COURT OF APPEAL CASES

OF CEYLON:

BEING

Reports of Cases decided by the Supreme Court of Ceylon in its Original and Appellate Jurisdiction, and sitting as a Colonial Court of Admiralty and by His Majesty's Privy Council on Appeal from Ceylon.

EDITED BY

A. St. V. JAYEWARDENE.

Barrister-at-Law.

L. H. De ALWIS.

JAMES JOSEPH,

E. G. P. JAYETILLEKE,

Advocates of the

SUPREME COURT.

Vol IV. Part VIII. *OCTOBER. 1916.*

PRINTERS:
The CEYLONESE UNION Co., Ltd.
COLOMBO.

COURT OF APPEAL CASES OF CEYLON:

BEING

REPORTS OF CASES DECIDED BY THE SUPREME COURT OF CEYLON IN ITS ORIGINAL AND APPELLATE JURISDICTION AND SITTING AS A COLONIAL COURT OF ADMIRALTY AND BY HIS MAJESTY'S PRIVY COUNCIL ON APPEAL FROM CEYLON.

———:o:———

BINDUWA *v.* TYRREL *et al.*

No. 21455 D. C. Kandy.

Present : **Wood Renton A. C. J. & Ennis J.**

2nd June, 1913.

Action for damages—wrongful possession of elephant—tusker —Assistant Government Agent—also Assistant Superintendent of Police—seizure of property with respect to which an offence is commited—prescription—Police Ordinance No. 16 of 1865 §§ 51, 59, 79— Criminal Procedure Code § 419.

Plaintiff sued first defendant and the second defendant a Rate Mahatmaya for damages for wrongful possession and failure to restore an elephant belonging to him. The defendants alleged that the elephant was a tusker which had been captured without a licence in contravention of §§ 5 (1) and 6 (2) of Ordinance No. I of 1909 and was therefore liable to confiscation ; that the 1st defendant who was at that time Assistant Government Agent of Mata'e and also a Police Officer directed the 2nd defendant who was a subordinate under him to take charge of the elephant with a view to its production before the Police Court for being confiscated.

Held that where there is reasonable ground for a belief that an offence against the Game Laws has been committed with respect to the elephant, the 1st defendant who is a Police officer within the meaning of Ordinance No. 16 of 1865 had the right under the general powers conferred on the police by § 51 as also by the special powers created by § 59 of that enactment to seize the suspected elephant and detain it for the purpose of criminal proceedings.

Held that the plaintiff's claim is barred under § 79 of the Police Ordinance No. 16 of 1865 in as much as his action had not been brought within three months from the date of the act complained of.

Per Ennis J. For police purposes a Police Officer is considered to be always on duty (§ 51 of No. 16 of 1865) In performance of this duty in a case such as this when the act cannot be referred to anything but this duty a Police Officer cannot in my opinion be regarded as divesting himself of his character as a Police Officer by signing in some other capacity.

The second defendant is not a Police Officer under Ordinance 16 of 1685 but he acted under the lawful order of his superior Officer the 1st defendant and both of them are protected by § 419 of the Criminal Procedure.

Garvin, Acting S. G., for 1st defendant—appellant.

A Drieberg, for the 2nd defendant—appellant.

H. J. C. Pereira and *J. W. de Silva* for the plaintiff-respondent.

c. a. v.

Wood Renton A. C. J.—The plaintiff-respondent, Binduwa. sues the 1st defendant, Mr. Tyrrell, and the 2nd defendant, Mr. Tikiri Banda Aluwihare the Rate Mahatmaya of Matale South, who are the appellants, for damages for having taken wrongful possession of, and failed to restore, an elephant belonging to him. He claims a declaration of title to the elephant and estimates his damages at Rs. 4000/. The defendants allege that the elephant in question waa a "tusker," which had been captured without a license in contravention of the provisions of §§ 5. (1) and 6 (2) of ordinance No. 1 of 1909, and was, therefore, liable to confiscation, that the 1st defendant, who was at the time Assistant Government Agent at Matale and also a Police Officer, directed the 2nd to take charge of the animal with a

view to its production in the Police Court for the purpose of being confiscated, and that, before it could be so produced, it died from injuries sustained by it through its tusks having been sawn off prior to its seizure, and not from any act of commission or omission on their part. The defendants also pleaded, in an amendment of their answer, that the plaintiff's claim was barred under §. 79 of Ordinance 16 of 1865, in as much as his action had not been brought within three months from the date of the act complained of. The case went to trial on issues based on the allegations in these pleadings, evidence was adduced on both sides, and the learned District Judge gave judgment in the plaintiff's favour for Rs. 3000, with interest and costs, directing that execution should be levied in the first instance against the 2nd defendant. The defendants appeal. The view taken of the case by the District Judge may be summed up thus. The plaintiff, on 24th April 1911, bought the elephant in good faith for a sum of Rs. 1200/- from a Moorman, Sultan, who had brought it from Mannar on a permit for removal, issued by the Assistant Government Agent there to one Marikkathampi and dated 11th April, 1911. On 25th April, he brought the elephant, with several others which he had purchased, to his village. The 2nd defendant, under whom, as Rate Mahatmaya of the District, the plaintiff worked as a Payindakaraya or Police Headman, has a brother, who is Rate Mahatmaya of Matale North. This gentleman had seen, coveted, and unsuccessfully bid for, the elephant before its purchase by the plaintiff. Annoyed at his failure to secure the animal, and also at the fact that the plaintiff—a man of the Wahampura caste —should be the owner of a number of elephants, the Rate Mahatmaya abused the plaintiff for having outbid him and set his brother, the 2nd defendant, on his track. Between 25th and 28th April, the 2nd defendant had made his plans. On the latter date, in his letter D 3, he reported to the Assistant Government Agent the arrival of Binduwa's elephants, and added " I understand there is a tusker. The tusks are

said to have been cut short." On 30th April, the elephant was seized. On the same day, in his letter D4, the 2nd defendant informed the Assistant Government Agent of the seizure and stated that the animal seized was "undoubtedly a tusker." Up to this point the 1st defendant had been acting in good faith. But from 30th April onwards, he allowed himself to become a mere tool in the hands of the 2nd defendant, whose conduct had throughout been actuated by private malice against the plaintiff. Gulled by the Rate Mahatmaya's falsehoods, he took upon himself to commit the elephant to his care, although the Police Magistrate, Mr. Dunuwile, thought that it might safely be entrusted to the plaintiff on adequate security being given for its production when required. He directed the institution of proceedings against Marikkathampi and Sultan, first in Matale, and afterwards, when it appeared that the Police Court of Matale had no jurisdiction, in Mannar. Meanwhile, on 31st October 1911, the elephant, which was still in the 2nd defendant's custody, died from neglect and starvation.

Before dealing with the points of Law involved in the case, it may be desirable to consider the learned District Judge's finding on the evidence. The defendants have a right to insist that findings of such a character shall be based on facts and not on mere surmises or suspicions.

We must begin the case against the 2nd defendant. The District Judge accepts the plaintiff's evidence as to what took place between himself and the Rate Mahatmaya of Matale North, and then infers that it was the latter who spitefully instigated the 2nd defendant to seize the elephant from the fact that, although the 2nd defendant stated in substance in his evidence that he had only discovered on 30th April that the elephant was a tusker and that its tusks had been sawn off, he wrote to the 1st defendant on 28th April, saying that among the plaintiff's elephants he understood there was a "tusker" whose tusks were "said to have been cut short." The District Judge concludes that the 2nd defendant must have learned the details embodied

in the letter of 28th April from his brother, the Rate Mahatmaya, and from him alone, and on that conclusion he builds up his theory of a conspiracy between the two brothers to deprive the plaintiff of his elephant. The 2nd defendant denied that his letter of 28th April had been written on the strength of any information given to him by his brother, whom he did not, however, call as a witness at the trial, and alleged that, as far back as February or March 1911, he had learned of the recent capture of a tusker at Mannar from the plaintiff himself, and that, on 22nd or 23rd April, the plaintiff had told him of the purchase and impending arrival of his four elephants, though he said that the tusker from Mannar was not among them. This evidence, in so far as it is adverse to the plaintiff's case, the District Judge, of course, does not accept, and he approaches the consideration of the evidence from the standpoint that a conspiracy between the 2nd defendant and his brother to defraud the plaintiff had been established.

The ground on which this theory is based is, in my opinion, wholly insufficient to support it. Even if the 2nd defendant had received information about the tusker from his brother and had wrongly and foolishly suppressed the fact, it would by no means follow that the information was false. But the learned District Judge has omitted to take account of considerations, the mere statement of which will show that his sweeping condemnation of the 2nd defendant is unsafe. I will not dwell on the fact that the evidence of the 2nd defendant, in regard to the sources of his information as to the tusker, was obviously elicited by a cross-examination which in violation of the salutary provisions—too little enforced in our Courts—of §. 143 (1) of the Evidence Ordinance, "put into the mouth of the witness the very words "which he is to echo back." But apart from that, the 2nd defendant was speaking in September 1912 as to events that happened in April 1911. His recollections may well have been imperfect in regard to such details as the dates at which, and the persons from whom,

his information was derived, and there is evidence in the record pointing to the conslusion that it was so. The 1st defendant, Mr. Tyrrell, says :—

> "Sometime in April the Rate Mahatmaya (2nd de-
> "fendant) "informed me that a tusker had been cap-
> "tured in the Mannar District, and was going to be
> "brought to our district. I told him to keep a look
> "out. His report was verbal. He was one of my
> "subordinate officers."

It is clear from the passage, and from the passages immediately following, that the witness was speaking of a verbal report prior to 28th April. The 2nd defendant, who heard this evidence given, did not in examination in chief bring his own evidence into line with it, but when he was cross-examined on the subject he said :—

> "I heard Mr. Tyrrell give his evidence. I will not
> "deny its accuracy. If he stated that some time in
> "April I told him verbally that a tusker captured in
> "Mannar was likely to be brought to Matale, it must
> "be true. I gave him that information on the footing
> "that the animal was captured without a license."

That the District Judge infers that the 1st defendant must have received this information between the 25th and 28th April and treats the 1st defendant's evidence on the point as flatly contradicting and as further discrediting that of the 2nd. But the 1st defendant was not asked any question as to the date of the verbal communication, and the District Judge has failed to take account of the original omission by the 2nd defendant to make his own evidence on the matter agree with that of the 1st defendant's evidence as circumstances indicative of good faith. But there is more. There is a large body of evidence in the case tending to show that the elephant was a tusker, that its tusks had recently been sawn off, and that the plaintiff was possessing it under a permit applicable to an elephant which was not a tusker alone. This evidence by itself should have sufficed to stay the District Judge's hand. Taken in conjunction with the other circumstances in the

case, it renders his judgment against the good faith of the 2nd defendant incapable, in my opinion, of being supported.

When the theory of conspiracy between the two Rate Mahatmayas has been, as it must be, eliminated, the case at once loses the lurid aspect in which the judgment under appeal presents itself to us, and becomes tolerably simple as regards both the facts and the law. The plaintiff was found in possession of an elephant which the defendants had at least every reason to regard as a tusker. Its tusks appeared to have been recently sawn off. Whether the 2nd defendant's explanation of the polished ends of the tusks actually produced in Court is correct or not, there can be no reason for rejecting Mr. Dunuwile's evidence as to the actual condition of the tusks examined by him. The permit which the plaintiff held did not apply to a tusker. There was, therefore, *prima facie* ground for suspecting the commission by the plaintiff or his vendor or both of an offence against the provisions of Ordinance No. 1 of 1909. The 1st defendant was a Police Officer within the meaning of Ordinance No 16 of 1865, and he had the right under the general powers conferred on the Police by §. 51, if not also under the special powers created by §. 59, of that enactment to seize the suspected elephant and detain it for the purposes of criminal proceedings. The fact that the 1st defendant described himself, and was described by the 2nd and by Mr. Dunuwile in the communications which passed between them, as " Assistant Government Agent " does not show that he was not acting as a Police Officer or deprive him of his rights under Ordinance 16 of 1865 cf. (*Perera* v *Hansard* [1]. Apart from its failure on the merits. the case against him would, therefore, fail on the law. The elephant was seized on 30th April, 1911. The plaint was filed on 22nd February, 1912, The action is thus barred by reason of its not having been brought, as §. 79 of Ordinance 16 of 1865 requires, within three months from the date of

1. (*1889*) *8 S. C. C.*

the act of which the plaintiff complains. The 2nd defendant is not a Police Officer under Ordinance 16 of 1865, but he acted under the lawful orders of his superior officer, the 1st defendant, and both of them are protected by §. 419 of the Criminal Procedure Code. The respondent's counsel did not contend, as the learned District Judge seems to have assumed, that, in order to comply with that section, the property seized must be produced before the Police Magistrate to whom the seizure is reported. But he argued that in the present case the seizure had not been "forthwith reported," as §. 419 requires, to the Police Magistrate, that the Police Magistrate had made no "order" under that section as to the custody of the elephant, and that the animal had been detained, till it died, by the 2nd defendant under the sole and illegal authority of the first.

Section 419 of the Criminal Procedure Code does not say what the report to which it refers shall be in writing or even that it must be necessarily be made by the Police Officer effecting the seizure. The object of the section is to provide for a Police Magistrate being brought, with the least possible delay, into official touch with property seized by the Police. In the present case, the elephant was, on the orders of the 1st defendant, produced before him at the Kachcheri by the 2nd. On 1st May—the day after seizure, Mr. Dunuwile, the Police Magistrate, was asked to examine, and did examine it on the same day. On 2nd May, criminal proceedings were instituted, and the Police Magistrate, to whom the plaintiff had presented a petition claiming the elephant, made the following order :—

> "A case has already been instituted against the man
> "who captured the animal and another. The peti-
> "tioner being the purchaser, I think he should be
> "allowed to keep the animal on giving security in
> "Rs. 4000/- The animal is young and recently cap-
> "tured and should be looked after carefully. Before
> "I make a final order, send this to the Assistant
> "Government Agent, who appears to have made an
> "inquiry into this matter."

The 1st defendant replied in these terms :—

> " I have ordered the Rate Mahatmaya to take charge
> " of the animal. The Paindakaraya endeavoured
> " to conceal the fact that this was a tusker. His
> " conduct demands inquiry and he should not be
> " entrusted with the elephant. The R. M. can be
> " trusted to care of it."

Mr. Dunuwile then made the following memorandum :

> " In my opinion the purchaser should be entrusted
> " with the elephant. But as the Assistant Govern-
> " ment Agent has entrusted the animal to the R. M.,
> " I make no order."

In his evidence in the District Court Mr. Dunuwile stated that the seizure of the elephant had not been " reported " to him, and that he had made no order as to its custody under §. 419 of the Criminal Procedure Code, and the respondent's counsel argued that, from 2nd May onwards, it had been detained by the 2nd defendant on the illegal " order " of the 1st defendant alone. But Mr Dunuwile's interpretation of the entries set out above is refuted by the entries themselves. It is perfectly clear from his first memorandum on the plaintiff's petition that Mr Dunuwile regarded himself as being then in a position to make a " final order " under §. 419. His reference to the physical condition of the animal shows that it had been produced before him. He merely asked the 1st defendant for, and, in spite of the use of the word "ordered" in his reply, the 1st defendant merely gave, an expression of his opinion as to what should be done, and Mr. Dunuwile's last memorandum was in fact an " order " that the elephant should remain where it was viz. in the custody of the 2nd defendants The defendants were not responsible for the delays that occurred in connection with the criminal proceedings. The District Judge, if he had not unfortunately been under the influence of the idea of a baneful conspiracy between the Rate Mahatmayas against the plaintiff, with Mr Tyrrell as their tool, would never, I am sure, have made the wholly unwarranted statement or suggestion, that the animal had died from neglect or starvation, or have treated the evidence

---

(1) (1886) 8 S. C. C.

as to the open condition of its mouth as indicating merely an unsatisfied desire for food.

In my opinion, the judgment under appeal cannot stand. It is unnecessary in the view that I take of this case to express any opinion on the question whether, under Ordinance No. of 1909, prior to its amendment by Ordinance No. 13 of 1912, the possession of a "tusker" captured without a license would be illegal. I would set aside the judgment and decree of the District Court and would direct that decree should be entered dismissing the plaintiff's action, with the costs of the action and of the appeal.

Ennis, J.

This is an appeal from a decree of the District Court of Kandy awarding Rs. 3000 damages to the plaintiff-respondent for the wrongful seizure and detention of an elephant by the two defendant-appellants.

The 1st defendant was Assistant Government Agent. Central Province and an Additional Superintendent of Police, the 2nd defendant is the Rate Mahatmeya of Matale South.

The defendants admitted the seizure and detention of the elephant but denied that it belonged to the plaintiff, They further stated that they were justified in taking it out of the possession of the plaintiff as it was a tusker captured in contravention of the Game Ordinance, 1909.

The District Judge has taken the view that the 2nd defendant was actuated by malice, jealousy and vengeance against the plaintiff and this view has tinged the whole of his judgment. This view is based on a suggestion made by the plaintiff and the learned District Judge has at considerable length, detailed the grounds upon which he finds the suggestion supported. It is not in my opinion necessary to go into them for if the seizure and detention were lawful and proper the motive does not affect the case, but in justice to the 2nd defendant I think it right to say that I am not in accord with the findings of fact or the deductions made by the District Judge in support. of this view.

The amount of claim has been fixed and the damages

have been assessed as if the elephant were a "tusker" and Mr. Dunuwile in his order of the 2nd May on the plaintiff's petition of that date states that the animal "is young and recently captured". The permit under which it was removed from Mannar was not a permit for a tusker. There was therefore reasonable ground for a belief that an offence against the Game Laws had been committed in respect of the elephant, and, under section 59 of the Police Ordinance its seizure by the Police would be lawful.

The 1st defendant was a Police Officer, and for Police purposes, a Police Officer is considered to be always on duty (Section 51 of No. 16 of 1865). In performance of this duty in a case such as this when the act cannot be referred to anything but this duty a Police Officer cannot in my opinion be regarded as divesting himself of his character as a Police Officer by signing in some other capacity.

The elephant was therefore lawfully seized and the fact was brought to the notice of the Magistrate, Mr. Dunuwile, as the minutes on the plaintiff's petition show. In my opinion this was a sufficient compliance with section 419 of the Criminal Procedure Code which requires that a report of a seizure shall be made to a Police Magistrate. The Magistrate's written refusal to interfere with the custody of the elephant as arranged for by the 1st defendant was an acquiescence in that arrangement and virtually an "order" for the custody of the property seized.

The plaintiff's suggestion that the elephant was killed by starvation and neglect is entirely refuted by the evidence for the defence detailing the care and treatment it received and the periodical visits of inspection made by Mr. Tyrell,

I would allow the appeal with costs.

Proctor for appellant—*Nigel. I. Lee.*

Proctors for respondent—*Goonewardena & Wijegoonewardane.*

THE A. G. A. PUTTALAM *v.* C. E. COREA.

Nos. 4731 & 4732 D. C. Chilaw.

Present; **Wood-Renton A. C. J, & de Sampayo J.**

23rd September 1913.

Land acquisition—award of District Judge—assessors not concurring —need not be signed by assessors—District Judge inspecting the land after assessors delivered judgment irregular—assessors essential part of the tribunal in land acquisition--Ordinances No. 9 of 1876 and No. 9 of 1908.

When the assessors in a land acquisition case do not concur in the award of the District Judge the award need not be signed by the assessors.

Where after the assessors had delivered their opinion the District Judge reserved judgment and thereupon after inspecting the land made his award

Held, that the proceedings were irregular and the award was bad.

De Sampayo J. The tribunal constituted by the Land Acquisition Ordinance for the purpose of determining the amount of conpensation for the land acquired consists of the Judge as well as the assessors. The association of assessors with the Judge is, under the provision of the Ordinance, compulsory and thus the position of assessors in a land acquisition case is essentially different from that of assessors whom it is optional with the District Judge under section 72 of the Courts Ordinance to appoint, for the purpose of assisting him in any case or proceeding. But even in the case of ordinary assessors it would not be right for the Judge to conduct any part of the cause of proceeding apart from, and independently of, the assessors. To do so is still more irregular in the case of assessors under the land Acquisition Ordinance, which has in view the object of securing the assistance of two additional Judges with the qualifications of experts in the special subject of market value of land.

E. W. Jayawardene with *J. S. Jayawardene* for appellants.

Garvin A. S. G. for respondents.

c. a. v.

Wood Renton A. C. J.

Two distinct cases are embraced in the present appeal, D C. Chilaw, 4731 and D. C. Chilaw 4732. They were consolidated at the trial, under section 20 of Ordinance 3 of 1876. The question in dispute is as to the amount of compensation that should be paid by the Crown for the compulsory acquisition of two portions of land, lot 567 in case 4731, and lot 574 in case 4732,

Two assessors were appointed before the trial, Mr. Beven on behalf of the appellants, and Mr. Gould on behalf of the plaintiff, the respondent, the Assistant Government Agent of Puttalam and Chilaw. Evidence was adduced on both sides, and at the close of the trial the assessors each expressed his opinion which was duly recorded and signed by the District Judge. The plaintiff had offered Rs. 250/- for lot 567. and Rs. 120/- for lot 574. The assessor appointed by the plaintiff stated that he considered the compensation ample. The appellants' assessor, on the other hand, would have awarded a larger total amount. The learned District Judge thereupon reserved his judgment. Before delivering judgment he inspected the land himself, and it is common ground that this inspection was carried out without notice to either the appellants or the assessors, and in the absence of them both. In the event, the District Judge gave an award differing from the amount suggested by each of the two assessors, namely, Rs. 391/- in case No. 4731, and Rs. 120/- in case No. 4732. In the former case he required the plaintiff to pay the costs of the appellants, in the latter case the costs were divided. Several points have been argued in support of the present appeal. In the first place, it is contended that the award is bad because it has not been signed by the assessors as required by section 29 of Ordinance 9 of 1876, as re-enacted by section 2 of Ordinance 9 of 1908. This contention, in my opinion, is bad. It is only where 'the assessors concur in the view of the Judge that they are required to sign the award. Here neither of the assessors was in accordance with the view of the Judge as to the total amount that ought to be awarded, and, therefore, the requirement as to the signature of the award by the assessors does not apply. The second contention, however, is a more serious one, and I think that it is entitled to prevail. It is urged that the learned District Judge was not entitled to inspect the land without notice even to the parties, and still less so without notice to the assessors. There is nothing on the face of the record to justify the suggestion, which is

faintly put forward in the petition of appeal, that the District Judge made a mistake as to the identity of the land either through his own ignorance of the locality, or through having been misinformed as to its whereabouts by third parties. Still less is there anything to show that his view was in any way influenced " by persons interested in upholding the respondent's valuation. " But the inspection of the land, for all that, was made for a serious purpose. The District Judge has himself stated that his object was to satisfy his mind on certain points as to which the evidence led by either side was " extraordinarily contradictory, such as the value of the soil and the plantations of the lots acquired, and the relative value of the neighbouring lands and plantations. " These are obvious matters bearing directly on the question of the amount of compensation to be awarded, and the judgment itself shows that the District Judge had tested the accuracy of the *viva voce* evidence given before him by his personal observations on the land, and his own opinion as to its character and quality. In doing this, he was, in my opinion, dissociating himself from the two assessors who, by operation of law, were an essential part of his Court for the purpose of the determination of the amount of compensation due, and was depriving himself of the assistance, which the law intended that he should have throughout the whole inquiry up to and including the delivery of the award, of the experts for whose appointment as assessors it has provided. It is always dangerous I think, whatever may be the inherent rights of Courts of first instance, for a Judge to conduct an inspection of the land without notice to the parties although there are many cases in which he may be well within his rights in doing so. But I am clearly of opinion that the parties to actions like the present under Ordinance 3 of 1876 have the right to require that the Judge shall have the assistance, to the last, of the assessors appointed under the Ordinance. My Brother de Sampayo put to the learned Solicitor-General in the course of the argument an illustration which, to my

mind, is conclusive of the question. Suppose that the assessors have expressed and recorded their opinion, and that the Judge has reserved judgment. After reserving judgment, he finds on perusing his notes of the evidence that material witnesses have not been examined upon important points. Can it be suggested that merely because the opinions of the assessors have been recorded and signed the Judge would be entitled to reconstitute the Court, to hear additional evidence himself, and then to pronounce his own independent award? On the grounds that I have stated, I think that the procedure adopted by the learned District Judge in this case was wrong in principal, and that it should not be countenanced. Even although the amount in dispute between the parties is not large, the results of sanctioning any laxity of practice in a matter of this kind would be greatly inconvenient. 1 would set aside the decree under appeal, and send these cases back for further inquiry and adjudication, which both sides agree, in order to save expense, should take place before the same Judge and the same assessors. If an inspection of the *locus* is held to be necessary, it must take place with notice both to the parties and to the assessors. The appellants are entitled to the costs of the appeal. All other costs should be costs in the cause.

