[Privy Council]

1966 *Present :* **Lord Guest, Lord Pearce, Lord Upjohn, Lord Pearson, and Sir Frederic Sellers**

M. P. MUNASINGHE, Appellant, *and* C. P. VIDANAGE and another, Respondents

Privy Council Appeal No. 41 of 1964

S. C. 346/1962—Application in Revision in D. C. Galle, 6177/L

Appeal—Findings of fact of trial Judge—Appellate tribunal's proper approach to them.

Sale of immovable property—Consideration—Statements in attestation clause of deed—Evidential value thereof—Notaries Ordinance (Cap. 107), ss. 31, 38.

The jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon that evidence should stand has to be exercised with caution.

" If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."—*per* Viscount Simon in *Watt or Thomas v. Thomas* (1947 A. C. 484 at pp. 485-6).

The question at issue in the present case was whether, in an instrument which purported to be a deed of sale of immovable property, any consideration was received by the vendors. The first defendant appellant, who was one of the two vendors, claimed that there was no consideration for the deed and that no beneficial interest on the property passed to the vendee (plaintiff-respondent). The deed stated that the property was sold for Rs. 20,500 " well and truly paid to the said vendors ". The notary's attestation stated that the full consideration of Rs. 20,500 was acknowledged before him to have been previously received. The trial Judge, in accordance with his findings of fact, which involved assessment of the veracity of witnesses, held that no consideration passed, but the Supreme Court, on appeal, reversed the decision mainly on the basis of statements made by the notaries in their attestation of the deed in question and two other connected deeds.

2——RB 19923-1,914 (12/66)

Held, (i) that this was a case of rather complicated and difficult facts, and there was a good deal to be said on each side. The findings, however, of the District Judge were not unreasonable and, as he had had the advantage of seeing and hearing the witnesses giving their evidence, the Supreme Court should not have set aside his findings and consequently should not have reversed his decision.

(ii) that the statements of the notary in the attestation clause of a deed of sale are admissible evidence, and may well be important evidence, regarding consideration, but are not conclusive.

APPEAL from a judgment of the Supreme Court.

T. O. Kellock, Q.C., with *Ian Baillieu*, for first defendant-appellant.

No appearance for the respondents (the plaintiff and the second defendant).

June 7, 1966. [*Delivered by* LORD PEARSON]—

This is an appeal, by leave granted by the Supreme Court of Ceylon, from a judgment of that Court whereby in exercise of their powers in revision they adjudged that (*a*) a decree of the District Court of Galle in favour of the first defendant (now the appellant) be set aside (*b*) decree be entered declaring the plaintiff (now the first respondent) entitled to certain premises and to the ejectment of the first defendant therefrom (*c*) no order be made for damages except as from the date of the decree of the Supreme Court, and that the amount of the damages be fixed at the authorised rent of the premises to be determined by the District Judge. The judgment of the Supreme Court was given in exercise of their powers of revision after an appeal by the first respondent had been ordered to be abated because of a small deficiency in payment of fees. The reason for not making any order for damages except as from the date of the decree of the Supreme Court was the family relationship between the parties.

In substance the question arising in this appeal is whether the Supreme Court were justified in setting aside the District Court's findings of fact, which involved assessment of the veracity of witnesses. There was no appearance for the respondents before the Board.

The family relationship is this. Adirian Munasinghe, who died in 1922, had a number of children including (*a*) a daughter, who married, (*b*) a son Manikpura Peiris Munasinghe, the appellant (*c*) a daughter Manikpura Lily Munasinghe, who is unmarried. The married daughter, now deceased, had four children, namely (i) Bertram Clive Vidanage, the second respondent (ii) Cynthia Pearline Vidanage, the first respondent (iii) Geoffrey Malcolm Vidanage and (iv) another son who died. Thus the appellant is the uncle of the first respondent. The dispute is between

them. The second respondent, nephew of the appellant and elder brother of the first respondent, was joined in the action as a second defendant in order that he should have notice of the proceedings (for reasons which will appear later) but he has not taken any part in the proceedings.

