[IN THE PRIVY COUNCIL]

1961 *Present :* **Lord Reid, Lord Tucker, Lord Denning, Lord Morris of Borth-y-Gest, Mr. L. M. D. de Silva**

THE ATTORNEY-GENERAL, Appellant, *and* H. R. FONSEKA and another, Respondents

Privy Council Appeal No. 38 of 1959

S. C. 820—D. C. Colombo, 37090

Contract—Can a person contract with himself ?—Excise licence to sell arrack—Liability of a person acting in two distinct capacities in respect of two distinct licences—Arrack rent sale conditions— Interpretation.

A person acting in two distinct capacities can, for the purpose of a contract, be regarded as capable of entering into an agreement with himself.

The exclusive privilege of selling arrack for a period of twelve months in certain taverns in Colombo Municipality was granted by the Government upon certain conditions to any person who offered to pay the highest " rent " for every gallon of arrack that would be removed by him from the Government Warehouse for sale in the taverns.

Condition No. 13 provided that if, by mutual agreement between the outgoing and incoming grantees, an incoming grantee took over from the outgoing grantee the balance of arrack remaining in a tavern after the closing hour of the date of expiry of the privilege of the outgoing grantee, the incoming grantee should pay to the Government in respect of every gallon taken over by him from the outgoing grantee an amount equivalent to the rent payable by him for the privilege. In default of agreement the outgoing grantee was bound to deliver the balance arrack to the Excise Warehouse where he would be paid a certain price for it per gallon.

The respondents were the grantees of the privilege for the year ending 30th September 1953. They subsequently became grantees also for the following year ending 30th September 1954, upon the same conditions. When they became grantees for the second year, they took over the balance of 1,832 2/3 gallons of arrack that had remained unsold at the end of the first year.

Held, that when the respondents became grantees for the second year and decided to take over the balance arrack remaining unsold in the taverns at the end of the first year, they were liable to pay rent to the Government for the balance arrack at the full rate stipulated in Condition No. 13. There was no reason why Condition No. 13, which the respondents had bound themselves to perform, could not be performed in a case where the same persons were concerned with two distinct privileges in reference to which they had the distinct capacities of outgoing and incoming grantees.

APPEAL from a judgment of the Supreme Court.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena*, for the defendant-appellant.

T. O. Kellock, for the plaintiffs-respondents.

Cur. adv. vult.

January 31, 1961. [*Delivered by* LORD MORRIS OF BORTH-Y-GEST]—

This is an appeal from the judgment and decree (dated the 31st July 1958) of the Supreme Court of Ceylon (Basnayake C.J. and Sansoni J. : Pulle J. dissenting) dismissing the appeal of the Attorney-General of Ceylon from the judgment and decree dated the 25th October, 1956 of the District Court of Colombo (Mr. W. Thalgodapitiya, District Judge). By the judgment and decree of the District Court the respondents succeeded in their claim for a sum of Rs. 7,882·03 (with legal interest and costs) which they alleged had been wrongfully withheld from them out of a sum of Rs. 66,800 which they had deposited as security upon the grant to them of the exclusive privilege, for a particular period, of selling arrack on certain specified premises. The appeal raises questions as to the construction of the Special Conditions which governed the grant of the privilege to the respondents.

By a notification published in the Gazette of the 25th July, 1952 the Excise Commissioner directed that the grant of the exclusive privilege of selling arrack by retail within any local area during the period commencing on the 1st October, 1952 and ending on the 30th September, 1953 and subsequent periods should be subject both to the General Conditions in force which were applicable to all Excise Licences and also to the Special Conditions as set out in the Gazette. Those desirous of obtaining a grant could in the prescribed form tender for the purchase of the exclusive privilege of selling arrack within a particular area. The Government Agent could in his discretion reject any or all of the tenders received and if he rejected all tenders he could call for tenders again or he could put up the privilege either at once or after further notice for sale by auction. Certain of the Special Conditions related to any sale by auction that might take place. There followed Conditions in these terms :—

" 8A. Grant of Privilege. The privilege will be granted to the person who offers the highest price for every gallon of arrack removed from the appropriate warehouse referred to in schedule B hereto for sale in the tavern or taverns to which the privilege

relates. Such price (hereinafter referred to as the "rent") shall not include the price at which arrack is issued from the warehouse as fixed by the Excise Commissioner under condition 16."

