1945 *Present:* **Wijeyewardene and Cannon JJ.**

DE ZOYSA, Appellant, *and* WIJESINGHE, Respondent.

230—D. C. Colombo, 5,588.

Action for penalty for sitting or voting in State Council when disqualified—Defendant's disqualification at time of his election as State Councillor—Removal of it prior to opening of State Council—Defendant's liability for penalty—"Hansard" as evidence of sitting or voting in State Council—Evidence Ordinance, s. 78 (2) (iii)—Prescription—Date of commencement of action—Date of accrual of cause of action—Prescriptive period of three years—The Ceylon (State Council) Order in Council, 1931, Articles 8, 9, 10, 11 and 15.

The plaintiff sued the defendant, under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of Rs. 12,500 as penalty due from him for sitting and/or voting in the State Council knowing or having reasonable grounds for knowing that he was disqualified for so sitting or voting or that his seat had become vacant.

At a State Council election held on February 22, 1936, the defendant was declared to be duly elected. On July 16, 1936, however, in consequence of a petition filed under the Ceylon (State Council Elections) Order in Council of 1931, his seat became vacant as his election was declared null and void on the ground that he was a Visiting Lecturer at the University College at the time of his election and was thus disqualified for election as a member.

To prove that the defendant sat or voted in the State Council on nineteen days between March 17, 1936, and June 26, 1936, plaintiff produced what he claimed to be "a copy of the Hansard" (P3):—

Held, (i) that even if P3 could be regarded as falling under section 78 (2) (iii) of the Evidence Ordinance it would be only evidence of the proceedings of the Legislature. Such a copy could not by itself prove that the defendant sat or voted in the State Council on the days in question. That fact should have been proved by the evidence of a witness, for instance, an official Stenographer, to the effect that he saw the defendant, who was known to him, sitting or voting in the State Council;

(ii) that even if the defendant had sat or voted on any one of the nineteen days referred to above, he would not be a person who sat or voted while "disqualified by this Order for so sitting or voting", as he had ceased to be a Visiting Lecturer at the University College on February 29, 1936, some days before the formal opening of the State Council;

(iii) that the defendant did not sit or vote after his seat became vacant within the meaning of Articles 11 and 15 of the Order in Council;

(iv) that, on the issue as regards prescription, the burden was on the plaintiff, and not on the defendant, to prove the date of filling the plaint in conformity with the provisions of Article 11 (2);

(v) that the cause of action in respect of a penal action is given to a common informer by virtue of Article 11 (2) and cannot be regarded as accruing to him only at the time when he files his plaint;

(vi) that section 10 of the Prescription Ordinance applies to penal actions filed under Article 11 of the Order in Council.

APPEAL from a judgment of the District Judge of Colombo. This was an action filed under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of Rs. 12,500 as penalty due from the defendant. The District Judge entered judgment for plaintiff for Rs. 9,500, as according to P3 (*vide* head-note), the defendant had sat or voted in the State Council without qualification, only on nineteen days. The main questions argued at the hearing of the appeal were:—(1) Has the plaintiff proved that the defendant sat or voted on the nineteen days or any of them in respect of which he has been awarded a penalty of Rs. 500 per day? (2) Was the defendant disqualified within the meaning of Article 11 or was the seat vacant on anyone of those days? (3) If the defendant sat or voted on those days did he do so knowing or having reasonable grounds to know that he was disqualified or the seat was vacant? (4) Is plaintiff's claim prescribed?

