1977 *Present:* **Pathirana, J., Udalagama, J., Ismail, J., Tittawella, J., and Gunasekera, J.**

MAPALANE DHAMMADAJA THERO, Defendant-Appellant

and

ROTUMBA WIMALAJOTHI THERO, Plaintiff-Respondent

S.C. 438/68—D.C. Matara 2274/L

Buddhist Ecclesiastical Law—Action for declaration that plaintiff Viharadhipathi of and entitled to certain temples together with their temporalities—Whether action for declaration of status—Period of prescription applicable—Prescription Ordinance, sections 3, 10—Buddhist Temporalities Ordinance (Cap. 318) sections 4, 18, 20, 34—Civil Procedure Code, sections 34, 207.

Abandonment of bhikku's right to incumbency—Circumstances in which such plea can prevail—What conduct can amount to abandonment.

Concept of "de facto" and "de jure" Viharadhipathi discussed.

The plaintiff instituted this action to have himself declared the lawful Viharadhipathi of five temples exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance, and as such Viharadhipathi to be declared entitled to their temporalities described in the schedule to the plaint. He also prayed for the ejectment of the defendant therefrom and that he be placed in possession of the said temples and their temporalities. Among the questions that arose for determination at the trial was the question whether an action of this nature was prescribed in three years under section 10 of the Prescription Ordinance. The learned trial Judge took the view that section 10 did not apply and that such an action was not prescribed in three years. The defendant appealed *inter alia* on this question and in view of the fact that although the Supreme Court had earlier held that the three year period of prescription did apply, different opinions had been expressed in certain judgments subsequently, this question was referred for decision to a bench of five judges.

Held (Udalagama, J. dissenting) : That an action of this nature to be declared Viharadhipathi of a temple was not prescribed in three years and section 10 of the Prescription Ordinance had no application to such an action. By virtue of the provisions of the Buddhist Temporalities Ordinance (Cap. 318) the temporalities of a vihara which had been exempted from the provisions of section 4(1) of that Ordinance have been vested in the Viharadhipathi who is termed for the purposes of the Ordinance, Controlling Viharadhipathi (*vide* sections 4 and 20). An action for a declaration that a bhikku is Viharadhipathi of a temple filed after the Ordinance, in which he also asks for possession of his temporalities is therefore not one for a mere declaration of a status to which section 10 would have applied.

Held further (by Pathirana, J., Ismail, J., and Gunasekera,J.) :

(1) That such an action is one to which section 3 of the Prescription Ordinance applies and the period of prescription applicable would therefore be ten years.

(2) That the plaintiff's cause of action arose on 16.4.59 on the death of his tutor Pannalankara Thero and as this action was instituted on 15th October. 1965, the plaintiff's claim was not barred by the provisions of the Prescription Ordinance.

Per Tittawella, J. : "Such an action is not one that can be barred by lapse of time at all. It carries with it an assertion to the title of the movable and immovable property belonging to the temple and it cannot be barred by lapse of time in view of the express provisions of section 34 of the Buddhist Temporalities Ordinance. Even if one considers an action of this

nature to be one for the declaration of a status, there is in such an action a continuing invation of subsisting right. It would thus constitute a continuing cause of action not barred by any rules of prescription. "

Although the question of law above referred to induced the reference to this bench of five judges the whole appeal was argued before this court and submissions were made on behalf of the defendant-appellant on the question whether the plaintiff-respondent had abandoned his rights to these temples and the Viharadhipathiship. The facts relevant to these submissions that emerged from the admissions and the evidence were that one Pannalankara Maha Thera had been the lawful Viharadhipathi and had died on 16th April, 1959, and the defendant-appellant had been a co-pupil of his. The temporalities described in the schedule to the plaint had vested in the said Pannalankara Maha Thera as such Viharadhipathi and the rule of succession applicable was the sisyanu sisya paramparawa. The plaintiff-respondent was the senior pupil of the said Pannalankara Thera. The latter by a deed P3 had purported to appoint the defendant-appellant as his successor and the plaintiff-respondent as well as five brother priests also pupils of Pannalankara Thera signed the document P3 consenting to this appointment. On the death of the plaintiff-respondent's tutor the defendant-appellant assumed office as Viharadhipathi and took residence in the main vihara of that paramparawa while the plaintiff respondent himself left this vihara and took up residence in another of the appurtenant viharas. Further after the death of Pannalankara Thera the defendant-appellant had filed an action in the District Court of Colombo to withdraw some moneys lying to his credit in an account at the Bank of Ceylon and the defendant-appellant gave a writing consenting to such withdrawal and also as one of the defendants in that action filed answer admitting the defendant -appellant's claim and praying *inter alia* that " judgment be entered declaring that the plaintiff is the controlling Viharadhipathi of the said temples ". This action was however, dismissed and in fact in the course of the judgment the learned District Judge held that it was the plaintiff-respondent who was entitled to be controlling Viharadhipathi. The said deed P3 also contained a clause which stated as follows : " And I also desire that after the demise of my said successor (i.e. the present defendant-appellant) my said pupils by mutual consent appoint any one of them to the chief incumbency and viharadhipathiship of the said six viharas ".

Held (by Pathirana, J., Ismail J,. Tittawella, J. and Gunasekera, J.) :
(1) That the argument based on abandonment must fail. If the deed P3 was considered in its entirety it could not be said that the consent of the defendant-appellant to this document constituted an abandonment ; but quite apart from this the circumstances surrounding its execution and the evidence of the plaintiff-respondent showed that even the partial renunciation contained in the document was not so freely and voluntarily given as to work any forfeiture against him. Further the other conduct of the plaintiff-respondent referred to above including his leaving the main vihara of the paramparawa, in the context of this case, was only continued acquiescence by the respondent in the partial renunciation contained in the deed P3 and could not amount to any further or fuller renunciation so as to be a new and complete abandonment.

(2) In any event the submission on behalf of the defendant-appellant that the plaintiff-respondent had at least renounced his right to officiate as Viharadhipathi could not stand as the Buddhist Ecclesiastical Law does not recognise such a renunciation of the right to function as Viharadhipathi. The office of Viharadhipathiship is inalienable and a priest on whom this office has devolved according to the sisyanu sisya paramparawa rule of succession only holds it in his lifetime to pass it on according to law to his senior pupil or such other pupil as he may select.

The plaintiff-respondent had also filed a cross-appeal against a finding against him in respect of one of the temples, namely, Sunandharamaya Viharaya. This temple had been brought under the operation of section 4(1) of the Buddhist Temporalities Ordinance *subsequent to the institution of this action* and the trial Judge therefore held against the plaintiff-respondent on the question of prescription in regard to this temple.

Held :

(1) That inasmuch as the rights of parties must be determined as at the date of action and this vihara had been brought within the operation of section 4(1) of the Buddhist Temporalities Ordinance only during the course of the action, as at the date of the action the temporalities of that vihara too were vested in the respondent. His action was not prescribed therefore in respect of this temple as well and the cross-appeal must be allowed.

(2) That, however, a decree could not now be entered giving the respondent possession of the temporalities of this temple inasmuch as it had during the course of the action been brought within the operation of section 4(1). Nevertheless as the plaintiff-respondent had now been declared the lawful Viharadhipathi of this temple as well he would be entitled to nominate himself as Trustee of the temporalities of that vihara in terms of section 10(1) of the Buddhist Temporalities Ordinance and assume possession of those temporalities also on that right.

Cases referred to :

Sobhitha Unnanse vs. Ratnapala Unnanse, (1881) Beven & Siebels Reps. 32.

Ratnapala Unnanse vs. Kevitiyagala Unnanse, 2 S.C.C. 26.

Henaya vs. Ratnapala Unnanse, 2 S.C.C. 38.

Elisahamy vs. Punchi Banda et al., 14 N.L.R. 113.

Dhammrakkita Unnanse vs. Sumangala Unnanse, 14 N.L.R. 400.

Revata Unnanse vs. Ratnajothi Unnanse, 3 C.W.R. 193.

Saranankara Unnanse vs. Indajoti Unnanse, 20 N.L.R. 385.

Davarakkita vs. Dharmaratne, 21 N. L. R. 255.

Terunnanse vs. Terunnanse, 28 N. L. R. 477.

Gunananda vs. Deepalankara, 32 N.L.R. 240.

Saddhananda vs. Sumanatissa, 36 N.L.R. 422.

Sumana Terunnanse vs. Somaratana Terunnanse, 5 C.L.W. 37.

Premaratna vs. Indrasara, 40 N.L.R. 235.

Chandrawimala Terunnanse vs. Siyadoris, 47 N.L.R. 304.

Buddharakkita Thero vs. Public Trustee, 49 N.L.R. 325.

Pemananda vs. Welivitiye Soratha, 51 N.L.R. 372.

Algama vs. Buddharakkita, 52 N.L.R. 150.

Samarasinghe vs. Pannasara Thero, 53 N.L.R. 271.

Saranankara Thero vs. Dhammananda Thero, 55 N.L.R. 313.

Pemananda Thero vs. Thomas Perera, 56 N.L.R. 413.

Pitawala Sumangala vs. Hurikaduwa Dhammananda, 59 C.L.W. 59.

Podiya vs. Sumangala, 58 N.L.R. 29.

Moratota Sobita Thero vs. Akwatte Dewamitte Thero & another. S.C. 405 (F), 1958—D.C., Kegalle Case No. 10050.

Amaraseeha Thero vs. Sasanatilaka Thero, 59 N.L.R. 289.

Dheerananda Thero vs. Ratnasara Thero, 60 N.L.R. 7.

Dheerananda Thero vs. Ratnasara Thero, 67 N.L.R. 559.

Ramsarup Das vs. Rameshwar Das, (1950) A.I.R. (Patna) 184.

APPEAL from a judgment of the District Court, Matara.

H. W. Jayewardene, Q.C., with *C. Ranganathan, Q.C., K.V.P. Jayatilleke, Miss S. Fernando and Miss P. Seneviratne* for the defendant-appellant.

Eric S. Amerasinghe, with *J. W. Subasinghe, N. S. A. Goonetilleke, M. B. Peramuna* and *Miss K. D. Meddegoda*, for the plaintiff-respondent.

Cur. adv. vult.

December 12, 1977. PATHIRANA, J.

The plaintiff instituted this action on 15.10.1965 against the defendant-appellant to have himself declared the lawful Viharadipathi of five temples and as Viharadipathi to be declared entitled to the temporalities described in the schedule to the plaint for ejectment of the defendant therefrom and that he be placed in possession thereof.

Among the questions that came up for decision in this appeal was whether an action to be declared entitled to be the Viharadipathi of a temple, which is exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance and the mode of succession to which is regulated by *sisyanu sisya paramparawa*, is prescribed in 3 years in terms of section 10 of the Prescription Ordinance. The learned District Judge took the view that it was not prescribed in 3 years and section 10 of the Prescription Ordinance did not apply.

In view of opinions expressed as far back as in 1954 by Gratiaen, J. in *Saranakara Thero vs. Dhammananda Thero*, 55 N. L. R. 313, and thereafter in 1957 by Basnayake, C. J. in *Amaraseeha Thero vs. Sasanatilake Thero*, 59 N.L.R. 289, doubting that such an action was prescribed in 3 years under section 10 of the Prescription Ordinance and that therefore the question called for reconsideration by a fuller bench, this question was referred at the invitation of the learned counsel appearing in this appeal by a bench of 3 judges to the Chief Justice, who in terms of section 14 (3) of the Administration of Justice Law has directed that this appeal be decided by the present bench of five judges of this Court.

I shall at the outset set out the relevant passages in the judgments of Gratiaen, J. and Basnayake, C. J. where the point involved is considered along with the suggested answers. Although the point was not in fact decided, they however serve as useful guidelines for the purpose of deciding the question for decision in this appeal.

Gratiaen, J. in *Saranakara Thero vs. Dhammanada Thero* (*supra*) at 315, stated :—

> "The earlier authorities certainly seem to indicate that, if a trespasser who disputes the status of the true incumbent of a temple continues thereafter to remain in adverse possession without interruption for a period of three years, the dilatory incumbent's right to relief in the form of a declaratory decree becomes barred by limitation under section 10. We must, of course, regard ourselves as bound by these decisions, but with great respect, I think that, on this particular point, the question calls for reconsideration by a fuller bench on an appropriate occasion. It is clear law that an imposter cannot acquire a right to an incumbency by prescription ; nor can the rights of the true incumbent be extinguished by prescription. Although the operation of section 10 may destroy the remedy accruing from a particular "denial", the right or status itself still subsists. It is true that the lawful incumbent can take no steps after three years to enforce his remedy if it is based exclusively on that particular "denial" of his status, but there is much to be said for the argument that a continuing invasion of a subsisting right constitutes in truth a continuing cause of action. Indeed, the contrary view would indirectly produce the anomalous result of converting the provisions of section 10 into a weapon for the extinction of a right which cannot in law be extinguished by prescription."

Basnayake, C. J. in *Amaraseeha Thero vs. Sasanatilake Thero* (*supra*) at page 293 said :—

> "The plaintiff's action is in effect an action, for not only a declaration of status, but also for the recovery of the temple and its property, for his prayer is that the defendant be ejected from the premises described in the schedule to the plaint.
>
> It would therefore not be correct to treat the instant case as an action for declaration of a status alone. The period of prescription in respect of actions for the purpose of being quieted in possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish a claim in any other manner to land or property is governed by section 3 and not by section 10 of the Prescription Ordinance. The decisions of this Court which hold that an action for an incumbency of a temple, being an action for a declaration of a status is barred by the lapse of three years from the date when the cause of action arose, may have to be re-examined in a suitable case

in the light of the altered rights of a Viharadipathi who is now empowered to sue and be sued as the person in whom the management of the property belonging to a temple is vested."

The facts of the present case are briefly as follows :—

The plaintiff claimed that Pannalankara Maha Nayake Thero was the Viharadipathi of these temples and on his death on 16.4.59 the plaintiff as the senior pupil became entitled to the Viharadipathiship of the said temples and temporalities. The plaintiff stated that although by deed No. 818 of 1.2.59 the said Pannalankara Maha Nayake Thero had appointed the defendant who was his co-pupil to succeed him as Viharadipathi of the said temples, the purported appointment on the said deed was of no force or avail in law and was null and void. He alleged that since 13.7.1975 the defendant was wrongfully and unlawfully collecting and appropriating the income from the temporalities of the said temple in violation of the plaintiff's rights.

The defendant pleaded that on deed No. 818 of 1959 Pannalankara Thero appointed him his co-pupil, to succeed him as Viharadipathi of the said temples. He further pleaded that the plaintiff and the other five pupils of Pannalankara Thero renounced their right, title and interest and abandoned all their claims to the said temples. He pleaded certain documents in confirmation of their renunciation and abandonment and stated that since the death of Pannalankara Thero on 18.4.59 the defendant is in lawful occupation, residence and possession of the Viharadipathiship of the said temples and their temporalities. He claimed that he had succeeded by virtue of the said appointment or by pupillary succession to the incumbency of the said five temples and the temporalities on the ground that all the pupils of Pannalankara Thero had renounced or abandoned their rights to the Viharadipahiship of the said temples. He further pleaded that the plaintiff's claim was prescribed in law.

