**1975** *Present :* **Tennekoon, C. J., Pathirana, J., and Ratwatte, J.**

THE ATTORNEY-GENERAL, Appellant, *and* W. A. WIMALADHARMA, Respondent

*S. C. 281/71 (F)—D. C. Colombo 72018/M*

*Customs Ordinance—Goods seized as forfeit under Sections* 12 *and* 43 *of the Customs Ordinance read with the Import and Export (Control) Act and regulations thereunder—Burden of proof of lawful importation under Section* 152 *of the Customs Ordinance—Imposition of forfeiture under Section* 129 *of the Customs Ordinance—Application of Section* 152 *to cases arising under Section* 129*—Section* 107 *discussed.*

The Plaintiff instituted an action against the Attorney-General inter alia for a declaration that the forfeiture under the Customs Ordinance of wrist watches and other articles was unlawful and that the imposition of a forfeiture of treble the value of the said articles was illegal. The Attorney-General in his answer pleaded that the aforesaid articles were imported into Ceylon contrary to the restrictions contained in Sections 12 and 43 of the Customs Ordinance read with provisions of the Import and Export Control Act and the regulations made thereunder. The articles were accordingly seized as forfeit to the State. The Attorney-General further pleaded that the imposition of the forfeiture of treble the value of the articles seized was under Section 129 of the Customs Ordinance inasmuch as the plaintiff was knowingly concerned in dealing with goods liable to duties of customs with intent to defraud the revenue of such duties.

It was common ground that it was only from 11.01.63 that a licence was required to import the said articles and that prior to the said date there were no import restrictions. It was contended that the onus of proving lawful importation on the part of the plaintiff did not arise until the State proved not only that the articles were imported but also that the importation was after 11.01.63, the date on which the import restrictions came into operation.

*Held : (Tennekoon, C.J. dissenting)* (1) that once the State proves the fact of importation, Section 152 of the Customs Ordinance puts the burden of proving lawful importation on the claimant and relieves the Attorney-General of such burden. Lawful importation may not only be proved by the production of a licence or permit by the claimant, but also by proving that the goods were imported prior to the date on which the restrictions came into operation. (Attorney-General *vs.* Gnanapiragasam 68 N. L. R. 49 followed).

(2) that in order to justify the imposition of the forfeiture under Section 129 of the Customs Ordinance the State must prove (*a*) that the plaintiff was in any way knowingly concerned in any manner dealing with any goods liable to duties of customs and (*b*) that he did so with intent to defraud the revenue of such duties or any part thereof.

*Per Tennekoon, C.J.*

" In Gnanapiragasam's Case, as in this case, the cause of forfeiture was given as importation of goods without a permit, and with respect I would like to say, that H. N. G. Fernando, S.P.J. posed the wrong question. The question that arose was not the broad question as to whether the gold bars were lawfully imported, but only the question as to whether the importation of the gold bars was covered by a licence or permit, because the allegation of the Customs authorities was that they were imported without a permit. That question presupposes that at the date of importation a permit was necessary and it was clearly the burden of the Crown to prove that the importation was after 1953, the year in which the importation of gold came under a permit.".

APPEAL from a judgment of the District Court, Colombo.

*K. M. M. B. Kulatunga*, Senior State Counsel, with *A. S. M. Perera*, State Counsel, for the defendant-appellant.

*H. L. de Silva* with *John Kitto* for the plaintiff-respondent.

*Cur. adv. vult.*

December 19, 1975 TENNEKOON, C.J.—

The plaintiff-respondent filed this action against the Attorney-General on the 4th of January, 1970—

(i) claiming 82 wrist watches, 120 wrist watch straps and 137 Pilot pens "purported to have been seized by the Assistant Collector of Customs" (1st cause of action),

(ii) claiming 212 wrist watches, 58 wrist watch straps and 10 Pilot pens also purported to have been seized as aforesaid (2nd cause of action),

(iii) for a declaration that the imposition of a forfeiture of a penalty of a sum of Rs. 31,845.00 was null and void (3rd cause of action).

The plaintiff alleged in his plaint that the seizures referred to and the forfeiture of a sum of Rs. 31,845.00 were "illegal, wrongful and unlawful".

The Attorney-General in his answer stated that the goods referred to in the 1st cause of action were seized as forfeit under Section 125 of the Customs Ordinance as they were goods imported or brought into Ceylon contrary to the restrictions contained in Sections 12 and 43 of the Customs Ordinance; the position of the State was that the importation of goods of the description set out in the plaint was prohibited as from 11.1.63 except on a licence from the relevant authority. The Attorney-General further answered that the goods referred to in the 2nd cause of action were seized as forfeit under the aforesaid Section 125 of the Customs Ordinance as they were made use of in the concealment of the goods referred to in the 1st cause of action.

Answering to the 3rd cause of action the Attorney-General pleaded that the sum of Rs. 31,845.00 was treble the value of the goods referred to in the 1st cause of action forfeited under Section 129 of the Customs Ordinance as the plaintiff was knowingly concerned in dealing with those goods which were liable to duties with intent to defraud the revenue. The Attorney-General prayed in reconvention for judgment in the sum of Rs. 31,845.00.

The case went to trial on 18 issues adopted by the Court. The issues and the learned District Judge's answers to them were:

"1. Are the goods mentioned in paragraph 3 of the plaint, namely, 82 wrist watches, 120 wrist watch straps and 137 pilot pens, which have been seized on behalf of the Crown, the property of the plaintiff?—Yes.

2. Are the goods mentioned in paragraph 6 of the plaint, namely, 212 wrist watches, 58 wrist watch straps and 10 Pilot pens, which have been seized on behalf of the Crown, the property of the plaintiff?—Yes.

3. If issue 1 and/or issue 2 be answered in the affirmative, is the plaintiff entitled to the return of the goods, or to recover their value?—Yes.

4. Have the goods referred to in paragraph 3 and/or paragraph 6 of the plaint, been seized without reasonable or probable cause?—Yes.

5. Is the seizure of the goods referred to in paragraph 3 of the plaint lawful?—No.

6. Is the seizure of the goods referred to in paragraph 6 of the plaint lawful?—No

7. If issue 5 is answered in the affirmative must the plaintiff fail on his first cause of action?—Does not arise.

8. If issue 6 is answered in the affirmative must the plaintiff fail on his second cause of action?—Does not arise.

9. Are the goods described in paragraph 3 of the plaint liable to duties of Customs?—No.

10. Was the plaintiff knowingly concerned in dealing with the said goods with intent to defraud revenue of such duties, or any part thereof?—No.

11. Did the Assistant Controller of Customs elect, under the provisions of Section 129 of the Customs Ordinance, that the plaintiff shall forfeit a sum of Rs. 31,845 being treble the value of the said goods?—Yes.

12. If issues 9, 10 and 11 are answered in the affirmative is the defendant entitled to judgment in reconvention against the plaintiff in a sum of Rs. 31,845?—No.

13. Have the goods referred to in paragraph 3 of the plaint been imported, or brought into Ceylon?

14. If so, on what date, or dates, were they imported into Ceylon?

15. Were there in force restrictions against their import into Ceylon on the said date or dates ?

16. Were there valid restrictions on such date or dates ?

17. If so, have the goods referred to in paragraph 3 been imported, or brought into Ceylon, contrary to such restrictions ?

18. Were the goods referred to in paragraph 6 of the plaint made use of in the concealment of the goods referred to in paragraph 3 of the plaint ? "

Issues 13 to 18 were not answered.

The learned District Judge gave judgment for the plaintiff-respondent and dismissed the Attorney-General's claim in re-convention holding *inter-alia*—

(i) that the plaintiff is the owner of the goods or the articles in question ;

(ii) that the burden was on the State to prove that the goods were imported into this country after 11.1.63 the date of the Gazette Notification imposing restriction on importation ;

(iii) that as the State failed to establish that the goods were imported after 11.1.63, they were not liable to seizure;

(iv) That the seizure of the articles by the Customs Authorities was illegal, wrongful and unlawful ;

(v) that the burden of proving lawful importation which is placed on the claimant by section 152 of the Customs Ordinance did not arise till the State proved that the articles were imported after 11.1.63 ;

(vi) that the evidence did not establish that the goods referred to in the 2nd cause of action were used to conceal the articles referred to in the 1st cause of action.

