[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present :* **Basnayake, C.J. (President), Abeyesundere, J., and Silva, J.**

THE QUEEN *v.* V. P. DAVID PERERA

APPEAL NO. 9 OF 1962, WITH APPLICATION NO. 9

S. C. 23—M. C. Kandy, 18,359

Trial before Supreme Court—Charge of possessing or using a forged or counterfeit currency note—Burden of proof—Evidence—Effect of admission of irrelevant evidence—Limits within which the Judge may ask questions from a witness—Penal Code, ss. 478B, 478C—Evidence Ordinance, s. 165.

In a prosecution for possession or use of a forged or counterfeit currency note the burden is on the prosecutor to prove that the accused knew or had reason to believe that the currency note referred to in the charge was forged or counterfeit.

Although no objection is taken at the trial to the admission of irrelevant ovidence, a verdict founded on such evidence is bad.

Assuming that it is open to a Judge in a trial by jury to employ the provisions of section 165 of the Evidence Ordinance to put questions to a witness, then, if he asks questions about any facts which are irrelevant, it is incumbent on him to draw the attention of the jury to those facts and direct them that they must not base their verdict on those facts elicited by him which are irrelevant. A Judge acting under section 165 should be wary in questioning witnesses under the powers conferred thereby, especially when the witness is an accused person giving evidence on his own behalf.

A Judge is not entitled to put leading questions, the answers to which are calculated to prejudice the accused. Further, he must not ask questions in such manner or in such great number as to encroach upon the functions of a Counsel who appears in the case.

APPEAL against a conviction in a trial before the Supreme Court.

L. P. P. Wettesinghe (Assigned), for Accused-Appellant.

V. T. Thamotheram, Senior Crown Counsel, for Attorney-General.

July 24, 1962. BASNAYAKE, C.J.—

The accused-appellant has been convicted on an indictment containing the following charges :—

" 1. That on or about the 9th day of February 1959 at Dodanwela in the division of Kandy, within the jurisdiction of this court, you did have in your possession a forged or counterfeit currency note, to wit, a

2——R 4091—1,855 (2/65)

Rs. 100 currency note bearing Serial No. V/13 18748 knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine and that you have thereby committed an offence punishable under section 478 C of the Penal Code as amended by Ordinance 19 of 1941.

" 2. That at the time and place aforesaid and in the course of the same transaction you did use as genuine the said forged or counterfeit currency note by tendering the same to one D. M. Dhanapala, knowing or having reason to believe the same to be forged or counterfeit and that you have thereby committed an offence punishable under section 478B as amended by Ordinance 19 of 1941.

" 3. That on or about the 11th day of February 1959 at Nattaranpotha in the division of Kandy, within the jurisdiction of this court, you did have in your possession a forged or counterfeit currency note, to wit, a Rs. 100 currency note bearing Serial No. V/13–18748 knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine and that you have thereby committed an offence punishable under section 478C of the Penal Code as amended by Ordinance 19 of 1941."

The burden was on the prosecution to prove that the appellant knew or had reason to believe that the note referred to in each of the charges against him was forged or counterfeit. The prosecution relied on the notes themselves to discharge that burden. Evidence, that the accused appellant's father-in-law had been charged with the forgery of one-rupee notes and the possession of forged one-hundred rupee notes, was also given. The Crown has not been able to satisfy us that that evidence is relevant to the charges against the appellant. Although no objection was taken at the trial to the admission of that evidence, a verdict founded on irrelevant evidence (*Lion Yam Hong & Co. v. Lam Choon & Co.*)[1] is bad.

