neighbour unless the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used.

PERERA VS SIRIWARDENE 12

Thesawalamai

Thesawalamai—To whom does it apply.

Held : That the *Thesawalamai* applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy.

SINNIAH CHETTIAR VS NAGALINGAM CHETTY .. 54

Thesawalamai—Is a husband subject to Thesawalamai entitled to donate the whole of the thediathetam property—Wife's remedy in such a case.

Held : (i) That where a husband donates the whole of the *thediathetam* property to a son and the donee conveys it to a *bona fide* purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation.

(ii) That if the donee retains the property conveyed to him and after the death of the husband the wife gives a transfer of her share to another, that conveyance is good against the husband's donee.

(iii) She or the transferees from her can assert her claim to her half-share against such donee.

VAITHYLINGAM VS SEENIVASAGAM 63

Trusts

Trust—Transfer of property by debtor to creditor on the agreement that the latter is to retransfer the property after the debts have been liquidated out of the income therefrom—Can parol evidence of agreement be led—Prevention of Frauds Ordinance (Chapter **57**) *section* **2**—*Evidence Ordinance (Chapter* **11**) *section* **92.**

The plaintiff sued the defendant as executrix of the estate of one Natchiappa Chettiar for a declaration that a transfer deed (P21) executed by him in 1930 in favour of the latter was held in trust for him and for an accounting in the following circumstances :

(*a*) That in March, 1930 the plaintiff owned property of the total value of Rs. 660,115/ and had debts amounting to a sum of Rs. 539,114/– approximately.

(*b*) That of these debts a sum of Rs. 185,031/66 was due to the said Natchiappa Chettiar on a mortgage bond.

(*c*) That as plaintiff was financially embarrassed owing to lack of liquid cash, the said Natchiappa Chettiar, by his agent one Ramanathan, promised to act as trustee of the plaintiff and suggested to the plaintiff to give over the entire management of plaintiff's affairs to the said Natchiappa Chettiar.

(*d*) That the deed P21 was executed in consideration of a sum of Rs. 203,300/– to hold the properties mentioned therein in trust for the plaintiff.

(*e*) That the sums collected as rents and profits were agreed to be devoted by Natchiappa Chettiar to pay the debts due to him together with interest.

(*f*) That Natchiappa Chettiar may sell properties and the proceeds thereof should be paid in liquidation of the said Rs. 203,300/–.

(*g*) That after such liquidation of the said sum of Rs. 203,300/–, Natchiappa Chettiar agreed to reconvey the properties remaining unsold.

(*h*) That the plaintiff should remain as the owner of two of the said properties.

(*i*) That the properties conveyed by P21 was very much in excess of the consideration stated therein.

The learned District Judge accepted the oral evidence in support of the above arrangement and held that a trust was established.

Held : (i) That the learned District Judge was correct in holding that a trust was established.

(ii) That oral evidence was admissible to prove the trust.

Urban Councils Ordinance

A candidate whose name is not on the lists as certified under section **9 (6)** of the Urban Councils Ordinance is entitled under section **11** to claim nomination on nomination day on the ground that he is qualified under section 8 to be a candidate.

Void Conveyance

A minor who has effected a conveyance which is *ipso jure* void need take no legal action to have it set aside unless he has lost possession of the property conveyed.

Whipping

A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

Wills

Will—Prohibition of marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism under pain of forfeiture of rights under will—Is such a prohibition valid.

Held : That a clause in a will prohibiting marriage in the following terms was void for uncertainty :

" It is my will and desire that none of my aforesaid children shall contract a marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism. Such a marriage should further be sanctioned by all or a majority from and out of the following five persons, to wit, my wife the said Lydia Catherine de Cabraal Wijetunga, my brother Edward de Silva Mohandiram, Charles Batuwantudawe, Don Baron Jayatileke and (torn off) de Silva Abeyratne, all of Colombo. In case any of my children contract a marriage contrary to these instructions herein set forth such child or children shall forfeit whatsoever rights they may have acquired under this will and the property left bequeathed and devised by me to such child or children by this will shall ensure to the benefit of the remaining children of mine in equal shares subject to the terms of the specific legacies already enumerated, provided such children shall not contract any marriages contrary to the directions herein set forth."

A devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-Dutch law.

Will in handwriting of sole beneficiary under it—Will copied at the request of the notary who attested it—Absence of clause in testator's handwriting to the effect that he dictated the will and acknowledged its correctness—Effect of—Is the Roman-Dutch law repealed by section **11** *of the Prevention of Frauds Ordinance—Appeal—When may an issue not expressly framed in the trial court be taken in appeal.*

Held : (i) The person who writes out a will for the testator cannot insert therein any benefit for himself, and should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other manner clearly confirms the disposition. The fact that the will was copied at the request of the notary who later attested it makes no difference.

(ii) That a question which was not expressly raised in the trial court may be taken in appeal when it can be brought under one of the issues framed.

Witness

The prosecution is under no obligation to tender witnesses whose names are in the indictment and are not called for the prosecution. The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

Words & Phrases

"Fine "—meaning of

" Incapable of giving evidence "

" Whenever it is proved to the satisfaction of the court."

Present: SOERTSZ, J. VOL. XXVIII

MOHIDEEN vs GUNAPALA

S. C. No. 87—C. R. Colombo No. 93806.
Argued on 28th July, 1944.
Decided on 1st August, 1944.

Rent Restriction Ordinance No. 60 of 1942 section 8—Is there a right of appeal from the decision of the Court of Requests under section 8 proviso (a) to (d).

Held : That there is no right of appeal to the Supreme Court from the decision of the Court of Requests under section 8 proviso (*a*) to (*d*) of the Rent Restriction Ordinance No. 60 of 1942.

Cases referred to : *Attorney-General vs Sillen* (11 English Reports 1200)
King vs Joseph Hanson (106 E.R. 1027)
The Queen vs Stock (112 E.R. 892)
Sangarapillai vs Chairman, Municipal Council (32 N.L.R. 92)
Fernando vs Chairman, Municipal Council (38 N.L.R. 75)
Kanagasunderam vs Podihamine (42 N.L.R. 97 (Divisional Bench))
Vanderpoorten et al vs The Settlement Officer (43 N.L.R. 230)

S. E. J. Fernando, for the appellant.
M. I. M. Haniffa with *V. Arulambalam*, for the respondent.

SOERTSZ, J.

A preliminary objection has been taken to the hearing of this appeal on the ground that there is no right of appeal from such an order as was made in this case in the court below, the Court of Requests of Colombo.

It is well established by judicial interpretation that an action in ejectment on a contract of tenancy from month to month is not an action for debt, damage, or demand, but an action involving an interest in land, and that there is a right of appeal from a final judgment. or from an order having the effect of a final judgment pronounced in such a case.

But Ordinance No. 60 of 1942 — an emergency measure — introduced a material change in the law by debarring landlords, in certain areas, from instituting such actions without the written authorization of an Assessment Board ; and also by prohibiting courts of law in those areas from entertaining such actions were they introduced, unless in the opinion of the court, the rent was in arrear, or the tenant had given notice, or the landlord required the premises reasonably, or the premises were being used in an immoral, illegal, neglectful, or pestiferous manner. Under the common law, of course, a landlord dissatisfied for any of these reasons need hardly have put himself to the occasion of pleading these matters and proving them. He could, unless he preferred devious ways, put an end to the tenancy by valid notice to quit. Even the most resourceful and dilatory tenant would have, in such a case, to bow, sooner or later to his landlord's demand. But the Rent Restriction Ordinance served to put the tenant in a much more secure position in regard to his tenancy. The tenancy cannot now be determined by the landlord merely giving proper notice to quit. The landlord could come into court only if he had been authorized in writing by the Assessment Board, the decision of the Board being conclusive and final, or if the landlord, not confident of commending his action to the Board, or for some other reason, presented a plaint, as he is entitled to do, in the form of a plaint in an action for ejectment, there would have to be, in addition to the usual averments in such an action, averments in regard to the clause or clauses in section 8 (*a*) to (*d*) on which he relied to have his action entertained. The tenant then would make his answer to that averment as well as to the other averments and a preliminary enquiry would take place for the sole purpose of ascertaining whether the court has the power to entertain the action for ejectment in the exercise of its ordinary jurisdiction. In the case now before me the landlord relied on the matters in clauses 8 (*a*) and (*c*) of the Ordinance and averred that rent was in arrear, and that he required the premises for his own use and occupation. The tenant, however, denied the former averment and put the landlord to the proof of the latter. But he did not deny the tenancy, or dispute that he had been given valid notice to quit. The meaning of all this is that if this action had arisen before the Ordinance of 1942, a decree for ejectment would have been

entered of consent, and that would, or at least, should, have been the end of the case, there being no right of appeal from a consent decree.

The proceedings in this case show clearly that the only matters put in issue and enquired into were the question of the rent being in arrear, and the question whether the landlord required the premises reasonably. Both these questions were answered in favour of the landlord. That is to say, the court found that it had the power to entertain the action. But on the pleadings in the case, entertaining the action only meant, in this instance, the entering of a decree for ejectment because to the action of ejectment itself, once it was entertained, there was no defence offered. The present appeal is, therefore, in reality, an appeal against the Commissioner's findings in regard to the rent being in arrear and the landlord reasonably requiring the premises himself.

In a case that came before me on the 17th of July, 1944, see Supreme Court Minutes of that day,* the landlord had appealed against a finding that, in the opinion of the court, it could not be said that he required the premises reasonably. No preliminary objection was taken to the hearing of the appeal, but in disposing of it on the merits, I ventured to express the opinion that from such an order there was no right of appeal. Four days later this question arose directly before De Kretser, J. upon a preliminary objection taken by counsel who relied upon the view recently indicated by me, but my brother appears to have rejected the objection with uncompromising peremptoriness and to have delivered a judgment † immediately from his seat. He said " the remarks of Soertsz, J. were read to me. Those remarks were made *obiter*, and now an objection has been taken expressly. Section 12 sub-section 12 definitely says that the order of the Board of Assessment shall be final and conclusive. When we turn to section 8, that section does not give the right to the landlord to sue the tenant for ejectment. That is a right which he has independent of the Ordinance. What that section does is to curb his right and to limit it to certain circumstances." .....When I put forward that view in the way in which I did, I had hoped that it would be further and more fully considered when it arose directly. But that turned out to be a vain hope, and it has fallen to me again to consider and answer the question now that it has arisen directly. I must say at once that I derived no assistance whatever from my brother's judgment. To speak quite frankly, I do not see how from his premises he reaches his conclusion.....The propositions (*a*) that the landlord had a right to sue for ejectment before the Rent Restriction Ordinance; (*b*) that the Ordinance only curbed that right; (*c*) that a right of appeal that existed previously is not affected by the Ordinance, are obvious and hardly deserving of being stated, but now that they have been solemnly declared, how, I ask, from them does it follow that there is a right of appeal from *an order of the kind in question now?* The right of action and of appeal which existed previously is the right of the common law action and of the common law appeal from a final judgment or order having the effect of a final judgment. A present instance would be if a landlord obtains the authorization of the Board and comes into court, his action is *ab initio* pure and simple an action for ejectment. None of the preliminary matters in section 8 (*a*) to (*d*) arise in court and both parties would certainly have the right of appeal from the final judgment. But not so when the landlord without authorization institutes an action for ejectment. Really it is not correct to say in that event that the landlord institutes an action for ejectment. But that way of describing the matter may be allowed to pass provided we bear in mind that what he really does is that he presents a plaint in the form of a plaint in action for ejectment with an additional averment in view of section 8(*a*) to (*d*). So that the question whether to entertain it or not may, in the first instance, be considered by the court in the exercise of a new jurisdiction conferred upon it by the Ordinance. There is then an action for ejectment but only *in posse*. Till the court has held the preliminary enquiry in accordance with the fundamental rule of procedure that requires that the party to be affected shall be heard, there is in reality no action for ejectment over which the court has any power. If the court is of opinion that the landlord has not made out a case under section 8(*a*) to (*d*) and makes order accordingly, that surely is not an order in an ejectment action. An ejectment action had not yet come into being for the purpose of trial. The condition precedent for the court to entertain it, and admit it to its jurisdiction, and to try it, had failed. That was the case that was before me when I expressed the view that from such an order there is no appeal. If, however, a court finds that the relevant condition is satisfied and, that, therefore, it has power to entertain the action, the tenant will have no right of appeal from that order by virtue of the ordinary right of appeal in the common law action of ejectment because it is

* 27 C.L.W. p. 101 (Edd. C.L.W.)

† 28 C.L.W. p. 3 (Edd. C.L.W.)

not an order made in the action itself but in the course of the newly created preliminary enquiry. Suppose, however, that the tenant has in his answer traversed tenancy and/or notice, both those questions would have to be tried, and the landlord and the tenant would ultimately have a right of appeal from the final judgment. But even if we assume for a moment, without conceding the point, that the order may be regarded as an order made in the action for ejectment itself, still there is no right of appeal inasmuch as the order is not a final order. The case has still to be tried. It has only been admitted to the jurisdiction of the court. (See 1873 Grenier's Reports, Court of Requests, page 36.)

In other words, the position that results from the amendment of the law by the Ordinance appears to be that in an action for ejectment without authorization by a Board, a new jurisdiction has been conferred on certain courts to consider some preliminary questions that do not arise as preliminary questions in the ordinary tenancy case. Those questions have to be determined, for on them depends the court's power to exercise its ordinary jurisdiction.

Now, it is elementary, that a jurisdiction conferred on a court is not subject to a right of appeal unless such a right has been given by clear words or by inevitable implication. Lord Westbury speaking many years ago in the case of *Attorney-General vs Sillen* (11 English Reports 1200) said: "The creation of a new right of appeal is an act which required legislative authority .....for the creation of a new right of appeal is, in effect, a curtailment of the jurisdiction of one court, and an extension of the jurisdiction of another." This is the leading case on the point. There are other pronouncements to the same effect, and just to refer to the better known among them in England and here: *King vs Joseph Hanson* (106 E.R. 1027); *The Queen vs Stock* (112 E.R. 892); *Sangarapillai vs Chairman, Municipal Council* (32 N.L.R. 92); *Fernando vs Chairman, Municipal Council* (38 N.L.R. 75); *Kanagasunderam vs Podihamine* (42 N.L.R. 97 (Divisional Bench)) and *Vanderpoorten et al vs The Settlement Officer* (43 N.L.R. 230).

No right of appeal from orders made in the exercise of this jurisdiction has been given in express terms. So far as the implications of the Ordinance go they are inconsistent with the existence of a right of appeal. An Assessment Board called upon to authorize an action in ejectment may reasonably be supposed to guide itself to a decision by a consideration of such matters as the court is required by section 8(*a*) to (*d*) to enquire into. The decision of the Board is made final. Is it, at all, likely, that the legislature intended that the decision of a judicial tribunal *in pari materia* should not be final.

.....I only desire to make one reservation and that is to say that what I have said in this judgment applies to matters arising in Courts of Requests. Whether the position is the same in matters of this kind arising in District Courts, a question that may arise, in view of the difference between section 73 and section 78 of the Courts Ordinance, remains to be seen.

I uphold the objection and reject the appeal with costs.

Objection upheld.

Present: De Kretser, J.

WEERASINGHE vs AZEEZ

S. C. No. 85—*C. R. Colombo No.* 93747.
Argued & Decided on 21st July, 1944.

E. B. Wickramanayake, for the appellant.
G. Thomas, for the respondent.

De Kretser, J.

A preliminary objection was taken to the hearing of this appeal on the ground that no appeal lay, and the remarks of Soertsz, J. in C.R. Colombo No. 93851*, Supreme Court Minutes 17th July, 1944, were read to me. Those remarks were made *obiter* and now an objection has been taken expressly. Section 12 sub-section 12 definitely says that the order of the Board of Assessment shall be final and conclusive. When we turn to section 8, that section does not give the right to the landlord to sue the tenant for ejectment. This is a right which he has independent of the Ordinance. What that section does is to curb his right and to limit it to certain circumstances.

In my opinion, therefore, the right of appeal which existed previously is not affected by the Ordinance and I decided to hear the appeal. Having read the evidence and heard counsel I find no reason to differ from the conclusion arrived at by the learned Commissioner.

The appeal is dismissed with costs.

Appeal dismissed.

* See 27 C.L.W. 101 (Edd)

IN THE COURT OF CRIMINAL APPEAL

Present; HOWARD, C.J., (President), KEUNEMAN, J. & DE KRETSER, J.

REX vs AMARAKOON

Application No. 72 of 1944.
S. C. No. 17—M.C. Tangalle No. 18245—1st Southern Circuit, 1944
Argued on 24th July, 1944.
Decided on 28th July, 1944.

Court of Criminal Appeal—Evidence Ordinance section 33—Scope of expression "incapable of giving evidence."

Held : (i) That the evidence of a witness who is unable to attend the trial owing to illness such as pneumonia cannot be read in evidence under section 33 of the Evidence Ordinance.
(ii) That the expression "incapable of giving evidence" does not mean "incapable" for the time being owing to illness.
(iii) That consent of counsel for the accused to the admission of evidence which is not admissible does not rectify the wrong admission of evidence.

Cases referred to : *The King vs Kandappu* (20 N.L.R. 18)

H. Wanigatunga, for the applicant.
H. W. R. Weerasooriya, Crown Counsel, for the Crown.

HOWARD, C.J., (President)

The applicant applies for leave to appeal from his conviction on a charge of murder. The main ground of appeal is based on the admission in evidence of the deposition of one N. A. Pedris. Crown Counsel stated that Pedris whose name appeared on the back of the indictment was present on the opening day of the trial but had been taken ill and removed to hospital, suffering from pneumonia. In these circumstances he asked that the deposition of Pedris should be put in evidence. Counsel for the defence raised no objection to the deposition being read. Subsequently Mrs. N. R. Walpola, Admitting Officer at the Galle Hospital testified to the fact that Pedris was admitted to the hospital, suffering from pneumonia, that she did not think he was capable of attending court and giving evidence, and that he would not be able to give evidence for some days. Before Crown Counsel closed his case he moved to read the deposition of Pedris. It was then read in evidence.

The deposition of Pedris was admitted in evidence under the provisions of section 35 of the Evidence Ordinance. This section is worded as follows :

> "Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable,
>
> Provided—
>
> (*a*) that the proceeding was between the same parties or their representatives in interest;
> (*b*) that the adverse party in the first proceeding had the right and opportunity to cross-examine;
> (*c*) that the questions in issue were substantially the same in the first as in the second proceeding."

(Explanation — A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.)

Presumably his deposition was admitted because Pedris was considered by the learned judge to be either "incapable of giving evidence" or because "his presence cannot be obtained without an amount of delay or expense, which under the circumstances of the case, the court considers unreasonable." We are of opinion that temporary illness would not come within the category "incapable of giving evidence." There is no evidence on record as to how long a delay would be occasioned if the trial was postponed in order to enable Pedris to give his evidence in person, or if his presence to give evidence would necessitate a trial *de novo* with another jury. There is nothing to indicate what "delay or expense" would be involved or if the court considered such delay or expense "unreason-

able." In this connection I would refer to the case of *The King vs Kandappu* (20 N.L.R. 18) where Shaw, J. held that it is only in extreme cases of delay or expense that the provisions of section 33 should be brought into operation. The learned judge also stated that it was an important safeguard of the accused that the witnesses who speak to material facts against him should be present in court and should be seen by the judge or jury who has to decide on the evidence. In the Eighth Edition of Phipson on Evidence, at p. 432, it is stated that "if the indisposition be merely temporary, the proper course is not to admit the evidence, but to postpone the trial."

In his deposition before the magistrate, Pedris gave evidence with regard to an alleged threat against the deceased uttered six weeks previously. Pedris was, therefore, a witness who spoke to material facts and in our opinion the deposition should not have been admitted in evidence but the trial should have been postponed. Having regard to the fact that both counsel consented to its admission, the learned judge was no doubt in a peculiar position. The attitude of counsel for the defence is inexplicable.

It is impossible to say what effect the evidence of Pedris had on the minds of the jury. In these circumstances, the conviction cannot be allowed to stand. Nor do we consider, having regard to the flimsiness of the remainder of the evidence that this is a case in which a new trial should be granted. The conviction is, therefore, quashed and the accused discharged.

Conviction quashed.

Present: Moseley, S.P.J. & Wijeyewardene, J.

SANGARAPILLAI vs PRASAD (Collector of Customs)

S. C. No. 254—D. C. (Final) Jaffna No. 315.

Argued on 28th, 29th and 30th June, 1944.

Decided on 26th July, 1944.

Customs Ordinance section 146—Who should be made party defendant to proceedings under section 146.

Held : (i) That the Attorney-General is the proper person to be made party defendant to proceedings under section 146 of the Customs Ordinance.

(ii) That the special remedy provided by section 146 of the Customs Ordinance is the only remedy open to a subject whose goods are seized as forfeited under that Ordinance.

Cases referred to : *Raleigh vs Goschen* (1898–1 Ch. 73)
Feather vs Queen (122 English Reports 1191)
Buckland vs King (1933–148 Times Reports 557 at page 561)
Sanford vs Waring (1896–2 N.L.R. 361)
Le Messurier vs The Attorney-General (1901–5 N.L.R. 65)
The Colombo Electric Tramway Co. vs The Attorney-General (1913–16 N.L.R. 161)
Mackenzie-Kennedy vs Air Council (1927–2 K.B. 517)

H. V. Perera, K.C., with *J. E. M. Obeyesekere* and *T. Somasunderam*, for the plaintiff-appellant.

R. R. Crossette-Thambiah, Acting Solicitor-General with *T. S. Fernando, Crown Counsel*, for the defendant-respondent.

Wijeyewardene, J.

The plaintiff instituted this action against "M. Prasad, Collector of Customs, Northern Province," in respect of certain goods seized under the provisions of the Customs Ordinance. The defendant pleaded, *inter alia*, that the action was not maintainable against him on the facts set out in the plaint, and the District Judge held in his favour on that plea and entered decree

dismissing the plaintiff's action with costs. The plaintiff has appealed against that decree.

The plaintiff sets out in paragraph 2 of the plaint that "the defendant is the Collector of Customs for the Northern Province," and then proceeds to make certain material allegations which may be summarized as follows :—

Para 3 That Mr. E. B. Tisseverasinghe acting "for and on behalf of the defendant wrongfully and/or without any legal justification" seized 62 bundles of beedies and a motor lorry in which the beedies were taken.

Para 4 That customs duty had been duly paid.

Para 5 That the plaintiff gave a written notice "under section 146 of the Customs Ordinance" of his intention to institute an action in respect of the seized goods and offered to give security as required by that section.

Para 6 That the lorry was released on the plaintiff entering into a bond for a sum of Rs. 5,000/–.

Para 7 That the defendant offered to release the beedies on receipt of the following security :—

(*a*) security in respect of beedies — Rs. 7,000/–.

(*b*) security in respect of penalties which may be imposed under section 127 of the Customs Ordinance — Rs. 21,000/–.

(*c*) security in respect of costs of action Rs. ?,000/–.

Para 8 "The plaintiff pointed out that the item of security referred to at (*b*) of the preceding paragraph cannot be demanded as a condition precedent to the release of the beedies under section 146 of the Customs Ordinance. The defendant has however unlawfully refused to release the said 62 bundles of beedies unless the said item of security is also furnished."

The reliefs asked for in the plaint are :—

(i) that the beedies and lorry be declared not liable to seizure and that they are his property.

(ii) that the defendant be ordered to return unconditionally the beedies and "in the event of failure to do so that he be condemned to pay their value, namely, Rs. 7,000/–.

(iii) that the defendant be ordered to release the security given in respect of the lorry.

Clearly the plaintiff cannot obtain the relief (iii) in this action. The bond executed by him is in favour of His Majesty under section 105 of the Customs Ordinance, and the proper party to be sued in respect of that relief is the Attorney-General. (Civil Procedure Code 456).

It is necessary to consider in greater detail the facts on which the plaintiff asks for reliefs (i) and (ii).

Even if Mr. Tisseverasinghe, who was an Assistant Collector of Customs, Northern Province, committed a tort in seizing the beedies and lorry, the defendant is not liable, merely because he happened to be the Collector of Customs, Northern Province. No Head of a Department is liable for the tort of a subordinate unless the act complained of was substantially the act of the Head himself. *Raleigh vs Goschen* (1898–1 Ch. 73). No cause of action has, therefore, accrued to the plaintiff as against the defendant on the facts alleged in paragraph 3 of the plaint. Paragraph 4 of the plaint states that the duty has been paid, and, of course, the burden of proving that fact is on the plaintiff (section 144 of the Customs Ordinance). Paragraphs 5 and 6 refer to steps taken by him under section 146 of the Ordinance. Those paragraphs, 4, 5 and 6, do not set out the facts constituting a cause of action against the defendant. We then come to paragraphs 7 and 8 which shew what the cause of action is. The cause of action is the defendant's refusal to release the beedies on receipt of security (*a*) and (*c*) mentioned in paragraph 7 and his insisting on the defendant giving security (*b*) in addition. It may be noted here that no damages are claimed against the defendant for the alleged wrongful detention and the only claim is for a declaration of title to the goods, and an order for the recovery of the goods or their value.

It is convenient at this stage to deal with an argument of Mr. Obeyesekere in reply to the Acting Solicitor-General. He argued that section 146 which referred to goods seized as "forfeited" did not apply to the seizure in question, as the seizure was made under section 132 which refers to goods "liable to forfeiture." It is not necessary to consider the nature of the distinction sought to be drawn by Mr. Obeyesekere between the two classes of goods, as his argument is based on the erroneous assumption that there is some section in the Ordinance which states that goods for which Customs Duty is not paid are "liable to forfeiture." There is no such section in the Ordinance. There is, in fact, no section which states that the goods shall be seized, if no Customs Duty is paid. The Ordinance sets out in a number of sections (see sections 29, 35, 36, 39, 40, 49, 66, 67, 69 and 95) various matters which have to be done from the time that the ship carrying the goods arrives within a league of the port until the final delivery of the goods to the importer. The Ordinance further provides that the goods shall be forfeited for non-observance of any of these conditions. Then section 106 provides that "if any goods, packages, or parcels shall be landed, taken, or passed out of any ship, or out of any warehouse, not having been duly entered, the same shall be forfeited" while section 123 provides that the "means of conveyance.....made use of in any way in the..... removal of any goods liable to forfeiture under this Ordinance shall be forfeited." A non-payment of Customs Duty must necessarily be preceded or accompanied by the non-observance of some of these conditions. It is by declaring

that the goods shall be forfeited for non-observance of the conditions laid down in the sections mentioned by me that the Ordinance declares, in effect, that the goods as well as the conveyance in which they are removed shall be forfeited, if there has been a failure to pay Customs Duty. Such goods and conveyance will be "seized as forfeited," and section 146 would, therefore, be applicable to such a seizure. Moreover the plaintiff's position has been always that the seizure was governed by section 146 as shown by paragraphs 5 and 6 of the plaint, the bond given for the release of the lorry, and paragraph 5 (*e*) of the petition of appeal which pleads that "the steps contemplated by section 146 of the Customs Ordinance having been duly taken, the property has not been forfeited to the Crown."

I shall now proceed to examine the position of the parties under section 146. Under that section the beedies were "to be deemed and taken to be condemned" and dealt with accordingly, unless the plaintiff gave written notice that he would enter a claim to the goods, and that he was prepared "to give security to prosecute such claim." The section then required the Customs Officers to whom such notice was given to release the goods on receiving such security as "he shall consider sufficient." It will thus be seen that it was the action taken by the plaintiff in giving notice and in expressing his willingness to give security that created the situation which rendered it necessary for the defendant to exercise his powers under section 146 and fix the amount of the security. That was a power which the legislature made it obligatory for him to exercise. Could it then be said that in exercising that power he had given a cause of action to the plaintiff against himself? It is not the case of the plaintiff that the defendant acted *mala fide*. The Ordinance has vested the defendant with absolute discretion as to the amount of security to be demanded. If the defendant has proved himself incapable of exercising in a reasonable manner the unqualified discretion given to him by legislature, that does not give the plaintiff a right to bring this action against the defendant, whatever relief he may get in some other way.

The claim contemplated by section 146 in respect of goods released on security is clearly a claim for declaration of title to goods and the discharge of the relative bond.

It was open to the plaintiff to give the necessary security and prosecute his claim under section 146. He gave the security for the lorry but not for the beedies. He would not, therefore, be able to prosecute his claim in respect of the beedies in the manner contemplated by section 146. Is he then entitled to obtain relief by adopting some other legal procedure? The general principle appears to be against such a view. Where a special statutory procedure is provided for recovering property from the Crown the subject's remedy in England by petition of right is taken away (Laws of England (Hailsham) Volume 9 para 1177).

In England the remedy has to be sought by a petition of right, where the subject wants to obtain restitution of goods in the possession of the Crown. In *Feather vs Queen* (122 English Reports 1191 at page 1204), Cockburn, C.J. said: "The only case in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract." (See also the judgment of Mc Cardie, J. in *Buckland vs King* (1933–148 Times Reports 557 at page 561).

Our courts have been enabled to give relief to an aggrieved subject by the practice of the Crown waiving the right not to be sued for declaration of title and restitution of property in cases where the remedy by petition of right was open to such a person in England. It was held in *Sanford vs Waring* (1896–2 New Law Reports 361) that land in the possession of the Government could not be recovered in a suit against the servant of the Crown who is in temporary occupation of it as tenant and that the only way by which a subject could recover his land which he alleges to be in the wrongful possession of the Government was by an action against the Attorney-General. (See also *Le Messurier vs The Attorney-General* (1901–5 New Law Reports 65) and *The Colombo Electric Tramway Co. vs The Attorney-General* (1913–16 New Law Reports 161).

The argument against the maintainability of the present action against the defendant may be expressed in a slightly different way as in the judgment of Atkin, L.J. in *Mackenzie-Kennedy vs Air Council* (1927–2 K.B. 517):

> "It was held that the Lords Commissioners of the Admiralty could not be sued in tort, though they were named individually, where they were described collectively by their official title in a case (*Raleigh vs Goshen*) where Romer, J. came to the conclusion that they were sued in their official capacity. I think that perhaps it might be more accurate to distinguish between a suit against a person in his individual capacity and in a representative capacity, for I cannot see that if you are in fact suing an individual on his personal liability it makes any difference whether you describe him as an official or not. If, however, you sue him as representing

some interests or assets other than his own which you seek to bind by the action, it becomes very relevant how you describe him, for it may be found that as a representative he is not liable at all. And this is clearly true of a representative of the Crown who as such cannot be sued in tort. It is, of course, equally clear that individual servants of the Crown who themselves commit torts cannot escape liability by pleading the commands expressed or implied of the Crown. But sued as individuals they expose their own assets alone to liability in the event of judgment against them."

In the present case the beedies have become the property of the Crown, and they are in charge of the defendant merely as the agent of the Crown, as the Crown must necessarily exercise its right of possession through an agent. Thus, the defendant is sued in connection with goods vested in the Crown and the discharge of a bond executed in favour of the Crown. He is, therefore, sued "as representing some interest or assets other than his own." He is, moreover, described by reference to his office as Collector of Customs. Viewed in that light, the action is not maintainable against the defendant. It may be said that Mr. H. V. Perera argued that this action had to be brought against the defendant and not against the Attorney-General as the relief demanded was based on the tortious act of wrongful detention of goods pleaded in paragraph 7 of the plaint. That argument appears to ignore the fact that the defendant, who, as shown above, is sued as a representative of the Crown and not in his individual capacity can plead the same immunity as the Crown itself.

For the reasons stated above, I think that the present action must fail. The Attorney-General is the proper person to be sued either in an action under section 146 for declaration of title to goods released on security or in an action falling outside section 146 — if such an action is available — for declaration of title and restitution of goods condemned under that section.

I would, therefore, dismiss the appeal with costs.

MOSELEY, S.P.J.

I agree. *Appeal dismissed.*

Present: MOSELEY, J.

PERERA (A.S.P.) vs GUNEWARDENE

S. C. No. 274—*M. C. Kandy No.* 6308.
Argued on 12th June, 1944.
Decided on 20th June, 1944.

Defence (Miscellaneous No. 3) Regulations—Detention Order under Regulation 1 (1)—*Does the non-recital of the grounds on which the Governor has reasonable cause to believe that the detainee is a person of hostile origin etc. invalidate the Order.*

Held : That the non-recital in the Detention Order of the fact that the Governor has reasonable cause to believe that the detainee is a person of hostile origin etc. or the grounds for such belief does not invalidate the order.

Per MOSELEY, J. : "On this point, in *Rex vs Brixton Prison (Governor) Ex Parte Pitt-Rivers* Wrottesley, J. thought that an order in writing purporting to be made under regulation 18B (1) or (1A) without further ado could not be said to be in excess of the powers of the Home Secretary, provided he had what he thought reasonable grounds for the necessary belief. He thought, however, that a statement of the Home Secretary's belief on reasonable grounds as to the category into which the detainee fell, 'a desirable thing to be included in any order, since it gives the appellant early notice of the category.' With that desirability I respectfully and entirely agree, but I am quite unable to say that the omission of such a statement is fatal to the validity of the order."

Cases referred to : *Rex vs Brixton Prison (Governor) Ex Parte Pitt-Rivers* (1942–A.E.R. Vol. 1 p. 207)
Rex vs Secretary of State for Home Affairs Ex Parte Lees (1941–1 K.B. p. 71)
Stuart vs Anderson & Morrison (1941–A.E.R. Vol. 2 p. 665)
Gossett vs Howard (1845–10 Q.B. 411 at 452)

H. V. Perera, K.C., with *S. Nadesan* and *N. Nadarasa*, for the accused-appellant.
Walter Jayawardene, Crown Counsel, for the Attorney-General.

MOSELEY, J.

The appellant was convicted of an offence punishable under section 220A of the Penal Code in that he escaped from custody in which he was lawfully detained on an order made by His Excellency the Governor, in pursuance of powers vested in him by regulation 1 (1) of the Defence (Miscellaneous No. 3) Regulations, dated 3rd June, 1940.

The relevant sub-regulation is as follows :—

"1 (1) If the Governor has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the Island or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

On 18th June, 1940 the Governor made the following order :—

Detention Order

In pursuance of the powers vested in me by regulation 1 of the Defence (Miscellaneous No. 3) Regulations published in Gazette No. 8619 of June 3, 1940, I, Andrew Caldecott, Governor of Ceylon, do hereby order that Don Philip Rupesinghe Gunawardene, M.S.C., reputed to be resident at Boralugoda, Kosgama and Buller's Road, Colombo, be detained in accordance with the instructions set out in the succeeding paragraphs of this order.

2. I instruct the Inspector General of Police to cause the said Don Philip Rupesinghe Gunewardene, M.S.C., to be detained and delivered to the custody of the Inspector General of Prisons in order that the Inspector General of Prisons may give effect to the instructions to him which appear in paragraph 3.

3. I instruct the Inspector General of Prisons, upon such delivery, to cause the said Don Philip Rupesinghe Gunawardene, M.S.C., to be detained at Welikade Prison or at such other place as I may authorize from time to time and in accordance with such instructions as I may issue from time to time.

Given under my hand in triplicate at Colombo this eighteenth day of June, 1940.

(Sgd.) A. CALDECOTT,
Governor.

On 7th July, 1940, a further order was made directing that the appellant be removed to the appropriate prison at Kandy. During the night of 7th April, 1942, he escaped from that prison. The fact of escape was admitted by the appellant in an unsworn statement from the dock. He has appealed on the ground that the custody from which he escaped was not lawful.

The point taken by his counsel is that the order for detention, on the face of it, is invalid in that it does not set out the conditions precedent to the making of such an order, that is to say, that the Governor had reasonable cause to believe that a certain state of things existed and that by reason thereof it was necessary to exercise control over the appellant. Alternatively, he contended that there is no proof of the existence of such conditions and that consequently an element of doubt as to their existence remained. That being so, the prosecution cannot be said to have proved its case beyond reasonable doubt.

To me it seems that the whole case depends upon the validity of the order. It is either valid or invalid. If it is invalid, it cannot be said that the custody of the appellant was lawful. If it is valid, the onus laid upon the prosecution has been discharged. I find it difficult to visualize the circumstances in which the alternative position taken up by counsel for the appellant can arise.

No authority exactly in point has been brought to my notice. In *Rex vs Brixton Prison (Governor) Ex parte Pitt-Rivers* (1942–A.E.R. Vol. 1 p. 207) an order for detention was made by the Home Secretary under regulation 1 (1A) which set out a belief that the detainee was engaged in certain activities but omitted a recital that the Secretary of State had reasonable cause to believe it to be necessary to exercise control over him. It was held that the absence of such recital did not invalidate the order. Counsel for the appellant, however, sought to distinguish between the natures of the two conditions precedent. He described the belief for example, as to a person's activities as subjective : the belief as to the necessity for control as objective. I cannot think that this is a distinction of any substance. It seems to me that the existence of each condition depends upon the state of mind of the Secretary of State. With that ground of distinction out of the way, can it be said that there is anything attaching to the first condition which does not attach to the second ? That is to say, if the absence of a recital as to the existence of the second condition has been held not to invalidate a similar order, what is there to prevent me from holding a similar view in the present case where neither condition is recited ? In the case above cited Humphreys, J., dealing with the matter from the point of view of prejudice, said :—

"The applicant cannot be prejudiced in any way by the omission of a recital that the Home Secretary had reasonable cause to believe that it was necessary to exercise control over the applicant. The fact of his detention was the plainest intimation to him that the Secretary of State considered it necessary to exercise control over him, and the insertion of the words omitted would have added nothing to his information on the subject."

There can hardly be disagreement with that view. So, in the case before me it must have been clear to the appellant that the Governor believed that it was necessary to exercise control over him. Cannot the matter be carried a step farther to the point that, possessing that knowledge, the appellant must have been aware of the reasons underlying the necessity for control? Humphreys, J. thought that a document giving the general reasons for detention was essential, as "it would be contrary to the dictates of natural justice that a person not accused of an offence should be imprisoned for even a day without being informed of the general reasons for his detention." This expression of opinion is *obiter dictum* since, in the case then under consideration, the reasons had been set out in the order. It might be more correct to say that a variety of reasons had been set out since the order contained a recital of each of the three alternative reasons upon which an order made in pursuance of regulation 1 (1A) might be founded. In the present case, starting from the hypothesis that the appellant knew that the Governor thought it necessary to exercise control over him, the reference to the regulation under which the order was made would convey to the appellant that the Governor had reasonable cause to believe that he was of hostile origin or associations or had been recently concerned in acts prejudicial to the public safety or the defence of the Island or in the preparation or instigation of such acts. It seems to me that the appellant was no more prejudiced than was Mr. Pitt-Rivers in the abovementioned case. It should be mentioned that the regulation, 1 (1A), was not made applicable to Ceylon until 8th April, 1942, so that the recital that the Governor's order was made pursuant to the powers conferred by regulation 1 had no reference to the powers conferred later by regulation 1 (1A). Apart from the question of prejudice it was held by the Court of Appeal in *Rex vs Secretary of State for Home Affairs Ex Parte Lees* (1941–1 K.B. p. 72) in which it was argued that the order setting out allegations in terms of regulation 1 (1A) in the alternative was bad for duplicity, that there was "nothing in the point." A similar point was taken later in the case of *Stuart vs Anderson & Morrison* (1941–A.E.R. Vol. 2 p. 665) where exception was taken to an order made by the Home Secretary under regulation 1 (1A) which recited each of the conditions set out on that sub-regulation upon which a detention order might be made, and which ordered the detention of no less than 350 persons. Tucker, J. following the decision of the Court of Appeal, to which I have just referred, declined to hold that the order was bad on the face of it.

In support of the view taken by Humphreys, J. in *Rex vs Brixton Prison (Governor) Ex Parte Pitt-Rivers* (*supra*) counsel for the appellant cited the case of *Gossett vs Howard* (1845-10 Q.B. 411 at 452) in which it was held that "in the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to shew their authority on the face of them by direct averment or reasonable intendment." There has, counsel contended, been no dissension from this principle. Even so, does not a recital of the number of the regulation under which the present order was made amount to a "direct averment" as contemplated by the learned judges of the Exchequer Chamber? It seems to me that it does.

The position, I think, may be summed-up in this way: It is fairly clear that the order must be in writing. No form is prescribed. The regulations themselves contain no requirement that the grounds for making the order should be stated therein. On this point, in *Rex vs Brixton Prison (Governor) Ex Parte Pitt-Rivers* (*supra*) Wrottesley, J. thought that an order in writing purporting to be made under regulation 18B (1) or (1A) without further ado could not be said to be in excess of the powers of the Home Secretary, provided he had what he thought reasonable grounds for the necessary belief. He thought, however, that a statement of the Home Secretary's belief on reasonable grounds as to the category into which the detainee fell "a desirable thing to be included in any order, since it gives the appellant early notice of the category." With that desirability I respectfully and entirely agree, but I am quite unable to say that the omission of such a statement is fatal to the validity of the order. Further, it would appear, from a perusal of the succeeding sub-regulations of regulation 1, and particularly sub-regulation 5 that at a certain later stage the detainee is to be furnished with "the grounds on which the order has been made against him" which would appear to be an unnecessary proceeding if they had already been set out in the order.

For these reasons I hold that the order for detention is valid. The appeal is dismissed.

Appeal dismissed.

Present: KEUNEMAN, J.

COLLECTOR OF CUSTOMS, N.P., JAFFNA vs ARUNASALAM

S. C. No. 250—*M. C. Point Pedro No.* 2777.
Argued on 7th June, 1944.
Decided on 13th June, 1944.

Customs Ordinance sections 34 *and* 139*A—Meaning of the expression "fine."*

Held : (i) That the word "fine" in sections 34 and 139A of the Customs Ordinance does not mean a "fine" imposed by a court of law.

(ii) That the words "such fine and dues" used in the latter part of section 34 clearly refers to the penalties mentioned earlier.

(iii) That a penalty imposed under section 34 of the Customs Ordinance in respect of each missing package is a "fine" within the meaning of that expression in sections 34 and 139A.

(**Editorial Note.**— Since the date of this action section 34 of the Customs Ordinance has been amended and the expression "fines and dues" no longer occur in that section—*Vide* section 4 of Ordinance 8 of 1944).

L. A. Rajapakse, K.C., with *S. Mahadeva*, for the accused-appellant.
Walter Jayawardene, Crown Counsel, for the complainant-respondent.

KEUNEMAN, J.

The accused was charged as follows : That he did at Velvettiturai on the 2nd March 1943 become liable under section 34 of the Customs Ordinance (Chapter 185) to a penalty of Rs. 10,000/– as master of boat No. 46 by reason of the fact that on the arrival of the said boat at Velvettiturai from Tuticorin 389 bundles of beedies and 111 bags of beedi tobacco entered on the manifest of the said boat granted at Tuticorin were not found on board, and that he had thus committed an offence punishable under section 139 (A) of the Customs Ordinance as amended by section 8 of Ordinance No. 3 of 1939. The relevant portion of section 34 runs as follows : "If any goods entered on any clearance or other paper granted at the place from which any ship shall have come, shall not be found on board such ship, or if the quantity found be short *and the deficiency be not duly accounted for* .....the master shall be liable to a penalty not exceeding Rs. 200/– for every missing and deficient package and twice the amount of duty chargeable on the goods deficient and unaccounted for if the duty can be ascertained, and the Collector is authorized to require the payment of such fine and dues, and to decline the granting of a clearance outward to the master of any vessel so liable and refusing to pay such fine and dues."

Section 139 (A) as amended, runs: "If any person by reason of any action or omission becomes liable under the provisions of any section of this Ordinance to forfeit any goods or any sum of money, or to any penalty *other than a fine*, such person shall, in addition, be guilty of an offence....."

Two principal points have been urged by counsel for the appellant :—

(1) That the penalty imposed by the Collector was a "fine" within the meaning of the Ordinance, and that section 139 (A) has no application.

(2) That the accused has "duly accounted for" the deficiency.

As regards (1) I think it is clear that the Collector imposed a penalty of Rs. 200/– for each of the missing packages, making a total of Rs. 10,000/–. There is no evidence that any portion of the penalty of Rs. 10,000/– was levied in respect of duty chargeable on the missing packages. Can the penalty imposed be regarded as a fine ? Crown Counsel argued that "fine" meant a fine imposed by court, but clearly the word "fine" is not used in that sense in section 34. The words "such fine and dues" used in the latter part of section 34 clearly refer to the penalties mentioned earlier, and the section expressly says that the Collector "is authorized to require the payment of such fine and dues" and to decline the granting of a clearance if such fine and dues are not paid. The Collector had authority then to require the payment of a fine.

What is the difference between "fine" and "dues" ? I am of opinion that the imposition of a penalty of Rs. 200/– in respect of each of the missing packages is clearly in the nature of a *fine*. I do not think it can be regarded as *dues*. On the other hand, recovery of customs duty in respect of the missing packages may well be regarded as "dues." The word "fine" certainly fits the former penalty better than it fits the latter. I am, therefore, of opinion in this case that the penalty imposed was a *fine* within the meaning of the Customs Ordinance. It follows that section 139 (A) which deals with a "penalty

other than a fine" has no application to the facts of the present case.

There is really no need to deal with point (2) taken by the accused, but I must say that I am not at all satisfied with the reasoning of the magistrate in this connection. He has used manifestly exaggerated language, and has accepted as fact what has not been proved in evidence. For instance he has said, "I have no doubt whatever that these 389 bundles of beedies and 111 bags of beedi tobacco have been illicitly landed in the port of Velvettiturai." This is in direct contradiction of the evidence of the Customs Officer (the only witness for the prosecution) who said, "As far as I am aware there is no evidence that this cargo was brought either into the territorial waters of Ceylon or unloaded in any port in Ceylon." The defence of the accused was that in the course of a voyage from Tuticorin to Nagapatam, the ship encountered violent weather and strong winds off Point Calimere. As a result the mainsail was carried off and the mast fell and dashed against the side of the ship, which sprang a leak. To save the lives of the crew the master was compelled to jettison all the cargo and the provisions. The Customs Officer, when he visited the ship, found the damage to the ship which I have described. The magistrate appears to have had his mind obsessed with what he calls "a similar case" where another boat was also compelled to come to Velvettiturai after jettisoning the cargo. I need only add that there is no evidence on the record to show how and under what circumstances that other ship came into Velvettiturai, or to shew any connection between that ship and the present one, and the magistrate would have been well advised to base his judgment on the evidence recorded in this case.

The magistrate also commented on the fact that this ship, like the other one, drifted into Velvettiturai and not into the ports of Kankesanturai or Point Pedro where there are Customs Stations, and thought it strange that the winds and currents should have brought both ships into Velvettiturai. But here again there is not a scrap of evidence as to where the winds and currents would carry a ship. It is clear that the magistrate has elevated suspicion to the rank of proof and his finding is accordingly vitiated.

I, however, decide the case on the first point raised by counsel for the accused. I set aside the conviction and sentence and acquit the accused.

Conviction set aside.

Present: KEUNEMAN, J.

PERERA vs SIRIWARDENE

S. C. No. 30—*C. R. Gampaha No.* 2020.
Argued on 28th & 29th June, 1944.
Decided on 4th July, 1944.

Servitude of light and air—Erection of building on neighbouring tenement so as to affect the enjoyment of light and air—In what circumstances will the court by injunction stop the erection of the building.

Held : That a court will not prohibit a person from building on his land so as to affect the light and air of his neighbour unless the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used.

Cases referred to : *Pillay vs Fernando* (14 N.L.R. 138)
Goonewardene vs Mohideen Koya & Co. (13 N.L.R. 264)
Zahira Umma vs Abdul Rahiman (29 N.L.R. 411)
Colls vs Home Colonial Stores (1904–A.C. 179)

E. B. Wickramanayake, for the defendant-appellant.
S. C. E. Rodrigo for the plaintiff-respondent.

KEUNEMAN, J.

The plaintiff brought this action for a declaration that he is entitled to free use of light and air to his house on the western side, and for an injunction restraining the defendant from erecting any building so as to obstruct the free use of such light and air. He further claimed damages to his building, as a result of the cutting of the foundations in respect of the building which the defendant had commenced to erect.

The learned Commissioner held against the plaintiff as regards the damages claimed, but granted the injunction ; and defendant appeals.

As regards the plaintiff's claim to the servitude of light and air, the facts are as follows : The plaintiff is the owner of Lot E on Plan 3055 (P1), and the defendant is the owner of the narrow strip Lot D on the same plan towards the west. On lot E there was an old house which had three windows facing towards the west. The house had been built about 45 years ago. It consisted of a main building, which contained two of the windows, and a kitchen which contained one window. In 1930 the plaintiff had a plan approved by the Sanitary Board for improvements and extension of his main building towards the western boundary. According to the Plan P2, the main block which stood more than 12 feet from the boundary was brought 12 feet further to the west and almost up to the western boundary. The building however was not started till 1940 and was not completed till 1942, and a certificate of conformity has not yet been issued. The original wall of the main building in which the two windows were situated had been demolished and re-erected almost on the plaintiff's boundary. The kitchen was not demolished or re-erected.

The defendant had a plan approved (see D1) in 1943 and had commenced building operations. The defendant's proposed house comes almost up to his eastern boundary, so that the two buildings will have only a space of a few feet between them.

Defendant's counsel argued that the plaintiff was not entitled to the servitude of light and air to his new building, and I think there is substance in this argument. The prescriptive right to the servitude was in respect of a building set back over 12 feet from the boundary. The face of that building has now been demolished and has been re-erected almost on the boundary.

In *Pillay vs Fernando* (14 N.L.R. 138) Wendt, J. held that the taking down and the rebuilding of a wall should not be considered to evince an intention of abandoning the servitude, and that where the new window stood in substantially the same position as the old one, although the window was larger, the right to the servitude continued. But this depended on a question of fact. In the present case there is no evidence to shew that the new windows in the main building are substantially the same as the old windows in respect of which the servitude was obtained, and, on the face of it, a window on the boundary and a window 12 feet from the boundary would appear to raise different problems. Further, there is nothing to shew that if the windows had stood in the old position, light and air would have been obstructed.

In my opinion the plaintiff's claim in respect of the windows in the main block fails.