"9.—(1) (*a*) Security deposit. Every grantee shall, immediately on being declared to be the purchaser of the privilege—(1) sign these conditions; and (2) pay to the Government Agent as security for the due performance of these conditions such sum as may be specified in Schedule D hereto in respect of the tavern or taverns to which the privilege relates."

Condition 16, which was referred to in Condition 8A, was in the following terms :—

"16. Issue Price Payable. Issue Strengths. In addition to the rent the grantee shall pay to the Government Agent in respect of every gallon of arrack issued and removed from a Government Warehouse an amount calculated at rates to be determined from time to time by the Excise Commissioner by notification published in the Gazette. The difference between the price so determined and the selling price at the grantee's tavern or taverns shall in the case of every quality of arrack be Rs. 3·80 per gallon where arrack is sold in bottle and Rs. 6 per gallon where arrack is sold in bulk.

Provided, however, that if the issue price is increased during the period of this privilege, the grantee shall pay to the Government Agent in respect of the entire quantity of arrack remaining unsold in a tavern after the closing hour on the day immediately preceding the day on which the increased price comes into force an amount equivalent to the increase in issue price.

The Excise Commissioner shall, by notification published in the Gazette prescribe from time to time the strength of each quality of arrack issued from a Government Warehouse."

There followed Condition 16A which was in these terms :—

"16A. Payment of Rent. The grantee shall pay to the Government Agent rent at the same rate at which he has purchased the privilege, on every gallon of arrack in bulk or in sealed bottles to be removed from the warehouse."

It would appear from a consideration of the Conditions that a grantee of a privilege would, for the term granted to him, have the exclusive privilege of selling arrack by retail in certain specified premises, that he would obtain his arrack from a specified Government Warehouse, that he would

pay a specified amount in respect of every gallon issued and removed from such Government Warehouse and that by way of payment for his exclusive privilege he would pay a price or rent (being the price or rent per gallon offered by him) on every gallon of arrack removed by him from such Government warehouse.

A Condition (No. 28) which provided that there should be no compensation or remission of rent for loss or damage included the following :—

"(2) No remission of the rent payable in respect of the privilege will be granted on any plea of the grantee's having over-estimated the value of any tavern or on any other ground."

Certain other Conditions which are of particular consequence in these proceedings were as follows :—

"13.—(1) Taking over of Balance Arrack by Incoming Grantee by Mutual Agreement. The grantee shall take over from the outgoing grantee and pay to him an amount which may be agreed on, in respect of the cost of

(*a*) the balance of arrack, in bulk and in bottles, remaining in a tavern, after the closing hour of the date of expiry of the privilege of the outgoing grantee : and

(*b*) transport, wastage, and other miscellaneous charges.

(2) The grantee shall pay to the Government in respect of every gallon taken over by him from the outgoing grantee an amount equivalent to the rent payable by him for the privilege."

"14. In default of agreement, Outgoing Grantee to deliver Balance Arrack at nearest Warehouse. (1) Where the incoming and outgoing grantees cannot agree with regard to the sum to be paid as aforesaid, the outgoing grantee shall forthwith remove the balance of arrack on a permit, to the nearest Excise Warehouse, and deliver it to the Warehouse Officer in charge thereof, and obtain a receipt. Such arrack shall be of the strength prescribed by Notification for the time being in force in that behalf under condition 16.

(2) The outgoing grantee shall present such receipt to the Excise Commissioner, who shall pay to such grantee the value of the arrack so delivered at the rates at which such grantee purchased such arrack.

(3) If the sum payable by the incoming grantee at the time the arrack is so taken over by him, is higher than the sum actually paid for the said arrack by the outgoing grantee, the incoming grantee shall, within fourteen days of the commencement of his privilege, pay the difference to the nearest Kachcheri."

The respondents were declared to be the purchaser of the privilege of selling arrack in certain taverns in Colombo Municipality for the year ending the 30th September, 1953 and pursuant to Condition 9 (1) (*a*) they signed an Agreement in the following terms :—

" AGREEMENT

(Condition 9 (1) (*a*))

WE, KATHEGESU SELVADURAI and HEWAFONSEKAGE RUBAN FONSEKA of 105, 5th Cross Street, Colombo, do hereby acknowledge that we have this day been granted the hereinbefore-mentioned exclusive privilege for the sum of Rupees four and cents thirty per gallon on the conditions set forth above, and we do hereby bind myself/ourselves to perform the said conditions.

