1947 *Present :* Soertsz S. P. J. and Canekeratne J.

DEMBER, Petitioner *and* ABDUL HAFEEL, Respondent.

S. C. 36—Application for restitutio in integrum *in D. C. Colombo, 12,416.*

Restitutio in integrum—*Petitioner interned at time of action—Unable to instruct Proctor and place him in funds—Grounds for relief.*

Petitioner was sued for demages for breach of contract. He was not present at the trial but was represented by a proctor and judgment after trial was entered against him. Petitioner applied for *restitutio in integrum* on the ground that, by reasom of the fact that at the time of the trial he was interned in an Internment Camp, he had been unable either to instruct his proctor or place him in funds for the proper conduct of the case.

Held, that the remedy of *restitutio in intergrum* was not available in the circumstance.

APPLICATION for *restitutio in integrum.*

E. F. N. Gratiaen, K.C., with *Ivor Misso*, for the defendant, petitioner.

H. V. Perera, K.C., with *V. A. Kandiah*, for the plaintiff, respondent.

Cur. adv. vult.

November 12, 1947. CANEKERATNE J.—

This is an application to have the judgment and proceedings in action No. 12,416 M of the District Court of Colombo set aside ; the action was one instituted about September 30, 1940, against the petitioner by the respondent for recovery of damages for breach of a contract of sale of "old clean and unused newspapers". The petitioner denied liability on certain grounds. He had been interned in the Internment Camp at Diyatalawa and by the end of the year 1942 was transferred to a camp in India. After certain earlier proceedings the case ultimately came on for trial on Novermber 30, 1944. Issues were then framed and evidence led on behalf of the respondent but no evidence was called on behalf of the petitioner who was represented by his Proctor : he however raised an issue as regards a term of the contract. The trial was concluded and about a fortnight later judgment was entered against the petitioner.

In the present application which was filed on January 23, 1947, the petitioner states (*a*) that he was released from internment in August, 1946, and that by reason of the internment he was not in a position to instruct his lawyers in regard to the steps to be taken and witnesses to be summoned on his behalf at the trial and (*b*) that as a result of being interned he was not able to place his Proctors in funds for the proper conduct of the case and to enable them to summon the necessary witnesses. It was contended at the argument that in the interests of justice the judgment alleged to have been pronounced in the absence of the petitioner should be set aside as the Roman-Dutch Law allowed *restitutio in integrum* in respect of proceedings of this nature.

In integrum restitutio, in Roman Law, was a branch of the praetor's equitable jurisdiction and one of the most remarkable cases of his *cognitio extraordinaria*. It denotes the act not of a private party, but of a magisterial authority. It is the restitution by the praetor to his original legal condition, in cases where some injury has been done to a person by operation of law. The interposition in such cases of the highest Roman Minister of Justice bears some analogy to the use made of the prerogative of the Crown in early English legal history. The function of thus over-riding the law where it collided with equity was only confided to the highest magisterial authority, and even in his hands was governed

by the principle that he was only supposed to act in a magisterial, not in a legal capacity. Five grounds or titles (*justae causae*) to extraordinary relief (*extraordinarium auxilium*) were recognized and enumerated in the Edict, Dig. 4, 1 intimidation (*metus*), fraud (*dolus malus*), *absentia*, error, minority (*aetatis infirmitas*). Two, however, of these titles, fraud and intimidation, had additional remedies in the ordinary course of procedure where they were recognised as grounds of exception and personal action—the *actio* and *exceptio metus*, the *exceptio* and the *actio doli*. The effect of a grant of restitution was simply to reinstate a person to a legal right which he had lost, not to give damages on account of the violation of a right. It is to be observed that the praetor expressly avowed his magisterial discretion to be limited by statutory law[1].

The remedy of *restitutio in integrum* became part of the law of Holland. It is the reinstatement of an individual in the position he occupied before some occurrence that had resulted to his prejudice—the act of rescission is called *restitutio in integrum*. The remedy was obtained by an application made at the commencement of the action, but if the obligation was pleaded after an action has been commenced by obtaining permission to make a civil application to the Court for relief. In the case of a principal transaction, as Schorer states, restitution is granted by the Sovereign or by the High Council to whom the function is delegated, the practice being for the applicant to be referred to the inferior courts to inquire whether it is based on truth and is a sufficiently just one, and if it be found so, the restitution is confirmed; if not, it is refused. He gives as examples of a principal transaction, a contract or compromise or adiation of an inheritance.

