NOTES ON THE LAW OF TRUSTS

A. E. KEUNEMAN

Digitized by Noolaham Foundation
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

NOTES ON THE LAW OF TRUSTS

BY

A. E. Keuneman

(King's Counsel, M.A., L.L.B., Cantab;
Judge of the Supreme Court, Ceylon, retired.)

PRINTED AND PUBLISHED
BY THE TIMES OF CEYLON, LTD.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

PREFACE

The object of these articles is not to provide a text-book on the law of Trusts. Such books exist in England, and should be resorted to by all students of this branch of the law.

The chief object of these articles is to collect the principal cases which have been decided on this subject in Ceylon, and to arrange them for easy reference. It is obvious that the introduction and adaptation of the law of Trusts to the circumstances existing in Ceylon has not always been easy, and that our own conditions and Ordinances have created special difficulties, and this aspect has not been forgotten, and in fact a large number of cases have been cited in this respect. The Trusts Ordinance itself has not been exhaustively treated, and only those portions of it which are of peculiar interest in Ceylon have been dealt with. The decided cases which elucidate the sections of that Ordinance have been as fully set out as possible. Though the object of these articles is limited, it is hoped that they will be of use both to students and to practitioners.

A. E. K.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

I

WHAT IS A "TRUST."

Under the Trusts Ordinance, Cap. 72, section 3 (*a*), a trust is defined as follows :—

"Trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, or of another person and the owner, of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner.

Under section 3(*b*) a trust does not include a *fidei commissum.*

Under section 4 (1) a trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is—

(*a*) forbidden by law ; or

(*b*) is of such a nature that, if permitted, it would defeat the provisions of any law ; or

(*c*) is fraudulent ; or

(*d*) involves or implies injury to the person or property of another ; or

(*e*) the Court regards it as immoral or opposed to public policy.

Under section 4 (2) every trust for which the purpose is unlawful is void. If the trust is created for two purposes, one lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Section 5 sets out the form in which a trust can be created.

Under section 5 (1) no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee and notarially executed, *i.e.* executed in the manner prescribed by section 2 of the Prevention of Frauds Ordinance—see section 3 (*o*). But this rule is subject to section 107 whereby, in the case of a *charitable* trust, the Court is not debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it is of opinion that in the circumstances of the case a trust in fact exists, or ought to be deemed to exist.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Under section 5 (2) no trust in relation to movable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, or unless the ownership of the property is transferred to the trustee by delivery.

Section 5 (3) contains the important provision that the rules in sections 5 (1) and 5 (2) do not apply where they would operate so as to effectuate a fraud.

Under section 6 to create a trust, the author of the trust must indicate with reasonable certainty by any words or acts:—

(*a*) an intention on his part to create thereby a trust ;

(*b*) the purpose of the trust ;

(*c*) the beneficiary ;

(*d*) the trust property ; and

(*e*) (unless the trust is declared by will or the author of the trust is himself the trustee) transfers the trust property to the trustee.

II

INTRODUCTION OF TRUSTS INTO CEYLON

The manner in which the law of trusts was introduced into Ceylon raises many points of doubt and ambiguity, and these are intensified by the absence of regular reports of cases from the earliest period. We do not appear to have any records of cases decided before 1820. Ramanathan's Reports for 1820 to 1833 were actually published about half a century later. The first reports to be nearly contemporaneous were the reports issued by Sir Charles Marshall in 1839 (*Marshall's Judgments*), and they covered the years 1833 to 1836. Thereafter spasmodic attempts were made to report cases from time to time but not continuously. Eventually in the eighteen-seventies Ramanathan made a gallant and partially successful attempt to fill the gaps and report all cases of importance from 1833 which had not been previously reported. In his interesting preface to the volume for 1820 to 1833 Ramanathan discussed the difficulties in his way. Since the eighteen-seventies there have been more or less continuous reports of the decisions of the Supreme Court. A further difficulty was that the reports of early cases did not supply very efficient digests.

The first enactment with regard to trusts was contained in the Charter of 1801. By sections 39 and 40 it was enacted that the Supreme Court " shall also be a Court of Equity " and shall administer justice in point of form " according to the rules and proceedings of our High Court of Chancery in Great Britain." But there were definite limitations imposed, for the jurisdiction extended to " the Limit, District and Persons only as is or are hereinbefore declared and directed to be subject to the Supreme Court in the exercise of its ordinary Civil Jurisdiction." By sections 29 and 30 the ordinary Civil Jurisdiction of the Supreme Court was restricted and only extended to the Town or Fort of Colombo and to the District of said Town and Fort, as well as to all persons who were British, or commonly known and distinguished in India by the appellation of Europeans, resident in the Settlements, and to persons residing in the Settlements under special licences.

The Charter of 1801 on the face of it restricted the equitable jurisdiction of the Supreme Court both as to place and as to persons, and only affected the Supreme Court in its ordinary civil jurisdiction, and not in the separate jurisdiction of the High Court of Appeal over appeals from the other Civil Courts of the Island, to whom the rules of equity did not appear to apply. There is evidence, however, that so narrow a meaning was not given by our Courts to this Charter.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The earliest case I have been able to trace was *Mathes Pulle* v. *Rodrigo* decided in 1827 or earlier. *Ram.* (1820-1833) p. 119. It was there held that in view of sections 39 and 40 of the Charter "it is clear that the Provincial Court has no authority to entertain suits in equity by way of bill and answer according to the practice of the High Court of Chancery in Great Britain, because it is wholly unknown to the Roman-Dutch Law."

The Judges, however, considered the wording of these sections and also sections 29 and 41 and the fact that the Provincial Courts had by the Charter of 1810 been abolished and thereafter revived by the Charter of 1811 (during which interval the civil jurisdiction of the Supreme Court had been extended in the Island and had absorbed the jurisdiction of the Provincial Courts), and came to the conclusion that the Supreme Court could exercise its equitable jurisdiction even in matters arising in the Provincial Courts. The Judges considered the difficulties inherent in the application of that system "to a collection of laws totally different from that over which the jurisdiction of the Court of Chancery is exercised" and came to the conclusion that "the rules and practice of the Court of Chancery are to be applied to the law established in this country in the same way that the rules of the Court of Chancery in England are applied to the laws of England." They were of opinion that the spirit of equity should be the guide of the Court.

"Here, therefore, I must take my stand, and lay it down as a principle of the equitable jurisdiction of this Court, that we afford relief and provide a remedy by enforcing the principles upon which the ordinary Courts also decide, when the powers of those Courts or their modes of proceeding are insufficient for the purpose; *secondly*, by preventing those principles, when enforced by the ordinary Courts, from becoming instruments of injustice; *thirdly*, by deciding on principles of universal justice, when the interference of a Court of Judicature is necessary and the positive law is silent; and in practice we must apply these remedies as extensively as the Courts of Equity in England, whenever the modes of proceeding in the ordinary courts are insufficient."

The Charter of 1833 completely abolished the original Civil Jurisdiction of the Supreme Court, and set up in the place of the Provincial and other Civil Courts the new District Courts, with civil jurisdiction unlimited as to value of subject-matter but restricted as to place, *i.e.*, to each judicial district. The appellate powers of the Supreme Court remained, but the distinction between the Supreme Court and the High Court of Appeal was abolished and one Court exercised all the kinds of jurisdiction. There is no reference in this Charter to equitable jurisdiction.

In his article on the jurisdiction of the new District Courts (Marshall's Judgments, p. 261) the author said :—

"*Equitable* Jurisdiction, as distinguished from *Civil*, is not given by the Charter in express terms, it having been considered by the framers of that instrument that all cases brought before the District Courts should be decided, as in the civil law, according to the rules of equity blended with those of strict law . . . We have already seen that the District Courts possess the most extensive powers of relieving against fraud, a very important branch of the jurisdiction of the English Courts of Equity . . . Another very extensive branch of that jurisdiction, the compelling parties to reveal what their adversaries are in justice entitled to know, which is done in the Courts of Equity by means of bills of discovery, is effected under the present system in Ceylon by a much simpler, speedier and more effective mode, that of the examination of parties by each other and by the Court, . . . The power of granting Injunctions also . . . is vested in the District Courts by the general and comprehensive terms in which their civil jurisdiction is conferred by the Charter, but not for the purpose of prohibiting the commencement or prosecution of any action. . . The District Courts have also the power, under certain circumstances, to dissolve *fidei commissa*."

Marshall also quoted with approval the remarks of Norris, J., in his treatise on *Restitutio in Integrum*. (*see* Marshall's Judgments, 176 to 179) *Restitutio* was a remedy equitable in its nature, compare Voet 4.1. where it is described as "an extraordinary remedy, by which the praetor on the strength of his office and jurisdiction, and following the dictates of natural equity, places persons who have been injured or defrauded, in their former situation as if no injurious transaction had taken place, or at least decrees them to be saved harmless."

Although this was not a decision of the Court, and was a mere expression of opinion, it was of the utmost value because Sir Charles Marshall as Chief Justice was mainly responsible for the bringing into operation of the Charter of 1833 in its initial stages, and there can be little doubt that his opinion represented the considered policy of the Supreme Court with regard to equitable jurisdiction. It is clear, therefore, that before the Charter of 1833 in the case of the Provincial Courts and other lesser Civil Courts, and after the Charter in the case of the District Courts, the Supreme Court did exercise an equitable jurisdiction over the proceedings, and that the spirit of equity was the guide of the Court. It was inevitable therefore that these subordinate Courts should themselves apply the rules of equity, and this was rendered the easier because the Roman-Dutch Law itself contained many elements which were akin to the English rules of equity. The law of trusts

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

accordingly received recognition in Ceylon, and though there are comparatively few cases before the last quarter of the nineteenth century there are sufficient references in the reports to support this conclusion. In fact the word "trust" was so well-known that it was sometimes used as interchangeable with "*fidei commissum*"—a distinct conception under the Roman-Dutch Law. (See *Sabapathy* v. *Yusoof*, 37 N.L.R. 70; *de Saram* v. *Kadijar*, 45 N.L.R. 265; *Kadijar* v. *de Saram*, 47 N.L.R. 171, Privy Council.) There is accordingly support for the *dictum* of Bertram, C.J., in *Soysa* v. *Cecilia*, 23 N.L.R. 74, at p. 77 that the trust is " a principle which our system had assimilated long before the enactment of the Trusts Ordinance, the main object of which was to define the law already in force," and again in *Suppramaniam* v. *Erampakurukkal*, 23 N.L.R. 417, at p. 424, that "The English Law of Trusts was long ago received into the law of this country (see *Marshall's Judgments*, p. 523 and *Ibrahim* v. *Oriental Banking Co.*, 3 N.L.R. 148.")

An important landmark is the Property and Trustees Ordinance, 7 of 1871. The preamble purported to "amend the law of property, and to grant relief in certain cases to Trustees, Executors, and Administrators." Under section 3 it was enacted that all property held in equal undivided shares by trustees shall be held by them as joint tenants with right of survivorship. Other sections dealt with the right of the District Court to nominate trustees in certain cases, with the vesting of property in new trustees, with the keeping of lists of such trustees in the Land Registry Office, with the rights of trustees to apply to the Supreme Court for directions, and with the power of trustees to give valid receipts. It was at one time thought that this Ordinance applied only to private trusts, see *Ahamado* v. *Lebbe Marikar*, 12 N.L.R. 126. But it was later held that it applied both to private and to public trusts, *Mutthiahpillai* v. *Sanmugam Chetty*, 14 N.L.R. 15. These sections were eventually repealed by the Trusts Ordinance No. 9 of 1917.

The terms of Ordinance 7 of 1871 clearly indicate that the law of trusts had been accepted and recognized in Ceylon prior to the date of that Ordinance. It is, however, clear that this enactment gave a certain impetus to litigation on the subject of trusts in Ceylon.

An interesting case decided in 1874 and reported in 3 N.L.R. 148 (*Ibrahim Saibo* v. *Oriental Banking Corporation*) had a somewhat different approach to the question of the introduction of trusts into Ceylon. It is a judgment of Berwick, D.J., Colombo, and the Supreme Court affirmed the judgment "seeing no reason to the contrary," in the absence of the appellants.

"It is to be remembered that English trusts are the very offspring of the Roman law, enlarged and developed from the Roman *fidei commissa* (which were only testamentary) so as to embrace trusts created by parties *inter vivos* and ultimately embracing trusts created by implication of law, which are analogous to what, ages before, were known to the Civil Law as obligations arising *ex quasi contractu*, such as the *condictio indebiti*, (the action whereby 'whatever has been delivered or paid on an erroneous conception of duty or obligation may be recovered on the ground of equity, provided the person receiving it has no ground on natural right, implied donation, or compromise to rely on the acquisition as his own.' Bell's Principles, sections 531 to 587. The action by which is recovered whatever was paid without being due: Voet XII.6.1.) the *condictio sine causa*, (an action whereby the thing is recovered which another contrives to possess without just cause, although he may have originally obtained it justly, or when the consideration fails or is void in law, Voet XII.7.) . . .

"It cannot be denied that in the ordinary course of development of our Colonial Law to overtake the circumstances of modern life . . . express trusts *inter vivos* are now as much a part of the legal system of Ceylon as of England, though unknown to the practice of the old Civil Law (I mean, virtually unknown . . .)." The Judge held further that in Ceylon we had assimilated the "implied trust" as well, and pointed out that the *condictio sine causa* and *restitutio in integrum*, the last especially, were examples singularly in accord with the English principles of implied trusts.

It is interesting to compare this case with the South African decision in *Est. Kemp* v. *McDonald's Trustee*, (1915) A.D. 491. It appeared that in Ceylon the trust was not repugnant to the Roman-Dutch law but was a natural development from the older form of the *fidei commissum*, and that the Roman-Dutch law had remedies available to enforce the trust.

In South Africa it was said "The English law of trusts forms, of course, no portion of our jurisprudence, nor . . . have our Courts adopted it; but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our own law." See *Kemps Case* per Innes, C.J., at p. 499. Again at p. 502: "It was quite possible, under the Roman-Dutch Law, to separate the legal ownership of property from the right to its beneficial enjoyment."

But whether the trust in Ceylon is an importation from the English law or is a natural development of the Roman-Dutch law as practised here is now perhaps academic. There can be no question that from a very early period the trust has been recognised in Ceylon, and the rights of the *cestui que trust* or beneficiary have been enforced, and the English terms relating to trusts have been accepted in Ceylon.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

It does not follow from this that we have adopted all the incidents of property prevailing in England which are applicable to trusts. It has been held that we have not adopted the idea of an *equitable estate* known to the English law. The question involved was whether section 2 of the Ordinance of Frauds (7 of 1840) affected the transfer of an equitable interest in Ceylon. In *Narayen Chetty* v. *James Finlay & Co.*, 29 N.L.R. 65, Garvin, J., held that "the law of trusts and the conception of an equitable estate as apart from the legal estate, so peculiarly a development of English Equity, found no place then in the law of Ceylon. There is, therefore, every indication that section 2 of Ordinance 7 of 1840 was intended to deal with legal and not with equitable interests in land." In the same case Dalton, J., said: "In England by section 8 (of the Statute of Frauds) the transfer of an equitable interest was required to be in writing. When, however, Ordinance 7 of 1840 was enacted in Ceylon, no equivalent provisions such as that set out above were introduced, and presumably for a very good reason, for there was no need to provide for such an interest in land as an 'equitable estate' as that term was used prior to the Judicature Act 1873, since the terms 'legal estate' and 'equitable estate' and all that they connote were unknown to the Common Law." In the event the Judges held that there was nothing in section 2 of Ordinance 7 of 1840 repugnant to the proof by parol evidence of the transfer of equitable interests in land.