(Sgd.) K. SELVADURAI

(Sgd.) H. R. FONSEKA.

Grantee(s)

22.8.52.

Witnesses :

1. (Sgd.) (Illegible).

2.— "

They also made the requisite security deposit the receipt of which was duly acknowledged by the Government Agent.

It was recorded in the Ceylon Government Gazette dated the 19th June, 1953, that the Acting Excise Commissioner directed that the grant of the exclusive privilege of selling arrack by retail within any local area during the period commencing on 1st October, 1953, and ending on 30th September, 1954, should be subject, in addition to the General Conditions, to the Special Conditions then set out in the Gazette. Such Special Conditions were (except for certain numbering differences) the same as for the previous year. For that new period the respondents again became the grantees in respect of the same specified premises. They had offered a price or rent of Rs. 4·91 per gallon. By agreement dated the 30th July, 1953, in terms which, mutatis mutandis, were similar to those of their agreement dated the 22nd August, 1952, they acknowledged that they had been granted the exclusive privilege and they bound themselves to perform the Conditions. They also made the appropriate deposit (which was of Rs. 66,800) as security for the due performance of the arrack rent sale conditions.

By a letter dated the 30th June, 1954, written by the respondents to the Government Agent the respondents sought to elucidate the position as regards the quantities " of balance arrack " at the specified premises at the close of business on the 30th September, 1953 " and taken over by ourselves for stock against the 1953–54 rent period ". They submitted that had they been vacating the premises after the 30th September, 1953, they would either have received a sum representing Rs. 4·30 per gallon from the incoming renter if he had taken over the stocks of arrack or if he had not been willing to take over the stocks that they would have surrendered the stocks to the Government and would have claimed a refund of Rs. 4·30 per gallon.

The balance of the stocks of arrack at the premises at the close of business on the 30th September, 1953, was 1,832 2/3 gallons. The respondents submitted that if it was contended that as incoming renters they had been liable to pay Rs. 4·91 per gallon on the 1,832 2/3 gallons taken over on the 1st October, 1953, then they were entitled to reimbursement at the rate of Rs. 4·30 per gallon. If, therefore, they submitted, the sum of Rs. 8,998·73 (being 1,832 2/3 gallons at Rs. 4·91) was payable by them, the sum of Rs. 7,880·47 (being 1,832 2/3 gallons at Rs. 4·30) was payable to them: on the nett transaction they submitted that the difference of Rs. 1,118·26 was payable by them to the Government.

One of the issues raised in the proceedings is whether on a proper construction of the conditions the respondents would have been entitled, had they vacated after the 30th September, 1953, and had they returned the balance of arrack to the Government Warehouse, to receive a reimbursement of the sum of Rs. 7,880·47 (being 1,832 2/3 gallons at Rs. 4·30).

The Government of Ceylon denied that the respondents were entitled to set off any sum against their liability to pay an amount representing rent at Rs. 4·91 on 1,832 2/3 gallons.

In due course the respondents instituted an action against the appellant as representing the Crown. Their plaint dated the 5th December, 1955, included the following paragraphs :—

" 8. On the 1st October, 1953, the plaintiffs commenced business with the said 1,832 gallons 32 drams left over from the previous year referred to in paragraph 4 above for which the plaintiffs had paid a sum of Rs. 7,882·03 at the rate of Rs. 4·30 per gallon and for which the plaintiffs had to pay the Government a further sum of Rs. 1,117·97 at 61 cents per gallon so as to bring it to the amount of Rs. 4·91 payable during the year 1953–54.

9. On the termination of the said period of sale, viz.: On 30th September, 1954, the said Government Agent became liable to refund to the plaintiffs the said security deposit of Rs. 66,800 less the said sum of Rs. 1,117·97 but the said Government Agent wrongfully and unlawfully withheld a further sum of Rs. 7,882·03 less the said sum of Rs. 1,117·97 and has returned the balance of the said security deposit.

10. A cause of action has arisen to the plaintiffs to sue the defendant as representing the Crown for the recovery of the said sum of Rs. 7,882·03 together with legal interest thereon."

