Strimathoo Moothoo Vijia and others v. *Dorasinga Tever* (2 I.A 169)). It is, however, one thing to presume that a local legislature, when re-enacting a former statute, intends to accept the interpretation placed upon that statute by local courts of competent jurisdiction with whose decision the legislature must be taken to be familiar ; it is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed upon those terms by the courts of the foreign country with which the local legislature may or may not be familiar. There is no presumption that the people of Ceylon know the law of England, and in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew, or must be taken to have known, decisions of the English Courts under the Money Lenders Act, there is no basis for imputing to the legislature an intention to accept those decisions.

Mr. Wilberforce was on safer ground when he contended that it was the duty of courts in Ceylon to follow the decision of the English Court of Appeal on the construction of words identical with those used in a Ceylon Ordinance. In the case of *Trimble* v. *Hill* (L.R. 5 A.C. 342), the Board expressed this opinion :—

> " Their Lordships think the Court in the colony might well have taken this decision (i.e., a decision of the English Court of Appeal) as an authoritative construction of the statute. . . . Their Lordships think that in colonies where a like enactment has been passed by the Legislature the Colonial Courts should also govern themselves by it. "

This, in their Lordships' view, is a sound rule, though there may be in any particular case local conditions which make it inappropriate. It is not suggested that any such conditions exist in the present case, and the courts in Ceylon acted correctly in following the decision of the English Court of Appeal.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

1950 *Present :* **Jayetileke C.J. and Pulle J.**

SIMON WIJERATNE *et al.*, Appellants, and
RATNAYAKE (S. I. Police), Respondent

S. C. 26-27—M. C. Kalutara, 3,639

Criminal Procedure Code—Indictable offence—Assumption of summary jurisdiction by Magistrate—Evidence on oath not a condition precedent for forming necessary opinion—Sections 121 (2), 150 (1), 152 (3).

The opinion referred to in section 152 (3) of the Criminal Procedure Code can be based on a report sent to the Magistrate by the Police under section 121 (2). If there is material before the Magistrate on which he can form the opinion that the case is one which may properly be tried summarily, it is open to him to base his opinion upon it without taking evidence on oath.

APPEAL from a judgment of the Magistrate's Court, Kalutara. This appeal was referred by Jayetileke C.J. for decision by a bench of two Judges at the request of Gunasekara J.

M. M. Kumarakulasingham with *J. C. Thurairatnam*, for accused appellant.

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

Cur. adv. vult.

July 31, 1950. JAYETILEKE C.J.—

This appeal was referred by me for decision by a bench of two Judges at the request of Gunasekara J.

The question that arises for decision is whether the opinion referred to in Section 152 (3) of the Criminal Procedure Code can be based on a report sent to the Magistrate by the Police under Section 121 (2) of the Code. Section 152 (3) reads :—

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

In *Silva v. Silva*[1] it was held by a Divisional Bench that a Magistrate acting under Section 152 (3) shall state his reasons for the opinion that the offence may be properly tried summarily and that his opinion is subject to review by the Supreme Court. Middleton J. said :—

> " Any case which cannot be tried shortly and rapidly in point of matter and time which involves any complexity of law, fact or evidence, and double theory of circumstances, a very difficult question of intention or identity or in which the punishment ought really to exceed two years is one that is not properly triable summarily."

In the present case Sub-Inspector Ratnayake of Tebuwana sent to the Magistrate a report under Section 121 (2) of the Code dated June 17, 1949, (hereinafter referred to as B report) which reads :—

> "I, C. A. B. Ratnayake, Sub-Inspector of Police of Tebuwana, hereby report that I have inquired into the complaint of O. M. David Appuhamy of Nahalla made on June 16, 1949, at about 2 or 3 a.m. While he was sleeping in his boutique he was put up by Singho Appu who was also sleeping with him. He flashed his torch and saw Simon Wijeratne, Sugathan and another unknown man inside the house. Sugathan snatched his torch and the unknown man dealt two blows

[1] *(1904) 7 N. L. R. 182.*

on Singho Appu and threatened him not to get up. Sugathan took clothes from the almirah and gave to the other two accused. In the meantime Udenis Appuhamy, the father of the complainant, got up and Simon Wijeratne threatened to cut him with a sword. They shouted and the accused went away with clothes, &c., valued at Rs. 307. They found a breach had been made on the house wall. The offences are punishable under Sections 443 and 369 of Cap. 15, Volume 1 of the L. E. C. On receipt of the information Police visited the scene and made inquiries. In this connection Police arrested Don Simon Wijeratne of Nahalla. They move that he be remanded till June 23, 1949, pending the completion of the inquiry".

On June 23, 1949, he instituted proceedings under Section 148 (1) (*b*) charging the two persons referred to in the earlier report with house-breaking by night by entering into the house of O. M. David in order to commit theft and with theft of articles valued at Rs. 307 belonging to O. M. David under Sections 443 and 369 of the Penal Code. On that day the 1st accused was present on remand and the Magistrate made an order that summons should issue on the 2nd accused returnable on July 14, 1949. On the summons returnable date both accused were present and the Magistrate made the following order :—

> "Vide B report filed. I peruse the B report and assume jurisdiction as A.D.J. Facts simple. Expeditious. No complications of law or fact. Less expense to parties and Crown".