The kitchen window stands on a different footing. It has not been altered and the servitude subsists. But the defendant's counsel argued that the evidence adduced did not establish that an infringement of the right can be reasonably anticipated.

In *Goonewardene vs Mohideen Koya & Co.* (13 N.L.R. 264) and in *Zahira Umma vs Abdul Rahiman* (29 N.L.R. 411) the principles laid down in *Colls vs Home Colonial Stores* (1904–A.C. 179, have been adopted in Ceylon. It was accordingly incumbent on the plaintiff not only to prove that the light and air will be diminished, but he must also show that there will be such a substantial diminution as to render his building appreciably less fit than it was before for occupation or use for the purpose for which it had been used. The evidence on this point is very meagre. The plaintiff said generally, " If a building comes up alongside my western wall I will lose my right of light which I get from the three windows." His witness Samaratunga, V.H. said : " If a wall is built on the western boundary the window light would be restricted. The kitchen window is 8 feet high from the ground." This last point is of importance, for the plaintiff said, " I expect to put up a building which is 9 feet high." Also Peter de Saram, Supervisor of the Sanitary Board, called by the defendant said : " If the defendant's building is put up, the light and air to the plaintiff's building will be blocked," but added, " if the improvements asked in D4 are effected, the building will have enough light." D4 is a letter by the Chairman, Sanitary Board, directing plaintiff to do certain things before he can obtain a certificate of conformity. In default the plaintiff was liable to be prosecuted.

In my opinion the evidence fails to prove that the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used. No real attempt has been made to establish this in the evidence. All that has been proved is that there will probably be some restriction in the light and air. The present action must accordingly fail.

The appeal is allowed with costs, and the plaintiff's action dismissed with costs. But the right is reserved to the plaintiff to bring any further action which may be available to him later in respect of any infringement of the servitude of light and air coming through the kitchen window on the western side.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J., (President), WIJEYEWARDENE, J. & JAYETILEKE, J.

REX vs DUWALAGE ALDON *alias* ALDON

Appeal No. 32 *of* 1943 (*with leave obtained*).
Application No. 80 *of* 1943 — *S. C. No.* 1—*M.C. Kalutara No.* 19380.
Argued & Decided on 4th October, 1943.

Court of Criminal Appeal—Reduction of sentence.

In this case the court had a doubt as to whether the jury were of opinion that the accused had a murderous intention or merely the knowledge that what he did was likely to cause death. The accused was given the benefit of the doubt and sentence was therefore reduced.

Cases referred to : *King vs Ponnasamy* (45 N.L.R. 359)

Appellant in person.
Douglas Jansze, Crown Counsel, for the Crown.

HOWARD, C.J., (President)

In this case, the appellant was charged with murder. In his charge to the jury, the learned judge stated that there were no circumstances of a mitigating character. We agree with that aspect of the learned judge's charge.

The jury found the accused not guilty of murder but guilty of culpable homicide not amounting to murder. It would, therefore, appear, at first glance, that as there were no mitigating circumstances the jury were not satisfied that the appellant had a murderous intention and, therefore, his case comes within the second part of section 297 of the Penal Code which prescribes a maximum sentence of ten years' rigorous imprisonment. After the verdict had been given the learned judge put this question to the jury : " I take it that you are under the impression that there might have been some kind of fight ? " The answer to that question was " yes, my Lord." That answer seems to imply that the jury did consider that there were circumstances of a mitigating character. We are of opinion that there is some doubt as to whether the jury were of opinion that the accused had a murderous intention or merely the knowledge that what he did was likely to cause death. In these circumstances, we think, following the decision of this court in *King vs Ponnasamy* (45 N.L.R. page 359), that the accused should have been given the benefit of such doubt and sentenced under the second part of the section.

We, therefore, substitute for the 15 years' rigorous imprisonment a sentence of 10 years' rigorous imprisonment.

Sentence varied.

IN THE HOUSE OF LORDS

Present: VISCOUNT SIMON, L.C., & LORDS THANKERTON, RUSSELL OF KILLOWEN, MACMILLAN & WRIGHT

HENDERSON vs HENDERSON

November, 17th and December, 15th 1943.

Divorce—Condonation.

Held that : (i) It is fraudulent misstatement of fact, not assurances as to future conduct, which may remove the disabling consequences of condonation.

(ii) There cannot be such a thing as contingent condonation by a husband of his wife's adultery when the condonation includes the irrevocable act of sexual connexion.

Cases referred to : *Cramp vs Cramp & Freeman* (1920–89 L.J.P. 119 ; 123 L.T. 141)
Roberts vs Roberts & Temple (1917–117 L.T. 157 ; 27 Dig : 339, 3182)
Snow vs Snow (1842–27 Dig : 342, 3231 ; 2 Notes of Cases Supp. i)
Abercrombie vs Abercrombie (169 L.T. Rep. 340)
Edgington vs Fitzmaurice (1884–29 Ch. D. 459 ; 53 L.T. 369)
Sneyd vs Sneyd & Burgess 1926–95 L.J.P. 22 ; 135 L.T. 124)

Gilbert Beyfus, *K.C.*, and *M. Turner-Samuels*, for the appellant.
R. Bush James, *K.C.*, and *Ifor Lloyd*, for the respondent.
The House took time for consideration.

Viscount Simon, L.C.

My Lords, the appellant petitioned for divorce from his wife, who is the first respondent, on the ground of her adultery with the second respondent. The suit was defended, but Hodson J., who tried the case, found that the adultery was proved. Both the respondents had made admissions of their guilt. The petitioner, in the course of his evidence, stated matters which raised the question of condonation, and it is this question which has caused the present appeal to be brought to this House. The learned trial judge reached the conclusion that the appellant had condoned his wife's misconduct and consequently refused the decree for which he asked. The Court of Appeal (Scott, Mackinnon and Goddard, L.JJ.) confirmed the conclusion of Hodson, J.

The testimony as to condonation was contained in the appellant's own evidence-in-chief. He stated that, after his wife admitted to him her adultery, he told her that she must entirely break off all acquaintance with the co-respondent if he (the husband) were to remain with her, and that she promised to do so. Thereupon the husband and wife went to bed together; he forgave his wife and had sexual intercourse with her that night at her suggestion. Early the next morning her attitude changed and she said that she did not see why she should stop seeing the co-respondent, and that if she denied the adultery the co-respondent ought to do so too. Upon this, the appellant left the house and never lived with her again.

It was argued that there was no condonation, since the appellant's forgiveness of his wife was conditional of her promise to have no more to do with the co-respondent and this promise was withdrawn after he had intercourse with her. The learned judge rejected this contention. He pointed out that there was no evidence that the wife and the co-respondent had associated together since the promise was given and added, "I see no ground for finding that the respondent when she made the promise was making a fraudulent representation as to her future intention." The learned judge referred to McCardie, J.'s judgment in *Cramp vs Cramp & Freeman* (123 L.T. Rep. 141; 1920 P. 158 at p. 170) and agreed with the learned judge's conclusion that "a husband who has sexual relations with his wife after knowledge of her adultery must be conclusively proved to have condoned her offence." The Court of Appeal also held that the husband's actions, after he knew the facts as to his wife's unfaithfulness, amounted to condonation which deprived the appellant of the right to a decree based on the facts, and whether condonation should be regarded as a question of law or a question of fact, the conclusion in the present case that there was condonation was right, and was fatal to the appellant's claim.

I entertain no doubt that the conclusion in the courts below was correct. Condonation in connection with the law of divorce has been defined in a variety of phrases in many previous judgments. The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on the circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness to effect. The exception is that if the intercourse was induced by a fraudulent misstatement of fact by the wife, that circumstance will prevent the husband's actions having the effect of condonation; for example, in *Roberts vs Roberts & Temple* (1917–117 L.T. 157) where the husband petitioned for a dissolution of his marriage on the ground of the wife's adultery, and it appeared that she had confessed the adultery but had denied, in answer to his question, that she was pregnant in consequence of it, whereupon the husband forgave her and had marital relations with her, it was held by Hill, J. that since the wife knew she was pregnant and had induced the acts of her husband by false and fraudulent statements, he had not condoned her adultery and was entitled to his decree. I think this decision was right, and the view subsequently expressed by McCardie, J. in *Cramp vs Cramp* (*supra*) should not be understood to cover the exceptional case where the guilty party has made a deliberately false statement and has thereby brought about a situation which would otherwise have been proof of condonation. It has been more than once

pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations. In *Snow vs Snow* (1842)–2 Notes of Cases Supp. i p. xiii) Dr. Lushington discusses at length whether, where a husband has been guilty of cruelty, a wife can maintain a suit where cohabitation was continued after the last act, and he concludes that subsequent cohabitation is not universally a bar to the wife's suit, for the reason above stated. But I know nothing in the earlier decisions, either in the ecclesiastical courts or in the Divorce Court of this country, which supports the view that a husband who has intercourse which is not induced by the fraud of the wife, after knowledge of the facts of his wife's adultery, should not thereby be regarded as condoning his wife's misconduct. Mr. Beyfus in his ingenious argument advanced the proposition that condonation by the husband is not established by the resumption of intercourse if that intercourse was obtained by a promise given by the wife to the husband as to her future conduct which is not genuine and sincere at the time when it was given. To that contention there are two answers. In the first place, the facts in the present case and the findings of the learned judge do not involve the view that the wife was not genuine and sincere at the time when she made the promise to her husband that she would keep away from the co-respondent's company. Hodson, J. negatives the view that the respondent when she made the promise was making fraudulent misstatements as to her future intentions. On the contrary, he finds that in the morning, after the promise had been given and intercourse had taken place, the respondent changed her mind. But further, the proposition is itself unsound in law. There cannot be such a thing as contingent condonation by a husband of his wife's adultery — certainly not when the condonation includes the irrevocable act of sexual connection. I agree with the views on this point expressed by Lord Merriman, P., and Henn-Collins, J. in *Abercrombie vs Abercrombie* (169 L.T. Rep. 340). It is, of course, quite true that condonation is subject to one implied condition, but that is the condition that, if the spouse who has been forgiven past matrimonial offences is proved to commit a further matrimonial offence in the future, then the past offences are revived and become available as further ground for a divorce. But condonation cannot be treated as cancelled because an erring wife who makes promises as to her future conduct withdraws the promise later on. Condonation is not a contract in which one party may claim to be discharged by the other's repudiation. Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by the action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of the condonation, makes promises as to future conduct cannot lead to the consequence that the previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind, for, as Bowen, L.J. said in a well-known passage, the state of a person's mind, when it can be definitely ascertained, may be as much a fact as the state of digestion. *Edgington vs Fitzmaurice* (53 L.T. Rep. 369 at p. 376; 29 Ch. D. 459 at p. 483). But that is not the same thing as saying that the husband is not to be treated as condoning if he believed in the wife's promise to behave as she should in the future. Lord Merrivale, P. in *Sneyd vs Sneyd & Burgess* (135 L.T. Rep. 124; 1926 p. 27) rightly insisted that belief is not the test. It is a fraudulent misstatement of fact, not assurances as to future conduct, which may remove the disabling consequences of condonation.

I move this appeal to be dismissed.

Lord Thankerton, My Lords, I agree.

Lord Russell of Killowen, My Lords, I also agree.

Lord Macmillan, My Lords, I agree.

Lord Wright, My Lords, I agree.

Appeal dismissed.

IN THE HOUSE OF LORDS

Present: VISCOUNT SIMON, L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT & LORD PORTER

STIRLAND vs DIRECTOR OF PUBLIC PROSECUTIONS

Decided on 21st June, 1944.

Character of accused—When may accused be cross-examined as to his bad character—Questions which are unfair to accused should not be allowed—Can suspicion alleged to have been entertained by one of his employers on an earlier occasion be a legitimate topic for cross-examination of accused as to credit.

Held : (i) A question whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in court, or if charged was acquitted, is an example of a case where the judge should intervene.

(ii) A mere suspicion alleged to have been entertained by his previous employer on an earlier occasion cannot be a legitimate topic for cross-examination of an accused person as to credit.

Per LORD SIMON : " Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the jury took only a few minutes to consider their verdict, and the judge stated that he considered the verdict ' perfectly right.' When the transcript is examined it is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to section 4(1) of the Criminal Appeal Act, 1907, should be applied."

(Editorial Note : Our law on the question arising in this case is to be found in sections 54, 120(6) of the Evidence Ordinance.)

Cases referred to : *Woolmington vs Director of Public Prosecutions* (51 Times L.R. 446, 1935 – A.C. 462 at p. 483)
Rex vs Haddy (1944–1 A.E.R. 319)
Maxwell vs Director of Public Prosecutions (1935 – A.C. 309)
Reg. vs Rowton (1865 – Le. & Ca. 520 ; 34 L.J. (M.C.) 57)
Rex vs Dunkeley (1927 – 1 K.B. p. 323)
Attorney-General vs Bowman (1791 – 2 B. & P. 532, n.)
Trial of Arthur O'Connor (1798–27 State Tr. 1)
Rex vs Turner (1944–1 A.E.R. 599)
Rex vs Wattam (1941 – 28 Cr. App. R. 148)
Rex vs Firth (1938–3 A.E.R. 783)
Rex vs Ellis (26 Times L.R. p. 535, at 539 ; 1910 – 2 K.B. 746, at p. 764)

Geoffrey Crispin and *Hubert B. Figg*, for the appellant.
The Attorney-General, (*Rt. Hon. Sir. Donald D. Somervell, K.C.*,) and *T. Scott Henderson*, for the respondent.

VISCOUNT SIMON, L.C.

My Lords, the appellant was convicted on October 7, 1943, before the Common Serjeant (Judge Reazley) on six charges of forgery, and was sentenced to be kept in penal servitude for three years. He appealed to the Court of Criminal Appeal against the conviction and sentence, but the appeal was dismissed, the judgment of the court being delivered by Mr. Justice Atkinson. The appellant obtained from the Attorney-General a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was, in his opinion, desirable in the public interest that a further appeal should be brought. Accordingly this appeal has been brought before the House. The point of law immediately involved is as to the admissibility of certain questions put in cross-examination of the accused at the trial after he had put his character in issue, but at the end of the argument the House intimated that, whether the point of law raised on the accused's behalf was well founded or not, no substantial miscarriage of justice could be regarded as having actually occurred and consequently that the conviction should stand.

Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the jury took only a few minutes to consider their verdict, and the judge stated that he

considered the verdict "perfectly right." When the transcript is examined it is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to section 4(1) of the Criminal Appeal Act, 1907, should be applied. The passage in *Woolmington vs Director of Public Prosecutions* (51 The Times L.R. 446, 1935 – A.C. 462 at p. 483) where Lord Sankey L.C., observed that in that case, if a jury had been properly directed, it could not be affirmed that they would have "inevitably" come to the same conclusion, should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused, assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt, convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *Rex vs Haddy* (1944–1 A.E.R. 319) correctly interpreted section 4(1) of the Criminal Appeal Act, and the observation above quoted from Woolmington's case (*supra*) in exactly this sense.

It remains to decide the point of law on account of which the appeal has been brought to this House. The appellant clearly put his character in issue in the course of the trial, and that more than once, as appears from the quotations which follow :—

(*a*) Mr. French, a witness for the prosecution, was asked in cross-examination and answered : (Q) "During the time Stirland was employed by the corporation you had no complaint to make about him?" (A) "No" (Q) "You found him a loyal and faithful servant"? (A) "Yes."

(Q) "You had no reason at all to suspect him ? That is right, is it not ? " (A) "Yes."

(*b*) Again, a police inspector who was also called for the prosecution gave the following evidence in answer to questions from the appellant's counsel: (Q) "He is a man of good character ? " (A) "Yes, he has not been charged before."

(*c*) Further, the appellant went into the witness-box and was asked in chief: "Have you ever in your life been charged with any offence whatever ? " to which he answered "No."

As a result of the questions and answers, counsel for the prosecution felt justified in cross-examining the appellant as follows : (Q) "Why did you leave the Westminster Bank ? " (A) "For two reasons. The first reason was that I have other interests outside the bank, which the bank did not like, and they were entirely literary interests, when I came to London. The second reason was that I had the offer of an opportunity in London for going in for advertising, and therefore I resigned from the Westminster Bank and came to London. (Q) "May I suggest another reason to you ? Were you questioned about a suggested forgery ? " (A) "No" (Q) "Did you leave after an interrogation about a particular signature" ? (A) "I did not."

Finally, in re-examination, after explaining that he left the bank because his family expenses necessitated his earning more money than he was receiving as salary, the appellant said: "The suggestion that was made by counsel for the prosecution is untrue in every particular." (Q) "You say your leaving the bank had nothing whatever to do with any question of your honesty ? " (A) "No. I even had a reference from the Westminster Bank, which I told you about this morning." (Q) "The Bank gave you a reference ? " (A) "Yes, from the Leeds office." (Q) "After you left the bank ? " (A) "Yes."

It will be observed that these questions were not put in order to suggest a previous conviction, or even a previous charge (if by "charge" is meant a criminal proceeding), but insinuated that the appellant had left his previous employment under suspicion, whether well or ill founded, of dishonesty. The prosecutor, of course, put such questions relying on material in his brief — indeed, after conviction, a chief inspector of police, when asked about the appellant's history, gave information as to the circumstances in which the appellant left the Westminster Bank which corresponded to the questions put. But this provides no answer to the problem whether such questions were legitimate at the stage when the issue of the appellant's guilt or innocence of the crime charged was still before the jury.

Before Your Lordships it was contended that this cross-examination was wholly inadmissible, as tending to suggest that the appellant had been guilty of a crime other than that with which he was charged, and as being irrelevant to the question of his guilt in respect of the crime for which he was being tried.

The right of a prisoner to give evidence on his own behalf was not conferred until 1898 and is governed by the Criminal Evidence Act of

that year. The relevant portion of the first section runs thus :—

"(1) Every person charged with an offence.... shall be a competent witness for the defence at every stage of the proceedings.....Provided as follows :—.....

"(*e*) A person charged and being a witness in pursuance of this Act may be asked any questions in cross-examination notwithstanding that it would tend to criminate him as to the offence charged :

"(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless :—

"(*i*) The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or

"(*ii*) He has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution or

"(*iii*) He has given evidence against any other person charged with the same offence."

This House has laid it down in *Maxwell vs Director of Public Prosecutions* (1935 – A.C. 309) that, while paragraph (*f*) of this section absolutely prohibits any question of the kind there indicated being put to the accused in the witness-box, unless one or other of conditions (i), (ii) or (iii) is satisfied, it does not follow that such questions are in all circumstances justified whenever one or other of the conditions is fulfilled. Viscount Sankey, L.C., in delivering the judgment of the House defined the matter to be decided in Maxwell's case thus : Whether it was permissible in the particular facts of that case for the prosecution to ask the prisoner (who had put his character in issue) whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal. The House decided that in the circumstances the question was not admissible, for the previous acquittal proved nothing against the accused — "the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune" (page 319)—and moreover the accused had not said that he had never previously been charged, so that the question could not be justified as a challenge to the accused's veracity and as seeking to show that he was a person not to be believed on his oath. The question, in the opinion of the House, was therefore irrelevant and at the same time was "likely to lead the minds of the jury astray into false issues" inasmuch as it might suggest to the jury that the accused had committed a similar offence before and therefore was likely to have been guilty of the crime then charged against him.

In delivering the judgment of the Court of Criminal Appeal in the present case, Atkinson, J., thought that there was nothing in the trial which conflicted with the decision in Maxwell's case (*supra*) largely because the appellant swore that he had never in his life "been charged with any offence whatever." Therefore, argued Atkinson, J., cross-examination about the allegedly suspicious circumstances in which the appellant left the bank was relevant and admissible to disprove his denial that he had ever been "charged." I should agree with Atkinson, J., that, if an accused in the witness-box makes a statement of fact which the prosecution does not accept, he is liable to be cross-examined on the statement with a view to showing that it is not true. And this applies to a statement as to the accused's past record where he puts his character in issue just as to a statement on any other matter. But this is all subject, as explained below, to the judge's discretion to disallow any question which in the circumstances he thinks to be unfair.

It is necessary, however, to guard against a possible confusion in the use of the word "charged." In paragraph (*f*) of section 1 of the Act of 1898 the word appears five times and it is plain that its meaning in the section is "accused before a court" and not merely "suspected or accused without prosecution." When the appellant denied that he had ever been "charged," he may fairly be understood to have used the word in the sense it bears in the statute and to mean that he had never previously been brought before a criminal court. Questions whether his former employer had suspected him of forgery were not, therefore, any challenge to the veracity of what he had said. Neither were they relevant as going to disprove good character ; the most virtuous may be suspected, and an unproved accusation proves nothing against the accused. But the questions, while irrelevant both to the charge which was being tried and to the issue of good character, were calculated to injure the appellant in the eyes of the jury by suggesting that he had been in trouble before, and were therefore not fair to him. They should not have been put, and, if put, should have been disallowed.

It must not be forgotten that the judge presiding at a criminal trial has a discretion (as Viscount Sankey, L.C. said in Maxwell's case 1935 – A.C. at p. 321) to disallow questions addressed to the accused in cross-examination

if he considers that such questions, having regard to the issue before the jury and to the risk of the jury being misled as to what those issues really are, would be "unfair." A question whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in court, or if charged was acquitted, is an example of a case where the judge should intervene. It is true that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. But when Maxwell's case (*supra*) decided that where the prosecution had enough evidence to indict a man for a crime, but not enough to convict, no questions can be asked as to that incident in a later trial at which he puts his character in issue, how can mere suspicion alleged to have been entertained by his previous employer on an earlier occasion be a legitimate topic for cross-examination to credit ?

There is, perhaps, some vagueness in the use of the term "good character" in this connexion. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him ? In *Reg. vs Rowton* (1865 – Le. and Ca. 520 ; 34 L.J. (M.C.) 57) on a re-hearing before the full court, it was held by the majority that evidence for or against a prisoner's good character must be confined to the prisoner's general reputation, but Erle, C.J. and Willes, J., thought that the meaning of the phrase extended to include actual moral disposition as known to an individual witness, though no evidence could be given of concrete examples of conduct. In the later case of *Rex vs Dunkeley* (1927 – 1 K.B. p. 323) the question was further discussed in the light of the language of the section, but not explicitly decided. I am disposed to think that in paragraph (*f*) (where the word "character" occurs four times) both conceptions are combined.

The historical development of the English rule that the prosecution in seeking to prove the crime may not, generally speaking, introduce evidence as to the previous bad character of the accused, but that the accused may call evidence in support of his previous good reputation, is difficult to trace. Sir James Stephen in his "History of the Criminal Law of England" (vol. 1, p. 449) has some interesting observations on the subject: see also Kenny's "Outlines of Criminal Law" (15th ed. pp. 464–467). Stephen points out that before the Norman Conquest "the character of the accused decided the question whether he was to be allowed to make his purgation by compurgators or was to be sent to the ordeal. In later times the character of the accused must have weighed with the jury who acted as witnesses." Under the Stuarts, evidence was freely given of particular crimes or misconduct unconnected with the matter in issue committed by the prisoner. The earliest instance which Stephen records of evidence being admitted of the prisoner's good character is at the trail of Colonel Turner for burglary in 1664 (6 State Tr., 565 p. 613). In an early edition of "Russel on Crimes" (2nd ed. published in 1828, vol. II p. 703) there is a note stating that "formerly evidence of the prisoner's good character was admitted in capital cases only, *ni favorem vitae*." The rule, however, was later extended to cover any prosecution for positive crime. "The true line of distinction," said Eyre, C. B., in *Attorney-General vs Bowman* (1791 – 2 B. & P. 532, n.), "is that in a direct prosecution for a crime such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information" (it was an information for keeping false weights) "it is not." By the end of the 18th century evidence of good character was constantly admitted. A remarkable instance is provided by the trial of Arthur O'Connor for high treason in 1798 (27 State Tr. 1) where Mr. Erskine was one of a large number of distinguished persons who testified to the prisoner's character for loyalty. Erskine, indeed, in the course of his evidence (at p.40) stated that, with the choice before him of defending Mr. O'Connor or of giving evidence as to his good character, he chose the latter, and the Attorney-General, Sir John Scott (at p.113), told the jury that "in all doubtful cases, character ought to have very considerable weight indeed." Cockburn, C.J. in *Reg. vs Rowton* (34 L.J. M.C. at p. 61) observed: "Although logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation for the presumption of innocence, yet the prosecution cannot go into evidence as to the prisoner's bad character. The allowing of evidence of a prisoner's good character to be given has grown up from a desire to administer this part of our law with mercy as far as possible. It springs up in a time when the law was, according to the common estimation of mankind, severer than it should have been."

It is most undesirable that the rules which should govern cross-examination to credit of an accused person in the witness-box should be complicated by refined distinctions involving a close study and comparison of decided cases, when in fact these rules are few and can be simply stated,

The following propositions seem to cover the ground. (I am omitting the rule which admits evidence tending to prove other offences where this evidence is relevant to the issue being tried, as helping to negative accident or to establish system, intent or the like.)

1. The accused in the witness-box may not be asked any question " tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is a bad character, unless " one or other of the three conditions set out in paragraph (*f*) of section 1 of the Act of 1898 is fulfilled.

2. He may, however, be cross-examined as to any of the evidence he has given in chief, including statements as to his good record, with a view to testing his veracity or accuracy, or to showing that he is not to be believed on his oath.

3. An accused who " puts his character in issue" must be regarded as putting the whole of his past record in issue. He cannot assert his good character in certain respects without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character.

4. An accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses, *Rex vs Turner* (1944–1 A.E.R. 599.)

5. It is not disproof of good character that a man has been suspected, or accused, of a previous crime. Such questions as " Were you suspected ? " or " Were you accused ? " are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary. (See rule 2 above).

6. The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the judge. If the question is not only irrelevant but is unfair to the accused as being likely to distract the jury from considering the real issues, and so lead to " a miscarriage of justice " (Criminal Appeal Act, 1907, section 4 (1)), it should be disallowed, and, if not disallowed, is a ground on which an appeal against conviction may be based.

A further question was raised in the present appeal which can be briefly disposed of. Atkinson, J., in delivering the judgment of the Court of Criminal Appeal, called attention to the decision of that court in *Rex vs Wattam* (1941–28 Cr. App. R. 148), where Viscount Caldecote, L.C.J. quoted the observation of Lord Hewart L.C.J. in *Rex vs Firth* (1938–3 A.E.R. 783) and treated that observation as amounting to a ruling that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made by counsel for the prisoner for the trial to be begun again before another jury. No such application was made in the present case. I doubt whether Lord Hewart's words require so strict a construction, but in any case it seems to me that there cannot be a universal rule to this effect. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself. (See *Rex vs Ellis* 26 Times L.R. p. 535, at 539 ; 1910 – 2 K.B. 746, at p. 764). If that be the judge's duty it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said in the same case (at pp. 538 & 763 of the respective reports), the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal.

But where, as here, the reception or rejectment of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.

My Lords, my noble and learned friend, Lord Russell of Killowen, who is not able to be here, has authorized me to say that he concurs in this opinion.

Lord Thankerton :— My Lords, I have had an opportunity of considering the opinion which has just been delivered by my noble and learned friend on the Woolsack, and I find myself in complete agreement with it.

Lord Wright :— My Lords, I also agree.

Lord Porter :— My Lords, I agree.

Present: SOERTSZ, J.

SUB-INSPECTOR MUTHALIFF vs PEDRICK

In Revision—M. C. Gampaha No. 20715.
Argued on 1st August, 1944.
Decided on 23rd August, 1944.

Criminal Procedure Code sections 356, 357 *and* 411—*Power of Supreme Court to act in revision in any matter in which an appeal lies—Procedure to be followed before declaring a bond given under the Criminal Procedure Code to be forfeited.*

Held : (i) The Supreme Court will exercise its powers of revision even in a case in which an appeal lies in the following cases :—

(*a*) Where there has been a failure of justice.
(*b*) Where a fundamental rule of judicial procedure has been violated.
(*c*) Where the person affected by the order made against him had no knowledge of it till the time for preferring an appeal had elapsed.

(ii) An inquiry is a necessary condition precedent to the reaching of a decision under section 411 of the Criminal Procedure Code to forfeit a bond.

Per SOERTSZ, J. " The phrase " whenever it is *proved* to the satisfaction of the court " necessarily presupposes an inquiry. Indeed, even if the words that had been employed had been less cogent, for instance ' if the court is of opinion,' still inasmuch as a judicial officer, as distinct from an administrative officer, is concerned, an inquiry is a necessary condition precedent to the reaching of an opinion."

Cases referred to : *Gunasekera vs Jayaratne* (1 Bal. Rep. 154)
King vs Noordeen (13 N.L.R. 155)
Modder vs Ismail Lebbe (8 N.L.R. 104).

E. W. Perera, in support.
T. S. Fernando, Crown Counsel, for the Attorney-General.

SOERTSZ, J.

This is an application for the exercise of the revisionary powers of this court in respect of an order made by the Magistrate of the Gampaha Courts, on the 16th of June, 1944, forfeiting the full amount of a bond by which the petitioner, who was the surety for an accused party, had bound himself for the due performance by that accused party of certain conditions imposed upon him by the bond.

Crown Counsel by way of a preliminary objection contended that, the petitioner having had a right of appeal from such an order as was made in this case, and having omitted to avail himself of that right, is now debarred from making the present application for revision, inasmuch, as — so he said — the extraordinary jurisdiction of revision is exercised in cases in which there was no other remedy. He relied on the case of *Gunasekere vs Jayaratne* (1 Bal. Rep. 154), in which it was pointed out that there was a right of appeal from an order forfeiting the bond of a surety. That ruling amply justifies the first part of the Crown Counsel's contention. In regard to the second part of his contention namely that the petitioner is not entitled to revision because he failed to exercise his right of appeal, I would invite attention to the observations made by Wood-Renton, J., in *King vs Noordeen* (13 N.L.R. 155). He said :

" I do not think that that power (*i.e.* revisionary power) is at all limited to those cases in which either no appeal lies or for some reason or other an appeal has not been taken," but he went on to add that this power would be exercised only when a strong case is *made out* " amounting to a positive miscarriage of justice in regard to either the law, or the judge's appreciation of the facts."

In the case I am dealing with I should have felt compelled to give relief solely on the ground that what may well be said to be a failure of justice has been brought to the notice of this court, and technical rules must make way for the granting of redress in such a case. There has been a violation of the fundamental rule of judicial procedure that a person sought to be affected by an order shall first be heard. But, in this instance, there is yet another ground upon which this application for revision ought to be exercised and that is that the petitioner had no knowledge of the order made against him till the time for preferring an appeal had elapsed. I over-rule the preliminary objection.

On the merits, the petitioner has a strong case. By the bond the accused entered into, he bound himself " to attend at the Magistrate's Court.... immediately after the proceedings in the case had been returned to the said Magistrate's Court from the Supreme Court after appeal, and there surrender." The petitioner on his part,

bound himself as surety for the due performance of that condition by the accused.

Now, it is true that the obligation undertaken by the accused and his surety is not absolutely impossible of performance but, it is so onerous an obligation, that in a commonsense view of the matter, it may be regarded as reasonably impossible. It could have been fulfilled, if at all, only by constant attendance in the appeal court, and thereafter by constant attendance in the Magistrate's Court, in the interval between the listing of the appeal and the record being received in the Magistrate's Court. There is good reason for doubting that the accused and his surety appreciated that that was the extent of their undertaking even if we presume that the terms of the bond were explained to them. The later journal entries show that they were expecting to be " noticed " and that they understood that they were to appear immediately on being noticed.

In the case of *Modder vs Ismail Lebbe* (8 N.L.R. 104), the accused and his surety entered into a similar bond. On the return of the proceedings from the Supreme Court, both of them made default in spite of summons and, thereupon their bonds were declared forfeited. Moncreiff, J. in allowing the surety's appeal said that " it had not been customary to forfeit the surety's bond without giving him notice and an opportunity of showing cause against the forfeiture of the bond." The case under consideration is a stronger case than that case, for the surety, here, received no summons or notice of any kind. If I may say so with great respect, Moncreiff, J. might have put the matter higher than he did when he said that it had not been customary to forfeit the bond without notice or without a hearing for such a course not only violates a fundamental rule of judicial procedure, but also disregards a positive requirement of the relevant section of the Criminal Procedure Code, section 411(1) which provides that :—

" Whenever it is proved to the satisfaction of the court.....that the bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond, to pay the penalty.....or to show cause why it should not be paid."

The phrase " whenever it is *proved* to the satisfaction of the court " necessarily presupposes an inquiry. Indeed, even if the words that had been employed had been less cogent, for instance " if the court is of opinion," still inasmuch as a judicial officer as distinct from an administrative officer is concerned, an inquiry is a necessary condition precedent to the reaching of an opinion.

In this case, there was no inquiry whatever before the bond was forfeited. What the magistrate did was similar to putting the cart before the horse, for he forfeited the bond on the 16th of June, 1944, and on the 21st of June, 1944, called upon the petitioner to show cause why he should not pay the full amount of the bond.

The whole proceeding was misconceived and extremely unsatisfactory. If the magistrate's object was to save time, labour and money there were, obviously, much less drastic methods of attaining that object.

I set aside the order forfeiting the bond.

Order set aside.

Present: SOERTSZ, J.

AMBALAVANAR, (Sub-Inspector, Price Control) vs WAIDYARATNE

S. C. No. 665—*M. C. Colombo No.* 40022 *with Application in Revision* (302).

Argued on 3rd August, 1944.

Decided on 22nd August, 1944.

Defence Regulations—Control of Prices (Supplementary Provisions) Regulation 2(7)—*Breach of regulation* 6 *of the Control of Prices Regulations* 1942—*Can articles kept in an unregistered place be forfeited under Control of Prices (Supplementary Provisions) Regulation* 2(7).

Held : (i) That articles in an unregistered place are not liable to forfeiture under Control of Prices (Supplementary Provisions) Regulation 2(7) upon the conviction of the owner of such articles for a breach of Regulation 6 of the Control of Prices Regulations 1942.

(ii) That an order of forfeiture under Control of Prices (Supplementary Provisions) Regulation 2(7) should not be made without giving the person or persons affected by such an order an opportunity of showing cause against it.

H. V. Perera, K.C., with *J. E. M. Obeyesekere* and *D. W. Fernando*, for the accused-appellant and petitioner.

W. Jayawardene, Crown Counsel, for the Attorney-General.

SOERTSZ, J.

The first matter for consideration is the appeal from the order of confiscation of articles to the value of Rs. 18,000/- made by the magistrate, apparently in the exercise of the power conferred upon him by regulation 7 of the Control of Prices (Supplementary Provisions) Regulations. That regulation is in these terms :—

> "The court which convicts any person of an offence under this Ordinance (i.e. Control of Prices Ordinance No. 39 of 1939) *may* order the forfeiture of any article in respect of which the offence was committed."

In this case the conviction in consequence of which the order of confiscation was made, was a conviction entered against the appellant on his tendering a plea of guilty to charges framed against him as follows :—

> (1) You are hereby charged that you did..... at 71, Rosmead Place being a person who desired to keep a stock of price controlled articles to wit drugs described in attached list A which are controlled by the Controller of Prices (Miscellaneous Articles) published in Government Gazette No. 9141 of June 25, 1943, failed to furnish to the Controller of Prices a return specifying such stock in breach of regulation 6 of the schedule.....and thereby committed an offence punishable under section 5 of the Control of Prices Ordinance No. 89 of 1939 as amended by the Defence (Control of Prices) (Supplementary Provisions) Regulation 2(2).....
>
> (2) As above in respect of similar articles described in attached list B.
>
> (3) As above in respect of similar articles described in attached List C.

On the facts of this case it is obvious that the charges as framed are misconceived in that the allegation is that they are in breach of regulation 6*. That regulation, as the use of the words "every person who desires" show, is merely concerned to inform persons who desire in the future (*i.e.* after 9.10.42) to keep a stock of price controlled articles, that, in order to put their desire lawfully into effect, they must obtain registration of themselves and of the places in which they desire to keep their stocks by furnishing to the Controller a return specifying all the stores and other places in which they desire to keep their stocks, and, regulation 4 renders them liable in default.

The relevant regulations for the purpose of the charges made against the appellant who had been in business before 9.10.42 are regulations 2† and 3‡.

This point was not however, taken either in the court below, or in appeal and it seems clear that the appellant was well aware of what the actual charges against him were although the wrong regulation was referred to in the charges framed. I am, therefore, dealing with the case on the footing that the convictions entered against the appellant were entered as in breach of the proper regulations. Even so, it is obvious that the confiscation of the goods in the list D cannot be supported at all, for the reason that there was not even a *charge* in regard to those goods, and an order of confiscation may only be made in respect of articles in respect of which *there has been a conviction.*

But, in my opinion, the order forfeiting the articles in the lists A, B and C referred to in the charges is also bad. First of all, the forfeiture was ordered as a matter of inevitable course, without the appellant being given an opportunity to show cause against it. Such a proceeding is in violation of the fundamental rule that no order shall be made affecting a person without his being heard. The magistrate appears to have wrongly interpreted regulation 7 as if the word "may" meant "shall," and on that interpretation to have assumed again *wrongly*, that the petitioner was not entitled to be heard, whereas even if the regulation had said that "the court which convicts.....*shall* order the forfeiture of any

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* Every person who desires to keep any stock or quantity of any price-controlled article at any store or other place which is not a registered store, shall furnish to the Controller a return specifying such store or other place, and the Controller may in respect of such store or other place exercise the powers conferred on him by Regulation 5.

† Every person who on October 9, 1942, is carrying on business as an importer of or a wholesale trader in any price-controlled article shall, within two days of that date, furnish to the Controller a return specifying :—

(*a*) The stocks of that article which are in his possession or under his control at the time the return is made ;

(*b*) Each store or other place at which such stocks are kept.

‡ Where at any time after October 9th, 1942, an Order is made in respect of any article, every person carrying on business as an importer of or a wholesale trader in that article shall, within such period as may be specified in the Order, furnish to the Controller a return specifying :—

(*a*) The stocks of that article which are in his possession or under his control at the time the return is made ;

(*b*) Each store or other place at which such stocks are kept : Provided, however, that nothing in the preceding provisions of this Regulation shall apply in any case where an Order is made in respect of any article which was, immediately prior to the making of the Order, a price controlled article.

articles in respect of which the offence was committed," the appellant was, surely, entitled to be heard at least on the question whether these were such articles. Secondly, by no legitimate stretch of interpretation can it be said that these articles were liable to forfeiture. The convictions entered against the appellant were in respect of his failure to specify in his return that he kept part of his stock at No. 71, Rosmead Place, and not in respect of a failure on his part to disclose the stocks of the relevant articles in his possession or under his control. He had, it is conceded, made a full disclosure in that respect. It cannot be said, therefore, that on the charges as framed against him, he had committed offences in respect of the articles enumerated in lists A, B and C. The order of forfeiture was, therefore, *ultra vires*. I ought to say that Crown Counsel, quite properly, did not seriously seek to support that order. I set it aside.

The next matter that arises for consideration, arises on the application for revision of the sentence passed on the petitioner for his failure to specify No. 71, Rosmead Place as a place in which he kept part of his stocks. The sentence passed was a fine of Rs. 4,000/–, the maximum fine provided being, that is to say, in the case of a first offender, Rs. 7,500/–. It was contended for the petitioner that his offence was a technical one inasmuch as he had not only declared his stocks correctly, but had also supplied in the course of another case, the information which led to the discovery of the fact that he was using No. 71, Rosmead Place as another place for keeping a part of his stock. Although I feel disposed to take those facts into account in mitigation of his offence to some extent, I cannot but take adequate notice of the fact that the petitioner who has been carrying on business for a long time, on a large scale, had not, on his own showing, taken the trouble which every businessman ought to take, in this time of emergency, to acquaint himself with the relevant Defence Rules and Regulations. I do not agree that a nominal fine will suffice. It must be a fairly substantial fine. I would, therefore, direct that the petitioner shall pay a fine of Rs. 1,000/–, in default one month's rigorous imprisonment. I hardly think that this is a case for awarding a part of the fine to the Police Reward Fund.

Order of confiscation set aside.

Sentence varied.

Present: SOERTSZ, J.

SYLVA (Inspector of Police) vs AMARASINGHE

S. C. No. 89—*M. C. Chilaw No.* 22107

Argued on 24th & 25th July, 1944.

Decided on 22nd August, 1944.

Money Lending Ordinance sections 13 *and* 14—*Taking of a fictitious note—Abetment—Penal Code section* 102.

Held : (i) Where a sum of Rs. 650/– was lent on the understanding that a promissory note for Rs. 2,000/– was to be given by the borrower and a note for Rs. 2,000/– was given in pursuance of the understanding, the promissory note was fictitious within the meaning of that expression in section 13 of the Money Lending Ordinance. The fact that the promissory note was actually given a few hours after the loan and at a different place does not affect the question.

(ii) Where a proctor who arranges a loan for another on the understanding that a promissory note for a much larger sum than the amount actually lent would be given by the borrower, actually writes out the fictitious note, and takes an active and essential part in the transaction is guilty of abetting the offence of taking a fictitious note.

Cases referred to : *Sockalingam Chettiar vs Ramanayake* (35 N.L.R. 33)
Reg vs Coney (1882 – 8 Q.B.D. 534)
Rex vs Gray (1917 – 12 Cr. A.R. 246)
Bomdili Sankara Singh (1884 – 1 Weir 47 — Govr. 620).

H. V. Perera, K.C., with *E. F. N. Gratiaen* and *H. W. Jayawardene*, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, for the complainant-respondent.

SOERTSZ, J.

This is a deplorable case, and I have examined it anxiously this way and that, to see whether the evidence has established, beyond reasonable doubt, the charge of which the appellant has been convicted, namely that he abetted one Seiyed Mohamed Issa Bhai to take a promissory note in which the amount stated to be due was, to the knowledge of the lender, the aforesaid Bhai, fictitious.

I would say, at once, that it is difficult to withhold sympathy from the appellant, a young proctor of good reputation who has fallen into the distressing situation in which he now finds himself by responding to an urgent request made to him by a brother proctor in a neighbouring district, and by going to the assistance of a complete stranger to him, but a kinsman of the other proctor. The man to whose assistance he went goes by the name of Victor Amarasekera. He is described by the magistrate as a "thoroughly dishonest and unscrupulous witness." There can be no doubt about that. He is an accomplished perjurer, thoroughly unabashed. But, the evidence reveals him as so much worse that there is occasion to fear that he may see, in the description given by the magistrate, a very flattering picture of himself for, not to waste too many words on him, the evidence shows that law, morality, decency mean nothing at all to him. I cannot help thinking that the magistrate would have done well if he had promptly dealt with him under section 440(1) of the Criminal Procedure Code.

But, when all that has been said about this man, the question still remains whether the appellant has not by yielding to a generous impulse and going to his assistance, thoughtlessly transgressed the law.

The charge of which the appellant was convicted was laid under section 13 of the Money Lending Ordinance read with section 102 of the Penal Code.

Sections 13 says :—

> "Any person who shall take as security for any loan a promissory note.....in which the amount stated as due is, to the knowledge of the lender, fictitious.....shall be guilty of an offence."

and section 14 explains the meaning of the word "fictitious" in this context. It cuts down the ordinary connection of the word, and limits it to the following cases :

> (*a*) Cases in which a promissory note given in respect of a loan does not disclose upon it any reduction made or sum paid at or about the time of the loan on account of interest, premium or advance charges ;
>
> (*b*) Cases in which a promissory note is taken or other obligation incurred in respect of a loan, and *at or about the time of the loan, a payment is made or a collateral transaction entered into in order to disguise the actual* amount advanced, or the rate of interest payable.

Upon the evidence, this case cannot be brought under (*a*) so that if this promissory note is "fictitious" it must be so under (*b*), and even there, it is clear, upon the evidence, that it is not within the first part of (*b*), for no sum was paid ; no reduction made in the manner indicated. The sole question, on this part of the case, therefore, is whether there was a disguising collateral transaction of the kind indicated. Mr. H. V. Perera argued that the admitted fact that on the document itself a larger sum was inserted than was actually lent did not amount to a collateral transaction. That he submitted, was a part of the main transaction itself. I have examined that submission with all the care it undoubtedly deserved and I could give, and it seems to me that it overlooks the fact that this part of the section contemplates the actual loan as the main transaction. Collateral transactions may be of all sorts. The giving of the promissory note, whether it precedes the actual loan or is simultaneous with it or subsequent to it, may itself well be the collateral transaction, as I think it is in this case, for the facts, really not disputed, or at any rate found by the magistrate, are that the loan was made at Kurunegala and the note was given some hours later at Marawila, and that, at Kurunegala, it was understood by all the parties concerned that the note that was going to be given was to be a note for Rs. 2,000/- although the sum actually lent was Rs. 650/-, and such a note was actually given by the borrowers. On these facts I cannot but hold that when this note was given in pursuance of the agreement entered into at the time of the loan, there was collaterally with the loan, a transaction entered into with a view to disguising the actual amount advanced and the rate of interest. The note was therefore, a fictitious note within the meaning of section 14. This was the view taken in *Sockalingam Chettiar vs Ramanayake* (35 N.L.R. 33), It follows that the Afghan who took the note rendered himself liable under section 13.

The only other question in the case is whether the appellant is liable as an abettor. In that regard, the appellant's liability depends on whether, on the evidence accepted by the magistrate, the appellant can be said to have "intentionally aided by an act" the taking of this promissory note by the Afghan. In other words, whether he facilitated the taking of the note.

This kind of abetment, taken in large, involves a question of difficulty which has

given rise to a wilderness of single instances, some apparently inconsistent with others. To mention a few, in *Reg. vs Coney* (1882–8 Q.B.D. 534), the seconds in a prize-fight which ends fatally, as well as spectators who actively encouraged the contest by their applause were held to aid and abet, but not so the mere spectators, but in contrast there is *Rex vs Gray* (1917–12 Cr.A.R. 246). Similarly in India, in the case noticed by the magistrate, the priest who officiates to solemnize a bigamous marriage is an abettor, but not so the persons who are present at the marriage. Again in *Bomdili Sankara Singh* (1884–1 Weir 47—Govr. p. 620) a man who wrote and attested a sale deed of a child purchased by a prostitute for purposes of prostitution was not liable as an abettor, for the transaction might have been completed without any writing at all. The principle appears to be that in order to make an abettor "the facility afforded must be such as was essential for the commission of the crime. Whether there was assistance in an essential way is a question of fact and must depend on the findings in a particular case.

Applying this principle to the facts of this case, I must hold that the appellant fills the role of an abettor. Although he cautioned Amarasekera against getting into the clutches of the Afghan — incidentally I would observe that, as subsequent facts proved, it was the Afghan who stood in need of being cautioned against Amarasekera for it was he who eventually got into Amarasekera's clutches — the appellant ultimately arranged the loan and its terms; he took the money to the scene of the sale and got the sale stayed; he actually *wrote* the note in question; but whether he asked for it or not, he was given sixty rupees as a fee or as *solatium*. Indeed one might say that without his part in it the play would lack the prince.

In view of the many mitigating features in favour of the appellant.....the magistrate imposed a nominal fine, but after a most anxious consideration of the case in all its aspects and taking into account the fact that this is the first instance in which, so far as I am aware, such a prosecution was launched, I am of the opinion that the ends of justice will be met by an order under section 325(1) (*a*) of the Criminal Procedure Code. The warning will serve to bring home to the appellant and to others the peril such a a participation as there was in this instance, in transactions of this kind.

I would send the case back to the magistrate for him to take action in the manner indicated. The fine will be remitted.

Case sent back.

Present: SOERTSZ, J.

PACKEER (Sub-Inspector, of Police) vs PEIRIS

Application for revision in M.C. Gampaha No. 23079–328.
Argued on 28th August, 1944.
Decided on 29th August, 1944.

Criminal Procedure Code section 411—*Forfeiture of bond.*

Held: A bond should not be forfeited without giving the person affected by the forfeiture an opportunity of showing cause.

E. W. Perera, in support.

SOERTSZ, J.

Two servants of the petitioner were found transporting two bags of cement, and were arrested and taken to the Police Station at Nittambuwa. They were enlarged on bail on their entering into a bond, at that Police Station, undertaking "to appear if so required," in the Magistrate's Court at Gampaha, on the 16th of June, 1944.

The petitioner who is the master or employer of the two accused bound himself as surety for the due performance by the accused of their obligation on the bond.

On the 16th of June the Police filed a plaint in the Magistrate's Court charging the two accused with the relevant offence. They were absent. Thereupon the Magistrate made the following order :—

"No excuse.

Surety absent. I forfeit the full amount of the bond.

Warrant against the accused. Notice the surety."

The surety appeared on the 24th of June and on being called upon to show cause why he should not pay the full amount of the bond, stated that he did not get any notice and was still waiting for a summons. The Magistrate held that "no notice was necessary to be issued on him," and ordered him to pay the full amount of the bond which had already been forfeited.

This order cannot be allowed to stand. I believe the petitioner's statement in his affidavit that there was no date on the bond when he signed it at the Police Station. There could hardly have been. The Police were still investigating the matter and they could not have fixed a date with such certainty.

Be that as it may, the undertaking by the accused was to appear on the 16th June "if so required." They got no communication so requiring them as they were entitled to expect they would.

Moreover, the procedure adopted by the Magistrate is highly irregular. He forfeited the bond without giving the petitioner an opportunity to show cause.

I set aside the order forfeiting the bond.

Order set aside.

Present: WIJEYEWARDENE, J.

THE KING vs FERDINAND & SEVEN OTHERS

S. C. No. 46/1944—*M. C. Matara Case No.* 49741
Third Western Circuit 1944 (*Colombo Assizes*)
Argued on 9th August, 1944.
Decided on 10th August, 1944.

Evidence Ordinance sections 30 *and* 120(*b*)—*Accused giving evidence on his own behalf implicating his co-accused—Is the evidence admissible as against the co-accused.*

Held : (i) That the evidence of an accused which implicates his co-accused is admissible in evidence.
(ii) That the confession made by a co-accused in the witness-box cannot be shut out on the ground that it is prejudicial to the other accused.

Cases referred to : *Rex vs Ukku Banda* (1923 – 24 N.L.R. 327).