There are three conditions of restitution: (1) The first condition is a laesion by the operation of law, *i.e.*, a disadvantageous change in civil rights or obligations brought about by some omission or disposition of the person who claims relief. (2) A second condition of relief is the absence of various disentitling circumstances. Thus relief is granted against the effect of legal dispositions and omissions, but in Roman Law not against the effect of delicts. Again the extraordinary relief of *restitutio in integrum* is not granted when the courts of law can administer an adequate remedy. If restitution will be more effective than the ordinary remedy it may be granted. (3) A third condition is some special or abnormal position of the person who claims relief when such special circumstance is the cause of the loss which he has suffered. Such abnormal positions are minority, compulsion, fear, fraud, error, absence. Thus a minor may be relieved against an injudicious bargain, but not against the casual destruction of the thing he has purchased, for this loss was not occasioned by his minority or inexperience.

Grotius after stating that obligations may be rendered invalid by intrinsic or extrinsic causes proceeds to discuss the reliefs available. Intrinsic causes for relief are fear, fraud and minority. Under extrinsic causes he discusses decrees or quasi-decrees of Court[2]. The cases in which relief may, according to van der Linden, be obtained can, broadly speaking, be grouped under two heads: (1) Relief relating to the original

[1] *Sohm, Roman Law, 88.* [2] *Grotius, Introduction, 3-48-3, 4; 3-49-1, 2.*

matter itself (substantial relief) : relief, or relieving a party from any act or contract and replacing him in his former situation is granted on the ground of his having been induced through fear, fraud, minority, error or other sufficient reasons to do the act against which he prays relief ; among good reasons for obtaining relief he had earlier mentioned these—fear, violence, fraud, minority, absence, excusable error and prejudice in above half the value of the thing and further, such equitable grounds as may justify the resolution or cancellation of the contract. (2) Relief relating merely to some omission or error in the process or pleadings (judicial relief[1]). A Court will grant relief where one has been barred from pleading, where there has been delay or default in taking proceedings, as filing a petition of appeal or prosecuting it within the time limited (ten or twenty days respectively), a creditor omitting to file his claim in insolvencey. It is necessary to refer again to absence and the effect of a judgment. In consequence of his absence a person may have lost a right of action by limitation or some property through adverse possession on the part of a third person. As regards the former relief, by way of restitution does not seem to have been necessary in Grotius' time, the rule, broadly stated, being limitation cannot run against a person who is not competent to sue. Relief against prescription in rspect of property could be applied for where there were lawful reasons such as unavoidable absence[2]. Restitution is granted, according to Maasdorp[3], in some matters in which a perons has suffered damage through absence such as in matters of default in legal proceedings or in the acquisition of property by prescription. But relief against an absent person is only granted if the absent person has not left behind one with power to act for him (2 Nathan 165 quoting Voet).

A judgment has, according to Grotius, the force of a final and definite sentence when it does not admit of appeal or reformation or when the time for such appeal or reformation is passed unless indeed the judgment is altered by revision. A judgment though *ipso jure* null and void is valid unless appealed against and has the effect of *res judicata* unless indeed its nullity is due to want of jurisdiction or of service of summons or of power to sue. A judgment, however, may be rescinded by a *restitutio in integrum*, so as to lose all the effect of *res judicata* and the cause is then heard *de novo* just as if the judge had known nothing about it before : restitution was not, as a general rule available, according to Grotius[4], on account of the discovery of fresh evidence but in Schorer's time the law had gone further : restitution will be allowed whenever it was not owing to any negligence on the part of the applicant that the documents were not discovered, for instance, if they were in the possession of a third person without any act on his part and without any possibility of his knowing of it, especially if it was due to the fraud of the opposite party that they were not discovered[5]. In the Jurisprudence of Holland and of those countries, as Burte states, which adpot the civil law, the exception of *res judicata* could be avoided only on the ground of fraud or nullity consisting in the want of jurisdiction either inrespect of the

[1] *van der Linden, Introduction (Henry's translation), pp. 466, 275, 467, 468.*
[2] *Grotius, op. cit 2–7–2.*
[3] *Maasdorp, Vol. III (1st Ed.), 70.*
[4] *Grotius, op. cit. 3–49–5.*
[5] *Schorer, note D XXVII.*

subject of the suit or on account of the party against whom the sentence was pronounced not having been only cited and afforded an opportunity defending himself[1].

The cases in which application for relief by way of restitution in respect of judgments of original courts have been made in Ceylon can, broadly speaking, be classed under two heads : (*a*) where a judgement has been obtained by fraud or where there has been a discovery of fresh evidence ; (*b*) where a judgment has been entered of consent and there has been an absence of a real consent such as in cases of fraud, fear, excess of authority and mistake. It was open to the petitioner to make an application to have his evidence taken on commission and this matter was adverted to in the order made by this Court on March 30, 1944, when this case was remitted to the District Court. That he was not able to make such an application may be due to his lack of means at the time ; it may be his misfortune but that is really no ground for differentiating his case from that of another who is not able to get the funds necessary for prosecuting an appeal in time. It can hardly be said that the present application comes within the rule as laid down by the Roman-Dutch Law writers or the decisions of this Court.

The application is refused with costs.

SOERTSZ S.P.J.—I agree.

Application refused.