There now remains for consideration the question as to whether these collusive proceedings, teeming as they do with irregularities and lack of application of the elementary principles underlying the administration of justice in a Court of law in regard to the orders made on and prior to 13th March, 1946, should be permitted to stand even as regards the Quadiriya Takkia. To do so would be to set the seal of approval of this Court on what must be deemed to be arbitrary orders made by a Court under semblance of judicial proceedings. These proceedings cannot be permitted to disfigure the records of a Court of law.

I would, therefore, in the exercise of the revisionary powers of this Court, quash all the proceedings. This, however, would not debar any persons interested from making a fresh and proper application to Court. The appeal must therefore be and is dismissed with costs.

CANEKERATNE J.—I agree.

Appeal dismissed.

1949 *Present :* **Gratiaen J.**

SIRIMAL, Appellant, *and* DE SILVA, Respondent

S. C. 34—M. C. Balapitiya 61,651

Urban Councils Ordinance—Sale of soap to Council—Shop owned by Chairman—Order signed by Secretary on behalf of Chairman—Payment made later—Commission of offence—Master's liability for act of servant—Continuing offence—Prescription—Ordinance 61 of 1939—Sections 238 and 230.

Accused was Chairman of the Urban Council, Ambalangoda. On May 6, 1948, the Secretary of the Council sent a written order to a shop owned by the accused for four dozen packets of *Lux* soap. The soap was supplied on the same day by the accused's salesman to whom the accused had delegated the management of the shop. The salesman knew that the soap had been ordered for the Council. The bill was paid on June 8, on the express authority of the accused in his capacity as Chairman. Proceedings were instituted on September 7, charging the accused with the commission of an offence under Section 238 of Ordinance No. 61 of 1939. The Magistrate held that the offence had been committed but that the prosecution was out of time in view of the provisions of Section 230 of the Ordinance.

Held, that the accused had committed an offence punishable under Section 238 of the Ordinance although he had no personal knowledge of the transaction at the time when the soap was actually ordered and delivered.

Per Gratiaen J. " In transactions of this nature the knowledge of a servant acting within the scope of his employment must be regarded as the knowledge of his master unless the master can at least satisfy the Court that he took all possible steps to prevent the commission of the offence. If it were otherwise the statutory prohibition would be set at naught by any employer who leaves the conduct of his business in other hands. "

Held, further, that the offence was a continuing one until the payment of the price on June 8, and that the prosecution was within time.

APPEAL from a judgment of the Magistrate, Balapitiya.

D. S. Jayawickrama for complainant appellant.

H. V. Perera, K.C., with *U. A. Jayasundera, K.C.*, and *C. G. Weeramantry*, for the respondent.

Cur. adv. vult.

April 6, 1949. GRATIAEN J.—

This is an appeal against an acquittal, and has been filed with the sanction of the Attorney-General.

The accused was throughout the period relevant to the present proceedings the Chairman of the Urban Council of Ambalangoda. He also owned a shop in the town known as the Central Stores. Early in May, 1948, supplies of soap in the Council's resthouse ran short, and the Council's officers bestirred themselves with refreshing promptitude to make good the deficiency. On May 6 the Secretary of the Council at the storekeeper's request forwarded a written order P1 to the accused's shop for the supply of 4 dozen packets of Lux soap to the Council. The requisition was signed by the Secretary for and on behalf of "the Chairman". The order was executed on the same day by the accused's salesman, but the storekeeper who actually attended to the transaction admitted in evidence that the accused was not personally aware at the time that the soap had been purchased from the Central Stores. It was a credit sale, and in due course an account P6 was rendered by the shop to the Council for payment. The bill was paid on June 8 on the express authority of the accused in his capacity as Chairman of the Council. He has stated in his evidence that he did not appreciate that he was in fact authorizing payment to himself, but this statement has been rejected by the learned Magistrate. The learned Magistrate's finding to the effect that the accused read and clearly understood that the bill P6 was a demand for payment from his own shop has not been challenged in appeal.