There is one *dictum* of Garvin, J., in this case which is difficult to reconcile with the earlier decisions, viz., "The whole subject of trusts as known to the English law is foreign to our Common Law, and Ordinance 9 of 1917 may be said to have first introduced the law of trusts into our legal system." This is not in keeping with the *dicta* of Bertram, C.J., in 23 N.L.R. 74 and 23 N.L.R. 417 already quoted (*vide supra*) and also with the case in 3 N.L.R. 148 and other cases. I may add that Dalton, J., does not go so far but refers both to the case in 3 N.L.R. 148 and to *Kemps Case*, S.A.R. (1915) A.D. 491 with approval.

The particular matter decided in the case I have discussed came before the Privy Council in a later case, *Valliyammai Atchi* v. *Abdul Majeed* (48 N.L.R. 289 at 292), but was not finally determined there. "The argument based on the Prevention of Frauds Ordinance assumes that under the law of Ceylon the beneficial owner under a trust affecting land acquires an interest affecting land, and not merely a right to proceed against the trustee, an assumption that would seem to involve that the law of Ceylon recognises the distinction between legal and equitable estates in land so familiar under the English Law. No authority in support of this assumption was cited to their Lordships other than the definition of 'Trust' in section 3 (*a*) of the Trust Ordinance, a definition which must

be read with the definition of 'Beneficial Interest' in section 3 (*g*). However, their Lordships find it unnecessary to decide this question."

To continue the history of the legal enactments relating to trusts, the Civil Procedure Code, Ordinance 2 of 1889, contained provisions relating to trustees—see for instance section 472 referring to the right of the trustees to represent the persons beneficially interested in the property, section 595 referring to the appointment and removal of trustees, and section 639 referring to the carrying into effect of trusts for public charity.

Finally the Trusts Ordinance 9 of 1917 (now Cap. 72) introduced a comprehensive code relating to trusts, the object being to define and amend the law relating to Trusts. The principles of Equity for the time being in force in the High Court of Justice in England were made applicable to any *casus omissus* in the Ordinance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

III

TRUST DISTINGUISHED FROM FIDEI COMMISSUM OR SECURITY

There is an important case which sets out the elements constituting a *fidei commissum* as distinguished from those constituting a *trust*. This is *de Saram* v. *Kadijar* (45 N.L.R. 265) in the Supreme Court, and *Sitti Kadijar* v. *de Saram* (47 N.L.R. 171) in the Privy Council. The case depended on the interpretation of a will made by a Muslim testator. The will was not happily worded and was difficult of construction. For its actual terms reference should be made to the reports. The majority of the Supreme Court came to the conclusion that no valid *fidei commissum* was created, but an attempt had been made to create a trust which was invalid because it offended against the rule against perpetuities. The minority of the Judges held that a *fidei commissum* was established binding on the devisees, their children and grandchildren. The Privy Council held that the will created a valid *fidei commissum* and that the leading clauses were inconsistent with the structure of an English trust.

Their Lordships first set out the general principles to be derived from the rules of construction relating to the question. " In the first place, where there is doubt whether a *fidei commissum* has been created, that construction would be preferred which will pass the property unburdened ; but if the language of the will is such as to shew clearly an intention to create a *fidei commissum*, mere difficulty of construction will not prevent its being upheld."

The use of the word " trust " is inconclusive, as it is commonly used by writers in relation to *fidei commissa* as to the English type of trust.

Their Lordships agreed that the main differences between *fidei commissa* and English trusts are correctly set out in Professor R. W. Lee's *Introduction to Roman-Dutch Law* (3rd Edition, 1931), at page 372, as follows :—

"(1) The distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the *fidei commissum*.

(2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent and often co-extensive ; in the *fidei commissum* the ownership of the *fidei commissary* begins, when the ownership of the *fiduciary* ends.

(3) In the trust, the interest of the beneficiary, though described as an equitable ownership, is properly *jus neque in re neque ad rem*, against the *bona fide* alienee of the legal estate it is paralysed and ineffectual ; in the *fidei commissum* the *fidei commissary*, once his interest has vested, has a right which he can make good against all the world, a right which the *fiduciary* cannot destroy or burden by alienation or by charge.

Professor Lee adds a fourth difference which is not material here."

Their Lordships pointed out that the terms of the leading clause under which the devisees were entitled to take their respective shares, and the fact of the inclusion of movable property, which was not subject to any condition in the devise, pointed clearly to a devise of the *plenum dominium* of the immovable property to the devisees, subject to restrictions so far as binding under the law of Ceylon. It was clear that " there is not any attempt to constitute a trust as known to the law of England, but that there is an attempt to constitute *fidei commissa*." In view of the language of the last clause in the will, it was held that separate *fidei commissa* were set up in the case of each devisee. Their Lordships also found language in the will " apt for the constitution of a valid *fidei commissum* and a sufficient statement of the beneficiaries and the benefits to be taken by them."

As regards the distinction between a trust and a security or mortgage, there are two Privy Council cases which are more fully dealt with later on under IV. The first is the case of *Adaicappa Chetty* v. *Caruppen Chetty* (22 N.L.R. 417, Privy Council) where it was held that the real nature, the true aim and purpose of the transaction was to create something more resembling a mortgage or pledge than a trust. Such an agreement was obnoxious to section 2 of Ordinance 7 of 1840 unless it was created by a duly executed notarial deed. The other case is that of *Saminathen Chetty* v. *Vander Poorten* (34 N.L.R. 287, Privy Council,) where, on the construction of two notarial deeds in the light of surrounding circumstances, it was held that these deeds amounted to the creation of a security for money advanced, and not to the creation of a trust.

In the earlier decision a distinction was drawn between the case where the purchase money was paid by the alleged beneficiary and where it was paid by the alleged trustee. It was not shown that the alleged trustee was to hold the property in trust. The arrangement was made in order to secure to the alleged trustee the money sunk in the purchase. Until that was repaid the alleged trustee had the right to insist that he had a claim to the land. In the later case their Lordships interpreted the deeds " having regard to the circumstances up to and surrounding their execution and to the language employed " in the deeds. It was held that what had been created was not a trust but a mortgage or security for the money advanced. The facts taken into account were the expenditure of large sums of money by the alleged beneficiaries towards the acquisition of the lands, and the fact that the deed of agreement contained a number of conditions restricting the right of the alleged trustee to sell or otherwise deal with the property.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

IV

CONSTRUCTIVE TRUSTS

While express trusts were recognised by the Courts from an early date, trusts arising by operation of law did not receive judicial sanction for some time. One of the early cases arose in 1860. The plaintiff, a Goa priest, purchased a garden for £150 and employed his servant, the defendant, to get the deed of sale drawn in plaintiff's favour, but the defendant, with a view to defraud the plaintiff and in breach of the confidence reposed in him, procured the vendor to execute the deed in the defendant's favour. The Supreme Court ordered that the deed in question be declared to enure to the benefit of the plaintiff, and the defendant was condemned to reconvey the premises to the plaintiff at his own expense and to pay damages and costs. Ram. (1860), p. 6.

The element of fraud was emphasised in this case, as it was in most of the early cases: see *Grenier* (1873) *D.C.* 39, where the heirs of a deceased mortgage creditor who had been refused the right to claim credit at the Fiscal's Sale, arranged with the defendant to purchase the property and to reconvey to them, they (plaintiffs) providing the purchase price or the bulk of it. The objection was taken for the defendant that parol evidence of the agreement was not admissible in view of the terms of Ordinance 7 of 1840, in that this was an agreement creating an interest in land and had to be in writing under that Ordinance. The objection was overruled by the District Judge and his order was accepted by the Supreme Court.

In 1874 the case of *Ibrahim Saibo* v. *Oriental Banking Corporation* (3 N.L.R. 148) was decided. This case has earlier been referred to. It established that " implied trusts " were in substance part of the Roman-Dutch Law as practised in Ceylon, and that parol evidence to establish them would not violate our Ordinance of Frauds.

Another case in 1880 was *Siman* v. *Salo* (3 S.C.C. 103). The plaintiffs and defendant arranged between themselves jointly to purchase a share of a Crown land. The defendant acted as agent of the plaintiffs in negotiating the purchase and the plaintiffs paid their contributions to the defendant. The conveyance from the Crown was made out in the name of the defendant alone and he thereafter refused to allow plaintiffs to have any shares. There was reason to believe that the defendant acted fraudulently in procuring the conveyance to be made in his name alone, and he was not permitted to shelter himself under the Ordinance of Frauds. The defendant was ordered to convey their shares to the plaintiffs. In this case the Judges relied upon the case reported in Ram. (1860), p. 6.

In Ram. (1877), p. 158 the District Judge refused to allow plaintiffs to avoid the effect of a conveyance to first defendant by evidence in proof of the price having been found by the plaintiff : the Supreme Court supported this order on the ground that there was no allegation of fraud in the pleadings.

There were several cases decided on the same lines,—see 1 Br. 268 (also reported in 5 N.L.R. 188), 1 Br. 269, 1 Br. 390 (also reported in 5 N.L.R. 56) where the allegation and proof of fraud were insisted on in order to permit parol evidence to establish an interest in land. Two of these cases had contained the allegation that the land had been purchased in the name of one person with the money of another, but parol evidence was not admitted to establish this in the absence of an allegation of fraud.

Fraud in Equity and the Ordinance of Frauds.

In 1904 and 1906 two cases were decided which may fairly be regarded as leading cases in Ceylon because they purported to follow the English law relating to trusts, and because they contained a further elucidation of fraud in equity. In *Gould* v. *Innasitamby* (9 N.L.R. 177) the plaintiff employed the defendant to purchase a property for him. Plaintiff was to pay the purchase money and the defendant was to get the conveyance in his own name and subsequently to re-transfer the property to the plaintiff. The defendant later refused to re-transfer the property. In appeal the effect of Ordinance 7 of 1840, section 2, was fully considered, and it was recognized that a verbal promise to reconvey was under that section of no force or avail in law.

It was contended that there was no fraud in the inception of the agreement and that the plaintiff had parted with his money, trusting not to any legal obligation but to the defendant's honour, and that plaintiff was not induced by fraud to part with his money. It was held, however, that the defendant " turned the whole transaction into a fraud by taking the transfer in his own name and refusing to reconvey," and that accordingly he could not be allowed to plead the Ordinance of Frauds. " Equity will not allow you to set up a Statute passed for the purpose of preventing frauds in order that you may perpetrate and cover a fraud." The English cases were followed, namely, *Lincoln* v. *Wright* (1859) 4 de G. and J. 16, *Haigh* v. *Kaye* (1872) L. R. 7 Ch. App. 469, and *In re the Duke of Marlborough, Davis* v. *Whitehead*, L.R. (1894) 2 Ch. 133. It was pointed out that in the last-mentioned case there was no suggestion that the assignment was obtained by fraud, and that in *Haigh* v. *Kaye* no fraud at the inception was suggested.

Again in *Ohlmus* v. *Ohlmus* (9 N.L.R. 183) the plaintiff's testator bought a land from the Crown in the name of the defendant, his mother, who was to hold it in trust for the plaintiff's testator

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

and to reconvey it to him at his request. The defendant refused to reconvey. It was held that "parol evidence is at all times admissible to establish a resulting or constructive trust where the transaction is intended to effect a fraud. The question therefore is whether it is essential that the fraud must be at the very inception of the transaction, or whether in cases where the fraud arises subsequently it is open to the person defrauded to lead parol evidence to establish the trust. For my own part, I do not see why any distinction should be drawn between a case of fraud at the inception and fraud committed subsequently. Equity always relieves in cases of fraud." The fraud established in this case was "that the defendant with full knowledge that she was only a trustee for the plaintiff's testator and that the property had been purchased with his money refused to convey the property to him." The principles set out in *Gould* v. *Innasitamby* (*supra*) and in the English cases referred to in that case were accepted.

Some of the earlier cases (see also, 7 Tamb. 141) were reconcilable with the argument that fraud at the inception of the transaction was needed to let in parol evidence of the real transaction, but the two cases in 9 N.L.R. established that subsequent fraud by refusal to reconvey was also a good ground for permitting the admission of parol evidence.

But it should be emphasised that for the rule established by the cases in 9 N.L.R. to be enforced the advance of the purchase money by the person alleging the trust must be proved by clear and unequivocal evidence (see 15 N.L.R. 16). Otherwise the rule would be the means of evading the salutary provisions of the Ordinance of Frauds. Further the circumstances must be such as to establish fraud ; so where the inducement offered by a husband to his wife was the prospect that he might be able to obtain money for business purposes to enable the parties to live, it was held that fraud had not been proved : see *Poonchihamy* v. *Don Davith* (15 N.L.R. 13).

On the other hand, in *Thevanapillai* v. *Sinnapillai* (16 N.L.R. 316) a land was conveyed to the first defendant on the express verbal understanding that she was to convey it to her son S when his debts were settled ; it was held that oral evidence could be led to prove the trust.

In *Sangarapillai* v. *Kandiah* (19 N.L.R. 344) A agreed to buy a land from B and paid the purchase price for it but, fearing litigation, obtained a conveyance in the name of C without his knowledge. Subsequently A informed C of the execution of the deed in his favour and C acquiesced in it and agreed to transfer the land to A whenever called upon. It was held that "it is well established in England that where a purchase is made in the name of a stranger, a trust of the legal estate results in favour of the person out of whose pocket the money for the purchase has come: see *Dyer* v.

Dyer, 2 Cox 93. . . Similar principles to those obtaining under the English law have been recognised here . . . and they are in accordance with the important principle of the Roman-Dutch law that no person shall be enriched at the expense of another."

But this presumption of a resulting trust in favour of the person who provided the money does not apply in a case where the property is bought by a father or by another person *in loco parentis* in the name of a child. On the contrary a strong presumption arises that it is intended to be a gift to the child : see *Fernando* v. *Fernando* (20 N.L.R. 244). The presumption does not necessarily arise in the case of a mother except where she has placed herself *in loco parentis* within the special legal sense, that she has assumed an obligation to provide for the child. See also the case of *Ammal* v. *Kangany* (13 N.L.R. 65) decided by three Judges, where a father had purchased the land in the name of his minor child. The claim was made that the transfer to the child was a transfer to the father, but this was not supported in view of the Ordinance of Frauds. The Judges, however, referred to the presumptions which may arise in such a case and to the evidence necessary to establish a trust.

See also section 84 of the Trusts Ordinance in this connection : "where property is transferred by one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

Reference may also be made to *Fernando* v. *Fernando* (29 N.L.R. 316) where a father bought a lottery ticket in the name of his son. It was proved that the father bought the ticket for himself although it was written in the name of the son. It was held that no beneficial interest in the prize drawn for such ticket passed to the son by donation or other contractual obligation between the parties.