The accused gave evidence and denied that he knew or had reason to believe that the notes were forged. He said that he received them from his father-in-law for the purpose of building a house and that as the amount was insufficient for that purpose he hoped to increase it by gambling with the money. He made no secret of the fact that he had three one-hundred rupee notes. When a creditor of his demanded his debt the accused said in the hearing of the witness Herath Mudiyanselage Ukku Banda Herath, " Not that I do not have money, I have got three hundred rupee notes and I have to change them and give you ", and he showed the notes in support of his statement. One of those three notes

[1] *(1928) A. I. R. (P. C.) 127.*

was a note he had received as part of his salary. Herath took them into his hands and examined the notes. He says he did so because of a remark of his father, " How can this man have so much money, these must be forged notes ". The accused permitted not only Herath but his father also to examine the notes. They did not think they were forged. In fact Herath says they thought they were genuine. Even the post-master who detected the forgery says that if the forged note was handed with a genuine note he would not have detected it. The prosecution states nothing about the third note which the accused-appellant says he used for the purchase of a petromax lamp in Kandy town.

One of the forged notes passed detection by the witnesses Dhanapala, Heen Banda's wife, and Heen Banda himself who took it to the Post Office for the purpose of depositing it in the Savings Bank three days after he had received it. He was all along under the impression that the note was genuine. In fact that note was first given to Dhanapala in payment of his winnings at gambling and as he lost money to Heen Banda, Dhanapala tendered the note to him and obtained the difference. Heen Banda says he had seen hundred rupee notes before and that he had hundred rupee notes in his house on previous occasions and that he noticed no difference between those notes he had seen and handled before and the note he took to the Post Office. At the Post Office the forgery was detected. Though Heen Banda was unable to identify the note at the trial, the postmaster's evidence establishes that one of the forged notes was the note Heen Banda brought. The prosecution evidence does not establish that the accused knew or had reason to believe that the notes were forged or counterfeit. On the other hand the evidence of some of the prosecution witnesses negatives guilty knowledge and indicates innocence on the part of the accused-appellant because the notes were accepted by so many as genuine and the accused was ever ready to let others examine them. The absence of proof of this important element affects the verdict as it has no evidence to support it. We therefore quash the conviction and direct that a verdict of acquittal be entered.

Learned counsel for the appellant has drawn our attention to the fact that the learned trial Judge has asked the accused a very large number of questions which, he submits. has prejudiced him. Many of them, he complains, are leading questions. He has drawn our attention in particular to the following question which he submits was unfair as no one was able to state the difference between P1 and P2 :—

" 706. Q : P2 is the note which was found by the police in your purse ?

A : Yes."

The learned Judge directed the jury that the answer was an admission and that they were entitled to act on it. It was demonstrated during the trial that by looking at the notes one could not say which was P1 and which was P2 as they looked alike, bore the same number and the same signatures. There is no record that the note was shown to him as in the case of P1 in regard to which he was questioned earlier. But even if it had been shown to him there was no distinguishing mark on the note by which he could have said that it was the note the police found in his purse. It merely goes to illustrate what little value can be attached to an answer given to a leading question on a very important matter.

In view of the first Proviso to section 165 of the Evidence Ordinance that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved, it seems doubtful whether the power referred to by section 165 is meant to be exercised in trials by jury and if so whether facts which are not relevant can be elicited by the Judge under the power conferred by the section. If it is open to a Judge in a trial by jury to act under that section and ask questions about any facts which are irrelevant, then in any case in which he does so, he should draw the attention of the jury to those facts and direct them that they must not base their verdict on those facts elicited by him which are irrelevant. A Judge acting under section 165 should be wary in questioning witnesses under the powers conferred thereby, especially when the witness is an accused person giving evidence on his own behalf. The jury are apt to attach greater importance to questions emanating from the Judge than to those emanating from counsel on either side. In the formulation of those questions the Judge should take care that he does not unwittingly give the jury the impression that he does not believe the accused. If he does so, it is likely that they will be influenced to the prejudice of the accused by what appears to them to be his view. In other jurisdictions of the Commonwealth where the limits within which a Judge may ask questions from those who enter the witness-box are not regulated by statute they have been laid down by judicial pronouncement. Those judicial *dicta* serve as a usual guide in the application of our section, and some of the more important of those pronouncements are set out below *in extenso* as the reports in which they occur are not readily available in most of our provincial libraries. In the South African case of *Rex. v. Laubscher* [1] Innes C.J. observed :

> " The second irregularity suggested was that the Judge put leading questions favourable to the Crown case, the answers to such questions being calculated to prejudice the accused. That might have been a serious allegation had the questions referred to been particularised.

