1960 *Present :* **Basnayake, C.J., H. N. G. Fernando, J., and T. S. Fernando, J.**

SATHUK, Appellant, *and* LAYAUDEEN and others, Respondents

S. C. 452—D. C. Colombo, 7521/L

Res judicata—Estoppel by judgment—" Same parties "—Privity between father and son—Civil Procedure Code, s. 207—Evidence Ordinance, s. 100.

On an issue of *res judicata*, a decree against the father in respect of the same property binds the son when the latter bases his claim on the same deed on which his father based his claim.

APPEAL from a judgment of the District Court, Colombo.

On 27th May 1927 Saffra Umma gifted certain property to the defendants, who were her grandchildren. On 4th February 1928 she revoked the gift and gifted the property to her son Sathuk. On 27th September 1943 the defendants sued their paternal uncle, Sathuk, in case No. 2997 for a declaration that they were entitled to the land, and judgment was entered in their favour. After Sathuk died, the plaintiff, who was Sathuk's son, sued the defendants for a declaration of title in respect of the same property. He based his claim on the very deed on which his father relied in case No. 2997. The defendants pleaded that the decision in Case No. 2997 was *res judicata*.

E. B. Wikramanayake, Q.C., with *Nimal Senanayake*, for Plaintiff-Appellant.

C. Ranganathan, with *S. Sharvananda*, for Defendants-Respondents.

Cur. adv. vult.

July 22, 1960. BASNAYAKE, C.J.—

This appeal was first heard by my brethren de Silva and H. N. G. Fernando. As they were unable to agree it has been re-heard before a bench of three Judges.

The relevant facts are not in dispute and are as follows : The plaintiff-appellant Mohamed Sathuk Mohamed Huzahir also known as Mohamed Huzahir Sathuk (hereinafter referred to as the plaintiff), son of Idroos Lebbe Marikar Mohamed Sathuk (hereinafter referred to as Sathuk senior) who died on 11th January 1946, sought by this action against the defendants a declaration that he is the owner of the land and buildings bearing assessment No. 57 Messenger Street, Colombo, described in the

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schedule to the plaint and asked for an order of ejectment therefrom against them. Saffra Umma the paternal grandmother of the plaintiff by deed No. 1428 attested by Noor Hadjiar Mohamed Abdul Cader, Notary Public, on 27th May 1927 gifted to the five defendants, who are her grand-children, the premises in question subject to a *fideicommissum* in favour of their children, reserving her life interest. At the time of the gift she was their curatrix and guardian and administratrix of their father's estate. The gift was accepted by their mother. Sathuk senior joined in the deed as their paternal uncle and expressly renounced all his rights to the premises, in these words:

"And the said Idroos Lebbe Marikar Mohamed Sathuk who is the paternal uncle of the said donees doth hereby renounce all and every right interest or claim whatsoever which he may or shall have in respect of the said premises hereby gifted adverse to them and in the event of any question arising as to the validity of these presents by reason of the said donees not being put into possession of the said premises according to law the said Idroos Lebbe Marikar Mohamed Sathuk hereby agrees not to take any objection whatsoever to his advantage or take any other steps whatsoever detrimental to the interests of the said donees in respect of the premises hereby conveyed."

At the time of the gift the donees were 13, 12, 10, 7, and 5 years of age respectively. By deed No. 1483 attested by the same Notary on 4th February 1928 Saffra Umma revoked the earlier gift to her grand-children and gifted the premises to her son Sathuk senior on the following terms :—

"do hereby grant convey set over and assure by way of gift absolute and irrevocable (subject nevertheless to the terms conditions and restrictions hereinafter contained) unto my said son Idroos Lebbe Marikar Mohamed Sathuk his heirs executors and administrators all that and those the aforesaid premises in the Schedule hereto fully described together with all rights privileges easements servitudes advantages and appurtenances thereto belonging or appertaining or in anywise held used or enjoyed therewith or reputed or known as part, parcel or member of the same or any part thereof and all the estate right title interests property claim and demand whatsoever of me the said donor into upon or out of the same.

"To have and hold the said premises hereby conveyed or intended or expressed so to be with the appurtenances thereof which are of the value of rupees five thousand (Rs. 5000/-) unto him the said Idroos Lebbe Marikar Mohamed Sathuk his heirs executors and administrators subject nevertheless to the terms conditions and restrictions following that is to say that the said premises shall not be sold mortgaged or otherwise alienated by the said Idroos Lebbe Marikar Mohamed Sathuk nor shall the rents profits and income thereof become in any way liable to be seized attached or sold for any of his debts or liabilities whatsoever nor shall the same be leased out for any term or period of

more than three years at a time but he shall be at liberty to recover receive and enjoy and after his death the said premises shall go to and devolve upon his son Mohamed Sathuk Mohamed Huzair subject to the same conditions as hereinbefore set out. Provided nevertheless that in the event of the said Mohamed Sathuk Mohamed Huzair attaining the age of thirty years the said premises shall vest in him absolutely."