The respondents prayed for judgment for Rs. 7,882·03 (with interest and costs).

The answer of the appellant dated the 9th March, 1956, included the following paragraphs.

" 4. Answering further the defendant states that—(*a*) the plaintiffs who were the outgoing grantees of the privilege for the period 1st October, 1952, to 30th September, 1953, became also the incoming grantees for the period 1st October, 1953, to 30th September, 1954.

(*b*) the plaintiffs did not in their capacity of outgoing grantees at the termination of the contract for 1952–53 on 30th September, 1953, deliver to the warehouse officer in charge of the nearest warehouse the balance quantity of arrack referred to in paragraph 4 of the plaint, but instead in their capacity of incoming grantees took over the said balance quantity remaining in the taverns from themselves in their capacity of outgoing grantees.

(*c*) by reason of the averments contained in sub-paragraphs (*a*) and/or (*b*) of this paragraph the plaintiffs became liable under condition 15 (2) of the Arrack Rent Sale Conditions for 1953–54 to pay to the Government in respect of every gallon so taken over and remaining in their hands in their taverns at the termination of the contract for 1952–53 an amount equivalent to the rent per gallon payable by the plaintiffs for the privilege of selling arrack for the period 1953–54.

(*d*) the rent payable under the contract for the said privilege in the period 1st October, 1953, to 30th September, 1954, was Rs. 4·91 per gallon at which rate the plaintiffs became liable to pay to the Government under the said Condition 15 (2) referred to above the total sum payable by the plaintiffs being in consequence Rs. 8,998·40."

" 5. The plaintiffs having failed or refused to pay to the Government the said sum of Rs. 8,998·40 the Government Agent as he lawfully might withheld the said sum of Rs. 8,998·40 from the sum of Rs. 66,800 deposited by the plaintiffs as security for the performance of the contract in respect of the period 1st October, 1953, to 30th September, 1954."

The appellant prayed for a declaration that the Government Agent, on behalf of the Crown, was entitled to withhold the sum of Rs. 8,998·40 from the deposited amount of Rs. 66,800.

At the trial which took place on the 26th September, 1956 the respondents admitted that the Crown had been entitled to retain Rs. 1,117·97

(being the difference between the two rates of Rs. 4·91 and Rs. 4·30 i.e. 61 cents per gallon in respect of the 1,832 2/3 gallons) but claimed that the retention of Rs. 8,998·40 by the Crown was wrongful to the extent of Rs. 7,882·03.

Only one issue was framed. It was in the following form :—

" 1. Are the plaintiffs liable under Condition 15 (2) of the Arrack Rent Sale Conditions for 1953–54 to pay to the Government in respect of the 1,832 gallons 32 drams at the rate of Rs. 4·91 per gallon being an amount equivalent to the rent agreed upon ? "

Condition 15 (2) of the 1953/4 Conditions was in the same terms as Condition 13 (2) of the 1952/3 Conditions as set out above.

The learned District Judge (Mr. W. Thalgodapitiya) gave judgment for the respondents as prayed. He took the view that the rent payable by a grantee of the privilege of selling was to be calculated by reference to the number of gallons of arrack which he actually sold. He held that though, for convenience, payment was made in advance rent was only due and payable in respect of the quantity actually sold. In his judgment he said :—

" Now the rent payable for the privilege is the sum for which the renter has purchased the exclusive privilege to sell. The privilege is for selling, and not for removing or storing. No doubt the payment is made in advance for the sake of convenience and for the protection of the Government from fraud or from default in payment ; but still the payment is for the privilege to sell as set out in P1, P2, P3, and P4, and the rent becomes payable only for every gallon sold.

" Therefore the renter who has a stock in hand and who sells that stock to the incoming grantee will, in my view, be entitled to claim a refund of the money he has already paid to the Government for the privilege to sell that stock, because he has not sold that stock. In this case the outgoing grantee and the incoming grantee were the same ; but that does not alter the situation. The incoming grantee could have either claimed a refund of the Rs. 4·30 per gallon he had already paid to Government and paid Rs. 4·91 per gallon for the stock he took over, or he could pay the difference between Rs. 4·91 and Rs. 4·30, which comes to the same thing."