The premises include the family house, referred to in the evidence as " the big house ". Adirian Munasinghe had a business of mining for and dealing in plumbago. At one time the business was prosperous, and he was a rich man, but afterwards the business ceased to prosper. At some time before 1922 he mortgaged the premises to Bastian Samaranayake. After the death of Adirian Munasinghe in 1922 the appellant and his sister Lily continued to reside in the premises and are still residing there. The appellant took one-year leases from Bastian Samaranayake in 1924 and 1926 and after the death of Bastian, from his son Charles Samaranayake in 1927. Charles Samaranayake died in April 1928. After that the appellant and his sister Lily apparently remained in possession without any further lease for a number of years. Then in 1943 the four children of Charles Samaranayake, and the Public Trustee as next friend of two of them who were then minors, brought an action against the appellant for a declaration of title to six properties (of which the fifth and sixth were the premises now in dispute) and orders for possession and damages. The appellant defended the action, and gave evidence in support of his defence, but he was unsuccessful. On the 20th August 1945 the District Court gave judgment in favour of the plaintiffs in that action (the Samaranayakes and the Public Trustee) for the relief claimed by them against the appellant.

But a well-to-do relative of the appellant, his cousin Peter Wijetunga, came to the rescue. By a deed of transfer dated the 17th November 1945 Peter Wijetunga bought from the widow and the three adult children of Charles Samaranayake their interests in the six properties to which the children's title had been established in the action against the appellant. The price was Rs. 13,125 and the notary attested that a sum of Rs. 3,125 was paid in cash and the balance of Rs. 10,000 was paid by cheque. In 1946 the Court gave permission for the Public Trustee as curator of the remaining child, Swarnalatha Samaranayake, who was still a minor, to sell her interest, and it was sold by the Public Trustee to Peter Wijetunga on the 26th November 1947 for Rs. 4,375. Thus Peter Wijetunga acquired the six properties for a total of Rs. 17,500.

By a deed of transfer dated the 29th August 1948 Peter Wijetunga sold two of the properties, those which comprised the family home, to the appellant for Rs. 15,000. The notary's attestation stated that the full consideration was paid in cash in his presence. By another deed of transfer of the same date Peter Wijetunga sold the other four of the six properties to the appellant's sister Lily for Rs. 5,000. The notary's attestation stated that the consideration was paid in cash in his presence. Each of the deeds was witnessed by Ukwattege Udenis Wijetunga, a cousin of Peter Wijetunga, and Bertram Clive Vidanage, the second respondent.

On the 1st November 1948 there was another deed of transfer. It related to the two properties, comprising the family house, which had been sold by Peter Wijetunga to the appellant. The vendors purported to be the appellant and the second respondent (Bertram Clive Vidanage) though the second respondent did not hold any interest in the property. They purported to sell the two properties to the first respondent for Rs. 20,500 " well and truly paid to the said vendors ". But the sale was subject to a proviso which, being obscurely worded, should be set out in full so far as it is material. It is in these terms : " if the said Vendors or the survivor of either of them shall be desirous of obtaining a re-transfer of the said premises and shall at any time within ten years from date hereof pay to the said Vendee or her aforewritten " (*i.e.*, her heirs, executors, administrators and assigns) " the said sum of Rs. 20,500 with interest thereon at the rate of six per cent per annum from date hereof till payment in full . . . the said Vendee or her aforewritten shall sell and convey back the said premises to the said first-named Vendor or in either event whether the first-named Vendor alone or both Vendors should then be alive, or to the survivor of either Vendor if one or the other of them shall then be dead : if both Vendors shall be dead then the heirs, executors, administrators and assigns of the second-named Vendor alone shall be at liberty to claim such re-transfer." Probably the intention was that the option to repurchase within the stated period of ten years was intended to belong (i) solely to the appellant so long as he lived, whether or not the second respondent was still living (ii) after the appellant's death, if it occurred before the end of the stated period, to the second respondent or if he also had died, to his heirs, executors, administrators and assigns.