The case of *Adaicappa Chetty* v. *Caruppen Chetty* (22 N.L.R. 417) mentioned earlier under III is an important decision of the Privy Council and the facts have to be closely examined. The added defendant being desirous of purchasing certain lands applied to the Chetty firm of A.S.T. of which the plaintiff and defendants were partners, to lend him the money required for the purpose. For securing the repayment of the loan with interest the transfers were executed in the name of the first defendant and the purchase money was paid by the first defendant. Later the firm requested the added defendant to let them have absolutely for their own benefit a half share of all the property for the actual cost of the same,and offered to the added defendant, in consideration of his trouble in purchasing and planting the property, to forego

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

all claim for interest on the money advanced by the firm. The added defendant accepted this offer and acknowledged the title of the firm to a half share on the footing of this agreement. In substance the added defendant prayed that the second parol agreement should be specifically performed.

Their Lordships of the Privy Council found it necessary to determine the real nature, the true aim and purpose of the transaction.

"The purchase money was paid by the Chetty firm through the medium of Perera (added defendant). It was never lent to him to dispose of it as he pleased. If he got command of the money at all, he had only the command of it to devote it to a particular purpose, the purchase of these lands. He was to repay it with interest at 10 per cent. The conveyance was made to the first defendant. . . not for the purpose, in the view of either party, of being held in trust for Perera or for Perera's sole benefit, but to secure to the firm the repayment of the money sunk in the purchase with interest. *The object of the agreement was, in their Lordships' view, to create something much more resembling a mortgage or pledge than a trust.* The arrangement differed absolutely in nature and essence from that entered into where one man with his own proper moneys buys landed property and gets the conveyance of the property made to another. It would be a fraud upon his part to contend that it belonged to him, or to insist that he was entitled to a charge or incumbrance upon it, or had a right to retain the possession of it against the will of the man who purchased it. But in the present case, until the purchase money with interest was repaid to the firm, the first defendant had the right to insist that the firm had a claim upon this land . . . It was not a formal mortgage but . . . much more an agreement to create a security resembling a mortgage than to create a trust."

Parol evidence of the agreement could not be admitted, in view of section 2 of Ordinance 7 or 1840, which was "much more drastic than the fourth section of the Statute of Frauds." The second parol agreement was as invalid as the first, being clearly a contract or agreement for effecting the sale, transfer or assignment of land, and for the establishment of a security or incumbrance affecting land. Evidence to prove both the parol agreements was invalid.

The essence of the decision was that while oral evidence was admissible to establish a trust, it was not admissible, in view of section 2 of Ordinance 7 or 1840, to establish an agreement to transfer land or to create a security affecting land.

So also a mere agreement to reconvey orally entered into at the sale by deed of a land cannot be proved : see *Mohamadu* v. *Pathumma* (11 C.L. Rec. 48). A warning is uttered here against

the practice which was not uncommon by a mere allegation of trust to seek to evade the salutary provisions of the Ordinance of Frauds.

In *Nanayakkara* v. *Andris* (23 N.L.R. 193, at 197) Bertram, C.J., summed up the cases where oral evidence could be admitted in these circumstances as follows :—

(*a*) "Cases where the defendant has obtained possession of the plaintiff's property subject to a trust or condition, and claims to hold it free from such trust or condition."

In *Ranesinghe* v. *Fernando* (24 N.L.R. 170) Bertram, C.J., reiterated his remarks relating to (*a*) above and added : "This is settled law, notwithstanding the more drastic terms of our own Ordinance. On this latter point I observe a further expression of opinion by Lord Atkinson in *Adaicappa Chetty* v. *Caruppen Chetty*." In the argument an attempt was made to differentiate the case of an express trust from an implied or resulting trust. But this was not accepted, and it was pointed out that the English law did not recognize the distinction but stated the doctrine in plain and unqualified terms.

A Trust as distinct from a mere Agreement to Reconvey

It is a fine but sharp line that divides the cases where there is a mere agreement to reconvey and those where there is a trust. So in *Don* v. *Don* (31 N.L.R. 73) the plaintiff agreed with the defendants that they should buy his Karlton Estate, the plaintiff having the option to buy back the estate for the same price plus interest within ten years from the date of transfer. Instructions were given to prepare two deeds. Owing to the illness of the notary only one deed was ready for signature on the appointed date. This was the deed of transfer, which was signed on that day by the plaintiff and delivered to the defendants who paid the purchase price. The plaintiff was too pressed for money to wait any longer. The defendants, it was alleged, agreed to sign the deed relating to the reconveyance later but eventually refused to sign. It was held that the principle that equity does not allow the Statute of Frauds to be used as an instrument of fraud did not extend to cases where the absence of writing was due merely to non-performance of an informal contract to execute a formal agreement to reconvey the estate. It was not a fraud for a party under these circumstances to say "I have agreed but I will not sign an agreement."

So also in *Ameresekera* v. *Rajapakse* (14 N.L.R. 110) ; a non-notarial agreement entered into that the defendant should bid for and purchase a land at a fiscal's sale and that plaintiff should abstain from bidding against defendant, who was thereafter to convey a portion to plaintiff, did not create a trust and such agreement was invalid in the absence of a notarial deed. See also 17 N.L.R. 486, *Perera* v. *Fernando*.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Compare *Fernando* v. *Peris* (32 N.L.R. 25) where specific performance of an oral agreement to reconvey land was not allowed though money had been paid in pursuance of the agreement. In this case no trust was established.

See also *Arsecularatne* v. *Perera* (29 N.L.R. 342) where it was held by the Privy Council that the equitable doctrine of part performance has no application to the stringent provisions of section 2 of the Ordinance of Frauds, whereby an agreement as to land not duly attested by a notary and two witnesses is of " no force or avail at law."

In *Carthelis* v. *Perera* (32 N.L.R. 19), however, a deed which purported merely to be a deed of gift was in reality the transfer of the legal estate only, for the due fulfilment of a promise to pay dowry on the marriage of certain persons, and on the express understanding that the legal estate conveyed was to be retransferred on the payment of that amount. The surrounding and attendant circumstances proved that only the legal estate was conveyed and the equitable estate withheld. In the result it was held that a non-notarial writing was admissible to establish these facts.

In *Wijetilleke* v. *Ranasinghe* (32 N.L.R. 306) the Privy Council permitted the admission of a non-notarial writing to the effect that the defendant had received the sum of Rs. 639/- agreeing to give the plaintiff a half share of all the leasehold rights he had secured from Government to collect tea for ten years from a certain land. In all the circumstances it was held that defendant was trustee of the half share of the lease for plaintiff, and that the case fell within section 84 of the Trusts Ordinance so that the plaintiff was not prevented from maintaining the action by reason of Ordinance 7 of 1840. See also *Perera* v. *Tissera* (35 N.L.R. 257) where the facts were somewhat more complicated.

On the other hand in *Sanmuganpillai* v. *Anjappa Kone* (45 N.L.R. 465) A purchased property as the nominee of B and paid the purchase price. A agreed by an informal writing to retransfer the property to B on payment of a certain sum before a specified date. The contract was for the future transfer of land and was obnoxious to the Ordinance of Frauds. This case followed Adaicappa's case.

In *Carthelis Appuhamy* v. *Saiya Nona* (46 N.L.R. 313) plaintiffs by a notarial deed (P3) conveyed certain lands to the defendant. On the same day, in consequence of a prior oral agreement, a non-notarial document (P4) was signed by the defendant by which he agreed to retransfer the lands on payment by plaintiff within a certain time of a sum equal to the consideration paid on the deed. P3 itself set out no conditions and on the face of it conveyed the whole beneficial interest. There was no evidence of any gross disparity between the value of the land at the time

and the price paid under P3, nor of any circumstance other than the existence of P4 which shewed that the transfer was to be in trust and brought the case within the terms of the Trusts Ordinance. The non-notarial writing was not of avail in law.

Fernando v. *Thamel* (47 N.L.R. 297) fell on the other side of the line. Here plaintiffs conveyed by deed to the defendant, who on the same day gave an informal document to plaintiffs undertaking to give a retransfer within three years on payment of a specified sum. But in this case there were circumstances tending to shew that the transfer was to be in trust. For instance it was proved that no money was paid by defendant on the day of the transfer but the defendant merely undertook to free the property from mortgage, and that the transfer was only granted because the defendant agreed to retransfer. Moreover there was a gross disparity in the price named in the deed and in the value of the property at the time of the transfer. The issue of fraud was also determined against the defendant. It was held that this was a clear case in which Equity would grant relief to prevent the defendant from taking advantage of the Ordinance of Frauds to keep the plaintiffs' property. See also *Eliya Lebbe* v. *Majeed* (48 N.L.R. 357).

Trusts and section 92 of the Evidence Ordinance

In all the cases so far cited section 2 of the Ordinance of Frauds had been resorted to in order to prevent the admission of any evidence other than that contained in a notarial deed. In some of the cases however there were fugitive references to the absence of writing under section 92 of the Evidence Ordinance. In a recent case, however, section 92 of the Evidence Ordinance was mainly relied on to prevent the admission of oral evidence. (See *Valliyamma Atchi* v. *Abdul Majeed*, 45 N.L.R. 169 in the Supreme Court and 48 N.L.R. 289 before the Privy Council).

The action was brought by the plaintiff against the defendant as executrix of Natchiappa Chettiar's Estate to establish a trust. The facts were as follows :—

Plaintiff transferred by deed several premises to a creditor, Natchiappa Chettiar, on the suggestion of the latter that he would act as trustee for the plaintiff and undertake the entire management of his affairs which were an embarrassed condition owing to want of liquid cash and to creditors pressing for payment. Natchiappa Chettiar was to hold the properties in trust for plaintiff and to collect the rents and profits as trustee. Arrangements were made for the liquidation of the unsecured as well as the secured debts. The plaintiff could sell any properties he liked and Natchiappa Chettiar was to take the proceeds and give credit to the plaintiff. Finally these persons were to look into accounts and adjust matters on the liquidation of the debts, and the plaintiff was to obtain a

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

retransfer of the properties, if any remained. The plaintiff was to remain in possession of two of the premises transferred, and in fact so remained in possession. The value of the property at the date of the transaction was considerably in excess of the debt due to Natchiappa Chettiar. Natchiappa Chettiar himself on more than one occasion affirmed the trust, even after all the debts had been liquidated, and up to his death. His executrix, however, fraudulently repudiated the agreement and claimed the properties. In the District Court and the Supreme Court it was held that the agreement created a trust, and that the decisions already mentioned, as well as section 5 (3) of the Trusts Ordinance, prevented the defendant from claiming that the absence of a notarial deed vitiated the transaction. The argument relating to section 92 of the Evidence Ordinance was based on a number of Indian cases : *Balkishen Das* v. *Legge*, I.L.R. 22 All. 149 ; *Maung Kyin* v. *Ma Shwe La*, I.L.R. 45 Cal. 320 ; *Dhanarajagirji* v. *Parthasaradhi*, A.I.R. (1924) P.C. 226 ; *Baijnath* v. *Valley Mohamed*, A.I.R. (1925) P.C. 75. It was urged that the evidence in the case established not a trust but a security, and that under section 92 of the Evidence Ordinance evidence of an oral agreement could not be admitted. The principle laid down in these Indian cases was that "the principles of equity which are universal forbid a person to deal with an estate which he knows he holds in security as if he held it in property. But to apply the principles you must be placed in possession of the facts, and facts must be proved according to the law of evidence prevailing in the particular jurisdiction. In England the laws of evidence, for the reasons in *Lincoln* v. *Wright* and other cases, permit such facts to be established by a proof at large, the general view being that unless this were done, the Statute of Frauds would be used as a protection or vehicle for fraud. But in India the matter of evidence is regulated by section 92 of the Evidence Act, and it accordingly remains to be asked what is the evidence which under that Statute may be competently adduced."—per Lord Shaw in *Maung Kyin* v. *Ma Shwe La* (*supra*).

In *Balkishen Das* v. *Legge* (*supra*) it was held that "the case must be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what matter the language of the document is related to existing facts."

In the case of *Valliyamma Atchi* v. *Abdul Majeed* (45 N.L.R. 169) the Supreme Court held that proviso 1 of section 92 applied, as it was the case of a person making a fraudulent claim to property, such person knowing that the true owner had not parted with it, and that accordingly oral evidence was properly admitted. One of the Judges maintained that the cases cited did not apply to the case of a trust, as distinct from a security, in virtue of section 2 of the Trusts Ordinance (Cap. 72).

The Privy Council dealt with the point shortly (in 48 N.L.R. 289)—"If the formalities required to constitute a valid trust relating to land are to be found in the Trusts Ordinance, then section 5 sub-section 3 expressly provides that the rule that the trust must be executed in accordance with sub-section one is not to operate so as to effectuate a fraud. . . . The position therefore is that as against the appellant it is not necessary that the trust set out in paragraph 7 of the plaint should be in writing, and if that is so sections 91 and 92 of the Evidence Ordinance, which were so much discussed in the Supreme Court, do not come into the picture. The contract made in 1930 was not reduced to the form of a document ; only part of it was so reduced ; and the parol part of the contract was not required by law to be reduced to the form of a document."

The Privy Council dealt with another matter. A distinction was attempted to be drawn between repudiation of the contract by Natchiappa Chettiar and repudiation by his executrix after his death, and it was argued that repudiation by the executrix was not fraudulent. On this point it was decided—"If Natchiappa during his lifetime had repudiated the trust on which the property was conveyed to him, his conduct would have been manifestly fraudulent, and the executrix can be in no better position. She was no doubt entitled to require that the trust be proved against her, who may have no personal knowledge of the matter, but once the trust is established it would be a fraud on her part to ignore the trust and to retain the property for the estate."

There is one matter further. Their Lordships have referred to section 5 (1) of the Trusts Ordinance and the requirement that a trust should be "notarially executed" under section 5 (1) and have questioned whether the formalities required under section 2 of the Ordinance of Frauds are required in such case. It is not clear whether the definition of the words "notarially executed" contained in section 3 (*o*) of the Trusts Ordinance (Cap. 72) was brought to the notice of their Lordships.

Difference between Trust and Security

There is an important decision of the Privy Council which stands on a somewhat different footing, i.e. *Saminathan Chetty* v. *Vander-Poorten* (34 N.L.R. 287) mentioned earlier under III. It is to be noted at the outset that no question arose as to the admission of oral evidence to establish an agreement relating to land. The whole case turned on the interpretation of two notarial deeds, Nos. 471 and 472 in the light of the surrounding circumstances. One of the questions involved was whether a trust had been created, and the action was brought as for a breach of trust. Their Lordships decided that "having regard to the circumstances leading up to and surrounding their execution and to the language employed therein, these deeds . . . clearly do not operate to vest

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

in the respondent an absolute interest in the property conveyed." The circumstances included the fact that the Syndicate to which the appellant belonged had spent considerable sums for various purposes connected with their acquisition, and would have no interest in entering into an agreement by which the whole property passed absolutely to the respondent and their expenditure was wholly lost. Also the language of the deed of agreement No. 472 was inconsistent with that conclusion. The terms were set out. "In these circumstances and upon this language their Lordships conclude without hesitation that the transactions effected by the deeds No. 471 and 472 was the creation of a security for money advanced, which in certain events imposed on the respondent, who was the creditor, duties and obligations in the nature of trusts."

