The

Ceylon Law Weekly

containing Cases decided by the Supreme Court of Ceylon, and His Majesty the King in the Privy Council on appeal from the Supreme Court of Ceylon.

VOLUME IX

WITH A DIGEST

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ERRATUM

Read "and gave him judgment" in line 2 of p 47 as "and judgment was given."

DIGEST

Abatement

Abatement of appeal.
See Civil Procedure 124

Action

Action against an unincorporated association—Action first brought on the footing that the association was a corporate body—Action under section 16 *of the Civil Procedure Code taken later at the instance of Court—Claim within time at date of filing of plaint—Claim prescribed at the time action under section* 16 *of the Civil Procedure Code was taken—Is the action maintainable.*

Held : (i) That the action can be regarded as having been instituted on May 20, 1936.

(ii) That an action can be said to be properly instituted against one member of an unincorporated body in a representative capacity if the plaint is so drawn and filed and that it only remains to get the permission of the court to sue him, that is to say, to proceed with the action against him.

BANIEL SILVA vs. LOW COUNTRY PRODUCTS ASSOCIATION 13

Alimony

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Appeal

Objection that the action is not properly constituted—Can it be taken for the first time in appeal.
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See Civil Procedure 98, 107,141

Order of abatement of appeal—When may appeal from order of abatement of appeal be treated as a special application for relief under section 756 of the Civil Procedure Code.
See Civil Procedure 124
See Criminal Procedure 3

Criminal appeal out of time—Can Supreme Court treat such late appeal as an application in revision 76
See Stamp Ordinance 80, 82

Association

Association—Unincorporated—Action against.
See Action 13

Business Names

Business Names Ordinance No. 6 *of* 1918—*Sections* 4 *and* 9—*Scope of the expression "default" in section* 9.

Held : (i) That the failure of the plaintiff to set out their names in the plaint as fully as they were set-out in the register of business names was no ground for treating the action as if the plaintiffs had committed a "default" within the meaning of section 9 of the Registration of Business Names Ordinance No. 6 of 1918.

(ii) That it is difficult to say that an erroneous statement in regard to the usual residence of a partner can be regarded as a "default in furnishing a statement of particulars" under section 9 of the Ordinance.

(iii) That where the court is asked to give effect to the terms of section 9 of the Ordinance on the ground that there is an error in the register in regard to the plaintiff's place of residence, the mere statement of witness made in cross-examination tending to show that the description in the register is wrong, is not sufficient. It must appear that the witness was not misinformed and that he realised the implication of the matter.

Civil Procedure

Civil Procedure Code sections 306 and 311—Can the Court inquire into the validity of a gift made by the judgment-debtor before the action—Gift by Muslim—Can its validity be canvassed in proceedings under section 306.

Held : (i) That in proceedings under section 306 of the Civil Procedure Code, and the subsequent sections, there is hardly any scope for an inquiry with regard to the validity or otherwise of a transfer effected by a judgment-debtor.

(ii) That, if the court is satisfied that the judgment-debtor has not transferred any of his property since the institution of the action, it is entitled to discharge the debtor.

Civil Procedure Code section 837—Application to release judgment-debtor from jail—Order refusing the application—Appeal—What provisions of the Civil Procedure Code govern such appeal.

Held : That an appeal from an order refusing to release a judgment-debtor from jail is governed by the provisions of section 756 of the Civil Procedure Code.

Civil Procedure Code sections 14 and 36—Joinder of parties and causes of action—Can appeal court send back a case for amendment of pleadings.

Held : (i) That sections 14 and 36 of the Civil Procedure Code must be read together.

(ii) That the joint, several, or alternative liability of defendants mentioned in section 14 means a joint, several, or alternative liability in respect of one or several causes of action, which cause or causes of action are united in the same suit against the same defendants jointly.

(iii) That the Supreme Court can, in an appropriate case, send back a case for amendment of pleadings.

Civil Procedure Code section 337—Section 13 (1) Courts of Requests Amendment Ordinance No. 12 of 1895—Appeal from Court of Requests—Can question of law be argued in an appeal on facts—Prohibitory notice on employer seizing labourer's wages—Can employer take objection to the seizure.

Held : (i) That an appeal on law which has not been preferred within the prescribed time cannot be introduced into a petition of appeal on facts so as to defeat the provisions of the law regarding limitation of time for preferring an appeal.

(ii) That where a seizure of a labourer's wages is made by a prohibitory notice it is the judgment-debtor and not his employer or anyone else who should claim exemption under section 218 of the Civil Procedure Code.

Civil Procedure Code sections 614, 615 & 617—*Divorce—Action for recovery of cash dowry—Can the amount of permanent alimony be fixed before decree absolute is entered—Matrimonial Rights and Inheritance Ordinance No.* 15 *of* 1876 *sections* 6, 10, 11 *and* 19—*Married Women's Property Ordinance No.* 18 *of* 1923.

Held : (i) That it is open in law for the parties to a divorce action by consent to have the amount of permanent alimony determined before decree *nisi* is made absolute.

(ii) That an order for permanent alimony can properly be made only after the decree *nisi* for divorce has been made absolute, even though the amount of permanent alimony has been determined beforehand by consent of parties.

(iii) That a wife, under the Roman Dutch Law, is entitled to claim restitution of her dowry in a case where the marriage did not take place in community of property.

(iv) That, under the Roman-Dutch Law, the wife's right to claim restitution of her dowry may be forfeited by misconduct on her part.

(v) That, in the case of persons married before the Married Women's Property Ordinance No. 18 of 1923, the wife's movable property vests in the husband by virtue of section 19 of the Matrimonial Rights and Inheritance Ordinance No. 18 of 1923, and that dowry money which has vested in the husband before 1924 cannot be recovered.

Civil Procedure Code section 22—*Objection that the action was not properly constituted taken for the first time in appeal—Can such objection be taken at that stage—Action under section* 102 *of the Trusts Ordinance* 1917—*Trustee of Hindu Temple.*

Held : That the appellant was precluded by section 22 of the Civil Procedure Code from taking such an objection in appeal.

Civil Procedure Code section 218 (g)—*Seizure of lump-sum retiring allowance payable to a pensioner—Is such retiring allowance liable to be seized—Stipend—Meaning of.*

Held : (i) That a lump-sum retiring allowance, granted by the Governor under section 15 of the Minutes on Pensions, does not fall within section 218 (g) of the Civil Procedure Code.

(ii) That a lump-sum payment does not come within the scope of the expression "stipend" in section 218 (g) of the Civil Procedure Code.

Civil Procedure Code section 756—*Order of abatement of appeal—Relief under section* 756—*Special application—Appeal from order of abatement may be treated as special application.*

Held : (i) That the security was tendered in time and that it should have been accepted.

(ii) That the Supreme Court can treat an appeal from an order that an appeal has abated as a special application under section 756, and grant relief.

Civil Procedure Code—Appeal—Stamp Ordinance No. 22 of 1909 Schedule B Part II. Miscellaneous—Stamps for judgment in appeal and certificate in appeal—Should stamps be tendered "simultaneously" with appeal petition.

Where stamps for the judgment in appeal and the certificate in appeal were not tendered simultaneously with the appeal petition.

Held : (i) That the appeals were not properly before the Supreme Court and should be rejected.

(ii) That the words "together with" in Schedule B Part II. Miscellaneous mean "simultaneously."

Conditional Transfer

Conditional transfer of land—Agreement to repurchase within one year from the date of sale—Value payable on repurchase being the amount of consideration for the transfer plus interest thereon at eighteen per centum per annum—Is such agreement a transfer or a mortgage—Is the vendor entitled to a reconveyance after the period stipulated in the transfer—Principles governing the vendor's right to a reconveyance after the stipulated period.

Held : (i) That no matter what name or designation the parties give to a contract or transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be.

(ii) That *prima facie* the court assumes that the nature of a transaction is such as it purports to be, and the onus is upon the person who asserts that it is something different to prove that fact.

(iii) That each case must depend upon its own facts, and that no general rule can be propounded which can meet them all.

Contract

Contract—Arrival contract—C. I. F. contract—Failure to tender Bill of Lading—Acceptance of delivery order in lieu of a Bill of Lading—Where it is clear that the delivery order is tendered on C. I. F. terms, does the delivery order take the place of the Bill of Lading.

Held : (i) That, where in a C.I.F. contract the buyer accepts a delivery order in place of the Bill of Lading, the buyer must be taken to have agreed to accept the delivery order in place of the Bill of Lading.

(ii) That a misconception on the part of the buyer as to the nature of the contract cannot affect its character or its legal implications.

Crimes — Prevention of Crimes Ordinance No. 2 of 1926

Charge under sections 373 *and* 490 *of the Penal Code—Trial by Police Magistrate, who is also District Judge, under section* 152 (3) *of the Criminal Procedure Code—Registered criminal—Sentence of two years' rigorous imprisonment and two years Police supervision—Should judge, on finding that an accused is a registered criminal within the meaning of the expression in Ordinance No.* 2 *of* 1926, *discontinue summary proceedings and commence non-summary proceedings.*

Held : (i) That section 6 of the Prevention of Crimes Ordinance No. 2 of 1926 applies only where a person is accused of a crime triable summarily.

(ii) That a Police Magistrate, who is also a District Judge, when trying an accused under section 152 (3) of the Criminal Procedure Code in respect of a charge not triable summarily by a Police Magistrate, need not, on it being brought to his notice that the accused is a registered criminal, discontinue the trial and commence non-summary proceedings.

Criminal Procedure

Criminal Procedure Code sections 147 (1) *and* 338 (1)—*Judgment or final order—Penal Code section* 190—*Order discharging accused on the ground that the sanction of the Attorney-General is necessary before the charge can be entertained—Appeal from the order of discharge—In what circumstances will an appeal lie from an order of discharge by a Police Magistrate on the ground that the sanction of the Attorney-General is necessary before the charge can be entertained—Meaning of the expression "Court" in section* 147 (1) (*b*) *of the Criminal Procedure Code.*

Held : (i) That an appeal lies in a case in which the Police Magistrate discharges the accused, on an erroneous view of the law that the charge cannot be proceeded with, without the sanction of the Attorney-General.

(ii) That, for a charge under section 190 of the Penal Code the previous sanction of the Attorney-General is not necessary in a case where the offence has been committed in the course of an investigation directed by law preliminary to a proceeding in any court.

(iii) That the word "Court" in section 147 (1) (*b*) of the Criminal Procedure Code should be given the meaning it has in the Courts Ordinance No. 1 of 1889.

Criminal trial—Taking of evidence after close of the trial—When such evidence should not be taken—Criminal Procedure Code section 429—*Identification of accused—Principles which should be kept in view in testing the evidence given as to the identity of the accused.*

Held : (i) That evidence for the prosecution must not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or of resolving some doubt in favour of the prosecution.

(ii) That an identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right but must also be given every reasonable chance of being wrong.

(iii) That it is sufficient if an accused, without absolutely convincing the Magistrate of his innocence, does enough to produce a reasonable doubt of his guilt.

Criminal Procedure Code—Failure of the trial judge to consider the case for the defence—Identification—How should arrangements be made for the identification of an accused by the prosecution witnesses.

Held : (i) That the trial judge must scrutinise the evidence for the defence and that failure to do so is an injustice to the accused, unless it is overwhelmingly obvious that the witnesses for the defence are so contradictory of each other as to be unworthy of credit.

(ii) That the witnesses should not be allowed an opportunity of seeing beforehand the persons they have to identify, in such circumstances as to indicate to them in any way that the persons they see are the persons they will be required to identify later.

Criminal Procedure—Principles governing the decision of a criminal case by the trial judge—Both the prosecution and the defence must be considered.

Held : (i) That a defence, unless it is on the face of it fantastic or contradictory, must be properly examined and if it is rejected reasons should be given.

(ii) That a Magistrate cannot reject evidence for the defence merely because it appears to him that the evidence for the prosecution is the more likely.

Criminal Procedure Code sections 338 and 357—Appeal out of time—Can Supreme Court treat it as an application in revision—Principles of punishment—How should the appropriate punishment for an accused with previous convictions be determined.

Held : (i) That the Supreme Court has power to treat an appeal which is out of time as an application in revision.

(ii) That it is not proper to inflict a more severe punishment than is appropriate to the offence with which the accused is charged merely on account of previous bad record of the accused.

Inspection of scene of offence—When it should be done.

What should Magistrate trying a prisoner under section 152 (3) of the Criminal Procedure Code do on finding that the prisoner is a registered criminal.

Defamation

Defamation—Publication of defamatory report in a newspaper—Publication of apology by newspaper—Damages for pain of mind and injury to reputation—Principles of Roman-Dutch Law applicable to a case of defamation—Extent to which an apology may be regarded as minimising damages.

Held : That where words are defamatory they are *prima facie* actionable and it is unnecessary to give proof of special damage. The plaintiff may recover a verdict for damages without giving any evidence of actual pecuniary loss.

Executor

Executor—Power to borrow money for purposes of administration—Promissory note as security—Can successor of the Executor be sued on a promissory note given by the Executor as security for a loan for purposes of administration.

Held : (i) That an Executor has the power to borrow money on a Promissory note for the purposes of administration.

(ii) That where an Executor has contracted a debt for the purposes of administration in such a manner as to exclude personal liability the estate is liable to pay the debt.

Firearms Ordinance

Firearms Ordinance No. 33 of 1916—Refusal to renew gun licence—Mandamus to compel its issue.

Held : (i) That where a Government Agent has reasons for refusing to renew a gun licence, he cannot be compelled by mandamus to issue a licence.

(ii) That a Government Agent is not bound to hear the appellant before making his decision to refuse to renew a gun licence.

(iii) That once a gun licence is granted its renewal can be refused only on the grounds mentioned in section 6 of the Firearms Ordinance No. 33 of 1916.

(iv) That a Government Agent must exercise his discretion in granting or withholding the grant of a gun licence in a judicial manner.

Forgery

Forgery—Abetment of—Cattle Voucher—Penal Code section 454.

Held : That the failure of the prosecution to prove that the signature on the cattle voucher, which was alleged to be forged, was not genuine, by an express repudiation from the person whose signature it purported to be, was fatal to a conviction.

Gaming

Gaming Ordinance No. 17 of 1889—Search Warrant under section 7—How should the place to be searched be described in the warrant—Form A in the Schedule to the Ordinance.

Held : (i) That if, in a search warrant issued under section 7 of the Gaming Ordinance, the place to be searched is sufficiently described, the search will not be illegal on the ground that the place was not described by a more appropriate name or description.

(ii) That, in deciding whether the description of the place to be searched is sufficient or not, it is permissible to examine the evidence given both before the issue of the search warrant and at the trial.

Gaming Ordinance No. 17 of 1889—Section 5—Gaming carried on in a shed on an estate—Shed in charge of watcher—"Thon" collected from the gamblers by watcher—Refreshments provided by watcher—Is the watcher liable under section 5.

Held : That the prosecution had made out a case against the accused and that, in the absence of an explanation from the accused, an offence under section 5 of Ordinance No. 17 of 1889 was established.

Gratuity

Lump sum retiring allowance granted to public servant—Can it be seized.
See Civil Procedure 128

Gift

Muslim law—Can validity of gift be canvassed in proceedings under section 306 of the Civil Procedure Code.
See Civil Procedure 64

Housing and Town Improvement

Housing and Town Improvement Ordinance No. 19 of 1915 sections 6 (1) (2), 13 (1) (a) & (c) 15 (1)—Conversion of building—Is using a store as a dwelling-house an alteration within the meaning of section 6.

Held : That using, as dwelling-house, a building meant to be a store, is not an alteration within the meaning of section 6 of Ordinance No. 19 of 1915.

Identification

(1) *Principles which should be kept in view in testing the evidence given as to the identity of the accused. See Criminal Procedure* 17

(2) *How should arrangements be made for the identification of an accused by prosecution witnesses. See Criminal Procedure* 37

Income Tax

Income Tax—Ordinance No. 2 of 1932 sections 5 and 34—Sale brought about through the instrumentality of a person in Ceylon—Sales of goods arranged by indent agents.

Held : (i) That the indent agents (F. X. Pereira & Sons) were acting on behalf of a non-resident person within the meaning of section 34 of the Income Tax Ordinance.

(ii) That the indent agents were instrumental in selling or disposing of property within the meaning of section 34 of the Income Tax Ordinance.

(iii) That section 34 must be read along with section 5, and the effect of section 34 is to include, under profits arising in or derived from Ceylon, all profits from the sale of goods where such sale has been brought about through the instrumentality of a person in Ceylon acting on behalf of the seller who is outside Ceylon, and in spite of the fact that legally the transactions of the business or the sale takes place outside Ceylon.

Inspection—*of scene of offence.*

Maintenance

Maintenance Ordinance—Claim for maintenance of illegitimate children—Claim dismissed on claimant stating that there was no witness present who could corroborate

her—Application to Magistrate later to cause the respondent to the application to keep to the terms of a certain settlement that had been arrived at—Case re-opened by Magistrate—Is the Magistrate entitled to do so.

Held : (i) That the Magistrate had no jurisdiction to try a claim which had been already dismissed, as the respondent had no evidence in support of her claim.

(ii) That the fact that the appellant acquiesced in the proceedings did not give the Magistrate jurisdiction to do what he was not in law entitled to do.

Maintenance Ordinance No. 19 of 1889 Section 3—Child staying with maternal grandfather—Father willing to maintain the child if the child lives with him—Can grandfather insist on keeping the child with him and compel the child's father to pay maintenance.

Held : (i) That an order for maintenance under section 3 of the Maintenance Ordinance can be made only where there is proof of neglect or refusal by the father to maintain a child.

(ii) That the grandfather of a child who is maintaining such child cannot compel the father of the child to pay maintenance under section 3 of the Maintenance Ordinance, if the father has neither neglected nor refused to maintain the child in his own home.

(iii) That where the father of a child is willing to maintain the child in his own home, he cannot be compelled to pay for the child's maintenance in the child's grandfather's home on the ground that it is in the best interests of the child to remain with the grandfather.

Held : (i) That where a device is registered as a trade mark in respect of silver medals, the registration cannot be taken as extending to the use of the same device on medals made of other metals.

(ii) That the mere reproduction of the symbols commonly known as '*Panchauda*' on any metal disc, does not constitute an infringement of a registered trade mark consisting of the same symbols.

(iii) That where the public purchased an article merely for the sake of the design on it, and not because it indicated that a certain manufacturer made it, it was not a breach of trade mark to produce articles containing the same design.

Minor

Cheque issued by minor—Minor trading in partnership with another with his father's consent—Cheque drawn on partnership account in the bank—Payment of cheque stopped after its issue—Cheque drawn in favour of minor's other partner—Cheque endorsed by payee to plaintiff—Can minor plead minority.

Held : The first defendant was liable to pay the amount due on the cheque, and that, in the circumstances, he was not entitled to plead minority.

Minor—Bond executed by Muslim minor with his father's concurrence—Representation to notary that the minor was of full age—Goods supplied to minor for the purposes of his business—Can minor avoid payment for such goods on the ground of minority—Should the case be decided according to principles of Roman-Dutch Law or Muslim Law.

Held : (i) That, where a Muslim minor enters into a contract with the consent of his natural guardian, the contract is valid according to Muslim Law.

(ii) That, where a minor by falsely representing himself to be of full age deceives a person to contract with him, the minor is bound by his contract.

Mortgage

Mortgage action against executor of last will of deceased mortgagor—Sale of mortgaged property in execution—Balance of mortgage debt remaining unsatisfied—Death of executor—Ex parte order appointing a person administrator of the deceased mortgagor's estate for the purpose of realizing the balance due on the mortgage—Motion for writ—Can District Court set aside order of substitution.

Held : (i) That the order substituting the defendant as administrator in place of the deceased executrix of the mortgagor operated as *res judicata* and the District Court had no power to set it aside.

(ii) That an application under section 87 of the Civil Procedure Code to set aside a decree absolute must be made within reasonable time after the decree, and must show that there were "reasonable grounds for the default upon which the decree was passed."

Mortgage action—Several defendants—Death of one of them—Decree entered against all defendants including deceased defendant—Court not aware of death—Application to vacate decree against deceased defendant and substitute his legal representatives—Application allowed—Decree entered again against all defendants—Need the mortgagor defendant's consent be obtained before entering decree.

Held : (i) That the first decree is binding on the mortgagor, the first defendant, and that the judge had no power to set it aside and enter a second decree on the ground that one of the defendants was not alive at the time it was entered.

(ii) That the first decree was a nullity so far as the deceased second defendant was concerned, as he was not alive at the time it was entered.

(iii) Where decree is entered against several persons and it is later reopened on the ground that one of the persons against whom it was entered was not alive at the time, the other persons, against whom a valid decree has been entered, cannot make use of the opportunity and claim a rehearing of their case.

Mortgage in form of conditional transfer.
See Conditional Transfer 61

Motor Cars

Motor Car Ordinance No. 20 of 1927—Section 44 (2) and (4)—Obstruction—Rule of road.

Held : That, however unnecessary or negligent the act of a driver of a car may be, his conduct would not amount to obstruction within the meaning of section 44 (4) of the Motor Car Ordinance, unless such conduct causes risk of accident to other traffic.

Newspaper

Defamation by Newspaper.
See Defamation 157

Notaries Ordinance No. 1 of 1907

Notaries Ordinance No. 1 of 1907—Section 29 rules 24 and 33—Omission to transmit duplicates of deeds to the Registrar General—Failure to give an explanation of the omission—Effect of proviso to section 29.

Held : (i) That the proviso to section 29 of the Notaries Ordinance does not impose an obligation on the Registrar-General to give a notary, who has disregarded or neglected to observe the provisions of Rule No. 24, further time to comply with the requirements of the rule.

(ii) That the word "may" in the proviso to section 29 of the Notaries Ordinance does not have the force of "must."

(iii) That a notary is bound under rule 33 of section 29 to give an explanation of his omission to comply with rule 24, and that failure to give an explanation is punishable.

Obscene Words

Obscene words—Penal Code section 287—Failure to set out the obscene words in the charge—Offending words stated in the evidence of the witness who complained he was annoyed by them—Does the mere failure to set out the obscene words vitiate a conviction.

Held : (i) That the words were obscene within the meaning of the expression in section 287 of the Penal Code.

(ii) That the failure to set out the words in the charge did not vitiate the conviction, as the obscene words appeared in the evidence and the accused was not prejudiced by the omission.

Obstruction

Ordinances

Order by Court

Order by Court entering judgment for plaintiff in a case where defendant's pleader applies for a postponement and is refused—Is such order an inter partes *order or an* ex parte *order.*

Held : (i) That the plaintiff should have been called upon to prove his case before judgment was entered in his favour.

(ii) That the order made by the judge was an *inter partes* order and an appeal was the proper remedy.

Order in Council (State Council Elections)

Ceylon (State Council Elections) Order in Council 1931—*Articles* 60 (8) *and* 72—*Non-compliance with the provisions as to return and declaration respecting election expenses—Delay due to ill-health—Authorized excuse—Circumstances in which the Supreme Court will extend its indulgence to a candidate who has failed to comply with the terms of the Order in Council.*

Held : That, where the candidate himself was his own election agent, ill-health of the candidate was a sufficient excuse for the delay in supplying the omissions in his return.

Partition

Partition Ordinance No. 10 *of* 1863—*Final decree in partition action—Can any alteration of the decree be made by consent of parties—Does the fact that, though the order that decree be entered has been made by the judge, the actual decree has not been signed by him, make any difference—Civil Procedure Code Section* 189.

Held : (i) That the District Judge had no power to amend the decree in the partition action after April 7, 1932, except to the extent prescribed in section 189 of the Civil Procedure Code.

(ii) That the fact that the 5th defendant had no objection to the amendment made no difference.

(iii) That, although the final decree was not actually entered by the District Judge on April 7, 1932, his order "Enter Final Decree" should be regarded as the act of entering up of the final judgment required by section 6 of the Partition Ordinance.

Partnership

Partnership—Termination of—Absence of provision in deed of partnership that it can be terminated by notice—Donation of plaintiff's shares subject to a fideicommissum and reserving his life-interest—Action for dissolution of partnership—Can summons in

the action be regarded as notice of termination—Is partnership terminated by service of summons—What is a partnership terminable at will.

Held : (i) That the partnership created by the instrument set out above is a partnership for an indefinite period and, therefore, terminable at will.

(ii) That summons in an action for the dissolution of a partnership can be regarded as notice of termination of the partnership.

(iii) That the termination of the partnership comes into effect on the date of service of the summons.

Penal Code

Penal Code sections 220 A and 323—Excise Ordinance No. 8 of 1912 Sections 34, 43, 44, and 50—Meaning of the words "any person found committing.....any offence punishable under section 43 and section 44"—Powers of arrest of Excise Officers.

Held : (i) That on the facts, the Excise Guards were not entitled to arrest the 3rd accused as there was nothing to show that the cup of toddy given to the unkown man was for a money consideration.

(ii) That the authority conferred by section 34 of the Excise Ordinance No. 8 of 1912 cannot be exercised except in a case where a person is found actually committing an offence.

(iii) That a person cannot be lawfully arrested by virtue of the power conferred by section 34 of the Excise Ordinance No. 8 of 1912 merely because he is found doing something which the officers carrying out the arrest have reason to believe is an offence, and which is later proved to be an offence.

(iv) That the escaping of the 3rd accused from the custody of the Excise Guards was not an offence, as they were not in law entitled to arrest him.

(v) That a person causing hurt to a public officer in an attempt to rescue another person, who has been arrested without lawful authority, does not commit an offence under section 323 of the Penal Code.

Penal Code Section—Mischief—Trespassing cow—Fatal Injury caused in attempting to drive it away.

Held : That, if in the course of driving away a trespassing animal from his land, a landowner, with no intention of causing wrongful loss to anyone, causes it injury, he cannot be said to have committed mischief even though the injury proved fatal.

Penal Code sections 32, 146, 315 and 317—Causing hurt with deadly weapons while being members of an unlawful assembly—Several accused acquitted of the charge of being members of an unlawful assembly—Can they be convicted of causing hurt with deadly weapons in furtherance of a common intention if it is proved that they caused hurt.

Held : That the Supreme Court can, in appeal, alter convictions of causing grievous hurt and of simple hurt under sections 317 and 315 of the Penal Code read with section 146, to convictions under sections 317 and 315 read with section 32 of the Code.

Held : That the mere existence of two packets of opium under the pillow of the accused in the circumstances above stated does not constitute sufficient proof of an offence under section 32 of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929.

Postponement

Prescription

Prohibitory notice

Seizure of labourer's wages in the hands of the employer—Can employer take objection to the seizure.

Property

Property devolving on heir of deceased—Transfer of such property by heir—Transfer not for purposes of administration—When may a mortgage creditor of the deceased seize such property in the hands of the transferee.

Held : That, as the sale of the three properties to the plaintiff was not for the purposes of administration, the assignee-judgment-creditor was entitled to proceed against the other two properties in order to realize the balance due on the mortgage bond after the sale of the mortgaged property.

Punishment

Principles of—How should the appropriate punishment for an accused with previous conviction be determined.

Quo Warranto

Quo Warranto—Village Communities Ordinance No. 9 of 1924—Sections 18 (a) and 25 (2)—Objection taken, at time of election, to a candidate on the ground that he is not 25 years of age—Objection overruled—Can validity of election be questioned by Quo Warranto in a case where it can be proved that the candidate was under twenty-five years at the time of election.

Held : That the words "final and conclusive" in section 25 (2) of the Village Communities Ordinance No. 9 of 1924 preclude the validity of an election being questioned on any ground that was raised and decided at the election.

Quo Warranto—Buddhist Temporalities Ordinance No. 19 of 1931 Sections 7, 9 and 33 (b)—Election of Diyawadana Nilame—Person holding more than one office—Has he a vote in respect of each office.

Held : (i) That a person entitled to vote at the election of the Diyawadane Nilame can exercise only one vote although he may hold more than one office each of which qualifies him to vote at such election.

(ii) That the Attamasthane Committee has only one joint vote and that each member is not entitled to vote separately.

(iii) That the Court which has power under section 33 (b) of the Buddhist Temporalities Ordinance to grant an extension of time in the case of an election is not necessarily the Court within whose jurisdiction the temple or *devale* in respect of which the election is to be held is situate.

(iv) That the provisions of section 7 (2) of the Buddhist Temporalities Ordinance are directory and that a meeting held after the prescribed time is not invalid.

Registration

Registration of Documents Ordinance No. 23 of 1927—Section 12 (1)—Partition action—Registration of lis pendens *in wrong folio—Issue of summons—Rectification of error by registration in proper folio—Issue of fresh summons thereafter—Effect of non-compliance with the terms of section 12 (1).*

Held : (i) That the objection is unsustainable.

(ii) That there is no provision in law which declares that a partition action should be dismissed if the provisions of section 12 (1) of the Registration of Documents Ordinance are not complied with.

(iii) That where the *lis pendens* in a partition action is by mistake registered in the wrong folio and summons have been issued the plaintiff can, on discovering the error, rectify it by registering in the proper folio and obtaining fresh summons.

Re-opening

Maintenance case—Jurisdiction of Magistrate.

Retiring Allowance

Stamp Ordinance

Stamp Ordinance Part II Schedule B—Ascertainment of value of action—Appeal rejected in error—Can it be restored to the list on the error coming to the notice of the Court even after decree has been entered.

Held : (i) That the value of the claim in S. C. 77—D.C. Galle 35107 was Rs. 2,500/–.

(ii) That an appeal rejected in error can, on the error being brought to the notice of the court, be restored to the list.

(iii) That the Supreme Court will not entertain an appeal in any case in which the appellant has failed to tender the proper amount of Stamp Duty for the decree in appeal in the manner prescribed in Part II of Schedule B of the Stamp Ordinance under head Miscellaneous.

(iv) That failure to observe the requirements of Part II of Schedule B of the Stamp Ordinance, under head Miscellaneous, regarding the tendering of the stamps for the decree or order of the Supreme Court and the certificate in appeal cannot be rectified by tendering the stamps later, after the appealable time.

Stamps for judgment in appeal and certificate in appeal not tendered simultaneously with appeal petition.

Theft

Theft—Stolen property—Penal Code sections 367 and 394—Evidence Ordinance section 114 Illustration (a)—Presumption of theft—Carcases of stolen goods found in a car in which seven persons, including the owner and driver of the car, were travelling—What evidence is necessary to create the presumption of theft.

Held : That the accused could not be convicted of theft in the absence of evidence that any one or more of them had conscious and exclusive possession of the stolen property.

Trade Marks

Trade Mark Ordinance—Infringement of Trade Mark—Passing off—Offending mark likely to mislead purchasers—Tests to be applied in deciding whether the mark is calculated to deceive.

Held : (i) That, in the case of a colourable imitation of a trade mark, the test is whether or not the defendant's mark is calculated to cause his goods to be taken, by ordinary purchasers, for the goods of the plaintiff.

(ii) That the marks must be compared as they are seen in ordinary use on the goods they are used for, provided the plaintiff's mark does not substantially differ from the mark on the register.

(iii) The fact that the plaintiff has by injunction prevented the goods containing the infringing mark from reaching the market does not disentitle him from bringing an action for infringement of his trade mark.

(iv) That where it is shown to the satisfaction of a court that goods, calculated to pass off, or to cause to be passed off as the goods of the proprietor of a trade mark, have been imported and are at the Customs premises, the court is entitled to grant an injunction prohibiting the sale of the goods.

Trial

Inspection of scene of offence after conclusion of trial—Examination of witness for the prosecution at the inspection—Is such inspection contrary to the principles of justice.

Held : (i) That the inspection of the scene of an offence after the conclusion of the trial is irregular.

(ii) That if an inspection is considered desirable, it should be made during the course of the trial.

Words and Phrases

Workmen's Compensation

Workmen's Compensation Ordinance No. 19 of 1934—Question whether incapacity is total or partial—Is it a question of fact or law.

Held : (i) That the question whether incapacity is total or partial is a question of fact.

(ii) That in a case of permanent partial disablement, it is the duty of the Commissioner to decide on the evidence before him, whether there has been a complete loss of earning capacity or not.

Workmen's Compensation—Ordinance No. 19 of 1934—Injury to one eye—Total incapacity—Inability to obtain work.

Held : That there was no ground for interfering with the Commissioner's finding.

Present : SOERTSZ, J. & HEARNE, J.

RAMUPILLAI vs. SOMASUNDRAM

S. C. No. 74—D. C. (F.) Jaffna No. 7784.

Argued on 30th July, 1937.

Decided on 6th August, 1937.

Property devolving on heir of deceased—Transfer of such property by heir—Transfer not for purposes of administration—When may a mortgage creditor of the deceased seize such property in the hands of the transferee.

The plaintiff-appellant's mother transferred to him certain properties she had inherited from her deceased husband. The properties transferred were three in number and the consideration expressed in the deed Rs. 4,000/–. Part of this consideration was a sum of Rs. 1,475/– which went to pay the plaintiff's father's creditors. It also appeared from the deed of transfer that a sum of Rs. 2,525/– was retained by the plaintiff in order that he might settle the debt due on a mortgage bond executed by his deceased father, mortgaging one of the three properties transferred to him. The transfer was admittedly not made for the purposes of administration.

The mortgagee had assigned the mortgage bond and the assignee put it in suit, obtained a decree, and the property was sold. The plaintiff-appellant bought the property at the execution sale. The assignee then sought to levy execution for the balance of his decree against the other properties transferred to the appellant by his mother. Thereupon the plaintiff brought this action, naming the judgment-creditor in the mortgage action as defendant, in which he sought to obtain a declaration that he was entitled " to the three pieces of land " transferred to him and an order that they should be released from seizure.

Held : That as the sale of the three properties to the plaintiff was not for the purposes of administration the assignee-judgment-creditor was entitled to proceed against the other two properties in order to realize the balance due on the mortgage bond after the sale of the mortgaged property.

Followed—Gopalsamy vs. Ramasamy Pulle, 14 N. L. R. 238.
Referred to:—Muttiah Chetty vs. Ukkurala Korale, 27 N. L. R. 336.

H. V. Perera, K.C., with *Rajapakse & Thambiah* for plaintiff-appellant.
N. E. Weerasooriya with *N. Nadarajah* for defendant-respondent.

HEARNE, J.

The plaintiff-appellant was the transferee of certain properties from his mother who had inherited them from her deceased husband. She conveyed the properties as the deceased's sole heiress. One of the properties had been mortgaged by the deceased and after his death the assignee of the mortgage bond put it in suit, obtained a decree and the property was sold. It was the plaintiff-appellant himself who was the highest bidder. The assignee then sought to levy execution for the balance of his decree against the properties transferred to the appellant by his mother. In the present case under appeal, the plaintiff-appellant, naming the assignee or the judgment-creditor in the mortgage suit as defendant, sought a declaration that he was

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entitled "to the three pieces of land" transferred to him and an order that they should be released from seizure. The judge held against him and he has now appealed.

I think it is desirable to point to the difference between the position taken up by the appellant in his plaint in the lower court and the position he has taken up in this appeal. In the lower court he asked for a declaration that the lands in question were immune from seizure. Now through his counsel he has argued not that he is entitled to an unconditional order in his favour that the lands cannot be seized but that the lands can only be seized if in the first place Rs. 1,475/– are paid to him. The ground on which he rests this demand I shall refer to. I merely wish to say here that an appeal cannot be made the occasion of setting up a claim which was not put forward in the plaint in the lower court. It is a misconception to think that this court, sitting in appeal, can be asked to adjudicate upon a claim that is totally different from the claim originally set out in the court below. For this reason alone I think the appellant is not entitled to relief.

Now the grounds on which the plaintiff-appellant asks for the payment to him of Rs. 1,475/– as a condition precedent to the seizure of the lands are these. He says that part of the consideration for the transfer to him of the properties which had belonged to his father was a sum of Rs. 1,475/– which went to pay creditors of his father's estate and that as he had paid this sum, his properties, on the authority of *Muttiah Chetty vs. Ukkurala Korale* (1925) 27 N.L.R. 336, can only be seized if a refund is made to him of Rs. 1,475/–.

The consideration for the transfer of the properties to the plaintiff-appellant was stated to be Rs. 4,000/–. "I do hereby deduct and set off from the said consideration," the conveyance reads, "the sum of Rs. 2,525/– for the amount of principal and interest due on the said mortgage bond so that he (the transferee) may pay and settle the said debt and I receive from him the balance of Rs. 1,475/– in full....." The learned trial Judge found that the consideration for the transfer was Rs. 1,475/– which the widow acknowledged having received and the payment of the amount due on the mortgage bond and in regard to this finding I am in entire agreement with him. He went on to say, "In the present case the amount due on the bond is part of the consideration for the transfer. This amount was not paid to the executrix and, therefore, it was admittedly not spent for the purpose of the administration but was with the plaintiff himself. Therefore it is clear that all the properties transferred to the plaintiff are liable to the extent of the debt."

This, in my view, is a correct statement of the law. It is precisely what Jayawardene, A.J., following *Gopalsamy vs. Ramasamy Pulle* (1911) 14 N.L.R. 238, says, although he was there dealing with the heirs of an intestate estate. "Sale of property by the heirs of an intestate estate is valid if the purchase money has been expended for purposes of administration. But where part only of the consideration has been so utilised, the

property transferred may be sold in execution, at the instance of a creditor, for the realisation of the balance," that is to say, for the realisation of the balance of the consideration not utilised for purposes of administration. In the present case not only was the balance of the consideration not utilised for purposes of administration, but it was not paid.

If, in the present case, execution was being levied against the appellant's lands for a sum of Rs. 4,000/- the full consideration, it would have been competent for him to aver the payment of Rs. 1,475/- and to say that that amount had been utilised for the purposes of administration. But the trial Judge has in effect given him credit for Rs. 1,475/- and has held that the appellant's lands are only liable to be seized in respect of the debt on the bond, namely, that part of the consideration which had not been paid and which had therefore not been used for purposes of administration. He has directly followed 14 N.L.R. 238 (supra) which 27 N.L.R. 336 (supra) purported to follow and, in my opinion, he has held quite correctly.

I would like to add that 27 N.L.R. 336 (supra) does not appear to have been fully reported. It does not say whether the purchase money paid by the defendant had or had not been proved to have been utilised for purposes of administration. Probably it had not been so proved. Nor are the amount of the consideration and the amount of the debt, for which it was proposed to sell the land, reported.

Following 14 N.L.R. 238 (supra), the appeal is dismissed with costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

Present : SOERTSZ, J.

DHARMALINGAM CHETTY vs. VADEVIEL CHETTY & ANOTHER

S. C. No. 355—P. C. Colombo No. 6873
Argued on 15th & 16th July, 1937.
Decided on 28th July, 1937.

Criminal Procedure Code sections 147 (1) *and* 338 (1)—*Judgment or final order—Penal Code section* 190—*Order discharging accused on the ground that the sanction of the Attorney-General is necessary before the charge can be entertained—Appeal from the order of discharge—In what circumstances will an appeal lie from an order of discharge by a Police Magistrate on the ground that the sanction of the Attorney-General is necessary before the charge can be entertained—Meaning of the expression "Court" in section* 147 (1) (*b*) *of the Criminal Procedure Code.*

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Held : (i) That an appeal lies in a case in which the Police Magistrate discharges the accused, on an erroneous view of the law that the charge cannot be proceeded with, without the sanction of the Attorney-General.

(ii) That, for a charge under section 190 of the Penal Code the previous sanction of the Attorney-General is not necessary in a case where the offence has been committed in the course of an investigation directed by law preliminary to a proceeding in any court.

(iii) That the word " Court " in section 147 (1) (*b*) of the Criminal Procedure Code should be given the meaning it has in the Courts Ordinance No. 1 of 1889.

J. R. Jayawardena for complainant-appellant.

C. E. S. Perera with *Dodwell Gunawardena* for accused-respondents.

SOERTSZ, J.

An interesting point arises for determination on this appeal. Respondents' counsel takes the preliminary objection that the appellant has no right of appeal inasmuch as the order with which he says he is dissatisfied, is not a judgment or final order in terms of section 338 (1) of the Criminal Procedure Code.

The order from which this appeal is taken is an order made by the Police Magistrate of Colombo discharging the two accused on the ground that he is debarred by section 147 (1) (*b*) of the Criminal Procedure Code from taking cognizance of the offence alleged by the complainant against the accused under section 190 of the Penal Code, because the complainant has not obtained the previous sanction of the Attorney-General. If this order is right, the respondents' objection is entitled to prevail for, in that event, it cannot be said that it is a final order. It is not an order disposing of the matter brought to the notice of the court, but an order postponing consideration of it till a condition has been satisfied. If, however, the order was wrongly made, that is to say, if the sanction of the Attorney-General is not necessary, then the preliminary objection fails and the appellant is entitled to be relieved from the order.

The question, then, is whether in this case the previous sanction of the Attorney-General is necessary to entitle the complainant to ask the court to take cognizance of his complaint. Section 147 (1) (*b*) of the Criminal Procedure Code enacts that " no court shall take cognizance of any offence punishable under section 190.....of the Penal Code *when such offence is committed in or in relation to any proceeding in any court except with the previous sanction of the Attorney-General.* The words I have underlined make it clear that it is not in respect of every offence against section 190 of the Penal Code that the previous sanction of the Attorney General is required but in respect only of such offences as are committed in any court, or in relation to any proceeding pending in any court. Section 190 of the Penal Code falls into two parts. The first part deals with (1) the giving of false evidence *in any stage of* a judicial proceeding ; (2) the fabricating of false evidence for the purpose of being used *in any stage of a judicial proceeding.* The second part deals with (3) the giving of false evidence but

not in any stage of a judicial proceeding ; (4) The fabricating of false evidence for the purpose of being used *otherwise than* in any stage of a judicial proceeding.

The three 'explanations' appended to section 190 of the Penal Code extend the meaning of the words 'judicial proceeding' and bring within their scope : 1—a proceeding in a court of justice ; 2—a trial before a Court Martial ; 3—a trial before a Military Court of Requests ; 4—the investigation *directed by law* preliminary to a proceeding before a court of justice ; 5—an investigation *directed by a Court of Justice* according to law. The giving of false evidence before any of these tribunals and the fabrication of false evidence for the purpose of being used in any stage of a proceeding before these tribunals are visited with heavier punishment than is meted out in respect of the giving of false evidence elsewhere, or the fabricating of false evidence to be used in any proceeding elsewhere. But when it comes to the matter of the previous sanction of the Attorney-General, the position is different. Section 147 of the Criminal Procedure Code departs from the phraseology of section 190 of the Penal Code which had been employed to differentiate between the offences committed in or in relation to a *judicial proceeding*, and other offences and uses the words *in or in relation to any proceeding in any Court* for the purpose of stating the occasion on which the sanction of the Attorney-General is required.

It expressly states that it is required not in the cases of offences committed in any judicial proceeding or in relation to any judicial proceeding, but in the cases of offences committed in or in relation to any proceeding in any Court. The meaning of the word Court in section 147 has not been extended by explanation or otherwise in the way in which the words 'Judicial proceeding' have been extended in section 190. The Magistrate has overlooked this fact. He says, "a wider meaning has been given to the word 'Court' in the footnote by explanation 2 to section 190". That is not so. A wider meaning than the words usually bear has been given to 'Judicial proceeding.'

The word 'Court,' therefore, must be given the meaning it has in the Courts Ordinance No. 1 of 1889.

It follows, therefore, that the previous sanction of the Attorney-General is not necessary in the case of an offence committed in the course of or for the purpose of an investigation directed by law *preliminary* to a proceeding in any Court for such an offence is not committed in any Court or in relation to any proceeding in any Court, although it is committed in a stage of a judicial proceeding so far as section 190 of the Penal Code is concerned.

I set aside the order of the Police Magistrate and send the case back for inquiry.

Set aside and sent back.

Present: HEARNE, J. & FERNANDO, A.J.

MURUGAPPA CHETTIAR & Another vs. RAMANATHAN CHETTIAR

S. C. No. 162—*D. C. Colombo No.* 3131
Argued on 27th July, 1937.
Decided on 30th July, 1937.

Business Names Ordinance No. 6 *of* 1918—*Sections* 4 *and* 9——*Scope of the expression "default" in section* 9.

The plaintiffs Murugappa Chettiar, son of Raman Chettiar, and Murugappa Chettiar, son of Adaikalam Chettiar, sued the defendant for the recovery of a sum of Rs. 11,134/63. The plaintiffs, described themselves in the plaint as "Murugappa Chettiar son of Raman Chettiar, and Murugappa Chettiar, son of Adaikalam Chettiar, carrying on business under the name firm and style of Moona Roona Rawenna Mana." In the register of business names the plaintiffs had the additional words " Kana Yayna Ana " before their respective names. This difference in the names of the plaintiffs was made the basis of an objection to the action and it was contended that the plaintiffs should be treated as defaulters under section 9 of the Ordinance.

A further objection was taken on the ground that the plaintiff had in the particulars furnished under section 4 of the Ordinance given erroneous information in stating that their residence was " Pudukotah State, India." This objection was based solely on the testimony of a witness who in cross-examination stated that the 1st plaintiff had never lived in Pudukotah.

Held : (i) That the failure of the plaintiff to set-out their names in the plaint as fully as they were set-out in the register of business names was no ground for treating the action as if the plaintiffs had committed a " default " within the meaning of section 9 of the Registration of Business Names Ordinance No. 6 of 1918.

(ii) That it is difficult to say that an erroneous statement in regard to the usual residence of a partner can be regarded as a " default in furnishing a statement of particulars " under section 9 of the Ordinance.

(iii) That where the court is asked to give effect to the terms of section 9 of the Ordinance on the ground that there is an error in the register in regard to the plaintiff's place of residence, the mere statement of witness made in cross-examination tending to show that the description in the register is wrong, is not sufficient. It must appear that the witness was not misinformed and that he realised the implication of the matter.

Referred to:—(1) Karuppen Chetty vs. Harrisons & Crosfield, Ltd., 24 N. L. R. 317.

(2) O'Connor & Ould vs. Ralston (1920) 3 K. B. 451.

C. Nagalingam for defendant-appellant.
H. V. Perera, K.C., with *Aiyar* for plaintiffs-respondents.

HEARNE, J.

The plaintiffs who described themselves as Murugappa Chettiar, son of Raman Chettiar, and Murugappa Chettiar, son of Adaikalam Chettiar, " carrying on business under the name firm and style of Moona Roona Rawenna Mana " sued the defendant in order to recover a sum of

Rs. 11,134/63 and, in my opinion, the trial Judge was justified, on the evidence, in holding that this sum was due and that the claim was not prescribed.

It was pleaded by the defendant that the plaintiffs could not maintain their suit as " their business name had not been duly registered under the Business Names Registration Ordinance " and that the suit was not properly constituted " in that all the partners of the firm of 'M.R.R.M.' had not been joined as plaintiffs. " Issues arising out of these pleadings were framed and the judge decided them in favour of the plaintiffs.

Having regard to the facts which emerged in evidence it would appear that the defendant misconceived the issues. The name of the firm had been duly registered as " Moona Roona Rawenna Mana " and the only partners of the firm, as registered, are Murugappa Chettiar, son of Raman Chettiar, and one Murugappa Chettiar, son of Adaikalam Chettiar, the same name and the same father's name as appear in the caption of the plaint except that Murugappa is preceded by the words, whatever they signify, " Kana Yayna Ana. "

Now, although the defendant's objections proceeded, as I have indicated, upon a misconception, it has been decided by this court that " if it comes to the notice of the court that the provisions of the Ordinance (the Registration of Business Names Ordinance) had not been complied with, the court should, *ex mero motu*, give effect to the terms of section 9 of the Ordinance. " The trial Judge who was clearly aware of this decision considered the matter and held that there " was no proof that the person registered as 'Kana Yayna Ana Murugappa Chetty' and the person referred to in the plaint as 'Murugappa Chettiar' are not one and the same person. " No question was put to the 1st plaintiff when he was in the witness box. It is true that the Judge was acting on his own knowledge of the customs of Chetties rather than on the evidence when he says " it might be noted that Chetties, even as individuals, do take initials of their illustrious forbears, " but it is clear that the most that can be said to have come to the notice of the court is not that Murugappa Chettiar did not give his full name for purposes of registration, but that for the purpose of suing he used the name by which he was ordinarily known in business. In my opinion the judge was right in not giving effect to the provisions of section 9 of the Ordinance.

Another objection under the same Ordinance was taken in, what appears to me, rather a disingenuous way. For the purpose of registration under section 4 the plaintiffs had in 1926 given their usual residence as " Pudukotah State, India. " When a witness of the plaintiffs was in the box the answer was elicited from him in cross-examination that the 1st plaintiff was from Ramnad and had never lived at Pudukotah. On the basis of this answer the judge was invited to hold that the erroneous information given to the Registrar of Business Names amounted to a " default " which under section 9 disables the plaintiffs from recovering in the suit they had brought. In my opinion, if the plaintiffs desired that the court should

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give effect to the terms of section 9 of the Ordinance, the 1st plaintiff who gave evidence should have been given the opportunity of explaining the discrepancy between the registered "residence" on the one hand and the evidence of one of his witnesses on the other. Merely to rely upon the answer of a witness who may have been misinformed and who may not have realised the implication of the matter, especially as no issue had been framed, falls short, in my opinion, of the necessary minimum of evidence or of "notice" on which a court, following *Karuppen Chetty v. Harrisons & Crosfield, Ltd.* 24 N.L.R. 317, would act.

Apart, however, from the fact which, in my opinion, determine this appeal, I would find it difficult to hold that where a firm delivers a statement in writing in the prescribed form containing the particulars required by section 4 of the Ordinance, and where those particulars set out faithfully the name of the business, its general nature, the names of the partners and the place of business, an erroneous statement in regard to the usual residence of a partner can be regarded as a "default in furnishing a statement of particulars" under section 9. Clearly the person who verifies the particulars by signing them is liable to the penalties prescribed in section 10 if the particular is "material" and false to the knowledge of the person who signs the particulars, but there has not been, in my opinion, default in the furnishing of a statement of particulars. It is possible to conceive of a statement of particulars being so erroneous and misleading as to amount to a "default" but a mis-statement in regard to the one particular of "usual residence" does not fall within the category of default contemplated by section 9.

In *O'Connor and Ould v. Ralston* (1920) 3 K.B. 451, Lord Darling considered the question of the description of themselves by a firm of book-makers as "accountants." He said that while "turf accounts" might pass as a synonym for "book-makers," the expression "accountant" was a misdescription.

"As to whether," he went on to say, "the plaintiffs by describing themselves as accountants made 'default' in furnishing a statement of particulars within the meaning of section 8, sub-section 1 of the Registration of Business Names Act, 1916, I incline to think that the word 'default' in the sub-section means not furnishing any particulars at all, and does not mean furnishing insufficient particulars. But I do not decide the point, because I base my decision in the present case upon another ground."

I would dismiss the appeal with costs.

FERNANDO, A.J.

I agree.

Appeal dismissed.

Present: MAARTENSZ, J. & MOSELEY, J.

THOTCHINA vs. DANIEL

S. C. No. 188 (*Inty.*)—*D. C. Galle No.* 34347.
Argued on 18th May, 1937.
Decided on 2nd July, 1937.

Registration of Documents Ordinance No. 23 of 1927—Section 12 (1)—Partition action—Registration of lis pendens in wrong folio—Issue of summons—Rectification of error by registration in proper folio—Issue of fresh summons thereafter—Effect of non-compliance with the terms of section 12 (1).

This is a partition action. It was registered as a *lis pendens*, but in the wrong folio. Summons was issued thereafter. When the plaintiff discovered the mistake he registered the action once more and in the proper folio this time. He then moved for fresh summons. The 1st defendant objected to the motion for fresh summons. He contended that the action should be dismissed. His objection was overruled, and he appealed against the District Judge's order.

Held : (i) That the objection is unsustainable.

(ii) That there is no provision in law which declares that a partition action should be dismissed if the provisions of section 12 (1) of the Registration of Documents Ordinance are not complied with.

(iii) That where the *lis pendens* in a partition action is by mistake registered in the wrong folio and summons have been issued the plaintiff can, on discovering the error, rectify it by registering in the proper folio and obtaining fresh summons.

H. V. Perera, K.C., with *Colvin R. de Silva* for 1st defendant-appellant.
No appearance for plaintiff-respondent.

MAARTENSZ, J.

The question for decision in this appeal is whether a partition action should be dismissed because the precept or order for the service of summons was issued before the action was duly registered as a *lis pendens* as required by section 12 (1) of the Registration of Documents Ordinance No. 23 of 1927. This sub-section enacts that "a precept or order for the service of summons in a partition action shall not be issued unless and until the action has been duly registered as a *lis pendens*." By section 15 of the Ordinance an instrument is not duly registered unless it is registered in the book allotted to the division in which the land affected by the instrument is situated and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered.

It appears from the proceedings in this action that the action was registered as a *lis pendens* but not in the proper folio.