De Sampayo, J. I am of the same opinion. The tribunal constituted by the Land Acquisition Ordinance for the purpose of determining the amount of compensation for the land acquired consists of the Judge as well as the assessors. The association of assessors with the Judge is, under the provisions of the Ordinance, compulsory, and thus the position of assessors in a land acquisition case is essentially different from that of assessors whom it is optional with a District Judge under section 72 of the Courts Ordinance to appoint, for the purpose of assisting him in any cause or proceeding. But even in the case of ordinary assessors it would not be right for the judge to conduct any part of the cause or proceeding apart from, and independently of, the assessors. To do so is still more irregular in the case of assessors under the

Land Acquisition Ordinance, which has in view the object of securing the assistance of two additional judges with the qualification of experts in the special subject of market value of land. The Solicitor-General pointed to the Sections of the Ordinance relating to the making and signing of the award and argued that it is the Judge who gives the award and that the assessors only express their opinions which the Judge may or may not follow. This is not quite so. Section 17 enacts that " the District Judge *and* assessors shall proceed to determine the amount of compensation, " and the award is to be made not by the Judge but by " the Court ", which as I have said is constituted by the Judge and assessors. See the repealed §. 30 and the substituted §. 29 of the Ordinance No. 3 of 1876. It is true that if the Judge differs from both the assessors his opinion prevails and he alone signs the award, but this makes no difference in the consideration of the question as to the constitution of the Court which has to make the award. In this connection I may note the construction sought by the Solicitor-General to be put on the existing provision as to the signing of the award, The principal Ordinance No. 3 of 1876 s. 30 provided that " every award made by the Court shall be in writing, signed by the District Judge and assessors or assessor concurring therein ", while s. 29 substituted for it by the amending Ordinance No. 9 of 1908 provides that the award shall be signed by " the District Judge and assessors concurring therein ". It was argued that the amending Ordinance intended that the award should be signed by the assessors only if both of them concur and not by one assessor even if that one concurs, and this argument was used to emphasize the point maintained by the Solicitor-General that the assessors in this case, as soon as their opinions were recorded, dropped out and that the Judge, having alone to make his award, acted within his rights in inspecting the land without notice to and in the absence of the assessors. In my opinion the intention attributed to the amending Ordinance has no real existence. I think the use of the word " assessors " without the addition of the words " or assessor " is due to the enactment in the interval, of the Interpretation Ordinance 1901 which

provided that " words in the singular number shall include the plural, and *v ce versa.* "

It was next contended that the inspection of the land had not the effect of furnishing fresh material for the consideration of the matter of compensation but was only intended as a test of the evidence already recorded in the presence of the assessors. The inspection was conducted, as the District Judge stated it, for the purpose of satisfying himself " on certain points about which the evidence led by the either side was extraordinarily contradictory, such as the value of the soil and the plantation of the lots acquired and the relative value of the neighbouring lands and plantations.'' The very words of the judgment which I have quoted show that the inspection furnished, and was intended to furnish, a fresh source of evidence on the matter which the Judge and assesssors had to investigate and determine. It was in fact a " local investigation " within the meaning of s. 428 of the Civil Procedure Code which provides for a Commissioner being appointed for such local investigation when the same cannot be conveniently conducted by the judge in person. The report of the Commissioner with the evidence, if any, taken by him, will of course in such a case be evidence in the cause, and I cannot see how the result of the investigation when conducted by the Judge himself can be regarded as other than evidence in the sense that it is material influencing his judgment. The fact that in that particular case the inspection is stated to have resulted in certain respects more favourably to the appellants than otherwise cannot affect the question of principle and I think there should be a further inquiry and fresh adjudication in due course.

Sat aside and sent back.

Proctor for appellant—*James Corea.*
Proctor for respondent—*N. J. Martin.*
Vol. IV.

WICKREMESINGHE *vs* WICKREMESINGHE.

No. 5716 D. C. Galle.

Present: **Pereira and Ennis J. J.**

26th February 1914.

Specific performance—action by A against B and C to set aside conveyance of land by B in favour of A—misjoinder of defendants—§§ 14, 18 and 34 Civil Procedure Code.

Where A sued B and C in an action of specific performance for a cancell tion of a conveyance by B in favour of C and for trans'er by B in favour of A.

Held, that the action for specific performance is maintainable where the transfer from B to C is fraudulent and collusive and that B and C were rightly joined as defendants.

This is an action for specific performance. One Don Bastian deceased, entered into an agreement with the plaintiff to convey a certain land to the latter. 1st defendant is the administrator of Don Bastian. The 3rd and 4 th defendants who are the heirs of Don Bastian conveyed the land in question to the 2nd defendant after the death of Don Bastian. Plaintiff brought the action against the defendants for the cancellation of the conveyance by the 3rd and 4th defendants in favour of the 3rd defendant and for a conveyance by the 1st defendant in favour of the plaintiff. The learned District Judge gave judgment for the plaintiff and the defendants appealed.

A. St. V. Jayawardene for appellants :—An action for specific performance cannot be maintained in this case. It is beyond the power of the 1st defendant to transfer the land to the plaintiff. The land has been already transferred to the 2nd defendant. *Marthelis vs.Raymond* [1]; *Appuhamy vs Boteju* [2].

Further the transferor to the 2nd defendant is not the 1st defendant, but the 3rd and 4th defendanants who are the heirs of Don Bastian. There has been a misjoinder of defendants. The plaintiff has no cause of action against the

---

1 (1896) 2N. L. R. 270 2 (1908) 11 N. L. R.187

3rd and 4th defendants and his cause of action against 1st defendant is different from the cause of action against the 2nd defendant *Luckumey v Ookuda* [1]; *De Hoghton v Money* [2]; *Tasker v Small* [3].

Any cause of action that the plaintiff had against Don Bastian terminated with Don Bastians's death. He did not covenant for his assigns.

Bawa K. C. for respondent.—An action for specific performance can be maintained in this case. Under the Roman Dutch Law fraud vitiates a contract. Here the conveyance by the 3rd and 4th defendants in favour of the 2nd defendant is fraudulent and collusive and therefore the plaintiff can bring an action to have that conveyance set aside and for a conveyance by the 1st defendant in his favour. *Don Carolis Alwis v Mohammado* [4]; *Carimjee Jafferjee v Theodoris* [5]; *Amarawira v Mohamado Ali* [6]; *Smiths Leading cases 121*; *Story on Equity Vol 1.* § 784. The defendants are rightly joined. See §§ 14, 18, 34 of the Code. We cannot sue the 1st defendant for specific performance as long as the conveyance in favour of the 2nd defendant remained uncancelled. That conveyance may be fraudulent but none the less it is a valid conveyance. Therefore that conveyance must be cancelled before we can have any remedy from the 1st defendant. Therefore the defendants were rightly joined. [*Pereira J.* There is no issue in this case whether the 2nd defendant was a party to the fraud of the 3rd and 4th defendants] But the case has been fought on the basis that the 2nd defendant took the conveyance with the knowledge of the agreement between Don Bastian and the plaintiff. The learned District Judge has found that the 2nd, 3rd and 4th defendants were parties to a collusive transaction.

A. St. V. Jayawardene in reply.

c. a. v.

---

1 *I. L. R.5. Bom 117*
2 *L. R. 2 ch K. B.164.*
3 *3 My & C. R. 63*
4 *(1910) 3 S. C. D. 85*
5 *(1898) 5 Bal 20*
6 *(1910) 2 Cur L.R. 124*

Wickremesinghe v. Wickremesinghe

Pereira, J.

Pereira J.

The 1st defendant in this case is the Administrator of the estate of one Don Bastian, deceased and the plaintiff sues him for the specific performance of an agreement entered into by and between the plaintiff and Don Bastian for the conveyance by the latter to the plaintiff of the land described in the 20th paragraph of the plaint. The plaintiff has joined the 2nd 3rd and 4th defendants in the action because the 3rd and 4th defendants who are the heirs of Don Bastian have since the date of the agreement referred to above conveyed the land which was the subject of the agreement to the 2nd defendant. The plaintiff claims in this action a cancellation of the conveyance by the 3rd and 4th defendants in favour of the 2nd defendant as a preliminary to the 1st defendant being condemned to execute a convevance of the land referred to above in favour of the plaintiff. It has been argued by the appellants' counsel that there has been a misjoinder of defendants now. It has been held by this Court that it is competent to the heirs of an intestate to convey property left by the intestate although a conveyance by the heirs might be defeated by an Administrator subsequently appointed if he required the property for the purpose of administration (*Silva* v *Silva*. 10. N. L. R. 234) there is no pretence in the present case that the property in question is required by the 1st defendant for the purposes of administration. That being so the present case is similar to a case by A against B. & C. claiming that a conveyance by B. in C's favour be set aside and that B be condemned to execute a conveyance of the property thus released in favour of A in specific performance of an agreement between A. & B. Prior to the conveyance of the land by B in favour of C. And as regards the objection as to misjoinder of parties it will be less confusing to consider it with reference to this hypothetical case. It is clear that no conveyance can be executed by B in favour of A until the conveyance by B in favour of C is cancelled because as this Court has more than once laid down, under our law, even a fraudulent conveyance unlike one

excuted by a person not competent to contract, which on that account would be null and void, is operative until it is set aside by an order of Court and when it is set aside the cancellation refers back to the date of the conveyance.

Now in respect of the objection referred to above three cases have been cited (1) *Luckumey v Ookude* [I. L. R. 5 Bom, 117] (2) *De Hoghton v. Money* [2 Ch. Ap. 164] (3) *Tusker v Small* [3My & C. R. 63] I do not think that any of these cases has any application to the present case. In the present case the real cause of action is the execution of the conveyance by B in favour of C. That conveyance deprived B of the power of conveying the land to A and the object of the action primarily is to have that conveyance cancelled. For that purpose both B. &. C. are properly before the Court. In *Hoghton v Money* it was held that a purchaser could not before completing his contract, enforce any equities attaching to the property against persons not parties to the contract. There can be no doubt as to that provided the situation is such that it is possible for the purchaser to complete his contract. In the present case B. could not execute a conveyance in favour of A. so long as B's conveyance in favour of C. remained uncancelled and therefore it would have been nugatory for A. to sue B. alone and unless A. had title to the land from B. he could not sue C. & B. for a cancellation of the conveyance by the latter in favour of the former. That is the dilemma in which A. would be if the case of *Hoghton v Money* were applicable to the present case but it will be seen that the defendants who were objected to in that case claimed under a mere agreement prior to the agreement of which specific performance was sought. The latter agreement dated 1864 was one between plaintiff in that case and the defendant C, for the purchase of "the "piece of land in question and Cotton's entire interest therein "without any reservation whatever except as to a disputed "right claimed by the defendant Money, in, respect of a "certain letter addressed to him by Cotton dated 1862". The contention was that this letter conveyed no title and that it

Wickremesinghe v. Wickremesinghe

Pereira, J.

was null and void and not that it needed cancellation, so that it was quite open to the defendant Cotton to convey the land to the plaintiff, and for an order for that purpose the presence of Money as a defendant was not necessary. In the Indian case cited the defendants who were objected to asserted to be entitled to merely a charge upon the land in respect of which a conveyance was claimed. As to when and how that charge came into existence there is no precise information and there is nothing to shew that there was any obstacle to the land being conveyed to the plaintiff by the defendant against whom specific performance was claimed. In *Tusker v Small* it was held that mortgages of the property and persons who claimed an interest in the equity of redemption could not be joined as defendants to an action for specific performance. It is clear that in spite of such interest there was no objection to the conveyance of the property by the principal defendant. As explained above the situation that we are concerned with in the present case is different. We are here face to face with the Roman Dutch law principle that a fraudulent deed is operative until it is set aside, and so the 1st defendant could not forcibly be condemned to execute a conveyance in the plaintiff's favour until the conveyance by the 3rd and 4th defendants in favour of the 2nd defendant was cancelled. I therefore think that the objection to the action on the ground of mis-joinder cannot be sustained.

The next question in the case is whether the plaintiff has shown himself entitled to a cancellation of the deed of conveyance executed by the 3rd & 4th defendants in favour of the 2nd defendant [Deed No. 784 dated 16th July 1910]. From two of the cases cited in the course of the argument. *Marthelis v Raymond* [2 N. L. R 270] and *Appuhamy v Boteju* [11 N. L. R. 187] it would appear that where one conveys land to a person which he had already agreed to convey to another, he thereby places himself beyond the power of specifically performing his

agreement with the latter. But clearly under the Roman Dutch law fraud vitiates every contract and if the latter of the two deeds could be shewn to be fraudulent it would be cancelled and the way paved for the specific performance of the former. So that the main question in the present case is whether deed No. 784 was executed in fraud of the plaintiff. No such issue was expressly framed but we are asked by the plaintiff counsel to infer fraud from the facts proved. He has contended that the attitude taken up by the plaintiff was that the deed was fraudulent and that the tenth issue in the case is tantamount to an issue of fraud. I do not think that the passages cited by him from Story on Equity apply to a case like this. The issue framed in spite of objection was whether the 2nd defendant was a *bona fide* purchaser for value and the District Judge has held that the 2nd defendant "made a collusive purchase" but mere collusion or lack of *bona fides* does not necessarily amount to fraud A person may take unfair advantage of a particular situation and act accordingly but his action may nevertheless not be fraudulent. Whatever is dishonourable is not necessarily dishonest in the eye of the law. I think that the parties should clearly understand the issue before them and then proceed to trial thereon. I would set aside the judgment and direct that the following issue be framed and tried in lieu of issue No. 10. Did the 3rd and 4th defendants and the 2nd defendant act collusively and with intent to defraud the plaintiff in the execution of deed No 784 dated the 16th July 1910, the plaint being amended accordingly [*See Ratwatte v Owen* 2 N. L. R. 141] I think that the District Judge should deliver judgment *de novo* in accordance with his decision on the above issue and his decisions already recorded by him on issues 1 to 9 except so far as those decisions may be affected by his decision on the new issue framed.

I think that all costs should abide the event.

Ennis J. I agree.

Proctor for appellant—*Edward Buultjens*

Proctor for respondent—*D. A. A Wickremesinghe*

SEKUMARIKAR *vs.* CAROLIS.

No. 11419 D. C. Galle

Present : **Pereira and Ennis J- J.**

3rd July 1913.

Promissory note—action by endorsee against maker and payee— can maker set up defence that note was given as security—§92 Evidence Ordinance—when is a promissory note payable on demand overdue.

In an action by the endorsee of a promissory note against the maker and the payee it is open to the maker to set up the defence that the note was given by him to the payee as security for advance received by him for the supply of goods to the payee and that the said note is discharged by the supply of such goods.

When a note payable on demand is negotiated it is not deemed to be over due for the purpose of affecting the holder with defects of title of which he had no notice by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

A. St. V. Jayawardene, for plaintiff-appellant

H. A. Jayawardene, for 1st defendant-respondent

Gunaratne, for 2nd defendant-respondent.

c. a. v.

Pereira J.

In this case the first question to be decided is whether the Promissory Note sued upon has been duly paid and discharged, The 2nd defendant was the broker of the firm of Clark Spence & Co., and it is clear from the evidence of Mr. Leefe, the Manager of that firm, that the promissory note was given by the 1st defendant as security for the supply by the 1st defendant to the firm of coir yarn in liquidation of advance made to him by the firm. It appears that the 2nd defendant as the broker of the firm of Clark Spence & Co., was liable to the firm for advances made to customers introduced by him. If they made default the 2nd defendant was liable to make good to the firm the loss, and hence, promissory notes were, as stated by Mr. Leefe, usually taken in favour of the 2nd defendant so that he might recover on them if he was obliged to make good loss as stated above. The promissory note in question was in effect security for the supply of a certain quantity of coir yarn by the 1st defendant to Clark Spence & Co, The moment he supplied

the required quantity of coir yarn, the note was discharged. The appellant's counsel argued that it was not open to the 1st defendant to prove such an understanding, it being, as he contended, obnoxious to the provision of Section 92 of the Evidence Ordinance. I do not think so. There can be no greater objection to proof of such an understanding than there could have been to proof of suspension of liability on a note which this Court held would take place in certain circumstances in the case of *Coles v. Caruppen* reported in the New Law Reports Volume 16, page 198. In the present case, of course, as sworn to by Mr. Leefe the 1st defendant did supply the coir yarn in liquidation of the amount advanced to him.

The next question is how far the defence available to the 1st defendant as against the 2nd is available to him as against the plaintiff. On the authority of the case of *Tenna v. Balaya* (XI N. L. R. 27) the District Judge has treated the present promissory note as an overdue note, and possibly the 1st defendant's counsel in the Court below placed reliance on the decision in this case in conducting the defence. If that decision is to be deemed as implying that a promissory note payable on demand is always to be regarded as an overdue note so far as the matter of negotiation is concerned, I am not, as at present advised, inclined to endorse it. But I am not sure that the learned Judge who decided that case intended to go so far. Anyway, in the solution of the question whether a given instrument is overdue, the considerations that apply to Bills of Exchange payable on demand are different from those that apply to promissory notes payable on demand. Section 36, subsection 3 of the Bills of Exchange Act 1882 (45 and 46 Vict. Ch. 61) enacts- "A bill payable on demand is deemed to be overdue....." when it appears on the face of it—to have been in circulation "for an unreasonable length of time. What is an" unreasonable" length of time for the purpose is a question of fact." But in section 86 sub-section 2 it is provided as follows-

Sekumarikar v. Carolis

Ennis, J.

"When a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue". So that, the promissory note in question in this case cannot be deemed to be, and treated as, an overdue note. That being so, it is necessary that the 10th issue framed should be definitely determined. In view of the decision in the case of *Tenna v. Balaya* cited above, neither Judge nor counsel would appear to have treated that issue as of primary importance in this case. That issue is tantamount to the question whether the plaintiff is a "holder in due course" of the promissory note in question, and a "holder in due conrse", I need hardly observe, is defined in section 29 of the Act. I would set aside the judgment appealed from and remit the case to the District Court for the decision of the 10th issue as explained above and judgment accordingly. All costs should, I think, abide the event.

Ennis, J.

I agree.

set aside and sent back.

Proctor for appellant—*E. A. Wijayasuriya.*

Proctor for respondent—*H. A. Soertsz.*

KATHIRAVELU CHETTY *v.* RAMASAMY CHETTY

No. 36051 C. R. Colombo.

Present: **Pereira J.**

February 2nd 1914.

Prescription—part payment—promissory note given in blank—converted into a note for a larger sum then the sum agreed to.

Plaintiff sued on a promissory note for Rs. 250 and pleaded payment of interest in bar of prescription. Defendant denied the granting of the note sued upon but pleaded that he had signed a blank form of nots to be converted into a note for Rs. 60 and that in the belief that the form had bsen so converted he had paid plaintiff sums of money in liquidstion of the debt.

Held that it was not open to plaintiff to take advantage of this plea and claim to apply the payments pleaded by defendant to the note sued upon and plead such payments in bar of prescription.

Allan Drieberg & Joseph, for plaintiff-appellant
A. St. V. Jayawardene, for respondent

c. a. v.

Pereira J.—The Commissioner holds that the plaintiff has failed to discharge the burden on him of proving that his claim on the promissory note sued upon is not prescribed by reason of the payment of interest by the defendant. This decision might have been recorded at the close of the case for the plaintiff and the plaintiff's case dismissed. The Commissioner, however called on the defendant for his defence, and the defendant attempted to prove a totally different state of things than the granting of the promissory note for Rs. 250. A part of the defence is that the defendant made payments to the plaintiff for four months on what he thought was a promissory note for Rs. 60. The plaintiff seeks to take advantage of this plea and convert it into an admission of payment sufficient to remove the note sued upon from the bar of prescription. I do not think he can be allowed to do so. A payment is deemed to arrest the progress of prescription on the assumption that it involves an admission of the debt in respect of which the payment is made, but in this case there was no payment in respect of the claim made by the plaintiff. The alleged payment purported to be a payment in respect of a totally different liability. Whether that liability was real or imaginary hardly affects the question. I think that the view taken by the Commissioner is correct and I dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant—*C. T. Kandiah.*
Proctor for respondent—*A. L. de Witt.*

SELESTINA HAMINE *v.* KARTHELIS

No. 8987 D. C. Negombo.

Present: **Wood Renton A. C. J. & de Sampayo, A. J.**

14th October 1913.

Marriage by habit and repute—evidence of

H. married A. in 1865. The marriage was not registered. Thereafter in 1872 H. married A's sister S, and this marriage was registered. On the question whether H's marriage with A was legal

Held that though H's subsequent marriage with S. was registered, the oral and documentary evidence in support of a marriage by habit and repute between H. & A. was so strong that it should be held to be a valid marriage.

H. A. Jayawardene—for appellant.

A. St. V. Jayawardene—for respondent.

Wood Renton A. C. J.—The argument in support of this appeal has been limited to the issue whether Angohamy, on whose deed of 26th January, 1912, the 2nd defendant, the appellant, claims a half share of the property in suit, was the lawful wife of Don Hendrick, her co-donee of the whole property on the deed of 12th July 1865. If these donees were not in fact lawfully married, half of the property in question belonged to Angohamy, and she would be in a position to confer a valid legal title to it upon the appellant, subject to any question of prescription with which we are not here concerned. The issue as to the validity of the marriage between Angohamy and Don Hendrick derives its importance from the fact that Don Hendrick admittedly contracted a registered marriage with her sister Sanchihamy in 1872. The registration of this marriage would not, of course, annul the valid marriage previously entered into with another woman. But where, as here, the alleged earlier marriage was not registered, the registration of the subsequent marriage might well have the effect of throwing doubt upon evidence adduced for the purpose of establishing a marriage by habit and repute. The evidence in support of the validity of the marriage between Angohamy and Don Hendrick in 1865 is partly *viva voce* and partly documentary. The witnesses, whom the learned District Judge has believed,

have deposed to the facts of their presence at the celebration of the marriage itself, of its having been carried out with the customary ceremonies, of the parties having subsequently been regarded as man and wife, and of the attendance of the parties later on, in that capacity, at marriage and funeral ceremonies. Perhaps this evidence, if it stood alone, might not be strong enough to prevail against the registration of the second marriage after so short an interval as seven years from the celebration of the first. But the documentary evidence corroborates the decision of the District Judge on the issue that I am dealing with. In the deed of gift by Angohamy's parents of the property in suit they describe her as Don Hendrick's wife. Moreover, in 1887, fifteen years after the celebration of the marriage between Don Hendrick and Sanchihamy, we find Don Hendrick himself joining Angohamy in a deed of gift in which she is described as his wife. The only documentary evidence that can be relied upon, on the other side, is Angohamy's deed of gift in the appellant's favour in 1912. As my brother de Sampayo, however, has pointed out in the course of the argument, that deed shows traces of its having been prepared with a view to support the appellant's present claim. We find Angohamy, in spite of her deed in 1887, reciting that, in 1865, Don Hendrick Appu "had engaged and covenanted to marry" her, and that subsequently, "without marrying her, he had got married" to her sister Sanchihamy. I do not think that a recent deed of this character is entitled to very much weight as against the *viva voce* and documentary evidence in support of the validity of the marriage, especially as in another deed executed by Angohamy on 12th June, 1911, we find her describing herself as Don Hendrick's widow. On the whole I think that the decision of the District Judge is right, and I would dismiss the appeal with costs.

de Sampayo, A. J.—I am of the same opinion.

appeal dismissed.

Proctors for appellant.—*de Zoysa & Pereira.*

Proctor for respondent.—*Aserappa.*

FULL BENCH.

MOHAMMADO ALI *v.* WEERASURIYA,
No. 4801 D. C. Kurunegalle
Present : **Lascelles C. J., Pereira & Ennis J. J.**
29th May 1914.

Registration Ordinance No. 14 of 1891 §§ 16 & 17—what is judgment affecting land—registration—adverse title—estoppel by matter of record.