Although the plaintiff took up the position at the trial that the dispute with the defendant started in December 1963 and therefore even assuming that the period of prescription is three years, his claim was not prescribed, the learned District Judge rejected this contention. He held that Pannalankara Thero by deed No. 818 of 1959 had purported to appoint the defendant to succeed him as Viharadipathi of the said temples. The plaintiff was aware of this as he was a witness to this deed and there was an admission in his evidence that from the date of execution of the said deed the defendant was claiming the Viharadipathiship of the said temples. He therefore held that the plaintiff's right of action against the defendant arose from the time of the execution

of deed No. 818 or at any event on the death of Pannalankara Thero on 16.4.59. I should think that the plaintiff's cause of action arose after 16.4.59 on the death of his tutor Pannalankara Thero.

There were three questions for determination in this case before the District Court, namely,

(1) whether the plaintiff had abandoned and renounced his rights to the Viharadipathiship of the said temples.

(2) whether by the deed of appointment No. 818 of 1959 of pupillary succession, the defendant succeeded as Viharadhipathi of the said temples. The question would only arise if the first question is answered against the plaintiff.

(3) if the plaintiff had not abandoned or renounced his rights whether his cause of action was prescribed.

On the first question the learned District Judge has held that the plaintiff had not abandoned or renounced his rights to the Viharadipathiship of the said temples. I have perused the judgment prepared by my brother Gunasekera, J. who has dealt with this aspect of the matter. I agree with the conclusion and reasons reached by Gunasekera, J. that the learned District Judge was right in holding that the plaintiff had not abandoned or renounced his rights to the Viharadhipathiship of the said temples.

On the question of prescription the learned District Judge referred to the meaning of the term "incumbency" in the Buddhist Temporalities Ordinance of 1905 under which the rights to the temporalities of a temple are vested not in the incumbent but in a lay trustee. He next referred to the introduction of the expression "controlling Vitharadipathi" in the present Ordinance of 1931 in which under section 4 (2) and section 20 the management and title of the properties belonging to the temple are vested in the controlling Viharadipathi. He concluded that an action in respect of a temple the endowments of which are vested in the controlling Viharadipathi unlike in an action for incumbency of a temple governed by the old Ordinance, would not be an action brought for a mere declaration of status but would also involve the question of title to its endowments and therefore the action did not come under section 10 of the Prescription Ordinance and was not prescribed in three years.

It would be useful in order to appreciate the arguments presented to us to give a resume of the rights of a chief incumbent of a Buddhist temple in relation to the properties belonging to the temple before the Buddhist Temporalities Ordinance of 1889

and the impact of that Ordinance and the Ordinance of 1905 and 1931 particularly in relation to the rights of an incumbent to the properties belonging to the temple.

In *Saranankara Unnanse vs. Indajoti Unnanse,* 20 N.L.R. 385 at 394, Bertram, C. J. considers the essential nature of a vihara and the rights of the Buddhist clergy in connection therewith according to the principles laid down in the "Vinaya". He thereafter considers how those principles have been affected by the religious custom known as pupillary succession. Quoting from the original Buddhist texts he states that a Vihara is considered as being dedicated to the whole order of the Sangha present and future throughout the world. Every Vihara belongs to the whole order of the Sangha to the full extent of the accommodation which it affords and cannot be portioned out in shares whether divided or undivided. So strict was this original rule—later relaxed—that it went to the extent of laying down that no bhikku had separate personal ownership even over his robes. A gift of robes was, strictly speaking, made to the whole order though nominally given to a priest for his own use and really his own. Subject to the rules, they were, technically speaking the property of his Sangha. Bertram, C.J. then states :

> "This general principal of the dedication of every vihara to the Sangha as a whole is affected by the religious custom under which temples have been from time to time dedicated for the use of a particular priest and his pupils and the pupils of those pupils in perpetual succession."

He was referring to the succession by the pupillary succession known as *sisyanu sisya paramparawa.*

He then proceeds to state that this mode of succession affected the general principle in two ways. Firstly, in creating a special office in connection with the Vihara called an "incumbent" and secondly, in giving a special right of residence and maintenance to the pupils of the original priest.

In the course of time the principle was accepted that property dedicated to a Vihara or Pansala was the property of the individual priest who was the incumbent of the foundation for the purpose of his office including his own support and the maintenance of the temple and its services and on his death it passed by inheritance to an heir who was ascertained by a peculiar rule of succession or special law of inheritance and was not generally the person who would be by general law the deceased priest's *Kevitiyagala Unnanse,* 2. S.C.C. 26, and *Henaya vs. Ratnapala* heir in respect of his property. See *Ratnapala Unnanse vs. Unnanse,* 2 S.C.C. 38.

The Buddhist Temporalities Ordinance, No. 3. of 1889, was enacted for better regulation and management of Buddhist Temples in the island. By section 2 " incumbent " meant the chief resident priest in a Vihara. Section 20 of that Ordinance vested all the temple property in a lay trustee. The presiding priest or incumbent, however, had the control and administration of the Vihara itself although the property of the Vihara vested in the trustee. (see *Devarakkita vs. Dhammaratne,* 21 N.L.R. 255). The Buddhist Temporalities Ordinance of 1905 made an inconsequential change in the definition of the word " incumbent " in section 2 to mean " the chief resident priest in a temple". The Ordinance of 1931, however, introduced the new concept of the controlling Viharadipathi. The Ordinance spoke for the first time of a Viharadipathi and not an incumbent. Section 2 of the Ordinance defines a " Viharadipathi " as " the principal bhikku of a temple whether resident or not ". In the case of a temple exempted from the operation of section 4 (1) of the Ordinance, by section 4 (2) the management of the property belonging to every temple was vested in the Viharadipathi of such temple hereinafter referred to as " the controlling Viharadipathi ". Section 20 of the Ordinance states that all property movable and immovable belonging to the temple other than " pudgalika " property vested in the controlling Viharadipathi for the time being of such temple.

I have also to keep in mind in considering the submissions made in this case two other cardinal principles affecting the office of the de jure Viharadipathi of a temple. As pointed out by Gratiaen, J. in *Saranankara Thero vs. Dhammananda Thero,* an imposter cannot acquire the right to an incumbency of a temple and nor can the rights of a true incumbent be extinguished by prescription. The question we have to decide is which section of the Prescription Ordinance extinguishes the remedy of a lawful incumbent arising out of the particular denial of his rights.

Mr. Jayewardene for the defendant-appellant relied strongly on the decisions of this Court which held that a claim to be entitled to the Viharadipathiship of a Buddhist temple is one for a declaration to a status and therefore barred unless the action is instituted within three years of the accrual of the cause of action. I shall now examine these decisions.

In *Revata Unnanse vs. Ratnajothi Unnanse,* (1916) 3 C.W.R. 193, the plaintiff claimed that he was the original incumbent of the temple and that he was entitled to reside in the Vihara. Schneider, A. J. took the view that the action did not fall within section 3 of the Prescription Ordinance because it was not an

action for a declaration of title to immovable property founded upon 10 years' possession by the plaintiff or by him and his predecessors. Schneider, A. J. then said at page 198 :—

> " This is obviously an action for the declaration of a status, namely, that the plaintiff is the senior pupil of the deceased Madankara. The plaintiff himself values the right he claims at Rs. 350 whereas the vihara and its temporalities must be worth according to the evidence in the case many thousands of rupees. If the action is not governed by section 4 it must needs fall under section 11, for it can fall under no other. The period of limitation under section 11 is three years from the time the cause of action shall have accrued. "

Section 11 corresponds to the present section 10 of the Prescription Ordinance.

In *Terunnanse vs. Terunnanse,* (1927) 28 N.L.R. 477, the evidence clearly established that for at least 5 years prior to the bringing of the action the 1st defendant was in occupation of the incumbency and had been recognised by the congregation as tne incumbent. The District Judge held that the plaintiff's appointment was more regular and would have entitled him to the relief he claimed but for the circumstance that his right of action was barred by limitation. The plaintiff appealed and urged that the action was not barred in three years but was available until 10 years had expired from the date on which the right accrued. Garvin, J. following *Revata Unnanse vs. Ratanajothi Unnanse* (*supra*) rejected this contention thus :

> " This is clearly not an action for the recovery of immovable property based on a right acquired by ten years' adverse and uninterrupted possession thereof. Nor is it a case in which such an action based on title is being resisted on the ground of such adverse and uninterrupted possession. By the Buddhist Temporalities Ordinance the property of the vihare both immovable and movable is vested in the trustee, who in this case is the second defendant. An incumbent clearly has no title to the immovable property of the temple nor a right to the possession thereof. Apart from his ecclesiastical duties, an incumbent of a vihare has certain rights of administration and control of the vihare itself, but these are not such rights as are contemplated by section 3. They spring from and appertain to the office of incumbent, and cannot exist apart from it.

> The right of the plaintiff to the enjoyment and exercise of those rights is dependent upon his right to the incumbency. It is manifest that in form and in substance this is an action for a declaration of the plaintiff's right to the incumbency. In the absence of special provision in Ordinance No. 22 of 1871, section 11 of the Ordinance applies to the case, and the action is barred by limitation in three years."

These two cases had been decided when the Buddhist Temporalities Ordinance of 1905 was in operation. There is therefore much to be said for the contention put forward by Mr. Amerasinghe, who appeared for the plaintiff-respondent that under the Ordinance of 1905 the property of a Buddhist Vihara, movable and immovable, was vested in a trustee and the incumbent had no title to the immovable property nor a right to the possession thereof and therefore under that Ordinance an incumbent was only entitled to the right to the incumbency and not to any of the properties. In fact, this was the main argument which influenced Garvin, A. J. in *Terunnanse vs. Terunnanse (supra)*.

The case of *Premaratane vs. Indasara,* (1930) 40 N.L.R. 235 no doubt held that the claim to an incumbency of a temple was prescribed in three years. This was acase decided on 3rd June, 1938, after the Ordinance of 1931. According to this decision the plaintiff's cause of action was barred by a lapse of 3 years after the defendant became incumbent in January or February 1931. The impact of the 1931 Ordinance in relation to the property of the temple vesting in the Viharadipathi was not considered in this case.

Sumangala vs. Dhammananda Thero, 59 C.L.W. 59, is a report of a case which reproduces the order of the learned District Judge distinguishing 3 C.W.R. 193 and 28 N.L.R. 477. The District Judge has remarked that these were decisions under the Ordinance of 1905. That Ordinance did not vest the incumbent of a temple with the temporalities of a temple. Under the Ordinance of 1931 all temple property was vested in the Viharadipathi. An incumbency action brought under the present Ordinance in respect of a temple where the properties are vested in the incumbent would not be an action brought for the mere declaration of a status but would also involve the question of title to the temple. The District Judge held in favour of the plaintiff. The defendant appealed to the Supreme Court which merely dismissed the appeal without giving any reasons. I agree with Mr. Jayewardene that this case is not very helpful to decide the present appeal because in that case,

it was conceded that the plaintiff was the Viharadipathi and the only question was whether he was entitled to the temporalities.

The other case relied upon by Mr. Jayewardene is *Dheerananda Thero vs. Ratnasara Thero,* 67 N.L.R. 559, which decided that the claim of a plaintiff to be declared the Viharadipathi of a Buddhist temple is an action for a declaration for status and is therefore barred unless brought within 3 years of the accrual of the cause of action. This case too is not very helpful because it was conceded by counsel that a claim of this nature has to be brought into Court within 3 years of the cause of action arising.

In the cases decided after the 1931 Ordinance came into operation where the prescriptive period for an action to be declared entitled to the Viharadipathiship of a temple had been held to be 3 years under section 10 of the Prescription Ordinace, the altered rights of a Viharadipathi consequent to the enactment of section 4 (2) and section 20 had not been considered. Where these altered rights were in fact considered as in *Amaraseeha Thero vs. Sasanatilake Thero* (*supra*) doubts have been expressed about the 3 year period.

Mr. Jayewardene's basic submission nevertheless was, that despite the alterations brought about by 1931 Ordinance vesting the management and the rights in the temporalities of a temple in the controlling Viharadipathi, the decisions of this Court even given when the Ordinance of 1905 was in operation that an action for the office of Viharadhipathi of a temple was a personal action for a declaration of status and therefore section 10 of the Prescription Ordinance applied, the action being barred in 3 years, were still good law. His argument took the following lines. Under section 2 of the 1931 Ordinance "Viharadipathi" is defined as "the Chief Bhikku of a temple whether resident or not". According to Mr. Jayewardene he need not be a *de jure* Viharadhipathi. The bhikku who for the time being has been resident in the temple and had controlled its affairs came within the expression controlling Viharadipathi. Even a *de facto* Viharadipathi came within this definition. In support of his contention he relied on *Sumana Terunnanse vs. Somaratana Terunnanse,* (1936) 5 C.L.W. 37, *Chandrawimala Terunnanse vs. Siyadoris,* (1946) 47 N.L.R. 304, *Algama vs. Buddharakkita,* 52 N.L.R. 150.

Mr. Jayewardene's argument is that section 4 (1) vests the management of the property belonging to the temple in even a *de facto* Viharadipathi. Section 20 also vests all temporalities in the controlling Viharadipathi. If, therefore, any bhikku who

lays a claim to be the controlling Viharadhipathi of a temple wishes to bring an action he must first establish his personal right to such an office. Having successfully done so and having obtained a decree that he was entitled to be the controlling Viharadipathi of the temple and its temporalities, he can then proceed against the person in possession of the temple and its temporalities. The initial action for a declaration of a status must be brought within 3 years. Otherwise it is time barred. Mr. Jayewardene's argument will therefore stand or fall on whether the term "controlling Viharadipathi" in section 4 (2) and section 20 will include a *de facto* Viharadipathi and not necessarily a *de jure* Viharadipathi. There is then the other practical difficulty in accepting this contention, which would arise out of the plea of *res judicata* that can be raised against the second action in view of section 34 and section 207 of the Civil Procedure Code.

I shall now examine the cases relied upon by Mr. Jayewardene.

Sumana Terunnanse vs. Somaratana Terunnanse, (1936) 5 C.L.W. 37, wa a case decided when the Ordinance of 1931 was in operation. A bhikku who had been resident in a temple for 40 years and who was during this time in charge of its affairs was held entitled to maintain an action on the ground that he came within the expression "controlling Viharadipathi". The plaintiff was subordinate to one Revata Unnanse who was the chief pupil of the last incumbent and it was contended that he was nevertheless therefore the proper party to sue. Revata Unnanse hovever had lived away from the temple and had exercised no control over its affairs.

Soertsz, J. held :

> "There is the evidence, oral and documentary to show that the plaintiff is the controlling Viharadipathi. Revata Terunnanse had lived away from the temple for very many years and has exercised no control over its affairs. In the circumstances I think the plaintiff satisfies the requirement of section 18 of the Buddhist Temporalities Ordinance and is entitled to maintain this action."

Although Soertsz, J. has not expressly stated so it may very well be that the ground of his decision was that Revata Unnanse having abandoned the temple his pupils if any had to lose their rights to the temple. The plaintiff therefore had as co-pupil of Revata Unnanse, become the Viharadipathi of the temple and having functioned as such for over 40 years was therefore entitled to bring the action. There is, therefore, a legal basis for the plaintiff to be entitled to bring the action.