The evidence in the case shows that the atmosphere in the Ambalangoda Urban Council was very far from cordial at the time of this transaction. Fortunately it is not necessary for me to examine and far less to adjudicate upon the merits, if any, of the petty squabbles which seem largely to have influenced the actions of the rival parties and their respective supporters. Suffice it to say that on September 7, 1948—the date is important—the complainant, claiming somewhat speciously to be actuated by a mission to "purify" local politics, instituted the present proceedings in the Magistrate's Court of Balapitiya, charging the accused with the commission of an offence punishable under section 238 (2) of the Urban Councils Ordinance, No. 61 of 1939. The substance of the charge is that, whilst being a member of the Council, he was on or about June 8, 1949, directly or indirectly concerned in a contract made with the said Council—the alleged contract being the contract of sale by which the accused's shop had sold 48 packets of Lux soap to the Council on May 6, 1948.

After trial the learned Magistrate came to the conclusion "that the commission of the offence complained of had been established beyond all reasonable doubt, but that the accused was not liable to any fine or penalty by reason of the provisions of section 230 of the Urban Councils Ordinance of 1939". The accused was accordingly acquitted.

In appeal it was argued on behalf of the accused that the learned Magistrate had wrongly decided that the evidence disclosed the commission of an offence. Counsel for the complainant, on the other hand,

supports this part of the judgment, but challenges the finding that the accused was protected by the provision of section 230 from the consequences of his offence. The facts of the case as decided by the learned Magistrate are not in dispute, and, as far as they are relevant to this appeal, are substantially as I have set out earlier in my judgment.

The main questions for consideration are whether the transaction by which the accused's salesman sold a quantity of soap to the Urban Council of which the accused was admittedly a member at the relevant date constituted a "contract" of the kind which is prohibited by section 238 (1) of the Ordinance, and if so, whether the accused was "concerned or had any financial interest in" such contract within the meaning of the section. It is only if these questions are answered in the affirmative that the operation of section 230 would require to be considered.

Section 238 (1) of the Ordinance prohibits any member, officer or servant of the Council from directly or indirectly being concerned or having any financial interest in any contracts or work made, done or executed for the Council. Section 238 (2) declares that a person so concerned or interested shall (subject to a proviso which is inapplicable here) be guilty of an offence, and shall also be subject to a disqualification to which I shall later refer. Legislation of this kind is not unfamiliar in the case of local bodies, and, notwithstanding differences in language which sometimes creates additional problems, the intention, as Lord Esher said in *Nutton v. Wilson*[1] "is clearly to prevent members of local bodies, which may have occasion to enter into contracts, from being exposed to temptation or even *to the semblance of temptation*". Lindley L.J. said in the same case that "the object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise". In *Holden v. Southwark Borough Council*[2] Astbury J. considered the scope and object of analogous legislation and decided that the enactment had to be construed as referring to bargains or contracts entered into for profit between the person in question and the corporation, when the interest and duty of the member might come into conflict. He took the view, which I readily and respectfully adopt, that "*some limitation must be put upon the general words of the Section*". The difficult problem which arises, however, is the legitimate extent to which limitations can be placed upon the words without doing violence to their plain meaning and to the accepted canons of construction. Moreover, the right to limit must itself be limited if the mischief aimed at is to be avoided. Clearly, an actual and conscious conflict between interest and duty need not be established in each particular case, for proof of such a conflict would seldom be forthcoming. Rather is it sufficient to prove a possible conflict or, in the words of Lindley L.J., "the semblance of temptation". Indeed, it seems to me that the mischief which the legislature seeks to avoid is the risk of temptation not only in the way of the member concerned in the contract but also in the way of other officers of the local authority who may, in theory, be less disposed to scrutinise transactions in which an influential member

