1950 *Present:* **Dias S.P.J. and Swan J.**

THOMAS SILVA, Appellant, *and* HEMALATHA HAMINE, Respondent

S. C. 547—D. C. Ratnapura, 8,701

Assignment of a debt—Cession of right of action—Effect of such cession—Prescription—Addition of party or cause of action—When not permissible.

In an action for the recovery of a debt due on goods sold and cash advanced, it was established that the plaintiff had transferred the debt to his children prior to the date of action.

Held, that there had been a cession of the right of action. In such a case, the cedent is deprived of every right of action against the debtor, and the cessionary is the only party entitled to sue.

Held further, (i) that the plaintiff's children should not be allowed to be added as parties if, by such addition, the defence of prescription would be defeated.

(ii) that, for the purpose of prescription, an action is deemed to be brought against a new added party on the date he is made defendant.

Perera v. Toussaint (1935) 37 N. L. R. 250, followed.

Velupillai v. The Chairman, Urban District Council, Jaffna (1936) 39 N. L. R. 464, doubted.

APPEAL from a judgment of the District Court, Ratnapura.

U. A. Jayasundera, K.C., with *D. Wimalaratne*, for the plaintiff appellant.

N. E. Weerasooria, K.C., with *M. D. H. Jayawardene* and *W. D. Gunasekera*, for the defendant respondent.

Cur. adv. vult.

August 4, 1950. SWAN J.—

The plaintiff-appellant sued the defendant-respondent for the recovery of Rs. 2,084.44, being the balance due on goods sold and cash advanced to the defendant up to 1st October, 1948. In her answer the defendant stated that she had no dealings with the plaintiff and that the transactions in question were between one D. S. Abeywardene and the plaintiff.

At the trial, after certain issues had been framed, the plaintiff gave evidence. In cross-examination the plaintiff admitted that in May, 1948, he transferred his business including the book debts to his three children. Counsel for the defendant produced a copy of the certificate of registration which showed that on 31st May, 1948, the business name of M. P. Thomas Silva and Company was duly registered, the names of the partners being set out in column 6. The plaintiff's evidence on this point is as follows:—

> " On 31st May, 1948, my business was registered in the names of my sons and myself. (Mr. Advocate Jayawardene produces marked D. 1 Business Names Registration Certificate). I was under the impression that I was also a partner of this business. I have filed this action in my private capacity as M. P. Thomas Silva. I transferred my business to this new firm. All that I could claim are debts prior to 31.5.48 and that (*sic*) too I have transferred to the company."

An effort was made by counsel for the plaintiff to straighten out matters in re-examination. But that effort did not succeed for the learned District Judge, while holding that there were dealings between the plaintiff and the defendant and that the sum claimed was due, dismissed the plaintiff's action on the ground that the plaintiff had transferred his entire business to his three children on 31.5.48. It will be noted that the action was filed on 28th October, 1948.

It is unfortunate that after the plaintiff's evidence was concluded a specific issue was not raised as to whether, in view of his admission that he had transferred his business to his children, the plaintiff could maintain the present action. But the omission to frame that issue is not a fatal irregularity. The matter was argued on the footing that there was such a point in issue between the parties and the learned District Judge has dismissed the plaintiff's action on that ground.

Mr. Jayasundera contends that on the plaintiff's evidence there was no *complete* cession by the plaintiff to his children of his right of action to the debt in question. What more was necessary to complete the cession I cannot imagine. Wessels in his law of Contract in South Africa (Vol. 1, p. 546) states the law thus :—

> " *Sec. 1703.*—The cession transfers the rights of the creditor whether the debtor knows of it or not, and whether he consents or objects.
>
> As, however, the *vinculum juris* is between the original creditor and the original debtor the latter is entitled to pay the former so long as he is ignorant of the cession, and if the creditor accepts the payment the debt is discharged.

Sec. 1704.—If, however, the cession is complete and the debtor knows of it he can no longer pay the original party but must pay to the cessionary.

Sec. 1705.—As long as the cession is incomplete the original creditor may sue the debtor but as soon as the cession is complete the *cedent is deprived of every right of action against the debtor. The cessionary is then the only party entitled to sue* ".