In *Chandrawimala Terunnanse vs. Siyadoris,* 47 N.L.R. 304, de Silva, J. dealt with the case where the plaintiff was not the lawful Viharadipathi of the temple. It was conceded quite correctly that a person who did not come in the pupillary succession of the first incumbent could not acquire the incumbency by prescription. He distinguished the plaintiff's claim by saying that the plaintiff did not claim to be the incumbent but the controlling Viharadipathi who had the right to possess the properties belonging to the temple. De Silva, J. followed *Sumana Terunnanse vs. Somaratna Terunnanse* (*supra*) and held that the plaintiff was entitled to bring this action.

The other case relied upon was *Algama vs. Buddharakkita,* 52 N.L.R. 150, where the expression " controlling Viharadipathi " in section 32 of the Ordinance of 1931 was held to include the *de facto* Viharadipathi and not necessarily a *de jure* Viharadipathi. In this case Dias, S.P.J. no doubt, in the context of section 32 of the Ordinance held that the term Viharadipathi in that section was wide enough to include persons who were only functioning as *de facto* Viharadipathi or who claimed to be the Viharadipathis.

Before I deal with this case I would refer to the case of *Buddharakkita Thero vs. Public Trustee,* 49 N. L. R. 325, by Dias, J. The parties involved are the same Buddhist priests. In this case, there was a dispute to the Viharadipathiship of the Kelaniya Raja Maha Vihara between the senior priest and the junior priest of the deceased incumbent. While the junior priest claimed the office on an alleged nomination by the last incumbent, the senior priest challenged this nomination and claimed to be the lawful successor as senior pupil. The temple was not exempted from the operation of section 4 (1). The Public Trustee had to ultimately make the appointment of a trustee under section 11 (2). At the time an action was pending in the District Court between the two rival claimants for the Viharadipathiship of the temple. Under section 10 (1) the trustee had to be nominated by the Viharadipathi of the temple and under section 10 (2) the Public Trustee had to make the appointment. The senior pupil claiming to be the Viharadipathi nominated himself while the junior pupil nominated himself. As the Viharadipathiship was in dispute the Public Trustee expressing no views on the conflicting claims acting under section 10 (3) (B) appointed a layman as the provisional trustee so that the temporalities of the temple might be safeguarded. This appointment was challenged by the junior priest who claimed that he was the lawful Viharadipathi and moved for a writ of mandamus stating that the Public Trustee has failed to perform his legal duties under section 10 (2). Dias, J. in the context of the relevant sections stated :

" The duty of the Public Trustee to issue a letter of appointment can only arise " whenever a nomination is duly made " under section 9 or 10. To decide which of the two nominations was " duly " made, the Public Trustee must decide which of the two persons making the nomination was the Viharadipathi, i.e., the *de jure* incumbent of the Kelaniya Temple. If the Public Trustee honestly has a doubt on the point as to whether the nomination or nominations was or were " duly " made, I hold that his statutory duty to issue a letter of appointment does not arise until such doubt is resolved. Section 11 (3) makes special provision for such a situation. Pending a " Legal nomination ", i.e., a nomination by a *de jure* Viharadhipathi, he can refuse to issue a letter of appointment, and if necessary appoint as a provisional trustee some person duly qualified " for the safe management of the property " of the temple, while the priestly contestants have the question decided elsewhere as to who has the better rights. "

A legal nomination is therefore a nomination by a *de jure* Viharadipathi.

I shall now consider *Algama vs. Buddharakkita*, 52 N.L.R. 150. This case concerned the same temple and involved the same claimants to the incumbency. It was a judgment of Dias, S.P.J. consequent to the appointment of the provisional trustee under section 10 (2) pending the action of the two rival claimants in the District Court, that is, until the status of the person legally entitled to the incumbency was decided by the Court. The provisional trustee was entitled under section 32 (1) to call upon both rival claimants to surrender to him all the temporalities which were in their possession. Section 32 empowered the Public Trustee or the provisional trustee in such a case to apply by way of summary procedure to the Court for a writ requiring the Viharadipathi to deliver possession of such property to the provisional trustee. The provisional trustee having failed to obtain possession of the temporalities or adequate information concerning them, moved the District Court under section 32 naming both priests as respondents. The senior priest did not contest the claim. The junior priest contended that either of the respondents did not come strictly within the definition of Viharadipathi in the Ordinance and that " Viharadipathi " means the *de jure* Viharadipathi in section 2, namely, " the principal bhikku of a temple whether resident or not ". He granted that until the civil litigation pending between the two priests was decided it was not possible to say who the *de jure* Viharadipathi was. While reiterating that under section 10 (1) it is the duty of the Viharadipathi, that is, the *de jure* Viharadipathi to nominate a trustee except in certain excepted cases he stated: —

"It is contended that definition of "Viharadipathi" in section 2 means the *de jure* Viharadhipathi. Section 2 does not say anything of the kind. What it says is that "unless the context otherwise requires, "Viharadipathi" means the principal bhikku of a temple .... ". I find it impossible to interpret the word "principal" to mean "de jure". There are several sections in the Ordinance which indicate that, while there may be a "principal bhikku" in a temple, there can also be a "controlling viharadipathi"—*see* sections 18, 28(1), (2), 29 and 31. Furthermore, having regard to the aim, scope and purpose of the Buddhist Temporalities Ordinance—namely the preservation of the property of the temple in the hands of a trustee who is accountable to the Public Trustee, the object of the legislature would be completely frustrated if, in a case like the present, the Court is powerless to grant relief to the provisional trustee whose object is solely to preserve the valuable temporalities of this famous temple, until the question as to who is the person who can lawfully nominate a trustee has been decided once and for all.

The opening words of section 2 of the Ordinance says that the definitions contained in that section are to have effect "unless the context otherwise requires". The context in which the words " any Viharadipathi " is used in section 32 shows that the object of the legislature would be defeated by giving those words the narrow interpretation contended for by the first respondent."

Quite rightly Dias, J. has pointed out that the object of the Ordinance will be defeated and a person who claims to be the Viharadipathi who may in fact have no legal claims at all to the temple and is an imposter can continue to occupy the temple and take the benefit of its temporalities. A reading of the two judgements makes it clear that where the powers, rights and functions of a Viharadipathi are referred to in the Ordinance it is the lawful Viharadipathi who is entitled to exercise these powers, rights and functions and not the *de facto* Viharadipathi. I am, therefore, of the view that judgment of Dias, S.P.J. in 52 N.L.R. 150 read with his judgment in 49 N.L.R. 325 makes it quite clear that a *de facto* Viharadipathi has no legal title or rights to a temple under the Ordinance of 1931.

Sumana Terunnanse vs. Somaratana Terunnanse and *Chandrawimala Terunnanse vs. Siyadoris* (*supra*) came up for consideration in *Pemananda Thero vs. Thomas Perera,* 56 N.L.R. 413. One Pemananda Thero who described himself as the Controlling Viharadipathi of the Vihara in question with the written sanction

of the Public Trustee leased certain lands belonging to the Vihara to the plaintiff in 1946. The Vihara in question was exempted from the operation of section 4(1) of the Ordinance. He complained that while he was in possession as lessee he was ousted by the defendant priest in 1948. The defendant priest claimed to be the Viharadipathi since his tutor died in 1927. He claimed to be the controlling Viharadipathi and the proper authority to possess and lease the property belonging to the Vihara. He said that the plaintiff's lessor had been merely resident in the temple and looking after it with his permission. The learned District Judge held that the defendant was the lawful Viharadipathi but that the plaintiff's lessor functioned as *de facto* Viharadipathi from 1935 to 1948, while being in control of the temple and its temporalities and was therefore the Viharadipathi. He gave judgment for the plaintiff. The defendant appealed. In appeal the question for decision was whether the plaintiff's lessor Pemananda Thero who was not the lawful incumbent of the Vihara could rightly have claimed to be the controlling Viharadipathi as the term is defined in section 4(2) of the Ordinance. Sansoni, J. having referred to the definition of "Viharadipathi" in section 4(2) of the Ordinance said that the first qualification required of the controlling Viharadipathi is that he should be the Viharadipathi of the temple. He received the statutory label "controlling Viharadhipathi" only because the temple was exempted from the operation of section 4(1) and the management of its properties was vested in him as Viharadhipathi instead of in a duly appointed trustee. He then considered two essential matters in the statutory definition of Viharadhipathi, namely (1) he must be the principal bhikku of the temple; and (2) he need not be resident in the temple. He referred to the definition of incumbent in section 2 of the Ordinance of 1905 as "the chief resident priest of a temple" and also the definition of section 2 of an incumbent in 1889 Ordinance, "the Chief resident priest of a Vihara". Having considered all these definitions and the relevant provisions of the three Ordinances, Sansoni, J. finally expressed that view at page 416:

> "At no time in the history of Buddhist temples in this island has a priest who had no right to the incumbency of a temple been invested with the title to, or the power to manage the temporalities of the temple. I am unable to accept the suggestion that the Ordinance of 1931, Cap. 222, had the far reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the chief priest of a temple. Instead of the words "the chief" in the earlier definitions of "incumbent" the definition of "Viharadhipathi" contains the words

> "the principal" and the only other change effected is that a bhikku could be a Viharadipathi whether he was resident in the temple or not—a change which was probably made because a priest can be an incumbent of more than one temple. In effect, therefore, a Viharadipathi after 1931 is the presiding priest who was known as an incumbent before 1931, with the difference that he need not be resident in the temple of which he claims to be the Viharadipathi. Bearing in mind that the expression "chief priest (or bhikku) of a temple" has always been the definition of the word "incumbent" and substantially the same expression has been used to define the word "Viharadhipathi", it seems only reasonable to assume that the legislature meant the new expression to be the equivalent of the old expression "incumbent".

Sansoni, J. did not follow Soertsz, J.'s judgment in *Sumana Terunnanse vs. Somaratana Terunnanse* and the judgment of de Silva, J. in *Chandrawimala Terunnanse vs. Siyadoris* (*supra*). I am of the view that Sansoni, J. was right when he said that the Viharadipathi contemplated in section 4 (1) and section 20 of the Ordinance of 1931 is the *de jure* Viharadipathi and not the *de facto* Viharadipathi. The whole purpose of the Ordinance of 1931 will be defeated if temples and temporalities which should be safeguarded by the lawfully appointed custodian should be permitted to be in the hands of an imposter or one who had no legal claim and give such a person the protection of the Ordinance.

Although I have thus rejected the basis on which Mr. Jayewardene built his main argument the problem still remains for an answer.

There are two answers suggested—one by Gratiaen, J. and the other by Basnayake, C. J. Gratiaen, quite rightly states that although the operation of section 10 may destroy the remedy accruing over a particular denial the right or status itself still subsists. But he states that there is much to be said of the argument that a continuing invasion of a subsisting right constitutes in truth a continuing cause of action as the right of a true incumbent cannot be extinguished by prescription. The provisions of section 10 should not be converted into a weapon for the extinguishing of a right which cannot in law be extinguished by prescription. Basnayake, C.J., however, seems to think that in view of the altered rights of a Viharadipathi under the 1931 Ordinance section 3 and not 10 of the Prescription Ordinance may be applicable.

I would prefer to approach the problem by asking the simple question—What is the content and scope of an action to be declared Viharadipathi of a temple. It is in fact and in substance an action for the Viharadipathiship of the temple although in form it appears to be an action to be entitled to the status of a Viharadipathi of the temple. To give a not unfamiliar example by way of analogy it can be likened to a mediaeval king asking for his kingdom. This leads to the question what are the rights associated with the Viharadipathiship of a temple exempted from the operation of section 4 (1) of the Ordinance after coming into operation of the 1931 Ordinance. Apart from being entitled to the management and title of property movable and immovable belonging to the temple there are other rights which Sansoni, J. has referred to as the lesser proprietary rights which he has ably summed up in the short passage in his judgment in *Podiya vs. Sumangala,* 58 N.L.R. 29, at page 31. This case no doubt dealt with the question whether a pupil is a privy of his tutor for the purpose of *res judicata* but nevertheless the following passage is relevant to the question at issue in this case.

> "I do not think that it is essential in order to constitute one person the privy of another that there should be a question of ownership of property arising; there are lesser rights in property which a Viharadipathi, by virtue of his office, acquires. For instance, he is entitled to the unhampered use of the Vihare for the purpose of maintaining the customary religious rites and ceremonies. He can claim full possession of it even though the title in respect of it and of the other endowments of the Vihare is vested in a trustee. See *Guneratne Nayake Thero vs. Punchi Banda Korale.* Again, he is entitled to the control and management of the temple premises and might regulate its occupation and use to the extent that no other priest can select for himself a particular place in the Vihare independently of him against his wishes. A priest who is guilty of contumacy is liable to be ejected by him. See *Piyadasa vs. Deevamitta.*"

The temple which is the symbol of the office of the Viharadipathi and its appurtenances which include the residential quarters of bhikkus all stand on immovable property. The question of title to all these is involved in an action for the Viharadipathiship of a temple, not to mention that the title to its temporalities all of which by operation of law after the Ordinance of 1931 vests in the lawful Viharadipathi and in none other be he an imposter or trespasser. Two concepts are therefore associated with the office of Viharadhipathi of a temple

First, there is the holder of such an office. Secondly, by virtue of the office there are interests which are attached to such office by operation of law. When an usurper, imposter or trespasser disputes the right of the lawful Viharadipathi of a temple this usually takes the form of occuping the temple and/or its temporalities. An action for declaration of title to the office of Viharadhipathi though in form it may appear to be an action for an office or status is in substance an action for the temple and all its temporalities. In the present case the plaintiff is not only asking for a declaration of title to the incumbency and its temporalities but is also asking for an order of ejectment. To eject means to oust the defendant from the temple and its temporalities and put the plaintiff in possession thereof. Ejectment of the defendant cannot therefore be said to be purely incidental to the claim to be the incumbent. The temple and the office of Viharadipathi are so inextricably interwoven that it is almost impossible to visualize one without the other.

I would also refer to the definition of Viharadipathi in section 2 of the present Ordinance as " the principal bhikku of a temple whether resident or not ". The words " whether resident or not " are wide enough to cover the following two situations. A priest or bhikku may be the Viharadipathi of more than one temple, and the fact that he resides in one of the temples will not disqualify him from being the Viharadipathi of the others. It also means that a lawful incumbent of a temple even if he was kept out of the temple by an imposter or trespasser remains the lawful Viharadipathi. No imposter can step into his shoes. By the operation of section 4(2) and section 20 the management of and the title to the properties are vested in him and in none other. His rights cannot be extinguished by prescription nor can an imposter acquire the rights to the incumbency of the temple by prescription, though his remedy to sue for the incumbency may be barred by the laws of limitation. The decisions of Dias, S.P.J. in the Kelaniya Temple cases have laid down very clearly that under the Ordinance of 1931 only a lawful Viharadipathi has the rights and powers in regard to a temple exempted from the operation of section 4 (1).

