1949 *Present:* **Basnayake J. and Gratiaen J.**

SINNAPODY *et al.*, Appellants, and MANNIKAN *et al.*, Respondents

S. C. 305—D. C. Jaffna, 3,786

Rectification of deed—Circumstances when it will be granted—Delay in institution of action—Materiality of date of detection of the error—Admissibility of paroll evidence.

Decisory oath—Refusal by one party to take it—Effect on evidence—Evidence Ordinance, s. 3—Oaths Ordinance, s. 8.

The amount of the loan in a usufructuary mortgage was by mutual mistake of the parties incorrectly stated in the bond as Rs. 275 when it was in fact Rs. 2,750.

Held, in an action for rectification of the bond, that the rectification should be allowed. The material date for the purpose of deciding whether there had been delay in the institution of the action was the date when the error was noticed and not the date when the error was committed.

Held further, (i) that the fact that the mortgagee had gifted his interests to a third party was no impediment to the grant of rectification.

(ii) that parol evidence was admissible to make out a case for rectification.

Quaere, whether a judge in weighing the evidence is entitled to draw any inference from the refusal of a party, without sufficient reason, to take a decisory oath when challenged to do so by the opponent.

APPEAL from a judgment of the District Court, Jaffna.

N. E. Weerasooria, K. C., with *S. Thangarajah*, for the defendants appellants.

S. J. V. Chelvanayakam, K. C., with *C. Vanniasingham*, for the plaintiffs respondents.

Cur. adv. vult.

December 19, 1949. BASNAYAKE J.—

This is an action for rectification of a usufructuary mortgage bond attested by one S. Sinnathurai, a Proctor and Notary, on 5th October, 1946. The plaintiffs who are husband and wife are the mortgagees and the defendants who are also husband and wife are the mortgagors. The plaintiffs allege that the amount of the loan is incorrectly stated in the bond as Rs. 275 when it should in fact be Rs. 2,750. The defendants deny that allegation.

At the trial the following issues were settled :—

(i) Was the true consideration for deed No. 731 of 5.10.46 Rs. 2,750 ?
(ii) Has the consideration been stated wrongly as Rs. 275?
(iii) Is the plaintiff entitled to rectification?

After hearing the evidence placed before him by the parties the learned District Judge held in favour of the plaintiffs on all the issues, and entered decree ordering the rectification of the deed. The present appeal is by the defendants from that judgment and decree.

The material portions of the mortgage bond, which is in English, read—

" Know all men by these presents that we Kathirkaman Sinnapodi and wife, Varaththai of Palaly, Jaffna, hereinafter called the mortgagors, are jointly and severally held and firmly bound and do hereby acknowledge to be justly and truly indebted to Sinnapodi Mannikan and wife, Umaiaththai, both of Palaly, Jaffna, hereinafter called the mortgagees, in the sum of Rupees Two hundred and seventy-five (Rs. 275) of lawful money of Ceylon which we have this day borrowed and received of and from the said Sinnapodi Mannikan and wife Umaiaththai and therefore renouncing the *beneficium non numeratae pecuniae* the meaning of which has been explained to us agree and undertake and bind ourselves and our heirs, executors, and administrators to pay the said sum of Rupees Two hundred and seventy-five (Rs. 275) to the said Sinnarpodi Mannikan and wife, Umaiaththai, or to either of them or their heirs, executors, administrators, or assigns on demand and until such payment we engage and bind ourselves and our aforewritten to permit the mortgagees and their aforewritten to possess the four lands and premises described hereinafter and take and enjoy the produce of the said 4 lands by way of Otti Mortgage under the Law of Thesawalamai, in lieu of interest on the said sum of Rs. 275.

And for securing the due payment of the said sum of Rs. 275 we the said mortgagors do hereby specially hypothecate . . . . "

The case for the plaintiffs is that in pursuance of an agreement to lend to the first defendant a sum of Rs. 2,750 on a usufructuary mortgage of

certain lands the first plaintiff on 25th September, 1946, made a payment of Rs. 2,475 which the defendants needed to pay one Gambukeswara Kurukkal in order to obtain a reconveyance of certain lands transferred to him conditionally and that on 5th October, 1946, when the defendants executed a bond securing the loan by a usufructuary mortgage of four of their lands the first plaintiff paid the balance sum of Rs. 275. He says that he asked the notary to execute the bond for 275 meaning thereby 275 "pounds" or Rs. 2,750, a "pound" according to his usage being equal to Rs. 10. The notary bears him out on the point that the first plaintiff mentioned only the number 275 without qualifying it; but he says that when the first plaintiff said the bond was for 275 he understood him to mean Rs. 275 and prepared the document accordingly. The first plaintiff is also supported by the Village Headman to whom the first defendant admitted, on being questioned in consequence of a complaint by the former, that the amount Rs. 275 in the bond was a mistake for Rs. 2,750.