One of the two witnesses to this deed of the 1st November 1948 was Geoffrey Malcolm Vidanage, the younger brother of the first and second respondents. The notary's attestation stated that the full consideration of Rs. 20,000 was acknowledged before him to have been previously received.

The stated period of ten years expired on the 1st November 1958, and the option to repurchase the two properties had not been exercised. By a formal notice dated the 19th November 1958 the first respondent pointed out to the appellant and the second respondent that the period had expired and called upon the appellant to deliver up possession to the first respondent. The appellant remained in possession. On the 28th May 1959 the first respondent brought the action in the present case, claiming against the appellant a declaration of title and orders for possession and damages.

The appellant by his answer dated 28th September 1959 raised several pleas. One was that there was no consideration for the deed of 1st November 1948 and that no beneficial interest on the properties passed to the first respondent. The appellant's explanation of the deed was given in paragraph 6 of his answer, which alleged :

> " Further answering this defendant states that by the exertion of undue influence on this defendant by the plaintiff and her husband and brothers this defendant was induced to sign the document referred to in paragraph 3 of the plaint which was not the act and deed of this defendant as he was made to understand that the execution of an instrument of the nature of the deed referred to was the safest and the surest step to be taken in order to protect the properties dealt with in the said document from possible improvident hypothecation or alienation of them by the 1st defendant himself ; a step that was necessary, according to the representations of the members of the plaintiff's family to ensure that the 1st defendant and his unmarried and childless sister Lily will be able to live in their ancestral house till the end of their respective lives."

On the 7th March 1960 issues were framed. It will be convenient to set out here both the issues and the decisions thereon which were eventually, after trial, given by the District Judge in his judgment.

Issues	*District Judge's decisions*
Suggested by counsel for the first respondent (plaintiff)	
1. Is the plaintiff entitled to the premises described in the schedule to the plaint ?	No
2. Is the defendant in unlawful possession thereof since 1st November 1958 ?	No
3. If so, what damages is the plaintiff entitled to ?	Nil
Suggested by counsel for the appellant (first defendant)	
4. Was the first defendant made to sign document 1343 of 1st November 1948 by the exercise of undue influence on him by the plaintiff, her husband and brother ?	No
5. Was document 1343 of 1-11-48, relied on by the plaintiff for her title, the act and deed of the first defendant ?	Yes

6. Was deed 1343 of 1-11-48 executed by the first defendant for valuable consideration ?	No
7. If issue No. 6 is answered in the negative, did any beneficial interest in the property mentioned in the said deed pass to the plaintiff ?	No
8. Does the plaintiff hold the properties dealt with in the said deed in trust for the first defendant ?	Plaintiff has no title to the properties or has no beneficial interest in them.
9. Is the first defendant entitled to claim a re-transfer of the legal title to the properties dealt with in the said deed from the plaintiff ?	Yes
10. Did the plaintiff practise a fraud on the 1st defendant ?	No
11. If so, can she take advantage of her own fraud ?	—

The real dispute between the parties at the trial was as to whether the first respondent had ever in fact paid to the appellant the Rs. 20,500 stated to be the consideration for the deed of transfer of 1st November 1948. The first respondent's case was that in about August 1948 she obtained this money from her husband and paid it over to the appellant, at his request, before Peter Wijetunga by the two deeds of 29th August 1948 transferred the two properties to the appellant for Rs. 15,000 and the four properties to the appellant's sister Lily for Rs. 5,000. The appellant denied that he ever received the Rs. 20,500 from the first respondent.

A considerable amount of evidence was adduced at the trial. It is not necessary to examine it in great detail, but some examination of it is required in order to see whether the Supreme Court were justified in setting aside the District Judge's findings of fact against the first respondent and in favour of the appellant. The District Judge, who had seen and heard the witnesses giving oral evidence at the trial, disbelieved the evidence of the first respondent that she gave the sum of Rs. 20,500 to the appellant; and was not satisfied with and impliedly rejected the evidence of the first respondent's husband that he had provided that sum for his wife; and preferred to accept the appellant's evidence that he transferred the two properties without receiving any consideration to deprive himself of his right of disposal.