I am not inclined to agree with the answer suggested by Gratiaen, J. that a continuing invasion of a subsisting right constitutes a continuing cause of action and therefore the laws of limitation cannot apply to such an action. As an argument he states that section 10 can be used as a weapon to extinguish a right which cannot in law be extinguished by prescription. Every cause of action has a period of limitation imposed under the Prescription Ordinance and other statutes unless exceptions

are made either by the Prescription Ordinance or by statute. Under the Prescription Ordinance section 10 catches up those actions for which no express provision is made in the Ordinance. The Prescription Ordinance also exempts certain actions from the operation of the Ordinance—*vide* section 15. The Ordinance also makes provision whereby the laws of limitation are in abeyance for a period in certain circumstances. (*Vide* sections 13 and 14) The cause of action to sue for a declaration to the Viharadipathiship of a temple does not came under any one of these exceptions. Therefore once there is a denial of a right to the Viharadipathiship of a temple by a person the aggrieved party has a cause of action immediately and the laws of prescription will operate from the date of such denial. It only remains to find out which section of the Prescription Ordinance applies in such a case. I do not think one can escape the consequences of laws of limitation by resorting to the concept of continuing cause of action. A continuing cause of action may be a ground for a fresh action, vis-a-vis the law of *res judicata*. I do not think it can affect the operation of the laws of limitation of an action.

Certain submissions were presented to us in relation to section 34 and section 18 of the Buddhist Temporalities Ordinance. I must at this stage observe that the present action by the plaintiff to be declared entitled to the Viharadipathiship of the temple and its temporalities and the ejectment of the defendant, is not an action under any remedy given by the Buddhist Temporalities Ordinance. I agree with Mr. Amerasinghe that this is a *rei vindicatio* action under the Roman Dutch Law. It is not an action to which section 18 of the Ordinance applies. Section 18 merely states that it shall be lawful for the controlling Viharadipathi of a temple to sue in the name and style of " the trustees of (name of temple) ", for the recovery of any property vested in him under the Ordinance or the possession thereof. I am also not inclined to think that the plaintiff can avail himself of section 34 of the Ordinance which states that in the case of any claim for the recovery of any property movable or immovable belonging or alleged to be belonging to any temple or for the assertion of title to any property the claim was not held to be barred or prejudiced by any provision of the Prescription Ordinance. I am, therefore, of the view that the rights attached to the office of Viharadipathi of a temple being in the main rights to immovable property and therefore an action to be declared entitled to the Viharadipathiship of a temple involves title to such property. In the result section 3 of the Prescription Ordinance applies and the period of limitation is 10 years.

I must at this stage hark back to the reasons given by Garvin, J. in *Terunnanse vs. Terunnanse*, 28 N.L.R. 477, which I have already cited. This was a case decided when the 1905 Ordinance was in operation, and it was held that an action for incumbency was prescribed in three years. He gave the following reasons:

> "An incumbent is clearly not entitled to the immovable property of the temple, nor a right to the possession thereof. Apart from his ecclesiastical duties, an incumbent of a vihare has certain rights of administration and control of the vihara itself, but these are not such rights as are contemplated by section 3."

As a corollary to this, if under any subsequent law an incumbent is given title to immovable property of a temple or the right to possession thereof then these are rights contemplated by section 3 of the Prescription Ordinance. The Ordinance of 1931 by section 4 (2) and section 20 specifically gives the Viharadipathi these very rights. It therefore follows that an action for the Viharadipathiship of a temple is in respect of rights contemplated by section 3 of the Prescription Ordinance and this section is therefore applicable to such an action.

I would, therefore, hold that the plaintiff's action is not prescribed in law.

On the other questions decided by the learned District Judge I see no reason to interfere. My brother Gunasekera, J. has dealt with these questions fully in the judgment he has prepared and I am in agreement with him. I also agree with his conclusion and reasons for allowing the cross-appeal of the plaintiff-respondent in regard to the temple Sunandharamaya.

I, therefore, dismiss the appeal with costs. The cross-appeal of the plaintiff-respondent is allowed .

UDALAGAMA, J.

I have read the judgment of the President of the Court Pathirana, J. and I regret I cannot agree with his judgment.

The plaintiff, Rotumba Wimalajothi Thero, in this action, sued the defendant Mapalane Dhammadaja Thero for a declaration that he is the lawful Viharadhipathi of the five temples:—

(*a*) Mapalane Gnanabiwansa Siri Dhammarakkithramaya;

(*b*) Sunandaramaya at Batuwita Udadamana;

(*c*) Saddarmavijayaramaya at Kiraniyawatta, Poltugoda in Udadamana;

(*d*) Samaranayakaramaya at Kahagala in Akurugoda;

(*e*) Suddarmaramaya at Kahagala in Mapala;

and as the Viharadhipathi entitled to the lands and premises set out in the schedule to the plaint. He also prayed that the defendant be ejected from the said temples and temporalities and control of the said temporalities, and he be placed in peaceful possession of the said temples and of the said lands and premises. The defendant, Mapalane Dhammadaja Thero, by his answer, denied the claim of the plaintiff-respondent on the following grounds :—

(*a*) That he was lawfully appointed the Viharadhipathi of the said temples by the admitted former Viharadhipathi, Pannalankara Maha Nayake Thero by Deed No. 818 of 1.2.1959.

(*b*) That the plaintiff and his co-pupils renounced and abandoned their rights to the said temples.

(*c*) That the plaintiff is precluded and estopped in law from asserting any rights to the incumbency of the said temples and the temporalities appertaining thereto in consequence of the acts referred to in para. 8(*a*), 8(*b*), and 8(*d*), of the amended answer.

(*d*) That in any event the plaintiff's cause of action is prescribed in law.

The learned District Judge after trial held that Deed 818 of 1.2.1959 (D 3) did not constitute a valid appointment of the defendant, that the plaintiff and his co-pupil by signing the said deed, did not abandon their rights to the Viharadhipathiship, that the plaintiff was not precluded or estopped from asserting his rights to the Viharadhipathiship of the said temples, and that the plaintiff's cause of action was not prescribed in law. In the result judgment was entered for the plaintiff—as prayed for, save and except to so much of the prayer as related to the incumbency and the temporalities of Sunandaramaya and to the ejectment of the defendant.

In view of certain views expressed in two cases of the Supreme Court, namely, 55 N.L.R. 313 and 59 N.L.R. 289 on the question whether an action for an incumbency is prescribed in three years, the present case was referred to this Divisional Bench and so it has come up before us for argument.

Although the plaintiff-respondent did not admit that the cause of action in the instant case arose immediately on the death of the former Viharadhipathi, the Rev. Pannalankara Maha Nayake Thero, the main argument in regard to the limitation of the action, was based on the assumption that the cause of action arose on Pannalankara's death in 1959 and at the date of the present action, a period of over 3 years had lapsed.

The learned counsel for the defendant-appellant, has argued before us, citing a number of decided cases, extending over a long period of time, that an action for a declaration of Viharadhipathiship is essentially an action for a declaration of status and is prescribed in three years. The learned counsel for the plaintiff-respondent on the other hand, has argued before us, that the cases referred to by counsel for the defendant-respondent were either cases decided before the Buddhist Temporalities Ordinance of 1931 or where this specific question had not been discussed.

Under the Buddhist Temporalities Ordinance of 1905 the property of a vihare, both movable and immovable was vested in a trustee. The incumbent had no control over the movable or immovable property of the temple nor a right to the possession thereof. Apart from his ecclesiastical duty, the incumbent of a vihara had certain rights of administration and control of the vihara itself, but these were not such rights as were contemplated by section 3 of the Prescription Ordinance. Hence an action for an incumbency of a temple, being an action for a declaraction of a pure status, was barred by the lapse of three years from the date when the cause of action arose—*Terunannse vs. Terunanse,* (1927) 28 N.L.R. 477. Counsel for the plaintiff-respondent did not challenge the soundness of this principle, so far as actions filed, for a incumbency prior to the Buddhist Temporalities Ordinance of 1931 were concerned. However, counsel submitted that after 1931 the status of an incumbent or Viharadhipathi underwent a radical change with the coming into operation of the Buddhist Temporalities Ordinance of 1931. The management of the property of any temple exempted from the operation of section 4 (1) but not exempted from the entire Ordinance was vested in the Viharadhipathi of the temple who was designated the Controlling Viharadhipathi. Under section 18, it was only he, who could sue and be sued. Section 20 vested all property, movable and immovable, belonging or in any wise appertaining to and appropriated to, the use of any temple in the Controlling Viharadhipathi for the time being of such temple. Section 34 provided that in the case of any claim for the recovery of any property, movable or immovable belonging or alleged to belong to any temple or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance. It was therefore argued that an incumbency suit brought after the coming into operation of the Buddhist Temporalities Ordinance of 1931 was not for a mere declaration of a status but also for recovery of the temporalities of the temple. The two were so inextricably tied together that one could not be separated from the other and hence section 10 of the Prescription Ordinance did not apply.

Counsel for the defendant-appellant on the other hand submitted to us that the Buddhist Temporalities Ordinance of 1931 did not bring about any radical change in the status of an incumbent from what it was before 1931 and that actions for incumbencies were not affected and remained actions for a declaration of status.

It would be useful to consider who was an incumbent of a temple prior to 1931, and what this status was, and whether any change took place after the passing of the 1931 Ordinance. The Ordinance in force prior to the Buddhist Temporalities Ordinance, of 1931 was the Buddhist Temporalities Ordinance No. 8 of 1905. Section 2 of that Ordinance defined " Incumbent " as the chief resident priest of a temple. Ordinance 8 of 1905 repealed and replaced 3 of 1889, which had been passed to provide for the better regulation and management of the Buddhist Temporalities. Section 2 of Ordinance 3 of 1889 defined " Incumbent " as the chief resident priest of a Vihara. There was therefore only one meaning to be attached to the word " Incumbent " between the years 1889 and 1931 : it stood for the chief resident priest of a temple. After 1931 Viharadhipathi or the incumbent of a temple came to be defined as " principal bhikku of a temple whether resident or not."

From these definitions it will be seen that the only change that took place in the definition of a Viharadhipathi under the 1931 Ordinance, was that the Viharadhipathi or incumbent could be resident or not.

Prior to the Buddhist Temporalities Ordinance, the property dedicated to the Vihara or pansala was considered the property of the incumbent priest of the temple, for the purpose of his office, including his own support and the maintenance of the temple and its services, and on his death it passed by inheritance to his sacerdotal heir See *Rathanapala Unanse vs. Kewitiyagala Unnanse,* (1879) 2 S. C. C. 26. In *Davarakkita vs. Dharmmaratane,* (1919) 21 N.L.R. 255, it was held the presiding priest or incumbent had the control and administration of the Vihara itself, although, after the passing of the Buddhist Temporalities Ordinance, the property of the Vihara vests in the trustees the right to an incumbency is still a legal right and not purely an ecclessiastical matter. What was the position after the Ordinance of 1931 ? In *Sumana Therunnanse vs. Somaratana Therunnanse,* 5 C.L.W. 37, decided in 1936 it was held that a bhikku who has been resident in temple for forty years and who was during that

time in charge of its affairs comes within the expression of Controlling Viharadhipathi. Soertsz, A. J. in the course of his judgment stated :—

> " Now section 20 of the Buddhist Temporalities Ordinance, No. 19 of 1931, vests all movable and immovable property other than pudgalika offerings in " the trustee or the controlling Viharadhipathi for the time being of such temple ". It is not alleged—that there is a trustee for this temple. Section 18 of the Ordinance provides that it shall be lawful for the trustee or the controlling Viharadhipathi to sue for the recovery of property vested in him under this Ordinance.
>
> The only question is whether the present plaintiff can be said to be the controlling Viharadhipathi of the temple in question. The defining clause says that " Viharadhipathi means the principal bhikku of a temple other than a dewale or kovila, whether resident or not ".
>
> The Commissioner held on the evidence in the case that the plaintiff who has for the last forty years been resident in this temple and in charge of its affairs was the proper person to bring this action. There is evidence oral and documentary to show that the plaintiff is the controlling Viharadhipathi. Rewata Terunnanse has lived away from the temple for very many years and has exercised no control over its affairs. In the circumstances I think the plaintiff satisfies the requirements of section 18 of the Buddhist Temporalities Ordinance and is entitled to maintain this action. "

There was no suggestion that Rewate Terunnanse had renounced or abandoned his rights to the temple in question. In *Chandrawimala Terunnanse vs. Siyadoris,* (1946) 47 N.L.R. 304, following *Sumana Terunnanse vs. Somaratana Terunnanse,* (1936) 5 C.L.W. 37, it was held that the plaintiff priest who was not and did not claim to be the lawful incumbent of the temple, but claimed to be its controlling Viharadhipathi and to have the right to possess the properties belonging to the temple, could maintain his action. These two cases in short recognised the existence of a *de jure* Viharadhipathi and a *de facto* Viharadhipathi. These two cases also clearly demonstrated that the Viharadhipathi contemplated in the Buddhist Temporalities Ordinance of 1931 was not necessarily the *de jure* Viharadhipathi.

However in *Pemananda Thero vs. Thomas Perera,* 56 N.L.R. 413, Sansoni, J. (as he then was) stated " At no time in the history of Buddhist temples in this Island has a priest who had no right to the incumbency of a temple been invested

with the title to, or the power to manage, the temporalities of the temple". Wih all respect to the learned Judge I cannot agree with these observations. It is not uncommon in the villages of this country where an elderly priest has been accepted by the dayakas as the *de facto* Viharadhipathi or the controlling Viharadhipathi of a temple, while the *de jure* Viharadhipathi may be elsewhere and not heard of. In *I. Podiya vs. Rev. E. Sumangala,* 58 N.L.R. 29, decided after *Pemananda Thero vs. Thomas Perera,* 56 N.L.R. 413, Sansoni, J. in discussing whether the following settlement constituted an abandonment :—" Of consent plaintiff is declared the controlling Viharadhipathi of the Manawala Vihara but this right will vest in him as from the date of the demise of the defendant who is hereby declared entitled to reside in and officiate as Viharadhipathi of the said temple during his lifetime, without any let or hindrance from the plaintiff. Each party will bear his own costs ", stated :—

> " I think the meaning of the settlement is clear enough. The matter in dispute was whether the plaintiff was entitled to be declared the controlling Viharadhipathi, and this declaration was granted to him. There was added the condition that Rewata was entitled to reside in and officiate as Viharadhipathi during his lifetime. In effect, the plaintiff was declared *de jure* incumbent and Rewata was to be *de facto* incumbent for life. I do not think that this limitation imposed on the plaintiff's title rendered the matter which was decided by the decree uncertain. I would say that the very qualification which was introduced in favour of the defendant made it all the clearer as to who was declared by the decree to be lawfully entitled to the office of controlling Viharadhipathi ".

One could observe Sansoni, J. is here talking of a *de jure* Viharadhipathi and a *de facto* Viharadhipathi. In *Algama vs. Buddharakkita,* (1951) 52 N.L.R. 150, Dias, S. P. J. in construing the meaning of " Viharadhipathi " in section 2 of the Ordinance stated as follows :—

> " It is contended that the definition of " Viharadhipathi " in section 2 means the *de jure* Viharadhipahi. Section 2 does not say anything of the kind. What it says is that " unless the context otherwise requires, ' Viharadhipathi ' means the principal bhikku of a temple..... " I find it impossible to interpret the word " principal " to mean " *de jure* ". There are several sections in the Ordinance which indicate that, while there may be a " principal bhikku " in a temple, there can also be a " Controlling Viharadhipathi," see sections 18 28. (1). (2). 29 and 31. Furthermore, having

regard to the aim, scope and purpose of the Buddhist Temporalities Ordinance—namely, the preservation of the property of the temple in the hands of a trustee who is accountable to the Public Trustee, the object of the legislature would be completely frustrated if, in a case like the present, the court is powerless to grant relief to the Provisional Trustee whose object is solely to preserve the valuable temporalities of this famous temple, until the question as to who is the person who can lawfully nominate a trustee has been decided once and for all ".