Although the bond was written in October, 1946, it was not till July, 1947, that the first plaintiff removed the deed from the notary's office. He was also given a Tamil translation of the bond by the notary. When he took the documents home his son pointed out to him that the bond was for Rs. 275 and not Rs. 2,750. On that very day he pointed out to the notary the mistake in the bond. The notary at first refused to believe him but later undertook to ascertain from the first defendant whether he admitted that the bond was for Rs. 2,750. After meeting him the notary informed the first plaintiff that the error would be rectified by the defendants as it was admitted that the amount to be secured by the bond was Rs. 2,750. Despite the admission, however, the defendants on various pretexts avoided the execution of a deed of rectification.

The first defendant denies that the true amount is Rs. 2,750. He denies that he ever admitted to the headman or the notary that Rs. 275 was a mistake and that Rs. 2,750 was the amount intended to be secured. He alleges that the headman is ill-disposed towards him and that his evidence is false. He does not attack the notary's evidence beyond saying that it is not true.

The learned District Judge who has had the advantage of seeing the witnesses give their evidence, has preferred the evidence of the first plaintiff and his witnesses to the unsupported testimony of the first defendant. I see no ground on which I can interfere with his finding of fact.

Before I discuss the law applicable to this case it will be convenient at this point to refer to an incident which occurred at the trial and to which the learned District Judge has referred in his judgment. After the issues had been framed and before the evidence commenced the first plaintiff challenged the first defendant to take an oath at the Palaly Kanagiamman Temple that the true consideration for the deed was not Rs. 2,750 and that he did not borrow Rs. 2,750. The first plaintiff undertook to withdraw the action if the first defendant made the oath. The latter refused to make the oath.

Under our law [1] a party to a judicial proceeding of a civil nature may offer to be bound by any oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency. If a party or witness refuse to make such oath or solemn affirmation he cannot be compelled to make it but the court is required to record as part of the proceedings " the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it and that he refused it, together with any reason which he may assign for his refusal ". In the instant case the first defendant gave no reason for his refusal.

It was contended for the defendant that the learned District Judge was prejudiced by the refusal of the first defendant to make the oath. The judgment does not show that he was prejudiced by the first defendant's refusal. After reaching a conclusion against the defendants on the facts, he has referred to the first defendant's failure to make the oath as an added circumstance against him. A judge in weighing the evidence is entitled to take into consideration the refusal of a party, without sufficient reason, to make an oath when required to do so by the opponent [2]. The provisions of section 8 (4) which require a careful record to be made in the case of the refusal of a party to make an oath would be pointless if the refusal to make an oath was entirely irrelevant. In the instant case the learned judge has in my view rightly regarded it as a circumstance against the refusing party.

I shall now proceed to consider whether on the facts as found by the learned trial judge the plaintiffs are entitled to an order for rectification. Rectification will not be allowed where there has been an unreasonable delay in enforcing the right. The material date for the purpose of deciding whether there has been delay is the date of the notice of the error and not the date when the error was committed. In the instant case the error was noticed in July, 1947, and the present action was instituted on 26th August, 1947. The period between the detection of the mistake and the institution of the action was spent in persuading the defendants to rectify it. There has therefore been on delay.

Rectification will also not, as a rule, be allowed where it would affect prejudicially interests which third parties have acquired for valuable consideration on the assumption that the instrument in the form in which it was originally drawn was good. In the instant case the defendants have by deed of gift dated 20th August, 1947 (D4), gifted the lands dealt within the bond along with other lands to their second daughter Sinnammah, wife of Vairavy Vallipuram whose marriage was in 1944 or 1945. The first defendant does not give a satisfactory explanation for the execution of a deed of gift by way of dowry so long after his daughter's marriage. The close proximity of the date of the gift to the date of the institution of this action throws considerable doubt as to the bona fides of the transaction especially as the defendants were at the time aware of the position taken up by the plaintiffs. Donees stand on a different footing from a purchaser for valuable consideration without notice. Even though the donees would be affected by an order for rectification because

[1] *Section 8, Oaths Ordinance.*
[2] *Iyanohamy v. Carolis Appu (1900) 4 N. L. R. 78.*

the amount they will have to pay for the redemption of the mortgage will be nine times more than that expressed in the deed P2, I am of opinion that it will not be contrary to the principles of law or equity to allow the rectification of the bond in the instant case.

In order to obtain an order for rectification of an instrument the party claiming relief must show by clear and unambiguous evidence that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified and that the term the inclusion of which is sought was a term of the agreement between the parties and continued concurrently in their minds down to the time for execution of the instrument and that by mutual mistake in drafting there has been a failure to make the instrument conformable to the agreement. The evidence which the learned trial judge has accepted satisfies the above requirements.

The plaintiff's case rests on parol evidence. There is no objection in law to that class of evidence in an action for rectification. Parol evidence is admissible to make out a case for rectification, and the Court can even act on the evidence of the plaintiff alone where no further evidence can be obtained.