Mr. Kumarakulasingham argued that as the opinion formed by the Magistrate is subject to review by this Court it must be based on evidence taken on oath and not on hearsay evidence. In an unnamed case [1] it was held that a Magistrate has the power to act under Section 152 (3) if, in his opinion, the case is essentially a simple one. In order to decide whether a case is a simple one it seems to me that it is quite unnecessary to take evidence on oath. The contention put forward by Counsel appears to me to be untenable unless there is some provision in the Criminal Procedure Code which makes it obligatory on the Magistrate to record evidence on oath before he forms his opinion under Section 152 (3). Section 152 (3) does not say on what materials the Magistrate should form his opinion that the offence may properly be tried summarily. But Section 149 (1), before it was amended by Section 5 of Ordinance No. 13 of 1938, provided that, where the report under Section 148 (1) (*b*) discloses an indictable offence, the Magistrate shall forthwith examine on oath the complainant or informant. It read as follows :—

> "In cases falling under head (*a*) of the last preceding section and when the report under (*b*) discloses an indictable offence the Magistrate shall forthwith examine on oath the complainant or informant and if he thinks it advisable may also examine any other person and may for that purpose summon before him the complainant or informant or any other person".

In *Heyser v. James Silva* [2] and *Mohamadu v. Aponso* [3] this Court took the view that the failure to take the evidence of the complainant or

[1] *(1915) 1 C. W. R. 16.* [2] *(1915) 1 C. W. R. 136.*
[3] *(1915) 1 C. W. R. 170.*

informant on oath as required by Section 149 (1) before a Magistrate exercises the powers created by Section 152 (3) is a fatal irregularity. The amending Ordinance substituted the word "may" for the word "shall". Section 149 (1) as amended reads :—

Section 150 (1).

"Where the offence alleged in any proceedings instituted under Section 148 (1) (*a*) or Section 148 (1) (*b*) is an indictable one the Magistrate may, although no person by name is accused of having committed such offence, examine on oath the complainant or informant and any other person who may appear to the Magistrate to be able to speak to the facts of the case."

The amending Ordinance gives the Magistrate a discretion as to whether or not he should examine the complainant or informant on oath before he exercises the powers conferred by Section 152 (3). It follows, therefore, that, if there are materials before him on which he can form the opinion that the case is one which may properly be tried summarily, it is unnecessary for him to examine the complainant or informant on oath, and it is open to him to base his opinion upon them.

In the present case the Magistrate had before him the B report which contained a full statement of the facts. Section 126A shows that the Magistrate has the power to act on the report of the investigating officer and order the detention of the accused in the custody of the Fiscal. Section 126 gives the investigating officer the power to release an accused if there is not sufficient evidence or reasonable ground of suspicion to justify his sending the accused to the Magistrate's Court. When Sub-Inspector Ratnayake produced the 1st accused in Court and moved for summons on the 2nd accused the Magistrate was, in my opinion, entitled to assume that there was sufficient evidence to support the complaint in the B report and to act upon it. I would answer the question in the affirmative and direct that the case be listed for further argument in due course.

PULLE J.—

I agree that there is no provision of law which prevents a Magistrate from acting only on the material contained in a B report before he assumes jurisdiction under Section 152 (3) of the Criminal Procedure Code. Cases like *Heyser v. James Silva*[1] and *Mohamadu v. Aponso*[2] can be explained on the basis that a step in procedure prior to the assumption of jurisdiction expressly laid down by Section 149 (1) of the Code before its amendment in 1938 had not been followed. In the latter case Shaw J., referring to the provisions of Section 149, states "The object of the provision referred to is that the Magistrate shall not act under Section 152 (3) until he had before him sworn evidence stating that the case is a proper one for the exercise of the powers of a District Judge summarily". Assuming that the object of Section 149 was as stated by Shaw J., this section, as amended, leaves it optional to a

[1] *(1915) 1 C. W. R. 136.* [2] *(1915) 1 C. W. R. 170.*

Magistrate, having a B report before him, to take evidence before assuming jurisdiction under Section 152 (3). As a matter of construction there is nothing in Section 152 (3) which compels one to read into it a requirement to take evidence. I am not aware of any principle of law which makes it necessary that the assumption of any jurisdiction conferred on a Judge must be preceded by the taking of evidence on oath. I think that a Magistrate may act on any material properly before him as a Magistrate before assuming jurisdiction, provided the conditions laid down in *Silva v. Silva*[1] are satisfied.

The case of *Abanchi Hamy v. Peter*[2] was cited in the course of the argument by learned Crown Counsel. A bench of two Judges decided that the failure to take the complainant's evidence before assumption of jurisdiction was not a fatal irregularity but one curable under Section 425 of the Code. In the view I take that the failure to record evidence in the case under consideration is not even an irregularity, the application of this decision does not arise.

I would answer the question whether the opinion referred to in Section 152 (3) may be based on the B report in the affirmative.

Appeal to be listed in due course.

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

THANGAMMAH *et al.*, Appellants, *and*
KANAGASABAI *et al.*, Respondents

S.C. 471—D. C. Jaffna, 1,105

Misjoinder—Parties and causes of action—Right of pre-emption—Separate sales by co-owners—Right to purchase—One cause of action—Joinder of plaintiffs—Civil Procedure Code—Section 11.

Plaintiffs who were each entitled to ½ share of a land brought an action for pre-emption of the other half which belonged to two sets of defendants, viz., the first and second defendants who by 8D1 transferred to the eighth defendant and the third to the sixth defendant who by 8D2 also transferred to the eighth defendant. On an objection that there was a misjoinder of parties and causes of action,

Held, that the plaintiffs' cause of action was not the execution of deeds 8D1 and 8D2 but the violation of the plaintiffs' right to purchase the outstanding half-share and that there was no misjoinder.

Held further, that the right of pre-emption is based on an implied contract whereby co-owners are jointly bound to one another. The plaintiffs were therefore joint contractors and entitled to join in one action under section 11 of the Civil Procedure Code.

[1] *(1904) 7 N. L. R. 182.* [2] *(1918) 24 N. L. R. 15.*