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When the plaintiff discovered the mistake he registered the action in the proper folio and moved for the issue of fresh summons on the defendants. The 1st defendant objected to the motion—he contended that the action should be dismissed. His objection was overruled and this appeal is from that order.

The objection is, in my opinion, unsustainable. There is no provision in the Ordinance which declares that the action should be dismissed if the provisions of section 12 (1) are not complied with. In the absence of such provision I see no reason why the plaintiff should not be allowed to rectify his error and proceed with the action.

We have not in this case to deal with a question of competing actions which might give rise to other considerations.

I would dismiss the appeal with costs.

MOSELEY, J.

I agree.

MAARTENSZ, J.

Since the judgment was delivered in this case it has been brought to my notice that there was no appearance for respondents. The appeal is therefore dismissed without costs.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: SOERTSZ, J. & HEARNE, J.

MEEDENIYA vs. VANDER POORTEN

S. C. No. 64—D. C. Colombo No. 1513

Argued on 9th July, 1937.

Decided on 30th July, 1937.

Mortgage action against executor of last will of deceased mortgagor—Sale of mortgaged property in execution—Balance of mortgage debt remaining unsatisfied—Death of executor—Ex parte order appointing a person administrator of the deceased mortgagor's estate for the purpose of realizing the balance due on the mortgage—Motion for writ—Can District Court set aside order of substitution.

The plaintiff sued the executrix of the last will of one J. H. Meedeniya for the recovery of a sum of money due on a mortgage bond executed by the testator. Judgment was entered for the plaintiff and he took out execution and sold the mortgaged property. While there was still a balance due on the bond the executrix died. The plaintiff then noticed the defendant to show cause why he should not be substituted as administrator of the estate of the deceased mortgagor. He showed no cause, although notice was served on him, and he was duly substituted. Notice was next issued on him to shew cause why writ should not issue for the recovery of the balance due. Then the defendant appeared and moved that the order substituting him be vacated and that the decree entered against the original defendant—the executrix of the deceased mortgagor—be set aside.

Held : (i) That the order substituting the defendant as administrator in place of the deceased executrix of the mortgagor operated as *res judicata* and the District Court had no power to set it aside.

(ii) That an application under section 87 of the Civil Procedure Code to set aside a decree absolute must be made within reasonable time after the decree, and must show that there were "reasonable grounds for the default upon which the decree was passed."

N. Nadarajah with *J. R. Jayawardena* for substituted defendant-appellant.

H. V. Perera, K.C., with *S. N. B. Wijekoon* for plaintiff-respondent.

SOERTSZ, J.

In my opinion, this appeal fails and must be dismissed with costs. The action was a hypothecary action in which substituted service of summons was effected on the defendant on the 9th of January, 1935. There was an *ex parte* hearing, the defendant being in default, and decree absolute was entered on the 5th of February, 1935, under section 85 of the Civil Procedure Code as amended by section 14 (1) of Ordinance No. 21 of 1927. A commission for the sale of the mortgaged property was issued by the Court to an auctioneer and the sale took place on the 15th of June, 1935. The plaintiff was the purchaser. The defendant died in May, 1935, In January, 1936, the plaintiff moved for a notice on the present appellant to show cause why he should not be substituted as administrator of the estate of the original mortgagor in place of the defendant who had been sued in her capacity of executrix of the mortgagor's last will. As pointed out by the trial judge that "application was supported by a petition and an affidavit which recited the institution of the action and the decree and the sale of the property and the death of the original defendant, and proceeded to state that it was necessary to substitute Mr. J. H. Meedeniya (the appellant) in order that the balance amount due on the decree might be recovered by the plaintiff." The appellant showed no cause and was duly substituted in place of the original defendant. Thereafter, in September, 1936, the plaintiff moved for a notice on the appellant to show cause why writ should not go to recover the balance. Then, for the first time, the appellant came forward and moved that the order substituting him be vacated and that the decree absolute entered against the original defendant be set aside.

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The appellant does not, in his affidavit, state that the ground or grounds upon which he asks that the order substituting him be vacated. The journal entry of the 1st June, 1936, shows that he was substituted on his not showing cause against the application after personal service of the notice of this application had been affected on him. That order operates as *res judicata*, and binds the appellant. The District Court had no power to set aside its order substituting him and the application was, therefore, an impossible one. In regard to the other application made by the appellant, that the decree absolute entered against the original defendant be set aside, it is based on the allegation in the appellant's affidavit that the substituted service effected on her was not such as would have afforded her any knowledge of the action "as she had vacated the Ruanwella Walauwa over four years ago." The trial Judge comments on this as follows :—"It is not clear that the original defendant was not aware of these proceedings .....There is nothing to show that she had no notice of the action and there is no allegation in the affidavit filed by him to that effect." I agree. It is most unlikely that the defendant was not aware of the action. But quite apart from that, an application to have a decree set aside must in accordance with section 87 of the Civil Procedure Code as amended by section 14 (1) (*b*) of Ordinance No. 21 of 1927 be made within reasonable time after the decree, and must show that there were "reasonable grounds for the default upon which the decree absolute was passed." In the circumstances of this case, as disclosed by the appellant's own affidavit, it is impossible to hold that his application is made within a reasonable time or that it discloses reasonable grounds for the default. The appellant was admittedly aware of the sale under the decree. He warned intending purchasers against the validity of the sale, and when he was asked to show cause why he should not be substituted with a view to further execution of the decree, he was silent. He cannot be allowed to speak now to ask that the decree be set aside and the sale which took place so many months ago and other possible dealings with the mortgage bonds be upset.

In my view, the order of the District Judge was right and the appeal fails.

HEARNE, J.

I agree.

Appeal dismissed.

Present: ABRAHAMS, C. J.

BANIEL SILVA vs LOW COUNTRY PRODUCTS ASSOCIATION

S. C. No. 55—C. R. Colombo No. 20041

Argued on 30th July, 1937.

Decided on 5th August, 1937.

Action against an unincorporated association—Action first brought on the footing that the association was a corporate body—Action under section 16 *of the Civil Procedure Code taken later at the instance of Court—Claim within time at date of filing of plaint—Claim prescribed at the time action under section* 16 *of the Civil Procedure Code was taken—Is the action maintainable.*

The plaintiff who is carrying on business under the name and style of " Luxman Press " brought this action to recover a sum of Rs. 123/38 from an unincorporated association known as the Low Country Products Association. The plaint was filed on March 13, 1936, in the belief that the association was a corporate body and it described the association as a duly incorporated company having its registered office at No. 54, Keyser Street, Colombo.

The summons was served by delivery to one Wace de Niese, who was the Secretary of the Association at the time. On April 7, 1936, after service of summons, but before answer was filed, the Court made the following order.

" The Low Country Products Association is not a legal person. It consists of several members. The plaintiff should make application under section 16 Civil Procedure Code to have one or more person or persons appointed to represent the Association."

On May 20, 1936, the plaintiff moved to serve summons on the Secretary of the Association on behalf of the several members of the Association. On July 2, 1936, the plaintiff moved for leave to give notice of the action by advertisement in the Daily English paper known as the Ceylon Independent. On July 10, 1936, a notice was published to the effect that: "In the case of *Baniel Silva vs. Wace de Niese*, the proposed representative of the Low Country Products Association, Baniel Silva had applied to the Court of Requests to appoint the above named Wace de Niese as representative of the said Low Country Products Association, in an action for the recovery of Rs. 123/38, and that the application would be granted unless sufficient cause is shewn to the contrary on or before the 20th day of July, 1936."

On July 20, 1936, the case was called, and, as no cause was shown in the manner required by the notice, summons was ordered on Wace de Niese the Secretary of the Association. On September 9, 1936, service of summons was reported and the case was tried on December 1, 1936. The defendant filed answer on September 23, 1936. He took up the following defence viz:

(a) That he was not aware that the amount claimed in the plaint was due.

(b) That the action was not properly constituted inasmuch as at the filing of the action the plaintiff has failed to comply with the provisions of Section 16 of the Civil Procedure Code.

(c) That the plaintiff's claim was prescribed.

The following issues were tried:

1. Is the action properly constituted ?
2. If not, can the plaintiff maintain this action ?
3. Is the plaintiff's claim, if any, prescribed as when Mr. Wace de Niese was appointed on July 20?

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It was admitted that if the date of the action was regarded as July 20, 1936, the claim would be prescribed.

The Commissioner held that July 20, 1936, must be regarded as the date of the action and that the action was therefore prescribed. He accordingly dismissed the action.

Held: (i) That the action can be regarded as having been instituted on May 20, 1936

(ii) That an action can be said to be properly instituted against one member of an incorporated body in a representative capacity if the plaint is so drawn and filed and that it only remains to get the permission of the court to sue him, that is to say, to proceed with the action against him.

EDITORIAL NOTE.

The converse case of the right plaintiff coming into a case at a stage subsequent to the filing of plaint is discussed in the case of *Perera and another vs. Toussaint*, 4 C.L.W. p. 99.

Colvin R. de Silva for plaintiff-appellant.

No appearance for defendant-respondent.

ABRAHAMS, C. J.

This is an appeal against the judgment of the Commissioner of Requests who dismissed the action of the plaintiff on the ground that it was prescribed. The respondent is not represented.

These are the facts. The plaintiff appellant who was carrying on business under the name of "Luxman Press" supplied goods to the Low Country Products Association which is a body composed of a number of persons. It is unincorporated. Under the impression that the Association was a body corporate the plaintiff appellant filed a plaint in which he described the defendant as a duly incorporated company having its registered office at No. 54 Keyzer Street, Colombo. The plaint was filed on the 13th of March, 1936. On the 7th of April, the Commissioner of Requests noted in the journal that summons was served by delivery to Mr. Wace de Niese, who is presumably the Secretary of the Association, and the note goes on, "The Low Country Products Association is not a legal person. It consists of several members. The plaintiff should make application under section 16, C. P. C. to have one or more person or persons appointed to represent the Association." The facts are correctly stated and the direction of the Judge was a proper one in view of the section above quoted, which reads as follows:—

> "16. 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 case 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 20th of May, 1936, the journal states that the plaintiff's proctor moved to serve summons on the secretary of the Association as and on behalf of the several members of the said Association. He also moved that he be allowed to give notice of this action to all such parties by advertising in the Ceylon Independent. The Commissioner of Requests

directed that the usual notice should be inserted in the Ceylon Independent, returnable on the 8th June. On the 2nd of July the journal entry states that the Proctor for the plaintiff moved to issue the usual notice in the Ceylon Independent and this was allowed for the 20th of July. It is not stated in the journal that the directions given on the 20th of May were complied with, and on the 8th of June there is an entry, " Call case. No appearance. No order." This is something which I am unable to understand.

Presumably in compliance with the directions of the 2nd of July, a notice was issued on the 10th of that month to the effect that in the case of *Baniel Silva vs. Wace de Niese*, the proposed representative of the Low Country Products Association, Baniel Silva had applied to the Court of Requests to appoint the above named Wace de Niese as representative of the said Low Country Products Association, in an action for the recovery of Rs. 123/38, and that the application would be granted unless sufficient cause is shewn to the contrary on or before the 20th day of July, 1936. On the 20th of July, the case was called and summons was ordered for the 9th of September. Summons was served on Mr. Wace de Niese on the 9th of September. The case was finally tried on the 1st of December. At the trial the following were the issues :—

1. Is the action properly constituted?
2. If not, can the plaintiff maintain this action ?
3. Is the plaintiff's claim, if any, prescribed as when Mr. Wace de Niese was appointed on July 20?

The advocate for the plaintiff admitted that if the action was not considered to be filed until the 20th of July, then the claim must be prescribed.

The learned Commissioner of Requests said the plea of prescription must prevail. The action must be taken to have been brought against the Association properly constituted on July 20th, when Mr. Wace de Niese was appointed the representative of the Association and made a defendant, and that until that date the action was not properly constituted and, therefore, could not be said to have been filed against the defendant. He dismissed the action with costs. Leave to appeal was granted.

It is now argued on behalf of the appellant that this judgment was wrong because the real test is when was the action instituted, as section 16 of the Civil Procedure Code requires that notice of the institution of the action must be given, not notice of the intended institution of the action. Now, there is ample authority that an action must be deemed to have been instituted on the date that the plaint is handed in. See, for instance, *Mango Nona vs. Menis Appu* (31 N.L.R. 218). On the 20th of May, as I have said, it was moved on behalf of the plaintiff that summons should be served on the Secretary of the Association, and the usual notice to interested parties was directed to be issued by the court. Now, at that point the proper course for the plaintiff would have been to get the plaint amended, but it must not

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be pressed against him that he did not comply with this technicality. In the Court of Requests one must consider the intention of the parties, and it is obvious that at that stage the plaintiff's proctor was intending to comply with section 16 and I think he must be taken to have done so, and the plaintiff ought to be regarded as being in the same position as he would have been if the plaint had been amended and if the action had been styled as being instituted against Mr. Wace de Niese as the proposed representative of the Low Country Products Association.

I am of the opinion that an action can be said to be properly instituted against one member of an incorporated body in a representative capacity if the plaint is so drawn and filed and that it only remains to get the permission of the court to sue him, that is to say, to proceed with the action against him. If that view is not correct, unfortunate consequences might follow for which a plaintiff could in no way be held responsible. There is no statutory obligation on the Court to issue notice of the institution of the action within any given period. There is certainly no statutory obligation on the newspapers to which the notice is sent to publish it within any given period, and, finally, there is no statutory obligation on the part of the court to order that cause should be shown within any given period against the application to be allowed to sue. It is manifest that through delay in the stages contemplated above, time might run fatally against a plaintiff. No authority in our courts has been cited to me in aid of the proposition that an action has been instituted against a person in a representative capacity within the meaning of section 16 of the Civil Procedure Code when the plaint is filed against him and not when permission is given to sue him. I have been unable to discover for myself any such local authority. However, the case of *Fernandez vs. Rorrigues*, (21 Bom. 784), decided upon section 30 of the Indian Civil Procedure Code of 1882, the wording of which is the same as section 16 of the Ceylon Civil Procedure Code, is direct in point. In that case a Full Bench of the Bombay High Court decided that the permission of the court required by that section may be given subsequently to filing the suit.

It follows then that the action in this case was instituted at the latest on the 20th of May, 1936. Counsel for the appellant draws my attention to the case of *Velupillai vs. Chairman, Urban District Council, Jaffna*, (16 Law Recorder 75) and submits that on the strength of that case the action was really properly instituted on the 13th of March, the date when the plaint was filed, because although the defendant was said to be the Low Country Products Association, an incorporated company, it was the intention of the plaintiff to sue the Association whether it was a legal person or a body of individuals, and the constructive amendment of the plaint on the 20th of May related back to the date of the original plaint, see *Lucihamy vs. Hamid* 26 N.L.R. 41.

In view of what I have said above, that is to say, that the action could be taken to have been instituted on the 20th of May which is sufficient for

the plaintiff's purpose, it is not necessary for me to decide whether this submission is found on a correct inference or on a mere conjecture.

This appeal is allowed with costs and the case is remitted to the Court of Requests to be disposed of on its merits.

Appeal allowed.

Present : ABRAHAMS, C. J.

SUB-INSPECTOR VANDENDRIESAN vs HOWWA UMMA

S. C. No. 161—*P. C. Kandy No.* 51644
Argued on 29th & 30th July, 1937.
Decided on 4th August, 1937.

Criminal trial—Taking of evidence after close of the trial—When such evidence should not be taken—Criminal Procedure Code section 429*—Identification of accused—Principles which should be kept in view in testing the evidence given as to the identity of the accused.*

This is a prosecution under the Poisons and Danger Drugs Ordinance for illicit possession of opium. The prosecution was the sequel to a raid made by the Police on the boutique of one Idroos who was an accused at the early stages of this case. He was subsequently discharged. The other accused, a woman, denied she was present and her identity was in issue.

After the close of the case for the defence, the Magistrate recorded that he was visiting the scene of the offence the next day and directed three of the Police officers, who had given evidence, to be present. The accused or his proctor was not asked to be present, so far as the record goes. At the scene the Magistrate directed the Police officers to demonstrate their movements at the time of the raid and he actually timed some of the movements. He also made certain observations as to the suitability of the light at the hour of the day at which the raid was made, and the possibility of identifying the accused from where the witnesses said they identified her.

Held : (i) That evidence for the prosecution must not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or of resolving some doubt in favour of the prosecution.

(ii) That an identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right but must also be given every reasonable chance of being wrong.

(iii) That it is sufficient if an accused, without absolutely convincing the Magistrate of his innocence, does enough to produce a reasonable doubt of his guilt.

Gratiaen for accused-appellant.
M. F. S. Pulle, Crown Counsel, for the Crown.

ABRAHAMS, C. J.

The appellant was convicted by the Police Magistrate, Kandy, on the 20th of November last year for the offence of having in her possession on

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the 18th of May, 1936, 1286 grains of opium without having obtained a license, in breach of 74 (5) (a) of Ordinance No. 17 of 1929 as amended by Ordinance No. 43 of 1935. She was fined Rs. 500/– or in default six weeks simple imprisonment. The Magistrate believed that he was inflicting the maximum fine, which is in fact Rs. 1,000/–. This was a first offence. The Magistrate ordered half of the fine to be paid to the Police reward fund.

It was alleged by the prosecution that on the 18th of May last year, Sub-Inspector Vandendriesan, Police Sergeant Ratnam, Police Sergeant Marso, Police Constables Silva and Mohideen, went into a house in King Street, Kandy, owned by one Idroos. Presumably in anticipation of discovering illicitly possessed drugs in the premises, some of the Police entered from the front and others went round to the back. As entry was effected, a woman was seen to run through the house towards the back and to throw something she had in her hand on to the roof. This was found to be a packet containing 1286 grains of opium. The woman was detained and the police officers proceeded to search the house with no further result. Idroos, who was in the house, was then arrested and taken to the Police Station, but the Sub-Inspector left the woman in the house as he said she was pregnant and was in too delicate health to be further troubled. She gave her name as Maideen Beebee, and the Police accepted Idroos as surety for her appearance. Idroos was brought up a few days later, but the police were unable to find any woman called Maideen Beebee until the 8th of September, when a woman of that name appeared and said that she was not the woman who was found in the house, and this denial the police accepted. No further action was recorded until the 20th of November, 1936, when Police Sergeant Ratnam went to Gampola and arrested the appellant who is the wife of one Abdul Hamid and the sister-in-law of Idroos. The Police Sergeant said that when he entered her house she bolted and took shelter in a house some distance away, and was subsequently surrendered by the residents in the house. She and Idroos were brought up for trial on the 20th of January, 1937, that is to say seven and a half months after the alleged offence. It was manifest at an early stage of the evidence of the first witness that there was no case against Idroos, and it is a little difficult to see why he was ever put on his trial. The Magistrate then and there discharged him. Sub-Inspector Vandendriesan purported to identify the appellant as the woman who was in the house. Police Sergeant Ratnam said that he identified her when he arrested her at Gampola, and P.C. Mohideen seems to have identified her by necessary inference from his evidence. The evidence of these three witnesses was the only evidence brought up against the appellant. She gave evidence on her own behalf and completely denied that she was the woman concerned when the house was raided. She admitted her relationship to Idroos but said that she never went to his house without being accompanied by her husband. She said that she had only one child who was seven years old. She also denied that she ran away when Police Sergeant Ratnam entered her house in Gampola. Her husband also gave evidence

and supported his wife's statement that she never left Gampola unaccompanied by him.

During the evidence of the Sub-Inspector the Proctor for the appellant cross-examined him with a view to showing that in a previous drug case he had been disbelieved by the court. The questions were disallowed by the learned Police Magistrate, who gives no reason for this action which was certainly unjustified, as the questions were obviously intended to go to the credibility of a witness, and the credibility of a Police officer has no greater sanctity than that of any other witness. The only limitations on this form of cross-examination are those imposed by sections 149, 151, 152 and 153 of the Evidence Ordinance. It is not necessary, in view of what I am about to say in regard to the other merits of the case, to discuss what bearing the dis-allowance of these questions might have had upon the learned Police Magistrate's decision.

At the close of the case for the defence the Magistrate recorded that he was visiting the scene of the offence the next day, and directed the Sub-Inspector, Police Sergeant Ratnam, and Constable Mohideen, to be present. There is nothing on the record to indicate that the appellant or his proctor were invited to be on the spot to witness the further proceedings that were to be carried out. The learned Magistrate directed the Police officers to reproduce certain of their activities in the raid and actually timed the movements of Police Constable Mohideen, recording his opinion that they seemed to bear out what he said he had done on the day of the raid. This seems to me to have been a great irregularity. It has been said more than once in this court that evidence for the prosecution should not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or resolving some doubt in favour of the prosecution, but here again I mention this fact rather for the benefit of Magistrates in general than to calculate what bearing it had on the result of the trial.

It is obvious that the case against the appellant must stand or fall on the question of identification, and on this the learned Police Magistrate says very little. He says, " I accept the evidence of the 1st accused's identity. The back compound would have been quite bright at 5-45 p.m. and as 1st accused was uncovered, identification would have been easy. It does not tell against 1st accused that she is the sister-in-law of 2nd accused Idroos." He says later that the 1st accused was caught red handed in the act of throwing away these slabs of opium, and that " I see nothing improbable in her presence in this house and when these witnesses identify her on oath I believe them." I am compelled to say that the Magistrate seems to have proceeded on the ground that the features of the woman in the house had been easily discernible on the night in question, and comes to the conclusion that because the witnesses identified on oath a woman whose features had been easily discernible therefore they must be believed. But it is not only a question of credibility but it is also a question of accuracy.

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Proper identification is always difficult. It is a matter into which the court must probe with the greatest care. The learned Magistrate does not discuss the possibility of the witnesses being mistaken after so long a period as is indicated in these proceedings, although when it is a question of errors made by the police officers, in describing the topography of the house raided, he finds an excuse in view of the lapse of time and the unfamiliarity of the witnesses with the house. It is not even suggested that there was any peculiarity of feature, form, movement, or voice, that could be pointed out to the court as a means of identifying the woman after so long a time had expired. That being so, with all this uncertainty in mind, how can it be said that the woman was properly identified by Police Sergeant Ratnam who went to arrest a woman who was obviously suspected of being the woman wanted, or was properly identified by the Sub-Inspector and the Police Constable Mohideen who merely saw her in court. Irregular and improper methods of identifying accused persons have more than once been the subject of unfavourable comment by the Court of Criminal Appeal in England. In the case of *Williams* (Vol. 8, C.A.R. 84) the court quashed a conviction which depended on the identification of a man who was seen by the identifying witness in the Police Station, not having been placed among others. The court said that the mode adopted was not a proper one and the identification could not be said to have been satisfactory. In the case of *John Cartwright* (10 C.A.R. 219) the court said that the prisoner was not put among a number of other men so that a witness might be able to identify this man as the guilty man and that it would have been infinitely better had this been done.

It seems to me that this case is stronger in favour of the appellant than either of the two cases cited. As the identifying witnesses were all police officers engaged in a raid, with all credit given for fair-mindedness, they could not be said to be uninterested. I say, most emphatically, that an identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right but must also be given every reasonable chance of being wrong. This identification was all one way. The fact also that the appellant was the sister-in-law of Idroos seems to have helped the Magistrate towards a conclusion unfavourable to her, but that fact could only have any weight if the identification had been reliable. In this case any female relation of Idroos might have been charged for the same reason. On the matter of identification alone the appellant is, in my opinion, entitled to succeed but there is another defect in the trial which calls for some comment. The defence was completely ignored in the judgment. It is elementary that the defence must always be considered, and must be considered in this way, namely, that it is sufficient if the accused without absolutely convincing the Magistrate of his innocence does enough to produce a reasonable doubt of his guilt. The appellant denied her presence, denied that she was the woman wanted, said that she was 25 years of age, whereas the Sub-

Inspector said that the woman in the house was a young girl, and she said that she only had one child who was 7 years of age whereas the sub-Inspector had believed the woman in the house to be pregnant. She also said that she never left Gampola without her husband, and this fact was supported by her husband. On the mere fact that the woman was accused of an offence and that her only witness is her husband, there is no ground for disregarding their evidence completely. If an accused or the spouse of an accused is to be treated as a merely formal witness then the provisions of law for such persons to give evidence are completely stultified.

The trial was completely unsatisfactory. It may have been a difficult case to prove in any event, but that is no ground for requiring a very restricted mode of proof. It is of course thoroughly desirable that cases of illicit dealing in opium and dangerous drugs should be sternly suppressed, and that is all the stronger reason for handling these cases in such a way that the public may not have any cause for feeling that the courts are not impartial or the Police are not acting fairly. As was said by the present Lord Chief Justice of England, it is essential that not only should justice be done but it should appear to be done.

I quash the conviction, and acquit the accused.

Conviction quashed.

Present : FERNANDO, A.J.

KHAN (Inspector of Police) vs. KANAPATHY & FOUR OTHERS

S. C. Nos. 251–255—*P. C. Chavakachcheri No.* 11927.
Argued 6th and 7th July, 1937.
Decided on 14th July, 1937.

Theft—Stolen property—Penal Code sections 367 *and* 394*—Evidence Ordinance section* 114 *Illustration (a)—Presumption of theft—Carcases of stolen goats found in a car in which seven persons including the owner and driver of the car were travelling—What evidence is necessary to create the presumption of theft.*

On receipt of information that certain offenders would be travelling in car No. X 423, Inspector Khan kept watch for it at night. At 2 a.m. the wanted car came.

The accused, five in number, were found travelling in the car. The Inspector stopped it and examined it. There was in the car the carcases of four goats, and a live goat. Four of the accused were in the rear seat and they had their feet on the dead goats. The live goat was near the door on the right side. Besides the accused there were also the driver of the car and its owner. From information supplied by some of those in the car the Inspector traced the fold from which the goats had been stolen, and also the owner of the goats. None of the accused claimed the carcases or the goat found in the car. There was no evidence to show that the stolen property was in the exclusive and conscious possession of any one or more of the accused.

Held : That the accused could not be convicted of theft in the absence of evidence that any one or more of them had conscious and exclusive possession of the stolen property.

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Khan (Inspr. of Police) *vs* Kanapathy & Four others

Tiruchelvam for 2nd accused-appellant.
Thambiah for 4th accused-appellant.
Nadesan for 5th accused-appellant.
No appearance for 1st and 3rd accused.
M. F. S. Pulle, Crown Counsel, for respondent.

FERNANDO, A.J.

The learned Police Magistrate accepted the evidence of Inspector Khan that he stopped car X 423 at about 2 a.m. on the 13th September, 1936, and found in it several persons, namely, the five accused and the owner of the car, A. Sinnathamby, and the driver, V. Sithamperam Pillai. He also found inside the car, the carcases of four goats and one live goat. The Inspector appears to have questioned the owner and the driver, as well as the accused, and on information supplied by some or all of them, he traced the fold where the goats had been kept, and also the owner of the goats.

None of the accused claimed any of the goats or carcases found in the car, and in these circumstances, the Police Magistrate was justified in accepting the evidence of the owner of the goats who identified the carcases and the goat as his property.

The owner of the car and the driver were also called as witnesses, but the learned Magistrate states in his judgment that he had no doubt that the owner and the driver were accomplices in this offence, and that his finding against the accused " is entirely based on the evidence of the witnesses other than the owner and the driver. " Although he was of opinion that the evidence of these accomplices had been corroborated on material particulars, it is clear from these remarks of the learned Magistrate that he did not find these accused guilty on the evidence of the driver or the owner whether that evidence had been corroborated or not. The evidence given by the other witnesses is only to the same effect as the evidence of the Inspector, namely, that the five accused were found in the car in which the goats were also found.

There can be no doubt that the accused and the stolen property, namely, the live goat and the carcases of the dead animals, were found in the same car, but the learned Magistrate proceeded to hold that the possession of these goats by these accused was conscious and exclusive, but he does not state the reasons which led to that conclusion.

In the case of *Perera v. Marthelis Appu*, 21 N.L.R. 312, Bertram C.J. had occasion to discuss the exact effect of the presumption which arises from section 114 of the Evidence Ordinance. " It has been customary," he says, " to say, here is a man who is found in possession of recently stolen property. It is for him to say how it came into his possession. The onus is shifted upon him. If he does not satisfy the Court that he came by the stolen

property honestly, he should be convicted; but a recent case," (he proceeds) " in the Court of Criminal Appeal has put the principle on a more exact basis. That case is R. V. Ambramovitch. " The law as now laid down by Reading C.J. and the other judges in that case is as follows :—" In a case such as the present where a charge is made against a person of receiving stolen goods well knowing the same to have been stolen, when the prosecution have proved that the person charged was in possession of the goods, and that they had been recently stolen, the Jury should then be told that they may, not that they must in the absence of any explanation which may reasonably be true, convict the prisoner, but if an explanation has been given by the accused then it is for the Jury to say whether on the whole of the evidence they are satisfied that the prisoner is guilty. If the Jury think that the explanation given may reasonably be true although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury *beyond reasonable doubt* of the guilt of the prisoner. The onus of proof is never changed in these cases, it always remains on the prosecution. " I have thought it necessary to quote this extract at length because the learned Magistrate in this case appears to have been of the opinion that once it has been proved that stolen property was found in the possession of the accused, the burden then was on the accused to prove that they were innocent. The main question that arises in this case, however, is whether it is clear, on the evidence, that all these five accused or any of them was in possession of this property. In the case of *Banda v. Aramanis*, 21 N.L.R. 141, de Sampayo J. quoted a passage from Gour that " where property is found in a house in the possession of more than one inmate, none of them could be said to be in possession of it, for the purposes of this offence, unless there is evidence of exclusive conscious control against them. Beyond the fact, " he says, " of the finding of the beer in the house, there is nothing in the case to show that either of the accused put the article there, or was responsible for its being found there. He thought that the evidence might disclose a case of strong suspicion against one or the other or both of them, but I am obliged to give effect to the law on the subject and to hold that actual exclusive possession could not be attributed to either of the accused."

The principle laid down in this case appears to me to apply to the case before me, if possible with even greater force. There were seven persons in the car in which the stolen property was found. There is no evidence of any kind, if I exclude the evidence of the owner and the driver, to show that any one or more of the accused put the stolen property into the car, or was responsible for its being found there. The position becomes even worse for the prosecution when it is borne in mind that the owner of the car was himself in the car, and is not one of the accused in this case. If it can be said that any one person was in actual exclusive control of the

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car, and therefore, may be regarded as being in possession of what was found in the car, then the person responsible would appear to be the owner, but here the owner and the driver are not accused, and there is nothing whatever to indicate that the other accused are in any way in exclusive possession or control of what was in the car.

Counsel for the Crown referred me to the case of *Excise Inspector vs. Ponnathurai*, 31 N.L.R. 508, but that was a case where the accused were charged for possessing an illegal quantity of arrack in breach of section 16 of the Excise Ordinance. It was held in that case, that the accused had failed to discharge the burden imposed on them by section 50 of the Excise Ordinance. That case would fall under the case referred to by Bertram C.J. in *Perera vs Marthelis Appu*, where " for the better protection of property, artificial presumption have been created by statute." There are no provisions that apply to this case like the provisions of section 50 of the Excise Ordinance, and the only presumption applicable is the presumption that would arise from section 114 of the Evidence Ordinance, and I have already stated that the burden of proof did not shift to these accused but was always on the prosecution.

The Police Inspector in his evidence also stated that the accused made certain statements to him, and took him to a place and pointed out to him a fold in the field from which the goats were taken. Police Sergeant Nair was cross-examined on this point, and stated that all the accused pointed out the fold. It is almost impossible that in the circumstances diposed to by the witnesses each of these five accused actually pointed out the fold. One or two of them may have done so, and the others may by their silence have acquiesced in the statement made by the rest, but the evidence of the Inspector and of Police Sergeant Nair makes it difficult for me to conclude that any one of these five accused did so point out the fold, and that any inference as to their guilt can arise from the alleged pointing.

In these circumstances, I come to the conclusion that the prosecution has not discharged the onus which lay on it to prove that one or more of the five accused were in actual exclusive possession of the stolen property, and I would, therefore, set aside the conviction and acquit them.

Conviction set aside.

Present : HEARNE, J. & FERNANDO, A. J.

WICKRAMASURIYA AND OTHERS vs DE SILVA AND OTHERS

S. C. No. 53—*D. C. Colombo No.* 5165

Argued on 22nd and 23rd July, 1937.

Decided on 30th July, 1937.

Partnership—Termination of—Absence of provision in deed of partnership that it can be terminated by notice—Donation of plaintiff's shares subject to a fideicommissum and reserving his life-interest—Action for dissolution of partnership—Can summons in the action be regarded as notice of termination—Is partnership terminated by service of summons—What is a partnership terminable at will.

The plaintiffs and the defendants carried on business in partnership under the firm, name and style of J. D. S. Wickramasuriya & Co. On July 2, 1933, they had entered into an agreement of partnership. The following is a translation of this agreement (No. 11126) which was executed in the Singhalese language.

Know all men by these Presents that I, Sipkaduwe Anthony Jandoris de Silva Wickramasooriya, Muhandiram, of Poramba in Ambalangoda, in the Wellabada Pattu of the Galle District, have valued at Rs. 49,000/– of the currency of Ceylon, *subject to my life interest*, the 7/9th share belonging to me, in the name and goodwill of the business carried on for a long time at Talawakelle, Nawalapitiya and Kotagala as J. D. S. Wickramasooriya and Company as Forwarding Agents *et cetera* and belonging to me, and in the cash, goods, Motor Cars, Motor Lorries, carts and all the effects and things of the Business, save and except the 2/9th share belonging to Mr. David de Silva, Proctor, and in consideration of the natural love and affection I have unto my 7 beloved sons, Messrs. Francis Wickramasooriya, Albert Paulis Wickramasooriya, Peter Lionel Wickramasooriya, Hubert Wickramasooriya, Walter Wickramasooriya, Arnold Winnie Wickramasooriya and Gerald Wickramasooriya, all of Poramba aforesaid, and divers other good causes me hereunto moving, have hereby transferred, conveyed, assigned and delivered the said property unto my 7 sons as a gift that *cannot at any time be revoked for any cause whatsoever, subject however, to the under-mentioned agreements and covenants.*

Therefore in pursuance of the said gift, the said 7 Donees can only improve and receive the profits of the said 7/9th share belonging to me of the said J. D. S. Wickramasooriya and Company and all my right, title and interest therein and thereto, but they cannot do any act of alienation, such as selling, mortgaging, keeping as security, exchanging and gifting the same, any of the said Donees can if necessary, sell his share among his brothers only, subject to the said direction, and I have hereby authorised the children only of the said 7 Donees to own and possess the said property or to do whatever they please therewith, after the death of the said 7 Donees.

And I do hereby declare that I have not heretofore done any act that may alienate the said property or any part of the produce thereof, and I have hereby engaged and bound

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myself, my heirs, executors and administrators to warrant and defend this gift in every respect and to execute and grant all such other and further deeds and documents for further assuring the said property as may become necessary.

The above mentioned agreement and covenants are :—

1. The Business of the said Company shall be carried on in the name of J. D. S. Wickramasooriya and Company which shall not be changed into any other name.

2. As Mr. David de Silva, Proctor, the owner of the 2/9th share of the said Company, and Messrs. Francis Wickramasooriya and Peter Lionel Wickramasooriya are acting as Directors in the conduct of the said business, the said three persons can carry on as they *shall think fit, during my lifetime*, all cheques transactions shall be made in my name and with my signatures with the approval of the said David de Silva, Proctor, until another person is appointed hereafter to do that work, after my death all moneys *belonging to the Company shall be deposited in the Banks in the name of the said Company* and some person shall be authorised with the approval of the three Directors to sign cheques.

3. The posts of Managers of the places of business of the said Company shall be held by persons appointed with the approval of the said Mr. David de Silva, Proctor, and Messrs. Francis Wickramasooriya and Peter Lionel Wickramasooriya, but I shall have the right to appoint such persons during my lifetime.

4. The said Donees or the Directors named in the second paragraph hereof shall keep the capital of the said Company unreduced and the said persons *cannot borrow anything from the capital* of the said Company.

5. A sufficient sum shall be reserved *annually* out of the profits due to Mr. David de Silva, Proctor, a shareholder of the said Company, in order that they may come up to the sum of Rs. 14,000/- being the value of his 2/9 share, interest at the rate of 12 per cent shall be paid out of the income of the Company on the shares of the shareholders until the capital of all the shareholders shall be completed, and after the capital is made up, interest as aforesaid shall be paid only on the sum in excess, if any.

6. If it shall become necessary to borrow money for the improvement of the said business, it can be done with the consent of the three Directors named in the second paragraph hereof.

7. Except the Directors of the said Company, the other donees are not bound to be responsible for anything in regard to the said Company.

8. During the existence of the said Company neither the donees nor the Directors shall carry on any business carried on in the name of the said Company in any other name elsewhere and if it shall become necessary for them to carry on a new business they can do so only with the approval of the said three Directors, but a new business in the name of the said Company cannot be carried on with the consent of one or two.

9. The profits and loss of the said Company shall be looked into on or before the 31*st March* of each year and at such looking into accounts 25 per cent. of the value of motor cars and motor lorries belonging to the said Company shall be deducted on account of wear and tear.

10. A 1/4 share of the profits derived at such looking into accounts shall be reserved as bonus to the workmen of the said Company.

11. Mr. Paulis de Silva Jayasuriya and Mr. H. P. Sumanadasa, who are now working as Managers of the said Company shall be allowed to do the work of the said Company as long as *I consent*, thereafter the Directors shall decide that they shall work conjointly. As long as the said Mr. Paulis de Silva Jayasuriya and Mr. H. P. Sumanadasa are doing the work of the said Company, a 11/25 share of the bonus mentioned in the 10th paragraph hereof shall be paid to the said Mr. Paulis de Silva Jayasuriya, a 9/25th share to the said Mr. H. P. Sumanadasa and the balance 5/25 share shall be distributed among the workmen of the said Company with the approval of the three Directors as the said Messrs. Jayasuriya and Sumanadasa shall please.

12. For the purpose of inspecting the business of the said Company, I, during my lifetime, on behalf of the Donees, and *Mr. David de Silva, Proctor, himself, or anyone*

appointed by him on his behalf shall proceed to the said places every other month, the person who makes the visit can obtain a sum of Rs. 25/- for each visit as travelling expenses from the income of the said Company, but more than one person cannot obtain such some in one month, if at any time Mr. Francis Wickramasooriya shall be sent on my behalf such sum can be received by him, any remarks should be entered in Singhalese by the visitors in the log book kept at the various places, after my death the said three Directors shall in turn have the right to make such visits.

13. The immovable properties kept by me as security on behalf of the said Company with the " Hatton Bank Agency " and " Socony Vaccum Corporation " can, whenever I want, be released by me as I like.

14. I have reserved to myself the right to distribute among my children as I like during my lifetime the 7/9th share out of the profits of the said business, exclusive of the 2/9th share due to Mr. David de Silva, Proctor, and the right to alter or revoke this gift during my lifetime, for sufficient reasons, if any.

15. If any of the said Donees shall die unmarried or without issue, his share shall devolve on his other brother's share and share alike.

16. The shares of the said Company shall not be subjected to any debt of, or writ against the said Donees or the Directors or to any other such thing.

17. The Association of Mr. David de Silva, Proctor, is in respect of the agreement and covenants mentioned of the business, and, if it shall at any time appear to the said Mr. David de Silva, Proctor, that he cannot work in agreement and conjunction with the other shareholders, *he shall be permitted to do what he likes with the* 2/9th *share belonging to him.*

18. While doing the said business, if there be any differences of opinion or disagreement among the shareholders regarding any matter in connection with the business, all the shareholders shall abide by the award of eight outside arbitrators, of whom six shall be selected by Messrs. David de Silva, Proctor, Francis Wickramasooriya and Peter Lionel Wickramasooriya at the rate of two each, and two selected on behalf of the shareholders, the selection of the latter two arbitrators shall be made by me, as long as I live, and after my death, by my wife Andrwaas Patabendi Missie de Wass Gunawardena Lama Etani, and after her death by Mr. Hubert Wickramasooriya.

19. If any of the shareholders shall be unable to accept the award of the arbitrators, such person or persons can sell his share to any of the other shareholders as he or they like, and retire.

The said Messrs. Francis Wickramasooriya, Albert Paulis Wickramasooriya, and Peter Lionel Wickramasooriya, for ourselves and as the said Messrs. Hubert Wickramasooriya, Walter Wickramasooriya, Arnold Winnie Wickramasooriya and Gerald Wickramasooriya are minors, I, the said Andrawaas Patabendi Missie de Wass Gunawardene Lama Etani, their mother, on their behalf, by setting our signatures hereto accepted with love, reverence and thanks the foregoing gift subject to the above-mentioned directions.

In witness whereof we the said Sipakaduwe Anthony Jandoris de Silva Wickramasooriya Muhandiram, Francis Wickramasooriya, Albert Paulis Wickramasooriya, Peter Lionel Wickramasooriya and Andrwaas Patabendi Missie de Waas Gunawardene Lama Etani and I David de Silva, Proctor, in proof of having approved of the agreements in connection with the management of the said business, set our signatures hereto and to two others of the same tenor as these Presents on the 2nd day of July, 1933, at Poramba.

Subsequently, in or about 1935, certain disagreements arose between the plaintiffs and the first defendant and it became impossible to continue the partnership.

The plaintiffs then instituted this action *inter alia* to obtain a dissolution of the partnership.

They alleged *inter alia* that the conduct of the 1st defendant

(*a*) in interfering with the work of the Managers of the business and charging them with dishonesty;

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(*b*) in making unjust imputations as to the integrity and business probity of the plaintiffs;

(*c*) in threatening the constituents of the firm with legal proceedings unless they agreed to transact business with the firm according to the conditions and stipulations laid down by him;

(*d*) in representing the profit-earning capacity of the business in a manner calculated to cause disaffection and discontent among the constituents of the firm;

(*e*) in circulating defamatory statements regarding the 1st and 4th plaintiffs and in conveying false and malicious information to the authorities regarding their dealings with the funds of the firm;

had made it impossible to carry on the partnership business.

The first defendant resisted the action by (*a*) denying that he committed any act which made it impossible to continue the partnership business with him and (*b*) further alleging *inter alia* a series of acts of misconduct in the management of the business on the part of the plaintiffs and managers and other officers employed by the 1st plaintiff. Such acts of misconduct comprised fabrication of books of accounts, payment by way of loans or otherwise of partnership funds to the 1st plaintiff's relatives and friends, payment to managers of unauthorised sums of money by way of bonuses or otherwise, and misappropriation of partnership funds and property.

At the trial the following issues were tried:

2. Have plaintiffs or any of them failed to comply with the provisions of sections 3, 4 and 7 of the Business Names Registration Ordinance ?

3. If so, can plaintiffs maintain their action?

5. Has the 1st plaintiff only a life-interest in 7/9th share of the partnership and have the 2nd to 4th plaintiffs and 2nd to 5th defendants only a fiduciary interest therein ?

6. Are the gifts by the 1st plaintiff of his 7/9 share of the partnership business in favour of the 2nd to 4th plaintiffs and 2nd to 5th defendants revocable by him at any time during his life ?

7. If issues 5 or 6 is answered in the affirmative, can plaintiff maintain this action for a dissolution of the said partnership business ?

15 (*a*) Has the 1st defendant given valid notice that the partnership should be dissolved ?

15 (*b*) Even if no such notice was given, are plaintiffs entitled to a dissolution by court, in any event, as from the date of service of summons on the 1st defendant in 'this action ?

15 (*c*) If so, from what date ?

15 (*d*) Was the partnership created by deed No. 4462 of 14th Dec. 1908, and by deeds 8350 of 9th Jan. 1917, 88 of 21st May 1917, 1919 and 11125 of 2nd July 1933, a partnership at will ?

15 (*f*) Is the partnership created by deed No. 11126 of 2nd July 1933 a partnreship at will ?

The learned District Judge held in favour of the plaintiffs. The 1st defendant appealed and the main issues argued were whether this partnership was one terminable at will and, if so, whether service of summons in this action terminated the partnership.

Held : (i) That the partnership created by the instrument set out above is a partnership for an indefinite period and, therefore, terminable at will.

(ii) That summons in an action for the dissolution of a partnership can be regarded as notice of termination of the partnership.

(iii) That the termination of the partnership comes into effect on the date of service of the summons.

Per FERNANDO, A. J.

" The principle is clear. A partnership terminable by will can be terminated by notice, and notice may be given in one of several ways. The filing of

a pleading in Court stating that the partnership has been dissolved or praying that it should be dissolved is an indication of the intention of the person who files that pleading to terminate the partnership, and even if this plea that it has terminated previously fails, that pleading itself will be regarded as a notice coming into effect on that date. There were earlier decisions in which it had been held that a writ taken out by the plaintiff was a sufficient notice of termination and, in *Syers vs. Syers*, the answer was given the same effect."

Followed:—

(1) *Crawshay vs Maule* 1 Swan p. 495.
(2) *Syers vs Syers* (1876) 1 A. C. 174.

N. E. Weerasooriya with *Gratiaen* and *J. A. T. Perera* for 1st defendant-appellant.

H. V. Perera K. C. with *D. W. Fernando* for plaintiffs-respondents.

N. K. Choksy for 2nd–6th defendants-respondents.

FERNANDO, A. J.

The plaintiffs brought this action for a dissolution of the partnership existing between them and the first defendant, and constituted by the agreement P6 dated the 2nd July, 1933, and they complained that the first defendant had done certain acts which made it impossible for the plaintiffs to continue the partnership business with the first defendant, and that such conduct was in terms of section 35 D of the Partnership Act of 1890 calculated to affect the carrying on of the business, and that circumstances had arisen which rendered it just and equitable that the partnership should be dissolved. They alleged that due notice had been given to the first defendant of the fact that the said business should be dissolved. They prayed that pending the dissolution the plaintiffs be authorised to carry on the business or in the alternative that the first plaintiff be appointed receiver for the beneficial winding up of the business. The first defendant filed answer alleging that on account of certain acts done by the first plaintiff, the first plaintiff was not entitled to an order for the dissolution of the partnership, and he prayed that plaintiff's action be dismissed, for an injunction restraining the first plaintiff from carrying on the business, and that the first plaintiff be ordered to render an account to the first defendant.

When the case came on for trial, a number of issues was framed, and the learned District Judge, after framing the issues and after some discussion on certain of these issues, decided to try the issues set out by him at page 49 of the typewritten copy of the record. He held that the partnership subsisting at the time of the action was the partnership created by deed P 6. On issues 2 and 3 he held that the partnership was duly registered, and that the plaintiffs could maintain the action. On issues 5, 6, and 7 he held that the deed P 6 created a valid *fideicommissum* under which a seven-ninths share of the business passed to the donees, subject to the life-interest of the first plaintiff, and subject to certain other conditions recited in that deed. He also held on issue 15 F that the partnership created by deed P 6 was a partnership for an undefined period, and

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therefore a partnership at will. He then held on issues 15 (b) and 15 (c) that the plaintiffs were entitled to a dissolution of the partnership as from the date of the service of the summons in this action on the first defendant, that is to say, as from the 10th of June, 1936, and accordingly entered judgment for the plaintiffs declaring that the partnership shall be deemed to have been dissolved as from the 10th of June, 1936, ordering an account to be taken on that footing, and also a sale of the assets of the partnership. He also appointed the first plaintiff receiver for the purpose of winding up the business.

The first defendant appeals against this order, and Counsel for the appellant argued that the partnership created by P6 was not a partnership at will. His case was that the terms of P6 clearly showed that the partnership was to exist during the life of the 1st plaintiff, and was to continue even after the death of the 1st plaintiff as a partnership between the 1st defendant and the 2nd — 4th plaintiffs, and 2nd — 5th defendants. On this footing, he argued that the partnership must be regarded as one created for the lifetime of the 1st plaintiff, and that as such it was a partnership for a definite period. It is admitted that the law that applies is the English Law, that is to say, the Partnership Act of 1890, 53 and 54 Victoria C.39, and section 26 (1) of that Act provides that " where no fixed term has been agreed upon for the duration of the partnership, any party may determine the partnership at any time on giving notice of his intention so to do to all the other partners, and Lindley in his " Treatise on the Law of Partnership " 9th edition, at page 174, states the effect of this sub-section in these words : " in other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved." Section 32 of the Act further provides that " subject to any agreement between the parties, a partnership is dissolved if entered into for an undefined time by any partner giving notice to the other or others of his intention to dissolve the partnership." It also provides that in the case of notice as above, the partnership is dissolved from the date mentioned in the notice, or if no date is so mentioned, as from the date of the communication of the notice. It seems to me that the case of *Crawshay vs. Maule*, 1 Swan 495, is clear authority for the proposition that the partnership created by the deed P6 was a partnership for an indefinite period, and, therefore, terminable at will. " The general doctrine," said Lord Eldon in that case, " with respect to a trading partnership is that where there is no agreement for its continuance, any one of the partners may terminate it, and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine ; nor is it clear that a better rule could be suggested."

Counsel next argued that even if this partnership could be terminated at will, the District Judge was wrong in holding that the contract had terminated on the date of the service of summons. His contention was that a party could either ask for a dissolution by Court or terminate the

contract by notice. If he came to Court asking the Court to dissolve the partnership on the grounds of misconduct etc., it was not open to him to ask the Court to declare that the partnership had been terminated by the service of the summons in the action. He contended that a party's rights must be determined by the Court according to the pleadings filed by him, and that a party could not be allowed to add a fresh cause of action to the cause of action already pleaded by him in his plaint. The 1st plaintiff had prayed for a dissolution on the ground of misconduct, and he could not be allowed to amend that plaint in order to allege that the partnership had terminated by notice. Here again, I think the case is covered by authority. It was held in *Syers vs. Syers* 1876, 1 A.C. 174, that the answer filed by a defendant who submitted that there was no partnership, and that if there was a partnership, it was a partnership at will, and had been determined by a letter previously written by him, had the effect of putting an end to the partnership. "If the partnership," said Lord Cairns, "was not terminated by that letter, there is in this answer the clearest intimation that the will of the partners is against any continuance of the partnership; and whether that will is expressed by a letter or by an answer or in any other way is immaterial.....There is no technicality, no magic as to the mode of expression. There is here the clearest intimation given by the answer that if there is a partnership, the defendant wishes it no longer to continue."

The principle is clear. A partnership terminable by will can be terminated by notice, and notice may be given in one of several ways. The filing of a pleading in Court stating that the partnership had been dissolved or praying that it should be dissolved is an indication of the intention of the person who files that pleading to terminate the partnership, and even if this plea that it has terminated previously fails, that pleading itself will be regarded as a notice coming into effect on that date. There were earlier decisions in which it had been held that a writ taken out by the plaintiff was a sufficient notice of termination, and in *Syers vs. Syers*, the answer was given the same effect.

I would hold, therefore, that the learned District Judge was right in coming to the conclusion that this partnership had been terminated by the service of summons in this action on the 1st defendant. That was a clear intimation to the 1st defendant that the 1st plaintiff wished to terminate the partnership. In the circumstances it was unnecessary for the Court to proceed any further or to inquire into the ground on which the 1st plaintiff had asked for a dissolution.

It was urged for the appellant that the learned District Judge should not have appointed the 1st plaintiff receiver for the purpose of winding up the business, and that the 1st defendant had no opportunity of showing cause against that appointment. As a matter of fact, in the plaint, the plaintiffs asked that the 1st plaintiff be appointed receiver to wind up the business, and the 1st defendant in his answer prayed that the 1st plaintiff

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be restrained by injunction from carrying on the business. It was necessary, therefore, to make some order with regard to the business pending the action, and on the 29th of June, 1936, the parties agreed that the 1st plaintiff be appointed receiver and manager of the business pending the action on certain conditions set out in the order made on that date. The learned District Judge does not expressly state why he appointed the 1st plaintiff as receiver for the purpose of winding up the business, but the question whether the 1st plaintiff should continue in the office of receiver pending the action came up before the same learned Judge on the 13th of November, and he was then of opinion that the business could not be carried on with advantage both to the 1st plaintiff and to the 1st defendant by a person other than the 1st plaintiff. Perhaps, in these circumstances, he did not think any further inquiry necessary. At the same time the 1st defendant had no opportunity of showing cause against the appointment, and there is no reason why he should not have been allowed to urge any objections he wished to offer. I do not think it necessary, however, for this reason to interfere with the order made by the learned Judge inasmuch as the 1st defendant can still be given an opportunity to show cause against that order ; in other words, the desired object may be obtained by allowing the 1st defendant to apply to the District Judge for an order removing the 1st plaintiff from the office of receiver to which he has been appointed. I would, therefore, direct that the 1st defendant be allowed within three weeks of the receipt of this record in the District Court to file an application for the removal from office of the 1st plaintiff setting out the reasons, if any, on which he bases his application. That application if filed, may be dealt with by the court under section 674 of the Civil Procedure Code.

Subject to the above directions, the appeal is dismissed, and the appellant will pay to the respondents, their costs of this appeal.