In reviewing such findings of fact the proper approach of an appellate tribunal is as stated in the speeches of the House of Lords in *Watt or Thomas v. Thomas* [1947] A. C. 484 (H. L.). Viscount Simon said at pp. 485-6.

" Apart from the class of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand ; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

In the other speeches there are passages dealing with the same points, *e.g.*, at pp. 487-8 (Lord Thankerton) pp. 490-1 (Lord Macmillan) pp. 491-2 (Lord Simonds) and p. 493 (Lord du Parcq).

The first witness called for the first respondent was Edwin Wijesurendra who was the attesting notary on the deed of 1st November 1948. In his evidence in chief he referred to the statement in his attestation that the sum of Rs. 20,500 was acknowledged to have been received previously. In the course of his cross-examination he said this :

" When I went to the house, I expected the money transaction to take place, and I asked the first defendant as to the consideration as it was a big amount. He said ' put it down as received beforehand '. At that place I did not ask him anything. All that was relevant I put down on the deed. At a later stage a conversation ensued, and I asked the first defendant why he should take this money beforehand and not pay it at the time of the execution of the deed. That was after the deed was signed and when we were going away. He said that he did not take money on this deed, and I asked him why he transferred the property. Then he said ' Eka ape vedak ' (that is our business). I am sure he said that he did not take the money and I asked him whether it was safe to do that. He said that it was all right between relations."

It is clear from the judgment of the District Judge that he accepted and was impressed by this evidence of the notary Mr. Wijesurendra. It was hearsay evidence, but it was elicited in cross-examination, and no objection to it is recorded, and it could be regarded as cogent evidence of consistency in the appellant's version of the transaction.

The first respondent gave evidence on her own behalf.

(*a*) She gave a history of affectionate family relations in the early period. When she was small, her mother and she and the brothers used to live in the " big house " (*i.e.*, the premises in dispute). After the mother's death, the children remained there and were looked after by their aunt Lily, who was fond of them, and they were sent to school by the appellant. The children's father paid for their maintenance and schooling. The appellant was fond of the first respondent until " this transaction ".

(*b*) The first respondent said repeatedly that in August 1948 the appellant asked her to provide him with Rs. 20,500 for the purchase of the properties; that the appellant promised to have the properties transferred into her name; that she provided the sum of Rs. 20,500, having obtained it from her husband; and that in breach of his promise the appellant did not have the properties transferred into her name.

(*c*) The first respondent said that her two brothers were present when she handed over the money to the appellant. Later in her evidence she said, " It is my uncle the first defendant who took the money promising that he would transfer the land to me; that is why I gave the money to redeem the land. I gave him the money and asked him to transfer the land to me. I paid him in notes tied up in a bundle and wrapped in a cloth. I handed the money and asked the first defendant to count the money and take it. The money was counted in the presence of both of us. B. C. Vidanage, my elder brother, and my other brother G. M. Vidanage, and the first defendant were counting the money."

(*d*) The first respondent said that when she found fault with the appellant, he suggested that a conditional transfer should be given, and the deed of 1st November 1948 resulted. This deed applied to only two out of the six properties; and the transfer was subject to the vendors' option to repurchase.

There are difficulties in the first respondent's version of these events, and the District Judge referred to them in his judgment.

(i) If her version was correct, she was wickedly defrauded by her uncle in August 1948, when in breach of his promise he had two of the properties transferred to himself and the other four to his sister Lily, instead of having them all transferred to the first respondent. Such a fraud is inherently improbable and especially in view of the previous history of affectionate family relationships. It would be for the District Judge, on consideration of the appellant's demeanour as well as the general facts of the case, to decide whether he would be likely to defraud his niece. The conclusion of the District Judge was in favour of the appellant.

