Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Harvey v. *The King, from the Supreme Court of Ceylon; delivered* 13*th June* 1901.

Present at the Hearing:
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Lord Lindley.*]

This is an appeal from an order of the Supreme Court of Ceylon refusing to set aside a judgment obtained against the Appellant in default of appearance under the following circumstances.

The Appellant was an engineer employed by the Government in Ceylon. In 1891 he met with a serious accident which so affected his health and mental faculties that in 1894 he was compelled to give up work. He retired on a pension and came to England. In January 1895 he attempted to return to Ceylon and he proceeded on his way there as far as Naples when he was compelled by the state of his health to return to England. He has ever since resided in this country except for a short time when he went to Belgium. Ever since the beginning of 1895 Mr. Harvey has been quite unable to attend to any business or to manage his own affairs.

On the 9th January 1895, the Government of Ceylon, through the Attorney-General, instituted an action in the District Court of Badulla, for the recovery of Rs. 27,823. 44 alleged to have been received by Mr. Harvey for the use of the Crown in his capacity of Provincial Engineer

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and to have been by him wrongfully appropriated and converted to his own use; and the Government sequestrated his property.

On or about the same date the said Government also commenced criminal proceedings in the Police Court of Badulla before Mr. J. G. Fraser, who was also the Judge of the District Court, charging Mr. Harvey criminally in respect of the same matters as those referred to in the action.

On 2nd March 1895, upon an extradition warrant issued at the instance of the Government of Ceylon in connection with the said criminal proceedings in the Police Court of Badulla, Mr. Harvey (who was at that time in England and confined to his bed by illness) was arrested and incarcerated in Holloway Gaol.

On 15th March 1895, upon an affidavit by William Aldren Turner, M.D., as to Mr. Harvey's mental and bodily condition, Mr. Justice Wright after hearing Counsel for the prosecution, ordered Mr. Harvey to be released on bail till 24th March 1895.

On 22nd March 1895 upon an affidavit by Bernard Frederick Hartzhorne, M.R.C.S., England, as to Mr. Harvey's mental condition, Mr. Justice Wright after hearing Counsel for the prosecution, allowed the bail to be enlarged till 30th March 1895, and ordered Mr. Harvey to be examined by Dr. Gage Brown (now Sir Charles Gage Brown, K.C.M.G.), at that time holding the post of Medical Adviser or Physician to the Colonial Office. That gentleman made a report which stated that Mr. Harvey was quite unfit to be sent to Ceylon, and could not here be dealt with in a Court of Law with justice, and that he would probably become less and less fit to be brought to trial. On this report Mr. Justice Wright, on 29th March, enlarged Mr. Harvey's bail till 29th June 1895.

At the suggestion of Mr. Justice Wright the said Drs. Gage Brown and Bernard Frederick Hartzhorne, under the directions of the solicitor to the Treasury, jointly examined Mr. Harvey; and they reported to the said solicitor as follows on 24th May 1895:—"His brain condition has "deteriorated since he was reported on the 25th "day of March last, as the report indicated it "would be likely to do . . . . His memory "cannot be relied on for anything . . . Our "conclusion is that he is of unsound mind "through brain disease, and cannot justly be "put upon trial. He cannot plead, he cannot "understand evidence, he cannot give evidence."

On 30th May 1895, upon reading the aforesaid report and after hearing Counsel for the prosecution, Mr. Justice Wright ordered the bail to be enlarged till 29th December 1895.

Between June and December 1895 Mr. Harvey was examined more than once by the said Dr. Gage Brown and by Dr. Mawdsley, a specialist in brain diseases appointed by the Secretary of State for the Colonies on behalf of the said Government, and the said doctors jointly made a confidential report to the said Secretary of State, as the result of which the solicitor to the Treasury on behalf of the Government unhesitatingly consented to the recognisances of Mr. Harvey and his sureties being finally discharged.

On 20th December 1895 Mr. Justice Wright accordingly ordered the said recognisances to be discharged, and he furthermore directed that the attendance of Mr. Harvey at Bow Street should be dispensed with. The criminal proceedings instituted in the Police Court of Badulla against Mr. Harvey by the Government of Ceylon thereupon came to an end.

