1946 *Present :* **Howard C.J.**

DIAS, Appellant, *and* WIJETUNGE, Respondent.

*1,271—M.C. Colombo, 4,967.*

*Evidence—Charge of cheating—Proof of intention by evidence of similar acts—Evidence of System—Penal Code, s. 400—Evidence Ordinance, ss. 14 and 15.*

Where the accused was charged with cheating and the complainant, in order to prove fraudulent intention on the part of the accused, led evidence of a false representation made by the accused to another person in connection with another transaction—

*Held*, that the evidence of the false representation was not admissible under section 14 of the Evidence Ordinance unless there was a similar representation made in the transaction which was the subject-matter of the charge.

*Held, further*, that in order to prove system under section 15 of the Evidence Ordinance evidence of one similar transaction alone is not sufficient.

APPEAL against a conviction from the Magistrate's Court of Colombo.

*H. V. Perera, K.C.* (with him *H. W. Jayewardene* and *C. E. L. Wickremesinghe*), for the accused, appellant.

*L. A. Rajapakse, K.C* (with him *D. A. Jayasuriya* and *G. T. Samarawickreme*), for the complainant, respondent.

*Cur. adv. vult.*

June 3, 1946. HOWARD C.J.—

The appellant appeals from his conviction by the Magistrate's Court of Colombo on a charge of cheating the complainant in respect of a sum of Rs. 1,000, contrary to the provisions of section 400 of the Penal Code. The complainant in his evidence stated that on April 27, 1945, the appellant undertook to deliver to him on May 6, 1945, the articles of furniture in his house specified in the plaint. In consideration of that undertaking the complainant paid to the appellant Rs. 1,000, in cash Rs. 300 and by cheque Rs. 700. The complainant further stated that he had been to the appellant's house on several occasions, but he had not received either the furniture or the return of his money. It was also proved that in April, 1945, the Kotalawella Estates Co., Ltd. filed an action against the

appellant. In June, 1945, the appellant was examined under section 219 of the Civil Procedure Code and during such examination stated that there were no articles of furniture belonging to him in his house. Evidence was also tendered for the prosecution that on February 12, 1945, the appellant offered to rent to one T. P. Balasooriya a house No. 12, Kotalawala Terrace, together with the furniture for Rs. 75 a month. Balasooriya says that he paid the appellant Rs. 300 in advance, but the latter had failed to put him in possession or pay back the Rs. 300. The furniture to be hired, according to Balasooriya, consisted of the identical articles that were to be sold to the complainant in this case. Balasooriya in cross-examination stated that he told the appellant on February 29, 1945, that he did not want the house, but only his money back. Balasooriya also said that the appellant held him to his contract and refused to give him back his money. Further evidence was tendered by a man called Mohideen to the effect that he advertised for a house in February, 1945. The appellant replied to the advertisement and told him that he had a house fully furnisned which he would let. Mohideen and the appellant went to the house at 12, Kotalawala Terrace. There the appellant told Mohideen that he should buy the furniture if he was renting the house. Mohideen agreed and paid the appellant Rs. 350 as an advance out of the sum of Rs. 2,250 which he agreed to pay for the furniture. The articles of furniture seem to be identical with those that the appellant agreed to sell to the complainant. Mohideen further stated that up to date the appellant has neither given him the furniture nor returned his money.

It is contended by Mr. Perera on behalf of the appellant that the evidence of Balasooriya and Mohideen was not admissible. And without such evidence it has not been established that there was any fraudulent intention on the part of the appellant. Mr. Rajapakse on the other hand maintains that the evidence of Balasooriya and Mohideen was admissible under section 14 of the Evidence Ordinance as showing intention. Also under section 15 of the Evidence Ordinance inasmuch as there is a question as to whether the contract between the complainant and the appellant was made by the latter with the intention of defrauding the complainant. It is argued that this transaction formed part of a series of similar occurrences in each of which the appellant was concerned and the fact that it did so is relevant.

In *Rex. v. Seneviratne*[1] it was held that the proving of one isolated act apart from the act set out in the charge does not amount to a proof of the fact that there was a series of similar occurrences of which the act charged was one within the meaning of section 15 of the Evidence Ordinance. The evidence of Balasooriya is to the effect that he paid the appellant 4 months rent in advance for the house and furniture, that on February 28th he told the appellant he did not want the house and that the appellant held him to his contract. In my opinion this is not a similar occurrence to the contract made by the appellant with the complainant which was for the sale of furniture. Moreover Balasooriya on his own admission broke the contract. Hence this transaction does not bear the taint of fraud. Evidence of it was not admissible either as

[1] *( 1925) 27 N. L. R. 100.*

part of a series of similar occurrences under section 15 or of intention under section 14 of the Evidence Ordinance. Evidence of the appellant's transaction with Mohideen is not by reason of the decision in *Rex. v. Seneviratne* in itself sufficient to prove system.

There now remains for consideration the question whether the evidence of Mohideen was admissible to prove intention. The argument put forward by Mr. Rajapakse is that the transaction between the appellant and Mohideen is a fact which shows the existence of a particular state of mind, namely, the intention of the appellant to defraud the complainant. According to Mohideen the latter in February, 1945, agreed to buy from the appellant furniture consisting of a drawing room, bedroom and dining room suites of Apothecaries make. The articles of furniture comprised in these suites seem to be similar to those which the complainant said were sold to him by the appellant on April 27, 1945. With regard to this transaction Mohideen says that the appellant has neither given him possession of the furniture nor returned his money. In the case of the contract between the complainant and the appellant the former relies on a false representation that the furniture would be delivered to him on May 6, 1945. Only some of the furniture according to the complainant was of Apothecaries make. In the case of the Mohideen transaction the furniture was all of Apothecaries make. It has not been established that the appellant was, in each transaction, selling the same furniture. Nor can it be said there was a similar representation made on the occasion of each transaction. Mr. Rajapakse has cited a number of cases, but I am of opinion that none of them have any application to the facts of the present case. In *Rex. v. Wilks* [1] the accused in order to induce a shopkeeper to part with a fur coat on credit showed the latter a bill head with the words " Wholesale and retail Merchant " on it. It was held that the fact that three months previously the accused obtained goods on credit from another shopkeeper by using a similar handbill was admissible in evidence to prove intent to defraud. In this case there was a false representation of an existing fact, namely, that the accused was a wholesale and retail merchant. Similarly in *Rex. v. Smith* [2] the evidence indicates that the accused made a false representation as to an existing fact, namely, that he came from the Mercantile Syndicate, Ltd. Evidence that he used the same false representation to obtain goods from another shopkeeper was held to be admissible in evidence. In *Rex. v. Wyatt* [3], *Makin v. Attorney-General* [4] evidence of other similar occurrences was admitted to prove a systematic course of conduct. As I have already pointed out evidence of one similar transaction is not sufficient to prove system. I am of opinion that the Mohideen transaction was not admissible and without such evidence there is no proof of fraud on the part of the appellant.

For the reasons I have given the appeal must be allowed and the conviction set aside.

*Appeal allowed.*

[1] *(1914) 10 Criminal Appeal Reports 16.*
[2] *(1905) 92 Law Times 208.*
[3] *(1904) 1 K. B. 188.*
[4] *(1894) Appeal Cases 57.*