H. V. Perera, K.C. (with him *L. A. Rajapakse, K.C.*, and *Ian de Zoysa*). for defendant, appellant.—This was a common informer's action under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of a penalty due from the defendant for sitting and voting in the State Council " knowing and having reasonable grounds for knowing that he was disqualified ". It is submitted there was no proof that defendant knew or had reasonable grounds for knowing that he was disqualified. " Knowledge " is more certain than " belief ". The burden of proof was on the informer, who, however, placed no material before Court to show that the member knew or had reasonable grounds for knowing that he was disqualified. The judgment reported in *41 N. L. R. 121* is authority for the proposition that the member was disqualified but not for the proposition that the member knew or had reasonable grounds for knowing that he was disqualified when he sat and voted in Council. One cannot attribute to the member the knowledge of the judgment of the Election Judge prior to the judgment. It is next submitted that the informer's claim is prescribed. According to Article 11 (2) of the Order in Council no action can be brought without first obtaining leave from the District Judge. In the present case a stamped paper in the form of a plaint was filed on January 17, 1936, and leave was asked to " prosecute the action ". The District Judge treated the paper as a draft plaint. The real plaint, properly stamped, was only presented in June 16, 1943. By this time the claim was clearly prescribed under section 10 of the Prescription Ordinance. Finally, it is submitted that defendant was not " disqualified " within the meaning of Article 11. On this point the decision of Akbar J., sitting as an election judge, on a doubtful point of law, is not binding on this Court. The argument adduced by the Law Officer of the Crown, appearing as *amicus curiae*, in the election case (*41 N. L. R. 121*) is adopted on behalf of the defendant in the present case and it is submitted that defendant was not in the position of a person " holding or enjoying a contract made with a person for and on account of the public service ".

N. Nadarajah, K.C. (with him *C. Rengamathan* and *V. K. Kandaswamy*). for plaintiff, respondent.—The right to recover the penalty is given only to a person suing. No cause of action arises till plaint is filed. This is a

statutory right of action created by Article 11 (2) of the (State Council) Order in Council, 1931, which is similar to section 9 of the House of Commons (Disqualification) Act, 1782 (22 Geo. 3, c. 45). In *Forbes v. Samuel* [1] Scrutton J., decided that, under the English Act, the right to recover a penalty attached on filing an information. See also *Combe v. Pitt* [2]; *Grosset v. Ogilvie* [3]; *Tranton v. Astor* [4].

[CANNON J.—Scrutton J., in *Forbes v. Samuel* (*supra*), only decided priority of claims.]

He also decided the question as to when the right to recover vests. It is not a right vested in everybody. The right to recover a penalty, unless expressly given, belongs to the Crown and not to any individual—*Bradlaugh v. Clarke* [5]. In the present case Article 11 (2) expressly gives the right to recover the penalty to " any person who shall sue for the same ", and a special procedure is indicated. The cause of action arises when plaint is filed. In the alternative, on the facts, it is submitted that the draft plaint became the real plaint immediately leave to sue was granted. In either case the claim is not prescribed. Further, the Prescription Ordinance cannot affect rights created by an Order in Council. The Ceylon legislature has limited powers. The Order in Council must prevail over the Prescription Ordinance—*Abeysekera v. Jayatilaka* [6], *Keith: Constitutional Law, pp. 530, 540.*

On the question of " knowledge " it is submitted that the words " knowing or having reasonable grounds for knowing " refer to facts and not to law. " Knowingly " means " deliberately "—*Twycross v. Grant* [7]; *Burton v. Bevan* [8]; *Attorney-General v. Cozens* [9].

[WIJEYEWARDENE J.—Where is the evidence that defendant sat and voted in Council?]

The copy of the " Hansard " produced (P3) is evidence of that—section 78 of the Evidence Ordinance. " Proceedings " include the fact that defendant spoke and voted in Council. See sections 57, 78 and 79 of the Evidence Ordinance and " *The Englishman* " *Ltd. v. Lajpat Rai* [10]. Further, there was no suggestion at the trial that defendant was impersonated in Council. The onus of proof is on the defendant as regularity of proceedings is presumed—section 114 of the evidence Ordinance.

H. V. Perera, K.C., in reply.—There is no repugnance between the Prescription Ordinance and the Order in Council as the Ceylon Legislature legislates under powers conferred on it by the King—*Megh Raj et al. v. Allah Rakhia et al* [11]. The Prescription Ordinance is of wide scope and applies to every application for relief—*Dodwell & Co. v. John* [12]. " Cause of action " must be distinguished from " right of action ". The cases cited for plaintiff deal with priority and decide that the right of action attaches to some particular plaintiff when he comes into Court. They do not deal with " causes of action " for purposes of prescription. A cause of action is what gives a person a right to come into Court. Under