(ii) The first respondent's brother, the second respondent was a witness to the deeds of 29th August 1948 by which the transfers to the appellant and his sister Lily were effected. On the first respondent's version her brother, unless he was ignorant of the facts, must have been aiding and abetting the supposed fraud.

(iii) There was no corroboration of the alleged payment of the Rs. 20,500 by the first respondent to the appellant. If her evidence was correct, there could have been strong corroboration, because she said the payment was made in the presence of her two brothers and they and the appellant counted the money. And yet neither of the brothers was called to give evidence.

(iv) The conditional transfer fell far short of a complete redress for the supposed wrong suffered by the first respondent. On her evidence she had provided Rs. 20,500 for the purchase of properties in her name, and six properties were purchased with that money, and so, if the appellant had carried out his promise she would have had the unfettered ownership of six properties. In the result she did not have unfettered ownership of any properties, and her fettered ownership extended only to two out of the six properties. The redress for the supposed fraud is so inadequate, that it would have to be supposed that the fraud was being continued by her uncle with active co-operation from her brother.

These difficulties would not necessarily be fatal to the success of the first respondent's case ; her evidence might possibly have been accepted in spite of them ; but they are factors of improbability, and make it impossible to say that her case on her own evidence was so strong that the District Judge could not reasonably reject it.

The first respondent's husband gave evidence on her behalf, and it was directed to proving that he provided his wife with the Rs. 20,500 for her to hand over to the appellant. The District Judge found his evidence unsatisfactory and impliedly rejected it. In so far as his reasons were based on the financial position of this witness, as showing inability to provide the money, the Supreme Court's criticisms of the reasons appear to be well-founded. Also the witness's failure to produce his books of account is not in the circumstances a strong point against him. He produced copies of his balance sheets and profit and loss accounts for 1948 and following years, and these were verified by a witness who said he was a clerk in a firm of auditors and had personally audited these accounts. In the course of the clerk's evidence counsel for the first respondent moved for a date to produce the books of account, but the District Judge refused to name a date for this purpose. There are, however, other reasons for dissatisfaction with the evidence of the first respondent's husband.

(*a*). He is a business man carrying on business as a trader in Colombo. If he provided his wife with the sum of Rs. 20,500 for the purchase of properties, it is surprising that as a business man he took so little interest in the transaction and acquired so little information as to its nature and

progress. These points are brought out and relied upon in the judgment of the District Judge. Also it can be said that the witness gave three different versions of his understanding of the transaction.

First, he said that in the middle of August he gave a sum of Rs. 20,500 to his wife to acquire land, and the land belonged to the appellant and was to be bought from him. Later in his evidence he said that his wife did not state the lands were to be bought from Wijetunga, but that a deed was to be obtained from her uncle ; she wanted to buy some property from her uncle, and the lands were not then in the name of her uncle ; they had been in the name of a proctor and she wanted to buy them direct from the proctor. Still later in his evidence he said that the appellant was to be the vendor, but there had been a mortgage of the property in favour of a proctor and the mortgage had to be redeemed, and that the principal and interest on the mortgage amounted to Rs. 20,500.

(*b*) Althouth this witness produced a number of documents—copies of his trading accounts and balance sheets from 1949 to 1957—none of them showed when or how or from what source the alleged payment or drawing of Rs. 20,500 was made or that it was made at all. The balance sheet as at the 31st December 1948 contained under the heading " Assets " an entry " C. P. Vidanage (Wife's A/c) Investment on Mortgage Loan Rs. 20,500 ", and there was a footnote " The above investment made Wife's Name. No. 541 High Road, Galle related to Mr. P. Munasinghe of Galle, taken for a Primary Mortgage by deed No. 17081 on 2nd November, 1948 attested by Edwin Wijayasundara, Notary Public, for Rs. 20,500 at 6% Interest. (Not recovered) ". That entry was carried over into subsequent balance sheets. Evidently it refers to the deed of 1st November 1948. It would be consistent with evidence that money of the firm was used in making the investment. But such evidence was curiously lacking. There was no receipt, no acknowledgment, no entry or copy of an entry relating to any such payment produced. If there was such evidence, it is surprising that neither the witness nor the clerk to the auditors nor the lawyers made it available. The only thing the witness had to prove was that he made the alleged payment to his wife.