He considered that the demand of the Crown was unconscionable and was not justified according to the Conditions. His answer to the issue which was framed was as follows :—" Yes but only the difference between Rs. 4·91 and Rs. 4·30 per gallon."

The appellant appealed to the Supreme Court of Ceylon. By a majority (Basnayake C.J. and Sansoni J., Pulle J. dissenting) the appeal was dismissed.

Basnayake C.J. considered that the agreement and conditions made no provision for the case where the same person was the grantee in two successive years. He did not understand why the respondents had conceded that under their agreement in relation to the second year they were liable to pay 61 cents per gallon in reference to the 1,832 2/3 gallons. He said :—

> " It is trite law that a person cannot contract with himself and that for the formation of a contract or agreement at least two persons natural or juristic are essential There can be in the instant case no such agreement or taking over as is contemplated in Condition 15 (1) and the plaintiffs are under no legal obligation to make the payment provided for in Condition 15 (2). The author of agreement—the Crown—must suffer for its failure to provide for the case of the same person being the grantee in two successive years especially as it was signed at a time when it was well aware of the situation that would arise on the grant of the privilege to the plaintiffs for the succeeding year. The omission to make special provision for the case of the plaintiffs must in the circumstances be presumed to be deliberate.
>
> It is not clear why the plaintiffs have conceded that under agreement P2 they are liable to pay 61 cents per gallon. In making that concession they seem to have proceeded on the basis of a notional delivery of the arrack in the taverns at the nearest Excise Warehouse under condition 16 for which no payment has been made as provided therein. The Crown contended that the privilege-holder delivering arrack at an Excise Warehouse is not entitled to a refund of the price paid per gallon for the privilege, as that price was a rent for the privilege. With that contention I am unable to agree."

(Conditions 15 and 16 to which reference was made correspond to Conditions 13 and 14 set out above.) The learned Chief Justice considered that had Condition 16 applied, which in his opinion it did not, the Crown would have been bound to refund Rs. 4·30 per gallon of arrack delivered at the Excise Warehouse in addition to the issue price. He said :—

> " Now what are the words which limit the meaning of the word ' value ' in its context ' the value of the arrack so delivered at the rates at which such grantee purchased such arrack '? In the instant case the ' rates at which the grantee purchased the arrack ' is the rent or privilege price plus the issue price. The total of those two prices is the ' value ' of the arrack."

He also considered that the Crown were seeking to enrich themselves at the expense of the respondents by charging twice over for the arrack in their taverns on the 30th September, 1953 and he said that the Courts would not permit any such unjust enrichment.

Sansoni J. was of the opinion that the terms of Condition 15 (2) of the Agreement for the second year (which accorded with Condition 13 (2) of the Agreement for the first year) did not apply. He said that the

question was whether there was any legal justification for the demand of the Crown that the respondents should pay rent twice over in respect of the same quantity of arrack. He said :—

" I cannot see on what basis the Crown seeks to make the plaintiffs liable to pay a second rent on this quantity of arrack at the rate of Rs. 4·91. They were only liable to pay, and they had in fact paid rent, at the rate prevailing at the time of removal. Since, however, they have accepted liability to pay the difference between Rs. 4·30 and Rs. 4·91 per gallon, the Crown benefits to that extent, but such an acceptance of liability does not decide the question in issue.

" There is the further consideration that it was the privilege of selling arrack that the plaintiff purchased. The plaintiff received no benefit from merely storing the 1,832 gallons 32 drams until 30th September, 1953. It is not necessary to decide the hypothetical question whether the plaintiffs would have been entitled to claim a repayment of the issue price and rent paid for this quantity of arrack left unsold on 30th September, 1953, if they did not become the renters for the following year. They did in fact, become the renters again, and the contract contains no prohibition against such a quantity of arrack being sold in the following year. "

Pulle J. was of the contrary opinion and considered that the appeal should have succeeded. He said that the question that had to be determined was whether on the 30th September, 1953, the respondents had acquired the right to a refund of Rs. 4·30 per gallon on the 1,832 2/3 gallons. He said :—

" In my opinion once a payment is made on account of rent it is not subject to the condition that the purchaser of the ' privilege ', which as was submitted was in the nature of an incorporeal right, would become entitled to a refund if the arrack in respect of which the rent was paid was unsold, any more than the purchaser would have become entitled to a refund had the arrack which passed into his possession been lost through the negligence of his servants or been stolen. "

He referred to Condition 14 as set out above (which was Condition 16 in the agreement for the second year) and said :—

" My interpretation of paragraph (2) is that by its very terms the outgoing grantee is disentitled to a refund of any sum paid by way of ' rent '. A refusal to refund in those circumstances to an outgoing grantee can hardly be described as unconscionable.