In appeal Counsel for the appellant and the respondent devoted a considerable amount of time to the proper meaning to be given to section 152 of the Customs Ordinance. This section reads as follows :—

" 152. If any goods shall be seized for non-payment of duties or any other cause of forfeiture, and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported, the proof thereof shall lie on the owner or claimer of such goods and not on the Attorney-General or the officer who shall seize or stop the same. "

There are many provisions in the Customs Ordinance which declare goods to be forfeited in certain circumstances. Section 43 is one of the most important of these provisions. That Section reads as follows :—

> " 43. If any goods enumeratd in the table of prohibitions and restrictions in Schedule B shall be imported or brought into Ceylon contrary to the prohibitions and restrictions contained in such table in respect thereof, such goods shall be forfeited, and shall be destroyed or disposed of as the Principal Collector of Customs may direct. "

Section 125 then goes on to provide—

> " 125. All goods and all ships and boats which by this Ordinance are declared to be forfeited shall and may be seized by any officer of the customs; and such forfeiture of any ship or boat shall include the guns, tackle, apparel, and furniture of the same, and such forfeiture of any goods shall include all other goods which shall be packed with them, as well as the packages in which they are contained; and all carriages or other means of conveyance, together with all horses and all other animals, and all other things made use of in any way in the concealment or removal of any goods liable to forfeiture under this Ordinance, shall be forfeited. "

Sections 154 and 155 of the Customs Ordinance provide for certain formalities which claimants of goods seized have to comply with before or at the time of insitution of action.

Section 152 starts off with the words : " If any goods shall be seized for *non-payment of duties or any other cause of forfeiture,* and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported. " The way in which this section is drafted indicates that the existence of a seizure for a cause of forfeiture is a condition precedent to the application of the rest of the section.

Does the expression " if any goods have been seized " imply lawful seizure ? Obviously, it does mean that ; but is a seizure lawful only if the State can prove that the goods are forfeit under some provision of law ? Under Section 152 it cannot be that the Attorney-General must first prove that the goods are lawfully forfeit before the claimant is called upon to prove the contrary; that would make nonsense of the section.

We are still left with the question, when is seizure lawful ? It is contended for the State that it is sufficient merely to prove the fact of seizure by an Officer of Customs, and that once that is proved or admitted, the burden would be on the claimant to establish lawful importation. In support of this contention it has been submitted to us, borrowing words of Lord Goddard, C. J. in *R. V. Cohen.* (1951) 1 A. E. R., p. 203, that—

> " the powers of Customs Officers are always used with this discretion, "

and that there is no danger of abuse of this power by Customs Officers, but Lord Goddard himself added that though that may be so " it is in law possible for them (Customs Officers) to require anyone, be he trader or not, who has dutiable goods in his possession, to show that duty has been paid. "

This same power of investigation and inquiry is enjoyed by the Customs Authorities in Sri Lanka ; if there is even some anonymous information received by Customs reporting the presence of uncustomed goods in some premises it would be within the power of the Customs Officers to make inquiries, to search, and if need be take possession of any goods for purposes of further investigation without proceeding to ' seizure ' ; in some cases an attempt to smuggle goods would be detected red handed by a Customs Officer himself in which case the need for further investigation does not arise. In other cases, particularly, in those cases where foreign goods are found inland, any information will require some kind of investigation before goods are forfeited. For this purpose Customs Officers are given powers of examination and inquiry, search, etc., under Sections 8 and 9 of the Customs Ordinance. A formal seizure will follow only after such inquiry when the Customs Officer is satisfied that there is at least a well grounded suspicion that the goods have been unlawfully imported. As Gratiaen, J. said in the case of *Palasamy Nadar vs. Lanktree,* 51 N. L. R., p. 520 :

> " the power of seizure conferred by section 123 (now 125) includes by implication the power, for the purpose of examination, to detain for a reasonable period any goods which a Customs Officer suspects to be liable to be seized as forfeited goods. "

It seems to me, therefore, that the words in section 125 which give power to seize goods declared under the Customs Ordinance to be forfeited must be read as meaning that the Customs Officer may seize goods only if he has reasonable ground for suspecting that the goods are uncustomed or goods imported contrary t-

prohibition or restriction and are for that reason forfeit. When section 125 provides that—

> "All goods and all ships and boats which by this Ordinance are declared to be forfeited shall and may be seized by any officer of the customs,"

it does not mean that any goods may be seized by Officers of Customs according to whim and fancy, nor that the Customs Officer has a judicial or quasi judicial power to decide that certain goods are liable to forfeiture; it only means that an Officer of Customs *bona fide* acting as such may seize any goods which he has reason to suspect are forfeited or liable to forfeiture under one or other of the provisions of the Customs Ordinance. To use the words adopted by the Legislature itself —though in another context—the Officer of Customs seizing goods under section 125 must have 'probable cause for such seizure'. I take these words from section 159 of the Customs Ordinance, which reads—

> "In case any information shall be brought to trial on account of any seizure made under the Ordinance, and a judgment shall be given for the claimant thereof, and the court before which the cause shall have been tried shall certify on the record that there was probable cause of seizure, the claimant shall not be entitled to any costs of suit, nor shall the person who made such seizure be liable to any action or prosecution on account of such seizure; and if any action shall be brought to trial against any person on account of such seizure, wherein a judgment shall be given against the defendant, if the court before which such information shall have been tried shall have certified on the said record that there was a probable cause for such seizure, the plaintiff, shall only be entitled to a judgment for the things seized, or the value thereof and not to any damages, nor to any costs of suit."

To get back to section 152 : Section refers to a situation where goods are seized—

> "for non-payment of duties or any other cause of forfeiture. and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported."

The Customs Ordinance contains many provisions dealing with situations in which goods are forfeited. To mention a few of them, Section 27, Goods not reported or entered, forfeited. Section 30, Goods concealed on board the ship to be forfeited. Section 33, Goods unshipped or landed contrary to regulations be forfeited. Section 34, Goods unladen, landed or removed without

sufferance from the Collector for landing the same to be forfeited. Section 38, goods found in a boat without a boat-note or in excess of the quantities specified in the boat-note etc. to be liable to forfeiture. Section 43, Goods imported or brought into Ceylon contrary to prohibitions and restrictions to be forfeited. Section 47, Goods not agreeing with particulars in bill of entry be forfeited together with all other goods which are entered or packed with them. Section 50, Goods taken out of any ship or warehouse not having been duly entered, be forfeited Section 55, Goods removed from one sea port to another in Sri Lanka contrary to rules regulations and restrictions to be forfeited. Section 57, Goods exported without due entry to be forfeited. Section 59, Goods laden, put off, or shipped contrary to provisions of this section or without due entry outwards to be forfeited. Section 75, Goods not duly warehoused or fraudulently concealed or removed to be forfeited. Section 80, Goods delivered withheld, or removed from the proper place of examination before the same shall have been duly examined and certified to be liable to be forfeited. Section 107, Goods landed, taken out or passed out of any ship or out of any warehouse, not having been duly entered to be forfeited. Section 118, Prohibited goods on board the ship howering on the coast liable to forfeiture. Section 121, Goods exported or carried coastwise in contravention of prohibition to be forfeied. Section 125, All carriages or other means of conveyance, together with horses and other animals and all other things made use of in the concealment or removal of any goods liable to forfeiture, to be forfeited.

It will thus be seen that there are many grounds on which Customs Officers may seize goods as forfeited. When section 152 speaks of, " any dispute shall arise whether duties have been paid for the same or whether the same have been lawfully imported or lawfully laden or exported ", it contemplates that it is the duty of the Customs Authorities to disclose the ground of forfeiture or the grounds, if there are more than one ground. Thus it is insufficient for the Customs Authorities merely to say in general terms that the goods are forfeited because they have been unlawfully imported or unlawfully exported. To permit the Customs to do so would be to leave the claimants without any idea as to the ground of forfeiture. A dispute cannot arise unless the Customs Authorities indicate under what provision of the Customs law the goods are forfeit or liable to forfeiture. In the present case the goods were removed from the plaintiff's shop on the 22nd of February, 1969, after a search under section 126 of the Customs Ordinance. Thereafter, after a passage of nearly 9 months, the Principal Collector of Customs wrote to the plaintiff on the 11th of November, 1969, to the effect that the goods

referred to in the 1st cause of action are forfeited under section 43 and 107 (1) of the Customs Ordinance. This letter also stated that the goods referred to in the 2nd cause of action are forfeited in terms of section 125 of the Customs Ordinance, ie. on the ground that these goods were used for the concealment of the goods referred to in the 1st cause of action. Thus the seizure as forfeit must be deemed to have taken place on or about the 11th of November, 1969.