A judgment declaring the rights of litigants to land is not a judgment affecting land within the meaning of § 16 of the Registration Ordinance No. 14 of 1891 and is therefore not a registrable instrument within § 17 of that Ordinance.

A judgment affecting land for the purposes of the Registration Ordinance must be nnderstood to be a judgment which by its own operation invests a person with an interest in the land, such for example as a partition decree or a judgment which imposes or creates some charge interest or liability.

Section 17 has always been held to be applicable to cases where there is competition between two or more instruments of title proceeding from the same source.

The land Registration Ordinance does not establish rights to land by registration ; it affects only the devolution of rights, and leaves an unregistered instrument unaffected for all purposes other than the establishment of a prior claim to one and the same thing.

Estoppel by matter of record is not enacted as part of our evidence Ordinance but the law of estoppel by record is none the less a branch of the law of Evidence.

Samarawickreme and R. L. Pereira for appellant.—The appellant's conveyance is registered The respondent bases his title upon the judgment in D. C. Kurunegalle 3204. That judgment has not been registered and is therefore void as against the subsequent registered conveyance of the appellant (see § 16 of Ordinance No. 14 of 1891) [*Ennis J.* But the judgment in D. C. Kurunegalle is not one which affects land, it merely declares pre-existing title to land]. A judgment may affect title to land also. Suppose a plaintiff's case is dismissed for default of appearance. Looking at the nature of the documents sought to be registered as also at Vol. IV.

the object aimed at by the Ordinance, decrees should be registered. Any other interpretation of the words "affecting land "would leave a large number of deeds unregistered and would result in great harm. *Madar Lebbe v. Nagamma* [1]. [*Ennis J*—what about probate]. A probate is only declaratory; it does not affect title. [*Ennis J.* The §§ speak of *a priority* and *the priority*] Priority here refers to the particular priority given by the section and not to any priority in point of time. Priority here means preference .[*Lascelles C. J.* Can a matter which has been once adjudicated upon be reopened]. § 16 would suggest that it can be reopened. [*Lascelles C. J.* But a decree is something *inter partes* and not *in rem* and therefore the principle is not applicable] §16 is not confined to matters *in rem.* The test of §16. is to prevent the mischief arising from the taking of a conveyance by an innocent purchaser, when there is a prior unregistered conveyance. The object is to protect an innocent purchaser.

Bawa K. C. for respondent.—Neither plaintiff nor defendant relies upon the judgment as his source of title. The Ordinance enjoins on a person to register his title to land and not blot out the title of others. The argument of the other side if upheld would land in its logical conclusions to absurd results.

A declaratory judgment does not affect land ; §16 does not apply [Lascelles C. J. How do you proceed in case of probate]. A probate goes with the will and it need be registered only when there is land ; see § 22. Further § 18 sub § 1 speaks of judgments which ought to be registered. These judgments directly affect the land. Judgments affecting land can be readily mentioned : partition decree, mortgage decree etc, and that is the reason why Bonser C. J wanted a mortgage decree to be registered in *Madar Lebbe v Nagamma.* [1] Counsel cited *Casey v. Arnott.* [2] [*Pereira J.* That judgment does not apply as it refers to acts of persons

1. (1902) 6 N. L. R. 21 2. (1876) 2 Common Pleas 24

and not decrees of a court] It does not follow that a "deed affecting land" is one thing and a judgment affecting land is another. § 17 applies only to those claiming an adverse title. Adverse interest is defined in *Bernard v. Fernando* [1]. *Samarawickreme, in reply.* This Ordinance does not affect § 207 of the Civil Procedure Code. Every valid judgment will have the effect of § 207. But where § 17 invalidates a judgment § 207 does not apply.

c. a. v.

Lascelles C. J. The question of law reserved for consideration by the full Bench is as far as I am aware a new one.

The plaintiff and the defendant each claim title to the whole of the land in dispute from a separate source. The plaintiff claims through one Elapatha from one Kiriga and the defendant through one Girigoris Fernando from one Ukubanda. In 1908 Elapatha (through whom the plaintiff claims) sued Girigoris Fernando (through whom the defendant claims) in D. C. Kurnegalle No. 3204 with respect to the land now in dispute, and by consent half of the land was decreed to Elapatha and half to Girigoris Fernando. After this decree Girigoris Fernando, although entitled to half only of the land, conveyed the whole to the defendant who bought for valuable consideration and without notice of the decree. The defendant registered his conveyance In these circumstances the question arises whether the present action is not *res judicata* by reason of decree in the previous action inasmuch as both plaintiff and defendant derive title through the parties to that decree. The learned District Judge has decided this question in the affirmative and the defendant now appeals.

His argument may be stated as follows. The decree in D. C. Kurnegalle No. 3204 was a judgment affecting..... land" within the meaning of section 16 of the land Registration Ordinance No. 14 of 1891 and as such is a registrabble

1. (1913) 16 N. L. R. 438

instrument. But this decree, not having been registered must be deemed void under section 17 as against the defendant's subsequent conveyance for valuable consideration. The defendant's title therefore must be considered as though the previous judgment had no existence, so that the plaintiff is precluded from claiming that the matter in dispute in this action is res *judicata* in virtue of the previous judgment.

The question raised is of far reaching importance. It has not been the practice to register decrees in land cases, and if it is held that such decrees can be re-opened in the manner in which the decree under consideration is now sought to be re-opened a vast number of titles which are now believed to be secure will be put in question and it is difficult to see where litigation would stop.

I have come to the conclusion that the appellant's argument is fallacious.

At first sight it may appear paradoxical that a judgment declaring the rights of litigants to land is not a judgment affecting land. But I am satisfied that the expression refers to an entirely different class of judgments. In construing our Registration Ordinance, it must be remembered that the phraseology of these enactments is largely borrowed from that of English Acts of Parliament and that examination of these Acts often explains what is obscure in these Ordinances. If reference be made to English Acts of Parliament dealing with similar matters, many illustrations will be found of the sense in which judgments are referred to, as affecting land. Speaking quite generally a judgment creditor in England is regarded as having an actual charge or specific incumbrance on the land of the judgment debtor. The precise nature of this right and the conditions subject to which it is enforceable are defined by a long series of statutes which afford numerous illustrations as to what is meant by judgments "affecting land"

Thus by 32 & 34 Vict-ch. 38 Sect. 1 it is enacted that no judgment shall affect any land as to a *bona fide* pur-

Mohammado Ali v. Weerasuriya

Lascelles C.J

chase for valuable consideration unless writ shall have been first issued. The same term is used in 27 & 28 Vict ch 112 Section 1. No judgment "shall affect any land" until the land has actually been delivered in execution. Similarly, by 4 & 5 Will and Mary ch. 20 Section 30 and amending statutes it is enacted that no judgment not docketed and entered in the books mentioned in the Acts shall " affect any lands or tenements."

The expression "affecting land" is used in the same sense of creating a charge or incumbrance in 112 Vict ch. 110 Section 19, in 2 Vict ch. 11 Section 5 (where the words are " bind or affect any lands" &c.) and in 3 and 4 Vict ch. 82 Section 2.

When we turn to the statutes dealing with registration we find the same expression used in the same sense under the Middlesex and Yorkshire Acts no judgment shall affect or bind any hereditaments before entry of the memorandum

The statutes Geo. II ch. 6 Section 1 though it does not refer to judgment as "affecting land" is neverthless instructive. Judgments etc: are void against subsequent purchasers for value unless registered before the memorial of conveyance under which the purchaser claims but if the judgment is registered within twenty days after the signing thereof the lands of the defendant shall be "bound thereby"

It is clear that the judgments which are dcelared to be void as against purchasers are judgments which would otherwise have "bound" the land of the defendant, in the sense of charging the land with the payment of a debt.

I think the examination of these English Statutes which are more or less *in pari materia* with our registration ordinances goes to shew that a "judgment affecting land" means a judgment which by its own operation creates some right in the land, imposes some thing in the nature of a charge or burden, and that the term is not there used with refer.nce to judgments which are merely declaratory of

eht titles or interest of the parts, which are derived, not from the judgment itself, but depend upon previously acquired rights. I am therefore of opinion that a judgment "affecting land" for the purposes of this ordinance, must be understood to be a judgment which, by its own operation invests a person with an interest in the land, such for example as a partition decree or a judgment which imposes or creates some charge interest or liability.

But however this may be I think the appellant's case fails on another point.

Section 17 has always been held to be applicable to cases where there is competition between two or more instruments of title proceeding from the same source. But the appellant seeks to use the section for an altogether different purpose. He wishes to get rid of a disability imposed upon him by the law of evidence and to be allowed to prove in this action what he would otherwise have been precluded by the law of estoppel by matter of record. Estoppel by matter of record is not enacted as part of our Evidence Ordinance, and that it is formulated in a very incomplete shape in Section 207 of the Civil Procedure Code. But the law of estoppel by matter of record is none the less a branch of the law of evidence.

Even assuming the judgment in question to be a registrable instrument, it would be straining the language of section 17 to hold that the defendant is relieved of the bar created by the judgment if unregistered. The language of the Section will not admit of such a construction. The plaintiff does not claim an adverse "interest" to the defendant in virtue of the judgment. He claims no interest at all under the judgment. He in effect says to the defendant, the matter now in question was judicially determined in an action to which your vendor was a party. I claim the benefit of the rule of law which forbids you from again putting this matter in ques-

Moha mado Ali v. Weerasuriya

Pereira, J.

tion. Section 17 does not enable the defendant to meet this objection. The defendant would have us construe the section to mean that an unregistered judgment shall not be pleaded *res judicata* as against a party claiming under a subsequent registered instrument.

But the language of the section will not bear such a construction.

For the above reasons I think that the judgment of the Court below is right and I would dismiss the appeal with costs.

Pereira J.

In this case I regret that I am obliged to differ from the rest of the Court. The subject matter of the action is a half share of a certain parcel of land. In case No. 3204 of the District Court of Kurunegalle a decree was entered up of consent of parties declaring one Elapata (the plaintiff in the case) entitled to a half share of the parcel of land referred to above, and ordering that he be " put placed and quieted in possession " thereof and similarly declaring one Grigoris (the defendant) entitled to the other half share, and ordering that he be " put placed and quieted in possession " thereof. How it was intended to execute that part of the decree which directs that each party be put, placed and quieted in possession of his half share, it is difficult to say. However, Elapata did not register the decree in his favour with the result that Girigoris sold the whole land to the defendant in the present case who admittedly was an innocent purchaser for value. The conveyance in favour of the defendant was duly registered. The plaintiff derives his title from Elapata. The question is whether in terms of section 17 of Ordinance No. 14 of 1861 the decree in favour of Elapata in case No. 3204 is not void, for lack of registration, as against the defendant. Section 16 of the Ordinance enacts that every judgment affecting any land should be registered, and section 17 provides that any judgment, unless it is registered, should be deemed void as against parties claiming an adverse interest thereto on valuable consideration by virtue of any

subsequent deed duly registered. Now it is contended that the judgment (or decree) in case No. 3204 is not a judgment affecting land and that Girigoris's conveyance in favour of the defendant is not a deed conveying an adverse interest. It is conceivable that a contrary view would tell with some hardship on those who fail to register a judgment in their favour, but at the same time it is equally conceivable that should it be held that judgment like that entered up in case No. 3204 needed no registration, the door would be opened to the perpetration of an immence amount of fraud on the public by the sale as has happened in the case, of land by parties against whom judgment have been entered, by concealing that fact to innocent purchasers. I think therefore that this is eminently a case in which we should be careful to administer the law as we find it leaving it to the legislation to take action to amend it if so advised.

The direct question for decision in the case is whether a decree which is an embodiment of an adjudication on claims made to any land by the parties to an action is not a decree affecting land. I do not think that we can derive much help from cases decided in England in construing the expression " judgments affecting land." There is certainly no case quite in point, and the expression as used in certain English statutes has reference to the peculiar effect as regards lands, of judgments of Court in England. Under the statute of Westminister [13 Edw 1st St. I. C. 18] a judgment in England, that is to say a judgment for a mere debt such as would be called a money debt in Ceylon gave the creditor a general charge on the debtor's lands. The judgments Act 1838 [1 & 2 Vict cl 110] converted this general charge into a specific liev. Then came the judgments Act 1864 [27 & 28 Vict cl 112] which enacted that no judgment should affect any land until the land had been actually delivered in execution by virtue of a writ *elegit* or other lawful authority. The use of the expression " affect any land " here cannot help us to interpriet the same expression in our Registration Ordinance because it is used with reference to a judgment

Mohammado Ali v. Weerasuriya

Pereira, J.

which *ex facie* had nothing to do with land, and the provision in effect, is that such a judgment should not be allowed to affect any land of the judgment debtor except in certain circumstances. But the judgment that we are now dealing with directly affects claims to land, and clearly in our Registration Ordinance, the expression " judgment affecting land" is used in the sense of a judgment affecting any title, right or claim to land and it is manifest that the mischief that the ordinance was intended to provide against was exactly such as has occurred in the present case. It is well illustrated by the present case.

Then can it be said that the defendant in the present case claims an interest adverse to that of the plaintiffs? It has been said that interests are not adverse unless they are derived from the same source. In the present case it so happens that the decree in case no 3204 was what might be called a consent decree. So that the right of Elapata really emanated from Girigoris as a result of the consent given by him and the deed an which the present defendant relies is also from that same source. But suppose this were a case in which the decree was pronounced by the Court not of consent but on the merits of the case, the question is what was the right really gained thereby by Elapata. He obtained no title to the land in claim because that he already had. The right gained by him was a right to prevent Grigoris from advancing a claim to the land in question. A claim by Girigoris was therefore adverse to that right and it is no more than such a claim that the present defendant now sets up on the strength of the conveyance by Girigoris.

It is said that if the words " judgment affecting land " in the Registration Ordinance are given the meaning that I have mentioned the provision would conflict with section 207 of the Civil Procedure Code- I do not think that can be so. Sect : 207 speaks of decrees of all kinds. As regards a particular class, namely decrees affecting land, the Registration Ordinance provides that unless they are registered they should be void as against subsequent adverse claims.

There is no conflict here with section 207 of the Civil Procedure Code: that section enacts that all decrees shall be final between the parties. The Registration Ordinance provides that a decree affecting land should be registered and that unless it is registered it should be void as against an innocent purchaser for value from one of the parties on a registered conveyance. I fail to see the conflict.

For these reasons I think that the appellant is entitled to succeed and I would allow the appeal with costs.

Ennis J.

In this case, by a decree dated the 25th August 1908 two persons Charles Elapata and Girigoris Fernando were declared each entitled to an undivided half share of certain lands.

The decree was not registered. The plaintiff is by series of deaths the successor in title to Charles Elapata.

The defendant is a purchaser from Girigoris Fernando who sold the entire land without disclosing the decree of 1908. Two preliminary issues were tried first :—

(1) Is the decree *res judicata* and is the defendant estopped from denying the plaintiff's title.

(2) Is it void as against defendant's title by reason of its not having been registered. The learned District Judge found in favour of the plaintiff. It was argued in appeal that the decree was an order of the Court affecting land and as such should have been registered as required by section 16 of the Land Registration Ordinance No. 14 of 1891. That not having been registered it was void under section 17 of that Ordinance against one who claimed an adverse interest in the land by virtue of a subsequent registered deed. It was conceded that the Land Registration Ordinance could not operate to create title and that the defendant could not obtain a greater title than his vendor had, but it was urged that the decree being void the parties were free to litigate over again the matters settled by the decree.

Mohamado Ali v. Weerasuriya

Ennis J.

On the first point, I am not convinced that a decree merely declaring title to land is an order of the Court "affecting" land as contemplated by the Land Registration Ordinance. It will be observed that the other documents the registration of which is compulsory under section 16 are all documents affecting the devolution of land by transfer, transmission, or charge. They all affect the title to land, but how can a decree which merely declares title affect the title. The title existed presumably before the action in which the decree was had and the decree declaring title is the expression of the finding of the Court as to the true state of the existing title. It must be presumed to be a right finding and not one which affects the title but one which merely settles it.

Assuming however for argument that a decree declaring title to land is a document which must be registered under section 16 what would be the affect of registration? Section 17 provides that an unregistered instrument is to be deemed void as against persons claiming an adverse interest there to on valuable consideration by virtue of a subsequent register ed deed but there is a proviso that this shall not be deemed to give any greater effect to the registered instrument than the priority conferred by the section. This section in my opinion, means that the unregistered instrument is to be deemed void only for the purpose of establishing priority in the registered deed and for no other purpose. In this case no question of priority arises, because, in my opinion the principle of priority applies only between parties deriving title from the same source, for the land Registration Ordinance does not establish rights to land by registration, i affects only the devolution of rights and leaves an unregistered instrument unaffected for all purposes other than the establishment of a prior claim to one and the same thing; the effect of an unregistered instrument as evidence to establish an independent original right is not in my opinion, altered by the Ordinance.

A somewhat similar conclusion was arrived at in *Bernard v. Fernando* (16 N. L. R. 438) where two persons owned an undivided one fifth of a land but were subsequently by a partition decree allotted two separate lots after the passing of the decree, but before it was registered they sold an undivided one fifth of the entire land. In that case it was remarked " It cannot be supported that the Registration Ordinance intended ..... to defeat the whole object of legislation with regard to partitioning of lands..... The truth, I think, is that the expression adverse interest refers only to cases where two persons claim interests traceable to the same origin. " The partition decree in that case was held good to establish title to the two separate lots, so in this case, in my opinion, the decree of the 25th August 1908 is good to bar claims between the same parties and their successors in title at variance with the decree. In my opinion sections 16 and 17 of the Registration Ordinance were never intended to affect title in any other way than by giving priority in cases of alienation and incumbrances, matters which affects property in interests derivable from the same source but do not affect the validity of separate titles. So far as the Registration Ordinances do not establish title by registration and merely deal with the registration of documents of title the effect of the Ordinances on the validity of title by priority of registration must necessarily be limited to devolution of property from the same source by conflicting deeds.

In my opinion the defendant is estopped by the decree of the 25th August 1908 and I would dismiss the appeal.

Appeal dismissed.

Proctors for appellant.—*Markus & Markus.*

Proctor for respondent.—*F Daniels.*

PONNAN *v.* UKKUBANDA

7199 P. C. Nuwara Eliya.

Present; **Wood Renton A. C. J.**

11th July 1913.

Dishonestly receiving stolen property—misjoinder of charges—illegality— § 178 Cr. P. Code No. 15 of 1898.

The appellant was charged with two other men with having dishonestly received stolen property. The evidence showed that the receipt of the stolen property by the appellant was at a point of time different from its alleged receipt by his co-accused.

Held, that the joinder of the charges against the three accused and their simultaneous trial are in contravention of § 178 of the Criminal Procedure Code and are not saved by the provisions of § 184.

The provisions of the Criminal Procedure Code which § 178 embodies are designed to secure to an accused person substantial rights which cannot be denied without injustice. They are intended to enable him to call if he is so advised persons who could otherwise be his co-accused as his own witnesses. They are further intended to restrict the trial of a criminal charge to a clear issue and to see that nothing is allowed to enter into the case which can interfere with the definite proof of a distinct offence which it is the object of all Criminal Procedure to obtain.

H. A. Jayewardene for appellant:—The whole proceedings amount to an illegality. There has been a misjoinder of charges against the accused; See § 178 Cr. Pr. Code. The evidence shows that the receipt of the stolen property by the appellant was at a time different from the receipt of it by the other accused therefore it cannot be said that the offences were committed in the course of the same transaction. § 184 would not therefore apply, see *Subramania Ayyar v King Emperor*. [1]

c. a. v.

Wood Renton. A. C. J.—The appellant was charged with two other men in the Police Court of Nuwara Eliya with having dishonestly received certain stolen property. The learned Police Magistrate convicted him under section 394 of the Penal Code, and sentenced him to six month's

1. (1901) I. L. R. Mad. 61.

rigorous imprisonment, and, in addition to pay a fine of Rs. 50/-, or in default, to under go further imprisonment for a period of six months. The appeal is not pressed on the merits. The only point argued in support of it was that the proceedings involved a violation of the provisions of section 178 of the Criminal Procedure Code by reason of the fact that the appellant was tried with other persons for different offences which, though they are of the same character, did not arise out of the same transaction. The evidence clearly shows that the receipt of the stolen property by the appellant was at a point of time different from its alleged receipt by his co- accused, and that these two acts can in no respect be regarded as forming part of one and the same transaction. It follows, therefore, that the joinder of the charges against the three accused, and their simultaneouas trial are in contravention of section 178 of the Criminal Proceedure Code and are not saved by the provisions of section 184. It was held by the Privy Council in the well-known case of *Subramania Ayyar v. King Emperor* [1] that a disregard of the provisions of section 233 of the Indian Code of Criminal Procedure, which is practically identical with section 178 of our own Code, was not a mere irregularity which could be over looked if it had been productive of no substansial injustice. In delivering the judgment of the Privy Council, fhe Lord Chancellor, Lord Halsbury, made use of the following language,—"The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the Criminal law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission, or an irregularity. "These words are directly applicable to the present case. I desire to point out that the provisions of the Code of Criminal Procedure, which section 178 embodies are designed to secure to

1. (1911) 1. L. R. Mad. 61.

Ponnan v. Ukkubanda

Wood Renton A. C. J.

an accused person substantial rights which cannot be denied without injustice. They are intended to enable him to call if he is so advised. persons who could otherwise be his co-accused, as his own witnessess. They are further intended and here I will again quote from the judgment of Lord Halsbury in *Subrahmania Ayyar v. King Emperor* to restrict the trial of a criminal charge to a clear issue, and to see that nothing is allowed to enter into the case which can interfere with "the definite proof of a distinct offence which it is the object of all criminal procedure to obtain." It is obvious without expressing any opinion on the facts adduced in evidence at the trial of the appellant, that he is not entitled to a complete acquittal. I set aside the conviction and the sentence, and send the case back for a new trial which as the Police Magistrate has inevitably and naturally formed his own opinion in regard to the evidence, must take place before another judge.

Set aside and sent back.

Proctor for appellant—*Timothy de Silva.*

DINGIRIAMMA *v.* APPUHAMY.

No. 21319 D. C. Kandy.

Present : **Lascelles C. J. & De Sampayo J.**

26th January 1914.

Action for partition—undivided shares—cause of action—exhaustion of all the relief with respect to the cause of action—§ 34 Civil Procedure Code.

When by a deed which recited the entire boundaries of a land the plaintiff was gifted " a $^{2}/_{3}$ share towards the southern side from and out of the allotment of land within these boundaries."

Held, that the deed conveyed an undivided interest in the land and that the plaintiff could bring a partition action with respect to the land.

§ 34 of the Civil Procedure Code is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action even though they arise from the same transaction.

A. St. V. Jayawardene for defendant appellant.

A. Drieberg for plaintiff respondent

c. a. v.

Lascelles C. J.

This is an appeal from a judgment of the District Court of Kandy declaring the plaintiffs and added plaintiffs entitled to a one-third share in an allotment of land called Jamanarankotuwe Bogahamulahena and ejecting the defendant therefrom.

The learned District Judge has exhaustively gone into the complicated pedigrees of the parties and into the circumstances on which the claims of the parties are founded. I have no doubt but that he has arrived at a correct conclusion with regard to the rights of the parties. But the appellant has put forward certain technical and in some cases ultra-technical considerations which must be noticed.

In the first place it is said that the 2nd and 3rd plaintiffs are estopped by the decision in the Village Tribunal case No. 3542 Matale South. But, apart from any objection on the ground that estoppel was not specifically pleaded, this is clearly not the case. The substantial matter in issue in those proceedings was the right to a 1/3 share of the land in dispute. It is clear from the Assistant Government Agent's judgment that the whole land was worth at least Rs. 200.

The claim to 1/3 was thus beyond the jurisdiction of the Village Tribunal unless it can be shewn that the parties gave their consent in writing in the prescribed form in accordance with section 28 (2) of the Village Communities Ordinance 1889. This has not been done. The decision of the Village Tribunal, on the question of title was thus outside the jurisdiction of that tribunal and cannot therefore amount to *res-adjudicata*.

Dingiriamma v Appuhamy

Sampayo J.

Then it is said that in District Court Kandy No. 20660 the plaintiff (the 2nd plaintiff in these proceedings), in as much as he was aware of the extent of the defendant's claim should not have limited his claim to 2/3, and that he is precluded by the decree in those proceedings from now claiming the other 1/3. But the remedy must depend upon the wrong.