" I have dealt with this appeal solely on the merits of the ground urged by the plaintiffs that because a certain quantity of arrack was unsold on 30th September, 1953, they became immediately vested with the right to claim a refund of the sum paid as ' rent ' for that quantity. That was the basis on which the case for the plaintiffs was fought in the court below and that was also the basis on which the trial Judge gave judgment for the plaintiffs. In my opinion the plaintiffs' position is untenable and I would allow this appeal, with costs here and below. "

On the 10th October the appellant was granted final leave to appeal to Her Majesty in Council.

It is to be observed that in the District Court the argument of the respondents was that in respect of their second year as grantees of the privilege they were liable to pay a rent of Rs. 4·91 on the 1,832 2/3 gallons but that this liability only involved their paying an additional 61 cents per gallon because in the previous year they had already paid a rent of Rs. 4·30 on that quantity.

It will be appropriate to consider in the first place what the position would have been if the grantees for the two years had been two different persons and if a balance of 1,832 2/3 gallons of arrack had remained at the end of the first year. If by mutual agreement between the outgoing and incoming grantees the incoming grantee had taken over the balance arrack which remained then the Condition would have been applicable which provided that the incoming grantee should " pay to the Government in respect of every gallon taken over by him from the outgoing grantee an amount equivalent to the rent payable by him for the privilege ". If therefore the incoming grantee had taken over 1,832 2/3 gallons from the outgoing grantee the incoming grantee would have had to pay rent to the Government in respect of that quantity at the rate of Rs. 4·91. Furthermore if the price at which arrack was then issued was higher than the sum actually paid for such arrack by the outgoing grantee the incoming grantee would have had to pay the difference to the Government Agent. If the outgoing grantee and the incoming grantee had not agreed with regard to the sum to be paid by the latter to the former then the outgoing grantee would have been under obligation to take the balance arrack to the nearest Excise Warehouse.

The question arises as to what payment the outgoing grantee would under such circumstances have received. Their Lordships consider that the Rent Sale Conditions (see Condition 16 of the Conditions for the second year in terms as set out in Condition 14 recorded above) provide the answer. The outgoing grantee would obtain a receipt for the arrack that he removed from his taverns (and delivered to the nearest Excise Warehouse) and upon presenting such receipt to the Excise Commissioner he would be paid " the value of the arrack so delivered at the rates at which such grantee purchased such arrack ". Their Lordships cannot agree with the view that the " value " that would be paid would include the " rent " payable on the grant of the privilege. The " value " to be paid would be the value of the arrack that had been delivered to the grantee and which remained unsold. It would be the value " at the rates at which such grantee purchased such arrack ". The rates so referred to were the rates or prices at which from time to time the Government had sold the arrack. Those rates might vary. But they were quite separate from the " rent " which was a payment that had to be made for the privilege of selling. A grantee had to buy his arrack : he had to buy from

the Government and he had to buy at the rates or prices which were fixed from time to time. The price paid for the privilege of selling was quite distinct from the price paid on a purchase of the arrack itself. Thus Condition 8A cited above (which is the same as Condition 9 in the 1953–54 Conditions) states that the privilege of selling in the specified places will be granted to the person who offers the highest price for every gallon removed from the appropriate warehouse and provides that " such price (hereinafter referred to as the " rent ") shall not include the price at which arrack is issued from the warehouse as fixed by the Excise Commissioner under Condition 16 ". Condition 16 (which corresponds to Condition 18 of the 1953–54 Conditions) provides that the issue price of arrack (which is in addition to the rent) is a payment " in respect of every gallon of arrack issued and removed from a Government Warehouse " and that it is payment of " an amount calculated at rates to be determined from time to time by the Excise Commissioner by notification published in the Gazette. " Those " rates " are, in their Lordships' view, the " rates at which such grantee purchased such arrack " which are referred to in Condition 14 (2) cited above. The payment to be made to an outgoing grantee who returns balance arrack to a Government Warehouse is therefore the value of the arrack so delivered at the " rates " at which he purchased. Such " rates " would not include the " rent " paid for the privilege of selling.