Although this letter in substance alleged that the goods referred to in the 1st cause of action were seized as forfeit on two grounds, namely (*a*) importation or bringing into Sri Lanka contrary to section 43, and (*b*) as goods landed or passed out of any ship or warehouse not having been duly entered (Section 107 (1)), in the answer filed by the Attorney-General the only grounds of forfeiture alleged were that the goods referred to in the 1st cause of action were imported or brought into Ceylon contrary to restrictions (section 43), in that they were imported or brought into Ceylon without a licence or permit from the Controller of Imports and Exports and in regard to the goods referred to in the 2nd cause of action that they were used in the concealment of the other goods. The only dispute then on the 1st cause of action, when the matter was in Court, was whether or not these goods were covered by an import licence or permit. I have already referred to the fact that a licence or permit for import of goods of the kind referred to in the 1st cause of action became necessary only after the 11th of January, 1963. The assertion of the Customs Authorities and of the Attorney-General that these goods were imported without a licence or permit necessarily involves an assertion that the goods were imported or brought into Ceylon at a time when a licence or permit was rendered necessary by law for their importation. Thus, it seems to me some what obvious that the question of lawful importation in the sense of importation under a permit or licence would only arise if the goods are shown to have been imported after 11.1.1963, and accordingly, the burden of proving that these goods were imported under the authority of licence or permit would fall on the claimant only if the State first establishes that these goods were imported after 11.1.1963.

In the case of *Attorney-General v. Gnanapiragasam,* 68 N.L.R., P. 49, H. N. G. Fernando, S.P.J., as he then was, took a different view, in the course of his judgment he said :

> " If then these bars (of gold) must be held on the evidence to have been imported into Ceylon, the burden of showing that the importation was *lawful* was on the plaintiffs (Section 152 of Cap. 235) .....Counsel for the plaintiff has submitted that there was no prohibition or restriction of the

import of gold prior to the enactment of the Exchange Control Act in 1953. This position has not been contested by the Crown in the present case, although it is in fact probable that the importation of gold was prohibited or restricted for a long period under Defence Regulations. But Counsel's argument which is based on that position cannot succeed. He submitted that the Crown must prove that the importaion of these bars took place after the Exchange Control Act came into force, and that the burden of showing *lawful* importation need only be discharged upon such proof being furnished. Section 152 of Cap. 235 cannot in my opinion be so construed. It is clear that once there is proof of the importation of goods into Ceylon, the claimant must establish *all such facts as are necessary to prove lawful importation. One such fact to be established would be the actual time of importation, if it is sought to rely on the position that the act of importation at such time would not have been unlawful."*

It will be noted that this judgment proceeds on the basis that where goods of foreign origin are seized in Ceylon, the burden of proving *all facts necessary to establish that the importation was lawful* was on the claimant, and approaching the problem in that way H. N. G. Fernando, S.P.J. thought that the burden of proving lawful importation could be discharged by showing either, (1) that the goods were imported at a time when a permit was required and a permit had in fact been obtained, or (2) that the goods were imported at a time when a permit was not required, and that therefore the importation was lawful.

I have earlier pointed out that when there is a seizure of goods as forfeit, the Customs must be in a position to inform the owner or the person whose goods are seized of the ground or grounds of forfeiture. It is not enough for the Customs Authorities to make a general allegation that the goods are unlawfully imported, for importation may be unlawful on any one or more of numerous causes. In Gnanapiragasam's case, as in this case, the cause of forfeiture was given as importation of goods without a permit, and with respect, I would like to say that H. N. G. Fernando, S.P.J., posed a wrong question. The question that arose was not the broad question as to whether the gold bars were lawfully imported, but only the question as to whether the importation of the gold bars was covered by a licence or permit, because the allegation of the Customs Authorities was that they were imported without a permit. That question presupposes that at the date of importation a permit was necessary and it was clearly the burden of the Crown to prove that the importation was after 1953 the year in which importation of gold came under permit.

In the same way, having regard to the pleadings and the issues raised in this case, the substantial issue for the Court to decide was, were the import, of goods referred to in the 1st cause of action covered by an import licence or permit ? The burden of proving the existence of a permit or licence would only fall on the plaintiff if there was, first, evidence to show that the goods were imported at a time when a licence or permit was necessary.

It may be contended that to give this interpretation to section 152 would render the section useless in many situations in which the Customs Authorities have to act. Every smuggler is not detected at the time the goods are imported or brought into Ceylon ; many goods are smuggled into the country without detection at the time of importation, and in such cases the Customs Authorities will have no knowledge of the date or place of importation or landing of the goods. The present case and Gnanapiragasam's case are illustrations of these situations. These goods may have been brought into the Island secreted on the person of a passenger or concealed in his baggage or concealed in a false-bottom or other similar device, or the goods may have been landed from a ship or boat at an unlawful landing place, somewhere on the coast of Sri Lanka. They may have been imported or brought into the country many years ago or may have been brought in quite recently. In such a situation it is to my mind somewhat illogical for the Customs Authorities to allege that the goods were brought in without a licence or a permit when it is not the case that a licence or a permit was always necessary. The necessity for a licence for importation may exist at one time, may not exist at another and may be reintroduced again. I think that in this kind of situation, where the Customs Authorities have reason to suspect that the goods have not come into the country regularly, the ground for forfeiture should be section 107 (1) of the Customs Ordinance and not on grounds such as non-payment of duties or the absence of a licence or a permit, the need for which varies from time to time. Section 107 (1) reads as follows :—

> " 107 (1) If any goods, packages, or parcels, shall be landed, taken, or passed out of any ship, or out of any warehouse, not having been duly entered, the same shall be forfeited ".

Indeed in the Principal Collector's letter of 11th November, 1968, he alleged as the grounds of forfeiture section 43 and *section* 107 (1) of the Customs Ordinance. Unfortunately at the stage of answer and right through the trial, the ground relied on was only section 43. The advantage of using section 107 (1) in this situation is that when a dispute arises as to whether that section has been complied with or not, the claimant will have to prove *due entry*

and that involves proof that the goods were brought in a ship to a regular port or landing place, that due entry was made in terms of section 47, that duties, if any, have been duly paid, etc. Indeed section 107 contains much of the elements necessary for proof of lawful importation, but since the State chose to proceed on the basis of importation without a licence or permit, it was necessary for the State to establish that the importation was at a date when a licence or permit was required by law.

At the trial it was common ground that the goods referred to in the 1st and 2nd causes of action were seized by the Customs Authorities. The following matters arose for decision by the District Judge namely,

(i) Was the plaintiff the owner of the goods referred to in the 1st and 2nd causes of action, at the date of seizure ?

(ii) Did the Customs Authorities have reasonable grounds to suspect that the goods referred to in the 1st cause of action were goods imported into Sri Lanka at a date when a licence or permit was necessary for the importation of such goods ?

(iii) If so, were the goods referred to in the 1st cause of action imported under the authority of a licence or permit?

On these questions the burden of proving the ownership was on the plaintiff. The burden of proving the existence of reasonable grounds for seizure as forfeit or probable grounds for seizure was on the Attorney-General. The burden of proving the importation was on the Attorney-General. The burden of proving the need for a licence or permit at the date of importation was on the Attorney-General. If that was established then the burden of proving that the importation was covered by a licence or permit was on the plaintiff.

At the trial the plaintiff led only the evidence of the person who managed his shop. His evidence was directed mainly to the question of ownership. In cross-examination he was asked about the search conducted by the Customs Officers at the shop, on the 22nd of February, 1969. After that search the Customs Authorities took away a quantity of 294 wrist watches, 178 wrist watch straps, and 147 Pilot pens. The witness said that all these articles were openly displayed in the show cases. Out of the 294 wrist watches the witness identified 82 wrist watches as having been purchased locally from persons who came to the shop. He admitted that all the watches were of foreign origin. In regard to the wrist watch straps, he admitted that 120 wrist watch straps were locally purchased, and the balance imported. Of the Pilot pens he admitted that about 10 or 12 were imported, and the balance locally purchased. In regard to local purchases he mentioned the

names of persons who had sold them to the firm. He said that the receipts would be found in the files which the Customs Officers had taken possession of. The witness also testified to the fact that watches that had been unlawfully imported were often auctioned by the Customs Authorities. There would be in the country many wrist watches in respect of which there was no evidence of lawful importation or indeed of their having been imported under a licence. He also said that among the watches in his shop there would be some which have remained in the firm sometimes for as long as 15 years, because some of those were not popular with the public. The witness had later been questioned at the Customs premises, and after a period of nearly 9 months the plaintiffs were informed that the goods referred to in the 1st cause of action were forfeited under sections 43 and 107 of the Customs Ordinance, and that the goods referred to in the 2nd cause of action were forfeited as having been used to conceal the other goods.