Nihal Gunasekera, with *Vernon Wijetunga*, for the first accused.
G. E. Chitty, with *H. Wanigatunga*, for the second accused.
H. Sri Nissanka, K.C., with *Ananda Pereira* and *J. V. Fernandopulle*, for the fourth accused.
U. A. Jayasundera, with *S. E. J. Fernando*, and *J. V. T. de Fonseka*, for the fifth and seventh accused.
The third, sixth and eighth accused are undefended.

WIJEYEWARDENE, J.

The eight accused are charged with the offence of conspiracy to commit or abet the offence of giving false evidence in a judicial proceeding. The 6th accused is now in the witness-box giving evidence "in his own behalf." In the course of his evidence he inculpated several of the other accused and then commenced to speak of what happened on March 21, 1942. At that stage the Crown Counsel intimated to me that it would be desirable to ask the jury to retire, as perhaps, I might have to consider certain questions of law in respect of the evidence which the 6th accused might proceed to give. I asked the jury to retire and directed the 6th accused to go on with his evidence. That evidence was as follows :—

> "When he, the 1st accused, asked me that question I told him that I knew Abdeen. Then he asked me 'You know that Abdeen is my informant?' and I said, 'Yes, I know it.' Then he said 'When I went on leave the 2nd accused took Abdeen to the barracks and assaulted him. Hinniappu is also one of my informants. He was taken to the barracks and he was thrashed and killed there.' Then he uttered a threat saying 'I will do a nice thing' and went away with the headman Brumpy. At about 5 or 5-30 p.m. that day the alarm bell was rung and all the police officers fell in and assembled in the recreation room in their shorts and banians. The A.S.P. came in with Dingiya."

Before giving my ruling as to the admissibility of that evidence I asked the defence counsel

whether they wished to be heard. The counsel for the 2nd accused, thereupon, contended that the evidence so given was inadmissible and then proceeded to submit that the entirety of the evidence given by the 6th accused would be highly prejudicial to all the other accused, and moved—

(1) That I should direct the accused to stand his trial separately.
(2) That the other accused be tried in this case.
(3) That I should direct the jury to ignore all the evidence given by the 6th accused.

After the luncheon interval the counsel for the 2nd accused made an alternative submission, namely, that I should confine the present case to the 6th accused and direct the other accused to be tried in other proceedings. The counsel for the 1st, 4th, 5th and 7th accused adopted the argument of Mr. Chitty. The 3rd, 6th and 8th accused did not make any submission.

I have considered the matter and I am unable to adopt either of the suggestions made by the defence. The evidence given by the 6th accused before the jury retired was admissible. The evidence given by an accused person exculpating himself and inculpating his co-accused is admissible under our law. The evidence given by the 6th accused in this case may incriminate not only the other accused but also himself. He may be giving this evidence in the honest belief that he is entitled to an acquittal, if he acted on the advice of his superior officers. He may also be giving his evidence, as he thinks that in any event it may have a bearing on the sentence that may be passed on him. Whatever his reasons may be, there can be no doubt as to the admissibility of that evidence, as under our law a confession made by an accused in the witness-box affecting himself and his co-accused is not shut out by section 30 of the Evidence Ordinance (See *Rex vs Ukku Banda* (1923-24 N.L.R. 327). The 6th accused who is giving evidence has the right to do so "with the like effect and consequences as any other witness.

As the evidence in question is admissible, I do not think it open to advance an argument on the ground that such evidence is prejudicial to the other accused. I am of the opinion that this is not a case in which I should allow the application made by the defence.

The document P9 which contains a material part of the evidence given by the 6th accused before the special Commissioner in February, 1943 was included in the list of documents filed with the indictment. At the very commencement of this trial the counsel for the 2nd accused enquired whether the Crown Counsel gave an undertaking that he would not refer to it. In the murder case to which reference has been made in the course of the proceedings the 6th accused was one of the accused. There he appears to have made a statement from the dock similar to the document P9.

Though my attention was not drawn to these matters before the counsel for the 2nd accused made the present application, they must have been well within the knowledge of the counsel for the defence. In fact, when I asked Mr. Jayasundera who appears for the 5th and 7th accused whether he was leading evidence on behalf of his clients he said he would not call evidence for the 5th accused but that he would decide whether he should call evidence on behalf of the 7th accused after the 6th accused has given his evidence. Moreover, in the course of the trial the 6th accused made certain allegations in the absence of the jury that some of the other accused were trying to tamper with the witnesses for the Crown.

In the circumstances I find it difficult to understand why the present application is made for the first time at this stage.

Counsel for the 2nd accused said that, if they realized that the 6th accused was going to give evidence against them the other accused would have led evidence to disprove the truth of what the 6th accused was now saying, before they closed their cases. I am prepared as a matter of indulgence to give the 1st, 2nd, 3rd, 4th, and 5th accused an opportunity to lead such evidence.

The following evidence given by the 6th accused in the absence of the jury will not be placed before the jury :—

" Then he said ' When I went on leave the 2nd accused took Abdeen to the barracks and assaulted him. Hinniappu is also one of my informants. He was taken to the barracks and was thrashed and killed there.' Then he uttered a threat saying ' I will do a nice thing ' and went away with the headman Brumpy."

Application refused.

Present: WIJEYEWARDENE, J.

THE KING vs FERDINAND & SEVEN OTHERS

S. C. No. 46/1944—*M. C. Matara Case No.* 49741
Third Western Circuit 1944 (*Colombo Assizes*)
Argued on 11th & 14th August, 1944.
Decided on 15th August, 1944.

Criminal Procedure Code sections 237(2) *and* 296(2)—*Crown's right of reply where some only of the accused persons adduce evidence on their behalf.*

Held : (i) That where a witness called by the Crown to produce documentary evidence out of a court record is in cross-examination asked by the defence to produce other documents which are in the record or give evidence after reference to the record, the Crown is entitled to reply as against the accused requiring such evidence.

(ii) The fact that one of several accused, giving evidence on his own behalf after the close of the prosecution case, incriminates his co-accused does not affect the Crown's right of reply.

Cases referred to : *Queen-Empress vs G. W. Hayfield & Another* (1892 – 14 Allah. 212)
Queen-Empress vs Venkatapathi & Others (1888 – 11 Mad. 339)
Emperor vs Bhopatkar (1906 – 30 Bom. 421)
Gregory vs Tavernor (172 Eng. Rep. 1241)
The King vs Joronis (1921 – 22 N.L.R. 468)
Regina vs Burditt & Others (1855 – 6 Cox Rep. 458)
The King vs Hawden & Ingham (1902 – 1 King's Bench 822 at 887)
Regina vs Woods & May (1853 – 6 Cox Rep. 224)

Nihal Gunasekera, with *Vernon Wijetunga*, for the first accused.
G. E. Chitty, with *H. Wanigatunga*, for the second accused.
H. Sri Nissanka, K.C., with *Ananda Pereira* and *J. V. Fernandopulle*, for the fourth accused.
U. A. Jayasundere, with *S. E. J. Fernando* and *J. V. T. de Fonseka*, for the fifth and seventh accused.
The third sixth and eighth accused are undefended.
E. H. T. Gunasekera, Crown Counsel, with *E. L. W. de Zoysa, Crown Counsel*, for the Crown.

WIJEYEWARDENE, J.

The questions I have to decide relate to the order in which counsel should address the jury.

The accused in this case are indicted jointly for the offences of conspiracy to commit or abet the offence of giving false evidence in a judicial proceeding.

The Crown Counsel called as one of his witnesses Mr. Vitharana, the record-keeper of the Magistrate's Court of Matara. In answer to Crown Counsel, Mr. Vitharana read (*a*) the evidence given by some of the accused from the record of the proceedings in Inquest No. 50 of the Magistrate's Court, Matara, (P1) and (*b*) the evidence-in-chief of the 1st and 4th accused from the record of the non-summary proceedings in case No. 43107 of the Magistrate's Court, Matara (P2). He also referred to the Report of Mr. Leembruggen to the magistrate, the private plaint filed by U. R. Charles, the letter sent by Mr. Wijetunga, the charges framed in M. C. Matara No. 43107 and some other matters.

Mr. Vitharana was cross-examined by Mr. Chitty, counsel for the 2nd accused, and he read from P2 at Mr. Chitty's request, the evidence of a witness, U. R. Charles, and certain passages in the evidence of the 1st accused. He was also made to disclose the evidence with regard to the relationship between Hinni, the deceased, and certain persons as shown in P1.

At the request of Mr. Sri Nissanka, counsel for the 4th accused, Mr. Vitharana read passages from the evidence of a witness, Martin, as appearing in P21.

When the Crown Counsel concluded leading his evidence, Mr. Nihal Gunasekera called the 1st accused and a number of witnesses including Mr. Quyn, record-keeper of the Supreme Court. He got Mr. Quyn to read certain passages from the evidence of Ariyadasa and Sahabandu as

appearing in the notes of evidence taken at the trial in S. C. No. 51, M. C. Matara No. 43107.

At the request of Mr. Sri Nissanka who cross-examined him, Mr. Quyn read passages from the evidence of two other witnesses Martin and Andrayas. It should be noted that Mr. Vitharana and Mr. Quyn were not giving evidence on matters within their personal knowledge but were merely reading passages from the records of certain judicial proceedings.

At this stage I wish to refer to the stenographer's note made just before Mr. Sri Nissanka cross-examined for the 4th accused. That note does not set out clearly what happened. Mr. Sri Nissanka said he would like to get Mr. Nihal Gunasekera to ask Mr. Quyn to read the passages from the evidence of Martin and Ariyadasa. I told him that I could not allow that to be done. Mr. Sri Nissanka then said that he presumed that he would be allowed to cross-examine the witness and I replied that he would be cross-examining the witness.

After the 1st accused's case was closed, the 2nd, 4th and 5th accused did not call any evidence, the 3rd accused called two witnesses, while the 6th accused gave evidence and called one witness.

While giving evidence in his own behalf the 6th accused made statements inculpating the other accused. The 1st, 2nd and 3rd accused cross-examined the 6th accused. I gave the accused an opportunity for leading such evidence as they thought necessary to meet the evidence given by the 6th accused, but no such evidence was, in fact, called. After the 6th accused closed his case, the 7th and 8th accused closed their cases without calling any evidence.

The two questions for decision are :—

1. Can the Crown Counsel claim the right of reply as against the 2nd and 4th accused on the ground that they had led evidence through Mr. Vitharana and Mr. Quyn ?

2. Is the Crown Counsel's right of replying affected by the fact that the 6th accused incriminated the other accused while giving evidence after the close of the case for the prosecution ?

It is convenient to discuss question (1), as if there is only one accused, say the 2nd accused. In such a case the Crown Counsel is entitled to reply, if the defence has led evidence other than the evidence of the accused (see sections 237(2) and 296(2) of the Criminal Procedure Code). Now "Evidence" as defined in section 3 of the Evidence Ordinance includes "documentary evidence," that is, "all documents produced for the inspection of the court." Thus, if documentary evidence is adduced by the defence, the Crown is entitled to the right of reply. Conflicting views have been taken by the various High Courts in India on the question whether the Crown can claim a right, when such "documentary evidence" is led through a Crown witness while under cross-examination. The Madras and Allahabad High Courts have answered the question in the affirmative and the Bombay High Court too has expressed the same view in a number of cases. (See *Queen-Empress vs G. W. Hayfield & Another* (1892) 14 Allah. 212) ; *Queen-Empress vs Venkatapathi & Others* (1888 11 Mad. 339) ; *Emperor vs Bhopatkar* (1906–30 Bom. 421). Sections 234 and 237 of our Code differ, however, from the corresponding sections 289 and 292 of the Indian Code of Criminal Procedure 1882, and section 292 as enacted in 1882 was modified by the Code of 1898 and was replaced by an entirely new section in 1923. Our courts too have recognized this right in such circumstances, and the course of practice has been to allow counsel for the Crown to address the jury summing-up the evidence against the accused and commenting on the evidence led for the defence after the address of the counsel for the defence.

Now when the Crown Counsel examined Mr. Vitharana and proved through him certain facts as recorded in P1 and P21, the Crown did not, thereby, produce the entire records P1 and P21 for "the inspection of the court," as in that case the jury would have been entitled to read and examine the whole mass of evidence appearing in those records. Mr. Chitty, therefore, adduced fresh documentary evidence when he placed before the court the evidence of other persons and proved some other facts appearing in P1. No doubt the "documentary evidence" led by the Crown Counsel and the "documentary evidence" led by Mr. Chitty appear on a number of sheets bound together and referred to as the record of certain proceedings. That fact does not, however, make the evidence led by the Crown Counsel and the evidence led by Mr. Chitty one item of evidence. In this connection I would refer to *Gregory vs Tavernor* (172 Eng. Rep. 1241) decided under section 5 of the Criminal Procedure Act (28 & 29 Vict. c.18) corresponding to section 145 of the Evidence Ordinance. That decision holds that if a witness refreshes his memory from entries in a book, counsel may cross-examine on those entries without making them his evidence, and the jury may see them if they think fit, but, if counsel cross-examines as to other entries in the same book, he makes them his evidence.

What I have said above applies to the cross-examination of Mr. Vitharana and Mr. Quyn by the counsel for the 4th accused.

The fact that there are several accused in this case and that Mr. Quyn was called by the 1st accused does not affect this question.

For the reasons given by me I answer question 1 in the affirmative.

It may become necessary to determine in an appropriate case whether the Crown Counsel does not have a right of reply against all the accused where, as in the present trial, several persons are charged and some of them call witnesses. In such a case the decision in *The King vs Joronis* (1921 – 22 N.L.R. 468) would have to be considered. Section 296(2) of the Criminal Procedure Code reads :—

> " When at any trial the evidence of the defence consists only of the *evidence of the person or persons charged*, as the case may be, the prosecution shall not have the right of reply."

The words underlined by me, read with section 237(2) favour the view that the Crown is entitled to a right of reply against all the accused where there are several accused and some accused alone have called witnesses, as in this trial. The authorities cited in Archbold's " Criminal Pleading" (31st edn. p.181) are to the effect, that under the English law the Crown has such a right only where the evidence called by one accused is applicable to all.

The second question arises from the fact that the 6th accused's evidence inculpates all or most of the other accused. It is contended that the evidence given by the 6th accused became " tacked, as it were, to the case for the prosecution " (see judgment of Jervis, C.J. in *Regina vs Burditt & Others* 1855 – 6 Cox Rep. 458) and that, therefore, the Crown should be regarded as having led evidence in rebuttal, giving the defence thereby the right to the last word. I find it difficult to follow this reasoning. It is, to say the least, somewhat unsatisfactory to build a legal argument on a phrase occurring in a judgment. I do not think the phrase means anything more than that the Crown could avail itself of the evidence given by one accused against another (see *The King vs Hawden & Ingham* 1902 – 1 King's Bench 822 at 887) just as much as it could make use of the evidence given by a defence witness even against the accused calling that witness. If the contention of Mr. Chitty is correct, it would lead to most startling results. Suppose there is only one accused in the case, and that at the close of the case for the prosecution the accused gives evidence and calls five witnesses one of whom proves hostile to the accused. Suppose further that his credit is impeached by the accused himself as set out in section 155 of the Evidence Ordinance. And yet, according to this argument the accused can claim that the Crown has, in these circumstances, lost the right given to it under section 237(2) of the Criminal Procedure Code. The cases cited by the defence (*e.g. Regina vs Woods & May* 1853 – 6 Cox Rep. 224 ; *Regina vs Burditt & Others* 1855 – 6 Cox Rep. 458) show merely that the accused against whom evidence is given by another accused or a witness of that accused would have the right to cross-examine such accused or witness and also the right of addressing the jury after such accused.

I answer the second question in the negative.

The Crown Counsel stated to me that he did not desire to exercise his right of reply as against the 3rd and 6th accused who were undefended. I have, however, to consider the interests of the other accused. As the defence has not communicated to me any agreement among the accused as to the order of speeches, I direct that the jury should be addressed first by the 6th accused and then by Mr. Nihal Gunasekera, Mr. Chitty, the 3rd accused, Mr. Sri Nissanka, Crown Counsel, Mr. Jayasundere and the 8th accused.

IN THE PRIVY COUNCIL

Present: VISCOUNT MAUGHAM, LORD MACMILLAN & LORD WRIGHT

BANK OF BARODA, LTD. vs PUNJAB NATIONAL BANK, LTD. & OTHERS

Decided on 18th May, 1944.

Privy Council—Cheque—Certification for payment—Banking practice—Bank manager's authority to certify cheque for payment—Does the authority extend to post-dated cheques.

Held : (i) That a Bank Manager has no authority implied by law to certify for payment a post-dated cheque.

(ii) That certification of a cheque for payment is not an acceptance within the meaning of the English or Indian Act or the common law.

Per LORD WRIGHT : " Both Chalmers, (*supra*)* and Paget (The Law of Banking, 4th ed. p.164), are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded, it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the court in 1810 in *Robson vs Bennett* (1810 – 2 Taunt. 388). That is a practice between bankers for the purpose of clearing. It was judicially recognized by Sir Alexander Cockburn, C.J. in *Goodwin vs Robarts* (L.R. 10 Ex., at p. 351) in these words : ' A custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance by which they become bound to one another.' This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of rule 12 of the new regulations and rules of the Calcutta Clearing Banks' Association, which are exhibited in the documents of this case. Rule 12 states : ' It shall be permissible for any member or sub-member in the intervals of clearing hours, to apply for the " acceptance " of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of " acceptance " of the document.' It is to be noted that though it uses the term ' acceptance ' it puts it in inverted commas, so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked, and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot, however, be identified with an acceptance."

(Editorial Note : The importance of this decision to us lies in the fact that our Bills of Exchange Ordinance is based on the English Act. The law relating to cheques discussed in the judgment would therefore apply to us especially as our banking law is declared by section 3 of the Civil Laws Ordinance to be the same as would be administered in England in the like case at the corresponding period. Section 13 (2) of our Bills of Exchange Ordinance contains the words quoted in the judgment from section 13 (2) of the English Act.)

Cases referred to : *Goodwin vs Robarts* (1875 – L.R. 10 Ex. 337)
Ramchurn Mullick vs Luckmeechund Radakissen (1854–9 Moo. P.C. 46, at p. 69)
Macbeth vs North & South Wales Bank (24 Times L.R. 5, at p.7; 1908 – 1 K.B. 13 at p. 18)
Robson vs Bennett (1810 – 2 Taunt. 388)
Gaden vs Newfoundland Savings Bank (15 The Times L.R. 228 (1899) A.C. 281)
Keene vs Beard (1860 – 8 C.B. (N.S.) 372)
Pickard vs Sears (1837 – 6 Ad. & E. 469)
Jorden vs Money (1854 – 5 H. L. Cas. 185)
Forster vs Mackreth (1867 – L.R. 2 Ex. 163)

Sir Thomas Strangman, K.C., and *J. M. Pringle*, for the appellant Bank.
D. N. Pritt, K.C., and *S. A. Kyffin*, for the respondent Bank.

LORD WRIGHT

The appellant is a company doing banking business, established in the State of Baroda, under the Baroda Companies Act, 1896-1897, and having its registered office in Baroda, with branches in British India. The respondent is a bank incorporated under the Indian Companies Act. Both banks have branches in Calcutta. M. P. Amin was manager of the Calcutta branch of the appellant bank. Bhagwan Das was manager of the Calcutta branch of the respondent bank. One Mitter (respondent No. 2) became a customer of the appellant bank at Calcutta. In May, 1939, one Ghose (respondent No. 3) opened an account with the appellant bank on the understanding that he should be allowed " temporary accommodation from time to time." That account was guaranteed by Mitter.

On June 13th 1939, Ghose's account with the appellant bank showed an opening debit

* (On Bills of Exchange) Edd.

balance of Rs. 126,339, reduced during the course of the day to Rs. 81,274. On the same date Mitter's account with the respondent bank was overdrawn to the extent of about Rs. 35,000. On that day Mitter brought to the respondent bank two cheques drawn by Ghose on the appellant bank, both in favour of Mitter and both dated June 13th, 1939; both cheques were marked on their face with the words "Marked good for payment up to 20th June, 1939," and signed by Amin on behalf of the appellant bank. One cheque was for Rs. 140,000 and the other for Rs. 135,000. Mitter informed Bhagwan Das that the cheques would not be paid until June 20th, 1939, and asked to be allowed to draw Rs. 240,000 against them. Bhagwan Das said he wanted a cheque the date of which was the same as that on which payment was to be made. Mitter then took away the cheques and returned a little later on the same day with one cheque dated June 20, 1939, drawn by Ghose on the appellant bank in favour of Mitter or order, for Rs. 275,000. The cheque was crossed "& Co.," and on the face of it were written crosswise the words "Marked good for payment on 20–6–39. For the Bank of Baroda, Limited, M. P. Amin, Manager." It has not been questioned that the signature was that of Amin. Mitter endorsed the cheque generally and handed it to Bhagwan Das, with two letters, in which he asked the respondent bank to credit Rs. 275,000 to his account "on realization on due date," and also requested an overdraft of Rs. 240,000, besides the previous balance, which he promised to adjust on June 20th 1939. The respondent bank, on the same day, gave Mitter its cheque for Rs. 240,000, on the Imperial Bank of India at Calcutta, which Mitter duly cashed. The respondent bank debited Mitter's account with the amount.

Meantime, the appellant bank had become suspicious of the conduct of Amin, and had sent two senior officials to keep Amin under observation. On June 19, Amin was suspended, and early next day a notice was sent to the respondent bank and other banks that Amin's power of attorney had been cancelled and another branch manager appointed. On June 20, the respondent bank, who, though they had not yet received the notice, had become apprehensive, sent their cashier and their accountant to the appellant bank, as soon as it opened for business that morning, to present over the counter for payment, the cheque marked as above, which Bhagwan Das had endorsed generally for Rs. 275,000. Ghose's account was then in credit to the extent of annas 7 pies 3 only. The appellant bank refused payment, and returned the cheque with a memorandum attached "not arranged for." After some correspondence the respondent bank, on July 31st, 1939, began the present suit against the appellant bank, and also against Mitter and Ghose. As against the appellant bank, the respondents claimed as holders for value of the certified cheque, and also based their claim on a custom or usage, and, in the alternative, on estoppel. They claimed against Ghose as drawer, and against Mitter as endorser. The two latter did not appear, nor did they give evidence at the trial; indeed, they were then the subject, along with Amin, of criminal proceedings in connexion with their part in the affair. It was not suggested that either Bhagwan Das or the respondent bank were actually party or privy to the fraud, however irregular from a banking point of view was the discounting of a post-dated cheque, quite apart from the original request to have a single cheque in place of the two brought in the first instance. It does not appear whether the cheque was post-dated at the request of the drawer, Ghose, or of Mitter. It seems that the amount of the cheque was not debited to Ghose's account, and that there was no earmarking of funds or cover for it. Ghose's account, as already observed, was heavily overdrawn when the cheque was taken as security for the loan. It may be said that the respondent bank was not affected by irregularities of indoor management on the part of the appellant bank's manager, of which they had no notice, but the fact that money was lent on the post-dated cheque on June 13th though on its face it was only payable on June 20th and was marked for payment on that date, was a departure obvious on the face of the cheque from any practice there might be in these matters. The respondent bank, however made no inquiries, and did not question the validity of the certification or making. The effect of this will be considered later.

At the trial before Mr. Justice Panckridge the evidence called included that of some Calcutta bankers, who deposed on the question of there being a practice in Calcutta to mark or certify cheques, but it is clear that on any view there was no satisfactory evidence that it was usual to certify post-dated cheques. Mr. Justice Panckridge held the appellant bank liable on the cheque on the ground that they were acceptors, because in his judgment the certification constituted an acceptance within the meaning of the Negotiable Instruments Act, though he went on to hold as a further ground that the evidence showed that bankers at Calcutta are by usage liable on cheques certified by them when presented by parties

entitled thereto. He did not deal specifically with the case that the cheques were post-dated.

On appeal, the judgment of the trial judge was affirmed. The Chief Justice, who delivered the judgment of the court, decided the case on the ground that the marking or acceptance of the cheque was in law an acceptance by the appellant bank, and accordingly the question of usage did not arise. He said, however, that the evidence was insufficient to enable him to hold that the custom alleged was established. He was prepared to consider the evidence as showing that banks in Calcutta, which mark cheques, regard the certification as an acceptance which makes them legally liable to pay, and that they honour their obligation. The Chief Justice did not deal at length with the objections to certifying post-dated cheques, though in the memorandum of appeal it was expressly urged that to certify a post-dated cheque was outside the manager's authority and was outside any custom or usage.

In the court below the pleadings and issues were not very precise or formal, and before this Board the appeal has been presented and argued on the basis of the substantial issues. The first and principal issue was whether the certification amounted to an acceptance within the definition contained in section 7 of the Negotiable Instruments Act, 1881, which defines an acceptor as the drawee of a bill of exchange who has signed his assent upon the bill, and delivered the same. By section 6 a cheque is defined as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

There is no provision in the Negotiable Instruments Act as to a post-dated instrument such as there is in the English Bills of Exchange Act, 1882, section 13 (2), which states, "a bill is not invalid by reason only that it is ante-dated or post-dated." There are certain differences between the English Act and the Indian Act, which preceded the former by a year. But substantially the two Acts correspond. Both have been based on the law developed by the English Courts as a part of the law merchant, which the common law originally received on the basis of what was proved to the court to be the custom of European business men in their dealings, but which eventually, under the name of the law merchant was integrated with and became a part of the common law. The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal. Hence the English Act was described as a codifying Act, and so, in fact, was the Indian Act. Both were based on the English decisions, and hence these and later decisions of either country are commonly cited and relied on. And, in addition, decisions from other common law jurisdictions are frequently cited, as is done by the Chief Justice in the present case. But the law merchant is not a closed book, nor is it fixed or stereotyped. This was explained by Sir Alexander Cockburn, C.J., in *Goodwin vs Robarts* (1875–L.R. 10 Ex. 337, at p. 346 and following pages). Practices of business men change, and courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence evidence is admitted of custom and usage, which when juridically ascertained and established become incorporated in the common law. Thus, in the present case, there is an alternative claim based on custom and usage. But the contention that the certification was an acceptance of the cheque is primarily a question of law, to be decided on the terms of the Act and on the authorities on a correct understanding of the characteristics of a cheque and of the effect of certification.

The main question falls into two parts: one is whether it is legally competent to accept a cheque as if it were a bill within section 7 of the Negotiable Instruments Act, 1881, and the other is whether certification constitutes an acceptance. It is to be noted that, so far as their Lordships know, there is no case in the books of the acceptance of a cheque. This is an arresting fact at the outset, especially when the myriad cheques which have been drawn and paid during all these years are considered. The reason why a contrast is drawn between the acceptance of a cheque, which is a bill of exchange of a special type, and the acceptance of an ordinary bill of exchange depends on the distinction in fact between a bill of exchange and a cheque, which are in many respects different and distinct in their character and origin: see *Goodwin vs Robarts* (L.R. 10 Ex. at p. 346), though in many respects they are analogous. In *Ramchurn Mullick vs Luckmeechund Radakissen* (1854–9 Moo. P.C. 46, at p. 69), this Board, on an appeal from the Supreme Court of Calcutta, in a judgment delivered by Baron Parke, pointed out some of the essential differences: he said that "a banker's cheque is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different." He said that "in the ordinary course it is never accepted: it is not intended for circulation, it is given for immediate payment, it is not entitled to days of grace." In addition, it is to be noted, a cheque is presented for payment whereas a

bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance; this is not so in the case of a cheque, because the holder of a cheque, as between himself and the drawer, has no right to require acceptance.

These essential differences (besides others) are sufficient to explain why in practice cheques are not accepted. Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular if the customer has sufficient funds or credit available with the bank, the bank is bound either to pay the cheque or dishonour it at once. There is no point in its saying in effect to the drawer or, indeed, to the holder if it has been transferred, "I will pay if you present it again." It is different in the case of an ordinary bill; the drawee is under no liability on the instrument until he accepts; his liability on the bill depends on his acceptance of it. As between the drawer and his bank, acceptance of a cheque is superfluous. It would be merely a confirmation of the contractual liability of the bank to honour the customer's orders to pay. The customer's right to draw a cheque depends on his having satisfied the contractual conditions which require the bank to honour his mandate to pay the cheque. But if the bank (at least at the drawer's request) accepts the cheque, it should be entitled to protect itself as against his customer by setting aside the appropriate funds standing to the customer's credit. The change in the position of all parties which would follow on the acceptance of a cheque, if regarded as an acceptance under the Act, has led the highest English authorities to lay it down that cheques are not the proper subject of acceptance, or at least to say, as Chalmers stated (Bills of Exchange, 10th ed., at p. 292), that "a cheque is not intended to be accepted," though he adds "at common law there is no objection to the acceptance of a cheque if the holder likes to take it in lieu of payment."

These latter words emphasize the difference for this purpose between a bill and a cheque, and also explain why cheques are not in practice accepted. In *Macbeth vs North and South Wales Bank* (24 The Times L.R. 5, at p. 7; (1908) 1 K.B. 13, at p. 18) Lord Alverstone, C.J., said: "In ordinary parlance there is no acceptor of a cheque." It seems that on special occasions bankers do accept cheques drawn on themselves so as to make them payable at one of their clearing bankers, they themselves not being members of the Bankers' Clearing House, but this is rare and exceptional. Both Chalmers (*supra*) and Paget (The Law of Banking, 4th ed. p. 164) are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded, it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the court in 1810 in *Robson vs Bennett* (1810-2 Taunt. 388). That is a practice between bankers for the purpose of clearing. It was judicially recognized by Sir Alexander Cockburn, C.J. in *Goodwin vs Robarts* (L.R. 10 Ex. at p. 351) in these words: "A custom has grown up among bankers themselves of marking cheques as good for the purpose of clearance by which they become bound to one another." This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of rule 12 of the new regulations and rules of the Calcutta Clearing Banks' Association, which are exhibited in the documents of this case. Rule 12 states: "It shall be permissible for any member or sub-member in the intervals of clearing hours, to apply for the 'acceptance' of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of 'acceptance' of the document." It is to be noted that though it uses the term "acceptance" it puts it in inverted commas, so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked, and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot, however, be identified with an acceptance.

In the United States the practice of marking or certifying cheques has been established and defined by the different State Legislatures in the Uniform Negotiable Instruments Acts. It is presumably this law, as enacted in New York State in 1897, to which the Chief Justice refers in his judgment. The same measure, with trifling variations, has since been made law in the other States of the Union. Their Lordships must therefore briefly advert to this law, which gives a statutory recognition to the certification of cheques. Section 187 of the Uniform Act pro-

vides that "where a cheque is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." It does not say that the certification is an acceptance, which is dealt with in a different part of the Act. The whole position is, indeed, materially different, as is clear from section 188, which goes on to define the effect of certification in the following terms: "Where the holder of a check procures it to be accepted or certified the drawer and all endorsers are discharged from liability thereon." These sections have led to a great deal of judicial discussion in the courts of the United States, the effect of which is summarized in the standard work of Brannan (Negotiable Instruments Law, 6th ed. p. 1146 *et seq*). These discussions also show that certification and acceptance are different things under the Act. Certification makes the banker the debtor of the holder, and discharges the drawer altogether if the certification is not made by his procurement. Certification adds a new party, the bank, as primary debtor, and necessarily involves readjusting the legal position of the original parties, drawer and payee. A similar rule has been adopted, it seems, by the courts of Canada, on the basis of the custom of Canada judicially recognized by this Board in *Gaden vs Newfoundland Savings Bank* (15 The Times L.R. 228; 1899–A.C. 281). The custom was stated (at pp. 228 and 285 of the respective reports) to be that "the only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it was drawn." These last words are not very precise, and their exact effect has not been argued in this appeal. It is not here necessary or proper for Their Lordships to attempt to follow in detail the Canadian authorities on this topic. Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be "equivalent" to an acceptance.

But it is different in England and India, where the marking of a cheque has so far been only judicially recognized to import a promise or undertaking to pay as between banker and banker for the purpose of clearance. In the absence of relevant enactment or custom, the issue in England and India as to the effect of the certification of a cheque must be determined by the common law. Their Lordships are of opinion that the certification which is relied on as constituting acceptance of the cheque is not an acceptance within the meaning of the English or Indian Act or the common law. It is not necessary categorically to hold that a cheque can never be accepted; it is enough to say that it is only done in very unusual and special circumstances. The authority which has been strongly founded on by the respondent is *Robson vs Bennett* (*supra*), where the practice already mentioned of London bankers to mark cheques presented after banking hours by one banker drawn on another in order to show that the drawer had assets and to show that they would be paid next day at the clearing house, came incidentally into question. The real issue was whether the holder had become bound, as between himself and the drawer, to treat the cheque as good payment of the debt for which it had been given; the facts were that the drawee bank had stopped payment the next morning, so that the cheque was not actually paid. The drawer claimed that the holder was bound to treat the cheque as payment because he had been guilty of laches in not presenting the cheque within banking hours on the day on which it was given. In that event the drawee bank, which had not then stopped payment, would have met the cheque because the drawer's account was sufficiently in credit. The Court of Common Pleas rejected this contention, and held that there had been no laches on the part of the holder and that by reason of the practice of bankers the actual presentment which had been made was in good time. Sir James Mansfield, C.J., in giving judgment, used the phrase that "the effect of that marking is similar to the accepting of a bill" (2 Taunt. at p. 396). That was a mere dictum not necessary, or, indeed relevant, to the decision of the case; the banker was not even a party to the action. Having regard to the custom stated by Sir Alexander Cockburn, C.J., in *Goodwin vs Robarts* (*supra*), and the whole tenor of English authority, Their Lordships are of opinion that the dictum cannot be justified in English or Indian law. In *Keene vs Beard* (1860–8 C.B. (N.S.) 372) the question was whether the holder of a cheque could sue the endorser on his endorsement. It was held that he could. No question arose as to the acceptance of a cheque, but Sir William Earle, C.J., in the course of his judgment observed: "A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker, and though in practice the banker does not accept the draft, he might for aught I know do so." (8 C.B. (N.S.) at p. 380). Further instances of incidental observations to the same effect, or similar observations in well-known text writers, need not be quoted.

Their Lordships repeat that no case is reported in England or India, so far as they are aware, of a banker being held liable, or even sued, as acceptor of a cheque drawn on him. It would certainly require strong and unmistakable words to amount to the acceptance of a cheque. That cannot be predicated of the certification here in question, which cannot therefore be regarded as an acceptance unless a custom could be established to treat certifications as acceptances.

If the respondent were entitled to claim against the appellant as on an acceptance of the cheque, there would be no defence, unless on the point that the cheque was post-dated. This problem Their Lordships will consider later. If that point is for the moment disregarded the respondent's claim may, however, be put forward, in default of its being held that there was an acceptance of the cheque, on the ground that there is a custom which makes the appellant liable, or, alternatively, on the ground that by common law, apart from special custom, the respondent can claim either in contract or on an estoppel on the actual words used in the certification. The Chief Justice, having held that the certification constituted an acceptance, went on to say that the question of usage accordingly did not arise. He added that "before agreeing with the learned judge that a usage such as he mentions had been established, I should require further evidence.....I prefer to regard the evidence as showing that banks in Calcutta, which certify and mark cheques, regard the certification or marking as being an acceptance which makes them legally liable to pay the amount thereof and that they honour their obligations." Their Lordships do not regard these two sentences as necessarily inconsistent. The latter seems to them merely to state that the general habit of business men supports the Chief Justice's decision that in law there was an acceptance. It cannot be intended to substitute a sentiment that banks ought to honour their signature whether in law binding or not, for the correct legal position when a bank feels entitled or bound to rely on the strict letter of the law and the court is required to decide strictly the legal rights. Their Lordships, agreeing with his decision that the evidence of custom is insufficient, as they think it is both in the number and quality of the witnesses and in the certainty and precision of the evidence given, cannot in view of the decision which he had previously expressed on the issue of custom, treat the sentence as intended to find a legally binding custom. There is, indeed, in the evidence no instance spoken to of a dispute being settled in favour of the alleged custom; the instances given are comparatively few, and from a few banks, and are mainly instances of the limited custom of bankers in the clearance, which is not questioned. In some cases given in evidence the periods between certification and clearance extended over the week-end, and, in one instance at least, even a few days longer. They can, it seems, be most properly regarded as instances of occasional laxity. But there is nothing to justify the finding of a custom to identify certification with acceptance.

In one essential matter, however, the evidence is not merely too weak to support a custom, but is directly opposed to it. The cheque in question was post-dated. Post-dated cheques are a peculiar species, which have been described as objectionable. The general tenor of the evidence as to them in this case is that it is at the lowest unusual to certify post-dated cheques, indeed that it is almost unknown. Bhagwan Das said that he had never certified a post-dated cheque. As to the actual certification on the particular cheque in question, he said that he took it as a representation that the appellant bank would meet the cheque on a future date, and he said he would feel no difficulty in marking a post-dated cheque, though he did not directly answer the question whether it was usual to do so, but merely said "there is no harm" and later that it was done in rare cases. He also said that this was the only instance in which while at Calcutta he had advanced money on a post-dated cheque. His view of the law was that, by marking or certifying the cheque, a bank became in a way the drawer of it. Another of the respondent's witnesses said that he did not think he had certified a post-dated cheque or accepted (that is taken) a post-dated cheque certified by another bank. But he expressed his view that if he certified the cheque his bank would be liable. Another witness called by the respondent said that it was not usual to certify a post-dated cheque, though in answer to a leading question on re-examination he agreed that a bank was bound to pay a certified post-dated cheque. Another of the respondent's witnesses said that he would not discount a certified post-dated cheque; he would feel there was something suspicious in the transaction and would make inquiry. The appellant was content in the main to point out the inadequacy of the respondent's evidence.

In Their Lordships' judgment, the evidence of custom fails as the Chief Justice held. As to the alternative claim in contract or on an estoppel, that claim in their judgment also fails. The certification must for this purpose be

construed according to the proper meaning of the words used in their setting, and independently of the doctrine of negotiability, which is the creation of legislation or established usage. If legislation or usage is ruled out, as in this case it must be, the question is whether the words read in their context, that is, as appearing on a cheque, import a promise by the certifying bank to pay the amount of the cheque whether or not there are funds to meet it, and if they do, whether there is any privity of contract between the respondent and the appellant, and, if there is, whether there is consideration for the promise as between these parties. If the certification on the cheque had been negotiable, as an acceptance in the proper sense would have been, the respondent bank would *prima facie* have been entitled to claim as a holder in due course, having given value to its immediate transferor and would not be concerned with the state of accounts or the equities between the appellant bank and Ghose or Mitter, to one or both of whom the certification was issued. But this is not the case unless the certification amounted not merely to a promise but a negotiable promise by the appellant. The respondent bank must show privity of contract between itself and the appellant bank, whereas there was privity of contract only as between the appellant bank and either Ghose or Mitter, or perhaps both. The respondent bank claims as a holder in due course, and must so claim. If it claimed as assignee or agent for collection, it would have no better title than its assignor or principal. But in addition there clearly was no consideration passing to the appellant from the respondent. There was thus no enforceable contract, even if the certification could be construed according to its terms as a contract to pay. Their Lordships doubt whether, on this ground, no custom being established, the words of the certification could be so construed. They might be construed as words of representation as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But as the cheque was not due for payment until seven days later, a representation as to the then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise, and the want of consideration would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise given either to Ghose or Mitter, or to both, to lend the money when June 20 came. Their Lordships adopt the language of Mr. Justice Buckley, used in a different context in *In re Beaumont* (1902–1 Ch. 889, at p. 896): "No right had been acquired by the drawee but an expectation only. Even if the manager did not change his mind, still an agreement to lend is not enforceable, and no right of property had passed to the drawee." What was in question there was a *donatio mortis causa* of a cheque which the manager of the bank had said would be met. But the principle stated has an application to the certification here. What was said could have been revoked or disowned. It was not binding; there was no appropriation of funds or declaration of trust involved in the certification, because there were in fact no funds available on the 13th or indeed the 20th. Nor could the certification be construed as an estoppel on which the respondent could claim on the doctrine of *Pickard vs Sears* (1837–6 Ad. and E. 469) and *Jorden vs Money* (1854–5 H.L. Cas. 185), because that doctrine is limited to a representation as to an existing fact, whereas not only were no funds available, but what is called the representation related to the future. Even if funds had been available and had been "frozen," the bank would be entitled to release them before the 20th, in the absence of a binding promise to maintain them. It was only to the position in the future when the time for payment arrived that the certification had reference, and whatever language was used it necessarily amounted, if it was to be effective, to a promise or nothing. From the point of view of a court of law, a gentlemen's agreement or honourable obligation, however important in business, has no validity.

But behind all these considerations lies the circumstance that the cheque was post-dated. The question of certifying a post-dated cheque has been adjudicated on in the United States. It has there been held that there is no authority implied by law for an officer of a bank to certify a cheque until on or after the date when it is made payable, and that anyone taking a post-dated cheque before the day of its date is put on inquiry. As to this reference may be made to Brannan (Negotiable Instruments Law, p. 1152). There do not seem to be any English cases on the point, presumably because the practice of certifying cheques is not judicially or legislatively established in England, and the same is true of India. It was, however, held in *Forster vs Mackreth* (1867–L.R. 2 Ex. 163) that a partner had no authority to bind his firm, who were solicitors, by a post-dated cheque any more than he had authority to bind the firm by a bill of exchange. No doubt the reason for denying ostensible authority is in some aspects different in the one

case from that in the other. But in each case it depends on the nature and normal exigencies of the business, and a banker's business does not normally involve that a manager's authority should extend to certifying, and still less making a loan against, a post-dated cheque. The Chief Justice dealt shortly with the difficulty by holding that the post-dated cheque was in law a bill of exchange at seven days' date, which on June 20 became a bill of exchange payable on demand and therefore a cheque. But the material date in this context is that of the certification, issued when the bill or cheque was not due. A post-dated bill is under the English Act, section 13 (2), not invalid by reason only that it is post-dated. There is no similar provision in the Indian Act, but the same result would, it seems, follow from the common law, and the position of a post-dated cheque is recognized in the Indian Stamp Act. But the material invalidity is that of the certification, taken in connexion with the fact that the cheque was post-dated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due *in praesenti*, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdiction where by law or custom certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of post-dated cheques, and that in the present case the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

Their Lordships are not unconscious that bankers regard their word as their bond, and honour their signature even though they might have an answer in law. This is especially true as between banker and banker. Bankers would say that the bank making the mistake, or whatever it was, should stand by its act. But in circumstances such as those of the present case the mistake on certifying the cheque would have done no harm, if it had not been for the act of the other banker in discounting it, though the defect was apparent on its face. A lawyer would be disposed to hold that the responsibility lay with the latter bank. In any case the court is here called on to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken.

On the whole case Their Lordships are of opinion that the action of the respondent should fail. They think that the appeal should succeed and the judgment for the respondent should be set aside, and the action dismissed, with costs in the courts below and of the appeal. They will humbly so advise his Majesty.

Appeal allowed.

Present: SOERTSZ, J. & HEARNE, J.

THAMBU vs ARULAMPIKAI & ANOTHER

S. C. No. 59-S—D. C. (Inty.) Jaffna No. 1036.
Argued on 20th & 21st July, 1944.
Decided on 1st August, 1944.

Will in handwriting of sole beneficiary under it—Will copied at the request of the notary who attested it—Absence of clause in testator's handwriting to the effect that he dictated the will and acknowledged its correctness—Effect of—Is the Roman-Dutch law repealed by section 11 of the Prevention of Frauds Ordinance—Appeal—When may an issue not expressly framed in the trial court be taken in appeal.

Held : (i) The person who writes out a will for the testator cannot insert therein any benefit for himself, and should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other

manner clearly confirms the disposition. The fact that the will was copied at the request of the notary who later attested it makes no difference.

(ii) That a question which was not expressly raised in the trial court may be taken in appeal when it can be brought under one of the issues framed.

Cases referred to : *Smith vs Clarkson & Others* (1925 A.D. 501)
Gunn vs Gunn (1910 T.P.D. 423)
Smith vs Mathey (1926 C.P.D. 31)
Andrado vs Silva (22 N.L.R. 4)
The Tasmanis (1890–15 A. at 223 ; 15 N.L.R. at p. 312)

N. Nadarajah, K.C., with *V. K. Kandasamy*, for the respondent-appellant.
E. F. N. Gratiaen with *D. W. Fernando* and *C. Chellappah*, for the plaintiff-respondent.

SOERTSZ, J.

The last will which was admitted to probate by the order of the District Judge, dated the 15th of April, 1943, had been attacked mainly on the grounds that—

(*a*) it was not the act and deed of the deceased ;

(*b*) that it was procured by undue influence ;

(*c*) that it was procured by fraud.

The learned trial judge, in a full and well considered judgment, found against the appellants on all three questions, and, in my opinion, on the evidence before him, he reached the only possible conclusions in regard to the questions (*a*) and (*c*). The evidence, he accepted, established quite clearly that the testatrix signed the will in the presence of the Notary and of the two attesting witnesses, all of them being present together, and there was no evidence whatever of fraud. In regard to the other question, that of undue influence, two views were possible, but the trial judge having found that there was no undue influence, I do not think we ought to reverse that finding although possibly, we ourselves might have reached a different conclusion. But, on appeal, counsel for the appellants raised a question which had not been expressly put in issue in the court below, and contended that the will failed to take effect inasmuch as it was, in its entirety, in the handwriting of the petitioner, who is the sole beneficiary under it. Now, it is a well-established rule of the Roman-Dutch Common Law that " the person who writes out a will for the testator cannot insert therein any benefit for himself, and should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other manner clearly confirms the disposition. Such confirmation can take place *dehors*, or apart from the will itself, as for instance in a subsequent and independent codicil, or by some other satisfactory proof of confirmation. Such confirmation cannot, however, be gathered merely from the fact that the testator knew the contents of the will either because he had read or dictated it, or prepared the draft which the writer merely copied." See Steyn on Wills p. 16. This statement is based on the several cases to which reference is made by the writer, *Smith vs Clarkson & Others* (1925 A.D. 501) ; *Gunn vs Gunn* (1910 T.P.D. 423); *Smith vs Mathey* (1926 C.P.D. 31). The case of *Smith vs Clarkson*, in particular, deals very fully with this question in the judgment of Kotze, J.A. which considers the opinions of nearly all the well-known Roman-Dutch jurists.

In regard to wills, we are governed by the Roman-Dutch law, except in so far as local Ordinances have modified it, and whatever view we may personally entertain in regard to what we may be disposed to regard as an archaic, and in many cases, a purely technical rule of exclusion, we must submit to it if it is in force. The question, then, arises whether the Roman-Dutch Common Law rule stated above has been abrogated by any local Ordinance. Counsel for the respondent to this appeal submitted that section 11 of the Prevention of Frauds Ordinance (Chapter 57) repealed that rule by implication in that it rendered void only devises, legacies, gifts, etc. to attesting witnesses and to their wives and husbands and persons claiming under such witnesses, wives or husbands. I do not think that argument can be accepted for as Steyn points out (pages 15-18) these were persons incapacitated from benefiting under a will both by the Common Law and by Statute Law. In South Africa too, there are statutes incapacitating attesting witnesses, their wives and husbands from taking benefits, and yet, the rule of the Common Law excluding persons writing out a will from benefits under it is very much alive and is strictly enforced there, as the cases already cited show. The resulting position would appear to be that to the Common Law exclusions, the statutes added others.

In this case, it is admitted that the whole will is in the handwriting of the petitioner who is the respondent to this appeal. It matters not, in the least degree, that evidence was led to show that the petitioner copied the will from a Notary's manual at the request of the Notary who later attested the will. He cannot take under the will unless there is satisfactory proof of a confirmation by the testatrix of the will in the manner indicated in the passage cited from Steyn's treatise.

That brings me to the two other questions that arises on this appeal, namely, whether (*a*) this point may be taken on appeal, it not being an issue expressly framed in the court below; (*b*) if it may, properly, be considered on appeal, whether we should send the case back to the trial court for further consideration of the question of appropriate confirmation, or deal with it here.

In regard to these questions, the important fact to bear in mind is that they arise in testamentary proceedings in which it is sought to have a will admitted to probate proceedings *in rem*. In such proceedings, as laid down in the case of *Andrado vs Silva* (22 N.L.R. 4), "it lies upon the propounder of a will to prove (1) the fact of execution; (2) the mental competency of the testator; (3) his knowledge or approval of the contents of the will. If the circumstances are such that a suspicion arises affecting one of these matters, it is for the propounder to remove it." Applying this principle, we find that in regard to the fact of execution, a strong suspicion arises in this case in consequence of the will being wholly in the handwriting of the beneficiary who is the father of the testatrix, a young woman living under his roof in a state of estrangement from her husband, the father himself having, in great measure, caused the estrangement. It was, therefore, incumbent on the propounder to dissipate that suspicion by leading evidence of the confirmation of the will. From the very beginning of the inquiry, the fact of the will being in the handwriting of the petitioner was pressed in order to show that the will was designed, drawn up, and imposed upon the testatrix by her father, the petitioner, and yet no attempt whatever was made to show that there was any independent confirmation of the will by the testatrix. It may indeed be granted that the parties were not aware of that rule, but granting that only makes it most unlikely that there was any other confirmation of the will by the testatrix. But, even if such a confirmation had come into existence for some other reason, it would have, undoubtedly, been relied upon to repel the attack that was actually delivered against the will. But, even if we disregard the fact that these are testamentary proceedings, in which, quite apart from issues such as are framed in ordinary suits, an initial burden lies upon the propounder of a will, and treat the case as an ordinary suit purely *inter partes* to be tried and decided upon issues, I still think that the rule laid down in the leading case on the point, "*The Tasmanis* (1890–15A at 223) applies to enable the appellants to raise this question on appeal (*a*) because the question might have been put forward in the court below under some one or other of the issues framed," (15 N.L.R. at page 312). In this instance, it could have been put forward under, at least, issues 1 and 2; (*b*) because, in the circumstances of this case, we may safely assume that we have before us all the material in support of the will, at the command of the petitioner. If there had been any further confirmation by the testatrix of the will, it would undoubtedly have been put forward, when in cross-examination, attention was repeatedly called to the fact that the petitioner himself had written the will. To send the case back now might only serve to expose the parties to stronger temptation than they appear to be able to resist.

In the result, although this will was rightly admitted to probate on the findings of the District Judge and would have been operative in other circumstances, it fails in this instance because the sole beneficiary under it is incapacitated from taking under it.