In January 1896 the summons in the civil action was served on Mr. Harvey in Brussels.

On the 7th March 1896 Mr. Taylor who had been appointed by Mr. Harvey in 1894 to act for him in his absence informed the Court by affidavit of Mr. Harvey's condition and of the proceedings in England before Mr. Justice Wright. The action came on on the 23rd March 1896 but it was postponed for three months to enable Mr. Taylor to communicate with the Defendant's solicitors in London.

On the 23rd June 1896 the action was called on. A motion that the action should abate was made by a Mr. De Silva acting under instructions from England and came on at the same time. Affidavits by him and by a solicitor in England and a number of exhibits from England including office copies of the orders made by Mr. Justice Wright and of the evidence before him were laid before the Court, and the action and the motion were postponed for a fortnight.

On the 7th July 1896 the motion was dismissed with costs and an order was made that the case should be set down for *ex parte* hearing on the 15th October 1896.

On the 15th July 1896 a Master in Lunacy in this country made an order under Section 116 of the Lunacy Act 1890 appointing Mrs. Harvey to receive the income of Mr. Harvey's property and to apply such income for the maintenance of Mr. and Mrs. Harvey and their infant child. This order is headed "In the matter of Henry "Beecroft Harvey a person of unsound mind "not so found by inquisition" and it contains a recital in the following terms "it having been "established to my satisfaction that the said "Henry Beecroft Harvey is of unsound mind "and is incapable of managing his affairs."

On 15th October 1896, before the *ex parte* trial of this action, the said Attorney-General and Mr. Crown Counsel Cooke appearing for the Crown, the said J. W. de Silva produced to the

said District Court an office copy of this Order of the Master in Lunacy.

The said office copy was verified by the stamp of the Masters in Lunacy, and by affidavit. A further affidavit was produced stating in effect that Mr. Harvey's solicitors were advised by Counsel to obtain a power of attorney from Mrs. Harvey and also an order empowering her to defend this action and grant such power.

The District Judge nevertheless refused to stay the proceedings, and ordered the *ex parte* trial of this action to proceed; and on the 29th October 1896, a decree nisi was passed in favour of the Crown for the sum of Rs. 27,823. 44 with the costs of the action; the Defendant having failed to answer or to appear.

This decree was made absolute on the 23rd November 1896.

Although their Lordships have thought it desirable to allude to these proceedings at some length they have done so only in order to show the information which the officers of the Crown and the District Court had when the decrees nisi and absolute were made.

Their Lordships do not think it necessary to examine the provisions of the Ceylon Code in order to ascertain whether the proceedings above referred to were in any respect irregular. The fact that the Defendant had not answered or appeared cannot be disputed; but if the order nisi had not been served on the Defendant there was a serious defect in the proceedings as pointed out by Mr. Justice Browne (see p. 196 of the Record). However assuming the decrees nisi and absolute to have been in all respects perfectly regular it by no means follows that they ought not to be set aside. The Ceylon Civil Procedure Code 1889 Chap. XII. Art. 87 contains the following important provision to prevent any injustice being done to Defendants who through

no fault of their own have decrees made against them in their absence.

"No appeal shall lie against any decree nisi or absolute for default; but, if any Defendant, against whom a decree absolute for default shall have been passed, shall within a reasonable time after such decree appear and satisfy the Court, upon notice to the Plaintiff, by good and sufficient evidence that he was prevented from appearing to show cause against the notice for making the decree absolute by reason of accident or misfortune. or by not having received due information of the proceedings, and shall, if the Court shall in its discretion so require, give good and sufficient security to satisfy the Plaintiff's claim and costs of action, the Court may, upon such terms and conditions as such Court shall think it just and right to impose, set aside the decree and direct that the action be proceeded with as from the stage at which the decree was for default of the Defendant made.

"The order setting aside or refusing to set aside the decree shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Supreme Court.

"The mere consent of the Plaintiff's proctor will not be reason sufficient to justify the Court in setting aside the decree."

In December 1896 Mr. Taylor made an unsuccessful attempt to induce the Supreme Court to send for the record and to revise and set aside the proceedings on the ground of their irregularity; but this attempt failed. It was held to be unnecessary; the proper mode of proceeding being that prescribed by the above article of the Code.