[1] *(1913) 3 K. B. 706 at p. 734.*
[2] *(1763) 3 Burr. 1423.*
[3] *(1753) 3 Bro. P. C. 527.*
[4] *(1917) 33 T. L. R. 383.*
[5] *(1883) 8 A. C. 354.*
[6] *(1931) 33 N. L. R. 291.*
[7] *L. R. (1876-7) 2 C. P. D. 469.*
[8] *(1908) 2 Ch. 240 at p. 247.*
[9] *(1934) 50 T. L. R. 320 at p. 321.*
[10] *(1910) I. L. R. 37 Calcutta 760.*
[11] *(1942) 29 A. I. R. (Federal Court) 27.*
[12] *(1918) 20 N. L. R. 206.*

the Civil Procedure Code the Court can reject a plaint if no cause of action is disclosed. Therefore the cause of action must exist before plaint is filed. On the question of "knowledge", the cases cited for the plaintiff have no application to the facts of the present case.

Cur. adv. vult.

October 12, 1945. WIJEYEWARDENE J.—

This is an action filed under Article 11 of the Ceylon (State Council) Order in Council, 1931, for the recovery of Rs. 12,500 as penalty due from the defendant.

The defendant is a Barrister-at-Law and a Doctor of Philosophy of the London University. In 1934 the defendant agreed to lecture two hours every week as a Visiting Lecturer at the University College, Colombo, and was paid a fee of Rs. 10 per hour. He continued to deliver those lectures up to February 29, 1936.

The defendant and a medical man, Dr. Coorey, stood as candidates for the Colombo South seat at the State Council Election held on February 22, 1936. He polled about 2,000 votes more than Dr. Coorey and was declared to be duly elected. Dr. Coorey, thereupon, filed a petition under the Ceylon (State Council Elections) Order in Council, 1931, to have the election of the defendant declared null and void on the ground that he was a Visiting Lecturer at the University College at the time of his election and was thus disqualified for election as a member. By his judgment dated July 16, 1936 (*vide* (1936) 41 New Law Reports 121), the Election Judge—Mr. Justice Akbar—" determined " the defendant's election to be null and void and certified that " determination " to the Governor under Article 75 of the Ceylon (State Council Elections) Order in Council, 1931.

On July 17, 1936, the plaintiff's Proctors filed in the District Court of Colombo, a stamped paper XX in the form of a plaint (*a*) stating that " the defendant sat and voted in the State Council knowing and having reasonable grounds for knowing that he was disqualified and thereby became liable to pay a penalty of " Rs. 12,500 but (*b*) restricting his claim to Rs. 1,000.

Seven years later, the plaintiff filed what is referred to in the proceedings of the District Court as an " amended plaint " claiming the entire penalty of Rs. 12,500.

At the trial the plaintiff proposed, among others, the following issue:—

> " Did the defendant between February 22, 1936, and July 17, 1936, sit and/or vote in the State Council knowing or having reasonable grounds for knowing that he is disqualified by the State Council Order in Council for so sitting or voting or that his seat had become vacant? "

The defendant's Counsel stated that the words " or his seat had become vacant " should be deleted, as the plaintiff did not claim the penalty either in the " plaint " or " the amended plaint " on the ground that the plaintiff sat or voted when he knew or had reasonable grounds to know that his seat had become vacant. The District Judge, however, accepted the issue as proposed by the plaintiff.

The only evidence placed by the plaintiff before the Court was:—

(*a*) a copy of the evidence given by the defendant at the Election Petition Inquiry (marked P1);

(*b*) a copy of the judgment in the Election Petition Inquiry (marked P2); and

(*c*) " a copy of the Hansard " from March 17, 1936, to August 25, 1936, (marked P3).

The defendant's Counsel called no evidence.

The District Judge entered judgment for plaintiff for Rs. 9,500, as according to P3 the defendant had sat or voted only on nineteen days, viz.:—four days in March, eight days in May and seven days in June. The present appeal is preferred against that judgment.