In substance it was held that what was created was not a trust but a security or mortgage, and the facts, which have not been set out in detail here, should be closely examined to mark the distinction between the two conceptions. In the event their Lordships held that in the Roman-Dutch law the maxim "once a mortgage always a mortgage" applied, and that a time-limit for paying off the debt was of no avail.

Chetty Vilasam

Another class of case is illustrated by *Somasunderam Chetty* v. *Arunasalem Chetty* (17 N.L.R. 257). Natucotta Chetty firms trading in Ceylon have a *vilasam* or trade style consisting usually of the initials of the persons who constitute the firm, and an agent signing in Ceylon on behalf of the firm usually prefixes these initials to his own name. This practice has been recognised in many cases. In the present case the question was as to the effect of a transfer of immovable property to a Chetty with the initials or *vilasam* of his firm prefixed. It was argued that such a conveyance is a conveyance to the individual or individuals composing the firm. This argument was not accepted. "Where a conveyance is made in accordance with Ordinance 7 of 1840 to a juristic person, there can be no doubt that the legal title vests in that person, though it may be that the legal title is subject to some equity in favour of another." It was further held that it was "permissible in these cases to call evidence as to the meaning of the *vilasam* in order to prove that the conveyance was made to the transferee in the capacity of accredited agent of the firm." Evidence was accordingly permitted to prove that the agent held in trust for the firm.

See also *Narayanan Chetty* v. *James Finlay & Co.* (29 N.L.R. 65), where it was held that the transfer of the equitable interest obtained by the firm in this manner could be established by oral evidence, because Ordinance 7 of 1840 dealt only with legal and not with equitable interests: cf *Valliyammai Atchi* v. *Abdul Majeed*, 45 N.L.R. 289—at 292, cited earlier.

Duties of a Person in a Fiduciary Position

Ceylon Exports Ltd. v. *Abeysundere* (35 N.L.R. 417) was a case which raised several important points. By a deed of 1908 R donated to his minor son an estate consisting of several allotments of land. The gift was accepted by the minor's mother, but not registered till December 17th, 1915. The deed was retained by R who remained in possession, and mortgaged on several occasions, concealing the fact of the donation. On September 28th, 1915, R transferred the land to the defendant, who was aware that R's action in not registering the deed was prompted by the fraudulent intention to deprive the minor of the property, and further induced R not to register the deed of gift until the transfer was complete. The Court held that the defendant acted fraudulently and collusively in securing prior registration of his deed, and that he was not entitled to priority under the Registration of Documents Ordinance No. 23 of 1927.

One further point arose in the case. The estate consisted of Crown lands in the Kandyan Provinces for which R had village title, and he covenanted that he would obtain Crown Grants in the name of the defendant, or if he obtained the grants himself he undertook to convey to the defendant. In fact the defendant with the help of R obtained the Crown Grants in his own name, by concealing the fact of the gift to the minor. Defendant claimed that the title vested in him by virtue of the Crown Grants. On this point the court held that the Crown Grants made were subject to the equitable interests that may exist, and that R acted in fraud of the minor and collusively in obtaining the Crown Grants. Any rights granted to the defendant thereunder must necessarily be held by him on behalf of the minor.

The case went up to the Privy Council—see 38 N.L.R. 117.—Their Lordships affirmed the finding of the Supreme Court as regards the question of registration. On the second point too, namely that of trust, their Lordships agreed with the judgment of the Supreme Court. Referring to Section 118 of the Trusts Ordinance 9 of 1917 (now section 2 of Cap. 72), their Lordships were "clearly of opinion that this section makes the English law applicable to trusts or obligations in the nature of trusts arising or resulting by the implication or construction of law which has been provided for by the Ordinance. There is no doubt that according to the law of Ceylon, as according to the law of England, a guardian stands in a fiduciary relation to his ward . . . . It was his duty, if not at once to register the deed of gift, at least to prevent the registration of any instrument by which a third party could destroy the interest of the son. The relevant facts were known to the defendant: and in the circumstances the appellant became a constructive trustee of the estate included

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

in the Crown Grants, since that estate was obtained by him on the strength of the transfer of 1915 from a person in a fiduciary position, and by concealment of the fact that the beneficial owner of the village title was the minor. . . . ."

Trust does not exhaust the whole corpus

Hashim v. *Mohideen* (34 N.L.R. 1) was an instance of a devise of property in trust where the trust did not exhaust the whole corpus. The trust was limited to the rents and profits for a period of time, and no provision was made for the ultimate destination of the property. In such a case the trustee must hold the property for the benefit of the author of the trust or his legal representatives.

Section 85 of the Trusts Ordinance now applies to such a case.

"Where a trust is incapable of execution, or where a trust is completely executed without exhausting the trust property, the trustee, in the absence of a direction to the contrary, must hold the trust property or so much thereof as is unexhausted for the benefit of the author of the trust or his legal representative."

In pari delicto

There is a series of cases in which it has been held that where a plaintiff who seeks to recover property has himself been guilty of an illegal purpose or fraud, the Court will not allow him to recover the property transferred. So in *Mohamadu Marikar* v. *Ibrahim Naina* (13 N.L.R. 187) plaintiff intending to defraud third parties, by whom he expected he would be sued in respect of a certain land, executed without consideration a deed of conveyance by which he purported to transfer the land to Marikar Pulle, of whose intestate estate defendant was administrator. The Judges decided to soften the rigours of the Roman-Dutch Law by applying the doctrine of equity derived from the English law, and took into consideration the fact that the intended fraud was not carried out, and that the possession and title deeds were with the plaintiff. They referred to the principle in the Roman-Dutch law that no person shall be enriched at the expense of another, and held that in the circumstances there was no reason why the Court should punish his intention by giving away his estate to one whose roguery was even more complicated than his own.

In *Siyatu* v. *Banda* (19 N.L.R. 59) the law on this point was set out.

"The law is that when the intended fraud is not carried out, the maxim *in pari delicto potior est conditio defendentis* has no application and the party who has delivered the property may lawfully reclaim it before the alleged purpose is carried out. . . . It is not necessary that the illegal purpose should be fully accomplished and it is sufficient if a material part of it is carried out."

In *Andris* v. *Punchihamy* (24 N.L.R. 203) the matter was put in this way. "Strictly under the Roman-Dutch law a person who conveys with an intention to defraud is not entitled to any relief, but in the Roman-Dutch law no person can enrich himself at the expense of another, and by mingling the two doctrines the English Equitable Doctrine was applied."

In *Fernando* v. *Fernando* (35 N.L.R. 154) A and B entered into a collusive conveyance by which the latter was to be vested with title in order that he may qualify for membership of the local Council as a person possessed of property in his own right, with an implied understanding that it should some day be reconveyed. The object aimed at was fully carried out. It was held that the creditors of B were entitled to seize and sell the property on a decree against B. It was unnecessary in the case to decide the rights of A and B among themselves.

In *Saurma* v. *Mohamadu Lebbe* (44 N.L.R. 397) one person transferred property in the name of another in order to put it beyond the reach of creditors, at a time when these creditors had instituted proceedings against him.

"Even if the defendants had no intention of depriving the creditors permanently of what was owing to them and has eventually paid the debts in full, the effect of what he did was to delay the payment of those debts and his purpose was illegal. That illegal object was achieved. Hence the maxim *in pari delicto potior est conditio defendentis* applies, inasmuch as the defendant cannot succeed without proving his own fraud and illegality to rebut the title conferred on the plaintiffs by D1."

The effect of section 86 of the Trusts Ordinance on this matter was also referred to. The section runs thus: "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

On the question of what constitutes the intention to defraud creditors, see also *Valliyammai Atchi* v. *Abdul Majeed* (45 N.L.R. 169 and 48 N.L.R. 289 Privy Council). The fact that all the unsecured creditors were paid in full and that the plaintiff had explained to the proctor of the largest of the unsecured creditors the arrangement he made were among the circumstances which negatived the suggestion of intention to defraud.

A number of cases have arisen where a judgment creditor has purchased below the appraised value in the name of another at a fiscal's sale or a mortgage sale, in contravention of section 272 of the Civil Procedure Code, and has subsequently claimed the land from that other. Divergent views have been expressed

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

as to his right to do so. The earlier cases inclined to the view that such a claim could be upheld. So in *Silva* v. *Seadoris* (1 C.W.R. 225) the Court, following *Chellappa* v. *Selladurai* (15 N.L.R. 139), accepted the view that an objection under section 272 of the Civil Procedure Code was only an irregularity which must be set up either under section 282 of the Code or at the time of the confirmation of the sale. The plaintiff's claim was upheld. This case was followed in *Weeraman* v. *de Silva* (22 N.L.R. 107) and *Samaranayake* v. *Dissanayake* (23 N.L.R. 383).

In later cases a different view has been expressed—see *Emee Nona* v. *Wilson* (35 N.L.R. 221). " The holder of a decree in execution of which property is sold is prohibited from bidding for or purchasing the property without the previous sanction of the Court. This is enacted by section 272 of the Civil Procedure Code, see *Chellappa* v. *Selvadurai* (*supra*). The Court at the same time is empowered to impose terms as to credit or otherwise . . . . Any person dissatisfied has the usual remedy in appeal. In the case before us Endoris sought to evade the order of the Court, binding on him, by having the property conveyed " to another. It was held that he disobeyed the order of the Court, and now came to the Court to obtain the improper benefit he obtained by his unlawful act. " The maxim *in pari delicto potior est conditio possidentis* would apply."

See also *Ramanathan Chettiar* v. *Fernando* (14 C.L.Rec. 170) : it was held that the order not to bid below the appraised value was valid, and that the plaintiff did the very thing which the Court said he must not do, and as a result the judgment-debtor was damnified by the property being sold cheap. The act of the plaintiff was illegal and a fraud, and the trust set up by the plaintiff could not be enforced. The earlier cases were fully considered in this case.

See also *Warnasuriya* v. *Wickremesinghe* (43 N.L.R. 399) where plaintiff in a mortgage action, bought the mortgaged premises in execution of his decree through a nominee at a price below the appraised value, in order to circumvent the requirements of section 272 of the Code. It was held that he was not entitled to a declaration that the property was bought in trust for him.

In the earlier cases the plaintiff had actually obtained an order to bid under section 272 at the appraised value and had disobeyed that order. In *Warnasuriya* v. *Wickremesinghe* (*supra*) the plaintiff had refrained from asking for an order under section 272. But this was held not to alter the position : " A complete disregard of the authority of the Court is as serious a matter as a partial recognition of the authority of the Court and a subsequent disregard of its expressed order."

Section 86 of the Trusts Ordinance now governs such transfers for an illegal purpose. " Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried out into execution, or the transferor is not so guilty as the transferee, or the effect of permitting the transferee to restore the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

An unusual case is represented by *Marikar* v. *Marliya* (49 N.L.R. 76). The plaintiff had been the judgment-debtor in a previous action in which a hypothecary decree had been entered against him. The property was purchased at the sale in the name of the defendant, but the consideration was provided by the plaintiff, and it was established that the defendant was a trustee for the plaintiff of the property.. It was contended that the purchase by the plaintiff of the property in the name of the defendant was either contrary to law or with a view to achieve an illegal purpose, inasmuch as the plaintiff could not purchase his own property and was prohibited from purchasing it in the name of another. It was held that this did not apply to a sale on the orders of a Court. " Where by the interposition of a decree of the Court the debtor's property is ordered to be sold, the debtor cannot be regarded, for the purpose of the sale, as continuing to be the owner of it, more so is this the position under our law, for when a hypothecary decree is entered by Court, the property is brought *in custodia legis*."

It was further held that in the circumstances of the case, the plaintiff had not put the property beyond the reach of creditors, and that the purchase did not have the effect of delaying the creditors. The trust was accordingly upheld.

———

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

V

CONSTRUCTIVE TRUSTS AND THE TRUSTS ORDINANCE

The Trusts Ordinance No. 7 of 1917 (now Cap. 72) in Chapter IX proceeded to codify the law relating to Constructive Trusts. Under section 82 "an obligation in the nature of a trust (hereinafter referred to as a 'constructive trust') is created in the following cases." These "cases" are specified thereafter with particularity in sections 83 to 96. Under section 97 "the person holding property in accordance with any of the preceding sections of this Chapter must, so far as may be, perform the same duties and, save as in this Ordinance otherwise provided, is subject, so far as may be, to the same liabilities as if he were a trustee of the property for the person for whose benefit he holds it" subject to certain provisions. Under section 98 "Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration, or create an obligation in evasion of any law for the time being in force."

It is not proposed in these Articles to set out or comment on the various "cases" enumerated in Chapter IX except in so far as they have been elucidated in decisions of the Court. The "cases" given follow closely the English law relating to constructive trusts, though it is possible that in certain respects they may go beyond the English law. The decided cases in Ceylon have already been dealt with and some of the sections referred to. Attention may also be drawn to section 2 of the Trusts Ordinance which runs as follows :—

"All matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principles of equity for the time being in force in the High Court of Justice in England."

This section would cover a *casus omissus*—cf *Ceylon Exports, Ltd.* v. *Abeysundera* (35 N.L.R. 417).

A fairly recent case relates to the construction of section 96 of the Trusts Ordinance : this is *Jonga* v. *Nanduwa* (45 N.L.R. 128) decided by a Bench of three Judges. The 1st plaintiff had transferred the premises in question to the 2nd and 3rd defendants. The deed expressly stated the condition that the 1st plaintiff reserved to himself the right to pay to the vendees within eight years of the date of the deed a certain sum due on a mortgage bond which had been paid, and to redeem the transfer by that payment. The sum due was duly tendered by the 1st plaintiff within the time mentioned in the deed, but the objection was taken that the 2nd and 3rd defendants were not liable to retransfer the property as

they had not signed the deed as parties to it. It was argued that these defendants were entitled to take advantage of section 2 of the Ordinance of Frauds. The question turned on the interpretation of the words "where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest," in section 96 of the Trusts Ordinance.

It was held by Hearne J. that "where what is alleged to be a contract of sale with a *pactum de retrovendendo* annexed to it is found to be what on the face of the deed it appears to be, viz. a sale with a contract of repurchase, the vendees who are sued on their obligations cannot evade them by merely pointing to section 2 of Ordinance 7 of 1840." Keuneman J. held that section 96 caught up something which did not amount to a constructive trust under the previous sections, and emphasised (1) the words "where there is no trust" and (2) the obligation imposed on the person in possession of the property to hold the property for the benefit of the other party who held the beneficial interest wholly or partially. In this case the very terms of the grant set out the condition, and the defendants who entered into possession owed this duty to the plaintiff, viz. to hold the property available for the condition to be carried out. This was not a mere personal right vested in the plaintiff but in fact the defendants did not receive the whole beneficial interest, and the fractional portion deducted enured to the benefit of the plaintiff. An obligation in the nature of a trust accordingly arose and could be enforced under section 96.