Their Lordships conclude therefore that had a grantee whose privilege terminated on the 30th September, 1953, returned his balance arrack to a Government Warehouse he would not have been entitled to receive a return of the sum that he had paid by way of rent in respect of his unsold balance.

Their Lordships cannot accept the view (held by the learned District Judge) that " rent " was not lawfully due until arrack was sold by a grantee. It was said that though amounts of " rent " had to be paid when arrack was removed from a warehouse such payments were only by way of deposit : it was said that they were payments in advance and that liability only accrued when and if there were actual sales. In their Lordships' view the whole tenor of the conditions runs counter to this contention. Payments are made for the privilege of selling. It is expressly provided (see Condition 28 (2) cited above or Condition 31 (2) of the 1953-54 Conditions) that no remission of the rent payable in respect of the privilege will be granted on any plea of the grantee's having over-estimated the value of any tavern or on any other ground.

The Conditions do not include any provision enabling a grantee to obtain the return of any " rent " paid by him in respect of any arrack that he does not sell. Furthermore there is no Condition which provides that the liability to pay " rent " only arises in respect of quantities actually sold. Though a grantee is under obligation to have certain minimum quantities of arrack in his taverns it must be for a grantee to decide as to the quantity that he will purchase. The existence in the

Conditions of provisions for the return by an outgoing grantee in certain circumstances of balance arrack and for the payment to him of " the value of the arrack " returned by him " at the rates at which such grantee purchased such arrack " shows that purchase price may be returned but not rent. This is understandable when it is appreciated that " rent " represents a payment for enjoying the exclusive privilege of having the opportunity to sell. There is no failure of consideration merely because the opportunity to sell has not resulted in actual selling. The amount of the rent has undoubtedly to be paid over at the time when arrack is removed from Government Warehouse. The privilege is granted to the person who offers the highest price " for every gallon of arrack removed from the appropriate warehouse ". (See Condition 8A cited above—which is Condition 9 in the 1953-54 Conditions.) So also Condition 16A cited above (which is Condition 19 of the 1953-54 Conditions) provides that a grantee must pay rent at the same rate at which he has purchased the privilege " on every gallon of arrack in bulk or in sealed bottles to be removed from the warehouse ". The absence of any Condition as to any possible repayment of " rent " after it has once been paid is to be noted. If " rent " was merely being paid by way of a deposit in advance as against the time when, by actual sales, a legal liability to pay it or to account for it arose—then it would be reasonable to expect some express Conditions as to accounting in regard to quantities actually sold by retail. What, it might be asked, would be the position if arrack in a tavern were destroyed by fire or removed by theft ? What also would be the position if a grantee in some legitimate manner used a quantity of arrack for his personal requirements ?

Their Lordships conclude that " rent " is payable for the exclusive privilege of having the opportunity to sell arrack in certain places for a defined period, that it is payable in respect of the quantity issued and removed from a Government Warehouse, and that it does not cease to be payable or become recoverable in respect of any quantity that the grantee does not sell. It follows from this that had the incoming grantees for 1953-54 been different persons from the outgoing grantees for 1952-53 the Government would have been entitled to retain the amount of the rent paid in respect of arrack which was unsold at the end of the first year and if the incoming grantees took over such unsold quantity from the outgoing grantees the Government would have been entitled to claim rent at the new figure of rent in respect of such quantity from the incoming grantee. Whether this result be or be not regarded as desirable is not a matter for their Lordships but the contractual arrangements freely entered into would have brought it about and neither incoming nor outgoing grantees could justifiably have asserted that there was " unjust enrichment ".

The question next arises as to whether the respondents can claim that in respect of the second year the Conditions dealing with the taking over of balance arrack by an incoming grantee did not apply to them with the result either as the majority in the Supreme Court apparently thought

that they need not have paid any further rent in respect of the second year in reference to the 1,832 2/3 gallons or as the District Judge thought that they were obliged to pay further but only to the extent of the difference between Rs. 4·91 and Rs. 4·30 per gallon. It was on the basis of the latter view that the respondents made their claim in the action.