[1] *1926 A. D. 276 at 281.*

Because though a Judge has a certain latitude as for instance in putting leading questions of an explanatory or supplementary nature—*Hodgson v. Rex* (18 Cr. Ap. Reports, p. 5)—he is certainly not entitled to put leading questions, the answers to which are calculated to prejudice the prisoner."

In the English case of *Yuill v. Yuill* [1] Greene M.R. stated—

"The other argument was to the effect that the trial was unsatisfactory owing to the fact that the judge took an undue part in the examination of witnesses. It was said that the judge put many more questions to witnesses than all the counsel in the case put together and that he in effect took the case out of counsel's hands to the embarrassment of counsel and the prejudice of his case. The part which a judge ought to take while witnesses are giving their evidence must, of course, rest with his discretion. But with the utmost respect to the judge it was, I think, unfortunate that he took so large a part as he did. I wish to say at once that having read the many pages of the transcript over which the judge's questions extend to the exclusion of counsel, often at the most critical points of the examination or cross-examination, I can find no trace whatever of any tendency to take sides or to press a witness in any way which could be considered undesirable. It is quite plain to me that the judge was endeavouring to ascertain the truth in the manner which at the moment seemed to him most convenient. But he must, I think, have lost sight of the inconveniences which are apt to flow from an undue participation by the judge in the examination of witnesses. It is, of course, always proper for a judge—and it is his duty—to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get to what seems to him to be

[1] *(1945) 1 All E. R. 183.*

the crucial point, himself intervenes and prematurely puts the question himself. I think it desirable to throw out these suggestions in case they may be found helpful in the future . . . . . .

"A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation."

Finally in the case of *Jones v. National Coal Board*[1] Denning L.J. endorsed what Greene M.R. had said in *Yuill's* case and added—

"The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

Judges would do well to bear in mind the words in the passages quoted above and endeavour to abide by the counsel contained therein. In the instant case it is difficult to escape the conclusion that the fact that there were limits to the power of a Judge to ask questions had escaped the attention of the learned Judge. Out of a total of 713 questions appearing in the transcript 293 are attributed to him. Not all those questions appear to be questions designed "to discover or to obtain proper proof of relevant facts". Some of them were questions asked from the accused-appellant who gave evidence on his own behalf on matters of record in another proceeding against the accused-appellant's father-in-law without due proof of those matters. The accused was required to furnish an explanation for his conduct in not obtaining from his father-in-law the details about the cases against him for forgery or possession of counterfeit currency notes. The line of questioning followed by the learned Judge tended to show the accused-appellant in an unfavourable light and it is not unlikely that the jury inferred, from the fact that his father-in-law was involved in cases of forgery and possession of forged or counterfeit currency notes that the accused knew or had reason to believe that the notes which were in his possession were forged or counterfeit.

Accused acquitted.

[1] *(1957) 2 W. L. R. 760.*

1961 *Present :* **H. N. G. Fernando, J., and L. B. de Silva, J.**

S. M. BASTIAN, Appellant, *and* S. M. BENEDICT, Respondent

S. C. 152/1959—D. C. Negombo, 18849

Contract—Funds sent by a Ceylonese from abroad to Ceylon in contravention of Exchange Control laws—Use of them by sender's agent in Ceylon to conduct business—Claims of principal and agent against each other resulting from the business transactions—Objections to them on ground of illegality—Validity.

The defendant was a Ceylonese who had lived in Malaya for sometime. When he was in Malaya he executed a Power of Attorney in favour of the plaintiff in order to enable the plaintiff to invest his moneys which he proposed to send from Malaya and otherwise to conduct business in Ceylon. Thereafter he successfully transferred his secret assets to Ceylon by the device of handing money to persons in Malaya who arranged for premium payments to be made to the plaintiff in Ceylon but for the defendant's credit.

