order made by it may be liable to be questioned on *Certiorari*, as for instance, where the Commission, without framing charges, without affording an opportunity to the employee to exculpate himself and without holding an inquiry, purports to dismiss him, I do not think it can be gainsaid that such an order would, as being one made without jurisdiction, be liable to be quashed in *certiorari*; but where it has performed its duties in accordance with the statutory provision, the soundness of the conclusions reached or the decision arrived at cannot form the subject of review by means of a writ of *certiorari*.

It is, however, unnecessary for me to pursue the question further as I am satisfied that in this case the Commission has acted in accordance with the powers and duties vested and imposed on it and Mr. Wickremenayake has not been able to show the contrary; so that, even assuming the act of the Commission to be a judicial act, that act is not liable to be questioned on *certiorari*, for it is well established that the writ cannot be availed of to set right even a wrong decision provided it is not one without or in excess of jurisdiction. See *King v. Woodhouse (supra)* and *de Soysa v. Dyson* [1].

In this view of the matter the application fails and is refused with costs.

Application refused.

1949 *Present:* **Windham J. and Gratiaen J.**

WILLIAM PERERA *et al.*, Appellants, *and* INSPECTOR OF POLICE, MAHARAGAMA, Respondent

S. C. 375-376—M. C. Colombo South, 20,548

Criminal Procedure Code—Magistrate assuming jurisdiction as District Judge—Replaced by another Magistrate after commencement of proceedings—Successor continues proceedings without independent decision to act under Section 152 (3)—Conviction not vitiated—Sections 152 (3) and 292—Courts Ordinance, Section 88.

Magistrate G, without proceeding to hear any evidence, recorded: "I peruse the B reports and as facts are simple I assume jurisdiction as Additional District Judge". The accused were thereupon charged and the hearing of the case was adjourned. By the time of the adjourned hearing Magistrate G had been transferred, and Magistrate W, his successor, who was also an Additional District Judge, proceeded to record the evidence and eventually to convict the accused.

Held, (i) that there was a proper assumption of jurisdiction by Magistrate G under section 152 (3) of the Criminal Procedure Code;

(ii) that, by virtue of section 88 of the Courts Ordinance, the proceedings before the successor Magistrate W were not vitiated by the fact that he himself did not record his independent decision that he was electing to try the case summarily in accordance with section 152 (3) of the Criminal Procedure Code.

[1] *(1945) 46 N. L. R. 351.*

CASE referred by Wijeyewardene C.J. to a Bench of two Judg for the determination of a point of law and procedure.

C. E. Jayewardene, for accused appellants.

H. A. Wijemanne, Crown Counsel, with *A. Mahendrarajah, Crown Counsel*, for the Attorney-General.

Cur. adv. vult.

October 27, 1949. WINDHAM J.—

This matter comes before us for the determination of a point reserved—a point of law and procedure arising out of the proper interpretation of section 152 (3) of the Criminal Procedure Code. The facts, in so far as they affect the point reserved, were as follows. The accused-appellants were charged with house-breaking and theft, and the first accused was also charged with dishonestly retaining stolen property. The case came up for trial before the magistrate, Mr. Gunawardene, on January 5, 1949, on which date, without proceeding to hear any evidence, he recorded—" I peruse the B reports and as facts are simple I assume jurisdiction as A.D.J. ". It is undisputed that by these words the learned magistrate, who was also an Additional District Judge, was assuming jurisdiction to try the case summarily, with the powers of punishment of a District Court, under section 152 (3) of the Criminal Procedure Code. Section 152 (3) reads as follows :—

> " 152 (3) : Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction to try the offence is of the opinion that such offence may properly be tried summarily, he may try the same summarily following the procedure laid down in Chapter XVIII and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose ".

After the recording of the above words by the magistrate, the accused were charged from summary form No. 1B. This completed the hearing on January 5. By the time of the adjourned hearing, on February 2, 1949, Magistrate Gunawardene had been transferred, and Magistrate Wijesekera his successor, who was also an Additional District Judge, proceeded to record the evidence and eventually to convict the accused.