I would, therefore, set aside the order made and direct that the estate be dealt with on the footing of an intestacy. In regard to costs, the appellant, that is the 2nd respondent to the petition, having failed on the questions he raised in the trial court, I think he should pay the petitioner-respondent's costs in the court below personally. In regard to the costs of appeal, the petitioner-respondent will recover half from the estate.

HEARNE, J.

I agree.

Order set aside.

IN THE COURT OF CRIMINAL APPEAL

REX vs WILLIAM PERERA & ETIN

Present: HOWARD, C.J., (President), KEUNEMAN, J. & DE KRETSER, J.

Appeals Nos. 23-24 *of* 1944 *with Applications Nos.* 70-71 *of* 1944.
S. C. No. 49—*M.C. Gampaha No.* 18370—*2nd Western Circuit,* 1944.
Argued on 24th & 25th July, 1944.
Decided on 4th August, 1944.

Court of Criminal Appeal—Evidence Ordinance section 114 (*a*)—*Presumption arising om possession of stolen goods soon after they have been stolen.*

Held : (i) That possession by a person of property recently stolen from a house in the course of house-breaking gives rise to the presumption that the possessor was either concerned in the house-breaking or received the goods knowing them to be stolen.

(ii) That the strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed since the commission of the offence.

Per HOWARD, C.J.: " 'If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can only judge of matters with reference to their knowledge and experience of the ordinary affairs of life.

Thus, for instance (to put the present case), if the property were the produce of a burglary, then the possession of it, soon after the burglary, is some evidence that the person in whose possession it is found was a party to the burglary. For, at all events, he must have received it from one who was a party to it; and this is strong evidence that he was privy to it and some evidence that he was a party to it. Whether or not he was so, must be judged of from all the other circumstances of the case.

If the explanation is, for instance, that the party has found the property where it might have been found, and was going to deliver it up to a constable, and the circumstances were consistent with that account, some evidence ought to be given to contradict it, and show it to be untrue.

What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable, or otherwise.' "

Cases referred to : *Emperor vs Pothal* (1939–A.I.R. Patna 577)
Lohar vs Emperor (1936–A.I.R. Nagpur 200)
Ragnath vs Emperor (26 Cr. L.J. of India 1380)
Reg. vs Langmead (10 L.T. 350)
Rex vs Densley & Others (172 E.R. 1294)
Rex vs Exall & Others (176 E.R. 850)

J. E. M. Obeyesekere and *M. M. Kumarakulasingham*, for both appellants.
H. W. R. Weerasooriya, Crown Counsel, for the Crown.

HOWARD, C.J., (President)

The two accused appeal from their convictions on a charge of being members of an unlawful assembly and as such on further charges of committing offences punishable under sections 146 and 436, 146 and 333, 146 and 380, and 146 and 382 of the Penal Code. The appeals are based on two grounds, (*a*) that it was not proved conclusively that five or more persons took part in the robbery, (*b*) that a wrong inference was drawn from the evidence that the accused took part in the robbery. In connection with ground (*a*) Mr. Obeyesekere, on behalf of the appellants, has contended that the question put by the jury and recorded at page 25 of the judge's charge indicated considerable confusion in their minds. The question to which Mr. Obeyesekere referred was asked by the jury to elicit from the judge a ruling as to what constituted participation in a gang robbery. No exception can, in our opinion, be taken to the direction given by the learned judge in answer to this question. With regard to the number that took part in this robbery, Don Pedrick Appuhamy states that three or four persons seized him and held his hands and feet together. Also that almost immediately after he was left tied, the watcher was brought and placed in the other corner of the room. He also says that the watcher must have been tied by some other people. In answer to the court Pedrick Appuhamy also states that there were more than five people. Charles Appuhamy, the watcher, says that he was falling asleep when three persons came calling for " watcher " and got into the room occupied

by Pedrick Appuhamy. That as Pedrick was tied, he was also tied in the verandah and carried into the room. Apart from the people who tied him and Pedrick there were a large number of people whom he could not identify because he was blindfolded. He also said he is certain he was being held down by three men while three or four rushed into the kangany's room. In view of the evidence of Pedrick and Charles I do not think that there is any substance in the point that it has not been proved that five or more persons participated in this robbery.

The second ground of appeal necessitates a more detailed examination of the evidence. Pedrick and Charles both testify to the fact that about midnight on the 4th August, 1943, the small bungalow on the rubber estate belonging to Mr. Tudugalla was broken into by a large number of thieves. Pedrick and Charles were both tied up whilst the assailants proceeded to open boxes and rifle the bungalow. After their departure a large number of rubber sheets and other articles were found missing. Neither Pedrick nor Charles identified any of their assailants. The main evidence against the two accused was the fact that on the day after the robbery at 10.50 p.m. there was found in the house of the first accused 300 rubber sheets and two brand new Dunlop Bates tyres. The house of the second accused was searched at 11.45 p.m. and 700 diamond rubber sheets and an old torn tweed coat were found. Some of the rubber sheets, the Dunlop Bates tyres and the torn tweed coat were identified as property stolen from the house of Pedrick on the night of the robbery. No question was raised by Mr. Obeyesekere with regard to the genuineness of this identification. The only other evidence connecting the two accused with this robbery was supplied by two persons called Peter Peries and D. A. P. Suriapperuma. Peries stated that on the night of the robbery about or 11.30 p.m. he was returning from Colombo when a little way from Kurunduwatte Estate Road he met a cart without lights. The first accused was driving the cart and there were others inside. The second accused and another man were walking behind the cart. The evidence of Suriapperuma was to the effect that he heard of the burglary about 8.30 or 9 p.m. on the 4th August. He made investigations and found fresh wheel tracks up to a footpath that led to the accuseds' houses. He also found a sheet of rubber in a bush. He suspected the two accused and reported the matter to Mr. Tudugalla who informed the police. The houses of the two accused were then searched. Neither accused elected to give evidence. The defence suggested that the large number of rubber sheets found in the houses of the accused had been introduced by the witness Suriapperuma and Tudugalla, to implicate the two accused. The defence even went so far as to make the fantastic suggestion that to effect this purpose the roof of the house of the first accused had been removed.

Mr. Obeyesekere takes exception to certain passages which occur in the charge of the learned judge. At page 7 the following passage occurs:

> "Possession of stolen property soon after the commission of a theft raises the *prima facie* presumption that the possessor was either the thief or the receiver of stolen property knowing it to be stolen according to the circumstances of the case. You must take the evidence as a whole and decide whether it raises a presumption of theft or of dishonestly receiving stolen property. On this question the fact that the stolen articles were found in the houses of the accused within 24 hours of the theft has an important bearing. There was hardly any time for the articles to pass from hand to hand by normal bargain and sale. In the circumstances, you would be justified in drawing the presumption that the accused were the thieves and not receivers of stolen property. If, however, you think that the presumption of theft is not raised by the evidence but only the presumption of receiving stolen property, or if a reasonable doubt arises in your minds on that point, then it is your duty to acquit the accused. You need not consider the case any further because there is no charge against the accused that they received stolen property."

Again at pages 14-15 there is the following passage:

> "This shows that the presumption of theft arising from the recent unexplained possession of stolen property may extend even to the manner in which the theft was committed, namely, of robbery. If you draw the presumption under section 114 (*a*) that the accused were the thieves, you will be entitled to draw the further presumption that they committed robbery. That is the meaning of that passage. There can be no doubt that the stolen articles were found in the houses of the accused soon after the theft. You will have to consider whether the accused had possession of the articles."

I would also invite attention to the following passage on pages 24-25:

> "You must ask yourselves whether this evidence is consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of innocence. It seems to me that it is not. So, it is not possible for you to return a verdict against the accused upon the circumstantial evidence. The prosecution has to fall back upon a presumption raised under section 114 of the Evidence Ordinance. If you are of opinion that the accused were in possession of the rubber and that the presumption is that they were the thieves and not the receivers of stolen property, and that there was an unlawful assembly, then it will be open to you to find the accused guilty on the charges laid against them. If a reasonable doubt arises in your minds on the point, then it will be your duty to give them the benefit of the doubt and acquit them."

The passages I have cited from the charge of the learned judge clearly indicate that he left it open to the jury to find by their verdict on

the evidence that the two accused participated in the robbery. He also indicated that the jury might find that the accused were merely receivers of stolen property in which case they were to be acquitted. Mr. Obeyesekere contends that the jury should have been directed that the presumption arising from section 114 (*a*) of the Evidence Ordinance was that the two accused were receivers rather than the actual thieves. We are of opinion that there is no substance in this contention. He has cited in support of this contention some Indian authorities. In one of these, *Emperor vs Pothal* (1939–A.I.R. Patna 577) it was held as follows:

> "Where robbery has been committed along with murder and articles alleged to have been robbed from the body of the deceased have been discovered in the house of the accused as a result of a statement made by him to the Police and the accused gives no explanation for the possession of these articles, one may presume under section 114 that the accused was either involved in the murder and robbery or at least received the stolen property knowing it to be the proceeds of the robbery. This presumption is within the terms of section 114, illustration (*a*); but when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused."

It would appear that in *Emperor vs Pothal* the accused was a goldsmith, a person likely to be resorted to by a thief for the disposal of stolen jewels. Moreover the question which the learned judge was considering was whether there was any evidence other than that of being in possession of property of the deceased to connect the accused with the latter's murder. In the absence of such evidence it was held that the presumption was in favour of the accused not being a participant in the murder. The same principle was formulated in *Lohar vs Emperor* (1936–A.I.R. Nagpur 200) and *Ragnath vs Emperor* (26 Cr. L.J. of India 1380). Mr. Obeyesekere also cited the case of *Reg. vs Langmead* (10 L.T. 350). The judgment of Blackburn, J. in this case is as follows :

> "I am of the same opinion. As a proposition of law there is no presumption that recent possession points more to stealing than receiving. If a party is in possession of stolen property recently after the stealing, it lies on him to give an account of his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly ; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as to render it more likely that he did not steal the property, the presumption is that he received it. In the present case I believe that the jury have drawn the right conclusion."

The case hardly seems to bear out the contention of Mr. Obeyesekere that the presumption is more in favour of receiving than theft. This judgment seems to lay down that it is a presumption of fact dependent on the surrounding circumstances in each case as to whether the accused is guilty of receiving or stealing. This principle seems to follow from some cases cited by Mr. Weerasooriya on behalf of the Crown. In *Rex vs Densley & Others* (172 E.R. 1294) it was held as follows :

> "Stolen property being found concealed in an old engine-house, and, it being watched, the prisoners were seen taking it away :— **Held,** that, to warrant the conviction of the prisoners, on an indictment charging them as receivers, the jury must be satisfied that the property had been stolen by some other person to the knowledge of the prisoners, and that there should be some evidence to shew that such was the case :— **Held,** also, that the evidence given in this case would warrant a conviction for the stealing."

In *Rex vs Exall & Others* (176 E.R. 850) Pollock, C.B., in his charge to the jury stated as follows :

> "And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson, or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.
>
> The law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable. The strength of the presumption, which arises from such possession, is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can only judge of matters, with reference to their knowledge and experience of the ordinary affairs of life.
>
> Thus, for instance (to put the present case), if the property were the produce of a burglary, then the possession of it, soon after the burglary, is some evidence that the person in whose possession it is found was a party to the burglary. For, at all events, he must have received it from one who was a party to it ; and this is strong evidence that he was privy to it, and some evidence that he was a party to it. Whether or not he was so, must be judged of from all the other circumstances of the case.
>
> If the explanation is, for instance, that the party has found the property where it might have been found, and was going to deliver it up to a constable, and the circumstances were consistent with that account, some evidence ought to be given to contradict it, and show it to be untrue.
>
> What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe

the account given by the prisoner is, under the circumstances, reasonable and probable, or otherwise."

The jury in this case were invited to say whether the evidence pointed to theft rather than receiving. They have answered this question by finding that the accused participated in the robbery. In our opinion the evidence of Peries and Suriapperuma and the finding of such heavy material in the form of a large number of rubber sheets in the houses of the accused so soon after the robbery, coupled with the failure of the accused to give any explanation, raised an overwhelming presumption that the latter participated in the robbery. The appeals are, therefore, dismissed.

Appeals dismissed.

Present: KEUNEMAN, J.

KANAPATHIPILLAI vs NAGARAJAH & SIX OTHERS

S. C. No. 1044—*M. C. Kayts No.* 4339.
Argued on 26th June, 1944.
Decided on 30th June, 1944.

Penal Code sections 408 *and* 427—*Criminal trespass and mischief—Harvesting of paddy crop on land lawfully in the possession of another.*

Held : (i) That a person who enters on a paddy field in the lawful possession of another and harvests the crop commits the offence of " mischief " within the scope of that expression as defined in section 408 of the Penal Code.

(ii) That the failure to read over to the accused the evidence of a witness who was examined before the issue of process or to tender him for cross-examination is an irregularity which does not vitiate a conviction.

Cases referred to : *Mohamed Foyaz vs Khan Mohamed* (18 W.R.Crl. 10)
Shakur Mohamed vs Chunder Mohun Sha (21 W.R. 38)
Sonai Sardar vs Bukhtar Sardar (25 W.R. Crl. 46)
Regupathi Aiyar vs Narayana Goundan (52 Mad. 151)
Miras Chowkidar (7 C.W.N. 178)
Juggashwar Dass & Others vs Chatterjee (12 Cal. 55)
Gimirulla Sarkar vs Narayana (10 Cal. 408).

N. Nadarajah, K.C., with *H. W. Thambiah* and *Ragupathy*, for the accused-appellants.
L. A. Rajapakse, K.C., for the complainant-respondent.

KEUNEMAN, J.

The accused were charged with criminal trespass with intent to commit mischief under section 433 of the Penal Code, and with committing mischief under section 409. They were convicted on both counts and now appeal.

The evidence accepted by the magistrate is that the complainant and his predecessors had been in possession of the field in question. The complainant had the field sown. The accused entered on to the field and cut the paddy. A short time later the Kirama Vidane intervened and took charge of the paddy.

There had been previous litigation as regards the land, which had gone in favour of the predecessors of the complainant, and the accused well knew that the field was in the possession of the complainant.

Two points were argued in appeal. :

(1) It was contended that an illegality existed in the proceedings. When the complainant came into court and asked for process, he led the evidence of three witnesses, viz., himself, the Kirama Vidane, and Amarasingham Ponnambalam. After process was issued the evidence of A. Ponnambalam was not read, nor was he tendered for cross-examination, and the complainant tendered the other two witnesses only. Further, a complaint made to the Police by A. Ponnambalam (C2) was read in evidence. I think there has been an irregularity but not an illegality. The magistrate has made it abundantly clear that he depended on the evidence of the complainant and the Kirama Vidane alone, and not on that of A. Ponnambalam. The evidence of the two witnesses who were tendered for cross-examination amply

justified the finding of the magistrate, whose opinion was not affected by the evidence of A. Ponnambalam or by his alleged statement. I am satisfied that there has been no miscarriage of justice, and I see no reason to interfere with the finding of the magistrate.

(2) It is contended that the offence of mischief has not been made out, and that this affects the convictions on both counts. I have been referred to certain Indian cases.

In *Mohamed Foyaz vs Khan Mohamed* (18 W. R. Crl. 10), in the reference to the High Court, the following passage occurs : " To cut a crop which is grown to be cut is not to destroy it or to affect it in the manner defined above (*i.e.* under the section). The taking may cause wrongful loss to the grower, and if it be dishonest a conviction may be had for the theft. But it cannot be mischief."

This view appears to have been accepted by Kemp, J. There were, however, other grounds on which the decision could rest. So also in *Shakur Mohamed vs Chunder Mohun Sha* (21 W.R. 38) where these words occur in the reference : " Now as bamboo is a thing that is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above "—this apparently was concurred in by Kemp, J. Here again there was a general concurrence with regard to a number of points raised.

This latter decision is open to doubt because, when the case was cited later to the same Bench, Glover, J. said : " We have no doubt that where a party whose land (as he says) is given possession of to another under sale in execution by a civil court, and who at the time of attachment made no objection.....and who since has taken no legal steps to enforce his legal right does, if he enters upon the land, possession of which has been formally made over to the execution purchaser, and cuts down bamboos growing upon it, commit the offence of mischief." *Sonai Sardar vs Bukhtar Sardar* (25 W. R. Crl. 46).

In *Regupathi Aiyar vs Narayana Goundan* (52 Mad. 151) Curgenven, J. followed the case in 21 W. R. 38 and said that the words of the section " carry the implication that something should be done contrary to the natural use and serviceableness of such property." The later case in 25 W.R. was not cited.

In another case, the report of which I have not been able to obtain — *Miras Chowkidar* (7 C.W.N. 178)—it was held that if crops were cut when immature, the offence may be committed.

It is interesting also to consider the case of *Juggashwar Dass & Others vs Chatterjee* (12 Cal. 55). Here the complainant had for purposes of removal placed certain goods upon a cart, and the accused came and unyoked the bullocks and turned the goods off the cart on to the road. It was held that the offence of mischief had been committed. "There was an unlawful removal of goods from the cart, and an unlawful change in their situation with the knowledge that the change must amount to an inconvenience, more or less serious, to the owner of the goods, and must to some extent diminish the utility of the goods..... We think it is not necessary that the damage required by this section should be of a destructive character. All that is necessary is, that there should be an invasion of right and diminution of the value of one's property by that invasion of right, which must have been contemplated by the doer of it when he did it."

The terms of section 408 are as follows :—

" Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits ' mischief. ' "

In the present case it is clear that the accused were well aware of the fact that the complainant and his predecessors were in possession of the field. The magistrate has held that this attempt on the part of the accused was part of a policy to try to get into possession as soon as a new owner appeared on the scene. The accused acted dishonestly in making the attempt. The accused entered on to the field and reaped the paddy, and but for the intervention of the Kirama Vidane, would probably have carried the crop away. The reaping of the crop, in my opinion, caused a change in the property, — there was not only a physical change but even a legal change. There has also been a change in the situation of the property. There must have been at least inconvenience caused to the complainant. No doubt the property was not destroyed, but I think it follows that there was a diminution in its value or utility to the complainant.

I prefer to follow the cases reported in 25 W. R. 46 and in 12 Cal. 55 (see also *Gimirulla Sarkar vs Narayana* (10 Cal. 408)). In my opinion the offence of mischief has been established.

The appeals are dismissed.

Appeals dismissed.

Present: SOERTSZ, J.

JAN SINGHO vs ROSELINE NONA

S. C. No. 88—*C. R. Colombo No.* 91240.
Argued & Decided on 3rd August, 1944.

Rent Restriction Ordinance No. 60 *of* 1942—*Trial of preliminary issues arising under section* 8 *proviso* (*a*) *to* (*d*) *along with the main issues in the action for ejectment—Is there a right of appeal from the decision of the court—Procedure to be followed in actions for rent and ejectment.*

Held : (i) That before an action for rent and ejectment can be tried the court must form the opinion that there exists one at least of the conditions specified in section 8 proviso (*a*) to (*d*) of the Rent Restriction Ordinance No. 60 of 1942.

(ii) That the issues arising under the proviso to section 8 of the Rent Restriction Ordinance should be tried as preliminary issues and till those issues are decided the court is not entitled to proceed to try the case on the main issues.

(iii) That the absence of a right of appeal from the decision of the court under the proviso to section 8 of the Rent Restriction Ordinance No. 60 of 1942 does not affect the right of a party aggrieved by the decision in an action in ejectment to appeal from the final judgment of the court on questions other than those specified in the proviso abovementioned.

E. B. Wickramanayake, for the defendant-appellant.
S. R. Wijayatilake, for the plaintiff-respondent.

SOERTSZ, J.

This case again affords an illustration of the confusion that appears to prevail in regard to the procedure to be adopted by Commissioners of Requests in trying actions of ejectment instituted after the commencement of Ordinance No. 60 of 1942. Section 8 of that Ordinance enables a landlord to bring a case into court as an ejectment case with the authorization of the Board of Assessment. If no such authorization has been obtained, section 8 enables, none the less, a landlord to present a plaint to the Court of Requests framed in the manner of an action for ejectment. But section 8 debars the court concerned from entertaining that action till that court is of opinion that one or other of the conditions appearing in clause 8 (*a*) to (*d*) was satisfied. This means that the court has no power to try the proposed action till it has reached the opinion that one of the conditions precedent has been satisfied.

In this instance, the plaintiff came into court, and it appears from the plaint that the ground on which he sought to have his action entertained by the court was that the rent was in arrear, that would be under clause 8 (*a*). It was, therefore, incumbent upon the court to try this preliminary matter which has now been introduced by the Rent Restriction Ordinance, namely, whether the court had the power to try the case on the ground that the court was of opinion that rent was in arrear. Instead of setting about the enquiry in that manner, the proceedings of the 25th of October, 1943, show that the learned Commissioner framed 10 issues, involving issues whether there was a tenancy or not and whether proper notice to quit had been given. Those were matters over which the court had no jurisdiction till the court had found that it had the power to entertain the proposed action. Eventually the court held that the rent was in arrear, and also held that there was a tenancy of these particular premises, and further that the tenancy in respect of these particular premises had been determined by valid notice. Now, if the court had set about this case in the manner I indicated, directly the court answered the issue in regard to the rent being in arrear in favour of the landlord, the court was entitled to entertain the action. The court should then have gone on to try the other questions, namely, the existence of a tenancy and the determination of it. The court eventually did that in this case by taking both the enquiry and the trial together.

Mr. Wijayatilake, on behalf of the respondent, has taken a preliminary objection to the hearing of this appeal on the ground that there was no right of appeal upon a recent ruling* pronounced by this court. But here again he is under a misconception because the defendant clearly had a right of appeal inasmuch as there was a trial on the questions of tenancy and the determination of the tenancy, which are the questions that usually arise in an ejectment case, and from a final judgment, or an order having the effect of a final judgment, there is a right of appeal in such an action. The preliminary objection is overruled, but Mr. Wickramanayake was not able to satisfy me that the findings of the Commissioner on the questions of tenancy and the determination of the tenancy by valid notice are wrong.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

* 27 C.L.W. p. 101

IN THE PRIVY COUNCIL

Present: VISCOUNT MAUGHAM, LORD THANKERTON & SIR MADHAVAN NAIR

ADEL MUHAMMED EL DABBAH vs ATTORNEY-GENERAL OF PALESTINE

Decided on 18th May, 1944.

Emergency Powers (Defence) Act, 1939 section 1—Palestine Defence (Judicial) Regulations 1942 regulation 3—Constitution of court by direction by Chief Justice under regulation 3—Is formal order necessary—Overriding effect of a Regulation which modifies a local Ordinance—Delegation of power—Ultra vires—Discretion of prosecuting counsel to call witnesses named in the indictment—Alteration of judgment by judge after it had been dictated in court.

The facts which are fully set out in the judgment shortly are as follows :—

On March 24th 1943, the Chief Justice of Palestine sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder under the Palestine Criminal Code Ordinance, 1936 section 214 (*b*), and sentenced him to death. An appeal by the appellant was dismissed on April 17th 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal. The appellant by special leave appealed against that judgment.

It was contended by the appellant that :

(*i*) regulation 3 which was made by the High Commissioner under the powers vested in him by the Emergency Powers (Colonial Defence) Order-in-Council, 1939, article 3, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was, therefore, *ultra vires* of the High Commissioner ;

(*ii*) assuming that regulation 3 was *intra vires* of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case ;

(*iii*) in any event, such a direction was an order within the meaning of the Palestine Interpretation Ordinance, 1933, section 7, which was applied to the Defence (Judicial) Regulations, 1942, by regulation 9 thereof, and which required publication in the Gazette before such an order could have the force of law ;

(*iv*) the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him ;

(*v*) there was no sufficient evidence before the Chief Justice to justify a finding of " premeditation" within the meaning of the Palestine Criminal Code Ordinance, 1936, sections 214 and 216, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon ; and

(*vi*) the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was an obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

Of the above points (*iii*) and (*v*) are of little or no local interest ; but the other points are of assistance to us. The decision of the Privy Council on points (*i*) (*ii*) (*iv*) and (*vi*) is as follows :—

(*i*) That the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions and was therefore *intra vires.*

(*ii*) The constitution of the court which was to try the appellant was prescribed in the cause list of the Supreme Court of Palestine for the week ending Saturday, March 20th 1943, which had been approved by the Chief Justice prior to Monday, March 15th 1943. There was no objection to this course for fixing the constitution of the court which was to try the appellant, and which is obviously the usual method of administering the business of the court. In the absence of any provision for the form which the direction by the Chief Justice is to take, the Chief Justice was free to adopt the course he did.

(*iv*) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on April 17th 1943, which the Chief Justice now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon is admitted by the Chief Justice in his statement, *viz.* the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his disposition at the preliminary inquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villagers, but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the Chief Justice.

(*vi*) The prosecution is under no obligation to tender witnesses whose names are in the indictment and are not called for the prosecution. The prosecutor has a discretion as to what witnesses should be

called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

On the question of the conflict of the defence regulation with the Courts Ordinance of Palestine the Privy Council decided that the regulation prevailed.

(**Editorial Note:**—Section 1 of the Emergency Powers (Defence) Act, 1939 referred to in the judgment has been applied to Ceylon by Order-in-Council. On the question of the duty of the prosecution in regard to calling evidence the Privy Council's observations in a previous case not referred to in this judgment are worth recording :—

" It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Raj vs The King-Emperor* (I.L.R. 42 Cal. 422) to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions ; but at the same time they cannot, speaking generally, approve of an idea that the prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions of both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination." *Stephen Seneviratne vs The King* 6 C.L.W. p. 51 at 66.)

Cases referred to : *R. vs Woodhead* (1847–2 Car. & Kir. 520 ; 14 Digest 274, 2841)
R. vs Cassidy (1858–1F. & F. 79 ; 14 Digest 274, 2842)
R. vs Nicholson (1937–unreported)*
R. vs Dora Harris (1927–2 K.B. 587 Digest Supp ; 96 L.J.K.B. 1069 ; 137 L.T. 535)

Gilbert Beyfus, K.C., with *John Bassett*, for the appellant.

Sir David Maxwell Fyfe, K.C., Solicitor-General, with *Kenelm Preedy*, for the respondent.

Lord Thankerton

On March 24th 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder under the Palestine Criminal Code Ordinance, 1936, section 214 (*b*), and sentenced him to death. An appeal by the appellant was dismissed on April 17th 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal, and the appellant, by special leave, now appeals against that judgment.

Counsel, in his full and able argument on behalf of the appellant, conveniently submitted his contention under two heads, *viz.* those which challenged the constitution of the Court of Criminal Assize by which the appellant was tried, and those which alleged grave impropriety in the course of the trial.

As regards the constitution of the trial court, the Chief Justice sat alone by virtue of the Palestine Defence (Judicial) Regulations (No 2), 1942, regulation 3, which provided as follows :—

" 3. Whenever the Chief Justice considers it expedient so to do he may, either generally or for the hearing of any particular case, direct that the Court of Criminal Assize shall consist of the Chief Justice or a British puisne judge, sitting alone, or with any one or more judge or judges of the Supreme Court, or with a president, or relieving president, or any one or more Palestinian judge or judges, of the District Court."

At the date of making these regulations, the constitution of the Court of Criminal Assize was prescribed by the Courts Ordinance, 1940, section 10, under which, in the absence of any application by the accused, such court must consist of three judges. No such application was made by the present appellant.

Counsel for the appellant submitted that the Court of Criminal Assize was not validly constituted on three grounds, *viz.* (*i*) that regulation 3 already referred to, which was made by the High Commissioner under the powers vested in him by the Emergency Powers (Colonial Defence) Order-in-Council, 1939, article 3, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was, therefore, *ultra vires* of the High Commissioner ; (*ii*) that, assuming that regulation 3 was *intra vires* of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case ; and (*iii*) that, in any event, such a direction was an order within the meaning of the Palestine Interpretation Ordinance, 1933, section 7, which was applied to the Defence (Judicial) Regulations, 1942, by regulation 9 thereof, and which required publication in the Gazette before such an order could have the force of law.

These submissions were raised for the first time before this Board.

(*i*) It is unnecessary to refer to the Order-in-Council of 1939 in detail; it is sufficient to state that its effect was to extend the Emergency Powers (Defence) Act, 1939, to Palestine, and, for present purposes, that the parts of section 1 of the Act which are material may be read as originally enacted, with the substitution of the High Commissioner for His Majesty in Council. The material parts of section 1 are as follows:—

"1. (1) Subject to the provisions of this section, His Majesty may by Order-in-Council make such Regulations (in this Act referred to as 'Defence Regulations') as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.

(3) Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and bye-laws for any of the purposes for which such Regulations are authorized by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purpose of the Regulations.

(4) A Defence Regulation, and any order, rule or bye-law duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

Counsel maintained that the discretion conferred on the Chief Justice by regulation 3 involved a delegation of his powers by the High Commissioner which was not authorized by section 1 (3) of the Act of 1939, which only authorized a delegation in general terms of the High Commissioner's power to make regulations under section 1 (1) and (2), and that, therefore, the attempted delegation in regulation 3 was *ultra vires* of the High Commissioner. Counsel also maintained that the right conferred on an accused to be tried by a court of three by the Courts Ordinance, 1940, could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations.

Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in section 1 (1) of the Act of 1939, and, *inter alia*, that a flexibility in the constitution of the Courts of Criminal Assizes was necessary or expedient. It was rightly admitted by counsel for the appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly, no question can arise under section 1 (3) of the Act. As regards the other contentions as to modification or abrogation of the appellant's right to a court of three under the Courts Ordinance, 1940, regulation 3 of 1942 is clearly inconsistent with it, and, by virtue of section 1 (4) of the Act the regulation must prevail. The suggestion made by counsel that the appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious; it was modified by the regulation as soon as it came into operation.

(*ii*) Regulation 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the court which was to try the appellant was prescribed in the cause list of the Supreme Court of Palestine for the week ending Saturday, March 20th 1943, which had been approved by the Chief Justice prior to Monday, March 15th 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the court which was to try the appellant, and which is obviously the usual method of administering the business of the court, was not a proper method by which the Chief Justice should exercise the discretion vested in him.

(*iii*) The Palestine Interpretation Ordinance, 1933, section 7, so far as material, provides as follows:—

"7. Where an Ordinance confers power on any authority to make regulations or orders, the following provisions shall have effect with reference to the making and operation of such regulations or orders....(*d*) all regulations and orders, save where otherwise provided, shall be published in the Gazette, and shall have the force of law upon such publication thereof or from the date named therein.

It follows from the views already expressed by their Lordships that the direction by the Chief Justice under regulation 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the Gazette.

Their Lordships now turn to the second group of contentions raised on behalf of the appellant, which relate to the course of the trial, and are as follows: (*a*) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (*b*) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of the Palestine Criminal Code Ordinance, 1936, sections 214 and 216, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and (*c*) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was an obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

(*a*) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on April 17th 1943, which the Chief Justice now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon is admitted by the Chief Justice in his statement, *viz.* the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his disposition at the preliminary inquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villagers, but also between the families of the deceased and stated, the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the Chief Justice.

(*b*) The appellant was charged under the Palestine Criminal Code Ordinance, 1936, section 214 (*b*), as having "with premeditation" caused the death of the deceased, and section 216 provides as follows:—

"216. For the purpose of section 214 of this Code a person is deemed to have killed another person with premeditation when (*a*) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and (*b*) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realize the result of his actions, and (*c*) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed."

In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime.

Under this section the three essential ingredients are cumulative, and while counsel for the appellant admitted that there was sufficient evidence to justify a finding under (*b*) and (*c*), he submitted that there was no sufficient evidence to justify a finding under (*a*), and that, subject to his next contention, the Chief Justice misdirected himself, and the conviction under section 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill; such resolution will more often rest on legitimate inferences from the proved circumstances and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the appellant resolved to kill the deceased.

The Court of Criminal Appeal, holding, in effect, that the Chief Justice had pronounced no finding as to premeditation, and forming an independent view of their own upon the evidence, "it is quite clear to our minds that the

irresistible inference — the only inference possible from the facts of this case — is that this killing was done with premeditation." While not accepting their criticism upon the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion upon the facts, which are summarized by the Court of Criminal Appeal as follows :—

That the three armed men were seen proceeding from north to south at varying distances up to a maximum of a hundred metres from the house of the deceased ; that shots were fired by those armed men into the doorway of the house of the deceased ; that the deceased was found lying eighteen metres from his doorway with two shots in the back ; that the three armed men were seen immediately after the shots had been heard proceeding together from south to north over the road by which they had approached the scene ; that there is no evidence and no suggestion that there was any provocation or quarrel; and that it was night time.

On the question of common design, they state :—

Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible.

It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the appellant and the deceased and between their families, which have been already referred to. This evidence of enmity was also treated by the Chief Justice as relevant to the question of premeditation. It may be added that the appellant himself admitted that there were broken relations between the deceased and himself.

The appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this criticism to some extent. In their Lordships' opinion, the judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by the Criminal Procedure (Trial upon Information) Ordinance, 1933, section 51, which provides :—

"51. Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based : Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case."

It is only necessary to make a short quotation from the judgment of the learned Chief Justice :—

"It is not necessary for the prosecution to prove a motive for a murder, but it does explain what otherwise might be unexplainable. In this case it explains the shooting in cold blood of the deceased, and it was a premeditated murder.

I, therefore, find that Adel, accused No. 1, was one of the three men who took part in this murder, and I, therefore, find him guilty of murder as charged.....Adel Muhammed el Dabbah, as I said a few moments ago, this is a cold blooded premeditated murder, of which I find you guilty."

The Court of Criminal Appeal does not pay attention to these findings as to premeditation, which expressly formed part of the charge, and one could not easily assume — even apart from his express reference thereto — that the Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(*c*) The last contention of the appellant is that the accused had a right to have the witnesses whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence, at the close of the case for the prosecution. The Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and that they could not say that the Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called

for the prosecution, and the court will not interfere with the exercise of that discretion, unless perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such suggestion is made in the present case.

It will be sufficient to go back to the judgment of Alderson, B., in *R. vs Woodhead*,* in which he said, at p. 520:—

"You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule."

In reply to the counsel for the prisoner, who asked if he was to understand that, if he called them, he would make them his own witnesses, Alderson, B. said:—

"Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to show them unworthy of credit, however, falsely the witnesses might have deposed."

In *Rex vs Cassidy*,† Parke, B., at p. 79, stated the correct principle to be that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in court for the prisoner to examine them, as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He would, therefore, follow the course said to have been pursued by Campbell, C.J. who ruled that the prosecutor was not bound to call such a witness and that, if the prisoner did so, the witnesses should be considered as his own. Cresswell, J., who was consulted by Parke, B., agreed with this view.

It is consistent with the discretion of counsel for the prosecutor, which is thus recognized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably become even more general in recent years, and rightly so — but it remains a matter for the discretion of the prosecutor. Archbold on Criminal Law, 31st Edition contains a list of a series of decisions, but in none of these has the court superseded the prosecutor's discretion. The most recent of these was the unreported case of *R. vs Nicholson*,‡ at the Nottingham Assizes in 1937, where Hawke, J. declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory remark by Lord Hewart, L.C.J., in *R. vs Dora Harris*,§ at p. 590, to the effect that.....in criminal cases the prosecution is bound to call all the material witnesses before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury.

In their Lordships' view, Lord Hewart, L.C.J. could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under the Criminal Procedure (Trial upon Information) Ordinance, 1933, section 41, already referred to, the court has the right, of its own motion, to call upon persons to give evidence.

This last contention of the appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal should be affirmed, and their Lordships will advise His Majesty accordingly.

Appeal dismissed.

Present: Soertsz, J. & Hearne, J.

SINNIAH CHETTIAR vs NAGALINGAM CHETTY

S. C. No. 5 Inty.—D. C. Jaffna No. 562.
Argued on 18th July, 1944.
Decided on 28th July, 1944.

Thesawalamai—To whom does it apply.

Held: That the *Thesawalamai* applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy.

Cases referred to: *Thillainathan vs Ramaswamy Chettiar* (4 N.L.R. 328 at 333)
Marshal vs Savari (1 S.C.C. 9)
Spencer vs Rajaratnam (16 N.L.R. 321)

* (1847) 2 Car. & Kir. 520; 14 Digest 274, 2841
† (1858) 1 F. & F. 79; 14 Digest 274, 2842
‡ 100 J.P. p. 553 (Edd. C.L.W.)
§ (1927) 2 K. B. 587 Dig. Supp.; 96 L.J.K.B. 1069; 137 L.T. 535

H. V. Perera, K.C., with *N. Nadarajah, K.C.*, and *H. W. Thambiah*, for the appellant.
S. Nadesan with *C. Chellappah*, for the respondent.

SOERTSZ, J.

Counsel for the appellant sought to controvert the generally accepted view that the *Thesawalamai* applies to *Tamils* inhabiting the Northern Province, and to contend that, in reality, it applied not to all Tamil inhabitants of that province, but only to such of them as were descended from the *Malabar* Tamils who were inhabitants of Jaffnapatam at the time the Dissawe Isaakz's collection of customs was given full force by the Regulation of 1806, or if that be regarded as too rigid a restriction, then, alternatively, to those Malabar Tamils, and to other *Malabar* Tamils who had since become inhabitants of the Peninsula. For those contentions, counsel relied, almost entirely, on the fact that, in section 3 of the Regulation, it is stated that—

> "All customs between Malabar inhabitants of the said province, or wherein a *Malabar* inhabitant is defendant, shall be decided according to the said customs."

He characterized as fanciful and depreciatory of the historical acumen of the Dutch, the view expressed by the trial judge that the Dutch fell into the error of mistaking all the Tamil inhabitants of Jaffna as Malabars as they resembled in physiognomy, dress and habits, the people whom they found on the Malabar Coast and that they so came to employ the term Malabars indiscriminatingly for all Tamils who had come to Jaffna from the Territories of the Chola and Pandiya Kingdoms as well. Counsel submitted that the Dutch were well informed in these matters and that they, with a full and correct appreciation of the facts, deliberately, made the *Thesawalamai* applicable only to the *Malabar* Tamils. If this contention of counsel is correct, it would mean that the prevailing view is as erroneous as it is inveterate. I do not think the facts compel us to such a conclusion. It would appear that by 1706, the year in which Governor Simons commissioned the Dissawe Issakz to collect "the Jaffnapatam ancient customs and rules according to which *persons* of this province are in the habit of recovering in civil matters etc.," there were resident in the Province of Jaffna, Tamils who had come from the Malabar, Chola and Pandiya Kingdoms, but all of them, probably, displaying a preponderant Malabar bias in the matter of customs in consequence, perhaps, of the majority of them, or the most influential of them being of Malabar origin. It is difficult to read such well-known authorities as Lewis Moore, Mayne and others without being convinced of the Malabar origin of most of the customs collected by Issakz as radically different from the customs appertaining to the general Hindu Law which obtained in other parts of the Deccan, and that fact leads almost inevitably to the inference that even those Tamils who had come from other parts of India such as the Coromandel Coast adopted the Malabar customs. When the question is considered in that way it is easy to understand why in the Regulation of 1806 which gave full force to the collection made by Isaakz in 1706, it is shortly described as a collection of the customs of the Malabar inhabitants. It is worthy of note that in the reproduction of this collection in the appendix to Van C. Leeuwen's commentaries, the translator speaks of it as a collection of "customs, usages, institutions according to which civil cases were decided among the Malabar or Tamil inhabitants etc." Likewise Thomson in his Institutes of the Laws of Ceylon (1866) calls the collection "*Thesawalamai* or *Tamil* Country Law." Again in *Thillainathan vs Ramaswamy Chettiar* (4 N.L.R. 328 at 333) Bonser, C.J. refers to it as a collection of "The Ancient Customs of the Tamil Inhabitants of the Province of Jaffna." In *Marshal vs Savari* (1 S.C.C. 9) Clarence, J. with whom was associated Dias, J. said: "We are clearly of opinion that the devolution of the land must be decided according to the *Thesawalamai*.....The persons concerned.....were all *Tamils* living in the Mannar district a portion of the Northern Province." These views have been consistently followed in the later cases. To mention one, there is the well-known case of *Spencer vs Rajaratnam* (16 N.L.R. 321) in which Ennis, J. made the observation that "the *Thesawalamai* are not the customs of a race or a religion common to all persons of that race or religion in the Island; they are the customs of a locality and apply only to *Tamils of Ceylon who are inhabitants of a particular province.*" The words I have underlined appear to me, if I may say so respectfully, to state the position concisely and correctly. The *Thesawalamai* applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy. Both questions, that of domicile and inhabitancy depend ultimately on questions of fact, and in this case, the evidence supports strongly the findings of the trial judge that the father of the appellants, although he came from India, settled

in this Island, *animo manendi et non revertendi*, and that he and his wife and his son, the appellant, and the appellant's wife are inhabitants of the Northern Province.

I would dismiss the appeal with costs.

HEARNE, J.

I agree.

Appeal dismissed.

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

WILLIAM vs WICKREMASINGHE

S. C. No. 70—D. C. (F) Colombo No. 14645.
Argued on 11th September, 1944.
Decided on 27th September, 1944.

Broker—Authority to sell house at a fixed price—Remuneration specified—Refusal by vendor to sell although a willing buyer has been found—Is vendor liable to pay broker.

The defendant gave the plaintiff the following authority :—

" I do hereby authorize you to sell my property bearing assessment No. 44 at Kotta Road, Borella for the sum of Rupees twenty thousand five hundred (Rs. 20,500/–).

I agree to pay you by way of remuneration Rupees five hundred (Rs. 500/–). This holds good for 2 weeks."

The plaintiff found a buyer who was willing to pay the stipulated price, but the defendant when called upon refused to execute the transfer.

Held : That the plaintiff broker was not entitled to his remuneration until the sale had been completed.

Cases referred to : *Perera vs Boteju* (44 N.L.R. 313)
Luxor Ltd. vs Cooper (1941–A.C. 108)
Inchbald's Case (17 C.B.N.S. 733)

N. Nadarajah, K.C., with *E. B. Wickramanayake*, for the defendant-appellant.
J. M. Jayamanne, for the plaintiff-respondent.

HOWARD, C.J.

This is an appeal from an order of the Additional District Judge of Colombo ordering the defendant to pay to the plaintiff the sum of Rs. 500 with costs. The plaintiff claimed this sum by virtue of an agreement dated the 22nd December, 1942, (P1). This agreement, in the form of a letter signed by the defendant, was worded as follows :

" I do hereby authorize you to sell my property bearing assessment No. 44 at Kotta Road, Borella, for the sum of Rupees twenty thousand five hundred (Rs. 20,500/–.)

I agree to pay you by way of remuneration Rupees five hundred (Rs. 500/–). This holds good for 2 weeks."

The plaintiff found a buyer who was willing to pay the stipulated price, but the defendant when called upon refused to execute the transfer. In finding in favour of the plaintiff the learned judge distinguished the present case from *Perera vs Boteju* (44 N.L.R. 313). In the latter case the contract between a principal and his agent was expressed in the following terms : " I have authorized B. to negotiate the sale of my house and property for the sum of Rs. 11,500/- only. I further promise to remunerate B..... with 2 per cent. on the amount realized." The Full Bench held that the right to the commission was dependent not on the agent finding a purchaser ready and able to purchase at the price but on the completion of the sale. In his judgment Soertsz, J. referred to and followed the rule enunciated by Viscount Simon in *Luxor Ltd. vs Cooper* (1941–A.C. 108). This rule, also cited by the learned judge in this case, is as follows :—

" It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result. There is another class

> of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts the employment and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. Each case turns on its own facts and the phrase 'finding a purchaser' is itself not without ambiguity. *Inchbald's Case* (17 C.B.N.S. 733) might, I think, be regarded as falling within this second class. But there is a third class of case (to which the present instance belongs) where, by the express language of the contract, the agent is promised his commission only upon the completion of the transaction which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him."

The learned judge then proceeded to hold that the express language of the contract does not contemplate the completion of the sale. The question arises as to whether this interpretation of P1 is correct. P1 is an authorization to sell the property for a certain sum. The sale is not complete until both vendor and purchaser have agreed. It seems to me that the plaintiff's right to commission under the terms of P1 depends on a particular event, namely, the completion of the sale. The claim to commission becoming due when the sale is not completed involves the contention that the principal by virtue of the contract has surrendered the freedom to dispose of or retain his own property which he unquestionably enjoys *vis-a-vis* the other negotiating party. The commission agreement is, however, subordinate to the hoped for principal agreement for sale. The only interpretation that can be given to P1 is that the commission is payable on sale, that is to say on completion of the sale. This event has not happened. The further question arises as to whether the law permits the introduction of an implied term making the commission payable on the plaintiff finding a person ready to purchase the property at the defendant's price.

Their Lordships in *Luxor Ltd. vs Cooper* (*supra*) dealt in a comprehensive manner with the power of the court to imply particular terms in contracts. In this connection Lord Wright at page 137 stated that it is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral, or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicted that " it goes without saying," some term not expressed but necessary to give to the transaction such business efficiency as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. I do not think there is any room for the introduction into the contract of an implied agreement making the commission payable on the plaintiff finding a person ready to purchase the property at the defendant's price. To hold that such a term must be implied would, to use the words of Lord Wright, mean that the court was embarking on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. It cannot be argued that the implication arises inevitably to give effect to the intention of the parties. To use the words of Viscount Simon, if the plaintiff was not willing to run the risk of disappointment he should have introduced into the express terms of the contract the clause which protects him.

In these circumstances the appeal must be allowed and judgment entered for the defendant with costs in this court and the court below.

Wijeyewardene, J.

I agree.

Appeal allowed.

Present: DE KRETSER, J.

DAHANAYAKE vs PIERIS

In the matter of the by-election for the Electoral District No. 45, Bibile, held on the 11th March, 1944.
Argued on 10th, 11th & 12th July, 1944.
Decided on 20th July, 1944.

Election—Article 9 (d) of the Ceylon (State Council) Order-in-Council 1931—Person having contracts with Government seeking election to the State Council—Formation of incorporated company to take over contracts of such person before nomination day—New company a sham—Does such person come within the disqualification in Article 9 (d).

Held : That a Government contractor cannot escape the disqualification created by Article 9 (*d*) by merely transferring his contracts to an incorporated company, which is specially designed for the purpose of providing a cover under which he may remain as the virtual contractor though not in name.

N. Nadarajah, K.C., with *C. S. Barr-Kumarakulasingham* and *H. W. Jayawardene* instructed by *G. A. Nissanka*, for the petitioner.

H. V. Perera, K.C., with *E. F. N. Gratiaen* and *G. Samarawickreme* instructed by *S. R. Amarasekere*, for the respondent.

DE KRETSER, J.

The member for Bibile died on the 2nd of October, 1943. A by-election was gazetted, nomination day being fixed for the 22nd December, 1943. On that date five candidates were nominated *viz.* the petitioner, the respondent and three others. Polling was fixed for 11th March, 1944, and the respondent was declared elected. The petitioner filed a petition on the 3rd April challenging the election of the respondent under article 9 (*d*) of the Ceylon (State Council) Order-in-Council, 1931, on the ground that the respondent held contracts with the Government of Ceylon. On particulars being called for, he stated what the contracts were, and at the trial his objections were further elaborated. The contract which he specially emphasized was one for the construction of a maternity home at Bibile. He also based objection on contracts for the building of the Guruhella Group School and schools at Hathakme and Pussellakande.

The evidence was to the effect that the respondent was a well-known government contractor and that he carried on business under his own name, also as the Uva Forwarding Agency and as a partner in the firm of D. L. Perera & Co. The exact scope of the business done by the respondent has not been fully proved, the only evidence besides the written contracts coming from the petitioner. The petitioner was more or less a stranger in the district, and purports to speak partly from information and partly from what he saw. His capacity to speak was challenged by the respondent but the respondent himself gave no evidence. It is clear, and it is admitted for the respondent, that he was anxious to rid himself of the disqualification which existed by reason of his having contracts with the Government, and he was naturally anxious to do so before nomination day. He accordingly decided to have a private company formed, his sister, his brother's wife, and a first cousin, and to transfer all his interests to this company. He seems to have employed one Mr. Mivanapalana, who is alleged to have considerable experience in promoting companies and the result was that the Memorandum of Association and Articles were handed to the Registrar of Companies on the 7th of December, and he issued his certificate the same day. The new company, called the Trading & Forwarding Agency, came into existence at once. When it commenced to do business would be quite another thing. According to the Memorandum of Association it was to acquire and carry on besides the Uva Forwarding Agency and the business carried on by S. A. Pieris, the respondent, the business originally carried on by D. L. Perera & Co., and later carried on by the respondent and his brothers Sirisena and Bandusena. The Memorandum further contemplated contracts with Government Departments, Local Councils, the business of importers and dealers in rice, currystuffs, etc., clothing, millinery and the taking over of other businesses. Clause 8 to which the petitioner draws attention provided that the company could "amalgamate, unite, or co-operate, either generally or to any limited extent for any period (determinable, continuous or otherwise) with any corporation, company, person or persons already or hereafter to be established for or engaged in objects all of which are or shall be within the scope of or connected

with any of the objects of this company and to purchase or acquire the business or any interest in the business, or in any branch of the business, carried on by any such corporation, company, person or persons, and being a business which this company is authorized to carry on, and for any such purpose to make and enter into any contracts, agreements, or arrangements and to undertake any liabilities." I pause to note that in this document, the Uva Forwarding Agency is said to be carried on by both the respondent and his brother Sirisena whereas P4 which is the certificate of registration of the business name mentions only the respondent, and P5 which is the registration of the business name D. L. Perera & Co. includes besides the three names mentioned in P12 the names of six females. Both P4 and P5 were declarations made in 1935. The memorandum P12 is signed by two of the females named, and we know that Celina Pieris was the sister and that the other was the wife of the respondent's brother Bandusena. The parties to the Memorandum, therefore, with the exception of William Daniel (the cousin) were interested in the three businesses earlier existing. The contracts in question, however, do not affect D. L. Perera & Co.