The only witness for the Attorney-General was a Deputy Collector of Customs who was called mainly to produce a statement made by the plaintiff's witness, the Manager of his shop. This Deputy Collector stated that he knew nothing of the search conducted on the 22nd of February, 1969, that it was not he who authorised it, nor was he one of the persons who went on the search. He also stated that he was not the officer who conducted the inquiry, as a result of which it was decided to forfeit the goods in question. He said the inquiries were conducted by one Mr. de Neise, an Assistant Collector. This witness was thus in no position to state on what ground Mr. de Neise suspected that those goods were liable to forfeiture. No other witness was called by the defendant appellant. The State scrupulously avoided calling anyone who was in a position to state why these goods were suspected to have been imported without a licence or permit. The learned District Judge held that the plaintiff-respondent was the owner of the goods, that the seizure was unlawful, that the goods were seized without reasonable or probable cause, and that there was no burden on the plaintiff-respondent to prove that the goods were imported under a licence or permit, as the defendant appellant had failed to discharge the burden that lay on him of proving the goods were imported at a time when a licence or permit was necessary.

In my opinion, I think, the learned District Judge was right in holding that there was no proof of lawful seizure for the defendant-appellant had failed to place any evidence before the Court tending to show any reasonable ground to suspect that the goods had been unlawfully imported, and the defendant-appellant had also failed to establish that the goods were imported after

11.1.1963. I also accept the learned District Judge's finding that in this situation there was no burden on the plaintiff-respondent to prove that the importation of these goods was covered by a licence or permit. I further accept the learned District Judge's finding that the goods referred to in the 2nd cause of action were not by any manner or means used for the purpose of concealment of the goods referred to in the 1st cause of action.

To turn now to the forfeiture of the sum of Rs. 31,845 under Section 129 of the Customs Ordinance.

> "Every person who shall be in any way knowingly concerned in any manner dealing with goods liable to duties of Customs with intent to defraud the revenue of such duties shall forfeit either treble the value of the goods, or the penalty of Rs. 1,000 at the election of the Collector of Customs".

The burden of proving that no duty had been paid on these goods, i.e. on the goods referred to in the 1st cause of action, was clearly on the Attorney-General. Section 152 has no application to cases arising under section 129. Section 152 is confined to those cases where a claimant for goods seized under the Customs Ordinance sues, as owner, the Attorney-General or the officer who seizes the goods ; the character in which a person becomes liable to forfeiture of a penalty under Section 129 is not as owner or claimer of the goods, but as a person alleged to be knowingly concerned in dealing with uncustomed goods. The fact that both matters came up in one action does not mean that the Attorney-General can utilise section 152 to discharge the burden that falls upon him to prove that duties had not been paid on these goods. The claim for the sum of Rs. 31,845 was made by the Attorney-General as a claim in reconvention, and the question of burden of proof arising on that cause of action must be treated in the same way as if the Attorney-General has instituted a separate action in terms of section 160 of the Customs Ordinance for the recovery of the penalty imposed by section 129. There was also no evidence on the question whether any competent officer of Customs had made any election between a penalty of Rs. 1,000 and a penalty of three times the value of the goods. In the result I hold that the learned District Judge was right in dismissing the Attorney-General's claim in reconvention.

For the reasons set out in this judgment I would dismiss the appeal with costs.

PATHIRANA, J.—

The plaintiff-respondent who is the sole proprietor of the business "Wimaladharma Brothers" carries on the business of dealer inter alia. in wrist-watches, wrist-watch straps and fountain pens

at 120, Front Street, Colombo. On 22.2.1969 Customs officers visited the shop of the plaintiff, acting on authority contained in document P1 under Section 128 of the Customs Ordinance, and took into custody 294 wrist-watches, 178 wrist-watch straps and 147 Pilot pens as goods liable to be seized under the provisions of the Customs Ordinance. Subsequently, after inquiry, by letter dated 11.11.1969 (P4) the Principal Collector of Customs informed the plaintiff-respondent that the articles were forfeit under Section 43 and Section 107 of the Customs Ordinance read with Import and Export (Control) Act and the regulations made there under under Section 125 of the Customs Ordinance. Further, that under Section 129 of the Customs Ordinance a forfeiture of a sum of Rs. 31,845 being treble value of 82 wrist-watches, 120 wrist-watch straps, and 137 Pilot pens forfeited was imposed on the plaintiff.

The plaintiff instituted this action in the District Court of Colombo against the Attorney-General, the defendant, as representing the Crown on three causes of action.

On the first cause of action he alleged that the purported seizure on 11.11.1969 by the Assistant Collector of Customs under the Customs Ordinance and the forfeiture of 82 wrist-watches valued at Rs. 8,200, 120 wrist-watch straps valued at Rs. 360, and 137 Pilot pens valued Rs. 2,055 owned by him was illegal, wrongful and unlawful as the goods were not liable to seizure.

On the second cause of action he averred that the seizure as forfeit by the Assistant Collector of Customs of 212 wrist-watches valued at Rs. 21,200, 58 wrist-watch straps valued at Rs. 580, and 10 pilot pens valued at Rs. 300, owned by him was illegal, wrongful and unlawful as the goods were not liable to seizure.

On the third cause of action he pleaded that the forfeiture of Rs. 31,845 imposed by the Assistant Collector of Customs being treble value of 82 wrist-watches, 120 wrist-watch straps and 137 Pilot pens referred to in the first cause of action was illegal, wrongful and unlawful.

He asked for a declaration that he was the owner of the said goods and that these goods be restored to him ; on failure, for a judgment in a sum of Rs. 10,615 and Rs. 22,080 being the value of the goods, for a declaration that the seizure and forfeiture of the goods were illegal, wrongful and unlawful and for a declaration that the imposition and the forfeiture of the sum of Rs. 31,845 was illegal, wrongful and unlawful.

The defendant filed answer denying that the plaintiff was the owner of the said goods, and pleading that the Assistant Collector of Cusoms lawfully seized the said goods under the Customs Ordinance. The defendant further pleaded that the

goods referred to in the first cause of action were imported or brought into Ceylon contrary to the restriction contained in Sections 12 and 43 of the Customs Ordinance read with the provisions of the Import & Export (Control) Act and the regulations made thereunder, that the goods seized and became forfeit under the provisions of the Customs Ordinance and the Import & Export (Control) Act and the regulations made thereunder.

In regard to the goods referred to in the second cause of action, the defendant averred that they were made use of in the concealment of the goods referred to in the first cause of action, and thereby became forfeit under Section 125 of the Customs Ordinance.

In regard to the imposition of the sum of Rs. 31,845 being treble the value of the goods under Section 129 of the Customs Ordinance, the defendant pleaded that the plaintiff knowingly was concerned with in dealing with the goods referred to in the first cause of action which were liable to duties of Customs with intent to defraud the revenue of such duties contrary to the provisions of Section 129 of the Customs Ordinance.

The defendant claimed in reconvention the said sum of Rs. 31,845. In the replication the plaintiff joined issue with the defendant on the several denials in the answer and denied all the averments in the answer that were inconsistent with the plaint.

The learned District Judge entered judgment for the plaintiff as prayed for. The Attorney-General appeals to this Court against this judgment and decree.

It is common ground that by reason of the regulation contained in Gazette No. 13447 of 11.1.1963 the importation of the articles in question into Ceylon from this date was restricted except on a licence by the authorities. It was not disputed that prior to this Gazette Notification there were no restrictions on the import into this country of the wrist-watches and other articles referred to in the plaint. There was also no dispute as to the value of the goods seized and forfeited.

The learned District Judge's findings may be summarised as follows :—

(i) that the plaintiff is the owner of the goods, or the articles in question ;

(ii) that the burden was on the Crown to prove that these goods were imported into this country ;

(iii) that despite the provisions of Section 152 of the Customs Ordinance the burden was on the Crown to establish that the goods were imported into this country after 11.1.1963 the date of the Gazette Notification imposing the restrictions.