The main questions argued at the hearing of the appeal were:—

(1) Has the plaintiff proved that the defendant sat or voted on the nineteen days or any of them in respect of which he has been awarded a penalty of Rs. 500 per day ?
(2) Was the defendant disqualified within the meaning of Article 11 or was the seat vacant on anyone of those days?
(3) If the defendant sat or voted on those days did he do so knowing or having reasonable grounds to know that he was disqualified or the seat was vacant?
(4) Is plaintiff's claim prescribed?

P3 was the only evidence submitted by the plaintiff in proof of the fact that the defendant sat or voted on nineteen days between March 17, 1936, and June 26, 1936. P3 is a bound volume of 1226 printed pages. This has obviously been bound by some private individual. On the cover of the bound volume appears the legend "Ceylon Hansard 1, 1936". It does not even show that it has been printed by the Government Printer. It was not produced by any official of the State Council, but was tendered by the plaintiff's Counsel. Now section 78 of the Evidence Ordinance reads:—

"The following public documents may be proved as follows:—

(2) the proceedings of the Legislature:—

(i) by the minutes of that body, or

(ii) by published Ordinances or abstracts, or

(iii) by copies purporting to be printed by order of Government ".

Clearly P3 does not come under section 78 (2) (i) or section 78 (2) (ii). It cannot come under section 78 (2) (iii), as there is nothing to show that it is a copy " purporting to be printed by order of Government ". Even if P3 is regarded as falling under section 78 (2) (iii) of the Evidence Ordinance, it will be only evidence of the proceedings of the Legislature. Such a copy cannot by itself prove that the defendant sat or voted in the State Council on the days in question. That should have been proved by the evidence of a witness, for instance, an official Stenographer, to the effect that he saw the defendant who was known to him sitting or voting

in the State Council (vide *Tranton v. Astor* [1]). I would in this connection refer to sections 74, 76, 77 and 80 of the Evidence Ordinance. Section 74 (*a*) (iii) declares records of Courts to be public documents and sections 76 and 77 provide for certified copies being produced in proof of the contents of a record. Section 80 then proceeds to enact:—

> " Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence . . . . given by a witness in a judicial proceeding . . . . in accordance with law and purporting to be signed . . . . the Court shall presume :—
>
> (i) that the document is genuine;
> (ii) that any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true; and
> (iii) that such evidence . . . . was duly taken. "

It has been held both here and in India that where it is sought to prove that a person gave certain evidence in an earlier judicial proceeding it is not sufficient to produce the record of that case, but there should be some independent evidence to show that the person who gave such evidence is the person against whom it is sought to be proved [vide *Queen-Empress v. Durga Sonar* [2] and *The King v. Sirimana* [3]]. A comparative study of those sections of the Evidence Ordinance leaves no doubt that if such evidence is necessary in the case of judicial records it becomes doubly necessary in the case of copies mentioned in section 78 (2) (iii). The decision in " *The Englishman* ", *Ltd. v. Lajpat Rai* [4] which was cited by the plaintiff's Counsel does not militate against the view I have expressed. In that case the question arose whether by producing a volume of Hansard's Reports of Parliamentary Debates the defendant could prove that a certain statement made in the " Englishman " with regard to the alleged seditious activities of Mr. Lajpat Rai was merely a repetition of what had been said in the British Parliament. Harington J. thought it could only be proved by calling the reporter or obtaining his evidence on commission. Woodroffe J. thought the deportation of Mr. Lajpat Rai was a matter of public history within the meaning of section 57 of the Indian Evidence Act and the Hansard might be used as an appropriate book of reference. I am unable to invest the commonplace fact of the defendant sitting in the State Council with the importance of " a matter of public history ". I hold that the plaintiff has failed to prove that the defendant sat or voted on anyone of the nineteen days referred to by plaintiff's Counsel.

The second question requires a careful consideration of Articles 8, 9, 10, 11 and 15 of the Ceylon (State Council) Order in Council.

Article 8 says that every person not disqualified under Article 9 shall be qualified for election if he is qualified to be registered as a voter and is actually so registered or, if he is not so registered, his non-registration as

[1] *(1917) 33 Times Law Reports 383 at 385.*
[2] *(1885) Indian Decisions (New Series) 11 Calcutta 580.*
[3] *(1925) 7 Ceylon Law Recorder 7.*
[4] *(1910) Indian Law Reporter 37 Calcutta 760.*

a qualified voter is due to some unavoidable circumstances. The relevant parts of Article 9 may be written as follows:—

A. No person shall be capable of being elected . . . . as a member . . . . . who . . . . . holds or enjoys . . . . . any contract . . . . . made . . . . . with . . . . any person for or on account of the public service.