By the Articles of Association the three brothers were to be directors of the company, the respondent being the managing director "so long as he may choose to remain and function as such managing director." The remuneration of the directors was to be determined by the directors in meeting or in terms of any agreement entered into between the company and a director or directors with the consent of the company in general meeting. The Articles do not provide whether this remuneration was to be in the form of a fixed salary or be on a commission basis, and there is no evidence on the point. It is a matter of some importance. Mr. Nadarajah for the petitioner argued that in view of clause 8 of the Memorandum it was open to the company through its managing director to enter into an agreement with the respondent by which the profits under the contracts with the Government would be shared, and that the whole position would be obscure until the contracts had not merely been changed in the eyes of the Government but until due provision had been made as between the respondent and the new company. There is no evidence as to what the terms were on which his business was or would be taken over. There is a letter from the respondent on behalf of the new company to the Sanitary Engineer undertaking to carry on the contract on behalf of the new company. The contract for the maternity home was entered into on the 8th of May, 1942 and the work was to be completed by the 20th of September. The time was extended till the 31st of March, 1943, so that the work, which was estimated to cost Rs. 8,834/43 should have been well advanced in December and the respondent should have received a fair percentage of its price, provision having been made for monthly payments. The respondent was the managing director and as such would have the main burden of the contract and the family company may well have been generous in their treatment to him. A director who receives a monthly salary stands on quite a different footing from a director who is paid on a commission basis. There might well be no profit to the new company from the contracts.

Once the new company was formed on the 7th of December, prompt steps were naturally taken. By letter dated 8th of December, the respondent informed the Sanitary Engineer, who had entered into the contract for the maternity home at Bibile on behalf of the Government, that he desired the contract to be "altered" into the name of the new company, undertaking on behalf of the new company as its managing director to carry out the contract. On the Sanitary Engineer receiving this letter on the 10th of December, he acted with commendable quickness, examined the Memorandum and the Articles and sent a letter by hand to the Director of Medical and Sanitary Services recommending the transfer. That department referred him to the Deputy Financial Secretary, by reply of the same date, and on the same day the Sanitary Engineer wrote to the Deputy Financial Secretary. On the 11th the Deputy Financial Secretary replied inviting the Sanitary Engineer or his representative to be present at a meeting of the Tender Board on the 14th. Mr. David, as assistant, attended, and, on his return, minuted as follows to the Sanitary Engineer: "Recommendation approved subject to amendment of contracts, etc." The Sanitary Engineer says he saw the minute. The meeting of the Tender Board had been fixed for 2-30 p.m. and the chances were that he saw the minute on the 15th. He says he gave instructions that the contract should be called for from the office of the Director of Medical and Sanitary Services so that it may be altered and initialled by the parties and he left on circuit on the 16th, returning *via* Badulla to Colombo on the 22nd or 23rd of December. Meanwhile on the 18th of December his office had called for the contract and on the 18th he received a letter from the Deputy Financial Secretary stating that the Tender Board had no objection to the transfer of the contracts. This letter made no specific requirement that a fresh contract

should be entered into and confined itself to its proper scope. It did, however, contemplate a subsequent transfer of the contracts and Mr. David could hardly have made the minute he did unless it had been made clear at the meeting of the Tender Board that he was not to assume that all formalities had been complied with. On this letter Mr. Alwis endorsed "inform contractor Pl." Now, as he was away on the 18th this endorsement could only have been made after his return. A letter was sent, dated the 24th of December to the Trading and Forwarding Agency Ltd., informing them that the Deputy Financial Secretary and the Tender Board had agreed that there was no objection to the transfer. These documents are of importance since Mr. Alwis alleges that he took with him on circuit a copy of the contract and requested the respondent to meet him on the 19th at Bibile, and bring his copy of the contract with him. He alleges that after lunch at the Rest House they duly "altered" the contract, both of them initialling the two copies. Mr. Alwis's copy has disappeared. The respondent had produced his copy, marked R6, purporting to be initialled by Mr. Alwis and himself and bearing the date 19th December, 1943. The petitioner strongly contests this alleged initialling of documents but admits there may have been a meeting, as the entry in the Rest House book indicates that. He points to the fact that Mr. Alwis is not likely to have taken upon himself to make any change till he had received official sanction and that his letter of the 24th December negatives any previous intimation to the contractor. Mr. Alwis himself spoke of the document which was filed in the office of the Director of Medical and Sanitary Services as being THE contract. It was the document which was stamped and to which was annexed the security bond and the specifications. Junior counsel for the respondent was anxious to speak of five "originals" and Mr. Alwis was anxious to oblige, but it is quite clear that there was only one original and Mr. Alwis himself said so. Mr. Alwis states that at the present time three copies besides the original contract are made, making four documents in all. But he alleges that at "that time" there used to be five documents. He can quote no rule nor give any reasons for five copies. When the contract was made, he forwarded it with a "duplicate" to the Director of Medical and Sanitary Services, who returned it to Mr. Alwis's office where it remains still. It has been produced and marked P6D.

Now the question whether there was a fifth copy is important. There being one copy with the contractor, and one with the Auditor-General as required by the Financial Regulations, and four copies being available and all but the contractor's copy not being initialled on the 19th of December, there had to be a fifth copy which Mr. Alwis could take on circuit. This fifth copy has disappeared. Mr. Alwis did not impress me at all as a witness, I expected the respondent would go into the box to support him, but he abstained from doing so. The respondent's counsel invites attention to a loose slip of paper now to be found in the file in which some clerk is alleged to have noted on the 15th of December that the agreement had been taken by the Sanitary Engineer on circuit. This clerk has not been called. The petitioner challenges the document. The file according to Mr. Alwis was paged only when it became necessary to produce it in court, and it is quite clear that even then some of the paging was altered. It was, therefore, quite easy to slip in a bit of paper to support a theory which was being put forward by the respondent. I cannot on the evidence before me hold that any of the copies was altered or initialled on the 19th of December. This renders it unnecessary for me to do more than a passing reference to R6.

As soon as it was handed to me, I remarked that only one person had initialled it. I was then pointed out the lower portion of a configuration and told by the respondent's counsel that it was the respondent's initials. I remarked that there must have been wonderful unity of mind for the two to so run into each other as to present one pen stroke. When Mr. Alwis was in the box, I asked him whether he could tell me where his initials ended and the other began, he could not. Counsel then examined the initials under a magnifying glass and Mr. Perera remarked that there was a tear, but that had nothing to do with the matter for that came right at the top and not where the two initials are alleged to join. Even under a magnifying glass I could see no kind of pen pause or break in the line. What is more, Mr. Pieris, when he put his initials in other places always sloped his letters from left to right and wrote in a thin and spidery way, whereas in R6 not only is the writing firm, but, quite unlike his other initials, he starts with a downward slope from right to left and it is this slope which runs so extraordinarily into the upward stroke of Mr. Alwis's "A," Mr. Alwis himself initialling much more clearly than he did on other occasions. The petitioner's counsel was content to make no point of it. I myself could not believe Mr. Alwis and accordingly this matter was not pursued further, nor do I take it more into account than to say that it does not remove the impression created by Mr. Alwis's evidence. In my opinion there was no fifth copy ever in existence. If

it was, some clerk in the office must have known of it. It must have been kept for some purpose, and what the purpose is one cannot see since on what is called the "duplicate," P6D, appear the first alteration of the date for completion initialled by the respondent and Mr. Alwis. A further extension to the 30th of June, 1944 was initialled by Mr. Alwis in the original without a date but his initials were copied into the office copy by some clerk over the date 14th of June, 1944, the clerk also copying the initials over the same date to the alteration from the Uva Forwarding Agency into the Trading and Forwarding Agency. P6D was, therefore, not only termed the "duplicate" but was the office copy, and that was the copy which Mr. Alwis should have taken on circuit if he was so anxious to have the alteration made and initialled with expedition.

The main questions that arise are:—

1. Was the company merely a camouflage and a pretence, there being no change whatever?
2. Were the contracts transferred to the company before nomination day and the respondent's disqualification removed?
3. Did the company come within the proviso to Article 9 (*d*) of the Order-in-Council?

With the issue of the Registrar's certificate of incorporation activity of the company consisted only in the change of a few letters between the respondent, the managing director, and Mr. Alwis. None of the subsequent steps required by the Companies Ordinance were taken till May and even then some were not in due form. No nameboard was put up, as required, on its place of business, no meeting of directors, no fixing of the remuneration, no allotment of shares. By April the present petition had been filed and then came the steps taken to show the existence of a company and then only did Mr. Alwis become urgent about the alteration and initialling of the original contract. The respondent was clearly disqualified unless he could bring himself within the proviso, and this he has failed to do. It is noteworthy that no evidence has been produced of the transfer of the contracts and other business from the previous owners to the company. The report of the allotment of shares in May is not what is required by section 43. Appropriate forms are provided but were not used. Form 7 is used where the shares are paid for in cash, and Form 8 where they are allotted for other consideration. In the latter case contracts in writing duly stamped are required by the section. In the return made shares have been allotted to 14 persons. The first five were interested in the existing businesses and it is scarcely likely the value of their rights did not form part of the consideration. The others were probably employees since they got a few shares. The vagueness of the return, with the Ordinance starting them in the face of Mr. Mivanapalana at least to guide them, seems to be deliberate and the return a mere cloak and a pretence. The respondent ought to have, and could have produced the contracts made with the shareholders, and I am entitled to infer he did not do so either because there was no transfer or the alleged transfer was made after the election or because an agreement exists by which he was to keep the whole or greater part of the profits of the existing contracts. While, therefore, the relatives were willing to provide the goat's skin for the deception to be practised by Jacob, Jacob remained Jacob and was not regenerate. As the Privy Council observed in *Norton and Allan Arthur Taylor* (L.R. 1906, A.C. 378) no device to conceal the true nature of the transaction is entitled to prevail and courts of justice must be vigilant on this point. In my opinion the first question must be answered in the affirmative.

All Government officers and Government departments are governed by the Financial Regulations, which are published by the Government and are available to the public, and all contractors with the Government are aware of their existence. Certainly the respondent must have been aware of them not only because he was a well-known Government contractor, but also because the evidence in this case indicates that the course pursued was that laid down in the Financial Regulations. In accordance with them, tenders are called for on a prescribed form of notice in the Government Gazette and three times in one or more newspapers likely to be read by tenderers. The notice gives full information to the tenderers and requires them among other things to make a deposit in cash before a tender form is issued. On a tender being accepted, the tenderer is notified and if he fails to enter into the contract and to furnish security within 10 days, the deposit is forfeited. On the contract being signed the deposit is returned. It is clear, therefore, that the tenderer may withdraw and forfeit his deposit, and that no binding contract exists at that date but only an agreement to enter into a contract. The notice also states that no contract may be assigned or sub-let without the authority of the Tender Board. The written contracts are on printed forms with blanks for the details to be filled in. The Financial Regulations require the head of the department making the contract to take steps for the completion of the contract and to take a security bond, and provides that the letter from the tenderer, the

schedule of prices and the bond with conditions of the contract would then form the complete contract, the complete contract being retained by the head of the department and a copy thereof being at once forwarded to the Auditor-General. Mr. Alwis was, therefore, quite correct in saying that the documents lodged with the Director of Medical and Sanitary Services was the contract. He would naturally keep a copy for his own guidance and the contractor might well require one for reference. These would form the four documents which Mr. Alwis states are now being used. It is true that on a tender being accepted a contract may come into being. Building contracts need not be written out, where the specifications are many and the sums involved considerable, common sense would indicate a written contract. Experience endorses this view, and if need be there is the authority of 3 Halsbury section 340. Government contracts must be in writing and the tenderer has ample notice of the fact that there is no contract complete in form until he has signed one and given security. In such circumstances the written contract is alone the contract which can be recognized. Section 91 of the Evidence Ordinance enacts that when parties put their contract into writing, then that writing alone is evidence of the contract. This disposes of the ingenious argument raised by Mr. H. V. Perera that on the Tender Board expressing its approval the respondent's contract, formed on the tender being accepted, ceased to exist and a new contract had come into being, operating by way of novation to release the respondent, who thus ceased to be disqualified. He argued that the minute made by Mr. David should not be considered but only the letter from the Deputy Financial Secretary. I cannot agree. But even if we take that letter alone, it had expressed the Board's approval of the transfer. A transfer had, therefore, to be made. It was what the respondent himself had asked for and he himself realized that till the transfer was made he would not be released. The notice calling for tenders has informed him that no assignment would be recognized without the previous authority of the Board. Both he and Mr. Alwis quite understood the position.

It was nomination day on which objections were feared. Once that hurdle was cleared the persons concerned seemed to have lapsed into a feeling of security and directed attention only to the election and no steps were taken both as regards the steps to be taken by the new company under the Ordinance and the formation of a new contract. The Registrar of Companies had to call repeated attention before he was informed regarding the registered office of the company or a return made of its directors and of its allotments of shares.

Turning to another aspect of the matter it was clearly intended to effect the release of the respondent by bringing in a new contracting party and it is clear that until the new contracting party came in, the respondent was not released. Willingness to accept a new party is not the same as a new party being accepted. Mr. Alwis was the agent of the Government and could only act in terms of the instructions given him. At no time had he before him evidence of an assignment to the company. The new contract between the company and the Government or the contract of assignment from the respondent to the company could only be effected with the same formality that the previous contract had been effected. A fresh security bond was required. Whether one considers it an assignment of the contract to the new company or a new contract by the company which took the place of the old contract, the transfer of obligations ought to be evidenced by a contract duly stamped and binding on the new party. I do not think that merely scoring out the name of the Uva Forwarding Agency and writing the name of the new company was sufficient. Even if this be so, this was not done till the 14th of June on which date as a result of an urgent letter from Mr. Alwis and also probably because the petitioner's proctor had applied for certified copies, the respondent and the petitioner's proctor were present in Mr. Alwis's office and only then was the alteration in the document made. In my opinion there was no change prior to that date, and such a change as was made was quite inadequate. At the beginning of the contract the words "Uva Forwarding Agency, Badulla" were scored off and the words "Trading and Forwarding Agency, Badulla" substituted. The date of the contract remained unaltered thereby making it read that the new company had entered into this contract even before it was formed. No, fresh stamp was used and the old signature was utilized so that the document still remained signed by the "Uva Forwarding Agency." It may be noted in passing that even the contractor's copy, R6, made no change than the name at the start of the contract. The contractor clearly did not attach much importance to this document. Ordinarily his copy of the specifications would be sufficient for the purpose of inspection. As a result the date for the completion of the contract still remains the 20th of September, 1942, *i.e.*, a date almost exactly three months earlier than the alleged transfer of the contract. It is not surprising that Mr. Perera was driven to abandon these documents and to emphasize that it did

not matter whether the new company was or was not bound by the contract so long as the contracting parties had agreed to release the respondent from his contract. Mr. Alwis, according to the contract itself was acting on behalf of the Government of Ceylon, and it was his duty to see that a real novation took place.

In the view, therefore, which I have taken the respondent was clearly disqualified both at the date of nomination and of election. It is accordingly unnecessary to pursue the interesting argument raised by Mr. Nadarajah that section 9 (*d*) of the Order-in-Council was taken from the English Statute 22 George III C. 45 and that at that date by an " incorporated trading company " was meant a corporation created by Royal Charter, such as the East India Company, or one created by Act of Parliament and that therefore the same meaning should be attached to those words in the Order-in-Council. It is quite clear from Palmer on Company Law that private companies were recognized in the Statute dealing with companies only at a much later date. In 1782 besides the incorporated trading companies already referred to there were companies in the sense that they were voluntary associations of persons, but the Statute only exempted where the company had more than 10 members, thus minimizing the interest of the candidate. It might be interesting when the occasion arises to consider whether members of private companies, which might consist of two members, come within the terms of the exception. The observations of Viscount Cave, L.C. in *Lapish and Braithwaite* (L.R. 1926, A.C. p. 275) are not without value on this point. The provision in Britain aims at securing the independence of members of the legislature and their freedom from any conflict between their duty to the public and their private interests. In Ceylon it may have a wider significance.

It is unnecessary for me to deal with the contracts in respect of the three schools, for the same observations apply.

Undoubtedly the respondent comes within the general disqualification and the burden was on him to prove that he had got rid of that disqualification, and he has failed to bring himself within the exception. I hold the respondent's election was void and shall certify accordingly to the Governor. The petitioner is entitled to the costs and these will be fixed by me after consultation with counsel.

Counsel agree that the costs should be fixed at Rs. 3,000/–.

Election declared void.

Present: Soertsz, J. & Hearne, J.

VAITHYLINGAM vs SEENIVASAGAM

S. C. No. 34—*D. C. Point Pedro No.* 1653.
Argued on 17th & 18th July, 1944.
Decided on 26th July, 1944.

Thesawalamai—Is a husband subject to Thesawalamai entitled to donate the whole of the thediathetam property—Wife's remedy in such a case.

Held : (i) That where a husband donates the whole of the *thediathetam* property to a son and the donee conveys it to a *bona fide* purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation.

(ii) That if the donee retains the property conveyed to him and after the death of the husband the wife gives a transfer of her share to another, that conveyance is good against the husband's donee.

(iii) She or the transferees from her can assert her claim to her half-share against such donee.

Cases referred to : *Parasatty Ammah vs Setupulle* (1872 – 3 N.L.R. 271)
Sampasivam vs Manikkam (1921 – 23 N.L.R. 257)
Seelachchy vs Visuvanathan Chetty (1922 – 23 N.L.R. 97)
Tankamuttu vs Kanapathipillai (1923 – 25 N.L.R. 153)
Iya Mattayer vs Kanapathypillai (1928 – 29 N.L.R. 301)

N. Nadarajah, K.C., with *S. Subramaniam* and *V. K. Kandasamy*, for the defendant-appellant.

H. W. Thambiah, for the plaintiff-respondent.

HEARNE, J.

The plaintiff and the defendant are brothers. Their father had transferred during his lifetime to the defendant the properties described in the plaint. These had been acquired during the subsistence of his marriage with Ponnachy, the mother of the parties.

The trial judge held that at the time of the transfer the father was not indebted to the defendant, and that the transfer was by way of donation. I accept this finding of fact. Ponnachy conveyed her half share of the *thediathetam* to her son, the plaintiff, by deed P5. In these circumstances the rights of the two brothers under the rival deeds depend upon the answers to two questions. (1) Is a husband governed by the law of the *thesawalamai* entitled to deal with the whole of the *thediathetam* property by way of donation ? (2) If he does so, what is his wife's remedy ? Is her share irretrievably lost ?

The first question was answered in the negative as far back as 1872. In *Parasatty Ammah vs Setupulle* (1872–3 N.L.R. 271) it was held that, " although the husband had the right .....to manage and dispose of property belonging to the community by way of sale, he had no power to donate anything beyond half of the property." The correctness of the law on this point was not questioned in *Sampasivam vs Manikkam* (1921–23 N.L.R. 257).

In *Seelachchy vs Visuvanathan Chetty* (1922–23 N.L.R. 97), it was decided by the majority of the judges, on different grounds that a *bona fide* purchaser acquired good title, (in that case the transfer was a gift to a son from whom the defendant had purchased *bona fide*) but both of the judges, who took this view, approved the decision in 3 N.L.R. 271 in no uncertain terms. Bertram, C.J. said that " the decision must be accepted as correctly stating the law " while Garvin, A.J. said " express authority.....is to be found in the case of *Parasatty Ammah vs Setupulle* (*supra*) where it was held in an action by the widow to vindicate her title to property donated by her husband that she was entitled to judgment for half the property, ' inasmuch as by the Tamil customary law the donor could only dispose of half the property'." The binding authority of this case can hardly be questioned now.

In regard to the 2nd question there is authority for the view that a wife's remedy is to claim compensation from her husband's estate and " not to claim against an alienee from her husband to a half share in any specific property." *Tankamuttu vs Kanapathipillai* (1923–25 N.L.R. 153. It was stated by de Sampayo, A.C.J., that this was what the majority of the judges had decided in (1922) 23 N.L.R. 97 but, clearly, this is not the case. Bertram, C.J., expressly reserved the point, while Garvin, A.J., thought that " if the husband has not the power to dispose of more than one half, the wife is entitled to contend that she has not been divested of her title to a half share by her husband's deed of gift." This view of the matter commended itself to Dalton, J., in a judgment with which Lyall Grant, J., agreed in *Iya Mattayer vs Kanapathypillai* (1928–29 N.L.R. 301) and, if I may say so with respect, strongly commends itself to me.

The position, as it appears to me is this: If a husband donates the whole of the *thediathetam* property to a son and the donee conveys it to a *bona fide* purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation. If, however, the donee retains the property conveyed to him and, as in this case, after the death of the husband, the wife gives a transfer of her share to another son, that conveyance is good against the husband's donee. Her remedy is not *only* by way of a suit for compensation. She can assert her claim to half share against the husband's donee and the transferee from her can do the same.

The judge followed 3 N.L.R. 271 and 29 N.L.R. 301 and correctly held that the decision in 23 N.L.R. 97 was not applicable to the facts of the case before him. In doing so and in giving judgment in favour of the plaintiff-respondent he was, in my opinion, right. I would dismiss the appeal with costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

IN THE PRIVY COUNCIL

Present: LORD MACMILLAN, LORD CLAUSON & SIR GEORGE RANKIN

MADRAS & SOUTHERN MAHRATTA RAILWAY CO., LTD. vs BEZWADA MUNICIPALITY

Privy Council Appeals Nos. 7 and 8 of 1943.
Decided on 30th March, 1944

Interpretation of statutes—Proviso—Function and effect of.

Held : That the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

(**Edd. C.L.W.**— The only point of local interest is the question of interpretation of a proviso. We have therefore omitted any reference to the other points decided in the case.)

J. Millard Tucker and *R. K. Handoo*, for the appellants.
Craig Henderson and *S. P. Khambatta*, for the respondents.

LORD MACMILLAN

The appellants, the Madras & Southern Mahratta Railway Company, Limited, own certain vacant lands within the municipality of Bezwada. These lands are admittedly subject to the property tax which the respondents, the Bezwada Municipality, are empowered to levy. The question for decision in these consolidated appeals is whether the respondents acted within their statutory powers in ascertaining the annual value of the lands for the purpose of imposing the tax. The method which the respondents adopted in order to arrive at the annual value of the lands was first to ascertain their capital value, which they did by reckoning them at so much per square yard, and they then took 6 per cent. of the capital value as representing the annual value. On the annual value so calculated they imposed property tax at the rate of $16\frac{1}{2}$ per cent. per annum. The appellants under protest paid the assessments made upon them in each of the four financial years ending on 31st March in 1932, 1933, 1934 and 1935. They now seek to have these payments refunded as having been illegally exacted. In this they have been unsuccessful in both the courts in India.

Many points were raised and many topics were discussed in the course of the proceedings in India, but before their Lordships the appellants both in their printed case and in their arguments at the bar concentrated upon one main ground of attack, namely, that on a sound construction of the respondents' statutory powers the method adopted by the respondents of fixing the annual value of the lands in question was not permissible. If they failed to make good this point the appellants did not contend that they could otherwise succeed. The taxing powers of the respondents are conferred upon them by the Madras District Municipalities Act, 1920, as amended by subsequent legislation. Their Lordships take the Act as it stood at the relevant period. By section 78 every Municipal Council is empowered to levy *inter alia* a property tax and any resolution of a Municipal Council determining to levy a tax is required to specify the rate at which and the date from which it shall be levied. Sections 81 and 82 deal with the levying and assessment of property tax and the argument turned upon the interpretation of these sections. So far as material to the present question they read as follows :

"Section 81—(1) If the Council by a resolution determines that a property tax shall be levied, such tax shall be levied on all buildings and lands within municipal limits save those exempted by or under this Act or any other law. The property tax may comprise —

(*a*) a tax for general purposes ;
(*b*) a water and drainage tax.

(2) Save as otherwise provided in this Act, these taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the Municipal Council, subject to the provisions of section 78.

(3) The Municipal Council may, in the case of lands which are not used exclusively for agricultural purposes and are not occupied

by, or adjacent and appurtenant to, buildings, levy these taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands, as it may fix :

Provided that such percentages or rates shall not exceed the maxima, if any, fixed by the Local Government and that the capital value of such lands shall be determined in such manner as may be prescribed.

(4) (*a*) The Municipal Council may, in the case of lands used exclusively for agricultural purposes, levy these taxes at such proportions as it may fix of the annual value of such lands as calculated in accordance with the provisions of section 79, Madras Local Boards Act, 1920.

Section 82—(1) Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.

(2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction, in the case of buildings only, of ten per centum of such annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatever :

Provided that —

(*a*) in the case of—

(*i*) any Government or railway building or

(*ii*) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the executive authority, be estimated, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost."

By a resolution dated 29th January, 1932, the respondents resolved to levy property tax within the municipality at certain specified rates. The terms of this resolution give rise to some questions but the assessment on the appellants was not challenged by them before their Lordships on the ground that there had been no effective resolution to levy property tax. It will be observed that under section 81 (2) the property tax, save as otherwise provided in the Act, is to be levied at a percentage of "the annual value of lands or buildings or both." Sub-section (3) otherwise provides inasmuch as it permits, but does not enjoin, the levying of the tax "in the case of lands which are not used exclusively for agricultural purposes and are not occupied by or adjacent and appurtenant to buildings" either at a percentage of the capital value of such lands or at such rates with reference to the extent of such lands as the Municipal Council may fix, subject to compliance with the proviso to the sub-section. If either of the alternative methods permitted by sub-section (3) is adopted the assessment is not on annual value. Appropriate as this sub-section was to the case of the appellants' lands the respondents did not in fact avail themselves of it in making the assessment complained of. In particular, they did not levy the tax at a percentage of the capital value of the appellants' lands ; they levied it at a percentage on their annual value.

Section 82 (2) prescribes how the annual value of lands and buildings is to be ascertained. It is to be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year, less 10 per cent. in the case of buildings. The spectre of the hypothetical tenant, so familiar an apparition in English rating law, is here invoked. The appellants did not dispute that, if this sub-section had not had a proviso appended to it, it would have been open to the respondents to resort to any of the recognized methods of arriving at the rent which a hypothetical tenant might reasonably be expected to pay for the lands in question, including the method of taking a percentage of their capital value. But the proviso, they say, makes all the difference. It expressly enjoins resort to this last-mentioned method of arriving at annual value in the case of two specified classes of buildings. Therefore, they say, resort to this method is by necessary implication prohibited in every other case, and in particular in the case of their lands. The respondents contest this reading and maintain that the proviso does not impliedly prohibit resort to capital value as a means of getting at annual value in every case not covered by the proviso, and that the chief purpose of the proviso is to be found in the limitation to 6 per cent. which it contains. Their Lordships cannot accept the appellants' argument which in their opinion involves a misinterpretation of the effect of the proviso. The proviso does not say that the method of arriving at annual value by taking a percentage of capital value is to be utilized only in the case of the classes of buildings to which the proviso applies. It leaves the generality of the substantive enactment in the sub-section unqualified except in so far as concerns the particular

subjects to which the proviso relates. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

It follows that in their Lordships' opinion the respondents were not precluded from adopting a percentage of the capital value of the appellants' lands as a method of ascertaining their annual value for the purpose of the imposition of property tax merely by reason of the fact that this method is specifically enjoined in the particular instances mentioned in the proviso and that their lands are not included in these instances. This is sufficient for the disposal of the case as presented before their Lordships. Before taking leave of it, however, they think it right to advert to certain matters which were incidentally brought to their notice. The resolution already referred to by which the respondents resolved to levy property tax consists of two paragraphs. The first imposes property tax in general under section 91 at a percentage of annual value for each component of the tax; the second imposes what it calls "land tax" presumably a species of property tax (1) on agricultural lands at 6 per cent. per half year and (2) "on other lands which fall under the category specified in section 81 (3) at $\frac{1}{2}$ per cent. of the capital value per half year." From this it would appear that the respondents were originally minded to exercise the option conferred upon them by section 81 (3) and to assess lands such as those of the appellants not on annual value but on capital value. The Local Self-Government Department, however, took exception to this part of the resolution on the ground that the proviso to section 81 (3) required capital value to be "determined in such manner as may be prescribed," that "prescribed" by section 3 (19) meant "prescribed by the Local Government by rules made under this Act;" that no such rules had been made; and that consequently the portion of the resolution in question was unwarranted and could not receive effect. Before their Lordships the appellants supported this view. The respondents on the other hand maintained that if no rules were made they were nevertheless entitled to avail themselves of the capital method of valuation under section 81 (3) unfettered as to the manner in which they might determine capital value. In this they have the support of the judgment of the High Court. It seems that rules have now been made but railway lands are expressly excluded from their operation.

The respondents do not appear to have rescinded the part of their resolution alleged by the Department to be incompetent or to have passed any amending resolution. So far as the appellants' lands are concerned they seem simply to have ignored it, and to have invoked instead section 82 (2). They submitted an argument to the effect that the resolution did no more than fix the rates of the tax to be levied but did not commit the respondents to assessing any particular class of subjects in any particular way. The appellants not unnaturally, do not seem to have objected to a departure from the capital value method under section 81 (3) for 1 per cent. per annum on capital value is more than $16\frac{1}{2}$ per cent. on annual value calculated at 6 per cent. on capital value. It is manifest that these topics are eminently debatable. As however, the respondents did not in point of fact proceed under section 81 (3); as the appellants, so far from saying that they should have done so, maintained that the respondents could not lawfully have done so; and as the controversy before their Lordships was confined to the mode of ascertaining annual value under section 82 (2), their Lordships while mentioning those other topics do not feel called upon to make any pronouncement upon them and confine themselves to the matter which alone was directly raised before them and on which they have already expressed an opinion adverse to the appellants. There having in their Lordships' view been compliance in substance and effect with the provisions of the Act, within the meaning of section 354 (2), the appellants cannot recover the assessments which they have paid. Their Lordships will accordingly humbly advise His Majesty that the consolidated appeals be dismissed. The appellants will pay the respondents' costs of the appeals.

Appeals dismissed.

Solicitors: *Solicitor, India Office, for the appellants*
Harold Shephard, for the respondents

IN THE COURT OF CRIMINAL APPEAL

Present: HOWARD, C.J., (President), MOSELEY, J. & WIJEYEWARDENE, J.

REX vs HARAMANISA

Application No. 89 *of* 1944.
S. C. No. 3—*M. C. Kurunegala No.* 12250—*2nd Midland Circuit,* 1944
Argued on 4th & 5th October, 1944.
Decided on 30th October, 1944.

Court of Criminal Appeal—Misdirection—Erroneous statement of fact by trial judge on the main evidence—Criminal Procedure Code Chapter XII and section 122 (3)*—Evidence Ordinance sections* 91, 155 *and* 157.

Held : (i) A statement made to a police officer or inquirer by any person, which expression includes a person accused in the course of any investigation under Chapter XII of the Criminal Procedure Code, must be reduced into writing.

(ii) By reason of section 91 of the Evidence Ordinance only the written record of a statement within the ambit of (i) is admissible in evidence. Hence oral evidence of such a statement is inadmissible. The effect of our finding on this point is to render the words " or to refresh the memory of the person recording it " almost nugatory, since there would appear to be no circumstances in which oral evidence regarding the contents of the statement would be admissible. This is one of the matters to which we would invite the attention of the legislature.

(iii) The written record of such a statement is admissible by virtue of section 122 (3) of Cap. 16 to contradict a witness after such witness has given evidence.

(iv) The written record of the statement of a witness used, as formulated in (iii), is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance.

(v) If it had not been for the prohibition contained in section 91 of the Evidence Ordinance, oral evidence of a statement made under Chapter XII of the Criminal Procedure Code might be tendered not only to contradict a witness, but also under the provisions of section 157 to corroborate the testimony of such witness. Such oral testimony would again not be substantive evidence of the facts contained therein, but merely corroboratory.

Per HOWARD, C.J. : " It is, therefore, clear that the learned judge told the jury that the accused's story was to the effect that he rolled the chimney before he had held the body of the deceased and in these circumstances the blood must have been on his hands before he touched the body. This was not what the accused had said either in examination-in-chief or in cross-examination. Having regard to this erroneous statement of fact in regard to what was the main piece of evidence in the case, we are of opinion that it is impossible to support the conviction.

" The investigation made by a police officer or inquirer under this Chapter covers a wide field and is not limited merely to the examination of persons by the putting of questions. The investigation includes the search for incriminating evidence and the examination of the *locus in quo* and the locality in the vicinity of the scene of the crime. A statement made by any person to a police officer who was so engaged would, in our opinion, be made ' in the course of any investigation.'

" The sub-section bristles with difficulties and is so difficult to interpret that, in our view, it is the duty of the legislature to re-draft the section so as to make its meaning clear."

Cases referred to : *King vs Silva* (30 N.L.R. 193)
Syamo Maha Patro vs Emperor (1932–A.I.R. Madras 391)
Pekala Narayana Swami vs King-Emperor (1939–1 A.E.R. 396)
The King vs Pabilis (25 N.L.R. 424)
The King vs Gabriel (39 N.L.R. 38)
The King vs de Silva (42 N.L.R. 57)
Emperor vs Ramaraddi (A.I.R. 1914 Bombay 263)
Fanindra Nath Banarjee vs Emperor (I.L.R. 36 Cal. 281)
Muthukumaraswami Pillai vs King-Emperor (I.L.R. 35 Madras 597)
Reg. vs Bai Ratan (10 Bom. High Court Reps. 166)
Reg. vs Shivya (1876–1 Bom. 219)
Queen-Empress vs Viran (1886–9 Mad. 225)
Jai Narayan Rai vs Queen-Empress (1890–17 Cal. 863)
The Empress vs Mayadab Gossami (1881–6 Cal. 762)

G. E. Chitty and *M. M. Kumarakulasingham*, for the applicant.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

Howard, C.J., (President)

The accused in this case appeals against his conviction on a charge of murder. The appeal is based on the following grounds :

(*a*) That the accused was prejudiced in his defence by an erroneous statement of fact in the learned judge's charge to the jury regarding the circumstances in which the accused testified to his having touched the exhibit P5, a glass chimney found with certain finger impressions of the accused.

(*b*) That there was misreception of evidence in the proof by the inspector of police of the statement made to him by the accused under section 122 (3) of the Criminal Procedure Code.

(*c*) That there was no direction in the charge that the statement referred to in (*b*) was not original evidence against the accused.

Crown Counsel at the commencement of the hearing of this appeal conceded that the charge did contain an erroneous statement of fact and in these circumstances he could not support the conviction. The evidence against the accused who was indicted with another person, who was acquitted, was of a purely circumstantial character. The main circumstance was the fact that finger impressions of the accused were proved to have been discovered on a glass chimney found near the dead body of the deceased, who was a Buddhist priest. The appellant did not deny that the finger impressions on the chimney were his, but in the witness-box gave an explanation as to the circumstances in which he handled the chimney. In his evidence-in-chief he stated as follows :

> " I went inside the temple, took a mat, spread it and placed the dead body on that mat. Then the body was raised with the mat and carried out of the house. Besides that there was a chimney close to the dead body on the ground and I took it from where it was and kept it aside. It was about a foot away from where the dead body was lying. I touched the chimney after the dead body was placed on that mat. I held the head side of the deceased body in order to place it on the mat. There was a lot of blood on that part of the body. I took the chimney and put it under the arm-chair. I took it from the place where it was lying and placed it on the ground and rolled it along on the ground."

In cross-examination he stated as follows :

> " That was at about 5 p.m. Some entered through the front door and others through the kitchen door. I brought a mat from the temple. It was in the temple. It was in front of the place where the dead body was lying. The body was lying with the head towards the front door. The mat was found about 1½ fathoms away from the head. It was in the open space in front. It was rolled up and put into a corner. The people there said that a mat was required to take the dead body out. Then I brought the mat and put the mat under the body together with other people. The body was lifted up and placed on the mat. I spread the mat on the floor some people lifted the body and placed it on the mat. 3 or 4 people lifted the body and placed it on the mat. I too helped in doing so. I got hold of the region of the head and neck. I saw blood all over the body. The blood was clotted. There was liquid blood also. Near about the place where there were injuries there was liquid blood. I did not put my hand where liquid blood was."

And later in answer to questions put by the court he stated :

> *To Court:* " I said that when the robes were lifted out of place the chimney stood revealed. As a result of the robes being there the chimney was almost covered. The chimney was near about the middle of the body. There were people to the left of the dead body. They could have seen the chimney if they looked carefully. I took the chimney."
>
> *To Court:* " I just rolled it. I did not take it like this and roll it. It was not upright. I did not get hold of the chimney into my hand like this. The chimney was like this and I rolled it down. I simply rolled it down. I did not wait to see where it stopped. It rolled in the direction of that armchair. The other people who were there must have seen me rolling it. It was after the body was placed on the mat that I rolled it."

With regard to this evidence, the learned judge stated at pages 19–21 of the charge as follows :

> " Now remember the story he related from that point to Crown Counsel as well as to counsel for the defence. He said that when he approached the body of the priest in order to prepare to carry the body out for the purpose of the post mortem examination he saw a mat a little distance away from where the body of the priest lay. The mat was folded, and he says it was necessary to get a mat or something like a mat in order to place the body of the priest upon, for the body had to be carried out ; and so he says he went and took this mat and laid it alongside the body of the priest, and that at that time he noticed a chimney just peeping from beneath the folds of the robe with which the priest's body had been covered from head to toe, not literally, but the major part of the body had been covered, and he says — and he was repeatedly questioned on the point — thinking somebody might tread on the chimney or kick it he used his fingers and rolled the chimney along and it came to rest under the arm-chair you see on the photograph.
>
> You see the chimney was photographed by Inspector Weerasinghe. It was photographed on the 30th. Nobody else had noticed this chimney till the 30th. It was on the 29th morning that the priest's body was discovered, and it was on the 29th afternoon that the body was carried out for the post mortem examination. Nobody had noticed the chimney under the arm-chair till the 30th of June when the finger-print expert and photographer were looking for objects to see if any finger-prints existed.
>
> Now, gentlemen of the jury, if that was the correct version, the version given by the accused of how he came to discover the chimney somewhere under the robes and a part of it peeping out and that he thereupon moved the chimney and rolled it along like that till it came to rest under the arm-chair, you will see that all that happened before the body was raised and placed on the mat. That was his evidence. So that unless before he actually helped to raise

the body and deposit it on the mat the first accused had gone and held the body for some reason or other — and he does not say he did that — there was no occasion for his fingers to have got blood-stained before he touched the chimney. They would get blood-stained only if he had carried the corpse or helped to carry the corpse, but according to him, it was only after he had pushed the chimney along and made it reach that place under the arm-chair that he went on to help the others to carry the corpse and place it on the mat. So that really if it were in that way he acted, there was no occasion for his fingers to get blood-stained in a way in which he could communicate these blood-stains on to the chimney, because he does not say that thereafter he meddled with the chimney at all. But supposing he has forgotten it, the only other way in which you can account for the blood-stained finger-prints found on the chimney is that, although he does not say it, before carrying the body from the floor on to the mat, he had gone and held the body and so got his finger-prints on to the chimney."

It is, therefore, clear that the learned judge told the jury that the accused's story was to the effect that he rolled the chimney before he had held the body of the deceased and in these circumstances the blood must have been on his hands before he touched the body. This was not what the accused had said either in examination-in-chief or in cross-examination. Having regard to this erroneous statement of fact in regard to what was the main piece of evidence in the case, we are of opinion that it is impossible to support the conviction.

Although counsel for the accused has succeeded in obtaining the setting aside of the conviction on the first ground put forward by him, we conceive it our duty, having regard to the uncertainty that exists with regard to the interpretation of section 122 (3) of the Criminal Procedure Code, to deal with grounds (*b*) and (*c*). In cross-examination by counsel for the accused, Inspector Dole said that the latter made a statement to him voluntarily and said that he had a sword which he had thrown into the ela. Also that he did not say that he used that sword on that particular night or that he had been to the temple that night. In answer to the court the inspector said that the accused said he had not gone to the temple at all. At the end of this testimony the inspector in answer to questions put by the court stated as follows :

"This is a part of the statement to me by the 1st accused which was recorded by me : 'On the morning of the 29th at about 10 a.m. when I was ploughing a field I heard that the police had been informed. I did not go to the temple. I had a sword at home. Immediately after the murder I threw it into the ela for I feared that I could be unnecessarily implicated. I can point out where the sword is now. I know nothing about the murder'."

In his charge to the jury the learned judge referred to the statement made by the accused to the inspector in the following passage :

"Now there is not a single witness in regard to that, and there is additional significance in the absence of evidence on that point when you remember the statement made by the first accused to Inspector Dole on the 12th of July, the day he was arrested, for he said to Inspector Dole : 'I heard about this when I was working in the field. I did not want to go to the temple. I did not go there at all.' He did not say that he went there in the afternoon, that he helped to carry the corpse and things like that. That is not conclusive in itself, but that is a point which you may take into account."

Mr. Chitty makes three points with regard to the reception of this evidence and the manner in which it was treated.

These points are as follows :

(1) It was a statement within the ambit of section 122 (3) of the Criminal Procedure Code and hence cannot be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it.

(2) The evidence with regard to the statement being only admissible to impeach the credit of the accused, the learned judge should have directed the jury to the effect that such statement to the Inspector was not substantive evidence of the facts stated in such statement, but merely evidence impeaching the credit of the accused as a witness tendered under section 155 (*c*) of the Evidence Ordinance (Chapter 11). In the absence of such a direction Mr. Chitty maintains there was non-direction.

(3) Parts of the statement made by the accused were not admissible.

With regard to (2) Mr. Chitty in support of his contention cited the case of *King vs Silva* (30 N.L.R. 193) in which it was held that a statement which is made by a witness to a police officer and is afterwards denied by the witness at the trial, cannot be used as substantive evidence of the facts stated against the accused. Such a statement is only relevant for the purpose of impeaching the credit of the witness. In his judgment on pages 195–196, Fisher, C.J. stated as follows :

"As regards the statement to the Superintendent, it was admissible only for the purpose of impeaching the credit of the witness Mohammadu and, in view of the fact that his evidence amounted to a denial of all knowledge of the circumstances, it could not strengthen the case for the prosecution. A statement such as this so put in evidence is not substantive evidence of any of the alleged facts stated in it against an accused person ; it is merely evidence of the unreliability of the person who denied having made it. That being so, the learned judge's direction to the jury that they should not act upon Mohammadu's statements unless they were corroborated by other evidence they could accept was a misdirection. That direction amounts to a direction that if the facts stated in the statement were corroborated by reliable evidence they could act upon the statements as substantive evidence against the

accused. They should have been directed that they were not entitled to consider any of the contents of either of these statements as evidence against the accused."

The wording of section 162 of the Indian Criminal Procedure Code is on similar lines to section 122 of our Code. In *Syamo Maha Patro vs Emperor* (1932–A.I.R. Madras 391) and in *Pekala Narayana Swami vs King-Emperor* (1939–1 A.E.R. 396) it was held that " a statement made by any person " includes a statement made by a person accused of the offence under investigation. Hence the accused in this case was in the same position as the witness Mohammadu in *King vs Silva* (*supra*). The direction — " That is not conclusive in itself " (that is to say, the accused's statement and alleged lack of frankness about certain matters) " but that is a point which you may take into account "— did not make it clear that such evidence was only available for impeaching the credit of the accused. We think that Mr. Chitty's contention that the learned judge's treatment of such evidence amounted to misdirection is, strictly speaking, correct.

With regard to the third point, Mr. Chitty maintains that parts of the statement made by the accused to the Inspector as elicited by the learned judge were not admissible. The inadmissible parts were the alleged statement— " He said that he had not gone to the temple at all "—recorded on page 47 of the record and the following parts of the statement recorded on page 48 :

> " On the morning of the 29th at about 10 a.m. when I was ploughing a field I heard that the Kollure Temple had been burgled and that the police had been informed. I did not go to the temple. Immediately after the murder. I know nothing about the murder."

This evidence, it is asserted by Mr. Chitty, could only be given to contradict the accused. It was, therefore, premature as the latter had not at that stage given his evidence. At page 193 in *King vs Silva* (*supra*), Fisher, C.J. stated as follows :

> " As regards this statement, in my opinion the objection to its admission should have been upheld. If it was intended to apply section 157, it was admitted prematurely ; a witness cannot be corroborated in advance, and moreover the sequel showed that the statement would not have been corroboration of his evidence. This statement was therefore inadmissible under the circumstances."

The principle laid down by Fisher, C.J., in our opinion, applies. The evidence of Inspector Dole with regard to the accused's statement was admitted prematurely. A witness cannot be contradicted in advance any more than he can be corroborated.

In regard to the first point made by Mr. Chitty as to the reception in evidence of the statement made by the accused to the Inspector, Mr. Gunasekera on behalf of the Crown contends :

> (1) That the statement is not within the ambit of section 122 (3) as it was not made in the course of any investigation under Chapter XII of the Code.
>
> (2) Section 122 (3) only limits the use of the written record of a statement. Oral evidence of such a statement is not subject to such restriction.

We are of opinion that there is no substance in (1). The investigation made by a police officer or inquirer under this Chapter covers a wide field and is not limited merely to the examination of persons by the putting of questions. The investigation includes the search for incriminating evidence and the examination of the *locus in quo* and the locality in the vicinity of the scene of the crime. A statement made by any person to a police officer who was so engaged would, in our opinion, be made " in the course of any investigation."

Mr. Gunasekera's second contention raises a more difficult problem. Section 122 (3) is worded as follows :

> " No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial.
>
> Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.
>
> Nothing in this sub-section shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code."

The words " No statement " would, at first glance, seem to refer back to the words " any statement " in sub-section (1), that is to say the statement or words used by the person orally examined which must by virtue of sub-section (1) be reduced into writing by the police officer or inquirer. " No statement " would therefore include both the oral statement of a witness and such oral statement reduced into writing. The use of the words " to prove that a witness made a statement at a different time" also points to the same conclusion. On the other hand the words " or to refresh the memory of the person recording it " seems to indicate that

"No statement" refers only to the written record inasmuch as the memory cannot be refreshed by an oral statement. Again, the last sentence seems to imply that only the recorded or written statements come within the purview of this sub-section. The sub-section bristles with difficulties and is so difficult to interpret that, in our view, it is the duty of the legislature to re-draft the section so as to make its meaning clear. We are, however, not devoid of authority in so far as the interpretation of the words to which I have invited attention is concerned. At page 425 of the judgment of Bertram, C.J., in *The King vs Pabilis* (25 N.L.R. 424) we find the following passage :

> "A difficulty has, from time to time, arisen with regard to the words 'to refresh the memory of the person recording it.' These words have always seemed to me to imply that an officer recording such a statement may (where the law allows it, *e.g.* under section 157 of the Evidence Ordinance) give oral evidence as to the terms of that statement, but may not put in the written statement itself. He may only use that statement to refresh his memory, though, of course, counsel for the defence may call for a statement so used under section 161 of the Evidence Ordinance."

The opinion of Bertram, C.J. that the evidence of the oral statement is not subject to the limitations imposed by section 122 (3) was an *obiter dictum* but was followed by Keuneman, J. when sitting as Commissioner of Assize in *The King vs Gabriel* (39 N.L.R. 38). Nihill, J. in *The King vs de Silva* (42 N.L.R. 57) would also seem to have been of the same opinion. Various Indian judgments on the interpretation of section 162 of the Indian Criminal Procedure Code support the view taken by the courts in Ceylon that only the written statement is excluded. This view was taken in *Emperor vs Ramaraddi* (A.I.R. 1914 Bombay 263), *Fanindra Nath Banarjee vs Emperor* (I.L.R. 36 Cal. 281) and *Muthukumaraswami Pillai vs King-Emperor* (I.L.R. 35 Mad. 597). In the first of these cases it was held that under section 162 of the Criminal Procedure Code a policeman can be allowed to depose to what a witness had said to him in the course of the investigation for the purpose of corroborating the testimony of that witness before the trial court. Although on the wording of section 122 the question cannot be said to be free from doubt, we are of opinion that on the various authorities I have cited oral evidence of a statement made under section 122 is not subject by virtue of sub-section (3) to the limitations imposed by that sub-section and can be given in evidence under section 157 of the Evidence Ordinance (Chapter 11).

As pointed out by Mr. Chitty there is, however, a further impediment to the reception of such oral evidence. This is imposed by section 91 of the Evidence Ordinance which is as follows:

> "When the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Section 91 of the Indian Evidence Act is similarly worded. But oral evidence of a statement made to a police officer by a person under section 162 of the Indian Criminal Procedure Code is not rendered inadmissible as the police officer is not required to take down such statement in writing. Under section 122 of the Ceylon Criminal Procedure Code the statement must be reduced to writing. Hence section 91 of the Evidence Ordinance would seem to be applicable and no evidence can be given except the document itself. Indian decisions support this view. Thus in *Reg. vs Bai Ratan* (10 Bombay High Court Reps. 166) it was held that a confession of an accused person, taken by a magistrate having no jurisdiction to convict or try him, is imperfect, if not signed by the accused person, and is inadmissible in evidence, and oral evidence to prove such confession is by reason of section 91 of the Evidence Act inadmissible also. This case was followed in *Reg. vs Shivya* (1876–1 Bom. 219) and *Queen-Empress vs Viran* (1886–9 Mad. 225). *Jai Narayan Rai vs Queen-Empress* (1890 – 17 Cal. 863) and *The Empress vs Mayadab Gossami* (1881–6 Cal. 762) are authorities to the same effect. In the later case the headnote was as follows :

> "Failure to comply with the provisions of sections 182 and 183 of Act 10 of 1877 (Civil Procedure Code) in a judicial proceeding, is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition ; and under section 91 of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible."

In conclusion our findings may be summarized as follows :

(1) A statement made to a police officer or inquirer by any person, which expression includes a person accused in the course of any investigation under Chapter XII of the Criminal Procedure Code, must be reduced into writing.

(2) By reason of section 91 of the Evidence Ordinance only the written record of a statement within the ambit of (1) is admissible in evidence. Hence oral evidence of such a statement is inadmissible. The effect of our finding on this point is to render the words "or to refresh the

memory of the person recording it" almost nugatory, since there would appear to be no circumstances in which oral evidence regarding the contents of the statement would be admissible. This is one of the matters to which we would invite the attention of the legislature.

(3) The written record of such a statement is admissible by virtue of section 122 (3) of Cap. 16 to contradict a witness after such witness has given evidence.

(4) The written record of the statement of a witness used, as formulated in (3), is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section 155 of the Evidence Ordinance.