(iv) as the defendant failed to prove that the wrist-watches were imported after 11.1.1963 they were not liable to seizure ;

(v) that the seizure of the articles by the Customs was illegal, wrongful and unlawful ;

(vi) that the onus of proving lawful importation on the part of the plaintiff did not arise till the defendant proved that the articles were imported after 11.1.1963, the day the restrictions came into operation.

He also held that the evidence did not establish that the articles referred to in the second cause of action were used to conceal the articles referred to in the first cause of action.

In any event, in view of his finding that the seizure and forfeiture of the articles referred to in the first cause of action was illegal, wrongful and unlawful, this question did not arise for decision.

In view of his finding that the seizure of the articles referred to in the first cause of action was illegal wrongful and unlawful, the question whether the plaintiff was knowingly concerned with dealing with the goods referred to in the first cause of action with intent to defraud the revenue contrary to the provisions of Section 129 of the Customs Ordinance did not arise.

It will be useful at this stage to reproduce Section 152 of the Customs Ordinance :

> " If any goods shall be seized for non-payment of duties or any other cause of forfeiture, and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported or lawfully laden or exported, the proof thereof shall lie on the owner or claimer of such goods, and not on the Attorney-General or the officer who shall seize or stop the same. "

The learned District Judge in coming to the conclusion that despite the provisions of Section 152 the burden of proving that the goods were lawfully imported was placed on the owner or claimer of such goods and not on the Attorney-General. or the officer who seized the same, relied on the judgment of Basnayake

C. J. in *The Attorney-General* v. *Lebbe Thamby.* 61 N.L.R. 254 and in particular the following passage at page 256 :

> " In the instant case in my opinion the Crown has failed to establish that the gold in question was imported on or after the relevant date or at any time. The Customs Ordinance is a penal enactment which imposes severe penalties on those who violate its provisions. The Crown must therefore establish any breach of those provisions beyond reasonable doubt as in a criminal prosecution. The onus of proving that the gold bars were imported being on the Crown it should have established that fact beyond reasonable doubt. It has failed to do so. The onus of proving lawful importation does not therefore lie on the respondent. "

Basnayake, C.J., in this case was considering Section 144 (present Section 152) of the Customs Ordinance in regard to the question of the burden of proof of importation of any goods seized for non-payment of duties, or any other cause of forfeiture. The argument was no doubt raised in appeal by the claimant that the gold bars in question were imported after the relevant date, namely, 15.8.1953 when the Exchange Control Act came into operation after which date the importation of gold except with the permission of the Central Bank of Ceylon was prohibited.

It was conceded by the Crown that the burden of proving lawful importation would not lie on the claimants unless the Crown proved that the gold bars were imported. It was also conceded by the claimant that gold imported after the relevant date was liable to seizure and forfeiture under the Customs Ordinance, without the requisite permit, a contention similar to that put forforward in the current case.

Basnayake, C.J., held that the burden of proving that the goods in question were imported was on the Crown, but he held on the facts that he was not satisfied that the gold bars were imported on or after the relevant date, or at any time, as here was evidence that gold bars are locally made and can be impressed locally with similar characters as those in imported gold bars. As the Crown had failed to prove that the gold bars were imported, the onus of proving lawful importation, therefore, did not lie on the claimant. This case is therefore not an authority for the conclusion reached by the learned District Judge that the burden of proving lawful importation was on the Crown This case only lavs down that the burden of proving importation is with the Crown.

In regard to the case of *The Attorney-General v. Gnanapiragasam*, 68 N.L.R. 49, cited by learned Crown Counsel the learned District Judge observed that the facts of the present case were entirely different from the facts in that case. In *The Attorney-General* v. *Gnanapiragasam,* the plaintiffs asked for a declaration against the Attorney-General that they were entitled to eight bars of gold which were seized by the Collector of Customs and forfeited under the relevant provisions of the Customs Ordinance and the Exchange Control Act. The learned District Judge held that the gold bars were not imported. but that the plaintiff had purchased old jewellery and converted them into slabs of gold. H. N. G. Fernando, SPJ. in reversing the findings of the District Court and holding that the gold bars in question were not lawfully imported made the following observation:—

> " If then these bars must be held on the evidence to have been imported into Ceylon, the burden of showing that the importation was *lawful* was on the plaintiffs (Section 152 of Cap. 235) ..... Counsel for the plaintiff has submitted that there was no prohibition or restriction of the import of gold prior to the enactment of the Exchange Control Act in 1953. This position has not been contested by the Crown in the present case, although it is in fact probable that the importation of gold was prohibited or restricted for a long period under Defence Regulations. But Counsel's argument which is based on that position cannot succeed. He submitted that the Crown must prove that the importation of these bars took place after the Exchange Control Act came into force, and that the burden of showing *lawful* importation need only be discharged upon such proof being furnished. Section 152 of Cap. 255 cannot in my opinion be so construed. It is clear that once there is proof of the importation of goods into Ceylon, the claimant must establish all such facts as are necessary to prove lawful importation. *One such fact to be established would be the actual time of importation, if it is sought to rely on the position that the act of importation at such time would not have been unlawful.* "

The contention put forward that the Crown must prove that the importation of the articles took place after the restrictions came into force and that the burden of showing lawful importation on the claimant need only be discharged upon such proof being furnished, was rejected by H. N. G. Fernando, SPJ.

If we are to follow the judgment of H. N. G. Fernando, SPJ. in *The Attorney-General* v. *Gnanapiragasam,* we have to take the view that the learned District Judge had misdirected himself

in law in placing the burden, despite the provisions of Section 152 of the Customs Ordinance, on the Crown to establish that the importation of the articles in question took place after the restrictions were imposed on 11.1.1963. H. N. G. Fernando, SPJ. clearly states that "One such fact to be established by the claimant would be the actual time of importation, if it is sought to rely on the position that the act of importation at such time would not have been unlawful."

At the argument it was also not disputed that the articles in question came within the restrictions imposed by the relevant Gazette Notification.

Mr. H. L. de Silva, learned Counsel for the plaintiff-respondent sought to justify the findings of the learned District Judge on the ground that there was an initial burden on the defendant to prove that the articles in question were liable to seizure and forfeiture by proving that they were imported after the restrictions came into operation on 11.1.1963. This submission would in effect be an invitation to us to reconsider the judgment of this Court in *Attorney-General* v. *Gnanapiragasam* (supra.) Mr. de Silva buttressed his argument by the submission that before the burden of proving under Section 152 of the Customs Ordinance that the goods were lawfully imported was shifted to the plaintiff the defendant had to discharge what he described as the evidential burden by adducing evidence that the goods were liable to seizure and forfeiture under Section 47 and Section 107 of the Customs Ordinance, in that they were imported after 11.1.1963. This submission is based on the two distinct meanings which are attributed to the phrase "burden of proof". The burden of proof in the first sense is a matter of law or pleadings, that is, the burden of establishing a case whether by a preponderance of evidence or beyond reasonable doubt. This burden is also referred to as the 'legal burden'. The burden of proof in the second sense, which was the one referred to by Mr. H. L. de Silva is a burden of adducing evidence which is referred to as the 'evidential burden'.

The cases cited at the argument before us both in support of and against Mr. H. L. de Silva's submissions may broadly be brought under four categories.

Firstly that the presumption of innocence casts the burden of proving every ingredient of an offence even though negative in form on the prosecution. In the *Sanitary Inspector* v. *Thanaamalai Nadar*, 55 N.L.R., 302, the charge against the accused was one under the Quarantine and Prevention of Diseases Ordinance alleging that he did "being permanently or temporarily resident

in a building in which was a person affected with a contagious disease, to wit, small pox, failed to inform the proper authority forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance", Nagalingam, A. C. J. held that Section 106 of the Evidence Ordinance did not cast on the accused the burden of proving that he had given information to the proper authority until some *prima facie* evidence at least had been first led by the prosecution of the failure on his part to give the information. The presumption of innocence casts on the prosecution, the burden of proving every ingredient, even though negative in form. In this connection, two other examples come to our mind : In the case of the offence of rape in a criminal trial, the prosecution must establish that the sexual assault took place on the victim without her consent, although the ingredient 'without consent' is a negative ingredient—*R. v. Balakiriya* 46, N.L.R. 83. Similarly, in an action for malicious prosecution, the burden is throughout on the plaintiff to establish want of reasonable or probable cause for instituting the prosecution although in one sense it is an assertion of a negative.—*Abrath v. North Eastern, Railway Co.*—11 Q. B. 440.