(*c*) The witness was cross-examined as to the source of the alleged payment. He said " I am a trader in a large way. I have several bank accounts . . . I gave my wife Rs. 20,500 in cash . . . I brought this money in currency notes. I brought it from Colombo. I have always with me about Rs. 20,000 to 30,000 in cash. That money is in the safe. I did not get this money from the bank. This sum of money was in my safe, and I gave it to her." That evidence is on the face of it unimpressive, though it might be true. If, however, the money was simply cash taken out of a safe and handed over, there was all the more reason for some documentary record to be kept.

Here again the difficulties would not necessarily preclude acceptance of the evidence of the witness. But the evidence does seem unconvincing. It cannot be said that the District Judge acted unreasonably in finding it unsatisfactory and impliedly rejecting it.

The appellant gave evidence on his own behalf. He said that in 1945 he agreed with the Samaranayakes to buy the properties from them for Rs. 17,500, and he had some money but not the full amount. He was able to raise Rs. 11,000, of which Rs. 9,000 would be provided by his sister Lily and Rs. 2,000 by himself from sale of properties. He and his sister went to see Peter Wijetunga in his office at his Richmond Restaurant in Colombo. Peter Wijetunga agreed to buy the properties, providing the balance required, and he bought them accordingly. In August 1948 he transferred them to the appellant and his sister. He had already received from them the Rs. 11,000 in 1945. For the Rs. 7,000 which he had provided out of his own money he was content to receive only an additional sum of Rs. 4,500, waiving the balance of Rs. 2,500. Then later in 1948 the appellant conditionally transferred his two properties to the first respondent by the deed of 1st November 1948. He denied that he received the Rs. 20,500 or any money from the first respondent. The appellant said : " Plaintiff and her brother and sister got together and told me that I was getting aged and that I would run through their property by digging for plumbago and therefore they asked me to write a deed in favour of my niece. Her husband also participated in that matter. " The appellant said he agreed to this, and so the deed came to be written.

In cross-examination the appellant was confronted with the statements of the notary (named Kulasooriya) in the deeds of 29th August 1948 that the consideration therein mentioned (Rs. 15,000 in the one deed and Rs. 5,000 in the other deed) had been paid in cash in his presence. The appellant's explanation was that in respect of each deed he handed some cash to Peter Wijetunga in the presence of the notary, and Peter Wijetunga counted it and said it was correct, and the notary did not count it.

That evidence of the appellant by itself might or might not have carried conviction, but it was corroborated in important respects by a witness who was apparently independent and whose veracity does not seem to have been impeached. This witness was Ukwattege Udenis Wijetunga, who was one of the witnesses to the two deeds of 29th August 1948. He said he was a first cousin of Peter Wijetunga and managed for him the Richmond Restaurant, where Peter Wijetunga had his office, and they were great friends. This witness said, " I remember the first defendant and his sister coming to see Peter one day . . . I went into the office . . . and then I saw the first defendant and his sister asking Peter to buy the lands as Samaranayakes were requesting them to buy the lands back. The first defendant said on that occasion that he had not sufficient money with him and asked Peter to buy the lands having contributed the balance money. The first defendant said he would get the lands back from him. The first defendant gave some money to Peter Wijetunga on that occasion. Later Peter Wijetunga gave those properties to the first defendant and his sister Lily on P.2. and 1D3 " (*i.e.*, the deeds of 29th August 1948). " In both these deeds I have signed as a witness. These two deeds were written in the house of the first defendant. Peter Wijetunga came there with me from Colombo on that occasion. First defendant gave some

money to Peter. I do not know how much was paid to him." In cross-examination he said : " The money was not counted at the time of the attestation of the deed. I did not see anyone counting the money. I went away having signed it as a witness. The notary who attested the deed questioned Peter whether the amount of the consideration was correct and he said " Yes ". The notary did not take the money into his hands and give it to Peter. He himself did not count it."