Saffra Umma died on 6th December 1929. On 27th September 1943 the present defendants (hereinafter referred to as the defendants) sued Sathuk senior in D. C. Colombo case No. 2997 (hereinafter referred to as case No. 2997) for a declaration that they are entitled to the premises in dispute. They pleaded the deed in their favour and claimed that they were entitled to the land by virtue of it and alleged that he was in unlawful possession of the premises. Sathuk senior claimed that he was in lawful possession by virtue of the deed in his favour. The court gave judgment against him holding that the earlier deed was valid and that the defendants were entitled to possession, and passed a decree in the following terms :

" It is ordered and decreed

(*a*) that the plaintiffs be and they are hereby declared entitled to the premises in the schedule hereto described,

(*b*) that the defendant be ejected from the said premises, and

(*c*) that the plaintiffs be restored to possession of the said premises."

Sathuk senior appealed against that decree but died while the appeal was pending. On 23rd August 1948 his widow who had obtained letters of administration of her deceased husband's property moved that she be substituted as defendant as legal representative of the deceased and was substituted accordingly. The appeal was thereafter prosecuted by her. This court affirmed the decision of the District Court and she further appealed to the Privy Council which also on 12th January 1953 affirmed the decree of the original court. In February 1955 in execution of the decree in their favour the Fiscal delivered possession of the premises to the defendants in the manner prescribed in section 324 of the Civil Procedure Code. On 9th June 1955 the plaintiff instituted this action, basing his claim on the very deed on which his father unsuccessfully sought to repel the action by the defendants. He claimed that his father was in possession till his death and that thereafter he possessed till 28th February 1955. That was the date on which the defendants had him evicted by process of law after the successful conclusion of their long-drawn-out litigation against his father. The defendants pleaded that the decision in case No. 2997 is *res judicata* and that the questions decided therein cannot be reagitated between the present plaintiff and the defendants. That issue was decided as a preliminary issue of law by the learned District Judge who held that the decree in case No. 2997 is

res judicata and binds the parties to this action. This appeal is from that decision. It is well settled that a decree in an action binds not only the parties who are named in the action but also their privies. As the defendants are parties whose names appear on the record in both actions, but as the plaintiff was not a party to case No. 2997, the only question that arises for decision is whether the plaintiff is a privy of his father the defendant to that action. The plaintiff's claim is based on deed No. 1483 of 4th February 1928 on which his father unsuccessfully claimed the premises in case No. 2997.

As pointed out in my judgment in S. C. 60/D. C. Kurunegala 12263—S. C. Minutes of 22nd June 1960*—our law of *res judicata* is to be found not only in our statutes such as the Civil Procedure Code and Evidence Ordinance but also in our common law, and where questions of estoppel by judgment arise for decision recourse may be had in appropriate cases to the English law by reason of section 100 of the Evidence Ordinance. Here we are concerned with the question whether the decree against the father in respect of the same property binds the son who bases his claim on the same deed on which his father based his claim. Turning to our common law first we find that the subject of *res judicata* is discussed by Voet under two heads—*Res Judicata* (Bk XLII Tit. 1) and the Exception of *Res Judicata* (Bk XLIV Tit 2). In the instant case we are concerned with the latter aspect of the subject of *res judicata*. Voet states that the three requisites for *res judicata* are " same persons, thing and cause." He states : " There is nevertheless no room for this exception unless a suit which had been brought to an end is set in motoin afresh between the same persons, about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking." In discussing the meaning of " same person " (in s. 5 Gane Vol. 6 p. 558) Voet says : " A deceased and his heir, a principal and his agent, a free town and its manager, an insane person or a soldier and his curator, a ward and his guardian, and a father and the son of his household are in civil law the same person ". Huber (Gane's translation of Jurisprudence of My Time, Vol. II p. 338 s. 4) also deals with this topic of " same persons " thus : " But to justify this exception, it is necessary that the persons should be the same, the things the same and the causes of action the same. If one of these things is different, then it is fair that a new action should be allowed, since it cannot be said that the same question has been previously disposed of. Testator and heir, principal and agent, purchaser and seller, owner and successor in ownership, debtor and surety, and also the first members of a family and their successors, entitled to one and the same *fideicommissum*, though not heirs of each other, are considered as the same persons ". The examples of " same persons " given by both Voet and Huber are meant to be illustrative and not exhaustive.