The second category is where the Statute without expressly providing that the burden is on an accused person, but while describing the offence omits all mention of the negative element but sets out exceptions to the offence, like e.g. authority. consent, lawful excuse, proviso, or qualification where the burden of proving the exception, lawful excuse, qualification, etc., is cast on the accused.

The case of the *Mudaliyar, Pitigal Korale North v. Kiri Banda.* 12 N.L.R. 304, Full Bench, deals with a prosecution under Section 20 of the Forest Ordinance. It was held that the burden of proving that the forest where the offence is alleged to have been committed " is not included in a reserved or village forest " lies on the accused, as these words were merely another way of saying. "unless it is included in a reserved or a village forest".

In *The Solicitor-General* v. *Dharmasena.* 67 N.L.R. 68, the accused was prosecuted under Section 18 of the Excise Ordinance for the sale of an excisable article without a licence. Nowhere in the evidence of the witnesses was there any statement to show that the accused had no licence. T. S. Fernando, J. held that the Evidence Ordinance itself provides the answer to the question that was raised in the appeal as to whether the burden was on the prosecution or the accused to prove that the accused had a licence. Having referred to Sections 105 and 106 of the

Evidence Ordinance and the English cases of *R. v. Oliver* (1943) 2 A.E.R. 800, and *John* v. *Humphreys,* (1955) 1. A.E.R. 793, he observed as follows:

> " While the question before me can be disposed of by a reference to our own Evidence Ordinance, it is of some interest to note that even under the English law of Evidence where, generally speaking, the burden of proof of a criminal charge lies upon the prosecution, the position is that there are some facts peculiarly within the knowledge of the accused that the prosecution is not required to give even *prima facie* evidence on the point. "

In *R. v. Oliver,* the appellant was charged with supplying sugar otherwise than under the terms of a licence, permit. or authority granted by the Minister of Food in contravention of certain regulations, it was held that the onus was on the accused-appellant to prove that he had a licence as being a fact peculiarly within his own knowledge, and the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence.

In *John* v. *Humphreys* (1950) 1 A.E.R., 793, the accused was charged with driving a motor vehicle on a road without a licence contrary to Section 4 (1) of the Road Traffic Act of 1930 which provides " that a person shall not drive a motor vehicle on a road unless he is the holder of a licence." It was held that the burden of proving that the accused had a licence lay on him, because that fact was peculiarly within his own knowledge and in the absence of proof on his part that he had a licence the justices ought to have convicted him.

In *Regina v. Evens* (1967) 1. A.E.R. 322, the accused was found in possession of drugs. At his trial with being in unauthorised possession of drugs, it was held that once the prosecution has proved that the accused was in possession of the drugs within the meaning of the Act, the onus of establishing the statutory defence which was enacted in the words " unless it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner, etc. " lay on the defendant, the fact whether or not he came within ' excepted categories ' being equally within his own knowledge.

These cases will be covered by Section 105 of our Evidence Ordinance.

The third category is where the Statute, while expressing the exception uses words to the effect that the burden of establishing the exception shall be on the accused ; Section 468, Section 392B and Section 449 of the Penal Code, are examples.

In *Regina v. Fitzpatrick* (1948). 1 A.E.R., 769, the Customs Consolidation Act, 1876, section 186, imposed penalties on persons " who shall be ..... knowingly concerned in ..... in any manner dealing with.....goods " the import of which is prohibited or which are liable to duty "with intent to defraud" the Crown " of any duties due thereon, or to evade any prohibition " applicable to such goods. By section 259 : " If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for recovering any penalty or penalties under the Customs Acts, any dispute shall arise whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported ..... then and in every such case the proof thereof shall be on the defendant in such prosecution. "

Section 259 is worded almost similarly to our Section 152 of the Customs Ordinance. It was held in this case that the onus is put on the defendant where there is a dispute in the proceedings whether duty has been paid or whether goods were lawfully imported. The obvious reason for this provision is that these facts must be within the knowledge and often within the exclusive knowledge of the defendant.

The fourth category of cases is one dealt with in Section 152 of the Customs Ordinance where the Statute not only puts the burden of proving a matter on one party, but expressly relieves the burden of proving such matter on the other party. Section 152 a rare example states that the burden of proving whether the goods have been lawfully imported shall lie on the owner or claimant of such goods and not on the Attorney-General, or the officer who seizes the same.

The case we are presently dealing with is a civil case where the burden of proof in regard to the issues in the case are settled on the pleadings or the substantive law. The decisions that have been cited and the argument based on them strictly speaking will not be applicable in a civil case. In a criminal case, both in England and in our country, the procedure is for the prosecution to begin and although the accused is a competent witness he is not a compellable witness. In a criminal case the prosecution having to prove its case beyond reasonable doubt, and as in the case referred to by Nagalingam, ACJ. in 55 N.L.R., 302, the prosecution will therefore have to establish the negative ingredient

if it is an essential element in the case. On the other hand, if we take the facts in the 55 N.L.R., 322, case and the Statute had enacted that any person being permanently or temporarily resident in a building in which a person affected with a contagious disease, to wit, small pox, failed to inform the proper authority forthwith, shall be liable to a penalty recoverable in a civil court, if a person who so fails to inform the proper authority is sued in a civil court, if he takes up the plea that he had informed the proper authority, then clearly the burden is on him. Or, we might take the example given by Channel, J. in *Over v. Harwood* (1900) 1 Q.B., 803. In this case, upon the hearing of a summons under Section 31 of the Vaccination Act, 1867 against the parent of a child for non-compliance with an order of justices directing him to have his child vaccinated, it was held that the burden of proving non-compliance was on the prosecution. Channel, J. observed : " If it were a civil proceeding, the burden of proof would undoubtedly be on the defendant, but that is not the rule in a criminal case, which the present apparently is ; the prosecution therefore must give some evidence of the negative proposition, unless a question arises on some exception, exemption, proviso, excuse, or qualification . . . "

In fact, in this case issues 13 to 17 germane to the questions of importation and lawful importation have been raised by the plaintiff, but had not been answered by the learned District Judge. The issues read as follows :—

No. 13. Have the goods referred to in paragraph 3 of the plaint been imported, or brought into Ceylon ?

No. 14. If so, on what date, or dates, were they imported into Ceylon ?

No. 15. Were there in force restrictions against their import into Ceylon on the said date or dates ?

No. 16. Were there valid restrictions on such date or dates?

No. 17. If so, have the goods referred to in paragraph 3 been imported, or brought into Ceylon, contrary to such restrictions ?

If the learned District Judge had not misdirected himself as to the burden of proof regarding lawful importation, it may very well be that he would have answered issues Nos. 13 and 17.

The question whether the concept of evidential burden of proof can be imported into our law was discusssed by Lord Devlin in the Privy Council case of *Jayasena v. Queen*, 72 N.L.R. 313 In this case, the accused who was charged with murder, admitted at the trial that the deceased died of wounds definitely

inflicted on him with the intention to kill and his defence entirely was that he was acting in self defence. An argument was put in the Privy Council that it would be sufficient that if the accused gave some evidence in support of his case, and that the burden imposed by Section 105 of the Evidence Ordinance was not a burden of establishing this case, but of adducing evidence. The argument, in effect, sought to disapprove the decision of this Court in *King v. Chandrasekera,* 44 N.L.R. 97.

Lord Devlin at page 316, made the following observations:

> "Their Lordships do not understand what is meant by the phrase 'evidential burden of proof'. They understand of course that in trial by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends upon the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English Law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in private defence. So it is a misnomer to call whatever it is that he has to provide a burden of proof,—a misnomer which serves to give plausibility but nothing more to Mr. Kellock's construction of s. 105."

S. 3 of the Evidence Ordinance deals with proof in the following terms :

> "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Their Lordships do not think that proof means anything different in English law. But at any rate in the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that

the burden imposed by s. 105 can be anything less than proof in accordance with s. 3. Their Lordships will not elaborate further since the incongruities of any such supposition are fully exposed in the judgments of the majority in *R. v. Chandrasekra* particularly the judgment of Soertsz, J."