The record will now go back to the District Court for the trial of any other issues that are outstanding having regard to the order made in this case.

The appeal in 16 D.C. Interlocutory is dismissed without costs.

HEARNE, J.

I agree.

Dismissed.

Present : SOERTSZ, J.

APPUHAMY & ANOTHER vs ALPERIS & OTHERS

S. C. No. 34—*C. R. Galle No.* 16524

Argued on 16th July, 1937.

Decided on 5th August, 1937.

Partition Ordinance No. 10 *of* 1863—*Final decree in partition action—Can any alteration of the decree be made by consent of parties—Does the fact that, though the order that decree be entered has been made by the judge, the actual decree has not been signed by him, make any difference—Civil Procedure Code, Section* 189.

The two plaintiffs brought this action against the defendants praying that:

(*a*) they be declared entitled to a land described as Lot F of the land called Kalugamegewatte situated at Metaramba, in the Galle District, purchased by the first plaintiff at a Fiscal's sale held on March 20, 1933, and held by them by virtue of Fiscal's transfer dated May 31, 1935;

(*b*) for damages at Rs. 10/- per annum for wrongful possession of the land by one of the defendants; and

(*c*) for costs of suit.

The land in question was sold by the Fiscal in execution of a writ against D. G. Hinniappuhamy the 5th defendant in D. C. Galle Partition Case No. 16324. Hinniappuhamy had been allotted the lot in question in the scheme of partition and final decree had been ordered accordingly.

The defendants, who are the children of the 5th defendant Hinniappuhamy, were substituted as defendants in the partition action after final decree had been ordered.

The partition action was filed in 1918. One of the defendants—the seventh—objected to the scheme of partition. On April 7, 1932, he withdrew his objection and the District Judge made order "Enter Final Decree." A final decree was drawn but while it was still unsigned by the District Judge, on March 10, 1933, the children of the 5th defendant sought to intervene with a view to having 13/240ths out of the share allotted to the 5th defendant decreed to them, and the lot assigned to the 5th defendant divided between him and them in the proportion of 15/240 and 13/240 respectively. The 5th defendant was given notice of this application and he had no objection. The application was thereupon allowed on March 20, 1933.

On the very date this application was allowed the lot assigned to the 5th defendant was sold by the Fiscal in pursuance of a seizure effected on November 26, 1932, under a decree entered against the 5th defendant in favour of the plaintiff in this case. The Fiscal's conveyance was issued on May 31st, 1935, and on November 6, 1935, the 1st plaintiff to this action transferred a one-eighth of the lot in question to the 2nd plaintiff.

The plaintiffs contended that the District Judge had no jurisdiction to alter the decree after his order made on April 7, 1932 "Enter Final Decree."

Held : (i) That the District Judge had no power to amend the decree in the partition action after April 7, 1932, except to the extent prescribed in section 189 of the Civil Procedure Code.

(ii) That the fact that the 5th defendant had no objection to the amendment made no difference.

(iii) That although the final decree was not actually entered by the District Judge on April 7, 1932, his order "Enter Final Decree" should be regarded as the act of entering up of the final judgment required by section 6 of the Partition Ordinance.

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L. A. Rajapakse with *J. R. Jayawardena* for the plaintiffs-appellants.

No appearance for defendants-respondents.

SOERTSZ, J.

One D. G. Hendrick alias Hinniappuhamy who was the 5th defendant in D. C. Galle No. 16324—a partition suit — claimed 1/10th plus 1/80th plus 1/240th *i.e.* 28/240ths of the land in this case. In making this claim he appears to have ignored the fact that he had many years before conveyed 13/240ths to one Brampy who had two years later conveyed that share to the 5th defendant's children. Preliminary decree was entered allotting the entire 28/240ths to the 5th defendant. That was done as long ago as 1921. On the 7th April, 1932, the 7th defendant who had objected to the scheme of partition withdrew his objections and the District Judge made order 'Enter Final Decree.' A final decree was accordingly drawn up, but for some reason, was not signed by the District Judge. That decree allotted lot F to the 5th defendant.

The 1st plaintiff in this case had obtained writ against the 5th defendant in the partition case and on that writ he caused lot F to be seized on the 26th of November 1932. It was sold on the 20th of March 1933 and Fiscal's conveyance was issued to the 1st plaintiff on the 31st of May 1935. On the 6th of November 1935, the 1st plaintiff transferred a one-eighth of lot F to the 2nd plaintiff. On the 10th of March, 1933, that is to say, several months after the seizure of lot F on the 1st plaintiff's writ, the children of the 5th defendant sought to intervene with a view to having 13/240ths out of the share allotted to the 5th defendant decreed to them and lot F divided between him and them in the proportion of 15/240 and 13/240 respectively. Notice of this claim was given to the 5th defendant. He, of course, had no objection to make and the District Judge allowed the application on the 20th of March 1933. The present case is the result.

The plaintiffs contended that the amendment of the decree effected on the 20th of March 1933 was without jurisdiction because, in the circumstances of this case, final decree must be taken to have been entered on the 7th of April 1932 and the District Judge has no power to amend the decree thereafter.

In my opinion this opinion is entitled to prevail. Section 6 of the Partition Ordinance enacts that on receipt of the return of the Commissioner, the court shall fix a date, with notice to the parties, for the consideration of the return and on that day or on some other day appointed by the Court, the court shall summarily hear the parties and if there is no occasion for the further reference to the Commissioner, confirm or modify the partition *and enter final judgment accordingly*. In this case, on the notice given to the parties regarding the consideration of the return made by the Commissioner, the only party who objected to it was the 7th defendant. But on the 7th April 1932, he withdrew his objection and all that remained for the court to do was to enter final judgment according to the return. The District Judge instead of doing this himself, gave direction for it to be done when he made the order 'Enter Final Decree.' Therefore, it was a duty of a minister of the Court to enter the decree as directed. In *Ibrahim vs. Beebee* 19 N.L.R. 289, Wood Renton and de Sampayo J.J. held that when in circumstances like these an order was made directing a final decree to be entered, there was in effect a final decree, although the ministerial act of drawing up that decree had not been performed. That ruling has been followed consistently and by virtue of it, I must hold that final decree was

entered in this case on the 7th of April, 1932. Thereafter, the court had no power to amend the decree except to the extent prescribed by section 189 of the Civil Procedure Code. The amendment affected in this instance is not such an amendment. Hinniappuhamy by consenting to the amendment could not confer on the District Judge a jurisdiction he did not possess. The Commissioner of Requests in concluding his judgment suggests that the defendants are entitled to the share they claim ' on another aspect of the matter,' namely that ' the 5th defendant in the partition case held 1/2 lot F in trust for his children.' I do not pretend to be able to understand this. I cannot see how a trust arose or how if it could have arisen it affected a half of lot F. All that seems to me clear is that if the 5th defendant in the partition case defrauded his children by having their shares too allotted to him, their only remedy is to sue him for damages.

I set aside the judgment of the Commissioner and enter judgment for the plaintiff as prayed for with costs in both courts.

Present : FERNANDO, A.J.

ALAGAMMAH vs SUBRAMANIAM

S. C. No. 210—*C. R. Mullattivu No.* 8566

Argued on 1st July, 1937.

Decided on 9th July, 1937.

Pleadings—Civil Procedure Code section 817—*Claim in reconvention—Order that replication should be filed before a date fixed by court—Failure to file replication—On such failure can judgment be entered for defendant on his claim in reconvention.*

Briefly the facts are as follows :—

The plaintiff instituted this action on April 24, 1936, against the defendant for the recovery of a sum of Rs. 25/– due to her by way of rent on a land called Yanukathoddam. The defendant while admitting the tenancy denied that any rent was due. His answer was dated May 26, 1936. On June 15, 1936, the defendant filed an amended answer in which he alleged:

(*a*) That the plaintiff in breach of an informal agreement under which the defendant occupied the land unlawfully terminated it to the defendant's damage which he valued at Rs. 50/–.

(*b*) That in terms of the said agreement the defendant put up buildings on the said land at a cost of Rs. 104/61.

(*c*) That the defendant was forced to leave the land by the plaintiff by duress.

(*d*) That the defendant was entitled to a *jus retentionis* till the sum of Rs. 104/61 was paid.

The plaintiff did not object to the filing of this amended answer, and the Court ordered the plaintiff to file a replication on July 25, 1936. The plaintiff failed to file the replication she had been ordered to file, though the case was called on July 25, 1936, and on several dates thereafter. On September 26, 1936, when the case was called, the plaintiff's proctor stated that he had no instructions. The Commissioner of Requests thereupon entered judgment dismissing plaintiff's action and entering judgment with costs for defendant on his claim in reconvention.

Held : (i) That the Commissioner of Requests was wrong in entering judgment for the defendant on the claim in reconvention.

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(ii) That the absence of a replication by the plaintiff cannot be construed as meaning an admission by the plaintiff of the allegation in the answer.

(iii) That judgment on a counter claim should not be entered merely on the ground that the statements made therein remain uncontradicted.

Thiagarajah for plaintiff-appellant.
S. Soorasangaran for respondent.

FERNANDO, A.J.

In this case, the defendant filed answer on the 26th of May, and the trial was fixed for the 27th of June. On the 27th of June, however, the defendant filed an amended answer, and in that amended answer, he claimed a sum of Rs. 154/61 in reconvention. The plaintiff was then ordered to file a replication on the 25th of July. The case was called on several dates thereafter for the replication of the plaintiff, but no replication was filed, and on the 26th of September 1936 plaintiff's proctor stated that he had no instructions. The Commissioner of Requests thereupon entered judgment dismissing the plaintiff's action and entering judgment for defendant on his claim in reconvention with costs. He purported to make this order under section 817 of the Civil Procedure Code.

On the 29th of September, 1936, the plaintiff filed an affidavit and moved for notice on the defendant to show cause why the judgment entered in his favour should not be vacated, and on the 28th October 1936, after hearing counsel for both sides, the Commissioner of Requests refused to interfere with his previous order. Against this order the plaintiff appeals.

It was argued by counsel for the appellant that the Commissioner of Requests had no power to enter judgment for defendant on the claim in reconvention, and he referred to the judgment of the Full Court in *Loku Hamy vs. Sirimala* 1 S.C.R. 326, where it was held that " where new matter is pleaded by way of defence and there is no replication, every material allegation shall be deemed to have been denied, and the burden of proof of any such matter shall be on the party asserting it ." In other words the absence of a replication by the plaintiff cannot be construed as meaning an admission by the plaintiff of the allegations in the answer. In a case where a party defendant fails to appear on the dates specified by the summons, or on the date fixed for the action, the Commissioner is empowered to enter judgment by default against the defendant and if on such date the plaintiff fails to appear, judgment may be entered dismissing the plaintiff's action.

In the case of *Fernando vs. Ceylon Tea Company, Ltd.* 3 S.C.R. 35 it was held that the District Court could not enter judgment on a counter claim without hearing any evidence and merely on the ground that the averments in the counter claim had not been denied.

There was in this case no evidence of any kind to support the judgment that has been entered against the plaintiff on the claim in reconvention and there appears to be no provision in the Code which enables a Court of Requests to enter judgment in such circumstances.

Plaintiff's counsel stated that he was not prepared to contest that part of the order by which the Commissioner of Requests dismissed the plaintiff's action, but he contended only that the order entering judgment in favour of the defendant on the claim in reconvention was wrong. I would, therefore, allow the appeal, set aside the decree of the Court of Requests, and order decree to be entered dismissing the plaintiff's action with costs. In the circumstances of this case, I order that each party should bear his own costs of this appeal.

Appeal allowed.

Present: HEARNE, J.

THE KING vs. THOLIS DE SILVA AND THREE OTHERS

S. C. Nos. 68–71—*D. C. (Cril.) Galle No.* 15717
Argued on 30th August, 1937.
Decided on 1st September, 1937.

Criminal Procedure Code—Failure of the trial judge to consider the case for the defence—Identification — How should arrangements be made for the identification of an accused by the prosecution witnesses.

Held : (i) That the trial judge must scrutinise the evidence for the defence and that failure to do so is an injustice to the accused, unless it is overwhelmingly obvious that the witnesses for the defence are so contradictory of each other as to be unworthy of credit.

(ii) That the witnesses should not be allowed an opportunity of seeing beforehand the persons they have to identify, in such circumstances as to indicate to them in any way that the persons they see are the persons they will be required to identify later.

H. V. Perera, K. C., with *Colvin R. de Silva* for accused-appellants.
M. F. S. Pulle, Crown Counsel, for respondent.

HEARNE, J.

The case for the prosecution stands or falls by the question of identification.

Apart from the question of whether the witnesses for the prosecution had the opportunity of identifying the 1st appellant it is very doubtful whether in giving evidence they were honest in saying that they did identify him. The witness Charles, who stated that he had seen the 1st appellant on the night of the attack upon him and his companions and had heard him speak, did not mention his name to the Police when he made a complaint. In his evidence he stated that he knew the 1st appellant well and had mentioned his name to the Police but this is inconsistent with the evidence of P.S. 1253, Velappen, who is emphatic that the complainants "could give no names but said they could identify" their assailants. The witness Upasakappu stated that he knew "Tholis (the 1st appellant) as did the lorry driver Charles" but that he mentioned "no names at the Police Station as I was not asked." The fact that these witnesses "knew" the name of one of their assailants and did not mention his name makes their evidence suspect at least in regard to the 1st appellant.

But there is another reason why the conviction of the 1st appellant is unsatisfactory and cannot be affirmed. His defence of an alibi in regard to which he gave evidence himself and called a witness in support was

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apparently not considered at all. The evidence for the defence must be scrutinised and failure to do so is an injustice to the accused "unless it is overwhelmingly obvious," as the Chief Justice remarked in a recent case, "that the witnesses are so contradictory of each other so as not to be worthy of credit....." That would not be a fair criticism of the witnesses in the present case. They were not contradictory and if their evidence was believed the 1st appellant would have been entitled to be acquitted. "A defence, and that applies as much to an alibi or to any other defence, unless it is on the face of it fantastic or contradictory, must be properly examined and if it is rejected reasons must be given."

In regard to the remaining appellants "identification" was far from being satisfactory. It does not appear in the evidence in what circumstances Charles and Upasakappu identified the 4th appellant (accused No. 5), if before the Police Court proceedings they identified him at all, but the evidence of Velappen is to the effect that the 2nd and 3rd appellants (accused Nos. 3 and 4) were brought to the Police Station and were thereupon identified by Charles Upasakappu. In the case of *Williams*, 8 Crim. App. Rep. 84, the Court quashed a conviction which depended on the identification of a man who was seen by the identifying witnesses in the Police Station, not having been placed among others. The court said that the mode adopted was not a proper one and the identification could not be said to have been satisfactory. The method of identification adopted in this case is to be strongly deprecated. The Police on hearing that the associates of Wijeratne were concerned with the attack on the complainants may have arrested two of them on suspicion and the witnesses, as appears to have happened, merely said "Yes, these are two of the men who were in the gang." The danger of such a procedure is too obvious to be stressed.

The witness Alim had not known the accused previously. His evidence is to the effect that "he picked out the accused subsequently from other men." What precisely he means it is difficult to say. There is no evidence of an identification parade having been held. Certainly neither of the two Police witnesses speaks of one. The convictions must be regarded as unsatisfactory.

I allow the appeals and acquit the appellants.

Appeal allowed.

Present : ABRAHAMS, C.J.

PEIRIS (Inspector of Crimes) vs CHERKKAM

S. C. No. 290—*P. C. Colombo No.* 2872

Argued & Decided on 5th August, 1937.

Criminal Procedure—Principles governing the decision of a criminal case by the trial judge—Both the prosecution and the defence must be considered.

Held : (i) That a defence, unless it is on the face of it fantastic or contradictory, must be properly examined and if it is rejected reasons should be given.

(ii) That a Magistrate cannot reject evidence for the defence merely because it appears to him that the evidence for the prosecution is the more likely.

No appearance for the accused-appellant.

M. F. S. Pulle, Crown Counsel, for respondent.

ABRAHAMS, C.J.

In this case the appellant was charged along with another man called Madan with voluntarily causing grievous hurt to one Andy. The Magistrate finds the evidence of the prosecution unsatisfactory in one respect, namely, that although Andy alleged that Madan stabbed him with a knife there was no knife wound. The Magistrate seems to have come to a proper conclusion on one point, namely, that there was a scuffle of some kind between Andy and Madan in the course of which both men seem to have sustained slight injuries. But Andy also had a fracture of the bones of one of his arms and he and his witnesses alleged that this was caused by the appellant who struck Andy with a club. This undoubtedly established a *prima facie* case against the appellant, but the appellant's defence was that of an alibi which he seems to have advanced from the beginning of the trial and this alibi was supported by a witness. The Magistrate has completely ignored the evidence both of the appellant and this witness. This is wrong. A defence, and that applies as much to an alibi as to any other defence, unless it is on the face of it fantastic or contradictory, must be properly examined and if it is rejected reasons should be given. A Magistrate cannot reject evidence for the defence merely because it appears to him that the evidence for the prosecution is the more likely.

It cannot be said that from the point of view of the appellant this trial has been conducted in a satisfactory manner. In the ordinary way it would be ground for claiming a re-trial, but the offence is not a very serious one and the punishment, a fine of Rs. 20/- is trivial, in addition to which the witnesses for the prosecution were not entirely satisfactory and I cannot see what useful purpose will be served in hearing them over again. I therefore quash the conviction and acquit the appellant.

Conviction quashed.

Present: SOERTSZ, J.

THE KING vs. GUNASEKERA AND TWO OTHERS

S. C. Nos. 14-16 (*Criminal*)—*D. C. Negombo No.* 4281/15320

Argued on 15th July, 1937.

Decided on 28th July, 1937.

Penal Code sections 220*A and* 323—*Excise Ordinance No.* 8 *of* 1912 *Sections* 34, 43, 44, *and* 50—*Meaning of the words "any person found committing.....any offence punishable under section* 43 *and section* 44"—*Powers of arrest of Excise Officers.*

The accused R. D. A. Goonesekara, M. Carolis Appuhamy and Podie were indicted before the District Court on the following counts—

1. That on or about 11th July, 1936, at Ambagahawatte, in the district of Negombo, you 1. R. D. A. Goonesekara and 2. M. Carolis Appuhamy did voluntarily cause hurt to a public servant to wit, Excise Guard H. A. Gomis Perera, in consequence of his having taken into custody you 3. Podie upon a charge of illicit sale of fermented toddy without a licence from the Government Agent in contravention of section 17 of Ordinance No. 8 of 1912, an offence under section 43 (*h*) of Ordinance No. 8 of 1912, in the lawful discharge of his duties as such public servant; and that you have thereby committed an offence punishable under section 323 of the Ceylon Penal Code.

2. That at the time and place aforesaid you, 1. R. D. A. Goonesekara and No. 2 M. Carolis Appuhamy did rescue you 3 Podie aforesaid from the custody of the said Excise Guard, H. A. Gomis Perera, in which you 3. Podie were lawfully detained upon the charge as set out in count (1) and that you have thereby committed an offence punishable under section 220 A of the Ceylon Penal Code.

3. That at the time and place aforesaid and in the course of the same transaction, you 3, Podie did escape from the custody of the said Excise Guard, H. A. Gomis Perera, in which you were lawfully detained upon the charge as set out in count (1); and that you have thereby committed an offence punishable under section 220 A of the Ceylon Penal Code.

The facts, as found by the trial judge, shortly are as follows :—

Excise Guards Gomis Perera, Stephen alias Elaris and Rupasinghe were along with other excise officers on duty on the day in question at the Burulapitiya Roman Catholic Church Festival. Excise Guard Gomis Perera was in uniform while Guards Stephen and Rupasinghe were not in uniform. At about 6-30 p.m. one Jacolis, a witness for the prosecution, informed Guard Rupasinghe that there were illicit sales of toddy at a certain spot. Three Excise Guards went with Jacolis to this place, which was behind a butcher's stall, and kept watch. After a short time a man came and was handed a cup of toddy by the 3rd accused. The Guards rushed up. Gomis and Stephen seized the 3rd accused while Rupasinghe pursued the unknown man who on seeing the Excise Guards, threw the cup and took to his heels. The 3rd accused on being seized raised a cry and a crowd collected. The 1st and 2nd accused who were in the crowd assaulted the two guards and rescued the 3rd accused. He was later charged in the Police Court with illicit sale of toddy, but was acquitted on the ground that the prosecution had failed to prove a sale. The 3rd accused gave evidence and he denied that he sold toddy. He said that he attended the festival with his cousin and brother-in-law. He also said that he brought with him a bottle of toddy and that he drank from it at a place behind the butcher's stall. He said that he borrowed a cup from a boutique. He also gave a cup of toddy to one of his relations.

Held : (i) That on the facts, the Excise Guards were not entitled to arrest the 3rd accused as there was nothing to show that the cup of toddy given to the unknown man was for a money consideration.

(ii) That the authority conferred by section 34 of the Excise Ordinance No. 8 of 1912 cannot be exercised except in a case where a person is found actually committing an offence.

(iii) That a person cannot be lawfully arrested by virtue of the power conferred by section 34 of the Excise Ordinance No. 8 of 1912 merely because he is found doing something which the officers carrying out the arrest have reason to believe is an offence, and which is later proved to be an offence.

(iv) That the escaping of the 3rd accused from the custody of the Excise Guards was not an offence, as they were not in law entitled to arrest him.

(v) That a person causing hurt to a public officer in an attempt to rescue another person who has been arrested without lawful authority does not commit an offence under section 323 of the Penal Code.

H. V. Perera, K. C., with *Colvin R. de Silva* and *Chitty* for accused-appellants.

M. F. S. Pulle, Crown Counsel, for respondent.

SOERTSZ, J.

Whatever view one takes of the ruling in the recent case of *Ledwith v. Roberts* (see Journal of Criminal Law January, 1937, p. 135 et seq.) which called in question and overruled the view taken in the earlier case of *Hartley v. Ellnor*, 117 Law Times Reports p. 304 in regard to the powers of Police Officers to arrest without a warrant in certain circumstances, one readily accepts the observations made by Lords Justices Greer, Greene and Scott to the effect that those powers should be jealously scrutinised and that any act which is in excess of those powers should not be tolerated. Lord Justice Scott said : " I should like respectfully, but earnestly, to express the opinion that powers of arrest without warrant should be expressed in quite unambiguous and simple language which anyone can understand, and that the occasion for reliance on the Constable's discretion should be defined in the case in any statutory provision conferring such a power." Their Lordships were in that case interpreting the meaning of the words 'suspected person' in the Vagrancy Act of 1824, in relation to a Police Officer's power to arrest such a person without a warrant. But the observation is opposite to the question that arises in the present case. In accordance with it, I have to consider the plain meaning of the straightforward language of section 34 of Ordinance 8 of 1912. That section enacts as follows : " Any officer of the Excise, Police or Customs or Revenue Departments..... any other persons duly empowered, *may arrest without warrant any person found committing, in any place other than a dwelling house, any offence punishable under section* 43 *and section* 44." It is not questioned that the officers with whom we are concerned in this case have been duly empowered to arrest without warrant, but the contention for the defence is that they are limited to arresting any person *found committing* in any place other than a dwelling

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house, *an offence punishable under sections* 43 *and* 44. The admitted facts in this case are that the 3rd accused was arrested by these officers when he gave to another man a cup of toddy. That was all that had taken place between the 3rd accused and the other man at the time the arrest was effected. The case for the Excise Officer was that the 3rd accused was arrested because they took the view that the 3rd accused had sold the toddy to the other man and had by so doing committed an offence under section 43 (*b*) of the Ordinance. Now, in my view, it is impossible to hold on the facts we have here that a sale had taken place. No consideration of any kind passed from the other man to the 3rd accused. This is said to have happened at about 7.30 p.m. on a festival day in the Boralupitiya Church and it might well be that the 3rd accused was treating a friend to a drink. To say the least, it was an equivocal transaction, not an unambiguous sale, and, therefore, the occasion contemplated by section 34 for an arrest without a warrant had not arisen.

Mr. Pulle for the complainant-respondent maintains, however, that a sale must be deemed to have taken place in view of section 50 of the Ordinance.

That section provides that '*in prosecutions under section* 43 it shall be presumed, until the contrary is proved, that the accused person has committed an offence under that section in respect of—

(*a*) Any excisable article; or

(*b*)

(*c*)

for the possession of which, or for his conduct in connection with which, he is unable to account satisfactorily.' In my opinion, this section does not help Crown Counsel at all. The presumption arises only when the prosecution stage is reached and it is a presumption a Court is required to draw. The Officers referred to in section 34 are not empowered to act upon any presumption that an offence is being committed. They are empowered to arrest in the one and only event of their finding a person actually committing an offence, and not merely doing something which they have reason to believe is an offence, and which is later proved to be an offence. As a matter of fact, in the present case, if the matter is tested by the result of the case that arose from this incident, the 3rd accused cannot be said to have been committing an offence at the time of his arrest, for he was acquitted after trial. But, I wish to make it clear that in my view, the result of the case is not necessarily decisive of the question. I, therefore, reach the conclusion that the 3rd accused is not guilty of the charge preferred against him in the 3rd count of the indictment namely, escaping from the lawful custody of Excise Guard Perera. The custody was not lawful.

In regard to the 1st and 2nd accused, they were charged: 1. with causing hurt to a public servant in order to prevent or deter him from doing his duty, 2. with rescuing the 3rd accused from lawful custody. It follows from the finding I have already reached in regard to the 3rd accused, that the second

charge against the 1st and 2nd accused, necessarily fails. So far as the other charge against these accused is concerned, I do not think section 92 (1) of the Penal Code applies, for the reason that the act against which the right of private defence was being exercised was an *unlawful* act and not merely one that was *not strictly justifiable by law*. But, I am of opinion, in the circumstances of this case, that it was not necessary for these accused to assault the Excise Officers to achieve their purpose. Therefore, although their convictions under section 323 of the Penal Code cannot be sustained because it cannot be said that the Excise Officers were acting in the lawful discharge of their duty, see *Davis v. Lisle* 1936-2 All. E.R. p. 213, nonetheless they are guilty of an offence under section 314 of the Penal Code. I vary their convictions accordingly and sentence each of them to pay a fine of fifty rupees in default 6 weeks rigorous imprisonment. The 3rd accused is acquitted and discharged.

Sentence varied.

Present : FERNANDO, A.J.

S. C. No. 365—*M. C. Colombo No.* 37335

Argued on 24th August, 1937.

Decided on 30th August, 1937.

COOPER (S. I. Police) vs DE SARAM

Motor Car Ordinance No. 20 *of* 1927—*Section* 44 (2) *and* (4)—*Obstruction—Rule of road.*

Held : That, however unnecessary or negligent the act of a driver of a car may be, his conduct would not amount to obstruction within the meaning of section 44 (4) of the Motor Car Ordinance, unless such conduct causes risk of accident to other traffic.

Gratiaen for accused-appellant.

T. S. Fernando, Crown Counsel, for respondent.

FERNANDO, A.J.

The accused appellant in this case was charged with overtaking traffic proceeding along Darley Road in the direction of Maradana so as to obstruct traffic proceeding in the opposite direction in breach of section 44 (4) of Ordinance 20 of 1927. He was also charged with failing to keep to the left side of the road in breach of section 44 (2) of the Ordinance. The Municipal Magistrate found the appellant guilty of both these charges and imposed a fine of Rs. 5/– on each charge in default five days simple imprisonment.

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The facts as found by the Magistrate are these. The accused was driving along Darley Road towards Maradana, and near St. Joseph's College, the accused attempted to overtake a car which was going ahead. While attempting to overtake that car, the appellant saw another car coming from the opposite direction, and that car was apparently about to overtake three bullock carts that were also coming from the direction of Maradana. When he saw the car overtaking the carts, and coming towards him, the appellant thought that there was possibility of a collision as that car was driven very fast, and he then cut across the road to the extreme right apparently in front of the bullock carts. The Magistrate then came to the conclusion that there was no immediate danger of any collision, and that the action accused took in cutting across the road was unnecessary. With this view I do not disagree, but the charge against the accused was that he did obstruct traffic proceeding in the opposite direction, meaning the three bullock carts and the motor car that was coming from Maradana, and on this point it seems to me that there is no evidence of any obstruction. Sub-Inspector Cooper of the Traffic Police gave evidence, but there is nothing in that evidence to indicate that when the accused crossed the road to his right he passed so close to the bullock carts as to create any risk of an accident. Sub-section 10 of Ordinance 44 lays down that " for the purpose of this section a motor car obstructs other traffic if it causes risk of accident thereto," and however unnecessary or negligent the act of the accused may be, I do not think the conviction can be upheld in the absence of evidence that the act of the accused did obstruct either the bullock carts or the car coming from Maradana, in the sense in which that expression is defined in sub-section 10. As far as I read this section, there is nothing to prevent the driver of a motor car crossing the road for any purpose, but in so crossing the road he must take care that he does not cause the risk of any accident to a vehicle proceeding in the opposite direction, and in the absence of evidence to the effect that the act of the accused did cause risk of accident, I do not think a conviction can be sustained.

With regard to the second charge it seems to me that the accused did not commit any offence in failing to keep to the left side of the road. Sub-section 2 provides that a car which is being overtaken by another car, or which meets another car, shall be kept to the left side, but the sub-section proceeds to enact that a car which is over-taking other traffic shall be kept on the right side of such traffic, and if the accused did attempt to overtake a motor car which was ahead of him, it seems obvious that he was no longer bound to keep to the left side of the road. It seems to me that the act of the accused, if it could be the basis of any charge at all, might give rise to a charge of obstruction under sub-section 4 or 5, and that is the 1st charge which I have already dealt with. In these circumstances, I think the conviction was wrong and I would acquit the accused.

Present: ABRAHAMS, C.J., MAARTENSZ, J., AND SOERTSZ, J.

SATHAPPA CHETTIAR vs. THAHA & ANOTHER

S. C. No. 22—*D. C.* (*Final*) *Colombo No.* 24309
Argued and Decided on 5th May, 1937.

Cheque issued by minor—Minor trading in partnership with another with his father's consent—Cheque drawn on partnership account in the bank—Payment of cheque stopped after its issue—Cheque drawn in favour of minor's other partner—Cheque endorsed by payee to plaintiff—Can minor plead minority.

The facts shortly are as follows :—

The plaintiff P. L. S. S. Sathappa Chettiar carried on business in Colombo with a branch at Gampola. The first defendant M. N. M. M. Thaha, at the time material to this action, carried on business in partnership with the second defendant, Mohamedo Thamby, under the name and style of British Indent Agency, which trade name was, about November 1928, altered to M. N. M. Thaha & Co. The first defendant traded with the consent and approval of his father.

On January 30th 1927, the first defendant issued the cheques P 3 and P 4, set out below, in favour of the 2nd defendant his partner, as payment for tea supplied by the latter for sale in Colombo. The second defendant endorsed the cheques to the plaintiff, with whom he regularly transacted business at his branch in Gampola.

At the date he issued the cheques in question the first defendant was sixteen years of age. Shortly after he issued the cheques the first defendant stopped payment. The cheques were dishonoured and notice of dishonour was duly given. As the amount due remained unpaid the plaintiff, on July 4th 1927, filed action against the defendants for the recovery of a sum of Rs. 2,554.99.

The first defendant pleaded minority. The District Judge held that he committed fraud and that he was not entitled to plead his own fraud and further that as he traded with the approval of his father he was bound by his contract. The first defendant appealed to the Supreme Court.

(*P* 3.) No. F.A. 384,023 Colombo, 30th January, 1927.

National Bank of India Limited, Colombo.

Pay Mr. S. Mohamed Thamby or order the sum of Rupees Nine hundred and thirty eight and cents 38/100 only.

Rs. 938.38

The British Indent Agency,
M. N. M. M. Thaha,
Partner.

Payment stopped by drawee, 18-2-37.
Crossed : Not Negotiable.
Endorsed : P. L. S. S. Sathappa Chetty (Sgd. in Tamil)
Imperial Bank of India.

(*P* 4.) No. F.A. 384,024 Colombo, 30th January, 1927.

National Bank of India Limited, Colombo.

Pay Mr. S. Mohamed Thamby or order the sum of Rupees One Thousand five hundred and thirty four and cents 56/100 only.

Rs. 1,534.56

The British Indent Agency,
M. N. M. M. Thaha,
Partner.

Payment stopped by drawee 25-2-37
Crossed : Not Negotiable.
(Endorsed in Tamil.)

Held : The first defendant was liable to pay the amount due on the cheque, and that in the circumstances he was not entitled to plead minority.

L. A. Rajapakse with *J. R. Jayawardene*, *Mahroof* and *Macan Markar* for the 1st defendant-appellant.

H. V. Perera with *J. L. M. Fernando* for the plaintiff-respondent.

ABRAHAMS, C.J.

This case has been referred to us by a Bench of two Judges on certain vexed questions of law,† but it appears to us that the facts in this case are inseparable from those in *A. C. Shorter & Co. vs. A. R. Mohamed* (1 Ceylon Law Journal p. 240),* decided by a bench of two Judges. In view of that decision any question in this reference becomes a purely abstract one and any decision we might give on the law would be *obiter* and no court would be bound by it. We therefore dismiss the appeal with costs.

†*Present:* AKBAR, ACTING S.P.J. AND KOCH, J.

SATHAPPA CHETTIAR vs. THAHA & ANOTHER

S. C. No. 22 (*Final*)—*D. C. Colombo No.* 24309

Argued 26th and 27th May, 1936.

Decided on 22nd June, 1936.

L. A. Rajapakse with *Mahroof* for appellant.

H. V. Perera, K. C., with *E. B. Wickremanayake* and *Fernando* for respondent.

AKBAR, ACTING S.P.J.

We are of opinion that this case should be argued before a bench of three Judges. There are four questions of law which have to be decided in this case. They are :—

(1) whether Muslims are governed by the Roman-Dutch Law so far as their contractual capacity is concerned ;

(2) if not whether they are governed by their own law or by Ordinance No. 7 of 1865 ;

(3) the effect of the case of *Narayanen vs. Saree Umma* (21, N.L.R., 439);

(4) if the Roman-Dutch Law is applicable is it open to a minor to plead minority as a defence to an action on a contract to which he is a party without a counter-claim for a recission of the contract.

KOCH, J.

I agree.

**Present :* POYSER, S. P. J. AND SOERTSZ, J.

SHORTER & CO. vs. MOHAMED

S. C. No. 166—*D. C. Colombo No.* 2197

Argued on 16th and 17th March, 1937.

Decided on 23rd April, 1937.

Minor—Bond executed by Muslim minor with his father's concurrence—Representation to notary that the minor was of full age—Goods supplied to minor for the purposes of his business—Can minor avoid payment for such goods on the ground of minority—Should the case be decided according to principles of Roman-Dutch Law or Muslim Law.

Held : (i) That where a Muslim minor enters into a contract with the consent of his natural guardian the contract is valid, according to Muslim Law.

(ii) That where a minor by falsely representing himself to be of full age deceives a person to contract with him, the minor is bound by his contract.

Rajapakse with *E. B. Wickremanayake* for defendant-appellant.

H. V. Perera, K. C., with *H. A. Wijemanne* for plaintiff-respondent.

† Infra.

POYSER, S.P.J.

The plaintiffs, a firm carrying on business in England, sued the defendant, a Muslim, on the mortgage bond A and gave him judgment for the sum of Rs. 9,918.73. This mortgage bond was executed to secure the payment of goods supplied by the plaintiffs to the defendant, and it was admitted in the lower court that goods of the nett value of Rs. 9,918.73 had been supplied. It was admitted in the lower court that the defendant did not attain the age of 21 till the 14th of May, 1935, and was consequently a minor when the bond in question was executed.

The defence was that the said mortgage bond was void and was of no effect against the defendant as he was a minor when he executed it.

The District Judge has found that the following are the circumstances under which the bond was executed. The plaintiffs had, prior to its execution, business dealings with the defendant, but such dealings had ceased owing to the defendant's indebtedness to the plaintiffs. The defendant and his father were anxious to continue the business and the bond in question was drawn up by Mr. Vethecan, a notary and proctor of long standing, on the instructions of the defendant's father. The defendant and his father came to the notary's office for the execution of the bond and the notary, noticing that the defendant had a youthful appearance, asked if he was twenty-one and the defendant replied that he was, and his father said nothing.

The bond was then executed by the defendant and was then forwarded to the plaintiffs and the business relations were then resumed between them.

In view of these findings, the District Judge has found, in answer to issue 2, that the defendant did fraudulently represent he was a major and was debarred from setting up the plea of minority, I do not think there is the slightest doubt that the Judge was correct in finding that the bond was fraudulently executed. Apart from the evidence of the notary, other evidence and all the circumstances of the case indicate that the defendant and his father were anxious to renew business relations with the plaintiffs and the bond was executed by the defendant under the expectation that it would be held to be void, if sued upon, on account of the defendant being a minor.

In view of these findings of fact which are simply supported by the evidence, the question that arises on this appeal is whether the bond is in law enforceable. Mr. Rajapakse argued that Muslim Law must be applied to decide this point as the defendant is a Muslim. Mr. Perera did not agree and argued that Muslim law is not applicable when only one of the parties is a Muslim and that Roman-Dutch Law must consequently be applied.

It was at one stage suggested by counsel that this appeal should stand over until the determination of S. C. No. 22 D. C. Colombo No. 24309. In that case the following four questions of law were referred to a Bench of Three Judges, viz :—

(1) Whether Muslims are governed by the Roman-Dutch Law so far as their contractual capacity is concerned.

(2) If not, whether they are governed by their own law or by Ordinance No. 7 of 1865.

(3) The effect of the case of *Narayanan vs. Saree Umma* (21 N.L.R. 439).

(4) If the Roman-Dutch Law is applicable, is it open to a minor to plead minority as a defence to an action on a contract to which he is a party without a counter-claim for a recision of the contract.

I think, however, for the following reasons, that this case can be

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decided without the determination of any of the questions reserved for a Bench of three Judges. Assuming firstly, that Muslim Law is applicable, and, that a Muslim attains his majority at the age of twenty-one and not when he attains " discretion, " the plaintiff is still in my opinion entitled to recover the amount claimed. On this point the District Judge held, and correctly too in my opinion, on the authority of Amir Ali, 4th edition, Vol. 1 page 278, as follows :—" Where, therefore, a Muslim minor enters into a contract with the consent of his natural guardian the contract is valid. The disability arose because he was under the *patria potestas*, but when the father gave his consent then the contract was valid ."

This view is supported in Hamilton's Hedaya, Volume iii. page 469, the material passage being " The acts of an infant are not lawful unless authorised by his guardian, nor the act of a slave unless authorised by his master ; and the acts of a lunatic, who has no lucid intervals, are not at all lawful. The acts of an infant are unlawful, because of the defect in his understanding ; but the license or authority of his guardian is a mark of his capacity ; whence it is that in virtue thereof an infant is accounted the same as an adult."

In view of these authorities and the fact that the father not only gave his consent to the execution of the bond but was mainly instrumental in securing its execution, there is no doubt in my mind that if Muslim Law is applied the plaintiffs are entitled to succeed.

Further, if Roman-Dutch Law is applied, the plaintiffs are also entitled to succeed and there is ample authority for this proposition. One case only need be cited, viz : *Ahamadu Lebbe vs. Amina Umma*, (29 N.L.R. p. 449), in which it was held that " where a minor by falsely representing himself to be of full age deceived a person and induced him to purchase his immovable property, the conveyance was valid."

The following passages occur in the judgment of Jayawardene A.J. at page 450. " The view of the Roman Law thus was that the remedy of *restitutio in integrum* should not be granted to a minor who was fraudulent, fraud supplying the want of age."

The same principle was adopted in the Roman-Dutch Law. Van Leeuwen states that the " decree of reinstation is not granted to those who committed fraud, as for instance, if they have lied in saying that they were of age. (Van Leeuwen's Cens. For pt. i bk. iv chap. 43).

According to Professor Lee, restitution is refused when a minor has fraudulently misrepresented his age (Introduction to Roman-Dutch Law by R. W. Lee p. 43). He quotes two cases—*Johnston vs. Keiser* and *Vogel and Co. vs. Greentley*— which are not available locally. He also refers to the Ceylon case of *Wijesooriya vs. Ibrahimsa* (13 N.L.R. p 195). In that case it was held that a minor who falsely represented himself to be a major, and deceived the other contracting party, was bound, and the sale of a piece of land of the minor was held to be good. Hutchinson C.J. refused to allow the minor to obtain the benefit of the fraud which he had committed, and Middleton J. held that a fraudulent minor should not expect the Courts to extract him from a position in which his own improbity had placed him.

For the above reason, I am of opinion that whether Muslim or Roman-Dutch Law is applied, the plaintiff is entitled to succeed and the appeal must consequently be dismissed with costs.

Soertsz, J.

I agree.

Appeal dismissed.

Present: HEARNE, J.

Application for a Writ of Quo Warranto on Watte Walauwe Heen Banda alias Abeyratne of Thalgagoda in Dullewa Matale Asgiriya Udasiya-pattu.

Argued on 2nd September, 1937.
Decided on 15th September, 1937.

Quo Warranto--Village Communities Ordinance No. 9 of 1924—Sections 18 (a) and 25 (2)—Objection taken, at time of election, to a candidate on the ground that he is not 25 years of age—Objection overruled—Can validity of election be questioned by Quo Warranto in a case where it can be proved that the candidate was under twenty-five years at the time of election.

The applicant questioned the election of the respondent on the ground that he was disqualified for election as a member of a Village Committee under section 18 (*a*) of the Village Communities Ordinance No. 9 of 1924. Objection was taken at the election to the respondent's candidature on this very ground, but the presiding officer overruled the objection. That the candidate was under 25 years of age was not denied at the hearing of the petition for a writ of *quo warranto* at which his age was proved to be 21 years by the production of his birth certificate.

Held : That the words "final and conclusive" in section 25 (2) of the Village Communities Ordinance No. 9 of 1924 preclude the validity of an election being questioned on any ground that was raised and decided at the election.

PER HEARNE, J.

"Section 18 (*a*) of Ordinance No. 9 of 1924 amounts to a statutory declaration that a person who is not over 25 years of age may not be a member of a Village Committee and I venture to think that if an application had been made for a rule that the respondent, though elected, is disqualified from taking his place as a member of the Village Committee, it might very well have been successful."

Followed :—

(1) 4 C. L. Rec 81.
(2) In re S. A. de Silva 15 C. L. Rec. 206.

Referred to :—

1. *Regina Vs Collins* 2 Q. B. D. 30.
2. *The Queen Vs Diplock* 4 Q. B. Cases 549.
3. *The King Vs Beer* (1903) 2 K. B. 693.

R. C. Fonseka for petitioner.

B. H. Aluwihare with *T. K. Curtis* for respondent.

HEARNE, J.

On 5th June, 1937, a meeting was held in the Asgiriya Udasiya Pattu Division of Matale District in order to elect a Village Committee in terms of Ordinance No. 9 of 1924. The applicant and the respondent were candidates and the latter was elected.

The applicant objected to the election of the respondent on the ground that he was disqualified under section 18 (*a*) of the Ordinance but the presiding Officer, the Government Agent, overruled the objection. The respondent's birth certificate has been filed. He is 21 years of age. Under

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section 18 (*a*) a person shall be disqualified to be elected unless he is over 25 years of age. There is, therefore, now no question that the respondent's age disqualified him from being elected.

The applicant prayed for the issue of a writ of *quo warranto* on the respondent who entered an appearance through Counsel to show cause why the application should not be allowed.

Section 25 (1) and(2) of the relevant Ordinance is as follows :—

(1) " If at any meeting any question shall be raised as to the right " of any person to vote or to be elected as member of a Com- " mittee, the Government Agent shall then and there make " such inquiry as he may deem requisite and decide whether " or not such person has the right to vote or to be elected.

(2) " Such decision shall be final and conclusive."

In a case dealing with *quo warranto* proceedings and reported in 4 Ceylon Law Recorder 81, Ennis, J. said " The only question of fact is whether section 14 of the Board of Health Improvement Ordinance No. 13 of 1898 provides that the Chairman shall act judicially on any objection raised to an election. In my opinion, section 14 does so provide. It authorises the Chairman upon being satisfied that the election was not duly and regularly held or any member not duly elected to declare the election void altogether or void as to any particular member. In my opinion, the Chairman acting under that section is clearly exercising a judicial function, and applying the rule of *Regina v. Collins*, 2 Q.B.D. 30, no writ of *quo warranto* will lie."

In an application for a writ of *quo warranto* against S. A. de Silva, reported in 15 Ceylon Law Recorder 206, Poyser, J. followed 4 Ceylon Law Recorder 81 and quoted Shortt on Informations (Criminal and *quo warranto*) Mandamus and Prohibitions, 1st Edition, at page 132, which is as follows—" If there is any person who is appointed by law to discharge, at the election to an office, any functions of a judicial character with respect to it, an erroneous decision of such person in that character cannot be questioned by *quo warranto*."

Counsel for the applicant was unable to argue that the Government Agent was exercising a ministerial as distinct from a judicial function. Apart from this, the words " final and conclusive " appearing in section 25 (2) have been considered by this Court for the purpose of interpreting section 29 of Ordinance No. 11 of 1920 and it was held by Koch, J. that they must be given " their due weight." I, therefore, discharge the rule against the respondent. I do not consider this as a suitable case for costs.

Now the rule which I have discharged and which the applicant asked the Court to make absolute was " that the election of the respondent was null and void " by reason of an erroneous decision made by the Government Agent. Such a rule, if made absolute would have been, as I have indicated, repugnant to the authorities I have cited. But as section 18 not only enacts that a person shall be disqualified to be elected but also

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to be a member of a Village Committee unless he is over 25 years of age—and the respondent is certainly not—it is possible that the application would have had a different result if what was sought was not a declaration that the election of the respondent was void, but a declaration that the respondent, notwithstanding his election, is disqualified from holding office. I would, however, point out that this represents my view on a question of law which was not taken, which was outside the scope of the application and on which I had not the advantage of hearing arguments by Counsel.

In the case of *The Queen v. Diplock*, 4 Q.B. Cases 549, it was sought to question the validity of votes given at the election of a coroner. After holding that as the Sheriff exercised judicial functions in his scrutiny of the votes " the validity of votes cannot be inquired into on a *quo warranto* " Cockburn, C.J. said, " I am very far from saying that there may not be cases in which a *quo warranto* would lie as to the office of coroner, as where the candidate elected was personally disqualified....."

It is, however, the case of *The King v. Beer*, (1903) 2 K.B. 693, which illustrates my view that even if there has been an election *de facto* and even if the validity of the election cannot be questioned by *quo warranto*, the remedy is nevertheless available for the purpose of calling upon a person, who is *prima facie* disqualified from holding a particular office to show upon what authority he claims to hold such office.

In that case the defendant was called upon to show by what authority he claimed to hold the office of Councillor of a borough, the objection being that he was a bankrupt and therefore disqualified. It was held that the election could not be questioned on a *quo warranto*, as an election petition would have been the appropriate remedy for objecting to the election but that, nevertheless, the remedy by *quo warranto* was available where the disqualification was in respect of holding or exercising the office, as well as being elected thereto. 9 Halsbury (Hailsham Edition) foot note to paragraph 1377 page 809.

In his judgment Lord Alverstone, C.J. said " It is true that section 87 (of the Municipal Corporations Act 1882) says that an election shall only be questioned by election petition where the ground of the objection is disqualification at the time of the election ; but I do not think that this extends to the continuous holding of the office by the person so disqualified." And again, " Although section 39 of the Municipal Corporations Act, 1882, applies to a disqualification by bankruptcy arising after an election, I think that where there is a continuing disqualification the right to hold the office may still be questioned by *quo warranto*."

Section 18 (*a*) of Ordinance No. 9 of 1924 amounts to a statutory declaration that a person who is not over 25 years of age may not be a member of a Village Committee and I venture to think that if an application had been made for a rule that the respondent, though elected, is disqualified from taking his place as a member of the Village Committee, it might very well have been successful.

Rule Discharged.

Present: FERNANDO, A.J.

GUNATILLEKE (Sub-Inspector of Police) vs. NEPOSINGHO & Another

Application in Revision in P. C. Avisawella No. 14763 (272)

Argued on 2nd July, 1937.

Decided on 14th July, 1937.

Prevention of Crimes Ordinance No. 2 of 1926—*Charge under sections* 373 *and* 490 *of the Penal Code—Trial by Police Magistrate who is also District Judge under section* 152 (3) *of the Criminal Procedure Code—Registered criminal—Sentence of two years' rigorous imprisonment and two years Police supervision—Should judge, on finding that an accused is a registered criminal within the meaning of the expression in Ordinance No.* 2 *of* 1926, *discontinue summary proceedings and commence non-summary proceedings.*

Held : (i) That section 6 of the Prevention of Crimes Ordinance No. 2 of 1926 applies only where a person is accused of a crime triable summarily.

(ii) That a Police Magistrate who is also a District Judge when trying an accused under section 152 (3) of the Criminal Procedure Code in respect of a charge not triable summarily by a Police Magistrate, need not, on it being brought to his notice that the accused is a registered criminal, discontinue the trial and commence non-summary proceedings.

M. F. S. Pulle, Crown Counsel, for Solicitor-General.

FERNANDO, A.J.

The two accused in this case were charged with attempting to commit extortion, an offence punishable under sections 373 and 490 of the Penal Code. After the accused had surrendered to court, the Police Magistrate, who was also a District Judge, decided to try the case under the provisions of section 152 (3) of the Criminal Procedure Code. At the trial, they were convicted and sentenced, each of them to undergo two years' rigorous imprisonment, and two years' Police supervision. It is contended for the Solicitor-General that each of the accused was a registered criminal within the terms of Ordinance 2 of 1926 and that the Magistrate should have discontinued the summary proceedings and commenced non-summary proceedings against the accused as soon as it was brought to his notice that the two accused were registered criminals.

Crown Counsel referred to various decisions of this court, and his position was that these decisions were inconsistent with one another. In *P. C. Kegalla* 12703‡, decided on the 13th of September, 1929, Akbar J. refused to interfere in a similar case by way of revision. " I do not think " he said,

" section 6 of Ordinance 2 of 1926 applies to a case of this description where the Police Magistrate, who is also a District Judge, tried the accused summarily under section 152 (3) of the Criminal Procedure Code. " He does not set out his reasons at any greater length but I understand that order to mean that section 6 is not applicable to a case where a Police Magistrate tries a case summarily under section 152 (3) because he is also a District Judge. In other words, section 6 of Ordinance 2 of 1926 only applies in a case where a person is accused of a crime triable summarily, and to a case where the offence with which the accused is charged is not summarily triable. Crown Counsel also referred to the case of *Nadarajah v. Gopalan*, 32 *N. L. R.* 115, where Dalton J. expressed his opinion, that a Police Magistrate who tries a case summarily under the provisions of section 152 (3) has rid himself of his character as Police Magistrate, and is nothing more and nothing less than a District Judge. He refers to the case of *Nadar Lebbe v. Kiri Banda* 18 *N.L.R.* 376, where de Sampayo J. expresses the opinion that a Police Magistrate, if he proceeds under section 152 (3), acts in all cases as Police Magistrate, but as Dalton J. states the only question for decision by the Full Court was whether a Police Magistrate trying a case under section 152 (3) can in respect of an offence triable by him summarily as Police Magistrate exercise his larger punitive powers as District Judge. In P.C. Balapitiya 42272, which is printed at the foot of page 379 of the 18th Volume of N.L.R., de Sampayo J. expresses the same view, and in *P. C. Colombo* 43809† Koch J., on the 19th of June 1936, appears to have adopted the same view as Dalton J. He did not actually decide that the procedure adopted by the Police Magistrate was wrong, but quashed the proceedings and ordered non-summary proceedings to be taken against the accused, reserving to the accused the right to raise the plea of *autrefois* convict as was done by Dalton J. in 32 N.L.R. 115.

Dalton J. also refers to a judgment of Lyall Grant J. in P. C. Dandagamuwa 4802, but that case appears to have turned on the question whether the Police Magistrate, when he assumed jurisdiction, under section 152 (3) was still a Police Magistrate or District Judge. This question, however, is of purely academic interest in the case before me. Before I can deal with this application in revision I must be satisfied that the Police Magistrate who tried the case, whether he acted as Police Magistrate or District Judge, was required to follow the provisions of section 6 of Ordinance 2 of 1926. As I have already pointed out in *P. C. Gampaha* 34542*, Supreme Court Minutes, 24th February, 1937, that section can only apply where a person is accused of a crime triable summarily. The judgment of Akbar J. to which I have already referred, appears to me to have proceeded on that ground, and in the case before me, the offences with which the accused were charged were not triable summarily. In these circumstances, I do not think it necessary to refer this question to a Full Court. I refuse to deal with these proceedings in revision.

Refused.

‡*Present:* AKBAR, J.

SOLICITOR-GENERAL vs PODISINGHO Alias DANIEL

Application in Revision in P. C. Kegalle No. 12703

Argued and Decided on 13th September, 1929.

Ramachandra, Crown Counsel, in support.

AKBAR, J.

I do not think section 6 of Ordinance No. 2 of 1926 applies to a case of this description where the Police Magistrate who is also District Judge tried the accused summarily under section 152 (3) of the Criminal Procedure Code. I therefore do not intend to interfere by way of revision, and remit this case to the District Judge with directions to pass sentence.

†*Present:* KOCH, J.

THE SOLICITOR-GENERAL vs PATHADEEN

In Revision—P. C. Colombo 43809

Argued and Decided on 19th June, 1936.

M. F. S. Pulle, Crown Counsel, in support.

KOCH, J.

Mr. Pulle, Crown Counsel, appears in support of the application to this court to act in revision and quash the proceedings had in this case on the 18th of April, 1936, and to direct non-summary proceedings against the accused. Notice had been previously ordered on the accused when this application was first made to this court and, from the return which has been filed, I find that notice has been served on the respondent in jail. He, however, is not represented.

What has transpired in this case is, that the accused had pleaded guilty to the charges framed against him when those charges had been read and explained to him. The learned Judge thereupon did what is customary for Judges to do, namely, to act under section 6 (1) of Ordinance 2 of 1926, and to cause finger prints of the accused to be taken and forwarded in manner prescribed under that section. After this was done, a certificate was issued which declared that the accused's finger prints were identical with those of a registered criminal as described in sub-section 5 (2) of the Ordinance. The presiding Judge should then, as he was bound to do, have discontinued further proceedings and commenced non-summary proceedings against the accused, but instead he proceeded to convict the accused and impose a sentence on him.

Mr. Pulle very properly brought to my notice the fact that the Judge in acting as he did was trying the case summarily as District Judge, but argued that although section 6 (2) of the above referred to Ordinance dealt with the case of a Police Magistrate and not a District Judge, that nevertheless the Judge, whether Police Magistrate or District Judge, who was trying the accused summarily, was bound to stay proceedings and commence non-summary proceedings. Whatever difficulty I may feel in the matter, and whatever difficulty my brother Dalton J. felt in the matter when he decided the case of *Nadarajah v. Gopalan*, may be got over by my action, as my brother did, in allowing the application in revision but reserving to the respondent the right to raise the plea of *autrefois* convict if so advised.

I, therefore, quash these proceedings and order that non-summary proceedings may be taken against the accused, subject to the reservation I have referred to. If the plea of *autrefois* convict is taken and is upheld, the previous proceedings and conviction will stand.

*Present : FERNANDO, A.J.

SOLICITOR-GENERAL vs ENDI SINGHO

Application in Revision in P. C. Gampaha No. 34542 (33).
Argued on 16th February, 1937.
Decided on 24th February, 1937.

Nadarajah, Crown Counsel, for Solicitor-General.
Accused produced in custody.

FERNANDO, A.J.

The Solicitor General applies in this case that the conviction and sentence entered by the learned Magistrate of Gampaha be set aside in revision, and the case sent back for non-summary proceedings.

The accused was charged with committing house-breaking with intent to commit theft, and with causing hurt, offences punishable under sections 443 and 314 of the Ceylon Penal Code. The learned Police Magistrate started non-summary proceedings, but after some evidence had been recorded, he on the 1st December, 1936, informed the accused that he would try the case summarily in his capacity as Additional District Judge, Negombo, as the facts were simple and no property had been stolen. The learned Magistrate took this action apparently under section 152 (3) of the Criminal Procedure Code. The trial then proceeded till the case for the prosecution was closed, and the case was postponed for the 8th of December for the defence and for the identification of the accused. The accused was then convicted and, apparently after he was found guilty, it was brought to the notice of the Magistrate that the accused had been previously convicted as set out in the certificates filed of record. The Magistrate then sentenced him to six months' rigorous imprisonment on the 1st count, and one month's rigorous imprisonment on the 2nd count, the sentences to run concurrently. He also sentenced the accused to two years' Police supervision.

It was argued that the procedure adopted by the learned Police Magistrate was incorrect, inasmuch as he has not observed the terms of section 166 of the Criminal Procedure Code, but it is obvious from the record made by the learned Police Magistrate on the 1st December, to which I have already referred, that he was acting not under section 166 but under section 152 (3), and where he is proceeding under that section, it is not necessary that the accused should consent to the Magistrate so doing. Crown Counsel referred to section 6 of Ordinance 2 of 1926 which provides that whenever a person is accused of a crime triable summarily, and the Police Magistrate is satisfied that there is a *prima facie* case against him, such Magistrate may cause his finger prints to be taken, and if the Registrar issues a certificate declaring that the finger prints of the accused are identical with those of a registered criminal, the Police Magistrate shall discontinue the summary proceedings and commence non-summary proceedings. It will be noted, however, that this section applies in a case where the accused is charged with a crime triable summarily, whereas section 5 provides for the case of persons who are accused of crimes not triable summarily. In the case of *Anthony Appu v. Noordeen,* 19 N.L.R. 223, Wood-Renton C. J. held that where an accused against whom non-summary proceedings were taken pleaded guilty, and also admitted certain previous convictions, the Police Magistrate could not proceed under section 152 (3), because by doing so he was acting in contravention of the requirements of Ordinance 32 of 1914. There of course, the fact that the accused had been previously convicted was brought to the notice of the Police

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Magistrate before he decided to proceed under section 152 (3). In the case reported in 4 C.W.R. 123, P.C. Panadure 56910, the Police, in making the complaint, produced a certificate showing two previous convictions, and the Magistrate decided to take non-summary proceedings. Subsequently, however, he thought it expedient to try the accused summarily in terms of section 166 (1). As de Sampayo J. pointed out, section 2 of Ordinance 32 of 1914 makes it imperative "when a certificate of previous conviction is produced that the Magistrate shall take non-summary proceedings." "That means, that the accused shall be tried by the District Court or Supreme Court, and not by the Police Court. Even if the Police Magistrate obtains the accused's consent under section 166 (1) of the Criminal Procedure Code, he will still only try the accused summarily as Police Magistrate, and his doing so will be a contravention of the above provision of Ordinance 32 of 1914."

The position under Ordinance 2 of 1926 appears to me to be somewhat different from the position under Ordinance 32 of 1914. Section 5 provides for a case where a person accused of a crime not triable summarily has been committed for trial and section 6 provides for the case where a person is accused of a crime triable summarily. The offence with which the accused was charged in this case is not triable summarily, and for that reason, it seems to me that section 6 does not apply. It is not possible to apply the provisions under section 5 inasmuch as the accused was not committed for trial as would ordinarily happen in a case that is not triable summarily. There is no provision in Ordinance 2 of 1926, and no provision has been pointed out to me, which requires a Police Magistrate who has begun to try an accused summarily under section 152 (3) to stop those proceedings and to take non-summary proceedings when after he has decided to try summarily, it is brought to his notice that the accused has been previously convicted or, to use the words of section 6, is a registered criminal. For these reasons the application of the Solicitor-General is refused.

Present : SOERTSZ, J.

APPLICATION BY NEIL HEWAVITHARANE UNDER ARTICLES 60 & 72 OF THE CEYLON (STATE COUNCIL ELECTIONS) ORDER IN COUNCIL 1931

Argued on 3rd June, 1937.

Decided on 18th June, 1937.

Ceylon (State Council Elections) Order in Council 1931—*Articles* 60 (8) *and* 72— *Non-compliance with the provisions as to return and declaration respecting election expenses—Delay due to ill-health—Authorized excuse—Circumstances in which the Supreme Court will extend its indulgence to a candidate who has failed to comply with the terms of the Order in Council.*

Held : That, where the candidate himself was his own election agent, ill-health of the candidate was a sufficient excuse for the delay in supplying the omissions in his return.

PER SOERTSZ, J.

"Addressing myself to the whole matter now, as I have already observed, I find that the explanation given by the petitioner for most of the omissions are not satisfactory, but I feel that some allowance must be made, at present, when the candidates are not quite conversant with all the details of election law.

It is probable, however, that the same indulgence will not be shown on future occasions, and candidates who choose to be their own election agents must make it a point to acquaint themselves with the requirements of the law. But the real question I have to consider is whether the delay in sending an amended return, and the errors and omissions in the original return arose 'by reason of illness.....of inadvertence or any reasonable cause and not by reason of any want of good faith on the part of the applicant."

H. V. Perera, K. C., with *M. T. de S. Amarasekera* and *N. M. de Silva* for the petitioner.

E. A. L. Wijewardena, Solicitor-General with *M. F. S. Pulle, Crown Counsel*, for the Attorney-General.

Colvin R. de Silva with *A. H. C. de Silva* for the party noticed.

SOERTSZ, J.

This is an application for an authorized excuse under section 72 of the Ceylon State Council Elections Order-in-Council of 1931 as amended in 1934 and 1935.

The petitioner was elected a member of the State Council for the Udugama Electoral Division on the 27th of February, 1936. He was his own election agent and in compliance with the requirements of section 67 of the Order-in-Council, he made his return declaration respecting election expenses to the Returning Officer. On the 15th of April, 1936, the Returning Officer addressed the petitioner in regard to certain omissions in the return and requested him to send by return of post the omitted details. The petitioner sought to supply the omission to which his attention had been drawn by his letter C of the 4th of May, 1936, that is to say after the time limit appointed for the return being made had elapsed. The Returning Officer, by his letter D of the 30th of May, 1936, returned to the petitioner his letter of the 4th of May, 1936, with its annextures stating that he was unable to accept the omitted details 'except upon an order of an election Judge or a Judge of the Supreme Court.' Hence this application.

The petitioner has submitted an affidavit in which he affirms that the delay in supplying the omissions in his return was due to ill-health. This has not been questioned by the Attorney-General or by the party noticed and I accept it as a sufficient excuse for the delay.

In regard to the omissions complained of by the Returning Officer, they were:

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1. That the names and descriptions of persons from whom any money was received in respect of expenses incurred have not been shown under the head of 'Receipts' in terms of paragraph 1 of the fifth schedule.
2. That vouchers have not been attached in respect of the following payments of over Rs. 20/–.

Purchase of second hand car ..	Rs.	325.00
Paying servants when occupying Baddegama house	,,	87.50
House expenses ..	,,	220.00
Stationery	,,	30.00
Postage	,,	40.00

3. That sums paid but for which no receipts are attached have not been set out in detail with dates of payments, names of payees etc.
4. That stamped receipts have not been furnished in support of payments of resthouse bill No. 404 of 19.1.36 viz. Rs. 23.25.

Part payment to Messrs Siedle Bros. ..	Rs.	50.00
Part payment to Maha Bodhi Press ..	,,	325.00

5. That the declaration has not been signed on a rupee stamp.

The petitioner sought to supply these omissions and to explain their occurrence by stating in regard to

1. That he did not realise the necessity for stating anything under the said head as he did not receive any moneys from any person in respect of his expenses, but spent his own money.

If that were so, the petitioner should have made a 'nil' return under that head. But that is an omission that can easily be accounted for on the ground of inadvertence if no other question has arisen. A question has, however, been raised by the party noticed. He points out that the petitioner obtained from Calcutta certain posters the cost of which has not been disclosed. The petitioner's explanation of this is that the posters were sent to him by a friend and well-wisher in Calcutta without expectation of payment and that no money has been paid for the posters. That may well be so. The Attorney General says he is unable to challenge the petitioner's statement that he spent no money himself on account of these posters. But that does not conclude the matter, for rule 1 of schedule 5 provides that 'under the head receipts there shall be shown the name and description of every person (including the candidate), club, society or association from whom any money.....or *equivalent of money* was received in respect of expenses incurred on account of or in connection with, or incidental to the election.....clearly, there must be an equivalent in money for these posters, namely what they cost the friend or well-wisher.

In regard to this omission, therefore, the return made by the petitioner is still incomplete.

2. (*a*) That the omission to attach the receipt for Rs. 325/– in respect of the second hand car was due to the fact 'that the said receipt was mislaid.' The petitioner now produces a receipt. The petitioner has not tendered any explanation as to his failure to obtain another receipt in place of the original he mislaid and to attach it to his return. He should have done then what he is seeking to do now. I, therefore, find his explanation of this omission not quite satisfactory.

2. (*b*) That vouchers were not attached in respect of the sums of Rs. 87/50 and Rs. 220/– because they were paid in sums under Rs. 20/– at a time. But in that case, he should have given a detailed statement showing how those payments were made up. His present explanation is that he 'from inadvertence, overlooked and forgot that it was necessary to do so,' and he now produces a detailed statement supported by two pass books.

2. (*c*) That in regard to this item too, the petitioner pleads inadvertence. He says he incurred the sums of Rs. 30 and Rs. 40/– respectively on account of stationery and postage from time to time in small sums.

3. That no receipts were attached in respect of payments to messengers and for petrol purchase as the expenditure in these cases was also incurred from time to time in sums under Rs. 20/–. As I have already observed, the petitioner should have given details of the expenditure incurred. He does so now and now pleads inadvertence in excuse of his omission. I do not consider this satisfactory.

4. That the omission to furnish a stamped receipt in support of his payment of Rs. 23/25 on account of the resthouse bill in Hikkaduwa was due to its being customary for resthouse keepers to give stamped receipts. But the petitioner knew or should have known, that the law required a stamped receipt and he should, in this instance, have obtained one from the resthouse keeper. In my opinion, this explanation again is not satisfactory. This omission has not been supplied as the petitioner says the resthouse keeper's whereabouts were not known. In regard to payments made to Messrs. Siedle Bros. and the Maha Bodhi Press the petitioner says that those were only part payments and that considerable balances are still outstanding and that that was the reason for this failure to obtain receipts. This, too, I consider an unsatisfactory explanation. The fact that these sums represent part payments, is no reason whatever for not obtaining receipts in respect of them. The petitioner has, however, now supplied this omission. The petitioner offers no explanation of his omission to sign his declaration on a rupee stamp.

While seeking to supply the omissions pointed out by the Returning Officer, the petitioner has applied under section 60 of the Order-in-Council to pay certain amounts which are still due to certain firms on account of expenses incurred in connection with his election.

The party noticed has himself filed an affidavit in which in addition to the matters I have already referred to in regard to posters, he submits (*a*) that the petitioner's statement that he forwarded his return on the 8th of April is false (*b*) that the petitioner incurred beyond the item of Rs. 23/25 shown in resthouse charge at Hikkaduwa, a sum of Rs. 63/07 which he has concealed (*c*) that there are two other items of expenditure incurred by the petitioner in respect of his candidature which were not omission from inadvertence, but the affirmant does not state them because he was directed, he says, by this Court to limit himself to matter set out in the petitioner's affidavit.

Addressing myself to the whole matter now, as I have already observed, I find that the explanation given by the petitioner for most of the omissions are not satisfactory, but I feel that some allowance must be made, at present, when the candidates are not quite conversant with all the details of election law.

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It is probable, however, that the same indulgence will not be shown on future occasions, and candidates who choose to be their own election agents must make it a point to acquaint themselves with the requirements of the law. But the real question I have to consider is whether the delay in sending an amended return, and the errors and omissions in the original return arose 'by reason of illness.....of inadvertence or any reasonable cause and not by reason of any want of good faith on the part of the applicant.'

In regard to this, the Solicitor-General stated that he could not question any of the statements made in the petitioner's affidavit. I am satisfied that the delay was due to illness. In regard to the errors and omissions, although I find that the explanations offered are in many cases unsatisfactory, I am unable to say that they were due to any want of good faith on the part of the applicant. They appear to me to be the result of inadvertence, or perhaps, of carelessness. He was entitled to spend nearly twenty thousand rupees on his election. He showed an expenditure of Rs. 3,210/69 and it can hardly be said that he was trying to minimise expenses in order not to exceed the limit the law imposed on him.

As regards the allegations contained in the affidavit submitted by the party noticed, I am satisfied that the discrepancy in dates in the petitioner's petition to this court and in the declaration made by the petitioner in making his return occurred in the manner stated by the petitioner in his affidavit of the 28th of January, 1937. I am unable to hold on the material before me that the petitioner incurred an additional expenditure of Rs. 63/07 on account of Hikkaduwa resthouse charges in connection with his election. The petitioner's explanation is that that sum represents money spent by him on visits he made to that resthouse in connection with other business matters of his. I, therefore, make order giving the petitioner leave in terms of section 60 (8) of the Order-in-Council to pay the amounts set forth in paragraph 15 of his petition to the parties mentioned therein and in terms of section 72 (3) of the Order-in-Council I make order allowing him an authorized excuse on condition that he makes amended return to the Returning Officer within six weeks of this order being communicated to him, supplying all the omissions (except the voucher for the resthouse charges) to which his attention has been called by the Returning Officer, and stating the equivalent of money of the gift of posters made to him, and showing in addition the payments he has now been authorized to make on account of disputed claims. This amended return must be accompanied by a duly stamped declaration.

The date of allowance of this excuse will be that date within six weeks of this order being communicated to the petitioner, on which he fully complies with the directions I have given.

Allowed.

Present : HEARNE, J. & FERNANDO, A.J.

DE SILVA vs DE SILVA

S. C. No. 258—*D. C. Galle No.* 33787
Argued on 17th September, 1937.
Decided on 20th September, 1937.

Conditional transfer of land—Agreement to repurchase within one year from the date of sale—Value payable on repurchase being the amount of consideration for the transfer plus interest thereon at eighteen per centum per annum—Is such agreement a transfer or a mortgage—Is the vendor entitled to a reconveyance after the period stipulated in the transfer—Principles governing the vendor's right to a reconveyance after the stipulated period.

The plaintiff sued the defendant for a reconveyance of a land transferred by him "on the agreement to repurchase the said premises before the expiration of one full year from this date of transfer on any day whatsoever, on the payment of the said sum of Rupees Three hundred together with interest thereon from date hereof till date of payment at the rate of eighteen per centum per annum."

The defendant resisted the action on the ground that the payment had not been tendered in terms of this agreement.

At the trial the following issues were framed :—

1. Is the plaintiff entitled to a retransfer of the premises conveyed to him on P1 ?
2. Was there a failure on plaintiff's part to carry out the terms of P1 ?
3. Is the defendant the absolute owner of the premises ?
4. Does the plaint disclose a cause of action against the defendant ?

The District Judge held on the facts against the plaintiff on the following grounds *inter alia.*

"Plaintiff was no stranger to conditional transfers. On D1 or P3 (1002 of 24-7-1932) he sold these lands to Mendis for Rs. 500/– with interest at 20 per cent per annum with a $1\frac{1}{2}$ years retransfer clause. Mendis transferred to Kovis on D2 or P4 (24239 of 1933) who transferred to the defendant on D3 or P5 (11246 of 1933) who re-transferred to plaintiff on D4 or P6 (11674 of 20-1-1934) *i.e.* 4 days within the 18 months retransfer period, on payment by the plaintiff to him of the total sum due for consideration and 20 per cent interest. On the same day 20-1-1934 plaintiff transferred the properties to defendant on P1 with a one year retransfer clause for a sum of Rs. 300/– and interest.....

.....

There is no evidence before court sufficient to establish that P1 is other than what it purports to be *i.e.* to establish that it is a security bond and not a conditional transfer of properties."

Held : (i) That no matter what name or designation the parties give to a contract or transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be.

(ii) That *prima facie* the court assumes that the nature of a transaction is such as it purports to be, and the onus is upon the person who asserts that it is something different to prove that fact,

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(iii) That each case must depend upon its own facts, and that no general rule can be propounded which can meet them all.

Per HEARNE, J. "The facts of this case require careful scrutiny. It may be that the parties intended to effect a pledge and not a sale. Considerations pointing to this being the case are that, while the transaction was on the face of it a *pactum de retrovendendo* attached to a contract of sale, the stipulation for re-conveyance was created in favour of a vendor who retained the beneficial interest apart from a collateral agreement, and who was indebted to the purchaser in the exact amount of the purchase price."

Cases cited :— 1. *Samynathan Chetty vs. Vanderpoorten* 34 N.L.R. 287.
2. *Wijewardena vs. Peiris* 15 C.L.R. 7.
3. *Jeremius Fernando vs. Perera* 28 N.L.Rec 183.
4. *Zandberg vs. Van Zyl* (1910) A.D. 302.
5. *John vs. Trimble* (1902) 1 Transval High Court Reports 146.
6. *Balkisten Das vs. W. F. Legge* (I.L.R.) 22 Allahabad 149.
7. *Narasingerji Jayanagerji vs. Panuganti Parthasaradhi Rayanam Garn* (I.L.R.) 47 Madras 729.

H. V. Perera with *G. P. J. Kurukulasuriya* for plaintiff-appellant.

M. T. de S. Amarasekera with *Colvin R. de Silva* for defendant-respondent.

HEARNE, J.

The plaintiff instituted an action to redeem certain premises which had been conveyed by him to the defendant by deed (P1), alleging that the premises were transferred to the defendant as security for the payment of a debt of Rs. 300/– and interest at 18 per cent per annum. The plaintiff remained in possession after the execution of P1.

According to P1 the plaintiff for a consideration of Rs. 300/– made a formal conveyance of the premises to the defendant " Provided, however, that if the said vendor were to repay the sum of Rs. 300/– with interest thereon at the rate of 18 per cent per annum, to be computed from this date, then the said vendee shall re-transfer the said premises on any day within one year from the date of this deed."

The defendant admitted that the plaintiff had tendered the principal and interest to him but stated that the tender was made after the period stipulated in the deed had expired. The Judge found, as in fact the plaintiff admitted, that the tender was made after the stipulated period had expired, and he rejected the plaintiff's evidence to the effect that the defendant had misled him regarding the period within which he (the plaintiff) was entitled to redeem. The defendant further pleaded that on the expiration of the stipulated period the plaintiff's right to a conveyance as well as his right to possess " ceased and the defendant thereupon became the absolute owner of the premises."

The question before the court was whether the transaction created a security for money advanced or whether it was a sale with a contract for a re-purchase. The Judge held that it was a sale and dismissed the plaintiff's suit.

" It is a general principle of law," as counsel for the appellant quoted, " that no matter what name or designation the parties gave to a contract or transaction, the court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be." This is of course subject to the rule that " *prima facie* the court assumes that the nature of a transaction is such as it purports to be, and the onus is upon the person who asserts that it is something different to prove that fact " by evidence that is legally admissible to prove that fact.

The general principle I have quoted " applies particularly to contracts of security. Hence, though the parties call their contracts a mortgage or pledge the court may hold it in fact to be a contract of another description ; or *vice versa* may hold a contract to be a mortgage or pledge though the parties designate it as a contract of another description."

" Each case must depend upon its own facts ; no general rule can be propounded which can meet them all." (Wille at pp. 75 & 76.)

Thus in *Saminathan Chetty vs. Vanderpoorten* (1932) 34 N.L.R. 287, the transaction effected by the deeds themselves construed in the light of circumstances leading up to their execution was, as the Privy Council held, no more than the creation of a security for money advanced ; in *Wijewardene vs. Peiris*, 15 Ceylon Law Rec. a most important consideration was that " there were no circumstances to show that the beneficial interest in the land or any residue thereof was outstanding in the plaintiff " ; and in *Jeremias Fernando vs. Perera* (1926) 28 N.L.R. 183, although the vendor remained in possession she did so in consequence of a collateral agreement to this effect and, as was held, the vendor understood the transaction to have effected a sale with a contract for re-purchase.

The facts of this case require careful scrutiny. It may be that the parties intended to effect a pledge and not a sale. Considerations pointing to this being the case are that, while the transaction was on the face of it a *pactum de retrovendendo* attached to a contract of sale, the stipulation for re-conveyance was created in favour of a vendor who retained the beneficial interest apart from a collateral agreement, and who was indebted to the purchaser in the exact amount of the purchase price. But, notwithstanding these considerations, I am not prepared to displace the judgment for the reason that the Judge found, and in my opinion, had ample grounds in particular the plaintiff's conduct for finding, that the plaintiff understood the transaction to be what, on the face of P1, it is, a sale with a right to re-purchase within a certain time, that time being of the essence of the contract.

On all the Judge's findings of fact I am in agreement with him and I would, therefore, dismiss the appeal with costs.

FERNANDO, A.J.

I agree.

Appeal dismissed.

Present : HEARNE, J. & FERNANDO, A.J.

SINNIAH CHETTIAR & OTHERS vs ISMAIL

S. C. No. 61 (*Inty*)—*D. C. Colombo* 1153

Argued on 15th & 16th September, 1937.

Decided on 20th September, 1937.

Civil Procedure Code sections 306 *and* 311—*Can the Court inquire into the validity of a gift made by the judgment-debtor before the action—Gift by Muslim—Can its validity be canvassed in proceedings under section* 306.

Held : (i) That in proceedings under section 306 of the Civil Procedure Code, and the subsequent sections, there is hardly any scope for an inquiry with regard to the validity or otherwise of a transfer effected by a judgment-debtor.

(ii) That if the court is satisfied that the judgment-debtor has not transferred any of his property since the institution of the action it is entitled to discharge the debtor.

N. Nadarajah for defendant-appellant.

Nadesan and *D. W. Fernando* for plaintiff-respondent.

FERNANDO, A.J.

The appellant in this case was arrested under a warrant, and he applied to the District Court to be discharged from custody as provided for by section 306 of the Civil Procedure Code. He filed an affidavit along with his petition in which he stated that he was not possessed of any property movable or immovable.

At the inquiry, the judgment-creditor in this action as well as the judgment-creditor in D. C. 3135 both opposed the discharge of the appellant, and the learned District Judge on the evidence before him came to the conclusion that the defendant some time before the institution of this action had donated his property at San Sebastian to his wife. He held, however, that in spite of the donation, the appellant had been in occupation of at least one room in the said property, and that the impression created in his mind was that the donation was merely a make believe, and that the appellant was still in possession. On these facts he came to the conclusion that the appellant was possessed of immovable property and that the averment in the affidavit to the effect that he had no property was not substantially true, and he ordered that the appellant be committed to prison for three months.

Counsel for the appellant contends that there was not sufficient evidence to enable the District Judge to come to this conclusion, and that the question whether the deed of gift should be set aside is one that the respondents can raise by way of appropriate proceedings if they desired

to do so. It seems obvious that in a proceeding under section 306, and the subsequent sections, there is hardly any scope for an inquiry with regard to the validity or otherwise of a transfer effected by a judgment-debtor. Section 311 sub-section (b) enables the Court to discharge the judgment-debtor if it is satisfied that he has not transferred any of his property since the institution of the action. Obviously, a transfer executed before the institution of the action cannot form the subject of an inquiry under section 311, and a failure to set out as his property an asset which he had transferred before the institution of the action cannot be regarded as the making of an untrue statement in terms of section 311 (a).

Counsel for the respondent contends that under the Mohamedan law a deed of donation is incomplete until delivery of possession has been given and that the evidence in this case proved that the appellant was in actual possession. The donation was, however, executed in favour of the appellant's wife and it seems difficult to say that the evidence in this case proves that the appellant was in possession on his own behalf and not as agent for his wife. The question whether in such a case, actual physical possession must pass from the appellant to his wife before the deed can be held to be good is one which really arises between the appellant's wife and another party who claims that the deed of transfer in her favour is ineffective as against him, and I do not think these questions really come within the scope of the inquiry which was being held by the District Court.

Some difficulty is created by the fact that notice of these proceedings was given to the judgment creditor in D. C. 3135, but that fact does not enable that judgment-creditor to contend in this action that the petitioner has failed to substantiate the averments in his affidavit even if it had been proved that he had fraudulently transferred his property before the institution of this action. For these reasons, I would set aside the order made by the learned District Judge and direct that in terms of section 311, the appellant be discharged from custody. The respondent will pay to the appellant his costs of this appeal. The learned District Judge himself made no order with regard to the proceedings of the 17th of February and in the circumstances of this case, I do not think it necessary to make any order for such costs.

HEARNE, J.

I agree.

Appeal allowed.

Present : MAARTENSZ, J.

Application by C. B. Nugawela for a Writ of Quo Warranto on (1) T. B. Ratwatte and (2) The Public Trustee.

S. *C. No.* 318

Argued on 6th & 7th September, 1937.

Decided on 21st September, 1937.

Quo Warranto—Buddhist Temporalities Ordinance No. 19 *of* 1931 *Sections* 7, 9 *and* 33 (*b*)—*Election of Diyawadana Nilame—Person holding more than one office—Has he a vote in respect of each office.*

Held : (i) That a person entitled to vote at the election of the Diyawadane Nilame can exercise only one vote although he may hold more than one office each of which qualifies him to vote at such election.

(ii) That the Attamasthane Committee has only one joint vote and that each member is not entitled to vote separately.

(iii) That the Court which has power under section 33(b) of the Buddhist Temporalities Ordinance to grant an extension of time in the case of an election is not necessarily the Court within whose jurisdiction the temple or *devale* in respect of which the election is to be held is situate.

(iv) That the provisions of section 7 (2) of the Buddhist Temporalities Ordinance are directory and that a meeting held after the prescribed time is not invalid.

F. A. Hayley, K.C., with *B. H. Aluwihare* and *E. B. Wickremanayake* for petitioner.

H. V. Perera, K.C., with *R. C. Fonseka* and *J. R. Jayawardena* for 1st respondent.

E. A. L. Wijeyawardena, Solicitor-General, with *R. R. Crossette Thambyah, Crown Counsel*, for 2nd respondent.

MAARTENSZ, J.

This is an application for a mandate in the nature of a writ of *quo warranto* to test the validity of the election of the 1st respondent to the office of Diyawadane Nilame. The 2nd respondent is the Public Trustee who presided at the meeting at which the 1st respondent was elected to the office.

The matter comes before me upon cause being shown by the respondents against the order *nisi* issued upon them being made absolute.

The main facts are not in dispute and are as follows :—

The last holder of the office of Diyawadana Nilame died on the 25th of March, 1937.

The procedure for the election of a Diyawadana Nilame when a vacancy occurs is prescribed by the Buddhist Temporalities Ordinance of 1931. In terms of section 7 of that ordinance, the Public

Trustee issued notices on the 19th of April to the persons mentioned in section 7 (2), (*a*), (*b*), (*c*), (*d*) and (*e*) to attend a meeting to be held in Kandy on the 22nd May, 1937.

The 22nd of May was proclaimed a Public Holiday and the Public Trustee thought it necessary to postpone the meeting fixed for the 22nd of May, and to issue notices summoning another meeting.

Section 7 of the Ordinance provides that the Public Trustee shall summon a meeting within two months of a vacancy occurring in the office, and as it was not possible to hold the meeting within that period, he moved the District Court of Colombo on the 18th May 1937, under the provisions of section 33 (b) of the ordinance, to extend the time for holding the meeting. He was granted 4 months' time from the 25th of March, 1937. On the same date (18th May, 1937) he issued notices to the persons summoned for the 22nd May that the meeting was postponed for the 3rd July, 1937. On the 31st of May he issued further notices to the same persons summoning them to a meeting at Kandy on the 3rd of July.

At the meeting held on the 3rd July, the petitioner and the 1st respondent were proposed and seconded for appointment to the office of Diyawadana Nilame. A ballot was held, and, on a count being taken, it was found that the 1st respondent had 45 votes and the petitioner 42 votes. Five ballot papers were at first regarded as spoilt as the number of the candidate was not written on the face of the paper. On further examination the number was found written on the backs of four of the papers. Three of these were in favour of the petitioner, and the other in favour of the 1st respondent. The 1st respondent had one vote more than his opponent, and was declared appointed Diyawadana Nilame.

The first objection taken to the appointment was as regards the date of the meeting. It was contended that the election was bad as the meeting was held more than two months after the death of the late Diyawadana Nilame. It was urged in support of this contention that a District Court has no jurisdiction under section 33 of the Ordinance to extend the time fixed by section 7, and that at all events the District Court of Colombo had no jurisdiction to make the order; the court, if any, which had jurisdiction being the District Court of Kandy.

The objection is based on the terms of section 7 of the Buddhist Temporalities Ordinance 1931 which enacts — I quote the relevant passage — that " Whenever a vacancy occurs in the office of the Diyawadana Nilame the Public Trustee shall within two months of such occurrence summon to a meeting at Kandy ---. "

I do not propose to discuss the objection, which was not strongly pressed, at length, as I am of opinion that the words relied on are merely directory and that a meeting held after the prescribed time is not invalid. The cases on this point are collected on page 321 of the 7th edition of Maxwell on the Interpretation of Statutes.

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I think I should point out with reference to section 33 that the Ordinance, though it defines the court as meaning the District Court having jurisdiction in the matter in question, does not define the term jurisdiction, and it is impossible to say what is meant by the definition of the term Court.

The provisions of the Civil Procedure Code, with regard to the jurisdiction of a District Court, are obviously inapplicable to the applications which are contemplated by the provisions of section 33.

The next objection to the election was that certain electors who were entitled to more than one vote were only allowed one vote. The question which arises from this objection is whether a person summoned to a meeting under the provisions of section 7 is only entitled to one vote although he may be present in two capacities. The determination of this question depends on a construction of the terms of section 7.

By section 7 the right of electing a Diyawadana Nilame is vested in

(*a*) the Mahanayake Theros of Malwatte Vihare and Asgiriya Vihare ;

(*b*) the Adigars and Disawas being Kandyans ;

(*c*) the Ratemahatmayas holding office within the Kandyan Provinces ;

(*d*) the Basnayake Nilames of all Dewalas situated within the Kandyan provinces ; and

(*e*) the trustees of all temples within the Kandyan provinces of which the annual income during the three preceding years is estimated by the Public Trustee at over one thousand rupees ; to each of whom must be sent a written notice addressed to the last known place of abode of such person.

The petitioner affirms that eight of the persons present at the meeting were summoned there in two capacities. Their names and offices are set out in paragraph 10 of his affidavit.

As the election was by a majority of one, I need only refer to two of them who actually claimed to have a right to two votes. There are (1) Mr. P. B. Bulankulame who claimed to have two votes, one in the capacity of Dissawe and the other as Ratemahatmaya of Nuwaragam Palata ; and (2) Mr. J. C. Ratwatte who claimed two votes — one as Adigar and the other as Basnayake Nilame of the Maha Dewala.

These claims were put forward after the Public Trustee had declared the poll closed.

The Public Trustee did not reject the claims on the ground that the poll was closed, but ruled that under subsection 3 of section 7 they had only one vote each.

Subsection 3 (a) provides as follows :—" The Public Trustee shall preside at such meeting and every person duly summoned and present thereat shall have a vote at every ballot to fill the said vacancy. Such ballot shall always be secret."

It was contended on behalf of the petitioner that the ruling of the Public Trustee was incorrect. It was argued in support of this contention that subsection 3 of section 7 contemplates two classes of voters, namely, the institutions mentioned in subclauses (*a*), (*d*) and (*e*), and the holders of the offices mentioned in subclauses (*b*) and (*c*). Accordingly, where a person was entitled to vote as representative of an institution and in his own right as the holder of one of the offices mentioned in the subsection, he was entitled to two votes, the result of the Public Trustee's ruling, it was submitted, was to deprive either the institution or the holder of the office of a vote.

There is some force in this contention. But an institution cannot vote ; the vote must be cast by an officer of the institution. Now the person or persons responsible for the enactment of section 7 must have been aware of the possibility of the person, representing the institution, being also entitled to vote as the holder of one of the offices specified in subclauses (*b*) and (*c*), and if it was the intention of the legislature to give that person the right to cast two votes, I should have expected provision to that effect in the Ordinance. So far from such provision being made, subsection 3 enacts that every person duly summoned and present shall have a vote, that is to say, one vote and no more. I am of opinion, in view of the terms of the subsection, that the ruling of the Public Trustee was right and must be upheld.

The next objection is based on the terms of this subsection. The petitioner states in his affidavit that the Public Trustee refused to allow two members of the Attamasthana Committee, who were present, to vote.

The terms " Attamasthana " means " The eight sacred sites of Anuradhapura. These, according to the decision of the Attamasthana Committee in 1909, are : (1) Bomaluwa, (2) Lowa Maha Paya, (3) Ruwanweli Seya, (4) Abhayagiri Vihara, (5) Thuparama, (6) Jetawanarama, (7) Lankarama, and (8) Mirisawetiya "—I quote from the Glossary of Native, Foreign, and Anglicized Words, compiled by H. W. Codrington of the Ceylon Civil Service, page 5.

The definition of the term " Temple " in section 2 of the Ordinance includes the " Attamasthana " of Anuradhapura, and the term " Trustee " includes the Attamasthana Committee.

This committee is composed of three persons nominated (under the provisions of section 9 (2)) by (*a*) the Nayaka Thero for the time being of the Bomaluwa ; (*b*) the head of the Nuwarawewa family for the time being ; and (*c*) the Mahanayaka Theros of Malwatte Vihare and Asgiriya Vihare and the Nayaka Thero of Sripadasthana by a majority respectively.

Section 9 (1) provides that " the trustee for the Attamasthana shall be the Attamasthana Committee.—"

The Public Trustee in his affidavit denies that he refused to allow the other two members of the Attamasthana Committee to vote at the election. His statement of what took place is set out in paragraph 11

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as follows :—" Referring to paragraphs 11 and 14 of the petitioner's affidavit, I admit that the Attamasthana Committee, which is the trustee for the Attamasthana, consists of three persons. The said committee, by a writing dated the 2nd July, 1937, and handed to me at the said meeting, authorized and deputed one P. B. Bulankulame, member and Chairman of the said Committee, to cast the Committee's vote on behalf of the said Committee at the said election. A copy of the said writing is annexed hereto and marked 2R4. The said P. B. Bulankulame was, accordingly, given a ballot paper. I specifically deny that I refused to allow the other two members of the Attamasthana Committee to vote at the said election, It is, however, correct that whilst the voting was in progress, one of the bhikshu members of the said committee approached the officer issuing the ballot papers and produced the copy (sent to him for his information) of the notice issued to the Attamasthana Committee, the trustee for the Attamasthana. I explained to him at this stage that it was not necessary for him to put himself to the trouble of voting as he had given the Chairman of his Committee written authority to cast the vote on behalf of the Attamasthana Committee. He agreed and did not ask for a ballot paper or claim a right to vote at the election. I affirm that when this incident occurred the Chairman of the Attamasthana Committee had already voted."

This statement was not challenged and clearly no formal claim to vote was made by the two members of the Committee who, the petitioner alleges, were not allowed to vote.

According to this statement, it would appear that the Attamasthana Committee was summoned to the meeting and a copy of the notice was sent to each member of the Committee for his information.

The document 2R4, which is as follows :—

Anuradhapura,
2nd July, 1937.

Mr. P. B. Bulankulame, member and chairman of the Attamasthana Committee, is hereby authorized and deputed to cast the Committee's vote on behalf of the said Attamasthana Committee at the meeting for the election of a Diyawadana Nilame to be held at Kandy on Saturday, July 3, 1937.

1. Sgd. H. DEWAMITTA
2. Sgd. H. REWATA

Members, Attamasthana Committee.

Received today.
Sgd. A. G. RANASINGHE
Public Trustee,
July 3, 1937.

shows that the members of the committee took the view that they were not each entitled to vote and authorized the Chairman to cast the vote of the Committee. I am of opinion that, so far as the election of a Diyawadana Nilame was concerned, they were right.

It was argued that if a person appoints A, B and C his *trustee*, it is the same as saying that he appoints them his *trustees*. But that is not the phraseology of section 9 which says that the trustee shall be the committee, and then goes on to provide that " the said committee shall elect one of their number as chairman, its quorum shall be two and in the case of an equal division of votes at a meeting the chairman shall have a second or casting vote."

The Buddhist Temporalities Ordinance No. 8 of 1905 section 5 provided that the Attamasthana Committee shall consist of six members, and by section 17 the trustee was appointed by this committee. In the case of other temples the trustees were appointed by the District Committees created by the Ordinance.

The Ordinance of 1931 substituted the committee as trustee instead of vesting the Committee with the right of electing a trustee, which confirms my view that the trustee was the committee and not each member of it. I repeat, for the sake of emphasizing what I have already said, that this opinion is limited to the question I have to decide, namely, whether this committee had one vote or three votes for the purposes of the election of a Diyawadana Nilame.

I think, accordingly, that this objection must be overruled on two grounds,—(1) because the Public Trustee did not in fact refuse to allow the two members of the committee to vote, and (2) because the Committee had only one vote for the purpose of the election in question.

In view of my rulings on the objections raised by the petitioner to the validity of the election, it is unnecessary for me to discuss Mr. Perera's contention that the remedy by *quo warranto* was not available to the petitioner because (*a*) the office of Diyawadana Nilame was not created by charter from the Crown or by Statute, (*b*) the Public Trustee was exercising a judicial function which he was appointed by law to discharge.

I discharge the rule with costs.

Rule discharged.

Present : HEARNE, J. & FERNANDO, A.J.

THE PUBLIC TRUSTEE vs KARUNARATNA

S. C. No. 134—*D. C. Kalutara No.* 19174
Argued on 14th September, 1937.
Decided on 17th September, 1937.

Order by Court entering judgment for plaintiff in a case where defendant's pleader applies for a postponement and is refused—Is such order an inter partes *order or an* ex parte *order.*

On the date of trial the defendant's pleader produced a medical certificate and moved for a postponement on the ground that the defendant was ill. The trial judge refused postponement. The pleader, thereupon, stated that he could not proceed with the case and that he had no instructions. The judge entered judgment for the plaintiff as prayed for. No evidence was led to prove plaintiff's claim. The defendant in his answer had traversed the plaint and denied the plaintiff's claim except for a sum of Rs. 43/75.

Held : (i) That the plaintiff should have been called upon to prove his case before judgment was entered in his favour.

(ii) That the order made by the judge was an *inter partes* order and an appeal was the proper remedy.

Cited :—*Andiappa Chetty vs Sanmugam Chetty*, 1 C.L.W. 178.

G. P. J. Kurukulasuriya for defendant-appellant.

N. E. Weerasooriya with *A. E. R. Corea* for plaintiff-respondent.

HEARNE, J.

The plaintiff as administrator of the estate of a deceased person sued the defendant for the recovery of Rs. 2,000/–. On the case being called, Mr. C. W. Perera, who appeared for the defendant, moved for a postponement on the ground of defendant's illness. A medical certificate was produced. The Judge recorded that he saw nothing in the medical certificate to show that the defendant was unfit to attend court and refused the application for postponement. Mr. C. W. Perera then stated to the court that he could not proceed with the defence as he had no instructions and the Judge entered judgment for the plaintiff as prayed for..... No evidence was given.

Apart from the question of whether the Judge exercised his discretion properly in refusing the application for a postponement, it is clear from the record that the plaint was traversed and a specific defence was raised to the plaintiff's case except to the extent of Rs. 43/75. In the circumstances, the plaintiff should have been called upon to prove his case before judgement was entered in his favour. The order made by the Judge was an *inter partes* order, following *Andiappa Chetty vs. Sanmugam Chetty*, 1 C.L.W. 178, and an appeal is the proper remedy.

The appeal is allowed with costs and the case is remitted to the lower court for trial.

FERNANDO, A.J.

I agree.

Appeal allowed.

Present : ABRAHAMS, C.J.

WIJESURIYA (Registrar of Lands) vs DALPATADU (Notary Public)

S. C. No. 420—*P. C. Panadure No.* 41828

Argued on 22nd September, 1937.

Decided on 29th September, 1937.

Notaries Ordinance No. 1 *of* 1907—*Section* 29 *rules* 24 *and* 33—*Omission to transmit duplicates of deeds to the Registrar-General—Failure to give an explanation of the omission—Effect of proviso to section* 29.

Held : (i) That the proviso to section 29 of the Notaries Ordinance does not impose an obligation on the Registrar-General to give a notary, who has disregarded or neglected to observe the provisions of Rule No. 24, further time to comply with the requirements of the rule.

(ii) That the word "may" in the proviso to section 29 of the Notaries Ordinance does not have the force of " must."

(iii) That a notary is bound under rule 33 of section 29 to give an explanation of his omission to comply with rule 24 and that failure to give an explanation is punishable.

Kottegoda with *Dodwell Gunawardena* for Accused-appellant.

M. F. S. Pulle, Crown Counsel, for Complainant-respondent.

ABRAHAMS, C.J.

The appellant, a Notary Public, was convicted in the Police Court of Panadura of the offence of having failed to transmit or deliver to the Registrar of Lands, Kalutara, the duplicates of deeds drawn and attested by him during the month of December, 1936, on or before the 15th day of January, 1937, as required by rule 24 of section 29 of Ordinance No. 1 of 1907. He was fined for that offence Rs. 30/–. He was also convicted, at the same time, of the offence of having failed to give an explanation as regards his failure to transmit these duplicates as required by rule 33 of the same Ordinance, and he was fined Rs. 20/–. The appellant does not dispute the facts of the case. He admits that he failed to transmit the duplicates by the date mentioned. He also admits that when he was called upon for an explanation of his failure he gave no explanation. He pleads, however, that in law he did not commit either offence.

Rule 24 abovementioned reads as follows :—

> " He shall deliver or transmit to the Registrar of Lands of the district in which
> " he resides the following documents, so that they shall reach the registrar on or
> " before the fifteenth day of every month, viz., the duplicate of every deed or
> " instrument (except wills and codicils) executed or acknowledged before or
> " attested by him during the preceding month, together with a list in duplicate,

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" signed by him, of all such deeds or instruments, which list shall be substantially " in the form F in Schedule II hereto, and he shall at the same time " forward a similar list so signed by him to the Registrar-General. Provided, " however, that in the case of wills and codicils only the number and date of the " document shall be inserted in such list."

Rule 33 abovementioned reads as follows :—

" He shall, in regard to any irregularity, error, or omission discovered or alleged " to have been discovered in the discharge of his duties as notary, and which appears " to the Registrar-General to be a violation of the law, give an explanation in " writing when required by the Registrar-General or by the Registrar of Lands' " under the order of the Registrar-General, but such explanation shall in no case " be called for after the expiry of twenty-four months from the date of the commis- " sion of such irregularity or error, or of such omission."

The penalty provision under which the appellant was convicted occurs at a later point in section 29 and also reads as follows :—

" And if any notary shall act in violation of or shall disregard or neglect to observe " any of the rules and regulations contained in this section that are binding upon " him, he shall be guilty of an offence, and shall be liable on conviction thereof " to a fine not exceeding two hundred rupees, in addition to any civil liability " he may incur thereby."

As regards the first conviction it is argued for the appellant that he had committed no offence because section 29 of the abovementioned Ordinance was amended by section 6 (*d*) of the Notaries Amendment Ordinance, No. 10 of 1934, and, in these circumstances, protected him from prosecution. This amendment was inserted in section 29 of the principal Ordinance immediately after that penal provision to which I have referred, and reads as follows :—

" Provided that where any notary shall act in violation of or shall disregard or " neglect to observe the provisions of Rule No. 24, the Registrar-General may, by " a written notice served on him personally or sent by registered post, call upon " such notary to comply with the requirements of the said rule within such further " time as he may specify for such purpose, and any notary who fails to comply " with the terms of such notice shall be guilty of an offence and shall be liable " on summary conviction to a fine not exceeding five hundred rupees."

Learned Counsel for the appellant contends that the effect of that Ordinance is to place an obligation upon the Registrar-General to notify every Notary who has failed to carry out the directions in rule 24 of his failure to make such compliance and to give the Notary a period of time within which he must make such compliance. He contends that since that was not done, and admittedly it was not done, no prosecution would lie.

The question then clearly is, has the Registrar-General a discretion to send such a notice or is he under an absolute duty to do so? It says that the " Registrar-General *may* etc., " and it has been decided in a number of cases, which it is not necessary to mention, that 'may' never meant ' must ' or ' shall.' Those cases furnish an overwhelming balance of judicial opinion on the point. As Cotton L.J. said *In re Baker*, 44 Ch. D. 262, at page 270, the word 'may' " never can mean 'must'.....but " it gives a power, and then it may be a question in what cases, where a Judge

" has a power given him by the word 'may', it becomes his duty to exercise " it." Assuming for a moment that the Registrar-General has an absolute discretion and does not exercise it in the case of a particular Notary who has failed to make compliance with Rule 24, what is the result ? The result is that that Notary is liable to a penalty for failing to do what the law says he must do. What individual Notary can say that the Registrar-General was under an obligation to serve notice of an extension of time upon him ? What was the intention of the legislature when the principal Ordinance was amended by the amending Ordinance ? I think that it is obvious that the legislature had in mind the hardship that can be caused to certain Notaries who are unable to make compliance with the regulation in rule 24. I do not think that it can be seriously urged that the legislature thought that it will be a hardship on every Notary that he will be compelled to transmit the relevant documents by the 15th of the month. If the legislature thought that, the simplest method of relieving Notaries from the presumed hardship would have been to alter the date, but the legislature did not do that but it gave the power instead to the Registrar-General to grant an indulgence. Since the legislature could not have considered that rule 24 was too stringent for all Notaries, can it then be said that it intended to give every Notary irrespective of his reasons for failing to make compliance with rule 24 the benefit of the indulgence prescribed by the amending Ordinance ? Learned Counsel for the appellant argued that that was the intention. I find myself quite unable to accept that. It seems out of the question that because some people are deserving of indulgence therefore everybody is to get it, the wilfully neglectful, the grossly negligent and the grossly careless, the slightly careless as well as the person with a complete excuse. The plain commonsense view of the matter is that the Registrar-General was invested with a discretion, and if he could be trusted to fix the period of time to which the indulgence should extend it would be absurd to say that he could not be trusted to discriminate between a person who deserves that indulgence and a person who does not. I think on that point alone the appeal against this particular conviction fails.

As regards the second conviction, it is argued by learned Counsel for the appellant that if the first conviction is good the second conviction cannot stand because the appellant will then have been punished twice for the same offence. As I understand his argument he means this, that if it is an offence in the appellant to fail to send in these documents by the 15th of the month as required by rule 24, it cannot be an offence in him to fail to give an explanation as to why he committed that offence because it is obvious that there is no explanation to give. I cannot agree with that argument. Rule 33 imposes a duty upon every Notary to give an explanation in writing of any irregularity, error or omission which the Registrar-General discovers, or thinks he has discovered, and which appears to him to be a breach of the law. I do not see any words of limitation in that rule which would relieve the appellant of the obligation to comply with it. The rule does not call upon

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him to give an explanation which satisfies the Registrar-General that no irregularity in fact has been committed. I do not see how he could escape the consequence of refusing to give an explanation by saying that he could not give a satisfactory one. This appeal too fails, and, like the appeal against the first conviction, must stand dismissed.

Appeal dismissed.

Present: ABRAHAMS, C.J.

THE KING vs. SEEMAN ALIAS SEEMA

S. C. No. 88—*D. C.* (*Crim.*) *Kalutara No.* 5884/28170

Argued on 26th July, 1937.

Decided on 29th July, 1937.

Criminal Procedure Code sections 338 *and* 357—*Appeal out of time—Can Supreme Court treat it as an application in revision—Principles of punishment—How should the appropriate punishment for an accused with previous convictions be determined.*

Held : (i) That the Supreme Court has power to treat an appeal which is out of time as an application in revision.

(ii) That it is not proper to inflict a more severe punishment than is appropriate to the offence with which the accused is charged merely on account of previous bad record of the accused.

Appellant appears in person (in custody).

M. F. S. Pulle, Crown Counsel, for the Crown.

ABRAHAMS, C.J.

The appeal in this case is a day late and could not be admitted. I have, however, treated it as an application in revision, an action of somewhat doubtful justification, but the accused is not represented and, perhaps, is entitled to a little indulgence. The evidence supports the conviction for both offences with which the accused was charged. In his petition of appeal the accused contends that the prosecution witnesses were all partisans and were not telling the truth. The learned District Judge, however, said that they gave their evidence well and were no doubt speaking the truth. Apparently truthful witnesses are not to be discredited merely because they happen to be related to the complainant. The accused, it is true, was found to be suffering from certain injuries, but he gave no evidence at all in the lower Court and, in his petition of appeal, he does not assert that the injuries were caused by the complainant or any of his witnesses. He seems

to think that it is quite sufficient to allege that the prosecution had not accounted for the injuries which he himself has made no effort to account for. The learned District Judge's theory that some of the injuries might have been caused in the struggle which was evidenced by the prosecution witnesses or that the accused was assaulted by some other people, may be well founded. In any event, there seems to me to be nothing in the evidence for the prosecution to establish any hypothesis that the injuries were caused by either of the complainants.

The accused admitted four previous convictions and the learned District Judge observed that he was a dangerous criminal and sentenced him to two years' rigorous imprisonment on the 1st count and to 6 months' rigorous imprisonment on the 2nd count, the sentences to be served concurrently. Of these previous convictions one was for theft in 1924, two were for house-breaking and theft in 1931 and 1936 respectively, and one for loitering in a public place, being a reputed thief, in 1935. If the District Judge had thought he was under a duty to inflict a more severe sentence than he otherwise would have done on account of the accused's previous record, there is some ground for criticism, since, in the first place, none of the previous offences are at all connected with those that are the subject of the present case, and, secondly, it has been laid down by the Court of Criminal Appeal in England, on several occasions, that a man is not to be punished severely merely on account of his past record, otherwise this would be punishing him twice for the same offence. In some circumstances, I think I should have been justified in interfering with the sentence of two years' imprisonment, but I am inclined to take the nature of the offence into consideration. The complainant received one injury which rendered one hand useless, though the other injuries were not apparently serious. The attack seems to have been a reckless one and two of the wounds were in the chest, a part of the anatomy where even moderate force with a pointed weapon may result in vital injury. The use of the knife is so common in this country that Courts are justified in treating cases of this kind with severity. Further, concurrent sentences in this case are rather indulgent in view of the fact that the two offences were in no way connected with each other. I therefore propose to allow the sentences to stand.

The appeal must be dismissed.

Appeal dismissed.

Present: HEARNE, J. & FERNANDO, A.J.

DADA vs THE BRITISH CEYLON CORPORATION LTD.

S. C. No. 270—D. C. Colombo No. 4772

Argued on 8th September, 1937.

Decided on 14th September, 1937.

Contract—Arrival contract—C.I.F. contract—Failure to tender Bill of Lading—Acceptance of delivery order in lieu of a Bill of Lading—Where it is clear that the delivery order is tendered on C.I.F. terms, does the delivery order take the place of the Bill of Lading.

The plaintiff sued the defendant company for a sum of Rs. 348/72 being the difference between the value of 1,000 cwts. and 957 cwts. 82 lbs. of copra. The copra was coming by steamer from abroad. By their letter dated November 12, 1935, the defendant company asked the plaintiff to forward the necessary documents and to arrange for a representative of his to be present at the weighing of the copra. By his letter dated November 13, 1935, the plaintiff replied that his terms of contract being C.I.F. his responsibility ended with the delivery of the documents. The plaintiff enclosed a delivery order in place of a Bill of Lading and thereafter the defendant company took delivery.

Held : (i) That, where in a C.I.F. contract the buyer accepts a delivery order in place of the Bill of Lading, the buyer must be taken to have agreed to accept the delivery order in place of the Bill of Lading.

(ii) That a misconception on the part of the buyer as to the nature of the contract cannot affect its character or its legal implications.

Choksy with *Stanley de Zoysa* for the plaintiff-appellant.

VanGeyzel for the defendant-respondent.

HEARNE, J.

The plaintiff sued the defendant company for Rs. 348/72 being the value of the difference between 1,000 cwts. and 957 cwts. 82 lbs. of copra. The copra was coming from overseas. It is unnecessary to deal with all the facts of the case. The determination of the suit depended upon three considerations. If the contract was an arrival contract, the defendant company was not liable. If it was a C.I.F. contract, the question was, whether the plaintiff had delivered what are known as the " obligatory documents " under a C.I.F. contract. Finally, if he had not delivered the obligatory documents, did the defendant company, by express agreement, waive any of the obligatory documents and, in lieu thereof, accept another document.

The learned trial Judge found, and his finding is unexceptionable, that the contract was a C.I.F. contract. He then considered the contention

of the defendant company that " the plaintiff had not fulfilled his obligations under such a contract to tender a Bill of Lading." This issue (it is issue 2) he decided against the plaintiff when he held that " there was no constructive delivery by tender of a Bill of Lading." Having so found he dismissed the plaintiff's suit. But he failed to consider the further issue of whether the defendant company, having accepted a delivery order in lieu of a Bill of Lading, was not liable on the contract as a C.I.F. contract.

The law on the subject is settled. If a seller tenders in place of one of the obligatory documents—for instance, a warehouse order or a ship's release in place of a Bill of Lading—the buyer need not accept it and the seller may subsequently retender proper and valid documents provided the time for tendering has not gone by. But a buyer may, by express agreement, accept another document, for instance a warehouse order, in place of a Bill of Lading.

The facts of this case indicate either that the defendant company did not appreciate the significance of a C.I.F. contract, or, if they did that, they sought to convert what the Judge found to have been a C.I.F. contract into an arrival contract. In their letter of the 12th November, 1935, (D3) they ask the plaintiff to forward the necessary documents and to arrange for a representative of his to be present at the weighing of the copra. In his letter (P 3) dated the following day (13th November) the plaintiff pointed out that his terms being C.I.F. terms his responsibility ended with the delivery of the documents. There was a clear indication to the defendant company that such documents as the plaintiff was tendering were being tendered " on C.I.F. terms ." The plaintiff enclosed a delivery order in place of a Bill of Lading and thereafter the defendant company took delivery. In view of the clearest intimation to the defendant company that the documents were tendered under a C.I.F. contract it must be held that they had expressly agreed to accept the delivery order in place of the Bill of Lading. Any misconception on the part of the defendant company as to the nature of the contract cannot affect its character or the legal implications of their conduct.

I would allow the appeal and enter judgment as prayed for by the plaintiff with costs in this court and in the court below.

FERNANDO, A.J.

I agree.

Appeal allowed.

Present : POYSER, J. & SOERTSZ, J.

SINNAPOO vs THEIVANAI AND ANOTHER

S. C. No. 15 *of* 1937—*D. C. Jaffna No.* 7163

Argued on 13th September, 1937.

Decided on 28th September, 1937.

Stamp Ordinance Part II Schedule B—Ascertainment of value of action—Appeal rejected in error—Can it be restored to the list on the error coming to the notice of the Court even after decree has been entered.

This case and two other cases—S. C. 77—D. C. Galle 35107 and S. C. 251—D. C. Kurunegala 13943—were on March 19, 1937, listed for dismissal on the ground that the appeal proceedings were insufficiently stamped. After hearing counsel on the question of Stamp Duty, the Supreme Court reserved its order. Judgment dismissing all three appeals (*vide infra Sinnapoo vs. Theivanai*), on the ground that the petition of appeal in all three cases were insufficiently stamped, was delivered on April 23, 1937. It was later brought to the notice of the judges who heard the cases that the petitions of appeal in *Sinnapoo vs. Theivanai* and S. C. 77—D. C. Galle 35107 were in fact stamped correctly according to Part II of Schedule B of the Stamp Ordinance as amended by Ordinance No. 19 of 1927 and that the judgment of the Supreme Court had overlooked the fact that the Schedule had been amended by Ordinance No. 19 of 1927. The cases were again listed for argument. It appeared at the second argument —

(*a*) that in this case (*Sinnapoo vs. Theivanai*—S. C. No. 15 —D. C. Jaffna 7163) the petition of appeal and the certificate in appeal were correctly stamped, but that the proper amount of Stamp had not been tendered for the decree in appeal;

(*b*) that in S. C. 77—D. C. Galle 35107, the proper amount of duty had been paid on petition of appeal, the certificate in appeal and the decree in appeal;

(*c*) that in S. C. 251—D. C. Kurunegala 13943, the petition of appeal, the certificate in appeal and the decree in appeal were all insufficiently stamped, although the correct amount of duty was paid on the petition of appeal and the decree in appeal after the appealable time.

The court thereupon rejected the appeals in this case (*infra*) and D. C. Kurunegala 13943 and ordered that the appeal in D. C. Galle 35107 be restored to the list.

In the last mentioned case, the plaintiff sought to obtain a retransfer of a land valued at Rs. 2,500/– and damages at Rs. 15/– per mensem from the date of the plaint. The plaint though dated July 22, 1936, was filed on July 23, 1936—the day following.

Held : (i) That the value of the claim in S. C. 77—D. C. Galle 35107 was Rs. 2,500/–.

(ii) That an appeal rejected in error can, on the error being brought to the notice of the court, be restored to the list.

(iii) That the Supreme Court will not entertain an appeal in any case in which the appellant has failed to tender the proper amount of Stamp Duty for the decree in appeal in the manner prescribed in Part II of Schedule B of the Stamp Ordinance under head Miscellaneous.

(iv) That failure to observe the requirements of Part II of Schedule B of the Stamp Ordinance, under head Miscellaneous, regarding the tendering of the stamps for the decree or order of the Supreme Court and the certificate in appeal cannot be rectified by tendering the stamps later, after the appealable time.

[**Editorial Note :** In the following cases the Supreme Court "rejected" appeals which did not comply with the requirements of the stamp law relating to the stamping of appeal proceedings :—

Salgado vs. Peiris 12 N.L.R. p 379.
Sathasivam vs. Cadiravel Chetty 21 N.L.R. p 93.
Ramalingam Pillai vs. Wimalaratne 36 N.L.R. p 52 at p 53.
British Ceylon Corporation vs. United Shipping Board 36 N.L.R. 225 at pp 249 and 258.
Attorney-General vs. Karunaratne 37 N.L.R. p 57 at p 60; 4 C.L.W. p 23 at p 25.
Sinnethamby vs. Thangamma 1 C.A.C. 151.
Hurst and another vs. Attorney-General 4 C.W.R. 265.

In the case of *Attorney-General vs. Karunaratne* 37 N.L.R. p 57 at p 60 ; 4 C.L.W. p 23 at p 25, which is a judgment of three judges, it was held, following *Bandara vs. Balan Appu* 1 Matara Cases p 203, that unless the stamps for the decree or order of the Supreme Court and the certificate in appeal are delivered to the Secretary of the District Court or the Clerk of the Court of Requests simultaneously with the petition of appeal, an appeal cannot be entertained by the Supreme Court.]

H. V. Perera, K.C., with *H. W. Thambiah* for defendants-appellants.
L. A. Rajapakse with *P. A. Senaratne* for plaintiff-respondent.
E. A. L. Wijeyawardene, Solicitor-General, with *H. H. Basnayake, Crown Counsel*, as *Amicus Curiae.*

POYSER, S.P.J.

Several weeks after our judgment had been pronounced in this case, it was brought to our notice that the Stamp Ordinance had been amended in regard to duties on law proceedings by Ordinance No. 19 of 1927. The argument had proceeded on the basis that the duties in the Ordinance of 1909 applied. Counsel state that they were not aware of the amendments effected in 1927 and our recollection did not serve us on this point. The result of the amendments now brought to our notice is to show that the petition of appeal and the certificate in appeal had been provided with sufficient stamps, but the stamps supplied for the judgment of the Supreme Court were insufficient. There is a deficiency of three rupees.

The order dismissing the appeal, therefore, stands, and so does the principle enunciated in our judgment in regard to the assessment of the value of a claim made in a case for the purpose of fixing the correct stamp duty.

Two other cases, in which the same question arose, were disposed of by us in accordance with the principle stated by us in this case. These cases were : (1) *S. C. No. 77—D. C. Galle No.* 35107 and (2) *S. C. No.* 251—*D. C. Kurunegala No.* 13943.

In view of the amendments referred to above, the former of these cases was wrongly dismissed. The proceedings appear to have been duly stamped. We, therefore, direct that this case be listed for argument in due course. It is not necessary that it should be listed before us.

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In regard to the latter case, the order of dismissal stands, for although the petition of appeal has been stamped in accordance with the amended schedule of the Stamp Ordinance, the stamps for the certificate in appeal and for the Supreme Court Judgment are insufficient.

SOERTSZ, J.

I agree.

Present : POYSER, S.P.J. & SOERTSZ, J.

SINNAPOO vs THEIVANAI AND ANOTHER

S. C. No. 15—*D. C. Jaffna No.* 7163

Argued on 19th March, 1937.
Decided on 23rd April, 1937.

Stamp Ordinance—Method of determining the value of a suit for the purposes of stamping the proceedings—Schedule B Part II of the Ordinance.

The plaintiff instituted this suit in November, 1934, claiming that he be restored to the possession of a temple, his interest in which he valued at Rs. 500/–, and for damages at the rate of Rs. 10/– per mensem from the month of September 1934.

Held : (i) That the proper method of ascertaining the value of a suit, for the purpose of determining the stamp duty on the proceedings under Part II Schedule B of the Stamp Ordinance, is by aggregating the value of all claims on the date the action is filed.

(ii) That in this case the value of the suit was Rs. 530/–.

H. V. Perera with *Manikawasagar* for defendants-appellants.
Rajapakse with *J. L. M. Fernando* for plaintiff-respondent.
N. Nadarajah, Crown Counsel, for Attorney-General.

POYSER, S.P.J.

In this appeal the plaintiff claimed, *inter alia*, to be restored to possession of a temple and for damages at the rate of Rs. 10/– per mensem from the month of September 1934. The plaintiff stated his interest in the said temple to be worth Rs. 500/– and his plaint was filed in November 1934.

The appeal has been listed for dismissal on the ground that the petition of appeal has been stamped on the basis of a claim "up to and including Rs. 500/–," viz. that it was stamped on the assumption that the claim came within Schedule B, Part II, Class I of the Stamp Ordinance.

Mr. Perera, while conceding that the aggregate value of the claim is over Rs. 500/–, argued that the claim is really only for land of the value of Rs. 500/– and the claim for damages is incidental. In support of that argument, he referred to section 77 of Courts Ordinance which defines the jurisdiction of Courts of Requests. The material parts of that section are as follows :—

" Every Court of Requests shall be a Court of record and shall have original juris-
" diction, and shall have cognizance of and full power to hear and determine all
" actions in which the debt, damage, or demand shall not exceed three hundred
" rupees, and in which the party or parties defendant shall be resident within
" the jurisdiction of such court, or in which the cause of action shall have arisen
" within such jurisdiction, and all hypothecary actions in which the amount claimed
" shall not exceed three hundred rupees, and the land hypothecated or any part
" thereof is situated within the jurisdiction of such court, and also all actions
" in which the title to, interest in, or right to the possession of any land shall be
" in dispute, and all actions for the partition or sale of land, provided that the
" value of the land or the particular share, right, or interest in dispute or to be
" partitioned or sold shall not exceed three hundred rupees, and the same or any
" part thereof is situate within the jurisdiction of such court..... "

That section has been judicially interpreted by a Full Bench in the case of *Banda vs. Menika*, (21 N.L.R. p 279), and it was held that "the test of jurisdiction in a land case is the value of the land or interest in dispute irrespective of any damage or other relief claimed in the cause of action. Any claim for damages is only incidental and subsidiary, and does not affect the question of jurisdiction of the Court. Where the action involves a mere money claim, such as an action sounding in damages only, the continuing damages are not incidental, but are part of the cause of action, and must be reckoned in determining the monetary jurisdiction of the Court."

Bertram C.J. stated, in the course of his judgment, " it is no doubt a singular result that it should be possible to bring in conjunction a claim to land worth Rs. 300/–, and a further incidental monetary claim to the same amount, but there is nothing in the section to prevent such claims from being combined."

I do not, however, consider that this decision affects the present case, for the section in question gives the Court of Requests specific jurisdiction in cases where the value of the land in dispute does not exceed Rs. 300/–, and does not exclude such cases where there is an incidental claim for damages.

There are no explanatory words in the Stamp Ordinance in regard to Part II as in the Civil Procedure Code Schedule III which deals with costs.

The practice in similar cases is stated to have varied, some proctors stamping documents according to the value of the land only and others aggregating the value of the land and damages claimed.

Of the authorities that were cited the following are the most in point : *de Silva vs. Lever*, (28 N.L.R. p 436), in which *Schneider J.* held, "The rates or scales of costs and charges in Schedule III of the Civil Procedure Code, and the tables containing the duties on law proceedings in Schedule B of the Stamp Ordinance No. 22 of 1909. which is the Ordinance now in force, are not based upon identical monetary limits. One common element there is, that is that the division between class and class in both enactments turns upon a monetary limit, but the classifications of the limits are different. The Stamp Ordinance is silent as to what the sum of money mentioned at the head of each class represents. Obviously it refers to the same thing as the Civil Procedure Code does. The Civil Procedure Code (Schedule III) says that the sum is the value of ' the cause of action, title to land or property or of the Estate or subject matter of the action.' Costs do not mean stamp duty alone."

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In Silva vs. Fernando, (XI N.L.R. p378), *Wendt J.* held, "In the absence of such statement, I think we ought to appraise the " subject matter, " meaning thereby the thing (whether land, chattel, money, or interest in one of these, or right or status) which the Court in deciding the action has to determine the ownership of, not merely " relief " in the sense of that which the plaint expressly asks for and the decree expressly grants. If, therefore, plaintiff says defendant trespassed on his land, and removed part of that land, to wit, plumbago worth Rs. 10/–, and prays for judgment for the Rs. 10/–, and defendant says the land is his own, but the Court finds plaintiff is the owner and gives him judgment for Rs. 10/–, in that case, the subject matter dealt with by the Court, is not the Rs. 10/– only, but the land in addition ; and if plaintiff had reason to suppose that defendant's act was done in assertion of a claim to the land, he ought to have stamped his plaint according to the aggregate of the value of the land and of the plumbago.

These cases certainly support the argument on behalf of the Attorney-General and the respondent, that you cannot read into the Stamp Ordinance provisions contained in the Civil Procedure Code or the Courts Ordinance, and I am of the opinion that, in the absence of any explanatory words in the Stamp Ordinance, the words " up to and including Rs. 500/– " must mean the aggregate value of the claim, and if that is so, the contention of the Attorney-General and respondent must succeed.

There is one further point, viz. whether this appeal must be dismissed or whether the defect can now be cured. There seems no doubt that the court must dismiss the appeal and this point is settled by authority. In this connection I would refer to two cases viz. *Salgado vs. Peiris*, (12 N.L.R. p379), a Full Bench case in which it was held, a petition of appeal in insolvency cases must bear a stamp of Rs. 2/50 at the time it is presented to the Court. The Court has no power to allow it to be stamped after the time for appealing has expired. In the course of the judgment of *Hutchinson C.J.*, at page 380, the following passage occurs " In my opinion the effect of the Stamp Ordinance is that a petition of appeal in insolvency cases must bear a stamp of Rs. 2/50 ; and that the court has no power to allow it to be stamped after the time for appealing has expired."

The other case is *Hurst & Another vs. The Attorney-General* (4 C.W.R.) in which Ennis J. held at page 265 :—" Objection has been taken that the petition of appeal in this case is not correctly stamped. It is stamped with stamps to the value of Rs. 10/– instead of Rs. 107/–. This appears to be correct, and, on the authority of the cases of *Sinnethamby vs. Thangamma*, (1 C.A.C. p 151) and *Salgado vs. Peiris*, (12 N.L.R. p 379) the appeal must be dismissed with costs. I would add that section 36 of the Stamp Ordinance prohibits the Court from acting upon the instrument and there is no proviso or any provision in the Stamp Ordinance allowing the defect to be cured other than possibly section 43."

For the above reasons, this appeal must be dismissed with costs.

There were two other appeals, viz. 251 D. C. Kurunegala No. 13943 and 77 D. C. Galle No. 35107 in which exactly the same point arose, and it was conceded by counsel appearing in these cases that the aggregate claims, as in this case, exceeded Rs. 500/– and that those cases should be decided by the decision in this case. Consequently those appeals also will be dismissed with costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

Present: MOSELEY, J.

RANHOTIYA vs LIYANNA AND ANOTHER

S. C. Nos. 640–41—*P. C. Gampola No.* 12017
Argued on 30th September, 1937.
Decided on 4th October, 1937.

Penal Code Section—Mischief—Trespassing cow—Fatal Injury caused in attempting to drive it away.

Held : That, if in the course of driving away a trespassing animal from his land, a landowner, with no intention of causing wrongful loss to anyone, causes it injury, he cannot be said to have committed mischief, even though the injury proved fatal.

E. B. Wickramanayake for accused-appellant.

MOSELEY, J.

The 1st accused was convicted of mischief by causing the death of a cow belonging to the complainant by striking it with a stone. The 2nd accused was convicted of abetting the 1st accused in the commission of the above offence.

The learned Magistrate had no reason to disbelieve the evidence for the prosecution. In that respect I agree with him, that is to say, I am satisfied that the cow was killed by being struck by a stone thrown at it by the 1st accused, with whom the 2nd accused was acting in concert.

It is contended in this court, that the act of the 1st accused did not amount to mischief inasmuch as there is no evidence that either of the accused intended to cause wrongful loss to the complainant. One witness did in fact say that the 2nd accused asked the 1st accused to give a hard blow to kill the animal. In my view, it is extremely doubtful that the remark, even if made, expressed the intention of the 2nd accused. It emerged that the cow was trespassing on the land of the 2nd accused and was eating jak fruit, the property of the 1st accused. In that case they were entitled to chase it away, and it would seem that in so doing, the injury sustained by the animal was caused by accident rather than by design.

In the case of *Saibo v. Perera* (24 N.L.R. 65) Schneider J. said that the definition of mischief in our Penal Code makes it clear that the mere doing of an act resulting in injury to property is insufficient to constitute the offence. Such an act may render the doer liable to an action for damages. To constitute the offence it is required that the act should be done by the person with the intention to cause, or with the knowledge that he is likely to cause, wrongful loss or damage. In this connection it would have been useful to know the size of the stone, but any evidence that might have been available on this point was carefully suppressed. I do not think that it would be safe to presume that either of the accused had the requisite intention or knowledge.

I would, therefore, allow the appeals and quash the convictions.

Convictions quashed.

Present: ABRAHAMS, C.J.

SEETI vs MUDALIHAMY

S. C. No. 481—*P. C. Avisawella No.* 13836
Argued on 30th September, 1937.
Decided on 4th October, 1937.

Maintenance Ordinance—Claim for maintenance of illegitimate children—Claim dismissed on claimant stating that there was no witness present who could corroborate her—Application to Magistrate later to cause the respondent to the application to keep to the terms of a certain settlement that had been arrived at—Case re-opened by Magistrate—Is the Magistrate entitled to do so.

The respondent to this appeal instituted a claim for maintenance against the appellant on the ground that he was the father of three children by the respondent. On the date of trial, the respondent did not appear. The Magistrate then issued a warrant for her arrest. On the next date of trial, the respondent said that she had no witness present who could corroborate her evidence on the material points. The Magistrate thereupon dismissed her claim. Some days later, the respondent sent a petition to the Magistrate stating that when the case was first instituted the appellant had approached her and discussed a settlement and that in consequence she brought no witness on the trial date. That, though the appellant had paid her a part of the money promised by him, he had failed to keep to the terms of settlement agreed on.

On receipt of this petition the Magistrate ordered the case to be fixed for trial. The trial proceeded, both the appellant and the respondent participating.

Held : (i) That the Magistrate had no jurisdiction to try a claim which had been already dismissed, as the respondent had no evidence in support of her claim.

(ii) That the fact that the appellant acquiesced in the proceedings did not give the Magistrate jurisdiction to do what he was not in law entitled to do.

PER ABRAHAMS, C. J.

"He then makes the ingenious suggestion that the proceedings should be treated, not as a re-opening of the case, but as fresh proceedings in maintenance and cites the case of *Beebi v. Mahmood*, (23 N.L.R. 123) where Shaw J. held that fresh proceedings in maintenance could be instituted even by a party whose case had been dismissed, provided that the case had not been dismissed on the merits. But the respondent's case had been dismissed on the merits as she admitted she had no witnesses to support her claim, not that she had witnesses but had been unable to bring them on the day of trial, whereas in *Beebi v. Mahmood* (supra) it would appear that there were witnesses but they had not been brought."

H. V. Perera, K.C., with *J. A. T. Perera* for defendant-appellant.
P. A. Senaratna for applicant-respondent.

ABRAHAMS, C.J.

The respondent instituted proceedings against the appellant in the Police Court, Avisawella, for the maintenance of her three illegitimate children of which she alleged the appellant was the father. On the date

fixed for the trial the respondent did not appear. The learned Magistrate instead of dismissing the case, as he should have done, took the amazing course of issuing a warrant for her arrest. The parties both appeared on the day next fixed for the hearing and the case came on before another Magistrate. The respondent said she had no witnesses present who could supply the necessary evidence corroborative of her claim that the appellant had fathered the children. The case was quite properly dismissed.

Some days later, the first Magistrate returned and the respondent transmitted a petition to him alleging that, when the case had been first called, the appellant approached her and suggested a settlement promising, on consideration of her withdrawal of the case, to give her Rs. 100/– and to transfer to her a piece of land, and in consequence of this promise she brought no witnesses with her to the trial of the case. She stated she had received Rs. 50/– and a promise of the balance of the money within a few days, but no further mention had been made of the piece of land which the appellant had agreed to transfer. She, therefore, prayed the learned Magistrate to cause the appellant to fulfil this promise.

The Magistrate made an order fixing the case for trial. The respondent gave evidence claiming maintenance as before and adding a claim in respect of a fourth child of which she alleged the appellant was the father, though she had, at his request, registered the child in the name of another man. During the proceedings, discussions relating to a settlement were entered into and at one time the appellant said he was willing to purchase a certain piece of land for Rs. 500/– which would serve to maintain the four children. The negotiations for purchase, apparently, failed and the appellant undertook to pay such sum for maintenance as the Court might consider reasonable. The Magistrate fixed the monthly sum of Rs. 40/- and made an order accordingly.

The appellant contends the order is invalid and, in any event, the amount is excessive.

It is obvious that the learned Magistrate had no power to re-open a case once dismissed, whatever might be his anxiety to do justice. Counsel for the respondent admits that this re-hearing was illegal, but makes the somewhat faint submission that the appellant cannot complain as he accepted the jurisdiction of the Court in the matter, and, indeed, offered to abide by the decision of the Magistrate as to the amount of maintenance which he agreed to pay. But the agreement of parties to submit to the decision of a court which has no jurisdiction cannot confer jurisdiction. He then makes the ingenious suggestion that the proceedings should be treated, not as a re-opening of the case, but as fresh proceedings in maintenance and cites the case of *Beebi v. Mahmood*, (23 N.L.R. 123) where Shaw J. held that fresh proceedings in maintenance could be instituted even by a party whose case had been dismissed, provided that the case had not been dismissed on the merits. But the respondent's case had been dismissed

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on the merits as she admitted she had no witnesses to support her claim, not that she had witnesses but had been unable to bring them on the day of trial, whereas in *Beebi v. Mahmood* (supra) it would appear that there were witnesses but they had not been brought. The implication in the petition that the respondent had witnesses but had been induced, by the appellant's promises, not to bring them, ought not to be permitted to prevail over the statement in the first case that she had no witnesses present. Had she intended to inform the Magistrate that there were witnesses, but that she had not brought them for some reason or other, she would surely have said as much. Further, the request of the respondent in her petition was not for the grant of a maintenance order, but for some order or direction to the appellant calculated to cause him to fulfil his promise to pay money and to transfer a piece of land.

The appeal must succeed. When the case stood dismissed, the Court was *functus officio*. The respondent might have (I do not say she has) some cause of action against the appellant but the Magistrate had no power to re-open a dismissed case for that purpose. Magistrates must proceed according to law, even if they feel they cannot do justice according to their notions by an adherence to prescribed procedure.

The appeal is allowed with costs.

Appeal allowed.

Present: ABRAHAMS, C. J.

ABDUL AZEEZ vs SEYAD MOHAMED BUHARY

S. C. No. 447—*P. C. Colombo No.* 4593

Argued on 24th and 27th September, 1937.

Decided on 8th October, 1937.

Merchandise Marks Ordinance No. 13 *of* 1888—*Sections* 3 *&* 4—*'Panchauda'—Registration of trade mark for' silver medals—Symbols commonly used on a charm—Does such registration exclude the right of any other person to produce medals containing the same symbols—Is a trade mark registered in respect of silver medals capable of application to medals of metals other than silver.*

The appellant sold small medals of brass coated with silver bearing a device known as the '*Panchauda.*' The complainant had registered this device as a trade mark in respect of silver medals, and he sold these medals to appellant, among others. The appellant bought them for purposes of trade, till he started selling the medals in respect of which the present charge is preferred.

Held : (i) That where a device is registered as a trade mark in respect of silver medals, the registration cannot be taken as extending to the use of the same device on medals made of other metals.

(ii) That the mere reproduction of the symbols commonly known as '*Panchauda*' on any metal disc, does not constitute an infringement of a registered trade mark consisting of the same symbols.

(iii) That where the public purchased an article merely for the sake of the design on it, and not because it indicated that a certain manufacturer made it, it was not a breach of trade mark to produce articles containing the same design.

PER ABRAHAMS, C. J.

"In view of the insignificance of the tablet itself, the number and distribution and sacred associations of the objects in the device, and the evidence given as to the reasons for which members of the public purchase the medals so engraved, I can only come to one conclusion and that is, that the metal tablets are merely of importance for the purpose of displaying the device, and that is the reason why the medals are purchased. Looked at in another way, the device and the tablet upon which it is engraved combine to form a 'charm' or an ornament, and the device loses its distinguishing characteristic of a trade mark (if, indeed, it was ever intended to have that characteristic by the complainant itself) and becomes a part of the goods to which it is applied. I am therefore of opinion that for this reason also the appellant is entitled to acquittal on the first count."

H. V. Perera, K. C., with *Renganathan* for accused-appellant.
Hayley, K.C., with *Choksy* for complainant-respondent.

ABRAHAMS, C.J.

This case has led to a very interesting argument in Trade Mark law and has been very ably presented, as one would expect, by both the learned Counsel engaged. The appellant was charged in the Police Court of Colombo as follows :—

(*a*) with falsely applying to goods a mark so nearly resembling Trade Mark No. 4236 as to be calculated to deceive and thereby committing an offence against section 3 (1) (*b*) punishable under thereby committing an offence against section 3 (1) (*b*) punishable under section 3 (3) of Ordinance No. 13 of 1888 ; or alternatively with causing to be applied to goods a mark so nearly resembling the said Trade Mark as to be calculated to deceive and thereby committing an offence against section 3 (1) (*b*) read with (*f*) punishable under section 3 (3) of the said Ordinance;

(*b*) with applying a false trade description to goods and thereby committing an offence against section 3 (1) (*d*) read with section 4 (2) punishable under section 3 (3) of the said Ordinance ; or, alternatively, with causing to be applied to goods a false trade description and thereby committing an offence against section 3 (1) (*d*) and (*f*) read with section 4 (2) punishable under section 3 (3) thereof ;

(*c*) with selling or exposing for sale or having in his possession for sale goods to which a false trade description was applied or, alternatively, to which a mark so nearly resembling trade mark No. 4236 as to be calculated to deceive was applied and thereby committing an offence against section 3 (2) of the said Ordinance punishable under section 3 (3) thereof.

He was convicted on the first count alternatively, on the second count alternatively, and on the 3rd count, and was fined Rs. 50/– on each count

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(*i.e.* Rs. 150/– in the aggregate) or, in default, six weeks' rigorous imprisonment.

The facts which led to his prosecution are as follows. On the 31st of March, 1928, one Sheik Dawood of Colombo registered a trade mark for fourteen years. The certificate of registration shows that the trade mark consisted of two spade shaped shields about one inch long by three-quarters of an inch broad, side by side. In the centre of the left hand shield is permanently portrayed a pagoda, and on the other shield is portrayed, so as to occupy a considerable portion of its surface, a *swastika* and five weapons. It was given in evidence that the *swastika* and the five weapons had associations sacred to members of the Buddhist faith. The trade mark was stated to be registered in respect of silver medals. It seems rather remarkable that a trade mark, which is intended merely to designate that the goods to which it is attached are the goods produced by a particular manufacturer or owned by a dealer should, in this case, consist of such a large number of elaborately arranged objects, and that, in the words of a witness from the Registrar General's Office, both faces of the medal should be registered, and it seems to me to be obvious from the outset that these peculiarities had a bearing on the intentions of the manufacturer when he registered the mark. For a number of years, Sheik Dawood sold a large number of medals with the Pagoda on one side and the *swastika* and five weapons on the other, and a large number of medals the same as these but for the substitution of a Dagoba for the Pagoda. Some of the medals were made of silver, some others, of what is described in the evidence but not explained, as alpaca silver. It was given in evidence by Sheik Dawood's Attorney and Manager, Abdul Azeez, that mostly Singhalese Buddhists buy the medals, and that they buy them for their children, and that they were sold as "*Punchauda*" that is to say, five weapons. It was also given in evidence by a vedarala that by itself the *swastika* is the sign of luck among Buddhists, and that the "*Punchauda*" has some curative effect where medicines fail. I think then it is manifest that the demand for these medals, which, according to Abdul Azeez, were sold at –/60 cts. for the silver specimens and –/25 cts. for the alpaca silver specimens, were for their use mainly as charms though they may have had a certain ornamental quality which possibly made them attractive.

It was alleged against the appellant that for some years he was in the habit of purchasing Sheik Dawood's medals, but in October, 1936, he ceased to buy them and shortly afterwards began to sell medals which were almost and exact replica of the "*Punchauda*" and Dagoba sided medals which he had hitherto purchased from the complainant. These medals were made of brass and they were faced with some metallic substance which gave them a silvery appearance.

Now, dealing with the first charge, a point has been raised by the appellant which is immediately fatal to the conviction on that count. It is pointed out that the trade mark is registered in respect of silver medals

only and, therefore, cannot extend to medals made of any other metal, precious or base. This point was raised in the Police Magistrate's Court, but the learned Police Magistrate waived it aside denouncing it as an extremely technical defence which, in his opinion, should not be seriously considered. It is, of course, extremely technical, but why the learned Magistrate disposes of it in that summary way I do not understand. He ought to have appreciated that the application of Sheik Dawood meant what it said and that he did not use the expression "medals" *simpliciter* or "medals of every metal," as he might have done. Learned Counsel for the respondent admits quite freely that unless silver can be extended to mean brass silvered over (and he does not suggest that it can) the appellant is entitled to succeed on that ground.

There is, however, a further ground upon which it is argued by the appellant that he is entitled to an acquittal, not only in respect of this count, but in respect of the others as well. He claims that he did not use the complainant's trade mark as a trade mark, but that the device which was engraved upon the medals became part of the goods and was not engraved as a trade mark, that is to say, as a mark attached, or, to use the words of the Ordinance, 'applied to the goods' (*i.e.* the mere plain metal tablet) to indicate that the goods were those produced by a particular manufacturer in distinction to similar wares produced by other Firms.

Now, section 3 (I) (*b*) of the Merchandise Marks Ordinance penalises any person who falsely applies to goods any trade mark, or any mark so nearly resembling a trade mark, as to be calculated to deceive, and it seems to me, on analysis, to mean this, that a person applies to goods the trade mark of another person or some mark which appears to be the trade mark of another person in such a way as to lead the public to believe that that mark has been applied to the goods *qua* trade mark, that is to say, to indicate that the goods on which the mark appears are the goods of some particular person. But has the trade mark of the complainant been applied to the metal tablet in such a way as to suggest to the public that the metal tablet is the manufacture of Sheik Dawood ? I cannot admit that for a moment. In view of the insignificance of the tablet itself, the number and distribution and sacred associations of the objects in the device, and the evidence given as to the reasons for which members of the public purchase the medals so engraved, I can only come to one conclusion and that is that the metal tablets are merely of importance for the purpose of displaying the device, and that is the reason why the medals are purchased. Looked at in another way, the device and the tablet upon which it is engraved combine to form a 'charm' or an ornament, and the device loses its distinguishing characteristic of a trade mark (if, indeed, it was ever intended to have that characteristic by the complainant itself) and becomes a part of the goods to which it is applied. I am therefore of opinion that, for this reason also, the appellant is entitled to acquittal on the first count,

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The same reasoning which relieves the appellant from liability in respect of count 1, also clearly applies to count 2. The wording of section 4 (2), under which it is sought to bring home liability to the appellant, makes it a false trade description to apply to goods "any such figures, words, "or marks, or arrangement or combination thereof, whether including a "trade mark or not, as are reasonably calculated to lead persons to believe "that the goods are the manufacture or merchandise of some person other "than the person whose manufacture or merchandise they really are."
It is obvious that what is intended by this provision of law is the application to goods of some figures, words, or marks, placed on the goods for the same purpose as a trade mark and not placed there so as to become part of the goods themselves, as for instance, the pattern on a wall paper, or the chasing of figures, or of an ornamentation upon a metal vase, so as to form with the goods upon which they are placed some new combination as in this case, where a device engraved upon a metal tablet makes a charm. In this connection an Indian case has been cited to me which bears a remarkable resemblance to this case. In *Narumal Khemchand v. Bombay Co., Ltd.* (A. I. R. 1914 Sind. 109), Hayward, C.J., and Boyd, A.C.J., held that a person who imported chintz printed with a particular design or pattern similar to other chintz imported by another Firm was not guilty of applying a false trade description to goods under section 41 of the Indian Merchandise Marks Act, 1889. This section is identical with section 4 (2) of the Ceylon Ordinance. The Court said, "The design or pattern makes the chintz "attractive for sale and is part and parcel of the goods themselves. Where-"as what appears to us to be contemplated by the section in the application "of some independent marks calculated to lead persons to believe the goods "to be the merchandise of some other person." This reasoning applies to the case before me with even greater strength, since purchasers of chintz wanted chintz and merely selected that particular chintz because of the attractive pattern. Whereas persons in Colombo buying "*Panchauda*" medals were primarily purchasing them because of the design, and they merely looked upon the medal itself as the medium to enable them to purchase the design. In other words, the medal was the subordinate consideration.

A number of English decisions on passing off cases were cited, but they do not help to interpret this Ordinance. A passing off action is not unfamiliar in this country and it may be, I give no opinion on this point, that the complainant had his remedy in that connection, but to say that one man has imitated the goods of another is not the same as saying that he has applied somebody else's trade mark to his own goods or given a false trade description to them.

The 2nd count also fails and the 3rd count, automatically, follows it. I quash the convictions and acquit the appellant.

Convictions quashed.

Present : FERNANDO, A.J.

NESADURAY (Courts Inspector) vs AMARASINGHE

S. C. No. 488—*M. C. Colombo No.* 10417

Argued on 27th & 30th August, 1937.

Decided on 8th September, 1937.

Housing and Town Improvement Ordinance No. 19 *of* 1915 *sections* 6 (1) (2), 13 (1) (*a*) & (*c*) 15 (1)—*Conversion of building—Is using a store as a dwelling-house an alteration within the meaning of section* 6.

Held : That using, as a dwelling-house, a building meant to be a store, is not an alteration within the meaning of section 6 of Ordinance No. 19 of 1915.

Per FERNANDO, A.J. "When section 6 (2) enacted that, for the purposes of this and the connected sections, an alteration means any of the following works including the conversion into a dwelling house of any building not previously constructed for human habitation, it seems clear to my mind that the Ordinance had in view some work which resulted in the alteration or conversion.....
A person who uses a building, not constructed for human habitation, as a dwelling house, may be committing some offence against the provisions of Ordinance 19 of 1915, but if he makes no alteration and carries on no building operations for the purpose of converting the premises into a dwelling house, then, I do not think he can be regarded as having made an alteration within the terms of section 6, or having commenced building operations within the terms of section 10; nor could he for that purpose be regarded as having commenced or executed any building operations within the terms of section 13 (1) (*a*) or (*c*)."

Mackenzie Pereira, with *V. F. Gunaratna* for accused-appellant.

Gratiaen with *de Saram* for respondent.

FERNANDO, A.J.

The appellant, in this case, was charged with making certain alterations to the buildings at No. 87, Dematagoda, by converting certain stores standing on the premises into dwelling-houses, in breach of section 6 (1) of Ordinance 19 of 1915. He was also charged with allowing the premises to be occupied as dwelling-houses from and after the 29th July, 1936, without a certificate from the Chairman of the Municipal Council as required by section 15 (1) of Ordinance 19 of 1915.

The facts were practically admitted. The appellant's son was the lessee of the stores and, before his death in April, 1936, had converted the seven stores into tenements and let them out to tenants. He appears to have done so without the permission of the Municipality, but later he obtained certificates of conformity for two of the seven stores. The appellant's son having died in April, 1936, the appellant continued to let the tenements to tenants although there were no certificates of conformity. The Chairman of the Municipal Council wrote two letters P1 and P2 to the accused, and the accused thereafter submitted certain plans and applied for a certificate of conformity for these buildings, but his application was refused.

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The appellant must have been aware, when he received the letters from the Municipal Council, that no certificates of conformity had issued in respect of these buildings, and that he was not entitled to let them out to tenants; but even after the receipt of these letters, the appellant continued to allow the buildings to be occupied, and, in these circumstances, I think he was clearly guilty on the 2nd count. He attempted to argue that he was willing to give notice to the tenants to vacate the tenements but that he did not give such notice because he did not know which tenements the Municipality wanted vacated. As a matter of fact, the learned Magistrate held, and I think, rightly, that the accused was well aware of the tenements in respect of which the objection had been taken by the Municipal Council. With regard to the 1st count, it is clear that whatever alterations were made, were made not by the appellant, but by his son who died in April, 1936, and it must also be admitted that the son had a lease from the owner of the premises, and had undertaken by that lease to make alterations to the buildings in question.

Mr. Gratiaen, however, argued for the respondent that the mere fact that the appellant used or allowed the use of the buildings as tenements constituted a conversion within the meaning of the Ordinance, and that such conversion would also be an alteration within the meaning of section 6. Section 6 enacts that no person shall make any alteration in any building without the written consent of the Chairman, and section 10 provides that no person shall commence any building operations, involving the alteration of a building, unless he shall have given to the Chairman seven days' notice of his intention to commence such operations and has obtained the approval or consent of the Chairman, and section 13 provides that any person who shall commence or execute operations in contravention of any provisions of this chapter shall be liable to a fine. It is necessary, therefore, for the prosecution to prove that a person did make some alteration in a building and did commence the building operations involving such alteration without giving notice to the Chairman and without his approval. When section 6 (2) enacted that for the purposes of this and the connected sections an alteration means any of the following works including the conversion into a dwelling-house of any building not previously constructed for human habitation, it seems clear to my mind that the Ordinance had in view some work which resulted in the alteration or conversion. Mr. Gratiaen referred to certain English decisions in which it has been held that the mere use of a building not constructed for human habitation as a dwelling-house may be a conversion of such building into a dwelling-house, but, even if this construction is applicable to section 6 of Ordinance 19 of 1915, still I do not think such user would make that conversion an alteration within the meaning of section 6. In other words, a person who uses a building not constructed for human habitation, as a dwelling-house, may be committing some offence against the provisions of Ordinance 19 of 1915, but if he makes no alteration and carries on no building operations for the purpose of converting

the premises into a dwelling-house, then, I do not think he can be regarded as having made an alteration in the terms of section 6, or having commenced building operations within the terms of section 10; nor could he for that purpose be regarded as having commenced or executed any building operations within the terms of section 13 (1) (*a*) or (*c*).

For these reasons, I think the conviction on the 1st count must fail. I would, accordingly, set aside the conviction on that count, and affirm the conviction and sentence on the 2nd count. The continuing penalty imposed by the learned Magistrate will also stand.

Present : HEARNE, J.

THE KING vs SAYANERIS *Alias* SAYA & OTHERS

S. C. Nos. 55–59—*D. C.* (*Crim.*) *Galle No.* 15691

Argued on 27th & 30th August, 1937:

Decided on 6th September, 1937.

Penal Code sections 32, 146, 315 *and* 317—*Causing hurt with deadly weapons while being members of an unlawful assembly—Several accused acquitted of the charge of being members of an unlawful assembly—Can they be convicted of causing hurt with deadly weapons in furtherance of a common intention if it is proved that they caused hurt.*

Held : (i) That the Supreme Court can, in appeal, alter convictions of causing grievous hurt and of simple hurt under sections 317 and 315 of the Penal Code read with sections 146, to convictions under sections 317 and 315 read with section 32 of the Code.

Per HEARNE, J. "The questions to which an Appellate Court should apply its mind in such cases are "Had the accused to meet the same set of facts or not and has he been prejudiced by the failure to specify the charge under which he was convicted ? If not, the conviction is good."

L. A. Rajapakse for accused-appellants.

M. F. S. Pulle, Crown Counsel, for the crown-respondent.

HEARNE, J.

The appellants, five in number, were convicted of rioting and of causing grievous hurt and simple hurt. The latter convictions were under sections 317 & 315 of the Ceylon Penal Code read with section 146.

The appellant Battagoda Radage James alias Jamia put forward the defence of an alibi, gave evidence in support of this defence and called a witness. But their evidence was not examined by the trial Judge. It

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was not inherently improbable; there were no contradictions, and if the Judge rejected the evidence, he should have recorded his reasons for so doing. Apart from this, the evidence of the prosecution against Battagoda Radage James was not nearly so strong as it was against his co-accused. I allow his appeal and acquit him.

The logical sequence of this acquittal is that the remaining four appellants cannot be said to have been guilty of being members of an unlawful assembly or of riot and their convictions, in respect of these offences, are therefore quashed.

It remains to be considered whether the convictions of causing grievous hurt and of simple hurt under sections 317 & 315, read with section 146, can be altered to convictions under these sections read with section 32. Counsel for the appellants has submitted that this is legally possible, and I agree with him.

A contrary view was taken in India prior to the decision of their Lordships of the Privy Council in *Barendra Kumar Ghosh vs. Emperor*, A.I.R. 1925 P.C. 1. Since that case, however, while it is still the law that on a charge of riot only the accused, if acquitted of riot, cannot be convicted of causing hurt — for causing hurt is not a necessary ingredient of riot — it has been held that " if a person has been charged with an offence under section 326 1 I.P.C. (section 317 Ceylon) read with section 149 (section 146 Ceylon) but has been convicted under section 326 read with section 34 (section 32 Ceylon), the conviction is not necessarily bad by reason of the absence of a specific charge under the latter section." A.I.R. 1934 Sind 89 : A.I.R. 1934 Madras 565 : 36 Cr. L.J. 113.

The questions to which an Appellate Court should apply its mind in such cases are " Had the accused to meet the same set of facts or not and has he been prejudiced by the failure to specify the charge under which he was convicted ?" If not, the conviction is good. In the present case, both the questions must be answered against the appellants. I do not see that the appellants could be said to be prejudiced by a substitution of the convictions under sections 317 & 315 read with section 146 for convictions under sections 317 & 315 read with section 32, for it was plainly set out in the indictment that they were associated together with a common intention and, in pursuance of that intention, caused grievous hurt and simple hurt.

I alter the convictions accordingly. I have given the question of sentence every consideration and do not think that interference with the sentence of nine months, passed in respect of the convictions under section 317, would be justified. Although the complainant had behaved dishonestly towards a person, whose agents the appellants were, it is clear that in going armed with clubs extreme violence was contemplated. As the sentence for riot was concurrent with the major sentence of 9 months for causing grievous hurt, the appellants' partial success on appeal is sterile.

Convictions altered.

Present: ABRAHAMS, J.

FERNANDO (On behalf of Leelawathie Fernando) vs FERNANDO

S. C. No. 660—*P. C. Avissawella No.* 15279
Argued and Decided on 11th October, 1937.

Maintenance Ordinance No. 19 *of* 1889 *Section* 3—*Child staying with maternal grandfather—Father willing to maintain the child if the child lives with him—Can grandfather insist on keeping the child with him and compel the child's father to pay maintenance.*

The appellant is the father of a girl aged twelve, whose mother is dead. The appellant had since her death married twice. He had only recently married his third wife. The child had, since the death of her mother, been staying with her maternal grandfather who had maintained her, first, on the income from her deceased mother's property and then, after they were sold, from his own income. He brought this action to compel the father of the child to pay for her maintenance. The Magistrate allowed the application and ordered the father to pay Rs. 20/- per mensem for the child's maintenance. The father took up the position that he was quite prepared to look after the child if she were handed to his custody but that if the grandfather desired to keep the child he should bear the cost of maintaining her.

Held : (i) That an order for maintenance under section 3 of the Maintenance Ordinance can be made only where there is proof of neglect or refusal by the father to maintain a child.

(ii) That the grandfather of a child who is maintaining such child cannot compel the father of the child to pay maintenance under section 3 of the Maintenance Ordinance, if the father has neither neglected nor refused to maintain the child in his own home.

(iii) That where the father of a child is willing to maintain the child in his own home, he cannot be compelled to pay for the child's maintenance in the child's grandfather's home on the ground that it is in the best interests of the child to remain with the grandfather.

Colvin R. de Silva for the defendant-appellant.
W. M. de Silva with *S. de Zoysa* for the applicant-respondent.

ABRAHAMS, C.J.

This is an appeal against an order of the Police Magistrate of Avissawella directing the appellant to pay a sum of Rs. 20/- for the maintenance of his infant daughter. The money is ordered to be paid to the maternal grandfather of the child, who, it is not disputed, has been looking after her almost the whole of her twelve years of life. The child's mother is dead and the father has been married twice since. His third wife was married recently to him. The grandfather, on behalf of the child, made an application for maintenance alleging that, until six months prior to the proceedings, he had maintained the child from the income of the land given to the father by him at his marriage to the child's mother ; that all the lands have been sold off and no money has been paid by the father to the grandfather who

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has been maintaining the child from his own resources. The appellant stated that he had not refused to maintain the child and was willing, in fact desirous, of resuming her guardianship.

The learned Magistrate, in making the order referred to, did not appreciate the fact that the father could not be said to have refused to maintain the child if he made it a condition that she should, first of all, be returned to him by her grandfather. A refusal to maintain must obviously be a categorical refusal. The father is entitled to say to the grandfather " I am willing to allow my child to remain under your care but on condition that you maintain her. If you do not care to do so, return the child to me and I will maintain her myself." The grandfather cannot have the guardianship of the child and expect the father to maintain her under the Maintenance Ordinance.

That, as the learned Magistrate found, it is in the best interests of the child to remain with the grandfather is not to the purpose. The father has a right to her custody and the grandfather cannot deprive him of that right by taking up the attitude which he has done, nor can he compel him to maintain his child if he chooses to retain her.

I find that the order of the learned Magistrate is invalid and I allow this appeal with costs.

Appeal allowed.

Present: MAARTENSZ J, & HEARNE, J.

Messrs. CARGILLS LTD. (of Nuwara Eliya) vs ABDUL RAHIMAN

S. C. No. 108 (*Inty*)—*D. C. Nuwara Eliya No.* 1885

Argued and Decided on 12th October, 1937.

Civil Procedure Code section 837—Application to release judgment-debtor from jail—Order refusing the application—Appeal—What provisions of the Civil Procedure Code govern such appeal.

Held : That an appeal from an order refusing to release a judgment-debtor from jail is governed by the provision of section 756 of the Civil Procedure Code.

N. Nadarajah for appellant.

E. F. N. Gratiaen for respondent.

MAARTENSZ, J.

Respondent's counsel has taken the preliminary objection that this appeal must be dismissed because the defendant-appellant did not, when he filed his appeal, tender with it the necessary stamps for the certificates in appeal and the decree. That this was so is clear from the journal entry dated 24th April, 1937.

Appellant's counsel, however, submits that though the appellant filed his appeal under the provisions of section 756 of the Civil Procedure Code, it was not necessary for him to furnish the stamp duty in respect of which he has made default. He argues that the order in this case, refusing to release the judgment-debtor from prison, was an order made as for contempt of Court, and that the provisions of section 798 of the Civil Procedure Code would govern the appeal.

I do not think we can assent to this argument. It is plain from the terms of section 798 that the section applies to a conviction for contempt of court or for an offence made punishable by the Code as a contempt of Court.

The committal of the appellant to jail for non-payment of the judgment debt is not a punishment for contempt of Court or for an offence punishable as a contempt of Court.

The appeal must, therefore, be dismissed with costs.

HEARNE, J.

I agree.

Appeal dismissed with costs.

Present : HEARNE, J. & FERNANDO, A.J.

GRACE FERNANDO & OTHERS vs FERNANDO

S. C. No. 88—*D. C. Colombo No.* 483

Argued on 14th & 15th September, 1937.

Decided on 20th September, 1937.

Civil Procedure Code sections 14 *and* 36—*Joinder of parties and causes of action—Can appeal court send back a case for amendment of pleadings.*

The plaintiffs brought this action against the defendants praying for :—

1. A declaration that the first and second defendants hold, 2487/4160 shares of a certain land and premises, subject to the terms and conditions and restrictions set forth in a certain deed (Deed No. 3004 of February 17, 1885, attested by M. D. S. S. Wijesinghe, Notary Public) in trust for the beneficiaries referred to in the said deed.

2. In the alternative, for a declaration that a sum of Rs. 24,870/–, for which the first defendant purchased the half-share of the land in question, is held by the first defendant subject to the terms and conditions and restrictions set forth in the deed mentioned above or in trust for the beneficiaries referred to in the deed and that the first defendant be ordered to bring the said sum into Court within a time to be fixed by the Court to be held subject to the terms and conditions in the said deed.

3. In the alternative, that the first defendant be ordered to pay into Court a sum of Rs. 24,870/– as damages and that the said sum be declared subject to the terms, conditions and restrictions set forth in the said deed.

The action was intended to preserve the rights of the plaintiffs and was in the nature of a *quia timet* action.

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By deed No. 3004 of February 17, 1885, the father of one Lucas Fernando, the deceased husband of the first defendant, gifted to her at the time of her marriage a half-share of a certain land and premises subject to certain conditions and restrictions. The first, third and fourth plaintiffs and the second, third and fourth defendants are the children of the first defendant.

In 1911 the first defendant instituted action No. 31884 in the District Court of Colombo for the partition of certain lands she held in common with others, including the land in question. A decree for sale was obtained and the lands were sold. The first defendant purchased for a sum of Rs. 41,600 a divided portion of the land, in question. She obtained an order of credit for Rs. 24,870/- being her share of the premises partitioned and she paid in the balance of Rs. 16,730/- due, and obtained a certificate of title. This certificate was dated September 12, 1916. By deed No. 297 dated February 2, 1920, the first defendant gifted the land purchased by her to her son the 2nd defendant.

The plaintiffs alleged that the conditions in the deed referred to above create a valid *fidei commissum*.

The plaintiffs alleged:

1. That the conditions and restrictions in the deed created a valid *fidei commissum*.

2. That deed No. 297 was fraudulent and executed to defeat the rights of first, third and fourth plaintiffs and the 3rd and 4th defendants.

3. That the first defendant's son, the second defendant, was privy to the fraud.

The defendants objected to the action *inter alia* on the grounds that there was a misjoinder of parties and of causes of action.

The District Judge found in favour of the plaintiffs and overruled the objection to joinder of parties and causes of action. In appeal, the Supreme Court set aside the trial Judge's finding.

Held : (i) That sections 14 and 36 of the Civil Procedure Code must be read together.

(ii) That the joint, several, or alternative liability of defendants mentioned in section 14 means a joint, several, or alternative liability in respect of one or several causes of action, which cause or causes of action are united in the same suit against the same defendants jointly.

(iii) That the Supreme Court can, in an appropriate case, send back a case for amendment of pleadings.

H. V. Perera, K. C., with *M. T. De S. Amarasekera, N. E. Weerasuriya* and *E. B. Wickremanayake* for 2nd defendant-appellant.

Hayley, K.C., with *D. W. Fernando* for plaintiffs-respondents.

Molligoda with *Kurukulasuriya* for 8th & 9th respondents.

HEARNE, J.

This is an appeal which concerns a question of alleged misjoinder on which conflicting views have been expressed by the Judges of this Court. I shall state, in the first place, what appears to me to be the law on the subject.

Section 14 of the Civil Procedure Code, which deals with the joinder of parties, reads " All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same cause of action....." There has been no difference of opinion that the section justifies the joinder of, for instance, two defendants, with a claim for relief in the alternative,

Section 36 of the Civil Procedure Code deals with the joinder of causes of action. It enacts that "Subject to the rules contained in the last section, the Plaintiff may unite in the same action several causes of action against the same defendant or the same defendants jointly....." In my opinion, this section, interpreted by itself, means that, subject to the rules in section 35 as to claims which may be joined with a suit for the recovery of immovable property, where there are two defendants and two causes of action, both defendants must be jointly interested in each of the two causes of action.

This is the view which was taken in *Kanagasabapathy vs. Kanagasabai* (1923) 25 N.L.R. 173 and in the minority judgment in *London & Lancashire Fire Insurance Co. vs. P. & O. Co.* (1914) 18 N.L.R. 15.

If section 14 and section 36 are read together, as I think they must, the joint, several or alternative liability of defendants mentioned in section 14 means a joint, several or alternative liability in respect of one or several causes of action, which cause or causes of action are united in the same suit against the same defendants jointly ; in other words, while the cause or causes of action must be joint as to all defendants, the relief asked may be joint, several or in the alternative.

The question that has exercised my mind is whether we are bound by the majority decision in 18 N.L.R. 15 which, according to the report, is designated a Full Bench decision. In 25 N.L.R. 173, there were two Judges only who took the same view. It would appear that the decision in 18 N.L.R. 15 was not a Full Bench decision. At that time there were four Judges and " a judgment of three Judges when four Judges constituted a Full Bench is not a judgment of the Full Bench," *Jane Nona vs. Leo* (1923) 25 N.L.R. 241. On the other hand, even if the decision in 18 N.L.R. 15 is to be regarded merely as a two Judge decision " it is not competent for a Bench of two Judges to overrule a judgment of two Judges," 25 N.L.R. 241, which is what the Judges in 25 N.L.R. 173 did. In the difficult position in which we find ourselves, I have decided to follow the two Judge decision with which I agree.

The plaint in the present case may have been framed very differently. In the form, however, in which it has been framed, it is bad for misjoinder on the authority of 25 N.L.R. 173. The first cause of action is one on which it is claimed that the 1st and 2nd defendants are jointly liable, and the second cause of action is one on which it is claimed that the 1st defendant is solely liable. It was pointed out by counsel for the appellants that while the averments in paragraphs 3, 4 and 5 of the plaint gave rise, as it was claimed, to a cause of action against the 1st defendant alone, the prayer asked for relief against the 1st and 2nd defendants jointly. On the other hand, while, in regard to the alternative cause of action, fraud was alleged against the 1st defendant to which it was further alleged the 2nd defendant was a party, relief was claimed against the 1st defendant only. I refer to the pleadings only for the purpose of indicating that it is possible that amend-

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ments may be made in them which would enable the action to be brought within the rules which regulate the bringing of actions. I follow *Sivakaminathan vs. Anthony*, 3 C.L.W. 51 in the order which I propose.

I would allow the appeal with costs and would remit the case to the trial court for the purpose of enabling the plaintiffs to make such application as they are advised to make. I need hardly add that the Judge's discretion in allowing or disallowing any proposed amendment is completely unfettered by this order.

FERNANDO, A.J.

I agree.

Appeal allowed and sent back.

Present : ABRAHAMS, C.J.

JAYAWARDENA vs DIONIS SILVA

S. C. No. 407—*P. C. Galle No.* 15046

Argued & Decided on 21st September, 1937.

Obscene words—Penal Code section 287—*Failure to set out the obscene words in the charge—Offending words stated in the evidence of the witness who complained he was annoyed by them—Does the mere failure to set out the obscene words vitiate a conviction.*

The accused was charged under section 287 of the Penal Code in that he did on the 2nd day of April 1937, at Tiranagama, utter obscene words on a public road to the annoyance of others. The only witness called by the prosecution out of a list of four witnesses was the Mudaliyar of the Wellaboda Pattu who stated that when he was passing Tiranagama, on the day in question, he saw the accused and twenty-five others standing on the road. The Mudaliyar also stated that the accused was using indecent words, and that the accused asked someone to have intercourse with that person's mother. This statement and the accused's behaviour, the Mudaliyar stated, annoyed him. The defence admitted that the words were used but argued that they were not obscene, though they were coarse. In support of this contention the following cases were cited:—

(1) *Sub-Inspector of Police, Tangalle, vs. Dharmabandu* 33 N.L.R. 114;

(2) *Collette vs. Perera* 3 C.W.R. 136.

The learned Magistrate convicted the accused.

In appeal, it was also urged that the obscene words were not set out in the charge and that failure to do so was sufficient to vitiate a conviction.

The following cases were relied on:—

(1) *Haniffa vs. Neina Mala & Another* 1 Weer. 35.

(2) *Udayar (Point Pedro) vs. Alfred* 30 N.L.R. 454.

Held : (i) That the words were obscene within the meaning of the expression in section 287 of the Penal Code.

(ii) That the failure to set out the words in the charge did not vitiate the conviction as the obscene words appeared in the evidence and the accused was not prejudiced by the omission.

Editorial Note:—The question whether the failure to set out the obscene words in the charge or summons vitiates a conviction is discussed in the following cases:—

(1) *Nell vs. Muttu* 2 N. L. R. 321.

(2) *Ratnayake vs. Dionis* (1916) 2 C.W.R. 21.

(3) *Mohamed vs. Bastian Appu* (1920) 2 Law Recorder 24.
(4) *Ukku Banda vs. Girigoris* (1917) 4 C.W.R. 299.
(5) *Fernando vs. Fernando* 6 Weer. 33.

G. P. J. Kurukulasuriya for accused-appellant.
M. F. S. Pulle, Crown Counsel, for respondent.

ABRAHAMS, C.J.

I think the words used can fairly be said to be obscene. They were calculated to disgust, which really means that they have a depraving tendency. There was one person who heard them when they were uttered in a public place and that is quite sufficient to sustain a charge.

It has been brought to my notice that the obscene words were not set out in the charge. There is authority that where an accused pleads guilty the absence of the words in the charge can vitiate the conviction. But that is not the fact here. The accused pleaded not guilty and the language, the use of which constituted the offence, was stated in the evidence of the witness who said he heard the words. Therefore, the absence of the words in the charge cannot be said to have prejudiced the accused in any way as the ground of his appeal was that the words were not obscene but merely coarse. The defect (it is of course a defect) is curable.

I dismiss the appeal. *Appeal dismissed.*

Present: MAARTENSZ, J. & HEARNE, J.

LEVER BROTHERS LTD. vs RENGANATHANPILLAI

S. C. No. 202—*D. C. Colombo No.* 4160
Argued on 27th, 28th, and 29th September, 1937.
Decided on 5th October, 1937.

Trade Mark Ordinance—Infringement of Trade Mark—Passing off—Offending mark likely to mislead purchasers—Tests to be applied in deciding whether the mark is calculated to deceive.

Held : (i) That in the case of a colourable imitation of a trade mark, the test is whether or not the defendant's mark is calculated to cause his goods to be taken, by ordinary purchasers, for the goods of the plaintiff.

(ii) That the marks must be compared as they are seen in ordinary use on the goods they are used for, provided the plaintiff's mark does not substantially differ from the mark on the register.

(iii) The fact that the plaintiff has by injunction prevented the goods containing the infringing mark from reaching the market does not disentitle him from bringing an action for infringement of his trade mark.

(iv) That where it is shown to the satisfaction of a court that goods, calculated to pass off, or to cause to be passed off as the goods of the proprietor of a trade mark, have been imported and are at the Customs premises, the court is entitled to grant an injunction prohibiting the sale of the goods.

H. V. Perera, K.C., with *N. Nadarajah* and *Chelvanayagam* for defendant-appellant.

Hayley, K.C., with *Choksy* for plaintiffs-respondents.

MAARTENSZ, J.

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The plaintiffs, who are the proprietors of a trade mark duly registered in respect of perfumed toilet soaps, have brought this action to restrain the defendant from selling certain soaps, imported by him, on the ground that the mark on the imported soap and on the wrapper is calculated to deceive, and amounts to an infringement of plaintiffs' trade mark.

The plaintiffs' trade mark consists in the main of a label having printed thereon the word "LUX," and certain designs within a fancy border.

The plaintiffs' soap is oblong in shape, with bevelled edges and white in colour. On one side of the cake is cut in the word "LUX;" in the middle of the cake, below it, is a floral design followed by the words "TOILET SOAP." On the other side is cut the words "LEVER BROTHERS" enclosed within an oblong panel.

The cakes of soap imported by the defendant are of the same shape and size, with bevelled edges, but rather darker in colour.

On one side of the cakes appears the word "REX" and a floral design similar to the design on plaintiffs' soap, followed by the words "MADE IN JAPAN" and the number "No. 4440." On the other side appear the words "RILAK SOAP FACTORY" within an oblong panel of exactly the same size as the panel on plaintiffs' soap. Outside the panel appear the words "MADE IN JAPAN."

The salient features on the cakes of soap sold by the plaintiffs and imported by the defendant is, in my opinion, the two words of three letters, both of which end in the letter X. Both of them are Latin words and the letter E of the word "REX" can be given the sound of the letter U somewhat, the word "REX" can have a sound similar to the word "LUX." The defendant's mark of "REX" and the floral design below it, placed on a cake of soap of exactly the same size and shape as the soap sold by the plaintiffs, is, in my judgment, calculated to deceive. The two soaps are also similar in smell, which would add to the possibility of deception.

The plaintiffs' soap is put up in a creamy wrapper of paper, patterned in small squares. The word "LUX" is printed prominently on it in dark mauve, each letter being made up of small squares. Under this word appear the words "TOILET SOAP" followed by a floral design.

On each edge of the wrapper there is an ornamental design in green with mauve and yellow dots. The design is made of tiny squares.

The defendant's soap is put up in wrappers of smooth paper, rather darker in colour. The prominent feature is the word "Rex," smaller in size than the letters forming the word "LUX," and of a different shade of mauve. The letters forming the word "REX" are built up in a slightly different way to the word "LUX."

To the left of the word "REX" and below it, there is the picture of a man on a camel and some palm trees and pyramids in the distance.

On each side of the wrapper is an ornamental design in green with mauve and yellow dots. The design is of a different pattern to the design

on plaintiffs' wrapper, and is made up of circular dots. Placed side by side the difference in the patterns is obvious. Apart, however, there is every possibility of one pattern being mistaken for the other.

It was very strongly urged that the picture of the man on the camel and the pyramids and palm trees would enable a would-be purchaser to distinguish the difference between the two wrappers, and that therefore the defendant's wrapper was not calculated to deceive. On the other hand, it was urged that a would-be purchaser, seeing a wrapper very similar in appearance to the plaintiffs' wrapper in other respects, might well think that the plaintiffs had merely made an alteration in the design of their wrapper.

We were referred to various cases by counsel on both sides; but I do not think it necessary to examine them all. It is impossible to say from the decided cases what amount of resemblance is necessary for the Court to hold that a mark is calculated to deceive. But the case of *John Gosnell and Co., Ltd., v. Sivaprakasam*, 1910, 15 N.L.R. page 33, is of the greatest assistance to the plaintiff, as the Court in that case held that the use by the defendant of the word " Farina " with a certain device on the soap sold by him was an infringement of plaintiff's mark, the essential features of which were the word " Famora " with a device which was different to the device on defendant's mark.

In an action for infringement, the plaintiff can rely only upon the imitation of his trade mark. In the case of a colourable imitation, which is what the defendant's mark is said to be, the test is whether or not the defendant's mark is calculated to cause his goods to be taken by ordinary purchasers for the goods of the plaintiff.

The marks must be compared as they are seen in ordinary use on the goods they are used for, provided the plaintiffs' mark does not substantially differ from the mark on the register.

The plaintiffs' mark, as used, does not differ from the registered mark, and the two marks as used do, in my opinion, so resemble each other that defendant's mark is calculated to cause his soap to be taken for plaintiff's soap.

As regards the second cause of action, I agree with the District Judge that there is sufficient material upon which to hold that the defendant intended to pass off his soap as the plaintiffs' soap.

The grounds upon which damages were claimed are not set out in the plaint. I do not think that the plaintiff can claim as damages the amount he had to pay the Customs for detaining the goods which is the basis of the District Judge's estimate of the damages.

I do not think, however, that the sum awarded is more than nominal and I see no reason to interfere with the District Judge's order as to damages.

I am of opinion that the appeal should be dismissed with costs and direct accordingly.

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Hearne, J.

Lever Brothers Ltd. *vs* Renganathanpillai

HEARNE, J.

This is an appeal by the defendant from the judgment and decree passed by the District Judge of Colombo in case No. 4160 of his Court.

The plaintiffs' first cause of action was one for infringement. The goods, the marks on which were alleged to be an infringement of the plaintiffs' mark, had been detained by the plaintiffs at the Customs and had not reached the Ceylon market. This, however, did not disentitle them to bring their action. There is authority for this—*Upmann v. Forester*, 24 Ch. D. 231; (1883) 52 L.J. Ch. D. 946. The plaintiffs' second cause of action was designed to prevent the goods in question reaching the Ceylon market. It was alleged, in the alternative, that the " get-up " of the goods was calculated to deceive and to enable goods, not of the plaintiffs' manufacture, to be passed off as and for the plaintiffs' goods. It is clear that they were entitled to the remedy of an injunction assuming the facts pleaded could be established.

I have no doubt that, in granting a perpetual injunction in terms of the plaintiffs' prayer, the Judge acted wisely and properly. I agree with him that the totality of resemblances in the " get-up " of the defendant's soap to the plaintiffs' soap was undoubtedly calculated to pass off or to cause to be passed off the defendant's soap as and for the plaintiffs' soap.

The alleged infringement of the plaintiffs' mark, in regard to which the Judge also found against the defendant, is one that must be examined with greater care. For the plaintiffs can rely only upon the imitation of a registered mark to which they are exclusively entitled and not " those additional things proved to be connected with his trade or goods " upon which they may also rely in a " passing off " action.

The imitation by the defendant of the plaintiffs' mark would not, I venture to think, be likely to deceive literate persons. Some of the distinctive features of the plaintiffs' mark, in particular the border on the wrapper, have been reproduced by the defendant with an exactness that would be calculated to lead the unwary into thinking the mark on the defendant's goods was the registered mark of the plaintiffs. But the word "Rex" (this is the name of the defendant's soap) is so unlike "Lux" (the trade name of the plaintiffs' soap) as to make deception in my opinion unlikely in the case of literate persons. On the other hand, in the case of illiterate persons, it might very well, as the Judge has found, be otherwise. An illiterate person is not concerned with letters of which he has no knowledge. The impression he receives of the name of a soap printed on a wrapper is an impression of symbols. Where a three-lettered word is used in each case, the last of which " X " is one which, for reasons given by the Judge, is known to him, this mental impression of symbols similar as to number and identical as to one of them in shape, coupled with the mental impression of the other features of the wrapper which were imitated to an extent that was only limited by the defendant's ideas of safety, would most probably

deceive an illiterate into mistaking the defendant's mark for that of the plaintiffs. The Judge directed himself very properly in answering the test question—" Is the spurious mark likely to deceive? "—in reference to the persons who are the probable purchasers of a cheap soap. The case of *John Gosnell & Co., Ltd., v. Sivaprakasam* (1910) 15 N.L.R. 33, is an illustration of the trend of decisions in this class of case.

The plaintiffs did not suffer any injury consequent on the infringement of their registered mark, and are only entitled to nominal damages. The Judge related the amount decreed in their favour (Rs. 500/–) to the actual out-of-pocket expenses incurred by the plaintiffs in seeking to protect themselves. I am not at all sure that this is correct. But in all the circumstances of the case I do not regard Rs. 500/– as being anything more than nominal.

I would dismiss the appeal with costs.

Appeal dismissed.

Present: ABRAHAMS, C. J.

JOSEPH NADAR vs ASEERWATHAM

S. C. No. 79—*C. R. Colombo No.* 69266

Argued on 1st & 4th October, 1937.

Decided on 6th October, 1937.

Civil Procedure Code section 337—*Section* 13 (1) *Courts of Requests Amendment Ordinance No.* 12 *of* 1895—*Appeal from Court of Requests—Can question of law be argued in an appeal on facts—Prohibitory notice on employer seizing labourer's wages—Can employer take objection to the seizure.*

Held : (i) That an appeal on law which has not been preferred within the prescribed time cannot be introduced into a petition of appeal on facts so as to defeat the provisions of the law regarding limitation of time for preferring an appeal.

(ii) That where a seizure of a labourer's wages is made by a prohibitory notice it is the judgment-debtor and not his employer or anyone else who should claim exemption under section 218 of the Civil Procedure Code.

Chelvanayagam for plaintiff-appellant.

Thillanathan for defendant-respondent.

ABRAHAMS, C. J.

In this case the appellant obtained judgment on 23rd November, 1931, for Rs. 130/– and costs. He took out a writ in February, 1932, and seized moneys belonging to the respondent in the hands of the Anglo-Persian Oil Company, his employers. In answer to the prohibitory notice of the Fiscal, the Company stated that the respondent was a cooly employed on one of their oil barges, and they assumed that his wages were, therefore,

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exempt from seizure. The appellant took no further step until December last year when he applied to the Court of Requests for the re-issue of a writ.

The learned Commissioner accepted the respondent's submission that the appellant had not exercised due diligence on the last preceding application to procure complete satisfaction of the decree as contemplated by section 337 of the Civil Procedure Code. He also held that the respondent had proved by his evidence that the debt had been settled by payment of Rs. 130/– after his wages had been seized.

The appellant obtained leave to appeal from this court alleging in his petition that he had done all that was possible for him to do in the circumstances when he took out the writ for the first time, and that, accordingly, the finding that he had failed to exercise due diligence was wrong. He further alleged that, as there was no entry of record of satisfaction of the decree, the learned Commissioner ought not to have taken into consideration the respondent's evidence of settlement.

It is objected on the part of the respondent that the appellant cannot now be heard to argue the second allegation. It is a submission in law and ought to have been made the subject of a separate appeal under section 13 (1) of the Courts of Requests Amendment Ordinance (No. 12 of 1895), and could be inserted in the petition of appeal on the facts as it was then barred by time.

I agree with that objection. It is not a question of the enactment requiring two petitions of appeal but of the requirement that an appeal on law must be preferred within seven days of the decree appealed against.

This case is covered by authority. Middleton J. in *Northway v. Naatchia*, (15 N.L.R. 30) held that an appeal on law could not be introduced into a petition of appeal on facts so as to defeat the provisions of the law regarding limitation of time for preferring an appeal.

As to the exercise of due diligence, the appellant appears to think that, after the Anglo-Persian Oil Company had suggested to the Fiscal that the wages of the respondent were exempt from seizure, he was absolved from doing anything further to follow up his decree. It is urged for the respondent that the letter to the Fiscal from the respondent's employers should have been ignored by the appellant as it is for the judgment-debtor and for him alone to claim exemption under section 218 of the Civil Procedure Code. I agree, and the objection of the Company, if indeed it was an objection, was out of order. Further, the appellant in his duty to exercise due diligence should have taken action under section 219 of the Code to compel a full disclosure from the respondent. Put at its best for him, he asks this court to hold that when the Anglo-Persian Oil Company stated that what they held of the moneys due to the respondent was by way of wages, it was obviously useless to proceed further as the respondent would have claimed exemption and must have had no other property. I do not agree that either of these propositions is necessarily true, and I dismiss the appeal with costs.

Appeal dismissed.

Present : MAARTENSZ, J. & HEARNE, J.

KARUNANAYAKE vs KARUNANAYAKE

S. C. (F) No. 36. (1936)—*D. C. Galle No.* 34107

Argued on 21st and 22nd September, 1937.

Decided on 13th October, 1937.

Civil Procedure Code sections 614, 615 *&* 617—*Divorce—Action for recovery of cash dowry—Can the amount of permanent alimony be fixed before decree absolute is entered—Matrimonial Rights and Inheritance Ordinance No.* 15 *of* 1876 *sections* 6, 10, 11 *and* 19—*Married Women's Property Ordinance No.* 18 *of* 1923.

In this action the plaintiff and defendant are wife and husband respectively. The plaintiff sued the defendant:—

(*a*) for dissolution of their marriage on the ground of his adultery ;

(*b*) for the return of a sum of Rs. 6,550/- given to him as dowry ; and

(*c*) for alimony at Rs. 300/- a month.

The District Judge gave judgment for the plaintiff:—

(*a*) ordering a dissolution of the marriage ;

(*b*) ordering the defendant to pay a sum of Rs. 5000/-, being the amount of dowry paid in cash ;

(*c*) ordering the defendant to pay Rs. 225/- a month as alimony ; and

(*d*) ordering the defendant to hypothecate property to the value of Rs. 20,000/- to secure the payment of alimony.

The defendant appealed on the following grounds :—

(*a*) that the sum of Rs. 5,000/- was given to him as a wedding present and not by way of dowry ;

(*b*) that he was not liable to return the sum of Rs. 5,000/- ;

(*c*) that the amount fixed as alimony is excessive ; and

(*d*) that the amount of security ordered is beyond his means.

It was also contended that the trial judge's order fixing alimony was bad inasmuch as it had been made before decree absolute was entered in the divorce case.

Held : (i) That it is open in law for the parties to a divorce action by consent to have the amount of permanent alimony determined before decree *nisi* is made absolute.

(ii) That an order for permanent alimony can properly be made only after the decree *nisi* for divorce has been made absolute, even though the amount of permanent alimony has been determined beforehand by consent of parties.

(iii) That a wife, under the Roman Dutch Law, is entitled to claim restitution of her dowry in a case where the marriage did not take place in community of property.

(iv) That under the Roman Dutch Law, the wife's right to claim restitution of her dowry may be forfeited by misconduct on her part.

(v) That in the case of persons married before the Married Women's Property Ordinance No. 18 of 1923, the wife's movable property vests in the husband by virtue of section 19 of the Matrimonial Rights and Inheritance Ordinance No. 18 of 1923, and that dowry money which has vested in the husband before 1924 cannot be recovered.

[**Editorial Note :** The parties were married before July, 1924, and the dowry was handed at the time of marriage. By virtue of section 19 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 the money vested in the husband on it being given.

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The repeal of sections 6—19 of the Matrimonial Rights and Inheritance Ordinance in respect of persons married after June 1877 by section 4 of the Married Women's Property Ordinance, No. 18 of 1923, is not regarded as affecting this case, in view of the proviso. The last mentioned section reads —

> " Sections 5 to 19 (both inclusive) and sections 22 and 23 of the Matrimonial Rights and Inheritance Ordinance 1876 are hereby repealed in so far as they relate to persons married on or after the twenty-ninth day of June, 1877.
>
> " Provided, however, that such repeal shall not affect any act done or right or status acquired while such sections were in force or any right or liability of any husband or wife, married before the commencement of this Ordinance to sue or be sued under the provisions of the said repealed sections, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Ordinance."]

C. Brooke-Elliott, K.C., & H. V. Perera, K.C., with *S. Nadesan, C. Seneviratne & A. L. Jayasuriya* for defendant-appellant.

R. L. Pereira, K.C., with *E. G. P. Jayatilleke* and *Colvin R. de Silva* for plaintiff-respondent.

MAARTENSZ, J.

The plaintiff in this action sued the defendant, her husband, for a dissolution of their marriage, on the ground of his adultery; for the return of a sum of Rs. 6,550/– given to him as dowry; and for alimony at the rate of Rs. 300/– a month. She also prayed that the defendant be ordered to give security for the due payment of the alimony.

The District Judge gave judgment for the plaintiff ordering a dissolution of the marriage and condemning the defendant to pay her Rs. 5,000/–, Rs. 225/– a month as alimony, and to hypothecate property to the value of Rs. 20,000/– to secure the payment of the alimony.

The defendant appellant contends in appeal that he is not liable to return the sum of Rs. 5,000/–, which was not given to him by way of dowry but as a wedding present; that the amount fixed as alimony is excessive; and the amount of security ordered beyond his means.

I shall first deal with the contention that the amount payable as alimony is excessive.

The District Judge assessed the appellant's income at Rs. 5,600/– a year, made up as follows :—

> Rs. 3,600 a year, being salary payable to him, after deductions, as station master ;
>
> Rs. 1,200 a year derived by him from his properties planted with rubber ;
>
> Rs. 600 a year from properties planted with coconut ;
>
> Rs. 200 a year being rent which he would receive if his ancestral home was rented.

In determining the amount payable as alimony out of this income, the District Judge took into consideration the misconduct of the appellant and the unfounded allegations he made against his wife, the plaintiff.

It was urged (1) that the District Judge's assessment of the income derived by the appellant from his rubber and coconut properties, and the amount at which he considered the house could be let was incorrect ; (2) that he was wrong in taking into consideration the defendant's misconduct and his allegations against the plaintiff in determining the amount the appellant should pay by way of alimony.

The largest property planted with rubber is Medahena, 27 acres in extent. According to the extract from the Register of Rubber Lands, the standard production for 1935 was 8320 lbs. and the exportable maximum 4,160 lbs.

The defendant's evidence is that he and his brother are entitled to 51% of the exportable maximum, and that he gets coupons for 1,591 lbs. How the figure 1,591 is arrived at does not appear from the evidence. He produced five deeds, D12, D13, D14, D15, and D16, in favour of himself and his brother for 4/10 plus 1/12 of the land.

The rubber was planted by Robert Abeysinghe Gunasekere under a planting agreement No. 1807 (D17) by which the planter was to receive half the soil and plantation as planter. The planter assigned his interests in the planting agreement to the defendant and another by deed No. 14632 (D18), dated 16th September 1925. The defendant, according to these documents, became entitled to a half share of the planter's interest and 29/60 of the land. Thus, practically the whole of the rubber plantation vested in himself and the other grantee of the deed, of which the defendant was entitled to a half share.

These deeds were executed in favour of the defendant between the years 1925 and 1929, and it would appear that he acquired all the plantations subsequently for, in the extract from the Rubber Register (P10) he is described as the owner. The defendant's explanation that he registered himself as owner for the sake of convenience, and that he kept his share of the coupons and handed over the others to his brother to be distributed to the other co-owners, is not supported by any receipts or entries in the books of account; considering that coupons are valuable documents, I should have expected him to produce evidence of that nature in support of his explanation. The defendant admitted he had an account book which shows the amount spent by him on the land. He has not produced this account book. I think an inference adverse to his explanation can be deduced from the non-production of this book.

The defendant is, admittedly, the owner of the entirety of the other two lands planted with rubber. The extracts from the Rubber Register, P9 & P11, show that the exportable maximum is 1,588 and 650 lbs. of rubber. The exportable maximum of the three lands is 6,398 lbs. of rubber, the figure adopted by the District Judge.

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The defendant asserted that he had three caretakers who were paid Rs. 10/–, Rs. 15/–, and Rs. 15/– a month respectively. With regard to the other two lands too, he has an account book in which he has entered the expenses and income from the lands and which he has not chosen to produce, and the same adverse inference can be drawn from their non-production.

I am of opinion that the defendant has not established that the District Judge's assessment of his income from the lands planted with rubber is incorrect.

As regards the land planted with coconut and the rental of the house, there was, no doubt, exaggeration on the part of the plaintiff's father who gave evidence as regards the income from these properties, and the defendant, of course, sought to minimise the income as much as possible. The defendant has certainly not been frank about his income ; for instance, when he gave evidence, as regards his income, at the inquiry held to determine the amount he should pay as alimony *pendente lite*, he said Pussellawatte is a bare land of 21 acres and that he got no income from it. At the present inquiry, he admitted that it was planted with 608 trees.

As regards the house, the plaintiff's father said it could be rented at Rs. 75/– a month. The Vidane Aratchy, C. Ratnaweera, a witness for the defence, said it could not be let for more than Rs. 10/– a month.

The District Judge, no doubt using his experience, has assessed the income derivable from the coconut properties and the house at a figure which he considered reasonable, after considering the evidence led in the case.

I am unable to say that his assessment of the defendant's income is excessive.

As regards the sum which should be paid by way of alimony, the appellant's counsel submitted that there was a rule that it should not exceed one fifth of the husband's income. I am not aware of such a rule. On the contrary, the proviso to section 614 of the Civil Procedure Code enact that ' alimony pending the action shall in no case *be less than one fifth* of the husband's average net income for the three years next preceding the date of the order.' And the rule in England is that permanent alimony is always larger than alimony *pendente lite*. See *Browne and Watts* on Divorce, page 145.

Some evidence was led as to what it would cost the plaintiff to live in Balapitiya, and it was urged that on that evidence Rs. 75/– a month was sufficient for the plaintiff to live on. I am unable to agree with this contention ; there is no rule that a wife is only entitled to the least amount on which she could live by way of alimony.

The defendant at page 10 of the record has stated as follows : " I would estimate my monthly expenses at Rs. 200/– to Rs. 250/–. I would consider it an amount necessary for my wife as well." I think this evidence is a fair basis for estimating the amount of alimony the defendant should

pay the plaintiff. The District Judge's estimate of Rs. 225/– a month is in my opinion too high, as it amounts to nearly fifty per cent. of the defendant's income, part of which must fluctuate with the fluctuation of the price of rubber and coconut.

I am of opinion that the alimony should be reduced to Rs. 200/– a month.

The decree ordered the defendant to pay the plaintiff permanent alimony from the 13th day of June, 1935, that is, from the date the action was filed. This order was clearly made *per incuriam*, for under the provisions of section 614 of the Civil Procedure Code, 1889, alimony *pendente lite* is payable until the decree is made absolute, and permanent alimony becomes payable from that date.

Section 615 of the Code indicates that an order for the payment of permanent alimony should be made only after the decree *nisi* dissolving the marriage is made absolute.

As this section was not referred to at the first hearing of the appeal, we heard counsel on the 30th September on the question whether an order for the payment of permanent alimony could be made before the decree was made absolute.

The appellant's counsel contended that the Court had no jurisdiction to make the order before the decree *nisi* was made absolute, and that there must be a fresh inquiry and a fresh order made after the decree is made absolute.

It would be most regrettable if we were constrained to uphold this contention. In my opinion, we are not bound to do so.

The Court clearly determined the amount payable as permanent alimony, when it did, at the invitation of the parties, as one of the issues agreed to was " (7) What amount is plaintiff entitled to as permanent alimony ? " I can see no reason why the parties should not by consent have this question determined before the decree is made absolute. I took this view in the case of *Silva v. Silva et al.** D. C. Colombo No. 10859 which I tried as District Judge. In that case I made an order under the provisions of section 617 of the Civil Procedure Code before the decree was made absolute, at the invitation of the parties, although, as I pointed out in my judgment, such an order could properly be made only after the decree *nisi* was made absolute.

There was an appeal from this judgment, and my order under section 617 was varied as regards the amount of income I had ordered the 1st defendant to pay the plaintiff, but it was not set aside on the ground that I had no jurisdiction to make the order.

As regards the property to be hypothecated as security for the payment of alimony, the appellant complains that his property may not be worth Rs. 20,000/–. To obviate the possibility, I direct him to hypothecate as security the three lands planted with rubber, namely, Galpotte Ela Mamana Medahena and Ketakellagahahena, for sum of Rs. 20,000/–.

* 27 N.L.R. 289.

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The next question for decision is whether the plaintiff is entitled to restitution of the sum of Rs. 5,000/– which she claims was given by her father on her behalf to the defendant as her *dos*. The defendant averred that the sum of Rs. 5,000/– was given to him as a wedding present.

The District Judge has held that the sum of Rs. 5,000/– was dowry intended for the plaintiff, and I see no reason to dissent from his finding of fact.

Under the Roman Dutch Law, "*Dos* or dowry consists of the property which is given by a wife or some person on behalf of the wife to the husband for the purpose of sustaining the burden of marriage" and "included, in the absence of proof to the contrary, all the property given to the husband for administration by the wife" (Nathan's Common Law of South Africa, section 420, pages 266 and 267.)

"Where a marriage has taken place in community, the dowry or its value must be brought into collation, for the purpose of ascertaining the sumtotal of the estate owned in community and dividing the same." (Ibid. page 268).

The marriage, in this case, did not take place in community of property and the plaintiff would, under the Roman Dutch Law, be entitled to claim restitution of the sum of Rs. 5,000/–. Nathan, in section 505, page 317, commenting on Voet's statement that the right to claim restitution of the dowry may be forfeited by misconduct on the part of the wife, says : "It is submitted, that if there is to be any restitution whatsoever of dotal property, it must proceed upon the supposition that it belongs to the wife, and not to the husband. Dotal property is not to be looked upon as a benefit arising out of the marriage, except in so far as, during the marriage, the husband has the usufruct of the same ; and therefore a decree of forfeiture of benefits, following on divorce, given as against the guilty spouse, should not deprive the wife of her dotal property, provided the parties are married out of community."

It appears to me from the above statement of the law that the right to restitution of the *dos* results from the fact that the *dos* is the property of the wife, and not of the husband.

The Roman Dutch Law, as regards the matrimonial rights of husband and wife in respect of property, has been abrogated by the Matrimonial Rights and Inheritance Ordinance, 1876.

Section 6 of this Ordinance enacts as follows : "The respective matrimonial rights of every husband and wife domiciled or resident in this Island, and married after the proclamation of this Ordinance, in, to, or in respect of movable property shall, during the subsistence of such marriage and of such domicile or residence, be governed by the provisions of this Ordinance."

Section 10 and 11 enact that the wages and earnings of a wife, her jewels, implements of trade and agriculture shall be deemed and taken to be part of her separate estate.

Section 19 enacts as follows: "All movable property to which any woman, married after the proclamation of this Ordinance, shall be entitled at the time of her marriage or may become entitled during her marriage, shall, subject and without prejudice to any settlement affecting the same, and except so far as is by this Ordinance otherwise provided, vest absolutely in her husband."

In terms of this section, if there was no settlement affecting it, the sum of Rs. 5,000/– became the absolute property of the defendant.

There was, admittedly, no settlement of this sum in writing.

The plaintiff's father who provided the money stated: "The Rs. 5,000/– was money given to my daughter for her upkeep. We handed it to defendant but it was meant for the upkeep of my daughter." Again he said: "I gave that money to my daughter. I may have handed the money to the defendant as it is the custom. Defendant had to preserve that money for the plaintiff."

Now, if the Rs. 5,000/– was money given to the daughter without reference to her intended marriage, that money would on her marriage become the absolute property of her husband in terms of the provisions of section 19 of the Ordinance. I am unable to distinguish between such a gift and a gift of Rs. 5,000/– given to her as dowry in the absence of any agreement, on the part of the intended husband that that sum should not become his absolute property on the marriage taking place.

I am, accordingly, of opinion that where movable property, to which section 19 applies, is given as dowry, that property becomes the absolute property of the husband in the absence of any proof that he has contracted himself out of the provisions of the section.

It is the custom in this island to give a dowry to the wife. Money is almost invariably a part of the dowry, and it is significant that this is the first case to my knowledge in which restitution of the dowry was claimed.

I am of opinion that the order of the District Judge, directing the defendant to pay the plaintiff the sum of Rs. 5,000/–, must be set aside.

The decree of the District Court is varied as follows: (1) By the deletion of the order directing the defendant to pay the plaintiff the sum of rupees five thousand (Rs. 5,000/–) given to her as dowry.

(2) By substituting "Rs. 200/–" for the sum of "Rs. 225/–" and the words "from the date the decree is made absolute" for the words "from the 13th day of June, 1935."

(3) By substituting the words "that the defendant shall, within one month of the return of the record to the District Court, enter into a bond in the sum of Rs. 20,000/– and hypothecate as security the lands called Galpotte Ela Mamana, Medahena and Ketakellagahahena.

I would not interfere with the order of the District Judge as to costs. There will be no costs of this appeal.

HEARNE, J.

I agree.

Appeal allowed and decree varied.

Present : ABRAHAMS, C.J.

DE NEISE (Inspector of Excise) vs SAMBUNATHAN ALIAS SAMPEN AND OTHERS

S. C. Nos. 185–188—*P. C. Batticoloa No.* 45122

Argued on 29th & 30th September, 1937.

Decided on 5th October, 1937.

Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929—Possession of opium by several persons—Person running away from a house raided by an Excise raiding party—To what extent does such conduct alone raise a presumption strong enough to demand an explanation in a charge against him for possession of opium along with the other occupants found in the house at the time of the raid.

The 5th appellant, in this case, escaped from a house that was raided by an Excise party on information that opium would be found in the premises. Opium was found in the house, and the fifth appellant was charged, along with others, with unlawful possession of opium. All the accused were convicted of possession of opium.

The 5th appellant did not give evidence at the trial in explanation of his conduct.

Held : That the conduct of the accused in running away from the house by itself does not create a presumption strong enough to demand an explanation.

L. A. Rajapakse with *J. R. Jayewardena* for accused-appellants.

M. F. S. Pulle, Crown Counsel, for complainant-respondents.

ABRAHAMS, C.J.

The appellants were convicted, in the Batticoloa Police Court, of having in their possession, without the licence of the Governor, raw or prepared opium weighing two pounds, an offence punishable under section 74 (5) (a) of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 as amended by section 28 of the Poisons, Opium and Dangerous Drugs Ordinance No. 43 of 1935.

The appellants were all found in a house that was raided in the expectation, that was realised, that opium would be found on the premises. The individual and combined activities of the appellants led the raiding officers to the conclusion that they were all concerned in the possession of two one pound packets of opium that were found on the premises. They were all convicted and fined various sums.

The petition of appeal relates to questions of fact only, but learned counsel for the appellant, when presenting his case, raised and argued a very ingenious point of law. The evidence, that the substance that was found on the premises was opium, was given by the Excise Inspector who conducted the raid, and the substance was sent for examination and report to the Government Analyst. The report of the Government Analyst contained the following information :—

"The parcel contained a sealed packet labelled 'D.' One parcel said to contain two one pound packets of raw or prepared opium produced in P. C. Batticoloa Case No. 45122. This held two packets of black substance. Opium was identified in both the packets."

The charge is that of being in possession of raw or prepared opium. Raw and prepared opium are respectively defined in section 30 of the principal Ordinance as follows :—

"'Raw Opium' means the spontaneously coagulated juice obtained from the capsules of the *papaver somniferum L.*, which has only been submitted to the necessary manipulations for packing and transport, whatever its content of morphine ;

"'Prepared opium' means raw opium which has undergone the processes necessary to adapt it for smoking or eating, and includes opium dross."

It is argued that there is no proof that the substance analysed contained either raw or prepared opium because the Analyst's report does not say so; it merely uses the expression 'opium,' and, says counsel, for anything that the case actually proved the substance might have been what he calls opium *simpliciter*, that is to say, opium as extracted from its source, or, to use a more convenient term in the circumstances, 'crude opium,' and that is what the Analyst may have meant, or indeed the substance might have been medicinal opium which is defined in section 46 (2) of the Ordinance as :—

"'Medicinal opium' means raw opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the British Pharmacopoeia, whether it is in the form of powder or is granulated or is in any other form, and whether it is or is not mixed with neutral substances."

I am of the opinion that this argument, subtle though it is, will not stand scrutiny. The very expression 'raw opium' suggests opium in its crudest form, and it must be remembered that the long title of the Ordinance is "An Ordinance to amend and consolidate the Law relating to Poisons, Opium and Dangerous Drugs," so that the legislature must have intended to deal with opium in every known form. This is borne out by various sections where the expression 'opium' is used without any qualification, for instance, section 36 prohibits the use of premises as an opium divan, that is to say, as a place of resort for the purpose of eating or smoking opium. Finally, the definition of 'opium' in the Oxford Dictionary is to all intents and purposes that of 'raw opium' in the Ordinance, namely :—

"The inspissated juice of a species of poppy (Papaver Somniferum), obtained from the unripe capsules by incision and spontaneous evaporation."

On the other point, namely, that the substance might have been medicinal, it seems to me that the evidence of the Excise Inspector was important as to the identification of the article in view of the fact that he is constantly examining such substances and that, the most cursory glance and immediate odour of the substance would identify it so far as he was concerned. Also, the report of the Analyst would hardly have been silent on the point. The context clearly implies that he identified the substance as raw or prepared opium.

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Abrahams, C. J.

De Neise (Inspector of Excise) *vs* Sambunathan Alias Sampen and Others

The appeal on the facts is not pressed except by the 5th appellant. When the authorities raided the house, he bolted. He was not the owner of the house nor was he related to the owner, the 1st appellant. No doubt, to run away from a house which is raided to search for contraband articles is some indication of guilt, but it does not of itself raise a presumption strong enough to demand an explanation. The appellant might very well have known of the presence of opium in the house and may even have come to obtain some, but that does not make him guilty of the offence charged. Crown Counsel agrees that he cannot urge anything more against the appellant than that he ran away.

I allow the appeal of the 5th appellant and direct his acquittal, and I dismiss the appeals of the other three appellants.

Present : ABRAHAMS, C.J. & MAARTENSZ, J.

THIAGAR & OTHERS vs SARAWANAMUTTU & ANOTHER

S. C. No. 54—*D. C. F. Jaffna No.* 3824

Argued on 13th September, 1937.

Decided on 4th October, 1937.

Civil Procedure Code section 22—*Objection that the action was not properly constituted taken for the first time in appeal—Can such objection be taken at that stage—Action under section* 102 *of the Trusts Ordinance* 1917—*Trustee of Hindu Temple.*

This action was brought against three defendants referred to in the judgment as first, second and third defendants under section 102 of the Trusts Ordinance. The plaintiffs asked:—

(*a*) for a declaration that the first and second defendants were not entitled to the offices of Manager and Assistant Managers, respectively, of a Hindu Temple known as Pararajasekara Pillayar temple.

(*b*) that the first and second defendants be removed from the offices of Manager and Assistant Manager respectively.

(*c*) that a scheme be framed for the management of the temple and its temporalities.

It was admitted that one Ponnampalam Kathirgamar was the last duly appointed Manager and that, after his death in 1903, his son, the third defendant, continued to manage the temple with the consent of the congregation.

In appeal, objection was taken that an action under section 102 of the Trusts Ordinance lay only against a legally appointed trustee or manager and that, as the third defendant had not been legally appointed, the action was not properly constituted.

Held : That the appellant was precluded by section 22 of the Civil Procedure Code from taking such an objection in appeal.

C. Nagalingam with *Kumarasingham* for 1st and 2nd defendants-appellants.

N. E. Weerasuriya with *N. Nadarajah* for plaintiffs-respondents.

MAARTENSZ, J.

The plaintiffs, purporting to be the regular worshippers of the Pararajasekara Pillayar temple situated at Inuvil in Jaffna, instituted this action under the provisions of section 102 of the Trusts Ordinance of 1917, praying (1) for a declaration that the 1st and 2nd defendants were not entitled to the offices of Manager and Assistant Manager, respectively, of the said temple ; (2) that the 1st and 2nd defendants be removed from the offices of Manager and Assistant Manager respectively ; (3) that a scheme be framed by the Court for the management of the temple and its temporalities.

In paragraph 8 of the plaint, the plaintiffs averred certain reasons for their prayer that the 1st and 2nd defendants be removed from the offices of Manager and Assistant Manager respectively. *Inter alia*, because the 1st defendant was never appointed manager of the temple by the congregation.

The temple, according to the minutes of the meeting annexed to the deed D1, was built and dedicated by U. Subramaniar and Mylar Arumugam on land belonging to the children and brother-in-law of Subramaniar.

The first manager mentioned in the proceedings is Mylar Arumugam. After his death, eleven persons executed deed No. 5974 (P2) dated 16th April, 1894, by which they appointed Ponnampalam Kathirgamar manager of the temple. The 3rd defendant is his son.

This deed does not recite that the grantee was appointed manager at a meeting of the congregation held for that purpose, or that the grantors were authorized to do so by the congregation.

The 1st defendant, who was married to a sister of Arumugam's wife and lived in the same house, alleges that the 3rd defendant's father was not appointed manager by the congregation, and that he (1st defendant) was appointed manager by deed No. 2320 (D1) dated 3rd May, 1897, by the grantors of the deed who were authorized by the congregation at a meeting held on the 3rd October, 1896, to appoint a manager. A copy of the minutes of the meeting is attached to this deed. The names of seventy persons, who are said to have been present at the meeting, are set out in the minutes. It is also signed by the thirteen persons who were authorized to appoint a manager.

The notice (D3) convening the meeting was published in the 'Hindu Organ' on the 16th September, 1896.

The main question for determination in the District Court was whether the 1st defendant or the 3rd defendant's father was duly appointed manager of the temple.

The issues raising this question are the 3rd and 6th issues which are as follows — (3) " Did Kathirgamar function as manager by virtue of the appointment by the congregation ? " (6) " Was Sarawanamuttu duly appointed manager of this temple ever and did he act as manager before

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Maartensz, J.

Thiagar & Others *vs* Sarawanamuttu & Another

decision in case No. 24399 D. C. Jaffna by virtue of deed No. 2320 of 3rd May, 1897 ? "

The learned District Judge answered the 3rd issue in the affirmative, and the 6th issue in the negative. I am not prepared to disturb these findings of fact. Although deed P1 does not recite that there was a meeting of the congregation, the 3rd defendant deposes to there having been a meeting, and the documents produced by the plaintiffs show that Kathirgamar acted as, and was recognised as, manager. The only document in which the 1st defendant describes himself as manager is a petition to the Chairman of the District Road Committee, dated 25th August, 1909. That is after the death of Kathirgamar who died in 1903.

As Kathirgamar was appointed manager by the congregation in 1894, the 1st defendant's appointment as manager in 1897 by a section of the congregation was invalid.

It is agreed, for the purposes of this action, that the right to appoint a manager is vested in the congregation, and it is common ground that the congregation did not appoint a manager after the death of Kathirgamar.

There was therefore, when this action was instituted, no legally appointed manager. Paragraph 4 of the plaint avers that " on the death of the said Kadirgamar in the year 1903, the congregation failed to appoint a successor, but the 3rd defendant, son of the said Kathirgamar, continued to manage the said temple with the consent of the congregation." The appellant accordingly contended in appeal that the action was not properly constituted. It was argued that an action under section 102 of the Trusts Ordinance No. 9 of 1917 could only be instituted against a legally appointed manager or trustee, and that the question whether the defendant was a legally appointed manager could not be decided in such an action. In support of this contention we were referred to the case of *Nur Hussain Shah vs. Mt. Hussain Bibi*, A.I.R. 1926 Lahore, page 16.

I do not propose to discuss the merits of the objection, as I am of opinion that it has, in view of the provisions of section 22 of the Civil Procedure Code, been taken too late.

Section 22 enacts as follows :—

" All objections for want of parties, or for joinder of parties who have no interest in the action, or for mis-joinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases, before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant."

The terms of this section are imperative and the defendant must be deemed to have waived any such objection as the one taken in appeal.

I would dismiss the appeal with costs.

ABRAHAMS, C.J.

I agree.

Appeal dismissed.

Present: ABRAHAMS, C.J.

BORHAM (Police Serjeant 448) vs CHIANG FONG CHING

S. C. No. 573—*P. C. Nuwara Eliya No.* 11999
Argued and Decided on 11th October, 1937.

Medical Ordinance No. 26 *of* 1927 *section* 51 (1) (*b*) & (*c*)*—*Practising dentistry for gain without being a registered dentist—Meaning and scope of the expressions "practising dentistry" and "performing dental service."*

Held : That to take an impression of a person's mouth and to make artificial teeth on the strength of that impression and to fit those teeth into the mouth when completed amounts to practising dentistry and to performing dental service.

PER ABRAHAMS, C. J.

"It is clear, therefore, that the Magistrate was wrong in stopping the case where he did. It is, in my opinion, an undesirable thing for the Court to stop a case in an intricate point of law without calling upon the defence."

T. S. Fernando, Crown Counsel, for complainant-appellant.
No appearance for the accused-respondent.

ABRAHAMS, C.J.

This is an appeal, by leave of the Attorney-General, against an order of the Police Magistrate of Nuwara Eliya acquitting the respondent of the offence of having practised dentistry for gain and of performing a dental service for gain in breach of section 51 (*b*) and section 51 (*c*) of Ordinance No. 26 of 1927. The case against the respondent was that one Godahewa required two artificial teeth and went to the respondent's place to obtain them. The respondent took the measurement of his mouth by giving him some wax which he bit and handed back. When Godahewa came the next day, the respondent produced two artificial teeth and placed them in Godahewa's mouth. On Godahewa saying that the teeth did not fit, the respondent put his hand into his mouth, shook the teeth and took them away to alter. The respondent performed a similar service for one R. L. Daniel who required one artificial tooth. The shape and measurement of Daniel's mouth was obtained from a wax impression. The tooth was supplied the next day and Daniel found it was uncomfortable. Both patients paid a few rupees to the respondent.

After hearing the case for the prosecution, the learned Magistrate discharged the accused as, in his opinion, what was done by the respondent did not amount to "dental service." He said that "the accused constructs

* 51 (1) No person, not being a dentist, shall :—

(*b*) Practise for gain or profess to practise or publish his name as practising dentistry or dental surgery, or

(*b*) Perform for gain any dental operation or service other than the extraction of teeth.

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artificial teeth to order. He allows the buyer to supply him with the measurement of his mouth, taken in wax, and then manufactures the teeth to that measurement, later delivering them to the buyer for a small sum of money." The Magistrate went on to say that he did not think such a process came within the term "dental service" contained in the Ordinance and which seems to contemplate some action taken with regard to the living person, his teeth or his gums.

In my opinion, the learned Magistrate was quite wrong. He appears to assume that the taking of the impression of the mouth and fitting in false teeth, made in accordance with that impression, is a purely mechanical process. I think it is very much more than that. A number of things have to be considered in addition to the merely making of the teeth. It is essential that they should be constructed with due allowance for the contraction of the gums and also with due consideration to the presence or otherwise of other teeth in their proximity. It is just as important that artificial teeth should fit perfectly as that an offending tooth should be cleaned, filled or extracted.

The learned Magistrate observed that he had been guided by the remarks of Mr. Justice Akbar in the case of *Ruben v. Sheengyhe* (36 N.L.R. p. 205).* An examination of that case satisfies me that the learned Magistrate has misread it. The accused there was acquitted on the facts, the learned Magistrate having some doubts as to whether the accused was even responsible for the supply of the artificial teeth and, further, he was of the opinion that there was no reliable evidence to prove that what had been done had been done for gain. On the question of the meaning of "dental service" the learned Judge was of the opinion that the expression would cover a case of some service which included the fitting of the artificial teeth in the gap in the mouth of the person, for whom the service was performed, in addition to actually fitting the teeth into position in the gap. If I may say so, I respectfully agree. Further, there are certain South African cases which interpret the expression "practising as a dentist" to include the performance of such a service as is alleged in the case before me. I need only cite one—*Rex v. Vlotman, Rex v. Koonin* (South African Law Reports, 1911, (C.P.D.) p. 879). The judgment of Mr. Justice Hockly is most interesting and illuminating.

It is clear, therefore, that the Magistrate was wrong in stopping the case where he did. It is, in my opinion, an undesirable thing for the Court to stop a case in an intricate point of law without calling upon the defence. Had he not done so, the whole question, both of fact and of law, could have been settled by me here and now. As it is, the case must be remitted for a completely new hearing before another Magistrate, who will, of course, bear in mind this ruling that to take an impression of a person's mouth and to make artificial teeth on the strength of that impression and to fit those teeth into the mouth when completed amounts both to practising dentistry

* 2 C.L.W. 354. Edd

and to performing dental service. The question of fact for him to decide will be, whether this was what the respondent actually did and, if he did so, whether he actually performed such a service for gain.

I quash the order of acquittal and remit the case to be re-tried in accordance with my directions above.

Sent back.

Present : MOSELEY, J. & FERNANDO, A.J.

SEYADU IBRAHIM SAIBU & OTHERS vs SYDNEY PHILIPS

*S. C. No.*105—*D. C. Kurunegala No.* 18791

Argued on 14th October, 1937.

Decided on 20th October, 1937.

Civil Procedure Code section 218 (*g*)—*Seizure of lump sum retiring allowance payable to a pensioner—Is such retiring allowance liable to be seized—Stipend—Meaning of.*

Held : (i) That a lump-sum retiring allowance, granted by the Governor under section 15* of the Minutes on Pensions, does not fall within section 218 (g) of the Civil Procedure Code.

(ii) That a lump-sum payment does not come within the scope of the expression " stipend " in section 218 (g) of the Civil Procedure Code.

H. V. Perera, K.C., with *Mahroof* for plaintiffs-appellants.

S. de Zoysa for defendant-respondent.

MOSELEY, J.

The appellants seized, under a writ of execution, certain moneys alleged to belong to the respondent in the hands of the Controller of Finances and Supply. There is no evidence on record to indicate the nature of the moneys seized, but, throughout the proceedings, it appears to have been taken for granted that they represent a retiring allowance granted by the Governor as provided by section 15 of the Minutes on Pensions. That at least was the attitude taken up by counsel for the respondent, and I do not think that any useful purpose would be served by remitting the case for evidence on the point.

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* The Governor may call upon a public servant, who is below the limit of age entitling him to retire on pension, to retire from the service on the ground of his inability to discharge efficiently the duties of his office. In such a case, if the Governor considers that the special circumstances of the case justify the grant of a retiring allowance, the public servant so called upon to retire may be given such retiring allowance as the Governor thinks just and proper, but in no case exceeding the amount for which his length of service would qualify him. If the pensionable emoluments of the officer so retired exceed £ 300 or Rs. 4,500 per annum, the award of such a retiring allowance requires the approval of the Secretary of State.

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Moseley, J.

Seyadu Ibrahim Saibu & Others *vs* Sydney Philips

Following the seizure, the respondent moved that the moneys be released on the ground that they were exempt from seizure under section 218 of the Civil Procedure Code, paragraph (g) whereof provides that " Stipends allowed to naval, military, and civil pensioners of Government and political pensions " are not liable to seizure. The learned District Judge was of opinion that the " gratuity " is not liable to seizure and ordered its release. The appeal is against that order.

Now, it will be observed that the exempting provision, upon which the respondent relies, makes no express mention of a gratuity. This word appears in the corresponding paragraph of section 266 of the Indian Civil Procedure Code of 1882, which served as a model for the Ceylon Code which made its appearance seven years later, while it must be conceded that the object of the paragraph is to protect pensions payable to Government officers, it would seem that the omission of the word " gratuity " must have been deliberate. Counsel for the respondent argued that the word " stipend " is sufficiently comprehensive to include a payment of this nature. In my view, the word is inseparable from the notion of periodical payments and cannot, therefore, embrace a lump-sum such as the payment in the present case.

Counsel for the respondent further argued that the payment is in the nature of a gift, that the respondent had no disposing power over the moneys, and that so far he has no seizable right, inasmuch as it is open to the Governor to revoke the grant. He cited in support an Indian case in 6 Allahabad page 643. It seems to me, however, that in the present case the Governor had approved the grant, the Legislature had voted the money, and the latter was in the hands of the Controller to whom the respondent was in a position to give directions as to its payment either to himself or to another party, *e.g.* his bankers.

On these grounds, I would allow the appeal with costs, and declare that the moneys are liable to be seized.

FERNANDO, A.J.

I agree.

Appeal allowed.

Present : MAARTENSZ, J. & HEARNE, J.

DE SILVA & ANOTHER vs JAMES & ANOTHER

S. C. No. 118 (*Inty*)—*D. C. Galle No.* 35087

Argued & Decided on 12th October, 1937.

Civil Procedure Code section 756—*Order of abatement of appeal*—*Relief under section* 756—*Special application*—*Appeal from order of abatement may be treated as special application.*

The judgment of the District Judge, in this case, was delivered on March 23, 1937. On April 9, 1937, the petition of appeal was filed. On April 20, 1937, certificate of worth with title deeds etc. were tendered. On April 23, 1937, appellants' proctor moved to

deposit security for costs of appeal. Objection was taken on the ground that the appellants were out of time. The District Judge upheld the objection and made order that the appeal had abated. The appellants appealed from that order.

Held : (i) That the security was tendered in time and that it should have been accepted.

(ii) That the Supreme Court can treat an appeal from an order that an appeal has abated as a special application under section 756, and grant relief.

S. S. Kulatilake for 2nd and 3rd defendants-appellants.
M. T. de S. Amarasekera for plaintiff-respondent.

MAARTENSZ, J.

Judgment, in this case, was delivered on the 23rd March, 1937, against the 2nd and 3rd defendants-appellants. On the 9th April, 1937, they tendered their petition of appeal, the necessary stamp duty, and moved for notice of security to be issued. The notice issued was returnable on the 20th April, 1937.

On that date, Mr. Karunaratna, Proctor for the 2nd and 3rd defendants, tendered certificate of worth with title deeds and extract from the Register of Lands, and moved that it be accepted as security for costs of appeal. Apparently, no order was made on this motion, but under the previous minute on the same day is an entry that the notice of security had been served on the 1st and 2nd plaintiffs-respondents, and there is the order, " Call on 23rd April." On the 23rd April, there is a minute that the 2nd and 3rd defendants wish to deposit the security for costs of appeal. Mr. Dissanayake, who was counsel for the plaintiffs, objected on the ground that the appellants were out of time. The District Judge upheld the objection and made order that the appeal had abated. The present appeal is from that order.

It was held in the case of *Zahira Umma vs. Abeysinghe and others*, 8 Ceylon Law Weekly, page 26, that where an order is made under the provisions of section 756 of the Civil Procedure Code, relief should be sought from this Court upon a special application made for that purpose. We shall treat this appeal as a special application.

I am of opinion that the security was tendered in time, and that, as no cause was shown against the security tendered, it should have been accepted. The order of abatement is, therefore, set aside. The appellants will perfect this security within one week of the receipt of the record in the District Court. Thereafter the appeal will be forwarded to this Court in due course. The appellants will be entitled to the costs of the appeal against the plaintiffs-respondents.

HEARNE, J.

I agree.

Appeal allowed.

Present : MAARTENSZ, J. & HEARNE, J.

THE COMMISSIONER OF LOAN BOARD vs FELSINGER

S. C. No. 96—*D. C. Colombo No.* 53991

Argued on 24th September, 1937.

Decided on 1st October, 1937.

Mortgage action—Several defendants—Death of one of them—Decree entered against all defendants including deceased defendant—Court not aware of death—Application to vacate decree against deceased defendant and substitute his legal representatives—Application allowed—Decree entered again against all defendants—Need the mortgagor defendant's consent be obtained before entering decree.

This is a mortgage action in which the plaintiff, is a corporation, suing under the name of the Commissioner of the Loan Board, and the defendants are the mortgagor and two puisne encumbrancers. The action was uncontested and judgment was entered for the amount claimed in the plaint and declaring the decree executable against the mortgaged property. One of the defendants—the second—had died before the date of decree. Neither the plaintiff nor the court was aware of this at the time. Later, the plaintiff moved to vacate the decree entered against the second defendant and to substitute his legal representatives. This motion was allowed and a second decree was thereafter entered against the first and third defendants and the legal representatives of the second. The first defendant—the mortgagor—appealed against this second decree on the ground that he did not consent to it.

Held : (i) That the first decree is binding on the mortgagor, the first defendant, and that the judge had no power to set it aside and enter a second decree on the ground that one of the defendants was not alive at the time it was entered.

(ii) That the first decree was a nullity so far as the deceased second defendant was concerned, as he was not alive at the time it was entered.

(iii) Where decree is entered against several persons and it is later reopened on the ground that one of the persons against whom it was entered was not alive at the time, the other persons, against whom a valid decree has been entered, cannot make use of the opportunity and claim a rehearing of their case.

N. Nadarajah with *E. B. Wickremanayake* for appellant.

N. E. Weerasooriya for respondents.

HEARNE, J.

The plaintiffs sued the 1st defendant on mortgage bond No. 333 dated 2nd October, 1928. They prayed for judgment against him in a sum of Rs. 152,074/13 with interest and costs, and for an order that the properties and premises, primarily mortgaged to them, be declared " bound and executable " for the said sum of Rs. 152,074/13, interest and costs. They further prayed for an order on the 1st defendant to pay the sum found to be due and, in default of such payment, for an order of sale of the property

secured by the mortgage bond. The 2nd and 3rd defendants were made parties to the suit as secondary mortgagees subject to the primary mortgage in favour of the plaintiffs.

The 1st defendant consented to judgment and prayed that the order to sell the mortgaged premises be sold subject to certain conditions. This was on 25th May, 1934. The matter was fixed for enquiry and on the 18th July, 1934, the court entered a decree in the action and made an order for the sale of the mortgaged property.

Between the 25th May, 1934, and 18th July, 1934, namely, on the 12th June, 1934, the 2nd defendant had died and this fact was not known to the Court at the time the decree was entered. On an application being made by the plaintiffs, court vacated its decree.

On the 31st March, 1936, a second decree was entered after the legal representatives of the 2nd defendant had been brought on to the record.

It is from this second decree that the 1st defendant appeals. He says he did not consent to the 2nd decree and, for the purpose of this appeal, I shall take this to be so.

The legal position which, in my opinion, has arisen is this. The 1st decree, so far as the 2nd defendant is concerned, is a nullity. This does not mean that a party who was heard and against whom a decree has been passed by consent or on the merits can take advantage of the death of another party and claim a rehearing on the merits. (*Chitaley Vol.* 2 *p.* 2121 citing (1930) Madras 719). The decree that was passed against the 1st defendant on the 18th July, 1934, was a valid decree. The Judge had no power to vacate it, nor had he any power to enter a second decree against the 1st defendant. The position, so far as he is concerned, is that he is bound by the 1st decree which is executable against him according to the rules relative to execution.

Now, what the 1st defendant on appeal prays is, that the decree entered on the 31st March, 1936, be set aside. This will be done, and to this extent this appeal succeeds. He also prays that the case be remitted to the District Court to be proceeded with according to law. Regarding this prayer, this appeal is dismissed. There is no need for proceedings, other than execution proceedings, to be taken by the plaintiffs as there is a valid decree subsisting against the 1st defendant.

This result may be the reverse of what the 1st defendant hoped for, but it is one which has been occasioned by his own perversity.

As regards the legal representatives of the 2nd defendant, different considerations apply. They, however, have not appealed. It would appear that that portion of the 2nd decree which affects them binds them.

The appeal will be allowed to the extent I have indicated, but there will be no order for costs.

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Maartensz, J.

The Commissioner of Loan Board *vs* Felsinger

MAARTENSZ, J.

I agree to the order made by my brother Hearne as the plaintiff will not be prejudiced, as between themselves and the 1st defendant, by the order of the District Judge vacating the original decree being set aside.

I, however, reserve, for determination when it arises, the question whether a party who has consented to a decree being vacated or altered, or acquiesced in such an order by not appealing, can be allowed to impeach the order in an appeal from an order made directing a new decree to be entered, or made in pursuance of the new decree, when to set aside the order would be prejudicial to the other party. I have in mind such a case as this:— The defendant in an action having consented to, or acquiesced in, a decree dismissing plaintiff's action being vacated, finds judgment entered against him after trial of the case. Can he, in appeal, claim a reversal of the judgment on the ground that the Judge had no jurisdiction to vacate the 1st decree ? As at present advised, I think it would be iniquitous to allow such a claim.

In every case where it was held that a District Judge can only amend an order or decree in terms of section 189 of the Civil Procedure Code, there was an appeal from the order vacating or altering the decree.

Present : MOSELEY, J.

ARNOLIS HAMY vs THE CONTROLLER OF ESTABLISHMENTS

S. C. No. 463—*Application under Ordinance No.* 19 *of* 1934

Argued on 14th September, 1937.

Decided on 29th October, 1937.

Workmen's Compensation Ordinance No. 19 *of* 1934—*Question whether incapacity is total or partial—Is it a question of fact or law.*

Held : (i) That the question whether incapacity is total or partial is a question of fact.

(ii) That in a case of permanent partial disablement, it is the duty of the Commissioner to decide on the evidence before him, whether there has been a complete loss of earning capacity or not.

Kumarasamy Subramaniam for applicant-appellant.

J. E. M. Obeyesekera, Crown Counsel, for crown-respondent.

MOSELEY, J.

This is an appeal against an order of the Commissioner for Workmen's Compensation on the ground that the applicant had been held entitled to

compensation on the footing of permanent partial disablement, whereas the applicant contended his disablement was permanent and total.

The applicant was a blacksmith, employed by the Ceylon Government Railway, and as a result of an injury to his right index finger was found by a Medical Board to have Fibrous Ankylosis of all joints of that finger. The Board found further that he was unfit for further service anywhere in the Island. That lack of fitness, I take it, is only intended to apply to service as a blacksmith, since there must be many occupations for which the loss of the use of the right index finger would not necessarily unfit one.

Section 48 of the Workmen's Compensation Ordinance, No. 19 of 1934, provides *inter alia* that an appeal to the Supreme Court from an order of the Commissioner shall lie on a point of law. The point was taken by counsel for the respondent that the appeal, in this case, is on a question of fact and therefore does not lie. The reply of counsel for the appellant was that the Commissioner had treated the matter as a question of law.

In the case of *Sage vs. Stothert* (1923 16 B.W.C.C. 74) it was held that whether incapacity is total or partial is a question of fact. That proposition appears to have been accepted without question, and it seems to me that it must be so.

In this case the Medical Board has found the applicant's capacity " slightly impaired." The Commissioner, in considering the finding of the Board, applied to that finding the definition of " partial disablement," which provides that every injury specified in Schedule I shall be deemed to result in permanent partial disablement. Among the injuries specified in Schedule I is " Loss of index finger." He held that it was therefore unnecessary for him to decide whether there had been a complete loss of earning capacity.

In my view, it was his duty to make a finding upon the evidence before him, and in a proper case I should adopt the course of remitting the case to the Commissioner for such a finding. To do so in this case would not, I think, serve any useful purpose. Not only is there evidence upon which the Commissioner could arrive at the conclusion to which he has come, but I do not think that, on that evidence, he could have made any other finding. In other words, I do not see by what process of reasoning the Commissioner could have found that the applicant has been incapacitated for all work which he was capable of performing at the time of the accident.

The appeal is dismissed.

Appeal dismissed.

Present : SOERTSZ, J.

EXCISE INSPECTOR OF NATTANDIYA vs SOMASUNDERAM

S. C. No. 260—*P. C. Chilaw No.* 2625
Argued on 13th September, 1937.
Decided on 24th September, 1937.

Illicit possession of opium—Opium, Poisons and Dangerous Drugs Ordinance No. 17 *of* 1929—*How should charge in regard to possession of opium be framed—Criminal Procedure Code section* 425.

Held : That failure to describe, in a charge for illicit possession of opium, the kind of opium in respect of which the offence has been committed is a defect to which the provisions of section 425 of the Criminal Procedure Code would be applicable.

Per SOERTSZ, J. "I would observe, however, that it is desirable in these cases for the prosecution to state definitely whether the substance in respect of which a person is charged is raw or prepared or medicinal opium."

J. R. Jayawardena with *V. F. Gooneratne* for accused-appellant.
Pulle, Crown Counsel, for complainant-respondent.

SOERTSZ, J.

The accused-appellant was charged with having had in his possession "raw or prepared opium" weighing 2 ounces 3 drachms, 20 grains.....and with having thereby committed an offence against section 32 of Ordinance 17 of 1929 read with section 74 (1) (*a*) of the said Ordinance, punishable under section 74 (5) (*a*) as amended by section 28 of Ordinance 43 of 1935.

He was convicted and sentenced to pay a fine of Rs. 125/–, in default 2 months' rigorous imprisonment.

On appeal, appellant's counsel contended that the conviction was bad in that the evidence did not specifically establish that the substance alleged to have been found in the possession of the accused was either raw or prepared opium or medicinal opium. The evidence on this point was that of the two Excise Inspectors, who described and identified the substance as opium, and the analyst's report which stated that the substance in question had been examined and that opium was identified. Was this evidence sufficient to sustain the conviction ?

For the purposes of Ordinance No. 17 of 1929 as amended by Ordinance No. 43 of 1935, opium is either raw or prepared or medicinal opium. It is prepared if "it has undergone processes necessary to adapt it for smoking and includes dross and any other residues remaining after opium has been smoked." It is raw opium when it is "the spontaneously coagulated juice obtained from the capsules of the *papaver somniferum* which has only been submitted to the necessary manipulations for packing and transport whatever its content of morphine." Raw opium is medicinal opium when

it has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the British Pharmacopoeia, whether it is in the form of powder, or is granulated or is in any other form, and whether it is or is not mixed with neutral substances.

From this it is clear that ' raw opium ' is the genus opium and that, for the purposes of the ordinance, two species are particularly carved out of it, namely, prepared opium and medicinal opium. It follows, therefore, that when a substance is described as opium it is either raw opium, or prepared opium, or medicinal opium, and the possession of any of these kinds of opium is penalised. Possession of the first and second kinds is penalised by section 32 read with sections 74 (1) (*a*) and 74 (5) (*a*) as amended by section 28 of 43 of 1935 and the possession of the 3rd kind by section 50 (1) read with sections 74 (1) (*a*) and 74 (5) (*a*) as amended by section 28 of 43 of 1935. The charge in this case would have been complete if it had stated ' raw or prepared or medicinal opium ' and if it had cited section 50 of the Ordinance in addition to section 32. But, in my view, the accused has not been prejudiced by this defect and it is a defect to which the provisions of section 425 of the Criminal Procedure Code are applicable.

I would observe, however, that it is desirable in these cases for the prosecution to state definitely whether the substance in respect of which a person is charged is raw or prepared or medicinal opium.

It was also contended on appeal that there was not sufficient evidence to show that this substance was in the exclusive possession of the accused-appellant, but I see no reason to differ from the view of the Magistrate on this point. He has given good reasons for holding the appellant responsible for the opium that was found in that particular drawer. I dismiss the appeal.

Appeal dismissed.

Present : MOSELEY, J.

PERUMAL (Excise Inspector) vs FONSEKA & ANOTHER

S. C. Nos. 732–733—*P.C. Panadura No.* 42410

Argued on 8th October, 1937.

Decided on 15th October, 1937.

Inspection of scene of offence after conclusion of trial—Examination of witness for the prosecution at the inspection—Is such inspection contrary to the principles of justice.

In this case, the magistrate reserved his verdict and judgment at the close of the trial and thereafter decided to visit the scene of the offence where he questioned the witnesses for the prosecution as regards further details of the evidence already led.

Held : (i) That the inspection of the scene of an offence after the conclusion of the trial is irregular.

(ii) That if an inspection is considered desirable, it should be made during the course of the trial.

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Moseley, J.

Perumal (Excise Inspector) *vs* Fonseka & Another

Per MOSELEY, J. "In view of the learned Magistrate's remarks, it must be assumed that justice was done, but what, in the words of Lord Hewart, C.J. 'is of fundamental importance is that justice should manifestly and undoubtedly be seen to be done.'"

G. P. J. Kurukulasuriya for accused-appellants.

M. F. S. Pulle, Crown Counsel, for respondent.

MOSELEY, J.

The two accused were convicted of selling arrack without a licence in breach of section 7 of the Excise Ordinance No. 8 of 1912, and were sentenced to pay a fine of Rs. 250/- each, in default six weeks' rigorous imprisonment. They appealed against the convictions and sentences on various grounds, with only one of which, for reasons which will appear hereafter, I propose to deal.

At the conclusion of the case for the prosecution, counsel for the defence intimated that he called no evidence. Certain authorities were cited by both sides, and the learned Magistrate stated that he would make his order two days later. On that date he made the following entry :— "I find that an inspection of the 2nd accused's house is necessary before I can make my order. Inspection on 3/7 (*i.e.* five days later). Verdict and judgment on 5/7."

The ground of appeal which I propose to consider is that at the inspection the learned Police Magistrate questioned the prosecuting Inspector who, to quote from an affidavit sworn by the 2nd accused, "demonstrated the arrangement of the furniture in the house to suit the prosecution evidence already given. The Inspector also explained several other questions put to him by the learned Magistrate." The latter, in the course of his statement of his reasons, referred to the incident as follows :—"My inspection of the scene did not alter the opinion I had formed at the trial. The principal point on which I desired an inspection was in regard to the table in the inner room on which the glass and the bottle are alleged to have stood. I found.....etc., etc.....The room had obviously undergone some re-arrangement."

From these remarks it may be inferred that the learned Magistrate had made up his mind to convict unless, from the inspection, something should emerge favourable to the accused. The accused were not therefore prejudiced by what must be characterised as irregular procedure. If an inspection was considered desirable, it should have been made during the course of the trial, when the further evidence of the Inspector could have been taken as to the re-arrangement of the furniture. In view of the learned Magistrate's remarks, it must be assumed that justice was done, but what, in the words of Lord Hewart, C.J. "is of fundamental importance is that justice should manifestly and undoubtedly be seen to be done."

For that reason I would set aside the convictions and sentences and order a new trial before another Magistrate. *Sent back.*

Present: SOERTSZ, J.

HALALDEEN, (Inspector of Police) vs. YOTHAN

S. C. No. 332—*P. C. Gampaha No.* 41359
Argued on 13th September, 1937.
Decided on 29th September, 1937.

Gaming Ordinance No. 17 *of* 1889—*Search Warrant under section* 7—*How should the place to be searched be described in the warrant—Form A in the Schedule to the Ordinance.*

Held : (i) That if, in a search warrant issued under section 7 of the Gaming Ordinance, the place to be searched is sufficiently described, the search will not be illegal on the ground that the place was not described by a more appropriate name or description.

(ii) That, in deciding whether the description of the place to be searched is sufficient or not, it is permissible to examine the evidence given both before the issue of the search warrant and at the trial.

Illangakoon, K.C., Attorney-General with *Pulle, Crown Counsel,* for complainant-appellant.

Colvin R. de Silva for accused-respondent.

SOERTSZ, J.

In this case, the learned Police Magistrate found that on the search warrant issued by him, under section 7 (1) of Ordinance 17 of 1889, the Police raided the place in which, according to the information given on oath by the informants, unlawful gaming was being carried on habitually, but he nevertheless held the presumption created by section 9 of the Ordinance did not arise, because the land on which this gaming took place was described in the search warrant as Jayakoddy Estate *alias* Tuttirihena, whereas in point of fact, the particular portion of land involved was *lot D of Diulapitiya* and, therefore, the correct description should have been Jayakoddy Estate *alias Diulapitiya.*

Assuming for the moment that the Magistrate's finding is right that this portion of land is not known as Tuttirihena, I am unable to agree with the Magistrate that that fact invalidated the search warrant in this case to the extent of avoiding the presumption created by section 9. The land to be searched is described in the warrant not only as "Jayakoddy Estate *alias* Tuttirihena and in a shed on the said estate," but also as situated in the village of Balagalla and on the border of Wewagedera and as owned by Lionel Jayakoddy. It is beyond question that the portion of land raided is a portion of Jayakoddy Estate situated in Balagalla and on the border of Wewagedera and belongs to Lionel Jayakoddy.

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Soertsz, J.

Halaldeen (Insp. of Police) *vs* Yothan

In my view, therefore, although on the finding of the Magistrate the use of the name Tuttirihena as an '*alias*' for this piece of land is inaccurate, it is nothing more than a innocuous *falsa descriptio*, and the land of which the warrant authorised a search is sufficiently identified by the other particulars contained in the warrant. Section 7 provides that the warrant should be in the form A given in the schedule to the Ordinance. An examination of that form shows that no stereotyped description of the place to be searched is required. All that appears necessary is a sufficient description. I am of opinion that, when this question whether there has been a sufficient description of the place arises, it is permissible to examine the evidence given before the issue of the search warrant and at the trial in order to answer that question and the other question, namely, whether the place searched was the place intended and whether that intention has been adequately given effect to by the description given of the place in the warrant. Of course the mere intention that the search should be of a certain place will not suffice, if, in fact, the description employed is erroneous in that it clearly applies to some other place, and not to the place intended, or does not apply with reasonable certainty to the place intended.

In this case, the evidence given before the Magistrate directed a search warrant to issue and the evidence at the trial clearly establish, in my view, that the place sought to be searched has been sufficiently described despite the use of the alternative name of Tuttirihena, and that it was the place described in the warrant that was searched. So far, I have dealt with this question on the assumption that the Magistrate is correct that this portion of land is not correctly described as Tuttirihena. But, on the evidence, I am satisfied that, although this portion of land was originally Diulapitiya, after it was acquired by the owners of Tuttirihena it became incorporated in Tuttirihena and was itself generally referred to as Tuttirihena. In that view of the matter, there is not even a *falsa descriptio* when the words '*alias* Tuttirihena' are used as an alternative description.

On this finding by me on this question, it does not become necessary for me to consider the other question raised, namely, whether the Magistrate was right, when he found on the evidence before him, that there was no proof of specific acts of gambling against the accused or any of them.

I set aside the order of the Magistrate and remit the case to him so that he may examine the evidence and record his findings on the basis that the presumption created by section 9 of the Ordinance arose.

The parties may lead any further evidence they desire in proof or in refutation of the charge.

Set aside and sent back.

Present : MOSELEY, J. & FERNANDO, A.J.

SATHIYANATHAN vs SATHIYANATHAN

S. C. No. 203—*D. C. Colombo No.* 2414
Argued on 14th October, 1937.
Decided on 20th October, 1937.

Divorce—Decree nisi—Marriage of divorcee with co-respondent several months after decree nisi *but before decree absolute—Death of plaintiff in divorce action before entry of decree absolute—Can decree absolute be entered after such death* nunc pro tunc *—Is the marriage by a party to a divorce action after decree* nisi *but before entry of decree absolute a valid marriage.*

A the husband of B brought an action for divorce making B the first respondent and C co-respondent. A obtained judgment and on October 10, 1921, decree *nisi* was entered to be made absolute after three months. Nearly a year later, on October 6, 1922 B married C the co-respondent. Decree absolute had not been entered at the time. Several years after, C died and the question arose whether B was entitled to succeed as the widow of C. C's heirs questioned B's right. Then B sought to have the decree in the divorce action made absolute *nunc pro tunc*. At the time B made her application—September 14, 1936—A was not alive, having died in September 1935. The District Judge refused to grant the application and B appealed. At the appeal C's heirs were granted permission to be represented.

Held : (i) That a party to a marriage, in respect of which a decree *nisi* for dissolution of marriage has been entered, is not entitled to contract another marriage until decree absolute is entered.

(ii) That if a party to a divorce action contracts another marriage after decree *nisi*, but before decree absolute and during the life time of the other party;

(*a*) the second marriage is invalid ;

(*b*) On the death intestate of either of the contracting parties tc the second marriage, the survivor is not entitled to any share of the estate of the deceased.

Per FERNANDO, A.J. "There seems to me to be another difficulty in the way of the appellant. Her application now is that the order making the decree absolute should be made *nunc pro tunc*. Such orders are sometimes made by courts of law, but in practice such an order will not be made in a case where the interests of other parties may be affected by the order."

(**Editorial Note :** As to a promise of marriage given after decree *nisi* but before decree absolute see *Fender vs. Mildmay*, (1937) 3 All E.R. 402, where it was held by a majority of the House of Lords (Lord Russell of Killowen and Lord Roche dissenting) that a promise of marriage made after decree *nisi* was enforceable after decree absolute.)

H. V. Perera, K.C., with *D. W. Fernando* and *Subramaniam* for 1st defendant-appellant.

N. E. Weerasuriya with *E. B. Wickremanayake* for heirs of 2nd respondent as *amicus curiae*.

FERNANDO, A.J.

The plaintiff in this action prayed for the dissolution of his marriage with the 1st defendant appellant, and the 2nd defendant was joined in the action as co-respondent. A Decree *Nisi* was entered on the 10th October,

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1921, to be made absolute at the expiration of three months from that date, but no decree absolute was in fact entered.

Counsel for the appellant states that after three months from the date of the decree *nisi*, that is to say, on the 6th October, 1922, the 1st defendant married the 2nd defendant. The 2nd defendant is now dead, and a question has arisen whether the 1st defendant is entitled to succeed as one of the heirs of his estate. The application of the 1st defendant is contested by the other heirs of the 2nd defendant who are represented in these proceedings by the counsel who have been allowed to appear in this appeal as *amicus curiae*.

It was contended by Mr. H. V. Perera that on the expiration of three months from the date of the decree *nisi*, the District Judge should have entered decree absolute *ex mero motu* even if there was no application for that purpose by any of the parties to the action, and the applicant's application to the Court was that a decree absolute should now be entered *nunc pro tunc*.

The learned District Judge refused the application for the reason that the plaintiff had died before the application, and that the marriage between the plaintiff and the 1st defendant had already been dissolved. It is admitted that the plaintiff died in September 1935, and the application by the 1st defendant was made on the 14th September, 1936. It is also admitted that the application that the decree absolute be entered *nunc pro tunc* has been made because of the death of the plaintiff in September, 1935.

Mr. Perera contended that under section 605 of the Civil Procedure Code it was the duty of the Court to enter an order absolute. Section 605 is in these terms : " whenever a decree *nisi* has been made, and no sufficient cause has been shown why the same should not be made absolute as in the last preceding section provided within the time therein limited, such decree *nisi* shall on the expiration of such time be made absolute."

In *de Silva vs. de Silva*, 29 N.L.R. 378 Garvin, J. ordered that decree *nisi* entered in that action should be made absolute in spite of an appeal that had been filed against an order made in the decree *nisi* directing one of the parties to make a certain settlement of property. The appeal against the order directing a settlement, he thought, could not affect the question of the dissolution of the marriage. In the course of his judgment, Garvin, J. uses these words : " at the expiration of three months, in the absence of any objection, the court is required to make the decree so entered absolute." Lyall Grant, J. in the same case said that if the reasons set out in section 604 of the Code are not brought forward, the decree is made absolute as a matter of course, and went on to state that the Civil Procedure Code appeared to contemplate a decree *nisi* being made absolute, even though an appeal may be pending against it. In the case of *Aserappa vs. Aserappa*, 37 N.L.R., 372*, Dalton, J. observed that the practice of the Court of entering decrees absolute in matrimonial cases as a matter

* 5 C.L.W. p. 7 (Edd.)

of course after the lapse of the prescribed period without the court being moved thereto by either party was not justified by any provision of the Civil Procedure Code. " This," he states " is the English practice, and I see nothing contrary to it in our Code. One can visualise a case without any difficulty in which the successful party might not wish to have the decree made absolute immediately the time limited expired. Cases are not unknown, if they are rare, of husbands and wives coming together again after a decree *nisi* has been entered." Maartensz, J. in a separate judgment stated that he was unable to agree with the contention that the District Judge should have made the decree absolute on the expiration of three months from the date of the decree *nisi*, and if I may say so with all respect, he appears to have agreed with the opinion of Dalton, J. that the person who requires the Court to move should move the court and that the Court is not required to act of its own motion in making the decree absolute.

In *Hulme King vs. de Silva*, 38 N.L.R. 63, which is the same case as *de Silva vs. de Silva*, 29 N.L.R. 378, their Lordships of the Privy Council observed that it had been held in Ceylon that there was nothing either in the law or the practice to prevent the application for a decree absolute being made by the innocent or by the guilty spouse and Lord Maugham proceeds to say that Their Lordships see no reason for differing from the view, and indeed they were not invited to hold the contrary. In this respect, the practice in Ceylon differed in their Lordships' opinion from the English law, and they came to the conclusion which is expressed in these words : " if the conditions have been complied with (that is to say, if no cause has been shown and the fixed period has elapsed) the court is bound to make the decree absolute, and it has been held that in Ceylon, there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse." This judgment to my mind while expressly stating that either spouse may make the application, appears to contemplate the position that while the court is bound to make the decree absolute, there should be for that purpose an application by one of the parties to the action. In these circumstances I do not think there is anything in the authorities which will enable us to disagree with the opinion expressed in *Aserappa vs. Aserappa*, that there is nothing in our Code which requires that the court should act of its own motion in making the decree absolute. I would repeat the observation of Dalton, J. that the person who requires the Court to move should move the Court for that purpose. I would add that there was no good reason why the 1st defendant should not have applied that the decree *nisi* be made absolute before her marriage if she desired to conserve any rights that may accrue to her as a result of that marriage. I presume that all the formalities required by law for her marriage with the 1st defendant were duly observed, and the further requirement that the decree *nisi* should have been made absolute could have been observed by her without any difficulty.

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Section 625 of the Civil Procedure Code provides that it shall be lawful for the respective parties to the marriage to marry again upon the decree *nisi* being made absolute. That section also refers to a case where a case of nullity has been entered, and the words of the section appears to me to provide that in a case where a decree of nullity has been entered the parties may marry again when three months have expired from the date of the decree, without any appeal therefrom, or if there is an appeal upon the confirmation of the decree of nullity by the Appeal Court. The words, " any such decree " in that section appear to my mind to refer to the case of nullity and not to the decree *nisi*, because with regard to a decree *nisi*, it is expressly provided that the parties may marry again on the decree being made absolute. The proviso to that section contemplates two cases (1) the case of an appeal to His Majesty in Council, and (2) to a case where in appeal the order of the District Court refusing to dissolve the marriage has been set aside, and the Court of appeal orders that the marriage be dissolved. The section is perhaps not very happily worded but in view of the requirement in section 605 that a decree *nisi* should be made absolute on the conditions set out in that section I do not think the party to a marriage in respect of which a decree *nisi* has been entered is entitled in any circumstances to marry again until the decree *nisi* has been made absolute.

There seems to me to be another difficulty in the way of the appellant. Her application now is that the order making the decree absolute should be made *nunc pro tunc*. Such orders are sometimes made by courts of law, but in practice such an order will not be made in a case where the interests of other parties may be affected by the order. If, as I venture to think, it was not lawful for the 1st defendant to marry again till her marriage with the plaintiff had been dissolved either by an order absolute or by the death of the plaintiff, then in the testamentary proceedings with regard to the estate of the 2nd defendant, she would not be a person who is entitled to succeed as a widow of the 2nd defendant. The heirs of the 2nd defendant would be such persons as are entitled in law to succeed to his estate on the footing that he was not legally married. On the death of the 2nd defendant, certain rights would devolve on his heirs on that footing, and the rights claimed by Mr. Weerasuriya's clients will clearly be affected by an order dissolving the marriage between the plaintiff and the 1st defendant as such order is made to date previous to the death of the plaintiff. The question would also arise whether the court would have power to enter such an order in a case where the marriage has already been dissolved by the death of the plaintiff. In my opinion, the learned District Judge was right in refusing the application and I would accordingly dismiss the appeal.

MOSELEY, J.

I agree.

Appeal dismissed.

Present : ABRAHAMS, C.J.

KALYANARATNA vs GUNADASA alias JAMES SILVA

S. C. No. 581—*P. C. Colombo No.* 2700
Argued on 30th September & 1st October, 1937.
Decided on 5th October, 1937.

Penal Code section 388—*Criminal Breach of Trust—Promissory note in favour of servant in respect of money lent by master—Judgment entered in favour of servant on promissory note—Can servant legally appropriate to his own use money paid to him by judgment-debtor in part satisfaction of judgment-debt.*

The accused was a servant under the complainant one Kalyanaratne, a trader. At the time of this prosecution he the accused had left his master's service.

About May 1935 one T. D. Gunadasa a friend of Kalyanaratne was arrested on a civil warrant and was in jail. On his informing Kalyanaratne of his plight the latter sent the accused with a sum of Rs. 237/50 being the amount of Gunadasa's debt. This sum was paid and Gunadasa obtained his freedom. That very day Gunadasa gave a promissory note for the amount. Kalyanaratne obtained the note not in his own name but in the name of the accused. As Gunadasa failed to pay his debt action was filed and judgment was entered in favour of the accused. Gunadasa paid Rs. 10/– and Rs. 5/– after judgment. The latter of these sums was paid to the accused who misappropriated it.

Held : That the accused was guilty of criminal breach of trust.

PER ABRAHAMS, C. J.

"But I think the terms of section 388 of the Penal Code are sufficiently wide to cover a case of this kind, and illustration (*a*) to that section certainly indicates one instance where the legal owner of property can commit criminal breach of trust in respect of it. If that were not so, many cases of misappropriation by servants and agents of the property for which they are bound to account to their employers would go unpunished. This case does in fact bear a sufficiency of resemblance to the *King vs. Perera*, (2 T. of C.L.R. 72) where Jayawardena A.J. upheld the conviction for criminal breach of trust of a salesman who misappropriated cheques made out in his own name by purchasers of his employer's goods."

R. C. Fonseka with *S. W. Jayasuriya* for the accused-appellant.
R. G. C. Pereira for complainant-respondent.

ABRAHAMS, C.J.

This is a somewhat unusual case and has been argued with commendable ability. The appellant was convicted of criminal breach of trust of Rs. 5/– which he had obtained in the following circumstances.

One T. D. Gunadasa was arrested by civil process for a sum of Rs. 237/50. From jail he requested assistance of the complainant who sent his employee the appellant to the jail with the money to discharge Gunadasa's

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liabilities. Gunadasa then went to the complainant's boutique and by arrangement signed a promissory note in favour of the appellant. The complainant stated that this was done because he was a busy man and the appellant transacted all his business.

Action was taken on this note and Gunadasa agreed to pay the amount in instalments of Rs. 15/– per mensem. He stated that the appellant came to him and asked him for an instalment whereupon he gave him Rs. 5/–.

It is submitted on behalf of the appellant that his liability is civil only since he received the Rs. 5/–, if he did receive it, by virtue of the promissory note which was made out to him, and that Gunadasa was liable in law to discharge his obligation to the appellant, and the appellant only, who thus received the money in his own legal right. But I think the terms of section 388 of the Penal Code are sufficiently wide to cover a case of this kind, and illustration (*a*) to that section certainly indicates one instance where the legal owner of property can commit criminal breach of trust in respect of it. If that were not so, many cases of misappropriation by servants and agents of the property for which they are bound to account to their employers would go unpunished. This case does in fact bear a sufficiency of resemblance to the *King vs. Perera*, (2 T. of C.L.R. 72) where Jayawardena, A.J. upheld the conviction for criminal breach of trust of a salesman who misappropriated cheques made out in his own name by purchasers of his employer's goods.

It has also been argued for the appellant that the judgment contained no specific finding that he misapproriated the Rs. 5/–, in fact there is not even any mention that he obtained the money. It is pointed out that the learned Magistrate stated that "the only point is to determine whether the money lent to Gunadasa belonged to the complainant or to the accused." The only defence raised by the appellant was that it was he who actually lent the money. He did not deny that he obtained the Rs. 5/–, so that it may be implied from the absence of a defence on this material point and the learned Magistrate's concluding words in his judgment to the effect that the appellant, having been dismissed by the complainant, is trying to take advantage of the fact that the note is in his favour and dishonestly recover money really due to the complainant, that the learned Magistrate accepted Gunadasa's evidence that the Rs. 5/– had been actually obtained. At the same time, as I have said before, a Magistrate in writing his judgment ought to be careful to find specifically on every fact in issue. Omission to do so gives scope for objections to the judgment and leads to the time of this Court being unnecessarily occupied.

I dismiss the appeal.

Appeal dismissed.

Present : MOSELEY, J. & FERNANDO, A.J.

MATHES vs MATHES & ANOTHER

S. C. Nos. 179–180—*D. C. Negombo No.* 861

Argued on 13th October, 1937.

Decided on 20th October, 1937.

Civil Procedure Code—Appeal—Stamp Ordinance No. 22 of 1909 *Schedule B Part II. Miscellaneous—Stamps for judgment in appeal and certificate in appeal—Should stamps be tendered "simultaneously" with appeal petition.*

Schedule B Part II, head Miscellaneous, of the Stamp Ordinance provides—"that in appeals to the Supreme Court the appellant shall deliver to the Secretary of the District Court or Clerk of the Court of Requests, together with his petition of appeal, the proper stamp for the decree or order of the Supreme Court and certificate in appeal which may be required for such appeal."

In this case two petitions of appeal were filed, by the parties affected by the judgment. One on the date of judgment, the other on the day after. The stamp for the certificate in appeal and the judgment in appeal were tendered a few days later but within appealable time.

Held : (i) That the appeals were not properly before the Supreme Court and should be rejected.

(ii) That the words "together with" in Schedule B Part II. Miscellaneous mean "simultaneously."

H. V. Perera K.C., with *D. Abeywickrema* for 1st respondent-appellant.

M. T. de S. Amarasekera for 2nd respondent-appellant.

N. Nadarajah for petitioner-respondent.

MOSELEY, J.

Counsel for the petitioner (respondent) has raised the point that the appeals should be rejected on the ground that the stamps in each case required by the proviso in part 2 of Schedule B of the Stamp Ordinance, No. 22 of 1909, have not been tendered by the appellant "together with his petition of appeal" as therein provided.

The order against which the appeals are brought was consequent upon an application under section 325 of the Civil Procedure Code, as a result of which the appellants were sentenced to undergo one month's rigorous imprisonment each. A petition of appeal was filed in one case on the same day, in the other on the following day, but the necessary stamps were not furnished until eight or nine days later but still within the time allowed for filing the petition of appeal. No doubt the prompt filing of the petitions was intended to expedite the granting of bail which was in fact allowed on the same day.

The point has been frequently raised in this Court. One of the earliest decisions is that by a Full Bench in *Bandara vs. Babun Appu* (1 Matara Cases 203). The order there made was that the appeal be rejected

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"stamps for the Supreme Court judgment and the certificate in appeal not having been supplied at the same time." That decision was considered by Macdonell C.J. in *Ramalingam Pillai vs. Wimalaratna*, (36 N.L.R. 52)† The learned Chief Justice held that he was bound by that decision and in discussing the meaning of the words "together with" said that "their simplest meaning would be that there shall be simultaneously delivered with a certificate of appeal the stamp required for same."

The point was next considered in *Attorney General vs. Karunaratna et al.* (37 N.L.R. 57)‡ by a Bench of Three Judges to whom it had been referred. It was necessary in that case to decide whether *Bandara vs. Babun Appu* (supra) was in fact a Full Bench decision. Poyser J. had not the slightest doubt that it was a Full Bench decision and therefore binding on the Court as then constituted. The appeal was therefore rejected. Poyser J. added that even if the decision in *Bandara vs. Babun Appu* (supra) was not binding on the court of which he was a member, he would have rejected the appeal for the reasons stated by Macdonell C.J. in *Ramalingam Pillai vs. Wimalaratne* (supra).

It was contended by learned Counsel for the appellants that inasmuch as the stamps were in fact tendered within the time allowed for the filing of the petitions of appeal, the requirements of the law were complied with, and that it does not emerge from any of the authorities cited that in those cases the stamps were so tendered. In view of the interpretation given to the words "together with" by Macdonell C.J. in *Ramalingam Pillai vs. Wimalaratne* (supra), with which interpretation Poyser, J. associated himself in *Attorney General vs. Karunaratne et al.* (supra), I do not see how we can accept that contention. In my view, the words must be construed as meaning that the certificates and stamps must be tendered simultaneously.

The appeals must therefore be rejected with costs.

FERNANDO, A.J.

I agree.

Appeals rejected.

Present: MOSELEY, J. & FERNANDO, A.J.

IRAGANATHAR & ANOTHER vs AMMAL,

S. C. No. 110—*D. C. Jaffna No.* 9518

Argued on 12th October, 1937.

Decided on 20th October, 1937.

Executor—Power to borrow money for purposes of administration—Promissory Note as security—Can successor of the Executor be sued on a promissory note given by the Executor as security for a loan for purposes of administration.

The Executor of one Ambalavanar borrowed a sum of money on a promissory note for the purposes of administration. The capacity in which the Executor took the

† 2 C.L.W. p. 410 (Edd. D.)

‡ 4 C.L.W. p. 23 (Edd. D.)

loan and the purpose for which the money was required appeared on the note itself. Later, after the Executor had been succeeded by the widow of the deceased as administratrix the promisee put the note in suit. The administratrix *inter alia* contended that the action should be first instituted against the Executor.

Held : (i) That an Executor has the power to borrow money on a Promissory Note for the purposes of administration.

(ii) That where an Executor has contracted a debt for the purposes of administration in such a manner as to exclude personal liability the estate is liable to pay the debt.

Chelvanayagam with *Muttucumaroe* for plaintiff-appellant.

Nadesan for defendant-respondent.

FERNANDO, A.J.

The main question that arises on this appeal is whether the defendant who has now been appointed administratrix of the estate of K. Ambalavanar is liable on the promissory note signed by the Executor of that Estate, in whose place she has been substituted some time after the date of the note. This issue of law was raised at the trial, and is numbered 3, and the argument of Counsel for the respondent was to the effect that the only person liable on the Promissory note was the Executor Appasamy himself. The note P 1 has been signed by Appasamy " as Executor of the Estate of K. Ambalavanar for the purposes of the Testamentary expenses." There are some observations made by the learned District Judge with regard to the words as " Executor etc." which he thought had been added some time after the note was signed, but Counsel for the respondent frankly admitted that he was not in a position to support the learned District Judge's opinion on this point, and on certain other references made by him.

Appasamy himself gave evidence, and stated that he had to borrow money for the purpose of managing the estate of the deceased, and that in the course of his administration, he borrowed this money for the purposes of supplying stamps in the Testamentary proceedings, for the expenses of Thudaiman Estate and for the purposes of administration. There was no evidence led for the respondent and I do not think there was any material to support the observations of the learned Judge, some of which he admits are based on mere surmises, or to enable him to hold that in fact the money had not been borrowed for the purposes of adminsitration.

It was not denied that under our law, " an Executor may raise money by a sale or a mortgage of the property belonging to the Estate or even by the pledge of assets." (see *Fernando v. Muncherjee*, 5, S.C.C. 141.) If an Executor has that power, I do not think it is possible to deny that he also has the power to borrow the money on a Promissory Note for the purposes of administration, and the only question is whether in such a case it is open to him to borrow that money as Executor, that is to say, in such a manner as to make the Estate liable for the re-payment of that money, or whether even in a case where, as here, he executes a promissory note as Executor of the Estate, he nevertheless remains personally liable for the money.

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The question whether a Trustee can incur a liability in such a manner as to enable the creditor to claim payment out of the trust Estate was considered in *Hayley v. Nugawela*, 35 N.L.R. 157. Drieberg, J. in the course of his judgment cites a portion of the judgment of Bertram C.J. in *Maraliya v. Goonasekera*, 23 N.L.R. 261, where Bertram C.J. differentiates the position of a Trustee from that of an Executor or Administrator, and states that a Trustee is personally liable on a bond executed by him and adds, "The law knows nothing of the idea of a Trustee suing or being sued in his capacity of Trustee. He has not a representative capacity like that of Executor or Administrator." Drieberg, J. then refers to certain English decisions on the question whether a Trustee by describing himself as such can exclude his personal liability. Referring to the case of *Muir v. Glasgow Bank*, 1879, A.C. 337, he refers to the observation of Lord Cairns that there was nothing to prevent a Trustee by appropriate words from stipulating that he will make payment not personally, but out of trust funds, "but having regard to the words used in that case, it was held that they did not amount to an exclusion of personal liability." It was pointed out by de Silva, A.J. that in that case, Lord Cairns observed that an Executor who contracted as Executor, and as Executor only, had not incurred a personal liability. In these circumstances, I do not think it necessary to examine the English authorities any further, and it seems clear to my mind that an Executor has full power to contract a debt for the purposes of administration in such a manner as to exclude personal liability, and where he has done so, the estate is liable to pay the debt incurred by him.

Counsel for the respondent suggested that the proper course for a creditor on a note like this was first to sue the Executor himself, and that the Executor having paid the debt may be able to have recourse against the assets of the Estate. I cannot understand why the law should require this circuitous process in a case where the Executor who represents the Estate of the deceased has incurred a debt in the course of administration.

In the case of *re Watson Ex parte Philips*, 18 Q.B.D. 116, it was held that where services had been rendered for the benefit of the Estate during the time when there was no personal representative of the deceased, under a contract with someone who subsequently by becoming Administrator became authorised to bind the Estate, the Estate of such deceased person was liable for those services, more particularly because the Administrator on being appointed, ratified his previous contract. It is clear from this decision that the right of the Executor or Administrator to bind the Estate cannot be challenged, and that where he does an act so as to bind the Estate, the Estate itself is liable for the payment of that debt.

For these reasons I would allow this appeal and enter judgment for the plaintiff as prayed for with costs here and in the court below.

MOSELEY, J.

I agree.

Appeal allowed.

Present: MOSELEY, J. & FERNANDO, A.J.

MESSRS. CHIVERS & SONS, LTD. vs THE COMMISSIONER OF INCOME TAX

S. C. No. 82.—D.C. (Inty.)
Argued on 26th October, 1937.
Decided on 1st November, 1937.

Income Tax—Ordinance No. 2 of 1932 sections 5 and 34—Sale brought about through the instrumentality of a person in Ceylon—Sales of goods arranged by indent agents.

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

That Messrs F. X. Pereira & Sons, who are residents in Ceylon, stock and sell, among other goods, the goods of the appellant—a non-resident Company. That they display samples of the appellant's goods. That they have an indenting department which arranges for the supply on orders from local dealers of goods shipped by the appellant and others.

That F. X. Pereira & Sons, from time to time, canvass for orders for the appellant's goods. That F. X. Pereira & Sons supply goods when so ordered from their stocks or, if that is not possible, the dealer forwards to them a form of indent addressed to the appellant. That F. X. Pereira & Sons receive a commission from the appellant for all orders received and executed by them on indents placed through F. X. Pereira & Sons.

That sometimes dealers do place orders directly with the appellant, and that on such orders, F. X. Pereira & Sons get no commission.

That F. X. Pereira & Sons have to pay to the appellant the value of the goods ordered on indents placed through them if the local dealers fail to pay for the goods.

That there is no formal agency agreement between the appellant and F. X. Pereira & Sons, and that the appellant does not have any sole agency in Ceylon.

The questions submitted for the opinion of the court are :—

(1) whether upon the facts F. X. Pereira & Sons were acting on behalf of a non-resident person within the meaning of section 34 of the Income Tax Ordinance;

(2) whether they were instrumental in selling or disposing of goods by the appellant;

(3) whether the profits arising to the appellant from the sale of goods on indents placed through F. X. Pereira & Sons should be deemed to be derived by the appellant from business transacted in Ceylon within the meaning of section 34, and therefore liable to Income Tax under section 5 (1) (b) of the Ordinance.

Held : (i) That the indent agents (F. X. Pereira & Sons) were acting on behalf of a non-resident person within the meaning of section 34 of the Income Tax Ordinance.

(ii) That the indent agents were instrumental in selling or disposing of property within the meaning of section 34 of the Income Tax Ordinance.

(iii) That section 34 must be read along with section 5, and the effect of section 34 is to include, under profits arising in or derived from Ceylon, all profits from the sale of

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goods where such sale has been brought about through the instrumentality of a person in Ceylon acting on behalf of the seller who is outside Ceylon, and in spite of the fact that legally the transactions of the business or the sale takes place outside Ceylon.

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

Obeysekera, Crown Counsel, for the Commissioner of Income Tax.

FERNANDO, A.J.

This is a case stated under section 74 of Ordinance 2 of 1932 by the Board of Review constituted under that Ordinance for the opinion of this Court on the question of law involved in the assessment made on Messrs. Chivers & Sons, Limited, who are referred to as the appellants.

The facts of the case as stated are :—

That Messrs- F. X. Pereira & Sons, who are residents in Ceylon, stock and sell, among other goods, the goods of the appellants. That they display samples of the appellants' goods. That they have an indenting department which arranges for the supply on orders from local dealers of goods shipped by the appellants and others.

That F. X. Pereira & Sons, from time to time, canvass for orders for the appellants' goods. That F. X. Pereira & Sons supply goods when so ordered from their stocks or, if that is not possible, the dealer forwards to them a form of indent addressed to the appellants. That F. X. Pereira & Sons receive a commission from the appellants for all orders received and executed by them on indents placed through F. X. Pereira & Sons.

That sometimes dealers do place orders directly with the appellants, and that on such orders, F. X. Pereira & Sons get no commission.

That F. X. Pereira & Sons have to pay to the appellants the value of the goods ordered on indents placed through them if the local dealers fail to pay for the goods.

That there is no formal agency agreement between the appellants and F.X. Pereira & Sons, and that the appellants do not have any sole agent in Ceylon.

The taxable profits derived by the appellants from orders placed with them through F. X. Pereira & Sons were assessed at Rs. 174/–, and the tax payable upon such profits was assessed at Rs. 20/88.

The questions for the opinion of this Court are stated to be as follows :—

(1) Whether upon the facts F. X. Pereira & Sons were acting on behalf of a non-resident person within the meaning of section 34 of the Ordinance.

(2) Whether they were instrumental in selling or disposing of goods by the appellants.

(3) Whether the profits arising to the appellants from the sale of their goods on indents placed through F. X. Pereira & Sons should be deemed to be derived by the appellants from business transacted in Ceylon within the meaning of section 34, and therefore liable to Income Tax under section 5 (1B) of the Ordinance.

Section 5 of the Ordinance provides that Income Tax shall be charged in respect of the profits and income arising on, or derived from Ceylon in the case of a person who is not resident in Ceylon, and sub-section 2 provides that for the purposes of this Ordinance " profits and income arising in or derived from Ceylon " includes all profits and income derived from business transacted in Ceylon whether directly or through an agent. The word

" agent " for the purpose of this section is defined by section 2 as including any person in Ceylon through whom the non-resident person is in receipt of any profits or income arising in or derived from Ceylon. Section 34 occurs in chapter 8 which contains provisions relating to special cases, and the special case dealt with by chapter 8 F is the liability of non-resident persons. With regard to such non-resident persons, section 34 (1) provides that where a person in Ceylon acting on behalf of a non-resident person sells or disposes of any property, the profits arising from such sale shall be deemed to be derived by the non-resident person from business transacted by him in Ceylon, and the person in Ceylon who acts on his behalf shall be deemed to be his agent for all the purposes of this Ordinance. It also provides that, where a person in Ceylon acting on behalf of a non-resident person is instrumental in selling or disposing of any property, the profits arising from the sale are similarly deemed to be derived from business transacted in Ceylon. This section was considered by this Court in *Anglo Persian Oil Company Limited v. The Commissioner of Income Tax* 38 N.L.R. 348, and it was held that section 34 is supplementary to section 5 and was inserted in the Ordinance to include contracts which have been entered into as a result of the efforts of agents in Ceylon of a foreign principal, even when such contracts have been finally concluded outside Ceylon. Akbar J. followed the English case of *Maclaine & Company v. Eccott* 42, Times Law Reports 416, in which it was laid down that in the case of a merchant's business, the trade is exercised or carried on at the place where the contracts are made. Referring to that part of section 34, which deals with sale or disposal, and that was the only part of the section that was considered in that case. Akbar J. held that a sale or disposal referred to in the section was a definite legal act, and did not include a mere delivery of goods in pursuance of a contract made outside Ceylon. He then proceeded to consider the effect of the words " instrumental in selling or disposing " and observed that those words were intended to catch up acts of canvassing which result in contracts outside Ceylon if the Crown can prove that the agent was instrumental in getting the sale or disposal fixed. Koch J., in the same case, dealing with the words " instrumental in selling " held that these words meant aiding or assisting in bringing about the contract of sale which, but for such aid and assistance, may never come off. "The non-resident person" he observed, " will also be liable, *although the sale was actually effected by him*, if in point of fact his agent in Ceylon acting on his own behalf was instrumental in selling the property." There was no evidence led in that case to prove that the agent in Ceylon had anything to do with the contract of sale which was entered into in England, and it was not contended in that case that the agent in Ceylon had been instrumental in bringing about the contract of sale. In this case, however, it has been found as a fact that F. X. Pereira & Sons stocked goods, which belonged to Chivers & Sons, Limited, displayed their goods, kept samples of them, canvassed orders for those goods and received a commission on any order which was accepted,

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Obviously, these acts were all done on behalf of Chivers & Sons, Limited, and the correspondence produced before the Commissioner shows clearly that they were done at the request of Chivers & Sons, Limited.

When the purchaser had, after seeing the samples and having ascertained the price, decided to order the goods, he entered into an indent which appears to have been a printed form supplied to him for that purpose. That indent was forwarded by F. X. Pereira & Sons to Chivers & Sons, Limited, and the latter on receiving the indent accepted it, and sent the goods. It seems to me that F. X. Pereira & Sons had done everything that was possible for them to do to bring about a contract, although they had no authority from Chivers & Sons, Limited, to enter into a contract themselves on their behalf. While it is correct to say that the sale of the goods by Chivers & Sons, Limited, did not take place in Ceylon inasmuch as they accepted the offer in England, there is little doubt to my mind that F. X. Pereira & Sons had done everything that was necessary to bring about a contract. They were, therefore, instrumental in selling within the meaning of section 34, and it seems obvious that in acting with that object, they were acting on behalf of the assessee.

Mr. Perera for the appellants contended that the Indentors constituted F. X. Pereira & Sons their agent, and he referred to the condition in that form by which the purchaser authorised and requested F. X. Pereira & Sons to order and import the goods on their account. For this reason, he urged that when that indent was signed, F. X. Pereira & Sons became the agents of the purchaser, and that they therefore ceased to be the agents of Chivers & Sons, Limited, or to act on their behalf. If, however, it is admitted that they were acting on behalf of Chivers & Sons, Limited up to the time of that indent, it is difficult to see how the act of the purchaser in signing the indent deprived F. X. Pereira & Sons of their authority to act on behalf of Chivers & Sons, Limited. It is not necessary in this case to consider whether the indent did not constitute F. X. Pereira & Sons the Agents of the Indentor and whether they ceased, therefore, to be the agents of Chivers & Sons, Limited, because the only question before us is, whether by canvassing for the orders, F. X. Pereira & Sons had been instrumental in bringing about the sale by the assessee, and on that question I see no difficulty.

Mr. Perera also urged that the person who is instrumental in selling the goods must do something between the offer by the purchaser and the acceptance by the seller. It is difficult to my mind to conceive of any act which a third party could or should do between offer and acceptance. If A had induced B to make an offer to C on terms which A knows will be acceptable to C, the only act which is necessary to complete the contract is the acceptance by C of those terms. If A is aware that C will accept those terms, all he has to do is to see that the offer is communicated to C. In my opinion, this contention of Mr. Perera must fail.

The English authorities cited to us are really not relevant inasmuch as they deal with the question as to where a sale in fact takes place, which

question was considered by this Court in *Anglo Persian Oil Company v. Commissioner of Income Tax.*

Section 34 must, I think, in this Ordinance be read along with section 5, and the effect of section 34 is to include under profits arising in or derived from Ceylon, all profits from the sale of goods where such sale has been brought about through the instrumentality of a person in Ceylon acting on behalf of the seller who is outside Ceylon, and in spite of the fact that legally the transaction of the business or the sale takes place outside Ceylon. Section 34 provides that those profits shall be deemed to be derived from a business transacted in Ceylon.

The appeal, therefore, must be dismissed, and the appellant will pay to the respondent his costs of this appeal as taxed by the Registrar.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: ABRAHAMS, C.J.

HALALDEEN (Inspector of Police) vs YOTHAN

S. C. No. 333—*P. C. Gampaha No.* 41360

Argued on 18th October, 1937.

Decided on 22nd October, 1937.

Gaming Ordinance No. 17 *of* 1889—*Section* 5—*Gaming carried on in a shed on an estate—Shed in charge of watcher—"Thon" collected from the gamblers by watcher—Refreshments provided by watcher—Is the watcher liable under section* 5.

The accused, the watcher of the estate of one Lionel Jayakody, was arrested in the course of a raid on a gambling den in a shed in the estate. The gamblers all escaped, but the accused was arrested. In the shed were the following articles :—

(*a*) three large mats,
(*b*) a pack of cards,
(*c*) some cash on the mats,
(*d*) four packs of new cards in a corner of the shed,
(*e*) a '*thon*' box with Rs. 3/20 in it.

The witnesses all stated that when they were there the accused was present ; that he collected '*thon*', or commission, of 50 cents from everybody participating in the game inside the estate, and that he also sold refreshments to anybody who required it. Sometimes the number of gamblers were too large for the shed and the overflow played outside, paying '*thon*' of 50 cents to some other person.

Held : That the prosecution had made out a case against the accused and that, in the absence of an explanation from the accused, an offence under section 5 of Ordinance No. 17 of 1889 was established

M. F. S. Pulle, Crown Counsel for complainant-appellant.
Colvin R. de Silva with *G. E. Chitty* for accused-respondent.

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Abrahams, C. J.

Halaldeen (Insptr. of Police) *vs* Yothan

ABRAHAMS, C.J.

This is an appeal by the Attorney-General against an acquittal by the additional Police Magistrate, Gampaha. The accused was charged with having on the 2nd November, 1936, had the care or management of, or assisted in the management of, a place kept as a common gaming place, an offence punishable under section 5 of the Gaming Ordinance, No. 17 of 1889. The scene of the gaming was an estate owned by a certain Mr. Lionel Jayakody at Balagalla. It was given in evidence, and was not disputed, that gambling had been carried on there for a considerable time and certain witnesses, either Police Officers or persons sent by the Police, testified that considerable numbers of people were to be found every day gambling in a shed on the estate a few yards away from the hut occupied by the accused who is the watcher of the estate. The game generally played was the card-game known as 'Baby.' The witnesses all stated that when they were there the accused was present; that he collected '*thon*' or commission, of 50 cents from everybody participating in the game inside the estate, and that he also sold refreshments to anybody who required it. Sometimes the number of gamblers were too large for the shed and the overflow played outside, paying '*thon*' of 50 cents to some other person. One afternoon the Police raided the establishment; the gamblers bolted but the accused was captured. There were three large mats on the floor, a pack of cards scattered, and some cash on the mats. Four packs of new cards were found in a corner of the shed and in the '*thon*' box was a sum of Rs. 3/20. One of the witnesses stated that he had, on occasion, seen the accused himself play. No evidence was called for the defence.

The learned Magistrate acquitted the accused on the ground that there was no proof that he had the care or management or assisted in the management of the gaming place. In so doing he was of the opinion that he was following the case of *The Queen v. Dapanadurage Seya* (1 Weerakoon's Rep. 21). This case was decided by Bonser C.J., and the facts were that gambling with dice was going on in a jungle, under a mango tree, that the appellant was present and took commission from the winners and that he advanced money to the gamblers. The learned Chief Justice said:—

> "I think the case is very near the line that there was not sufficient evidence that the appellant had the care or management of any particular place. There is no evidence that he exercised any kind of control over the place, or the persons frequent the place. Had there been evidence that he refused access to some persons, or refused to allow some persons to stake, or that he turned some persons out, or of any acts of that kind, then there would have been evidence from which we could have inferred that he had the care or management of the place; but there is nothing of that kind proved here, and in my opinion, evidence of something of this nature is necessary to establish the charge of having the care or management of a gambling place."

This case and the cases of *Hart v. Warnasuriya* (6 Weerakoon's Rep. 52) and *Weerakoon v. Gabriel Appuhamy* (3 Weerakoon's Rep. 52) have been relied upon by accused's counsel as justifying the acquittal in this case.

Now, if Bonser C.J. meant to lay it down as a rule for all cases that there must be evidence of the sort mentioned in his judgment before an accused can be convicted of having the care or management or assisting in the management of a gaming place, I must respectfully disagree; but I do not so interpret the judgment of the learned Chief Justice. Both he and the learned Judges who decided the other cases cited were dealing with the facts before them and those facts only. In all these cases the accused person was only distinguished from the other persons present by conduct referable to the gambling only, and Middleton J. in *Hart v. Warnasuriya* (*supra*) differentiated, if I may say so, quite properly, between the person who is managing the actual gaming and the person who has the care or management of the place where gaming is going on. But in the present case the accused had a definite connection with the gaming place. It was on the estate on which he was the watcher, where he not only had the power but was also under a duty to his employer to expel undesirable persons; and *ex facie* law breakers are undesirable persons on an estate which is owned by somebody else. It is extremely unlikely that the gamblers came there by chance and converted into a gambling den a shed on an estate within a few yards of the hut of the person who had the power to keep them out. It is probable that they came there either by his invitation or with his permission. It is also equally probable that he did not abandon his power of controlling the place while they were gaming, that is to say, to decide who should come and on what conditions he should be allowed to stay, at what hour the game should begin and at what hour it should finish, and at what hour the people should leave and other incidents of control. When one appreciates the fact that the watcher was collecting the '*thon*' and selling refreshments, that is to say, intimately concerning himself with the success of the establishment, the case against him is strengthened.

The learned Magistrate said that "it was even possible to infer that the accused was merely a collector of '*thon*,' and was a waiter or "bar-keeper in so far as the selling of arrack was concerned." If that is so, who was the person in control? The Magistrate suggested that that person might conceivably be Mr. Jayakody and that the accused was merely his '*thon*' collector. It is possible, and it would appear from the record, that the Police, when sending their agents to get information at the spot, believed that Mr. Jayakody was actually running the gambling den. His bungalow was on the estate, and one witness said that it was possible to see what was going on from there; but, be that as it may, there is no evidence that he was present on any of the occasions when the Police agents were at the spot, and they remained there for several hours at a time. It is certainly improbable that if Mr. Jayakody was running the gambling den that he, a landowner and Chairman of a Village Committee, would be so imprudent as to be on the spot at any time. He would be far more likely to put somebody in his place to run the establishment and to collect the profits for him. Who could that person be? The accused is, naturally, suggested as he was not

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only in the employment of the owner but he had authority to keep off the estate those who had no business there and, therefore, he would at least be assisting in the management. I think that there was a case for the accused to answer. He has made no attempt to answer it. The gaming had been going on for a long time, one witness said for the past two years or more. Whether the accused has been running the establishment on his own account, or as agent for somebody else, he must have made a good thing out of it. I fine him Rs. 150/- or six weeks' rigorous imprisonment in default.

Appeal allowed.

Present: ABRAHAMS, C.J.

THE KING vs KONAR

S. C. No. 80—*D. C.* (*Criminal*) *Colombo No.* 11780

Argued on 6th October, 1937.

Decided on 18th October, 1937.

Forgery—Abetment of—Cattle Voucher—Penal Code section.

The appellant was charged with having aided and abetted an unknown person to forge a cattle voucher. One Seventhi claimed to be the owner of the animal, a cow, in respect of which the forged voucher was made. He did not in his evidence state that the signature on the voucher which was alleged to be forged was not his.

Held : That the failure of the prosecution to prove that the signature on the cattle voucher, which was alleged to be forged, was not genuine, by an express repudiation from the person whose signature it purported to be, was fatal to a conviction.

PER ABRAHAMS, C. J.

"The appellant at first said that it was Seventhi who had actually signed the alleged forged voucher and had left it for him with the Aratchi. This defence was not examined by the learned District Judge and he did not even refer to the appellant's witnesses. No doubt, he felt that the case for the prosecution was very strong, but, at the same time, he was not entitled to ignore the defence. It has been said many times in this Court, and quite frequently of late, not only by myself but by other Judges, that the defence must be dealt with unless it is obviously incredible on the face of it."

F. A. Tissaverasinghe with *C. T. Olegesegeram* for the accused-appellant.

M. F. S. Pulle, Crown Counsel, for respondent.

ABRAHAMS, C.J.

The appellant was convicted of having aided and abetted an unknown person to forge a certain cattle voucher with intent to commit fraud, and having fraudulently or dishonestly used as genuine the said cattle voucher which he knew to be forged.

The case for the prosecution was that one Seventhi was the owner of a cow that he had handed over to the appellant for sale and had given

him at the same time the usual voucher indicating legal ownership. The appellant was then alleged to have transferred this cattle voucher to some unknown person who appeared together with him before the Aratchy and pretended to sell him the cow, filling in the usual voucher with the name of Seventhi. The appellant then sold the cow to another person. Seventhi gave evidence of his ownership of the cow, and his directions to the appellant to sell the cow, and the transmission of his voucher, but he did not repudiate his signature to the alleged forged voucher. Indeed, it was by some curious omission not even shown to him. Counsel for the appellant now objects that this is a fatal defect in the case for the prosecution. Crown Counsel argues that the evidence of Seventhi on the question of the forgery is not necessary since he claimed the cow and said that he had given his voucher to the appellant, and since also the Aratchy before whom the alleged forged voucher was executed stated that the appellant appeared before him in connection with the sale, that the seller was alleged to be Seventhi and signed the voucher as such, but was not actually Seventhi.

I am of the opinion that the submission of the appellant is well founded. Whatever may be the reason for the omission the fact does remain that the foundation of the proceedings must have been the repudiation by Seventhi of the signature alleged to be his. This omission has not been explained and cannot be remedied by the evidence of the Aratchi. It may very well have been that the omission is the result of an oversight on the part of Counsel for the Crown, and the learned District Judge took it for granted that Seventhi had given the necessary evidence, but that, unfortunately for the prosecution or perhaps fortunately for the appellant, makes no difference.

There is also another serious defect in the judgment. The defence of the appellant was that it was he who was actually the owner of the cow, and that when he bought it, for certain reasons permitted the original voucher to be made out in the name of Seventhi who was in his employment. He produced, as a witness in support, a man who said he was the actual vendor of the cow and who said that it was the appellant who had bought it, and the voucher was made out in Seventhi's name. The appellant at first said that it was Seventhi who had actually signed the alleged forged voucher and had left it for him with the Aratchi. This defence was not examined by the learned District Judge and he did not even refer to the appellant's witnesses. No doubt, he felt that the case for the prosecution was very strong, but, at the same time, he was not entitled to ignore the defence. It has been said many times in this Court, and quite frequently of late, not only by myself but by other Judges, that the defence must be dealt with unless it is obviously incredible on the face of it. This defence may not have been true, but I do not think that it is obviously incredible.

I quash the conviction and acquit the appellant.

Conviction quashed.

Present: ABRAHAMS, C.J.

APPLICATION FOR A WRIT OF MANDAMUS ON THE ASSISTANT GOVERNMENT AGENT, UVA PROVINCE.

S. C. No. 578

Argued on 7th October, 1937.
Decided on 15th October, 1937.

Firearms Ordinance No. 33 *of* 1916—*Refusal to renew gun licence—Mandamus to compel its issue.*

Held: (i) That where a Government Agent has reasons for refusing to renew a gun licence, he cannot be compelled by mandamus to issue a licence.

(ii) That a Government Agent is not bound to hear the appellant before making his decision to refuse to renew a gun licence.

(iii) That once a gun licence is granted its renewal can be refused only on the grounds mentioned in section 6 of the Firearms Ordinance No. 33 of 1916.

(iv) That a Government Agent must exercise his discretion in granting or withholding the grant of a gun licence in a judicial manner.

PER ABRAHAMS, C. J.

"It is clear from the Ordinance that the grant of a gun licence is not a mere privilege to be exercised at pleasure by some public officer. It ought not to be withheld from any member of the public unless for good cause. The Government Agent must exercise his discretion in granting or withholding the grant in a judicial manner, though it is not necessary for me to discuss what considerations should actuate him in withholding the grant.

Once the licence is granted, it will be observed by the wording of section 6 that the powers of the Government Agent in refusing to renew are narrower than those referred to in respect of the grant of the licence. The causes for which he can refuse are clearly expressed, and if those causes do not exist, in my opinion, it would be an infringement of his duty to refuse to renew."

S. P. Wijewickrema for petitioner.
M. F. S. Pulle, Crown Counsel, for Government-Agent.

ABRAHAMS, C.J.

The applicant, in this matter, obtained from my brother Soertsz a rule for a writ of mandamus on the Assistant Government Agent of the Uva Province. The applicant's petition stated that the Assistant Government Agent had unlawfully refused to renew his gun licence for the year 1936.

The applicant stated that when he applied for a renewal of the licence he was informed by the Assistant Government Agent that he was not considered to be a fit and proper person to possess a gun, and, on asking for further reasons, he received no reply although he wrote on several occasions covering a period which carried him well into 1936, so that, on the face of it, it would appear that he could not in any event obtain an order from this Court for the renewal of the licence for the year which has already expired;

but it is not necessary to go into this point and I propose to deal with the case on its merits.

Now, under the Firearms Ordinance No. 33 of 1916, which is the relevant enactment in this case, the licensing authority in his discretion may refuse to issue a gun licence (section 4); but once this licence has been granted, the Government Agent can only cancel it or refuse to renew it if certain circumstances exist. These are set out in section 6 and are as follows :—

> (*a*) " When the holder of such licence or permit is convicted of any offence under this Ordinance, or under any of the sections of the Ceylon Penal Code enumerated in schedule B ; or
>
> (*b*) " When (for reasons to be recorded by him in writing) the Government Agent deems it necessary for the security of the public peace to withdraw such licence or permit.
>
> " The decision of the Government Agent shall be final and conclusive."

A writ of mandamus is a writ discretionary on the part of this Court. The applicant for a writ must show that the officer against whom the remedy is prayed, has infringed a right, or, to put it another way, that an officer who is under a duty to do something on his behalf has refused to do so. It is clear from the Ordinance that the grant of a gun licence is not a mere privilege to be exercised at pleasure by some public officer. It ought not to be withheld from any member of the public unless for good cause. The Government Agent must exercise his discretion in granting or withholding the grant in a judicial manner, though it is not necessary for me to discuss what considerations should actuate him in withholding the grant.

Once the licence is granted, it will be observed by the wording of section 6 that the powers of the Government Agent in refusing to renew are narrower than those referred to in respect of the grant of the licence. The causes for which he can refuse are already expressed, and if those causes do not exist, in my opinion, it would be an infringement of his duty to refuse to renew.

In his affidavit, the Assistant Government Agent annexes the reasons which actuated the refusal. They are contained in a report by the Inspector of Police to the Government Agent of the Province. This report mentioned that the applicant had been convicted of shooting in so negligent a manner as to endanger human life, that it had been said on the estate where he was employed that he created a disturbance and threatened to shoot some labourers with a gun, and that, in the opinion of the proprietor of the estate it was unsafe to give him a gun as he was a very hard drinker, had a bad temper and was most quarrelsome, and that the dispenser on a neighbouring estate said that if he was allowed a gun there was bound to be murder, and that there were two factions living in the lines on the estate who were constantly quarrelling and, on one occasion, actually fought.

It appears from this statement of reasons that the Government Agent did deem it necessary for the security of the public peace to refuse to renew

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the licence, and, apart from the provision as to the finality of his decision, I do not see how his reasons can be questioned as it is for him and not for me to say what he thinks necessary.

The applicant, however, points out that he has been given no opportunity to protest to the Government Agent that the information upon which he is acting is unreliable, and he urges that the discretion vested in the Government Agent to come to a definite conclusion as to what is necessary in the public safety could not be said to have been properly exercised where he has decided *ex parte*. No doubt, there are cases where the exercise of discretion is the essential point for decision, in which the Court has held that a party affected by the decision ought to have been given an opportunity to make representations on the other side, but I am by no means sure that in the circumstances it is required of the Government Agent, in his consideration of what is for the public security to hear the other side, if, in his opinion, the information that he has had is sufficient. There is a sanctity about the public safety which is more important than the possession of a gun by an individual. It is a great responsibility that is placed upon the officer, and it might very well be that to hold an inquiry, in which the applicant for the gun licence is informed of the people upon whose statements of opinion the licence was likely to be refused, might lead to some act of violence one way or the other and precipitate the very mischief which the Government Agent is seeking to avoid.

However, if that is not so, and without the words relating to the finality of the Government Agent's decision he would be bound to hear the applicant, I think he is absolved from doing so by the order of the legislature that his decision should be final and conclusive. These words are either superfluous or they must be given due effect to. If they are superfluous, of course, then in their absence the Government Agent is not obliged to hear a person seeking the renewal of a licence, but, if the fact is otherwise, then I consider that their presence absolves him from the necessity of doing any more than coming to a genuine conclusion on the information that he has that the security of the public peace will be affected by the renewal of the licence. Therefore, the only consideration for this Court is whether on the reasons that the Government Agent reported he did deem it necessary for the security of the public peace to refuse the renewal. I think he did and I discharge the rule.

Rule discharged.

Present : MAARTENSZ, J. & KOCH, J.

WICKREMANAYAKE vs THE TIMES OF CEYLON, LTD.

S. C. No. 224 (*Final*)—*D. C. Colombo No.* 5005

Argued on 6th & 7th October, 1937.

Decided on 12th November, 1937.

Defamation—Publication of defamatory report in a newspaper—Publication of apology by newspaper—Damages for pain of mind and injury to reputation—Principles of Roman Dutch Law applicable to a case of defamation—Extent to which an apology may be regarded as minimising damages.

The plaintiff sued the proprietors and the Editor-in-chief of the *Times of Ceylon* for damages to the extent of Rs. 20,000/- suffered by him by reason of the publication of a defamatory article in the 1st defendant's paper. The defendants admitted that the article was defamatory but denied that the plaintiff suffered the damages claimed. The defendants also alleged that they made all possible amends by publishing in their paper an apology and an expression of regret. The District Judge found in favour of the plaintiff and awarded damages in Rs. 500/- for pain of mind. Plaintiff was not granted damages for injury to his reputation on the ground that he had failed to prove actual pecuniary loss. The plaintiff appealed. In appeal the damages were increased to Rs. 1,000/- by the addition of Rs. 500/- as damages for injury to plaintiff's reputation.

Held : That where words are defamatory they are *prima facie* actionable and it is unnecessary to give proof of special damage. The plaintiff may recover a verdict for damages without giving any evidence of actual pecuniary loss.

[**Editorial Note:**—As to mitigation of damages by reason of the fact that the defendant has published a full apology see:—

Nathan, *Law of Torts*, (1921) pp 83–84 ;
De Villiers on *Injuries* pp 244–246 ;
Ward-Jackson v. Cape Times Ltd. (1910) T.H. 263;
Van Leggelo v. Argus Printing and Publishing Co., Ltd., (1935) T.P.D. 241.

For English law see:—
Fraser on *Libel and Slander* 7th edition (1936) p 175 ;
Clerk & Lindsell on *Torts* 9th edition (1937) pp 599–600].

Hayley, K.C., with *Weerasooria* and *E. B. Wickremanayake* for the appellant.

H. V. Perera, K. C., with *N. Nadarajah* for the respondents.

MAARTENSZ, J.

This is an action for the recovery of a sum of Rs. 20,000/- as damages sustained by the plaintiff by reason of a libellous paragraph being published concerning him in the issue of the newspaper known as the *Times of Ceylon* dated the 24th of January, 1936.

The defendants, who are the proprietors and Editor-in-chief respectively of the newspaper in question, admitted the publication of the paragraph and that it was libellous, but denied that the plaintiff suffered the damages claimed. They alleged that they had made all possible amends for the publication of the paragraph by publishing an apology and an expression of regret in the issue of the paper dated the 27th of January, 1936, and they brought into Court a sum of Rs. 500/- as representing the damages suffered by the plaintiff.

The District Judge awarded the plaintiff Rs. 500/- as damages and directed him to pay the defendants' costs.

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The plaintiff appeals from this award.

I do not think it necessary to set out the paragraph complained of in full. It is sufficient to say that it purports to be a report of certain proceedings in the Police Court of Galle in which one Letchimanan Chettiar charged one Mr. Benjamin Jayesekere with cheating, and the plaintiff with abetment.

As the libel must have injured the plaintiff's reputation, it is actionable *per se* and the plaintiff may recover a verdict without giving any evidence of actual pecuniary loss. (Nathan's Common Law of S. Africa, Vol. III page 1626, section 1585.)

The plaintiff in his plaint claimed damages for pain of mind and injury to his reputation, and, judging by the averments in paragraph 7 to 10 of the plaint, on the ground of his defeat at the poll taken for the election of a member to the State Council by the Galle electorate. The last ground of claim was abandoned at the trial.

It was not alleged or proved that the defamation was deliberate and malicious, or that the defendants, who were deceived by the forgery of the signature of their reporter in Galle, Mr. Wootler, to the communication, were culpably reckless or negligent in the matter. There were, therefore, no circumstances to enhance the damages.

The 24th of January, 1936, was a Friday. The plaintiff heard of the paragraph that night and instructed his Proctor, Mr. Jayasundara, to send a letter of demand to the 2nd defendant demanding payment of a sum of Rs. 50,000/– as damages sustained by the plaintiff by reason of the publication (Letter P8). The letter was, according to the 2nd defendant's evidence, received by him on the 27th ; but he had received on the 25th a telegram from Mr. Wootler in which he denied sending the report. In the issue of the 27th, the 2nd defendant published an apology. I do not think I can possibly accept the suggestion that the apology was a tardy one. P9 is a copy of the apology that was published. It appeared as a second leading article and is headed "FORGED REPORT SENT TO 'TIMES OF CEYLON'"— "CLAIMS FOR DAMAGES FOLLOW."

These headlines would certainly draw the attention of the readers of the paper to the article. There should also, in my opinion, have been a headline to indicate that the article was intended to be an apology for the publication of the report.

The article contains a *resumé* of the report and states that it has been found to be false, that the *Times of Ceylon* had no reason to suspect the authenticity of the report which bore, what seemed to be, the signature of Mr. Wootler, the representative of the *Times of Ceylon* at Galle, and that letters of demand have been received from Mr. Jayasekere and Mr. Wickremanayake claiming as damages Rs. 20,000/– and Rs. 50,000/– respectively.

There follows an unqualified apology and an expression of regret for the publication of the report.

The article concluded with a statement to the effect that the apology is published in the earliest possible issue after the receipt of confirmation of the facts, a repetition of the statement that the journal had no reason to suspect the authenticity of the report, and that the matter has been placed in the hands of the Criminal Investigation Department.

The 2nd defendant replied, to Mr. Jayasundara's letter of demand, on the 27th January (P10) intimating that he greatly regretted the publication of the " para " and that he is tendering an apology in the issue of the paper of the 27th, and requesting him, in the circumstances, to withdraw his letter and claim of the 24th January.

Mr. Jayasundara replied by letter P11 dated 31st January, 1936, that his client had instructed him to say that his reputation has been irreparably damaged and that the statement that the report was based on a forgery is not proved to his satisfaction.

In conclusion, Mr. Jayasundara stated : " My client is willing to reconsider the amount of damage if an unqualified apology is tendered to him through your journal."

The 2nd defendant inquired what further apology was required (P12).

Mr. Jayasundera in reply sent a draft of the apology (P14) which his client wanted published in a prominent place in the newspaper.

The draft apology is a *resumé* of the report, a statement that the report is false and an expression of regret for the pain of mind and body unwittingly caused to Mr. Wickremanayake.

The 2nd defendant replied that he was prepared to publish the apology on condition that the claim for damages was withdrawn (P15).

The condition was not agreed to and the apology required by the plaintiff was not published.

The plaintiff in evidence admitted (at page 26 of the record) that the three paragraphs of the article published in the issue of the 27th January were, by themselves, a complete apology. He alleged, however, that it was qualified by the introduction of the letters of demand. The plaintiff appears to object to the reference to the letters of demand on the ground that it suggests that the plaintiff himself sent a false report to the " Times " for the purpose of making money (page 23 of the record). On the same page, he said that he learnt from Mr. Jayasundara that Mr. Wootler made this suggestion to Mr. Jayasundara. Mr. Jayasundara denied hearing Mr. Wootler making such a statement (page 51). He said, however, that there was general talk to that effect and that it may have reached him 10th hand. There is, therefore, no reliable evidence that anyone drew from the reference to the letters of demand an inference that the plaintiff sent a false report to the newspaper for the purpose of making money. In my judgment, there is nothing in the article containing the apology from which such an inference can reasonably be drawn,

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Apart from the omission in the heading of any words to indicate that the article was intended to be an apology — which I have already referred to — the article was, in my opinion, an adequate apology and it is, as required, coupled with an expression of regret for the publication of the false report. The District Judge has, therefore, not misdirected himself, as was urged by the appellant, regarding the adequacy of the apology, and, as I have already observed, there was no tardiness in its publication. No exception was taken to the apology on the ground that it did not appear in a prominent place in the newspaper or that it was printed in such small type as to escape the notice of a reader of the paper.

It was also urged that the District Judge had misdirected himself as regards the claim for damages resulting from the injury to the plaintiff's reputation. On this point the District Judge in his judgment said, " No damages need be considered on the ground that plaintiff has lost professionally, for plaintiff himself cannot produce a single person who has deserted him ; he says it is too early to judge. If for 24 years plaintiff had held a very high place in the public esteem, and has proved to his clients that he is quite dependable, I should be very surprised to find any client deserting him because of some publication in a newspaper which had never reached him, and which newspaper subsequently apologised for the publication. If, by any accident, his clients include some rogues, I should imagine that the fact that he was suspected of some sharp practice will only commend him to them on that ground. Damages, therefore, need not be considered on that ground."

There then remains only to consider damages on the ground of the pain of mind which the plaintiff had sustained by the publication of the libel. I do not think one need consider the question of loss of reputation or pecuniary loss at all. His reputation seems to me as high as it was before

The law on this point as stated by Odgers on Libel and Slander, page 304 and 305, is as follows :—

> " When, on the face of them, the words used by the defendant clearly must have injured the plaintiff's reputation, they are said to be actionable *per se* ; and the plaintiff may recover a verdict for a substantial amount without giving any evidence of actual pecuniary loss."
>
> " General damages are such as the law will presume to be the natural or probable consequences of the defendant's conduct. They arise by inference of law, and need not therefore be proved by evidence. Such damages may be recovered wherever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has in fact resulted. They will only be presumed where the words are actionable *per se*."

Under the Roman–Dutch Law, where words are defamatory they are *prima facie* actionable, and it is unnecessary, whether they be spoken or written, to give proof of special damage." (Nathan, Vol. III page 1626, section 1585).

The observations I have quoted from the judgment are not consonant with the law as laid down in the passages from Odgers and Nathan. They

indicate that the District Judge has not distinguished between general and special damages.

The District Judge awarded the sum of Rs. 500/– as damages of pain of mind only.

In my judgment, he should have awarded the plaintiff damages for injury to his reputation as well. I do not think it necessary to remit the case to the District Judge to assess the damages as they do not depend on any finding of fact, and we are in as good a position as the District Judge for the purpose of deciding what sum should be awarded as damages for injury to the plaintiff's reputation.

I think the plaintiff should be awarded a sum of Rs. 500/– for injury to his reputation in addition to the amount awarded.

The plaintiff will have the costs in the Rs. 1,000/– class and pay the defendants the difference as excess costs incurred by them by reason of the action being brought in a higher class. The plaintiff in his petition of appeal prayed for judgment for Rs. 20,000/–. He has succeeded to only a very small extent. I accordingly make no order as to costs of appeal.

KOCH, J.

I agree.

Present: ABRAHAMS, C.J.

WILLIAM PERERA vs MESSRS. BROWN & Co., LTD.

S. C. No. 356—*Application under Ordinance No.* 19 *of* 1934

Argued on 22nd October, 1937.

Decided on 1st November, 1937.

Workmen's Compensation—Ordinance No. 19 *of* 1934—*Injury to one eye—Total incapacity—Inability to obtain work.*

The appellant workman lost his left eye in an accident which occurred in the course of his employment. He agreed with his employers on a lump-sum compensation, but later resiled from the agreement on the ground that undue influence had been used in securing his consent to it. He claimed compensation on the footing that he had suffered total disablement. The Commissioner took the opinion of three doctors one of whom stated that the injury to the left eye affected the use of the right eye as well. The other two doctors were of opinion that the use of the right eye was unaffected to any great extent by the injury to the left. The Commissioner acted on the latter of the two opinions and awarded compensation accordingly.

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An appeal was taken from this order and the appellant sought to establish in appeal that the injury incapacitated him. There was no evidence to show that he tried and failed to obtain work.

Held: That there was no ground for interfering with the Commissioner's finding.

J. R. Jayawardena for appellant.

E. F. N. Gratiaen for respondent.

ABRAHAMS, C.J.

This is an appeal against an order made by the Commissioner for Workmen's Compensation under sub-section 2 of section 48 of the Workmen's Compensation Ordinance No. 19 of 1934. Now, an appeal against any order made by the Commissioner lies to this Court on a point of law only. No particular procedure was prescribed by the Ordinance as regards the form in which the petition of appeal has to be drawn up, although under section 51 of the Ordinance the provisions of Chapter XXX of the Criminal Procedure Code, 1898, are held to apply *mutatis mutandis* in regard to all matters connected with the hearing of such an appeal. I think, however, it is desirable as regards the form in which appeals should be preferred it would perhaps be better that the procedure in respect of appeals in civil cases should be followed, though possibly as these cases become more frequent some particular kind of practice in the interests of both parties will eventually be adopted.

The history of the case is as follows :—The appellant was a workman in the employ of the Engineering Department of Messrs. Brown & Co., Ltd., Colombo. His work was that of a fitter. He had to fix bearings on crown wheels, which appears to have been rather fine work. On the 24th of April 1936, as he was chipping metal at his work a splinter of steel struck him on the right eye. The accident necessitated hospital treatment, and from the 17th of May to the 1st of October he received payment of Rs. 17/50 per mensem from his employers. On the 5th November 1936, the employers and the workman came to an agreement whereby the workman agreed to accept the sum of Rs. 698/50 in full settlement of all and every claim under the Workmen's Compensation Ordinance in respect of the disablement which was stated to be " loss of right eye," and all disablement now manifest. The employers then applied to the Commissioner for registration of the agreement under section 42 of the Ordinance, notice was served upon both parties on Form I, as required by Regulation 39 (1) of the Regulations made in 1935 under the Ordinance. The workman wrote to the Commissioner protesting against the registration on the ground that improper influence had been brought to bear upon him to sign the agreement, and further, that both his eyes were affected by the accident and that he claimed compensation for permanent total disablement. The Commissioner then served a notice on Form K, as required by Regulation 40 (2) of the abovementioned Regulations, to give an opportunity to the employers to show cause why the agreement should be registered in view of the objection

of the workman. The workman appeared on the appointed day, the 3rd of March 1937, but the employers did not appear. The workman gave evidence claiming that the compensation fixed in the agreement was inadequate because his left eye was affected as well as his right, and he said he could not see properly with that eye and that it was always watering. Dr. Billimoria, Opthalmic Surgeon, gave evidence to the effect that the workman was totally blind in the right eye as the result of an injury, and that in the left eye there were indications of sympathetic inflammation and that the eye was somewhat impaired. He said that, in his opinion, the workman would not be able to do his work as a fitter because as soon as he tried to use the eye it watered and incapacitated him from seeing clearly. His conclusion was that the workman could not do anything but light work.

The Commissioner, on the strength of the evidence that he had heard, refused to register the agreement. It appeared to him that there was a *prima facie* case for increase in the compensation, and that he further believed that the workman did not fully understand the implications of the agreement. He directed notice to be served on the employers to show cause why compensation should not be paid to the workman on the basis that he had been totally incapacitated. Total incapacity, or rather, total disablement, is defined in section 2 (1) of the ordinance as " such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement ; provided that permanent total disablement shall be deemed to result from the permanent total loss of the sight of both eyes."

The parties came before the Commissioner on the 12th of March, 1937. I infer from the record that the workman had been, at some time or other, examined by Dr. Seneviratne acting on behalf of the employers, who must have made a report of the condition of the workman's sight which varied from the evidence of Dr. Billimoria, for the Commissioner adjourned the hearing till the 22nd March and directed that Dr. Arndt, the Chief Surgeon of the Victoria Memorial Eye Hospital, Colombo, should be called to give expert evidence as a Court witness. Dr. Arndt described the very detailed test to which he had subjected the eyes of the workman and said that " with a glass for his left eye he should be able to do any fine work with ease, except that the loss of the right eye would hinder him from doing fine adjustments to some extent. His powers of skilled work were impaired. I have seen no evidence that his left eye is unduly watering." Dr. Seneviratne, the 2nd Surgeon of the same hospital, gave evidence to the effect that there was no abnormal watering in the left eye, and that after a time the left eye would get accustomed to the work and he could carry on his work as a fitter " provided he does not have to work among moving machinery which might endanger him owing to the complete blindness of his right eye."

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The Commissioner then recorded in the form of issues these two questions for his decision :—

(1) Is claimant's left eye affected by the accident and, if so, to what extent?

(2) What compensation is due to claimant?

After hearing the medical evidence, he had no hesitation on the strength of Dr. Arndt's evidence in coming to the conclusion that the workman's left eye was not in any way affected by the accident. He said then that he was bound to award him compensation according to Schedule I of the Workmen's Compensation Ordinance which fixed a percentage of the loss of working capacity to the loss of one eye at 30 per cent. He awarded him the sum of Rs. 882/– from which were to be deducted the amount of half monthly payments made by the employers.

Against the above order the workman now appeals. In his petition of appeal dated the 28th of April, 1937, he sets out the facts of his accident and contrasts the evidence of Dr. Billimoria with that of Dr. Arndt and states that the compensation is inadequate as the left eye is radically affected. This is obviously not an appeal on a point of law. It is an appeal on a point of fact, namely, that the Commissioner, to put it briefly, ought to have preferred the evidence of Dr. Billimoria to that of Dr. Arndt. But in order to endeavour to set up a point of law he produced an affidavit prior to the date of hearing which contains the following paragraph:

> " As a result of the said injury I was totally incapacitated and was, and is not, " able to secure any employment anywhere. I am now unemployed."

Learned Counsel for the workman strives to interpret this paragraph as a point of law by arguing that the Commissioner improperly limited the meaning of the word " incapacitates " contained in the definition of " total disablement " in the Ordinance to physical incapacity, whereas in a number of English decisions, for instance, *Ball v. William Hunt & Sons Ltd.*, (1912 A.C. 496), it means not only physical inability but also inability to obtain work owing to his physical condition. It was said in the same case in the judgment of Lord Shaw, " Incapacity for work does include the case of his eligibility to obtain work from being diminished or lost, or, in other words, of his incapacity to get work being impaired or destroyed."

It is argued by learned Counsel for the appellant that the Commissioner, by putting upon the respondents the burden of disproving that the workman was not totally incapacitated, embarrassed the appellant's case, for what he should have done, in considering this question of total incapacity, was to call upon the workman to show that he was not only unable to work but had been unable to obtain work. This is rather a bold line to take. At no time did the workman claim that he had been unable to obtain work. From the beginning he claimed that his left eye was so impaired as a result of the accident to his right eye that he was unable to work. The petition of appeal says as much, and even his belated affidavit only goes half way towards ineligibility by submitting that he was not able to secure any employment, but it does not allege that he made an endeavour to do so.

It seems to me that what the workman requires is more time to go round and apply for work of some kind or other. He might possibly, when faced by Dr. Arndt's evidence, have asked for a postponement of the Commissioner's final decision to enable him to prove ineligibility. I do not say that the Commissioner would have been obliged to have granted this adjournment, but the workman certainly cannot complain that the Commissioner has failed in respect of any legal duty imposed upon him by the Ordinance. I therefore dismiss the appeal with costs.

Appeal dismissed.

Present : ABRAHAMS, C.J.

WIJEMANNE (Inspector of Police) vs SINNATHAMBY

S. C. No. 191—*P. C. Batticaloa No.* 45136

Argued on 18th October, 1937.

Decided on 20th October, 1937.

Illicit possession of Opium—Poisons, Opium and Dangerous Drugs Ordinance No. 17 *of* 1929—*Sections* 32 *and* 74 (1) (*a*)—*Opium found under pillow of accused—How far is it evidence of illicit possession.*

The appellant was found in the house of one Sampunathan sleeping on a camp bed in the verandah. On lifting the pillows of the camp bed two packets of opium of a total weight of two pounds were found. The opium was covered with paper and wrapped up in a shawl. There was no other evidence to show that the accused had any connection with the opium.

Held : That the mere existence of two packets of opium under the pillow of the accused in the circumstances above stated does not constitute sufficient proof of an offence under section 32 of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929.

L. A. Rajapakse with *Dodwell Gunawardena* for accused-appellant.

M. F. S. Pulle, Crown Counsel, for respondent.

ABRAHAMS, C.J.

The appellant was convicted of having in his possession, without a licence, two pounds of prepared opium in breach of section 32 of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929, and read with section 74 (1) (*a*) of the same Ordinance. The facts were very brief. The police entered the house of one Sampunathan, it would appear, to ascertain whether the appellant, who had gone to Sampunathan's house, was in possession of opium. They found the appellant sleeping on a camp bed in the verandah. He had nothing on his person, but on lifting the pillows of the camp bed two packets of opium amounting to two pounds in weight were discovered covered with paper and wrapped up in a shawl. It was not questioned that the stuff was opium and the appellant gave no evidence, but it was suggested in cross-examination of one of the police officers that the opium was actually found in the garden.

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It is objected that the mere discovery of the opium beneath the pillow of the bed occupied by the appellant is not more than suspicion that the appellant had it in his possession. It does not even provide sufficient evidence to call upon him to explain why it was there. The learned Magistrate who tried the case seems to have only concerned himself with deciding whether the opium was found under the pillows of the bed or whether it was found, as suggested by the defence, in the garden, and he decided without any hesitation that it was found under the pillows; but no fault can be found with him for that. There is another question that must be decided before the appellant could be convicted, and the learned Magistrate has not given that any attention. That question is whether the appellant's connection with the opium is sufficient to imply that he had possession of it. I am not prepared to say that it is sufficient. The appellant was not in his own house. There is nothing to show how long the opium had been there. It might have been put there by the occupier of the house who was sleeping actually inside the house. It might have been put there by any other person who had been previously in the house, and there is nothing to show that the bulk or shape of the packet was such that a person with his head on the pillows must have known of the presence of the article under the pillows, and there is nothing in the conduct of the appellant, either before or after the discovery of the opium, to indicate that he knew it was there.

Evidence was given that earlier in the day was a raid in somebody else's house and that the appellant ran away on the approach of the Excise party, but the purpose of that raid was not explained. This is, at any rate, inadmissible and there is nothing to show that anything was discovered as a consequence of the raid. A little more care, it may be, in the conducting of the prosecution might have produced evidence both admissible and valid. I am of opinion that though this is a very suspicious case, it lacks that finality in proof which every criminal case must have.

I must also make some observations on the action of the Magistrate in admitting evidence of information made to the Police that the appellant had two pounds of opium in Sampunathan's house. It is very difficult to resist the conclusion that the Magistrate was influenced by that hearsay evidence because he opens his judgment by stating that an informant had conveyed this news to the Police. He further says that the proctor for the appellant had only himself to blame for the adoption of this hearsay evidence through his line of cross-examination of the police witnesses who preceded the witness who gave the hearsay evidence. I fear that the learned Magistrate has completely overlooked the fact that the very first witness in the case, namely, the Police Inspector who raided Sampunathan's house, gave in ample detail the information which he had received from the informant. That being so, how the proctor is to be blamed I entirely fail to understand. Magistrates must remember that it is their duty to keep out inadmissible evidence.

I quash the conviction and acquit the accused.

Conviction quashed.

Present : HEARNE, J.

GRENIER (Inspector of Excise) vs SIRIMALE & ANOTHER

S. C. No. 707—P. C. Kandy No. 55278

Argued on 29th October, 1937.

Decided on 3rd November, 1937.

Excise Ordinance No. 8 of 1912—Illicit possession of toddy—Possession by husband and wife—House in which toddy found occupied by three persons—Can occupants jointly possess a quantity of toddy which when divided by the number of inmates of the house is a permissible quantity.

The two accused, husband and wife, were charged with illicit possession of 48 drams of toddy. It was admitted that the house in which the toddy was found was also occupied by a third person, the father of the first accused. Under Excise Notification No. 264 published in the " Ceylon Government Gazette " No. 8060 of June 22 1934‡ a person may without a licence possess 16 drams of toddy. The prosecution claimed that the toddy was in the possession of the two accused and there was no evidence to show that the father of the first accused claimed any part of it. The quantity of toddy found, when divided by the number of inmates, being less than the prohibited amount in respect of each inmate, the Magistrate acquitted the accused.

Held : That where two persons are charged with illicit possession of toddy in a house, they are not entitled to be acquitted on the mere showing that the toddy found, when divided among all the inmates of the house, is less than the prohibited quantity in respect of each inmate.

M. F. S. Pulle, Crown Counsel, for complainant-appellant.

No appearance for accused-respondents.

HEARNE, J.

The two accused, who are husband and wife, were charged with having in their possession 48 drams of fermented toddy without a licence from the Government Agent. It was admitted by the prosecution that there were three occupants in the house viz., the two accused and the father of the 1st accused, and the Magistrate holding that " the accused were entitled to possess 48 drams " acquitted them. He quoted the case reported in 1 Ceylon Law Weekly, 225 — *Holsinger vs. Francina Fonseka.* In S. C. No. 31, P. C. Panadura No. 40607*, Soertsz, J. delivering judgment on 14-5-37 said " I am unable to follow the reasoning of that case (1 C.L.W. 225). If the ruling in that case means, as I gather it does, that if by dividing the quantity of toddy found on any premises by the number of inmates of those premises a permissible quantity is obtained as a result, the accused is *ipso facto* entitled to an acquittal. I refuse to follow it." He added " It is for

‡By virtue of the powers vested in him by sections 4 and 12 of the Excise Ordinance No. 8 of 1912, the Governor by this Notification—

(1) rescinds, with effect from the 1st day of October 1934, certain provisions of earlier notification ;

(2) declares that from and after the said date the limit of sale by retail, with respect to the whole Island and as regards purchasers generally, shall be one-third of an imperial gallon in the case of either arrack or toddy ;

(3) prescribes generally for the whole Island, one-third of an imperial gallon as the quantity in excess of which no arrack or toddy shall be transported, from and after the said date, except under a pass issued under section 13 of the said Ordinance.

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the defence to prove.....that the toddy was stored in a common vessel and belonged to more than one person." With respect, I agree with Soertsz, J. In the present case the prosecution claimed that all the toddy was in the possession of the accused. Before it had concluded its case and without any evidence that the toddy was in the possession of any person other than the accused, the Magistrate without calling upon them acquitted them.

The appeal must be allowed and the case remitted for trial by another Magistrate.

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* *Present:* SOERTSZ, J.

EXCISE INSPECTOR (Horana) vs MANGO NONA

S. C. No. 31—*P. C. Panadura No.* 40607

Argued on 7th May, 1937.

Decided on 14th May, 1937.

K. W. E. Perera, for accused-appellant.

Jansze, Crown Counsel, for complainant-respondent.

SOERTSZ, J.

Counsel for the appellant has pressed this appeal on several points of law and of fact. On the law, he submitted that the charge was not sustained because the prosecution failed to prove that the sale was without a licence and the possession without a permit. I do not quite follow this argument. It is proved that the alleged sale was in the house of the accused. It is not contended that the house is a tavern, therefore it is obvious the sale was without a licence. As for the charge of possession, it was specifically stated that the possession was without a permit, and section 50 of the Excise Ordinance creates a presumption that an offence has been committed when the accused is found in possession of an excisable article in cases under section 43. The charges in this case are made 43 (*a*) and (*h*). It was for the accused to rebut that presumption.

In the next place, it is argued that a conviction cannot be sustained on the uncorroborated testimony of a decoy, and the case of *Fernando vs. Ardrayas* 31 N.L.R. 444 is cited in support. All that was laid down in the case is that it is unsafe to convict on the sole testimony of a decoy if it is not corroborated in some material way. In this case, in my opinion, there is ample corroboration. Lastly, it was contended that the quantity of toddy found was 25½ drams, that there were three inmates of this house, that the law *permits* each person to possess a certain quantity and that, therefore, 25½ drams were well within the *permitted* limit. I do not agree that this question can be solved by a simple arithmetical process. The presence of 25½ drams in one vessel in this case creates the presumption that an offence has been committed and it is for the defence to obtain exemption by proving that the toddy was stored in a common vessel and belonged to more than one person. Here the defence was that the toddy was introduced in order to implicate the accused.

The case of *Excise Inspector Holsinger vs. Francina Fonseka*, 1 Ceylon Law Weekly p.225, was cited to me, but, frankly, I am unable to follow the reasoning in that case. If the ruling in that case means, as I gather it does, that if by dividing the quantity of toddy, found on any premises, by the number of inmates of those premises, a permissible quantity is obtained as the result, the accused is *ipso facto* entitled to an acquittal, I refuse to follow it. In my opinion, this case has been clearly proved. The sentence is by no means excessive. I dismiss the appeal.

Appeal dismissed.