[1] (1889) 58 *L. J. Q. B. 445.*

[2] (1921) 1 *Ch. 557.*

of the local authority is known to have some financial interest. Again, it would not be legitimate to construe the section so as to limit its operation to contracts which are proved to have been *corruptly* entered into. In *Nutton v. Wilson* (*supra*) a member was expressly absolved from the stigma of corrupt intention but was nevertheless held to be disqualified. I am also satisfied that, as learned Counsel themselves concede, the price of the goods which form the subject-matter of a contract of sale cannot by itself turn the scales one way or the other. "That", said Cave J. in *Nell v. Longbottom*[1], "is a matter into which we cannot enter, as the Legislature has not entrusted us with any dispensing power". It is noteworthy that in that particular decision one of the grounds for holding a member to be disqualified was that he had sold half a gallon of oil to the local authority for only four-pence. Indeed, it would be very difficult, without a clear direction from the language of the enactment itself, to draw the line with any confidence between contracts which are clearly mischievous at one end and others which, when regarded as isolated transactions, seem to be of trivial consequence. Nor am I satisfied that the circumstance that a particular contract represents a single transaction can necessarily make a difference. It seems to me that certain *obiter dicta* of Low J. in *Tranton v. Aston*[2] go too far. If the only contracts which are prohibited are those of a continuing character, the decision in *Royse v. Birley*[3] which he purported to follow and to which I shall shortly refer might well have been disposed of on that simple ground. If that were the law, a member could with impunity derive a very considerable profit from an isolated transaction whereas another would be disqualified for entering with less profit into a series of transactions. I cannot conceive that the Legislature did not necessarily intend to bring both such members within the ambit of the prohibition.

For the purpose of deciding whether the sale of soap on May 6, 1948, renders the accused liable under section 238 (2) I am content to accept the submission of Mr. H. V. Perera that this transaction represented nothing more than a sale by the accused's salesman over the counter in the ordinary way of business. The question is whether such transactions must always, upon a reasonable interpretation, be excluded from the operation of the Section. In *Royse v. Birley* (*supra*) the Court of Common Pleas considered the case of a Member of Parliament whose election was challenged on the ground that he "held or enjoyed" an interest in two contracts with the Government. The second of these contracts was very similar in nature to the transaction with which we are now concerned. Shortly after Mr. Birley's election an officer of a Government establishment purchased certain goods for the establishment from a shop in which Mr. Birley had a proprietory interest. The officer making the purchase however did not inform the salesman that he was contracting for the Government "nor did he supply the means of ascertaining that he was so or not". The salesman therefore who supplied the goods was not aware that he was dealing with the Government. In these circumstances Willes J. held that the contract did not disqualify Mr. Birley

[1] *(1894) 1 Q. B. 764.*

[2] *(1869) 4 C. P. 311.*

[3] *(1898) 3 Q. B. 306.*

" because there was a total absence of knowledge that the contract was with the Government". Having regard to the highly penal provision of the statute, he took the view that "knowledge *or at least means of knowledge* should be a condition of the penal consequences which are to follow". Montague Smith J. agreed that "there must be a contract which is known *or which at least ought reasonably be known* by the person sought to be disqualified to be a contract with the Government". I would with great respect adopt in the present case the test which commended itself to the learned Judges in *Royse v. Birley*. The principle appears to have been regarded in England as settled ever since. In *Nutton v. Wilson* it was conceded by Counsel during the argument at page 445 that the cases "where trivial articles are purchased at the shop of a local member *without his knowledge*" fell outside the scope of the statute under consideration.

The test then to be applied is whether in the present case the appellant had the knowledge *or at least the means of knowledge* that the Council was the other contracting party to the contract for the sale of 48 packets of soap on May 6, 1948. If the answer to this question be in the affirmative, I think that however innocent the transaction may have been, it was within the mischief which section 238 seeks to avoid.

In the present case the accused had no personal knowledge of the transaction when the soap was actually ordered and delivered. But unfortunately that circumstance is not in itself sufficient to entitle him to an acquittal. He had so arranged the affairs of his shop that, as is usual in such cases, he delegated its management largely to someone else. That person not only possessed the means of knowledge but knew in fact that the soap was being ordered for the Urban Council of which the accused, his master, was Chairman. The requisition P1 and the subsequent bill P6 establish this beyond doubt. In transactions of this nature the knowledge of a servant acting within the scope of his employment must I think be regarded as the knowledge of his master unless the master can at least satisfy the Court that he took all possible steps to prevent the commission of the offence. If it were otherwise, the statutory prohibition could be set at naught by any employer who leaves the conduct of his business in another's hands. *Coppen v. Moore*[1]. In the present case the fact that the accused later adopted the transaction and knowingly authorised the payment of the price makes the strict application of the legal principles involved less disagreeable than it would otherwise have been.