Lord Devlin thereafter dealt with Section 106 of the Evidence Ordinance, and stated at page 319 as follows:

> "Their Lordships are concerned with s. 106 only to see whether it gives any support to Mr. Kellock's argument on s. 105. He submits that the right solution lies in treating s. 106 as imposing only an evidential burden of proof; and that if s. 106 has to be treated in that way, why not also s. 105? This submission gets no help from the two authorities cited. In these cases the Board said simply and without elaboration that the section does not cast upon an accused the burden of proving that no crime has been committed. Their Lordships in no way dissent from this conclusion. It may well be that the general principle that the burden of proof is on the prosecution justifies confining to a limited category facts " especially within the knowledge " of an accused; but their Lordships do not consider that it can alter the burden of proof either in s. 105 or s. 106."

The two authorities cited are *Attygalle v. R.* 37 N.L.R. 337, and *Seneviratne v. R.* 38 N.L.R. 208.

We are inclined to agree with Lord Devlin when he observed that matters relating to burden of proof and the manner of discharging that burden are clearly spelt out in our Evidence Ordinance.

The burden of proving lawful importation under Section 152 of the Customs Ordinance is on the claimant and this no doubt is in conformity with the rationale underlying Section 106 of the Evidence Ordinance that when a fact is within the knowledge of any person. the burden of proving that fact is upon him. But, in our view Section 152 of the Customs Ordinance can be considered without reference to Section 106 of the Evidence Ordinance, as the former section clearly and in unambiguous language puts the burden of proving lawful importation on the claimant and relieves the Attorney-General or any other officer of any such burden.

We are, therefore, of the view that the decision of this Court in *The Attorney-General v. Gnanapiragasam,* lays down the correct construction of Section 152 of the Customs Ordinance which puts the burden of proving lawful importation on the claimant. Lawful importation may not only be proved by the production of

a permit by the claimant, but also by proving that the goods were imported prior to the date on which the restrictions came into operation.

The learned District Judge had therefore misdirected himself in holding that despite Section 152 of the Customs Ordinance there was an initial burden on the Crown to prove that the goods in question were imported after the restrictions came into operation on 11.1.1963 and as the defendant had failed to discharge this burden the seizure and forfeiture of the goods in question were illegal, wrongful and unlawful.

An argument was addressed to us by Mr. H. L. de Silva that if the burden in these matters is so strictly placed on the claimant it will lead to unwarranted harassment of ordinary citizens who have in their possession imported articles like wrist-watches and radio sets as they could be called upon at any time by the Customs officers to prove that they were either lawfully imported or Customs duties have been paid on them. There may be cases where although these purchases have been bona fide made by citizens, nevertheless, they are not in a position to prove that they were either lawfully imported or Customs duties have been paid on them. The answer to this is given by Lord Goddard, C. J. in *R. v. Cohen* (1951) 1 A. E. R. 203 at page 205:

> "Though the powers of Customs officers are always used with discretion, it is in law possible for them to require anyone, be he trader or not, who has dutiable goods in his possession to show that duty had been paid. If the person challenged cannot prove payment, it does not follow that he must be taken to have committed the offence of what for convenience we will call unlawful harbouring. He will not be guilty unless he knew that duty had not been paid....."
>
> "A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. If a man buys a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled, if, in fact, they had been? In the course of his summing-up the deputy chairman quoted a passage from a recent judgment of this Court in *R. v. Fitzgerald* (1948), in which I said :
>
> > "If a man buys something from a trader in the ordinary way (it does not matter whether it is wholesale or retail), you would presume that he has bought it honestly and that the duty on it has been paid.'

It would, perhaps, have been more accurate if I had said :

' that he had no knowledge or reason to believe that the duty had not been paid. ' "

The question next is whether if the burden is placed on the plaintiff of proving lawful importation, the evidence led by the plaintiff in this case established lawful importation. No doubt an appeal court on an appeal in a case tried before a Judge alone should not lightly differ from a finding by a trial judge on a question of fact, but as observed by Lord Reid in *Benmax v. Austin Motor Co. Ltd.,* (1955) 1 A.E.R., p. 326 at 329 :

" But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

We are of the view that in view of the serious misdirection as to the burden of proof on the part of the learned District Judge, this is an appropriate case where we should review the findings of fact of the learned District Judge, whether (*a*) the goods were imported into this country. (*b*) whether they were lawfully imported.

Regarding the ownership of the goods we do not think there is any difficulty in agreeing with the District Judge that the plaintiff was the owner of the goods seized by the Customs on 11.11.1969. There is ample evidence to support this. The learned State Counsel in his argument on this did not seriously contest this question.

Also regarding the 212 wrist-watches, 58 wrist- watch straps, and 10 Pilot pens referred to in the second cause of action, there is evidence that these articles were originally seized in 1967 by the Customs and returned to the plaintiff and they were displayed with the goods referred to in the first cause of action. These goods were displayed openly and the element of concealment is absent. Learned State Counsel also concedes that these goods were lawfully imported, as such he conceded that the plaintiff was entitled to succeed on the second cause of action.

We have therefore now to deal with the question whether the 82 wrist-watches, 120 wrist-watch straps and 137 Pilot pens referred to in the first cause of action were lawfully imported.

The Crown to succeed must prove that these goods were imported into this country, and on discharging that burden it was for the plaintiff to establish that these goods were lawfully imported. We are of the view that being a civil case there is no burden on the parties to prove their cases with the same strict proof as in a criminal case, but the standard of proof in a civil case, viz., by a balance of probabilities, will suffice.

We are satisfied that on the evidence given by U. D. Kulasinghe, manager of plaintiff's establishment that the 79 wrist-watches, 120 wrist-watch straps and 137 Pilot pens referred to in the first cause of action were imported articles. Kulasinghe is the manager of the plaintiff's firm in charge of the shop which was raided by the Customs. The plaintiff did not give evidence but called Kulasinghe as his only witness. Kulasinghe had joined the plaintiff's firm in 1957 as a sales representative and he was the manager of the firm from 1961. According to him these articles were locally purchased. He sorted out of the 294 watches that were seized by the Customs, 82 as being locally purchased, and he said that except for the 3 ladies Nelson wrist watches, the remaining 79 were imported. Regarding the 120 wrist-watch straps, he said that they were not locally made, but they were locally purchased and that he did not buy any brands which were locally manufactured. Regarding the 137 Pilot pens he said that they were purchased from L. A. Edwin, a former employee and that they could not have been locally made, but would have been imported because the prices were high.

In view of our finding that the goods were imported articles, the burden is on the plaintiff to prove that they were lawfully imported. Kulasinghe has stated that he bought these articles on behalf of the plaintiff. His position was that they were imported before 1963 or it came through the Customs and as such he was satisfied that they were lawfully imported as they were imported either before 1963 or purchased at the Customs sales. In cross-examination he stated as follows :—

"Q: You say that they could have been lawfully imported before 1963, or purchased at the Customs sales ?

A : Yes.

Q: How did you satisfy yourself that they were imported before 1963, or sold at Customs sales ?

A: I was satisfied with what the brokers said.

Q : You were not concerned with making any further inquiries ?

A : No.

Q: I take it that you were aware that the smuggling of watches was rampant in the country ?

A : Yes. "

This witness has been the manager of the plaintiff's firm from 1961. The firm is a well established firm importing clocks and watches, owning a factory for manufacturing and assembling wrist watches. The shop had been raided by the Customs in October 1967, and 342 wrist watches were seized and returned. In 1962 the firm's stores at Kurunegala were raided by the Customs. In these circumstances, the plaintiff's manager Kulasinghe should have been more circumspect and exercised greater caution in purchasing these goods from the brokers. No receipts have been produced for these purchases. The two persons who were alleged to have sold these articles, namely, Edwin, an ex-employee, and Munasinghe, the broker, have not been called as witnesses by the plaintiff. These witnesses were known to the plaintiff, and therefore if in fact these articles were purchased at the Customs sales, or imported before 1963, their evidence could have been obtained. For the same reasons evidence could have been obtained if the Customs duties have been paid for these articles. It is difficult to accept the explanation given by Kulasinghe that these articles were purchased from the brokers as imported before 1963 or purchased at the Customs sales in view of the statement made by Kulasinghe to Mr. G. Cumaranatunge, the Deputy Collector of Customs, who recorded his statement in the early hours of the morning on the 23rd of September 1969, at the Customs Preventive Office at Fort. When extracts of these statements D1, D2. D2b, D2c, and D2d were put to Kulasinghe in cross-examination he said that these statements were incorrect. Mr. Cumaranatunge was the only witness called by the defendant. He narrated the circumstances under which Kulasinghe made his statement. He testified to the fact that after he had recorded the statement of Kulasinghe, Kulasinghe initialled all the alterations and corrections in his statement. These statements that have been proved to have been made by Kulasinghe not only serve to discredit Kulasinghe's evidence that they were articles either imported before the ban came in 1963 or purchased at the local Customs sales, but in our view are relevant as admissions against the plaintiff under Section 18 (1) and Section 21 of the Evidence Ordinance. In D2 Kulasinghe has stated:

"I have purchased these watches from brokers. Brokers known to me are Messrs. Munasinghe, Yatawara, Hameed, and two or three other persons. I hold receipts signed on stamps for every purchase. The address of these brokers are

on the receipts themselves. All these receipts are in the shop. They are not filed separately but with the receipts for other purchases made daily."