After the defendant returned to Ceylon in 1953, the plaintiff sued him for a certain sum of money as due to him as salary and commission and expenses arising from the agency. The defendant claimed a certain sum in reconvention. The trial Judge declined to enter a decree upon either the plaintiff's claim or the defendant's claim in reconvention. He held that the transactions between the parties were contrary to public policy, being tainted by illegality on the ground that the moneys which the plaintiff received in Ceylon on the defendant's account were brought into Ceylon by illegal means.

Held, that the finding of the trial Judge in regard to the question of illegality was wrong. " Assuming that the plaintiff would not have acted as the agent of the defendant and thereby become entitled to claim remuneration and expenses but for the fact that the defendant's money came to Ceylon by means which contravened Ceylon's Exchange Control laws, it was not necessary for the plaintiff to found his claim on the illegality if any. The agency and the right to earn remuneration were proved without any need to rely upon any facts which constituted a contravention of those laws. *Vice versa* the defendant's counter-claim was proved, not by any reliance on the fact of any contravention of those laws, but rather by the plaintiff's own clear admissions in the correspondence."

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *C. Ranganathan, L. C. Seneviratne* and *Miss S. Wickremesinghe*, for Defendant-Appellant.

C. S. Barr Kumarakulasinghe, with *G. T. Samerawickreme, V. J. Martyn* and *K. Ratnesar*, for the Plaintiff-Respondent.

Cur. adv. vult.

November 10, 1961. H. N. G. FERNANDO, J.—

The defendant in this action is a Ceylonese who had apparently lived in Malaya for sometime being employed there in the Public Works Department. The plaintiff who described himself as a businessman is the defendant's brother-in-law, being married to a sister of the defendant.

In May 1950 the defendant wrote to the plaintiff (*P3*) that he intended to send some money to Ceylon " so that I can quit this country (Malaya) at any moment " and requested the plaintiff to look for a house for him in Jaffna or Colombo stating that he could spare about Rs. 30,000 for the purpose. A while later in *P5* of July 1950 the defendant informed the plaintiff that he would try to send some money from Malaya through Chettys who apparently would pay rupees in Ceylon in exchange for funds in Malaya, which they could thereupon remit to India. In order to enable the plaintiff to invest these moneys in Ceylon and otherwise to conduct business in Ceylon, the defendant executed a Power of Attorney in favour of the plaintiff. Thereafter several letters which show that the defendant successfully transferred his secret assets to Ceylon by the device of handing money to persons in Malaya who arranged for premium payments to be made to the plaintiff in Ceylon but for the defendant's credit. According to the judgment in this case it was common ground between the parties that in the course of about three years the defendant had collected about three lakhs of rupees in Malaya and was able to have corresponding payments made in Ceylon to the plaintiff. The letters *P41*, *P45*, *P47* and others written by the defendant to the plaintiff indicate that the defendant's anticipation in 1950 that it may be necessary for him to return to Ceylon " at any moment " was due to the fact that the Malayan Police were investigating into his affairs there and trying to trace his Bank balances and remittances. It is scarcely necessary to read between the lines of these letters in order to understand how the defendant was able to amass so much money in so little time. In one of these letters dated 21st July 1951 he says :

> " My promotion is a great disadvantage to me. Before I was in charge of a District, now in charge of State. Before I was in charge of overseers and now in charge of T. A. s. Income is nothing but I hope to organise and turn to be a fruitful one as at Klang in another year's time."

In regard also to the money which was to be accumulated in Ceylon the defendant was careful to instruct the plaintiff not to disclose " the collections in Ceylon " to the local tax authorities and to pretend instead that the money represented accumulations in Ceylon. The defendant ultimately returned to Ceylon in 1953 and at that stage the parties apparently fell out. This action was the consequence of their disagreement.