The complaint was that the defendant in that action had forcibly and unlawfully entered into possession of 2/3 of the land. The remedy claimed, namely a declaration of title to the southern 2/3 shares was appropriate to the injury complained of. There is no analogy between this case and the illustration to Section 34 of the Civil Procedure Code of a claim for rent for one year only when the rent for two years is due.

Then it is said that the remedy sought for by the plaintiffs is misconceived and that they have not adopted the right form of action. The authority cited for this contention is the judgment of *Pereira J.* in 135 D. C. (Inty) Puttalam No. 2366. But the facts of that case present no analogy to the case under consideration. In the former case there had been a partition deed by which the 1st and 2nd defendants stated that they had divided and accepted as their share two third portions of the land towards the northern side containing 128 acres, and the plaintiff declared that he had divided and accepted for his third share a portion of 64 acres on the south. It was there held that a partition action was inappropriate and that if it was found impossible to demarcate the boundary between the shares, it was open to either party to ask the Court to do so. There is, I think, no foundation for the suggestion that a similar course ought or could be taken in the present case.

I would dismiss the appeal with costs.

De Sampayo J.

I agree, and wish only to touch upon two of the

points urged on behalf of the defendant-appellant. The deed of gift by Tikiri Menika gave the boundaries of the entire land and conveyed to the 2nd plaintiff "a 2/3 share towards the Southern side from and out of the allotment of land within those boundaries". It is argued that under the deed the 2nd plaintiff became entitled to a divided portion of the land and that this action for the partition of the entire land cannot be maintained. This form of description of the interest intended to be conveyed is not uncommon in deeds in Ceylon though it is inartistic as a matter of conveyancing but so far as I am aware such deeds have not been construed to convey other than an undivided share in the land. What the parties should be taken to mean is that the grantee should possess his interest in a particular side of the land. Of course, if a portion is thereafter divided off and is separately possessed, the Court may, in certain circumstances, regard the entire land as no longer held in common within the meaning of the Partition Ordinance and so disallow proceedings under the Ordinance. But I do not think that such a deed without more should necessarily be taken as of itself conveying a divided portion of land. The deed dealt with in the Puttalam case cited as an authority was a partition deed and provided for the divided portion allotted to the several parties being properly demarcated by means of a survey, and, if I may say so, this Court rightly held that, in the absence of a survey binding upon the parties, the proper course was not to bring an action for partition of the land afresh but to apply to Court for the definition of boundaries. The circumstances of that case were therefore entirely different from those with which we have to deal here.

It was further contended that the 2nd plaintiff was concluded by the claim made in the action No. 20660 of the District Court of Kandy. The 2nd plaintiff, as al-

Dingiriamma v. Appuhamy

Sampayo J.

ready stated, is entitled to a 2/3 share by virtue of the deed of gift from Tikiri Menika, She is also entitled (by inheritance from Tikiri Menika) to a certain interest out of the remaining 1/3 share of the land. The Kandy case was brought by her only in respect of the 2/3 share on an allegation that the defendant, who was also defendant in that action, had since a certain date been in the unlawful possession of that 2/3 share. Now the argument is that she should have included in that claim her interest in the other 1/3 share also, as at that time the defendant knew that the defendant was claiming that 1/3 share, and that in view of the provisions of §. 34 of the Civil Procedure Code she is estopped now from setting up any title to any interest in that share. I do not think this argument is well founded. The 2nd plaintiff's cause of action in the Kandy case was the ouster in respect of her 2/3 share of the land. There may have been disputes as to the title to the other 1/3 share which she and several others owned on a different title, but such disputes would constitute a distinct and separate cause of action. As was pointed out by the Privy Council in *Palaniappa Chetty v. Saminathan Chetty* [1] decided on 16th December, 1913, section 34 of our Code "is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action different causes of action, even though they arise from the same transactions."

Appeal dismissed.

Proctor for appellant—*Beven & Beven*

Proctor for respondent—*A. H. Van Langenberg*

---

(1) 17 N. L. R. 56.

SEGU MOHAMMADU v. SULTAN MEYDEEN *et al.*

C. R. Jaffna No. 11427.

Present: **De Sampayo, J.**

18th February, 1916.

Trustee—right to lease—validity of lease after death.

A trustee in Ceylon has the right in the absence of anything to the contrary in the instrument of trust to grant a lease for a reasonable term. Such a lease would be valid even after the death of the trustee.

The position of a trustee is different from that of a fiduciary. A trustee has no personal interest in the trust property, while a fiduciary possesses the property for his own benefit, so that the law which prevents a fiduciary from leasing the property for a longer period than his own life or other limited estate does not apply to a trustee.

James Joseph (with him *Arulanandan*)—

The D. J. is in error in framing only one issue in the case. The will creates what is known to Mohammadan Law as a *Wakf* and Nainapillai was the *Muwtalli* or Trustee. A lease given by a Muwtalli is not cancelled by his death. *Ameer Ali's Mohammadan Law* Vol *I 380*; Under the English Law a trustee's right to lease trust property is recognised. *Lewin on trusts* p *727*.

Counsel referred also to *Ram. 72-76, 185.*

A. St. V. Jayewardene for the Respondents.—

The point is concluded by authority. *Ram. 1877 p. 325.* A trustee is in the same position as a fiduciary under a fidei commissum and cannot bind the property for a longer period than his interest in the property.

Arulanandan in reply :—

Ram. 1877 p 325 was considered in the case of *Giriagama v. Henaya.*[1] A trustee is in a different position to that of a fiduciary.

c. a. v.

de Sampayo, J. One Katuru Meyadeen by his will dated 4th June 1874 set apart a certain land for the use of

(1) 2 C. L. R. 42.

Segu Mohammado v. Sultan Mohideen de Sampayo, J.

a mosque and directed that the income should be applied to defraying the expense of lighting a lamp daily at the mosque, repairing and maintaining the mosque itself, and holding the annual '*Kandiri*' or almsgiving. He appointed as trustee " to look after and manage the said land" his elder brother Muhamadu Sultan and after him his younger brother Usan Nayinapulle and after them the eldest of their male descendants. Usan Nayinapulle in due course became trustee under the provisions of the will. In November 1912, he granted a lease of the land to the defendants for a term of 8 years and died a few months before this action. The plaintiff, who is the eldest male descendant of the testator's brothers and has succeeded them as trustee in terms of the will, sued the defendants in ejectment. The issue stated at the trial was whether Usan Nayinapulle had power to grant a lease for a longer period than his own tenure of office as trustee. The Commissioner decided this issue in the negative and gave judgment for the plaintiff.

The position of a trustee is different from that of a fiduciary. A trustee has no personal interest in the trust property, while a fiduciary possesses the property for his own benefit, so that the law which prevents a fiduciary, from leaving the property for a longer period than his own life or other limited estate does not apply to a trustee. In the due management of the property and in the interest of the trust I think that a trustee in Ceylon has the right, in the absence of anything to the contrary in the instrument of trust, to grant a lease for a reasonable term. Under the English law a trustee may, even without an express power, let from year to year, but the decisions are conflicting as to whether he can let for a longer term without a power. Of course it is in the power of the Court to upset a lease which is improvident and prejudicial to the objects of the trust. The principle to be drawn from the authorities

appears to be that a trustee may let for a longer term than ne year subject to the condition which Lord Eldon stated in *Attorney-General v. Owen*, [1] namely that it should be shown that the lease was reasonable and granted in the fair management of the estate. This is in accordance with what has been laid down in the few cases which have arisen in Ceylon. In *Loku Banda* v. *Giriagama* [2] which related to the right of a Basnaike Nilame, the Court, after referring to the practice in connection with Dewalas, observed : "Every case will greatly depend on its own circumstances and the urgency of the need for a departure from ordinary usage, the guiding principle being that a Basnaike Nilame should execute his trust, consistingly with the interest of the Dewale, as one terminating with himself, hampering his successor as little as possible", This principle was reaffirmed in *Dewa Nilame v. Henaya.*[2] This case I think may be decided on the same basis.

The period of 8 years in the case of agricultural land is not *prima facie* excessive. Nor is the rent secured shown to be inadequate. Indeed, the plaintiff has not based his action on any allegation that the lease was in itself undesirable or that Usan Naynapulle was personally benefited thereby. The sole ground of action it that the lease became on the death of Usan Naynapulle *ipso facto* inoperative, and the issue was stated and decided as a pure matter of law. In my opiuton the plaintiff was not entitled to succeed on that issue.

The judgment appealed from is set aside and the case is sent back for the trial of the other issues arising in the case. The plaintiff will pay the costs of this appeal

set aside.

Proctor for appellant—*K. Somasunderam*

Proctor for respondents—*K. Tambyah.*

1. 10. Vic. 560.

2. (1875) Ram 1872-1876, 185 3 (1891) 2 C. L. R. 42.

FULL BENCH

BANDARA vs. SINNO BABA.

No 6245 D. C. Matara.

Present: **Wood Renton**, **C. J.**, **Shaw**, and **de Sampayo, J. J.**

28th January 1916.

Partition Ordinance No 10 of 1863—order for sale—conclusive decree within meaning of Section 9—Decree for sale under Section 4.

Per Curiam : The conclusive decree within the meaning of section 9 of the Partition Ordinance 1863 in the case where the court has directed the sale of the property is the decree under section 4 by which the title of the parties is ascertained and the property is ordered to be sold.

Per **Wood Renton C.J** : I may say in passing that the right of intervention under the Partition Ordinance so far from being extended should be peremptorily barred in the courts of first instance on the expiry of a prescribed period after the interlocutory decree and could be so barred with safety provided always that due provision was made for securing greater publicity to partition proceedings.

E. W. Jayawardena for plaintiff-appellant.

Keuneman for intervenients-respondents.

Wood Renton, C. J. This case has been referred by my brothers Shaw and de Sampayo to a bench of three Judges for the determination of the question, whether the decree for sale, to which § 9 of the partition Ordinance, 1863 [1], assigns a conclusive effect, is the original order for sale or the certificate of Court mentioned in Section 8. There have been two conflicting currents of authority on the point. The view adopted impliedly by Clarence, A. C. J. in *Don Mathes Appuhamy* v. *Wijesiriwardena* [2] and expressly by Wendt and de Sampayo, J. J., in 50 D. C. F. Colombo, No. 11747 [3] and by Sir Charles Layard, C. J.,

(1). No. 10 of 1863. (2). (1883) 5. S. C. C. 181

(3) S. C. M. 4th August, 1904.

and Moncreiff, J., in *Louis Appuhamy* v. *Punchy Baba* [1] was that the certificate of sale is merely evidence of the purchaser's title without any deed or transfer from the former owner, and is not the decree for sale to which Section 8 refers. On the other land Lawrie, A. C. J., in *450 C. R. Matara, No. 622* [2] held that the decree for sale which is to be final and conclusive is the certificate under the hand of the Judge that the property has been sold under the order of the Court. The same view was adopted *obiter* by Sir Joseph Hutchinson, C. J., and Middleton, J., in *Cathirinahamy* v. *Babahamy* [3] the decision that finally settled the controversy as to whether the decree for partition mentioned in Section 9 of the partition Ordinance, 1863 was the decree referred to in Section 4, or the final judgment spoken of in Section 6, of that Ordinance. The view taken by the Judges who decided the case of *Cathirinahamy* v. *Babahamy* [3] seems to have been that, if the decree under Section 9 of the Partition Ordinance, 1863, is the final judgment in the partition action. it must follow as a necessary inference that the decree for sale under the same section is the last step in the proceedings, namely, the issue of the certificate of the Court. The fallacy, as I venture to think it of this reasoning had been pointed out by anticipation by Sir Charles Layard, C. J., in *Louis Appuhamy* v. *Punchi Baba* [1] to which the attention of the Court does not seem to have been called. *Cathirinahamy* v. *Babahamy*[3] was treated as an authority binding upon them by Benches of two Judges in *Bandaranaike* v. *Bandaranaike*[4] and *Perera* v. *Alvis* [5].

Now, however, that the question has been formally raised before a Bench of three Judges I have no hesitation in holding that the older authorities ought to be followed.

(1) (1904) 10 N. L. R. 196. (2) (1899) Koch 13.
(3) (1908) 11. N. L. R. 20. 4. (1908) 11 N. L. R. 185.
5. (1913) 17 N. L. R. 135.

Bandara v. Sinno Baba Shaw, J.

We are not concerned here with the policy of the law, although I may say in passing that I think that the right of intervention under the Partition Ordinance, 1863, so far from being extended should be peremptorily barred in Courts of first instance on the expiry of a prescribed period after the interlocutory decree and could be so barred with safety provided always that due provision was made for securing greater publicity to partition proceedings. All that we have to do at present, however, is to construe the ordinance itself. I do not see how the certificate of title can be regarded as the decree for sale to which Section 9 refers. That it is not so is clear from the language of Section 8 which speaks of the certificate under the hand of the Judge that the property has been sold 'under the order' of the Court. This enactment clearly draws a distinction between the certificate of title and the decree or order for sale.

I would answer the question referred to us in the same sense as my brothers, and I concur with the order which they have proposed.

Shaw J.

This case raises the question what is the conclusive decree within the meaning of section 9 of the Partition Ordinance 1863 in the case where the Court has directed the sale of the property.

In *Louis Appuhamy* v. *Punchi Baba* [1] following *D. C. Colombo* 11747 [2] it was held that the decree for sale is the conclusive decree, and opinion to the same effect was expressed in *Don Mathes Appuhamy* v. *Don James de Silva Wijesiriwardena* [3].

In the more recent cases *450 C. R. Matara 622* [4] *Catherinahamy* v. *Babahamy* [5] *Bandaranaike* v. *Bandaranaike.* [6] and *Perera* v. *Alwis* [7] the Court appears to

(1) 10 N. L. R. 196, (2) S. C. M. August 4th 1904.
(3) 5 S. C. C. 181. (4) Koch's R. 13.
(5) 11. N. L. R. 20. 6. 11 N L R 185 (7) 17. N. L. R. 135.

have thought that the conclusive decree was not the order for sale but the confirmation of the sale.

In my opinion the earlier decisions are correct and the order for sale is the conclusive decree. It is impossible without doing violence to the provisions of the Ordinance to read the words 'decree for sale' used in section 9 to mean the confirmation of the sale. The order for sale is the order finally settling the rights of the parties to the suit and the confirmation of the sale is a purely formal act affecting the purchaser only, analagous to obtaining a Fiscal's transfer in the case of an ordinary execution, and affecting the purchaser's title only.

I would allow the appeal with costs.

de Sampayo, J.

I am of the same opinion. With regard to my judgment in *Perera* v. *Alvis* [1] I need only say that, as I there stated, I considered myself bound by the decision *Catherinahamy* v. *Babahamy* [2]. My own view as to what is the final and conclusive decree in the event of a sale under the Partition Ordinance was indicated in the earlier case *Abdul Ally* v. *Kelaart* [3] which was approved of in *Louis Appuhamy* v. *Punchi Baba* [4]. Now that the whole question has come before us I have no hesitation in giving effect to that view and in agreeing witn the rest of the Court that, on the true coustruction of the Ordinance, the decree for sale to which a conclusive effect is given by section 9, is the decree under section 4. by which the title of the parties is ascertained and the property is ordered to be sold.

This being so, the respondents to this appeal, who intervened after the order for sale had been made and the sale had been carried out, and claimed a right of way over the land, were too late and are concluded by the previous decree. I would set aside so much of the order of the

(1) 17 N. L. R. 135.
(2) 11 N. L. R. 20.
(3) (1904) 1. Bala: 40.
(4) 10 N. L. R. 196.

District Judge under appeal as allows the path claimed by the respondents and awards them costs. The respondents should I think pay to the Plaintiff the costs of the intervention in the Court below and of this appeal.

Proctor for appellant-*Wilfred Gunesekere.*

Proctor for respondent-*D. S. Weerasinghe.*

BURAH *v.* ALIM SA.

P. C. Matale 4526.

Present: **Wood Renton, C. J. & de Sampayo, J.**

25th January, 1916.

Cocoa Thefts Prevention Ordinance, No. 8 of 1904, Sect. 4, 5, 8, 11, 12, 16—Purchase by agent of licensed dealer—special permit under Sect. 5 (5).

Where the accused, as agent of a licensed dealer in cocoa made an offer on behalf of his principal which the seller accepted, and where the account was subsequently rendered to the principal by the seller and was settled,

Held, that the transaction amounted to a 'purchase' of cocoa by an unlicensed person within the meaning of the Ordinance and the accused was rightly convicted.

A licensed person cannot legally effect purchases of cocoa by an unlicensed agent.

One licensed dealer cannot purchase cocoa at the premises of another without the special permit provided for in section 5 (5).

631 P. C. Matale 4582, (S. C. M. 26th October 1915) dissented from; P. C. Matale 4708, (S. C. M. 21 December 1915) followed.

Hoyle v. *Hitchman*, (1879) 4 Q. B. D. 283 referred to,

Bawa, K. C. and Drieberg for accused appellant,

Garvin, S. G. and Fernando, C. C. for the Crown.

Wood Renton, C. J.

This appeal came before me in the first instance alone, and, as the point involved in it is one of considerable difficulty and importance, I referred it to a Bench of two

Judges. The appellant was charged with, and has been convicted of, an offence under section 4 of the Cacao Thefts Prevention Ordinance 1904 [1], which prohibits the purchase of cocoa by unlicensed persons. The evidence shows that, acting as the agent of Mr. Victoria, a licensed dealer in cocoa in Matale, the appellant made an offer to Mr. Miller, the Superintendent of Wiltshire Estate, which the latter accepted, to purchase a certain quantity of cocoa. Mr. Miller was aware that this purchase was being effected on Mr. Victoria's behalf. The account for the cocoa was rendered to Mr. Victoria and was paid for by him. Neither Mr. Miller nor the appellant has any license to deal in cocoa. The question that arises for decision is whether a transaction, such as I have described, is a " purchase " of cocoa by an unlicensed person within the meaning of the Ordinance of 1904 ; or, in other words, whether a licensed person can legally effect purchases of cocoa by an unlicensed agent. That question has to be answered with reference to, the provisions of the enactment as a whole. The appellant's counsel referred us to a series of decisions under the English Licensing Acts, dealing with the doctrine of agency in its application to the sale of intoxicating liquor, and counsel for the Crown relied upon a body of similar authorities under the English Sale of Food and Drugs Act 1875, and Pharmacy acts. The cases under these enactments, however, assists us for the most part only by their clear enunciation of the principle that for the purpose of arriving at a solution of such a problem as we have here to deal with, each enactment has to be interpreted in the light of its own provisions.

After careful consideration, I have come to the conclusion that the appellant has been rightly convicted under section 4 of the Cocoa Thefts Prevention Ordinance, 1904 and that under that Ordinance a licensed dealer in

(1) No. 8 of 1904.

Burah v. Alim Sa
Wood Renton, C.J. and de Sampayo, J.

cocoa is not at liberty to effect his purchases through unlicensed agents. On this point I am unable to agree with the decision of Ennis J. in *631. P.* C. Matale No. 4582[1] It is no doubt true that as a matter of contract the purchase of cocoa here in question was made not by the appellant but by Mr. Victoria but in another case [2] I have ventured to express the opinion that the term "purchase," in section 4 of the Ordinance of 1904 should be interpreted in its popular sense without reference to the rules laid down by the sale of goods Ordinance, 1896 [3] in order to ascertain the civil rights and liabilities of parties to an ordinary contract of sale, and that, where there is a *consensus ad idem* in regard to the *res* and the *merx*, there is a purchase within the meaning of that section. Applying the principle of that decision to the present case, I think that there may be for the purposes of the Cocoa Thefts Prevention Ordinance 1904, a 'purchase' by an agent even although the real purchaser in the eye of the civil law is his principal. I may refer in this connection to the case of *Hoyle* v. *Hitchman* [4] in which it was held that where an article of food, which was not of the nature, substance and quality of the article demanded, was sold to an inspector of nuisances, who was merely an employee of a local authority and who bought the article with money belonging to the local authority by which he was employed, there was a sale "to the prejudice of the purchaser" within the meaning of the sale of food and Drugs Act, 1875. [5] The objects of the Ordinance of 1904 was to prevent these petty thefts of cocoa which in their cumulative effect are produc-

(1) S. C. M. 26th October, 1915.

(2) *P.* C. *Matale No. 4708.* S. C. M. 21st December, 1915.

(3) No. 11 of 1896.

(4) (1879) 4. Q. B. D. 233.

(5) 38 and 39 Vict. C. 63. S. 6.

tive of so much mischief in this country. The Ordinance was made applicable in the first instance not to the colony as a whole but to those districts villages or parts of the Island only in which it was proclaimed and its provisions have in fact been applied in a careful and tentative manner. The legislature has placed no restrictions on the sale of cacao by licensed dealers to unlicensed purchasers. But the Ordinance is clearly based on the assumption that the purchase of cacao by licensed dealers would ordinarily be effected at their licensed premises. It is only where a licensed dealer has obtained under section 5. (5) of the Ordinance a special license on that behalf, which the Government Agent has a discretion to grant or to refuse, that he is entitled to purchase cacao at any place other than his own licensed premises. It is unnecessary for the purposes of this case to decide the point, but as at present advised I am nof prepared to accept the view suggested in *631 P. C. Matale No. 4562*[1] that the omission of the word 'his' in section 1. sub section 1. (a) of the Ordinance in the clause 'other than licensed premises' enables one licensed dealer to purchase cocoa at the premises of another without the special permit provided for in section 5. (5). I am inclined to think that to interpret the law in that sense would to a great extent stultify the provisions of sections 11 and 16 as to the inspection of licensed premises. The prohibition in section 4. of the purchase of cocoa by any unlicensed person is as wide and as peremptory as it could well be made. Section 8 and 12 make special provision for the case of partners, enabling them to deal in cocoa under a single license but rendering each member of the firm liable for the acts or omissions of his co-partners, unless he is able to supply affirmative proof of his innocence. I cannot believe that an enactment of

(1) S. C. M. 26th Oct. 1915.

Burah v. Alim Sa
Wood Reetoo, C. J. and de Sampayo, J.

this kind would have found its place in the Ordinance if the intention of the legislature had been to leave every lic nsed dealer free to employ as many agents as he chose, and to make the liability of those agents for their conduct dependent only on th› Ordinary Civil law. Moreover, Section 9 sub-Section 1. (b) presents, in my opinion, an insuperable obstacle in the way of the success of this appeal. It provides that.

"It sh ll be unlawful for any license l dealer to purchase or to take delivery of cocoa from any person who is not pers nally known to him, or from any person whom be knows or has reas nable grounds for be'ieving is under the age of twelve years, or from any estate labourer"

This enactment clearly contemplates the personal purc'ase of cocoa by licensed dealer. It is absurd to suppose that the Legislature could have intended to authorise such a dealer to engage the services of as many agents as he desired and at the same time to impose upon this facility a restriction which w ›uld render it futile, namely, that each of these agents should be in a position to say whether every would be vendo · was or was not personally known to his employer.

I am not greatly impressed with the argument, which was urged upon us in appea', that if we interpret Section 4 of the Cacao Thefts Prevention Ordinance, 1904 in the sense above indicated, a licensed d aler will be unable not only to effect purchas s, which he himself has directly made, through a servant, but even to employ his servant for subsidiary and wholly innocent purposes, such as the entry of the delivery of cocoa at his licensed premises or its removal there from. The question in each case will have to be determined whether there has been a 'purchase' by the agent in the sense which I have endeavoured to explain above, and there is nothing in this decision that can prevent the employment of the servants of the licensed dealer in any

form of service which the Legislature has not either expressly or by necessary implication prohibited. I am glad to be able to arrive at this solution of the difficulty before us, because I feel that to interpret the Cacao Thefts Prevention Ordinance in any other sense would be to reduce its provisions to a nullity. I would affirm the conviction, but as the case is practically a test one, and as there is no suggestion that Mr. Victoria acted in this matter otherwise than in good faith, I would reduce the sentence to a fine of Rs. 20/-.

Proctor for appellant—C. *Ariyanayagam.*

De ZYLVA *v.* WILLIAM SINGHO.

No. 5484 P. C. Gampola

Present : **Pereira & Ennis, J. J.**

5th October 1914.

Excise Ordinance No. 8 of 1912—Excise Officer—Power of search without a search warrant—recording grounds of belief under Section 36 of Excise Ordinance.

In every case of a search by an Excise Officer under Section 36 of the Excise Ordinance without a search warrant it must be affirmatively established by him in evidence that before making the search he made the record required by that section.

It is that record that vests in an Excise Officer the authority to search

In a case of obstructing a public servant in the execution of his duty it is essential that it should be proved beyond doubt that the public servant had proper legal authority to do the act in the doing of which he was obstructed.

F. J. de Saram for appellant.—Under section 36 of the Excise Ordinance the Excise Officer should have recorded the grounds of his belief with regard to the commission of an offence under section 43 or section 44 before entering upon the search. There is no proof here that such record

has been made. He had no authority to search without previously making that record *Ashan UllahKhan Bahadur v. Trilochan Bagche* [1]. *Queen Empress v. Kallian* [2]. It is the record that invests him with authority to search without a search warrant. Under section 183 of the Penal Code it should be strictly proved that the public servant had proper legal authority to do the act in the doing of which he was obstructed *Deen Assen v Silva.* [3]

Obeyesekere C. C. for respondent.—It must be presumed that all official acts have been done properly. Section 114 of the evidence act applies. [Perera J. section 114 says "may presume." The mere fact that the complainant was an Excise Officer does not vest him with the power to make search; something more must be done—a memorandum under section 36.] In the case of a Police Officer there may be a presumption. It would appear that this presumption arises in favour of all official acts. *Gvnesekere v. Teberis* ; *The Municipality v. Sholapur Spinning and Weaving Company.*[5]

Pereira, J. In this case the 1st accused has been convicted under Section 183 of the Penal Code of voluntarily obstructing a public officer, to wit Excise Inspector de Zilva in the discharge of his public functions and 2nd accused, under the same section, with voluntarily obstructing Police constable Ekanaike while acting under the lawful orders of the Excise Inspector de Zilva in the discharge of his public functions. It appears that the Excise Inspector received information that arrack was being illicitly sold in the house of the 1st accused, and therefore "he made a raid," as he says, on that house with the assistance of police constable Ekanaike and others. He seized the 1st accused while sel-

1. (1886) 8 Cal. 1197 2. (1896) 19 All. 310
3. (1887) 6 Tam 61 4. (1907) 10 N. L. R. 18
5. (1895) 20 Bom 732

ling arrack, and then made up his mind to search the house. His own words are—"I seized the arrack as it was being sold, and then I said I must search the house." In the course of the search, or sometime after, he and the Police Constable were beaten by the accused, and hence this charge. Now in a case of obstructing a public servant in the execution of his duty, it is essential that it should be proved beyond doubt that the public servant had proper legal authority to do the act in the doing of which he was obstructed. Assuming for the sake of argument that the Excise Inspector had full authority to search the 1st accused's house, can it be said that Police Constable Ekanaike was acting under his lawful order? There is nothing to shew that the Excise Inspector had any right to give any orders to the Police Constable to search any house at all. The fact however, that the Excise Inspector had no such right did not imply that he could not legally enlist the services of the Police Constable to search the house, provided of course that he himself had proper authority to search. But then the obstruction of the Police Constable would be tantamount to obstruction of the Excise Inspector himself, and the conviction of the 2nd accused with having obstructed the Police Constable when acting under the lawful orders of the Excise Inspector cannot be supported.

It has not been contested that an Excise Inspector is a public servant and that voluntarily obstructing him in the discharge of his public functions would be an offence under section 183 of the Penal Code. The main question in the case is whether the Excise Inspector had lawful authority to search the 1st accused's house. Power of search is given to him under Section 36 of the Excise Ordinance No. 8 of 1912. What that section enacts [omitting immaterial portions] is that when an Excise Officer has reason to believe that an offence under Section 43 or 44 of the Ordinance has been, is being or is likely to be committed; and that a search

warrant cannot be obtained without affording the offender an opportunity of escape or of concealing evidence of the offence, he may, after recording the grounds of his belief, enter and search any place &c. There is no evidence whatever in this case that the Excise Inspector made the record required by this section. Crown Counsel argued that under Section 114 of the Evidence Ordinance the Court should presume that such a record was made, because that section enacts that the Court *may* presume that judicial and official acts have been regularly performed. This, if I might say so, is tantamount to begging the question. It assumes that the act of search was an official act. It does not become so until the record referred to has been made. It is that record that vests in an Excise Officer the authority in that direction more than any ordinary individual. I think that in every case of search by an Excise Inspector, compliance by him with the requirements of Section 36 should be affirmatively established by him in evidence.

Moreover, in this particular case, the facts cited above as having been sworn to by the Excise Inspector himself render it unlikely that he made the necessary record, and assuming that Section 114 of the Evidence Ordinance applied I should not be prepared to presume anything under that section.

For the reason given above I should set aside the conviction and acquit the accused.

Ennis, J. I agree.—The evidence given by the Excise Inspector precludes the Court from drawing the presumption contemplated in Section 114 of the Evidence Ordinance.

Proctor for appellant—*E. G. Jonklaas.*

BARONCHI APPU *v.* SIYADORIS APPU.

No. 21186 C. R. Negombo,

Present: **Pereira, J,**

13th July 1914.

Paulian Action---open to any creditor—grantor necessary party.

A Paulian Action is open not only to creditor who has obtained a decree in his favour but to any person who can establish to the satisfaction of the Court that he was a creditor at the time of the execution of the fraudulent deed.

The grantor on the fraudulent deed is a necessary party to the Paulian action even where the deed is a donation and not one for valuable consideration.

E. A. L. Wijewardene for plaintiff appellant.—The Paulian action is open to all creditors to whose prejudice things have been fraudulently obtained. De Vos Translation of Voet p 2.) It is not necessary that the creditor should have obtained a judgment against the debtor [Pereira J. Can you maintain this action without making the donor of the deed a party to the action?] Yes, being a deed of donation the grantor is not a necessary party. He cannot be affected by a declaration that the deed is fraudulent. [Pereira J. *Gopalsamy* v. *Ramasamypulle* [1] is against you]. That authority does not apply to the facts of the present case. In the case of a transfer the transferor is interested in a Paulian action brought to set aside the deed, for if the deed is cancelled, the transferee may sue the transferor for a refund of the purchase money. But in case of a donation no such action againsf the donor can arise and therefore the donor need not be made a party.

De Zoysa for defendant respondent.—The donor must be made a party to the Paulian action. He is interested in the question of fraud alleged against him and he should have an opportunity to defend himself against such allegations. *Gopalsamy* v. *Ramasamypulle*.[1]

1. 14 N. L. R. 238

Baronchi Appu v. Siyadoris Appu. Pereira J.

Pereira J—I do not agree with the Commissioner when he says that it is only a creditor who has obtained a decree in his favour who can bring a Paulian Action to have a fraudulent deed set aside. I think that the action is open to any person who can establish to the satisfaction of the Court that he was a creditor at the time of the execution of the deed. Nor do I agree with the Commissioner when he says that the grantor on the fraudulent deed is not a necessary party to the action where the deed is a donation and not one for valuable consideration. It is the mere condemnation of the act as fraudulent rather than the prospect of throwing pecuniary liability on the shoulders of the persons that weighs on the determination of the question as to who should be made parties to a Paulian Action. In the case of *Gopalsamy* v. *Ramasamypulle* [1] this Court held as follows.—The Paulian Action lies for "the revocation of whatever has been alienated in *fraudem creditorum* and it follows that when an alienation of the kind is attacked both the grantor and grantee should have an opportunity to defend it." In the present case there is no allegation of fraud against the defendents. The allegation of fraud in the plaint is altogether against the grantor on the impeached deed, namely, Thambegalage Issan Appoo. Fraud on the part of the grantor alone is, in certain circumstances, sufficient to support a Paulian Action, but in any case, the grantor or his legal representative should be a party to the action ; otherwise, it is wrongly constituted. On that ground I dismiss the present appeal with costs. I, however, reserve the right to the plaintiff to institute another and more correctly constituted action if so advised.

Proctor for respondent---*D. J. S. Goonewardene.*

Proctor for appellant.---*de Silva & Perera.*

1. 11 N. L. R. 238.

LABUNA *v.* SUWADA.

No. 3707 P. C. Colombo (Itg.)

Present : **Pereira** J.

22nd September 1914.

Police Ordinance No 16 of 1865 Section 54—false charge to the Police—complaint not prosecuted by the complainant in the Police Court—unreliable evidence.

The fact that a Magistrate is unable to place reliance on the evidence called by the complainant is not a sufficient ground for inflicting a fine under Section 54 of the Police Ordinance for bringing a false and frivolous charge.

Samarakkody for appellant.

Pereira J----I doubt very much that summary proceedings such as those taken by the Magistrate can be taken in respect of the acts mentioned in Section 54 of the Police Ordinance except where a complaint is made to the Police and is further prosecuted by the person making the complaint and the Magistrate after trial of the charge finds that there were no sufficient grounds for making the charge.

This is an appeal from an order of the Magistrate awarding fine and imprisonment to the appellant whom the Magistrate calls the " complainant " for, as the Magistrate says, " bringing the false charge. " The appellant brought no charge before the Police Court. The proceedings commenced not on a complaint under section 148 (1-a) of the Criminal Procedure Code but on a written report by a Police Officer under section 148 (1-b), and I presume that what the Magistrate means is that the appellant is punished for making a false charge to the police. I doubt very much that summary proceedings such as those taken by the Magistrate can be taken in respect of the acts mentioned in section 54 of the Police Ordinance except where a complaint is made to the Police and is further prosecuted by the person making the complaint, and the Magistrate after trial of the charge finds that there were no sufficient grounds

Labuna v. Suwada. Pereira, J.

for making the charge. Except in such a case, I fail to see how the matter could come before a Magistrate at all, and it seems to me that in all the other cases mentioned in the section the proper course would be a formal prosecution of the complainant or informant who had made the complaint or given information to the Police. I need not however decide this question because it seems to me to be clear that this is not a case in which it can be fairly said that the appellant made a false charge to the Police. The Police had charge of the prosecution, and presumably the appellant had no voice in the matter of the witnesses to be called. Moreover, the evidence is all one way, and the accused have not contradicted on oath the charge against them made by the appellant. As held by my brother Ennis in case No. 1888 of the Police Court (Itinerating) of Colombo [See S. C. Civil Minutes 7th October 1913]" the fact that the Magis- "trate was unable to place reliance on the evidence called is "not a sufficient ground for inflicting a fine under Sec : "54 for bringing a false and frivolous charge."

I set aside the order appealed from.

set aside.

FERNANDO *v.* PERERA *et al.*

Muttucarpen Chetty---*Appellant.*

v.

Ramanathen Chetty---*Respondent.*

C. R. Negombo No. 21444.

Present : **de Sampayo** J.

16th February 1916.

Concurrence---notice, meaning of---Application for refund after payment---Civil Procedure Code section 350.

Vol. IV.

The provisions of section 350 of the Civil Procedure Code have regard to the proceeds of a particular execution, and, in no way, justify the idea that a claim to one fund stands good in respect of all funds realized by execution in the same case at any time thereafter and under entirely different circumstances.

The notice contemplated by section 350 is not a mere notice that the party has obtained a decree against the same judgment-debtor but a notice of a claim to the money in Court.

When the money has gone home to a creditor by actual payment it is too late for another creditor to ask for a refund.

G. Koch with *L. G. P. Jayetileke* for the appellant.—The notice contemplated by section 350 of the Civil Procedure Code is one with regard to a particular fund. The section says "notice shall be given to the Court of any claim to *such* proceeds etc."

J. S. Jayawardene with *F de Zoysa* for the respondent.---The respondent was the only creditor who claimed the proceeds of the first sale. The order allowing the money to be drawn without notice to the respondent was made *per incuriam*. The Court had notice of our claim and should not have paid the money.

G. Koch in reply.

c. a. v.

de Sampayo, J.---The plaintiff in this action obtained a decree against the defendant on a mortgage bond and caused the mortgaged property to be sold, and the sale having realized more than sufficient to pay the plaintiff, the respondent to this appeal who was plaintiff in the action D. C. Negombo, No. 9175, and had obtained a money decree against the same defendant, seized a certain sum in Court in July 1914. The sale was, however, set aside in appeal, and the sum in deposit was drawn by the purchaser. Then the plaintiff had the property resold in March, 1915, and paid himself out of the proceeds ; There was still left a balance out of these proceeds, and this sum was seized in June, 1915, by the appellant and two other judgment creditors of the same defendant. On

Fernando v. Perera. de Sampayo, J.

due application made in that behalf the Court distributed the amount among the three seizing creditors and paid it to them in September, 1915. Then the present respondent appeared in the case again and moved that the appellant and the two other creditors should be ordered to refund the money in order that he might have a portion of it in concurrence. The commissioner has allowed the application, and this appeal is taken from that order.

The ground of the order, if I understand the Commissioner's judgment, is that by reason of the seizure in July, 1915, at the instance of the respondent the Court had notice of his claim and should not have paid the money to the appellant and the two other creditors without notice to him. The simple answer to that is that what was seized in July, 1915, was not the fund now in question but the proceeds of a prior abortive execution. The provisions of section 350 of the Civil Procedure Code, upon which the Commissioner evidently relies, have regard to the proceeds of a particular execution, and in no way justify the idea that a claim to one fund stands good in respect of all funds realized by execution in the same case at any time thereafter and under entirely different circumstances. It should be borne in mind in this connection that the notice contemplated by section 350 is not a mere notice that the party has obtained a decree against the same judgment debtor but a notice of a claim to the money in Court. The money now in claim has gone home to the appellant and the two other creditors by actual payment, and it is too late now for the respondent to ask for a refund.

The order appealed from is set aside so far as the appellant is concerned with costs in both Courts.

Set aside.

Proctor for appellant---*H. A. Jayetileke.*

Proctor for respondent---*D. J. S. Goonewardene.*

RAMA AIYER v. SIEKET.

No. 47802 C. R. Colombo.

Present: **de Sampayo** J.

1st March 1916.

Limitation of actions—winding up of company—liability of contributory in respect of balance due on his shares—Indian Companies Act 1882 sections 61 and 151—Ordinance No. 22 of 1871 section 9.

In 1907 defendant was allotted three shares of Rs. 25 each in the S. S. N. Co for which he made the initial p yment of Rs. 15. The Come pany was registered in India. In 1908 the directors called for the balance due on the shares but defendant did not pay it. In 1911 the District Court of Tinnevelly made order for the compulsory winding up of the Company and plaintiff was appointed official liquidator. In September 1912 the Court settled the list of contributories and in the list the defendant was included as a contributor On the 9th October 1912 the Court made order that the defendant should pay the amount to the plaintiff within four days of the service of the order. The order was served on the defendant on the 11th or 12th October 1912 and he having failed to pay the amount the plaintiff brought this action against him on the 15th October 1915.

The defendant pleaded that the action was prescribed as the cause of action arose in 1908 when the Directors made the call.

Held (reversing the judgment of the Commissioner) that the cause of action arose when the order of the Tinnevelly Court was served on the defendant as a contributory and the action was not prescribed,

The period of prescription in respect of the liability of a contributory to pay the balance due on his shares is 3 years under section 9 of Ordinance No 22 of 1871.

Per de Sampayo J.—It is true that the ordinary liability of a share holder to contribute his share of the capital arises under the articles, but on a winding up it is converted into a statutory liability. The liability of a contributory as such is distinct from his previous liability as a share-holder. It is a new liability under the statute.

From the fact that the statutory liability is a new one it follows that the amount of contribution ordered by the Court to be paid can be recovered though the claim on the basis of calls originally made by the Directors may have been barred by limitation before the winding up.

A. St. V. Jayewardene (with Muhudeva) for appellant.—

Rama Aiyer v. Sheik de Sampayo, J.

The learned Commissioner has erred in holding that the action is prescribed. Liability to contribute in the winding up proceedings is distinct from the liabilty to pay calls made by the Directors. Section 61 of the Indian Companies Act 1882 provides that not only present but also past members of the Company are liable to contribute. The nature of a contributory's liabilitary is set out *in re Whitehouse & Co.*[1] *Paroll Spinning & Weaving Co v. Manek Haje,*[2] *Jaweltje v. Juggin Wandas*[3] *and Vaidiswara Aiyar amv Subrania Mudaliyar*[4]. The period of prescription begins to run only from the time the call is made in the winding up proceedings (section 125 of the Indian Companies Act). It is immaterial in this case to consider the number of years in which the action is prescribed because the least number of years possible is three (section 9 of the Prescription Ordinance). This action has been instituted within three years of the date of call in the winding up proceedings.

Keuneman for respondent.—The cause of action arose in 1908 when the directors made the call. The defendant is not bound by the winding up proceedings in India. He had no notice of those proceedings nor was he a party to them. *Worman & Co v. Noorbai*[5].

c. a. v.

de Sampayo, J.—The plaintiff as the Official Liquidator of the Swadeshi Steam Navigation Co sues the defendant, who is the holder of three shares in the Company, for the recovery of Rs 86/29 as the amount of contribution with interest due by him towards the assets in the winding up of the Company. Though the amount claimed is small, the case involves an important point in the law relating to limitation of actions.

1. (1878) L. R. 9 ch. D 599
2. I L. R. 10 Bom 483.
3. I L. R. 20 Bom 654.
4. I L. R. 31 Mad 66.
5. (1912) 15 N. L. R. 355.

The Swadeshi Steam Navigation Co is a Company registered in India under the Indian Companies Act 1882. In September 1907 the defendant was on his application allotted three shares of Rs 25/ each for which he made the initial payment of Rs 15/. In 1908 the D.rectors made a call for the balance due on the shares, but the defendant did not pay it. In 1911, the Company being in difficulty, the District Court of Tinnevelly made an order for its compulsory winding up and the plaintiff was appointed Official Liquidator. In September 1912 the Court settled the list of contributories and in the list the defendant was included as a contributor in respect of the balance due by him on his shares. On the 9th October 1912 the Court made order that the defendant should pay the amount to the plaintiff within 4 days of the service of the order. The evidence is, and the Commissioner is satisfied, that the order was served ont he defendant on the 10.h or 11th October 1912, and the defendant not having paid the amount this action was instituted on the 7th October 1915.

If the date of the order or of its service is taken as the time when the cause of action arose, this action cannot be said to have been prescribed. The Commissioner, however, on the footing that the cause of action arose in 1908 when the Directors made the call, held that the action was barred by prescription, and dismissed it. He is clearly wrong in taking no account of the winding up proceedings. Section 61 of the Indian Companies Act 1882, which corresponds to section 38 of the English Companies Act of 1862 and to section 123 of the Companies (consolidation) Act 1908 enacts that

"In the event of the Company formed under this Act being wound up, every present and past member of such Company shall be liable to contribute to the assets of the Company etc."

It is true that the ordinary liability of a shareholder to

Rama Aiyar v. Siebel et de Sampayo, J.

contribute his share of capital arises under the articles but on a winding up it is converted into a statutory liability under the above section. The liability of a contributory as such is distinct from his previous liability as a shareholder. It is a new liability under the Statute. *In re Whitehouse & Co* (*1878*) *L. R. 9 ch D 599*; *In re West of England Bank* (*1879*) *48 L. J. ch 464*; *Burgess's case* (*1880*) *L. R. ch D 511*. This interpretation of the statute has been adopted in India. *The Pudukkottai Spinning & Weaving Co v. Manek Haji* (*10 Bom 483*); *Jamsetje v. Jugjiwandas* (*20 Bom 654*). It is therefore clear that the circumstance that the Directors made a call in 1908 before the winding up order makes no difference as regards the defendant's present liability. From the fact that the statutory liability is a new one it follows that the amount of contributions ordered by the Court to be paid can be recovered though the claim on the basis of calls originally made by the Directors. may have been barred by limitation before the winding up *Vaidiswara Ayyar v. Subramania Mudaliyar* (*31 Mad 66*). Section 125 of the English Companies (consolidation) Act 1908, corresponding to section 125 of the Indian Companies Act 1882, emphasises the nature and extent of the liability by declaring that "the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced but payable at the time when calls are made for enforcing the liability." Now, the way in which calls are made for enforcing the liability is by order of Court under section 166 of the English Act corresponding to section 151 of the Indian Act. Consequently the cause of action against the defendant arose when the order of the Tinnevelly Court was served on the defendant and when therefore the debt became payable. As regards the period of prescription, the cause of action not being otherwise provided for by the Ordinance No. 22 of 1871, section 11 of the Ordinance governs, and as this action has been instituted within 3 years from the time when the cause of

action accrued it is not barred by prescription.

I may note that Counsel for the defendant contended that no liability arose under the statute so far as the defendant was concerned, because the Liquidator had not given him notice in connection with the settlement of the list of contributions. But this point was not raised in the Court below and no evidence was directed to it. The defendant for the purpose of proving that he had not received the order of Court did swear generally that he had not received any notice or communication from the Company or the Liquidator since his application for shares, but the Commissioner did not believe him there. Moreover, if the defendant was wrongly put on the list of contributories his remedy I think is to apply in that behalf to the Court in the winding up proceedings. The appeal is allowed and judgment will be entered for plaintiff as claimed with costs of the action and of this appeal.

Set aside.

Proctor for appellant—*B. O. Pullenayagam.*

Proctor for respondent—*P. A. T. La Brooy.*

RAMASAMY NADAR *v.* MARIE ASSARI.

No. 8750 P. C. Puttalam.

Present : **Shaw, J.**

1st March 1916.

Cheating—dishonestly inducing delivery of property—Penal Code 2 of 1883 sections 399, 400 and 403.

Where a person is dishonestly induced to deliver property as the result of cheating the offence committed falls under section 403 of the Penal Code and the offence is not summarily triable by a Police Magistrate.

A. St. V Jayewardene for appellant.—The proceedings were irregular, The learned Police Magistrate should not have tried the case summarily. The offence does not fall

Ramasamy Nadar v. Marie Asari
Shaw, J.

under section 400., it falls under section 403. When property has been delivered as the result of the cheating the latter section is applicable. An offence under section 403 is triable by a District Judge on an indictment. (vide *371 P. C. Badulla 7419.*[1]) A lesser offence should not be chosen for trial when the evidence discloses a graver one. (*Nagamma v. Themis Sinno*[2]).

Arulanandan for respondent.—It is submitted that section 403 applies to graver offences and section 400 to smaller offences. It has been held in India that the corresponding sections of the Indian Code overlap, and that some degree of common sense ought to be exercised in adopting either section to fit the facts of a particular case. Counsel cited *Gour's Criminal Law Vol 2 p. 1724*

Shaw J. In this case the accused has been convicted of the following offence :—that he did on or about the 4th of January, 1916, cheat one Ramasamy Nadar, and thereby dishonestly induced the said Ramasamy to deliver to him three gold sovereigns by false representation, and the indictment to the charge alleges that he thereby committed an offence punishable under section 398 of the Ceylon Penal Code. It appears to be a mistake to have alleged that the offence was punishable under this section. Section 398 is a definition section, and not one relating to punishment for an offence. The Magistrate no doubt intended to punish under section 400 which is for simple cheating, but the offence charged and the offence for which the accused was found guilty is an offence directly provided for by section 403 of the Penal Code, namely dishonestly inducing a person to deliver property by means of cheating. This offence is punishable on indictment before the District Court, and is not triable by the Police Court. There is a case No. 371 (*S. C. Mins of 19th May, 1915*) in which the late Mr. Justice Pereira decided on facts similar to

(*1*) *S. C. M. 19th May 1915.* (*2*) *1 C. A. C. 56.*

those in the present case, that the offence must be tried and punished by the District Court under section 403, and cannot be tried summarily by the Police Magistrate under section 400. This appears to be consonant with the decisions of this Court on other sections of the Penal Code It is laid down in *Nagamma v. Themis Sinno* [1] that a lesser offence cannot be chosen for trial when the evidence discloses a graver one, and there are many other decisions of this Court to the same effect. The evidence here disclosing an offence under section 403, the offence under section 400 could not be selected by the Magistrate for adjudication. He should, in conformity with those decisions, have proceeded to deal with the case as for an indictable offence. There is some inconvenience in the application of the law I have referred to, but I do not feel justified in not following these cases although some day it may be advisable that they should be reconsidered by a fuller Court. In the present case I do not think there is any necessity to do this, because no inconvenience will arise to public interest if I allow the appeal and set aside the conviction and send the case back to the Magistrate with instructions to deal with the case as a non-summary one.

Sent back.

Proctor for appellant—*W. S. Strong.*

Proctor for respondent—*A. E. Abeyekoon.*

WICKRAMRATNE *v.* FERNANDO.

No. 6043 D. C. Kalutara.

Present: **Shaw** and **de Sampayo J. J.**

17th March, 1916

Partnership – Capital—partnership assets or property.

(1) 1 C. A. C. 56.

Wickremeratne v. Fernando
Shaw, J.

The capital of a partnership is not the same as the partnership assets or property.

By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in that business.

The capital is a sum fixed by the agreement of the partners whilst the actual assets of the firm vary from day to day and include every thing belonging to the firm and having any money value.

Samarawickrama, for appellant:—The learned District Judge is in error in thinking that the partnership capital is the same as partnership assets. The capital of a partnership is not the same as its property; capital is a sum fixed by agreement of parties while the assets may vary from day to day. In this case the capital is below Rs. 1000/- but it is the partnership assets that gradually grew to more than Rs. 1000/-

E. W. Jayawardene, for respondent: The learned District Judge was right in dismissing the action. There the capital itself varied every year by addition to it.

Shaw, J.—The action was brought to recover the plaintiff's share of the assets after the determination of an alleged verbal partnership, and for money said to have been paid by the plaintiff on behalf of the partnership.

Objection was taken that the capital of the alleged partnership was over Rs. 1000/- and that consequent to Section 21 of Ordinance No. 1840 and the decision of the Privy Council in *Pate* v. *Pate*, (18. N. L. R. 289.) the action was not maintainable.

The District Judge tried a preliminary issue as to the ammount of the partnership capital and found that it exceeded Rs. 1000/- and consequently has dismissed the action.

There appears to have been considerable misapprehension in the minds of both the parties and the Judge as to the meaning of the expression "Capital" when applied to a

to a partnership, which has been confused throughout the case with "assets" which are by no means the same.

By the Capital of a partnership is meant the aggegate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in that business. The Capital of a partnership is not therefore the same as its property: The Capital is a sum fixed by the agreement of the partners; whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. (See Lindley on partnership Bk. 111, Ch. 3).

Neither the stock in trade or the assets of the partnership at any particular time necessarily represent the capital of the firm which is the actual cash and the value of the property contributed by the partners to be the common property of the firm to be used for the purpose of the joint business. It would appear to me that the value of the good will of a business, the property of one of the partners and contributed by him to the purposes of the Joint venture, may constitute part of the capital of the firm.

I would set aside the judgment appealed from and send the case back to the District Judge to retake evidence and reconsider his finding on the preliminary issue having regard to the principles above stated.

I would direct the costs of this appeal to abide the result of the action.

de Sampayo, J.—I agree.

Proctor for appellant—*C. Wijeratne.*

Proctor for respondent—*A de Abrew.*

DIAS *v*, PERERA.

No' 23066 D. C. Kandy.

Present: **Wood Renton C. J.** and **de Sampayo J.**

17th March 1916.

Partnership—capital—partnership assets—Ordinance No. 7 of 1840, Section 21 (4).

By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in that business. The capital of a partnershsp is therefore not the same as its property.

Per **De Sampayo, J.**—**The question occurs to me as to whether when Section 21 (4) of our Ordinance (No. 7 of 1840 speaks of "capital" it refers to the initial capital or whether it extends to the amount that may stand as capital after additions or withdrawals at any time during the course of the business. The latter construction appears to me to render the provisions of the Ordinance unworkable and I think that the Ordinance refers to the initial capital only and not to the fluctuating capital of a partnership.**

Bartholomeusz for appellant.

A. St. V. Jayewardene for respondent.

c. a. v.

de Sampayo, J.—The plaintiffs in their plaint alleged that in April 1913 they and the defendant agreed to carry on business in partnership as printers and publishers, and they brought this action for the dissolution of the partnership and for an accounting. There was no agreement in writing as required by Section 21 (4) of the Ordinance No. 7 of 1840, but the plaintiffs alleged that the capital of the partnership was under Rs. 1000/-. That defendant in his answer denied the a leged partnership and stated that he was in May 1913 induced by the plaintiffs to buy a printing press and other accessories and to carry on a business in printing and publishing, and that the plaintiffs were only his servants having been

employed by him as foreman and manager respectively. Certain issues arising upon the pleadings were submitted to Court, but when the case came on for trial, the defendant withdrew his denial of the partnership and consented to the matter of accounts being referred to commissioners to be appointed by court. The commissioners so appointed examined the parties, took an account, and reported to court the result of their preceedings. Among other things they reported that the defendant's books "shewed items amounting to a total of Rs. 1417/28 as representing the value of press and press accessories," and setting off expenditure and debts against the assets and income, they found that there was a nett balance of 398/82 due to plaintiffs.

When the case came up again before the District Judge the following issue suggested by the Defendant's proctor was accepted as an additional issue:

"Whether in view of the finding and report of the Commissioners that the property of the alleged partnership is over Rs. 1000/- in value it is competent for the plaintiffs to maintain this action etc.?"

On behalf of the plaintiffs the report and proceedings of the commissioners were put in evidence, The defendant called one of the Commissioners and produced the defendant's "expenditure book," marked A, in which 8 items relating to the purchase of two presses and materials appeared as of date the 15th May 1913, amounting to Rs. 1197/-. These items were followed by other items in June—(without a date), making a total expenditure of Rs. 1308/88. The District Judge, taking the 15th May 1913 as the day on which the presses and materials were bought and on which the business started, said that "if Rs. 1197/- was the amount the parties had to spend on the very first day it was not unreasonable to suppose that they had a balance of capital for

the purchase of other accessories and for the conduct of the business" and held that the business began with a capital exceeding Rs. 1000/-. The plaintiffs' action was accordingly dismissed.

The District Judge's idea that the business started on 15th May 1913 is not in accordance with the case of either party. The plaintiffs say that the business was started in April with the first press and accessories called the "Modern press" which they bought with money contributed by all the parties for the purpose of the business. This is borne out by the deed of transfer dated 24th April 1913 in favour of the partners from the former owner of the press and accessories. The defendant stated before the Commissioners that the business started in June, intending no doubt thereby to show that the press subsequently bought was part of the capital concern. The defendant has nothing to go upon for fixing a date, and so far as the books are concerned the Commissioners report that the defendant's books contain many erasures and alterations and they significantly remark that "the dates are often topsyturvy." The book marked A, upon which the District Judge relies, is demonstrably false as to the date. It has the heading "Spent for the Chandralankara Press on the 15th May 1913." The Defendant at first tried to make out that this was in the handwriting of the 2nd plaintiff. But the Commissioner who was examined in Court says that it was ultimately admitted to be in the handwriting of the defendant himself, and there is more than a suspicion that it was put in by him to serve the purpose of this case. The first item under the heading is "Modern press Rs. 325/-," and I have already shewn by reference to deed No. 3917 that sum was spent not on 15th May 1913 but on the 24th April 1913. Another item under the heading is "½ demi foolscap Victoria Machine Rs. 440." If that item is taken out, even assuming that all the rest of the items in book A. constitute the capital

Vol. IV.

of the partnership, the amount is less than Rs. 1000/-. Now as to the "Victoria Machine" the plaintiffs say that it was not bought by the partners with their money and they do not claim it. The defendant's own evidence on the point is that he bought it for the partnership for Rs. 440/- out of his own money. He carefully abstains from saying that it was bought on the 15th May 1913 or that it was intended to be part of the capital of the partnership, nor do the circumstances justify any such conclusion. It may indeed be part of the assets of the partnership and the defendant may be entitled to its price as a debt due to him from the partnership, but I think it cannot be included in the capital of the partnership. Accordingly I think that the capital was under Rs. 1000/-.

Having now dealt with the facts, I may point out that there is a misconception as to what is capital on the face of the issue which I have above quoted and which has been tried by the District Junge. The distinction between the capital and the property of a partnership does not appear to have been sufficiently realised. "By the capital of a partnership" says Lindley (Ed. vii) p 358 "is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in that business. The capital of a partnership is not therefore the same as its property" Lindley at p. 359 adds, "It follows from these considerations that the agreed capital of a partnership cannot be either added to or withdrawn except with the consent of all the members of the partnership." The principle is undoubted and no further references are necessary. *De Silva* v. *De Silva*, (1902) 3 Br. 136 cited on behalf of the defendant is no authority to the contrary, in as much as that case was decided clearly on the assumption that the capital of the partnership was over Rs. 1000/-. The question, however, occurs to me as to whether, when Section 21 (4) of our Ordinance speaks of

Dias v. Perera
Wood-Renton, C.J.

capital," it refers to the initial capital or whether it extends to the amount that may stand as capital, after additions or withdrawals, at any time during the course of the business. The latter construction appears to me to render the provision of the Ordinance unworkable, and I think that the ordinance refers to the initial capital only and not to the fluctuating capital of a partnership. But it is unnecessary to decide the point, because as I have said the "Victoria Machine" purchases for Rs. 440/- is not shown to have been brought in as part of the capital. The plaintiffs did not contribute to its purchase and certainly did not consent to its being added to the capittal. The only reasonable conclusion to be drawn from the whole tenor of the defendants' evidence is that the money that went towards its purchase was money advanced by him to the partnership. Moreover, the defendant having admitted the partnership, the court will exact from him the most strict proof of any facts on which he may reply as entitling him to take refuge under the Ordinance. In my opinion the defendant wholly failed to discharge the heavy burden which lay on him.

I would set aside the decree appealed from and send the case back in order that the claim of the plaintiffs may be determined on the footing that no writing was required for establishing the partnership between the parties. The plaintiffs will have the costs of the trial in the District Court and of this appeal. All other costs will be in the discretion of Court and the District Judge.

I agree.—**Wood Renton C. J.**

Proctors for appellant—*Leisching* and *Lee.*

Proctor for respondents—*M. A. Perera.*

MARIKAR *v.* ASSANPILLAI.

No. 7285 C. R. Kandy.

Present: **De Sampayo, J.**

27th January, 1916.

Service Tenurees—Nindagama proprietor—nilakaraya—impossibility of performance of service—tenant cannot be compelled to render other service.

A panguwa under the Service Tenures Ordinance does not belong to the Nindagama proprietor but is a holding of the nilakaraya himself subject only to the performance of service; and the nilakaraya becomes free even of his burden if the right to service is lost as for instance by non performance of service for ten years.

The nature of the service is definite and determined and the tenant is bound to do that and none other. If he has elected to commute the service by a money payment the proprietor can of course claim the money irrespective of any charge in the circumstances. But if there has been no such election the proprietor must be content with exacting the service and if that becomes impossible he must suffer the loss.

Arulanandam for plaintiff appellant.

J. W. de Silva for defendants respondent.

c. a. v.

De Sampayo, J.—The plaintiff as proprietor of a Nindagama sues the defendants as tenants of a certain Panguwa for a recovery of Rs. 118/- as damages for non-performance of service for the year 1913. The sum of Rs. 118/- is the assessed value of the services as stated in the Service Tenure Register. On a previous appeal it was pointed out that as the defendant had not agreed to commute the services the actual damages must be proved though the value stated in the Register might be taken as *prima facie* evidence, and the case was sent back for further proceedings. At the further trial it has been found that some of the services were incapable of performance and others had not been required to be performed. I entirely agree with the Commissioner that the damages due to plaintiff, after the necessary deductions, amount to no more than Rs. 5/-, but I

Marikar v. Assanpillai de Sampayo, J.

wish to add a word on one of the points in the case. The principal service specified in the Register is to cultivate the Muttetuwa for two harvests in the year. But it appears that the plaintiff has leased the neighbouring high lands to the Alutta Rubber Company and in consequence of those lands being cleared for rubber cultivation the Muttetuwa field has been so covered with silt that it has become incapable of cultivation, and the plaintiff has even brought an action against the Company in respect of the damage done by the Muttetuwa. I cannot conceive how in these circumstances the plaintiff can claim the damages from the defendants for not cultivating the Muttetuwa. The plaintiff himself has perceived the difficulty, but he justifies the claim by saying that he asked the defendants to cultivate another field in lieu of the Muttetuwa in question and that they refused to do so, and this same view has been pressed upon me by his counsel. No authority has, however, been cited to show that the tenants of a Nindagama are bound, when the specified service becomes incapable of performance through no fault of their own, to do something else at the instance of the proprietor, and the contention appears to me to be contrary to principle. The case for the plaintiff was put as high as this, that he was the owner of the tenants' holding and had in substance leased them to the tenants for a consideration which must be paid in some shape or another. This involves an entire misconception of the relation between the Nindagama proprietor and the Nilakarayas. The holding in fact belong to the tenants thenselves subject only to the performance of service, ond they becomc free even of this burden if the right to service is lost, as, for instance, by non-performance of service for 10 years. The nature of the service is definite and determined, and the tenant is bound to do that and none other. If he has elected to commute the service by a money payment, the proprietor can of course claim the money irrespective of any change in the

circumstances. But if there has been no such election the proprietor must be content with exacting the service, and if that becomes impossible, he must suffer the loss.

The appeal is dismissed with costs.

Proctor for appellant—*Beven and Beven.*

Proctor for respondent—*G. E. de Silva.*

PODI SINGHO *v.* PODI MENIKA.

D. C. Kurunegala 5088.

Present: **Ennis**, and **Shaw**, **J. J.**

25th May 1916.

Person entitled to land both by inheritance and purchase—subsequent division of land between himself and planter equally—sale by him thereafter of half share alleging title by inheritance—later sale of half share derived on purchase—validity of second sale.

U and K each being entitled to a half share of a certain land by inheritance, K sold her half share to U in 1889. In 1891 in an action in the Court of Requests between U and P. A., a planter, decree was entered dividing the land equally between U and P. A. In 1892 U sold a half share of the land to the 3rd defendant claiming to be entitled to it by inheritance, but in the operative clause purporting to convey his right title and interest in his share of the land Subsequently in 1908 he purported to convey to the 4th defendant the half share he purchased from K in 1889.

Held, that U must be taken to have conveyed to the 3rd defendant in 1892 the entire half share he was entitled to at the date, and that the transfer to the 4th defendant of half share in 1908 conveyed no title.

This was a partition action. One Ungurala and Kiri Menika inherited each a half share of the land to be partitioned from their father. Kiri Menika sold her half to Ungurala in 1889. In 1891 by a decree of the Court of Requests one Punchi Appuhamy, who was a planter was declared entitled to a half share of the land and Ungurala

was declared entitled to the other half. In 1892 Ungurala purported to sell by deed 1 D[1] a half share acquired by inheritance exclusive of 2 seers to the 3rd defendant, and this share was subsequently sold by the 3rd defendant to the 4th defendant. In the operative clause of the deed however Ungurala purported to convey all his right title and interest in his share of the land. Ungurala in 1895 sold the two seers excluded to the 1st and 2nd defendants by the deed 1 D[2]. Subsquently in 1908 Ungurala by deed 4 D[1] purported to transfer the half share of the land purchased from his sister to the 4th defendant. The District Judge held that Ungurala having divested himself of title to ½ share of the land in 1892 by 1 D[1], deed 4 D[1] conveyed no title to the 4th defendant.

Samerewickrame, for 4th defendant-appellant—Deed 1 D[1] must be held to have conveyed to the 3rd defendant the half share only of the portion inherited from Ungurala's father viz. 1/4 of the land; and the remaining ¼ viz. the ½ share of the portion purchased from Kiri Menika must be taken to have been sold to the 4th defendant by 4 D[1]. *Sandris v. Dinakahamy*[2].

A. St. V. Jayawardene with *L. H. de Alwis*, for defendants-respondents, not called upon.

Ennis, J.—(After setting out the facts as above continues:—)

It is argued that this deed conveyed only Ungurala's half share in the portion inherited from his father, and not in the portion he purchased from his sister. The case of *Sandris* v. *Dinakahamy*[1] has been cited in support of that contention. The case does not appear to me to be an authority in the matter, as it would appear that in that case the conveyance was one of the share derived from a father, and it was held that this deed did not apply to a conveyance

(1) (1919) 5 Bal. 75.

share derived from the husband, In the present case the operative clause does not limit the share conveyed to the share derived by inheritance. In 1908 Ungarala on 4 D^5 transferred the property he bought from his sister to the 4th defendant, who is the present appellant. In my opinion as Ungurala had disposed of all his share in the land on documents 1 D^1 and 1 D^2, there was nothing left to be covered by the deed 4 D^5.

In my opinion the decree is right. and I would dismiss the appeal with costs.

Shaw, J.—I agree.

affirmed

Proctor for appellant—*V. I. V. Gomis.*

Proctor for respondents—*E. G & E. G. M. Goonewardene.*

COOMARASURIAR *v.* SITHAMPARAPILLAI.

No., 2829 D. C. Jaffna (Testy).

Present: **Ennis** and **de Sampayo, J. J.**

6th March 1916.

Thesawalame—married woman dying without issue—are heirs entitled to have her dowry made good out of acquired property before distribution—section 1 (15) of Ordinance No. 18 of 1806.

Under the Thesawalame the heirs of a married woman dying without issue are not entitled to have the amount of her dowry made good out of the acquired property before distribution.

The provisions of section 1 (15) of the old Thesawalame Ordinance No. 18 of 1806 must be deemed to be obsolete.

One Ponnupillai who was married before the Ordinance No. 1 of 1911 and who was therefore subject to the old Thesawalame recognised by Ordinance No. 18 of 1806 died intestate and issueless and her husband became the administrator of her estate. The respondents who were the

sisters of Ponnupillai claimed to have a sum of Rs. 1000/- refunded to them by the administrator from out of the acquired property of Ponnupillai and her husband on the ground that under Section 1 (15) of the Thesawalame Ordinance the acquired property of the spouses was liable for any diminution of the dowry property. At the trial it was agreed that at the marriage of the deceased Rs. 1000/- was given her as dowry and that there is property acquired during coverture. It was conceded by the respondents that the Rs. 1000/- was spent during coverture. It also appeared from a statement made by counsel for the administrator that the spouses had in order to settle a niece in life dowered the money to her.

The District Judge held that he was bound by the provisions of Section 1 (15) and condemned the administrator to pay the amount to the respondents out of the acquired property of the spouses. The administrator appealed.

A. St. V. Jayawardene with *Arulanandan* for appellant.—

Many provisions of the Thesawalame are obsolete e. g., the distinctions to be observed in right of inheritance where a pagan marries a Christian woman ; mortgage of slaves, sales of children and such like. Section 1 (1) is also obsolete especially after the enactment of the Wills Ordinance No. 21 of 1844. Section 4 (1) authorises the husband if the wife is living peaceably with him to give some part of the dowry away. It is absurd to suppose that what may be lawfully given away must be made good. Vide Muthukrishna's Thesawalame pp. 117, 176, 257, Marshall's Judgments pp. 199, 223, 17 N. L. R. 294, 243, 381.

Several provisions of the Thesawalame were based on the Hindu Joint family system and this being no longer law in Ceylon all such sections must be interpreted in the light of this fact. Further such fetters on alienation are against public policy and should not be tolerated.

Wadsworth with *J. Joseph* for respondents.—

The plain provision of the law ought to be followed and not whittled away by legal refinements. [*de Sampayo, J.* But Section 1 (15) treats of division of property where two persons each being the sole child of their respective parents die without issue. It is repeated in the body of the section too. How can you claim the benefit of this section?] That does not govern the last clause, it is a general provision. [*de Sampayo, J.* How do you make that out. It is by no means clear]. The Thesawalame attaches a sacredness to dowry property and muthusom property and imposes a wholesome fetter on childless couples. The case in Muthukrishna 176 is a case from Mannar and is no authority.

Arulanandan in reply.—The case in Muthukrishna 176 concludes the matter especially in view of the note appended to the case by the learned editor [*de Sampayo, J.* How do the people of Jaffna like these ancient provisions?] They do not like the letter but the spirit of the Thesawalame as interpreted by your Lordships' Court. In case of doubt the Roman Dutch Law applies and there is no doubt that the R. D. L. permitted alienations of dowry property with the consent of the husband (3 N. L. R. 42.

c. a. v.

Ennis, J.—The question for determination in this appeal is whether, under the Thesawalamai, the heirs of a married woman dying without issue are entitled to have the amount of her dowry made good out of the acquired property before distribution? The learned District Judge answered the question in the affirmative holding that the matter was governed by sub-section 15 Section 1. He appears to have dealt with the case on this point as a preliminary issue hence there is no evidence and all the facts are not before the Court.

Coomarasurier v. Sithamparapillai. Ennis, J.

It appears however to have been admitted that Ponnupillai, the deceased, was given Rs. 1000- in cash dowry by her parents in 1874, and that she has spent it. It would also seem, but it was not proved, that it was spent in giving a dowry to an adopted daughter. It is also admitted that Ponnupillai's heirs are her two sisters the 2nd and 3rd added-respondents.

The paragraph in Section 1 (15) upon which the respondents rely runs:—

"Should any of the man's hereditary property or woman's dowry be diminished during marriage when one of them dies and the property is divided the same must be made good from the acquired property, if it be sufficient; if not he or she who suffers the loss must put up with it patiently."

The construction and application of this passage is not so clear as it looks. The whole of sub-section 15 refers to the case of two married persons "each in particular being the sole child of their respective parents." In this case the deceased was not the sole child of her parents for the heirs are her sisters, hence the passage quoted does not directly apply and it has to be considered whether the passage ennunciates some principle of general application.

The Tesawalamai is a collection of isolated cases and it is almost impossible to extract any principles which could give cohesion to the whole It was drawn up in 1706 as a record of Jaffnapatam ancient customs. These customs would seem to have originated in the Joint Hindu family system. Section 1 (1) says: —

"In ancient times.....invariably the husband's property always remains with the male heirs and the wife's property with the female heirs, but the acquisition or Tedijitentom should be divided among the sons and daughters alike."

Had the principle remained the Tesawalamai could be regarded as a consistent whole and the single instances recorded would be illustrations of the principle.

The heirs of the husband would have a vested interest in reversion in the husband's property and the heirs of the wife similar interest in the wife's property. But the principle had disappeared even in 1706 for we read in subsection 2:—

"But in process of time.....several alterations were gradually made in those customs and usages.....so that, at present, whenever a husband or wife give a daughter or daughters "in marriage the dowry is taken indiscriminately either from the husband or wife's property or from the acquisition."

In other words the custom had changed so that the male heirs no longer had a vested interest in reversion in the husband's property. The husband and wife could deal with the property as they liked. This clearly was so where the descendants were concerned, and it seems incredible that the ancient rule should have been altered when the interests of the descendants were concerned and not altered where the interests of ascendants were concerned. That it was altered in both cases find support in provisions of the Ordinance No. 21 of 1844 which enacted that a will should "be valid and effectual to alienate and pass property in" any immovable or movable property devised, bequeathed or disposed of by the teatator "any other law or custom to the contrary notwithstanding." The Ordinance made no exception in favour of persons to whom the Tesawalamai applied, and it was in accordance with the altered principle set out in Section 1 Sub-section 2 of the Tesawalamai. It is moreover conceded that a wife can alienate her dowry property during her life-time but it is contended that such an alienation is a "diminution" of the property and should be made good out

of the acquired property. The contention seems to me impossible. It would make the husband on marriage an insurer of his wife's dowry in the interests of the relations against an alienation which she lawfully could make and such a result could hardly have been contemplated by the compiler of the Tesawalamai when he made the remark in Sub-section 5 of Section 1. "It is not for the girls but for the property that most of the men marry." In my opinion the passage I have cited from Sub-section 15 Section 1, if it is not entirely obsolete, must be read with a due regard to the altered principles of law and in that case any "diminution" of the dowry should be made good out of the wife's half of the acquired property, a procedure which would not affect the distribution in this case, as the only heirs are the sisters of the deceased.

I would allow the appeal with costs.

De Sampayo, J.—I concur in the opinion of my brother Ennis as to the construction of Clause 15 of Section 1 of the *Tesawalamai*. Even if the last paragraph of that clause is not to be limited to the specific case with which the clause deals, I cannot read it as providing that, where the dowry property is diminished by the wife herself, the husband's half of the acquired property is liable for any deficiency. It is undoubtedly the law, it is conceded by the counsel for the respondents, that the dowry property may validly be spent or alienated by the wife during her life-time and that it cannot on her death be reclaimed from the person to whom it has passed. That being so, unless we are compelled by a clear statement to the contrary in the *Tesawalamai* or in any authoritative decision, it seems to me against principle to hold that what has been properly spent or alienated by the wife should nevertheless be made up for her heirs by the husband. The *Tesawalamai* is by no means clear on the point nor has any decision been cited which supports the respondents' contention.

Certain references were made in the course of the argument to *Mutukrishna's Tesawalamai*. The reports of cases in that work are extremely bare and it is very difficult in any particular case to gather on what basis of facts decision has proceeded. Of the cases referred to the most favourable for the respondents are cases of mortgages effected by the husband and wife over the wife's dowry property and ultimately paid by the sale of the mortgaged property, but it is evident that in such cases the dowry property is regarded as having been diminished by the act of the husband as well.

I also think that this appeal should be alllowed and the order of the District Judge should be set aside with costs.

Proctor for the appellant—*V. Ramalingam.*

Proctors for respondent—*Cooke* and *Chrysostom.*

VYRAVEN CHETTY *v.* FERNANDO *et al.*

No. 22981 D. C. Kandy.

Present:—**Wood Renton, C. J.,** and **de Sampayo, J.**

2nd March, 1916.

Legacy—conditions in restraint of marriage—second marriage of legatee—Roman Dutch Law—English Law.

A general restraint of marriage is against public policy and void but a provision in restraint of marriage not as condition annexed to the gift but as pointing out the limit of the legatee's interest is good.

This doctrine does not apply in restraint of the second marriage of the legatee.

One A. F. who was lawfully married to another woman kept one W. M. as his mistress and had several children by her. A. F. executed a last will which contained the following provision:—

"It is my further will and desire that should the said W. M. take a husband after my death or behave in my way disgraceful in the family she shall thereupon forfeit all rights to any share of my estate and

Vyraven Chetty v. Fernando. De Sampayo, J.

the property hereby bequeathed to her shall sink into my residuary estate.'

Held, that the conditions operated as an absolute or general prohibition of marriage and was therefore void.

Held further, that a condition against the second marriage imposed upon a surviving spouse is valid but that the said condition did not apply to W. M. as she was not a widow.

Bawa, K. C. for plaintiff-appellant.

A. St. V. Jayawardene for defendant-respondent.

De Sampayo, J.—The plaintiff claims title to certain lands which he purchased in execution against the 8th added defendant Walimuni Mudiyanselage Ukku Menika in November 1913. The defendant and the first to the 7th added defendants are the children of said Ukku Menika by one Arnolis Fernando, and they claim the lands adversely to the plaintiff under the will of Arnolis Fernando. The question involved in this case turns upon the legal effect of the said lands in favour of Ukku Menika.

Arnolis Fernando who was a low-country Singhalese man of Galle was lawfully married to a woman who is still alive, and there are some children of that marriage He appears to have deserted his lawful wife some 20 years before his death and to have settled in Kandy, where he acquired considerable property. During his residence in Kandy he kept Ukku Menika as his mistress, and he died in 1905, having made a last will dated 7th December 1904. Some time after his death Ukku Menika began to live with his brother James Fernando by whom some children have also been born to her, and she has now married James Fernando. They lived and still continue to live in James Fernando's house The defendant and the added defendants have also lived with them on cordial terms, and up to this action there has been no question as to Ukku Menika having forfeited her right to these lands in consequence of her association or marriage with James Fernando.

By the will Arnolis Fernando in the first place gave certain pecuniary legacies to his legitimate daughter Engeltina, to his four sisters, and to his brother the said James Fernando. He next devised to Ukku Menika all the lands situate at Dumbera, among which are included the lands now in question. He then disposed of the residue by giving $\frac{1}{8}$ share to his brother Bastian Fernando and the remaining $\frac{7}{8}$ shares to his children, the defendant and the added defendants, subject to the condition that should any of the children die before attaining majority his or her share should go to the remaining children and that should they all die before that age one half of the bequest to them should go to his said brother Bastian Fernando and the other half to his daughter Engeltina. This is followed by the following provision:—

"It is my further will and desire that should the said Walimunai Mudiyanselage Ukkumenika take a husband after my death or behave in any way disgraceful in the family she shall thereupon forfeit all rights to any share of my estate and the property hereby bequeathed to her shall sink into my residuary estate."

The District Judge has held that under the circumstances above stated Ukku Menika violated the condition of the legacy and forfeited her right to the lands. It is not, however, clear whether in his view the forfeiture was due to the association with James Fernando or her subsequent marriage with him. But Counsel for the defendants felt himself unable seriously to contend that her association with James Fernando constituted "disgraceful behaviour in the family" within the meaning of a testator who though a married man had himself kept her as his mistress, and I need only say that under all the circumstances of the case Counsel acted rightly in not pressing that point. The forfeiture, if any, must therefore be confined to the condition which prohibits Ukku Menika from taking a husband.

Vyraven Chetty v. Fernando. De Sampayo, J.

The law applicable to the subject, I take it, is the Roman Dutch Law. Burge Vol. 2 p. 155 states it as a general proposition that "a condition, which either in terms or in its effect operates directly or indirectly as an absolute or general prohibition of any marriage, would be void." There is no doubt that the condition in the present case is of that description. It is however necessary to consider the application of the authorities which have been referred to at the argument further. The old Roman law entirely reprobated any provision in a husband's will by which the wife was prohibited from contracting a second marriage as the condition of her taking a legacy, but the *Lex Julia Miscella* introduced a modification by providing that the widow might have the legacy within a year upon taking an oath that she would not marry again *nisi liberorum procreandorum causa* or after a year upon giving security not to marry. Justinian first considered these restrictions to be oppressive and undesirable and allowed the widow to take the legacy absolutely without any oath or security (Code 6 40. 2) but later by *Novell.* 22. C. C. 43 and 44 he repealed his previous legislation and reciting various reasons for the change he enacted that if husband or wife should leave a legacy to the other on condition that she or he should not marry again the legatee should elect either to marry and renounce the legacy or to take the legacy and abstain from contracting a marriage. He further provided that in the latter case the legacy should be taken only upon security being given for the restoration of the property in the event of a marriage. I have thus briefly stated the Roman Law, in order to make clear the opinions of the Roman-Dutch Jurists on the subject. Peckius *de test. conjug.* 1. 24. 1 and 2. controverts the reasons given by Justinian for his latest legislation and states the law in Holland to be that the conditions in restraint of marriage imposed upon a widow or widower need not be observed, while he allows

as good and equitable a provision for the surviving spouse during widowhood or celibacy. He thus recognises the distinction between a condition annexed to the legacy and a limitation. Van Leeuwen *Cen For* 1, 3, 5, 29 lays down broadly: *Gonditio viduitatis, sive mari sive feminae imposita, quasi non adjecta remittitur*, and he specially points out that Justinian's *Novell* 22 made an alteration only in regard to second marriages of spouses and not to other marriages. He repeats that "*hodie* (i. e. under the Roman Dutch Law) *Viduitatis conditionem rejici aut remitti constat: excepto quod superstiti conjugi ad tempus secundarum nuptiarum aliquid testamento relinqui possit.* The excepted case here as in Peckins is that of a provision during widowhood or celibacy, which therefore is no restraint on marriage. Groenewegen. *De Leg. Abrog. ad eod* 6. 40. 2. is to the same effect. On the other hand Voet 28. 7. 12 and 13 differs from Van Leeuwen and Groenewegen in their comments on Justinian's *Novell* 22 and is of opinion that a condition against the second marriage imposed upon a surviving spouse should be observed in order to prevent a forfeiture, though he is at one with all the Jurists as to the general rule that a condition in restraint of marriage is against public policy and therefore inadmissible. The controversy, however, need not concern us in this case, for taking the above passage in Voet as the more correct exposition of the Roman Dutch Law, the party to be affected by the condition must be a widow or widower who is prohibited from entering upon a second marriage. Ukku was not in that position, and I think that under the Roman Dutch Law the condition was in her case void and inoperative.

The English law does not appear to compel us to a different conclusion, These too conditions in terrorem are considered contrary to public policy and as such void. In *Newton* v. *Marsden* (1862) 2 J and H at page 336, Vice-Chan-

cellor Page-Wood, stated that "the law must be taken to be settled as to males and unmarried females, that you cannot impose on them a condition in restraint of marriage" and he proceeded to consider, with reference to both English and Civil Law authorities, and to decide in the negative, the question whether the law should be extended to a restraint on the marriage of a widow. There is also a distinction in English law, in the application of the rule between a legacy of personal estate and a devise of real estate, but for the present purpose it is not necessary to notice it further than to say that as there is no distinction with us in regard to such questions between personal and real property. The English rule of law which is in respect of a gift of personal estate regards restraint as *in-terrorem* and void, derived as it is from the principles of the Civil Law, appears to me be more relevant on the present question. *Jones* v. *Jones* (1876) 1. Q. B. D. 279 which was cited to us is no real authority on behalf of the respondents. For what the Court decided there was that on the construction of the particular will the intention on the part of the testator was not to restrain any marriage but to provide for the devisee while she was unmarried. In *Allen* v. *Jackson* (1875) 1 ch. D. 399, it was held that a condition in restraint of the second marriage whether of a man or a woman was not void, and the Court extended the principle to the case of the legatee other than the testator's wife or husband. It will thus be seen that in the English Law as much as in the Roman Dutch Law there are two settled principles (1) that a general restraint of marriage is against public policy and void but a provision in restraint of marriage not as a condition annexed to the gift but as pointing out the limit of the legatee's interest is good, and (2) that the doctrine does not apply to a restraint on the second marriage of the legatee. It is clear in this case that the will contained not a mere limitation but a condition in general restraint of marriage. It was contended, however, that the provision against marriage

was in the interests of the testator's children by Ukku Menika and was not a condition *in terrorem*, but that argument can hardly be maintained in view of the fact that the residuary estate, into which the lands devised to Ukku Menika were to fall in the event of her taking a husband, was devised and bequeathed not only to those children but also to the testator's brother Bastian Fernando and (on a certain contigency) to his legitimate daughter Engeltina. Further, Ukku Menika never having been married, the law which allows restraints on second marriages is not applicable to her.

For these reasons I think the judgment appealed against is erroneous, and I would allow the appeal. There is no proof of damages, and I would therefore give judgment for the plaintiff for the lands and for possession with costs in both Courts but without damages.

I agree.—**Wood Renton C. J.**

Proctor for appellant—*C. N. De Jonkalas*

Proctor for respondent—*Beven & Beven.*

ILAGAPILLAI *v.* SIVAGURU.

No. 10955 C. R. Jaffna.

Present:—**De Sampayo, J.**

19th June 1916.

Deed—Forgery—signed by maker—is deed genuine.

Respondent impeached appellant's deed as a forgery and the only issued raised at the trial was whether the deed was genuine. The Commissioner found that the deed was signed by the person who was alleged to have executed it. He however held the deed to be a forgery on the ground that the deed was not executed at a place called N where it purports on the face of it to have been executed but at a place called M.

Held, that on the issue raised in the case and in the face of the finding that the deed was signed by the alleged maker, it cannot be held to be a forgery.

The presumption of law in favour of a notarial instrument as to formalities can only be rebutted by very cogent evidence.

Bawa K. C., for defendant-appellant.

A. St. V. Jayawardene for plaintiff-respondent.

c. a. v.

De Sampayo, J.—The plaintiff as heir of one Velupillai claimed title to 5/9 share of what has been called "sea land," that is to say, a portion of the sea, at Kalmunai. No question has been raised as to the possibility of the existence in law of such a right, but the 1st and 2nd defendant pleaded the deed No. 4504 dated 3rd August 1914 said to have been executed by Velupillai in their favour for the said 5/9 share. The plaintiff impeached the deed as a forgery, and accordingly the issue stated at the trial was whether the deed was genuine. The deed on the face of it purports to have been executed and attested on the above date at Nallur where the Notary's office is. There was another deed of the same date executed before the same Notary by a number of people, including Velupillai, in connection with a certain temple. Much of the proceedings was taken up with the question whether the latter deed was executed at Nallur or at Mathuvilnadu, and on the 23rd August or on some day in July and in consequence the trial went somewhat awry and obscured the only issue with which the Court was concerned. In the result, however, the Comissioner found that Velupillai did sign the deed No. 4504 in question, though he thought that Velupillai did so at Mathuvelnadu and in July and not in the presence of the Notary and both the witnesses. There is really no doubt whatever as to the genuineness of the signature, and no attempt was even made to dispute it except by suggesting, in the circumstances above stated, that Velupillai could not have been at Nallur on the 3rd August. The finding as to Velupillai's signature appears to me to conclude the matter and to require the issue in the case to be decided in the

defendant's favour. It is contended on behalf of the plaintiff, however, that the Commissioner's judgment shows that formalities required by the Ordinance No. 7 of 1840 and and the Notaries' Ordinance as to attestation were not observed and that the deed therefore was not operative. But no question was raised in the pleadings or formulated at the trial regarding the due observance of those formalities, and in my opinion the case should not be disposed of on such a ground. Moreover, the Notary and both the witnesses gave evidence to the effect that the deed was duly executed in the manner and form stated in the attestation clause. If, as the Commissioner thinks, the other deed was signed at Mathuvelnadu early in July, that circumstance supports the defendant's case, for then it must he held that it is quite possible for Velupillai to be at Nallur on 3rd August and to execute the deed in defendant's favour. This appears to me to be eminently a case to which the observations of Bonser C. J., in *Arumugam* v. *Sanmugam* (1899) 4 N. L. R. 314, apply. There too the Court of first instance found that the deed was genuine, being executed by the party concerned, but as the witnesses had said that they did not sign in the presence of each other and one of them even denied his signature altogether, the Court pronounced against the deed. The Chief Justice in appeal observed that the District Judge had acted upon a dangerous doctrine and that the presumption of law in favour of a notarial instrument as to formalities can only be rebutted by very cogent evidence. There is no such cogent evidence in the present case. In any event, as I have already pointed out no specific issue was raised on the point at all, and the matter of formalities was wholly irrelevant.

In my opinion the one issue tried should have been decided in the affirmative. The judgment appealed from is therefore set aside and the plaintiff's action dismissed with costs in both Courts.

Proctor for appellant—*G. N. Tisseveresinghe.*

Proctor for respondent—*Caripillai & Kadiravelu.*

THYRIAR *v.* SINNATAMY.

No. 19340 P. C. Jaffna.

Present:—**Shaw A. C J.**

4th July, 1916.

Stolen property—found in possession of pawn broker—accused acquitted of theft—Magistrate discretion in directing restoration of property to owner—appeal—Criminal Procedure Code §§ 413, 338.

There is no appeal from an order of a Police Magistrate under § 413 of the Criminal Procedure Code regarding the disposal of any property produced before him regarding which an offence has been committed.

Under § 413 of the Criminal Procedure Code a Magistrate has discretion to direct property produced before him, in respect of which he considers an offence has been committed to be delivered to the person who he believes to be the rightful owner although it has been produced from some other custody and and although the accused is acquitted.

The facts of the case are set out as follows in the judgment of Shaw, A. C. J:—

One Thyriar charged Michel Sinnatamby in the Police Magistrate's Court at Jaffna with the theft of a jewel. A search warrant was issued and the jewel was found in the possession of the appellant a pawn broker and was produced before the Court at the hearing. The Magistrate came to the conclusion on the evidence that the jewel had not been stolen by Sinnatamby but by a nephew of the complainant and pledged by him to the appellant. He accordingly acquitted the accused and at the conclusion of the case made an order under Section 413 of the Criminal Procedure Code for the delivery of the jewel to the complainant. The appellant has appealed from this order.

J. Joseph for complainant respondent.—No appeal lies in this case. Section 338 of the Criminal Procedure Code provides for appeals from Police Courts and District Courts. Under that section any person who shall be dissatisfied with any judgment or final order pronounced by a Police Court.....in a Criminal cases or matter to which he is a party may prefer an appeal to the Supreme Court. The learned Magistrate made the order under Section 413 of the Criminal Procedure Code. That order cannot be said to be made in a Criminal case or matter.

"A Criminal case or matter" is explained in the case of *Gunesekere* v. *Jayaratne*. [1] Further the appellant was not a party to the proceedings in the Police Court in which Sinnatamby was acquitted. *Rex* v. *Mack* [2].

A. St. V. Jayawardene with *Arulanandan* for appellant.—The appellant has been brought into the case by the respondent and therefore the appellant is a party to the case. The Order of the Magistrate is grossly irregular and therefore if no appeal lies it is submitted that this matter might be dealt with by your Lordship in revision. [His Lordship intimated that he would deal with the case in revision]. In this case the accused was acquitted, therefore the Magistrate should have returned the article to the custody from which it was taken. It would have been different if the accused was convicted. Then the respondent would have been entitled to it. This matter is concluded by authority. *Thambipillai* v. *Ramaswamy* [3], *in re Sadashi* v. *Narayan Valkar* [4].

J. Joseph in reply. Section 413 of the Criminal Procedure Code invests the Magistrate with discretion as to the disposal of the article. It does not say that in case of an

(1) 1 Bal. 154.
(2) 1 Bal. 194.
(3) 4 Bal. 89.
(4) 9. Cr. L. J. 162.

Thyriar v. Sinnatamby Shaw, A. C. J.

acquittal the article should he returned to the custody from which it was taken. The Magistrate has exercised a judicial discretion and it is submitted this Court should not interfere with it. *Podisingho* v. *Meyer*[1] ; *Silva* v. *Rajelis* [2] .

c. a. v.

Shaw, A. C. J.—(His Lordship having set out the facts as above continued):—I am opinion that no appeal lies. Under Section 338 of the Criminal Procedure Code, subject to certain conditions, "any person who shall be disatisfied with any judgment or final order pronounced by any Police Court.....in a Criminal case or matter to which he is a party may prefer an appeal to the Supreme Court. The appellant was not a party to the proceedings in the Police Court in which Sinnatamby was acquitted, and the order for the delivery of the jewel to the complainant is not a judgment or final order in a Criminal case or matter. See *ex* v. *Mack*, (1 Bal. 194,) *Gunesekera* v. *Jayaratna*, (1 Bal. 154.)

But even if I were to treat this as an application for revision I consider the appellant could not succeed.

There is ample authority that the Magistrate has discretion to direct property produced before him, in respect of which he considers an offence has been committed, to be delivered to the person who he believes to be the rightful owner, although it has been produced from some other custody, and although the accused is acquitted, *Podisinho* v. *Meya*, [1] *Silva* v. *Rajelis* [2].

The Section invests the Magistrate with a discretionary power and if he exercises his discretion in a judicial manner, that discretion ought not to be reversed by a higher tribunal exercising its power of revision. *In re Sadashi* v. *Narayan Valkar*, 9. Cr. L. J. 162. In the present case the Magistrate has so exercised his discretion and his order should not be interfered with.

(1) 4 N. L. R. 80. (2) 1. C. L. R. 39.

I dismiss the appeal.

Proctor for appellant—*A. Ramalingam.*

Proctor for respondent—*J. A. J. Tisseveresinghe.*

PERUMAL KANGANY *v.* SINNE PERUMAL.

P. C. Panwila No. 882.

Present:—**Schneider, J.**

23rd August 1916.

Labour Ordinance—§ 11 of Ordinance 11 of 1865—misunderstanding as to nature of contract of service—refusal to work except as Kanakapulle—Ordinance No. 13 of 1889 § 5; Ordinance 16 of 1905.

The accused was induced to come to the complainant's estate on the representation of the Head Kangany that he would be employed as a Kanakapulle. After his name had been entered in the register and check roll he was asked to do the supervising work of a Kangany. He refused and was prosecuted under § 11 of Ordinance No. 11 of 1865.

Held, that there was no contract existing between the Superintendent and the accused that the latter should serve as a Kangany.

There having been misunderstanding as to the exact nature of the contract of service, the accused could not be convicted of 'wilful disobedience' of lawful orders under § 11 of Ordinance No. 11 of 1865.

Appavu v. *Ponniah*[1] ; *Ryan* v. *Weerappen*[2] ; and *Natu Meya* v. *Kadersa Kangany*[3] ; followed.

The accused while employed as a Kanakapulle on Heerasgalle Estate was promised by the Head Kangany of Gavatenna Estate a better position as Kanakapulle and induced to come over to the latter estate. Upon the arrival of the accused and some coolies under him on Gavatenna Estate their names were entered in the Register, the accused's name being entered as Kangany. When the accused was asked by the conductor of the estate to supervise

1. *15 N. L. R. 342.*
2. *P. C. Matale (S. C. M 12th September, 1906).*
3. *P. C. Badulla Haldumulla (S. C. M. 7th August, 1902).*

as Kangany the work of certain coolies he refused, and stated he had come under a contract to serve as a Kanakapulle. This prosecution was then instituted. The Police Magistrate held that the agreement between the Head Kangany and the accused did not bind the Superintendent of the estate and that the contract with the Superintendent was created by the entry of the name of the accused on the check roll and register, and convicted the accused under § 11 of Ordinance 11 of 1865 for refusing and neglecting to work. The accused appealed.

G. Koch, for appellant.—The learned Police Magistrate is wrong in holding that the agreement between the Head Kangany and the accused does not bind the Superintendent. This is a civil contract of service and the usual rule of agency applies. There was no wilful disobedience of lawful orders on the part of the accused as he reasonably believed he was only bound to work as a Kanakapulle. *Ryan* v. *Weerappen*[1].

Although under § 5 of Ordinance No. 13 of 1889 the entry of the accused's name in the register and check roll and the receipt of the rice advances is deemed to establish a contract of service, the nature of the service contracted for must be proved *aliunde*.

Further, the order was not a 'lawful' order as there is nothing to show that the conductor, who gave the order, was authorised to do so.

Schneider, J.—In this case the Head Kangany of Gavatenna Estate prosecuted the appellant for refusing and neglecting to work from the 7th May, 1916 without reasonable cause under § 11 of the Ordinance of 1865, as amended by Ordinance No. 16 of 1905, The learned Police Magistrate convicted the accused and imposed a fine of Rs 50/-. The accused appeals. His defence is that he was employed

(1) P. C. Matele (S. C. M. 12th September, 1906), Vol, IV.

as a Kanakapulle on Heerasgalle Estate and that the Head Kangany who is the complainant promised him a better position as Kanakapulle at Rs 30/- a month. The complainant denies this part of the evidence, but the evidence establishes that this promise had been held out as an inducement to the accused. Upon the arrival of the accused and some coolies under him on Gavatenna Estate their names were entered in the register, the accused's name being entered as Kangany. When the accused was ordered by the conductor of the estate to supervise as Kangany the work of certain coolies he refused, and stated that he had come under a contract to serve as a Kanakapulle and not as a Kangany. He asked for a *tundu* for himself and his coolies. In the result this prosecution was instituted on the 8th June, 1916. The learned Police Magistrate states that the agreement between the Head Kangany and the accused does not bind the Superintendent of the estate and that the contract with the Superintendent was created by the entry of the name of the accused in the estate check roll and register.

In my opinion the evidence does not establish that there was a contract between the Superintendent and the accused that the accused should serve on Gavatenna Estate as a Kangany. It is quite possible that the Superintendent may have assumed that the accused had consented to serve in that capacity, but there is no evidence to support that assumption. Putting the evidence for the prosecution as high as it could possibly be put it is obvious that there has been a misunderstanding und such a misunderstanding as as negatives the formation of a contract of service of the nature upon which the prosecution is based. I think the evidence clearly proves that the accused came to Gavatenna Estate fully believing that he was only to do the work of a Kanakapulle. Tnere is no evidence to show that he refused to do such work.

I therefore set aside the conviction and acquit the accused.

I direct the attention of the Police Magistrate to the case of *Appavu* v. *Ponniah* (15 N. L. R. 342) and the cases of *Ryan* v. *Weerappen* and *Natu Meya* v. *Kadersa Kangany* which are reported at the foot of that case.

Set aside.

Proctor for appellant—*J. D. Jonkalaas.*

BANDA *et al.* *v* BANDA *et al.*

D. C. Kurunegala 5756.

Present:—**Wood Renton, C. J.**, and **De Sampayo, J.**

6th June, 1916.

Kandyan Law—illegitimate son—is father heir to acquired property?

The father is not the heir of his illegitimate child in respect of the acquired property.

Niti Nigenduwa **pp 13 and 15 followed.**

A. St. V. Jayawardene, for defendants-appellants.

E. T. de Silva, for plaintiff-respondents.

c. a. v.

De Sampayo, J.—The point of Kandyan Law, which the appeal mainly raises, is whether the father is heir to his illegitimate child in respect of the acquired property. There is no direct statement on this specific question either in the text books, with perhaps one exception which will be presently noticed, or in the reports of judicial decisions. There is good authority for the proposition that an illegitimate child succeeds to the acquired property of the father along with legitimate children. *Appuhamy* v. *Lapaya*, 8 N. L. R. 328; *Re Sundara*, 10 N. L. R. 129; *Ran Hamy* v. *Menik Etana*. 10 N. L. R. 153. The exception among the text books I referred to is the passage at p. 13 of the *Niti* Vol. IV.