For the reasons which I have given I hold, though with little enthusiasm, that the evidence in the case disclosed the commission of an offence prohibited by section 238 of the Ordinance. I cannot accept the submission that, on the analogy of the judgments of the Court in *Royse v. Birley* regarding the earlier of the two contracts proved in that case, section 238 does not apply to contracts of sale where the member concerned has already fulfilled his obligations under the contract, so that all that remains is for him to receive payment of the price from the local authority. In *Royse v. Birley* the defendant had entered into a contract

[1] *(1889) 58 L. J. Q. B. 445.*

with the Government and had performed his obligations under it *before* the date of his election to Parliament, and it would clearly have been inequitable to hold him disqualified by reason only of the Government's delay in paying him what was his due. In that case the contract was at its inception unobjectionable, and no disqualification could attach to a contractor who secured election to Parliament thereafter unless at that later date the contract still remained unperformed by him in any respect. But in the present case the contract of sale was entered into at a time when the accused was already a member of the Council. If the view that the section aimed only at executory contracts was intended by Willes J. to be of general application, he would not have found it necessary to insist upon "knowledge" as a condition of Mr. Birley's guilt in the case of the later contract executed and instantaneously performed by his agents *after* the date of his election to Parliament.

It remains only to consider whether the learned Magistrate was justified in holding that the accused is protected by the provisions of section 230 of the Ordinance. Section 230 declares that "no person shall be liable to any fine or penalty under this Ordinance . . . . for any offence triable by a Magistrate unless the complaint respecting such offence shall have been made three months next after the commission of such offence". The learned Magistrate took the view that the contract was concluded on May 6, 1948, when delivery of the soap was effected, and that the institution of proceedings on September 7, 1948, was therefore out of time. I think that this was taking too narrow a view of the transaction. Payment of the price was not made by the Council until June 8 (which date falls within the prescribed period) and the contract was clearly subsisting until that date in so far as the Council's obligations were concerned. The contract had not till then been finally discharged in any of the ways recognised by law, and the accused had a financial interest therein which was very real. I hold that section 230 does not apply because there was a continuing offence punishable under section 238 (2) until the contract was finally discharged by payment on June 8, 1948. It was not the making of the contract but "being concerned or having a financial interest" in it which constituted the offence complained of.

The verdict of acquittal recorded by the learned Magistrate must be quashed. It is with much regret that I have come to this conclusion. The transaction proved against the accused is of a trivial nature, but that is a circumstance which I am powerless to consider except on the question of sentence. It is very likely—although this affords no defence—that he was unaware that transactions of this nature were in fact prohibited by law. I would use as my own in this connection the concluding words of Lord Esher in *Nutton v. Wilson* (*supra*). "I do not find that the accused acted with any corrupt motive. But he has made a blunder, and brought himself within the provisions of this act". I think that it would meet the ends of justice if, in setting aside the order appealed from, I record my finding that the accused is guilty and, without proceeding to conviction, make order under section 325 of the Criminal Procedure Code discharging him with an admonition. I make order accordingly.

As I do not proceed to conviction, it is not necessary to consider whether I have the power to order, by way of " punishment ", that the accused be declared disqualified from sitting in Council. Whether or not any *statutory* consequences follow from the transaction which I have held, for the purposes of the present appeal, to constitute an offence, it is not for me to say. Learned Counsel had invited me to hold in this connection that *Galapathy v. Martin*[1] was wrongly decided. It is not necessary for me to consider this question in view of the order which I have made.

The appeal is now disposed of, and the appellant is entitled to his victory for what it is worth. It is only to be hoped that what has transpired will not in any way discourage the praiseworthy aspirations of any resthouse-keeper to provide soap for the customer.

Acquittal set aside.
Accused discharged with warning.

[1] *(1948) 50 N. L. R. 17*