On the 18th January 1897 the Master in Lunacy in England made an order headed in the same way as the previous order and authorising

Mrs. Harvey to take such proceedings in her husband's name as might be necessary for the purpose of defending the action against him in Ceylon and of appealing from any judgment of the Court there and also authorising her to execute in her husband's name such power of attorney as might be necessary for such purpose. This order contains a recital as follows "it having "been established to my satisfaction that the "said Henry Beecroft Harvey continues to be "of unsound mind and incapable of managing "his own affairs."

Armed with this authority Mrs. Harvey appointed Mr. Taylor to act for her husband and to take such steps as might be necessary to have the decrees against him set aside and to enable him to defend the action. Accordingly a petition for this purpose was presented in the District Court on the 27th February 1897. It was supported by an affidavit of Mr. Taylor making an exhibit of the power of attorney which recited the orders in Lunacy but it does not appear that those orders or copies of them or the various orders and exhibits previously brought to the attention of the District Court were made exhibits to this affidavit, nor did the petition or affidavit state that Mr. Harvey continued to be and was at the time of unsound mind and incapable of managing his affairs. The order in Lunacy of 18th January 1897 was however put in evidence before the District Judge and was admitted by him and he set aside the decrees nisi and absolute. His order dated the 7th April 1897 was as follows:

"It is ordered that on the Defendant giving "good and sufficient security on or before the "26th day of April 1897 to satisfy the Plaintiff's "claim and costs of action up to the 7th day of "April 1897, that the decree nisi entered in this "case on the 29th day of October 1896, and

"made absolute on the 23rd day of November
"1896 be discharged, and that the action do
"proceed in due course, and that the 26th day
"of April 1897 be fixed for the Defendant to
"answer the Plaintiff's claim."

The District Judge who made this order was Mr. Fraser who on previous occasions had been informed of all that had taken place in England as herein-before stated.

The Attorney-General, on behalf of the Government, appealed to the Supreme Court of the Island of Ceylon against this order in its entirety, and Mrs. Harvey, subsequently lodged an appeal against so much of the said order as required her to give security.

On 6th July 1897, the Supreme Court (Mr. Justice Lawrie, Acting Chief Justice, and Mr. Justice Withers, Puisne Justice) set aside the said order of 7th April 1897, and dismissed the said Eleanor Frances Julian Harvey's petition of 27th February 1897, with costs. Their Lordships' judgment is to the effect that the said petition and motion of 27th February 1897, if successful, could only be successful to the extent of causing the decree absolute of 23rd November 1896 to be set aside, but could not affect the decree nisi of 29th October 1896; that the said Henry Beecroft Harvey had had due notice of the proceedings; and that he was not prevented by accident or misfortune from appearing on 23rd November 1896 to show cause against the decree nisi.

On the 26th November 1897 the foregoing judgment having been brought up in review before the Collective Supreme Court (Mr. Justice Lawrie, Acting Chief Justice; Mr. Justice, Withers, Puisne Justice; Mr. Justice Browne, Acting Puisne Justice), preparatory to an appeal to Her Majesty in Council, the said judgment was, on 13th January 1898, confirmed, with costs.

Their Lordships are quite unable to concur in these orders reversing the order of Mr. Fraser. The learned Judges of the Supreme Court regarded Mr. Taylor as properly representing and acting for Mr. Harvey throughout these proceedings and they seem to have regarded his conduct as embarrassing. Taking this view they came to the conclusion that Mr. Harvey failed to bring his case within the 87th Article of the Code. Having carefully attended to the evidence before them their Lordships have come to the conclusion that the learned Judges in Ceylon have misjudged Mr. Taylor and the steps he took. Mr. Taylor although he was appointed in 1894 to act for Mr. Harvey could not act for him after he became of unsound mind to Mr. Taylor's knowledge. Mr. Taylor from the first felt the difficulty he was in. Except when he applied to the Court in December 1896 as already mentioned he never assumed to act for Mr. Harvey as his attorney or as in anyway legally authorised to represent him until authority so to do was conferred upon him by the order in Lunacy of the 18th January 1897. With the same exception all that Mr. Taylor did before that time was to inform the Court of the condition of Mr. Harvey and of the impossibility of his defending the action. In a statement made to the District Court on the 7th March 1896 Mr. Taylor referred to his power of attorney 1894 and distinctly stated that he was advised by Counsel that he could not safely act upon it; and in another statement made on the 23rd March 1896 he explained his position more in detail so as to remove all misconception on the matter. Mr. Taylor made a mistake in December 1896 but otherwise his conduct appears to their Lordships to have been correct throughout; and not only correct but proper and respectful to