I would in the result agree with the submission of learned counsel for the defendant-appellant, that the Viharadhipathi referred to in the Ordinance of 1931 need not necessarily mean the *de jure* Viharadhipathi and that it could refer to a *de facto* Viharadhipathi also. That being so, when the question as to who is the *de jure* Viharadhipathi of a temple arises, it has to be decided outside the Ordinance and in a properly constituted declaratory action.

There is a further matter I would like to refer to. It will be observed that in all incumbency cases, cited to us, where the action had been barred by the lapse of three years, have been brought by the plaintiffs in their personal capacity, with a claim for the recovery of the temple and its property added on. In the present case the plaintiff brought this action purely in his personal capacity. In para (*a*) of the prayer of the plaint he is asking that he be declared the lawful Viharadhipathi of the temples mentioned in para 2 of the plaint. In paras (*b*), (*c*) and (*d*), of the prayer he is asking that as Viharadhipathi he be declared entitled to the land and premises set out in the schedule, the defendant be ejected from the said temples and temporalities and control of the said temporalities and that he be placed in peaceful possession of the said temples and the lands. Is such an action permissible ? Under section 18 of the Buddhist Temporalities Ordinance it is only the controlling Viharadhipathi who can bring an action for the recovery of the temple property. In *Samarasinghe vs. Pannasara Thero*, 53 N.L.R. 271, two plaintiffs, Buddhist priests, sought to vindicate title to a land in their personal capacity on the footing that it was their private pudgalika property. During the trial, however it appeared, that the land in question was the Sangika property of the Vihare. The 2nd plaintiff was the Viharadhipathi of the temple. Counsel argued that as he, the 2nd plaintiff, the Viharadhipathi of the temple, was vested with the temporalities, he had status to maintain the action. Dias, S. P. J. stated, " The answer to this contention is that this is not an action instituted in terms of section 18 of the Ordinance

by the "Controlling Viharadhipathi" who is suing under the name and style of "The Trustee" of the temple to recover property vested in him in that capacity. It is only such a person who can vindicate title to a land which belongs to or is appurtenant to a Buddhist temple. This action as framed is one by two monks suing in their personal capacity to vindicate title to a land which the plaint asserts belongs to them. That was the case which the defendant had to meet". In *Dheerananda Thero vs. Ratnasara Thero,* 60 N.L.R. 7, the plaintiff-respondent brought an action against *Konwewa Piyaratana Thero* alleging that the latter was unlawfully disputing his right to the incumbency and obstructing him in the lawful exercise of his right as incumbent. He prayed that he be declared the incumbent and that the defendant and his agent be ejected from the temple. Piyaratana Thero, the defendant filed answer claiming to be the incumbent of the temple and that the plaintiff's right of action, if any was prescribed. In the course of the trial Piyaratana Thero died. The defendant was substituted in place of Piyaratana Thero, and the case went to trial and the learned District Judge declared the plaintiff to be the incumbent and ordered ejectment of the appellant. In appeal counsel for the appellant contended that the judgement should not be allowed to stand as the action instituted by the plaintiff abated on the death of Piyaratana Thero. He argued that the action being one of a personal nature against the original defendant, the right to sue ceased on the death of that defendant. T. S. Fernando, J. stated in reference to this argument "To consider the soundness of counsel's contention, we must examine the nature of the action filed against Piyaratana Thero. As I have stated already at the outset of this judgement the allegation with which the plaintiff invoked the assistance of the court was that Piyaratana Thero was unlawfully disputing his rights, was disobedient and disrespectful to him and was obstructing him in the exercise of his rights as incumbent. The action as so framed was therefore undoubtedly of a personal nature and was limited to seeking a declaration of his alleged status of incumbent. It is true that the ejectment of the defendant and his agents was also claimed, but this claim was purely incidental to the claim to be the incumbent and was not a claim to eject the defendant on the ground of parajaka conduct of the latter". Further on, he quoted the following passage from Sinha, J. in the Indian case of *Ramsarup Das vs. Rameshwar Das,* (1950) A.I.R. (Patna) 184.

> "If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and

his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will therefore abate."

It will therefore appear that a personal right to an office which would entitle a person to possession of property does not survive on death, because it is a declaration to a status. It is a common practice in incumbency cases, as in the present one, to tack on a claim for a declaration to the possession of the temporalities of a temple in addition to the main cause of action, which has given rise to the plaintiff to come to court. It is this irregularity which has confused the real issue in the present action. If the two causes of action are kept apart, the problem that we are faced with in this case would never have arisen, that is to say, if a plaintiff's claim to be *de jure* Viharadhipathi is counter claimed by a defendant, it is a must that this cause of action should be tried in a separate action and thereafter if the temporalities are being possessed by a person who is not entitled to possess them, he be sued by the Controlling Viharadhipathi as provided for in section 18 of the Buddhist Temporalities Ordinance. No doubt it would mean bringing two actions, but that cannot be helped. If the learned District Judge had approached the present case on the lines indicated above, I have no doubt he would have come to the conclusion that the plaintiff's claim to the incumbency was barred by time.

In *Rewata Unnanse vs. Ratnajothi Unnanse,* (1916) 3 C.W.R. 193, plaintiff, a Buddhist priest claimed a declaration that he was the rightful incumbent of the Pusulpitiya Vihare and that he was entitled to reside in the Vihare. Schneider, A.J. dismissing the plaintiff's action stated "This is obviously an action for the declaration of a status namely that the plaintiff is the senior pupil of the deceased Medankara. If the action is not governed by section 4 (Prescription Ordinance 22 of 1871) it must needs fall under section 11, for it can fall under no other. The period of limitation under section 11 is three years from the time the cause of action should have accrued". In *Terrunanse vs. Terrunanse,* (1927) 28 N.L.R. 477, it was held that an action to an incumbency to a temple, being an action for a declaration of a status, was barred by the lapse of three years from the date when the cause of action arose. It will be observed that this case has been decided prior to the Buddhist Temporalities Ordinance of 1931. In *Premanaratna vs. Indasara,* 40 N.L.R. 235, it was held that an action for

the declaration of a right to the incumbency of a Buddhist temple is barred in three year's from the time the action arose. Also see *Dheerananda vs. Ratnasara,* 67 N.L.R. 559. The latter two cases have been decided after Buddhist Temporalities Ordinance of 1931. It was contended by counsel that these cases were either decided before the Ordinance of 1931 or it was conceded, without discussion, that an action for the declaration of a right to the incumbency of a Buddhist temple is barred in three years from the action arose. I have, however, been able to come across an unreported case, wnere this point was specifically taken and the Supreme Court ruled, that such an action is barred in three years. I refer to the case of *Moratota Sobitha Thero of Menikkubura Vihare, Katugastota vs. Akwatte Dewamitta Thero and another of Talgaspitiya Vihare, Aranayake,* S.C. 405 (F) 58 D.C. Kegalle Case No. 10050. This case came up before Sansoni, J. and Sinnetamby, J. The plaintiff sued the two defendants for a declaration that he is the Viharadhipathi of Mediliya Vihare and devale and their endowments. The 1st defendant claimed to be the rightful Viharadhipathi as the senior pupil of one Ganegoda Piyaratana. The learned District Judge held that the plaintiff had failed to establish that he was the Viharadhipathi and that in any event his action was barred by prescription. Sansoni, J. on the issue of prescription stated :—

> " Another submission on the question of prescription was based on the view that under section 34 of the Buddhist Temporalities Ordinance, No. 10 of 1931, no length of time can prevent the plaintiff recovering judgment in this case if he is the lawful Viharadhipathi. I have already indicated that the plaintiff has not established his claim to be the lawful holder of the office but, assuming that he had, the law still is that the period of limitation in respect of an action to be declared Viharadhipathi of a temple is three years under section 10 of the Prescription Ordinance—see *Saranakara Thero vs. Medegama Dhammananda Thero,* (1954) 55 N.L.R. 314 and *Amaraseeha Thero vs. Sasanatilake Thero,* (1957) 59 N.L.R. 289. "

Learned counsel for the plaintiff-respondent also submitted to us that the cause of action to sue the defendant arose really not on the death of the Rev. Pannalankara but towards the end of 1963 or the beginning of 1964, when the plaintiff realised from certain acts of the defendant that the defendant was trying to set up a claim to the Viharadhipathiship. Some of these acts were the robing of two pupils by the defendant and the plaintiff being treated as an outsider at the ceremony, cutting down of certain valuable trees and removing a foundation laid by the late Rev.

Pannalankara. The learned District Judge had held on the oral testimony of the plaintiff, that the plaintiff was aware that the purport of D3 was to confer on the defendant an alleged right to the incumbency of the several vihares and that the defendant started asserting the said right soon after the execution of D3 and that the cause of action arose after the execution of D3 or in any event on Pannalankara's death. I agree with this conclusion of the learned District Judge. On the death of Rev. Pannalankara on 16.4.1959, if the plaintiff was of the view that the deed D3 was bad and it conveyed no rights to the Viharadipathiship of the temple to the defendant, his right to claim the incumbency arose on 16.4.1959. I cannot accept the view that as the defendant was attending to certain functions of the Rev. Pannalankara during his lifetime, he was allowed by the plaintiff to continue that arrangement, and no challenge to his right to the Viharadhipathiship arose till the end of 1963 or early 1964. The defendant's clear position was that after Rev. Pannalankara's death he was officiating as the Viharadhipathi not under the plaintiff or anyone else, but on his own right. I would accordingly hold that the cause of action of the plaintiff arose on the death of the Rev. Pannalankara, and as the plaintiff has brought this action three years after his cause of action arose, he is barred by limitation of time from maintaining the action.

The further question, whether the plaintiff and his co-pupils had renounced or abandoned their rights, by deed 818 of 1.2.59 (D3) document D2 and answer D5 was argued before us, as the learned District Judge had held against the defendant-appellant on this issue. In view of the conclusion I have arrived at, on the issue of prescription I would refrain from making a pronouncement on this issue, as it may have other repercussions on the future rights of the pupillary heirs of the Rev. Pannalankara Thero, including the plaintiff-respondent.

I would allow the appeal with costs both here and below and dismiss the cross-appeal.

ISMAIL, J.

I have had the advantage of having read the judgments prepared by my brothers Pathirana, J. and Gunasekera, J. I find that on the question of abandonment my views and conclusions accord with those of Gunasekera, J. I accordingly agree with the judgment of Gunasekera, J. I also find that Pathirana, J. has dealt comprehensively on the question of prescription which arises in this matter. I am of the view that his analysis and the conclusions reached on the question of prescription arising in this case is correct and I therefore find that I am in agreement with his judgment.

TITTAWELLA, J.

I have read the judgements of my brothers Rathirana, J. and Gunasekera, J. and I am in agreement with the conclusions reached by Gunasekera, J. that the appeal of the defendant-appellant should be dismissed with costs and that the cross-appeal filed by the plaintiff-respondent should be allowed with costs. I have, however, separately set down my reasons and conclusions on the question of prescription which was one of the main matters argued at the hearing of these appeals. So much of the facts pertaining to this matter appears in my judgment.

The late Pannalankara Maha Nayaka Thero was the controlling Viharadhipathi of the temples which are the subject matter of this appeal. The plaintiff is his senior pupil and the defendent is a co-pupil of Pannalankara. The rule of succession to the Viharadhipathiship in this case is that known as *sishyanu sishya paramparawa*. The temples were exempt from the provisions of section 4 (1) of the Buddhist Temporalities Ordinance.

By Deed No. 818 of the 1st February, 1959, Pannalankara appointed his co-pupil the defendant as his " successor and viharadhipathi " of the said temples. The plaintiff and the other pupils of Pannalankara had consented to this appointment and were signatories to this deed. Pannalankara died on the 16th April, 1959, and after this the defendant has assumed control of the temples and at his request the plaintiff had exchanged residence with the defendant. The defendant took up residence at the temple called Dhammarakkitharamaya whilst the plaintiff resided at another temple called Sunandaramaya.

The late Pannalankara had a considerable amount of money deposited to his account at the Bank of Ceylon. It was his wish that this money should be utilised for the construction of a library at Dhammarakkitharamaya. In order to carry out the wishes of his late benefactor the defendant had made an application to the bank to withdraw this sum of money. The plaintiff and the other pupils of the late Pannalankara had in writing consented to the defendant withdrawing the money. The bank authorities had however refused this application and advised the defendant to obtain an order of Court. Consequently on the 28th March, 1962, the defendant instituted an action. No. 968/Z, in the District Court of Colombo. The plaintiff, his co-pupils, and the bank were made respondents. The plaintiff and his co-pupils did not object to this application but the Court after a consideration of the merits dismissed it on 29.8.63.

The relationship between the plaintiff and the defendant took a different turn thereafter. Each was trying to assert his claim to the control of the temples and the amity that had hitherto

prevailed turned into discord. There were many differences between them and in January, 1965 an appeal had even been made by the plaintiff to the Maha Nayaka Thero of his sect in order to bring about a settlement of the differences but no satisfactory solution energed. Attempts by the plaintiff to take up residence at Dhammarakkitharamaya during the "vas" season of 1965 were resisted by the defendant.

The action which has resulted in this appeal was instituted on the 15th October, 1965. The plaintiff sought against the defendant *inter alia* :—

(*a*) a declaration that he is the controlling Viharadhipathi of the temples in question ; and

(*b*) a declaration that as the controlling Viharadhipathi thereof that he is entitled to the perquisites of the temples.

The plaintiff's claim was resisted on four grounds—

(*a*) that deed No. 818 of the 1st February, 1959 constitutes a valid appointment of the defendant as the Viharadhipathi ;

(*b*) that the act of the plaintiff and his co-pupils in signing the said deed and agreeing to and approving of the defendant's appointment together with several other acts are tantamount to a renunciation and an abandonment of their rights ;

(*c*) that the plaintiff is precluded and estopped in law from asserting any rights to the incumbency of these temples ;

(*d*) that in any event the plaintiff's right of action is prescribed in law.

After trial the learned District, Judge held against the defendant on all the above four matters and granted the declaration sought by the plaintiff. The defendant has now appealed against the judgment and order of the learned District Judge.

One of the matters argued at length in this appeal was the question of prescription. At the trial the defendant raised the question of prescription. It was submitted that the cause of action took place on the execution of deed No. 818 of 1st February, 1959. The plaintiff's action being one for a declaration of a status as Viharadhipathi and under section 10 of the Prescription Ordinance (22 of 1871) no such action would, it was submitted be maintainable after three years from the date when such cause

of action shall have accrued. Reliance was placed on a number of decided cases. They are, *Rewata Unnanse vs. Ratnajothi Unnanse* 3 C. W. R. 193, *Terunnanse vs. Terunnanse* 28 N. L. R. 477, *U. Dheerananda Thero vs. D. Ratnasara Thero* 67 N. L. R. 559.

The case of *Rewata Unnanse vs. Ratnajothi Unnanse,* was decided in 1916 by Shaw, A.C.J., and Schnieder, A.J. The plaintiff Buddhist priest claimed a declaration that he was the rightful incumbent of the Pusulpitiya Vihara and that he was entitled to reside in the Vihara. His claim was based on the ground that the succession to the incumbency to the Vihara was based on the *sisyanu sisya paramparawa* and that he as the senior pupil of the last incumbent Medankara Unnanse was entitled to the succession. Schneider, A.J. says as follows :—

> " This is obviously an action for the declaration of a status namely that the plaintiff is the senior pupil of the deceased Medankara. If the action is not governed by section 4 (Prescription Ordinance, 22 of 1871) it must needs fall under section 11 for it can fall under no other. The period of limitation under section 11 is three years from the time the cause if action shall have accrued ".
>
> (Section 4 and 11 of Ordinance 22 of 1871 now correspond to sections 3 and 10 respectively of the Prescription Ordinance, Cap. 68, Vol. III, Legislative Enactments, 1956 revision).

Terunnanse vs. Terunnanse, 28 N.L.R. 477 was a case decided by Garvin and Dalton, JJ. in 1927. It was an action by a Buddhist priest to obtain a declaration that he was the rightful incumbent of a Vihara and that he was entitled as such to be placed in possession thereof. The District Judge held that the plaintiff would have been entitled to the relief that he claims but for the circumstance that his right of action is barred by limitation. It was urged in appeal that an action to be declared the rightful incumbent of a vihara is not barred in three years but is available until ten years have expired from the date on which the right accrued. It was also urged that *Rewata Unnanse vs. Ratnajothi Unnanse* was not a binding authority inasmuch as the opinion expressed on this point was not necessary to the decision of the case and that in any event it should be reconsidered. Garvin, J. at page 478 refers to the Buddhist Temporalities Ordinance which was in force at that time. It was the Buddhist Temporalites Ordinance, No. 8 of 1905, enacted on the 25th August, 1905. He goes on to state—

> "By the Buddhist Temporalities Ordinance the property of the vihara both immovable and movable is vested in the *trustee*. An *incumbent* clearly has no title to the immovable

property of the temple nor a right to the possession thereof. Apart from his ecclesiastical duties an incumbent of a vihara has certain rights of administration and control of the vihara itself but those are not such rights as are contemplated by section 3 of the Prescription Ordinance. They spring from and appertain to the office of incumbent and cannot exist apart from it. The right to the plaintiff to the enjoyment and exercise of these rights is dependent upon his right to the incumbency. It is manifest that in form and in substance this is an action for a declaration of the plaintiff's right to the incumbency. In the absence of special provision in Ordinance No. 22 of 1871, section 11 of the Ordinance applies to the case and the action is barred by limitation in three years."

For an understanding and an appreciation of these cases it is necessary to examine the legal status of Buddhist temples. This has been done in the case of *Ratnapala Unnanse vs. Kevitigala Unnanse,* 2 S.C.C. 26, and in *Gunananda vs. Deepalankara,* 32 N.L.R. 240. The view has also been expressed in the case of *Saddhananda vs. Sumanatissa,* 36 N.L.R. 422, that a Buddhist temple is not a juristic person. The Vihara or the Pansala does not cover any legal entity resembling the deity of a Hindu family or a temple in which case any dedicated property belongs by law to the deity who is recognised by the civil courts as a perpetual corporation. The officiating priests and the others are only stewards or agents with very limited powers of dealing with the property. On the other hand the property dedicated to a Vihara or a Pansala appears originally to have been the property of the individual priest who is incumbent of the foundation for the purpose of his office including his own support and the maintenance of the temple and its own services. On his death it passes by inheritance to an heir who is ascertained by a peculiar rule of succession or special law of inheritance. It is not generally the person who would be by general law the deceased priest's heir in respect of secular property. The sacerdotal heir is determined by the rule of succession which applies to the particular Vihara. The right to an incumbency carried with it the right to the possession and the control of lands and other property. (Havley—The Laws and Customs of the Sinhalese, 550). The incumbent priest was the sole owner of the Vihara property but he could not alienate or encumber it except for the benefit of the Vihara and on his death it passed to his sacerdotal heir.

The Buddhist Temporalities Ordinance 1889 was enacted on the 20th March, 1889. It was amended by Ordinance Nos. 17 of 1895 and 3 of 1901. This Ordinance divested the incumbents of their titles to the temporalities of their viharas and vested them in the

trustees of the temples. The incumbent could sue for a declaration of his right to the incumbency but any claim to the temporal property must be brought by the trustee. On 25.8.1905 an Ordinance to consolidate and amend the law relating to Buddhist temporalities bearing the short title "The Buddhist Temporalities Ordinance 1905" was enacted. It repealed the Ordinance referred to above but the position of an incumbent regarding temple property remained more or less the same. This Ordinance was amended by the Buddhist Temporalities (Amendment) Ordinance, No. 15 of 1919.

The Buddhist Temporalities Ordinance 1931 (No. 19 of 1931) was enacted on 26.6.1931 and brought into operation from 1.11.1931. It repealed the Buddhist Temporalities Ordinance 1905 and its amendments. The preamble to the 1931 Ordinance reads as follows :—

> Whereas it has been found that the provisions of the "Buddhist Temporalities Ordinance 1905" have failed to give adequate protection to the Buddhist Temporalities and whereas it is expedient to provide such a system of administration and control over such temporalities as will afford to them such adequate protection, be it therefore enacted.....

The provisions of this Ordinance and its amendments all of which are now consolidated as Chapter 318 of the Legislative Enactments, Vol. X, p. 515 shall apply to every temple in Ceylon (section 2). Provided however except the Dalada Maligawa, the Sri Padasthana, and the Atamasthana, any temple may by an Order made by the Minister be exempted from the operation of all or any of its provisions. The management of the property belonging to any temple not exempted from the operation of section 4 (1) shall be vested in a trustee appointed under the provisions of the Ordinance. The management of the property of any temple exempted from the operation of section 4 (1) but not exempted from the entire Ordinance shall be vested in the "Viharadhipathi" of such temple. Such a Viharadhipathi shall be designated as a "Controlling Viharadhipathi". Section 20 of the Ordinance reads as follows :—

> All property movable and immovable belonging or in any wise appertaining to or appropriated to the use of any temple, together with all the issues, rents, moneys, and profits of the same and all offerings made for the use of such temple other than the pudgalika offerings which are offered for the exclusive personal use of any individual bhikkhu shall *vest* in the *Controlling Viharadhipathi* for the time being of such temple

subject however to any leases and other tenancies, charges and encumbrances already affecting any such immovable property.

The temples which are the subject matter of this appeal have at the time of institution of the action been exempted from the operation of Section 4 (1) of the Buddhist Temporalities Ordinance and the sections referred to above have immediate relevance to this appeal. Under the old Ordinances the term "incumbent" was used and it was defined in the following terms :—

"*incumbent*" shall mean the chief resident priest of a Vihara.

The word "incumbent" finds no place in the present Ordinance but a new term "Viharadhipathi" has been defined as follows :—

"*Viharadhipathi*" means the principal bhikku of a temple whether resident or not.

Originally as mentioned earlier the "incumbent" was the sole owner of temple property subject to certain limitations. The position was changed in 1889 when the properties became vested in a "trustee" a person different from the "incumbent". This position continued until 1931 when thereafter the Viharadhipathi became vested with the property of the temple. He is then designated the "Controlling Viharadhipathi". It will thus be seen that the "Controlling Viharadhipathi" now is in a different position from that of the former "incumbent". Basnayake, C. J. in the case of *Panditha Watugedera Amaraseeha Thero vs. Tittagalle Sasanatilleke Thero*, 59 N.L.R. 289, decided in December 1957, had the following observation to make on this matter at page 292—

"The present Ordinance made a radical change in this respect and vested the management of the property belonging to every temple exempted from the operation of section 4 (1) but not exempted from the operation of the entire Ordinance in the viharadhipathi of the temple who is called the "controlling viharadhipathi" for the purposes of the Ordinance. In the instant case the plaintiff states that Sanghatissarama is exempted from the operation of section 4 (1) of the Ordinance and that he is its controlling viharadhipathi.

As the learned District Judge has decided against the plaintiff on the ground of prescription I think I should say a word on the period of limitation. The earlier cases hold that an action to have a person declared entitled to the incumbency of a temple is barred by the lapse of three years on

the ground that such an action is an action for the declaration of a status, a class of action for which the Prescription Ordinance makes no express provision.

The plaintiff's action is in effect an action, for not only a declaration of status, but also for the recovery of the temple and its property, for, his prayer is that the defendant be ejected from the premises described in the schedule to the plaint.

It would therefore not be correct to treat the instant case as an action for declaration of a status alone. The period of prescription in respect of actions for the purpose of being quieted in possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish a claim in any other manner to land or property is governed by section 3 and not by section 10 of the Prescription Ordinance. The decisions of this Court which hold that an action for an incumbency of a temple, being an action for a declaration of a status, is barred by the lapse of three years from the date when the cause of action arose, may have to be re-examined in a suitable case in the light of the altered rights of a viharadhipathi who is now empowered to sue and be sued as the person in whom the management of the property belonging to a temple is vested".

Gratiaen, J. in the case of *Kirikitta Saranankara Thero vs. Medegama Dhammananda Thero,* 55 N.L.R. 313, a case decided in 1954 said thus on this matter of incumbency and prescription :—

"An action to be declared entitled to the incumbency of a Buddhist temple is an action for a declaration of a status. As the cause of action in proceedings of this nature has not been "otherwise provided for" in the Ordinance, section 10 applies, and the action must therefore be instituted "within three years from the time when such cause of action shall have accrued"—*Rewatte Unnanse vs. Ratnajoti Unnanse* and *Terunanse vs. Terunanse.* The "cause of action" is the "denial" of the plaintiff's status because it constitutes either an actual or seriously threatened invasion of his vested rights.

The earlier authorities certainly seem to indicate that, if a trespasser who disputes the status of the true incumbent of a temple continues thereafter to remain in adverse possession without interruption for a period of three years, the dilatory

incumbent's right to relief in the form of a declaratory decree becomes barred by limitation under section 10. We must, of course, regard ourselves as bound by these decisions, but with great respect, I think that, on this particular point, the question calls for reconsideration by a fuller Bench on an appropriate occasion. It is clear law that an impostor cannot acquire a right to an incumbency by prescription ; nor can the rights of the true incumbent be extinugished by prescription. Although the operation of section 10 may destroy the remedy accruing from a particular " denial ", the right or status itself still subsists. It is true that the lawful incumbent can take no steps after three years to enforce his remedy if it is based exclusively on that particular " denial " of his status, but there is much to be said for the argument that a continuing invasion of a subsisting right constitutes in truth a continuing cause of action. Indeed, the contrary view would indirectly produce the anomalous result of converting the provisions of section 10 into a weapon for the extinction of a right which cannot in law be extinguished by prescription ".

A few months before Basnayake, J. expressed his views on the question of incumbency and prescription in the case of 59 N.L.R. 289, the case of *Pitawela Sumangala vs. Hurikaduwe Dhammananda,* 59 C.L.W. 59, came up in appeal before him. The plaintiff claiming to be the Viharadhipathi of a temple exempted from the operation of the provisions of section 4 (1) of the Buddhist Temporalities Ordinance instituted an action in 1955 alleging that from 1946 the defendant had disputed his right to the incumbency. The plaintiff prayed—

(*a*) for a declaration that he is the Viharadhipathi ;

(*b*) for ejectment of the defendant from the Vihara property and restoration to possession.

The defendant pleaded that the plaintiff's cause of action was prescribed on the basis of the plaintiff's admission that his rights were first disputed in 1946. The plea of prescription therefore was tried as a preliminary issue. Counsel for the defendant cited *Revata Unnanse vs. Ratnajothi Unnanse* 3 C.W.R. 193, and *Terunnanse vs. Terunnanse,* 28 N.L.R. 477, in support of his contention that the claim of the plaintiff was barred as more than 3 years had lapsed after the cause of action arose. The learned District Judge however held in favour of the plaintiff and the

appeal of the defendant was dismissed by Basnayake, J. and L. W. de Silva, A. J. No reasons were given but the order of the learned District Judge is reproduced in the law report at page 60. Some of the paragraphs in the learned District Judge's order are as follows :—

> The two Supreme Court decisions, 3 C.W.R. 193 and 28 N.L.R. 477—cited by counsel and which have not been overruled support his contention. They lay down the rule that a claim to an incumbency is a claim to a declaration of a status and that such a claim would be prescribed in three years. At the time the Supreme Court made the decisions referred to, the Ordinance that governed Buddhist temporalities was Ordinance No. 8 of 1905. That Ordinance did not vest the incumbent of a temple with the temporalities of that temple. The property belonging to a temple vested in the trustees so that when a claim to incumbency was made it did not involve the question of ownership of temple property. A claim to an incumbency was as indicated by their Lordships only a claim for a declaration of a status.
>
> In November 1931 the new Buddhist Temporalities Ordinance came into operation. The present case is governed by this Ordinance. Under this Ordinance in certain circumstances all the temple property would vest in the Viharadhipathi who was known as the Controlling Viharadhipathi. An incumbency action brought under the present Ordinance in respect of a temple where the temple property vests in the incumbent would not be an action brought for the mere declaration of a status but would also involve the question of title to the temple lands.
>
> I am of the view that the present action is a claim by the Controlling Viharadhipathi of a temple to be declared entitled to the temple properties from which he has been kept out of possession by the defendants. In view of the provisions of section 34 of the present Ordinance such a claim could be made at any time and would not be barred by the provisions of the Prescription Ordinance. I would therefore answer the preliminary issues in the negative.

The same matter, viz., incumbency and prescription came up for decision in the case of *U. Dheerananda Thero vs. D. Ratnasara Thero,* 67 N.L.R. 559. The earlier cases were not considered in

the light of the present Buddhist Temporalities Ordinance. The matter appeared to have been conceded by the parties and the head note to the case reads thus :—

> "The claim of a plaintiff to be declared that he is the Viharadhipathi of a Buddhist temple is an action for the declaration to a status and is therefore barred unless it is brought within 3 years of the accrual of the cause of action".

In the result whilst there are a series of decisions, some under the 1905 Ordinance and others under the 1931 Ordinance, to the effect that an action for the incumbency of a Buddhist temple is barred by 3 years, there are also definite expresions of opinions by Gratiaen, J. and Basnayake, C. J. to the effect that no such period of limitation would apply to such actions.

In 55 N.L.R. 313 where Gratiaen, J. doubted the operation of section 10 of the Prescription Ordinance to bar incumbency action after a period of three years he stated that—

> An action to be declared entitled to the incumbency of a Buddhist temple is an action for a declaration of status. Although the operation of section 10 of the Prescription Ordinance may destroy the remedy accruing from a particular "denial" the right or status itself still subsists. It is true that the lawful incumbent can take no steps after three years to enforce his remedy if it is based exclusively on that particular "denial" of his status but there is much to be said for the argument that a continuing invasion of a subsisting right constitutes in truth a *continuing cause of action*.

As Gratiaen, J. has said "it is clear law that an imposter cannot acquire a right to an incumbency by prescription; nor can the rights of a true incumbent be extinguished by prescription". This being the position, incumbency is a continuing right and a continuing invasion of a subsisting right. An incumbency action constitutes a continuing cause of action not barred by any rules of prescription. On this view of the matter it does not become necessary to consider the changed position of a Viharadhipathi under the 1931 Ordinance vis a vis the position of an incumbent under the 1905 Ordinance. On this line of reasoning neither an incumbent under the 1905 Ordinance nor a controlling Viharadhipathi would be barred by the operation of any sections of the Prescription Ordinance.

Basnayake, C.J.'s approach to the matter is simpler and is intimately connected with the position of a controlling Viharadhipathi under the 1931 Ordinance which is the situation in the present appeal. The term " Viharadhipathi " has been defined in the Buddhist Temporalities Ordinance now in force as the— " principal bhikku of a temple whether resident or not."

On a consideration of this definition two matters seem to arise, the first is that the Viharadhipathi must be the principal bhikku and the second is that there must be a temple for a Viharadhipathi to function. Indeed the ordinary meaning of the term Viharadhipathi also carries with it the two attributes referred to at above. By law the Viharadhipathi is vested (in cases like the present appeal) with all property movable and immovable belonging to the temple. Any order declaring a person Viharadhipathi carries with it a declaration that the temporalities are also vested in him. Any assertion of title to property belonging to a temple must always be by the Viharadhipathi and by virtue of section 34 of the Buddhist Temporalities Ordinance the Prescription Ordinance will not bar such an action. A claim to be declared Viharadhipathi cannot therefore be considered to be a claim seeking a mere declaration of status. It carries with it an assertion to the title of the movable and immovable property belonging to the temple and it cannot be barred by the lapse of time in view of the express provisions of section 34 of the Buddhist Temporalities Ordinance.

It would therefore appear that whether one considers an action to be declared to the incumbency of a Buddhist temple as an action for a declaration of a status, viz ; that of a Viharadhipathi or as something more than a mere declaration of a status the provisions of the Prescription Ordinance would not apply. According to the former view there is in such an action a continuing invasion of a subsisting right and according to the latter position such an action carries with it an assertion to the " title " of the movable and immovable property belonging to the temple. In the circumstances I would hold that such an action is not barred by the lapse of time. In my view the conclusions of the learned District Judge on this matter are correct and the appeal must be dismissed with costs.

GUNASEKERA, J.

This appeal has been referred to the decision of a bench of five Judges because the learned District Judge has in this case held, that the plaintiff-respondent's action brought for a declaration that he is the lawful Viharadhipahi of five Viharas exempted from the operation of section 4 (1) of the Buddhist Temporalities

Ordinance, No. 19 of 1931, Cap. 313, and that as the controlling Viharadhipathi therefore, he is entitled to the possession of the twenty-nine lands which are their temporalities, and for the ejectment of the defendant-appellant therefrom, is not barred by the lapse of over three years since the defendant-appellant first claimed the Viharadhipathiship and took possession of the lands. The defendant-appellant, relying on several earlier decisions of this Court contended that the action was statute barred in three years in terms of section 10 of the Prescription Ordinance.

Although this is the question of Law that induced the reference to this bench, the whole appeal is before this Court and Mr. Jayewardene appearing for the appellant argued also the question of mixed fact and law that arose on the evidence led at the trial, whether the respondent had abandoned his rights to these Viharas and the Viharadhipathiship.

It will be more convenient to decide the question of fact first, and so I will consider first the question of abandonment.

It was admitted at the trial,

(1) that the rule of succession to the Viharadhipathiship of these Viharas is the *sisyanu sisya paramparawa* rule of succession.

(2) that one Pannalankara Maha Thero was the lawful Viharadipathi of the said Viharas and that he died on 16. 4. 1959.

(3) that the temporalities described in the schedule to the plaint had vested in Pannalankara as controlling Viharadhipathi.

(4) that the defendant-appellant was a co-pupil of Pannalankara.

Although the appellant in his answer put the respondent to the proof of the fact that he was the senior pupil of Pannalankara, this was not seriously contested at the trial, and the learned Judge has held on the evidence that the respondent was the senior pupil of Pannalankara and that he succeeded to the Viharadipathiship of these Viharas on the death of Pannalankara. This finding was not canvassed by the appellant before us and so for the purpose of the appeal it may be considered now as established that the respondent is the *de jure* Viharadipathi of these Viharas.

The evidence led in the case shows that by a Deed No. 818 dated 1. 2. 1959 (P3/D3) Pannalankara purported to appoint the appellant as his successor as Viharadipathi of these Viharas and that the respondent and his five brother priests, being all the pupils of Pannalankara, signed that deed consenting to the appointment of the appellant and that on Pannalankara's death the appellant on that deed, assumed the office of Viharadhipathi and took residence in the Dhammarakkitharamaya which was apparently the main Vihara of this paramparawa, and that the respondent left that Vihara and took up residence in Sunandharamaya Vihara. It also appears that there was a sum of Rs. 12,000 lying to the credit of the account of Pannalankara in the Bank of Ceylon and that the appellant had applied to withdraw this money from the Bank and that the respondent gave a writing D2 dated 24. 11. 1960 consenting to such withdrawal. As the Bank was not satisfied about the appellant's right to withdraw this money the appellant instituted action No. 968/Z in the District Court of Colombo on 28. 3. 1962 (journal entries marked P2 and plaint marked D4) making the respondent and his brother priests the 1st to 6th. defendants and the Bank of Ceylon the 7th Defendant in the action, and asked for a declaration that he was the lawful Viharadhipathi of the Viharas and that he was entitled to withdraw the sum of Rs. 12,000. The respondent along with four of his brother priests filed a joint answer D5 on 30.11.1962 admitting the appellant's claim and praying that " judgment be entered declaring that the plaintiff is the controlling Viharadhipathi of the said temples. " The learned District Judge who heard the case however dismissed the appellant's action holding *inter alia,*

> " Mr. Amerasinghe submitted that the 1st defendant (i.e., the present respondent) by signing P1 has renounced his rights to the Viharadhipathiship. I do not think that is a correct view. It does not follow that because the 1st defendant in deference to the wishes of his tutor agreed to the course proposed by the tutor he loses his rights if the proposed appointment turns out to be one that cannot be made in law. It appears clear that it is the 1st defendant who is entitled to be the chief incumbent and controlling Viharadhipathi and is entitled to draw the money. It is a position which Mr. Jayamana appearing for the plaintiff (i.e., the present Appellant) informed me he would not contest."

That judgment was delivered on 29.3.1963 and the respondent's evidence is that the appellant thereafter requested the respondent to withdraw the money from the bank for him and that the respondent said that if he withdrew the money he would not give it to the appellant and that therefore relations between the parties became strained. The respondent sent a petition P4

to the Mahanayake and the Sangha Sabha of his sect and as he was not satisfied with the decision of the Sangha Sabha (D7) given on 7.1.1965 the respondent attempted to go into occupation of the Dhammarakkitharamaya in July 1965 and when he was forcibly ejected by the appellant he filed this action on 15.10.1965.

This action was brought in respect of five Viharas of which Pannalankara was the Viharadhipathi on the basis that all five Viharas were exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance, but in the course of the trial it was found that the Sunandharama Vihara had been subsequently brought within the operation of that section.

Mr. Jayawardena's submission that the respondent has renounced his rights and adandoned his claim to the Viharadipathiship of these five Viharas is based on the facts that,

(1) In the deed P3/D3 it is stated :

> "AND WHEREAS MY young pupils Rotuba Wimalajothi, Seevalgama Premaratne, Udapola Sumangala, Mapalane Kitthi, Kudaheelle Ratana and Batuwita Wimala, Six in number have agreed and approved of my said decision to appoint the said MAPALANE DHAMMADHAJA THERO as the Chief incumbent and Viharadhipathi of the aforementioned six Viharas and to the local Managership of the three institutions mentioned above, as is evidenced by their joining in these presents."

(2) In writing D2 the Respondent had stated :

> "I hereby sign and give my consent to Mapalane Dhammadaja Nayake Thero the present Viharadhipathi of Mapalane Gnanabhiwansa Siri Dhammarakkitharamaya to withdraw the said amount." and that,

(3) In their joint answer D5 the Respondent and his brother priests stated :

> "Wherefore these defendants pray that judgment be entered declaring—
>
> (*a*) that the plaintiff is the Controlling Viharadhipathi of the said temples." and that,

(4) After the three months alms giving after the death of Pannalankara at the request of the appellant the respondent left the main Vihara, Dhammarakkitharamaya and took up residence at Sunandharamaya.

The learned Judge referred to the clause in the deed P3/D3 which stated :

> " AND I also desire that after the demise of my said successor (*i.e.* the present appellant) my said pupils by mutual consent, appoint any one of them to the Chief Incumbency and Viharadhipathiship of the said six Vihares. "

and held that this clearly showed that there was no renouncing or abandonment of rights by the respondent and his brother priests but rather that there was only an agreement

> " to suspend any claim of right to the incumbency till after Dhammadhaja's *death* and to allow Dhammadhaja to officiate as the Incumbent of the Vihares during his lifetime. The basis of abandonment is an intention to renounce. An intention to renounce will not be inferred unless such intention is clearly demonstrated by the facts and circumstances. If the facts and circumstances leave the matter in doubt the inference is that there is no renunciation or abandonment. Moreover the law does not recognize a qualified abandonment. In the case under consideration on a reading of the Deed the only conclusion one could come to is that the late Pannalankara's pupils agreed not to assert any claim or right to the incumbency during the lifetime of Dhammadhaja. In the circumstances the plea of abandonment and renunciation to my mind is not sustainable and fails. "

I agree entirely with this view of the learned Judge that there is no abandonment if the deed is considered in its entirety. But the circumstances surrounding the execution of this deed and the respondent's evidence makes me doubt whether even the limited renunciation therein contained was at all voluntarily made.

The deed was signed at the hospital in Colombo where the respondent's tutor had been ill for over three months and the respondent had been visiting him weekly from Matara. The respondent's evidence is :

" Q. Did you sign it voluntarily ?

A. I signed it at the request of the Nayake Thero.

Q. But you signed voluntarily ?

A. I signed to please my teacher.

Q. You may have signed it to please others, but did you sign it voluntarily ? (no answer)

Q. Did you sign it willingly or unwillingly ?

A. Unwillingly.

Q. Please tell me why you were unwilling ?

A. Though I signed at the request of the Nayake Thero I knew the rights should devolve on me on the demise of the Nayake Thero.

I remember the time I was summoned to sign D3. I was apprised of the fact that such a deed was to be executed before it was actually executed. I was so informed after the operation on the Nayake Thero. I was so informed about two or three weeks prior to the execution of the deed. I was asked whether I was willing to have such a deed executed. The other co-pupils were not present at that time.

Q. What did you tell him when he asked whether you are willing ?

A. The Nayake priest proposed the scheme and asked me whether I liked it. I gave my consent.

Q. It is that scheme that was subsequently embodied in D3 ?

A. I cannot say exactly.

TO COURT :

Q. Why was that deed executed ?

A. The Nayake priest gave me the reason for the execution of such a deed. He wanted to please the defendant priest. He also stated that by the execution of this deed our rights will not be affected. The Nayake priest also mentioned that the defendant had been helpful to him and to all of us. Therefore we agreed."

Besides, the deed P3/D3 contains the further clause,

"FINALLY IT IS MY WISH that if anyone of my pupils contravenes the above mentioned provisions then and in that event, he or they will not be entitled to make any claim to my properties movable or immovable and whatsoever situate."

In these circumstances I hold that the deed P3/D3 does not amount to a full and complete renunciation and that even the partial renunciation contained in it was not so freely and voluntarily given as to work any forfeiture against the respondent.

Mr. Jayewardene next submitted that in any event the respondent's signing D2 and D4 and leaving the main Vihara were willingly done by him and would amount to a renunciation of his rights, especially because the respondent was 32 years of age and ten years an upasampadha priest at the death of his tutor. But in the context, these acts show only the continued acquiescence in the partial renunciation contained in the deed P3/D3 and cannot amount to any further or fuller renunciation amounting to a new and complete abandonment.

Mr. Jayewardene also submitted that at least the respondent had renounced his rights to officiate as viharadhipathi. But in my view the Buddhist Ecclesiastical Law does not recognize such a renunciation of the right to function as Viharadhipathi. The office of Viharadhipathi is inalienable and a priest on whom this office has devolved according to the *sisyanu sisya paramparawa* rule of succession only holds it in his life time to pass it on according to law, to his senior pupil or such other pupil as he may select. The law as stated in *Dhammarakkita Unnanse vs. Sumangala Unnanse* (1910) 14 N.L.R. p. 400, based on the opinion of several learned priests, recorded for the purpose of deciding that appeal, is that " a right of pupillary succession will be forfeited if the pupil deserts his tutor and the temple the incumbency of which he claims. " In *Pemananda vs. Welivitiye Soratha,* (1950) 51 N.L.R. p. 372, which is the only reported case of an abandonment being established, Hikkaduwe Sri Sumangala, who was held to have abandoned his rights of pupillary succession to a Vihara in Hikkaduwa, lived all his life at the Maligakanda Vihara in Colombo and expressly stated " I do not want these temples now, nor did I want them in the past either. Further I do not want them at all at present. " The renunciation was not of the right of functioning as Viharadhipathi but there was the desertion of the Vihara which was said in *Dhammarakkitha Unnanse vs. Sumangala Unnanse* to constitute a forfeiture. In the instant case the respondent did not desert the Vihara but remained in a Vihara of the paramparawa hoping, as he said, eventually to function as the Viharadhipathi and so, even if he did permit the Appellant to officiate as Viharadhipathi such conduct cannot constitute an " abandonment " of the office of Viharadhipathi which devolved on him in law, so as to deprive his pupils also of their rights of succession. I affirm therefore the finding of the learned District Judge that the respondent has not abandoned his rights to the Viharadhipathiship of the five Viharas claimed in this action.

We have next to consider the appellant's main defence in this case, that as the right to claim the Viharadhipathiship vested in the respondent on 16.4.1959 and as the respondent filed this action

only on 15th October, 1965, this action was statute barred in terms of section 10 of the Prescription Ordinance. In support of this contention Mr. Jayewardene relied on the decisions in :

(1) *Revata Unnanse vs. Ratnajothi,* 3 C.W.R. p. 193.

(2) *Terunnanse vs. Terunnanse,* (1927) 28 N.L.R. p. 477.

(3) *Premaratne vs. Indasara,* (1938) 40 N.L.R. 235.

(4) *Dheerananda Thero vs. Ratnasara Thero,* (1964) 67 N.L.R. p. 559.

Mr. Amerasinghe spent considerable time and effort in submitting that the cause of action arose to the respondent only in 1963 when relations got strained between the parties and the respondent's claim to the Viharadipathiship was refuted by the appellant. He submitted that until then he had acquiesced to the appellant functioning in the office on account of the cordial relationship that existed between them. In the plaint too the respondent pleaded that on the death of Pannalankara the respondent had come to a "working arrangement" with the appellant by virtue of which he functioned, but the learned Judge quite rightly, in my view, has rejected this story of a "working arrangement" and held that the plaintiff's right to sue the respondent arose on the date of death of Pannalankara. Mr. Amerasinghe had necessarily to admit that the respondent's right accrued to him on 16.4.1959 and that the right to sue the appellant who claimed the office on P3/D3 arose on this day, but he says that nevertheless the cause of action arose on an express denial of the respondent's right in 1963. There can be only one Viharadhipathi in a Vihara and the appellant claimed on P3/D3 that office on the death of Pannalankara, and that claim was inconsistent with the respondent's rights and a clear refutation of those rights. Therefore there can be no doubt whatsoever that the denial of the respondent's right, which is the cause of action in this case, arose on 10.4.1959. The respondent's acquiescence may be the explanation for his inaction and his delay in making his claim but it is no excuse in law to prevent time running against him if the three year rule of prescription is applicable to this case.