The point referred for our decision is whether the proceedings before Magistrate Wijesekera were vitiated by the fact that he himself did not record his independent decision that he was electing to try the case summarily in accordance with section 152 (3) ; in short, that he did not personally assume jurisdiction under that section. It is contended that the assumption of jurisdiction by Magistrate Gunawardene was insufficient to clothe Magistrate Wijesekera with such jurisdiction.

This question of whether the assumption of enlarged jurisdiction under section 152 (3) by one magistrate vests with such jurisdiction a successor magistrate who takes over the case, where the latter does not

record that he is himself assuming or reassuming jurisdiction under that section, has been the subject of two recent conflicting decisions of this court—*Gunawardene v. Veloo*[1] in which Wijeyewardene A.C.J. held that it did so vest him, and *Hendrick Hamy v. Inspector of Police, Kandana*[2] where Basnayake J. held that it did not.

There appear to be no earlier decisions directly in point. In *Queen v. Silva*[3] the point decided was that the summary proceedings were not regularly initiated because neither the original magistrate nor his successor recorded that he was of opinion that the offence charged might properly be tried summarily by him under section 152 (3), and there was thus no proper assumption of enhanced jurisdiction by anybody in the manner required by the section. It was held that the recorded statement by the successor magistrate that "the charge was one triable by a District Judge, and that he held the dual office of Judge and Magistrate" did not constitute the necessary recorded opinion that the charge might properly be tried summarily, and accordingly did not constitute a proper assumption of jurisdiction under the section. The case thus differs from the present one, where there was an assumption of jurisdiction by the former magistrate and where the only question is whether the succeeding magistrate had independently to record his assumption and the reasons for his assumption of it. I would state at this point that, although in the present case Magistrate Gunawardene did not expressly refer to the section under which he was assuming jurisdiction, section 152 (3) is the only provision to which his words "I assume jurisdiction as A.D.J." could refer, and he must be deemed to have been assuming jurisdiction under it. Secondly, while he did not in so many words record that he was of opinion that the charge might properly be tried summarily under section 152 (3), his statement that he was assuming jurisdiction "as facts are simple" amounted in effect both to an expression of such an opinion and to the furnishing of his reasons for forming that opinion. And his perusal of the police B reports of the case afforded him sufficient material upon which to form that opinion; for section 152 (3) does not require that his opinion must be formed on evidence recorded by him. There was accordingly a proper assumption of jurisdiction in the present case by the former magistrate, Mr. Gunawardene.

It is this fact which also distinguishes another earlier decision from the present case, namely, *Silva v. Kelanitissa*[4] where there was only one magistrate concerned, and where it was held that it could not be presumed that the magistrate had acted under section 152 (3), since he had omitted to record two essential things: first, that he was of opinion that the case might properly be tried summarily, and secondly his reasons for forming that opinion. I agree that these things are a condition precedent to the assumption of jurisdiction under section 152 (3), though as I have said, I think that a statement such as that "as facts are simple I assume jurisdiction as A.D.J." amounts at one and the same time both to the expression of the opinion and to the furnishing of the reasons for it.

[1] *(1948) 50 N. L. R. 107.*
[2] *(1948) 50 N. L. R. 116.*
[3] *(1901) 5 N. L. R. 17.*
[4] *(1935) 37 N. L. R. 68.*

We turn, then, to the point referred, which was considered in the recent conflicting decisions in *Gunawardene v. Veloo* and *Hendrick Hamy v. Inspector of Police, Kandana* (*supra*). It is to be noted that in both of those cases the bearing of section 292 of the Criminal Procedure Code upon section 152 (3) was considered. Section 292, however, has no direct bearing on the present case, since it applies only where the first magistrate ceases to exercise jurisdiction " after having heard and recorded the whole or any part of the evidence ". It would not therefore be applicable here, where Magistrate Gunawardene heard no evidence. The section in the light of which section 152 (3) should be interpreted in the present case is, in my view, section 88 of the Courts Ordinance. That section provides as follows :—

" 88. In case of the death, sickness, resignation, removal from office, absence from the Island, or other disability of any Judge before whom any cause, suit, action, prosecution, or matter, whether on an inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such cause, suit, action, prosecution, or matter may be continued before the successor of such judge, who shall have power to act on the evidence already recorded by such first-named Judge or partly recorded by such first-named Judge and partly recorded by himself or, if he thinks fit, to re-summon the witnesses and commence afresh :

Provided that in any such case, except on an inquiry preliminary to committal for trial, either party may demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh ".