B. No person shall be capable of. . . . sitting or voting in the Council as an elected . . . . member . . . . who . . . . . holds or enjoys . . . . . any contract . . . . made . . . . with . . . . . any person for or on account of the public service.

Clearly A does not refer to a person who enters into a contract after his election. It is equally clear that A does not make a person who held a contract before the election and ceased to hold it before the election incapable of being elected as a member. In other words A refers only to a person who is elected during the time he holds a contract. Consequently I hold that the only interpretation that could be placed consistently on B is that it makes a person incapable of sitting or voting as a member during the time he holds a contract. This interpretation of Article 9 brings it into harmony with section 1 of 22 George III Chapter 45 which reads:—

> " Any person who shall . . . . hold or enjoy . . . . any contract . . . . made . . . . with . . . . . the Commissioners of His Majesty's Treasury . . . . or with any other person . . . . for or on account of the public service . . . . shall be incapable of being elected, or of sitting or voting as a member . . . . during the time that he shall . . . . hold or enjoy any such contract . . . . ".

No doubt, Article 9 of our Order does not contain the words " during the time that he shall. . . . hold or enjoy any such contract " found in the English section. Those words had to be inserted in the English section, as that section refers at the beginning to a person " who shall . . . . hold or enjoy . . . . any contract ", as otherwise that section may have invalidated even the election of a person who had a contract which terminated months before the election. I think Article 9 conveys the same meaning as the English section by substituting the words " who . . . *holds* or *enjoys* " for " who shall . . . . hold or enjoy " followed by " during the time he shall . . . . hold or enjoy . . . ".

Article 10 enacts that " except for the purpose of electing the Speaker . . . . no member . . . . shall sit or vote . . . . until he shall have taken and subscribed . . . . the oath of allegiance . . . . or . . . . an affirmation . . . . ".

For the reasons given by me I hold that when Article 11 speaks of persons " disqualified by this Order for sitting or voting ", it refers only to persons who sit or vote:—

(*a*) without taking the oath as required by Article 10, or
(*b*) while holding or enjoying a contract, or
(*c*) while disqualified in any other way under the Order.

Even if the defendant sat or voted on any one of the nineteen days referred to above, he would not be a person who sat or voted while disqualified by this Order for so sitting or voting ", as he ceased to be a Visiting Lecturer at the University College some days before the formal opening of the State Council. I may add that this view derives some support from two decisions in the King's Bench Division.

In Forbes v. Samuel [1] Scrutton J. said:—

" The ground of this (the plaintiff's) objection was that, as the defendant's election was declared void as soon as he became interested in the first contract, he was voting when not a member. My attention, however, was not called to any statute under which he was liable to a penalty for voting when not a member if he did not hold a public contract at the time of voting; and in my opinion the statute (22 George III Chapter 45) on which the action is based does not impose such a liability ".

In *Tranton v. Astor* (*supra*) Low J. said:—

" The mere fact that he might have vacated his seat was not enough to entitle the plaintiff to recover as the penalties do not attach for sitting or voting while disqualified but for sitting or voting while executing, holding or enjoying a contract ".

There remains the connected part of the question to be considered—whether the defendant sat or voted after the seat became vacant.

Article 15 refers to the vacation of seats in the Council and the relevant portion of that Article reads as follows:—

" The seat in the Council of an elected . . . . member shall become vacant:—

(*a*) upon his death; or
(*b*) if . . . . he shall resign; or
(*c*) if he shall become incapable of sitting or voting as a member by reason of any of the provisions of Article 9; or
(*d*) . . . . or
(*e*) if his election shall be vacated or made void by reason of the commission of any corrupt or illegal practice or by reason of the declaration certificate or report of an Election Judge; or
(*f*) . . . . or
(*g*) . . . . or
(*h*) . . . . . "

The circumstances causing a vacancy under Article 15 (*e*) are those contemplated by Articles 73, 74, 78 and 79 of the Ceylon (State Council Elections) Order in Council. There is no doubt that the defendant's seat became vacant under Article 15 (*e*) when the Election Judge certified his " determination " to the Governor on July 16, 1936.