The plaintiff sued the defendant on the basis that he was entitled to a salary and commission and to expenses in a total sum of about Rs. 38,000, but stating that he owed the defendant a sum of Rs. 18,000 which had been taken from the defendant's moneys and utilised in the purchase of a house for the plaintiff. This amount was deducted in the plaint from the plaintiff's claims which became reduced to a sum of about Rs. 19,000. The defendant denied the liability and further counterclaimed a sum of about Rs. 23,000 as due to him on other transactions. In addition the defendant claimed that the plaintiff had purchased a house at Negombo with the defendant's money and that the purchase

was made on behalf of the defendant. On this ground the defendant claimed either a transfer of the property into his name or in the alternative a payment to him of Rs. 32,500. With regard to the plaintiff's claim for salary and commission the learned District Judge held on the relevant issues that a sum of Rs. 16,702·37 is due from the defendant to the plaintiff under these heads. As for the defendant's counter-claim for the sum of Rs. 23,000 odd alleged to be due to him on the accounts, the finding of the trial Judge was that the accounts were settled in or about July 1953 and that with one exception nothing is due from the plaintiff to the defendant. Apart from the question of prescription and the further interesting question of law which latter led the learned District Judge to reject the plaintiff's claim for the said amount of Rs. 16,000, I see no reason to interfere with the findings of fact to which I have just referred.

In December 1950 the plaintiff wrote *D 16* to the defendant stating that he had bought some property in Negombo for Rs. 25,000. He said then that he had bought it in his name because he would thus be able to get a loan on the property from a Bank. It is quite clear from this letter that the sum of Rs. 25,000 for the purchase price was taken by the plaintiff from the defendant's funds in his hands and indeed that fact was admitted both in the plaint and in the plaintiff's evidence. He said in the letter that the rent for the house was Rs. 65 and that the money would be credited to the defendant's account and further that if the defendant desired he would have the property written in his name. Again after the defendant had by *P 17* disapproved of the purchase in the plaintiff's name the defendant by *D 17* of 4th January 1951 agreed to transfer the deed to the defendant. In fact the income from this house in Negombo, No. 2 Mudaliyar's Road, was regularly credited to the defendant's account in the books which the plaintiff maintained. Quite clearly the purchase was made by the plaintiff out of the defendant's money and the plaintiff was a trustee in terms of section 84 of the Trusts Ordinance and he undoubtedly held the property in trust for the defendant. But according to the uncontradicted oral evidence of the defendant which the learned District Judge had accepted the matter of the Rs. 25,000 taken by the plaintiff for the purchase of the Mudaliyar's Road property was considered in July 1953 when the parties went into the accounts. According to this evidence the plaintiff had then stated that he wished to retain the house for himself and the defendant had agreed to this provided the Rs. 25,000 was paid back before the end of November 1953. This agreement was reduced to writing in the document *D 22* dated 19th July 1953 by which the plaintiff and his wife signed a promissory note in the following terms :

> " . . . . to repay the money of Rs. 25,000 to Mr. S. M. Bastian within four months time failing which we promise to transfer the premises No. 2 Mudaliyar's Road in favour of Mr. S. M. Bastian. I am transferring my premises No. 153 Kudapaduwa Negombo in favour of Mr. S. M. Bastian for Rs. 7,000. If we are not paying him the amount we are not mortgaging."

The learned Judge states that the Kudapaduwa property referred to in *D22* was transferred to the defendant in terms of *D22* and although no deed of transfer was produced at the trial it has not been represented to us at the argument of the appeal that there had in fact been no such transfer. Indeed counsel for the plaintiff conceded that if the defendant's claim to a transfer of the house in Mudaliyar's Road is to succeed there should be a re-transfer to the plaintiff of the Kudapaduwa house. The learned District Judge after consideration of the defendant's attitude to the matter of the Negombo house as disclosed in many of his letters formed the view that soon after the purchase of that house the defendant had led the plaintiff to believe that he would not insist on a re-transfer but would be satisfied if the plaintiff repaid to him the money utilised for the purpose. I do not propose to question the finding in regard to this for I am in agreement with the further finding of the learned Judge that the agreement evinced by *D22* was a compromise of the rights if any which the defendant may have had on the basis of a trust; or in other words that in lieu of the former rights which the defendant would have had as a beneficiary under the trust he accepted the promises contained in *D22* and cannot now seek to enforce the trust. I agree also with the learned District Judge that in so far as *D22* contains a promise to re-transfer the property it is not enforceable for want of notarial execution.