It will be seen that section 88 of the Courts Ordinance, although it largely duplicates section 292 of the Criminal Procedure Code, is wider in its scope, quite apart from the fact that it covers civil matters as well as criminal. For although it contemplates " the evidence already recorded . . . . or partly recorded by such first named Judge " it is not restricted in its terms to cases where the first judge (or magistrate) has recorded some evidence, as section 292 is ; on the contrary the words " has been instituted or is pending " in section 88 indicate that it is designed to cover the case of a prosecution which has merely been instituted before the " first named Judge ". The section provides that such prosecution may be " continued before the successor of such judge ". It seems to me that this provision necessarily implies that the new judge shall step into the shoes of the original judge and may carry on from the point where he left off. Any act lawfully done in the case by the original judge may therefore be adopted by the new judge as if it had been done by himself, without the necessity of his having to do such act himself afresh. And this, as I see it, would apply to the act of assuming jurisdiction under section 152 (3). There is in my view no question of his having independently to assume or re-assume jurisdiction. He is at liberty to vest himself in the cloak of jurisdiction which has already been assumed by his predecessor.

In reaching the contrary view in *Hendrick Hamy v. Inspector of Police, Kandana*, Basnayake J. relied strongly on the wording of section 152 (3)

wherein it is provided that where the magistrate is of opinion that the offence may properly be tried summarily, *he* may try the same summarily. But with the greatest respect I do not think this use of the word " he " is to be interpreted so narrowly as to rule out the possibility of the magistrate who records his opinion that the case should be tried summarily being replaced by another magistrate who tacitly adopts that opinion and proceeds to try the offence. Section 152 (3) is worded so as to apply to the normal case, where one magistrate conducts the proceedings throughout, and its literal meaning must be modified in the light of section 88 of the Courts Ordinance—and I would add of section 292 of the Criminal Procedure Code likewise—which provide for the abnormal case where one magistrate is replaced by another after the commencement of the proceedings.

It is further pointed out by the learned Judge in *Hendrick Hamy v. Inspector of Police, Kandana*, that the succeeding magistrate ought to give his own mind to the propriety of trying the case under section 152 (3) and form his own opinion as to whether the case is one that may properly be tried by him summarily as District Judge. With this I entirely agree. But the question is whether he is to be required to record these things, which would be necessary if an independent act of assumption of enhanced jurisdiction were required from him, or whether it will be presumed, in the absence of such a recording, that he is of the same opinion as his predecessor and for the same reason. Certainly his predecessor's opinion is not binding on him, (the wording of section 88 of the Courts Ordinance is permissive only), and it would always be open to him to decline to adopt it, and to refrain from trying the case under the enhanced jurisdiction which his predecessor had assumed under section 152 (3). But if he does proceed to try the case summarily in accordance with the procedure prescribed in section 152 (3), then the presumption of regularity will operate, and it will be presumed that before trying it he looked at the record, including the recorded opinion and reasons of his predecessor, and that he adopted his predecessor's opinion and his assumption of jurisdiction under that section. And in such a case, if his predecessor's assumption of jurisdiction under the section was itself regular, it will enure for his successor, who may then properly try the case in accordance with the procedure laid down in the section, clothed with that jurisdiction.

One further point was argued before us, though not strenuously, namely, that there was no proof, nor any indication on the record, that Magistrate Gunawardene was at the time an additional District Judge. I consider, however, that it was not necessary to prove this fact, for Magistrate Gunawardene was in fact gazetted as Additional District Judge for the relevant period, and it was therefore a matter of which his successor was, and this Court is, entitled to take judicial notice.

For these reasons I hold that in the case referred to us, the offence was properly tried by Magistrate Wijesekera under section 152 (3) of the Criminal Procedure Code. The appeal will now be listed before a single judge of this Court for determination on its merits.

GRATIAEN J.—I agree entirely.

Appeal to be listed for determination on merits.