Did the defendant's seat become vacant on an earlier date under any other paragraph of Article 15? The only other paragraph that may have to be considered is paragraph (*c*). I do not think that paragraph applies to the defendant. That paragraph, like all other paragraphs, refers to

[1] *(1913) 3 King's Bench 706.*

something happening after the election. That paragraph requires that "he *shall* become incapable" and that the incapacity should be "by reason of any of the provisions of Article 9". Now, as I explained earlier in the judgment, the fact that the defendant functioned as a Visiting Lecturer on February 29, 1936, did not make him incapable of sitting or voting in the State Council which was opened some days afterwards. I would, therefore, hold that the defendant did not sit or vote after his seat became vacant.

I am aware that the interpretation of the Articles mentioned above is not free from doubt, but I think the interpretation I have given is in conformity with the principle adopted in *Dickenson v. Fletcher* [1] and *Remmington v. Larchin* [2]. In the former case Brett J. said:—

> "Those who contend that the penalty may be inflicted, must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty".

I come now to the third question argued before us. The defendant knew that he was a Visiting Lecturer at the University College up to February 29, 1936. If that fact disqualified him for sitting or voting as a member or rendered his seat vacant within the meaning of Article 11, could it not be said that he had the knowledge contemplated by that Article, though, in fact, the defendant might have held the view that his holding the post of Lecturer did not disqualify him from being elected as a member? My brother and I hold somewhat conflicting views on this question, and I do not, therefore, propose to deal with this matter, as the appeal could be decided on the points on which we agree.

For a decision of the issue of prescription it is necessary to determine—

(*a*) when the plaint was filed;
(*b*) when the cause of action accrued to the plaintiff, and
(*c*) whether there is any legal enactment fixing the period of limitation for actions under Article 11.

On July 17, 1936, the plaintiff's Proctors filed two documents (i) a stamped paper marked XX in the form of a plaint for a claim of Rs. 1,000 against the defendant and (ii) a motion asking for leave "to prosecute" the action "in terms of section 11 (2) of the Order in Council". Where a person has to obtain leave of Court for the institution of an action, that person has to submit to Court a statement giving full particulars of the claim so as to enable the Court to decide whether leave should be granted. It is usual in such and similar cases for practitioners in our Courts to file a draft plaint as such a draft plaint would set out concisely all the information required by the Judge. I would, therefore, regard XX as such a document and I find additional reason for this view in the facts (*a*) that the motion filed on that day did not contain any allegation with regard to the filing of a plaint on that day, and (*b*) that the first clause in the prayer of XX asked for leave in terms of Article 11 (2) and such a clause should not find a place in the plaint.

[1] (*1873*) *Law Reports 9 Common Pleas 1.*
[2] (*1921*) *3 King's Bench 404.*

On the papers being submitted to him on July 20, 1936, Mr. Crosette-Thambiah who was then Acting District Judge made an order to the effect that the application for leave should be supported. On the same day the Proctors filed another motion for raising the claim from Rs. 1,000 to Rs. 12,500. Mr. Crosette-Thambiah made an endorsement on that motion referring to the order he had already made on the previous motion. On July 29, 1936, he allowed both the applications after hearing Counsel. It is, therefore, clear that no plaint could have been filed before July 29, 1936. Dr. Dias Bandaranaike, the District Judge who heard the case, held, however, that certain entries appearing in the record proved that Mr. Crosette-Thambiah accepted document XX as a plaint on July 29, 1936, soon after he allowed the two applications. Dr. Dias Bandaranaike reached this decision for the following reasons:—

(*a*) the initials of Mr. Crosette-Thambiah appear against the amendment of clause 2 of the prayer in XX raising the claim from Rs. 1,000 to Rs. 12,500.

(*b*) the initials of Mr. Crosette-Thambiah appear just below the type-script, "Plaint accepted. Summons to issue on . . . . :" appearing on XX.