It was argued on behalf of the respondents that Condition 15 (2) of the Conditions for the second year (which corresponds to Condition 13 (2) cited above) did not apply to them because, they asserted, they were not incoming grantees who were taking over from an outgoing grantee: it was urged therefore that they were not liable to pay "rent" in respect of the balance arrack since it was not taken over by them from an outgoing grantee. It is to be observed however that pursuant to the notice in the Ceylon Government Gazette of the 19th June, 1953, it was open to all persons to make offers for the privilege of selling in the period from the 1st October, 1953, to the 30th September, 1954. The privilege of selling was to be granted to the person who offered to pay the highest price or "rent". An outgoing grantee could make a bid just as anyone else could and there was no provision which would entitle him to have an advantage over others or which would cause the Government to be less satisfactorily placed if an outgoing grantee rather than someone else obtained the new monopoly for the new period. The respondents enjoyed a privilege in respect of the year down to the 30th September, 1953. They decided to make an offer with a view to being granted a new and different privilege i.e. one in respect of the year beginning the 1st October, 1953. They succeeded in obtaining the new privilege. In respect of it and in respect of the new period covered by it they were incoming grantees. In respect of their old privilege and in respect of the period covered by it they were outgoing grantees. In these circumstances there was no reason why in different periods they should not have different capacities. The respondents themselves had no difficulty in appreciating the different capacities as is shown by the terms of their letter dated the 30th June, 1954, addressed to the Government Agent in which they stated:—"Our position is that we were the incoming renters for 1953-54 as well as the outgoing renters for 1952-53. The balance stocks as at 30th September, 1953, were duly carried over by us against the 1953-54 period in respect of each tavern". When they were successful in obtaining the new privilege for the second year they signed an acknowledgment that "We have this day been granted the hereinbefore-mentioned exclusive privilege for the sum of Rupees four and cents ninety-one on the conditions set forth above and We do hereby bind ourselves to perform the said conditions". The learned District Judge does not seem to have considered that there was any practical difficulty in honouring the Conditions. He however decided the case as he did because he concluded that any "rent" paid could be recovered if the arrack in respect of which it was paid was not sold. He said therefore (in the passage cited above) that a grantee who sold to an incoming grantee could claim a refund from the Government of "rent"

in respect of unsold arrack. He added :— "In this case, the outgoing grantee and the incoming grantee were the same ; but that does not alter the situation. The incoming grantee could have either claimed a refund of the Rs. 4·30 per gallon he had already paid to Government and paid Rs. 4·91 per gallon for the stock he took over, or he could pay the difference between Rs. 4·91 and Rs. 4·30, which comes to the same thing ".

For the reasons which they have stated above their Lordships reject the view that liability to pay "rent" only accrued or was only finalised when the arrack in respect of which it was handed over was actually sold.

It follows that the respondents, who had admitted their liability to pay at the rate of Rs. 4·91 in respect of the balance arrack, were not entitled to a refund at the rate of Rs. 4·30 and on this ground their claim in the action should in their Lordships' view have failed.

Furthermore their Lordships see no reason why Condition 15 in reference to the second year (in terms of Condition 13 cited above) which the respondents bound themselves to perform could not be performed in a case where the same persons were concerned with two distinct privileges in reference to which they had the distinct capacities of outgoing and incoming grantees. If the respondents had taken the view that there could not be a taking over at an agreed amount then as outgoing grantees they should have returned the balance arrack to Government Warehouse and have received a return of what they had paid for the arrack but not what they had paid as rent. They did not do that but in the capacity of incoming grantees they took over the balance arrack and accordingly, under one of the Conditions which they had undertaken to perform, they became under a liability to pay an amount per gallon equivalent to the rent payable by them for the privilege.

For the reasons which their Lordships have set out the respondents became under liability to pay rent at Rs. 4·91 per gallon for the year 1953-54 on the balance stock and were not entitled to a refund of Rs. 7,882·03 which they had paid as rent in the year 1952-53 in respect of the arrack which remained unsold and which formed the balance stock. It follows therefore that the claim of the respondents should have failed. Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the judgment and decree of the District Court and of the Supreme Court should be set aside and that the respondents' action should be dismissed. The respondents must pay the costs before their Lordships' Board and the costs in the District and Supreme Courts.

Appeal allowed.