For the above reasons the plaintiffs are entitled to succeed, and I uphold the learned District Judge's order for rectification and dismiss the appeal of the defendants.

This is a case in which both parties are to blame, the plaintiffs for making the mistake and the defendants for failing to correct it. The costs of trial should therefore be borne by either party. But as the defendants not content with the decision of the trial judge have brought the plaintiffs to this Court, the plaintiffs' costs of appeal should be paid by the defendants.

GRATIAEN J.—

I agree that this appeal should be dismissed, and that no good grounds exist for disturbing the conclusion arrived at by the learned trial Judge upon the evidence. The probabilities in the case strongly support the version of the plaintiff. With respect, however, I cannot agree with my brother Basnayake that, as an additional ground for disbelieving the defendant, any weight could legitimately be attached to the circumstances that he refused to accept a challenge to take an oath at the Palaly Kanagiamma Temple that the true consideration for the deed was not Rs. 2,750.

A party to an action is entitled to demand that his claim or his denial of a claim (as the case may be) should be decided upon legally admissible evidence at a trial regulated by the normal procedure which governs Courts of civil jurisdiction. No doubt Section 8 of the Oaths Ordinance (Chapter 14) lays down a special process whereby parties, *should they so desire*, may have their disputes settled if one of them takes a decisory oath in an agreed form. But in such cases mutual agreement is of the essence of the matter, and no party can be compelled to waive his right

to have the action tried in the normal way. The decision of Bonser C.J. in *Iyanohamy v. Carolis* [1] lealt with a maintenance case where the defendent, who had in the first instance agreed to take a decisory oath, later retracted from his undertaking on the ground of impossibility for a reason which the Magistrate characterized as specious. Bonser C.J. held that the duty of the Magistrate in the circumstances was to try and determine the action upon the evidence, but that " when he came to weigh the evidence, *if he was satisfied that the reason given by the defendant for refusing to take the oath was inadequate and a mere quibble, and that the defendant was really afraid to take a solemn oath, he might take that fact into consideration.* But he must hear what both sides and their witnesses have to say before he decides the case ".

Section 8 of the Oaths Ordinance permits a party to specify his reasons for refusing to take a decisory oath, and in that event the Court is required to record those reasons. There may, perhaps, be instances in which a Court might regard itself as qualified and competent to decide that the reasons assigned are so inherently fantastic that an adverse inference may properly be drawn against the party who propounds them. But such instances, if I may say so with respect, must be rare indeed. A Court of law would to my mind be involved in a most hazardous and embarrassing undertaking if it attempted to examine the merits of a litigant's personal objections to have his mundane disputes determined in accordance with the extraordinary procedure contemplated by section 8. In our present limited state of knowledge of matters spiritual and metaphysical, it is I think safer for a judicial tribunal to follow the principle adopted by the House of Lords when it was called upon, in a case dealing with a charitable bequest, to assess the efficacy of prayer. " The faithful ", said Lord Simonds, " must embrace their faith believing where they cannot prove: *the Court can act only on proof* ". *Gilmour v. Coats* [2].

Whether or not the ruling of Bonser C.J. could with safety be adopted in appropriate cases, it cannot in my opinion apply to the present action. The defendant was callenged to take a decisory oath; he refused to do so, assigning no reasons for his refusal. He could not be compelled to give his reasons, nor had the Court any power to investigate what was not divulged to it. In that state of things, I do not see what material existed upon which the learned Judge could draw any inference, favourable or adverse to the defendant, from this circumstance. The defendants bare refusal to take a decisory oath is not in my opinion a " fact " which a prudent man can accept as " proof " of any contentious matter which arose for adjudication in the case. (Section 3 of the Evidence Ordinance.) I prefer to follow the decision of this Court in *Perampalam v. Kandiah* [3] where Abrahams C.J. said, " The provision that cases can be disposed of by taking an oath in a place of worship is no doubt an excellent one, but there is nothing in the enactment which makes provision for this mode of deciding cases which sanctions an adverse finding against the party refusing. A man may have his reasons for issuing a challenge and the other party may have his reasons for refusing to accept the challenge,

[1] *(1900) 4 N. L. R. 78.* [2] *(1949) A. C. 426.*
[3] *(1937) 17 Law Recorder 158.*

and not only is the Court not justified in coming to an adverse conclusion against the party who refuses to accept such a challenge but it is also not entitled to investigate his reasons ".

If I took the view that the relevant and admissible evidence in the case was evenly balanced, and that the adverse inference erroneously drawn by the trial Judge had in his judgment turned the scales against the defendant, I should have thought it necessary for the case to be tried afresh. In my opinion, however, the other grounds on which the learned Judge has quite independently held in favour of the plaintiff are very substantial and convincing. I therefore agree to the order proposed by my brother Basnayake.

Appeal dismissed.