The learned District Judge has distinguished the cases relied on by Mr. Jayewardene on the reasoning that is found expressed in the decision in *Pitawela Sumangala vs. Hurikaduwe Dhammananda,* (1967) 59 C.L.W. p. 59, and in the observations of Basnayake, C. J. in *Panditha Watugedara Amaraseeha Thero vs. Tittagalla Sasanatilleke Thero,* (1957) 59 N. L. R. p. 292, that when a priest sues to be declared the controlling Viharadhipathi and to be quieted in possession of the temporalities of a Vihara, not within the operation of section 4(1) of the Buddhist

Temporalities Ordinance of 1931, he is not sueing merely for a declaration of status but for possession of immovable property and that such an action is not governed by section 10 of the Prescription Ordinance because an action for possession of immovable property is governed by section 3 of that Ordinance.

With regard to the earlier decisions it is very relevant to note that both the case reported in 3 C.W.R. p.193 and the case reported in 28 N.L.R. were decided during the operation of the Buddhist Temporalities Ordinance, No. 8 of 1905, which vested all temple lands in lay trustees and that these two actions for declaration of Viharadhipathiship filed during that period were necessarily only actions for declarations with regard to the office of Viharadhipathi simpliciter. In fact in the 28 N.L.R. case Garvin, J. specifically stated thus :

> " Counsel for the appellant suggests that provision is made for the case by section 3 of the Ordinance. That section relates to actions ' for the purpose of being quieted in his possession of land or other immovable property or to prevent encroachment or usurption thereof or to establish a claim in any other manner to such land or other property' and declares that proof of undisturbed and uninterrupted possession for a period of ten years previous to the bringing of the action shall entitle the person adducing such proof to a decree in his favour. This is clearly not an action for the recovery of immovable property based on a right acquired by ten years ' adverse and uninterrupted possession thereof. Nor is it a case in which such an action based on title is being resisted on the ground of such adverse and uninterrupted possession. By the Buddhist Temporalities Ordinance the property of the Vihara both immovable and movable is vested in the trustee, who in this case is the second defendant. An incumbent clearly has no title to the immovable property of the temple nor a right to the possession thereof. Apart from his ecclesiastical duties, an incumbent of a vihara has certain rights of administration and control of the Vihare itself, but these are not such rights as are contemplated by section 3. They spring from and appertain to the office of incumbent, and cannot exist apart from it.
>
> The right of the plaintiff to the enjoyment and exercise of those rights is dependent upon his right to the incumbency. It is manifest that in form and in substance this is an action for a declaration of the plaintiff's right to the incumbency. In the absence of special provision in Ordinance No. 22 of 1871, section 11 of the Ordinance applies to the case, and the action is barred by limitation in three years. "

In the case reported in 40 N.L.R. p. 235 the question of possession of temporalities was not raised or considered and in the case reported in 67 N.L.R. p. 559 it is expressly stated that counsel conceded that the claim in that case was barred in three years.

The Buddhist Temporalities Ordinance, No. 10 of 1931, (Cap. 318) however has repealed and replaced the Buddhist Temporalities Ordinance of 1905, and now the temporalities of Viharas which have been exempted from section 4(1) of that Ordinance have been vested in the Viharadhipathi, who is termed for the purpose of the Ordinance, the controlling Viharadhipathi (see sections 4 and 20).

It is plain therefore on the reasoning of Garvin, J. in the very case relied on by Mr. Jayewardene that when, after the 1931 Ordinance, a priest files an action for a declaration that he is controlling Viharadhipathi of a Vihara and asks for possession of its temporalities, his action is one for being "quieted in possession of lands or other immovable property" (section 3) to which he has a title, and that such an action is not governed by section 10 of the Prescription Ordinance.

In the instant action the plaint was framed thus :

> 13. "That in the premises a cause of action has accrued to the plaintiff to sue the defendant for a *declaration of title* to the Viharadhipathiship of the said temples *and to the said temporalities* appertaining thereto and for the ejectment of the defendant therefrom and for recovery of possession of the said temples and the temporalities appertaining thereto."

and the prayer to the plaint asked, *inter alia,*

> "(*d*) That the plaintiff as Viharadhipathi as aforesaid be placed in peaceful possession of the said temples and of the *said land and premises* set out in the Schedule hereto."

On these pleadings this action is certainly not an action for a mere declaration of status as Viharadhipathi as in the case reported in 28 N.L.R. p. 477 ; this is also an action for declaration of title to immovable property vested in the respondent by the Buddhist Temporalities Ordinance.

Mr. Jayewardene submitted, however, that the Buddhist Temporalities Ordinance of 1931 has not in any way affected this question and that when as in this case, the appellant denied the respondent's claim to the Viharadhipathiship, he still had to bring his action for a declaration that he was the lawful holder of that office within three years in accordance with the earlier decisions of this Court.

Firstly, he submitted that the Buddhist Temporalities Ordinance of 1931 has not vested the temporalities in the appellant and that his present action still is one merely for a declaration that he is the lawful Viharadhipathi only. He says that in the Ordinance the term Viharadhipathi is defined thus :

> " Viharadhipathi means the principal bhikku of a temple other than a dewale or Kovila, whether resident or not. "

He submits that it does not say ' the principal bhikku according to the Buddhist Ecclesiastical Law ' and that the term " principal bhikku " must be given its plain and ordinary meaning, that is, the person *de facto* officiating as such, and that on that interpretation the temporalities have vested in terms of section 20 on the appellant who admittedly has functioned as the ' principal bhikku ' of those Viharas since 16.4.1959. He relied strongly on the decision of Soertsz, J. in *Sumana Terunnanse vs. Somaratana Terunnanse,* (1938) 5 C.L.W. p. 37, and de Silva, J. in *Chandrawimala Terunnanse vs. Siyadoris,* (1946) 47 N.L.R. p. 304, and Dias, J. in *Algama vs. Buddharakkita,* (1950) 52 N.L.R. p. 150. But as this very submission, based on these very three cases and by Mr. Jayewardene himself, was considered fully by Sansoni, J. in the case of *Pemananda Thero vs. Thomas Perera,* (1955) 56 N.L.R. p. 413, I need only state that having considered the question myself, I am in respectful agreement with Sansoni, J. when he said :

> " These considerations lead me to the conclusion that a correct construction to be placed on the provisions of the Ordinance is that it was intended, in the case of a temple which was exempted from the operation of section 4 (1), to vest the management and the title to the property of such a temple in the priest who is the principal bhikku in the line of pupillary succession from the first incumbent of that temple. "

Mr. Jayewardene submitted that the statement of Sansoni, J. that,

> " at no time in the history of Budhist temples in this island has a priest who had no right to the incumbency of a temple been invested with a title to, or the power to manage the temporalities of the temple. "

was factually incorrect. He referred us to the case of *Sobhitha Unnanse vs. Ratnapala Unnanse,* (1861) Beven and Siebels Reports p. 32, which he said was a case of our Courts having recognised the right of a *de facto* trustee to the possession of temporalities. I have only been able to examine a summary of this case

in Woodhouse, 'Pupillary Succession' at p. 20 and I see that in that case, the Court held that neither the plaintiff who was only the executor of the deceased Viharadhipathi and was in possession of the temporalities as such executor, nor the defendant who claimed upon a conveyance from the deceased testator, had title to the land. Creasy, C.J. said :

> "We have been strongly inclined to non-suit the plaintiff on the maxim in pari delicto potior est conditio possidentis; but, on the other hand there is the maxim interest reipublicae ut finis sit litum ; and, on the whole, we think it best not to make another action necessary, but to place at once the possession of the property where it is clear it ought to be, that is, in the hands of the officiating priest. We do not adjudicate the plaintiff to be officiating *de jure*, but only *de facto*. If the defendant, or any other persons have conflicting claims to the priesthood (as has been suggested), this judgment is not to prejudice those claims which have not been investigated in the present action."

Woodhouse himself has relied on this authority only for the proposition that,

> "A priest is entitled to be declared an incumbent *de facto* of a vihara, provided that his right thereto is superior to the party or parties litigating with him and that the incumbent *de jure* does not intervene or otherwise assert his title to such incumbency."

It will thus be seen that that case did not recognize any title or right to possession in a *de facto* Viharadhipathi. It only gave him possession in the exigencies of the case.

But quite apart from the reasoning in the decision of Sansoni, J. this submission that the temporalities were vested in the appellant on 16.4.1959 when he started to function as the *de facto* Viharadhipathi, is demonstrably erroneous. If the Buddhist Temporalities Ordinance does vest the temporalities in a priest the moment he begins to function as the *de facto* Viharadhipathi, then he must be considered to be in lawful possession of the temporalities whether he got into possession by fraud or force ; and being thus in lawful possession, no Court will ever be able to order his ejectment because the temporalities have been vested in him by a statute and he will, on this submission, continue to be so vested as long as he, forcibly or otherwise, so functions. But this just cannot be the intention of any statute, and the Buddhist Temporalities Ordinance must therefore be interpreted so as to vest property in a priest who has a legal claim thereto and not in one who acts in defiance of legal rights.

Also Mr. Jayewardene says that if the respondent brought this action within the three year period, being the senior pupil of Pannalankara Maha Thero, he could have obtained a declaration that he is the lawful Viharadhipathi, and that thereafter, he could bring another action to get himself declared entitled to the temporalities and obtain possession, from the appellant. It need hardly be said that if the Respondent can so obtain possession once he is declared the *de jure* Viharadhipathi, that is not because the Court has held that he is the *de jure* Viharadhipathi, but because being that *de jure* Viharadhipathi, the temporalities have vested in him. The Court does not give the Respondent a new title ; it only declares that he had become the *de jure* Viharadhipathi on 16.4.1959 and if whether in the same action as it should be, or in a separate action as Mr. Jayewardene says it can only be, the Court gives him possession of the temporalities that also is because these temporalities became vested in him in terms of section 2, 4 and 20 of the Buddhist Temporalities Ordinance on 16.4.1959 and because they never vested in the appellant.

Mr. Jayewardene's next submission was that section 18 of the Buddhist Temporalities Ordinance provides the only action available for the recovery of vihara lands and that such an action can only be brought by a trustee or controlling Viharadhipathi and that therefore when as in this instance, the Viharadhipathiship itself is being contested, the respondent had first to bring a declaratory action to have himself declared the *de jure* Viharadhipathi and thereafter only can he, describing himself as the controlling Viharadhipathi, sue for the recovery of the temporalities. But this is reading into section 18 many things that the section does not say or intend.

Firstly, this section does not say that the only action that can be brought for the recovery of Vihara lands is in terms of this section. In fact this section gives no right of action at all ; the right of a person vested with property to sue *rei vindicatio* when his right to that property is denied, is found only in the Common Law and paragraph 13 of the plaint in this action (*supra*) shows that this action has been correctly brought on that Common Law right. Section 18 merely says that when a person entitled to do so, brings such a *rei vindicatio* action in respect of Vihara lands, he may sue in the capacity of trustee or controlling Viharadhipathi and describe himself as such, and thereby escape personal liability for costs if he loses his action. If the respondent in this action wanted to avail himself of this.

statutory advantage he may have described himself a 'Controlling Viharadhipathi' and secured for himself immunity from personal liability for costs; but if he choses to waive this privilege his action *rei vindicatio* cannot be bad for such waiver.

Secondly, this section does not say nor can it be inferred therefrom that the trustee or controlling Viharadhipathi must first get a declaration of his title from Court before he can ask for possession. The Buddhist Ecclesiastical Law provides for the devolution of the office of Viharadhipathi and the Buddhist Temporalities Ordinance provides for the appointment of trustees and if a person has a valid claim to either office this section enables him to sue in that capacity. If the defendant denies that the plaintiff is the holder of the office of trustee or controlling Viharadhipathi, as in any *rei vindicatio* action the first issue in the trial will be whether the plaintiff is the trustee or controlling Viharadhipathi and able to maintain his action and if the plaintiff is successful, in the same action, the plaintiff will get his declaration of title as well as restoration to possession. Indeed, the submission that two separate actions must be brought for obtaining the two reliefs arising from the denial of the plaintiff's right to the temporalities is against the provisions of our law of Civil Procedure and the rules of *res judicate*. Sections 34 and 207 of the Civil Procedure Code make it mandatory that both the claim of title to the temporalities and the claim for restoration to possession arising from the same cause of action, must be contained in one action.

I am therefore of the view that the respondent's claim in respect of the four Vihares exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance is not prescribed and that the judgment of the learned District Judge must be affirmed in relation to these four Viharas.

With regard to the Sunandharamaya Vihara the learned District Judge said:

> "I therefore hold that the provisions of the Prescription Ordinance are inapplicable to so much of the case under consideration save and except that part of it that relates to Sunandharamaya, which has subsequent to the institution of this action been brought under the operation of Section 4 (1) of the new Buddhist Temporalities Ordinance, and I hold against the defendant on his plea of prescription."

He also answered issues 6, 7 and 13 with the saving words added 'save and except Sunandharamaya.'

Mr. Amerasinghe submitted that he has filed a cross-appeal against this finding of the learned judge in respect of Sunandharamaya and he contended that his claim to be declared *de jure* Viharadhipathi simpliciter of this Vihara, also was not barred by section 10 of the Prescription Ordinance, because as argued by him the cause of action to sue arose only in 1963. Although I do not accept that submission as correct, the rights of parties must be determined as at the date of action and if this Vihara has been brought within the operation of section 4 (1) of the Buddhist Temporalities Ordinance only during the course of this action, as at the date of the action the temporalities of that Vihara too were vested in the respondent and he was entitled to file and maintain this action and his action was not prescribed in terms of section 10 of the Prescription Ordinance in respect of Sunandharamaya as well. I therefore, allow the cross-appeal of the plaintiff-respondent, and vary the answer to Issues 6 and 13 by deleting therefrom the words in issue 6 "save and except Sunandharamaya", and in issue 13 "save and except the claim to the incumbency of Sunandharamaya" and make Order that decree be entered in favour of the plaintiff-respondent accordingly.

I will not vary the answer to issue 7 because if during the course of the action Sunandharamaya has been brought within the operation of section 4 (1), a decree cannot now be entered giving the respondent possession of the temporalities of Sunandharamaya. See *Eliashamy vs. Punchi Banda et. al,* (1911) 14 N.L.R. 113 (DB). But as the respondent has by this judgment been declared the lawful Viharadhipathi of Sunandharamaya he will be entitled to nominate himself a trustee of the temporalities of that Vihara in terms of section 10 (1) and assume possession of those temporalities also on that right.

Accordingly subject to the variations made by me in the learned Judge's answers to issues 6 and 13, I affirm the judgment of the learned District Judge and dismiss the defendant-appellant's appeal with costs.

Appeal dismissed.

Cross-appeal of plaintiff-respondent allowed.