(5) If it had not been for the prohibition contained in section 91 of the Evidence Ordinance, oral evidence of a statement made under Chapter XII of the Criminal Procedure Code might be tendered not only to contradict a witness, but also under the provisions of section 157 to corroborate the testimony of such witness. Such oral testimony would again not be substantive evidence of the facts contained therein, but merely corroboratory.

For these reasons the appeal must be allowed and the conviction set aside.

Appeal allowed.

Present: Keuneman, J. & Cannon, J.

YUSUF vs SHERIFF

S. C. No. 251—*D. C. Ratnapura No.* 7367.
Argued on 7th November, 1944.
Decided on 10th November, 1944.

Fidei commissum *created by will—Death of fiduciary before testator—Does the devise lapse—Difference between an "heir" in Roman-Dutch law and a "devisee" under a will of the present day.*

Held : That a devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-Dutch law, and in the case of a *fidei commissum* with which a legacy is burdened, it does not lapse by the death of the immediate legatee before the testator.

Cases referred to : *White vs Landsberg's Executors & Others* (1918 – C.S.C. Rep. 211)
Livera vs Gunaratne (17 N.L.R. 289)

H. V. Perera, K.C., with *S. A. Marikar*, for the defendant-appellant.
N. Nadarajah, K.C., with *P. Navaratnarajah*, for the plaintiff-respondent.

Keuneman, J.

The plaintiff sued the defendant, the executor of the last will of Bawa Lebbe Mohamed Haniffa, to be declared entitled to a 6/20 share of an undivided 10 acres of Haniffa Estate. Plaintiff alleged that by his last will which was duly proved in D. C. Colombo No. 9682 (Testy) Haniffa devised to Sitti Suleha the said undivided 10 acres subject to a *fidei commissum* in favour of certain persons. Plaintiff further stated that Sitti Suleha predeceased the testator and that the devise had lapsed, and that by reason of the lapse the said undivided 10 acres had devolved on the intestate heirs of Haniffa. Plaintiff said he was the brother of Haniffa and one of the intestate heirs, and claimed a 6/20 share of the said undivided 10 acres.

The defendant in his answer admitted the devise to Sitti Suleha and the fact that Sitti Suleha predeceased the testator, but denied that there has been a lapse and also denied the further allegations of the plaintiff.

The last will of Haniffa, No. 400 of the 20th January 1941, (P1), granted the said undivided 10 acres to Sitti Suleha to be possessed during her natural life and on her death the premises were to devolve on her lawful children, but should she die leaving no children the said shares of the estate were to devolve on the lawful children of Hamsia. There is no evidence on the record as to whether Sitti Suleha left any

children but there is evidence that Hamsia has a son about six years old.

The District Judge held that as Sitti Suleha predeceased the testator the *fidei commissum* lapsed and failed. He gave no reasons and cited no authorities for his decision.

Authorities have now been cited to us in appeal. Voet (26.1.69) — I cite from McGregor's Voet, p. 149 — states: "The *fidei commissum* must also perforce fail if the fiduciary die before the testator, because at the very time when the *fidei commissum* should vest there is no one to make restitution thereof, no one who by adiating is bound to make delivery of the *fidei commissum*. For we may take it that what has been entrusted to the good faith of a person specially named as heir the testator was desirous of giving only in the event of his being heir."

It is to be noted that this applies to a *fidei commissum* imposed upon the heir. Voet, however, has mentioned certain exceptions to the rule: (*a*) where the testator has added the direct common substitution to the *fidei commissary* substitution; (*b*) where the codicillary clause has been inserted in a will containing a universal *fidei commissum;* (*c*) the case of particular *fidei commissa* with which a legatee has been burdened.

On the other hand Steyn (Law of Wills in South Africa p. 221) states: "A *fidei commissum* does not fail by reason of the death of the fiduciary before the testator, nor because the fiduciary refuses to adiate. In such a case the *fidei commissary* heir or legatee will be entitled to the burdened property forthwith, unless payment is in terms of the will necessarily postponed, *e.g.* where all the *fidei commissaries* cannot then be ascertained."

This view is based upon the change in South African law *i.e.* a change from the early Roman-Dutch law conception of the heir as the universal successor of the deceased to the legislative provisions whereby the estate of a deceased person became vested in an executor: see *White vs Landsberg's Executors & Others* (1918 – C.S.C. Rep. 211). In this case Searle, J. comments on the reason given by Voet for his opinion: "The fiduciary was the heir and the heir represented the *persona* of the deceased; he took over the whole estate with all its assets and obligations. But the executor has now taken the place of the heir, with the modification that he is not personally liable in the same way the heir was, his duty being to distribute the estate according to the testator's expressed wishes. There may be fiduciary heirs in modern wills and executors as well, but neither is in the same position as the heir under the old system." The learned judge expressed the view that it was difficult to imagine that "the reason given by Voet in the passage.....could influence the mind of a modern testator, who appointed executors to carry out his will, in any manner at all."

After a careful examination of a number of authorities, Searle, J. came to the conclusion that "the rule of law relied on by the plaintiff must be regarded as in effect abrogated by modern legislation with regard to estates."

The point emphasized in this judgment is that the rule of law enunciated by Voet has application to a *fidei commissum* imposed upon the heir under Roman-Dutch law, and it is interesting to note that in the case in question the matter related to a *fidei commissum* imposed upon the residuary legatee, and it was argued that the position of a residuary legatee resembled in some particulars at any rate the position of the Roman-Dutch heir. In the case I am now dealing with, the position is much more closely akin to the third exception mentioned by Voet, *viz.* a particular *fidei commissum* with which the legatee has been burdened. Such a *fidei commissum*, in Voet's view, was not defeated by the death of the fiduciary before the testator.

The argument of Searle, J. which I accept applies with equal force in Ceylon, where the modern executor has replaced the older Roman-Dutch heir by virtue of legislation. There is in fact local authority for that — see *Livera vs Gunaratne* (17 N.L.R. 289) — where the passage in Voet was considered. Pereira, J. there stated: "The next question is whether by reason of the death of Cornelis Jacobus before the testator the *fidei commissum* lapsed and the property fell back into the estate of the testator. Now, it is a general rule of the Roman-Dutch law that a *fidei commissum* ended by the death of the fiduciary heir before the death of the testator .....but 'heir' must not be taken as a mere devisee under a will of our time. The reference is to the 'testamentary heir or heirs' under the Roman-Dutch law, in whom was vested in the first instance 'the entirety of the property of the testator, and to whom was committed the power of carrying out his wishes and directions. In him was vested *inter alia* the rights duties and responsibilities of the executor of our time, and his presence was necessary to animate, so to say, testamentary dispositions. A devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee

under the Roman-Dutch law, and in the case of a *fidei commissum* with which a legacy is burdened, it does not lapse by the death of the immediate legatee before the testator."

I accordingly hold that the plaintiff has failed to prove that the testamentary devise in question has failed or lapsed. It is unnecessary to consider the other matters raised in the issues.

The appeal is allowed, and the plaintiff's action dismissed with costs in both courts.

CANNON, J.

I agree.

Appeal allowed.

Present: HOWARD, C.J. & DE KRETSER, J.

DE SILVA & OTHERS vs WANIGASURIYA & OTHERS

S. C. No. 90—*D. C. (F) Colombo No.* 2187.
Argued on 10th October, 1944.
Decided on 19th October, 1944.

Will—Prohibition of marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism under pain of forfeiture of rights under will—Is such a prohibition valid.

Held : That a clause in a will prohibiting marriage in the following terms was void for uncertainty : "It is my will and desire that none of my aforesaid children shall contract a marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism. Such a marriage should further be sanctioned by all or a majority from and out of the following five persons, to wit, my wife the said Lydia Catherine de Cabraal Wijetunga, my brother Edward de Silva Mohandiram, Charles Batuwantudawe, Don Baron Jayatileke and (torn off) de Silva Abeyratne, all of Colombo. In case any of my children contract a marriage contrary to these instructions herein set forth such child or children shall forfeit whatsoever rights they may have acquired under this will and the property left bequeathed and devised by me to such child or children by this will shall ensure to the benefit of the remaining children of mine in equal shares subject to the terms of the specific legacies already enumerated, provided such children shall not contract any marriages contrary to the directions herein set forth."

Cases referred to : *Clayton vs Ramsden* (1943–1 A.E.R. 17)
Clavering vs Ellison (1859–7 H. L. Cases 707)
In Re Blaiberg (1940–1 Ch. 385)
Hodgson vs Halford (11 Ch. D. 959)

N. Nadarajah, K.C., with *E. G. Wickramanayake*, for the 4th to 7th, 9th and 10th defendants-appellants.

H. V. Perera, K.C., with *M. T. de S. Amarasekera, K.C.*, and *H. W. Jayawardene*, for the plaintiff-respondent.

N. E. Weerasooriya, K.C., with *G. T. Samarawickrema*, for the 2nd and 3rd defendants-respondents.

HOWARD, C.J.

In this appeal the question for consideration is whether the decision of the Additional District Judge of Colombo, made in a partition action, with regard to the failure of certain conditions imposed by the will of one Mudaliyar Richard de Silva, is correct. This will is dated the 25th March, 1915 and clause 12 is worded as follows:—

> "It is my will and desire that none of my aforesaid children shall contract a marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism. Such a marriage should further be sanctioned by all or a majority from and out of the following five persons, to wit, my wife the said Lydia Catherine de Cabraal Wijetunga, my brother Edward de Silva Mohandiram, Charles Batuwantudawe, Don Baron Jayatileke and (torn off) de Silva Abeyratne, all of Colombo. In case any of my children contract a marriage contrary to these instructions herein set forth such child or children shall forfeit whatsoever rights they may have acquired under this will and the property left bequeathed and devised by me to such child or children by this will shall ensure to the benefit of the remaining children of mine in equal shares subject to the terms of the specific legacies already enumerated, provided such children shall not contract any marriages contrary to the directions herein set forth. No legatee among my aforesaid children shall be at liberty to lease for a period exceeding five years, mortgage, encumber, sell or in any other way alienate or dispose of the bequests made under this will until and unless such legatees shall have contracted a marriage in accordance with the directions specified in this clause and any property so leased for a period of over five years,

> mortgaged, encumbered, sold or (torn) other way alienated or disposed of shall vest in my remaining children who may be surviving at the time of such (torn off) legatee that does not contract a marriage shall have on (torn off) interest of his or her share."

The learned judge has held that the conditions imposed by clause 12 of the will fail and cannot be given effect to for want of certainty. In coming to this conclusion he has held that:—

(1) The will gave each devisee an absolute interest in the property devised subject to forfeiture in the event of such devisee contracting a marriage forbidden by the testator;

(2) The restrictions must be taken *seriatim* and not *en bloc*;

(3) Although there would be no difficulty with regard to the term "Sinhalese race" it was impossible to say what the testator meant when he said "those not belonging to the Goigama community." Nor would a court know what criterion to apply in order to distinguish a person "who professed Buddhism" from one who did not.

(4) With regard to the further condition imposing on the devisee the duty of submitting his choice of a spouse for the approval of five named persons, the learned judge was doubtful whether a testator had the right to impose such a condition and even if such a right existed a court could not interpret it in the absence of terms providing for every possible and conceivable eventuality.

Mr. Nadarajah on behalf of the appellants has contended that the clause imposed a partial restraint on marriage which was valid. In this connection he referred to Theobald on Wills and the Roman-Dutch law on Wills as set out in Steyn at pages 69–70. The passage is as follows:

> "A condition that a beneficiary 'shall not marry' and that if he does the benefit must go to another is void on the ground of public policy as it operates in general restraint of marriage, but not where the condition merely forbids the beneficiary from marrying a particular person, or a person belonging to a particular family or of a particular faith."

This principle is conceded although Mr. Perera had contended that the forfeiture clause in this case taken as a whole almost amounts to a complete restraint on marriage.

Dealing *seriatim* with the finding of the learned judge, I am of opinion that (1) is unassailable. With regard to (2), I think the learned judge was wrong. Clause 12 of the will is composite, but contains several limbs. I think it would be sufficient to defeat the forfeiture that any of the limbs should be uncertain. In this connection I would refer to the judgment of Lord Atkin in *Clayton vs Ramsden* (1943–1 A.E.R. 17). In his judgment in the same case, when marriage with a person not of Jewish parentage and not of the Jewish faith was prohibited, Lord Romer also held that this was a composite qualification. If one of the two qualifications required in a permissible husband is expressed in so uncertain terms that it is impossible to say of any particular individual whether he does or does not possess it, the whole condition is void. If the clause is considered as a whole the case put forward on behalf of the respondents is all the stronger. In fact the clause so considered practically deprives the children of the testator of all freedom of choice in the matter of marriage.

I agree with the learned judge's findings as summarized in (3) and (4). The use of the words "not professing Buddhism" would impose on a court the difficulty of discovering what degree of adherence to the Buddhist religion the testator required. These words were, therefore, uncertain. In *Clayton vs Ramsden* (*supra*) the House of Lords cited and followed the rule formulated by Lord Cranworth in *Clavering vs Ellison* (1859–7 H. L. Cases 707). This rule was as follows:—

> "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine."

Lord Romer in *Clayton vs Ramsden* (*supra*) at page 23 of the report of *Clayton vs Ramsden* applied this rule in the following passage:—

> "Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? It will have been observed from what I have already said that in the Court of Appeal they answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence and that the assertion by the man that he was of the faith was well nigh conclusive. I would agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words 'of the Jewish faith.' Until I know that, I do not know what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of and observe every rule of practice and conduct prescribed by the Jewish religion. As to them there can be no doubt that they are of the Jewish faith. But there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. Now, I do not doubt that each of these last mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly

not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules.

My Lords, I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, what degree will bring about a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty."

The question as to whether a person professes Buddhism would depend on the extent to which the particular individual accepted the tenets of the Buddhist religion and observed the rules. In his judgment Lord Romer cited with approval the judgment of Morton, J. in *In Re Blaiberg* (1940–1 Ch. 385) where it was held that a condition of forfeiture in the event of marriage to a person not of the Jewish faith was void for uncertainty. Lord Russel of Killowen would also appear to have taken the same view of the words " of the Jewish faith " although he did not consider it necessary to decide the point. At page 19 he states :—

" In these circumstances it is unnecessary to express an opinion upon the certainty of the words 'of the Jewish faith'; but had it been necessary I should have felt a difficulty in holding that their meaning was clear or certain. It seems to me that (apart from the difficulty which arises from the existence of the three varieties of Judaism referred to by Lord Greene, M.R.) the testator has given no indication of the degree of attachment or adherence to the faith which he required on the part of his daughter's husband. The requirement that a person shall be of the Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual complies with the requirement. The decision of Morton, J. *In Re Blaiberg* though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of the uncertainty of the words there in question."

Lord Thankerton agreed with Lord Romer and Lord Atkin seems to have shared the same views. The only member of the court who was doubtful as to whether the words " of the Jewish faith " were of insufficient clearness and distinctness was Lord Wright. His Lordship, however, held that the uncertainty of the words " Jewish parentage " rendered it unnecessary for him to make a decision on the words " Jewish faith." The only case put forward by counsel for the appellant in support of his proposition that the condition imposing forfeiture in the event of marriage with a person " not professing the Jewish religion " was valid, is *Hodgson vs Halford* (11 Ch. D. 959). The will in this case imposed a forfeiture if " any son or daughter of mine shall marry a person who does not profess the Jewish religion, or shall marry a person not born a Jew or Jewess although converted to Judaism and professing the Jewish religion, or shall forsake the Jewish religion and adopt the Christian or any other religion." It was held by Hall, V.C. that the clause was single and not void as being against public policy. The question as to its being void for uncertainty was not raised and hence I do not think it can be regarded as an authority so far as the present case is concerned. With regard to its authority on a matter of public policy, it must be remembered that it was decided in 1879. Lord Atkin's judgment in *Clayton vs Ramsden* (*supra*) would seem to suggest that a different view would be taken now.

As one limb of the composite condition is void, it follows that so is the whole condition. I think, however, that I should also consider the two other conditions.

Again applying the principles laid down by the House of Lords in *Clayton vs Ramsden* (*supra*) I am of opinion that the prohibition of marriage " with those not belonging to the Goigama community of the Sinhalese race " is void for uncertainty. It may be conceded that the expression " Sinhalese race " is well defined and would present no difficulty to a court called upon to interpret it. On the other hand the words " Goigama community " introduce uncertainty. Does it mean a person who always or generally associates with other Goigamas or lives in the same locality with other Goigamas? Does it mean a person who associates himself with the aims of this particular community if it has any aims ? If it means merely of Goigama descent, what degree of caste purity, if community is a synonymous term for caste, is required ? The language is, in my opinion, ambiguous. To use the words of Lord Wright in *Clayton vs Ramsden* (*supra*) the court will have to amplify and add to it before it could be held to denote any definite set of facts.

Judged by the same test, the further condition in the will requiring the devisees to obtain the consent of the majority of five persons prior to marriage is also, in my opinion, void. There is no provision providing for the position that would arise if one or other of the referees is dead or refuses to act.

For the reasons I have given the appeal must be dismissed with costs.

DE KRETSER, J.

I agree. *Appeal dismissed.*

IN THE COURT OF CRIMINAL APPEAL

Present: KEUNEMAN, J., (President), DE KRETSER, J. & JAYETILEKE, J.

REX vs PEDRICK APPUHAMY KADIRESU & TWO OTHERS

Appeals Nos. 34–36/1944, *with Applications Nos.* 95–97/1944.
S. C. No. 10—*M. C. Mallakam No.* 25165.
Argued on 31st October & 1st November, 1944.
Decided on 3rd November, 1944.

Criminal Procedure Code Chapter XII section 122 (3)—*Illegal sentence passed per incuriam—Can it be altered by the judge who passed the sentence—Can statement made in the course of an inquiry into another offence be used to contradict the accused—Can sentence of imprisonment be imposed in the event of a sentence of whipping not being carried out.*

Held : (i) That a statement made by an accused in the course of an inquiry under Chapter XII of the Criminal Procedure Code can be used under section 122 (3) of that Code to contradict him in proceedings against him in regard to an offence which was not the subject of the inquiry in the course of which the statement was made.

(ii) A judge who imposes an illegal sentence *per incuriam* has the power to set aside the illegal sentence and to impose a legal sentence.

(iii) A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

Cases referred to : *Police Officer of Mawalla vs Galapatha* (1 C.W.R. 197)

H. V. Perera, K.C., with *M. M. Kumarakulasingham*, for the 1st to 3rd accused-appellants.

E. H. T. Gunasekera, Crown Counsel, for the Crown.

KEUNEMAN, J., (President)

The following points have been argued for the appellants :—

(1) It was urged that it was irregular and illegal to admit in this case, for the purpose of establishing a contradiction, a statement made by the 2nd accused in the course of an enquiry under chapter 12 of the Criminal Procedure Code into another offence alleged to have been committed by the 2nd accused. It was contended that the words "otherwise than to prove that a witness made a different statement at a different time" amounted to a permission only to contradict a witness in the course of the trial which resulted from the particular inquiry under chapter 12, and not at any other criminal trial. We do not agree that the wide language used should be given such a restricted meaning and think that the statement in question was properly admitted and proved.

(2) The statement in question was that the 1st accused was employed at the time of this offence by the 2nd accused. In his evidence the 2nd accused admitted that the 1st accused had been in his employment up to six months before the offence, but stated that the 1st accused had then left his service. The trial judge did not specifically say that the statement which was denied was not evidence in the case. It was argued, we think correctly, that this amounted to a non-direction. But the trial judge dealt fully both with the statement and the denial and stated towards the end of his charge— "There is another point which by no means is conclusive at all. It is that all these three men are known to each other — two of them live within a quarter mile of the scene, one *has been* under the employ of the 2nd accused, and two of them are brothers." The trial judge has here correctly stated the effect of the evidence. Even if there was a non-direction, the matter was of little or no importance. The main question was whether the three accused had been correctly identified. All the elements necessary to constitute the offence of unlawful assembly, robbery and hurt had been abundantly proved. We do not think the non-direction could have in any way influenced the jury in arriving at their verdict.

(3) Certain alleged irregularities with regard to the first identification parade were

stressed, but we do not think they are of substance or that they affected the credibility of the witnesses. Those alleged irregularities were fully explained to the jury.

(4) The original sentences imposed under counts 3 and 6 were certainly not justified in law, *viz.*, 10 years' rigorous imprisonment on each of these counts together with 5 lashes on each of these counts *i.e.* 10 lashes in all. The next day the prisoners were produced before court and their counsel pointed out that under section 57 of the Penal Code no person who had been sentenced to death or to imprisonment for more than five years shall be punished by whipping. The trial judge thereupon altered the sentences on counts 3, 4, 5 and 6, reducing the sentences under the 3rd and 4th counts to 5 years' rigorous imprisonment each. Under counts 5 and 6 he imposed 5 years' rigorous imprisonment and 5 lashes on each count, all sentences to be concurrent. It is contended that he had no power to do this. We are, however, of opinion that the trial judge having imposed an illegal sentence *per incuriam* had the power to set aside the illegal sentence and to impose a legal sentence: see *Police Officer of Mawella vs Galapatha* (1 C.W.R. 197) in this connection.

(5) There is a further point. The trial judge added a further provision that if the accused were not given the whipping, the sentence was to be 12 years' rigorous imprisonment. This we think the trial judge had no power to do. There is provision in the Criminal Procedure Code for imposing a sentence of imprisonment in default of the payment of a fine, but there does not appear to be any section which authorize an alternative punishment in the event of a sentence of whipping not being executed. Where a sentence of whipping is in fact wholly or partially prevented from being carried into execution under section 317 of the Criminal Procedure Code, the court that passed the sentence can revise it under section 318, and has power to impose an additional sentence of imprisonment. This is a reasonable provision, for it is advisable to wait until it is known whether the sentence of whipping has been even partially executed before the court decides what further steps should be taken in punishing the offender. We are of opinion that the alternative sentence of 12 years' rigorous imprisonment if there was no whipping was not justified in law, and delete that portion of the sentence. The sentence of five years' rigorous imprisonment and five lashes under each of the counts 5 and 6 will stand, as will the punishments imposed under the other counts, the sentences of imprisonment being concurrent.

Subject to the deletion indicated above, the appeals and applications are dismissed.

Appeals dismissed.

Present: HOWARD, C.J. & KEUNEMAN, J.

BOGSTRA & OTHERS vs RANASINGHE (Custodian of Enemy Property)

S. C. No. 38—*D. C. Colombo No.* 11015/*M*

Argued & Decided on 6th November, 1944

Civil Procedure Code section 404—*Action instituted by alien enemy—Addition of Custodian of Enemy Property as a party—Can the added plaintiff proceed with the action.*

This is an action instituted by an alien enemy. The Custodian of Enemy Property intervened and was added as a party-plaintiff under section 404 of the Civil Procedure Code. The defendant contended that the Custodian was not entitled to proceed with the action in the absence of the plaintiff. The District Judge held that the added-plaintiff was entitled to proceed with the action. The defendant appealed from that decision. The Supreme Court dismissed the appeal and upheld the District Judge's order.

H. V. Perera, K.C., with *Ivor Misso*, for the appellant.
N. K. Choksy, for the respondent.

The judgment of the District Judge is reproduced.

JUDGMENT

In this case an application by the Custodian of Enemy Property to be added as a party, whether as plaintiff in substitution of the original plaintiff on the record, or as an added party, was considered and after inquiry the Court made order that the Custodian's application should be allowed. The learned judge further added "but even if this view is held to be wrong I see no objection to adding the petitioner as a party to this case not in substitution of the plaintiff but as an added plaintiff so that the trial can proceed and when the decree stage is reached there will be a proper person on the record who could take steps to enforce the decree or against whom steps could be taken if the defendants win. The safest course, therefore, appears to be to add the petitioner as an added plaintiff."

The defendants appealed against this order and the Supreme Court held that the plaintiff was an alien enemy and that the order of the learned District Judge was correct and accordingly dismissed the appeal. The Custodian of Enemy Property was thereafter made an added plaintiff and is so styled on the record. When the case came up for trial Mr. Gratiaen for the defendant suggested certain preliminary issues to be decided first. The first three issues related to the status of the plaintiff as to whether the original plaintiff was properly before court and if the action could proceed in his absence or whether he was competent to proceed with the action. Mr. Gratiaen's contention was that the plaintiff was an alien enemy and that this action had been filed through his attorney and as the plaintiff was incompetent to be a principal, therefore, he could not legally appoint an agent of his so as to carry on this action. The plaintiff in this case has by a Power of Attorney given authority to Mr. Mount of Messrs. Julius & Creasy to file the action. Mr. Mount as the attorney of the original plaintiff, namely, the Co-operative Condensfabrick "Friesland," has signed the proxy appointing Mr. Duggan to appear in this action for the plaintiff. Mr. Gratiaen's contention is that the plaintiff being an alien enemy could not give authority to an agent, Mr. Mount, or any member of the firm of Julius & Creasy and they themselves could not legally authorize Mr. Duggan to act as their proctor. On those points counsel for the plaintiff, Mr. Choksy, had no arguments or authorities against Mr. Gratiaen's contention. The authority cited by Mr. Gratiaen — Empire Digest Vol. 2 page 145 para 192 — is an authority for the proposition that an alien enemy is incompetent to be a principal to appoint an agent or attorney. Halsbury Vol. 1 page 196 clearly lays down that the following class of persons are incompetent to contract or act as principal: an alien enemy during the period of hostilities with the country of which he is a subject.

The next issue was as to whether it was competent for the added-plaintiff to proceed with this action in the absence of the plaintiff. Mr. Gratiaen contended that inasmuch as the Custodian of Enemy Property was not substituted for the original plaintiff but added as a plaintiff, therefore, in the absence of the original plaintiff and where he is not properly on the record or before court, the Custodian of Enemy Property who is only as added plaintiff could not proceed with the action in the absence of the original plaintiff. In support he cited the case of *Haagenbeek vs Vaithilingam* (18 N.L.R. 1), where a Full Bench decided that an action instituted by a person who in the course of the action becomes an alien enemy cannot be continued by that person. The authority cited does not go so far as to say that the action cannot be proceeded with or continued by the Custodian of Enemy Property. Mr. Choksy relied on section 404 of the Civil Procedure Code which provides for the continuation of an action in the case of devolution of interest pending the action. He contended that in the present case by reason of the plaintiff having become an alien enemy and as he was incompetent to bring an action the Custodian of Enemy Property has been added for the purpose of continuing the action on his behalf, and section 404 provides for the action being with the leave of the court continued by or against the person to whom such interest is given either in addition to or in substitution for the person from whom it has passed. In this case the interest has devolved on the Custodian and the court has made order that the Custodian be added in addition to the original plaintiff from whom the interest has passed, and that, therefore, the Custodian is entitled to proceed with the action.

It may be here noted that the petition of the Custodian to be added or substituted stated that the plaintiff has become an enemy and the rights sought to be vindicated in this action become vested by operation of law in the Custodian of Enemy Property (added-plaintiff) and that it was necessary that the Custodian of Enemy Property should be substituted as plaintiff under section 404 of the Civil Procedure Code or alternatively that he should be added as a party for the further prosecution of this action.

Mr. Gratiaen contends that if the Custodian had been substituted and not added it might be argued that he could proceed with the action but inasmuch as the court made order adding the Custodian as a party-plaintiff that he could not proceed with the action in the absence of the original plaintiff or when the original plaintiff was not before court. He points out that the added-plaintiff asks for no redress or relief in his petition. This may be so, but what the added-plaintiff sought was to proceed with the action and therefore one must assume that the relief or redress he asks for was what the plaintiff himself prayed for in his plaint. I do not think the status of the Custodian would in any way be different by his being added as a plaintiff, or if he was substituted. In either case he would be a plaintiff. If he was substituted the other plaintiff would cease to exist, if he was added it only means that the existence of the other plaintiff was also recognized.

The only way effect can be given to the order of the Supreme Court is to allow the added-plaintiff, namely, the Custodian, to proceed with the action. I do not think Mr. Gratiaen's argument can be maintained and I would, therefore, decide the 4th issue against the defendant's contention and hold that it is competent for the added-plaintiff to proceed with this action in the absence of the plaintiff.

(*Sgd.*) W. SANSONI
Addl. D.J.

Present: HOWARD, C.J. & KEUNEMAN, J.

VALLIYAMMAI ATCHI vs ABDUL MAJEED

S. C. No. 30–*L*/43—*D. C.* (*F*) *Colombo No.* 1961.
Argued on 2nd, 3rd, 4th, 7th, 8th & 9th February, 1944.
Decided on 31st March, 1944.

Trust—Transfer of property by debtor to creditor on the agreement that the latter is to retransfer the property after the debts have been liquidated out of the income therefrom—Can parol evidence of agreement be led—Prevention of Frauds Ordinance (*Chapter* 57) *section* 2—*Evidence Ordinance* (*Chapter* 11) *section* 92.

The plaintiff sued the defendant as executrix of the estate of one Natchiappa Chettiar for a declaration that a transfer deed (P21) executed by him in 1930 in favour of the latter was held in trust for him and for an accounting in the following circumstances :

(*a*) That in March, 1930 the plaintiff owned property of the total value of Rs. 660,115/– and had debts amounting to a sum of Rs. 539,114/– approximately.

(*b*) That of these debts a sum of Rs. 185,031/66 was due to the said Natchiappa Chettiar on a mortgage bond.

(*c*) That as plaintiff was financially embarrassed owing to lack of liquid cash, the said Natchiappa Chettiar, by his agent one Ramanathan, promised to act as trustee of the plaintiff and suggested to the plaintiff to give over the entire management of plaintiff's affairs to the said Natchiappa Chettiar.

(*d*) That the deed P21 was executed in consideration of a sum of Rs. 203,300/– to hold the properties mentioned therein in trust for the plaintiff.

(*e*) That the sums collected as rents and profits were agreed to be devoted by Natchiappa Chettiar to pay the debts due to him together with interest.

(*f*) That Natchiappa Chettiar may sell properties and the proceeds thereof should be paid in liquidation of the said Rs. 203,300/–.

(*g*) That after such liquidation of the said sum of Rs. 203,300/–, Natchiappa Chettiar agreed to reconvey the properties remaining unsold.

(*h*) That the plaintiff should remain as the owner of two of the said properties.

(*i*) That the properties conveyed by P21 was very much in excess of the consideration stated therein.

The learned District Judge accepted the oral evidence in support of the above arrangement and held that a trust was established.

Held : (i) That the learned District Judge was correct in holding that a trust was established.

(ii) That oral evidence was admissible to prove the trust.

Cases referred to : *Blackwell vs Blackwell* (1929 A.C. 318)
Adaicappa Chetty vs Caruppen Chetty (22 N.L.R. 417)
Balkishen Das vs Legge (I.L.R. 22 All. 149)
Gyanagerji vs Rayanim Garu (A.I.R. 1924. P.C. 226)
Tsang Chuen vs Li Po Kwai (A.I.R. 1932 P.C. 255)
Mian Feroz Shan vs Sobhat Khan (A.I.R. 1933 P.C. 178)
Maung Kyin vs Ma Shwe Law (A.I.R. 1917 P.C. 207)
Lincoln vs Wright (1859–4 De Gex & Jones 16)
Perera vs Fernando (17 N.L.R. 486)
Ohlmus vs Ohlmus (1906–9 N.L.R. 183)
Ana Lana Saminathan Chetty vs Vander Poorten (34 N.L.R. 287)
McCormick vs Grogan (1869 L.R. 4 H.L. 82)
Manuel Louis Kunha vs Jnana Ceelho & Others (I.L.R. 31 Mad. 187)
Cutts & Another vs T. F. Brown & Others (Ind. Decs. N.S. 6 Cal. 339)
Dobell vs Stephene (107 E.R. 864)
Saurama vs Mohamadu Lebbe (44 N.L.R. 397)
Saminathan Chetty vs Vanderpoorten (34 N.L.R. 287)
Ranasinghe vs Fernando (24 N.L.R. 170)
Theevanapillai vs Sinnapillai (22 N.L.R. 316)
Carthelis vs Perera (32 N.L.R. 19)
Rochefoucauld vs Boustead (L.R. 1897, 1 Ch. 196, at p. 206)
In Re Duke of Marlborough, Davis vs Whitehead (L.R. 1894, 2 Ch. 133.)
Dhanarajirji vs Parthasaradh (A.I.R. 1924, P.C. 226)
Baijnath vs Valley Mohamed (A.I.R. 1925, P.C. 75)
Daniel Appuhamy vs Arnolis Appu (30 N.L.R. 247)

H. V. Perera, K.C., with *N. Nadarajah, K.C.*, and *S. J. V. Chelvanayagam*, for the defendant-appellant.

A. R. H. Canakaratne, K.C., with *C. Thiagalingam, C. Renganathan* and *M. M. K. Subramaniam*, for the plaintiff-respondent.

HOWARD, C.J.

In this case the defendant appeals from a judgment of the District Court, Colombo, declaring that a transfer deed, No. 1604, of the 3rd March, 1930, was executed in trust for the plaintiff on the terms and conditions set out in paragraph 7 of the plaint and that the defendant retransfer and convey to the plaintiff certain properties on payment by the plaintiff to the defendant of any sum found to be due on an account being taken. The defendant was also directed to pay to the plaintiff the costs of the action. The defendant is the executrix of the estate of one Natchiappa Chettiar, a money lender, who resided partly in Colombo and partly in South India. By virtue of the abovementioned deed, P21, the plaintiff in consideration of a sum of Rs. 203,300/– well and truly paid to him by Natchiappa Chettiar, sold, assigned and transferred to the said Natchiappa Chettiar, his heirs, executors, and assigns, the premises, the lands described in the schedule, to have and to hold the said lands and premises thereby conveyed together with the appurtenances unto the said Natchiappa Chettiar, his heirs, executors, administrators and assigns for ever. The plaintiff in his plaint alleged that at the beginning of March, 1930, he owned property, movable and immovable, of a total value of Rs. 660,115/– and had debts amounting to a sum of approximately Rs. 539,114/–. These debts included *inter alia* (*a*) secured debts being money due on mortgages in favour of Natchiappa Chettiar amounting to Rs. 185,031/66; (*b*) unsecured debts due to Natchiappa Chettiar amounting to Rs. 5,280/–; (*c*) secured debts due to a third party amounting to Rs. 1,515/–; (*d*) Rates and taxes amounting to Rs. 1,430/–; making a sum total of Rs. 203,256/66. The plaintiff further alleged that when in February, 1930, owing to lack of liquid cash he was financially embarrassed, the said Natchiappa Chettiar by his agent one Ramanathan promised to act as trustee of the plaintiff and suggested to the plaintiff to give over the entire management of the plaintiff's affairs to the said Natchiappa Chettiar. It was thereafter agreed that the plaintiff should execute the transfer, P21, which should purport to be for the consideration therein stated. That the said Natchiappa Chettiar should hold the said properties in trust for the plaintiff and should collect the rents, profits and income thereof as trustee for and on behalf of the plaintiff. That the sums so collected should be devoted by the said Natchiappa Chettiar to pay the said sum of Rs. 1,430/– for rates and taxes, the said secured debt of Rs. 1,515/– and finally the sums of Rs. 185,031/66 and Rs. 5,280/– together with interest due to the said Natchiappa Chettiar. That the proceeds of any sales of property made by the said Natchiappa Chettiar should be paid in liquidation of the said sum of Rs. 203,300/– and after such liquidation the said Natchiappa Chettiar should reconvey to the plaintiff such of the properties as remained unsold. That the plaintiff should remain in possession as true owner of two of the said properties to wit, Nos. 78 and 81, Messenger Street, Colombo. The plaintiff further alleged that within a few weeks of the execution of P21 the said Natchiappa Chettiar, having come to Ceylon personally, agreed to hold the said properties in trust for the plaintiff and to carry out the terms hereinbefore referred to. Thereafter Natchiappa Chettiar collected the rents of the said properties (save and except the two properties mentioned) and from time to time sold and transferred to the purchasers certain of such properties. The said Natchiappa Chettiar died in India on the 31st December, 1938, and subsequently the defendant as executrix proved his will. It was also asserted by the plaintiff that in or about November, 1939, the defendant by her agent the said Ramanathan agreed and undertook to retransfer to the plaintiff the properties described in schedules B and C to the plaint and to account for the moneys received. In or about January, 1940, the defendant, according to the plaintiff, fraudulently and in breach of the trust, claimed, on behalf of Natchiappa Chettiar's estate, the properties aforementioned. According to the plaintiff all amounts due to Natchiappa Chettiar had been liquidated before his death and the latter held the remaining properties in trust for the plaintiff.

The District Judge found the following issues in favour of the plaintiff:

(1) Natchiappa Chettiar by his agent Ramanathan Chettiar, a friend of the plaintiff, did promise to act as trustee of the plaintiff and suggested to him to give over the entire management of his affairs to the said Natchiappa Chettiar.

(2) The plaintiff entered into the agreement set out in paragraph 7 of the plaint with Natchiappa Chettiar acting through Ramanathan and P21 was executed in pursuance of such agreement and on the terms and conditions contained in paragraph 7. It was agreed *inter alia* that (*a*) P21 should purport to be for a consideration of Rs. 203,300/–, (*b*) Natchiappa Chettiar should hold the said properties in trust for the plaintiff and collect the rents and profits as trustee, (*c*) on liquidation of the said sum of

Rs. 203,300/- Natchiappa Chettiar should reconvey such properties as remained unsold to the plaintiff.

(3) The value of the property transferred by P21 valued by Mr. Beling at Rs. 460,115/- was very much in excess of the amount due to Natchiappa Chettiar. Natchiappa Chettiar in October, 1930, handed over the title deeds of the properties to plaintiff's lawyers to draw up a deed of reconveyance to the plaintiff at which time Natchiappa Chettiar reaffirmed the trust and prevented the plaintiff from getting back the property.

(4) The beneficial interest in the properties remained in the plaintiff who continued in occupation of Nos. 78 and 81, Messenger Street. The defendant was under a duty to account to the plaintiff for all sums received and to retransfer all properties as remained unsold.

(5) In June, 1935, Natchiappa Chettiar further reaffirmed the trust and agreed that the properties should be retransferred to the plaintiff in March, 1940.

(6) In or about 1940 the defendant fraudulently and wrongfully repudiated the trust and the plaintiff is entitled to obtain a retransfer of the properties mentioned in schedules E and C of the plaint on payment of whatever sums of money are found due to the estate of Natchiappa Chettiar after an account has been taken.

In finding these issues of fact in favour of the plaintiff, the learned judge has been very much influenced by the evidence of Mr. T. Canagarayar, a proctor, who testified to the arrangements entered into by the plaintiff and Ramanathan Chettiar. According to Mr. Canagarayar the first arrangement was made at the house of one Abdul Raheman, who was dead at the date of trial. It was agreed between Ramanathan Chettiar and the plaintiff that, in order to prevent the unsecured creditors of the plaintiff from seizing any of the properties they should be transferred to Natchiappa Chettiar in trust. It was also agreed that the unsecured creditors should be given the stock in trade which, it was believed, was more than sufficient to meet their demands. The learned District Judge, in accepting the evidence of Mr. Canagarayar, has held that the agreement set out in paragraph 7 of the plaint has been proved. In this connection it would appear that the plaintiff at this time told Mr. Wilson, a proctor acting on behalf of the unsecured creditors, that he had transferred the properties in trust to Natchiappa Chettiar. Mr. Wilson's testimony was also accepted by the District Judge. Although there is no evidence to show that Natchiappa Chettiar was aware of the secret arrangement made by his agent at the time of the execution of P21, there is evidence, which has been accepted by the learned judge, that a few weeks after the execution of P21 Natchiappa Chettiar came to Ceylon and ratified the arrangements made by Ramanathan Chettiar. At a later date also Natchiappa Chettiar reaffirmed his willingness to carry out the terms of the agreement. Through his agent, Natchiappa Chettiar entered into possession of the properties transferred and collected the rents and sold a number of such premises. The District Judge has held that in the majority of these cases the purchasers were introduced by the plaintiff who was then taking an active part in the sales. No accounts were, however, rendered to the plaintiff. According to the latter, Natchiappa Chettiar in 1935 finally promised to retransfer the properties in March, 1940, when the accounts would be settled between the parties. Before that date Natchiappa Chettiar died and the defendant was appointed his executrix. Objection was taken to the reception of oral evidence which would have the effect of furnishing proof that Natchiappa Chettiar through his agent, agreed to retransfer the property on the happening of certain events and that he agreed to hold the property in trust for the plaintiff under certain circumstances. After hearing argument by counsel the learned District Judge admitted oral testimony for the purpose of ascertaining whether a trust as alleged can be established on the evidence. He also held that this evidence fell within the dictum of Lord Warrington in *Blackwell vs Blackwell* (1929 A.C. 318) as evidence of the nature of the obligation which the defendant is alleged to have undertaken. The learned judge further held that oral evidence of an agreement by the defendant to reconvey can be admitted, not for the purpose of such an undertaking being held to be of force or avail against him, but as evidence of the trust under the personal obligation which Natchiappa Chettiar undertook with regard to the trust and for the purpose of ascertaining the terms and conditions upon which the transfer was executed and the nature of the obligation which the defendant was bound to fulfil.

The defendant appeals against the decision of the District Judge on the following grounds :

(*a*) The judge's order of the 29th January, 1942, that oral evidence of the transaction was admissible is wrong.

(*b*) Plaintiff was not entitled in law to contradict P21 nor to prove any verbal trust of immovable property.

(*c*) The plaintiff's story amounts only to having transferred properties to Natchiappa

Chettiar as a security and in such circumstances no trust is created.

(*d*) Even if plaintiff's story is accepted it amounts only to a promise by Natchiappa Chettiar to transfer whatever properties are left over after paying the debt due to him. Such a promise being only verbal can neither be proved nor enforced.

(*e*) The evidence called in support of the plaintiff's story of a trust or security is unreliable.

(*f*) The judge's finding on the issue of prescription was wrong.

(*g*) If the learned judge's finding that P21 was executed in fraud of creditors is correct, the plaintiff cannot succeed inasmuch as he comes into court with the case that his transfer was in fraud of creditors.

(*h*) Assuming that Ramanathan Chettiar promised to hold the properties in trust for the plaintiff, such trust would not bind Natchiappa Chettiar. Even if the latter subsequently agreed to hold the properties in trust, such trust being purely parol is not valid or enforceable.

Grounds (*a*), (*b*), (*c*) and (*d*) have been strongly pressed by Mr. Perera on behalf of the defendant. He contends that the admission of oral evidence is excluded by the provisions of section 92 of the Evidence Ordinance (Chapter 11). If such evidence is excluded the issue between the parties must be decided on an interpretation of P21. This document is a conveyance of the properties by way of sale to Natchiappa Chettiar by the plaintiff. No question of a trust or a conveyance with a right of retransfer can be implied from P21. If it stands by itself, the plaintiff's claim must fail. The first part of section 92 is worded as follows :

> "When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or substracting from its terms."

The terms of the contract between the parties have been reduced to the form of a document, that is to say, P21, which has been proved according to section 91. Hence no evidence of any oral agreement or statement, so it is contended, shall be admitted as between the parties to P21 or their representatives in interest for the purpose of contradicting, varying, adding to or substracting from its terms. There is no doubt that the arrangement between the parties, whether amounting in law to a trust or an agreement for the retransfer of the properties, with reference to which the plaintiff and his witness Mr. Canagarayar, have given oral testimony, does contradict, vary and substract from the terms of P21. Mr. Perera further contends that the plaintiff's story, even if accepted, shows that the arrangement was the creation of a security for money advanced. The agreement to retransfer could not, in these circumstances, by reason of section 2 of the Prevention of Frauds Ordinance (Chapter 57) be proved by oral evidence. In this connection Mr. Perera cited the case of *Adaicappa Chetty vs Caruppen Chetty* (22 N.L.R. 417). The facts in this case were as follows : The added-defendant being desirous of buying some pieces of land applied to a money-lending firm, of which plaintiff and defendants were partners, for a loan. For securing the repayment of the sum with interest, the transfers were executed in the name of the first defendant, to let them have absolutely for their benefit a half share of all the property alleged to be held in trust for him for the actual cost of such share, and in consideration offered to forego all claim for interest. The added-defendant accepted this offer, and acknowledged verbally the title of the firm to the half share on the footing of the agreement. In this action the added-defendant intervened and sought to establish by parol evidence that half share of the land was held in trust for him by the firm. In holding that parol evidence was inadmissible to establish the alleged trust, Lord Atkinson at pp. 425-426 stated as follows :

> "The first question which it is necessary to determine is what is the real nature, the true aim, and purpose of the transaction described in the 6th paragraph of Perera's answer. The purchase money was paid by the Chetty firm through the medium of Perera. It was never lent to him to dispose of it as he pleased. If he got command of the money at all, he only had command of it in order to devote it to a particular purpose, the purchase of these lands. He was to repay it with interest at 10 per cent. and the conveyance was made to the first defendant : 'The deed of the land so purchased to be taken in the latter's name.' Not for the purpose, in the view of either party, of being held in trust for Perera or for Perera's sole benefit, but to secure to the firm the repayment of the money sunk in the purchase with interest. The object of the agreement was, in their Lordships' view, to create something much more resembling a mortgage or pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into, where one man with his own proper money buys landed property and gets the conveyance of that property made to another. In such a case that other has no claim upon the property vested in him. It would be a fraud upon his part to contend that it belonged to him, or to insist that he was entitled to a charge or incumbrance upon it, or had a right to retain the possession of it against the will of the man who purchased it. But in the present case, until the purchase money with interest was repaid to the firm, the first defendant had a right to and that he (the first defendant) had the right, in the interest of his firm, to retain the ownership of it. It is true that the deed which

conveyed the land to the first defendant did not contain any provision for redemption. It was not a formal mortgage in that respect, but the agreement the parties entered into was much more an agreement to create a trust. It was in effect a parol agreement providing for the conveyance of land to establish a security for money, and creating an incumbrance affecting land, that Perera desired to prove the existence of by parol evidence. The parol evidence, was properly held to have been inadmissible, for the simple reason that the agreement, if proved by it, must, under Ordinance No. 7 of 1840, subsection 2, have been held not to be of 'any force or avail in law.' This section is much more drastic than the fourth section of the Statute of Frauds."

Lord Atkinson took the view that the first question to determine was the real nature, true aim and purpose of the transaction. He then held it was not for the purpose of the land being held in trust for Perera, but to secure to the firm the repayment of the money sunk in the purchase with interest. The judgment of Lord Atkinson in this case would also seem to negative the suggestion of counsel for the appellant in that case that the plaintiff was using the Statute of Frauds to perpetrate a fraud on the appellant. In *Balkishen Das vs Legge* (I.L.R. 22 All. 149) a deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The vendor did not exercise his right of repurchase, but after many years gave notice of his intention to redeem and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale. It was held that oral evidence for the purpose of ascertaining the intention of the parties to the deed was not admissible, being excluded by section 92 of the Indian Evidence Act. The following passage from the judgment of Lord Davey occurs at page 158 :

"Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or substracting from, its terms subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

The passage cited above from the judgment of Lord Davey in *Balkishen Das vs Legge* (*supra*) was referred to with approval by Lord Blanesburgh in *Gyanagerji vs Rayanim Garu* (A.I.R. 1924 P.C. 226) in the following words :

"It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than of surrounding circumstances such as in Lord Davey's words in *Balkishen Das vs Legge* are clearly required to show in what manner the language of the documents was related to existing facts."

His Lordship then considered the surrounding circumstances and held that the transaction was a mortgage only. In his judgment in *Tsang Chuen vs Li Po Kwai* (A.I.R. 1932 P.C. 255) Lord Blanesburgh at page 261 also dealt with the question of the admission of parol evidence to correct written instruments in the following passage :

"Indeed it appears from the authorities examined before their Lordships that the cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements, but does not contradict, the terms of the deed ; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual misstatement of fact."

It will be observed that in this passage his Lordship used the words "apart from fraud or mistake." Lord Davey's dictum in *Balkishen Das vs Legge* (*supra*) was also approved by Sir George Lowndes in *Mian Feroz Shan vs Sobhat Khan* (A.I.R. 1933 P.C. 178) in the following passage :

"Section 92, Evidence Act, forbids the admission or consideration of evidence as to the intentions of the parties, or to contradict the express terms of the document : see *Balkishen Das vs Legge*, and their Lordships think from the fact that there had been previous transactions between the parties of a similar character."

The judgment of Lord Davey in *Balkishen Das vs Legge* (*supra*) was also considered and explained in *Maung Kyin vs Ma Shwe Law* (A.I.R. 1917 P.C. 207). At pages 209-210, Lord Shaw stated as follows :

"In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Davey in the case of *Balkishen Das vs Legge*. It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents. Lord Davey cites section 92 of the Indian Evidence Act and adds :

'The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships,

any application to the law of India as laid down in the Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.'

The principles of equity which are universal, forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence for the reasons set forth in *Lincoln vs Wright* (1859–4 de G. & J. 16) and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked what is the evidence which under that statute may be competently adduced? The language of the section in terms applies and applies alone 'as between the parties to any such instrument or their representatives-in-interest'. Wherever accordingly evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case accordingly the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions."

It will be seen, therefore, that their Lordships held that section 92 was not a bar to the reception of the parol evidence as the evidence was tendered as to a transaction with a third party. On the other hand at page 210 the judgment stated that if section 92 applied, proviso 1 would seem to be in point because it would be a fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it.

The principle laid down in the Privy Council cases I have cited have been followed in our courts. In *Perera vs Fernando* (17 N.L.R. 486) where a person transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to reconvey the property on payment of the money advanced. The admission of oral evidence to vary the deed of sale is in contravention of section 92 of the Evidence Ordinance. The agreement to resell is not a trust, but is a pure contract for the purchase and sale of immovable property. In his judgment in this case on page 489 de Sampayo, A.J. stated as follows :

> "Another aspect of the case is that arising from the provision of the Ordinance No. 7 of 1840, which requires a notarial instrument to establish any agreement relating to immovable property. Here the plaintiff refers to the alleged trust and relies on the decisions of this court, which have laid down the principle that the Ordinance will not be allowed to be used for perpetrating a fraud, and of which *Ohlmus vs Ohlmus* (1906–9 N.L.R. 183) cited by the District Judge is an example. But those decisions when examined will be found not to apply to such a case as this. The argument as to the deed of sale being only a mortgage has been above disposed of, and the position then is reduced to this : that plaintiff seeks to enforce an agreement to resell the lands on repayment of the amount paid by the purchaser Diege Perera. Such an agreement does not constitute a trust, but is a pure contract for the purchase and sale of immovable property, and the Ordinance No. 7 of 1840 declares it to be void in the absence of a notarial instrument."

