screening off the unscreened parts of the two cages on the Doctor's side. I do not think that this is a satisfactory method of abating a nuisance caused by fowl droppings, feathers and stagnant water.

There is no evidence in this case that the state of the accused's premises are such that it is injurious to the health of any person. The only other question is whether it amounts to a nuisance. The term "nuisance" was defined by Knightbruce V.C., in *Walter v. Selfe* [1] as an "inconvenience materially interfering with the ordinary comfort physically of human existence not merely according to elegant or dainty modes and habits of living but according to plain and sober simple notions amongst English people". I think this definition may well be applied in Ceylon with the substitution of the word "Ceylonese" for "English". Judged by this test it cannot be said that the condition of the accused's premises is such as to amount to a nuisance.

It is a pity that the Municipal authorities should have permitted themselves to have been made tools of by one *irate* neighbour to pay off a grudge against another. Not the slightest attempt appears to have been made to find out before the plaint was filed whether the evidence available disclosed an offence or satisfied the provisions of the law under which it was proposed to prosecute the accused.

I think this is a fit case where the complainant should be condemned to pay the costs of the accused. I set aside the conviction appealed from and acquit the accused and order the complainant to pay to the accused the costs of appeal.

Accused acquitted.

[1] *4 G. D. & S. 322.*

1949 *Present:* **Canekeratne J.**

THAMBIAH *et al.*, Appellants, *and* TENNEKOON (Inspector of Police), Respondent

S. C. 365-366—M. C. Jaffna, 15,144

Charge—Several accused—Common intention—Section 32 of Penal Code—Need not be referred to in charge.

Where several accused acted with common intention it is not necessary to specify section 32 of the Penal Code in the charge framed against them.

APPEALS from a judgment of the Magistrate, Jaffna.

M. M. Kumarakulasingham, for 1st accused appellant.

H. W. Tambiah with *A. P. Thurairatnam* for 2nd accused appellant.

A. Mahendrarajah, Crown Counsel, for Attorney-General.

Cur. adv. vult.

May 31, 1949. CANEKERATNE J.—

At an election held about ten days before, the candidate whom the complainant zealously supported was successful; the one favoured by the two accused persons was not. So he became the object, as the Magistrate

finds, of their resentment. When the complainant met the two accused near a junction on February 22, the second accused addressed him thus, " Are you going to work in the elections ? " and seized him. Straightaway he called upon his companion, the first accused, who had a club, to hit him. The first accused then hit him twice on the head with the club—one caused a fracture of the underlying bone. Released from his grasp the injured man sat down on the ground ; the second accused then caught hold of his legs and dragged him a very short distance. There can hardly be any ground on which the conviction of the first accused can be assailed.

From a consideration of all the facts proved and the circumstances surrounding the case, the Magistrate came to the conclusion that grievous hurt was caused in furtherance of a common intention and convicted the second appellant ; he was a confederate and the act would be a joint one. The case of *Mahibub Shah v. Emperor* (A. I. R. 1945, Privy Council, 118), quoted by his Counsel, can have no application to the facts of this case. Every judgment must be read, as has often been said, as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found[1]. These remarks apply very forcibly to some of the language used in the judgment referred to.

It was strenuously contended by counsel that there was no correct charge in the case and in this connection he referred to four decisions. The recital of facts in the two Calcutta cases (*50 Calcutta 41* and *58 Calcutta 822*) shows that there was a reference to Section 34 (of the Indian Penal Code) in the charge in each of those cases, but there is not a word regarding the necessity of the section in a charge. The Madras case (*A. I. R. Madras (1924) 584*) falls within the same class. The Judge who decided the other case states thus :—

> " The omission to frame a charge under Section 34 was vital and the result is that each man is liable only for his individual acts. "

There is hardly any convincing reason given for this. In this connection attention was drawn by him to the following brief statement from Gour (5th Edition, 1930, 188) : No person can be convicted under the section unless he is specially charged with it. As authority for this statement is given the case of *Cheda Singh*, 1924 (P. C. 183),[2] a case which Counsel did not produce. There are also three other cases referred to a little later, namely, the Calcutta and Madras cases which have already been discussed ; these do not bear out what is stated in the text. The statement in the text is much wider than the decision in Cheda Singh's case warrants. Three persons R, S, and Cheda Singh were charged with causing hurt ; the first two were convicted but as C. S. was absconding proceedings were taken against him later and he was convicted apparently on the ground that he himself caused the injury. In appeal

[1] *Lord Halsbury's remarks.*

[2] *In the table of cases the reference is given as 1924, L. R. 5A, 133. The latter is the same as is reported at page 766 of A.I. R. 1924 Allahabad. The delay in delivering judgment was partly due to the search for this case.*

it was argued that a conviction could be arrived at with the aid of Section 34 but the Judge who heard the appeal stated :—

" there is no section which will justify me in altering the charge and proceeding now to a conviction on that charge. "

The view he took appears to be that this would be an entirely new case, as C. S. would not have known at that trial that the blow was struck by one of his companions and not by him and that it was struck in pursuance of a common intention. It is not referred to in any of the other cases quoted by counsel [1] or in the other text book, Ratanlal. Ratanlal at page 72 (16th Edition) discussing Section 34 states thus :—

" This section does not create any offence and it is not necessary to specify it in the charge—(6)". Note 6 is *Waryam Singh* (1941) Lahore, 423.