* *(1960) 62 N. L. R. 193.*

Voet makes his view clear in his discussion of the topic of Compromise a passage from which is cited by Jayewardene A.J. in *Charles v. Nonohamy* [1]. As the Latin text is cited in that report I shall quote the English from Gane's translation (Vol. I p. 450)—

> " Finally we may add that a judgment pronounced against a fiduciary will also damage a fideicommissary, unless the adverse judgment has occurred through the fault of the fiduciary; whether the suit was raised against the fiduciary before restoration in regard to a particular item or to the whole inheritance. The object is to prevent the ownership of property from being otherwise in uncertainty, and the weight of *res judicatae* from being uncertain; as is fully explained by the author cited below. If then fiduciary can damage fideicommissary by payment, by expenses *bona fide* incurred, by suit *bona fide* pursued and by notice given to himself, there is no reason why he should not be able to prejudice him also by *bona fide* compromise free from favour or corruption; especially when we remember that compromise just as much as *res judicata* is furnished for the disposal of law suits, and that its weight is not less than that of *res judicata*."

From the foregoing it would appear that there was no doubt in the minds of the Roman-Dutch Law Commentators that a decision against the fiduciary in respect of the same *fideicommissum* was *res judicata* as against the fideicommissary. The view taken in *Yusoof v. Rahimath* [2] finds no support in Voet or any other writer on Roman-Dutch Law. The view of Voet and Huber has been followed in Scotland also, for in footnote (*e*) to Erskine's Institutes of the Law of Scotland (1871 Ed.) Vol. II p. 1137 it is stated on the authority of certain decided Scottish cases cited therein " A judgment in an action *bona fide* litigated by an heir of entail is *res judicata* in questions with succeeding heirs ". It seems to me that the view which both Bertram A.C.J. and Shaw J. took in *Yusoof v. Rahimath* (*supra*) stems from the use of such expressions as " claiming under ", " claiming through ", or " derived from " in discussing the question of what classes of persons are bound by a decree. In that case Bertram A.C.J. as he then was says " These children are not claiming through Abdul Cader, but on the deed.", and Shaw J. adds " They do not take by inheritance from him, but under a separate title under the deed of July 22, 1871 ". A fideicommissary does not claim under the fiduciary nor does he claim through him or derive title from him. By virtue of the terms of the instrument creating the *fideicommissum* he succeeds to the property when his turn comes. But the circumstance that he does not claim " under " or " through " his predecessor or " derive title from " him does not enable him to reagitate questions decided in actions against his predecessor under the same *fideicommissum* in respect of the fideicommissary property. In our law

[1] *(1923) 25 N. L. R. 233 at 236 and 237.* [2] *(1918) 20 N. L. R. 225 at 240.*

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he is the " same person " or the " same party ", in the language of section 207 of the Civil Procedure Code, as the actual person or party to the litigation and is in privity with him. This view is not only in keeping with that of the Roman-Dutch Law Commentators but it gives effect to principles expressed in the maxims *res judicata pro veritate accipitur* and *reipublicae interest ut sit finis litium*. It has been adopted in *Charles v. Nonohamy*[1] and *Cader v. Marikkar*[2]. In my opinion the conflict between *Yusoof v. Rahimath* (*supra*) and *Cader v. Marikkar* (*supra*) must be resolved in favour of the latter.

As pointed out above and also in my judgment in S. C. 60/D. C. Kurunegala 12263—S. C. Minutes of 22nd June 1960 (*supra*)—if privity is confined to persons claiming " through ", " from " or " under" the actual party against whom judgment has been given the operation of *res judicata* would be unduly hampered and the principles contained in the maxims which are the *fons et origo* of this doctrine would be set at nought. In the Kurunegala case above referred to my brother Sansoni and I held that the successor of the viharadhipati of a temple was bound by a judgment against his predecessor on the ground of privity. The Roman and Roman-Dutch Law concept of " same persons " or " same parties " is not different from the present day concept of privity in *res judicata*. Privity is a mutual or successive relationship to the same rights. The nomenclature of " privy " is useful in expressing in one word the relationship which makes a decree binding on persons other than those who are named as parties to an action. Halsbury (Vol. 15 pp. 196–197) elaborates Coke's classification of privies thus : "(1) privies in blood, as ancestor and heir, (2) privies in law, as (formerly) tenant by the courtesy or in dower and others that come in by act in law, as testator and executor, intestate and administrator ; bankrupt and trustee in bankruptcy ; (3) privies in estate, as testator and devisee ; vendor and purchaser ; lessor and lessee ; a husband and his wife claiming under his title and *e converso* ; successive incumbents of the same benefice ; assignor and assignee of a bond ; the servant of a corporation defending an action of trespass at the cost of his employers and justifying under their title, and the corporation itself." This concept of " privy " appears to have found its way into the law of South Africa as well, for Hofmeyer A.J. says in the case of *Scharf N. O. v. Dempers & Co.*[3]: " The rule is that a judgment *inter partes* raises the estoppel of *res judicata* against the parties and their privies ".

The learned District Judge is in my view right. The appeal is dismissed with costs.

H. N. G. FERNANDO, J.—I agree.

T. S. FERNANDO, J.—I agree with the judgment of my Lord, the Chief Justice.

Appeal dismissed.

[1] *(1923) 25 N. L. R. 233*
[2] *(1942) 43 N. L. R. 387.*
[3] *(1955) 3 S. A. L. R. 316 at 318.*