In *Uduma Lebbe* v. *Kiri Banda* (48 N.L.R. 220) a distinction was drawn in the case where the original vendor sought to obtain specific performance of the agreement to retransfer *after* the expiration of the period specified in the agreement. It was held that time was a part of the contract and that, where there was a failure to perform within the time, the contract was broken in equity no less than in law, and that in the circumstances the plaintiff was not entitled to equitable relief.

The effect of section 96 was also considered in *Fernando* v. *Rosa Maria* (28 N.L.R. 234). The first illustration was dealt with, and it was held that where either an executor or an administrator distributes the estate of the intestate to the heirs without having paid the debts of the estate the heirs would hold for the benefit of the creditors, to the extent necessary to satisfy their just demands, the assets so distributed. Further, where such property becomes the subject-matter of a partition action, the shares allotted to the heirs in severalty are held in trust for the creditors to that extent.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

VI

CHARITABLE TRUSTS

The definition of the term "charitable trust" is set out in Chapter 10, section 99 of the Trusts Ordinance (Cap. 72).

"The expression 'charitable trust' includes any trust for the benefit of the public, or any section of the public, within or without the Island, of any of the following categories :—

(*a*) for the relief of poverty ; or

(*b*) for the advancement of education or knowledge ; or

(*c*) for the advancement of religion, or the maintenance of religious rites and practices ; or

(*d*) for any other purposes beneficial or of interest to mankind not falling within the preceding categories."

Charitable trusts were well-known in Ceylon from fairly early times. Religious trusts in particular are sometimes of great antiquity.

Under section 100 the Court has the same power for the establishment, regulation, protection and adaptation of all "charitable trusts" as are exercised with reference to "charitable trusts" within the meaning of the English law by the High Court of Justice in England. The term "adaptation" means the application of the doctrine of *cypres* where it is not possible to carry out the wishes of the author of the trust in the exact manner prescribed by the instrument of trust.

In Ceylon it has been held that a trust for the relief of the poor relations of a settlor constitutes a valid charitable trust : see *Trustees of W. Trust* v. *Income Tax Commissioners* (47 N.L.R. 313).

In the particular case exemption was claimed from the Income Tax Ordinance for such a settlement. "There must be a public element in a charitable trust according to the Income Tax Ordinance, the same element is required for the constitution of a charity according to English law ; the public element of the latter is furnished by the presence of a benefit to the community or a section of the community. A settlement for the benefit of the poor relations of the settlor is recognized by the English law as one that has a public element as it confers a benefit on at least a section of the community."

Under section 99 ordinarily the benefits must be to human beings, but sub-section (d) may go further. The words used are "beneficial or of interest to mankind." The words "of interest to" appear to have a wider significance than the words "beneficial to" and may include matters not at any rate immediately beneficial to mankind.

The matter is of importance because by section 110 the *rule against perpetuities* is made applicable to trusts, but the restrictions of this section do not apply to charitable trusts as defined by section 99.

The rule against perpetuities is set out as follows :—

"No trust shall operate to create an interest which is to take effect after the life-time of one or more persons living at the date of the constitution of the trust, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."

Religious Trusts

Religious trusts have long been recognized by the law. Buddhist Temporalities have for a considerable time been the subject of special legislation, and are at present governed by Cap. 222 of the Ordinances. In these articles it is not proposed to deal with the special rules applicable to Buddhist Temporalities. The Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) deals with Muslim charitable trusts or Wakfs and applies to both charitable and religious trusts. That subject will not be discussed here where the more general aspects of the law of trusts will be considered.

One of the questions which constantly arises is who is to be regarded as the trustee of the temple and the temporalities in the case of a religious trust. In *Kumarasamy Kurukkal* v. *Karthigeso Kurukkal* (26 N.L.R. 33) the matter arose with regard to a Hindu Temple and its lands. Three persons belonging to a Brahmin family—K. and his sons S. and T.—organized a public subscription. Transfers of land were obtained as voluntary gifts from various persons, and lands were purchased from the amounts subscribed. A Sivan temple was built, and formally and publicly dedicated with the traditional ceremonies. There was no doubt that a charitable trust for religious purposes was established. There was, however, a formal defect in that no instrument of trust was executed appropriating the property for the purposes of the trust. No Court of Equity, however, would allow the great principles it administers to be defeated by a formal defect of this character, and our own section 107 expressly provided for that point.

"What then is the legal position up to this point ? According to Hindu religious law the position is perfectly clear. The temple is conceived as being the property of the deity to whom it is dedicated. Or to put it in another way the foundation, as in the Roman law, is personified, and the temple is conceived as belonging to the foundation. We are no doubt authorized in these questions to have regard to the religious law and custom of the community concerned,—see section 106 (ii)—but I take in so

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

'having regard' we cannot subordinate to any such law or custom our own express law. According to our law as declared and defined by the Trusts Ordinance the *dominium* of the property remains vested in the legal owners, but is so vested on behalf of the beneficiaries, and the beneficiaries consist of that section of the public for whose benefit the trust was founded. Though there is a difference in form between our conception and that of the Hindu religious law, there is no difference in substance.

Bertram, C.J., continues—"It is perfectly clear that subject to any arrangement made by the founder, the right of management of the foundation vests in the founder himself and his heirs, but the founder himself is entitled to make express provision for its future management." This is stated to be the religious law with regard to the management of the foundation to which the Court is entitled "to have regard" under section 106 of the Trusts Ordinance.

Further, "In Hindu religious law the manager is the trustee. Although the property is conceived of as vested in the deity, the manager has the powers of a proprietor subject to a trust, and according to Hindu religious law the control of the property passes with the office. According to our own law, however, the legal ownership is actually vested in the trustee, but it does not under ordinary circumstances devolve with the office. This only takes place in certain defined cases,—see section 113 of the Trusts Ordinance and in particular sub-section (2)." But that sub-section does not provide for trusteeships devolving according to a family succession. On the death of a trustee holding office under an agreement to that effect, the legal ownership does not pass to the new trustee but in the absence of any formal instrument it would pass to the trustee's heirs, and in the absence of a transfer the only way of vesting it in a succeeding trustee is to obtain a vesting order under section 112.

See also *Suppramaniam* v. *Eranspakurukkal* (23 N.L.R. 417).

In this case a "madam" was founded by Arumugan Visuvanathen and his wife Kathirasapillai. For this purpose they dedicated a piece of land comprising 11½ lachams. They declared they would manage the property, and they appointed one Suppramaniam as co-trustee and made provision for the appointment of subsequent trustees. Two other lands were subsequently dedicated.

"The deeds of dedication were, unfortunately, none of them registered, and they had a further unfortunate feature, they merely dedicated the lands, they did not transfer any title to Suppramaniam who was appointed co-trustee with the donors. It was doubtless supposed that by the mere dedication and by the appointment of Suppramaniam as co-trustee title passed to him and would

devolve from time to time on the various trustees successively appointed. This, of course, is a mistake, though a mistake that is often made. The title remained after the dedication in Visuvanathen and his wife subject to the trust. In order to vest Suppramaniam and the other trustees with the legal title, notarial deeds were necessary, and the successive trustees were at all times entitled to call for these transfers. Consequently, on the death of Visuvanathen, the legal title to his interest in these properties ....passed to his heirs, subject in all cases to the obligations of the trust, and in particular to the obligation to transfer the legal title to the trustee for the time being. For this purpose the heirs were constructive trustees of the charity."

One further point was referred to a Bench of three Judges, and it was held that declarations of trust did not come within the terms of section 16 of the Registration Ordinance No. 14 of 1891.

"The two documents P 1 and P 2 (we need not consider P 3 for the present purpose) are both simple declarations of trusts. They transfer no title and, so far as the creation of the trust is concerned, are unilateral instruments. As was said in a recent case in the Privy Council (O'Meara v. Bennett, (1922) A.C. on p. 85) 'A declaration of trust is the exact opposite of any conveyance or transfer of the property. It imposes the trust without any conveyance upon the person who holds it."

The documents "undoubtedly establish an interest in land, but they are not deeds of promise, bargain, contract or agreement for that purpose. In other words, it is only where a trust of immovable property is established by a document *inter partes* that this document must be registered in order to secure priority."

See also *Sadhananda Terunanse* v. *Sumanatissa* (36 N.L.R. 422) where, following these cases, the Judges held that a Buddhist temple is not a juristic person. The view expressed by Professor Lee was approved: "We no longer attribute any kind of personality to an unincorporated charity, the only personality which comes into question being that of the trustee in whom the trust property is vested."

In *Karthigesar Ambalavaner* v. *Subramaniar Kathiravelu* (27 N.L.R. 15) a similar point was emphasised. Bertram, C.J., refused to accept the doctrine that a *de facto* trustee of the temple is as such entitled to the possession of its temporalities. He can only obtain these temporalities by becoming vested with the legal title to them. Also it was not possible to declare that lands are the property of the temple, as we do not recognize the personality of religious foundations.

In this case two families descending from a common origin had a joint interest in the temple for some 50 years past. They had each been vested with a share of its endowments, and had

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

from time to time participated in the management. Neither family had established an exclusive right to the management of the temple. The religious foundation was considered as having been founded by the two branches of the family. No scheme of management was drawn up at the time of the foundation or within a reasonable time after it. Under the Hindu religious law and custom, all the descendants of the founder would be joint managers and trustees discharging the functions in rotation or according to some other arrangement.

The case was sent back for the District Judge to give directions in regard to the devolution of the trusteeship from time to time among the descendants of both branches of the family and for the issue of any necessary vesting order under section 112.

As regards a *de facto* trustee, see also *Kurukal* v. *Kurukal* (12 N.L.R. 40).

In *Velupillai Arumogam* v. *Saravanamuttu Ponnasamy* (27 N.L.R. 173) members of the congregation of a Hindu temple sued the hereditary manager of the temple under section 102 *inter alia* for the removal of the hereditary manager and for the settlement of a scheme of management. It was held that the claim for the removal of the hereditary manager could not be sustained.

"The object of section 102....is not to alter the religious law and custom under which Hindu temples are carried on but to give effect to that law and custom. . . . It is not . . . the duty of our courts to take special measures to foster and extend religious institutions of any community. Its duty is to ascertain the legal rights of these institutions and the various persons connected with them, and to give effect to these legal rights." The members of the congregation were entitled to ask for a scheme of management but any such scheme must be in accordance with the existing religious law and custom.

See on this point *Kalimuttu* v. *Muttusamy* (27 N.L.R. 193 at p. 201) which emphasises the doctrine that the court cannot vary or modify existing trusts, and that only an Act of Parliament can do so.

One other matter of interest in 27 N.L.R. 173 relates to the customs governing such a religious foundation.

"It was proved by the evidence beyond doubt that the temple is one of those foundations which have been established and endowed by pious donors in past generations for the worship of particular deities. In such cases the temple and the lands dedicated in connection with it remain the property of the founder and his heirs, subject to a religious trust for the carrying on at the temple of the worship of the deity to whom it is dedicated. In such cases, if the founder has given no direction for the appointment of trustees, or as they are generally called, managers, the devolution

of the trusteeship and the management of the temple remain in the heirs of the founder. But as in most cases it is not convenient that they should all be managers, a system has grown up under which one person, generally the eldest male descendant of the last person who has acted in the office, with the consent of the other members of the family, acts as manager and trustee. This person, again with the presumed consent of the other heirs, often appoints some descendant of his own to succeed him in the managership, and in some cases to be associated with him until his death. I think that there can be no question that this is the religious law and custom with regard to temples in the peninsula of Jaffna, and that the temple now under consideration was a temple of this character."

In *Mohamedu* v. *Meera Kandu* (24 N.L.R. 370) the founders of a Muslim charitable trust directed that from time to time one of their heirs should succeed to the office of trustee. No direction was given as to the mode in which the particular heir should be chosen. It was held that it was in accordance with Muslim law, where there is no other definite way of obtaining the particular heir, that this should be done by the District Judge.

In *Velupillai* v. *Sabapathypillai* (43 N.L.R. 483) under the scheme of management settled by Court trustees had to be elected at a general meeting of the congregation held in the temple premises. The congregation was prevented from holding the meeting in the temple premises, and with the permission of the Court trustees were appointed at a meeting held outside the temple premises. This election was good, so long as the holding of the meeting outside the temple premises did not affect the result of the election, quite apart from the order of Court granting permission to hold the meeting outside.

In *Thamotherampillai* v. *Sellapah* (34 N.L.R. 300) it was held that in settling a scheme for the management of a trust, the Court had the power to direct that other trustees be associated with the hereditary trustee in the management, at any rate where the hereditary trustee took no part and wished to take no part in the management.

In *Tambiah* v. *Kasipillai* (42 N.L.R. 558) the plaintiff brought action claiming that he was the trustee of the temple and temple premises and asking for a vesting order under section 112 for land comprising the temporalities, on the ground that there was a doubt as to the persons in whom the legal title was vested. It was held that both these claims could be maintained. As regards the temple and temple premises the claim to be declared trustee was not a claim to an office or status. The action was in substance an action *rei vindicatio*. Plaintiff claimed that the original founder by his dedication of these premises to the temple became a trustee and that the legal title descended from the original owner to the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

plaintiff. As regards the temporalities, what was claimed was not legal title but a vesting order under section 112. The plaintiff did not claim as trustee in this respect. Under section 112 (2) the vesting order would have the same effect "as if the trustee or other person in whom the trust property was vested had executed a transfer to the effect intended by the order." The vesting order had the effect of transferring the legal title from any one in whom it may reside to the person named in the order. It was further held that a regular action could be brought to obtain a vesting order, and that a claimant was not restricted to bringing an action under section 102.

No question of prescription arose with respect to either of the claims.

Possessory Action

These cases throw some light on the question as to the person who can be held to be a trustee and to be entitled to assert rights in vindication of the trust property and for declaration of title as trustee. In *Abdul Azeez* v. *Abdul Rahiman* (15 N.L.R. 317) the Privy Council considered the right of a person appointed as "trustee" of a Muslim mosque by the congregation for a term of years to maintain a possessory action. The elements necessary to constitute a possessory action were present, but it was contended that as the plaintiff did not hold the property except as trustee or manager the possessory remedy was incompetent. The argument was that the trustee was not the owner of the property *ut dominus*. The Privy Council held that the "trustee" could maintain the possessory action.

"The passage from Voet, founded on 43.16.3 indicates that he was alive to the consideration that to give to the expression *ut dominus*, as applied to possession, too narrow a construction might prove inequitable and unworkable, and it shows clearly that the remedy was not denied to a *colonus* or a procurator if the *dominus* was absent. . . . The question of possession by agency was but slightly developed and accordingly slightly dealt with at the time and in the works of these learned authors."

Madams and Chattrams

In *Kandappu* v. *Segunathan* (16 N.L.R. 333) it was held that a "madam," which is a halting place or resthouse devoted to the public can be the subject of a charitable trust, and that the residents of a village where a 'madam' is situated have a sufficient interest in the 'madam' to maintain an action with the sanction of the Attorney-General under section 639 of the Civil Procedure Code, for removing a trustee for breach of trust and for the appointment of another. See also *Muttiahpulle* v. *Sanmugan Chetty* (14 N.L.R. 15).

It may be noted that under section 99 (4) of the Trusts Ordinance (Cap. 72) "the expression 'place of religious resort' includes establishments commonly known as 'madams' or 'chattrams'."