In support of his contention that oral evidence is admissible, even if the transaction is in the nature of a security for money, counsel for the respondent had relied to a certain extent on the judgment of Lord Tomlin in *Ana Lana Saminathan Chetty vs Vander Poorten* (34 N.L.R. 287). In this case the District Judge held that the respondent held the estate upon a trust and oral evidence was admissible. On appeal the Supreme Court allowed the appeal and the action was dismissed. On appeal to the Privy Council the finding of the District Judge in favour of the plaintiff was restored. In coming to this conclusion their Lordships held that the transaction effected by certain deeds Nos. 471 and 427 was the creation of a security for money advanced, which, in certain events, imposed upon the defendant, who was the creditor, duties and obligations in the nature of trusts. Their Lordships did not hold that there was a trust or that oral evidence was admissible.

Having regard to the authority of the various cases I have cited, the question with regard to the admission of oral evidence would it is thought have been removed from the regions of doubt. *Balkishen Das vs Legge* (*supra*) and the cases that subsequently followed Lord Davey's dictum no doubt make it clear that, so far as the law of India is concerned, in a case where one of the provisos to section 92 of the Evidence Act apply, oral evidence is inadmissible for the purpose of construing certain deeds or ascertaining the intention of the parties to those deeds. That there are still difficulties is evident from a perusal of a summary of the effect of the various Indian cases culminating in *Maung Kyin's* case in the 2nd edition of Monir's Law of Evidence at page 633, where it is stated as follows :

> "It may, therefore, be taken now as generally settled that neither oral evidence of intention nor evidence of the acts and conduct of the parties to a document is admissible between them or their representatives in interest to show that the document did not mean what it purports to be, and that neither direct evidence nor indirect evidence, *e.g.*

evidence of the acts and conduct of the parties to an instrument, is admissible to prove a contemporaneous oral agreement varying the terms of the instrument. A contemporaneous oral agreement to reconvey, or allow redemption of property conveyed by a deed of absolute sale is inadmissible to show that the transaction was one of mortgage. It is, however, apprehended that the Privy Council decision in *Maung Kyin's* case does not set at rest the controversy in all its aspects. Firstly, however considered the decision of the Privy Council on this point in *Maung Kyin's* case may be it is no more than an *obiter dictum*, as the actual decision of the case proceeded on another ground, namely, that section 92 does not apply to a transaction with a third party."

The author also states on page 634 that, though the Privy Council has definitely held the equitable doctrine of *Lincoln vs Wright* (*supra*) to be inapplicable to India, it has clearly recognized the possibility of such cases falling within the first proviso to section 92. Moreover, it has to be borne in mind that the passage I have cited from Lord Davey's judgment was an *obiter dictum* and no question of fraud arose. Again Lord Shaw in *Maung Kyin vs Ma Shwe Law* (*supra*) states at page 210 that it would be a fraud to insist on a claim to property arising under such a transaction the claimant knowing that the true owner had never parted with it and the proviso to section 92 would apply.

At this stage it is relevant to consider what has been established by the evidence. In this connection I am of opinion that the findings of fact made by the learned judge must be accepted. He is a judge of wide experience and had the opportunity of watching the demeanour of the witnesses when they tendered their evidence. It is impossible to say that, in accepting the evidence of Mr. Canagarayar, the proctor, he has misdirected himself although it is possible we might have come to a different conclusion ourselves. The learned judge has found that P21 was executed in pursuance of an agreement by Ramanathan acting as the agent of Natchiappa Chettiar that the latter should act as trustee of the plaintiff in whom remained the beneficial ownership of the properties. That this agreement was ratified by Natchiappa Chettiar. The learned judge has further found that the defendant has fraudulently repudiated the trust. Although the findings of the learned District Judge on questions of fact are accepted, it is incumbent on this court to consider whether his interpretation of those findings and the inference to be drawn therefrom are correct. In other words we must, to use the words of Lord Atkinson in *Adaicappa Chetty vs Caruppen Chetty* (*supra*), determine the real nature, true aim and purpose of the transaction. Was the effect of the oral arrangement to create a security for money advanced ? I think the learned judge was right in holding it was not, but such oral arrangement created a trust. In this connection it would appear that all except one of the properties transferred by P21 were already mortgaged to Natchiappa Chettiar. How then can it be argued that the purpose and true aim of the arrangement was to create a security for money advanced ? The security was already in existence and only a small amount was advanced. If the properties were held in trust by Natchiappa Chettiar, such trust is an express one, arising not only by oral agreement, but also as a violent and necessary presumption from the nature of the transaction between the parties. It now becomes relevant to consider the provisions of section 5 of the Trusts Ordinance which is worded as follows :

> " 5. (1) Subject to the provisions of section 107 no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.
>
> (2) No trust in relation to movable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, or unless the ownership of the property is transferred to the trustee by delivery.
>
> (3) These rules do not apply where they would operate so as to effectuate a fraud."

The findings of the learned judge imply that if a notarial agreement to prove the trust is required, a fraud will be effectuated inasmuch as such trust cannot be established by oral evidence. In these circumstances sub-section 1 would not apply and it is contended by Mr. Canakaratne that section 2 of the Trusts Ordinance comes into operation. Section 2 is worded as follows :

> " 2. All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

It is, in my opinion, impossible to maintain that specific provision for the manner in which a trust shall be established has not been made in this or any other Ordinance. Such provision is made by the Trusts Ordinance itself read in connection with section 92 of the Evidence Ordinance. It is suggested, however, that the judgment of the House of Lords in *McCormick vs Grogan* (1869 L.R. 4 H.L. 82) is an authority for the proposition that in the case of fraud section 92 of the Evidence Ordinance can be excluded from consideration. At page 97 Lord Westbury stated as follows :

> "My Lords, the jurisdiction which is invoked here by the appellant is found altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, *a malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating of fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills."

So in this case it is urged that the equitable principle formulated, proceeding on the ground of fraud, converts the defendant who has committed it into a constructive trustee for the plaintiff who is injured by that fraud. To hold that section 92 of the Evidence Ordinance is excluded would, in my opinion, be contrary to the dictum of Lord Davey in *Balkishen Das vs Legge* (*supra*) and that of Lord Shaw in *Maung Kyin vs Ma Shwe Law* (*supra*) when he said that principles of equity are of universal application but they can only be applied when they rest on facts which can be proved according to the law of evidence prevailing in a particular jurisdiction.

In *Manuel Louis Kunha vs Jnana Ceelho & Others* (I.L.R. 31 Mad. 187) it was held that under English law, where a testator disposes of property in favour of a legatee, and, at the time of such disposition or at any subsequent period during his life-time, the testator informs the legatee that the disposition in his favour, although apparently for his benefit, was so made in order that he may carry into effect certain wishes of the testator which are communicated to him, and the legatee expressly, or impliedly undertakes to carry out the wishes so expressed to him by the testator, the legatee will be treated as a trustee, and will be compelled to carry out the instructions so confided to him. The reason for this rule is that it would be a fraud on the part of the legatee not to give effect to the testator's intentions, and the law will not permit him to benefit by his own fraud. The legislature in enacting section 5 of the Indian Trusts Act and the proviso thereto intended to make this rule of equity applicable in India. In my opinion a legatee who expressly or impliedly undertakes to carry out the wishes of a testator and does not do so is not guilty of a greater fraud than the grantee of property who undertakes to hold it for the benefit of the grantor. The court would, therefore, apply section 5 (3) of the Trusts Ordinance. This provision, however, does not deal with the admissibility of evidence. It merely saves certain trusts from the rules formulated by section 5 (1) and (2). The question therefore arises, in what way does section 92 of the Evidence Ordinance operate in regard to the admission of oral evidence to prove a trust to which sub-section 1 of section 5 does not apply? It was said by Lord Shaw in *Maung Kyin's* case that, if section 92 applied, proviso 1 would seem to be in point, because it would be fraud to insist upon a claim to property arising under such a transaction, the claimant knowing that the true owner had never parted with it. But does Lord Shaw's dictum apply to the transaction which took place in this case between the plaintiff and the agent of Natchiappa Chettiar? The defendant who is his executrix cannot be in any better position than Natchiappa Chettiar and therefore it would be a fraud on her part as it would have been on the part of Natchiappa Chettiar to deny the trust. Although there is no clear decision on the point, proviso 1 would seem to permit the introduction of oral evidence to prove such a trust.

In *Cutts & Another vs T. F. Brown & Others* (Ind. Decs. N.S. 6 Cal. 339) it was stated by Garth, C.J. that the rule laid down in section 92 of the Evidence Act is taken almost verbatim from Taylor on Evidence and the exceptions to that section which follow in the provisos are discussed in the same work. That being so, it was legitimate to refer to Taylor as a means of ascertaining the true meaning of the provisos. In paragraph 1135 of the 12th edition it is stated that the rule (that is to say, the rule excluding parol evidence) is not infringed by the admission of parol evidence, showing that the instrument is altogether void, or that it never had any legal existence or binding force, either by reason of forgery or fraud. In paragraph 1136 it is stated that "if a person has been induced by verbal fraudulent statements to enter into a written contract for the purchase of a house, a ship, or the like, it is competent for him, in an action for deceitful representation, to prove the fraud," "fraud by evidence *aliunde*, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer." In this connection see *Dobell vs Stephene* (107 E.R. 864). In this case

there was a misrepresentation with regard to a state of affairs that existed in the past. But Taylor draws no distinction between a representation made to the past or the future. Untrue statements which deceive the person to whom they are made and which lead him to act to his prejudice as he would not otherwise have acted if he had not been deceived may be proved by parol evidence. Applying this principle to the facts of the present case it is open to the plaintiff to establish by parol evidence the untrue statement made by Natchiappa Chettiar's agent that he would hold the properties in trust. This statement deceived the plaintiff and led him to act to his prejudice and execute the deed P21. It is true that in *Cutts & Another vs T. F. Brown & Others* (*supra*) Garth, C.J. stated that the proviso applied to cases where evidence is admitted to show that a contract is void upon the ground of fraud at its inception. On the other hand, as I have already observed, Taylor imposes no such limitation on the applicability of the proviso. The words of the proviso are very wide and declare that any act of fraud might be proved which would entitle any person to any decree relating to a document. The words of the proviso are in my opinion wide enough to let in evidence of subsequent conduct as in the view of a Court of Equity would amount to fraud and would entitle the grantor to a decree restraining the grantee from proceeding upon his document. The conduct of Natchiappa Chettiar's in refusing to reconvey the premises and insisting that the transaction was an out and out conveyance amounted to fraud and hence the plaintiff is entitled to a decree restraining the defendant from proceeding upon P21. Even if the transaction is regarded not as a trust, but merely as the creation of a security with a right in the plaintiff to a retransfer of the property on payment of the amount due, I am of opinion that, having regard to the dictum of Lord Shaw, proviso 1 to section 92 would apply as it would still be a case of a person making a fraudulent claim to property, such person knowing the true owner had not parted with it. I have, therefore, come to the conclusion that the oral evidence was properly admitted.

With regard to the other contentions put forward by Mr. Perera, I am of opinion that the learned judge having come to the conclusion that the defendant held the properties as a trustee, was right in holding that in view of section 111 of the Trusts Ordinance the claim of the plaintiff was not barred by prescription. If the transaction is regarded as the creation of a security for money advanced with a right to retransfer, the cause of action would not arise until there was a refusal to retransfer. Regarded from this point of view, therefore, the plaintiff's claim was not prescribed.

With regard to ground (*g*), I am of opinion that it was not established that any creditors of the plaintiff were defrauded or their claims delayed by reason of the transfer of properties in favour of the defendant. In these circumstances, the principles laid down in *Saurama vs Mohamadu Lebbe* (44 N.L.R. 397) are not applicable.

With regard to ground (*h*), I am of opinion that the learned judge was right in holding that Ramanathan Chettiar's promise was endorsed by Natchiappa Chettiar and hence the latter is liable. As I have already indicated, the learned judge's other findings of fact must be accepted and, in these circumstances, the plaintiff's claim is established. The appeal is, therefore, dismissed with costs.

Keuneman, J.

In his plaint, the plaintiff alleged that in March 1930 he owned and possessed *inter alia* movable property being stock-in-trade of the value of Rs. 250,000/–, and certain specified immovable property of the value of Rs. 460,115/–, in addition to other immovable property of the value of Rs. 200,000.

At the same period he had debts viz :

(*a*)	unsecured debts to third parties ..	Rs.	225,857/–
(*b*)	secured debts to Natchiappa Chetty, the testator, now represented by defendant as executrix ..	,,	185,031/–
(*c*)	unsecured debts to the same person as (*b*)	,,	5,280/–
(*d*)	secured debts to a third party ..	,,	1,515/–
(*e*)	rates and taxes due	,,	1,430/–
(*f*)	other debts of about	,,	120,000/–

Plaintiff alleged that in February 1930, when he was in bad health and in financial embarrassment owing to lack of liquid cash, the said Natchiappa Chetty by his servant and agent Ramanathan Chetty promised to act as the trustee of the plaintiff and suggested to the plaintiff that he should give over the entire management of the plaintiff's affairs to Natchiappa Chetty. Thereafter the plaintiff alleged that an agreement was entered into between the plaintiff and Natchiappa Chetty by his agent Ramanathan Chetty, as set out in paragraph 7 of the plaint. In pursuance of the

agreement plaintiff executed the deed of transfer 1604 of the 3rd March 1930 (P21 or D1). The plaintiff alleged that Natchiappa Chetty died on the 31st December, 1938, and that about January 1940 the defendant fraudulently and in breach of the trust claimed that the estate of Natchiappa Chetty was entitled to the premises in question. The plaintiff stated that all amounts due to Natchiappa Chetty had been liquidated before his death, and that Natchiappa Chetty held the remaining properties in trust for the plaintiff.

In his very careful judgment, the District Judge held that the following facts were established, and I accept that finding as correct: The plaintiff who was possessed of several immovable properties carried on a business as a hardware merchant. At first the business was successful, but the plaintiff who was indebted to Natchiappa Chetty and others decided to raise a loan of Rs. 300,000/– at a moderate rate of interest in order to pay off the debts which carried a much higher rate of interest. Negotiations for the raising of the loan were opened with the Loan Board. Meanwhile a complication arose, in consequence of two overseas creditors, who were unsecured, suing the plaintiff for Rs. 25,000/– and Rs. 32,000/– odd. Plaintiff then went to a firm of proctors to assist him in the raising of the necessary loan.

Mr. Beling, retired assessor of the Colombo Municipality, was commissioned to make a valuation of the plaintiff's properties for this purpose. The valuation was made, and according to the value of the properties transferred to Natchiappa Chetty by the deed 1604 was Rs. 460,115/–. The District Judge definitely accepts the correctness of this valuation, which was made at that very time, and the point is of importance. While the negotiations for the loan were in progress, Natchiappa Chetty's agent in Ceylon, Ramanathan Chetty who was a trusted friend of the plaintiff, approached the plaintiff with a proposal that the plaintiff should transfer the lands already mortgaged to Natchiappa Chetty for the ostensible consideration of Rs. 203,300/– on the promise that the transferee would hold the lands in trust for the plaintiff subject to an obligation to retransfer the lands, or such of them as remained unsold, to the plaintiff.

The plaintiff consulted Proctor Canagarayar, who advised him against the suggestion and said that a deed setting out all the conditions agreed upon was desirable. In spite of this, however, the plaintiff persisted in going on with the suggestion of Ramanathan Chetty. It seems fairly clear that the object which the plaintiff had in mind was to prevent the unsecured creditors from seizing the valuable immovable properties. At the same time it suited Natchiappa's plans to have the whole of these valuable properties in his own name, and not merely under mortgage.

At this time the plaintiff had an extensive stock of hardware, and even Mr. Wilson who was acting for two of the unsecured creditors was satisfied that the stock was sufficient to meet the claims of the unsecured creditors. The plaintiff told Mr. Wilson that he had transferred the immovable properties to Natchiappa Chetty in trust. Mr. Wilson insisted on further security being given to the unsecured creditors, and a mortgage of Rs. 15,000/– was promptly given. In the result the sale of the stock resulted in a small shortfall, but the mortgage was more than sufficient to meet the claims of the unsecured creditors. I have dealt with this aspect of the matter out of its order, because I think the evidence disposes of the argument addressed to us that the plaintiff acted in fraud of his creditors, and that the fraud was actually carried out. I am of opinion that no creditor was either defrauded or even delayed as a result of the plaintiff's action.

The District Judge accepted the evidence of Proctor Canagarayar that a final arrangement was arrived at in the house of one Abdul Raheman, who was dead at the date of trial. Ramanathan Chetty and the plaintiff arrived at the agreement. It was decided that the properties which were under mortgage to Natchiappa Chetty should be transferred to him in trust. This was to be done in order to prevent any creditors proceeding to seize those properties in execution, and Ramanathan Chetty asserted that he was coming forward to help the plaintiff to save some of his properties from the creditors. At the same time the unsecured creditors were to be given all the stock-in-trade, which it was believed was more than sufficient to satisfy their claims. Another Chetty was to have transferred to him the properties mortgaged to him. This was Arumogam Chetty, who in fact received by Deed No. 120 of 15.4.30 the transfer of certain immovable property for a sum of Rs. 6,000/–. As regards the properties transferred to him, Natchiappa Chetty was to manage them and take the income and give credit to the plaintiff for what he collected. The plaintiff could sell any of the property he liked, and Natchiappa Chetty was to take the proceeds and give credit to the plaintiff. Finally these persons were to look into accounts and adjust matters and there was to be a retransfer of the properties, if any remained. All these terms were agreed upon

between Ramanathan Chetty and the plaintiff about February 1930. Secrecy as to arrangement was insisted upon by Ramanathan Chetty.

The District Judge has held that the agreement set out in paragraph 7 of the plaint was established. In that paragraph, it is said that the agreement included a term whereby the plaintiff should remain in possession as true owner of two of the premises transferred to Natchiappa Chetty, Nos. 81 and 78, Messenger Street. The evidence conclusively shows that plaintiff continued to reside in one and his mother-in-law in the other of these premises without payment of any rent, and they are still in occupation of these premises. Ramanathan Chetty actually paid rates and taxes on these premises till 1935, and thereafter the plaintiff has paid them. Ramanathan Chetty in cross-examination gave this explanation: "There are two houses, in one Majeed (plaintiff) was living and in the other his mother lived. .....I asked him for rent for some time, he did not pay the rent...I paid the taxes for a little over two or three years, after that I did not pay. I am not claiming those two properties now. I told my Mudalali....I would have to litigate, and that Majeed had been dealing with us for some time and he is down in life, and I appealed to the Mudalali to give those lands to him. It is because there was no trust in his favour that we gave up those two lands." This discloses a degree of generosity on the part of the Chetty which it is difficult to credit. The explanation given by the plaintiff is more realistic, and I think this circumstance vividly shows that the transaction between the plaintiff and Natchiappa Chetty was not a mere business transaction, of transfer.

On the 3rd of March 1930 plaintiff executed the deed of transfer P21 or D1 in favour of Natchiappa Chetty. In that deed the consideration is set out as Rs. 203,300/–. The consideration is as follows: Rs. 188,950/– represented the mortgage debt due to Natchiappa Chetty, plus a further sum of Rs. 6,081/66 in respect of interest thereon. Rs. 5,200/– plus Rs. 80/– was principal and interest due to Natchiappa Chetty on three promissory notes made by plaintiff. Rs. 1,430/– was for arrears of assessment rates on the premises. Rs. 1,515/– was paid by cheque to Mr. Nagalingam to clear off an outstanding mortgage on one of the properties. Rs. 44/34 was added in order to make a round figure. The items of Rs. 1,430/– and Rs. 1,515/– were paid at the time of the examination of the deed. The cheque for Rs. 44/34 was drawn and handed to the plaintiff, but admittedly it has never been cashed. Plaintiff stated that he handed it back to Ramanathan Chetty.

The transfer covered a large number of premises, all but one of which had already been mortgaged to Natchiappa Chetty.

There is no evidence to show that Natchiappa Chetty was aware of the secret arrangement made by his agent at the time of the execution of the deed P21 or D1. But there is clear evidence that Natchiappa Chetty came to Ceylon a few weeks after the execution and adopted and ratified the arrangement made by his agent Ramanathan Chetty. At a later date also Natchiappa Chetty intervened, when the question of commission claimed by Ramanathan Chetty arose, and reaffirmed his willingness to carry out the terms of the agreement upon which the transfer was made.

Natchiappa Chetty through his agent entered into possession of the bulk of the premises transferred, and collected the rents and profits, paid rates and taxes, and sold a number of the premises transferred. The District Judge has held that in the vast majority of these sales the purchasers were introduced by the plaintiff, and there is strong evidence to support the finding that the plaintiff played an active part in arranging the sales.

In this connection the purchase by Haniffa of 79, Messenger Street is of interest. Haniffa lent plaintiff Rs. 4,700/– without written security, and was allowed to occupy the premises mentioned in lieu of interest, although the premises were in the name of the Chetty. Eventually when the premises were sold to Haniffa the amount lent to the plaintiff was deducted from the consideration agreed on. The real consideration was Rs. 10,500/– but in the deed the consideration was stated to be Rs. 6,000/–, *i.e.* the real amount less the debt then due from the plaintiff to Haniffa.

No accounts were, however, rendered to the plaintiff, and when he asked for them he was put off. This was mainly because Natchiappa Chetty visited Ceylon very rarely. According to the plaintiff about 1935 Natchiappa Chetty finally promised that the trust properties would be retransferred in March 1940, and the accounts settled between the parties. Before that latter date Natchiappa Chetty died, and the defendant was appointed executrix of his estate.

The learned District Judge has subjected the evidence in this case to very careful examination, and although his findings of fact have been challenged, no real ground has been shown to me why these findings should not be accepted. I am satisfied that the findings of fact are justified and are strongly supported by the evidence. There have been certain matters of law which

have been argued, and certain inferences drawn by the District Judge on the evidence have been disputed.

The first point raised is that the evidence does not establish a trust, but only some form of security, which cannot be supported because of the absence of a notarial deed to establish it.

Counsel for the appellant referred us to the case of *Adaicappa Chetty vs Caruppen Chetty* (22 N.L.R. 417). The facts alleged in this case were as follows: The added-defendant, being desirous of purchasing the land in question applied to a Chetty firm for the moneys required for the purpose. The firm agreed to lend the moneys, on condition that the same should be repaid with interest at 10%, and that the deeds for the land purchased be taken in the name of the 1st defendant, one of the partners of the firm. The added-defendant purchased the land with Rs. 10,000/- borrowed from the firm, and took the transfer in the name of the 1st defendant. Later a new arrangement was arrived at. The firm requested the added-defendant to let them have absolutely for their benefit a half share of the land for the actual costs of that share, and agreed to forego all claims for interest on the moneys advanced by the firm in consideration of the trouble of the added-defendant in purchasing and planting the property. As regards the first agreement Lord Atkinson said:

> "The object of the agreement was....to create something much more resembling a mortgage or pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into, where one man with his own proper moneys buys landed property and gets the conveyance of that property made to another."

Lord Atkinson added:

> "The second parol agreement is....as invalid as the first. It was clearly a contract or agreement for effecting the sale, transfer, or assignment of land, and for the establishment of a security or incumbrance affecting land."

Lord Aitkinson held that—

> "The parol evidence...was properly held to have been inadmissible, for the simple reason that the agreement, if proved by it, must, under Ordinance No. 7 of 1840, sub-section 2, have been held not to be of 'any force or avail in law.' This section is much more drastic than the fourth section of the Statute of Frauds."

He points out that the latter section does not render the parol agreement invalid, but merely unenforceable.

Counsel for the appellant also relied on the case of *Saminathan Chetty vs Vanderpoorten* (34 N.L.R. 287). In this case there were two deeds, No. 471 which was an absolute transfer by the "Syndicate" to the defendant and No. 472 by the defendant and the members of the Syndicate, the material terms of which are set out in the judgment. It is to be noted that in this case there was no question of the Ordinance No. 7 of 1840 not being complied with.

Lord Tomlin said:

> "The first question is as to the construction and effect of the deeds Nos. 471 and 472.
>
> "Having regard to the circumstances leading up to and surrounding their execution and to the language employed therein, these deeds clearly do not operate to vest in the respondent an absolute interest in the property conveyed.
>
> "It cannot be overlooked that the Syndicate had expended about Rs. 200,000/- on the property before they got into conflict with the Crown, and that they provided Rs. 64,000/- towards the total sum which had to be deposited under the decree made in the Crown's favour. They could, therefore, have had no interest in entering into an arrangement by which in effect the whole property passed absolutely to the respondent and their expenditure was wholly lost.
>
> "But the language of deed No. 472 is...inconsistent with any such conclusion. By the terms of the documents—(1) the respondent cannot sell below a certain price without the consent of the original members of the Syndicate; (2) if he does sell he has imposed upon him an obligation to deal with the proceeds in a specified manner; (3) the distribution of the proceeds of sale includes payment to the respondent....for moneys advanced to the Crown ....(4) the ultimate balance of the proceeds of sale is to be distributed *pro rata* according to their interests amongst (the members of the Syndicate); and (5) the purchaser is relieved of any obligation to see to the application of the purchase money.
>
> "In these circumstances and upon this language their Lordships conclude without hesitation that the transaction effected by deeds Nos. 471 and 472 was the creation of a security for money advanced, which in certain events imposed upon the respondent, who was the creditor, duties and obligations in the nature of trusts."

It is to be noted in this case that the respondent had not sold the premises or any part thereof. Their Lordships considered this aspect of the matter, and came to the conclusion that, as long as the property remained unsold, the arrangement was in the nature of a mortgage, and that the members of the Syndicate had a right to redeem. Their Lordships did not uphold the finding of the trial judge that a trust had been created.

With respect I think the facts in the present case can be differentiated from each of the cases cited.

In this case the following facts are of importance: (1) Prior to the transfer P21 or D1, Natchiappa Chetty was already the holder of a valid mortgage security over the premises transferred which was more than sufficient to cover his claim. It is difficult to understand how the transfer can be said to create a security. According to the defendant, the transfer was in discharge of the debts due to Natchiappa Chetty. If the plaintiff's story be true, it was a

transfer of the legal title, which was to be held by Natchiappa Chetty according to the terms of the agreement.

(2) The avowed object of the transfer was to put these immovable properties beyond the reach of the unsecured creditors, who had already begun to press the plaintiff. I have dealt with this matter earlier, and need only add that no fraud was actually perpetrated on the unsecured creditors, because the other assets of the plaintiff were more than sufficient to meet the claims of the unsecured creditors, and in fact none of those creditors was either defrauded or delayed.

(3) The surrounding circumstances, in my opinion, point strongly to a trust. In particular, the gross inadequacy of the consideration, the intimate relationship between the plaintiff and Ramanathan Chetty, the fact that it was part of the arrangement that the plaintiff should be allowed to remain in possession without payment of rent of the premises occupied by him and by his mother-in-law, and that he did remain in such possession, and the fact that the plaintiff was to be permitted to play an active part in the disposal of the premises transferred, and that he did in fact arrange the bulk of the sales.

(4) In this case the plaintiff alleges that the proceeds of the sales already effected and of the rents and profits received were more than sufficient to satisfy the claims of Natchiappa Chetty in other words that the event has happened which imposes on the defendant "obligations and duties in the nature of trusts," to use the language of Lord Tomlin.

In my opinion, the cases cited do not prevent me from holding that the decision of the District Judge that a trust has been established is correct. The case of *Ranasinghe vs Fernando* (24 N.L.R. 170) is very much in point. In that case the judgment of Lord Atkinson in *Adaicappa Chetty vs Caruppen Chetty* (*vide supra*) was considered. See also *Theevanapillai vs Sinnapillai* (22 N.L.R. 316) and *Carthelis vs Perera* (32 N.L.R. 19). These are decisions of our courts and, with respect, I do not think they conflict with the decisions of the Privy Council, in the cases I have cited.

If this decision is right, there is evidence on which it can be held that there was an express trust created orally. I think at the same time that there is sufficient evidence to hold that there is a constructive trust established. If the matter is to be treated as a constructive trust, then I think no question of a notarial deed being needed arises. If however we are to regard this as an express trust, then section 5 of the Trusts Ordinance has to be considered. Under this section:

> "5. (1) Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.
>
> "(2).....
>
> "(3) These rules do not apply where they would operate so as to effectuate a fraud."

In this connection I may mention the case of *Rochefoucauld vs Boustead* (L.R. 1897, 1 Ch. 196, at page 206) in which Lindly, L.J. said:

> "It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."

See also *In re Duke of Marlborough, Davis vs Whitehead* (L.R. 1894–2 Ch. 133.)

In this case the Duchess, in consideration of natural love and affection, assigned to her husband, the Duke, a leasehold house belonging to her. The deed was in form an absolute assignment. Evidence was permitted on the part of the Duchess to shew that she assigned the house to the Duke, solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should reassign to her.

I think this last case also disposes of another point taken by the appellant, *viz.* that there is no evidence that Natchiappa Chetty himself repudiated the oral agreement, and no evidence that the defendant, his executrix, was aware of the arrangement. In the *Duke of Marlborough's* case Stirling, J. said:

> "If the late Duke of Marlborough had in his lifetime refused to convey the equity of redemption at the request of the Duchess, I think he could not have set up the statute. Nothing of the kind ever happened; on the contrary, the evidence appears to me to shew that he was willing and intended to reconvey, though, unhappily, he put off carrying his expressed intention into effect until it was too late. In my opinion the plaintiff, as claiming under him, is in no better position." (The plaintiff in this case represented the Duke's creditors).

In the present case I think the defendant, the executrix of Natchiappa Chetty, is in no better position than her testator, and that a repudiation of the trust, which would have been a fraud on the part of the testator, must be deemed a fraud if caused by the executrix who claims under him.

In this case I am of opinion that to permit the defendant to set up section 5 (1) of the Trusts Ordinance would operate to effectuate a fraud.

One further argument has been strongly pressed by counsel for the appellant, *viz.* that the admission of oral evidence of the alleged agreement is obnoxious to section 92 of the Evidence Ordinance. Counsel relied upon the decision in the case of *Balkishen Das vs Legge* (I.L.R. 22 All. 149). In this case a deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of repurchase; but after many years gave notice of his intention to redeem, and brought suit to enforce his right of redemption as upon a mortgage by conditional sale. In the Privy Council Lord Davey dealt with the admission of oral evidence to prove the intention of the parties:

> "Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds, or ascertaining the intention of the parties. By section 92 of the Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, or adding to or substracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned judges of the High Court have not, in the opinion of their Lordships, any application to the law of India, as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

In this case it was held that the deeds themselves contained indications that the parties intended to effect a mortgage by conditional sale.

In Maung Kyin vs Ma Shwe La (I.L.R. 45 Cal. 320) this matter came up once for consideration before the Privy Council. This also was a case where a deed which in form was an absolute sale was alleged to be a mortgage. Lord Shaw cited a number of Indian cases where the judges applied the equity doctrine as expressed in *Lincoln vs Wright* (1859–4 De Gex & Jones 16) —see the judgment of Lord Justice Turner:

> "The principle of the court is, that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and Writ the transaction should be a mortgage transaction, it is in the eye of this court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud."

In commenting on this case Lord Shaw said:

> "The principles of equity which are universal forbid a person to deal with an estate which he knows that he holds in security as if he held it in property. But, to apply the principles, you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons set forth in *Lincoln vs Wright* and other cases, permit such facts to be established by a proof at large, the general view being that, unless this were done, the Statute of Frauds would be used as a protection or vehicle for frauds. But in India the matter of evidence is regulated by section 92 of the Indian Evidence Act, and it accordingly remains to be asked, what is the evidence which under that statute may be competently adduced."

In the result, Lord Shaw held that in this case section 92 did not apply, because the evidence, the admissibility of which was in question, was evidence going to show what were the rights of a third party. The language of the section applied only as between the parties to the instrument and their representatives in interest.

It has been pointed out that both these decisions may be regarded as *obiter dicta*, but even so, I do not think that it is open to us to minimize the weight of these pronouncements. It is, however, I think competent for me to point out that in neither of these cases was the question whether parol evidence was admissible to prove a *trust* considered. With respect, I suggest that *Lincoln vs Wright* (*supra*) was an extension of the principle of equitable fraud to the case of mortgages, and that their Lordships declared that this was not permissible in India in consequence of section 92 of the Indian Evidence Act.

In the later case of *Dhanarajgirji vs Parthasaradhi* (A.I.R. 1924, P.C. 226) their Lordships of the Privy Council once more considered this matter. In this case the transaction, as phrased in the documents, was ostensibly a sale with a right of repurchase in the vendor and the appearance was laboriously maintained. Their Lordships, however, came to the conclusion that it was a mortgage by conditional sale. Their Lordships disposed of the case without reference to any oral evidence other than that of surrounding circumstances, in accordance with the case of *Balkishen Das vs Legge* (*supra*). Lord Blanesburgh, however, added these words:

> "They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such radical change in the laws of evidence, as suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to have been within that class."

It is interesting to note that one of the surrounding circumstances taken into account was the fact that six lakhs was an absurd purchase price.

In *Baijnath vs Valley Mohamed* (A.I.R. 1925 P.C. 75) the question was whether a transfer of certain shares was by way of security or sale with a clause for repurchase. The fact that the amount paid by the transferee had no relation to the market price of the shares, but was merely the amount advanced and interest as well as a debt already due to the transferor, and that the transferor's claims to the dividends in the shares was recognized together with other circumstances, were held to indicate that the transaction was a mortgage and not a sale with a clause for repurchase.

In dealing with this matter Sir Lawrence Jenkins said :

> " Section 92 merely prescribes a rule of evidence ; it does not fetter the court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances."

What is the principle to be deduced from these decisions of the Privy Council ? The first point is that it is permissible to examine "the surrounding circumstances," whatever that phrase may include. I am doubtful whether the agreement itself can be considered as one of the surrounding circumstances, but clearly facts such as gross inadequacy of consideration, and, I think, the transferor's relationship to the property after the transfer may be taken into account.

Next, do these decisions apply to a case where the evidence establishes a *trust*, and not merely a security. On this point I may refer to the language of Lord Westbury in *Mc Cormick vs Grogan* (L.R. 1869–4 H.L. 82 – at p. 97) :

> "The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud ; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes on him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills." It is incumbent however " to shew most clearly and distinctly that the person you wish to convert into a trustee acted *malo animo*."

I do not myself see why a Court of Equity should not act in the same manner when the Evidence Ordinance intervenes.

In this connection I think it is necessary to consider the effect of section 2 of our Trusts Ordinance, Chapter 72. (This appeared as section 118 on our original Trusts Ordinance 9 of 1917) :

> " All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

It has been argued before us that this has no application to a rule of evidence, but I do not agree with this contention. I think in this case a " matter with reference to a trust " has arisen. There is no specific provision that the principle enunciated by Lord Westbury, namely that a Court of Equity can act *in personam* as against an individual who obtains a title under an Act of Parliament, should not be applicable in the case of a trust under the law of Ceylon. In my opinion we are entitled to import " the principles of equity " into this case.

I think it follows from the *Duke of Marlborough's* case and other cases that evidence of an oral agreement can be admitted in England to establish a trust in respect of a transaction which is embodied in a deed. In my opinion the same principle should be applied in Ceylon, and, in view of the fact that to uphold the defendant's plea would operate to effectuate a fraud, our courts without overruling section 92 of the Evidence Ordinance can fasten on the defendant a personal obligation to carry out the terms of the trust.

I may add that, even if section 92 of the Evidence Ordinance has to be applied in full rigour, it is permissible for the plaintiff under proviso 1 to prove " fraud " such as arises in the circumstances of this case.

Counsel for the appellant has also pressed the issue of prescription. But here section 111 (1) (*a*) of the Trusts Ordinance is applicable, and prescription does not run. Further, I am of opinion that no cause of action accrued to the plaintiff until the defendant repudiated the trust, — see *Daniel Appuhamy vs Arnolis Appu* (30 N.L.R. 247), and that took place less than three years before action brought.

The appeal is dismissed with costs.

Appeal dismissed.

Present: HEARNE, J.

DE COSTA vs THE ASSISTANT GOVERNMENT AGENT, COLOMBO

Application for a Writ of Mandamus or Certiorari on the Assistant Government Agent, Colombo (306).
Argued on 13th July, 1944.
Decided on 17th July, 1944.

Urban Councils Ordinance No. 61 of 1939 sections 8, 9 (7) and 11—On nomination day can a candidate whose name is not on the lists as certified under section 9 (6) claim the right to be nominated on the ground that he is qualified within the meaning of section 8—Mandamus.

Held : That a candidate whose name is not on the lists as certified under section 9 (6) of the Urban Councils Ordinance is entitled under section 11 to claim nomination on nomination day on the ground he is qualified under section 8 to be a candidate.

H. W. Jayawardene, in support.
T. S. Fernando, Crown Counsel, for the respondent.

HEARNE, J.

Objection was taken to the nomination of the petitioner, a candidate for election for the Dehiwala-Mt. Lavinia Urban Council, on the ground that his name did not appear in the list, prepared under section 9 of the relevant Ordinance, of persons who possessed the qualification referred to in section 8. The Returning Officer, the respondent to this petition, upheld the objection and rejected the petitioner's nomination paper.

It is clear from the provisions of section 11 (3) of the Ordinance that objection may be taken to the nomination of a candidate on certain specified grounds and that the absence of a candidate's name from the list of persons who have qualifications referred to in section 8* is not one of those grounds. If a candidate has those qualifications, has duly delivered a nomination paper that is in order and has made the deposit he is required to make in the manner and within the time prescribed, the Returning Officer would have no power to reject his nomination paper. No person is qualified to vote unless his name appears in the list prepared of persons possessing the qualifications referred to in section 7. (The petitioner's name appears in that list). But the Ordinance does not lay down that no person may be a candidate unless his name appears in the list prepared under section 9 of those who have the qualifications referred to in section 8. On the contrary section 11 (1) merely enacts that he must have these qualifications.

Section 9 (7)* requires to be considered. It is as follows : " The lists certified under sub-section 6 shall be final and conclusive and be the sole evidence of the due qualification of each of the persons *whose names are included therein* to vote or to be a candidate for election at the general election referred to in sub-section 1 or at any by-election that may be necessary for the purpose of filling any casual vacancy in the Council at any time before the preparation and certification of new lists for the purposes of the next succeeding general election."

With reference to the list prepared of persons who possess the qualifications referred to in section 8, it means, in my opinion, no more than this: If the name of a person appears in that list it is final and conclusive of the fact that he has the qualifications referred to in section 8. It is the sole evidence of the due qualification of a person whose name appears in that list. But the section does not mean that a person whose name is *not* in the list has not, or is deemed not to have, the qualifications that are referred to in section 8. That is a question the Returning Officer must decide, on an objection being taken, in the case of candidates whose names do not appear in the list.

It is admitted that objection could not have been taken on any other ground. This is another way of saying that the petitioner was in every way legally qualified to be a candidate. The respondent will, therefore, be ordered and required to accept the petitioner's nomination paper and declare him to be a candidate for election.

Rule made absolute.

* Section 8 has since been repealed and a new section substituted therefor while section 9 has been amended, by Ordinance No. 36 of 1944—Edd. C.L.W.

IN THE PRIVY COUNCIL

Present: VISCOUNT MAUGHAM, LORD THANKERTON & SIR MADHAVAN NAIR

GALOS HIRAD & ANOTHER vs REX

Decided on 18th May, 1944.

Criminal Appeal—Counsel assigned to accused in appeal—Counsel unable to attend on date of hearing—Appeal heard in absence of counsel—Is hearing regular—Interpretation of provisions as regards the right of a convicted person.

In this case the Privy Council has laid down an important principle in regard to the right of a convicted person.

Shortly the relevant facts are as follows :

Under section 3 (1) of the Poor Persons' Defence Ordinance, 1939 an accused person whose means are insufficient to enable him to obtain legal aid is entitled to have an advocate (assigned) to defend him upon his obtaining a certificate from a certifying officer that he ought to have legal aid.

A person to whom an advocate has been assigned under sub-section 1 is, if convicted at the trial, entitled under sub-section 2, on his lodging an appeal, to have an advocate assigned for the preparation and conduct of the appeal.

The accused in this case were assigned an advocate to defend them at their trial on a charge of murder. Two of them were convicted and sentenced to death. They appealed and were assigned a counsel permanently practising in Aden and the only person enrolled to practice in British Somaliland. When required by the British Somaliland Government to defend accused persons on trial on capital charges he has to travel by sea from Aden to Somaliland. The hearing of the appeal was fixed for June 22nd 1942 and the proper authorities had been instructed to arrange for a passage for counsel but owing to shipping difficulties they failed to secure a passage which would enable him to reach Hargeisa, the place of hearing of the appeal, on or before the date of hearing. On June 22nd 1942 the Appeal Court Judge proceeded with the case without making any inquiry with regard to the absence of counsel or as to the date when he might be expected to arrive. He heard some very short statements by the appellants and dismissed the appeals. Counsel in fact arrived on July 2nd 1942.

It was contended on behalf of the appellants before the Privy Council that there was a disregard of section 3 (2) of the Poor Persons' Defence Ordinance 1939, and that the appeal has accordingly not been heard in accordance with the provisions of the law and must be treated as not having taken place.

Held : (i) That the provisions of a statute as regards the right of a convicted person are not of a merely directory character.

(ii) That the necessity for an assignment of counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the counsel to be present at the hearing.

(iii) That the failure to grant an adjournment of the hearing to enable counsel to be heard has resulted in the appeal not being effectively heard.

Per VISCOUNT MAUGHAM : "The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel. (See Holdsworth, History of English Law, Vol. IX, p. 226 *et seq.*). This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the government, who was unable, without any default on his part, to reach the court in time to conduct the appeal."

J. D. Casswell, K.C., and *S. B. Khambatta*, for the appellants.

Rt. Hon. Sir Donald B. Somervell, K.C., Attorney-General, and *Kenelm Preedy*, for the Crown.

VISCOUNT MAUGHAM

In this case the appellants were charged in the Protectorate Court of the Somaliland Protectorate that on or about the first week in June, 1941, at Harawati Balleh, near Bohadle, in the district of Burao, Somaliland, each of them did participate in a criminal act, namely, intentionally causing the death of Corporal Nur Musa, done by several persons in furtherance of the common intention of all and thereby committed the offence of murder punishable under the Indian Penal Code, sections 34 and 302 which applies in the Protectorate.

The trouble in this case seems to have originated shortly after the Italian forces had been driven out of British Somaliland by His Majesty's forces in the year 1941 and was caused partly at least by the circumstance that rifles had been distributed by the government to a number of the inhabitants to enable them to resist or to protect themselves against the

Italians. Rifles were in these circumstances distributed to certain illaloes or native watchmen. In June, 1941, one of the rifles so issued was missing and it was thought to have come into the possession of a sub-tribe of the Dolbahanta, known as the Adan Hagar, to whom also some rifles had been distributed. It was in the course of steps taken by a party of 22 illaloes to recover the missing rifle, which, however, had already been sent by the Adan Hagar to an illalo post at a village called Garrero, that an affray took place between the illaloes and the Adan Hagar, resulting in the death of 11 of the illaloes. The two appellants were alleged to be in a party of the Adan Hagar consisting of about forty men armed with about 20 rifles and a light automatic.

The trial took place in the month of February, 1942, before Captain George Paterson, Legal Secretary, acting as Judge of the Protectorate Court, and three assessors who were Akils (members of a native court). Nine persons had been charged, but one was too ill to be tried. The appellants belonged to the Adan Hagar sub-tribe. All the defendants pleaded not guilty, the appellant Mohamed Ibrahim relying on an alibi and calling two witnesses in support of it. Counsel was retained by the government to defend the appellants (amongst others) at the trial and he conducted their defence. A number of witnesses were called.

It seems desirable to state very shortly the somewhat unusual circumstances which were dealt with in the judgment of the learned judge :

In June, 1941, a party of 22 illaloes from Garrero, Bohotleh and Tallabur were investigating the loss of an illalo rifle, and the death of one Iman Mohamed (Abdi Hersi) and for these purposes went to Harawati, where there were some Dolbahantarer (sub-tribe) Adan Hagar karias. It appears that the missing rifle had come into the possession of the Adan Hagar who decided to sent it to the illalo post at Garrero. This was done and when the Adan Hagar heard that the illaloes were coming they sent a Dolbahanta Akil called Mohamed Abdi and an Elder called Farah Suleman to persuade them to go away. It seems that the illaloes did not believe that the rifle had been returned and they demanded another one as security, possibly because they suspected that this story might simply be a device to get them to return home empty-handed. Anyway, the two emissaries procured a rifle from the Adan Hagar which was handed over to the illaloes. The illaloes did not then leave the neighbourhood and a variety of reasons is suggested as to why they did not do so, the most likely being that as they had also come to investigate a murder they could not leave without finding out something about it.

On the day in question, Mohamed Abdi sent to the Adan Hagar karias, as he said, to arrange for the supply of some milk to the illaloes, leaving them some distance away. Shortly after, he was followed by Farah Suleman and two of the illalo corporals who were themselves members of the Dolbahanta tribe. They had seen three men returning to the karias and thought they might be the men who had returned the missing rifle to Garrero. The remaining sixteen illaloes then went to the Harawati balleh (rain pond) to have a drink and sit in the shade. Three of them actually reached the balleh, the other six having stopped to urinate some 300 yards to the west of it. Just then a party of rer (sub-tribe or clan) Adan Hagar rer Ali Adan appeared singing. They came from the east and passed about 400 yards south of the balleh going west. Their numbers were variously estimated and it seems that they were about twenty or thirty strong, half of whom were armed with rifles.

According to the prosecution witnesses, this party suddenly saw the illaloes at the balleh, stopped and one of its members fired a round at them, followed by a volley. They say that very shortly after, the rer Ali Adan were reinforced by about forty men (armed with about twenty rifles and a light automatic) of the Adan Hagar rer Farah Adan who came from the Karias to the west, and that the illaloes did not return the fire until after the arrival of the second party, and one of their number had been hit. They defended themselves to the best of their ability but eventually they were completely surrounded by the Adan Hagar who killed eight of them including Cpl. Nur Musa by rifle fire and hand grenades. At this point the Adan Hagar had succeeded infiltrating between the two parties (of ten and six respectively) and the survivors rose up and fled. In the flight three men were killed, including Abdi Badet. All the accused persons were alleged to be in the second party except Mohamed Ibrahim, who was supposed to have been in the first party.

The judge at the conclusion of the trial addressed the three assessors. All three expressed the opinion that the appellant Mohamed Ibrahim was not present at the fight (accepting his alibi), one of them expressing the view that it was his brother who had been taken for him. All three assessors expressed the opinion that the appellant Galos Hirad took part in the killing of Nur Musa. The judge found both appellants guilty of murder under the provisions of the Indian Penal Code, sections 34 and 302,

and sentenced them to death. They were then properly informed of their right to appeal and the time within which it was to be lodged. The other accused persons were acquitted.

The appellants duly appealed from the conviction and sentence to the Protectorate Court of Appeal of the Somaliland Protectorate. The Court of Appeal had very wide powers amounting in effect to a rehearing. Counsel was again instructed by the Government to appear as advocate for the appellants on the appeal, but owing to difficulties which will be mentioned later, counsel was not able to land in British Somaliland before July 2nd 1942, and the appeal was heard by the Appellate Court which consisted of Major E. P. S. Shirley, on June 22nd 1942, in the absence of counsel. The appellate judge heard the appellants in person and decided the appeal on a consideration of the record of the case, the judgment of the trial judge and the petition of appeal which had been submitted by counsel. The appellate judge dismissed both appeals. The sentences of death were subject under the law to the confirmation of the military governor. The sentences of death were confirmed by Major E. P. S. Shirley (acting secretary to the government) by command of the military government on June 26th 1942. Special leave to appeal against the judgment of the Protectorate Court of Appeal was granted by His Majesty in Council on August 10th 1943.

The main ground of the appeal is that there has been no proper hearing of the case before the Protectorate Court of Appeal for the reason that the counsel assigned to the appellants was, in the circumstances to be next mentioned, unable to appear at the hearing and to conduct the appeal. The Poor Persons' Defence Ordinance, 1939, provides as follows:

3 (1) Where it appears for any reason, that it is desirable, in the interests of justice, that an accused person should have legal aid in the preparation and conduct of his defence at his trial and that his means are insufficient to enable him to obtain such aid (*a*) a certifying officer upon the committal of the accused person for trial; or (*b*) a certifying officer at any time after reading the depositions recorded in any inquiry held under Chapter XVI of the Administration of Criminal Justice Ordinance into any of the offences specified in the schedule hereto; or (*c*) a certifying officer upon the framing of a charge against a native on trial for an offence against the Indian Penal Code, section 304 or an attempt at, or the abetment of, such offence, may certify that the accused person ought to have such legal aid, and if it is possible to procure an advocate, such accused person shall be entitled to have an advocate assigned to him.

(2) Any such accused person to whom an advocate has been assigned under the provisions of sub-section 1 of this section, shall, if convicted at such trial, be entitled, on his lodging an appeal with the Protectorate Court of Appeal, to have an advocate assigned to him for the preparation and conduct of such appeal.