Kulasinghe, in his evidence, said that he could not produce the receipts as they were in the five files that were removed by the Customs and the Customs were not releasing these files. We do not think that this is a genuine excuse. These files in fact were removed by the Customs. By P5 dated 19th July, 1970 the plaintiff wanted these documents from the Customs. By P7 of 24th October, 1970 the plaintiff's lawyers were informed that they were free to inspect, examine and take copies of the said books at the office of the Chief Preventive Officer, Customs, Colombo, but the plaintiff had not availed himself of this opportunity. He cannot therefore complain.

In D2b Kulasinghe has stated:—

"I bought these watches from brokers because they told me that the watches were assembled locally."

In D2c Kulasinghe states:—

"Although I was aware that watches like Favre Leuba and Enicar are reported imported illegally into Ceylon, I purchased these watches from the brokers because I thought that they were assembled locally."

Kulasinghe in his evidence has described these statements as incorrect and that he could not remember having made such statements. No reasons have been urged as to why Mr. Cumaranatunga should have incorrectly recorded any statements from Kulasinghe. On an analysis of Kulasinghe's evidence, we are of the view that the plaintiff has failed to prove that the articles referred to in the first cause of action were lawfully imported, the burden of proof of which was on the plaintiff.

In view of our finding that the plaintiff has failed to prove lawful importation of the goods in question, the next question we have to consider is whether the plaintiff is liable to a forfeiture of treble the value of the goods, or the penalty of Rs. 1,000 at the election of the Collector of Customs for the reason as averred in the answer of the defendant that the plaintiff was knowingly concerned in dealing with these goods which were liable to duties of Customs with intent to defraud the revenue of such duties under Section 129 of the Customs Ordinance.

The Principal Collector of Customs had by his letter (P4) dated 11.11.1969 found the plaintiff guilty under Section 129 of the Customs Ordinance and elected and imposed a forfeiture of

Rs. 31,845 being treble the value of the goods, viz : 82 wrist-watches valued at Rs. 8,200, 120 wrist-watch straps valued at Rs. 360 and 137 Pilot pens valued at Rs. 2,055. This amount is claimed by the defendant in reconvention against the plaintiff. In order to succeed, the Crown must prove to the satisfaction of this Court, first. that the plaintiff was in any way knowingly concerned in any manner dealing with any goods liable to duties of Customs, and secondly, he did so with intent to defraud the revenue of such duties or any part thereof.

The decision in the English case of *R. v. Cohen* (1951) 1 A.E.R. 203. lays some guide lines as to the nature of the evidence that is necessary to establish knowledge on the part of the plaintiff that he was concerned in dealing with goods liable to Customs duties, and also the intention to defraud the revenue of such duties. In *R. v. Cohen* (supra.), the accused was indicted with knowingly harbouring certain uncustomed goods, namely 382 Swiss watches and other articles with intent to defraud, His Majesty of the duties thereon, contrary to Section 186 of the Customs Consolidation Act, 1876.

There is similar provision in regard to the offence of knowingly harbouring goods liable to duty in our Section 129 of the Customs Ordinance. Lord Goddard, C. J., in dealing with the mental element of knowledge made the following observations :

> " First, let us consider the ingredients of the offence and what has to be proved by the prosecution in order to establish a *prima facie* case. Apart from an intent to defraud with which we will deal separately, the offence consists in knowingly harbouring uncustomed goods, and, in our opinion that means that the accused knowingly harboured goods and also knew that they were uncustomed. To prove a conscious harbouring it would usually be enough to show that goods which were subject to duty were found in the possession of the accused. If they are found in his house, warehouse or other place under his control, that would establish a *prima facie* case that he knowingly harboured them, though, no doubt, he could rebut this by proving that he did not know of their presence, for instance, by showing that someone had ' dumped ' them there without his knowledge or privity. Once it is proved that he knowingly harboured goods subject to duty, s. 259 throws on him the onus of proving that the goods are, in fact, customed. To do this he would have to prove that the duties had actually been paid, or, at least that they had been declared and that the customs officers, in the exercise of a discretion which, as is well known, they are allowed, had permitted the

goods to enter. The latter case would probably seldom arise and could only occur in the case of a small amount of spirits, tobacco, jewellery or the like, and we need not deal further with this. "

Thereafter, Lord Goddard. C. J. deals with the ingredient of the intent to defraud in this manner, :

" Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded, but, as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the accused knew, which would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue. That there may be cases where the circumstances would negative the intent is possible, but, ordinarily speaking, it is indeed difficult to see how it could be found he did not intend to defraud the revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling, but told lies to the officers when challenged on the matter. "

The admissions that Kulasinghe, manager of the plaintiff had made to Mr. Cumaranatunge, the Deputy Collector of Customs, that he purchased these watches from brokers because they told him that they were locally assembled, not only discredit Kulasinghe's testimony, but the contradictions and inconsistencies in his explanation on this issue which we have detailed earlier leave us with no alternative, but to reject his explanation given in his evidence in Court that he was satisfied that the brokers told him that these watches were imported before 1963 or were purchased at Customs sales. He has admitted that regarding the purchase of the 137 Pilot pens from Edwin that he did not question Edwin; regarding the watch-straps he admitted that the particular ones are not locally made and that he has not bought any locally manufactured watch straps.

Although Kulasinghe has said that regarding the purchase of watches, he was satisfied with what the brokers told him, but he admitted that he was not concerned with making any further inquiries, although he was aware that the smuggling of watches was rampant in the country. These circumstances entitle us to draw the irresistible inference that Kulasinghe, when he was

dealing with these articles, knew that they were not lawfully imported and uncustomed that they were liable to Customs duties, and he did so with intent to defraud the revenue. We are, therefore, of the view that the defendant is entitled to succeed in the claim in reconvention in respect of treble the value of 79 wrist watches, 120 wrist watch straps and 137 Pilot pens.

In view of our finding that the plaintiff has failed to prove that the goods referred to in the first cause of action were lawfully imported, we set aside the judgment and decree of the learned District Judge in respect of the first cause of action and hold that the seizure followed by forfeiture of 79 wrist watches, 120 wrist watch straps and 137 Pilot pens, was lawful. The plaintiff will therefore be only entitled to, out of the 82 wrist watches seized, the 3 ladies' Nelson wrist watches, which on the evidence had been locally assembled. We dismiss the appeal of the defendant in respect of the articles in the second cause of action, as, in our view, these articles were not used for the concealment of any goods liable to forfeiture under Section 125 of the Customs Ordinance.

In view of our finding that the 79 wrist watches, 120 wrist watch straps and 137 Pilot pens were not lawfully imported, we are satisfied on the evidence that the plaintiff was knowingly concerned in dealing with these articles which were liable to the duties of Customs with intent to defraud the revenue of such duties under Section 129 of the Customs Ordinance. After deducting the value of the three ladies' wrist watches, at Rs. 100 per wrist watch, treble the value of goods will be Rs. 31,545, which, in our view, was entitled to be forfeited by the Collector of Customs. The defendant, therefore, will be entitled to judgment in reconvention against the plaintiff in this sum of Rs. 31,545. As the plaintiff has partly succeeded in his claim, in the circumstances of this case, we order that the plaintiff-respondent do pay the defendant-appellant half the costs both in appeal and the District Court.

RATWATTE, J.—I agree with my brother PATHIRANA, J.

*Appeal partly allowed.*