Secular Courts and Ecclesiastical Matters

The extent to which secular Courts will interfere with religious matters has on more than one occasion been laid down in our Courts. In *Pitche Lebbe* v. *Cassim Marikar* (18 N.L.R. 111) the only question involved was whether the carrying of a pagoda in procession in connection with a Muslim mosque was repugnant to the Muslim religious law. Two propositions of law were laid down :

"In the first place, no secular tribunal will take cognizance of or adjudicate upon controversies between rival religious sects as to points of doctrine or ceremonial where nothing else is at issue. In the second place, no secular tribunal will refuse to take cognizance of and to adjudicate upon such controversies where civil rights are at stake, or hesitate, in that event, to consider and pronounce an opinion upon what would otherwise be purely ecclesiastical questions." Applying these principles, the Court refused the application for an injunction.

In *Gooneratne Nayake Thero* v. *Punchi Banda Korala* (28 N.L.R. 145) the chief priest of a Buddhist vihare claimed declaration of title to a *gabadage* and *mulvenge*, i.e. the storehouse for rice and other articles and the kitchen. Objection was taken that this was purely an ecclesiastical matter. The objection was rejected on two grounds : first, the dispute concerned the possession and management of certain property, with which the civil Court was entitled to deal ; next, the dispute involved the interpretation of the provisions of the Buddhist Temporalities Ordinance, especially section 20, and was therefore not a religious dispute which had to be determined by the consideration of merely ecclesiastical laws and customs.

In *Nessaemmah* v. *Sinnetamby* (36 N.L.R. 75) it was held that the right of a person to worship at a Hindu temple is a civil right enforceable in a Court of law. "The right claimed by the plaintiff to entry to all parts of the temple is of a civil nature and within the cognizance of the civil Courts. . . . The right of a worshipper to worship at a given temple is recognized . . . as a civil right."

Our Courts have also upheld the right of a Buddhist priest to claim the incumbency of a temple, even though the right to property belonging to the temple was vested in a lay trustee.

See also *Abdul Cader* v. *Ahamado Lebbe Marikar* (37 N.L.R. 257) decided by the Privy Council. This is cited in relation to section 102 of the Trusts Ordinance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

The Courts of law have all along claimed and exercised the right to interfere with the proceedings of ecclesiastical bodies of all descriptions wherever claims to property or to civil rights are involved : see *Nuku Lebbe* v. *Thamby* (16 N.L.R. 94) and compare *Mohamadu Lebbe* v. *Koreen* (1 N.L.R. 351).

The general principle is that extra-judicial tribunals are bound, in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem*, and that no man should be condemned to consequences resulting from alleged misconduct unheard, and without the opportunity of making his defence. Where that condition is complied with, Courts of law are exceedingly slow to interfere with the exercise of the jurisdiction of domestic tribunals to which each of his members has, either expressly or by implication, submitted himself. See *Dharmarama* v. *Wimalaratne* (Balasingham, 5 Notes of cases 57). A person whose civil rights are involved is entitled to question the finding of an extra-judicial tribunal on the ground of gross irregularity or improper conduct on the part of the tribunal : *Attadassi Unnanse* v. *Rewata Unnanse* (29 N.L.R. 361).

Beneficiary to be clearly indicated

The *Baptist Missionary Society Corporation* v. *Jayewardene* (20 N.L.R. 359) emphasises the necessity, in creating a trust, for the author of the trust to indicate with reasonable certainty the beneficiary. In this case the original donor assigned the lands to Rev. Pigott of the Baptist Society or his successor or successors in office " so that they may possess the same and deal with it as they may desire." The deed contained two references to the circumstances out of which it originated. The donor was said to have assigned to Rev. Pigott of the Baptist Society of Colombo " to build a chapel for the purpose of preaching the Christian Gospel to the inhabitants of the place."

The other reference stated that " a place of worship is being constructed on the aforesaid land at the expense of the public." These references were held to be merely recitals. The grant was, however, of the most unfettered possible description, with nothing to indicate a trust relating to the occupation and control of the premises. The grant to the " successors in office " would, apart from special legislation, be inoperative. But it could be given effect under section 113 of the Trusts Ordinance. In the circumstances it was held that no trust had been created in favour of the congregation, and the words used were " somewhat slender " for the purpose of creating a trust in favour of the Baptist Missionary Society.

A case on similar lines is *Arumogampillai* v. *Velupillai Periyatamby* (46 N.L.R. 241) where the parties were Hindus. Plaintiff and his wife transferred by P1 of 1925 as a gift to their son S a plot of land, subject to certain conditions. By P2 of 1928 the plaintiff and his wife " revoked cancelled and made void " the conditions contained in P1, and declared that the land should be considered " a donation free from all conditions." The question arose as to whether P1 created a charitable trust. In P1 the donors desired that S should perform certain ceremonies, of the nature of which there was no evidence, but did not state that any income from the land was to be utilised for these ceremonies. There was a prohibition of alienation *inter vivos* but no indication of persons or institutions to be benefited in the event of such alienation. There was no prohibition of a testamentary disposition.

In the circumstances it was held that no charitable trust had been created.

Sections 101 and 102 of the Trusts Ordinance

In relation to Charitable Trusts, two sections of the Trusts Ordinance (Cap. 72) require mention.

Under section 101 a special action is set up in the following cases :—

(1) where there is any alleged breach of any express or constructive charitable trust, or

(2) whenever the direction of the Court is deemed necessary for the administration of any such trust.

The action under this section may be instituted—

(1) by the Attorney-General acting *ex-officio*, or

(2) by two or more persons having an interest in the trust, and having obtained the consent in writing of the Attorney-General.

The relief that can be obtained is set out in sub-section (1), clauses (*a*) to (*f*).

Under sub-section (2) nothing contained in this section or in section 102 shall be deemed to preclude a trustee or author of any charitable trust from applying to Court by action or otherwise for such direction or relief under the general provisions of the Ordinance, or for invoking the assistance of the Court for the better securing of the objects of the trust, or for regulating its administration or the succession to the trusteeship, and on any such application the Court will make such order as to it may seem equitable.

Under sub-section (3) in proceedings under this section with respect to any religious trust, regard shall be had to the statutory or other powers belonging to or customarily exercised by the authorities of any religious body or society concerned in the administration of the trust.

Under sub-section (4), section 101 shall not apply to trusts governed by section 102.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

In *Dullewe* v. *Somawathie Upasika* (45 N.L.R. 217) it was held that an action may be instituted under section 101, even where the defendants deny the existence of the alleged trust. It was incumbent on the plaintiff, however, to prove either (1) the existence of the charitable trust and (2) the breach of such trust by defendants, or in the alternative (1) the existence of the charitable trust, and (2) the necessity for the direction by Court.

" The jurisdiction of the Court to try an action in respect of a disputed trust appears to me to be placed beyond any doubt by section 107," whereby in the case of a charitable trust, the Court is not debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it is of opinion from all the circumstances that a trust in fact exists or ought to be deemed to exist.

Another form of action is introduced by section 102 which relates to religious trusts. Under section 102 (1) any five persons interested (1) in any place of worship, or (2) in any religious establishment or place of religious resort, or (3) in the performance of the worship or of the service thereof, or (4) in the trusts, express or constructive, relating thereto, may without joining as plaintiff any of the other persons interested bring action to obtain a decree for all or any of the forms of relief contained in clauses (*a*) to (*j*) set out in that sub-section.

Under section 102 (2) the interest required under the section need not be a pecuniary or immediate interest, or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts. Any person who is connected with the trust as donor, or by family or hereditary interests, or who for a period of not less than twelve months has been in the habit of attending at the performance of the worship or service of or connected with the place or establishment in question, or of contributing to the general or special expenses incidental to such worship or service, or of partaking in the benefit of any distribution of alms thereat or in connection therewith, or of otherwise enjoying the benefit of the trust, shall be deemed to be a person interested within the meaning of the section.

Section 102 (3) provides that no action shall be entertained under the section unless (1) the plaintiffs have previously presented a petition to the Government Agent or Assistant Government Agent of the Province or District for the appointment of a commissioner or commissioners to enquire into the subject-matter of the plaint, and (2) unless the Government Agent or Assistant Government Agent has certified that an enquiry has been held in pursuance of the petition, and that the commissioner or commissioners (or the majority of them) have reported —

(*a*) that the subject-matter of the plaint is one that calls for the consideration of the Court, and

(*b*) either it has not proved possible to bring about an amicable settlement of the questions involved, or that the assistance of the Court is required for the purpose of giving effect to any amicable settlement that has been arrived at.

It should be borne in mind that section 102 does not apply to any Christian religious trust,—see section 102 (8). Further, both sections 101 and 102 appear in Chapter 10 of the Trusts Ordinance, and under section 109 of that Ordinance Chapter 10 does not apply—

(*a*) to religious trusts regulated by the Buddhist Temporalities Ordinance (now Cap. 222) and

(*b*) to religious trusts regulated by the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) in so far as this chapter is inconsistent with the provisions of that Ordinance.

Under section 103 of the Trusts Ordinance the Court has power to refer the matter to arbitration, or to appoint a committee for the purpose of making inquiry and reporting to Court on any matter.

In *Chinnatamby* v. *Somasundera Aiyer* (48 N.L.R. 515) it was held that all the reliefs available under section 102 (1) need not and frequently cannot be embodied in one decree, but that decrees may be issued from time to time thereunder.

In *Sivaguru* v. *Alagaratnam* (48 N.L.R. 369) it was emphasised that the certificate by the Government Agent must strictly conform to the requirements of section 102 (3) (*a* and *b*). Where a certificate did not contain the necessary elements and was not a sufficient compliance with the section, the plaintiffs' action was dismissed.

In the case of *Tambipillai* v. *Kumaraswamy Kurukkal* (46 N.L.R. 557) seventy-nine persons presented a petition to the Government Agent and obtained his certificate. It was held that it was not necessary for all the seventy-nine petitioners to join as plaintiffs ; any five or more of them could institute the action. Further, where eight of the seventy-nine petitioners and four strangers to the petition instituted action, the Court could permit the four strangers to withdraw from the action and the action to proceed thereafter.

In *Velupillai Arumogam* v. *Saravanamuttu Ponnasamy* (27 N.L.R. 173) it was held that the object of section 102 was not to alter the religious law and custom by which Hindu temples are governed but to give effect to that law and custom.

In *Sathasivam* v. *Vaithianathan* (23 N.L.R. 215) it was held that any action instituted under section 102 is subject to the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

general provisions of the Civil Procedure Code, and it is competent to the Court to appoint a receiver in respect of the trust property under section 671 of the Code.

In *Kandiahpillai* v. *Vaithilingam* (36 C.L.W. 27 ; 49 N.L.R. 127) it was held that the Court had power under section 408 of the Code to accept a compromise with respect to a charitable trust, even in an action under section 102 of the Trusts Ordinance, but effect should not be given to a compromise bearing the taint of collusion or lack of *bona fides* as presented to Court.

In *Abdul Cader* v. *Ahamado Lebbe Marikar* (37 N.L.R. 257) two members of the Board of Trustees of the Maradana Mosque, who were also members of the congregation, brought action for a declaration that a meeting of the congregation of the mosque was irregularly held in that the defendants wrongfully caused to be excluded therefrom a large number of the members of the congregation. The objection was taken in the Supreme Court that the only remedy of persons aggrieved as the plaintiffs in the action was to proceed by way of an action to be brought by not less than five persons under section 102 of the Trusts Ordinance. Before the Privy Council, however, it was conceded that a civil wrong was complained of in this action, and that section 102 did not exclude the jurisdiction of the Court to bring this action. But it was contended that the procedure under section 102 being available, and being the more appropriate and convenient procedure, the Courts as a matter of discretion were entitled to refuse to make the declarations and to grant the relief prayed, and should have refused to do so. Their Lordships saw no inconvenience involved in the procedure adopted in this action, and were of opinion that the plaintiffs were entitled to relief and that the declarations were properly made. In any case their Lordships saw no ground for interfering with the exercise of the discretion in the Courts below.

An objection that the proper parties were not before the Court was also dealt with. Their Lordships thought that in a matter concerning the interests of the congregation so closely it would have been proper that it should have been represented in the action by some member or members of it, not being officials. But their Lordships refused to interfere with the decree because they were of opinion that no injustice resulted from the absence of these parties from the record.

VII

TRUSTS AND THE PARTITION ORDINANCE.

The effect of proceedings under the Partition Ordinance on trusts has been considered by our Courts.

In *Daniel* v. *Sarnelis Appu* (7 N.L.R. 163) a partition action was brought by the trustee of a Buddhist Vihare. Two objections were taken : first, that under section 30 of the Buddhist Temporalities Ordinance 3 of 1889 the trustee had no authority to institute a partition action. This argument was not accepted. The further point raised was that a trustee is not an owner such as is contemplated by the Partition Ordinance. But the Court held that this Ordinance was not intended to be limited to persons who have an absolute ownership in the property but that it also includes one who has an undivided share vested in him as trustee. The trustee under the Buddhist Temporalities Ordinance was to be regarded as the owner of the temple property subject to the terms of the trust, and there was no reason why he should not be allowed to bring an action for partition.

In *Silva* v. *Silva* (19 N.L.R. 47) the question arose whether a beneficiary or *cestui que trust* could bring a partition action. The plaintiff in his plaint alleged that the defendant in purchasing this land from the Crown and in obtaining a Crown Grant in his own name had " acted on behalf of himself and the plaintiff " and that the plaintiff was entitled to a half share of the land. It was clear that the defendant was the legal owner of the whole land, and the only question was whether the plaintiff could maintain the partition action before he had obtained a conveyance from the defendant.

It was held that the plaintiff could not maintain the action.

" It is only a co-owner that is competent to bring an action for partition under the Ordinance. There are no doubt decisions. . . showing that a co-owner for this purpose need not be one who is entitled to the absolute *dominium* or who is beneficially interested. Thus it has been held that a fiduciary in the case of *fidei commissum* property or a trustee may bring an action for partition. But in all such cases the legal estate is vested in the plaintiff who is therefore rightly considered an ' owner' within the meaning of the Ordinance." Further the only proper decree which the Court could enter was one requiring the defendant to fulfil the trust specifically. Such a decree was obviously not possible in a partition action.

This view was modified to some extent in *Appuhamy* v. *Marihamy* (25 N.L.R. 421) where it was held that when the trust was admitted it would be futile to refer the plaintiff to a separate

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

action to obtain a conveyance to support a title which was not in dispute. It may be noted that in this case the plaintiff has also shown that he had prescriptive title to the share in question.

The right of parties to intervene for the purpose of establishing trusts was considered in *Galgamuwa* v. *Weerasekera* (21 N.L.R. 108) here plaintiff claiming to be an heir of Banda brought a partition action against the other heirs of Banda. The respondents sought to intervene after interlocutory decree, alleging that Banda held certain shares of the land in trust for them. The intervention was allowed. The objection was based on *Silva* v. *Silva* (*supra*) but was not accepted. "There, however, it was the plaintiff who had to establish a trust in his favour under the deed by which the defendant was vested with title. . . . . The plaintiff, not being a co-owner at the date of the action was not entitled to bring the action for partition. In this case it is not a question whether the partition action was originally rightly brought but as to whether the respondents, who assert a right to certain interests in the land, should be allowed to come in to safeguard those interests. . . . These respondents, if they were not allowed to intervene and the partition action went on, would no longer have been able to dispute the right of the parties to the action after final decree had been entered in the case."