The promise in *D22* which the learned District Judge held to have been accepted by the defendant in lieu of his equitable right to ask for a re-transfer of the Negombo house was one to pay Rs. 25,000 within four months, that is to say before the middle of November 1953. In the letter written by the plaintiff on 25th November 1953 (*D34*) the plaintiff sets out his claims against the defendant amounting to a total sum of Rs. 16,635. He then refers to the transfer of the Kudapaduwa property of the value of Rs. 7,000 on which account his liability on *D22* became reduced to Rs. 18,000 and thereafter proceeds to reduce from Rs. 18,000 the sum of Rs. 16,635 claimed by him, on which basis the net balance due would be Rs. 1,365. Stating further that another sum of Rs. 4,000 is due to the defendant on the Pawn Shop account he enclosed a cheque for Rs. 5,365 and asked for the return of *D22*. This cheque the defendant returned to the plaintiff sometime later. If then the plaintiff's claim for Rs. 16,635 was a proper one he did tender the net balance due on *D22*, although strictly speaking his tender was about one week late. I would pay no heed to this slight delay, because the defendant's refusal to accept the cheque was in the circumstances referable not to the delay but to his disagreement with the plaintiff's claim that Rs. 16,635 was due to him. As it turns out the latter amount corresponds very nearly with the sums which according to the finding of the trial Judge remains due as salary, commission and expenses from the defendant to the plaintiff, namely, Rs. 16,702·37. Having regard to that finding the tender by the plaintiff of a sum of Rs. 1,365 being the net balance due

on *D22*, if it had been accepted by the defendant, would have fully liquidated the liability on *D22*. In the circumstances the most that the defendant can now demand upon *D22* is a sum of Rs. 1,297·63.

The ground upon which the learned District Judge declined to enter a decree upon either the plaintiff's claim or the defendant's claim in reconvention was, briefly stated, his findings on issues 34 to 37 that the transactions between the parties were contrary to public policy, being tainted by illegality on the ground that the moneys which the plaintiff received in Ceylon on the defendant's account were brought into Ceylon by illegal means. Since the balance that has to be struck in respect of the two competing claims is comparatively small I do not propose to state at length my reasons for the view that the finding of the learned Judge in regard to this question of illegality was wrong. The matter is dealt with admirably in the judgment of the English Court of Appeal in *Bowmakers, Ltd. v. Barnet Instruments Ltd.*,[1] from which it is necessary to cite only a few *dicta* :—

> " ' The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. . . . No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act ' (*per* Lord Mansfield in *Holman v. Johnson, 1775*)
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> " *Prima facie* a man is entitled to his own property and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action."
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> " In our opinion a man's right to possess his own chattels will as a general rule be enforced . . . even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim."

Assuming that the plaintiff would not have acted as the agent of the defendant and thereby become entitled to claim remuneration and expenses but for the fact that the defendant's money came to Ceylon by means which contravened Ceylon's Exchange Control laws, it was not necessary for the plaintiff to found his claim on the illegality if any. The agency and the right to earn remuneration were proved without any need to rely upon any facts which constituted a contravention of those laws. *Vice versa* the defendant's counter-claim that his moneys had been utilised for the purpose of the Negombo house was proved, not by any reliance on the fact of any contravention of those laws, but rather by the plaintiff's own clear admissions in the correspondence.

[1] *(1944) 2 A. E. R. 579.*

There remains only the question whether the plaintiff's claim to a sum of Rs. 16,000 odd was prescribed. I see no reason to question the finding of fact of the trial Judge that the plaintiff was prevented by the deceit and fraud of the defendant from filing his action in time, and with the conclusion that on this ground the plaintiff's claim was not prescribed.

In the result the decree dismissing the action and the claim in reconvention is set aside. Decree will be entered in favour of the defendant for the sum of Rs. 1,297/63. Having regard to all the circumstances of the case, particularly the exaggerated claim made by the plaintiff, the plaintiff will pay to the defendant costs in respect of the proceedings in the lower court as in an action for a sum of Rs. 1,700. But the plaintiff will be entitled to the costs of appeal as in the same class.

L. B. DE SILVA, J.—I agree.

Decree varied.