Neither (*a*) nor (*b*) has been dated and it is not, therefore, possible to say when Mr. Crosette-Thambiah initialled the document in these places. It is not unlikely that he would have initialled the amendment referred to in (*a*) above shortly after he allowed the amendment in order to identify the claim which he permitted the plaintiff to sue for. That this initialling and correction were not intended as an amendment of an accepted plaint is borne out by the following facts:—

(*a*) He did not strike out the words in paragraph 7 of XX, "but the plaintiff restricts his claim to Rs. 1,000".

(*b*) He did not alter the figures in paragraph 8 which alleges that "there is now due and owing from the defendant to the plaintiff the said sum of Rs. 1,000."

(*c*) He did not delete clause 1 of the prayer asking for leave to sue the defendant which would have no place in the plaint which had to be filed after obtaining leave of Court.

It appears to me most unlikely that Mr. Crosette-Thambiah would have accepted XX as a plaint on July 29, 1936. He knew that on that day itself he had authorized the increase of the claim from Rs. 1,000 to Rs. 12,500 and made with his own hand an amendment probably on that day itself in clause 2 of the prayer in XX. He would have known, therefore, that XX did not bear the stamps required for a plaint in a claim of Rs. 12,500. It is difficult to believe that he would have in those circumstances accepted an understamped paper as a plaint. Moreover, if he did, in fact, accept XX as a plaint there is no explanation for his failure to give a returnable date for the summons. It will be remembered that the type-script he initialled read:—"Plaint accepted. Summons to issue returnable on. . . . ". Though the Judge initialled it, no date was mentioned as the summons returnable date. I am inclined to think that this initialling was probably done on July 20, 1936, for identifying XX when it was submitted to him with the first motion for

obtaining his leave to file an action, and he, therefore, refrained rightly from giving on that occasion a returnable date for the summons. This is supported by the first entry made on the journal sheet and initialled by the Judge on July 20, 1936. That entry could not have been signed by the Judge before he initialled XX just below the type-script.

The deficiency of stamp duty was made good only on June 3, 1943. What has been referred to in the proceedings of the District Court as an amended plaint was filed on June 16, 1943, and the Court issued summons on the defendant for the first time on June 28, 1943.

I am unable to infer from the above facts that a plaint in the action was filed or accepted by Mr. Crossette-Thambiah on July 29, 1936. The trial Judge has thought it possible to hold that XX was accepted as a plaint in July, 1936, by the aid of the presumption permissible under section 114 of the Evidence Ordinance " that official acts have been regularly performed ". I do not think that the plaintiff could invoke the aid of such a presumption in the circumstances of this case [vide *Narendra Lal Khan v. Jogi-hari* [1]]. It appears to me further that the decision of the trial Judge on this matter could be reached only by holding that there was some laxity on the part of Mr. Crossette-Thambiah. It is the duty of every officer who receives a stamped document liable to stamp duty to examine the document to see if it is properly stamped (*vide* sections 32 and 33 of the Stamp Ordinance). Moreover, section 46 (2) (*h*) of the Civil Procedure Code enacts that " when the plaint is written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamps within a time to be fixed by the Court fails to do so . . . . the plaint shall be rejected ". To hold that Mr. Crosette-Thambiah accepted XX as a plaint would necessarily mean that he failed to fix a date for the plaintiff to supply the requisite stamps, though, apart from the examination required by the Stamp Ordinance, he was well aware that the paper was understamped. The burden, therefore rested on the plaintiff and not on the defendant, as held by the trial Judge, to prove the date of filing the plaint in this case. He led no evidence whatever, and I hold that a plaint was filed only when the " amended plaint " was filed on June 16, 1943.

When did the cause of action accrue to the plaintiff ? It is argued on his behalf that the cause of action in respect of a penal action accrues to a party only at the time when that party files a plaint and the plaintiff's Counsel relied on *Forbes v. Samuel* (*supra*) and the earlier cases referred to in that decision.