The District Judge referred to the evidence of this witness, U. U. Wijetunga, as supporting that of the appellant, and impliedly accepted it. On acceptance of the evidence of Wijetunga, it was plainly open to the District Judge to accept the appellant's evidence and indeed acceptance of the appellant's evidence would be a natural consequence.

The Supreme Court's reversal of the decision of the District Judge was based mainly on statements by the notaries in their attestation of the deeds. It was not contended or decided that such notarial statements were conclusive as a matter of law. In paragraph 9 (*g*) of the first respondent's petition of appeal to the Supreme Court it was contended that the notarial statement in the deed of 1st November 1948 was strong *prima facie* evidence. The Supreme Court in their judgment referred to " the question of fact which the learned District Judge had to decide ", and they treated the acknowledgment referred to in the notary's statement as evidence of an admission by the appellant. Later in relation to another attestation clause the Supreme Court said that the best method of testing the truth of the appellant's evidence was to examine the attestation clause. Learned counsel in presenting this appeal did not refer to any provision of the law of Ceylon making a statement in a notarial certificate conclusive in law.

The Notaries Ordinance (Chapter 107 in Volume 5 of the Legislative Enactments of Ceylon, revised in 1956) does not contain any such provision, though it does contain in Sections 31 and 38 provisions making it the duty of a notary to attest deeds, and in the attestation to state " whether any money was paid or not in his presence as the consideration or part of the consideration of the deed or instrument, and if paid, the actual amount in local currency of such payment", and also " to endeavour to ascertain the true and full consideration for the execution of any deed and to insert and set forth the same in such deed." It is assumed therefore that such statements are admissible evidence, and may well be important evidence, but are not conclusive.

Three notarial statements are referred to and relied upon in the judgment of the Supreme Court.

(*a*) In the deed of 1st November 1948 the statement of the notary E. Wijesundera was " I certify . . . that the full consideration of Rs. 20,500 was acknowledged before me to have been previously received." There

was, however, as mentioned above, the oral evidence of Wijesundera that after this deed was made, the appellant told him that he had not in fact received any consideration for it That oral evidence diminishes, though it does not wholly destroy. the force of the appellant's recorded acknowledgment.

(*b*) In the deed of 1945, whereby Peter Wijetunga was buying from the widow and three of the children of Charles Samaranayake their interests in the properties, the notarial statement was that out of the full consideration of Rs. 13,125 a sum of Rs. 3,125 was paid in cash in the presence of the notary and the balance of Rs. 10,000 was paid by a cheque (which was identified). It is suggested in the judgment of the Supreme Court that this statement is inconsistent with the appellant's evidence that he and his sister provided Rs. 11,000. But there does not seem to be any inconsistency. If the appellant and his sister had provided or were expected to provide Rs. 11,000 towards the price, Peter Wijetunga could still make his own payment to the Samaranayakes by cash or cheque or by both in any proportions that were convenient to him.

(*c*) In the first deed of 29th August 1948, whereby Peter Wijetunga transferred the two properties to the appellant for Rs. 15,000, the notarial statement was that " the full consideration herein mentioned was paid in cash in my presence ". Undoubtedly that is inconsistent with the appellant's evidence that Rs. 11,000 had already been paid and that the cash sum paid in the presence of the notary was only Rs. 4,000. The appellant's explanation was as stated above, and the evidence of U. U. Wijetunga gave some corroboration.

This was a case of rather complicated and difficult facts, and there was a good deal to be said on each side. Their Lordships' conclusion after examination of the evidence and the judgments, is that the findings of the District Judge were not unreasonable, and as he had had the advantage (very material in this case) of seeing and hearing the witnesses giving their evidence, the Supreme Court should not have set aside his findings and consequently should not have reversed his decision.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment and decree of the Supreme Court should be set aside and the judgment and decree of the District Court should be restored. The first respondent must pay to the appellant his costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed.