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THE CEYLON LAW RECORDER.

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THE CEYLON
LAW RECORDER.

Vol. VI. (New Series) DECEMBER, 1924. Part III.

NOTES.

A point "of great importance to and of frequent occurrence in our Courts," relating to the law governing promissary notes is discussed in the decision of the Supreme Court in the recent case of *Muttu Carpen Chetty vs. Samaratunge*, reported in the present number of the "Law Recorder." This decision draws attention to the incorrectness of a Full Bench finding regarding the negotiation of a promissary note after payment and indicates an effective means of circumventing the authority of that finding which, it is now considered, was based on "a misapprehension of the effect, of certain English decisions on which it is based." The Full Bench case referred to, *Jayawardene vs. Rahaiman Lebbe* (21 N.L.R. 178), laid down the principle, on the supposed authority of section 36 (1) of the Bills of Exchange Act, that when a promissary note payable on demand is paid by the maker, it ceases to be a note, and becomes mere waste paper incapable of conferring any rights on subsequent indorsees. The decision was made in 1919 after a consideration of the earl[illegible] *[illegible]na vs. Balaya* (11 N[illegible] the comments of [illegible] Chalmers and [illegible] But the case of *Glasscock vs. Balls*, though decided in 1889 (24 L.R., Q.B.D. 13), was not referred to, and it is largely on the authority of this case that the Supreme Court, in *Muttu Carpen Chetty vs Samaratunge* has hesitated to follow the law as laid down by the local Full Bench case. According to the English authority if a negotiable instrument remains current, even when it has been paid by the maker, there is nothing to prevent a person, to whom it has been endorsed for value without knowledge that it has been paid, from suing on it. Further, as Mr. Justice Jayewardene points out, where a note comes back into the hands of the maker its re-issue or negotiation confers no right on an endorsee only because there exists a prohibition under the English Stamp Act. The English case was decided by the Court of Appeal, but such a decision would be binding in Ceylon where the colonial statute is identical with the English statute.—*Trimble vs. Hill* (49 L.J. P.C. 49). There are, therefore, two decisions on the point in question, which are equally binding on our Courts, and when a suitable occasion arises it will have to be decided which of them will be followed. We have seen a Collective Court of five judges overruling a decision of a three-judge Court (*Jane Nona vs. Don Leo* 25 N.L.R. 241), and

it is possible that *Jayewardene vs. Rahaiman Lebbe* will go the way of *Sopi Nona vs. Marsianu* and other overruled cases. In the meantime it would not be safe to consider a promissary note dead until its remains are decently buried.

* * * *

In *Thomas Walker vs. O. L. M. Mohideen* reported in this issue of the "Law Recorder" Jayewardene, J., says:—"In my opinion our Courts do not sufficiently regulate and control sales under mortgage decrees. Conditions of sale are approved as a matter of course and the mortgagee is permitted to bid unconditionally for the mere asking. This should not be so. The Court should, particularly in the case of decrees under which valuable properties are to be offered for sale, exercise its discretion judicially, and the mortgagee should not be allowed to bid except under such conditions as would prevent the sale of the property below its real value, and thus avoid the possibility of loss and damage not only to the mortgagor but also to his unsecured creditors, which section 201 of the Code was intended to obviate."

* * * *

The Supreme Court has now definitely laid down the law on a question which was causing some difficulty to Proctors who were called upon to advise married women as regards the disposition of their property. It will be seen that section 7 of the Ordinance 18 of 1923 makes special provision regarding the disposition of property of a woman married after the Ordinance. Section 10 (i.) makes provision for the disposition of property acquired after the Ordinance by a woman married before the Ordinance. No special section deals with the property acquired before the commencement of the ordinance by a woman married before the ordinance, although the terms of section 10 (2) seem to assume that under these circumstances the law as laid down by sections 9 and 12 of the Ordinance 15 of 1876 remains unaffected. These sections of the Matrimonial Rights Ordinance may be regarded as having a prospective effect and the Supreme Court has now held that, by virtue of section 4 of the new Ordinance, sections 5 to 19 of the principal Ordinance though repealed by the amending ordinance would still apply in cases where a right has already been acquired or a liability already incurred. By an extension of this principle it would also seem that a married woman cannot now sue or be sued without her husband being made a party to the action in cases where the cause of action arose before the commencement of the new ordinance.

* * * *

In commenting upon the case of *Benaim & Co. vs. Debono* (1924) A.C. 514; 93 L.J., P.C. 133, where the appellants were permitted to raise successfully a point appearing on the evidence for the first time in the Privy Council, the "Law Quarterly" states:—"It cannot be said that the circumstances under which an appellate tribunal has allowed issues to be raised for the first time upon the hearing of an appeal has been reduced to any clear or satisfactory rules of general application; indeed the question was regarded recently in the House of Lords as one of discretion. *North Staffordshire Railway vs. Edge* (1920) A.C. 254; L.J., K.B. 78. There is r[illegible] the suggestion of Lord [illegible] t case, that the d[illegible] appeal should b[illegible]

avoid injustice being done.' In *Jenkins vs. Price* (1908) 1 Ch. 10; 77 L.J., Ch. 41, ' neither in the pleadings nor in the argument in the Court below, nor in the judgment of Swinfen Eady, J., was there any allusion to the covenant which the Court of Appeal held concluded the case in favour of the appellant. *Johnson vs. Pickering*; Norton Claimant (1908) 1 K.B. 1; 77 L.J., K.B. 13 was a stronger case still, for the apellant succeeded ' not on any ground which his counsel put forward in support of the appeal, but on a ground which was suggested for the first time by the Court (of Appeal), and with regard to which we have not been able to obtain much assistance from counsel.' In the case of appeals from the County Court, the right to appeal is limited by the terms of the statue."

LAURANCE OLIPHANT.

Laurance Oliphant, the famous writer, traveller and mystic, was the son of Sir Anthony Oliphant, Chief Justice of Ceylon (1840-1854). Sir Anthony was Attorney-General of the Cape before he came out to Ceylon accompanied by Louis Leesching as his Private Secretary. Louis Leesching was subsequently drafted into the Civil Service as was also his brother Charles who too came out from the Cape somewhat later. Louis Leesching was Fiscal of the Western Province for some time, and, as an experiment to satisfy the cry of the *Observer* for a civilian judge, was put on to act as D.J. of Colombo.

His judgments were somewhat notable, for as a rule both sides used to appeal. One notable inquiry which he held was into the Peshawar-Glenroy collision. The P. & O. " Peshawar " was carrying the first of the Engish cricketers to Australia and off Colombo it ran into the " Glenroy." As the inquiry was proceeding the bells of All Saints Church over the way began to ring. " What is that ?" asked a stranger to Hultsdorf. " Oh," said somebody " they are praying for those at sea." The prayer however proved ineffectual for Leesching's judgment was upset by the Board of Trade.

As there is cricket in the air now it may be mentioned that Barlow the English professional gave evidence at the inquiry and the floor of the Court was strewn with lost h's. Louis Leesching wrote some reminiscences of Sir Anthony Oliphant of which no copy seems now to be extant. His son Laurance Oliphant Leesching was a notable figure in horsey circles many years ago. Private Secretaries in those days were most important personages, sometimes more important than the Judges themselves, a tradition they still endeavour to live up to. They were usually drafted to the Civil Service and put on to the judicial branch for Government indulged in the agreeable fiction that the Gamaliels at whose feet they sat inspired them with a knowledge of Law sufficient for their needs.

Laurance Oliphant was educated in England and passed out as an Advocate here. He practised at Kandy and he records that he appeared in 28 cases in one Session. He was Private Secretary to his father and the following letter by him and Thomas Rust, the Private Secretary to Justice Ogle Carr, speaks for itself. Thomas Rust was one of the great Advocates of the day. He was one of the Counsel with Queen's Advocate Selby, Advocates Richard Morgan, Lawson and

Lorenz in the famous Rajawella case. Laurance Oliphant did not remain long in the Island. He was a restless spirit and accompanied Jung Bahadur to Nepaul where he spent most of time in big game shooting. He tired even of this, and left for England, and was called to the Bar there. He brought out a book on the that then little known country. He engaged himself in literary work of an ephemeral natural in England, and eventually brought out what may be described as a novel, *Piccadily*, which took the literary world by storm: and he became the hero of the London season. The mordant sarcasm in the book, in which he castigated social and political life, delighted the public. Horticultural shows he not untruthfully dubbed Daughtycultural shows, and he pricked many a social bubble. Even at this time he was somewhat of a mystic and a dreamer, with peculiar utopias ideas, and under the sway of one Harris, an utterly unpractical dreamer. Oliphant was not altogether a dreamer. He had much of the practical common-sense of a man of the world. No mere dreamer would have been appointed Paris Correspondent of the London *Times*. He was this in the Francho-German war, but suddenly during the Seige of Paris a stray shot, which nearly cost him his life, was interpreted by him as a call, and he immediately left the *Times* office for America with his wife, and Blowitz, perhaps the most famous of continental correspondents, his second in command, was obliged to carry on. He accompanied Lord Elgin as Private Secretary to the United States and a treaty between the countries was signed—"floated on champagne "was Oliphant's not inaccurate account of how the business was done. (They float things now on gin and bitters and whiskies and sodas). He accompanied Lord Elgin to China and was severly wounded there. There was no part of the world he did not visit, especially the untrodden parts of it. His life was full of adventure, and it all ended by his surrendering everything he had to Harris and going with his mother and wife to a desolate part of the United States, where all three of them were employed, or rather employed themselves, in all the menial work of what we would call coolies. Harris failed him in the end, but it was long before Oliphant found that he was an imposter. This disillusion came too late, and the family, broken in health, gave up all ideas of reforming the world; but the race of impostors and reformers with their visions and dreams is not yet extinct.

What reply was made to the request in the letter referred to (which is reproduced below) is not known, but no case could be quoted in which a Private Secretary's son appeared before his father. Private Secretaries now do not practice at all though there is nothing to prevent an Advocate Private Secretary or Proctor Private Secretary from practising in the District or Minor Courts. In the provincial Courts, as in the County Couts in England, it is assumed that a son should not habitually practise before his father or even a near relation.

Supreme Court,
3rd December, 1850.

My Lords,

We have the honour to submit for Your Lordships consideration the following circumstances relating to the Ordinance No. 9 of 1843 by clause 6 of which it is enacted "that no person

holding the office of Clerk or Private Secretary to any Judge of the said Court shall be allowed to plead or practise before the said Judges on any circuit or in Colombo or at any general sessions."

Assuming that no gentlemen can be so well qualified to fill the offices of Private Secretaries to the Judges as those who have received a legal education and have been called to the Bar we think that their not being allowed to plead before their own judges in Colombo or at general sessions operates as a great hardship not only upon them individually but also upon suitors who have so limited a choice of advocates in this country.

We hardly think it necessary to call your Lordships attention to the advantages attaching to the employment of advocates not only in the District Court but also in appeal. The above clause tends to prevent Private Secretaries from taking cases in the District Court because as Advocates they are never certain before which Judge the appeal may be heard, the consequence of this uncertainty is that the administration of justice is delayed and causes postponed indefinitely; suitors of course preferring the same advocate in appeal as they employed in the Court below.

If it should happen that the three Secretaries should all be Advocates as was the case a short time since and all be retained in the same cause it would be impossible for the case to be argued by them either before a Judge sitting alone or before a collective court.

Admitting as we do the policy of the Private Secretaries being restricted from pleading before their Judges on Circuit, we submit to Your Lordships the reasonableness if not the necessity of the clause being altered except in that respect.

We have the Honour to be

My Lords,

Your Lordships Most Obedient Servants,

(Signed) L. OLIPHANT, P.S. to C.J.

THOMAS RUST, P.S. to S.P.J.

The Hon'ble,

The Judges of the

Supreme Court.

VETUS.

HYPOTHECARY ACTIONS.

II.

Prior to the passing of the Civil Procedure Code a decree in a hypothecary action only stated that the mortgaged property was specially bound and executable and contained no particular directions as to its sale. (See *Wijeysekere v. Rowel* 20 N.L.R. 126) Section 201 of the Code altered the procedure and provided that the decree should specify a day on or before which the amount due on the mortgage and costs of action should be paid and direct that in default of payment the mortgaged property should be sold. The Court was also authorized to give such directions in the decree as to the conduct and conditions of sale, the terms on which the plaintiff is to be allowed to purchase, the person who should conduct the sale and as to the terms of the instrument of conveyance and the persons who should execute the same. The fixing of a day for the payment of the amount due is a matter which is left entirely to the discretion of the Court. In special cases, particularly where there has been a protracted trial, the Court may fix a very short time. On the other hand there is no limit to the time, although the practice

in all the Courts is to fix a month. The Appellate Court will seldom interfere with the discretion of a Court regarding the fixing of time for payment. (*Palaniappa Chetty v. De Soysa* 6 C.W.R. 12) Section 201 of the Code provides that the decree in a mortgage action should embody all the necessary directions and instructions with regard to the sale of the mortgaged property and all matters incidental thereto and also as to the execution of the conveyance in favour of the purchaser. If the person who is to sell the property is an auctioneer or other officer of the Court such directions may be said to be absolutely necessary but when the order to sell is issued to the Fiscal, can it be said that the absence of such directions prevents him from acting under the general provisions regulating the sale of property on a money decree, under which term a mortgage decree is included. The Fiscal is one of the officers contemplated by section 201 and some of the sections of the Code dealing with the execution of decrees seem to imply that they are meant to be made use of in the execution of mortgage decrees as well. Section 226 which deals with seizure of property states what is to be seized and goes on to speak of "such property as is specified in the writ" and section 286 makes special provision for the execution of a conveyance in "sales effected in execution of a decree specifically directing the sale.." These and other sections lend colour to the suggestion that mortgage sales are governed by the Code where the sale is conducted by the Fiscal. But even if it is thought necessary that all the directions should be embodied in the decree, should the Court direct its attention to every minute detail regarding the conduct of the sale or is it sufficient if it says that the sale is to be carried out according to the provisions of the Code or according to rules made by it regarding auction sales generally? It might be said that the Court has not exercised its discretion as required by section 201. If the Court is expected to carefully examine the suggestions made in each mortgage action regarding the execution of the decree, a good deal of public time will have to be wasted over it. But what really happens in practice is that with the plaint or at the trial the proctor for plaintiff submits printed forms of conditions of sale, which are accepted by the Judge without question. It is therefore only in theory that the Judge exercises his discretion and there is not much force behind the opposition to the Court directing the sale to be carried out according to the provisions of the Code or according to general rules framed by it for all mortgage sales.

But there are matters regarding which the Court should exercise a certain amount of care if it has got the interests of the suitors at heart. The appointment of the person who is to carry out the sale is a matter of the highest importance. About 15 years ago, practically in all the Courts of the Island, mortgage decrees were executed by the Fiscal. It was chiefly in the District Court of Colombo that auctioneers were appointed to carry out the sales. The chief objection to the Fiscal was that sales by him were not properly advertised, but this never happened in the case of a vigilant creditor. The Fiscal is authorised to advertise a sale in the fullest manner possible, whatever the value of the property, provided he was supplied with the necessary funds. (Sections 256 and 257 of the Code). The only advantage of having an auctioneer

was that he was supposed to advertise the sale better and sometimes by his skill realized higher prices. On the other hand the disadvantages were many. The charges at auction sales have become very exorbitant and many a purchaser has been scared away owing to this. At a Fiscal's sale the conditions of sale are signed on unstamped paper and require no notarial attestation, whereas in the case of auction sales the purchaser is saddled with the notary's fee and stamp duty in addition to the auctioneer's charges. The question of excessive and unconscionable levies and charges made at auction sales is one which should engage the serious attention of the Courts. If section 201 of the Code requires that a Judge should exercise his discretion, let him do so about things that really matter. The all important question is that relating to the commission granted to the auctioneer. Conditions of sale are put in with rates of commission which are simply scandalous. Ordinarily the Judge is too busy to scrutinize the paper, and in the vast majority of cases the rate is passed without any scrutiny and the auctioneer benefits and others too! This accounts for the auctioneer inflating the rate of commission; otherwise he is not in a position to share it. This is not all. The auctioneer's travelling expenses and advertisement charges run up often to a surprisingly high figure. Invariably there is a big item for drawing conditions of sale, which are printed by him in large quantities. To all this is tacked on the notary's fee for attesting and his travelling expenses and batta, which is usually an appreciable item. When these charges are totalled up the purchaser finds that he has had to pay a price much higher than the real value of the land. Another matter which the Court should specially consider is the appointment of the auctioneer. The Supreme Court has several times condemned the practice of appointing the officers of the Court as commissioners to carry out sales under mortgage decrees. Such practice is capable of great abuse and it is not in the interests of justice to allow Court officers to have an interest in such sales. The same objection has been raised against proctor's clerks being granted permission to carry on the business of an auctioneer and figure in Court sales. Instances have not been rare of this class of people committing grave abuses.

Section 201 also requires the Court to embody in the decree the terms on which the plaintiff is to be allowed to purchase. In a recent case the Supreme Court laid down that this requirement as well as all other conditions and terms regarding the sale should be considered and embodied in the decree prior to the same being entered (See *Walker v. Mohideen* 121 D.C., Colombo, 7608 S.C.M., 2nd October, 1924) and that the provisions of section 272 are not applicable to a sale under an order to sell issued on a mortgage decree. It is submitted that if the general provisions in sections 336 to 354 of the Code can be held to be applicable to sales under mortgage decrees then the rest of the provisions in the same chapter must be taken to be applicable to such sales, provided the executing officer is the Fiscal. These general provisions occur in Chapter 22 of the Code, in which a set of rules has been framed for execution generally and there is no reason why a part of the chapter only should be extended to apply to sales under mortgage sales. The case

may be different when the order to sell is issued to a private auctioneer to whom the provisions of the Code cannot be said to apply, unless the decree specifically says that he is to follow them. Whatever the view may be regarding the applicability of the sections of the Code it will be useful to consider the terms upon which the plaintiff is to be allowed to bid and when he is entitled to obtain credit. Section 272 of the Code sets out the conditions upon which the plantiff is to be allowed to bid and the terms upon which he is to be given credit. In practice a motion is filed asking for permission to bid and for a direction to the Fiscal to give credit. This is usually allowed on condition that the property is first put up for sale at the appraised value and if not purchased at this figure then to the highest bidder at any price. After the sale the credit allowed is sanctioned by Court if the property sold has been purchased by the plaintiff. This is the practice followed with regard to sales in execution of money decrees. In the case of mortgage decrees too the same practice has prevailed for several years but during recent years in some Courts a practice has sprung up whereby the plaintiff is totally barred from buying the mortgaged property unless he is prepared to buy it at the appraised value. The imposition of this condition works great hardship and there is nothing in the Code to warrant it. In the case of money decrees the plaintiff is allowed to compete with the public if the property is not bought by him and in sales under partition decrees too any co-owner who does not buy at the appraised value is allowed to bid at the public sale. There is no reason therefore why in mortgage sales alone this innovation should be introduced. Ordinarily the property mortgaged is worth twice the amount lent and to insist on the mortgagee buying it at the full value of the property is to place him in a very difficult position. He may not be having the additional money to pay for the purchase of the property or it may be that the amount lent is the only capital he possesses in the world. If the new practice is to be followed he will not be in a position to buy the property, which might eventually be sold for much less than the amount due on the decree and the creditor finds that he is a loser in the transaction. There is no reason why the mortgagee should not be allowed to buy the property in open competition and credit allowed to him to the extent of his claim. A reservation might be made that the credit should be sanctioned by the Court as is done in the case of sales in execution of money decrees and if the mortgagee has purchased the property at a very low price, the Court might well refuse to sanction credit. It is submitted that this is a sufficient safeguard against any abuse being committed. In India the creditor is allowed to buy only if no purchaser at an adequate price can be found. This too is a very satisfactory rule, which might be incorporated into our practice.

A. CROOS DA BRERA.

Present: Ennis, J. and Jayewardene, J.

MERCANTILE AGENCY vs. ISMAIL.

59 D. C. Colombo 5795/22.

Decided: October 20, 1924.

Contract for the sale of goods—Failure to pay bills on maturity—Negotiations regarding terms—Goods sold at purchaser's risk—At what point of time was the breach of contract committed?—Rate of exchange.

(a) Where upon the breach of a contract the person in default—whether buyer or seller—becomes liable for the payment of a sum of money in a foreign currency, the damages, for the purpose of a judgment, must be assessed as at the date of default and the sum payable must be converted into local currency according to the rate of exchange prevailing at that date.

(b) The defendant committed a breach of his contract when he failed to pay the bill at maturity and take delivery of the goods, and not when the goods were sold at the risk of the purchaser upon the failure of negotiations.

Drieberg, K. C., with *Choksy* for defendant-appellant.

Croos Dabrera for plaintiff-respondents.

Jayewardene, J:—This is an action arising out of a contract for the sale of goods. The defendant on an agreement contained in letters that passed between the parties and embodied in indent P 20 contracted to purchase from the plaintiff 27 boxes of embroidery for the price of £212 19s. 11d. with interest at 8 per cent. per annum from the 20th of April, 1920. Payment was to be by bills drawn on the defendant who agreed to accept them on presentation and pay at maturity. The goods duly arrived but the defendant failed to pay the bills at maturity and to take delivery of the goods. Under a term of the contract the plaintiffs sold the goods in July, 1921, and they realised a sum of Rs. 1,900 equivalent to £121 14s. 4½d. The plaintiffs now seek to recover the balance which they say amounts to £119 3s. 3½d., £91 5s. 6½d. being the amount of the deficiency and £28 3s. 9d. being interest up to the 30th of June, 1922. These facts are not seriously disputed. The plaintiffs in converting the amount due to local currency seek to do so at the rate of exchange ruling at the date of the plaint. The defendant contends that the conversion should be at the rate of exchange ruling at the date he committed a breach of his contract. The learned District Judge has held that the amount due to the plaintiffs must be ascertained according to the rate prevailing on the day the goods were sold by the plaintiffs—namely the 28th of July, 1921. This is the main question argued in appeal. As regards the contention of the defendant that the goods were purchased by him according to an agreement arrived at between the parties after the breach and that the payment of the sum of Rs. 1,900 as the price of the goods extinguished his liability on the contract, the learned Judge has on the facts found that the sale was not to the defendant but to the third party, and I see no reason to doubt the correctness of his decision on this point. On the question of the rate of exchange applicable, I am not certain that the learned Judge has come to a right conclusion. It has been held in numerous cases that where upon the breach of a contract the person in default—whether buyer or seller—becomes liable for the payment of a sum of money in a foreign currency, the damages, for the purpose of a judgment must be assessed as at the date of default and the sum payable must be converted into local currency according to the rate of exchange prevailing at that date:—*Barry v. Van den Hurk* (1920 2 K. B. 709, *Labeaupin v. Richard Crispin & Co.* (1920) 2 K. B. 714 *Di Ferdinando v. Simon Senits & Co.* (1920) 3 K. B. 409, *s.s. Celia v. s.s. Valtorna* (1921) 2 A. C. 5284, 551, 552, where the previous cases were approved by the House of Lords. Therefore in this case the amount the defendant has to pay must be calculated according to the rate of exchange prevailing at the date the breach was committed. In my opinion, the defendant committed a breach of his contract when he failed to pay the bill at maturity and take delivery of the goods. This

happened in July, 1920. From July 1920, till the sale of the goods on the 28th of July, 1921, negotiations went on between the parties. The defendant positively refused to pay the amount appearing on the bill of exchange and wanted a reduction.

Correspondence passed between the parties for the purpose of a settlement but they failed to arrive at an agreement and the goods were sold on the 28th of July, 1921, at the defendant's risk. There was therefore no variation of the terms of the original contract and the rights and liabilities of the parties must be decided according to the terms of that contract. But the plaintiffs' Counsel contends that the breach must be regarded as having taken place when the goods were sold on the failure of the negotiations and he relies on the principle laid down in the case of *Ogle v. Vane* (1868) L. R. 3 Q. B. 272 and *Hickman v. Haynes* (1875) L. R. 10 C. P. 568. I have examined these cases but I cannot find in them any principle applicable to the question arising here. In *Ogle v. Vane* (*supra*) there was a breach of contract to deliver certain iron. The purchaser at the request of the seller granted an extension of time for the delivery of the iron. Ultimately the seller failed to deliver the iron contracted for, and the purchaser bought in the open market. At this time the price of iron was much higher than what it was at the date of the breach. It was held that the buyer was entitled to recover as damages the difference between the contract price and the price he actually paid for the iron. *Hickman v. Haynes* (*supra*) was a converse case, there the seller abstained from delivering the goods at the request of the buyer made both before and after the date for delivery under the contract. The seller was held entitled to the difference between the contract price and the price prevailing at the time the buyer finally refused to accept the goods. Postponement of delivery in these cases was held to be a mere forbearance by one party at the request of the other and not the formation of a new contract nor an abandonment of the original one and that either party might at any time have insisted upon his rights under the original contract. In the present case there was no mere postponement of delivery at the request of the buyer but a refusal on his part to pay the price agreed upon. The parties were negotiating about the reduction of the price and if the negotiations had been successful a new contract would have been formed. In taking the view that the original contract was still subsisting and not abandoned, the Court has taken a view very favourable to the plaintiffs and it is fortunate for them that the defendant had not raised the defence that the original contract had been rescinded. There is no evidence that the plaintiffs had suffered any damage by having to sell the goods in a falling market. I cannot see on what principle they could ask that the rate of exchange at which the pound sterling should be converted should be the rate prevailing at the date when goods were sold to a third party and not at the date the defendant committed a breach of his contract and became liable in damages. The plaintiffs, as I have pointed out, did not ask that the rate should be paid as allowed by the Court, but that the amount due to them in sterling should be converted according to the rate prevailing at the date of the institution of the action. This as I have pointed out cannot be the basis of conversion according to the authority. The rate according to them is the rate prevailing when the breach occurred. The amount due to the plaintiffs will be calculated on this basis.

The defendant will have the cost of appeal, but he will pay the plaintiffs' costs in the lower Court as decreed.

(Appeal Allowed.)

Present: Bertram, C. J. and Garvin, J.

RAN BANDA vs. KAWAMMA.

67 D. C. Kurunegala 9749.

Decided: October 21, 1924.

Offspring of an irregular union between a Burgher and a Kandyan

woman—Is she a Kandyan?—Subsequent legitimation by marriage of parents.

HELD:—The offspring of a non-Kandyan father by a Kandyan woman cannot be said to be a Kandyan and it is not necessary to inquire how the offspring may be classified.

This principle applies both to regular and irregular unions.

H. V. Perera for appellant.

J. S. Jayawardene for respondent.

Bertram, C.J.:—This is a case in which the 1st defendant, who is a married woman, repudiates a deed of transfer on the ground that it was executed without the written consent of her husband as required by Section 9 of the Matrimonial Rights Ordinance No. 15 of 1876. To this it is replied that she cannot claim the benefit of that Ordinance because she is a Kandyan and not subject to the Roman Dutch Law. The question we have to determine is really whether she is a Kandyan or not. The learned Judge has found, and rightly found, that she is not a Kanadyan. But he has felt himself justified in adding an appendix to the law as enacted by Section 9, and says that a deed executed under such circumstance is null and void "unless it can be found that the person executing it clearly derived an advantage or profit from the transaction." I do not know from what authority the learned Judge drew this suggested appendix.

Mr. J. S. Jayewardene who appears for the respondent is not able to justify the principle suggested. But he raises the question that the woman after all is a Kandyan, and suggests that the learned Judge is mistaken in his finding on that point.

It seems to me that the learned Judge is clearly right. The woman was the offspring of an irregular union between a Burgher named Siegertsz and a Kandyan woman. Some years after or after the 1st defendant was born she was legitimised by the marriage of her parents. Mr. J. S. Jayewardene suggests that up to the time of this marriage she has the status of a Kandyan, being the daughter of a Kandyan woman whose father was not known. He suggests that the offspring of such irregular union where the mother is a Kandyan must be Kandyan, and that the only race or community that can be looked at for the purpose of determining the status of the offspring, where there is no marriage, is the status of the mother.

I do not think that this is the law. I understand the law to be as it was laid down in the case of *Mudiyanse v. Appuhamy.* (1) It was there declared that the offspring of a Kandyan father by a Low-country Sinhalese woman could not be said to be a Kandyan, but that it was not necessary to inquire how he might be classified. Similarly, the offspring of a non-Kandyan father by a Kandyan woman cannot be said to be Kandyan. Again, it is not necessary to inquire how the offspring may be classified. This principle it seems to me, applies both to regular and to irregular unions. I do not see how any distinction can be drawn. The principle is subject only to the exceptions contained in the special enactments of the Kandyan Marriage Ordinance No. 23 of 1917. These enactments do not apply to the offspring of irregular unions. I am, therefore, of opinion that the learned Judge's ruling on this point was right. But as his ruling on the other point was wrong I am of opinion that the appeal must be allowed with costs in both Courts.

Garvin, J.—I agree.

(Appeal Allowed.)

Present: Bertram, C.J.

CALDERA vs. PERERA.

647 P.C. Itg., Colombo, 35833

Decided: 5th Nov., 1924.

Sanitary Boards Ordinance No. 18 of 1892—Is it competent for the Sanitary Board authorities to declare any particular trade to be an offensive trade?—Desiccating coconut trade not in its nature necessarily offensive—Water which is potentially offensive—Penal Code S. 261 and 283.

(1) (1913) 16 N.L.R. 117.

Where a charge was brought against a desiccated coconut manufacturer, alleging that he had allowed foul water from his mills to discharge into an open piece of water, contrary to a by-law enacted under the Sanitary Boards Ordinance N. 18 of 1892.

HELD: (a) The Sanitary Board has no power to declare any particular trade an offensive trade.

(b). Where an enactment authorises the regulation of an offensive trade, what is meant is a trade which from its very nature is necessarily offensive. The trade of a desiccated coconut manufacturer does not come within this designation.

(c) Water or fluid which is perfectly sweet when it emerges from the premises of a manufactory cannot be considered offensive water merely because when it is accumulated elsewhere it is liable to become offensive.

OBITER: "It may well be worth while to consider in future cases, whether such a proceeding would not come within the general Sections of the Penal Code with regard to nuisances, namely, Sections 261 and 283."

Aelian Pereira for appellant.
Mervyn Fonseka for respondent.

Bertram, C. J:—This is an appeal against an acquittal with the sanction of the Solicitor General. The only material charge with which we are concerned in this appeal is a charge brought against the defendant, who was a desiccated coconut manufacturer, alleging that he had allowed foul water from his mills to discharge into an open piece of water contrary to a by-law enacted under the Sanitary Boards Ordinance No. 18 of 1892. The by-law in question declares that no person carrying on any offensive trade shall pollute any open piece of water by discharging thereinto any offensive water. I have omitted irrelevant words. The trade of a desiccated coconut manufacturer has been declared to be an offensive trade by a subsequent by-law published in the "Government Gazette" on the 7th of January, 1921.

The learned Magistrate declined to convict the defendant on the ground that there was no provision in the by-laws making desiccation of coconuts an offensive trade. The learned Magistrate is here mistaken. The Amendment of the by-laws had not been brought to his notice. Nevertheless, admitting this misconception of the learned Magistrate, Mr. Fonseka, who apears for the respondent, maintains that no offence has been made out against his client. His points are as follows: Firstly, it is not competent for the Sanitary Board authorities to declare any particular trade to be an offensive trade. The offensive trade which they are entitled to regulate must be trades which are offensive in fact. Secondly, he maintains that this trade is not offensive in fact. Thirdly, he argues that the open piece of water referred to in the by-law means a permanent open piece of water. Finally, he further argues that it is not a breach of the law to discharge water on to such an open piece of water, unless that water is actually offensive at the time when it is discharged.

In order to appreciate these points we must deal somewhat further with the facts. The water which the respondent is said to have discharged is surplus water issuing from his coconut mills after the process of manufacture is complete. This water is discharged first of all into a cement drain; it then flows along an earthen drain belonging to the local authority, and is finally discharged to some grass land adjoining a public road. In this grass land water intermittently accumulates during the rainy seasons, and it appears to be proved that, though the water discharged from the mills is not offensive when it is so discharged, yet when it is accumulated for some time in the grass land where it is collected either because of its own nature, or because it is mixed with other discharges it becomes offensive and generates a smell which may well be calculated to annoy the surrounding residents or passers by on the public road.

I think that Mr. Fonseka's position is in the main sound.

In the first place, the Sanitary Board certainly has no power to declare any particular trade an offensive trade. The Municipality has such a power under Section 212

No. 6 of 1910. But no such power is given in Ordinance No. 18 of 1892. Mr. Aelian Pereira urges that the power to define is inherent under the Ordinance, and that a Board can regulate what it cannot define. I cannot agree with this contention.

We must examine therefore this particular trade to ascertain whether it was in fact offensive. Undoubtedly a desiccating coconut mill may be offensively carried on, but it is not necessarily offensive; and it has been held by unimpeachable authority, that, where an enactment authorises the regulation of offensive trades, what is meant is a trade which from its very nature is necessarily offensive. See *Wanstead Local Board of Health v. Hill* (1) The trade there in question was that of brick-making. Erle C.J. said, "Is brick-making of necessity a business of a noxious or offensive nature analogous to those specified at the beginning of the clause? I am of opinion that it is not. The business of brickmaking may be carried on in such a manner as not to be a nuisance to anybody." The principle of that decision was adopted and reinforced in *the Braintee Local Board of Health v. Boyton* (2). The trade of a deiccated coconut manufacturer does not come within this Section. It is not actually necessary, therefore, for me to determine whether the open piece of water in question comes within the by-law. Nor is it necessary for me to determine whether water, which is only potentially offensive after it has been accumulated, is offensive water within the meaning of the by-law.

With regard to the first of these questions, however, I may mention "open piece of water," would in-incidentally that the expression mittently existing piece of water." With regard to the second point, I do not think that water or fluid, which is pefectly sweet when it emerges from the premises of the manufactory, can be considered offensive water, merely because when it is accumulated elsewhere it is liable to become offensive. It is undoubtedly a serious matter for the local authority if a manufactory can be allowed to discharge either an offensive fluid, or a fluid that is certain to become offensive, into an open space within the control of the authoity, and if from foul water so accumulated offensive smells can be generated to the annoyance of the public, I imagne the law must be capable of coping with such a case, and it may well be worth while to consider in future cases, whether such a proceeding would not come within the general Sections of the Penal Code with regard to nuisances, namely, Sections 261 and 283. With regard to the present appeal, I do not think it is well founded, and it must therefore, be dismissed with costs.

(Appeal Dismissed.)

(1) (1863) 13. C.B. (N. S.) 479.
(2) 1885 52 L. T. (N. S.) 99.

Present: Bertram, C. J. and Jayewardene, J.

MUTTU CARPEN CHETTY vs. SAMARATUNGE.

42 D. C. (F) Kandy 31068.

Promissory note—Endorsement after payment by the maker—Rights of a holder in due course—Where an English statute is identical with a local statue English decisions to be followed.

HELD: (a) Where a negotiable instrument remains current, i.e., where it has not come back into the hands of the maker, even though it has been paid there is nothing to prevent a person to whom it has been endorsed for value without knowledge that it has been paid, from suing.

(b). Where a note comes back into the hands of the maker its *re-issue or negotiation* confers no right on an endorsee, and it stands on the same footing as if the note had been issued for the first time without a stamp.

H. V. Perera for plaintiff-appellant *Allan Drieberg, K. C.* with *R. C. Fonseka* for respondent.

Bertram, C.J., gave judgment dismissing the appeal with costs.

Jayawardene, J., in the course of his assenting judgment said:—I agree. Notwithstanding Mr. H. V. Perera's able argument for the plaintiff-appellant, I think that the judgment of the learned District Judge is, on the facts and circumstances of the case, correct. The strongest point against the plaintiff is the long and unexplained delay in bringing the action. That not only led the defendant to believe that the note was paid off, but has also rendered it most difficult for the defendant to adduce evidence in proof of the fact that the amount due on the note was paid off in the course of the transaction he had with the payee of the note, who is the plaintiff's brother. There is also another matter to which I should like to refer. It appears to have been contended in the lower Court that, if the promissory note had been endorsed after it had been paid and discharged in the manner indicated in the answer, it could not be sued upon even by an endorsee for valuable consideration—see issue No. 2. This contention is based on the authority of the case of *Jayewardene vs. Rahaiman Lebbe* (1) where it was held that when a promissory note payable on demand is paid by the maker it ceases to be a note, and that negotiation after the date of payment does not give any right to a *bona fide* holder for value to sue on on it. This is a judgment of a Bench of Three Judges. It is, I am afraid, due to a misapprehension of the effect of certain English decisions on which it is based. I have come across a case [*Glasscock v. Balls* (2)], which throws considerable doubt on the correctness of this legal decision. In the English case, which is not referred to in the local case, it is pointed out that it is only where a note comes back into the hands of the maker that its re-issue or negotiation confers no right on an endorsee, and this because of a prohibition under the English Stamp Act.

(1) (1919) 21 N. L. R. 178.
(2) (1889) 24 L. R. Q. B. D. 13.

In that case Lord Esher, M. R., said: "It has been held that there may be a defence to an action by a *bona fide* endorsee for value, where the note has been paid and has come back into the maker's hands before it was endorsed to the plaintiff. That defence does not arise in respect of any merits of the defendant, but because the Stamp Act has not been complied with. In such a case it has been held that there was a re-issue of the note, and, therefore, the case stood on the same footing as if the note had been then issued for the first time without a stamp. The effect of non-compliance with the stamp laws is that the note is not a negotiable instrument and is not capable of endorsement. Such a defence only arises where there has been a re-issue of the note. The note cannot be said to be re-issued, unless it gets back again into the power of control of the maker. If a negotiable instrument remains current, even though it has been paid there is nothing to prevent a person to whom it has been endorsed for value without knowledge that it has been paid from suing. This case is not within the rule applicable to such cases as *Bartrum vs. Caddy* (3). *Bartrum vs. Caddy* (3) is one of the cases relied on in the local case. The English case was decided by the Court of Appeal, and a decision by the Court of Appeal in England, and an English statute identical with the local statute is binding on our Courts—see *Trimple vs. Hill* (4) where the Privy Council laid down the rule that where the provisions of a Colonial statute are identical with those of an English statute, the Colonial Courts should follow the decisions of the Court of Appeal on the Imperial statute. In *Mohideen vs. Banda* (5) this rule was followed. The local law relating to Bills of Exchange and promissory notes is contained in the Bills of Exchange Act. There are therefore two decisions on the point in question, which are equally binding on this Court, and when a suitable occasion arises it will have

(4) 49 L. J. P. C. 49 (1879) L. J. 5. A. C. 342.
(5) 1 N. L. R. 51.

to decide which of them it will follow. I have taken this opportunity of pointing out the state of the law on the subject as the point is one of great importance to and of frequent occurrence in our Courts.

(Appeal Dismissed.)

Present: Bertram, C.J. and Garvin, J.

PUNCHI BANDA vs. MEDANKARA UNANSE.

95 D. C. Kegalle 5997

Decided: November 10, 1924

Alleged ancestral proprietorship of Buddhist temple—Right to appoint incumbent—Action to remove officiating priest and trustee under the Buddhist Temporalities Ordinance—Limited rights of a paraveni nillakaraya.

HELD:—The rights of a paraveni nilakaraya of a Buddhist Temple are incompatible with a heredity right to appoint the incumbent.

Navaratnam for the appellants.

D. B. Jayatilaka with *R. L. Pereira* for respondents.

Bertram, C. J:—This is an action relating to a Buddhist Temple said to be of some antiquity, and known as the Bihiwela Vihare. The plaintiff claims to be actually the proprietor of this temple, as well as of the pansala situated in the neighbourhood of the temple, and of the certain lands, in particular the land known as Viharagewatte. He claims an ancestral proprietorship in the temple, and apparently also a right to appoint the incumbent of the temple from time to time. He brings this action demanding the ejection of the present incumbent and his pupil, as well as the trustee of the temple appointed under the Buddhist Temporalities Ordinance. He gives evidence that his family for generations past have exercised the rights which he claims. He tenders in evidence the record of the case instituted in the year 1876 by his father Kiri Banda against the incumbent for the time being and the "High Priest" of Malwatte Vihare, Kandy. In this action the extensive claims I have mentioned were asserted and apparently succesfully asserted. He further gave in evidence a deed No. 6641 of 21st February, 1874 in which he purported to appoint the late incumbent of the temple Saranankara Unnanse. He produces no grant of any description in support of his own title. But it is quite possible that, if these facts were more substantiated, we might draw the inference that this temple belonged to the temples in respect of which under the Kandyan Kings grants were from time to time made to families. In the old case of Dantura Unnanse against the Government of Ceylon, which is referred to in the case of *Unnanse v. Unnanse* (1), it was stated by the assessors "that there were numerous temple estates in the country possessed by hereditary right, and that is incumbent on the proprietors of such estates to keep in repair the temples erected thereon and to have the sacred duties duly performed. Generally a member of the proprietary family is ordained priest with view of officiating, but if there is no member eligible to the priesthood, some other priest is selected to officiate." I need not quote very fully all the opinions of the assessors as the case is fully referred to in *Unnanse v Unnanse*(1).

As I say, we might presume that the temple belonged to this class of temples, and that the plaintiff's family had certain hereditary rights in connection with it, but for certain circumstances which seem wholly inconsistent with the claim. It is impossible for us to say how these circumstances arose, but they are fully recorded in the Service Tenures Register. Not only are they formally recorded, and this record alone might not perhaps be sufficient evidence of the validity of the facts there recorded, but it is expressly admitted by the plaintiff that his position is in accordance with the Register. The Register discloses that he is the paravani nillkaraya of some at any rate of the lands which he now claims to own, and

(1) 1921 22 N.L.R. 323.

that the temple, if one may use the term, is his overlord. Not only is this recorded in the Service Tenures Register, but in an action brought against him by the incumbent when he purported to appoint, he admitted that he was the paravani nillakaraya of the lands referred to, and maintained that he had always rendered the required service. I am totally at a loss to reconcile the hereditary rights, set out by the plaintiff, with his position as paravani nillakaraya of the temple, particularly when one notices the nature of the services which we see is under an obligation to perform. It is hardly necessary, therefore, to discuss the right which he claims to eject the incumbent and his pupil, based upon the supposition that he himself is entitled to appoint and dismiss incumbents.

There appears to be no doubt that in the year 1880, the superior of the Malwatte Temple purported to establish the institution of pupillary succession of a formal manner with regard to this temple. I would draw attention to the observation of De Sampayo J. in *Unnanse v. Unnanse* (1) on page 328, where he expresses the opinion that in the case of Viharagamas, which he discusses, "when an appointment is once made the rule of pupillary succession begins to operate." I should prefer to reserve my own opinion on that point until I have had an opportunity of more fully investigating the subject. All I would say at present is that the present incumbent holds his office as the pupillary successor of Saranankara Unnanse, who was the incumbent of the temple from 1881 to 1914, and that the presumption is that the rule of pupillary succession applies to all Viharas unless the contrary is shown. The contrary has not been shown in this case, and there is no ground whatever for suggesting that the present plaintiff, as a paravani nillakaraya, has any right to eject any incumbent from the temple.

The plaintiff is apprehensive that the form of the decree may seem to deny him such rights as he may have as paravani nillakaraya in accordance with the Service Tenures Register.

(1) 1921 22 N. L. R. 323.

I think, to quiet his apprehension, words may be inserted in the decree to the effect that nothing in the decree should be deemed to prejudice or be inconsistent with the rights of the plaintiff as paravani nillakaraya as recorded in the Service Tenures Register. Further there seems divergence of view in regard to the land described as Pansalwatte, and as to whether it is included in the Pansalawatte Gamage Panguwa referred to in the Service Tenures Register. It is understood that the right is reserved to the plantiff, if he thinks fit, to bring a separate action for the assertion of this right, which is contested by the defendants in this action. Subject to this, I think that this appeal should be dismissed with costs.

Garvin J:—I agree.

(Appeal Dismissed.)

Present: Bertram, C.J., and Garvin, J.

In the matter of an application by Ramanayakage Caroline Nona under Ordinance 15 of 1876.

167 D.C. Inty. Colombo 1191.

Argued and decided 20th Nov. 1924.

Matrimonial Rights Ordinance 15 of 1876 and Married Woman's Property Ordinance 18 of 1923—Alienation of immovable property acquired before the commencement of Ordinance 18 of 1923 by a woman married before that Ordinance—Husband's consent necessary—District Court's jurisdiction.

HELD:—(a). The husband's right to restrain his wife from disposing of her immovable property without his written consent and the wife's right, in the event of her husband refusing his consent, to apply to the District Court for an order dispensing with that consent, in respect of property acquired before the commencement of the Ordinance 18 of 1923, by a woman married before that Ordinance, are unaffected by the repeal

of Sections 9 and 12 of Ordinance 15 of 1876.

(b). The District Court is given the necessary jurisdiction by the preservation in favour of the wife of her right to apply to the District Court for the purpose of dispensing with the husband's consent.

Weerasooriya with Hulugalle for appellant.

Canjimanathan as *amicus curiae*.

Bertram, C. J:—This question we have to consider is a very simple one, and the parties are not in any disagreement. An order has been made by the District Judge, which he appears subsequently to have seen occasion to review in another case. The question which we have to consider is this. When a married woman, married before the Amending Ordinance No. 18 of 1923, desires to alienate property acquired before the commencement of that Ordinance is it necessary for her to obtain the consent of her husband in pursuance of Section 9 of the Matrimonial Rights and Inheritance Ordinance of 1876, and if her husband refuses his consent is she entitled to obtain from the District Court an order authorising her to dispose of the property without her husband's consent? It seems to me that both these questions must be answered in the affirmative. By Section 4 of the Amending Ordinance No. 18 of 1923, Sections 5 to 19 of the princiapl Ordinance are repealed. The repealed Sections thus include both Section 9 and Section 12; but it is provided that this repeal shall not affect any right acquired while such Sections are in force. By their marrigae while those Sections were in force, the husband and wife in this case acquired certain mutual rights. The husband under Section 9 acquired a right to restrain his wife from disposing of her immovable property without his own consent. The wife acquired a corresponding right, in the event of her husband refusing his consent, to apply to the District Court for an order dispensing with that consent; the conditions under which the Court could dispense with that consent being defined in the Section. Both these rights are consequently unaffected by the repeal of Sections 9 and 12, and in so far as the District Court requires any authority for exercising the jurisdiction to give that consent—a point which seems to have occasioned some difficulty in the learned Judge in the subsequent case referred to—it seems to me that jurisdiction is impliedly given by preservation in favour of the wife of her right to apply to the District Court for the purpose. I may point out at the same time that section 10 (2) of the Ordinance clearly implies the view of the law which I have just expressed. It implies that any woman married before the commencement of the Ordinance would require the written consent of her husband in order to dispose by sale of any immovable property to which she had become entitled before the commencement of the Ordinance.

The situation, therefore, appears to be this; the learned District Judge in this case now before us expresed the opinion, of her immovable property acquired before the Amending Ordinance, that the wife in this case should obtain the consent of her husband. He also expressed the opinion that the District Court has no longer any jurisdiction to make the order applied for. The views on further consideration the learned Judge has seen fit to abandon for those which I have already expressed.

The case must go back to the District Court with a view to the District Judge's considering whether the conditions under which the District Court may make an order dispensing with the husband's consent have been satisfied; in particular, as to whether the husband's consent, in the circumstances, has been unreasonably withheld. The appeal, therefore, should be allowed, but there shall be no order as to costs.

Garvin J:—I agree.

(Appeal Allowed.)

Present: Bertram, C. J. and Jayewardene, J.

WALKER vs. MOHIDEEN.

121 D. C. Colombo 7608

Argued 2nd October, 1924.

Decided 19th November, 1924.

Mortgage decree contains no express conditions as to conduct and conditions of sale—Conditions of sale filed

subsequently and permission granted to the mortgagee to bid at the sale—Procedure not justified by the Code and therefore irregular—Civil Procedure Code ss. 201, 272, 224, 344, 336—384 and 197.

HELD:—(a) Section 201 of the Civil Procedure Code lays down a particular course of procedure where a mortgagee seeks the special directions of the Court for the execution of the mortgage decree. Where a mortgagee applies for such special directions, he must do so before decree is entered, and the Court has no authority to give such directions except in the decree itself.

(b). Section 272 of the Code under which permission may be granted to judgment creditors to purchase at a sale in execution of their decree has no application to a sale under an order to sell.

(c). Of those Sections dealing with execution sales only Sections 336 to 384 have any application to sales in execution of mortgage decree.

Per Jayewardene, J:—"In my opinion our Courts do not sufficiently regulate and control sales under mortgage decrees."

C. A. V.

E. W. Jayawardene, K.C., with *Canjimanadan* for appellant.

Drieberg, K.C., with *Keuneman* for respondent.

Jayewardene, J.: This case raises an important point of practice regarding the execution of mortgage decrees under the Civil Procedure Code.

The plaintiff obtained judgment by default on a mortgage bond granted by the defendant for Rs. 75,000.00. On the 16th of August, 1923 a mortgage decree was entered requiring the defendant to pay this sum within one month of the decree and declaring the mortgaged property bound and executable; and in default of payment of the principal, interest and costs within one month, the mortgaged property was ordered to be sold by the Fiscal and the proceeds applied in payment of the amount due. The decree contained no express directions as to the conduct and conditions of sale as provided for by Section 201 of the Civil Procedure Code. It merely directed that the mortgaged premises be sold by the Fiscal. On the 15th of September the plaintiff's Proctors filed conditions of sale for approval and applied for execution of the decree by the issue of an order to sell the mortaged property. The conditions submitted for approval were the printed conditions under which the Fiscal usually sells property seized in execution of money decrees and the application for an order to sell was made in terms of Section 224 of the Civil Procedure Code and in the form prescribed under that Section. Section 224 indicates the procedure to be followed where a party is seeking to execute a decree to pay money. The conditions were approved and the application for an order to sell allowed. The order to sell issued by the Court, which is at page 135 of the record, directed the Fiscal Western Province or his Officers "to sell by public auction after giving ten days previous notice by affixing the same to the Court house and after making *due* publication." On the 1st of October the plaintiff's Proctors moved in terms of Section 272 of the Civil Procedure Code that the plaintiff be allowed to bid for and purchase at the sale and that the Fiscal be directed to give the plaintiff credit to the extent of his claim. In the same motion they asked for a direction to the Fiscal to put up the property for sale, first, at the amount of his valuation, and if ther were no bidders, then, at the amount of the plaintiff's claim, and if there be no bidders, then immediately thereafter, to put up the property for sale to the highest bidder. This application was also allowed by the Court. The property was accordingly sold on the 21st of January, 1924 and purchased by the plaintiff for Rs. 100. On the 19th of February before the sale could be confirmed the defendant moved to have the sale set aside. The application was based on Section 344 of the Civil Procedure Code, and the main objection taken was that the requirements of Section 201 had not been complied with, in that the conditions of sale under which the property was sold were not referred to in the decree, and the permission to the judgment creditor to purchase was not embodied in the decree. The learned District Judge held that the words of Section 201, providing for the giving of directions as to the conduct and condi-

tions of the sale, were not imperative but permissive and that the Section did not prevent the Court from giving such directions and permission to the plaintiff to bid for or purchase otherwise than in the decree and dismissed the defendant's application. The defendant appeals and the same objections have been pressed before us. Th question whether that part of Section 201 which empowers the Court to give directions in the decree is imperative is not free from difficulty.

Section 201 runs as follows.—

"When the action is to enforce a right of sale under a mortgage, and the Court finds for the plaintiff, the decree shall specify a day on or before which the money decreed to be due on the mortgage with interest thereon from date of action to date of payment and costs of action shall be paid, and shall direct that in default of such payment within the period so prescribed the mortgaged property shall be sold and the Court may in such decree for sale give such directions as to the conduct and conditions of the sale (including the purchase), and the person who shall conduct it and as to the terms of the instrument of conveyance and the party or parties by whom it shall be executed, as it may think fit."

Prima facie, the use of the word "may" would indicate that the provision is not imperative, but merely permissive, but in many cases it has been held that "may," when it is used in statutes imposing a duty or conferring power, has a compulsory or obligatory force, and it is equivalent to "must." There is no doubt that if plaintiff asks in his prayer for directions as to the conduct and conditions of sale the Court is bound to give such directions in the decree. In that sense "may" is equivalent to "must" in the section. Maxwell in the Interpretation of Statutes p. 360 Edition 4. But the question here is whether that is the only stage at which such directions can be given, or rather whether the Court can give them after decree has been entered.

It would serve no useful purpose to examine the authorities cited to us, for, in my judgment, the principle applicable to the determination of the question whether the word "may" is used in an obligatory and exclusive sense in section 201, is to be found in a passage in the judgment of Lord Selborne in the well known case of *Julis v. Bishop of Oxford* L.R. (1879) 5 A.C. 214 at page 235, where the noble Lord said:—

"The language (certainly found in authorities entitled to very high respect), which speaks of the words "it shall be lawful," and the like, when used in public statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion innaccurate. I agree with the noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The *question whether a judge, or* a public Officer, to whom a power is given by such words, is bound to use it upon any particular occasions or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the scope and objects, of the enactment conferring the power."

The words discussed in that judgment were "it shall be lawful" but, as Lord Blackburn remarked in the same case, words conferring a power are equivalent to "may." The question therefore whether the word "may" is used in an imperative, or, I should say exclusive sense, must be solved by a consideration of "the context the particular provisions and the general scope and objects of the enactment conferring the power."

Now section 201 forms part of a code. The essence of a code is to be exhaustive on the matters in respect of which it declares the law, and the law on any point specifically dealt with by it must be ascertained by reference to its provisions. It prescribes a particular course of procedure in a particular case that course or procedure must be adopted and no other.—*Gopal Mandar v. Pudmanund* Privy Council (1902) 29 Cal. 707 (715); "*Codification in British India*" by Achariya p. 5. This section is one of a group of sections dealing with judgments and decrees and provides for the contents of a decree passed in an action to realise a mortgage. It

requires the decree to specify a day on or before which the money decreed to be due shall be paid, and to direct that in default of payment within the period prescribed, the mortgaged property shall be sold, and the Court may in such decree for sale give directions as to the conduct and conditions of the sale, etc. Now Counsel has not been able to point out to us any provision in the Code which enables the Court to give directions as to the conduct and conditions of the sale of mortgaged property at any other stage of the mortgage action. The plaintiff might desire to have specific instructions given for the execution of a decree or he might prefer to execute his decree in the same way as a simple money decree. If he desires to have the sale carried out under special directions given by the Court, he must see that those directions are given in the decree for sale. I cannot see under what section of the Civil Procedure Code or any other Ordinance, the Court can give these directions, once the decree has been entered without reference to them. The use of the words "may" in one part of the section and "shall" in another ceases to have any significance, when we find that the Court has no authority to give the directions in question at any other stage of the proceedings. Section 197 affords an apt illustration of the alternative right reserved to the Court. Under that section, in the case of mesne profits which have a accrued prior to the institution of an action for the recovery of possession of immovable property, the Court may either determine the amount and embody it in the decree itself or may pass a decree for the property and reserve the inquiry into the mesne profits to be entered after the execution of the decree.

Section 201 alone gives the Court authority to give direction for the sale of mortgaged property. The plaintiff may apply for such directions or he may not, but if he does apply, he must do so before decree is entered, and the Court has no authority to give such directions except in the decree itself. The procedure adopted by the plaintiff in the case cannot be justified, unless we read some such words as "or at any time prior to the execution of such decree" before the words "give such directions, etc," in the Section. Such words are not found in the Section and there is nothing in the Code which would justify us in reading them into it. Considering therefore "the general scope and objects of the enactment conferring the power," the power being conferred by a Code, the Court was bound to exercise it in the particular manner prescribed by the Code. There is no practical difficulty in adopting such a course. The conditions of sale may be incorporated in the decree by reference to conditions drawn up by each Proctor and sanctioned by the Court and made applicable to all sales under mortgage decrees. The procedure followed in this case was, in my opinion, not justified by the Code and therefore irregular. The conditions of sale approved by the Court in this case are open to very serious objections. These conditions are the conditions under which the Fiscal sells property in execution of ordinary money decrees. The first condition is that "the sale shall be subject to the provisions of the Civil Procedure Code 1889." This is too vague and indefinite to be of any practical use. There was evidently safety in this vagueness for it would have greatly puzzled the Fiscal to say which of the Sections of the Code applied to mortgage sales. There are 837 Sections in the Civil Procedure Code and out of these about a hundred deal with execution sales, and it has been held that only those Sections grouped under the head "General Provisions," Sections 336 to 384, have any application to sales in execution of mortgage decrees. This condition is a mysterious one if it has any meaning. Purchasers ought to be informed of all the conditions under which a property is being sold, instead of being referred to a Code which contains a mass of provisions which are inapplicable to the sale at which they have come to bid. In England in the case of sales by Court, the conditions are passed by conveyancing counsel and in our Courts I think greater care ought to be taken in drafting conditions for Court sales. The order to sell issued to the Fiscal is also open to much criticism. He was commanded to sell the property by public auction after ten days' notice by affixing the same to the Court

House and after making due publication. Now in an ordinary Fiscal's sale when the property seized exceeds the value of Rs. 1,000, the sale cannot take place until the property has been advertised in the *Government Gazette* once at least 20 days prior to the sale (Section 256). Here a property mortgaged for Rs. 75,000 is ordered to be sold after ten days' notice by affixing the notice to the Court House. The Fiscal was also commanded to make "due publication." I am unable to understand what "due publication" means when a sale is to be carried out under an order to sell. The Fiscal construed it as meaning advertising in the *Government Gazette*, and he accordingly inserted an advertisement in the *Gazette*. The Fiscal ought to have been given specific directions as to the mode of publication and advertisement of the sale.

The publication of the sale in this case was not a "due publication" even under the Civil Procedure Code.

Now we come to the plaintiff's application to bid for and purchase the property. It is contended for the appellant that the permission for this purpose and the terms on which such permission is granted ought to be embodied in the decree under section 201. In the present case the terms on which the plaintiff was allowed to purchase were not embodied in the decree. Permission was obtained under section 272 of the Code. In my opinion section 272 has no application to sales under an order to sell—it applies to sales of property seized in execution of a simple money decree. It is to be noted that section 201 expressly requires that the directions should contain the terms on which the plaintiff is allowed to purchase the property mortgaged. It appears to have been a matter of complaint in the days before the enactment of the Civil Procedure Code that mortgagees purchased the mortgaged property for a nominal sum and proceeded to realise the balance out of the other property of the mortgagor; and one of the questions (No. 6) on which the Commissioners appointed to inquire and report on the Law of Mortgage in Ceylon invited the opinion of witnesses was based on this complaint. See Appendix "A" to H. A. Jayewardene's "*Law of Mortgage in Ceylon*" p. V. As Mr. Berwick states, in answer to this question, persons are deterred from taking the trouble to attend sales by the knowledge that another person, generally the mortgagee, intends to bid up to a price beyond what they are prepared to bid. The same feeling still prevails as is shown by the evidence of the plaintiff's Proctor in this case.

Mr. Berwick suggested that a reserved price should be placed on the property or that it should be sold at an "upset" or "assessed" price, the price being determined by an equitable consideration in each particular case of *all* interests concerned and by a practical consideration of the present and future and (near future) state of the market. The Commssioners, however, made the following suggestion for securing a fair market by public auction:—

> (39) That on a primary mortgagee becoming purchaser in execution on his own writ of a single security, the execution debtor shall be entitled to have credit for the full amount of the decree, unless the execution creditor shall, within thirty days from the date of the Fiscal's sale, satisfy the Court that the security was of less value than the amount of the decree, and that, if so satisfied, and to the extent determined by the Court after due inquiry, the execution debtor shall have credit only for the less amount accordingly.
>
> (40) That in the event of there being more than one property mortgaged, the mortgagee seeking to enforce his mortgage shall apportion his debt between the several mortgaged properties, and such apportionment shall be credited to the mortgagor if the primary mortgagee buys the security to which the apportioned amount relates, unless such apportionment does not represent the fair market value which the mortgagor must prove as above; and it is proposed that any such provision be not retrospective.—*Pages IV. and V.*

When persons are deterred as above described, the bidding becomes confined to a few bidders, if the mortgagee does not become the sole bidder. He is thus enabled to buy the property at a price which is much below its

real value and recover the balance from the other property of the debtor, who thereby suffers great injury.

It is to meet this difficulty that when the Civil Procedure Code was introduced, the duty was imposed on the Court of prescribing the terms on which a mortgagee should be allowed to buy the property.

In my opinion our Courts do not sufficiently regulate and control sales under mortgage decrees. Conditions of sale are aproved as a matter of course and the mortgagee is permitted to bid unconditionally for the mere asking. This should not be so. The Court should, particularly in the case of decrees under which valuable properties are to be offered for sale, exercise its discretion judicially, and the mortgagee should not be allowed to bid except under such conditions as would prevent the sale of the property below its real value, and thus avoid the possibility of loss and damage not only to the mortgagor but also to his unsecured creditors, which section 201 was intended to obviate.

I might here repeat what Sir Cromer Petheram, C. J., and Banerjee, J., said in a similar connection in *Sheonath Doss vs. Janki Prasad Singh* (1888) *16 Calcutta 132*:—

> "Whilst we attach so much importance to the leave of the Court to the decree-holder to bid, and consider that it removes all disability in him to bid, such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given after some inquiry that the sale proclamation has been duly published."

The question remains whether the sale now under consideration should be set aside owing to these irregularities. The defendant was fully aware of the fact that the property was to be sold and it may fairly be presumed that he informed himself of the terms and conditions under which the sale was to take place. He raised no objection then, but had the sale stayed when it was first advertised and obtained time to settle his debt. This he failed to do and the property was then put up for sale and purchased by the plaintiff. The plaintiff is prepared to give the defendant credit for the full amount due on the decree entered up, he is also prepared to cancel another bond for a sum of Rs. 3,000 advanced by the plaintiff on the security of certain property belonging to the defendant's sister for the purpose of paying the rates due to the Municipality on the property sold. The total amount due to the plaintiff would now amount to about Rs. 95,000. The defendant would thus be obtaining about Rs. 95,000 for his property. This is I think a fair price in the present state of the market. In these circumstances the defendant will not suffer any loss, and his substantial rights will in no way be prejudiced by the confirmation of this sale. On the plaintiff certifying of the decree in this case and cancelling the bond for Rs. 3,000 referred to above within fourteen days of the receipt of the record of the case in the lower Court, this appeal will stand dismissed and the sale will be confirmed. There will be no costs of this appeal. If the plaintiff fails to certify satisfaction of the decree and cancel the bond as directed above, the appeal will be allowed with costs in both Courts.

Bertram, C.J.:—I agree.

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