The penalty is created by sub-paragraph (1) of Article 11 which states merely the liability to pay a penalty. If there is only that sub-paragraph, the Crown alone could recover that penalty, as it is well settled law that " no man can sue for that in which he has no interest and a common informer can have no interest in a penalty of this nature unless it is expressly or by some sufficient implication given to him by statute " [vide *Bradlaugh v. Clerk* [2]]. We have, then, sub-paragraph (2) of Article 11 which enacts:—

" The penalty imposed by this Article shall be recoverable in the District Court of Colombo by any person who shall sue for the same;

[1] *(1905) I. L. R. 32 Cal. 1107.* [2] *(1883) 8 Appeal Cases 354.*

provided that no person shall bring an action for the recovery of any such penalty without first obtaining leave from the District Judge of the Court . . . . . ."

I interpret that sub-paragraph as giving a common informer an interest in the penalty and then setting up a special Court and a special procedure for the recovery of the penalty. He has the right given to him by the Article and he is told where he should file his action and what procedure he should follow. I am unable to read that sub-paragraph as stating that the interest in the penalty is given to a common informer if and when he files his plaint in the District Court of Colombo. If that contention is sound, it will not be possible for a common informer to file a plaint disclosing a cause of action and the plaint will have to be rejected under section 46 of the Civil Procedure Code. I do not think the authorities relied on by the plaintiff's Counsel establish the proposition put forward by him. In those cases the Courts were concerned with the question which of the two common informers who had sued for a penalty was entitled to priority over the other. It was held that the common informer who had obtained the previous writ did not lose his priority, even though the subsequent claimant obtained judgment earlier, " by the accidents of legal procedure ". It is true that in some of those cases the language used is such that when read apart from the context it conveys the idea that the right to the penalty becomes vested in the common informer only when he comes to Court. This, however, was not the meaning intended to be conveyed. I find that in the very case *Forbes v. Samuel* (*supra*) Scrutton J. paraphrases the sentence, in an earlier case,—" on filing an information the informer has a right to the penalty vested in him "—to mean that on filing the information the informer " secures his position against a later informant ".

Even if one interprets the principle in those English cases—that the party first coming to Court " attaches " the right of action to himself—to mean that the cause of action accrues only when the party comes to Court, then the cause of action in this case accrued to the plaintiff in July, 1936, when he filed papers in the District Court and asked for leave to sue the respondent.

In any event then the plaint has been filed in this case nearly seven years after the accrual of the cause of action.

The Ceylon (State Council) Order in Council does not fix a period of limitation for an action under Article 11, but section 10 of the Prescription Ordinance enacts:—

" No action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued ".

It is true that the Prescription Ordinance does not define " action " and " cause of action ". These terms are, however, defined in the Civil Procedure Code and an action filed by a common informer is regulated by the provisions of the Code except where special provision is made by Article 11. It would not, therefore, be inappropriate to adopt those

definitions in the present case. Moreover, " action " even in the restricted sence in which it is generally used would denote a civil action brought by a subject and commenced by writ or plaint (*vide* Halsbury's Laws of England, Volume 1, Paragraph 1). I would, therefore, hold that section 10 of the Prescription Ordinance applies to penal actions filed under Article 11. I may add that I do not see any incongruity in making a provision of a local Ordinance like the Prescription Ordinance applicable to an action permitted by an Order in Council.

The Prescription Ordinance was enacted in 1871 by the Governor of Ceylon with the advice and consent of the Legislative Council in the exercise of the powers vested in him under the Royal Instructions. An Ordinance so passed derives its authority from the Sovereign just as much as an Order in Council and where the Order in Council does not contain a conflicting provision with regard to limitation I do not see any reason why the Prescription Ordinance should not apply [vide *Megh Raj et al. v. Allah Rakhia et al.* [1]]. Where a local Ordinance is not to be made applicable to an Order in Council it is stated so in express terms as in section 2 (v) of the Interpretation Ordinance. It is, however, interesting to note that in view of that provision, the Ceylon (State Council) Order in Council provided in express terms in Article 4 (3) that the Interpretation Ordinance should apply to that Order in Council.

For the reasons given by me I allow the appeal and dismiss the plaintiff's action with costs here and in the Court below.

CANNON J.—I agree.

Appeal allowed.