At one time it was held that where a trustee obtained a partition decree in his own name without mention of the trust, it was not open to the beneficiary to claim a conveyance from the trustee, but that his only remedy was an action for damages under section 9 of the Partition Ordinance: see *Babunona* v. *Cornelis Appu* (14 N.L.R. 45). However, in *Weeraman* v. *de Silva* (22 N.L.R. 107) the plaintiff, who was an execution creditor, obtained an order to bid but, with a view to purchasing below the appraised value, purchased the property in the name of the defendant. The fiscal's transfer was issued to the defendant. A land the share of which was purchased by defendant in trust for plaintiff became the subject of a partition action and defendant was declared entitled to the share. The property was sold and defendant was declared entitled to a certain share of the purchase money. In view of the trust plaintiff was declared entitled to that share. It was contended that the partition decree wiped out the trust attaching to the share in favour of the plaintiff. But this contention was held to be unsound. Under the Partition Ordinance the title of the purchaser "was indefeasible as regards the estate that passed to him under the decree. . . . The title of the defendant may be said to be conclusive. He, nevertheless, owns the property subject to the original trust." The plaintiff was accordingly entitled to draw the money representing the share which was the subject of the trust.

Also in *Sultan* v. *Sivanadian* (15 N.L.R. 135), it was held that a certificate of sale granted under section 8 of the Partition Ordinance did not possess such a conclusive effect as to prevent a person from claiming the property sold on the ground of a secret trust between him and the purchaser. The plaintiff in this case alleged that the purchase was made with his money, but the certificate taken in the name of the other.

Marikar v. *Marikar* (22 N.L.R. 137) came before a Bench of three Judges. The previous cases relating to trusts and also to *fidei commissa* were reviewed, and it was held that a trust, express or constructive, is not extinguished by a decree for partition, and attaches to the divided portion, which on the partition is assigned to the trustee. "Section 9 of the Partition Ordinance does not and is not intended to extinguish equitable interests. The provision that the decree shall be good and sufficient evidence of the titles of parties to such shares or interests as have been thereby awarded in severalty refers to legal titles only, and cannot properly be stretched to extinguish a trust attaching to the property. . . . . The decree is good and conclusive against all persons whatsoever, including a *cestui que trust*, as to the partition or sale and as to the specific lot or sum of money to which the trust relates, but the effect, so far as the *cestui que trust* is concerned, is merely to set apart a specific portion of the common estate to which his rights attach in severalty."

A distinction was attempted to be drawn between express trusts and constructive trusts in this connection, but the distinction was not accepted.

The authority of *Babu Nona* v. *Cornelis Appu* (14 N.L.R. 45) was not followed.

See also *Fernando* v. *Rosa Maria* (28 N.L.R. 234). Where the heirs of a deceased person take possession of his estate, they hold the property in trust for the legal representatives, as representing the creditors, to the extent necessary for the payment of the debts of the estate: of section 96 of the Trusts Ordinance.

Where such property becomes the subject-matter of a partition action, the shares allotted to the heirs in severalty are held in trust for the creditors to that extent. The creditor or the legal representative may be said to have an equitable interest in the property of the intestate, while the legal estate is in the legatees or heirs.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

VIII

RIGHTS AND LIABILITIES IN THE CASE OF TRUSTS

Chapter 3 of the Trusts Ordinance (sections 11 to 31) sets out the duties and liabilities of trustees. Chapter 4 (sections 32 to 47) deals with the rights and powers of trustees, and Chapter 5 (sections 48 to 56) deals with the disabilities of trustees. Chapter 6 (sections 57 to 71) deals with the rights and liabilities of the beneficiary. The following decided cases raise matters of interest in this connection.

Even before the Trusts Ordinance, a trustee was entitled, in the absence of anything to the contrary in the instrument of trust, to grant a lease for a reasonable term. See *Mohamadu* v. *Meyedeen* (2 C.W.R. 93). The matter is now governed by section 38, where except with the permission of the Court and subject to any statutory provision on that behalf the trustee cannot lease trust property for a period of more than 10 years from the date of the lease, or for a period expiring after the date of termination of the trust, if such termination can be ascertained, or without reserving the best yearly rent that can be reasonably obtained. Any lease going beyond the limits prescribed is void to the extent to which it exceeds the limits.

Where a will contains an imperative trust for sale, qualified by a discretionary power of postponement, and the trustees cannot agree as to whether the discretionary power should be exercised or not, the trust for sale must be executed, *Roberts* v. *Rowlands* (2 C.W.R. 225).

A *de jure* trustee may maintain an action for an injunction against persons who unlawfully prevent him from entering upon his office, or who interfere with him in the exercise of his office. *Silva* v. *Banda* (28 N.L.R. 239).

The trustee of a Buddhist temple was permitted to maintain an action *quia timet* to set aside a deed by which a priest, claiming by virtue of pupillary succession, transferred land belonging to the temple. *De Silva* v. *Dheevananda Thero* (28 N.L.R. 257).

The co-trustee of a Hindu temple was held entitled to bring action against another trustee for the removal of an obstruction to the free passage of religious worshippers caused by a building. *Thamotheram Pillai* v. *Arumogam* (28 N.L.R. 406).

A trustee whose term of office has expired during the pendency of an action brought by him is not entitled to continue the action, *Sabapathipillai* v. *Vaithialingam* (40 N.L.R. 107). The succeeding trustee was not, however, precluded from applying to Court to continue the action.

A trustee may under certain circumstances be held liable for not making the funds he controls productive. *Janso Hamine* v. *Weeratunga* (1 C.W.R. 44). But in the circumstances of the case the Court held that it was inequitable to attribute neglect of duty to the defendant.

In *Ramanathan* v. *Kurukkal* (15 N.L.R. 216) it was held that the trustee of a Hindu temple was entitled to dismiss the officiating priest of the temple. In this case the priest was in fact appointed by the trustee, and was merely a monthly paid servant of the temple.

In *Markandu* v. *Ayer* (26 N.L.R. 102) it was held that an officiating priest had no right to transfer the right of officiating in the temple to another person, and was liable to dismissal on that ground. In this case by an earlier consent decree the priests were not to be dismissed without the intervention of a Court of law.

Where a trustee contracts as trustee and judgment is entered against him as such, he is not entitled to compel the judgment creditor, who seeks to execute the judgment against him personally, to levy execution instead on the trust peoperty. The mere use of the words " as trustee " in a contract is not sufficient to exclude personal liability. *Hayley* v. *Nugawela* (35 N.L.R. 157).

" It is clear on the decisions in England that persons to whom a trustee has incurred liability have no original or direct right to claim payment out of the trust estate, and it follows that the trustee cannot compel them to resort to the trust estate for payment."

Again " It was contended for the respondent that the effect of his contracting expressly as trustee was to negative a personal liability ; this cannot be, for a liability as trustee is a personal liability."

There are, however, cases in which " a trustee can contract so as to exclude personal liability." In this decision the English cases are considered. They are cases where " on an interpretation of the contract viewed as a whole, its language, its incidents, and its subject-matter, the intention of the parties was to exclude the personal liability of the trustee."

" But even where there is an agreement to exclude personal liability, it does not necessarily follow that it must be excluded." You must see whether the trustee had the power to deal on those terms. See in this connection *Moraliya* v. *Gunesekera* (23 N.L.R. 261—at 265). " The law knows nothing of the idea of a trustee suing or being sued in his capacity as trustee. He has not a representative capacity like that of executor or administrator. If he incurs a liability in the *bona fide* execution of his trust, he has a right of indemnity against the trust property " but he cannot demand that the property belonging to the trust be discussed before he is made personally liable.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

This last mentioned case also discusses the question whether a trustee for the time being can sue on contracts made by his predecessor. The trustee in this case sued on a mortgage bond entered into by his predecessor. The mortgage bond was a chose in action, and a chose in action " has become definitely naturalised in Ceylon as part of our legal system." The question was whether the mortgage bond had become vested in the new trustee without an assignment. The effect of the general law of trusts, and the Trusts Ordinance, was discussed in this case, but the decision was based on the terms of the Buddhist Temporalities Ordinance of 1905 ; and it was held that it was the intention of that Ordinance that choses in action should vest successively in the trustee for the time being holding office under the Ordinance. Under the Trusts Ordinance, sections 77 and 113 would apply.

In *Arunasalam* v. *Somasunderam* (20 N.L.R. 321), the question arose whether the heirs of a beneficiary could maintain an action against a trustee, or whether it was only the administrator of the beneficiary who could bring action. It was held that " the property of a deceased person who dies intestate passes on his death to his heirs, subject to the right of the administrator to sell for the purposes of the administration, if necessary. This principle applies to property held in trust for the deceased as well as to property, the legal title to which was vested in him, and the heir can enforce his rights to such property if it is not required by the administrator for the purposes of administration."

In *Sathasivam* v. *Vytianathan Chetty* (25 N.L.R. 93), the question was considered as to what reasons are sufficient for removing old trustees and appointing new trustees. It was held that " for the purposes of the Ordinance it is not necessary to prove specific acts of misconduct on the part of the trustees, but that it would be sufficient if they are shown to have neglected their duties as trustees, and the Court is satisfied that they are persons who, under the circumstances, are unfit to continue to act in that capacity." The action in this case was brought under section 102 of the Trusts Ordinance.

In *Public Trustee* v. *Walles* (43 N.L.R. 42), application was made under section 76 of the Trusts Ordinance for the removal of the trustee. It was held that in this case the burden was on the petitioner to prove that the trustee committed a breach of duty to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own : see section 15. Further a trustee who acted honestly but not reasonably is not entitled to relief under section 31.

Section 20 of the Trusts Ordinance sets out the securities, on which a trustee is bound to invest trust property which consists of money and cannot be applied immediately or at an early date to the purposes of the trust. Subject to any direction contained

in the instrument of trust the trustee can only invest such money on the securities mentioned in the section and on no others. The securities are mentioned in section 20 (*a*) to (*i*). Section 20 runs as follows :—

Where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others :—

(*a*) in promissory notes, debentures, stock, or other securities of the Government of Ceylon, or of the Government of the United Kingdom of Great Britain and Northern Ireland, or of the Government of India ;

(*b*) in bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India ;

(*c*) in any colonial stock which is registered in the United Kingdom of Great Britain and Northern Ireland in accordance with the provisions of the Colonial Stock Acts 1877 to 1900, and with respect to which there have been observed such conditions (if any) as the Lords Commissioners of the Treasury of the United Kingdom and Northern Ireland may, by order notified in the London Gazette, prescribe ;

(*d*) in the debenture or rent charge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special act of Parliament, and having during each of the ten years last past before the date of the investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock ;

(*e*) in stock or debentures of or shares in any railway or other company the interest whereof shall have been guaranteed by the Secretary of State for India in Council ;

(*f*) on a first mortgage of immovable property situated in Ceylon or the United Kingdom of Great Britain and Northern Ireland :

Provided that the property is not a leasehold for a term of years, and that the value of the property exceeds by one-third, or if consisting wholly or mainly of buildings, exceeds by one half the mortgage moneys ;

(*g*) in debentures issued by the Ceylon State Mortgage Bank ;

(*h*) in any other security authorised as a trustee investment by the law of England for the time being (other than real or hereditable securities) ;

(*i*) on any other security expressly authorised by the instrument of trust or by any rule which the Government may from time to time prescribe in that behalf.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

IX

THE APPOINTMENT OF NEW TRUSTEES AND VESTING OF THE TRUST PROPERTY

Section 75 of the Trusts Ordinance provides for the appointment of new trustees in the event of disclaimer by the trustee, or on his death, or on his absence from Ceylon for such a continuous period and under such circumstances that in the opinion of the Court it is desirable, in the interests of the trust, that his office be declared vacant, or on his being declared an insolvent, or on his desiring to be discharged from the trust, or refusing or becoming, in the opinion of the Court, unfit or permanently incapable to act in the trust, or on his accepting an inconsistent trust.

The new trustee, under section 75 (1), may be appointed in his place by

(*a*) the person nominated for that purpose by the instrument of trust, if any ; or

(*b*) if there is no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or the legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Under section 75 (2) such appointment shall be in writing under the hand of the person making it and shall be notarially executed. See section 3 (*o*) as to the term " notarially executed."

Under section 75 (3) every such instrument of appointment, in so far as it affects immovable property, shall contain the particulars required by section 14 of the Registration of Documents Ordinance, and shall be deemed to be an instrument affecting land for the purposes of that Ordinance. But no appointment of a trustee of any charitable trust is deemed to be invalidated by reason of the absence of such particulars, and is not liable to be defeated by the registration of any subsequent deed, order, or other instrument under section 7 of that Ordinance.

Under section 75 (4), on the appointment of a new trustee the number of trustees may be increased.

In *re de Mel* (42 N.L.R. 54) where the trust deed contained no power vested in the trustees specifically named or in their successors who were designated therein to appoint new trustees, a sole surviving trustee was entitled by virtue of section 75 to appoint new trustees for the purpose of filling vacancies caused by death or incapacity.

It was further held that the words " in the opinion of the Court " in section 75 (1) must be limited to their context, and that " the opinion of the Court is only needed (*a*) where the trustee is absent from Ceylon, for the purpose of considering whether the period and the circumstances make it desirable that his office be declared vacant, and (*b*) where the trustee is or becomes unfit or personally incapable to act in the trust, for the purpose of determining whether he is so unfit or personally incapable." In the other cases mentioned, the opinion of the Court is not needed for any purpose.

Under section 76 (1) where any vacancy or disqualification occurs, and it is found not reasonably practicable to appoint a new trustee under section 75, or where for any other reason the due execution of the trust is or becomes impracticable, the beneficiary may, without instituting a suit, apply by petition to the Court for the appointment of a trustee or a new trustee and the Court may make such appointment, keeping in view the rules for selecting new trustees set out in section 76 (2).

Under section 76 (2) every order of appointment must contain, so far as it affects immovable property, the particulars required by section 14 of the Registration of Documents Ordinance, and section 29 of that Ordinance applies to every such order. But charitable trusts are exempted from this provision.

Sections 101 and 102 relating to charitable and to religious trusts respectively should also be borne in mind. These sections have already been dealt with. In actions under these sections trustees may be removed and new trustees appointed.

Under section 77 (1) where a new trustee is appointed under section 75 or 76 or under or in pursuance of any other provision of the Trusts Ordinance, all the trust property for the time being vested in the surviving or continuing trustees or trustee, and all the rights of suit in relation thereto of the trustee in whose place the appointment is made, shall become vested in such new trustee either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Under section 77 (2) every new trustee so appointed and every trustee appointed by a Court has the same powers, authorities and discretions, and in all respects acts, as if he had originally been nominated a trustee by the author of the trust.