Dealing with *Cession of Action* Maasdorp (see Fifth Edition, Vol. IV. p. 183) says :—

> " The essentials of a valid cession of action correspond, in the main, with those of a valid transfer of ownership of movable property. They are (1) a right of action capable of being ceded and actually vested in the person proposing to deal with it, (2) an intention on the part of such a person to cede the right and (3) a formal cession of it according to law."

There can be no question that requirements (1) and (2) are satisfied in the present case and inasmuch as no special formalities are necessary under our law for the assignment of a debt, the cession of action was complete when the plaintiff transferred to his children his entire business and the debts due to him. Thereafter he had no right to sue his debtors. That right passed to the cessionaries.

It may also be useful to refer to a passage in Voet (XVIII 4. 15) quoted by Bertram C.J. in *Periyanayagampillai v. Silva and others* [1]. I shall reproduce the learned Chief Justice's transalation of the Latin :—

> " Certainly according to our customary law on the subject of the assignment of actions the opinion has prevailed *that the whole title of the assignor is extinguished by the assignment and that the assignor can no longer enforce payment of the debt but only the assignee can do so*, even although notice has not yet been given by the assignee to the debtor not to pay to the assignor. But, nevertheless, the debtor, who in ignorance of the assignment, in good faith pays the assignor, is wholly discharged. "

In my opinion the plaintiff had ceded his right of action to recover this debt from the defendant. He could not, therefore, have sued the defendant and his action must fail.

Mr. Jayasundera, however, falls back on a second line of defence. He says that the action should not have been dismissed. He asks us to set aside the order or dismissal and remit the case to the lower Court with directions that the plaintiff's children should be added as parties to the action.

I do not think that such an application should be allowed.

[1] *(1921) 22 N. L. R. 481.*

Mr. Jayasundera relies on the case of *Velupillai v. The Chairman, Urban District Council, Jaffna* [1] where the plaintiff who had a cause of action against the Urban District Council of Jaffna by mistake named the Chairman as the defendant. Abrahams C.J. (with whom Soertsz A.J. agreed) allowed an application to substitute the proper party as defendant remarking that, if the amendment were not allowed, it would be a very grave injustice to the plaintiff. Learned Counsel for the respondent there cited the case of *Weldon v. Neal* [2] in which Lord Esher M.R. held that an amendment should not be allowed which would deprive the defendant of a plea under the Statute of Limitations. The learned Chief Justice distinguished that case on the ground that it was there sought to amend the pleadings by instituting a fresh cause of action which was outside the period of limitation.

Perhaps the decision in *Velupillai v. The Chairman, Urban District Council* [1] might have been different had the later case of *Mabro v. Eagle, Star and British Dominions Insurance Co., Ltd.*[3] has cited to their Lordships. In that case Scrutton L.J. said:—

> "The Court has always refused to allow a *party or a cause of action* to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. *The Court has never treated it as just to deprive a defendant of a legal defence.* If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred I am unable to understand how it is possible for the Court to disregard the Statute."

This case was cited with approval by Soertsz A.J. himself (Koch J. agreeing) in *Perera v. Toussaint* [4]. In the course of is judgment Soertsz A.J. remarked:—

> "In my opinion a motion to add or substitute Harmanis Appu should not have been entertained at the stage at which it was made."

But even if we were disposed to accede to Mr. Jayasundera's request I do not see how it will avail the cessionaries, for in view of the decision in *Perera v. Toussaint* [4], with which we agree, the defendant could successfully set up a plea of prescription against the parties sought to be added.

In the case of an added or substituted defendant, too, it has been held that for the purpose of prescription the action must be taken to have been brought against the new party on the date he was made defendant—see *Mohamadu v. Jamis Baas* [5].

In my opinion the appeal fails and should be dismissed with costs.

DIAS S.P.J.—I agree.

Appeal dismissed.

[1] *(1936) 39 N. L. R. 464.*
[2] *(1887) 19 Q. B. D. 394.*
[3] *(1932) 1 K. B. 485.*
[4] *(1935) 37 N. L. R. 250.*
[5] *(1930) 32 N. L. R. 61.*