the Court. His conduct certainly ought not to have prejudiced Mrs. Harvey's subsequent application under Article 87 in the slightest degree.

The Judges of the Supreme Court rely on the abortive attempt made in December 1896 to have the proceedings set aside as conclusive to show that the Committee and the Attorney were not prevented from appearing on the 23rd of November 1896 and showing cause against the decree nisi being made absolute.

Mr. Taylor's petition of the 1st December 1896 appears to have been irregular and it seems to their Lordships to have been properly dismissed. But the conclusion drawn by the Supreme Court from his action on that occasion is in their Lordships' opinion quite erroneous. On the 23rd November 1896 Mr. Taylor informed the Court of the real state of the case; he could do no more. Mrs. Harvey who is referred to as the Committee was not her husband's Committee; she had no general authority toa ct for him; she only had the limited authority conferred upon her by the Master in Lunacy as to receive the income of her husband's property and to apply it in maintaining him and herself and their child.

Passing from this the learned Judges of the Supreme Court considered that the question of the Defendant's sanity was not before them; that the issue of fact had not been tried. Here again their Lordships are unable to concur with them. It is no doubt true that the Defendant had not been formally found lunatic on an inquisition, but Section 87 of the Code does not require that he should. The evidence strictly before the District Court on the application to set aside the decrees and before the Court of Appeal, was uncontradicted and in fact unchallenged. Such evidence was not so complete

as it might have been for it did not include all that was known to Mr. Fraser and all that is in evidence before their Lordships. But although this is so the evidence adduced was in their Lordships' opinion sufficient for the purpose for which it was wanted and for which it was used. It was in the language of the Code "good and sufficient evidence that he" (*i.e.* the Defendant) "was prevented from appearing to "show cause against the notice for making "the decree absolute by reason of accident or "misfortune or by not having received due "information of the proceedings."

One of the learned Judges Mr. Justice Browne intimated that the evidence filed in support of the application under Section 87 of the Code consisted only of the affidavit of a Ceylon solicitor and the exhibit thereto. The learned Judge appears to have overlooked the fact that the second order in Lunacy was put in evidence before the District Judge as their Lordships have already pointed out. If the application had been adjourned for further evidence ample was in Ceylon and could have been produced as the officers of the Crown well knew.

Mr. Haldane was bold enough to contend that the orders in Lunacy were not admissible in evidence in these proceedings at all; and that the Courts in Ceylon were justified in paying no attention to them. Their Lordships are not prepared to accede to this contention. The orders are not conclusive evidence of anything except their own existence; but being made by a competent tribunal in a matter within its jurisdiction they cannot be rejected as inadmissible or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as *primâ facie* evidence and if uncontradicted they ought to be regarded as sufficient evidence of those facts

not only in this country but in all His Majesty's dominions.

Their Lordships have come to the conclusion that the orders appealed from viz. those of the 6th July 1897 and the 13th January 1898 cannot stand, and they will humbly advise His Majesty that these orders should be reversed with costs and that the order of the District Judge of the 7th April 1897 setting aside the decrees nisi and absolute should be restored so far as it sets them aside but not so far as it requires security which is no longer necessary by reason of the sequestration of the Defendant's property. They will further humbly advise His Majesty that the order of the 7th July 1896 so far as it directed the case to be set down for hearing *ex parte* shall be discharged if the District Court in Ceylon shall be of opinion that effect cannot properly be given to this order whilst such order stands, and that the action should be remitted to the District Court in Ceylon to be proceeded with and to be tried on its merits. The Respondent must pay the costs of this Appeal.