Crown Counsel contended that the section need not be referred to in a charge, as the section of the Criminal Procedure dealing with a charge makes mention of an offence, not of an act. He referred [2] to *Waryam Singh v. Emperor*, 1941 (A. I. R. Lahore, 214), and *Borella Police v. Austin and others* (S. C. Minutes of September 10, 1948). In the course of the judgment in the former case appears the following passage : " of these the last [3] is directly in point and in the first authority, [4] which was a Full Bench judgment of five Judges, there is a passage in which it is pointed out that Section 34 does not create any offence and that it is not necessary to specify it in the charge. The other two judgments [5] though not exactly in point support the same principle. As we have said before we have not been shown any authority to the effect that Section 34 has to be mentioned in the charge and we are ourselves of opinion that there is no legal necessity to specify this Section. The section is really nothing more than explanatory and embodies in the Code the ordinary common sense principle . . . . " Barendra Kumar Ghose [4] was tried upon a charge of murder punishable under Section 302 of the Indian Penal Code: apparently there was no reference to Section 34 in the charge. He appealed from his conviction to the High Court and after obtaining a certificate from that Court he appealed from the order of the Full Bench to the Privy Council. The judgment of the High Court was affirmed by the Privy Council (I. L. R. 52 Calcutta, 197). There is nothing in the opinion of Lord Sumner to suggest that he disagreed with the view of the High Court on this point—the absence of a reference to Section 34 in the charge is not adverted to by him. In the case of *Borella Police v. Austin*, Windham J. stated briefly that the section need not be mentioned. In the few cases where the objection was taken in the Assize Court, it has been invariably over-ruled.

The analogy of Section 146 and abetment may suggest the inclusion of Section 32 in a charge but there is great difference between the two cases. Section 146 creates a specific offence and deals with the punishment of that offence alone. It provides for the doing of acts by members of an assembly (having a common object) in pursuance of that object. Membership of the assembly at the time of the committing of the offence

[1] *Some of these cases were pointed out by a note sent after the argument was concluded.*
[2] *In the note furnished after the conclusion of the argument.*
[3] *14 Patna 225.*
[4] *A. I. R. (1924) Calcutta, 257.*
[5] *58, Calcutta, 822.*
59, Calcutta, 1192.

makes a person a sharer in the offence. On the other hand, the element of participation in an act is the leading feature of Section 32. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart [1]. Section 32 only comes into operation when there is a substantive charge of an offence having been committed. The section is an interpretative clause included in the chapter of General Explanations (Chapter 2), and should be read into the definitions of substantive offences. Both principals in the first degree and principals in the second degree [1] or accessories are brought within the purview of the section. It does not, as stated previously, create a new offence. The charge in this case was under Section 316, "whoever . . . . voluntarily causes grievous hurt". The words "voluntarily to cause hurt" are referred to in Section 312—"whoever does any act . . . "; to ascertain the nature and effect of an act one has to resort to the Sections in Chapter 2, e.g., Sections 31, 32. (e.g., Section 170 of the Criminal Procedure Code). There is also nothing in Section 167, or Section 184 or in any other Section in Chapter 17 of the Criminal Procedure Code which tends to show that a reference to Section 32 is necessary. The view taken by some of the Indian decisions, and the view presently held in Ceylon seems to be a commonsense view and nothing that has been urged has shown that it is wrong. The objection urged by Counsel fails. The appeals are dismissed.

Appeals dismissed.

[1] *I. L. R. 52 Calcutta (112)*

1949 *Present :* **Gunasekara J.**

WEERASOORIA, Appellant, *and* CONTROLLER OF ESTABLISHMENTS, Respondent.

S. C. 141—Workmen's Compensation Case No. C 30/6,939/42

Workmen's Compensation—Order nisi dismissing application—Want of appearance—Can it be set aside after fourteen days ?—Discretion of Commissioner—Civil Procedure Code—Section 84—Workmen's Compensation Regulations—Regulation 30.

The Commissioner for Workmen's Compensation has jurisdiction to set aside an order *nisi* dismissing an application on the ground of default of appearance. An order setting aside an order *nisi* is, therefore, binding on the parties, unless it is reversed in appeal, and cannot be treated as a nullity even though it may be an erroneous order.

APPEAL from an order of the Commissioner for Workmen's Compensation.

H. W. Jayewardene, for the appellant.

B. C. F. Jayaratne, Crown Counsel, for the respondent.

Cur. adv. vult.

May 10, 1949. GUNASEKARA J.—

This is an appeal from an order made by a Commissioner for Workmen's Compensation dismissing with costs an application for compensation made by the appellant against the respondent.