It appears that counsel assigned to the appellants is a barrister-at-law, enrolled to practice as an advocate of the Supreme Court of the Colony of Aden and permanently practising in that colony and is the only person enrolled to practice in British Somaliland and has been in that position for some four years. He has to travel by sea from Aden to Somaliland when required by the British Somaliland Government to defend accused persons on trial on capital charges, and, as stated, he was retained by that government to defend the appellants both in the trial court and again on the appeal which he was told would take place on June 22nd 1942, at Hargeisa. The government had been in the habit of asking the Movement Control Office to arrange passages for counsel when his presence as counsel was required, but owing to the war there was no shipping available between Aden and British Somaliland by which counsel could arrive on June 22nd as instructed and, in fact, the authorities in British Somaliland, being well aware of the position, had written to him to make any other possible arrangements if there happened to be any chance shipping. The difficulty of the passage across the Gulf of Aden was well-known and on some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that counsel should have time to come to Somaliland. No steamship accommodation was in fact available for the journey so as to enable him to appear on June 22nd 1942, and it is not suggested that he could be expected to come by a native dhow or similar vessel at this time. However, the case was called on June 22nd 1942. The appeal court judge, so far as the note goes, made no inquiry with regard to the absence of counsel, or as to the date when he might be expected to arrive, but proceeded with the case. He heard some very short statements by the appellants and dismissed the appeals. In these circumstances it is contended on behalf of the appellants that there was a disregard of the Poor Persons' Defence Ordinance, 1939, section 3 (2), and that the appeal has accordingly not been heard in accordance with the provisions applicable in the Protectorate and must be treated as not having taken place, with the result that there was nothing which

the acting secretary to the government could validly confirm so far as the sentence of death was concerned.

It seems to their Lordships that the provisions as regards the right of a convicted person are not of a merely directory character. Sub-section 2 provides that poor persons in the position of the appellants having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. In the case of Somali natives who would probably be illiterate and, therefore, completely unable to make any criticism on the written judgment of the trial judge even if they could read it, it is clear that the provision is of the utmost importance where the penalty is the death sentence. There does not seem to be any reason for a very technical construction to be given to the sub-section in question. The necessity for an assignment of counsel for the purpose of "conducting an appeal" seems to their Lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was called for of the difficulties which, in such a case as their Lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the judge sitting as the appeal court and, in the view of their Lordships, the provisions of the Poor Persons' Defence Ordinance 1939, section 3 so far as regards the appeal have as a matter of substance been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable counsel to attend, and their Lordships are informed that he in fact arrived in British Somaliland on July 2nd 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal.

The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel. (See Holdsworth, History of English Law, Vol. IX, p. 226 *et seq.*) This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the government who was unable, without any default on his part, to reach the court in time to conduct the appeal.

The result is that the appeal to the Protectorate Court of Appeal which appears to have been properly lodged has not been effectively heard. The present appeal must, therefore, be allowed. Steps must be taken to restore the appeal for hearing either with counsel in question or some other advocate properly assigned to the appellants under circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Present: Howard, C.J. & De Kretser, J.

SOYSA vs RATWATTE

S. C. No. 80/43—*D. C.* (*Inty*) *Kandy No. X457.*
Argued on 9th October, 1944.
Decided on 26th October, 1944.

Civil Procedure Code section 16—*Application for permission to sue on behalf of certain specified members of an association—Factors that a court should take into account in deciding an application under section* 16—*Terms of the notice that should be given to the parties—Can the court hear objections to the application for permission to sue once permission has been granted.*

Held : (i) That once permission to sue or defend has been granted under section 16 of the Civil Procedure Code, the court is not entitled to hear and decide objections against the application for permission to sue.

(ii) That the notice required to be given by section 16 of the Civil Procedure Code is notice of the institution of the action, and not notice of the application for permission to sue or defend.

Per HOWARD, C.J. : " The appellants put forward their claim as representing a certain number of the original members of the Association. In putting forward this claim they maintained that at the time of filing the action they and they alone were entitled to represent the Association. This is a question which dealt with the merits of the action and could not be decided on an application for a writ of summons. If the plaintiffs are unsuccessful in regard to this question, their action fails. The only questions that should have been considered by the judge at this stage was whether the plaintiffs represented a class of persons with the same interest in the suit and whether there was a *prima facie* case."

Cases referred to : *Hadji Saheed Hameed Lebbe vs Mohamed Caderpillai Marakayar & Others* (A.I.R. 1925, Madras 985)
Bhicoobai vs Hariba Raghuji (A.I.R. 1917, Bombay 141)
Sayad Anwar vs Mohiddin Shamsuddin (A.I.R. 1932, Bombay 65)
Kali Kanta Surma vs Gouri Prosad Surma Bardeuri (17 Cal. 906)
Adamson vs Arumugam (9 Mad. 464)
Muhmmad Din Main vs Mt. Atirajo Kuer (A.I.R. Patna 418)
Kalidasa Jivram vs Gor Parjaram Hirji (15 Bombay 309)
Wilson vs Church (1878–9 C.D. 552)
Fraser vs Cooper, Hall & Co. (1882–21 C.D. 718)
Morgan's Brewery Co. vs Crosskill (1902–1 Ch. 898)
Call vs Oppenheim (1 Times L.R. 622)
Burt & Others vs Bowen & Others (8 Times L.R. 28)
Badische Anilin Und Soda Fabrik vs Henry Johnson & Co. & Basle Chemical Works, Bindschedler (1896–1 Ch. 25)
Krishnamachariar vs Chinnammal (24 M.I.J. 192)
Nadar & Others vs Nana & Others (A.I.R. 1921, Madras 683)

H. V. Perera, K.C., with *N. Nadarajah, K.C.*, and *H. W. Thambiah*, for the petitioners-appellants.

M. T. de S. Amerasekera, K.C., with *H. W. Jayawardene*, for the 1st – 19th intervenients-respondents.

E. B. Wickramanayake with *E. A. G. de Silva*, for the 20th – 23rd intervenients-respondents.

HOWARD, C.J.

This appeal raises an interesting question of law in regard to the powers of the court on an application being made to bring a representative action under section 16 of the Civil Procedure Code (Chapter 86). This section is worded as follows :

> " Where there are numerous parties having a common interest in bringing or defending an action, one or more of such parties may, with the permission of the court, sue or be sued, or may defend in such an action on behalf of all parties so interested. But the court shall in such cases give, at the expense of the party applying so to sue or defend, notice of the institution of the action to all such parties, either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable, then) by public advertisement, as the court in each case may direct."

On the 23rd December, 1941, the appellants applied to the District Court of Kandy under this section for permission to sue one H. L. Ratwatte on behalf of the members of a certain Association known as the Sadhachara Bauddha Kulangana Samitiya, Kandy. The appellants also asked the court to direct notice of the said application to be given to the members by publication in the newspaper " Ceylon Daily News." The application of the appellants was supported by an affidavit and a draft plaint. In these documents the appellants stated as follows :

> (1) That they are members of and contributors to an Association called the Sadhachara Bauddha Kulangana Samitiya, Kandy, founded in 1924, with the object of establishing a Buddhist Girls' School at Kandy.
>
> (2) That at the end of the year 1931 the number of members of the Association was 118, but since 1940 certain members of the Association set out in list " B " had acted in a way inconsistent with the duty owed to the Association.
>
> (3) That the present membership of the Association consists of 77 members set out in list "A" and the appellants and the members whose names are specified in this list have the same interest in respect of the said school.
>
> (3) That the Association about November, 1931, established a Buddhist School for girls known as Mahamaya College on premises purchased by the Association.
>
> (4) That about December, 1931, the Association appointed Adigar J. C. Ratwatte as Manager of the School. About the 1st November, 1932, one W. A. B. Soysa assumed the management of the School at the request of Adigar Ratwatte and managed it until April, 1938, when it was handed over by W. A. B. Soysa to one H. L. Ratwatte.
>
> (5) That about 7th April, 1940, the Association terminated the management of H. L. Ratwatte and requested him to hand over the school to the Association. The said H. L. Ratwatte failed to hand over the school to the Association or to give over the

management to the person nominated by the latter and since April, 1940, wrongfully holds himself out as Manager and, though called upon to do so, fails to render an account of the management of the school showing sums received by him from April, 1938, to 15th April, 1940.

(6) That it has become necessary to institute an action against the said H. L. Ratwatte to obtain a declaration :

(*a*) That he ceased to have the right of managing the said school on behalf of the said Association since the 15th April, 1940.

(*b*) That the said H. L. Ratwatte had no right to represent himself as Manager of the said School and

(*c*) That the said H. L. Ratwatte is liable to render an account of all sums received by him as manager of the said school

(*d*) That in view of the facts set out in the affidavit the appellants asked for leave to sue on behalf of the said members of the Association.

The application with affidavit and draft was filed by a proctor, appearing on behalf of the appellants, who moved in accordance with such application. The order made by the Additional Judge was " Allowed. Publication on 21/1/42." Proof of publication was given on the 11th February, 1942. As the result of the publication in the "Daily News," objections were filed on the 25th February, 1942, by a proctor, Mr. Vanderwall, appearing on behalf of certain persons. On the 6th April, 1942, Mr. Vanderwall asked the court, under section 102 of the Civil Procedure Code to make an order for discovery of all documents. On the 27th May, 1942, the District Judge ordered the appellants to declare by affidavit documents in their possession or power they rely on in support of their allegation that they are members of the Association. On the 24th August, 1942, further proceedings took place before the District Judge who decided that the following " points seemed to require adjudication " :

(1) Whether the petitioners were members of the Society at the date of the filing of the petition ?

(2) Whether the respondents numbered 4, 5, 7, 9, 10, 12, 13, 15 and 16 were themselves members of the Society ?

(3) Did the Society cease to exist in or about 1932 since the establishment of the Mahamaya College ?

(4) Was the said Society revived in or about March, 1940 ?

(5) Are the petitioners members of the revived Sadhachara Bauddha Kulangana Samitiya ?

(6) Does the Mahamaya College constitute a *de facto* charitable trust?

(7) If so, should any action relating to the said College or to its management be instituted under section 101 of the Trusts Ordinance.

(8) In view of the provisions of the Education Ordinance 31 of 1939, has this court jurisdiction to entertain the application ?

With regard to these points Mr. Nadarajah, on behalf of the appellants, contended the points for determination as issues (3) and (4) are based upon facts which are not only not pleaded, but are at variance with the averments in the statement of objections. He had, however, no objection to the question being framed as to whether the Society had ceased to function and not that it had ceased to exist. Mr. Nadarajah also stated that questions (6), (7) and (8) did not arise on the application. Evidence was then called both on behalf of the appellants and the intervenients who had filed objections. The hearing was adjourned on numerous occasions for further evidence to be called and legal arguments to be adduced. On the 12th March, 1943, the learned District Judge gave judgment answering the points as follows : (1) No. (2) No. (3) Yes. (4) No. (5) No. (6) Yes. (7) Does not arise. (8) (8) Yes. Having regard to his decisions on these points he dismissed the appellant's application with costs. In the course of his judgment the learned judge held that the question whether the appellants and the others mentioned in list " A " or whether the intervenients constitute the members of the Association is one which does not fall within the ambit of section 16 of the Code and is moreover one that cannot be adjudicated upon in these proceedings. He further held that the first objection taken by the intervenients was sound and that before the appellants can be given permission to sue, their assertion that they are members of the Association must be established to the satisfaction of the court. The learned judge then examined at considerable length the history of the Association and the proceedings of various meetings during the relevant years and held that no valid meeting of the Association as such had been held since January, 1932. It was therefore idle for one set of persons to deny membership of any other set or any other person who was a member in December, 1931. The result of this holding was that if the appellants as well as those whose names appeared in list " A " are to be deemed to be members, those on list " B " were equally entitled to rights of membership. Applying the principle laid down in the case of *Hadji Saheed Hameed Lebbe vs Mohamed Caderpillai Marakayar & Others* (A.I.R. 1925, Madras 985) he held that it was manifest that the application for a representation order on behalf of those in list " A " is one on behalf of one section of the body and is one that cannot be entertained, for a second suit will lie and can lie at the instance of those named in list " B."

The learned judge also held that a further objection to the granting of the application was the fact that there were 118 members of the Association and the names enumerated in lists "A" and "B" were not exhaustive inasmuch as

they left 18 members unaccounted for. These persons might have the same interest as the appellants or they might hold views opposed to those of the appellants. In order to bind them the application must be made on their behalf.

In my opinion the enquiry undertaken by the learned judge was misconceived. In fact there seems to have been general misconception on the part of all concerned as to the ambit and purpose of section 16 of the Civil Procedure Code. On the 23rd December, 1941, the court was moved by Mr. H. A. C. Wickremaratne to give permission to sue on behalf of the Association. The second part of the motion, that is to say (*b*), was for the court to direct notice of the application to be given in the "Daily News" (*b*) was not in order inasmuch as the last part of section 16 merely imposes on the court after granting permission to sue the duty of giving notice of the institution of the action to all parties on whose behalf the action is being brought. The learned judge allowed this action, that is to say he gave permission to sue, and then proceeded to direct notice of the said application to be given to the said members by publication in the newspaper "Ceylon Daily News." In view of the fact that permission to sue had been allowed on the 23rd December, 1941, this notice was not in order inasmuch as it gave notice of the application and not as laid down in section 16 of "the institution of the action." Although the application had been granted and permission to sue had been given on the 23rd December, 1941, the notice in the "Daily News" invited persons interested to show cause against the application on the 11th February, 1942. In my opinion all proceedings held after the 23rd December, 1941, to hear objections to the application were *ultra vires*. On an application under section 16 for leave to sue such objectors were not entitled to be heard and had no status so far as the application was concerned.

Although the proceedings were *ultra vires*, it is relevant to consider whether, on the assumption that an application under section 16 was properly before him, the learned judge's treatment of such application was in accordance with the law, and in refusing permission to the appellants to sue in a representative capacity he adopted proper legal principles. Section 16 of the Civil Procedure Code agrees almost word for word with Rule 8 of Order 1 of the Indian Civil Procedure Code. In *Bhicoobai vs Hariba Raghuji* (A.I.R. 1917, Bombay 141) it was held that the court should exercise a judicial discretion in granting permission to a person to sue in a representative capacity under the rule. In the second edition of Chittaley's Code of Civil Procedure, Vol. 2, pp. 1085-86, it is stated that the conditions for the applicability of the rule are:

"(1) The parties must be numerous; and

(2) They must have the same interest in the suit." With regard to (1) the rule does not fix any particular number. I do not consider that it could be argued in this case that the persons alleged to have the same interest in the action, that is to say 77, were not numerous. With regard to (2) the appellants in the affidavit and in the plaint claimed to represent the interest not of the persons who originally formed the Association, but of a certain section of such persons who, so they claimed, had the right to represent the Association at the time of the institution of proceedings. The true principle underlying the rule is that the suit, in form, be constituted into a representative one in order to prevent the defendant from being vexed by others. The rule does not require that the whole body on whose behalf the proceedings are taken should be of the same opinion. The rule was considered at some length in *Sayad Anwar vs Mohiddin Shamsuddin* (A.I.R. 1932, Bombay 65). In his judgment Patker, J. stated that it was not permissible for a judge to dismiss the suit under order 1, rule 8, simply on the ground that some persons objected to the plaintiffs carrying on the suit. Such persons could be brought on the record as parties. The following passage at pp. 67-68 from the judgment of Tyabji, J. is of interest:

> "Coming to the learned judge's decision under O. 1, R. 8, the object of that rule is to provide facilities where numerous persons have the same interest in a suit. The rule provides a method by which such persons can be before the court as if they were plaintiffs or defendants without the necessity of making every one of them a party. The scheme of the rule is that in such a case one or more persons may be given leave to sue or to defend the suit on behalf of all persons interested. Leave may be given to one, or if necessary, to several representative persons. The leave may be sought on behalf either of the plaintiffs or the defendants. When the leave is applied for, the court may, of course, take steps to verify the allegations of the applicant or applicants. If the number of those who apply to the court on the ground that they have the same interest is 'numerous' (that is the word of the rule) the court has jurisdiction to make the order. If an application is made on behalf of persons, as to whose willingness to be represented by the applicant or applicants, the court desires to have some evidence, there is no difficulty in this being insisted upon. As a further safeguard, it is provided that notice in the manner laid down in the rule shall be given to all such persons, as are alleged to have the same interest in the suit. Finally, under sub-section (2), if these other persons are not satisfied by the plaintiff representing them, they may apply to be made parties.
>
> This being an enabling rule, for the purpose of making it practicable to bring to trial a suit in which numerous persons would otherwise have to be made

parties, whose number might make the trial embarrassing, I am at a loss to understand what the learned judge can mean when he said: 'I hold that the plaintiffs have no right to sue in the representative capacity, and that the suit is bad under O.1, R.8 Civil P.C.'

Order 1, R. 8 does not make any suit bad or good. It only provides for a case where a number of persons are interested in a suit. A means is devised by which such a suit may be placed before the court with greater facility."

In *Kali Kanta Surma vs Gouri Prosad Surma Bardeuri* (17 Calc. 906) Banerjee, J. at page 911 referred to the purpose of section 30 of the Code of Civil Procedure, now Order 1, Rule 8, in the following passage:

"Section 30, as we understand it, requires that the court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested, and it further requires the court to give to the persons interested notice of the institution of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them. Now in the present case no such thing was done. In the first place the court did not give permission to any definitely named persons among those interested to represent the rest; and in the second place the notice issued by the court did not show who the persons were that had been selected to represent the remaining persons interested. That being so, we think that the persons interested in the result of the suit who are necessary parties have not been properly made parties to it, and that the suit must fail by reason of defect of parties."

Again in *Adamson vs Arumugam* (9 Mad. 464) it was held that section 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having special interests to represent the rest of the class. This case was followed in *Muhmmad Din Main vs Mt. Atirajo Kuer* (A.I.R. Patna 418.)

In *Kalidasa Jivram vs Gor Parjaram Hirji* (15 Bombay 309) the plaintiffs were 208 in number and as they had the same interest in the subject-matter of the suit, 13 plaintiffs obtained leave to sue on behalf of the rest under section 30 of the Civil Procedure Code. The following passage at page 321 of the judgment of Parsons, J. is of interest:

"The objection that section 30 of the Code of Civil Procedure does not permit of the present suit is untenable, since here we have a case, not of persons suing on behalf of a class, but of 208 persons suing for themselves, the 195 persons as per list (ex. 5) having been actually brought up on the record as plaintiffs just as the 119 persons as per list (ex. 6) have been brought on the record as defendants. The objection that under section 26 of the Code the plaintiffs cannot all be joined in this suit, is also, I think, one that we ought not to entertain. The issue by the defendants of the rules under date the 12th October, 1883, gave a cause of action to each of the plaintiffs. It also gave the same cause of action to all of them, since the rules prohibited their admission into the shrine of the temple for purposes of worship except on the production of passes to be obtained by payment. In so far as the issue of these rules gives the same cause of action to all the plaintiffs, I think the suit is rightly brought to have the obnoxious rules declared to be invalid, and this is really the main object for which it has been brought."

Representative actions in England are governed by Order 16, rule 9, which is worded as follows:

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the court or judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

The permission of the court is therefore not required in order to sue, but authorization is required to defend. In this connection it is of interest to observe the principles which have been followed by judges in authorizing persons to defend in a representative capacity under the rule. In *Wilson vs Church* (1878–9 C.D. 552) Jessel, M.R., refused to allow the defendant to defend in a representative capacity on the ground that there was no evidence that he represented anyone, but himself. As the Master of the Rolls said, he cannot be "a representative without a constituency." In *Fraser vs Cooper, Hall & Co.* (1882–21 C.D. 718) the plaintiff, a bondholder of a railway company, sued "on behalf of himself and all the bondholders of the company other than the defendant B.," but did not obtain an order under Order XVI, rule 9, that B., should be sued as representing all bondholders who dissented from the plaintiff's claim. One of the bondholders took out a summons whereby he stated that neither the plaintiff nor the defendant B., properly represented the interests of himself and certain other bondholders, and applied to be made a defendant. The applicant was joined as a defendant in a representative capacity because it appeared that he represented bondholders who dissented from the plaintiff's view. In *Morgan's Brewery Co. vs Crosskill* (1902 1 Ch. 898) a company proposing to issue new preference shares ranking *pari passu* with its existing shares served on one of its preference shareholders (sued on behalf of himself and the other preference shareholders) an originating summons for the determination of certain questions with reference to the proposed issue, arising on the construction of the Articles of Association. Buckley, J. refused to appoint the defendant to represent the preference shareholders unless a meeting of them was first called and nominated the defendant to represent them. From these cases it would appear that, in order to obtain authorization to defend in a represent-

ative capacity, the applicant has only to satisfy the judge that he does represent a class that dissents from the view of the plaintiff.

English cases on the interpretation of Order XI R.1, are also helpful in regard to the manner in which the judge should exercise his discretion in allowing the service out of the jurisdiction of a writ of summons. In *Call vs Oppenheim* (1 Times L.R. 622) the plaintiff, upon an *ex parte* application, obtained leave to serve the defendant with a writ out of the jurisdiction, whereupon the defendant took out a summons to rescind the order for service, on the ground that the claim had been determined by a foreign judgment, and that the matter was *res judicata*. It was held by the Court of Appeal that as there was sufficient doubt as to the effect of the foreign judgment, and therefore a question of law which might be reasonably argued, the service of the writ must be allowed. Again in *Burt & Others vs Bowen & Others* (8 Times L.R. 28) when the plaintiffs were trying to make out a case against two foreign defendants, Lord Coleridge held, on an application to set aside an order of the judge giving leave to serve the writ out of the jurisdiction, that it was not necessary to enter into the question of the merits which would be the question at the trial. This question was far too serious to be decided against the plaintiff summarily upon an application as to service or notice of the writ. In *Badische Anilin Und Soda Fabrik vs Henry Johnson & Co. & Basle Chemical Works, Bindschedler* (1896–1 Ch. 25) the Court of Appeal held that leave to serve the writ out of the jurisdiction should be granted where a *prima facie* case of a sale within the jurisdiction had been shown.

As I have already indicated, the proceedings by which the respondents were brought before the court were *ultra vires*. But even on the assumption that they were in order, I am of opinion that the learned judge had not correctly applied the law as formulated in the various cases to which I have invited attention. At pages 95-96 in his judgment he states as follows :

> "In this case it is abundantly clear from what I have set out already that there is a real dispute between the parties as to whether the petitioners or the respondents are the members proper of the Samitiya ; but what is more — and this concerns the court in a special degree — is whether the petitioners, respondents or any of them can claim to continue the identity and the life of the Samitiya that was in existence in 1931.
>
> Without going at all into the difficult question whether the petitioners, respondents or any of them can be regarded as continuing the identity of the Samitiya, it is tolerably clear from a reading of section 16 of the Civil Procedure Code that the question whether the petitioners and the others mentioned in list "A" or whether the respondents constitute the members of the association is one which does not fall within its ambit and is one that cannot be adjudicated upon in these proceedings. The effect of acceding to the application of the petitioners would be to recognize them as members of the Samitiya at least impliedly, for it is on this footing alone that they can be permitted to represent the general body of members. If in fact they be not members of the Association, then the result would be, if an order be made in their favour in terms of their application that the action instituted by them would be binding on the real members of the Association and tend to take away or prejudice their rights. The representation order would indeed have the effect of conferring on the petitioners *inter alia* the right to compromise the suit which they propose upon the true and proper members of the society who would thereafter be debarred from instituting an action on the same cause of action against the defendant — see *Krishnamachariar vs Chinnammal* (24 M.L.J. 192). It is therefore of the utmost importance that before the petitioner can be given permission their assertion that they are members of the Association must be established to the satisfaction of the court."

Then follows a long enquiry into the history of the Association with reference to various meetings and the validity of such meetings. The learned judge then holds that neither the petitioners nor the respondents were members of the Association. If the respondents were not members of the Association it is difficult to comprehend how they were ever allowed to become parties and put forward objections. It seems to me that the learned judge, in the face of the decisions to which I have invited attention, has decided, on an application for a summons, the case on its merits. In coming to the decision that the plaintiffs could not be given leave to sue under section 16 of the Civil Procedure Code, the learned judge appears to have been guided by the case of *Hadji Saheed Hameed Lebbe vs Mohamed Caderpillai Marakayar* (A.I.R. 1925 Madras 985). I am of opinion that this case is very much in point, but it seems to me that the learned judge has completely misunderstood the implications of this decision. After citing the principles outlined in this case the learned judge says :

> "Applying these principles, it is manifest that the application for a representation order on behalf of those in list 'A' is one on behalf of one section of the body and is one that cannot be entertained, for a second suit will and can lie at the instance of those named in list 'B'."

This deduction is wholly contrary to the decision in the case which was cited as will be seen from the following extracts from the judgment of Siriniwasa Iyengar, J. (on pages 985-986):

> "The contention on behalf of the defendant is twofold. It is stated that there is a large body of worshippers who have not agreed with the plaintiffs

either in the institution of the suit or in the proceedings that led up to it, and that, therefore, it cannot be stated that all the worshippers at this mosque have the same interest. It seems to me that, if the construction of the terms of O.1, R.8 C.P.C. should be that it is only where all the members of the body are of the same opinion with regard to the litigation as the plaintiffs that the rule should be applied, then the provisions contained in the rule would be practically useless. Most of the cases that come up before courts in which the provision contained in this rule is invoked are cases of temples or mosques in which we know that there are always two factions, one opposed to the other. If it should be stated that this rule should be applied only in cases where the whole body is of the same opinion, then, it follows that the rule cannot be applied to such cases at all

.....

I believe the true principle underlying this rule is that the suit should in form be constituted into a representative suit merely to prevent the defendant from being vexed and molested, as he may well be, by similar suits by other persons of the body. For the application of this principle it is really unnecessary to determine whether or not all the members of the body on whose behalf the suit is sought to be instituted are of the same opinion. The order only means this : that all the members of the body on whose behalf the suit would, on the passing of the order, be constituted into a representative suit, would be prevented thereafter from instituting any proceedings on the cause of action alleged in the plaint ; and such body being an indefinite body and the order being given only to sue in respect of all persons having the same interest, the order would have the effect only of preventing multiplicity of suits and would not be calculated in any manner or to any extent to prejudice the rights of any of the worshippers or of the defendant."

Again in *Nadar & Others vs Nana & Others* (A.I.R. 1921, Madras 683) the principle laid down was to the same effect as will be seen from the headnote which is as follows :

"Although a caste is of a quasi corporate nature and can hold property as a person, O. 1 R.8, is wide enough to cover suits by caste members for decision of questions affecting them, *inter se* and in respect of caste property.

Although plaintiffs admit that caste affairs are decided by a majority of the caste members, yet the plaintiffs need not have obtained, as a condition precedent to their bringing the suit, the consent of the majority of the caste members.

Per Napier, J. : It may be that the plaintiffs, if they are unable to prove that they have got the support of the majority of the caste members, cannot succeed in getting the relief which they seek. But there is no reason to introduce the condition precedent to the filing of the suit.

R. 8 is applicable to cases where one person seeks to represent a number of other persons who agree with him in the contention which he has raised in the suit as to the rights of the various members of the community.

The sole object of this section is to provide a simple means by which as many persons as possible, who are members of the same community or are equally interested in certain affairs, can be brought together and a judgment can be given which will find them all."

The appellants put forward their claim as representing a certain number of the original members of the Association. In putting forward this claim they maintained that at the time of filing the action they and they alone were entitled to represent the Association. This is a question which dealt with the merits of the action and could not be decided on an application for a writ of summons. If the plaintiffs are unsuccessful in regard to this question, their action fails. The only questions that should have been considered by the judge at this stage was whether the plaintiffs represented a class of persons with the same interest in the suit and whether there was a *prima facie* case. The plaintiffs claimed to represent a certain number of the original members of the Association. They make no claim on behalf of the members who dissent from that view. There was a dispute between the appellants and certain other original members of the Association. Such other members had, so it was claimed, lost their rights. The plaintiffs claimed an account for the Manager. If they prove this claim to be the sole members of the Association, they are entitled to such an account and also the right to determine the managership of the defendant. The order to sue being given only in respect of the appellants will have the effect of preventing multiplicity of suits and will not be calculative in any manner or to any extent to prejudice the rights of any of the dissentient members or of the defendant.

I think the learned judge's decision on point (7) was correct. The question as to whether the action should be instituted under section 101 of the Trusts Ordinance did not arise at this stage.

For the reasons I have given the appeal is allowed, the order of the District Court set aside, and the original application of the appellants to sue allowed. Notice of institution of action under section 16 is to be further published. I have given careful consideration to the question of costs. The original formal application of the appellants was faulty inasmuch as it prayed for notice of the application instead of the "institution of the action." This defect has been in great measure responsible for the procedure subsequently followed. Moreover although the draft plaint and petition made it clear that the proceedings were being instituted on behalf of certain members of the Association, the application for leave purported to be on behalf of the Association. For these reasons I am of opinion there should be no order as to costs.

DE KRETSER, J.

I agree.

Appeal allowed.

Present: JAYETILEKE, J.

HATURUSINGHE vs UKKU AMMA

S. C. No. 100 *of* 1944—*C. R. Kandy No.* 33473/71.
Argued on 21st August & 11th September, 1944.
Decided on 19th October, 1944.

Minor—Kandyan law—Does marriage confer majority on a Kandyan minor—Is a gift by a Kandyan minor void—What is the remedy of a minor who has executed a conveyance which is ipso jure void.

Held : (i) That marriage does not confer majority on a Kandyan minor.
(ii) A gift by a Kandyan minor is *ipso jure* void.
(iii) A minor who has effected a conveyance which is *ipso jure* void need take no legal action to have it set aside unless he has lost possession of the property conveyed. In such a case the remedy is by *actio rei vindicatio.*

Cases referred to : *Silva vs Mohamadu* (19 N.L.R. 426)
Ahamadu Lebbe vs Asina Umma (29 N.L.R. 449)
Muttiah Chetty vs Dingiria (10 N.L.R. 371)
Gunasekere Hamine vs Don Baron (2 Browne 402)
Breytenbach vs Frankel (1913 ; S.A.L.R. App. Div. 390)
Khairajmal vs Daim (I.L.R. 32 Cal. 296)

H. V. Perera, K.C., with *H. W. Thambiah*, for the plaintiff-appellant.
E. A. G. de Silva, for the defendant-respondent.

JAYETILEKE, J.

This is an action for a declaration of title to an undivided 3/4 share of a field called Meegahapitiyacumbura. It is common ground that upon deed No. 1765 dated September 29th 1911, Kalingu and Kiri Banda became entitled to the field in equal shares. By deed No. 4514 dated January 22nd 1915, (P1), Kalingu gifted her half share to Kiri Banda and Ukkuwa. At the date of execution of P1 Kalingu was 18 years of age. She died on January 23rd 1915, leaving as her sole heir the plaintiff. The birth certificate P2 shows that the plaintiff was born on January 1st 1915. The plaintiff claimed the share to which Kalingu was entitled on the footing that P1 is void and conveyed no title.

The defendant, who had purchased the interests of Ukkuwa, filed answer alleging that according to the Kandyan law a gift by a minor is valid and that even if it is not, the plaintiff's action is prescribed as he failed to institute it within three years of his attaining majority. He did not dispute the plaintiff's title to the undivided 1/4 share which he purchased from Kiri Banda.

At the trial the following issues were framed :

(1) Was Kalingu a minor when she executed deed No. 4514 of January 22nd 1915 ?
(2) If so, was the said deed void or voidable ?
(3) Is the plaintiff's cause of action, if any, prescribed ?

The learned Commissioner decided issues 2 and 3 against the plaintiff and dismissed his action with costs.

I shall first deal with the question whether P1 is void or voidable. No direct authority was cited to me, nor am I aware of any, in which this question was considered under the Kandyan law. But counsel for the respondent invited my attention to a passage from Sawer at page 27 which reads :

> "Should a youth sell his lands, his cattle or his goods before the end of his 16th year, he can break the bargain and renounce possession of his lands, cattle or goods, on refunding the value which he may have received for the same."

The Kandyan law fixed the age of majority at 16 years which was the age of puberty and manhood. But section 1 of Ordinance No. 7 of 1865 fixed the age of majority at 21 years and declared that, except as in section 2 excepted, no person shall be deemed to have attained his majority at an earlier period any law or custom to the contrary notwithstanding. This provision necessarily renders inoperative the rule of the Kandyan law as regards the age of majority.

The exception provided by section 2 reads :

> "Nothing herein contained shall extend or be construed to prevent any person under the age of 21 years from attaining his majority at an earlier period by operation of law."

Under the Roman-Dutch law a person attains majority by marriage. The question whether a Kandyan woman similarly becomes a major on marriage was raised in a case reported in Vanderstraatan's Reports at page 251, in which it was held that whereas there was no trace in the Kandyan law of any rule by which marriage before the age of 16 conferred majority, and as Ordinance No. 7 of 1865 had substituted 21 years of age as the legal age, a woman over 16 years of age but under 21 years did not become a major on her marriage.

A Divisional Bench took the same view in *Muttiah Chetty vs Dingiria* (10 N.L.R. 371). According to these decisions Kalingu was a minor in spite of her marriage at the time of the execution of P1.

The passage from Sawer quoted above refers to a sale by a minor and is apparently based on the principle that the alienation cannot be said to be definitely prejudicial to the minor inasmuch as he received value for it. Sawer has not dealt with a case where the alienation is definitely prejudicial to the minor. On this point the Kandyan law is silent. Where there is no Kandyan law or custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces we must have recourse to the Roman-Dutch law (Chapter 66 section 7).

The fact that Kalingu did not receive any consideration on P1 is manifest on the face of it. In *Gunasekere Hamine vs Don Baron* (2 Browne 402), it was held that under the Roman-Dutch law a donation by a minor is *ipso jure* void. This case was cited with approval in *Silva vs Mohamadu* (19 N.L.R. 426).

It follows from these decisions that P1 is void and of no effect and that the dominium remained in Kalingu.

The remaining question is whether the action is barred by any provision in the Prescription Ordinance (Chapter 55).

The answer to this question turns on whether or not it is necessary for a minor to bring an action after he attains majority to get the void alienation out of the way, and whether the proper action is the action *rei vindicatio*, or the action for *restitutio in integrum*.

The plaintiff has instituted this action, which is a vindicatory action, seven years after he attained majority.

Voet says that an action by a minor is not necessary where he is *ipso jure* protected but as a matter of precaution the action is brought for greater security. (4.1. section 13).

The section reads :

> "Nor is recourse to be had to restitution, whenever a person is *ipso jure* protected ; for instance, if without the authority of a tutor, a contract has been made with his ward, and the latter has thereby not been made the richer. For, restitution in respect of a prejudiced matter would be sought for in vain, if the law on the subject itself protects the person and preserves his rights intact. Nor do I doubt but that, nowadays, if an extra judicial transaction is *ipso jure* null and void, a person is safe against it without restitution, as Groenewegen establishes by many authorities, reasons, and decided cases. But since extra caution does no harm, and the more experienced practitioner usually takes the safer course and as those to whom the authority is given are readier to grant restitution nowadays, than was the case in Roman times, it has become usual in the courts of different places, to apply for restitution even against contracts manifestly of no effect in law, for the sake of greater security than from any necessity to do so."

In *Breytenbach vs Frankel* (1913 S.A.L.R. App. Div. 390) Lord de Villiers referring to this section in Voet said :

> "According to Voet such an action should not be brought when the minor is *ipso jure* safe (*tutus*), and as an illustration of such safety he mentions the case of a contract made with a minor without the authority of the guardian, by which the minor has not been benefited. Voet does not, however, say who is to judge whether the minor has been so benefited or not. He adds that as excessive caution can do no harm, and skilled practitioners are apt to take the safer course, and as the Dutch Courts were more inclined to grant the aid of restitution than those of Rome, a general practice has been introduced for the sake of safety than from necessity to ask for restitution from the courts against contracts labouring under manifest nullity. It is very difficult to gather from the authorities whether an action should be deemed necessary under the circumstances with which the court has now to deal, but it is reasonably clear that it would have been deemed advisable. No decision of any South African Court has been cited in which the exact point has been decided, but we know that the tendency of those courts has always been to uphold the general principle that a solemnly registered or duly executed instrument shall stand until set aside by a competent court and not to allow any person to be a judge in his own cause."

In the course of the judgment Lord de Villiers has made an observation that the universal practice in Holland must be taken to be the law, but there is nothing in his judgment to indicate that that was his considered opinion.

Vander Keesel, one of the latest writers on the Roman-Dutch law, says in his theses, which were published about the time when Ceylon passed into British hands, that though it is usual for the sake of greater security to apply for *restitutio in integrum* in transactions which are *ipso jure* void, it is not a matter of necessity. (Thesis 877 Lorensz's Trans. page 324). This statement shows that an inveterate practice did not exist in Holland.

The last sentence in the quotation given above from the judgment of Lord de Villiers seems to be based on the law relating to the registration of immovable property that is in force in South Africa. Throughout the Union the registration of transfers of immovable property is compulsory. For the purpose of ascertaining who is the owner of a particular piece of land it is the registration that must be looked at. The registration is regarded as conclusive as between any non-registered claimant to land and third parties. This is made clear by the judgment of Solomon, J. He said :

> " As long as the property remains registered in the name of a third party it is impossible for the minor to transfer the dominium. In practice therefore it makes little difference whether the alienation by a guardian of the immovable property of a minor is held to be void or voidable, for in either case, if the minor repudiates it, he must bring an action to set aside the registration. But there is this important difference, that in the one case the action is a vindicatory one and in the other a *restitutio in integrum*."

In the absence of a similar provision in our Registration Ordinance it seems to me on principle, and apart from authority, that a person who executes a deed of transfer which is *ipso jure* void is under no obligation to institute an action to get rid of the effect of his act because the transfer is a nullity and the dominium remains in him. But there is clear authority both in the Roman-Dutch law and in the English Law on the point.

The view expressed by Voet is supported by Story in his Commentaries on Equity Jurisprudence, 3rd edition at page 294. He says :

> " In the first place, then, let us consider in what way the court will direct the delivery up, cancelling or rescission of agreements, securities, deeds or other instruments. It is obvious that the jurisdiction exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matters apparent upon the face of it, there was no call to exercise the jurisdiction with the possible exception of instruments forming a claim upon the title to land. The party is relieved upon the principle, as it is technically called, *quia timet;* that is for fear that such agreements, securities, deeds or other instruments may be vexatiously or injuriously used against him when the evidence to impeach them may be lost ; or that they may have thrown a cloud or suspicion over his title or interest."

There is also a judgment of the Privy Council on the point. In *Khairajmal vs Daim* (I.L.R. 32 Cal. 296), Lord Davey said :

> " The question, therefore, is whether the equity of redemption not only purported to be, but was in fact sold under the decrees. Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales would be nullity and might be disregarded without any proceeding to set them aside."

I must now turn to a consideration of two cases on which reliance was placed. The principal case to which reference must be made is *Silva vs Mohamadu* (*supra*). In that case, one Warlianu, who was a minor, sold certain shares of a land for a sum of Rs. 2,000/- to the defendant. After he attained majority he conveyed the same share to the plaintiff.

The question for determination was whether the transfer to the defendant was void or voidable. Ennis, J. and de Sampayo, J. held that the transfer was voidable.

Counsel for the respondent placed particular reliance on the following passage in the judgment of de Sampayo, J.

> " It appears that, even in the case of void contracts, the universal practice in Holland was to apply for *restitutio in integrum* and, as Lord de Villiers observed in the course of the argument, what was the universal practice in Holland must be taken to be the law with us. Thus it appears that the Roman-Dutch law is quite in accord with the general principle that a person cannot be judge in his own cause, and that where he wishes to get rid of the effect of his own act he must seek the assistance of the court."

The next case which was greatly relied upon was *Ahamadu Lebbe vs Amina Umma* (29 N.L.R. 449). In that case the plaintiff, who was a minor, falsely represented himself to be of full age and induced the defendant to purchase his share of a land. Here, too, the deed was held to be voidable but restitution was not granted in view of the false representations made by the minor. In the course of the judgment delivered by Jayawardene, A.J. he said :

> " In view of these authorities (*Breytenbach vs Frankel; Silva vs Mohamadu*) it must be now taken to be settled law that whether an act is void or voidable, restitution must be sought from the courts, and neither the minor nor his subsequent purchaser can treat the alienation as never having taken place at all."

I think it is to be remembered that in each of these cases what was being considered was a voidable contract. There can be no question that restitution must be sought from the courts to avoid a voidable contract. That is because a voidable contract is valid until it is set aside.

With great respect, I would wish to say that the observations made by the learned judges in those cases, that restitution must be sought from the courts in respect of an act which is void, is *obiter* and not in accord with the authorities I have referred to.

What then is the position of a minor who has executed a deed which is *ipso jure* void ? Where the minor is in possession of the property no difficulty can arise but where he has lost posses-

sion he can recover it by an action *rei vindicatio* which is available to him as the *dominus* of the property.

In *Silva vs Mohamadu* (*supra*) Ennis, J. said :

> " Where the contract was void *ab initio* the proper Roman-Dutch action was the action *rei vindicatio* as the dominium had not passed, but where the contract was voidable only, the Roman-Dutch action was *restitutio in integrum*."

This view has the support of Voet (4.4. section 16).

An action *rei vindicatio* can be brought under section 3 of the Prescription Ordinance within ten years of the date of dispossession. The plaintiff's action has been brought within ten years of the accrual of the cause of action and is thus not barred by prescription.

I would set aside the judgment of the learned Commissioner and send the case back for judgment to be entered in favour of the plaintiff for the share claimed by him in his plaint. The parties will be at liberty to adduce evidence on the question of damages. The plaintiff is entitled to the costs here and in the court below.

Judgment set aside.

Present: CANNON, J.

RAMEN vs PERERA

S. C. No. 58—C. R. Colombo No. 93268.
Argued on 18th October, 1944.
Decided on 26th October, 1944.

Rent Restriction Ordinance No. 60 of 1942—Action for ejectment—To what extent should the court take into consideration the position of the tenant.

Held: (i) That in deciding whether a house is reasonably required for the occupation of the landlord within the meaning of the Rent Restriction Ordinance the court should take into consideration not only the position of the landlord but also that of the tenant.

(ii) That where the hardship to neither party appears to overbalance that of the other, the landlord should succeed by virtue of his ownership.

Cases referred to : *Raheem vs Jayawardene* (45 N.L.R. at page 316)
Abeywardene vs Nicolle (45 N.L.R. 354)

E. B. Wickramanayake, for the defendant-appellant.
J. E. M. Obeyesekere with *C. Renganathan*, for the petitioner-respondent.

CANNON, J.

This is an appeal against a judgment given in favour of the landlord in an action for ejectment. The issue was whether certain premises, No. 81 Hill Street, Colombo, were reasonably required for occupation as a residence for the landlord within the meaning of the Rent Restriction Ordinance No. 60 of 1942, section 8. The ground of appeal is misdirection in that the Commissioner has not taken into consideration the position of the tenant.

The question arises : To what extent must the position of the tenant be taken into consideration ? In *Raheem vs Jayawardene* (45 N.L.R. at page 316), Howard, C.J. says: "The learned Commissioner seems to think that the landlord discharges the burden of proof imposed on him by proving that he has a good reason for requiring the premises.....Having regard to the words 'in the opinion of the court' which occurs in section 8 (*c*) of the local Ordinance, I do not think that the words 'reasonably required' cast on the landlord the burden of merely establishing a good reason, so far as he himself is concerned, for requiring the premises as in the first part of section 5 (1) (9*d*) of the English Act. The court has to be satisfied, after taking into consideration other matters such as alternative accommodation at the disposal of the landlord and the position of the tenant, that the requirement is a reasonable one."

In *Abeywardene vs Nicolle* (45 N.L.R. 354) the Commissioner has decided that the premises were not reasonably required in view of the "relative position of the parties concerned." The inconvenience caused to the landlord was, the Commissioner thought, little when compared with the inconvenience the tenant would have to face in finding another house. Mr. Justice Soertsz, in affirming the Commissioner's decision, saw no misdirection in

the way he had considered the matter of alternative accommodation. The words "reasonably required" would, at first sight, appear to require no explanation to a reasonable man. Guiding principles are, however, desirable. Whether an action or request is reasonable must depend upon a consideration of all the surrounding relevant facts. It rests upon circumstantial as well as direct evidence. It follows that the circumstances of the tenant as well as those of the landlord must be taken into consideration and, although the Ceylon Ordinance, unlike the English Statute, does not require the landlord to provide suitable alternative accommodation, the availability or non-availability of alternative accommodation to the tenant, as well as to the landlord, is a fact which, in my view, is a major circumstance. Though the landlord may have sound reasons for seeking possession, as Mr. Justice Acton said in an English case cited by Soertsz, J. "Because the landlord's wish for possession was reasonable, it does not follow that it was reasonable for the court to gratify it."

The question to be answered may, it seems to me, be paraphrased thus: Is the landlord's requirement for occupation a reasonable one having regard to the circumstances of both parties? And where the hardship to neither party appears to overbalance that of the other, I think, the landlord should succeed by virtue of his ownership.

In the present case, the landlord has shown good reasons. He gave evidence that he resides at Kandana, about 11 miles from Colombo; he is a toddy and arrack renter, and has a number of taverns in Colombo. He bought the premises in question for the occupation of himself and wants to live there with his family. Kandana, he said, was too distant to enable him to look after his business. He has an office at Hill Street. Before he went to Kandana, he was a tenant of premises in Wolfendahl Street but went to Kandana during the time of the air raids. He owns a car and motor lorries. He further stated that he bought the premises solely for the reason of residing in them and, therefore, immediately gave the defendant notice to quit. He was unable to say whether he could get a rented out house in Colombo, and added "I cannot live in a rented out house." The landlord, therefore, has alternative accommodation and, although it is 11 miles from his business, that is no hardship in the present times to a successful business man who has motor transport at his disposal. On the other hand, the tenant gave evidence that he has no alternative accommodation although he has looked for it, and his household comprised 15 persons.

The Commissioner, in his reasons for judgment, stated "I do not see any circumstance in this case to doubt the *bona fides* and reasonableness of the plaintiff's need for the house in question. As soon as he purchased the house plaintiff gave defendant notice to quit. I accept plaintiff's evidence that he bought the house for the express purpose of residing in it. Plaintiff's large business as a toddy and arrack renter requires his daily presence in Colombo. His headquarters and office are situated in the same street as the premises in question. At present he resides 11 miles away from Colombo in a rented house. I can therefore well believe plaintiff when he states that he finds it extremely inconvenient to continue to reside away from Colombo." The Commissioner has evidently based his judgment on the good faith of the landlord and not on the reasonableness of his requirement. He does not appear to have taken into consideration the position of the tenant. On account of this misdirection, the appeal must be allowed with costs.

Appeal allowed.

Present: MOSELEY, J. & WIJEYEWARDENE, J.

WICKRAMANAYAKE vs NAGALINGAM, D. J., KANDY

Application for a Writ of Prohibition on Mr. C. Nagalingam, District Judge, Kandy.
Argued & Decided on 9th June, 1944.

Prohibition—Courts Ordinance section 42—Order issued by District Judge on a proctor to appear in court—Circumstances in which a mandate in the nature of a Writ of Prohibition will be issued.

The District Judge issued on the petitioner, a proctor practising in the District Court of Kandy, a notice in the following terms:

No. P 1369

In the District Court of Kandy

A. Alias V. Dingoo of Pihillitenna—Plaintiff

vs.

D. Gunee and 4 others—Defendants.

To A. N. Wickramanayake, Esq., Proctor S.C., Kandy.

You are hereby required to appear before this court at 11 a.m. on 19th May, 1944, in connection with the statement filed by the 3rd defendant in the above case, and alleged to have been drafted by U. B. Wijesinghe, a clerk under your employ.

By order

(Sgd.)

Secretary.

The 10th day of May, 1944.

Shortly the facts relevant to the matter of the above notice are :

One A. Alias V. Dingoo had filed action No. P 1369 in the District Court of Kandy, naming five persons as defendants. When the case was called in court on 28th April, 1944, the date on which the 3rd defendant had to file his answer he tendered a document which purported to be an answer written in English. On being questioned by the judge as to who drafted the document for him he informed him that it was the clerk of the petitioner. He also told the judge that he had paid Rs.1 /50 to the clerk by way of remuneration The judge thereupon directed the above notice on the proctor and another on his clerk. The petitioner appeared by proctor and counsel and filed the following objections :

(1) With regard to the alleged allegation that the clerk U. B. Wijesinghe typed the statement of the 3rd defendant in the above case, this matter is entirely outside the knowledge of the party noticed.

(2) The party noticed states that as a proctor of this court he would have been ready and willing to make such inquiries, if the court so desired, and had the party noticed been satisfied that his clerk had at any time typed unauthorized statements for suitors he would have dealt with the matter suitably.

(3) The party noticed, however, submits with respect, that the issue of this notice was unnecessary and outside the jurisdiction of this court and is detrimental to the professional standing and reputation of the party noticed.

The judge thereupon fixed the matter for inquiry. The present application for a Writ of Prohibition was thereafter made. The rule was made absolute.

Held : That there was no material before the learned District Judge upon which he could make an order directing the petitioner to appear before him at the inquiry which he intended to hold.

N. Nadarajah, K.C., with *A. H. C. de Silva* and *H. W. Jayawardene*, for the petitioner.

R. R. Crossette-Thambyah, Acting Solicitor-General with *T. S. Fernando, Crown Counsel*, for the respondent and also as *amicus curiae* on behalf of the Attorney-General.

H. V. Perera, K.C., with *E. B. Wickramanayake, S. J. Kadirgamar and E. P. Wijetunge*, for the Law Society of Ceylon.

MOSELEY, J.

This is an application for a Writ of Prohibition directed to Mr. C. Nagalingam, the District Judge of Kandy. We are asked to make an order prohibiting and restraining the District Judge from proceeding any further in a matter which he has set down for inquiry on the 26th of May, which order has been suspended pending the decision of this application. The matter arises out of a certain statement filed by the 3rd defendant in a partition proceeding, which on the face of it appeared to the learned District Judge to be an answer to the statement of claim. It was assumed that the document had been prepared and typed by someone with proctorial experience and when the 3rd defendant was questioned he stated that it had been typed by a clerk in the employment of the petitioner. Thereupon the District Judge issued notices both upon the clerk and his employer, the petitioner in this case.

Now it does not seem to us that there was any material before the learned District Judge upon which he could make an order directing the petitioner to appear before him at the inquiry which he intended to hold. No doubt, this somewhat comprehensive notice, including as it did the clerk and the proctor, was due to a slight misapprehension of the position on the part of the District Judge and we think, therefore, that in so far as the notice directed to the petitioner is concerned the rule must be made absolute. There will be no order as to costs.

WIJEYEWARDENE, J.

I agree.

Rule made absolute.

END OF VOL. XXVIII