Nigenduwa on which counsel for the plaintiff-respondent in this case entirely relies. It is there said "Procreate right gives a title to a legitimate child from the father and to the father from a legitimate child, but it does not give a title to an illegitimate child from the father or to the father from an illegitimate child." I was at first inclined to think that as the first branch of this proposition is shown by the decisions above cited to require modification se far as acquired property is concerned, a similar modification so far as acquired property is concerned, a similar modification might be necessary in the second branch of it also, especial ly as there appeared no logical reason why, if the child succeeded to the father's property, the father should not succeed to the child's. But the *Niti Nigedduwa* at p. 15 repeats the previous statement as regards the father in still more emphatic language thus;—"On the death of legitimate children their father may inherit their property by blood-right, but he can never, as their father, do this in the case of illegitimate children." I am able to find no sure ground on which we may confidently refuse to give effect to the rule so laid down. I think we also have to take account of the fact that it is not always possible to extract a logical principle from the rules of inheritance in the local customary systems of law. In the present instance the reason for the difference between the cases of the father and tha child may perhaps be found in the suggestion of counsel for the plaintiffs that the Kandyan law recognises an obligation on the part of a man to provide for a child for whose birth he is responsible and so allows the child to succeed to the father's acquired property, while no such obligation attaches to the child. In the Kandyan law, the right by which the father succeeds to the child's property, whenever he does so, is described as *jataka uruma*. and it is undoubtedly the case that in the treatment of the subject the reference is to the property of a legitimate child. In the absence of a positive or direct authority to the contrary

Banda v. Banda
Wood Renton. C. J.

I am not prepared to dissent from the opinion of the District Judge that the father of an illegitimate child does not inherit his property by *jataka uruma*. In this state of the law, I think we must decide the question involved in in this case in the negative.

The dispute in this case is to certain property which the defendant transferred to his illegitimate son-Kirimudiyanse who died unmarried and issueless. Kirinmudiyanse's mother appears to have predeceased him, and administration having been taken to his estate the property was sold to the plaintiffs by three other children of his mother by a different father. It was argued that the defendant's deed was not operative as it was without consideration and had not been delivered and that in any event the vendors to the plaintiffs were not the heirs of Kirimudiyanse. The original deed has not been produced by the defendant, and I cannot well say on the evidence in the case that it was not delivered after execution, and the District Judge held against the defendant on the issue as to consideration. As regards the second point, Kirimudiyanse's mother, if alive, would of course have been his heir, and in her default I think his half sisters were his heirs.

I would dismiss the appeal with costs.

Wood Renton, C. J.—I agree.

Proctor for appellant—*C. E. Madawela.*

Proctor for respondents—*W. A. C. de Silva.*

SEGO MOHAMADO *v.* MANIPILLAI.

No. 11092 D. C. Jaffna.

3rd July, 1916.

Present:—**Ennis, J.** and **de Sampayo, J.**

Land purchased by defendant at Fiscal's sale—prior sale by Judgment—debtor to plaintiff before execution—fraud—Can defendant ask for cancellation of plaintiff's deed on the ground of fraud.

Defendant was the execution purchaser of a land at Fiscal's sale Plaintiff who bought the land from Judgment debtor before execution sued the defendant for declaration of title. Defendant impeached plaintiff's transfer as fraudulent and prayed for its cancellation. The District Judge refused to grant a canellation of the deed and gave judgment for the plaintiff on the ground that the judgment debtor had no saleable interest in the land at the time of the Fiscal's sale.

Held. **it was open to the defendant to impeach the deed as fraudu- and to pray in reconvention that it be declared void.**

Harmanis **v.** *Harmanis*[1] **followed.**

c. a. v.

The 1st defendant appellant was the purchaser at a Fiscal's sale of a certain land which was sold as the property of the 2nd defendant respondent in execution of a decree against the 2nd defendant. It appears that the 2nd defendant objected to the application of the judgment-creditor for execution and, on the 24th August 1915, the day before the objection was heard, executed a deed of transfer No. 8578 in favour of the plaintiff-respondent. On the day fixed for hearing the objection, the 25th August, 1915, the second defendant failed to appear and the Court ordered execution to issue against the property of the second defendant. In pursuance of that order the property now in dispute was seized by the Fiscal and sold to the first defendant on the 29th November, 1915. The plaintiff, the second defendant's transferee filed action for a declaration of title

1. N. L. R. 332.

Mohamado v. Manipillai
Ennis, J.

against the purchaser at the Fiscal's sale (the first defendant) and his vendor the second defendant. The first defendant filed answer that the plaintiff having got his transfer fraudulently was not entitled to vindicate it against a *bona fide* purchaser for value without notice. The learned District Judge refused to allow the prayer for the cancellation of the deed, and gave judgment for the plaintiff, on the ground that the second defendant had no saleable interest in the land at the time of the Fiscal's sale.

Arulanandam, for appellant.—The mere recital of the relevant dates indicate that the second defendant and the purchaser were perpetrating a fraud on the judgment-creditor. All the parties necessary for the Court to adjudicate on the question of the fraud are made parties to the case.

The question of the fraud it was held could be gone into in an action for declaration of title. *Naidu* v. *Meera Saibu*[1] ; and even in an action under § 247 of the Civil Procedure Code. *Harmanis* v. *Harmanis*[2] . This is not a case where the legal title has gone to a third party who was no party to the fraud.

A. St. V. Jayawardene, for respondent.—Contended that the question of fraud should be raised in a separate action. A Paulian action and an action *rei vindicatio* cannot be joined.

Ennis, J.—[After recapitulating the facts as above, continued:]

In *Suppian Naidu* v. *Meera Saibu* (3 Bal. 129) (an action for declaration of title in which the plaintiff's predecessor in title had bought the land in dispute on a writ against one who had previously gifted them away) it was

1. 3 Bal. 129. 2. 10. N. L. R. 332.

held that it was open to the plaintiff to raise an issue as to whether the deeds of gift were fraudulent and that it was not necessary for the decision of the issue to make the donor a party to the action. In *Harmanis* v. *Harmanis* (10 N. L. R. 332) the majority of the Court held that, in an action under § 247 of the Civil Procedure Code where the claimant bases his title to the property seized on a deed of transfer executed by the judgment-debtor, it is competent for the judgment-debtor to claim in reconvention a declaration that the deed is void and that the Court had power to add the grantor as a party to the case.

I see no reason whatever why the defendant-appellant should not be allowed to add to his plaint a prayer for a cancellation of the deed, as the property is in the hands of a person alleged to be a party to an alleged fraud. If before the deed could be set aside the person holding the legal title under it had conveyed it to a *bona fide* purchaser for value the matter might be different, as the deed until set aside is valid, but, where the party claiming is a party to a fraud there is nothing that I can see which would prevent a Court from depriving, in the action in which the question of fraud is raised, the legal holder of the title of any advantage he may have gained by the fraud. I would set aside the decree and send the case back for further trial in due course. The answer can be amended and further issues framed if necessary. The costs of the appeal should be the costs ot the cause.

De Sampayo, J.—I agree.

Proctors for appellant—*Casipillai* and *Cathiravelu.*

Proctors for respondent—*Cooke* and *Chrysostom.*

ABDUL CADER *v.* VELAIDEN *et al.*

C. R. Panwila 3451

Present:—**Shaw, A. C. J.**

28th July, 1916.

Goods sold and delivered—running account—prescription—Ordinance No. 22 of 1871 Section 9.

An actions for goods supplied on a running account becomes barred by prescription after the expiration of one year in the supply of each particular lot of goods *Silva* v. *Adakkan Kangany*[1] followed.

A. St. V. Jayawardene, for the appellant.

M. W. H. de Silva, for the respondent.

Shaw, A. C. J.—This was an action for the balance of an account for the goods sold. The Commissioner of Requests has found that only Rs 1/11 can be recovered by the plaintiff, because the balance of the account is barred by the Prescription Ordinance. The account was for shop goods supplied and all the items, with the exception of the one allowed by the Judge, were prior to one year before the institution of the action. Section 9 of the Prescription Ordinance, 1871, provides that no action shall be maintainable for or in respect of any goods sold and delivered unless the same shall be brought within one year after the debt shall have become due. It is contended on behalf of the appellant that because the account was a running account the time of prescription for the whole of the goods must be calculated from the last item of the account, which is within one year of the institution of the action, and in support of this contention the case of *Mendis* v. *Mendis*[1] is cited I agree with the Judgment of my brother de Sampayo in the more recent case of *Silva* v. *Adakkan Kangany*[2] that

(1), 3. Br: 133. (2), 3. A. C. R. 121.

an action for goods supplied, as in the present case, on a running account becomes statute barred after the expiration of one year in the supply of each particular lot of goods The decision of the Commissioner is, therefore, in my opinion right and the appeal must be dismissed with costs.

Proctor for appellant—*C. Ariyanayagam*

In the matter of an application by V. Coomarasamy under section 32 of ordinance No. 22 of 1909 against a ruling of the Commissioner of stamps.

Present:—**Ennis, J. and Schneider, J.**

28th August, 1916.

Stamp Ordinance No. 22 of 1909—non-testamentary disposition of property—deed of settlement—stamp duty, section 3 (24) of the stamp Ordinance

An instrument contained the following words:—

"Know all men by these presents that we C. S. and wife A execute and grant a deed of distribution of *muthusam* known as deed of settlement to our children.....The above described four properties of the value of one thousand five hundred Rupees we make over in equal shares to the said..... .."

There was no acceptance on the face of it by or on behalf of the grantees.

It was contended that for the purpose of stamp duty the instrument falls under item 30 (b) in Part I. of Schedule B to the stamp ordinance 1909 as "a gift or deed in which the donee or some person authorised by law to represent the donee has not expressly signified his acceptance of the gift."

Held, that the instrument was a "settlement" under item 49 in Part I of the Schedule B to the Ordinance.

In re application by V. Coomaraswamy.
Innis, J.

Per Innis, J.—In my opinion an instrument is chargeable with duty when it falls within the character which it purports to have apart from any question as to whether or not it is effective for the purpose.

Arulanandan for appellant.—The deed in question was executed by the parents distributing their property among their children. It falls well within the definition of settlement given in sub-section 24 of section 3 of the stamp ordinance No. 22 of 1909. We do not rely on the fact that the deed is called a "deed of settlement" in the deed itself. But the nature of the instrument makes it come well within the definition of "settlement." The deed is therefore chargeable under article 49 of Part I in Schedule B; and not under article 30 as decided by the Commissioner of Stamps. At the lowest it is doubtful under which article the deed is to be stamped. The stamp ordinance is one which imposes pecuniary burdens on the subject and should be construed as favourably to the subject as possible. [See Maxwell on statutes 429–430.]

Garvin S. G. for the Crown.—Settlement is defined in 25, Halsbury 526. Settlements are alien to our system of laws. Even accepting the definition of "settlement" given in the Ordinance the deed in question is not a "non-testamentary disposition of property." There has been no acceptance and therefore there is no disposition. Under the R. D. L. the deed in question would be a donation where there has been no acceptance. For the purpose of determining the nature of an instrument, we must look to the instrument alone and not to any external circumstance. *In Re Chellappah 19 N. L. R. 116.* The deed therefore ought to be stamped as an unaccepted deed of gift.

Arulanandan, in Reply. If a deed purports to be a disposition of property the Court need not look behind it to see whether it is an effective disposition for the purpose of stamping the document. The Wills Ordinance speaks of

testamentary disposition of property. If a will is a stampable document it has to be stamped irrespective of its being a valid will. The heir or legatee may refuse to accept. It cannot be argued that a will need not be stamped if it becomes invalid for any such or other reason. *In re Chellappah* is no authority as the words of the deed in that case are different.

c. a. v.

Ennis, J.—This is an application under section 32 of the stamp ordinance No. 22 of 1909 by V. Coomarasamy Proctor and Notary Public, appealing against a decision of the commissioner of stamps determining that an instrument, submitted for his opinion as to the amount of duty with which it is chargeable, is chargeable under schedule B. Part 1, article 30. as a gift in which donees have not expressly signified acceptance of the gift.

The instrument in question, according to the official translation, purports to "make over" four lands to the children of the donors in equal shares. The instrument recites that the grant is made as a "deed of distribution of *mutusom* known as a deed of "settlement."

For the appellant it is contended that the instrument is one chargeable with the duty prescribed in article 49 for an instrument of settlement.

It is to be observed that article 49 includes a deed of dower in an instrument of settlement. Section 3 (24) defines "settlement" as follows:—

"Settlement means any non-testamentary di position in writing, of moveable or immoveable property made (a) in consideration of marriage, (b) for the purpose of distributing the property of the settlor among his family or those for whom he desires to provide or for the purpose of

In re-application by V. Coomaraswamy.
Ennis, J.

providing for some person dependent on him; or, (c) for any religious or charitable purpose, and includes an agreement in writing to make such a disposition."

In England "settlement" has been defined (25 Halsbury 526) as an instrument whereby property is limited to or in trust for persons by way of succession.

In Ceylon the inclusion of a deed of dower with settlements for the purpose of duty and the terms of the definition of settlement which are wide enough to include direct gifts in certain cases show that it was not the intention of the Legislature to limit the meaning of the term to the ordinary meaning when considering the character of a document for the purpose of duty. The rule for the construction of revenue laws is that they are to be read in favour of the subject but so that effect is given to the intention of the Legislature (Maxwell on the interpretation of the statutes 4th Ed: 430-434). The case of *In re Chellappa* (19 N. L. R. 116) decided that the document only can be looked to to determine its character and that it must contain words to show that it was made for one of the purposes mentioned in section 3 (24) before it is chargeable with duty as a settlement. The present document contains such words; it is to effect a "distributing" of the property of the settlors among their "children."

It was finally submitted by the Solicitor-General that an instrument of settlement under the terms of the definition is a non-testamentary disposition of "property," and that by Roman Dutch Law it would fall under the head of "donations" and would not be complete until accepted. In other words it would not be a *disposition* of property until accepted and could not therefore fall within the definition of settlement given in the stamp ordinance. On the other hand it has been pointed out that the words non-testamentary "disposition of property" have probably been used in

the stamp ordinance in contradistinction to the words "testamentary disposition of property" used in the Wills Ordinance, and that a donation under a will purports to be a gift notwithstanding that the legatee may decline to accept it. In my opinion an instrument is chargeable with duty when it falls within the character which it purports to have apart from any question as to whether or not it is effective for the purpose. The settlors in the present case purport by the instrument to "make over" certain lands to their children and this is a disposition of property by them. They have put it in the hands of others to complete the alienation or not. The acceptance may be inferred from conduct in the absence of an express acceptance and the disposition operates from the date of the document just as a gift under a will operates from the death of the testator. There is in fact a "disposition" of property notwithstanding that the "alienation" is incomplete. In the circumstances I am of opinion that the instrument before us in this case is a settlement within the meaning of the term as used in the stamp ordinance and is chargeable with duty as such. I would allow the appeal.

Schneider, J.—The appellant applied to the Commissioner of stamps under the provisions of section 30 of the stamp ordinance, 1909, to have the opinion of that officer as to the duty chargeable in respect of an instrument bearing No. 150, dated 29th November, 1915, and attested by the appellant. The commissioner held that it was chargeable with a duty of Rs 22/50 under item 30 (b) in part I of Schedule B to the stamp ordinance, 1909, as "a gift or deed of gift in which the donee or some person authorised by law to represent the donee has not expressly signified his acceptance of the gift."

The appellant contends that it is chargeable with a

In re application by V. Coomaraswamy, Schneider, J.

duty of Rs. 7/50 under item 49 in Part I of that Schedule as a 'settlement,' and appeals against the determination of the Commissioner. The material parts of the translation of the instrument, which is in Tamil, are the following;—

"Know all men by these presents that we Casynatar Sinniatampy and wife Annappillai execute and grant deed of distribution of Muthusam known as deed of settlement to our children.....

The above described four properties of the value of one thousand five hundred Rupees we make over in equal shares to the said....." The instrument is signed by the grantors. There is no acceptance on the face of it by or on behalf of the grantees. In section 3 of the Stamp Ordinance sub-section 24 the term "settlement" is defined as follows: "settlement" means any non-testamentary disposition, in writing, of moveable or immoveable property made

(a) In consideration of marriage, (b) for the purpose of distributing the property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or

(c) For any religions or charitable purpose; and includes an agreement in writing to make such disposition." In Sub-section 9 'conveyance' is defined thus: 'conveyance' includes a conveyance or sale and every instrument by which property, whether moveable or immoveable, or any interest or estate in any property, is transferred *inter vivos*, and which is not otherwise specifically provided for under this Ordinance." This instrument would have come under 'conveyance' but for the fact that it falls either under the head of 'gift' or 'settlement' or under both, and therefore it is an instrument specifically provided for under the Ordinance and thus excluded from the term conveyance. There can be no doubt that it is a deed of gift falling

under 30 (b) because it contains a voluntary transfer of property, and there is no express acceptance on the face of it.

Assuming for the moment that it falls also under the term 'settlement,' to my mind there is no room for doubt that in that case it should be regarded as chargeable with duty under 'settlement' and not under 'deed of gift' because the intention of the legislature is clear that certain deeds of gift which come under settlement because they partake of the characteristics of settlements within the meaning of the Ordinance besides being deeds of gift as well, should be charged with the lesser duty payable under the head of settlements.

The point at issue therefore resolves itself into the question: Is the instrument a 'settlement'?

The learned Solicitor-General contended with much skill that it did not come within the term 'settlement' as there was no 'disposition' of property; that 'disposition' must be taken to mean a *transfer* of dominium or other kindred right, and the instrument in question is not effectual to transfer the dominium inasmuch as there is no acceptance on the face of it, that of any other acceptance regard cannot be had, because for the purpose of determining the nature of the instrument the instrument, and it alone, must be considered. In support of the last part of this argument he cited 30 (2) of the stamp Ordinance, and the decision in the matter of the application and appeal of *In re Chellappah* under section 32 of the stamp Ordinance which is to be found in this Court's Civil minutes of date 25th May, 1916.

I agree with the principle of the decision cited by him and that we must look to the instrument and that alone to determine its nature or character. At the argument I was inclined to agree with the rest of his argument also namely

In re application by V. Coomaraswamy. Schneider, J.

that 'disposition' must be interpreted to mean actual transfer and that an unaccepted donation therefore was not a 'disposition.' But on reconsideration I hold that the instrument in question is a 'disposition' within the meaning of sub-section 24 of section 3.

The word 'disposition' is used in a similar connection as in our Stamp Ordinance in several English Acts. See 4 Encyclopaedia of the Laws of England (Wood Renton) p. 623 under " Disposition ". The case of *Attorney-Ceneral* v. *Montefiore* (1888) 21 Q. B. D. 461 turned upon the construction of the word " disposition " in section 2 of the Succession Duty Act, 1853 (16 and 17 Vict. C. 51). The material part of that section is as follows :—" Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death or any person." In that case by an Indenture Sir Moses Montefiore made provision for an endowment and covenanted that he or his executors or administrators after his death would transfer certain Bank Stock and certain shares unto the names of trustees. By another Indenture he declared that the trustees should stand possessed of the stock and shares upon trust for certain charitable purpose. By a subsequent deed about four years after he covenanted that he or his executors or administrators after his death would transfer a further amount of Bank stock unto the names of the trustees and declared that they should stand possessed of it in the same trust. After his death his executors transferred the stock and shares into the names of the trustees. It was held that the deeds showed a 'disposition' by the donor. Manesty, J. said, " The word ' disposition' is employed in its ordinary sense and when a man covenants himself to transfer in his lifetime, and that if he fails to do so in his life time his executors or administrators shall, it is plain that the

settlor makes in an ordinary sense a 'disposition' of so much of his property."

Sub-section 24 of Section 3 makes settlement to include "an agreement in writing to make such disposition."

The instrument shows that some four allotments of land are conveyed by parents to five of their children and to a child *en ventre sa mere*. The grantors say that they are doing this in order to distribute their *muttusam* or ancestral property among their children. This instrument therefore seems to me to be a "settlement" because it is a non-testamentary 'disposition', that is, a disposition so far as the settlors are concerned by an act *inter vivos* of immovable property, "for the purpose" that is with the "of distributing the property ot the settlors among their family." Even if the instrument is not a dispostion it is undoubtedly an agreement in writing to make such 'disposition' because it is an offer to give by way of donation which that may be at any moment converted into an actual transfer by acceptance.

I agree therefore in allowing the appeal, and holding that the instrument is chargeable with duty as a 'settlement.'

LEBBE MARIKAR *v.* BASTIAN APPU HAMY.

D. C. Colombo No. 44898.

Present—**Shaw, A. C. J.** and **De Sampayo, J.**

12th September, 1916.

Lease—lessee tapping cocoanut trees for toddy—action for cancellation of lease—interim injunction.

The plaintiff leased to the defendant by a deed a house and garden for three years. The defendant tapped the cocoanut trees in the garden for toddy. The plaintiff brought the above action for a forfeiture

Marikar v. Bastian Shaw, A. C. J.

of the lease on the ground that the defendant was using the property for the purpose for which it was not let and applied for an *interim* injunction restraining the defendant from tapping the trees till the determination of the action.

Held, that in view of the damage which the plaintiff, if successful in this action, may sustain if the defendant continues tapping the trees the *interim* injunction applied for ought to be granted.

This is an appeal from an order of the Acting District Judge of Colombo (L. M. Maartinsz Esq.) refusing to grant an *interim* injunction restraining the defendant from tapping the trees standing on the leased premises till the determination of the action.

Bawa, K. G. (with *E. G. P. Jayatilake*) for the plaintiff-appellant—The defendant is using the property for a a purpose for which it was not let. That it is a misuse of the property which would entitle the plaintiff to ask for a forfeiture of the lease. The plaintiff will sustain irremediable damage if an injunction is not granted.

A. St. V. Jayawardene (with him *A. L. P. Aserappa*) for the defendant-respondent—§ 87 of the Courts Ordinance lays down the powers of a Court to grant injunctions. According to that Section the appellant is not entitled to an injunction in this case. [**Shaw, A. C. J.**—He would be entitled under clause (1)]. No. The tapping of the trees will not cause injury to the plaintiff. On the contrary the effect of the tapping will be to make the trees very productive after some time. The defendant will be able to prove that those trees were tapped for toddy before the lease was executed. The defendant cannot, therefore, be said to be using the property for a purpose for which it was not let.

Shaw, A. C. J.—The defendant in the action is the tenant from the plaintiff of a house and garden in Colombo

holding a lease for three years from the first of September, 1915. The action is brought for a forfeiture of the lease on she ground that the defendant is using the property for the purpose for which it was not let to the detriment of the lessor. What is complained of is that the defendant is tapping for toddy cocoanut trees in the garden adjoining the house, which the plaintiff says will damage the trees and will make them less productive at the end of the lease, or should he resume possession of the property before that time. The application giving rise to the present appeal was an application for an *interim* injunction restraining the defendant from tapping the trees till trial of the action. The District Judge refused the injunction being of the opinion that it was applied for merely on the ground that it was contrary to the plaintiff's religious tenets that his trees should be used for the manufacture of alcohol, and he was not satisfied that there was any substance in this objection. There is, however, a more powerful objection urged by the plaintiff, namely, the damage which he may sustain if the defendant continues tapping the trees and the plaintiff is held entitled to succeed on the trial of the action. In my opinion the *interim* injunction ought for the proper protection of the defendant to be granted. I am not going to express any opinion as to what should be the result of the action that has been brought. But should the plaintiff succeed he is in danger, unless he obtains the injunction of sustaining damage which would be avoided if the injunction, was issued. The defendant, on the other hand, will be in no fear of suffering loss on the issuing of the injunction, because before obtaining it the plaintiff will have to give security for any damage the defendant may sustain by the issue of the injunction. I would set aside the order appealed from, and allow the appeal with costs, directing that the

Marikar v. Bastian. de Sampayo, J.

injunction should issue upon the plaintiff giving security to the satisfaction of the Judge for any damage the defendant may sustain in consequence of the injunction being obtained.

De Sampayo, J.—I agree.

Set aside.

Proctor for plaintiff—*A. C. Mohammadu.*

Proctor for defendant—*C. H. Gomes.*