Under section 77 (3) where the trust property consists of any stocks or any shares or securities transferable in any book kept by any company or society, or any shares in any ship registered under the law relating to merchant shipping, the instrument or order of appointment does not take effect, so far as it relates thereto, unless and until notice in writing of the appointment or order has been given by or on behalf of the new trustee so appointed to the

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

person or authority in charge of the register or book in which such stocks, shares or securities are entered. But on such notice being given, and on reasonable proof being furnished that such stocks, shares or securities form part of the trust estate, the new trustee is entitled to a transfer into his name of any such stocks, shares or securities, and to the receipt of all dividends, interest or other sums due or to become due in respect of such stocks, shares or securities.

Section 113 also has an important bearing on the devolution of trust property.

Under section 113 (1) where it is declared or intended in any instrument of trust that the trustee of the trust shall be a person for the time being holding or acting in any public office, or holding or acting in any office or discharging any duty in any public or private institution, body, corporation, association or community, or where the property comes into or is in the possession or ownership of any such person in any of the aforesaid capacities upon any constructive trust, the title to the trust property shall devolve from time to time upon the person for the time being holding or acting in any such office or discharging such duty, without any conveyance, vesting order or other assurance otherwise necessary for vesting the property in such person.

Section 113 (2) relates to charitable trusts or trusts for the purpose of any public or private association (not being an association for the purpose of gain). In these cases where a method for the appointment of new trustees is prescribed in the instrument of trust (other than nomination under section 75 (*a*)—i.e. nomination by the person nominated for that purpose in the instrument of trust) or by any rule in force, or in the absence of any such prescribed method is established by custom, then upon any trustee being appointed in accordance with such prescribed or customary method, and upon the execution of the memorandum referred to in section 113 (3), the trust property shall become vested without any conveyance, vesting order or other assurance in such new trustee and the old continuing trustees jointly, or if there are no old continuing trustees, in such new trustee wholly.

Under section 113 (3) every appointment under section 113 (2) shall be made to appear by a memorandum under the hand of the person presiding at the meeting or other proceeding at which the appointment was made, and attested by two other persons present at the said meeting or proceeding. Every such memorandum shall be notarially executed.

Under section 113 (4) it shall be the duty of the Registrar-General to prepare and maintain special registers of trustees appointed under section 113 (2), and the attesting notary is required

to forward to the prescribed officer for the purpose of such registers all particulars with reference to such memorandum prescribed by rules made under the Notaries' Ordinance.

Sections 77 and 113 are of great importance because they provide for the devolution of trust property without the need of a conveyance, vesting order or other assurance.

It has been pointed out in *Maraliya* v. *Gunasekere* (23 N.L.R. 261) that "in the case of trustees it has always been necessary that on the appointment of a new trustee the trust property should be formally assigned to him. All books of precedents of conveyancing contain forms for such assignments." The sections we have dealt with are statutory provisions which provide for the devolution of the trust property in the circumstances set out in the sections.

For example, section 113 (1) deals with the case of the trustee who holds or acts in a public office and provision is made for his successor in office to succeed him, where the trust so directs. The same applies to the person who holds or acts in any office or discharges any duty in a public or private institution, body, corporation, association or community. This is a departure from the ordinary law: see *Baptist Missionary Society* v. *Jayawardene* (20 N.L.R. 359—at 365).

In *Piyaratna Thero* v. *Dhammananda Thero* (47 N.L.R. 537) the gift was to a named priest who was the principal and on his demise to principals appointed to a Pirivena. It was held that section 113 (1) applied, and that the trust property devolved on the succeeding principals. It was argued that where sections 113 (2) and (3) were applicable the operation of section 113 (1) was excluded. This was doubted but the point was not decided because in the circumstances of the case section 113 (2) and (3) had no application, as no method of appointing new trustees was prescribed in the instrument of trust or established by custom, although the method of appointing the principal was set out in another document.

Apart from these sections, it would be necessary either to have an assignment or transfer or to obtain a vesting order under section 112.

Under section 112.

(i) where it is uncertain in whom the title to any trust property is vested ; or

(ii) where a trustee or any other person in whom the title to the trust property is vested has been required in writing to transfer the property by or on behalf of a person entitled to require such transfer, and has wilfully neglected to transfer the property for 28 days after the date of the requirement,

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

the Court may make an order (called a "vesting order") vesting the property in any such person in any such manner and to any such extent as the Court may direct: see section 112 (1). This "vesting order" has "the same effect as if the trustee or other person in whom the trust property has been vested had executed a transfer to the effect intended by the order." See section 112 (2).

The vesting order, in so far as it affects immovable property, shall contain the particulars required by section 14 of the Registration of Documents Ordinance, and section 29 of that Ordinance applies to every such order in the same manner as if it were an instrument which affects land, but charitable trusts are not invalidated by the absence of such particulars and are not liable to be defeated by the registration of any subsequent deed, order or other instrument: see section 112 (3).

Under section 112 (4) special provision is made in regard to any stocks or any shares or securities transferable in any book kept by a company or society, or to shares in a ship: on the same lines as section 77 (3).

Under section 112 (5) the Court, instead of making a vesting order, may if it is more convenient appoint a person to transfer the property.

The importance of section 112 has been brought out in *Karthigesu Ambalavanar* v. *Subramanian Kathiravelu* (27 N.L.R. 15).

Where a plaintiff who claimed as manager of a Hindu temple but had no legal title to the property sued without obtaining a vesting order under section 112, it was held that he could not cure the defect in his title by obtaining a vesting order after the institution of the action. See *Thamotherampillai* v. *Ramalingam* (34 N.L.R. 359).

In *Tambiah* v. *Kasipillai* (42 N.L.R. 558) it was held that the plaintiff could join in one action the claim as trustee to the temple and the temple premises and also the claim under section 112 to a vesting order with regard to the temporalities, on the ground that there was a doubt as to the person in whom the legal title is vested. The claim for a vesting order was not based on a declaration that the plaintiff was a trustee of these temporalities. "The claim to the vesting order is not then a claim to an office or status. The order only has the effect of transferring the legal title from anyone in whom it may reside to the person named in the order." See section 112 (2).

The claim to a vesting order may be made by a regular action.

In *Ambalavanar* v. *Somasunderam Kurukkal* (48 N.L.R. 61) plaintiff was the hereditary trustee of a Hindu *madam*. The

decree was (*a*) that the plaintiff be placed in possession of the lands and the defendants ejected therefrom, and (*b*) for a vesting order. It was held that plaintiff was not precluded by sections 101 and 102 from maintaining the action, and that a trustee of a religious trust is as much entitled as any other person to avail himself of the provisions of section 112 for obtaining a vesting order. The claim for a vesting order may be asserted by action. Reference was made to section 116 (1) whereby the enactments and rules relating to civil procedure for the time being are made applicable to all actions and other proceedings under the Trust Ordinance.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

X

TRUSTS AND PRESCRIPTION

Under section 111 (1) of the Trusts Ordinance, in the following cases, viz.—

(*a*) in the case of a claim by any beneficiary against a trustee founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy ;

(*b*) in the case of any claim to recover trust property or the proceeds thereof still retained by a trustee, or previously received by the trustee and converted to his own use ; and

(*c*) in the case of any claim in the interests of a charitable trust, for the recovery of any property comprised in the trust, or for the assertion of title to such property ;

the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance.

By section 111 (2), save as aforesaid, all rights and privileges conferred by the Prescription Ordinance shall be enjoyed by the trustee, provided that in any action or proceeding by a beneficiary to recover money or other property prescription shall not run against the beneficiary, unless and until the interest of such beneficiary shall be an interest in possession.

Under section 111 (5) this section does not apply to constructive trusts, except in so far as such trusts are treated as express trusts by the law of England.

The law prior to the Trusts Ordinance is dealt with in *Suppramaniam* v. *Erampa Kurukkal* (23 N.L.R. 417).

"The English Law of trusts was long ago received into the law of this country. . . . . One of the principles of that system of law is that for certain purposes it does not allow a trustee to set up the Statute of Limitations against a *cestui que trust* or anyone claiming on his behalf. The same principle has been applied in Ceylon with reference to our own Prescription Ordinance (see *Antho Pulle* v. *Christoffel Pulle*, 1 N.L.R. 398). The English principle that time was no bar to an action on a trust applied only to express trusts. But the doctrine was extended to certain cases of constructive trusts which, for the purpose, were by the law of England put upon the same footing as express trusts. The law on this subject will be found expounded in the judgment of Bowen, L.J. in the leading case of *Soar* v. *Ashwell* (1893) 2 Q.B. 390. It was clearly with reference to that case and in order to give effect to the principles there expounded that sub-section (5) was inserted in section 3 (now section 111) of our own Trusts Ordinance."

"There is another principle of the English law of trusts . . . It is that no length of possession avails against a charitable trust, where it is sought to recover trust property taken with knowledge of the trust."

In *Daniel Appuhamy* v. *Arnolis Appu* (30 N.L.R. 247) the time at which prescription begins to run was considered. The plaintiff claimed that certain property purchased in the name of the defendant be conveyed to plaintiff, on the ground that he had provided the purchase money. It was held that the cause of action did not arise until the defendant definitely declined what was requested of him, or until it came to the knowledge of the plaintiff that the defendant had taken a definite step which could only indicate that he regarded himself as the absolute owner.

In *Mohammed* v. *Abdul Makeen* (30 N.L.R. 378) it was held that a claim for declaration of title to property of a charitable trust cannot be barred by prescription. The provisions of section 111 (1) (*c*) would appear to go beyond the provisions of English law.

Section 111 (1) (*c*) applies to Buddhist Temporalities also. The fact that section 109 expressly excludes religious trusts regulated by the Buddhist Temporalities Ordinance from the operation of chapter 10 itself shows that the remainder of the Trusts Ordinance applies : see *Sobitha Thera* v. *Wimalabuddhi Thera* (42 N.L.R. 453).

In *Perumal* v. *Harding* (45 N.L.R. 367) the plaintiff as *cestui que trust* of a constructive trust sued the defendant for declaration of title to immovable property. The defendant had purchased the property with notice of the trust from the trustee within ten years of the institution of the action. It was held that the provisions of section 111 (1) (*b*) of the Trusts Ordinance read with section 111 (5) operated against the defendant relying on the possession of the trustee in support of his prescriptive title, as the trust was a constructive trust which would be treated as an express trust under the law of England.

Where an action is brought by a trustee against his predecessors to make good a deficiency of money which should have been handed to him when he assumed office, the cause of action arose on the date he assumed office : see *Abeysekera* v. *Maraliya* (31 N.L.R. 177).

In *Punchi Hamine* v. *Ukku Menika* (28 N.L.R. 97—at 113) section 111 (5) is dealt with. According to the case of *Soar* v. *Ashwell* (1893) 2 Q.B. 390 the following persons are treated under the English law as holding property under an express trust although the trusts arise by construction of law :—

(1) a trustee *de son tort* or a stranger who assumes to act in an express trust as if he were a duly appointed trustee ;

(2) a stranger to the trust who is privy to and participates in a fraudulent breach of trust by the trustee ;

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

(3) a stranger to the trust who receives trust moneys knowing them to be such and deals with them in a manner inconsistent with the trust ;

(4) one who is a fiduciary and in the footing of such position obtains possession of trust property.

In this case a decree was entered in pursuance of an agreement induced by fraud. The party obtaining property under the decree and those claiming from him as volunteers held the property so obtained in trust for the party defrauded.

The cause of action in such a case arose on the discovery of the fraud. The case of *Dodwell & Co.* v. *John* (20 N.L.R. 206, L.R. 18 A.C. 563), was followed.

This case was followed in *Coomaraswamy* v. *Vinayagamoorthy* (46 N.L.R. 246). The further point arose here because the subject-matter of the trust was a corporal chattel, to wit a schooner. It was held, on the authority of *Joseph* v. *Lyons* (15 Q.B.D. 280) that "corporal chattels are outside the realm of constructive notice." The alleged beneficiaries must prove that the purchaser had notice of their equitable title at the time of the purchase and, in the absence of such proof, the purchaser is entitled to depart in possession of the legal title.

In *Senaratna* v. *Siriwardene* (16 N.L.R. 376) A sold to B a parcel of land for Rs. 500/-, and it was agreed that B should pay that amount to C, to whom A owed that sum. The agreement was embodied in the notary's attestation. B failed to pay the amount to C. It was held that in the circumstances B was not to be deemed a trustee in respect of the sum of Rs. 500/- so as to prevent prescription running against A on the failure of B to pay C the Rs. 500/-.

In *Suaratna* v. *Jane Nona* (16 N.L.R. 389) where the question of prescription arose, it was held that the point of time when the right to bring the action accrues is the time when the party has been interfered with in the enjoyment of his rights. So long as he receives all that he considers himself entitled to he cannot be expected to take action, and the legal cause of action cannot be said to have arisen.

XI

SECTION 93 OF THE TRUSTS ORDINANCE AND SPECIFIC PERFORMANCE

Section 93 of the Trusts Ordinance runs as follows :—

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract :

"Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition."

The effect of this proviso was considered in *Hall* v. *Pelmadulla Valley Tea & Rubber Co., Ltd.* (28 N.L.R. 422). The Supreme Court thought that the proviso to section 93 does not prevent the application of the section to contracts affecting immovable property which are not required by law to be registered. On appeal to the Privy Council (31 N.L.R. 55) their Lordships were unable to concur in this view.

"The prior registration of the contract is made a condition of the application to it of the benefit conferred by the section. The object in the mind of the legislature in imposing such a condition, even if it could be known, would not affect the meaning of the words used. Under these words it is plain that the contract is one which does not satisfy the condition upon which alone it is entitled to the benefit conferred by the section."

In *Silva* v. *Salo Nona* (32 N.L.R. 81) it was held that registration of an agreement to sell land is of itself notice, within the meaning of section 93, to a person who acquires the land subsequent to such agreement. "The means of search are available ; there can be no doubt that a prudent purchaser should and almost invariably does search the register in his own interest ; if he searches the existence of registered documents is revealed to him and he has knowledge. . . . . If such a person refrains from searching, he must be held to have knowledge of those facts which would have come to his knowledge but for his wilful abstention from inquiry."

In *Sumangala Thero* v. *Caledonian Tea & Rubber Estates Co. Ltd.* (33 N.L.R. 49) it was held that where a person acquires property to which there is an existing lease which has been registered, and where the deed of lease contained a provision for the renewal of the lease for a further term, the registration of the deed constituted sufficient notice to the purchaser of the agreement for renewal.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

"The fact that the option was not disclosed *ex facie* of the register cannot help the buyer. The existence of the lease was disclosed to him, and if he took the risk of not examining the registered lease he cannot . . . . afterwards plead ignorance."

Paiva v. *Marikar* (39 N.L.R. 255) dealt with the meaning of the words "existing contract" in section 93. By deed of April 22, 1931, the first defendant agreed to transfer the premises to plaintiff before June 30, 1931, after discharging an existing mortgage. The agreement was subject to the condition that in case the first defendant failed to execute the transfer he should pay damages to the plaintiff, and that the plaintiff was entitled to recover the same according to law. It was held that in view of the option to pay damages, which was an alternative obligation specific performance could not be demanded. Further, owing to the time that had expired since June 30, 1931, the contract was not an existing contract within the meaning of section 93.

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org

Digitized by Noolaham Foundation.
noolaham.org | aavanaham.org